

# RECONCILIATION AS JUSTICE: EXAMINING THE SUITABILITY OF TRANSITIONAL JUSTICE MECHANISMS IN INDIA

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## ABSTRACT

Since the end of the Cold War, alternative legal techniques for dispute settlement have become increasingly prevalent as national governments work to rebuild their civil societies. Among these, the truth and reconciliation commissions in South Africa and Latin America has been the harbingers of a new form of justice- 'reconciliation'- that represents a new focus in conflict resolution by striving to promote "transitional justice". In societies such as India which are rife with numerous ethnic, socio-economic, and cultural cleavages, reconciliation as a tool for peace-building holds great promise, for it seeks to move a society from internal war to lasting peace or from a repressive authoritarian regime to a more democratic government, and offers pragmatic alternatives to the resignation of political realism to sectarian conflict. This paper explores the array of healing strategies embodied in reconciliation programs and analyses the key epistemological and implementation issues that impair their full success in a particular political context. In doing so, the limitations and dichotomies imbricate in transitional justice mechanisms, such as the contradictory nature of dialectics as well as an objective standard of justice that fails to enable disenfranchised communities, and reifies hegemonic power relations between dispensers and receivers of such 'justice' have been investigated, and certain recommendations that would aid the improved operationalization of these mechanisms have been enlisted. It is asserted that the formulation and application a dynamic reconciliation model that embraces a conglomeration of socially transformative agendas is imperative to achieve a lasting 'esprit de corps' and peace in the longer run.

## I. INTRODUCTION

*"Pero es bello amar al mundo*

*Con los ojos*

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*De los que no han nacido*

*todavía.”*

(“But it is beautiful to love the world through the eyes of those who have not been born yet.”)

-Otto Rene Castillo.<sup>1</sup>

The enduring dialectical antithesis between a grudging acceptance of the redacted truth for ameliorating historical legacies of violence and suffering, so as to encapsulate a peaceful feature (a philosophy embodied in the quote above), and a relentless pursuit of the ‘absolute’ truth for ‘just’ retribution, underlies the operationalization of Transitional Justice today.<sup>2</sup> Transitional justice as a reconciliation program especially holds promise for India, a society that has experienced several paradigmatic and non-paradigmatic transitions, right from securing independence from the British colonial rule to attempting to establish peace after countless communal riots. The versatile potential of Transitional Justice mechanisms, to address wrongs that have been committed during a conflict, as a *past*-oriented practice; to establish new ethical and institutional frameworks of post-authoritarian or transitional politics for interpreting the past as a *present*-oriented practice; and through this, to prevent the *future* occurrences of gross injustices and violence,<sup>3</sup> has been recognized by the international community, and has been partially realized in several countries.

This paper seeks to explore the prospects of reconciliation as an effective tool to secure justice, especially in the context of transitional societies. Section II of this paper discusses the pivotal concepts underpinning Transitional Justice mechanisms in order to clearly define the goals and scheme of operation of such mechanisms in reconciliation programs, while in Section III, the varying approaches to reconciliation are analyzed and the numerous detractions of traditional criminal prosecution are discussed so as to present a clear picture of the vacuum in

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<sup>1</sup>*Transitional justice and Development: Making Connections*, 40 (Pablo de Greiff & Roger Duthie, 1<sup>st</sup> ed., Social Science Research Council, 2009).

<sup>2</sup> See Bronwyn A. Leebaw, *The Irreconcilable Goals of Transitional Justice*, Vol. 30, No. 1, Human Rights Quarterly, 95, 95-125 (2008), available at <http://heinonline.org.ezproxy.nujs.ac.in/HOL/Page?handle=hein.journals>, last seen on 24/02/2015.

<sup>3</sup> Thomas O. Hansen, *Transitional Justice: Toward a Differentiated Theory*, Vol. 13, No. 1, Oregon International Law Review, 1, 1-55 (2011), available at <http://heinonline.org.ezproxy.nujs.ac.in/HOL/Page?handle=hein.journals>, last seen on 21/02/2015.

traditional justice procedures that reconciliation can fill in. Section IV investigates the key issues in conceptualizing and implementing reconciliation as an adequate means for securing justice and for peace-building. This paves the path for making an even more detailed study of these issues in a narrower context by exploring their operation in Transitional Justice mechanisms, in Section V. A brief discussion, of these issues and the limitations of the truth and reconciliation commission set up in Gujarat after the Godhra riots, is undertaken in Section VI to illustrate the unique obstacles faced by Transitional Justice mechanisms in the Indian context. Finally, Section VII carefully examines solutions that bridge the gap between transition and transformation, and offers recommendations for transitional societies that would help them adopt the most suitable reconciliation programs.

While the investigation of the functioning of transitional justice mechanisms and truth and reconciliation mechanisms has been interspersed with several illustrations drawn from real-life situations in transitional societies such as those in South Africa and Latin America, this paper does not dwell exhaustively on these instances. The focus of this paper is on defining and setting up the theoretical configuration and dialectical praxis of reconciliation programs and transitional justice mechanisms in the first place, in an attempt to clarify the numerous misconceptions surrounding such mechanisms. While there exist several transitions in India that would afford an opportunity to analyze the peculiarities of transitional justice in the national context, the instance of the Godhra riots has been selected here as it offers a particularly illuminating illustration of the transitional justice discourse in India, as will be explored in detail in section VI.

## II. THE THEORETICAL AND EPISTEMOLOGICAL FRAMEWORK OF TRANSITIONAL JUSTICE

Transitional justice refers to the implementation of truth-telling, reparations, and institutional reforms;<sup>4</sup> the processes of dealing with the aftermath of violent conflicts and systematic human rights abuses in order to provide conditions for a peaceful future<sup>5</sup> and numerous mechanisms and instruments that aim at uncovering the truth about past crimes,

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<sup>4</sup> *Law in transition: Human Rights, Development and Transitional Justice*, 190-300 (Ruth Buchanan and Peer Zumbansen, 1<sup>st</sup> ed., Hart Publishing, 2014), See *Encyclopedia of transitional justice*, 302-532 (Lavina Stan & Nadya Nedelsky, 1<sup>st</sup> ed., Cambridge University Press, 2013).

