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ERODING THE BARRIER BETWEEN PEACE AND JUSTICE: TRANSITIONAL JUSTICE MECHANISMS AND SUSTAINABLE PEACE

Jeffrey D. Pugh

Abstract

The expansion of international trials over the last decades has reinvigorated the debate surrounding the efficacy of retributive justice over restorative justice in response to mass humanitarian crises. This study examines the ways different transitional justice models contribute to stable peace. It suggests that a hybrid utilization of both restorative justice mechanisms (e.g., amnesty) and retributive justice mechanisms (e.g., trials) is most effective in achieving a stable peace in a post-accord state, and that context is an important intervening factor. Using a mixed method approach, I first examine a group of 25 test cases, analyzing the relationship between restorative and retributive justice and post-conflict stability. I then examine more closely the paradigmatic case studies of El Salvador, Rwanda, and Mozambique in order to see how the three dominant models worked within individual country contexts. While the data suggests some linkage between the hybrid model and post-conflict stable peace, there are intervening factors (such as culture, alignment of narratives with elite and popular interests and values, and international legitimacy), which are also at work.

Keywords

transitional justice, peace, retributive justice, restorative justice, Rwanda, Mozambique, El Salvador

Introduction

The large number of liberation, post-colonial, and post-Cold War internal conflicts over the past decades, and the mass killing and human rights abuses that have accompanied many of them have led to a debate concerning the efficacy of different sorts of transitional justice (TJ) mechanisms as states adapt to a new reality after undergoing violent conflict. A country which has faced mass humanitarian crises – crimes against humanity, genocide, or war crimes – usually must bear the weight of how to bring peace to its citizens while at the same time utilizing mechanisms of justice to restore law and order and punish perpetrators of crimes. This debate has centered around the question of which justice mechanisms are more likely to produce sustainable peace – those mechanisms which seek reconciliation through forgiveness or amnesty without a strict form of trial punishment (i.e., “restorative justice”) or those mechanisms which promote accountability for past wrongdoing, most often through trials (i.e., “retributive justice”).

While the universal norms of international law to honor the protection of human dignity and the common good are central to any discussion regarding human rights and TJ, there are a variety of ways in which further mechanisms are utilized to punish unjust aggressors and work towards sustainable peace and reconciliation in a given society. Some proponents of international

trials, which are charged with prosecuting criminals of mass crimes across borders, dismiss movements of reconciliation and amnesty—restorative means of justice—as the modicum for a culture of impunity. Skeptics of these tribunals, however, often highlight the importance of amnesty for ending violence and garnering reconciliation, and claim that trials—the surest form of retributive justice—may make it more difficult to achieve peace (Lyons, 2012). Yet such a debilitating separation often neglects the reality that faces most post-conflict states. Not only do means of amnesty and reconciliation remain important factors in convincing parties to participate in peace accords, but trials also add a legitimizing force to the peace efforts while addressing past wrongs committed by perpetrators.

This article examines which mechanisms – restorative or retributive, or a hybrid form of both – are most efficacious in sustaining peace and stability in a post-conflict State, and the degree to which country-level contextual factors affect the type of mechanism that is chosen and its effectiveness in producing sustainable peace. Paradigmatic case studies then shed light on how and why particular mechanisms work, and in what contexts—lending support to the argument that there is not one automatic prescription for effective transitional justice, although there is at least some tentative evidence that incorporating multiple mechanisms that balance between retributive and restorative justice increases the likelihood of sustainable peace. Rather, I argue that the most important factors influencing TJ design and effectiveness are local context, political interests, and the mobilization of persuasive narratives that resonate with society.

This study is important because much of the debate concerning post-conflict States focuses either on retributive justice or restorative justice, without taking into consideration hybrid institutions that incorporate elements of both models. Many of the best-known studies that have addressed the combination of mechanisms have focused on outcomes like improvements in democracy or human rights practices, rather than peace or stability. Moreover, because the study of TJ in domestic and international contexts is organic, this article will contribute to the growing research in this field, and will produce useful policy implications for institutional designers and international organizations.

Theorizing transitional justice

The presence of international tribunals in the fight for international justice in response to genocide, war crimes, and humanitarian offenses, has recently been the subject of a significant cluster of literature examining their efficacy, legitimacy and normative importance as international interventions. International actors and state leaders alike have questioned their efficacy in consolidating democratic transitions and peace. Underneath such discussions, however, is a pressing empirical dilemma: do tribunals used to judge war criminals (especially of mass humanitarian atrocities, such as genocide, crimes against humanity, or war crimes) help to foster stable peace in the longer term – or do they inhibit it? William Zartman (2005: 1) points out that “Attempts to bring current combats to an end may interfere with efforts to bring the entire conflict to an end and prevent its future reemergence. The contrast between the terms, ‘peace’ and ‘justice,’ where both are necessary but one is often possible only at the expense of the other, reflects this potential contradiction.” Even after a peace agreement has been reached, efforts to ensure accountability and build institutions capable of ending impunity in the future (by showing that aggressors have been punished) sometimes undermine the momentum for cooperating on a shared national project, which can disrupt security and stability as spoilers turned off by the ‘hard’ aspects of TJ use this as an excuse to resume fighting. Additional

questions arise about how this balance is managed during the negotiations themselves. Much of the debate has focused on this question.

Much of the literature involved in analyzing stable peace and the efficacy of different international TJ mechanisms falls into three theoretical camps, which can be organized following the categories proposed by Wenzel et al (2008): 1.) *retributive justice*, or holding those responsible for killing and human rights violations accountable through trials and other judicial or criminal processes; and 2.) *restorative justice*, or allowing amnesties and a focus on forgiveness to exempt past participants in conflict from individual accountability, usually in order to make it possible to reach a peace agreement and end combat. 3.) In addition to the categories developed by Wenzel et al, I also highlight the large number of studies that unpack the grey areas between these two extremes by proposing *hybrid models* that includes elements of both accountability and forgiveness (and often truth).

The following section elaborates on the three major theoretical schools in order to establish the foundation for the analysis of empirical cases in the second half of the article.

