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**TRANSITIONAL JUSTICE AND THE QUALITY OF DEMOCRACY
FROM DEMOCRATIC INSTITUTION BUILDING TO RECONCILIATION**

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TRANSITIONAL JUSTICE AND THE QUALITY OF DEMOCRACY – FROM DEMOCRATIC INSTITUTION BUILDING TO RECONCILIATION

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1. INTRODUCTION

Without Transitional Justice (TJ) measures, a society in democratic transition or democracies will face institutional failures. Democratic institutions, executive, legislative and judicial powers will be less resilient to political and even economic crisis if they can not base their effectiveness on public and civic trust by the majority of citizens. Civic trust in return is achieved through the frequency and ways citizens make use of and engage with democratic institutions. If they do not engage and mistrust these institutions, for example by boycotting elections or if they have to bribe judges in order to get justice, the level of civic trust will be low. So is then the effective performance of democratic institutions.

Transitional Justice measures can be an inter-linkage between civic behavior and democratic performance or culture. These measures are generally applied over a period of time throughout the democratization process and after democratic consolidation has taken place. When democratic institutions respond to citizens needs and claims, they shape societal attitude or identity and can lead to behavior that again mirrors democratic culture and thus the performance of effective democratic institutions. Thus, here I argue that TJ measures can strengthen democratic institution building and thus increase the quality of democracy.

One way of how to measure the quality of democratic institutions and democracy depends on how executive powers respond to citizens and victims claims such as how newly elected parliament responds to citizens needs and passing of effective laws or regulations. They ought to reflect the way on how the society comes to terms with its often cruel past. Furthermore, it depends on how legislative powers and parliament independently constrain executive powers and set frameworks for independence judiciary and the rule of law. Citizen or victim participation has to be guaranteed at all times, free from fear, want and repercussions whilst dealing with the past. Qualitative high democratic performance depends on how equity laws such as international human rights norms and standards are applied by the judiciary and transformed into guidelines and laws by legislative and executive powers. The aim is that citizens (re-) gain civic trust in (democratic) state institutions, make use of them, strengthen them and abstain from arbitrary vengeance and undemocratic means to seek justice.

In the following chapter I will outline the interrelation between Transitional Justice mechanisms, democratic institution (building) and the reconciliation process in transition or post-conflict societies.

2. TRANSITIONAL JUSTICE MEASURES

There is a close correlation between Transitional Justice measures and the performance of democratic institutions and the reconciliation process. Overall, Transitional Justice measures its mechanisms and democratic institutions are tools in order to reach peace while reconciliation is a method used for creating stability and fair sustainable development in society. However, the mechanism are diverse and multiple and mostly applied at different stages during a transition process. Transitional justice measures in the context of criminal, retributive or historical justice can contribute in strengthening democratic institutions and establish and enhance civic trust in societies. According to a general definition by the International Center for Transitional Justice (ICTJ), a Transitional Justice process includes ways,

means, institutions or instruments to respond to systematic or widespread violations of human rights. These mechanisms seek recognition for victims by bringing perpetrators to justice in order to promote possibilities for peace, stability and democracy. The process provides therefore the grounds for criminal, social or historical justice that adapt to societies transforming themselves after a period of human rights abuse such as during war, armed conflicts, periods of dictatorship, and autocratic suppression. International law, or international human rights and humanitarian law instruments such as treaties (covenants, conventions), declarations, agreements or protocols, are the legal basis for this process.¹ If looked at most of the different mechanisms and instruments used during a long term process of Transitional Justice in different countries and situation, we can categorize them in following four categories:

Acknowledgement and recognition of past wrongdoings can be conducted at different levels of intensity; either through history or truth commissions, apologies through civic and political actors, establishing memorials and introducing memorial days, initiating and responding to public debates, issuing films and documentaries, publishing literature or novels about the past, introducing past wrongdoings and historical facts in schoolbooks, conducting scientific research and allowing archives, media involvement or naming victims and alleged perpetrators. These acts can include claims by authors, media or the civil society for certain actions.

Restitution can be summarized as acts that involve restitutions, reparations, rehabilitation or compensation for victims of expropriations, eviction, imprisonment or illegal killings. Next to material and financial compensations or restorations, it includes establishing working relationships among former enemies or combatants in public institutions via quota or passing amnesties to political prisoners of the former regime, restoring and maintaining memorials, or through the public exhumation of mass graves. Compensation for example, is one part of a very specific TJ measure and is only targeted at victims and survivors. It has to be connected to a larger profile of TJ and the meaning of it, such as acknowledgement and quantifying the personal loss of lives or years of living under suppression or other losses. Otherwise, it will lose its meaning for future generations. Rule 150 of the Hague convention on reparations from 1948, for example, has become customary international law and is applicable to all countries and societies. It implies that the responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act.²

Criminal Justice can be defined as using international human and humanitarian law on cases to confront past injustice and perpetrators, to reform national legislation and criminal justice, and the vetting or lustration of civil servants. It helps to establish tribunals and a new national court system, as well as a judiciary that can deal with cases of the past. It also aims to combat impunity, to establish and reform a security system and to condemn or probate perpetrators of the former regime.

Silence can include amnesty laws or silence pacts according to agreements among old and new political elites and governments. They can be issued through informal agreements, or national legislations, but do not automatically equal impunity. Amnesties imply that perpetrators surrender and at the same time those to which amnesty is applied are seen to have committed crimes of some sort without (yet) being punished. But often, these laws become customary law and thus can turn into habits, political traditions or even impunity. Therefore, amnesty laws should be conditional and should be agreed upon or changed within referendum when the time is ready, always with the aim to avoid impunity.

¹ International Center for Transitional Justice, ICTJ <http://ictj.org/> (accessed in January 2012).

² Art. 38, Second Protocol of the Hague Convention for the Protection of Cultural Property; Art 51, First Geneva Convention from 1948.

Examples of Transitional Justice measures are:

Acknowledgement	Restitution	Criminal Justice	Silence
<ul style="list-style-type: none"> - Commissions of Inquiry - History commissions - Truth commissions - Apologies - Memorials - Public Debates - Film - Literature - Schoolbooks - Scientific research and open archives policies - Media involvement - Symbolic naming of victims and perpetrators 	<ul style="list-style-type: none"> - Reparations - Restitution - Compensation for past injustice - Working relationships among former opponents or combatants - Restoration of destroyed historical sites - Exhumation of mass graves 	<ul style="list-style-type: none"> - Application of international human and humanitarian law - National legislation and criminal justice reforms - Tribunals & Ad-hoc tribunals - National courts - Combat impunity - Security system reform - Condemnation or probation - Vetting - Lustration 	<ul style="list-style-type: none"> - Amnesty laws - Negotiated pacts

Prior to assessing which measures during which stage of transition is the most effective, strengthening democratic institutions can help carefully analyze which of these measure can either enhance the forthcoming of the democratic process or hamper it. Yet one must keep in mind that the elites of the previous non-democratic or violent regime are still holding many (or most) of public offices and will not be supportive of the idea to deal with their wrongdoings of the past. Without doubt the most crucial stage of transition from a suppressive or violent regime or conflict is the first year or even the first months of transition, for example, after a peace contract has signed as in Sierra Leone in 1999, a ceasefire agreed on, for example in 2011 in Libya or the new political regime made a commitment to introduce democratic reforms and justice as it happened in 2011 in Myanmar.