<sup>5</sup> Tazreena Sajjad, *Transitional justice in South Asia: a study of Afghanistan and Nepal*, 40-290 (1<sup>st</sup> ed., Routledge, 2013).

holding perpetrators accountable, vindicating the dignity of victim-survivors and contributing to reconciliation.<sup>6</sup> The developmental analyses that account for social capital, social exclusion and intuitionist economics recognize that normative systems existing in any society recognizing the rule of law cannot set up an entirely revolutionary “*Novus Ordo*” in the praxis of transitional dynamics, for victims and non-victims will coexist in whatever new order established, and victims will rightly claim that equity calls for their differentiated treatment.<sup>7</sup> The inevitability of the embossment of human rights violations in perpetuity, therefore, reinforces the necessity for justice<sup>8</sup> to first address concerns related to re-establishment of the force of norms, and then those related to the strength and reliability of institutions.<sup>9</sup>

This requires the investigation of the “phenomenology of victimhood” that overwhelmingly gravitates towards the conclusion that pain and suffering endured in the violation itself is merely the beginning of sequelae that frequently include a deep sense of uncertainty and a debilitating sense of fear.<sup>10</sup> Serious human rights violations shatter expectations fundamental to the sense of agency in the world, resulting in *normative disorientation*<sup>11</sup> - a pervasive predisposition towards reclusion, withdrawal from public spaces, disengagement from social networks and particularly to refrain from making claims to authorities and formal institutions- as also to derogate from the *intrinsic* worth of Transitional Justice processes<sup>12</sup>. This especially challenges the success of post-conflict reformative strategies embodied in Transitional Justice which are specially designed to address the legacies of massive

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<sup>6</sup> Stephanie Vieille, *Transitional Justice: A Colonizing Field?*, Vol. 4, No. 1, Amsterdam Law Forum, 58, 58-88 (2012), available at <http://heinonline.org.ezproxy.nujs.ac.in/HOL/Page?handle=hein.journals>, last seen on 20/02/2015. The term "transitional justice" has come, in recent years, to designate a field of academic inquiry as well as political practice concerned with the aftermath of conflict and large-scale human rights abuses.'

<sup>7</sup> *Supra* 1, at 30.

<sup>8</sup> Yusuf O. Hakeem, *Transitional justice, judicial accountability and the rule of law*, 50-100 (1<sup>st</sup> ed., Routledge, 2010).

<sup>9</sup> Rosemary Nagy, *Transitional Justice as Global Project: Critical Reflections*, Vol. 29, No. 2, Third World Quarterly, 210, 210-300 (2008), available at <http://www.tandfonline.com/doi/abs/10.1080/01436590701806848#.VO-R5Bv9mP8>, last seen on 26/02/2015.

<sup>10</sup> Fionnuala Ní Aoláin, *Women, Security, and the Patriarchy of Internationalized Transitional Justice*, Vol. 31, No. 4, Human Rights Quarterly, 1055, 1055-1085 (2009), available at <http://www.jstor.org/stable/40389987>, last seen on 18/02/2015.

<sup>11</sup> *Supra* 1, at 35.

<sup>12</sup> Mark Freeman, *Necessary evils: Amnesties and The Search for Justice*, 252-352 (1<sup>st</sup> ed., Cambridge University Press, 2009).

atrocities- be it the expropriation of distributive justice or perpetuating infrastructural and economic distortions engendered by authoritarian military and security apparatus.<sup>13</sup>

While the dialogical genealogy of Transitional Justice traces from the war crimes trials in Nuremberg<sup>14</sup> and Tokyo following the Second World War, the concept became *en vogue* in the 1990s to describe judicial and non-judicial mechanisms of accountability that heralded a period of socio-economic transformation from authoritarian to democratic government, or from a conflict to post-conflict society.<sup>15</sup> The contemporary *paradigmatic shaping* of Transitional Justice emerged from the worldwide trend towards evangelical optimism of liberal-democratization after the Second World War (Germany, Italy, Japan), especially since the mid-1970s (Southern Europe), spreading more widely since the beginning of the 1990s (most of Latin America, parts of Africa and Asia).<sup>16</sup> It, however, may also be broadened to include *non-paradigmatic transitions*- transitions from violent conflict (ethnic, racial or religious) to peace within broadly "democratic" states<sup>17</sup> (for instance, the situation after the victims of Godhra riots were provided rehabilitation).

The distinction between 'transition' and 'transformation' is important in the context of justice, peace and reconciliation, for they embody different visions and goals. While *transition* is usually a movement of a 'thing' from one state to another- for instance from monarchy to democracy- *transformation* is a broader concept- it is a change in the thing itself while moving from one state to another, accompanied by radical changes in the states themselves.<sup>18</sup> *Transitional justice* becomes *transformative justice*, when the post-conflict regime responds to

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<sup>13</sup> *Supra* 1, at 65.

<sup>14</sup> Ruti Teitel, *Transitional Justice: Postwar Legacies*, Vol. 27, No. 1, *Cardozo Law Review*, 1615, 1615-1631 (2006), available at <http://heinonline.org.ezproxy.nujs.ac.in/HOL/Page?handle=hein.journals>, last seen on 23/02/2015. Nuremberg established the principle of individual criminal accountability for human rights violations perpetrated against civilians in wartime: that certain crimes are so heinous that they violate the "law of nations" and may be prosecuted anywhere.

<sup>15</sup> *Ibid.*, at 1624.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Supra* 6, at 70.

<sup>18</sup> Thus the concept of transformation is broader than transition, as it encompasses recreation, reinvention and rethinking unlike the largely linear progression signified by transition. Such structural overhauling and use of institutional mechanisms to advocate peace, is symbolic of widespread transformative justice.

violations of rights by not only addressing particular instances of abuse, but also evolving a discourse of new values, enshrined in public consciousness and codified in a body of laws.

Transitional justice mechanisms are abundant and diverse- they include truth and reconciliation commissions, trials, amnesty programs, lustration programs,<sup>19</sup> and various forms of reconstructive projects. While they have differing modes of securing justice, they share certain salient features- embodiment of the new values that they seek to institutionalize in the transitional society, some form of legitimacy derived from a governmental or non-governmental mandate, an open discussion of past wrongs, embracing conflicting narratives of events and attempting to mediate between them, and understanding the contexts in which the atrocities were committed and in which reparations are to be made. The rubric of transitional justice mechanisms includes a movement from oppression to decentralization of power and a healthy democracy, from violence and conflict to dialogue and deliberation as the medium for public discourse.

The ideology underlying transitional justice mechanisms such as truth and reconciliation commissions is that justice and peace can be secured by using conciliatory discourses that advocate healing processes to alleviate the pain suffered by the victims. These discourses are examined in detail in the next section.

### III. THE CASE FOR RECONCILIATION

Reconciliation is often conceptualized as a *process* of relatively amicable accommodation between antagonistic forces. Montville's oft-used formula divides this process into three distinct yet equally essential elements- acknowledgment<sup>20</sup> and contrition from the 'perpetrators', and forgiveness from the 'victims.' Montville and Fisher envisage these elements as operating in unique 'workshop' contexts where alienated groups or persons are encouraged by neutral third-parties to resolve conflicts by undertaking genuine dialogue that involves recapitulation and

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<sup>19</sup> The "purification" of state organizations from their "sins" under the communist regime- it is mainly used in the context of public life of post-communist Central and Eastern Europe.