Competing mechanisms

Retributive justice

Some scholars (Akhavan, 2001; Rosenberg, 1996; Mendez, 1997) have argued that TJ is best fostered by institutional mechanisms that hold accountable those who have transgressed international norms regarding human rights or mass killing. These authors claim that the presence of such trials is a better predictor of success than amnesty or truth commissions, and thus fall into the first camp. They argue that in the period since the 1970s, the norm of international accountability has proliferated, and as a result of this ‘justice cascade’, the use of trials has grown much faster than other mechanisms, and has been more successful (Lutz and Sikkink, 2001; Sikkink and Walling, 2007).[1] This camp is openly “optimistic” about the efficacy of international justice accountability mechanisms (such as trials or international war tribunals), holding that tribunals can serve to consolidate peace within a state affected by mass humanitarian crimes, either serving as a deterrent to rogue individuals within the State, or offering a mechanism for victims to cope and move on with the peace process.

The first theoretical camp – favoring retributive justice mechanisms – finds significant support in the current human rights literature. Payam Akhavan (2001: 9) argues this position, claiming that the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have contributed to peace as these two post-war societies rebuilt themselves by bringing in criminal accountability to domestic and international culture. He notes that “Both institutions have helped to marginalize nationalist political leaders and other forces allied to ethnic war and genocide, to discourage vengeance by victim groups, and to transform criminal justice into an important element of the contemporary international agenda.” Rosenberg (1996) falls into a similar camp, arguing that peace is fostered when nations (in addition to individuals) seek to understand traumatic past events before they can transition to normalcy. Accountability through international criminal justice, Rosenberg argues, helps victims heal and prevents the return of dictatorships. Former President Ricardo Lagos of Chile, who rejected an amnesty for top leaders from the Pinochet dictatorship that was established in the Chilean constitution and affirmed by a previous truth commission, recalls why

he sought to ensure accountability and truth, despite the risk of reviving latent resentment and conflict: "It was a very difficult decision – will you open the problems of the past, or will you face the past as it was? When I appointed the commission I said – 'there is no tomorrow without yesterday.' You have to look back to look forward." [2]

Richard Goldstone (2007: 7), a former Justice of the Constitutional Court of Africa, argued the “optimistic” position, that criminal tribunals have made peacemaking through negotiations more attainable. He claims that the indictment of Radovan Karadzic, a Bosnian Serb politician accused of war crimes against Bosnian Muslims in the 1990s, was instrumental in allowing for peace negotiations in Dayton to commence, which resulted in the end of the Bosnian war in 1995: “There was no way that President Izetbegovic or any other Bosnian leader would have considered being in the same room as Karadzic in November of 1995. So the indictments assisted in bringing an end to the war in Bosnia and Herzegovina.” This practical application and personal testimony reinforces the retributive justice approach. In cases like Colombia, the presence and active engagement with the International Criminal Court (ICC) actually helped to shape the substance of the negotiated peace accords as well as specific policies of the Colombian government related to peace and accountability for ex-combatants (Rincón et al, 2019)

Juan Mendez (1997: 266) offers evidence against the so-called positive effects of amnesty and impunity in order to bolster the case for accountability. He notes, “It is far from proven that a policy of forgiving and forgetting automatically deters future abuses. In fact, at least in Haiti one can more easily make the case that the opposite is true: each self-amnesty by the military has only led to further interruptions of democracy and to further atrocities. This deference to democratically elected leaders, who supposedly know better than anyone what is best for their country and what the traffic will bear, is unwarranted.” He also uses the case of Guatemala in the mid-1980s, in which amnesty only allowed President Vinicio Cerezo and his military to commit even more violations of human rights. This argument is typical of this camp in its conviction that any peace agreement that does not include measures of accountability is shallow, empty, and likely to be short-lived—in short, no peace at all.

Restorative justice

The second theoretical camp favors 'restorative' justice mechanisms over retributive justice mechanisms. These scholars (Scharf, 1996; Graybill, 2004; Fletcher and Weinstein, 2002) argue that trials inhibit peace, and stable peace is sustained through mechanisms such as amnesty, falling into the second camp. They find that cases of forgiveness (amnesty) and impunity are just as likely, if not more likely, to propel a transitional state toward democracy, arguing that tribunals are costly, distrusted, and sometimes counterproductive. Snyder & Vinjamuri (2004) argue, “Preventing atrocities and enhancing respect for the law will frequently depend on striking politically expedient bargains that create effective political coalitions to contain the power of potential perpetrators of abuses (or so-called spoilers). Amnesty—or simply ignoring past abuses—may be a necessary tool in this bargaining. Once such deals are struck, institutions based on the rule of law become more feasible.” The United States State Department has argued that this insight should be incorporated into practice in reference to international justice, and that accountability policies must be balanced against the need to move on and encourage armed groups to disarm and reintegrate into society (Scharf, 1996).

The studies in this camp range from legal defenses of amnesty to empirical examinations relying on large-N datasets or case studies that conclude that retributive justice does not improve peace, human rights practice, or democracy. Scharf (1996: 59) argues that the practice of granting amnesty for crimes against humanity is not necessarily in defiance of international law. He claims that the “practice of states does not yet support the present existence of an obligation under customary international law to refrain from conferring amnesty for [these massive] crimes.” Scharf cites as evidence that at the same time as the term ‘crimes against humanity’ was coined, amnesty was offered simultaneously to the Turkish perpetrators of the Armenian genocide of the twentieth century, a historical precedent which shows that international law does not obligate states to utilize tribunals.

A study of attitudes within a nation regarding TJ, focusing on Rwanda, South Africa, and Mozambique, finds that the cases in which states favored reconciliation over tribunals were unexpectedly successful in achieving peace (Graybill, 2004). The author attributes this outcome, at least in part, to factors related to cultural context, in which the adversarial legal system developed largely in Western countries and reflected in the retributive approach to international law, may not resonate appropriately within some non-Western cultural contexts. This is an important observation that this study will build on, especially in the analysis of two of these same cases, plus an additional case representing hybrid forms of both mechanisms.

Fletcher and Weinstein (2002: 575) note that international criminal mechanisms bear no inherent relationship to building peace in a transitional democracy. In fact, they argue that trials undermine broader domestic peacebuilding by focusing exclusively on legal cases: “The significant limitations of justifying trials as symbols are that the focus on legal processes may divert attention from the multiplicity of symbolic efforts helpful to establish the credibility of a new regime.” Burdening TJ trials with symbolic meaning may interfere with the ability of judges, lawyers, and juries to produce legitimate verdicts.