These (short) windows of opportunity for constitutional reforms, democratic institution building and basic set ups for transition ought to be accompanied by Transitional Justice mechanisms. But depending on the kind of conflict, its severity, level of violence, the parties involved and how and whether old and new political elites in government oppose or cooperate, some of these mechanisms might apply in one country at an early stage of transition and in another one later during the reform process. It is a sequencing, timing and balance of mix of mechanisms that is of relevance for a fruitful impact of Transitional Justice mechanisms on the democratization process. Whereas in one country, trials or international tribunals might be an early option, as in the case of former Yugoslavia in 1993 or in the case of Rwanda after genocide in 1994, in another country it might be recommended to start with a Truth and Reconciliation Commission, as in South Africa after the end of the Apartheid regime in 1994. Or maybe it is suggested that with the process continues with informal ways when the government is not ready yet for any serious TJ measures such as to acknowledge the severe human rights abuses that happened in the past in the case of Turkey and the Armenian genocide in 1915. As

we have seen during the democratization process of post-Franco Spain after 1975, a negotiated silence pact that excluded any prosecution of perpetrators and instead issued broad and blanked amnesty laws seemed to be the most adequate form for the interim-governments during the democratization process. Observers of Transitional Justice processes such as Hazan and most recently Olson, Payne and Reiter, agree that sequencing and balancing of mechanisms matters significantly if Transitional Justice measures ought to have any impact at all. According to Hazan, a formal set of human rights and democratic norms and standards (formal democracy) have to be in place before even thinking about introducing any transitional Justice mechanisms at all. Furthermore, there has to be a popular and general catharsis and societal feeling of being ready for national reconciliation prior to issuing trials, commissions of inquiry or that alike. Mechanisms such as judicial proceedings, commissions of inquiry, reparations, public apologies or the achievement of a shared vision of history, are tools to reach any impact on a change of societal behavior.³ To apply measures varies greatly whether a country and society is still in the stage of an armed conflict – as was the case of the establishment of the International Criminal Tribunal on Former Yugoslavia (ICTY), or whether a country is in early transition process that is to say approximately up to 5 years after the conflict has ended. Medium term transition between five to twenty years during which usually democracies consolidate or fail to do so, is the next stage in which mechanisms might be applied. Interestingly enough most measures apply later rather than sooner and in general after 20 to 25 years with the first generation after the conflict ended or the regime change took place. This generation has the advantage to be free from any responsibility for past wrongdoings and at the same time is free from want and revenge of others because they have not been directly involved in the previous conflict. At the same time they are curious enough wanting to know what happened in the past, what the “stories” of their parents or grandparents is, the foundations of the society they live in and last but not least their identity.

The overall goal of these measures is to delegitimize the previous suppressive or violent regime and to legitimize instead the new democratic regime. And as such, the toolbox and measures of Transitional Justice attain to increase civic trust in democratic institutions. Therefore, policies of forgiveness and/or punishment provide a means of restoring the dignity of victims, of contributing to national reconciliation through efforts to seek truth and justice, whether symbolic or criminal, of preventing new crimes, participating in the restoration and maintenance of peace, and establishing or strengthening the rule of law by introducing institutional and political reforms. To underline the idea that only if there is sequencing and a balance and mix of different measures combined there will be any long term effect on democratic institution (building) was already highlighted by Hayner in 2002, when she summarized that either trials or truth commissions or vetting and lustration mechanisms will not have any impact on reconciliation and less so on democratization.⁴ There needs to be a parallel reparations program for those injured whilst at the same time attention given to structural inequalities and basic material needs of victimized communities is given. The existence of natural linkages in society that bring formerly opposing parties together should be taken into consideration over a passage of time. That is to say, measures that apply during the first five years of transition might not be relevant 20 years later. They need to be used in a combination with other measures, such as school book reforms, memorials or reconciliation projects on the local level. But the reality of many post-communist, post-conflict and post-war countries have shown over the past 20 years, that reconciliation and Transitional Justice policies are often add odds with politics of democratization. During the very delicate and fragile period of early transition political decision makers have to balance between past

³ HAZAN, P., *Measuring the Impact of Punishment and Forgiveness: A Framework for Evaluating Transitional Justice* (2006).

⁴ HAYNER, P., *Unspeakable Truths, Facing the challenges of Truth Commissions* (New York; London: Routledge, 2002).

and present and they have to publicly acknowledge that “something went wrong” without placing former “wrongdoers” outside society that is meant to reconcile. Otherwise, it is reasonably feared that the marginalization of potential perpetrators will lead to arbitrary acts of revenge and vengeance in the near future by all sides, and thus destabilize the country ones again. Therefore, democratic constitution building during this period has to include and respond to the needs of society during transition period and it often requires amnesty laws to apply – albeit the risk of establishing a culture of impunity that later weakens again democracy and the rule of law is high. The early constitutional set up has to reflect the interests of all societal groups adequate. Political and legal norms, for example penal codes and the way judges are appointed have to be based on agreements with all relevant groups in society, if they co-operate.⁵

Consequently democratization processes and Transitional Justice can go hand in hand, but Transitional Justice measure have to be carefully applied and might even consider to issue amnesty laws if the political or military elites occupy too many positions still in the newly reformed administration or government. However, amnesty laws, by no means should be the first choice but can be a measure of last resort if the countries runs the risk of facing violence or another civil war during transition period, as was the case in post-Franco Spain in 1975/1976 or in post-dictatorial Argentina in 1986/87, which nevertheless were revised in 2003. Also, the opposite of amnesty laws, that is to say the prosecution of perpetrators is often paired with little protection of victims and can lead to acts of revenge by its constituency and followers, such as coup d'états through military leaders or terror acts.

3. DEMOCRATISATION AND DEMOCRACY

The debate about the relationship between democratization, democracy and Transitional Justice has been influenced by Huntington's work on the third wave of democratization in Southern Europe, Latin America and Eastern Europe in the 1970s and the 1980s.⁶ Since the end of the Cold War in 1991, a large number of democracies have led to expanded research methodologies and increased attention to the impact of Transitional Justice on democratization, democratic consolidation, and the quality of democracy. During the 2000s, debates arose about how to differentiate between the levels of democracy after the democratization was completed. The term “quality of democracy” was introduced to measure the level of democratic strength in democratic regimes. The quality can be assessed by considering the level of responsiveness of institutional powers (legislative, executive and judiciary) to citizen's needs and claims, and in the case of Transitional Justice, the needs and claims of victims but also alleged perpetrators. Furthermore it can be measured by the level of citizen participation in politics, their civic trust, and level of engagement in political institutions. Civic trust is seen as a level of acceptance of democratic authorities and compliance with civic duties. Almond and Verba⁷ have curbed the term civic cooperation and trust⁸ already in the 1960s to measure the democratic quality of the political system.⁹ Civic trust, engagement and participation can include, for example, the way and intensity in which victim groups express their needs for acknowledgement and justice and victimizers claim their need for fair trials.

⁵ SCHAAB, A., *Political Reconciliation* (New York, 2005).

⁶ HUNTINGTON, S., *The Third Wave. Democratization in the Late Twentieth Century* (Oklahoma, University of Oklahoma Press, 1991).

⁷ ALMOND, G. and VERBA, S., eds., *The Civic Culture, Political Attitudes and Democracy in Five Nations* (Thousands Oaks: Sage Publications, 2004).

⁸ Ibid., p. 227, p. 360.

⁹ Ibid., p. 349.

Transitional justice measures are among the different factors needed to reach a higher quality democracy. For example, these measures can have an impact on the quality of democracy, if the newly established judiciary incriminates alleged perpetrators of past injustice and decisions against perpetrators are issued who under the old regime would have stayed unpunished. Civic trust in democratic institutions and thus the quality of democracy can also be impacted through new and old political elites publicly reckoning with the past, the launching of memorials, award reconciliation programs, etc. Thus, higher or lower quality of democracy in connection with Transitional Justice measures can be measured by looking at the correlation between these measures and the performance of democratic institutions and their political elites: parliament, government, judiciary, political parties, civil society organizations, etc.