<sup>20</sup> This acknowledgment aspect would also entail the victim's acknowledgment that there is 'good' in the perpetrator.

pardon of historical wrongs.<sup>21</sup> Others such as Lederach advocate a more proactive approach to reconciliation by viewing it as a *system*- a dynamic encounter wherein experiences and emotions are expressed actively to reshape and improve previously fractured relationships. This approach implicitly recognizes that conflict does not stem from mere objective and detached ‘ideological differences’ but is also inextricably intertwined with ‘the vagaries of emotion’- dissatisfaction, fear and mutual mistrust; therefore the conflicting forces themselves must be allowed to air their grievances fully before they are persuaded to move forward.

Traditional power and interest theorizations of conflict have been hotly debated by numerous writers who emphasize the glaring omission of the subjective aspect of experience in these models. It is here that reconciliation steps in as a suitable complement by representing the importance of *relational dynamics* and offers a viable alternative paradigm to the resignation of political realism to the inevitability of violence. By assimilating fulfillment of *basic needs* such as social harmony, bonding and security in the healing process, reconciliation transcends borders to simultaneously operate on *international, national, local and individual levels*. On a purely personal level, reconciliation usually involves some form of dealing with past wrongs committed or suffered, introspection, self-affirmation and closure. On a larger scale, reconciliation involves a formation of common understanding of a tragic event and some form of public acknowledgment of both the offence and its consequences.

Many argue that punitive justice and criminal prosecution have numerous detractors that provide ample space for reconciliation to step in as a better option to secure justice. Criminal prosecution, besides being protracted and incremental, causes much dissatisfaction among victims who need urgent compensation and reparations. Riddled with plea-bargains, ‘pragmatic’ compromises and manipulation of release of evidence, the process of criminal prosecution seldom takes note of the need for production of the truth of suffering- it does not inquire into the larger or comprehensive versions of the truth as it is usually restricted to the scope of each trial’s

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<sup>21</sup> Charles Lerche, *Peace building through Reconciliation*, Vol. 5 No. 2, International Journal of Peace Studies, 65, 61-76 (2000), available at <http://www.jstor.org/stable/41852878>, last seen on 23/05/2015.

inquiry. Truth-telling however becomes even more exigent in transitional societies, which seek to deal with the past, without dwelling on it, so as to move forward.<sup>22</sup>

Notably, the realistic and pressing public claims for reconstruction of homes, electricity, water and sanitation facilities may require diversion of resources from prosecution to provision of such basic services. For instance, in South Africa, the costs of criminal prosecution of leaders of the Apartheid regime were frankly disclosed to citizens- the twelve million rands (approximately US \$1.3 million) "in taxpayer-supported court costs" that were spent to prosecute the former Minister of Defense yielded an acquittal.<sup>23</sup>

Criminal prosecutions usually focus on individual responsibility of voluntary perpetrators and do not expand their approach to tackle the larger endemic culture of violence. The operation of varying degrees of coercion on the perpetrators themselves cast doubt on the appropriateness of traditional notions of criminal responsibility.<sup>24</sup> Criminal prosecution does not aim to be anathema to the social inequalities underlying conflict and fails to deter violence in the long-term precisely because it fails to herald widespread, lasting social transformation. By sharpening the divide between victims and perpetrators, these prosecutions fail abysmally in achieving larger goals of social reform and perpetuating healing processes where normative standards tolerating crime are abolished and democratic values are instilled in the public.

The numerous drawbacks of the traditional criminal justice processes render them incapable of drawing up and implementing conciliatory programs. Truth and reconciliation commissions provide a suitable alternative- they are *ad hoc*, autonomous and victim-centered commissions of inquiry, set up in and authorized by a state for the primary purposes of investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinative periods of abusive rule or conflict (*often spanning an entire political era*), and making

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<sup>22</sup> Also courts in post-conflict regimes are often staffed and run by officials who have not adapted to the new values propounded by the new social order.

<sup>23</sup> Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, Vol. 12, No. 1, 78, 73- 186 (2001), available at <http://www.jstor.org>, last seen on 23/05/2015.

<sup>24</sup> Further marginalization ensues when the emphasis is on the wrong done by the perpetrator *to the state*, not the victims.



recommendations for their redress and future prevention.<sup>25</sup> The success of the truth and reconciliation commission depends primarily on how well it provides reference points for reconstruction, how useful and practical its tools (for measuring the attitudes and will to promote new values) are, how consistent the aforementioned reference points are with the goals of justice and transformation, how actively it encourages civil and political society to follow up on the reconciliation process and how enthusiastically it attempts to incorporate the new values in the very social fabric.<sup>26</sup>

The chief impediments, both theoretical and pragmatic, that impair such success of truth and reconciliation commissions, are investigated in greater depth in the following section.

#### IV. RECONCILIATION, JUSTICE AND PEACE: PROBLEMS IN THEORY AND PRACTICE

Epistemological debates on the very nature of reconciliation arise when it is viewed as a *restoration* of peace between opposing groups<sup>27</sup> - for *restoration* usually connotes that an ideal state once existed in the past, which is capable of being reinstated and wherein social structures were harmonious and inter-group relations were stable and friendly. This presumption of a utopian past that was ruptured only due to sectarian conflict is highly debatable, given the tenuous and long histories of violence in contemporary societies, where reconciliation is sought to be used as effective justice. Rather than adopting such a traditionally 'conservative' approach to post-conflict reconciliation, it appears more suitable to view reconciliation as a congeries of strategies that require invigorated and subliminal social, economic, political, cultural transformation accompanying conflict resolution.

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<sup>25</sup>Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact On Human Rights and Democracy*, 30-330 (1<sup>st</sup> ed., Routledge, 2010). The "truth" that ultimately emerges from tribunals, however, can offer an inaccurate account based more on prosecution strategy than the reality of past events. There is also the concurrent danger, if the purpose of a trial is to establish the truth of events, a defendant may attempt to "hijack" the truth and record their version of the facts. Establishing any defense-superior orders, command responsibility, tu quoque, self-defense, necessity, proportionality, or reprisals requires the defendant to reference the context in which the accused crime occurred. This result is dangerous for the very fact that it cannot be avoided unless the safeguards inherent to a fair trial are disregarded; a result that should be untenable.

<sup>26</sup> The full operationalization of the goals of reconciliation is however possible only when the numerous societal mechanisms, both governmental and non-governmental, combine forces, a characteristic of a well-functioning democracy.

<sup>27</sup> *Supra* 23, at 102.

One of the main detractors of the South African and Latin American Truth and Reconciliation Commissions was that the reciprocation of trust and responsibility in the reconciliation process occur primarily between *individuals*.<sup>28</sup> Invariably, the individuals selected for this process were found to be influential and eminent, as they served dual aims- the occurrence of changes in themselves in the 'workshop context' and the increase in likelihood of a wider positive impact on the community. However, the extent of reconciliation of the *hoi polloi* who did not have the benefit of power,<sup>29</sup> as well as the real-time investigation of pervasive inequalities imbricate in the social structures to which these people belonged, are questionable.