In the Center for the Study of Human Rights debate referenced earlier, Leslie Vinjamuri (2007: 11-12) argues that in situations where institutions are too weak to ensure effective implementation, or where the political will of powerful actors supporting trials is absent, war crime trials are typically ineffective. She argues that “in the face of ongoing conflict, war crime trials can be inherently destabilizing and may impede efforts to negotiate a peace.”

Hybrid model

A final, third theoretical camp (David and Yuk-ping, 2005; Bell, 2006) analyzes the complex interactions between the positions of the previous two types of TJ mechanisms, arguing that the evidence is not strong enough to suggest that only one mechanism (amnesty *or* tribunals, for instance) can adequately predict the consolidation of stable peace. This is not simply a moderate “in-between” position, but a more complex synthesis, which recognizes that both goals (peacemaking and justice) must be balanced and present simultaneously. The ‘justice balance’ approach advanced by Olsen, Payne, and Reiter (2010) argues that a holistic approach that combines trials and selective amnesties (and sometimes also truth commissions) is more effective in improving democracy and human rights practices than either amnesty or trials alone. The current article further develops this insight and seeks to evaluate it against a different outcome: sustainable peace over time. Extending the argument beyond improvements in

democracy and human rights, I seek to explore the impact of a holistic 'justice balance' hybrid approach on the maintenance of stable peace.

In addition to those advocating for combining elements of retributive and restorative justice, other contributions to the hybrid model approach emphasize that any one-size-fits-all approach is destined to fail. These scholars argue that different contextual factors – such as culture, historical legacies, and trust in international organizations – are key elements of a more complex theoretical model, and that 'one-size-fits-all' prescriptions are unlikely to be very helpful. They are also aware of the potential for unexpected variations due to local context. Alexander Hinton (2010: 1) argues that, “However well-intentioned, transitional justice needs to more deeply grapple with the messiness of global and transnational involvements and the local, on-the-ground realities with which they intersect, complexities that are too often glossed over...” David and Yuk-ping (2005) argue that individual reparations through international criminal justice are successful only if coupled with broader socio-political efforts at domestic democratization. Using a large-N study of survey data from former political prisoners in the Czech Republic, these authors found that reparation is a two-dimensional process that incorporates both changes in social and political reconstruction as well as internal psychological healing by victims. They argue that different societies may have different understandings of concepts of justice, healing, reconciliation and forgiveness. Thus, an understanding of the relationship between trials, peace negotiations, and their role in fostering sustainable peace must also consider these relative, cultural and sociological presuppositions. This critique, coupled with the concern of some scholars that the issues underlying TJ are far too complex for quantitative data alone (Bell, 2006), have led us to design a multi-method study that incorporates some quantitative comparisons in addition to brief case studies that unpack some of the contextual factors that affect the interaction of different TJ mechanisms.

While a great deal of literature studying democratization and human rights improvements has focused on TJ mechanisms, several key questions remain: why do some states, affected by massive humanitarian crises, utilize retributive justice mechanisms, such as international tribunals, while others utilize restorative justice mechanisms, such as amnesty? Which mechanism, or combination of mechanisms, is likely to lead not only to human rights improvements, democratization, or negotiations, but also to longer-term sustainable peace and stability? Most importantly, why, and in what contexts does the institutional design have this effect? This article seeks to contribute to the literature by addressing this set of questions. In particular, it posits that post-conflict states that utilize complementary methods of *restorative* and *retributive* justice are somewhat more likely to engender sustainable peace and stability than post-conflict states that utilize either retributive or restorative justice alone. More importantly, a more detailed analysis of three paradigmatic case studies sheds light on the contextual factors that influence which TJ mechanisms are selected in a given country, and under what conditions they are likely to lead to sustainable peace. The most important of these contextual factors that I analyze are whether there is a match between elite and popular interests, the availability of symbols and narratives that can be mobilized by institutional designers, and the relative share of blame for the conflict by the parties in the conflict.

Evidence from cases

This section examines the effects of three different types of TJ mechanisms across a medium-N set of states that have undergone violent conflict. I measure the average degree of political

stability and lack of violence characterizing states that utilized retributive, restorative, and hybrid models of TJ. I draw upon an existing data set to measure political stability (a proxy for *sustainable* peace), operationalized by Kaufmann, et al. (2003) and compiled by Breuning and Ishiyama (2007). [3] Additional indicators of sustainable peace are drawn from the Human Security index, including its Peacefulness sub-index. In order to determine whether a state used restorative justice, I use the Peace Accords Matrix database, published by the University of Notre Dame. [4] This database identifies cases where amnesty was used. I draw on the Transitional Justice Database Project to examine where domestic or international trials were used over a number of cases. [5]

The second part of the empirical section goes into more detail for three post-conflict country cases to examine the factors involved in helping to maintain peace (or not). This qualitative analysis provides richer insights into intervening factors within specific country contexts, seeing which mechanisms within retributive justice, restorative justice, and the hybrid model contributed to the greatest amount of stable peace and *why* this was so. Mozambique serves as the paradigmatic case for restorative justice, Rwanda for retributive justice, and El Salvador for the hybrid model.

The outcome I am most interested in with this study is stable peace. This variable is operationalized through an index of variables measuring political stability of a given post-accord state. I use one of the six dimensions of the governance index calculated by the World Bank and utilized by Kaufman, et al (2003) to measure political stability and absence of violence. The definition of political stability in this index refers to “perceptions of the likelihood that the government will be destabilized or overthrown by unconstitutional or violent means, including domestic violence and terrorism” (Kaufman 2010: 4). [6] The measure is based on many underlying variables that reflect perceptions of a wide range of governance issues, using surveys from firms and individuals, nongovernmental organizations (NGOs) and think tanks, as well as multilateral aid agencies. As an additional check on the dependent variable, I also analyze the relationship between different TJ mechanisms and alternative measures of peace: the Peacefulness Index and the Human Security Index. [7]

The first factor examined in this study is *utilization of retributive justice*. This is measured using data from the Transitional Justice Database on international or domestic tribunals. Trials are further assessed based on their frequency. Countries that initiated more than 5 trials are classified as “High Trial,” countries that initiated less than 5 trials but more than 2 are classified as “Medium Trial,” countries that initiated fewer than 2 trials are classified as “Low Trial,” and countries that initiated no trials at all will be classified as “No Trial”. The Transitional Justice Database categorizes those post-conflict states that experienced some form of international or domestic criminal trial.