Assessing democratic performance and thus quality has a long tradition. Huntington¹⁰, Diamond¹¹, and Linz and Stepan¹² have proposed various core criteria for democratic consolidation which today can be found when looking at quality indicators for democracy. Diamond's consolidation indicators reflect citizens' trust in the political regime. Democratic regimes are legitimized by high levels of civic trust and thus engagement with their institutions. Without citizen's participation there is no legitimacy and a democratic system might have functional failures. For Diamond, to successfully democratize and to consolidate democratic institutions 1) the elites, the government and the state bureaucracy must be transparent, accountable and responsive; 2) interest groups must be allowed to participate in the decision-making process, and 3) citizens must actively and voluntarily participate in politics. At least 70 percent of the population must support democracy and democratic reforms for a society to be democratic.¹³ In this context, the notion that democracy must become the 'only game in town' underscores the fact that a significant number and majority of citizens and groups must support and participate in democratic institution building for democratization to be effective.¹⁴ To marginalize groups or to exclude victims, survivors or technocratic elites from the previous regime from the decision-making process might cause societal tensions and perpetuates conflict. Instead, new governments that aim to leverage their democratic institutions over time would be well advised to carefully launch legal and political reforms, criminal prosecution, inquiry commissions, recognize memorial days, launch re-education programs, allow property restitutions and issue public security sector reforms of the military and police. Nevertheless, during democratization politics are often at odds with Transitional Justice measures because they are meant to accuse old and new elites alike, open old wounds or shed light on democratic deficits in transition periods. This runs the risk of slowing down or hampering democratization and increase institutional deficits like weak rule of law, bias judiciary, executive and legislative powers who do not launch political reforms and instead issue blanked amnesties that create a culture of impunity, etc.

If applied in the early stages of democratization, some Transitional Justice measures might help to consolidate countries torn by an armed conflict or a totalitarian or authoritarian regime ended by force or collapse, but these measures are not necessarily a prerequisite to democratization. The point here is rather, how strong and resilient the democratic institutions and the political elites become during the process of transition and beyond, and to whether or not Transitional Justice can contribute to this

¹⁰ HUNTINGTON, *op.cit.*

¹¹ DIAMOND, L., *Developing Democracy, Toward Consolidation*, John Hopkins University Press, , Baltimore, 1999..

¹² LINZ, J. and STEPAN, A., eds. *Problems of Democratic Transition and Consolidation. Southern Europe, South America, and Post-Communist Europe*, John Hopkins University Press, Baltimore, 1996.

¹³ DIAMOND, *op cit.*

¹⁴ LINZ and STEPAN, *op. cit.*

development. If institutional strength and resilience can be leveraged through Transitional Justice measures, it will improve the quality of democratic institutions.

There is often a small window of opportunity for these measures to be applied during democratization in the first year of transition and in the following up to five or ten years. However, some Transitional Justice methods can be applied after consolidation has taken place and when there is no longer fear of vengeance, as was the case in post-Franco Spain.¹⁵ In an ideal scenario, Transitional Justice should facilitate a reckoning with the past by launching reconciliation programs, memorials, creating new courts, hiring constitutional reform experts, and/or training judges and new politicians in international human rights norms and standards that have to be transferred and adapted to domestic jurisdiction. This would foster democratization and respond to citizen's claims. New legal experts, lawyers and judges both national and foreign, can advise on constitutional reform, reconfigure civil law, train judges, lawyers and state security agents, build up an independent judiciary, and contribute to ad-hoc tribunals like the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR). Domestic actors', civil society, and, in particular, victim groups contribution to Transitional Justice and democratization is pivotal. But democratic regimes have to provide legal and political frameworks, by granting basic human rights and social justice for these actors to freely participate. Thus democratic institutions and citizen's participation are closely interlinked in this process. Citizens participate in reconciliation projects, claim and lobby for justice measures, support political and legal reforms, and ask for compensations to be applied or amnesties to be abolished. When representatives of democratic institutions, such as politicians, judges and delegates respond to citizens and electorates demands they see them as means to reach their goal for reparations, compensations, trials or general forms of acknowledgement. At the same time, they legitimize and strengthen these institutions. More engagement and civic trust in these institutions leverages functional quality.

4. TRANSITIONAL JUSTICE AND DEMOCRATIC INSTITUTIONS

Studies of transitional justice in emergent democracies that explored the connection between democratization and transitional justice argue that at least some formal democratic institutions have to be in place in order to implement state-led transitional justice measures. Measures such as trials, examinations, or compensations will not work without having effective democratic, decision-making mechanisms and a judiciary in place. It is even less so if there are not at least a minimum of fundamental human rights incorporated in domestic legislation that guarantees free and equal participation rights for victim groups, citizens or victimizers and other stakeholders in the Transitional Justice process. If there is no judiciary that applies them and no parliament that debates issues of the past, the correlation between Transitional Justice and democratic institutions can not be measured.

Olson, Payne and Reiter quantitatively assessed the relationship between democratization and Transitional Justice.¹⁶ They concluded that countries that implemented Transitional Justice measures during democratization enhanced freedom and human rights that in turn strengthened the functioning of democratic institutions. However, when and to what extent these Transitional Justice measures are adequate enough, or applied at the right time, depends on each country's political, social and historical profile, given the diversity of cases, definitions of terms and concepts, methodologies, and assessment criteria. For example, some authors are interested to see whether Transitional Justice leads to retributive or restorative justice. Others seek more precise, qualitative, Transitional Justice indicators;

¹⁵ AGUILAR FERNÁNDEZ, P., *Memory and Amnesty, the Role of the Spanish Civil War in the Transition to Democracy*, Berghahn Books, 2002.

¹⁶ OLSON T., PAYNE, L., and REITER, A., *Transitional Justice in Balance; Comparing Processes, Weighing Efficacy*, United States Institute for Peace, Washington DC, 2010.

like the extent to which the level of post-conflict national catharsis promoted through citizens joint efforts to change the regime generates willingness to implement Transitional Justice.¹⁷ Others examine the role of different non-state actors with regard to the relationship between democratization and Transitional Justice such as victims, non-governmental organizations, or the international community and how they impact political decisions of the newly established government.¹⁸

It is often assumed that Transitional Justice measures help prevent ‘victor’s justice’ and arbitrary vengeance. It demonstrates that human rights abuses cannot be ignored in the free society where people ask questions, file claims, and seek retribution and justice without violent repercussions. It seems to be an obvious development in liberal societies and democracies that people deal with the past sooner or later. If governments respond adequately and do not suppress or discourage citizen participation through means of fear, they have the potential to increase civic trust and equally democratic institutions. Governmental response needs to take into account the needs of citizens and victims and measure them against those of perpetrators. Such needs are, for example, the desire for acknowledgement, for compensation or truth as well as for the right to fair trials of perpetrators.¹⁹ In an ideal scenario, democratic institutions and their elites have to balance the interests and needs of all citizens regardless whether they are perpetrators or victims. Civic trust in this context is the individual assessment of ones own interest and capabilities of others whether to interact with democratic institutions. In this context, Diamond argues that during democratization, citizens engage with democratic institutions and do so more often and in larger numbers, if the institutions respond to their needs. This cycle increases civic trust and consequently legitimizes the new political system. If the majority of citizens experiences that the new regime is willing to reckon with past injustice, pay tribute to victims, prosecute and punish perpetrators, trust increases because people learn that this new regime is capable to attain justice for all, regardless what, when and who committed the crime even if it is delayed. Because of this, democratic institutions are strengthened by receiving citizens’ legitimacy through trust. The stronger these institutions are, the higher the quality of democracy and the sooner democratization is completed and democracy consolidated.