Popular perceptions of peace and reconciliation as absence of conflict, rather than dynamic, non-violent and creative attempts to handle conflict, also stem any real hope for lasting co-operation in pluralistic societies.<sup>30</sup> The fruition of attempts towards reconciliation, compatible with inherently diverse societies that have numerous disparate socio-politically important multitudes, such as India, requires an overt acknowledgment that as long as resources and benefits are scarce, competition for material and non-material stakes will be inevitable. The handling of this fundamental politico-economic process, however, ultimately determines how the conflict will pan out. A consciousness of such possibilities, a willingness to establish peace and tolerance, to encourage transparent democratic processes and institutions, and to instill a sense of responsibility and accountability both in the community and individual members, go a long way to secure reconciliation.

In a tumultuous atmosphere of inter-racial, religious, social, economic and cultural conflict, a policy of collective amnesia and belief in relegating the past to the background are not preferred today, by regimes which had used these strategies in the initial democratization process. Spain, for instance, found it politically viable to advocate 'forgetting' and 'distancing' as an adequate healing agent in the political context of a nascent popular democracy; however since the late 1980s and the early 1990s, the Latin American experience shows a marked proclivity towards truth telling, national broadcasts of narratives of suffering and

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<sup>28</sup> *Supra* 21, at 70.

<sup>29</sup> Such a fractured process, which does not result in genuine reconciliation, elevates antagonism and mistrust in the general public that feels unacknowledged and betrayed by the new government.

<sup>30</sup> *Supra* 21, at 71.

commemoration of survival and forgiveness.<sup>31</sup> Besides the inevitable thrust for closure, such reconciliation is representative of attempts to ensure that the horrifying wrongs of the past are *never committed again* (the never-again consensus), thus effectively nipping a destructive cycle of systemic conflict in the bud. By broaching and fostering an alternative to conflict, reconciliation attempts to mediate conflicting interests and create a dynamic social order where the political leadership has both external and internal security and accountability.

One of the gravest dangers posited by a policy of rampant forgiveness is ‘false reconciliation’- an illusion of peace and harmony that *masks a fundamental urge to not reconcile*.<sup>32</sup> The allowance of modes that deviate from forgiveness appears, at first, completely contradictory to the reconciliation process. It is, perhaps, time to re-interpret reconciliation as *deferring the right to retribution to the extent that it would obstruct and prevent peace*. On closer scrutiny, there appear particular instances of atrocities where a conciliatory discourse is, in fact, vehemently rejected as inappropriate. In purely ethical terms, crimes such as child abuse and rape or mass genocide *cannot be forgiven through full amnesty and impunity*. For instance, victims of the Rwandan genocide consistently refused and abhorred government-initiated efforts towards reconciliation, for a substantially long period- they were simply too angry to let go of what they suffered and believed the perpetrators had executed deeds too heinous to be allowed to go scot-free.<sup>33</sup> Here a re-evaluation of a simple equating of reconciliation with forgiveness appears imperative. The ‘forgiveness’ brought about by false reconciliation is, unsurprisingly, seldom accompanied by forgetting the past. Such a fruitless exercise in peace only temporarily attempts to alleviate deep-seated resentment and realistic political cynicism and to bridge chasms of social alienation, dissatisfaction and frustration that are too wide to mend. An acknowledgment as well as acceptance of all reactions, including grief, anger, embitterment and a willingness to *not forgive*, would create an open environment where true reconciliation would *recognize the urge for retribution*, but would look for and innovate solutions that work better than retributive justice.

False reconciliation also tends to ignore victims’ rights and modes of redressal provided by international instruments, conventions and treaties. Several human rights instruments, such as

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<sup>31</sup> *Supra* 23, at 100.

<sup>32</sup> *Supra* 21, at 72.

<sup>33</sup> *Ibid.*

the United Nations Universal Declaration of Human Rights, require States Parties to provide "effective remedies" by *national tribunals* for acts violating human rights<sup>34</sup> while treaties such as the International Covenant on Civil and Political Rights, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Covenant on the Elimination of All Forms of Racial Discrimination provide for the "*right to be compensated*" for acts violating fundamental rights. By completely sidestepping these remedies and considerations of prosecution as the *right of victims*, in favor of mere truth telling and instant absolution, the hitherto-shaky foundations of the edifice of international law are weakened even further.<sup>35</sup>

Another important aspect of transitional justice and the reconciliation process is the idea of reparations as effective redress.<sup>36</sup> Due to the use of extra-legal means to operationalize the process of reconciliation, these *reparations are often paid by the new governments and not the perpetrators*. Simultaneously, these governments also provide *blanket amnesty to the perpetrators*. Inevitable comparisons arise, as victims feel dissatisfied by the meager benefits these compensation packages provide, compared to the freedom and perks gained by full impunity offered to the offenders. For instance, by obliterating legal means such as court-trials, Chilean reparation efforts not only offered far less compensation to victims, but met protests as the victims critiqued the undeserved, relatively larger gains the criminal perpetrators obtained through amnesty. Such attempts fail to realize the *potential of reparation* as complete restitution and restoration of the prior situation, compensation for the consequences of violation of rights and indemnification for patrimonial (primarily financial) and non-patrimonial (primarily related to losses that cannot be monetarily estimated) damages, including emotional harm.<sup>37</sup>

Moreover, as substantiated by the findings of the Inter-American Commission on Human rights, blanket amnesty legislations often deny the victims' rights to judicial protection and to a fair trial, by eliminating legal means to obtain justice, closing trials in progress, and effectively

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<sup>34</sup> Article 8 of the United Nations Universal Declaration of Human Rights

<sup>35</sup> *Supra* 21, at 73.

<sup>36</sup> Offers of material restitution as a token of acknowledgment and contrition are recognized as legitimate means of compensation for the wrongs done.

<sup>37</sup> *Supra* 23, at 97.

shutting down all judicial avenues.<sup>38</sup> While the Commission distinguished these effects of the amnesty laws from the right to compensation, it recommended in the case of such violations in Argentina and Uruguay that the governments pay adequate and fair compensation for the violation of the rights of victims to a fair court trial, thus recognizing that it is imperative to expand the concept of reparation beyond material restitution- the compensation was not only for the pain and suffering caused by the wrongs committed, but also for the denial of the victims' rights to gain justice through legal routes.<sup>39</sup>

The ensuing tension between 'transition' and 'transformation' is only accentuated by an investigation into the reconciliation interface, which is alternatively viewed as a restricted process occurring primarily between victims and offenders, or a wider dynamic addressing the multifaceted dimensions of peace-building. The tendency to segregate political violence from systemic violence and crime in transitional and post-transitional societies, heralds an intensification of social alienation, when false reconciliation only addresses the immediacy of the needs of a post-conflict regime, and is oblivious to the much larger, deeper, structural inequality that leads to burgeoning daily violence. The temporary alleviation offered by reconciliation failed to recognize and address the need for a complete overhauling of the socio-economic system operating under Apartheid in South Africa.<sup>40</sup>

These dilemmas underlying the reconciliation program operate in a more limited context in case of transitional justice mechanisms, and yet they have equally serious ramifications. The following section investigates these dichotomies that undermine the potential of transitional justice.