The second factor to be examined is *utilization of restorative justice*. This will be operationalized using both the Peace Accords database as well as the Transitional Justice Database, which lists all issuances of amnesty from 1970-2007. This variable will reflect two factors: whether or not formal amnesty was involved in a comprehensive peace agreement and whether truth commissions were used. Formal amnesty will be assessed on four levels: No amnesty, low amnesty, medium amnesty, and high amnesty. Countries which had 10 or more issuances of amnesty are classified as “high amnesty,”; countries with 5-10 issuances as “medium amnesty,” those that had less than 5 issuances as “low amnesty,” and countries which had no issuances as “no amnesty”. [8] The indicators of restorative justice are listed in Table 1 as

two separate measures (i.e., amnesty and truth telling body or commission). Truth commissions are assessed at the binary level: namely, whether or not any truth commission was utilized. The Peace Accords database defines amnesty as “a legal guarantee that exempts former combatants, rebel leaders, and/or government officials from liability for criminal or political offences committed during the conflict.” The Accords database defines truth and reconciliation mechanisms/truth commissions as follows: “A temporary body established and officially sanctioned to investigate and report on patterns of human rights abuses occurring over a period of time in a particular country or in relation to a particular conflict.” The Peace Accords database traces post-conflict States that have experienced some form of a comprehensive peace agreement involving amnesty and truth-telling since 1989.

The third factor to be examined is utilization of a hybrid of retributive and restorative justice. This will be operationalized at the binary level—namely, whether or not both measures of retributive justice and restorative justice were utilized together. If both mechanisms were utilized, the case will be listed as a hybrid; if only one was utilized, it will be listed as not a hybrid.

The data summarized in Table 1 below compares the political stability of States that have emerged from conflicts or humanitarian crises with the existence of mechanisms of restorative and retributive justice. On the one hand, for the majority of “middle cases” of post-conflict states with a medium political stability, there is nothing significant concerning whether solely restorative, solely retributive, or some hybrid of the two was utilized. In fact, across most levels of political stability, there does not seem to be any trend in whether higher levels of either restorative or retributive justice contributed more to sustainable peace. Yet, looking at the more radical cases of political stability – the most and least stable post-accord states – there is an apparent trend. For the five states with the highest levels of political stability, all but one (Mozambique) utilized the hybrid model of restorative and retributive justice. Likewise, for the 5 states with the lowest levels of political stability, there is a similar pattern. All but one (Serbia and Montenegro) *did not* utilize the hybrid model. Interestingly, of the lowest three countries on the scale (Burundi, Tajikistan, and Angola), none had trials, but all had some level of amnesty. In comparing countries with hybrid forms of TJ and those without hybrid forms, the mean value for all three indices--political stability, peacefulness, and human security--is greater for countries utilizing hybrid TJ mechanisms than for those without them. [9] Given the small sample size, these effects are significant at the .10 level of significance using a one-tailed T test, so the finding should be viewed as a suggestive trend rather than a solid conclusion.

Country	Political Stability	Peacefulness Index	HS Index	Restorative Justice Mechanism (Amnesty)	Restorative Justice Mechanism (Truth Commission)	Retributive Justice Mechanism (# Domestic International Trials)	Hybrid of Restorative and Retributive Justice
1. Croatia	0.48	0.694	0.725	Low*	No	Low	Yes
2. El Salvador	0.25	0.456	0.616	High*	Yes	Low	Yes
3. Morocco	-0.06	0.384	0.606	Medium	No	Medium	Yes
4. Nicaragua	-0.10	0.436	0.540	High*	No	Medium	Yes

5. Mozambique	-0.16	0.354	0.482	Low*	No	None	No
6. Philippines	-0.19	0.146	0.535	High	No	Low	Yes
7. Armenia	-0.33	0.277	0.666	Low	No	None	No
8. Russia	-0.55	-0.037	0.645	Medium*	No	Low	Yes
9. Peru	-0.58	0.231	0.629	Medium	No	Medium	Yes
10. Ethiopia	-0.60	0.045	0.415	High	Yes	None	No
11. Azerbaijan	-0.69	0.126	0.673	Medium	Yes	Medium	Yes
12. Guatemala	-0.79	0.058	0.492	Medium	Yes	Medium	Yes
13. Georgia	-1.08	-0.133	0.646	Low	No	None	No
14. Chad	-1.16	-0.225	0.409	High*	Yes	None	No
15. Uganda	-1.21	-0.135	0.453	Medium*	No	Low	Yes
16. Iran	-1.24	-0.134	0.603	Medium*	No	Low	Yes
17. Rwanda	-1.26	-0.021	0.423	Low*	Yes	High	Yes
18. Indonesia	-1.27	-0.065	0.584	Medium	Yes	Medium	Yes
19. Nigeria	-1.38	-0.269	0.447	Medium	No	Medium	Yes
20. Somalia	-1.50	-0.442	0.296	High	Yes	Low	Yes
21. Dem Rep of the Congo	-1.52	-0.415	0.350	Medium*	No	None	No
22. Serbia & Montenegro	-1.64	-0.123	0.715	Low*	No	High	Yes
23. Burundi	-1.68	-0.368	0.396	Medium*	Yes	None	No
24. Tajikistan	-1.87	-0.246	0.550	Low	No	None	No
25. Angola	-1.99	-0.329	0.460	High*	No	None	No

Table 1. Political stability (1997-2005) and TJ mechanisms among post-agreement states whose conflicts ended after 1980

*Indicates whether general amnesty was granted (i.e., “Amnesty for all X, whether political, military, rebels, or general populace”). **Sources:** Kaufmann, et al. (2003); Breuning and Ishiyama (2007); Human Security Index; Transitional Justice Database; Peace Accords Matrix.

Going beyond a binary view of hybrid TJ or not, one can construct a TJ index that assigns a 1-3 value for low/medium/high trials and (reverse coded) amnesty, plus a binary variable for the presence of truth commissions (an indicator of restorative justice). This TJ index results in a value between 3 (most restorative) and 8 (most retributive). In Figure 1 on the next page, the cases from the table above are analyzed, comparing the TJ index with their average stability/peace score over the 10 years following their transitions (or as close as is possible with the existing dataset). The relationship shows generally greater levels of political stability and peace over time for the countries with middle-range scores on the transitional justice index, with those having more extreme retributive or restorative scores having generally lower levels of political stability and peace. Given the small sample size, these effects are not statistically significant and should be taken as suggestive trends.