However, in some post-conflict and post-authoritarian countries, absences of official acknowledgement and a resistance to dialogue between state authorities and victims prevails. Specifically, international justice measures such as international or hybrid tribunals are perceived as “winners’ justice” or legal vengeance. Often these justice measures fail in prosecuting opponents of the old regime who had also committed human rights abuses under that regime.

The US Institute for Peace in Washington D.C. and the University of Uppsala have investigated the role of justice in post-conflict periods and whether or not trials or truth commissions are more preferable to amnesty in order to strengthen democratic institutions. They concluded that trials, truth commission and amnesty can be relevant for democratization, if they lead to peaceful society and avoid arbitrary vengeance. Although this might only be for a determined time, the fact that amnesty laws do not automatically lead to a culture of impunity and a failure of the rule of law must be acknowledged, too. The International Criminal Court (ICC) also reviewed the idea that in some contexts amnesties can contribute to peace and stability during post-dictatorial transition, under certain circumstances and thus acknowledging that democratic institutions building can occur without necessarily bringing

¹⁷ HAZAN, P., ‘Measuring the Impact of Punishment and Forgiveness: a Framework for Evaluating Transitional Justice,’ *International Review of the Red Cross*, Vol. 88, No.36, 2006, pp. 19-47.

¹⁸ BACKER, D., ‘Civil Society and Transitional Justice: Possibilities, Patterns and Prospects,’ *Journal of Human Rights*, Vol. 3, No. 3, 2003, pp. 297-313.

¹⁹ MCADAMS, J., (ed.), *Transitional Justice and the Rule of Law in New Democracies*, University of Notre Dame Press, Notre Dame, 2003.

perpetrators to justice immediately after the conflict ended.²⁰ The case of the Extraordinary Chambers in the Court of Cambodia in 2003 almost 25 years after the atrocious Khmer Rouge regime ended in the country; or the example of the Hybrid Tribunals (the Special Panels of the Dili District Court) for East-Timor between 2000 and 2006 and one year after severe atrocities happened in the country in 1999, are some of the examples to further investigate whether they have more or less impact on democratic development due to the late or early time of their establishment under UN auspices.

But as mentioned earlier, whether or not certain measures to best apply during democratization also depends on the nature of the conflict, past injustice or previous regime, the level of crime, and the legitimacy and strength of the new political elite in regards to the old elites. These measures have to be adapted to the political and societal circumstances in post-authoritarian or conflict societies. For example, it matters if perpetrators and victims live side by side in the same villages, districts or even houses and have to re-establish working relationships after the end of conflict (like in many post-communist Eastern Europe, in post-war Kosovo, or in post-genocide Rwanda or Guatemala), or whether if they live largely in separate countries (like in post-World War II Europe between Germany and its neighboring countries).

With new democracies appearing in Eastern Europe, Latin America, the Arab world, Africa, and Asia, it is important to distinguish and compare their functioning, strengths, weakness, stability, fragility, and to understand if Transitional Justice can contribute to their strength and quality. Researchers have linked the functioning, strength, and quality of democracy with the degree to which human rights are granted through the rule of law and the implementation of justice. In this context Transitional Justice measures such as criminal justice on the basis of international human rights law, can contribute to the rule of law and leverage equity in society.²¹

Government commitment to pro-democratic transitions in countries like Africa and Latin America during the 1980s and 1990s was crucial for the social and political stability of those conflict-torn countries. Teitel highlighted the “punishment and democracy” thesis, which claimed that the justification for the punishment of human rights abusers contributes to the future creation and maintenance of democracy by providing victims with a form of legal redress; deterring future crimes by offering truth and evidence about the past; restoring faith in the judiciary and allowing for judicial resolution of past wounds and enabling reconciliation of warring groups.²² In his evaluation on the South African TRC, Gibson argued that bringing past events to light can reduce inter-group conflicts, stabilize societies, and enhance democratic efforts but the “blame” and thus the prosecution or accusations and truth telling has to be applied on all sides of societies even on those who are the “winners” of the transitions or those who claim to be victims, if that does not seem to be evident.²³ By clarifying past wrongdoings of all societal groups and former conflicting parties governments can avoid conflicts among groups, but also generate new conflicts.

²⁰ SCHABAS, W., *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2011.

²¹ O’ DONNELL, G., VARGAS CULLELL, J., and IAZZETTA, O., *The Quality of Democracy; Theory and Applications*, University of Notre Dame Press, Notre Dame, 2004.

²² TEITEL, R., ‘How Are the New Democracies of the Southern Cone Dealing with the Legacy of Past Human Rights Abuses?’ in *Transitional Justice. How Emerging Democracies Reckon with Former Regimes*, KRITZ, N. (ed.), 2nd edition. Washington, DC: US Institute of Peace, Vol. 1, 2004, pp. 146-153.

²³ GIBSON, J.L., ‘The Contribution of Truth to Reconciliation, Lessons From South Africa’, *Journal of Conflict Resolution*, Vol. 50, No. 3, 2006, pp. 409-432.

Civic trust, citizen's interest and engagement with democratic institutions are often mentioned as being crucial to strengthening and legitimizing democracy.²⁴ This means that the greater the citizens' participation in voluntary associations, the higher the effectiveness of governmental institutions. Thus, if a society aims for justice of the past regime, its institutions must respond to citizens', victims' and victimizers' claims, albeit often competing. The claim to attain truth and fair trial, the need for adequate compensation and recognition, but also the need to integrate all citizens equally in society regardless whether they are victims or victimizers, are difficult tasks. Nevertheless, democratic institutions try to come closer to the fulfillment of these rights than autocratic ones. A government needs to address inequalities in public politics and to establish a protective and legitimate relationship between citizens and state.²⁵ Executive, legislative and judiciary powers can diminish inequalities generated by birth, gender, race, traditions, or the discriminating laws of the previous regime. Democratically elected governments ideally aim at increase their institutions' capacities and effectiveness in order to be legitimized and exercise power. They perform better if they respond to citizens needs and include them in decision making process, beyond elections.

5. DEFICITS AND NEGATIVE CONSEQUENCES OF UNCONSOLIDATED DEMOCRACIES

If human rights norms, participation, citizens engagement, transparency, accountability, and the rule of law lead to the better functioning of democratic institutions, Transitional Justice should be considered as a means to provide tools to increase democratic and good governance performances like citizen engagement, political transparency, governmental accountability, etc. By silencing the past and issuing blanked amnesties, previous injustices can become enduring injustices, perpetuating the autocratic performance of leaders and reducing social capital and further decreasing the trust and confidence between institutions such as public agencies, security forces and among citizens.²⁶ Thus, the previous regime will not be delegitimized and its political culture and anti-democratic institutional behavior will most likely continue. If governmental institutions do not reckon with the past or silence it, mistrust, fear, intimidation, terror, and insecurity will prevail and democratic institutions' might function less efficiently. If major social segments agree on "forgiving and forgetting" and accept the silence of victims and the impunity of victimizers, new democratic institutions populated by leaders of the former regime might have functional failures or face violent resistance, radicalization and revitalization of old elites and political parties. The decisions of politicians and judges with close ties or loyalties with the previous regime will be influenced by those ties and legislators might not take the interests of small victims' groups into account because the old elitist parties are still major voices in parliament, security forces or in the judiciary, can silence or perpetuate injustice and thus weaken democratic institutions.