## V. KEY LIMITATIONS OF TRANSITIONAL JUSTICE MECHANISMS

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<sup>38</sup> *Ibid.*, at 99.

<sup>39</sup> *Ibid.*

<sup>40</sup> Strategic legalists point out that Transitional Justice fails to re-imagine the concept of impunity measures as comprising both *erga omnes* and *jus cogens* norms and to ask whether courts actually help post-atrocity societies to move beyond the past- it is noteworthy that trials of a few, do not recognize that the scope of these crimes could not have been as large, without the harnessing and the transformation of key societal institutions.<sup>40</sup> Thus reconciliation efforts that aimed to simply repair and compensate for racial discrimination and ethnic violence in South Africa remained unaccompanied by equally pressing needs to address class-based discrimination and cultural ethnocentrism.

An ontological exegesis of Transitional justice evinces its affinity towards the adoption of a ‘one-size-fits-all’ neoliberal approach (concomitant with the subjugation of the subaltern subject as noted above) that fosters uninhibited promotion of the rule of law<sup>41</sup> and institutional arrangements that support its development in transitional societies.<sup>42</sup> Transitional Justice mechanisms most frequently adopt the rule of law, an oft-misinterpreted concept perceived to exist "beyond culture" and believed to be an embodiment of apolitical, impartial rationality that may be ubiquitously applied to diverse contexts- thus according law the status of a foundational element that precedes all other factors, including culture and religion. This entails the risk of unconsciously eradicating alternative understandings of legal traditions and being oblivious to the potential of indigenous processes and engagement in the rebuilding process, thereby undermining the anchoring of a lasting peace. The legitimacy and efficiency of ‘local’ mechanisms is often eroded through the top-down models of transitional justice, which lean towards ignorant paternalism and psychological pathologization of post-conflict societies and cultural relativist legitimizations of human rights violations.<sup>43</sup>

An underlying dichotomy in the vision motivating truth commissions is that the *truth is never absolute*, especially when it involves radically diverse perspectives and interpretations of a strictly factual description of events.<sup>44</sup> The disclosure of the truth in commission reports, revelations of investigative processes, the testimony of the ‘antagonists’, the narratives of the victims- all juxtapose to create a complicated, interwoven tapestry of several truths. The

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<sup>41</sup> *Supra* 23, at 94.

<sup>42</sup> Fraser elucidates one of the most significant dilemmas in Transitional Justice templates- whether they should lean towards *redistribution*- reordering of material and symbolic resources based upon culpability, injury, and fairness (for instance, redistributing money or land in the form of reparations); or *recognition*- the establishment of official bodies, courts, tribunals, boards of inquest, whose task is to investigate, recognize, and call up the *identities* of the parties and acts that are brought to their official attention. While these mechanisms may employ both tools, most of them accomplish more recognition than redistribution. For instance, the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) illustrate, how, in spite of accomplishing laudable goals such as successful conviction of local killers in Bosnia and incarceration of topmost government officials complicit in overseeing massacres and ethnic cleansing, Transitional justice mechanisms did not successfully resist against the denigration of politicizing (the tribunals were often viewed as tools for ethnic persecution rather than prosecution), and showed pithy accomplishments at extraordinary cost.

<sup>43</sup> *Supra* 8, at 59. The two separate notions of justice in ancient Indian justice, namely the antiquated Sanskrit terms ‘*niti*’ (organizational propriety) and ‘*nyaya*’ (realized justice) present an antidote to the parochialism of contemporary Western theorizing of justice.

<sup>44</sup> See Laura C. Turano, *The Gender Dimension of Transitional Justice Mechanisms*, Vol. 43, No. 1, N.Y.U. Journal of International Law and Politics, 1045, 1045-1086 (2010), available at <http://heinonline.org.ezproxy.nujs.ac.in/HOL/Page?handle=hein.journals>, last seen on 24/02/2015.

handling and reconciliation of these *truths* ultimately determine the success of the reconciliation process itself. For instance, several Latin American and Apartheid South African army generals believed that the acts of torture and forced disappearances were necessary to combat security threats and expedient for the sake of national order and stability. In such circumstances, Montville's formulaic conception of reconciliation appears futile. There can be no true contrition if there is no full acknowledgment of the wrongness of such acts committed. Thus while a public official who has engaged in torture may apologize to the surviving victim, his belief that his actions were justified by necessity, if not by humanity, pose a hurdle to the movement from true acknowledgment and regret to contrition.<sup>45</sup>

Notably, conflict resolution and truth telling has often ignored the voices of one of the most disempowered groups- women.<sup>46</sup> As a section of society that is directly affected by conflict and is usually politically and economically marginalized, women have often faced opposition to their assertion of rights and reparations in post-conflict regimes that primarily focus on ethnicity, race and cultural cleavages, and typically disregard gender oppression. The over-recognition of sexual violence<sup>47</sup> and ignoring other forms of gender violence strains healing structures that ideally must accompany Transitional justice- narrating sexual violation according to strict positivist rituals of legal testimony renders it highly difficult for victims to script new social possibilities and to claim a self who has a future independent of a painful past.

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<sup>45</sup> Kirsten Campbell, *The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia*, Vol. 1, No. 3, Oxford Journals (The International Journal of Transitional Justice), 411, 411-432 (2007), available at <http://ijtransitionaljustice.oxfordjournals.org/content/1/3/411.abstract>, last seen on 26/02/2015. With an eight-year budget of five hundred and sixty-eight million U.S. dollars, or six percent of Rwanda's annual GDP, the cost of the ICTR's work totaled over forty-three million per case adjudicated- by June 2003, in its ninth year, the ICTR had handed down only twelve convictions and one acquittal.

<sup>46</sup> Susan H. Rimmer, *Sexing the Subject of Transitional Justice*, Vol. 32, No. 1, The Australian Feminist Law Journal, 123, 123-161 (2010), available at <http://heinonline.org.ezproxy.nujs.ac.in/HOL/Page?handle=hein.journals>, last seen on 24/02/2015. A dramatic feature of some regime transitions is the retroactive application of new legal and political norms to conduct that occurred under the old regime. Against the demand for substantive justice, however, is the competing concern of procedural legality. In the standard case of transition from a communist or authoritarian regime to a democratic one, leaders of the new regime want to establish (and want to be seen to establish) a conventional liberal democracy that respects constitutional and international norms of legality. Prominent among those norms is the concept that retroactive punishment violates the rule of law: "no punishment without law" (*nulla poena sine lege*) is taken to bar "after the fact" (*ex post facto*) sanctions.

<sup>47</sup> *Supra* 14, at 1061. The reduction of gender to the sexual and the ignorance of how men can suffer gendered violence is, to be most generous, a form of overcompensation for the years of ignoring women's place in humanitarian law.'