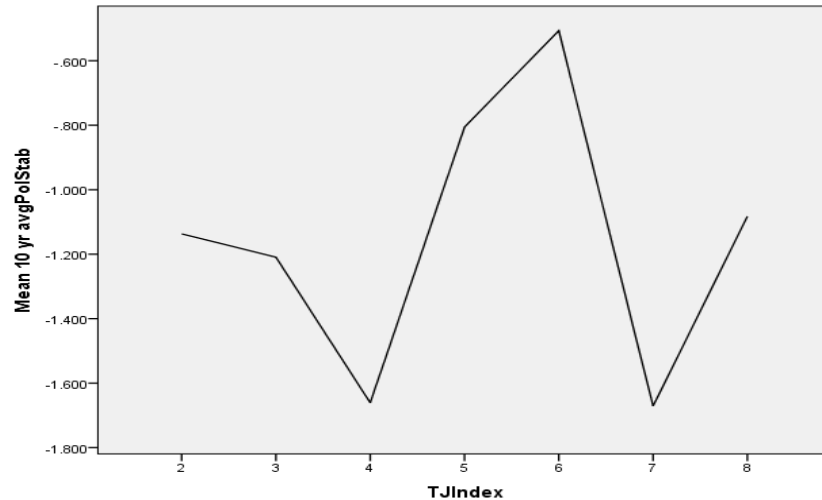
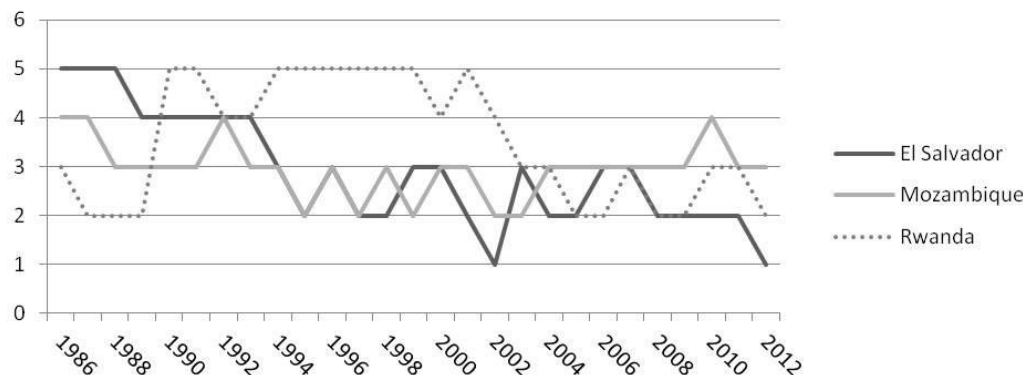


Figure 1: Average political stability/peace over 10 years compared with TJ index score

The preliminary comparative analysis suggests that there is some relationship between sustainable peace and the utilization of both restorative and retributive justice, although the tentative strength of the relationship seems to caution against a one-size-fits-all policy prescription. There need not be an inherent dichotomy. While this study does not purport to say that all cases that combine restorative and retributive justice lead to sustainable peace, the data do suggest a link between the utilization of the hybrid model and political sustainability of peace. In the next section, the article will examine paradigmatic cases for the three types of TJ mechanisms, examining the causes behind sustainable peace or the lack thereof.

Illustrative case studies of the three models

In this section, I examine in greater depth three cases that illustrate the three major approaches to TJ outlined above. Although El Salvador, Rwanda, and Mozambique have very different historical, regional and cultural contexts, all three were sites of intense internal conflict during the late 1980s or early 1990s, and they all ended around the same time, near 1994. None of the three cases have reverted to armed civil war since the conflicts ended in the 1990s (although of course many forms of structural and criminal violence and human insecurity persist). The variations in the forms of TJ that they employed at the end of the conflict help to shed light on the factors and process through which different mechanisms are selected and implemented, and which influence the effectiveness of TJ in leading to sustainable peace in the country. Figure 2 on the next page illustrates the changing levels of political violence in the three countries during and after their internal conflicts by comparing the Political Terror Scale score, a 5-point index calculated by Gibney et al (2015) on the basis of Amnesty International reports.



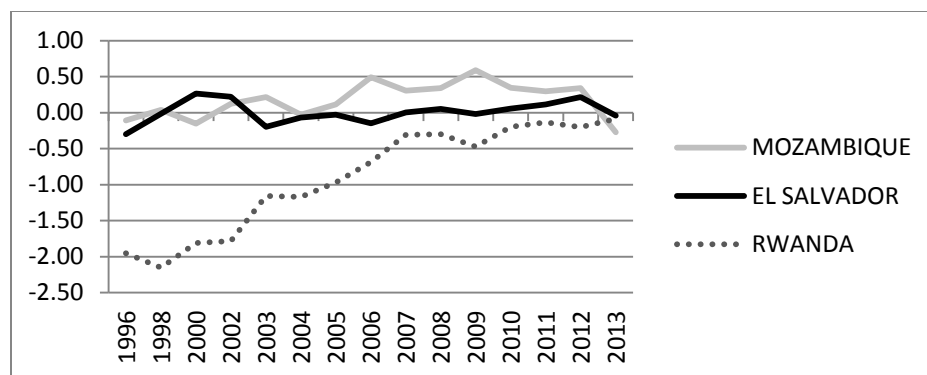
Source: Political Terror Scale score--Amnesty Intl (Gibney et al 2015)

Figure 2: Comparing the three cases over time on political violence

As the data shows, El Salvador's level of political violence dropped dramatically in the years immediately after its conflict ended, although it spiked a couple of times in the 2000s, especially leading up to election years. Rwanda's political violence score, on the other hand, remained rather high for the remainder of the 1990s, then dropped significantly at the beginning of the 2000s and remaining low. Mozambique's political violence score lowered moderately and inconsistently following the end of the conflict, and has risen somewhat again in the latter part of the 2000s. Of the three cases, El Salvador's decrease in organized political violence seems most directly tied to the transition that ended the war, whereas the other two cases seem to have improved their peace and security over a longer time frame, and possibly for other reasons than the design of transitional mechanisms (such as improving economic performance). [10]

Figure 3 on the next page shows the relationship between the three countries using the political stability score from the Governance Indicators of Kaufman et al (2014 update), available between 1996 and 2013. This also shows Rwanda recovering over a much longer time frame while El Salvador and Mozambique fluctuate over the 2000s (the fact that data are not available for the early 1990s is unfortunate, since this would likely better reflect the effects of the transitional justice process on Mozambique and El Salvador's stability and peace, given that their transitions happened earlier than Rwanda).