Nevertheless, democratization can go on, but democratic institutions might be of lower quality and thus less effective and not as progressive as they could be, as was the case in the transitions of the 1970s and the 1980s: the *'pacto de silencio'* embraced by post-Franco Spain, the *'punto final'* of the post-junta Argentina, or the Expiry Law in Uruguay.²⁷ In these countries, civic trust was rather low and a culture of impunity and amnesty laws led to democratic failure (Uruguay) or perpetuated citizens' fear and mistrust of state institutions (Spain). The level of corruption was higher, the judiciary was not

²⁴ PUTNAM, R., *Making Democracy Work. Civic Traditions in Modern Italy*, Princeton University Press, Princeton, 1993.

²⁵ TILLY, C., *Democracy*, Cambridge University Press, Cambridge, 2007.

²⁶ OLSON ET AL, *op. cit.*

²⁷ See for example: Aguilar Fernández, P., *op cit.*

working as independent as they could and social, political and legal reforms were not issued to the extent they could have been in order to decrease inequality in things like society, fight poverty, organized crimes, etc. Many decision-makers of the past dictatorial regimes continued to occupy important public positions in the emergent democracy and preserved their old antidemocratic and unequal privileges that caused major tensions in society and politics alike.

Due to the need for domestic reforms and pressure from international organizations, many of these countries that democratized did not return to dictatorship, but kept silent about past wrongdoings. Amnesties might be temporarily accepted for the sake of democratization, to avoid open conflict, but it must be decreased over time if a functioning democracy is to be installed. In countries that opted for amnesties or half-hearted justice, within one or two generations people no longer confronted with threats of vengeance or intimidation by old elites started to ask questions, demand justice for atrocities, and revoke the amnesty laws. Thus, in slower democratizing countries, Transitional Justice measures might be delayed due to the pressure and influence of old elites, victimizers or divergent interests of victims, but not necessarily refused. For example, victims might be acknowledged and compensated by special pensions, as it was the case in Spain, without perpetrators ever being convicted. Still, the country democratized and Transitional Justice claims arose stronger one generation after the democracy was consolidated.

6. DEMOCRACY AND TRANSITIONAL JUSTICE

A democratic transition ends when the democracy is consolidated through free and fair elections, political alternations of leaders, the establishment of the rule of law, and by high citizens' participation in civil society groups, elections and public debates. For Linz and Stepan, a democratic transition is complete when a sufficient agreement has been reached about political procedures to produce an elected government and when this government *de facto* has the authority to generate new policies, and when the executive, legislative and judicial power generated by the new democracy does not have to share power with other bodies *de jure*.²⁸ As was noted earlier, if these conditions are not met, democracy is deficient or lacks of qualitative performance. Thus, transition ends and consolidation begins when an absolute majority of the citizens view democracy as "the only game in town," there is no threat to return to the former authoritarian regime, and significant groups regard key political institutions as the only legitimate framework for political contestation and adhere to democratic rules.²⁹ Consequently, democratization ends when old and new elites and other social groups agree on and consistently follow the new democratic rules. An inclusive, new political elite is crucial for the success of democratic development because it can decrease political tensions among conflicting parties. To completely exclude technocratic and skilled elites from the previous regime could destabilize the system, because their ties to the old military or autocratic elites as they could be waiting for their chance to reinstall the previous power structures and privileges. But the challenge persists; how much can the new and fragile democracy bear with the old elites that ones represented a suppressive and anti-democratic regime?

There is a need to include and compromise with the old elites in the transition process and jointly agree with them on common rules, use their institutional knowledge as long as they do not contradict democratic rules and values. However, this is not to be equalized with reinstalling high political decision makers of the old regime in the new government. It is rather to make best use of them and include them to the extent that they can not harm democratization. At the same time, they should

²⁸ Ibid, p. 3.

²⁹ O' Donnell, G., Vargas Cullell, J., and Iazzetta, O., *op. cit.*

by no means compose the majority of the new government, but should be presented in parliament and among the judiciary. It is an act of political balance that not many transition governments manage well, due to lack of resources, new technocratic elites, education and training, economic development and other means. If there are no blanket amnesties or any litigation against perpetrators issued, the new regime has to decide which of the old political elites they will exclude and which ones they will keep. Where these criteria are not met and the necessary steps are not taken, authoritarian rule is likely to return within a foreseeable time, as in post-Soviet Russia and modern Russian Federation.

That in mind, one has not only to assess whether Transitional Justice measures such as memorials or reparations can leverage qualitative performance of democratic institutions but to what extent they contribute to societal reconciliation. Reconciliation of divided societies is important for sustainable and long term peaceful and democratic development and thus a high quality of democracy.

7. RECONCILIATION

The term reconciliation has a political connotation, when it refers to the political processes that bring groups of victims and victimizers, divided societies or former enemy states together. It has a theological connotation, when it refers to an act of forgiveness that brings people together after conflict, war or separation. Reconciliation is thus seen as a process that can take several generations to complete and it includes acknowledgement of past injustice, truth seeking, mercy, forgiveness, and assurance for personal safety and societal peace, which are seen as essential to the social interactions that lead to post-conflict reconciliation.³⁰

The longer the process goes on to reconcile victimizer, perpetrators, bystanders and victims of past injustice and atrocities, the more symbolic it becomes, for example when third and fourth generation victims receive rather symbolic compensation or public acknowledgement. It affects the whole society or turns into formal reconciliation as in the case of post WWII Germany, where foreign relations to countries like Israel or France include a specific state doctrine to reconciliation by the German government.

Reconciliation aims to slowly change societal awareness, the decisions and behavior of societies and the political elites. It aims to build trust in the new political institutions and foster stability and peace in the country, which, in turn, should prevent the society from returning to violence, vengeance, war or other severe human rights abuse in the future. Thus 'political reconciliation' deals more with building peace, friendship and trust in and among institutions and countries, more than the prevalent theological understanding of the term in terms of personal face-to-face reconciliation that has been practiced in South Africa or Rwanda in the 1990s.

Reconciliation is part of an essential Transitional Justice and democratization process. In reference to the impact that reconciliation measures can have, the United Nations General Assembly declared 2009 as the International Year of Reconciliation, understanding reconciliation as a process that subsumes various Transitional Justice measures like trials, truth commissions, apologies, lustration, file access and the like. This definition deviates slightly from others, who describe reconciliation as a precondition for Transitional Justice. Nevertheless, current debates indicate that reconciliation is seen as an overall goal and long term process of a number of different Transitional Justice methods in post-conflict societies. Consequently, reconciliation that addresses and redresses the wrongs of the past has been included on the political agenda of many emerging democracies and post-

³⁰ ABU-NIMER, M. (ed.), *Reconciliation, Justice and Coexistence, Theory and Practice*, Lexington Books, Lanham, 2001.

conflict societies. It is worth highlighting that reconciliation goes well beyond face-to-face programs that are launched after war, conflicts, or systematic persecution.

8. DEVELOPMENT OF RECONCILIATION

Controversies and debates about whether reconciliation is a precondition, a consequence or ongoing process parallel to Transitional Justice continue. The same is true for whether or not reconciliation of a divided society is a precondition for democratization and democratic societies. The examples above should nevertheless emphasize that reconciliation is an imperative to peace and democracy. There is a debate whether reconciliation is a Transitional Justice method or, as the United Nations Resolution 60/147 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of 21 March 2006 contends, a long-term process that starts after the end of conflict, turmoil or great injustice and strives to reunite the country through a number of methods which relate to Transitional Justice.³¹

Over the last decades, the concept of reconciliation was used and understood differently in disciplines like history, psychology, theology, political science, peace and conflict studies or international law. Slowly, in the 1990s it became a multi-disciplinary academic concept. Today, authors opt for a compromise stating that Transitional Justice methods contribute to reconciliation because of their impact on societal change and transition. Most countries in transition from authoritarian rule to democracy introduce some measure that potentially could lead to individual, societal or inter-state reconciliation. Whether explicitly named reconciliation programs or not, most states apply one of the other Transitional Justice mechanisms with the goal of seeking justice, peace or truth and thus reconciliation. As Olson et al have shown, a minimum mix of methods is necessary to achieve an outcome that can be identified as a reconciled behavior among individuals and societies. But those measures are still no guarantee that reconciliation will be achieved.³² In political rhetoric the term has become a firm part of post-conflict political agendas and thus is believed to be a tool to establish stable societies that go beyond the traditional understanding of acts of forgiveness, re-construction and the re-unification of societies.