Of course, there exists the trend of consulting the 'local' (framing perpetrator-bargaining as a reconciliation mechanism, claiming legitimacy from local customs and values) when designing and implementing a transitional justice package, which is however not a matter of objectively infusing static local practices, but of *selectively infusing subjective interpretations of the local*, obfuscating the imperative and importunate claims against ongoing injustices. An analysis of the elitist politicization of the non-linear and fluid sociopolitical reality of justice, reveal the machinations of communalist and partisan forces that sideline genuine concerns regarding truth and reconciliation processes instigated by local actors.<sup>48</sup>

The limitations imbricate in transitional justice mechanisms that have been enumerated above also underlie similar mechanisms functioning in India. However, there are certain trends of violence and conflict and distinctive responses to such conflict that are characteristic of the Indian society. The situation ensuing the Godhra riots affords a fitting exemplification of these responses, which have been detailed and analyzed below.

## VI. THE INDIAN CONTEXT- THE CASE OF THE GODHRA RIOTS

The insidious production of transnational solidarity functioning through the identification of 'victim spectacles' (for instance, the injured body of a female rape survivor), and display of blatant *apathy to authentic victim-subjects who do not conform to traditional marginalizing frameworks* (for instance, homosexual victims) are characteristic of the biases operating in Transitional Justice mechanisms in India.<sup>49</sup> Normative intelligibility is, thus, inextricably interwoven with hegemonic rationalizations of a nexus of political contestations, re-imaginative orchestrations of an entrenched veracity of textual strategies and the instrumentalization of vocabularies.<sup>50</sup> This would appear more evident on an analysis of *non-paradigmatic transitioning* after the Godhra riots- the communal carnage against Muslims in Gujarat in 2002, described as a "spontaneous reaction" to the burning of a train at Godhra in which 59 men, women and children perished, most of them Hindu *kar sevaks*.

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<sup>48</sup> Christine Bell, *Transitional Justice, Interdisciplinarity and the State of 'Field' or 'Non-Field'*, Vol. 3, No. 1, Oxford Journals (The International Journal of Transitional Justice), 5, 5-27 (2009), available at <http://ijtransitionaljustice.oxfordjournals.org/content/3/1/5.short>, last seen on 25/02/2015.

<sup>49</sup> Ameya Kilara, *Facing the Demons of the Past: Transitional Justice in Gujarat*, Vol. 3, No. 1, Socio-Legal Review, 250, 250-300 (2007), available at <http://heionline.org.ezproxy.nujs.ac.in/HOL/Page?handle=hein.journals>, last seen on 20/02/2015.

<sup>50</sup> *Ibid.*



The opaque hindsight instilled by the chassis of Transitional Justice- confined to of "gross human rights violations" or acts of extreme political violence- obscured the ideological context and discussion of the politics of *Hindutva* that dominated the socio-political constructs in play in Gujarat.<sup>51</sup> The National Human Rights Commission emphasized the role of the State in the 2002 carnage when it noted that there had been a comprehensive failure of the State to protect the constitutional rights of the people of Gujarat, starting with the tragedy in Godhra on 27 February 2002 and continuing with the violence that ensued in the weeks that followed.<sup>52</sup>

It must be noted that historically, regimes witnessing temporary turmoil often utilize the mechanisms of transitional justice to provide an apparently quick rule of law oriented state action, which in the long term divests victims of any realistic opportunity for effective redress.<sup>53</sup> Transitional justice in South Africa was operationalized in a context of institutionalized and legalized apartheid and pervasive silencing of its victims. The uniqueness of apartheid lay in its underpinning by the legal system which served its agenda of systemic socio-economic pillage. Instead of undertaking reforms by thoroughly investigating such ubiquitous victimization, the South African Truth and Reconciliation Commission selectively punished human rights violations and did not deign it necessary to expose the surreptitious ideologies responsible for encouraging the violations. Similarly, the traditional Transitional Justice frameworks of redress in Gujarat failed to incisively inquire about the darker and less forgiving aspects of an ostensibly emancipatory agenda that, in reality, subvert the idealism of rights discourse and root "extraordinary violence" in a starkly pejorative ideological manifesto. In reality, the unprecedented debilitating horror of the acts perpetrated root in the socio-political historicism of customary Indian structures- the marginalization of Muslim minorities, the supremacy of Hindu majoritarianism, the subversive fervor of nationalism and the empirically overarching presumptions of gender roles and status-ascriptions.

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<sup>51</sup> *Supra* 8, at 88.

<sup>52</sup> *Supra* 8, at 89.

<sup>53</sup> *Merciful Judgments and Contemporary Society: Legal Problems, Legal Possibilities*, 200-300 (Austin Sarat, 1<sup>st</sup> ed., Cambridge University Press, 2012).

The Concerned Citizen's Tribunal<sup>54</sup> is an illuminating exemplification of the way Transitional Justice apparatus focus solely on the victimization of the community and providing redress through international legal instruments dealing with genocide<sup>55</sup> as well as criminal law prosecutions at the domestic level, but ignore the broader discursive practices of various perpetrators (the Hindu Right, for instance) and the history of the ideology (*Hindutva*, for instance) in constructing subjectivities as well as producing the violence.<sup>56</sup> The Tribunal recommended that the central government must enact legislation to implement the Genocide Convention,<sup>57</sup> and punish all perpetrators involved in the pillaging and plundering of moral and communitarian dignity. Notably, it classed the state-sponsored crimes under genocide and crimes against humanity, affirming that the contemporary Chief Minister Narendra Modi and his ministerial colleagues must be prosecuted under the relevant provisions of the IPC, POTA of 2002, and the Unlawful Activities Act of 2001 and that the activities of anti-democratic organizations such as the VHP and BD be immediately banned.<sup>58</sup>

Evidently, the Tribunal did not deign to pay heed to the legal-political discourse that intermingled inextricably with the *communis opinio*- equating Muslims to “outsiders” and Hindus to “victims”- thus failing to suitably unravel the layered machinations of irreducible ideologies and communal politics, and fallaciously condemning the atrocities as instances of mere individual human rights violations. It failed to recognize that the objectification of women- which comprises notions of proprietorship, fungibility,<sup>59</sup> violability,<sup>60</sup> denial of autonomy and instrumentality<sup>61</sup> - entailed overt rejection of ideas such as inalienable dignity of women, the relevance of their subjective experiences and qualitative differences between themselves, thus

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<sup>54</sup> (Consisting of eight eminent members from the country and constituted in consultation with a large number of groups within Gujarat and across the country).

<sup>55</sup> The International Criminal Tribunal in Rwanda (ICTR) set up under the UN auspices in 1994, is another forum for undertaking criminal prosecutions in relation to the genocide. The Tribunal, in strictly adhering to the due process rights of the accused, has been painfully slow in undertaking trials. Since it began hearing cases in 1996, the ICTR has heard only 33 cases completely

<sup>56</sup> *Supra* 7, at 892. The Tribunal, after documenting horrifying instances of sexualized violence asserted that such violence in “post-independent, democratic and secular India” was utterly reprehensible and called for justice and reparations.