El Salvador was a country that utilized both restorative and retributive TJ measures, and ranked high on the list of sustainable peace in the previous section. Thus, I examine this country as an example of a hybrid model. For the first mechanism—retributive justice—I examine Rwanda, which scored the highest for the amount of criminal tribunals in a country. While Rwanda also utilized some means of amnesty (especially in an earlier episode of conflict during the 1970s, as opposed to the genocide of the 1990s) and truth telling, the amount of criminal tribunals outweighs the score for amnesty, which is far lower. [11] For the second mechanism—restorative justice—I examine Mozambique, as the paradigm for restorative justice. Although Mozambique did not use a hybrid model of restorative and retributive justice, the country nevertheless ranked in the top 5 of politically sustainable post-conflict States. I examine this counterexample in greater depth to flesh out the importance of context and political prudence for the effectiveness of TJ mechanisms, and as a warning against ‘one size fits all’ approaches.



Source: Kaufman et al 2014

Figure 3: Comparing the three cases over time on political stability/sustainable peace

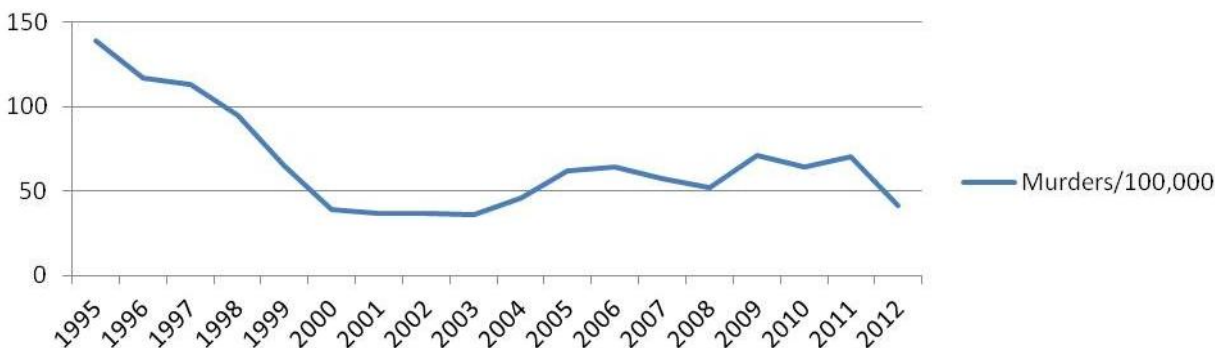
El Salvador: The hybrid model

I first examine in greater depth the case of El Salvador, a country that scored in the top five for political stability, and employed a hybrid TJ model that used both mechanisms of restorative and retributive justice. During some of the worst conflict years in El Salvador (1980-1991), many human rights abuses centered around the abuse and violent terror shown toward civilians, especially in human rights organizations and the Catholic Church, which was targeted by serious repression (Montgomery, 1995). As Cath Collins (2006: 726-727) points out, “Many of the most emblematic human rights violations of the war involved the violent death of prominent church figures, such as the 1980 assassination of Archbishop Oscar Romero, the 1981 rape and murder of four US churchwomen, and the 1989 killing of six Jesuit priests, their housekeeper and her daughter...In such circumstances legal responses could not and did not take root as primary responses to human rights violations in El Salvador.” Yet this lack of judicial structure did not prevent El Salvador from later utilizing criminal trials in the aftermath of such wide-reaching human rights abuses. In fact, the truth commission in El Salvador that followed the end of the war recommended the investigation and removal of the military officers responsible for the worst human rights violations, which ultimately led to unprecedented levels of accountability for very high-level officials and officers. According to Charles Call (2002: 397), “the consequences of the Ad Hoc and Truth Commissions’ reports signaled the most thorough housecleaning ever carried out of a Latin American military not defeated in war.”

El Salvador implemented six amnesty laws, launched a truth commission that issued a public report, and conducted trials in four different years for wartime human rights abuses. In the aftermath of these hybrid forms of TJ, El Salvador’s human rights and security record did improve significantly, as illustrated in the decrease in the Political Terror score in Figure 1. In fact, across the region, the existence of trials positively contributed to the change in Political Terror score—typically from higher levels of terror to lower levels. Sikkink and Walling (2007: 442) compare El Salvador and other Latin American countries that had both amnesty/truth-telling and trials, with countries that had trials, but no truth commissions. Their conclusion is that, “In Latin America, countries that choose to implement both trials and truth commissions seem to have better human rights practices than countries that choose to use fewer alternatives.” Moreover, their study also debunks claims of the restorative camp that trials actually prolong conflict and human rights abuses, concluding that “in Latin America, the advocates of trials do not inadvertently promote atrocities; that trials do not increase human rights violations,

exacerbate conflict or threaten democracy; and that amnesties cannot be proven to be deterrents [by themselves] to future human rights abuses ... [many] countries have held both truth commissions and human rights trials.” (Sikkink and Walling, 2007: 442-443)

Going beyond national security and peace at a political level to human security and the experience of peace at an individual level, El Salvador also experienced a drastic decrease in the homicide rate, which was reduced by some 70% over the five years immediately following the peace accords that ended the conflict. Although El Salvador continues to have one of the highest homicide rates in the world and suffers from serious gang violence, it is notable that the rate has decreased compared to what it was, as seen in



Source: UN Office on Drugs and Crime's International Homicide Statistics database

Figure 4: Homicide rate in El Salvador

El Salvador's combination of different mechanisms was relatively successful for several reasons. The Farabundo Marti National Liberation Front (FMLN), an effective guerrilla movement at war with the military, maintained substantial support in El Salvador, as well as from international actors. This international attention and support for conflict resolution efforts, combined with greater internal legitimacy and capability of the FMLN, put pressure on the government to negotiate and make meaningful concessions, especially after it was linked with serious human rights violations by death squads of civilian and church leaders (Pugh, 2009). El Salvador also was the subject of significant international attention, with the UN playing a crucial role as a mediator and observer, and in providing technical assistance. Because of the international significance of this UN assistance, the credibility of the truth commission was enhanced within the country, with public opinion polls reflecting widespread acceptance of its report. The truth commission also demonstrated its credibility and independence by naming high officials in the army as being responsible for the murder of Jesuit priests in 1989, and blaming Roberto D'Aubuisson, one of the founders of the ARENA political party, for helping to form death squads and planning the murder of Archbishop Oscar Romero, providing impressive levels of evidence to corroborate its accusations (Popkin and Roht-Arriaza, 1995).