Current reconciliation processes like in East-Timor, Cambodia, Guatemala or Rwanda take place under surveillance of the international donor community and organizations; in particular the United Nations and the European Union as well as foundations, parliamentary commissions, churches, charity organizations or NGOs and civil society actors alike. Their different approaches and priorities contribute largely to the current definition and understanding of reconciliation. As a result reconciliation, truth and history commissions, although nationally driven, are often internationally financed and of very different kinds, depending on their donors priorities. Among those measures mostly financed are truth, history and/or reconciliation commissions, projects and workshops. They present reports, launch websites, initiate face-to-face workshops or public debates which can lead to both individual and societal reconciliation. By doing so, they often re-define, if not, re-invent the term reconciliation. Consequently, many international and local NGOs support the idea of reconciliation being a long-term process that includes various mechanisms and means in order to balance the demand for condemnation of perpetrators on the one side, and to peacefully overcome conflict torn societies

³¹ United Nations Resolution 60/147 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of 21 March 2006.

³² OLSON ET AL, *op.cit.*

with forms of memorials, public apologies, and reparations on the other. The act of forgiveness, which has often been claimed to be merely a term in Christianity and Judaism, is no longer in the center of the definition but rather seen as one element of many such as truth and justice seeking methods during the ongoing process.

9. CONTROVERSIES OF RECONCILIATION

Reconciliation is complex and challenging because of its perpetual character explained above. Lederach³³ and Kriesberg³⁴ argue that this is the case because of reconciliation's close linkage to Transitional Justice mechanisms that can heal or open societal wounds at the same time and thus potentially perpetuate divisions between victims and victimizers or bring former enemies or combatants together. Gibney et al³⁵, Minow³⁶ and Murphy³⁷ argue that reconciliation is a long terms process and to some extent attained through Transitional Justice measures. Others like Abu-Nimer claim that reconciliation is an end in itself.³⁸ Reconciliation is thus not a fixed concept nor does it determine a period of time with an end in terms of time or a final act. Although many reconciliation programs such as truth commissions, for example, do have specific goals and timelines for reporting. There is no point in time when countries, societies or individuals can say, "We are reconciled." Reconciliation goes beyond the immediate group of victims. The process is complex because a number of different measures feed this process and there is neither a determined end of it, nor a clear indicator that defines it.³⁹ It can take generations in which old and new elites as well as former victims and perpetrators interact, debate, agree or disagree on definitions, terms or interpretations of the past. They are part of a societal debate on how to commemorate, compensate, apologize or forgive. It therefore often affects second, third and following generations, children and grand children of victims and perpetrators alike and thus whole society and countries. We have seen in reconciliation debates in post WWII Germany's, within former European colonial powers or post WWII Japans reconciliation efforts with its Asian neighborhood states. Acts of reconciliation have no determined end, but change in the ways measures, methods and procedures are used and applied, for example, during commemoration ceremonies, via direct or symbolic compensations or the way victim-victimizers dialogues and accouterments are preformed.

Reconciliation efforts combine different developments, activities and events that can lead to the anticipated peaceful change and healing of societal wounds. The process goes at a different pace after a conflict has ended or, for example, when democratic transition has passed the first stage of consolidation up to five to ten years after the conflict has ended. During the early transition period, Transitional Justice measures are essential for justice and accountability of young democracies and thus any democratization and consolidation process. Minow observed that after mass atrocities and human rights violations, historical memory, narratives, memorials, recognition, truth commissions, and

³³ LEDRACH, J.P., *Building Peace; Sustainable Reconciliation in Divided Societies*, United States Institute of Peace Press, 2004.

³⁴ KRIESBERG, L., *Constructive Conflicts: From Escalation to Settlement*, Rowman and Littlefield, New York, 1998, pp. 329-31.

³⁵ GIBNEY, M., HOWARD-HASSMANN, R., COICAUD, J.M, and STEINER, N. (eds.), *The Age of Apology, Facing up the Past*, University of Pennsylvania Press, Philadelphia, 2008.

³⁶ MINOW, M., *Between Vengeance and Forgiveness, Facing History after Genocide and Mass Violence*, Beacon Press, Boston, 1998.

³⁷ MURPHY, C., *A Moral Theory of Political Reconciliation*, Cambridge University Press, Cambridge, 2010.

³⁸ ABU-NIMER, *op.cit.*

³⁹ OLSON ET AL, *op.cit.*

forgiveness are linked together when re-establishing societal trust and peace which again are essential in order to reconcile.⁴⁰ Seemingly, by reviewing the Truth and Reconciliation Commission (TRC) in South Africa, Gibson connected reconciliation to democratic stability and concluded that, if reconciliation does not involve the society, democratic institutions will not be strengthened and consolidated.⁴¹ Reconciliation efforts therefore contribute to stable societies and as assumed play an important role in democracies.

A growing number of case studies have been published in the field of reconciliation. Many of them deal with a combination of measures of Transitional Justice that might lead to reconciliation. They also emphasize that the reconciliation process can fail if victims, perpetrators, bystanders, interest groups such as victims or victimizers, old and new elites and those who oppose the process as such are either excluded from the process or not proportionally represented. In addition to this, it can also fail if criminal justice is perceived as the justice of the winner, victims' justice, or the old elite and not of the society at large. Often victims believe that perpetrators who are put on trial often receive more fairness and justice than the victims. This can lead to emotional outbreaks and irritation among victims, thus perpetuating the divisions, mistrust and hostility in society which counteracts the movement towards reconciliation.

Therefore, the first years of post-conflict transition are a sensitive period in which governments, societal movements and civil society, victims' organizations and elites all have to make careful decisions and not fall into the trap of "the winner [or] the victim takes all." Because stereotypes, hatred, prejudice and racism tend to prevail for generations, acts of vengeance, discrimination, exclusion and revenge become even stronger instead of justice and forgiveness. Old ideologies and bigotry easily continue in the minds of people and are counterproductive to reconciliation. They can lead to new conflict or the continuation of divided societies. The same is true when victims are continuing to press with their demands for recognition or compensations and when victimizers are targeted by former victims in revengeful acts then the society remains divided because each group aims to delegitimize the others.

10. THE PROCESS OF RECONCILIATION

The process of reconciliation involves different stages, methods, mechanisms that all contribute to its outcome. These stages include attaining goals like truth, justice, mercy and peace.⁴² Personal security and thus freedom from harm and want are other important goals.⁴³ Transitional justice methods that lead to reconciliation need institutions that establish, promote or guarantee these goals. These institutions ought to be democratic in the sense that they allow participation by victim groups, bystanders and perpetrators alike as well as an independent judiciary that guarantees fair trials including testimony without fear, personal security and prevention from revenge. The societal willingness to acknowledge, to repair and to apply criminal justice is a precondition to start a TJ process but can be executed at different times and stages in a peace building processes. Even amnesty laws can foster reconciliation for a determined and limited period of time, but should never be the first option of Transitional Justice tool to be applied. However, if amnesty laws are granted blanked – as it is mostly the case – they can lead to a culture of impunity and for a large group of former victimizers to be above the law and thus the rule of law. This weakens democracy. Acknowledgements of past

⁴⁰ Minow, *op.cit.*

⁴¹ GIBSON, J., *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?*, HSPC Press, New York, 2004.