<sup>57</sup> *Ibid.* (which India has signed and ratified)

<sup>58</sup> *Ibid.*

<sup>59</sup> (One is entirely akin to the others)

<sup>60</sup> (The idea that it is perfectly just to break the thing up or abuse it)

<sup>61</sup> (A thing, unlike a person, is an instrument or means to the ends of persons; but not an end in itself)

encouraging gender violence.<sup>62</sup> The domination of Hindu male power over the hitherto-recalcitrant Muslim female body signified inter-planar operationalization of the *Hindutva* ideology- the Muslim women were vessels for enabling vindication of the ‘wronged’ Hindus who restored the *izzat*, power, and security of the Hindu women and the Hindu community.

Tanika Sarkar<sup>63</sup> argues that the violence cannot be explained merely in terms of a collapse of state machinery (failure of the Modi government, the weakness of the state, or the limits of the contemporary BJP-led coalition at the center), but rather by the penetration of state and grass roots institutions--from police to hospitals--by the Sangh parivar (its firmness of resolve, its ideological consistency). Sarkar notes that there was complete obliteration of identity by destroying bodies, Muslim houses, shrines, and mosques, by replacing these with Hindu temples and homes, and by failing to address concerns of the homeless Muslims in the relief who had been divested of all identification papers to prove that they ever had property, jobs, bank balances, land, families, or Indian citizenship.<sup>64</sup>

The commission disregarded how the pursuit of agenda diametrically opposed to the philosophies of progressive socio- political movements may be employed within the language of secularism and equality itself. Thus the Hindu Right successfully combined rights discourse with familial discourse while casting the Muslim as a threat, existing outside the values of liberal democracy and fashioning Hindu violence as a justified response to avenge the alleged rapes of Hindu women. By stressing violations of human rights and obscuring every-day, ordinary forms of violence; it not only distorted and individualized the abuse- it tended to treat it as an aberration, as outside the context of liberalism and liberal rights, thus limiting the range of victims and perpetrators. For example, by focusing on the killings, abuses, and disappearances in the Commission of Inquiry, the structural and ideological factors that have produced the victimhood of Muslim minorities in India remained unaddressed. The tapestry of interrelated ordinary and extraordinary forms of political violence engendered by structures and relations of power is not captured by the straitened horizons of ascribing guilt- there must be clear identification of viable political alternatives that transcend the victimization rhetoric and work in tandem with the broader ideological context.

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<sup>62</sup> *Supra* 51, at 360.

<sup>63</sup> (one of the leading Indian historians investigating the events that took place in Gujarat), *Supra* 7, at 895.

<sup>64</sup> *Ibid.*

The preceding sections have studied the numerous issues underlying reconciliation programs and transitional justice mechanisms. The following section attempts to present lasting solutions for using reconciliation to establish a secure, just, stable social order and offers certain recommendations to use transitional justice in the broader scheme of peace-building.

## VII. SOLUTIONS AND RECOMMENDATIONS

The Hegelian notion of 'reconciliation' or '*Versöhnung*', that strongly connotes an alternatively restorative and reformatory process of transformation (when relative harmony and solidarity ensue on overcoming fundamental conflict and estrangement, there is a resumption of relationships with radically altered behavior and attitudes)<sup>65</sup> appears consonant with justice when it posits wholehearted acceptance of an imperfection-ridden past and rebuilds edifices of truth after accepting the necessity of legally tempered retributive justice.<sup>66</sup>

Moreover, this appears to resolve the peace-versus-justice paradox, imbricate in Transitional Justice mechanisms,<sup>67</sup> as noted in Section V. The paradox was most famously enunciated by Machiavelli when he argued that a Prince might have to learn how to "not be always good" in order to act in the best interest of his polity,<sup>68</sup> and best expostulated by Jean-Paul Sartre, who imbued it with dramatic depiction and gave the problem its most familiar name in his play 'Dirty Hands', as one of his protagonists put it quite starkly: "I have dirty hands. Right up to the elbows. I've plunged them in filth and blood... Do you think you can govern innocently?"<sup>69</sup>

In reality, the tension underpinning this paradox is not so much between proponents of a Kantian commitment to full retributive justice, and cynical realists who are willing, to "dig a hole and bury the past"<sup>70</sup> - but it is, more accurately viewed, the dichotomy between two powerful

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<sup>65</sup> *Supra* 5, at 120.

<sup>66</sup> *Supra* 12, at 302.

<sup>67</sup> Nir Eisikovits, *Peace Versus Justice in Transitional Settings*, Vol. 32, No. 1, *Quinnipac Law Review*, 707, 707-737 (2013), available at <http://heinonline.org.ezproxy.nujs.ac.in/HOL/Page?handle=hein.journals>, last seen on 24/02/2015.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> In the infamous words of the Cambodian Prime Minister Hun Sen- See Brandon Hamber, *Masculinity and Transitional Justice: An Exploratory Essay*, Vol. 1, No. 3, *Oxford Journals (The International Journal of*

yet often contradictory moral intuitions embedded in the psyche of officials and citizens in transitional countries- that in order to establish a legitimate, properly functioning civil society, one must avenge the crimes of the past; and that to secure stability, and a functioning government, it is sometimes necessary and morally acceptable to ‘forget’ past crimes and past criminals.<sup>71</sup> This tension between justice and social utility, though ubiquitous to the political life of any consolidated democracy, is certainly definitive of the political life during transitions<sup>72</sup>, for, while it may be conveniently alleviated by legal institutions and traditions in the former, which embody conducive strategies to manage the requisite tradeoffs between justice and social utility (including a constitution, a body of accepted constitutional jurisprudence, and a respected high court with powers of judicial review), the latter rely on the relatively less entrenched Transitional Justice mechanisms to allay such concerns.<sup>73</sup>

Contextuality appears to be another radically innovative approach to the resolution of this paradox. The relative success of South Africa’s Truth and Reconciliation Commission shows that while there exist several problems in the conceptual and implementation aspects of reconciliation, the idea itself represents a revolutionary path to securing of justice and peace, and that the primary goals of transformative justice still remain reconciliation (learning to live in peace) and deterrence (continuing to do so in the future without interruption). An important lesson from the experiences of the victims in South Africa, who have undergone the reconciliation process, is that *contextuality* is critical to its overall success. The transitional path must be modeled to the unique blueprint of each country's needs, which are a conglomeration of social, cultural, political, economic, ethnic, racial, military, and other factors. These factors differently shape transitions, each of which consequently becomes distinct from the others; and these distinctions in transitions compel different structural and institutional responses to wrongs in the past. Thus tailoring responses that tackle injustice using the bottom-up approach by

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Transitional Justice), 375, 375-390 ( 2007), available at <http://ijTransitionaljustice.oxfordjournals.org/content/1/3/375.short> , , last seen on 25/02/2015.