The commission went out to peasant communities and interviewed victims' whose voices were never heard, which added legitimacy and a breadth of scope to the commission's efforts. The El Salvador case was also paradigmatic in that it "named names" in order to avoid impunity—it made sure that the people of El Salvador knew exactly who was responsible for crimes. The peace accord itself also recognized that perpetrators were not immune from legal

prosecution. Even if trials were not as frequent as amnesty, they were still implemented in tandem with the other mechanisms.

El Salvador also attempted to balance between preventing impunity by holding wrongdoers accountable and achieving an efficient and quick transition by applying retributive justice selectively. Instead of reforming functional institutions of justice, Salvadorans “confront a need to totally transform the structure of government...focusing on immediate judicial and political reform,” according to Popkin and Roht-Arriaza (1995: 102). Ruben Zamora, former presidential candidate for the leftist FMLN/CD/MNR coalition, recalled that the decision to tackle deep social justice and institutional reforms in the peace agreement, rather than focusing only on a cease-fire, was an important way that accountability was built into the transition in a way that would address root injustices. He also claimed that, despite some evidence of fraud in the democratic elections that he lost in the aftermath of the transition, he decided to continue supporting the process within the new system, because a degree of restorative justice and forgiveness was necessary to consolidate the fragile new democratic institutions. [12] These dual recollections illustrate the hybrid nature of El Salvador's justice balance.

Thus, in the case of El Salvador truth-commissions were key alongside trials and amnesty. This was due in part to international legitimacy, the efficiency of the commissions, and the public approval of the commissions. The people of El Salvador generally desired some form of accountability, without impunity, and a quick transition and overhaul of less-than-adequately functioning political and judicial structures. At the same time, the acceptance of governance authority, the demobilization of the guerrilla forces, and the good offices of ONUSAL, the UN verification mission, helped to facilitate peacebuilding and prevented escalating feuds based on retribution. El Salvador remains a paradigmatic case for a country that had a large shift in political terror, which utilized a hybrid model of restorative and retributive justice. This brief case study has offered a handful of reasons why this was so.

Rwanda: Retributive justice through human rights trials

For the case study of a country that received one of the highest trial scores, Rwanda provides a useful exemplar. Although Rwanda did utilize limited amnesty, the country retains the highest score for trials, and is a paradigmatic case for a focus on retributive over restorative justice.

One of the worst genocides in recent decades, the Rwandan conflict claimed 800,000 lives at the hands of over 200,000 perpetrators. The civil war centered around radical extremists of the Hutu clan who blamed the minority of Tutsi civilians for the country's social, political, and economic problems. There was also a widespread belief among Hutu that past abuse and discrimination from the Tutsi needed to be rectified by efficient and violent means. The civil war and genocide came to a conclusion when the RPF (Tutsi dominated rebel group) defeated the Hutu fighters in 1994 (Genocide, 2012).

The Rwandan political context following the conflict was significant, as there was pressure to hold those responsible for the genocide accountable to ensure that it never happened again. The fact that the conflict ended largely through military victory rather than through a negotiated pact also meant that the ‘winners’, the RPF and the government of Paul Kagame, could (and needed to for their political legitimacy) push for ‘maximal accountability’ that penetrated to all levels of society, and not only to top leaders. Despite pressure from the international community to follow the South African model and focus more on restorative justice that would include some form of amnesty and truth commissions, the Rwandan government

focused its TJ efforts mostly on the retributive side, and international responses mostly followed suit. Trials and tribunals were initiated at multiple levels: the national judicial system aggressively prosecuted genocide perpetrators, and when it was obvious that it did not have the capacity to try the hundreds of thousands of potential cases, a local-level process was devised through the gacaca courts to have community leaders try the accused. [13] Finally, an international tribunal was initiated to address war crimes, crimes against humanity, and genocide—namely, the International Criminal Tribunal for Rwanda (ICTR). According to its statute, the ICTR was designed to complement the domestic judicial process by prosecuting those responsible for genocide, mass killing, and crimes against humanity during 1994, both within Rwanda and in neighboring countries, since quite a few atrocities were orchestrated from the Democratic Republic of the Congo and other bordering territories (UNICTR, 2012).

At its outset, however, the Rwandan delegation to the United Nations was skeptical of the proposition. The delegation argued that the ICTR's temporal limitations would prevent accountability for those involved in planning the genocide before the beginning of the year 1994, and that unlike the Rwandan criminal justice system, the ICTR statute did not allow for the death penalty to be imposed as a sentence (Fink 2005). Thus, while the international community maintained that judicial intervention was necessary, the Rwandan government was not in agreement about exactly how this should be directed within the country. A dichotomy of opinion and skepticism of international powers were present—two things which were not as prominent in the El Salvador case.

The ICTR was seen by some as an “imperial gesture,” which did not allow Rwandan society to come to terms with a proper method of reconciliation, taking into account specific societal and cultural constructions. Instead, Jason Fink (2005: 123) notes, “its retributive orientation is directed toward rectifying the injury sustained by an abstract, a-historical and luminal subjectivity and is not able to address the needs for social reintegration marking Rwanda's dualist post-genocidal society.” Such factors largely contributed to the perceived lack of legitimacy that the international tribunal endured.

Because truth commissions were not widely used in concurrence with trials in Rwanda, and there was not much foresight given to the specific cultural and societal characteristics of the State, Rwanda had a harder time translating international efforts into local-level reconciliation, and moving toward inclusive and sustainable peace. For certain situations, trials work well—but when they are not coupled with some form of truth telling, reconciliation, or amnesty—that is restorative justice—they tend to neglect distinct cultural and societal needs. Fink (2005: 130) notes, “The legal process of arriving at issues of individual guilt, as such, may be inappropriate under certain types of dualist post-genocidal societies,” like Rwanda.