⁴² LEDERACH,, *op cit.*

⁴³ KRIESBERG, *op cit.*

injustice contributes to the creation of truth, public apologies, rewriting history books, initiation of memorials, public debates, films and documentaries, literature, trials, research and open archives policies, and the naming of victims and perpetrators can increase awareness on past wrongdoings. On the basis of public awareness, face-to-face programs, political measures and societal initiatives, reconciliation can be processed. Reparations, for example, can be acts of symbolic or financial compensation for past injustice to victims and survivors. These reparations work to re-establish relationships among former opponents or combatants. They can be the restoration of destroyed historical or religious sites or the exhumation of mass graves and public burials to ease open wounds and grievance. These can be acts and measures that contribute to political reconciliation by which the new government takes responsibility for the injustice perpetrated by the previous regime.

Another example is the restoration of public or religious spaces where atrocities have been committed and converting them into memorials. Subsidizing historical or religious sites goes beyond the humanitarian obligation of restoration by states according to the Geneva Conventions of 1949, but these measures are included in the above mentioned United Nations Resolution Basic Principles and Guidelines from 2006. These guidelines aim at building peace through reconciliation. The exhumation of mass graves in Spain, Argentine, Japan, Rwanda, Cambodia, and the Former Yugoslavian republics was more than a symbolic act paying tribute to death and the suffering of the victims. Under public surveillance it turned into an act of reconciliation where perpetrators acknowledged, political elites apologized, victims – in some cases – forgave without forgetting.

Criminal justice in this context is narrowly defined as the application of international human and humanitarian law on past injustice in civil and military, local and community-based, national, international, hybrid, and ad-hoc courts. In most countries it also includes traditional or customary legal procedures. Establishing truth and justice as components of reconciliation is one element of criminal justice. Prosecuting perpetrators or vetting public servants can contribute to fact and truth finding, to justice, and thus, reconciliation. At the same time, these measures are also controversial because they might heighten tensions in post-conflict societies. International tribunals such as the International Criminal Tribunal for Rwanda (ICTR) dealing with the crimes against humanity during the genocide in 1994 are sometimes used in conjunction with national, traditional or local courts like the *gacacas*. However, neither international tribunals nor merely traditional mechanism replaced entirely the national jurisdiction according to international human rights law to seek justice. It is assumed that the combination of applying international law, law reforms, and domestic jurisdiction leads to a condemnation or probation of perpetrators and criminals who are responsible.

Vetting of public servants and the exclusion of old elites from political positions is legally justified. Due to its public awareness raising and truth seeking efforts, these measures and mechanisms aim to contribute to the long term process of individual and societal reconciliation. Second, these mechanisms, such as fair trials, intend to bring facts and truth to light to demystify perpetrators. Victims seek overall acknowledgement to be assured that it was not them who committed the crimes under the previous regimes but the regime itself. This was a crucial step towards reconciliation among individuals, for example, between state police and political prisoners in former post-communist countries in Eastern Europe. After being exposed to the files, confronting former state police officers in the court room or knowing that they have been expelled from state office was, for some victims, more than an official acknowledgement of their innocence. It was also a moment of reconciliation.

Many of these measures attain the goal of reconciliation on the individual and societal level as well as among states. They do not happen at the same time or to the same extent, because to reconcile at the individual level does not mean that societies or states have done so, too.

11. RECONCILIATION AS A MEANS TO SOCIETY

Reconciliation tries to stabilize divided, post-conflict societies and develop “a democratic culture and thus create relationships between countries, communities, neighbors, constituencies and individuals which leads to civic trust in democratic structures and a new political system”.⁴⁴ Therefore it aims to healing wounds, mistrust and hatred among individuals and societies. Transitional justice methods can contribute to heal and overcome mistrust by re-establishing civic trust in institutions and in society who uses and supports these institutions through elections, participation and for example, by going to court to solve problems instead of taking into ones own hands and commit acts of vengeance. The nature of the past crimes, the time that lapsed between the crimes and their redress often determines the extent and success of these methods to overcome mistrust and vengeance.

Beyond individual, societal and state reconciliation stands a theory of social and moral justice for victims and perpetrators alike. Truth and ‘historical justice’ can avoid vengeance and contribute to peace if victim and perpetrators alike get the impression that facts have been investigated and came to a conclusion.⁴⁵ Such facts can be the outcome of a truth commission, public debates, tribunals, or educational programs and can increase civic trust of people into public and democratic institutions.

During the 1990s, reconciliation processes were often initiated by political leaders, former dissidents or church leaders. Raúl Rettig (Chile), Desmond Tutu and Nelson Mandela (South Africa), and Lech Walesa (Poland) appealed to Christian values to argue for reconciliation for their countries and forgiveness of victimizers by their victims. As such, many believed that reconciliation was a Christian concept, for example when Lederach uses the term “mercy”⁴⁶, although other Abrahamic faiths like Islam and Judaism uphold it, too. The Commission for Reception, Truth and Reconciliation of East Timor, established in 2001, or the Algerian Presidential Decree and Charter for Peace and National Reconciliation of 2006, which called on the Islamists to reconcile with the army guards after the civil war, show that reconciliation was attempted in predominantly non-Christian countries alike. Reconciliations commissions have also been established, for example, in South Korea, the Solomon Islands, Sierra Leone, El Salvador, Argentina, Ghana, and the Fiji.

The complexity of the term reconciliation becomes more evident when we ask: Is reconciliation intrinsic to peace and re-establishing stable societies? If so, we should be able to find evidence of reconciliation being used in any stable or democratic society. To reunite, forgive, establish working relationships, memorialize, punish and establish mutual trust between former combatants, victims and victimizers as well as bystanders. Yet, there is little evidence to what extent truth, history, reconciliation or restitution commissions, historical narrative projects, memorials, lustration condemnation probations and even amnesties for perpetrators contribute to peace and stability in a society. Instead, in some cases these methods perpetuate division between victims and victimizers and between old and new elites. Yet, there are no clear indicators that would explain when reconciliation begins; whether or not it affects societies or is about to be completed. As Olson et al conclude, that although there are no clear indicators it is evident, that one transitional method alone will not lead to reconciliation.⁴⁷

⁴⁴ BLOOMFIELD, D., BARNES T., and HUYSE, L. (eds.), *Reconciliation after Violent Conflict*, IDEA Handbook, Stockholm, 2005, pp. 14.

⁴⁵ BARKAN, E., *The Guilt of Nations, Restitution and Negotiating Historical Injustice*, John Hopkins University Press, Baltimore, 2004.

⁴⁶ LEDERACH, *op.cit.*

⁴⁷ OLSON ET AL, *op.cit.*

Mendez highlights that without any reconciliation efforts, political regimes would be based on the weak foundation of privilege for old elites and perpetrators and the denial of rule of law.⁴⁸ Neglecting to confront the past can lead to new or enduring injustice, conflicts or turmoil because old stereotypes, discrimination or vengeance will trigger or perpetuate violent acts. Old and new elites, former victimizers and victims such as oppressed, persecuted, and exiled people, deported, survivors, bystanders and ethnic, religious or sexual minorities, must be included in the reconciliation process. These groups have to agree on common standards of rules and conducting policies and come up with a version of the historical truth or common narrative that is acceptable to both in order to reconcile. Therefore, to agree on common political, juridical standards or historical facts can help to look jointly towards the future and re-establish social trust among formerly antagonistic groups. Needless to say, it is very difficult to achieve such a balance of protagonists to agree on common standards, narratives and rules for the future. Bearing in mind, that not all members of a society feel the need or want to reconcile and even oppose the process. Most reconciliation processes fail because they do not balance or achieve agreements among these groups, for example, when agreeing on a common historical narrative about the past. The difficulty in this process remains in the installation of methods and measures that neither perpetuate divisions among the groups nor affirm enduring injustice and mistrust of the past.