<sup>71</sup> Nir Eisikovits, *Peace Versus Justice in Transitional Settings*, Vol. 32, No. 1, Quinnipac Law Review, 707, 707-737 (2013), available at <http://heinonline.org.ezproxy.nujs.ac.in/HOL/Page?handle=hein.journals>, last seen on 24/02/2015.

<sup>72</sup> Clara Sandoval, *Transitional Justice and Social Change*, Vol. 20, No.1, SUR-International Journal on Human Rights, 181, 181-189 (2014), available at <http://heinonline.org.ezproxy.nujs.ac.in/HOL/Page?handle=hein.journals>, last seen on 22/02/2015.

<sup>73</sup> *Ibid.*

identifying the specific attributes of a society that leads to conflict, enable the transformational project to succeed in its aim of radical social reform. This serves to emphasize the need to transcend traditional dualities of blanket amnesty (a rejection of the engagement of law which constitutes the official, legitimate recognition of wrongs done, and their integration into the official history of the states) versus prosecution (the maximalist Nuremberg approach), and to study the particular context in which the conflict occurs, and the contemporary mechanisms that exist to deal with violence.

The interlaced associations, between the macrocosms of structural, systemic violence and microcosms of inter-group conflict that have been discussed in Section IV, merit deeper analysis and consideration. The detachment of conflict resolution from peace-building, defeats the innovation of new transformative strategies, which would *prevent* conflict and violence instead of *curing* resentment for a temporary period.<sup>74</sup> When the public and society as a whole have been systematically engaged in vicious cycles of oppression and victimization, then a change only in governance, without transformation in culture itself, *cannot stop conflict from recurring in the long-term, for the social conditions leading to conflict still exist*. At a time when generational conflict fosters pathological crime and violence, and discrimination is perpetuated and disseminated through means that transcend temporal or spatial restrictions, the reconciliation process needs rethinking and reinvention- questioning legacies of discrimination becomes as important as addressing wrongs committed .

While the concepts of co-operation and harmony have existed and been explored widely, the resignation of cynicism and realism has beleaguered any real hopes for replacement of inter-personal or inter-group competition with co-operation. It is here that Montville's three-step formula becomes redundant and a more proactive, dynamic paradigm of peace-building, that recognizes the *need* for peace rather than merely providing for ways to secure it, appears vital. With proliferating technological, biological, chemical and other weaponry; increasing geographical and social propinquity and a marked increase in competition transcending class, race and cultural boundaries, it is necessary to evaluate peace as a *mode of survival and adaptation*, not just a vacuum alternating with war. Reconciliation, viewed from this perspective,

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<sup>74</sup> *Supra* 23, at 86.

mediates between conflicting interests and needs so as to foster a ‘culture of co-operation’ that permeates to the lowest strata of society.<sup>75</sup>

Empirical evidence so far shows, however, that such total social reconstruction, in the current global scenario, usually occurs after a complete breakdown of society occurring after protracted conflict and rampant violence.<sup>76</sup> The cost of reparation efforts, global humanitarian aid and resources invested in reconciliation and peace building efforts *after* conflict must be compared to the cost of preventive strategies that are initiated *before* conflict and which seek to inculcate humanizing values in the community and to adapt to an atmosphere of equitable relations. A disintegration of the status quo that perpetuates social inequality, accompanied by continual programs that focus on rehabilitation and setting up of a stable, peaceful, harmonious social order, certainly seem to be a more pragmatic aim of reconciliation and peace, as compared to interim measures that seek to merely displace conflict instead of obliterating it entirely.<sup>77</sup> Thus a long-term commitment to and proactive involvement in ameliorating structural inequalities would aid in attempts to stem conflict, obviating the need for traditional reparation and compensation.

## VIII. CONCLUSION

Transitional societies harbor numerous unique impediments to progress that range from the immediate aftermath of conflict to deep-seated dissatisfaction of the general public with the social order itself. The genocide of 1994 in Rwanda left millions homeless in its wake, and in urgent need of social services which were tragically inadequate; the attempts to move past apartheid in South Africa largely failed to address issues of class oppression of the disempowered multitudes; the war in the former Yugoslavia destroyed cities and towns with scarce options to find refuge or initiate rehabilitation; and the number of disappearances and displaced populations in East Timor and Sierra Leone keep burgeoning.<sup>78</sup> In such societies where injustice occurs simultaneously on different scales, the prospect of tackling it successfully to set up a relatively stable and secure social order appears quite daunting for new governments.

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<sup>75</sup> *Supra* 21, at 74.

<sup>76</sup> *Supra* 23, at 88.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

The frequent occurrence of such transitions in societies such as India embodies the difficulty underlying determination of the 'transitional moment'<sup>79</sup> – a single point on a continuum of a protracted legal and political engagement between the transitional state and the international community- for it imparts importunate obscurity to the sifting of enmeshed multiple interests of other states, bent on articulating views about a regime or conflict, and on formal or informal interaction with key state and non-state actors.<sup>80</sup> Transitional justice, therefore, as discussed in the preceding sections, must advance from hinging on to the preciseness of the transitional moment in these societies and proceeds to embody a dynamic of movement, an ongoing metamorphosis, by drafting new laws, attempting to stabilize economies and adopting new policies that aim to allay the pain and suffering caused by conflict. The lessons learnt from the Godhra riots and the responses to sectarian conflict show that the answer to peace is not resignation to the inevitability of war, but innovation of a pragmatic transformative agenda that is rooted in reconciliatory discourse.

A rethinking of conservative approaches to reconciliation is required to answer difficult questions such as where the boundaries must be drawn, and who must draw them, while deciding which crimes merit punishment and which deserve forgiveness. Evidently, there exist several arguments for complete abhorrence of either amnesty or prosecution, but real-life experience of post-conflict regimes as well as the paradigms explored above show that an outright rejection of either path has devastating consequences and defeats the very aim of justice. The politicization of the decision-making process of pardon or punishment of offenders often hinders new governments from recognizing the potential of restorative justice. Rather than relying entirely on extra-legal mechanisms like truth commissions, or sticking solely to the conventional path of legal routes to justice, reconciliation appears to be best achieved when the post-conflict regimes use a judicious mix of both to attempt transformation while maintaining credibility. It is

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<sup>79</sup> See Eric A. Posner & Adrian Vermuele, *Transitional Justice as Ordinary Justice*, Vol. 117, No. 1, Harvard Law Review, 762, 762-825 (2003), available at <http://heinonline.org.ezproxy.nujs.ac.in/HOL/Page?handle=hein.journals>, last seen on 25/02/2015, for a detailed discussion of the methods of determination of a transitional moment.

<sup>80</sup> Charles T. Call, *Is Transitional Justice Really Just?*, Vol. 11, No. 1, Brown Journal of World Affairs, 100, 100-171 (2004), available at <http://heinonline.org.ezproxy.nujs.ac.in/HOL/Page?handle=hein.journals>, last seen on 20/02/2015.



suggested that the adoption and implementation of a proactive reconciliation paradigm is imperative for securing effective justice and lasting peace.