So far the impact of reconciliation process on societal peace is understudied. As shown above, the term is contested and many authors have aimed at defining reconciliation either as a precondition or as a consequence of Transitional Justice. It is nevertheless assumed that the process and its mechanisms as such can contribute to a more just and peaceful society, leading to a more legitimate new democracy.⁴⁹ Murphy argues that reconciliation is therefore a condition for successful democratization in transitional societies and is a critical component of peacemaking globally.⁵⁰

12. DURATION OF THE RECONCILIATION PROCESS

Reconciliation can take generations and is a long term process. Forgiveness, peace, truth and justice look good on paper, but the methods that lead to these goals have to be applied and enforced through state or international institutions which can take decades and generations. The extent to which this happens depends on the political will of the country's influential elites such as military or economic actors. In many cases, like in Argentina or Chile, these elites are only ready to confront the past after one or two decades after the turn of the regime. The international donor community plays a vital role in this process although many initiatives are national driven by civil society groups.

Truth and reconciliation commissions are expensive in terms of investigations and witness protection. In war and conflict torn societies with heavy economic burdens, the international community is often the main reliable source of funding and support. In addition, recommendations given by TRCs for example, on security sector or legal reforms on compensations and reparations, have to be implemented and monitored. Many of these commission efforts fail or are only half way completed due to a lack of finances or political will, and a lack of international support or surveillance. Right after the end of a dictatorship or civil war financial means are often not available or not seen as a priority. On the other side it can take decades until an official acknowledgement or apology by the

⁴⁸ MENDEZ, J.E., 'In Defense of Transitional Justice', in MCADAMS, J. A. *op.cit.*, pp. 1-26.

⁴⁹ BRONWYN LEEBAW, A., 'The Irreconcilable Goals of Transitional Justice,' *Human Rights Quarterly*, Vol. 30, No. 1, 2008, pp. 95-118.

⁵⁰ MURPHY, *op. cit.*, pp. 1-2.

government or perpetrators is expressed. Personal and public apologies are important in this process as it was seen in Argentina in the case of the Mothers of Plaza de Mayo who demanded a public apology since the 1970s. A similar event in Canada where an apology by the United Church in Canada to the First Nation Peoples was given in the 1980s, took place decades if not centuries after the crimes happened. In Germany after 1949 or in Rwanda after 1994, acknowledgements, state genocide laws and official reconciliation commissions, memorial sites, compensations and justice were put in place shortly after the genocide or the mass murder took place. However, their outcome, in terms of reconciliation, took another generation or two.

13. RECONCILIATION AS A CONTRIBUTION TO DEMOCRATIC TRANSITION

Reconciliation measures hope to change the civic and political behavior of societies to focus more on justice, which can re-establish trust among victim and victimizers, divided societies and former enemies. Today, reconciliation is a firm part of post-conflict and post-war political agendas, irrespective of a political system. It is an ongoing process passing through different stages of individual, societal or state reconciliation over generations. Ideally, reconciliation processes would trigger citizens to participate in political decision-making processes and come to terms with past dictatorial regimes or aggressive states. The intensity or the absence of Transitional Justice mechanisms can impact the level and extent of reconciliation. Mutual trust, confidence building, justice and forgiveness can lead to peace. However, without institutions like TRCs or independent courts as well as democratic decision making bodies in place, the likeliness that reconciliation can be achieved is low.

Reconciliation processes also benefit from the societal or national catharsis that past injustice should not turn into enduring injustice. Once the need for reconciliation is expressed, all societal groups, perpetrators, victims, old and new political elites and bystanders alike ought to work jointly in achieving change in behavior and politics. The process can fail because some of these groups alike are not sufficiently included in this process according to their proportion of victimhood or responsibilities. Others oppose it. Another negative impact on the process of reconciliation, however, could be that when naming and condemning perpetrators or old elites too soon will allow their followers and constituency to oppose the new regime and thus will divide the society again, for example through military putsch or boycotts by economic and old political elites. We should bear in mind that Transitional Justice measures have the potential to perpetuate divisions of groups in societies, but at the same time have the potential to reconcile divided societies.

14. CONCLUSION

Constitutional or liberal democracy rests on the rule of law and citizens' trust in an independent judiciary as well as in executive and legislative institutions which can be strengthened by successful Transitional Justice processes. Sometimes democratization is predicated on the need to bury the past, but most often democratization and Transitional Justice go hand in hand in reckoning with past injustices and crimes in order to bring stability to societies torn by war, violence, or facing a history of repressive rule. During the process of democratization, new governments may try to avoid victor's justice and the opening of old wounds by instead temporarily co-opting former perpetrators into the new democracy. This strategy can result in serious threats, but also successfully strengthen democratic institutions and progress democratization.

Democratization ends and democratic institution building is completed when power sharing between the different legislative, judiciary and executive institutions is installed and a high level of civic cooperation, engagement and participation and thus trust of citizens is guaranteed without

restrictive repercussions. Transitional justice measures and reconciliation among divided societies can promote citizen engagement and contribute to strengthening democratic institutions. It is able to do so if the political balance among societal groups, and thus victims and victimizers are attained, injustice acknowledged and dealt with, and a culture of impunity is avoided by all means. It focuses on bringing perpetrators to justice, reckoning with past injustices, and comparing old (authoritarian institutions) with new (democratic) institutions and unveiling the crimes of the former regime. At the same time, successful democratization also means successfully integrating technocratic elites of the old regime into the new democratic institutions, if no alternative is available.

Reconciliation is a process that can be defined as goal attained through Transitional Justice methods and measures. Today the term refers mainly to truth, justice, forgiveness, societal security and peace. These means are either considered as a prerequisite, a parallel requirement, or a consequence of Transitional Justice mechanisms that again contribute to democratic institution building and democracy. But democracies will face structural failures and lower quality if acts of injustice and past crimes are not brought to light and perpetrators are not held responsible for their wrongdoings. What matters is not so much the severity of punishment, but the ability of the new democratic institutions to reckon with, take responsibility for and punish those responsible for human rights abuses. They can use Transitional Justice measures to delegitimize the old regime to strengthen the new democratic institutions. At the same time, democratic institutions ought to respond to victims needs in one way or the other and if necessary even explain the necessity of amnesties, if not blanked, and the need to wait before trials, memorials or other Transitional Justice tools are applied. Otherwise, citizens will understand that, even under the new democratic system, perpetrators are exempted from justice. If injustice continues and if the new regime fails to punish those of the old regime, democratic leaders and institutions will suffer a lack of civic trust of citizens. Civic trust and the citizens' loyalty to the state and nation are key to stable democracy and can be fostered by Transitional Justice.

But Transitional Justice is only one way to do so. Many other factors such as economic development and leadership traditions contribute to democratic institution building. Thus, the continuous strengthening of democratic institution building through Transitional Justice are complementary processes, but not exclusive ones. After democracy is consolidated and a new post-conflict generation takes over leadership roles that is to say 20-25 years after the regime change took place, Transitional Justice measures might be applied more frequently and differently depending of course on the consensus within the society, the nature of the conflict, the severity of the crimes, and whether perpetrators and victims must live side by side in one country or in different countries.

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