In contrast to this critical view of Rwanda's retributive justice approach to TJ, other observers defend the focus on accountability. Genocide survivor Bukumura Egide dismisses the pressure from some sectors for a more restorative approach in Rwanda. “I see the way they postpone things and if there is no immediate justice in Rwanda, if there is no truth, if there is no trial proceeding, and if there is no clear punishment, which is an important foundation then I can assure that there will be no unity.” Pointing out the limitations of the ‘confession’ and community reconciliation components of the gacaca courts in particular, he argues,

How can one force someone to ask for forgiveness? Because one admits his or her mistakes and later asks for forgiveness after realizing that he or she really did

wrong. But in our case, people are forced to ask for forgiveness, yet in reality they [perpetrators] don't even accept that they killed. That act may later on lead Rwanda into problems. Another thing is the perpetrators are the ones who are catered for. The survivors are not remembered, no one talks for them [survivors]. The government and gacaca court are biased. If the gacaca court does not work in transparency, they will not reconcile people. (Aegis, 2014)

A report by the International Institute for Democracy and Electoral Assistance (IDEA) provides a more robust defense of the potential for the gacaca courts to achieve accountability more effectively than the overburdened national courts, while also introducing elements of community participation and truth telling that could potentially lead to reconciliation more than generally occurs through court trials. It argues, "there seem to be a number of real-world reasons that may render the human rights and criminal law violations embedded in the gacaca process less devastating than may appear, either because there are few real-world alternatives, or because the process can be argued to constitute a locally appropriate, and popularly legitimate, form of justice, with a higher potential for contributing to reconciliation (Uvin, 2003: 119)." This report was written near the beginning stages of the implementation of the gacaca experiment, but later analyses agreed that gacaca was more effective than the ICTR or domestic court trials (Gasanabo, 2019).

Other analyses of the system's results critically portray the use of the *gacaca* courts—or local, participatory legal mechanisms seeking a hybrid form of restorative justice and especially retributive justice—as ineffectual. Max Retting (2008: 45), for example, argues that such courts were really not helpful at all, from either a retributive or restorative situation: "*Gacaca*'s punitive model raised the stakes of participation and provided the opportunity for individuals in the community to use *gacaca* as a mode of personal revenge." Retting also claims that there is considerable evidence that *gacaca* did not eradicate distrust in the community, but in fact, exacerbated it, due to the damaging relationship between the people and authorities.

Thus, in the case of Rwanda, unlike El Salvador, there was not an effective mechanism for truth-telling or reconciliation, and the international tribunals were often seen as a top-down imperial imposition, and not a truly domestic effort on behalf of the Rwandan people. Even the *gacaca* court experiment, which meant to be both retributive and restorative, often failed to adequately address the underlying social distrust and polarization which impeded genuine healing and reconciliation. They were seen by many people on the ground as an imposed solution that often advanced the political interests and grievances of local and central government officials more than promoting genuine social integration.

Mozambique: Successful restorative justice without trials?

This section analyzes Mozambique, a unique case that ranks in the top 5 post-conflict states experiencing stable peace, and yet only utilized reconciliation and amnesty. Mozambique is an interesting case because it actually suffered two major armed conflicts: the first was a bitter liberation war against Portuguese colonialism from 1964-1975. Following independence, the Mozambican FRELIMO government implemented a program of trials and retributive justice against the 'comprometidos' accused of collaboration with the Portuguese. This campaign, named "'let us not forget the past', set out to 'transform the compromised based on the presumption of guilt, repentance, punishment and re-education'." (ICTJ 2008: 36) This

aggressive pursuit of retributive justice did not succeed in transforming social relations within the country, and simmering conflict eventually erupted in 1978 in what would become a fifteen-year civil war between the socialist FRELIMO government and the RENAMO rebel insurgency. A peace accord was signed in 1992 which prompted elections in 1994; yet, as Graybill (2004: 1125) notes, “Despite the fact that one million civilians were killed, thousands tortured, and some of the most horrendous acts of barbarism were committed, there were no calls for justice, punishment, or accountability.”

Unlike Rwanda, which pursued international and domestic criminal trials, there was a definite decision to avoid such retributive mechanisms in Mozambique (Cobban, 2007). Andrea Bartoli, an active participant in the talks as a member of the Community of Sant'Egidio, a Catholic organization which helped to facilitate the peace process, recalls several reasons for this. First, neither the RENAMO insurgency leaders nor the FRELIMO government was interested in playing the 'justice game' or pointing fingers, since both were implicated in atrocities during the war and had their share of dirty laundry. Second, there was a genuine war weariness and fear among the mass population of anything that might restart the war. The dominant narrative blamed the war itself as a collective trauma, rather than focusing on blame for a particular party or individuals. Third, because Mozambique had only recently gained independence from colonial Portugal, and the new government was immediately contested by internal guerrilla fighting, there was never a chance to consolidate a legitimate, widely trusted rule of law and governing institutions. For that reason, 'accountability' measures that would involve government-run trials were not attractive to a mass public having little experience with state institutions that they trusted. [14] Bartoli argues,

Although human rights were always in the background of all talks, no truth commission was established to address RENAMO's prior violent activity, and no provisions were made for indicting or prosecuting war criminals. The text of the agreement represented the reality that Mozambicans wanted peace more than they wanted retributive justice. Mozambicans preferred to accept those involved in horrible war crimes into their own communities again rather than follow the Western-oriented way of dealing with the consequences of war. Very soon they started blaming the war--not RENAMO or FRELIMO--for the suffering that had marked the life of the country. (Bartoli, 1999: 265)

The interests of political elites to avoid a damaging retributive justice process were translated into a narrative that resonated with the cultural and symbolic repertoires of the mass population by employing a discourse of forgiveness, of healing, and by legitimizing the decentralization of local, non-state approaches to reconciliation, especially through civil society and religious actors. In Mozambique's unique cultural context, blame and revenge were seen as inimical to a society seeking to move on. Instead, traditional healers, called “curandeiros,” were responsible for “defusing the cultures of violence the war had wrought” through rituals, ceremonies, and local healing processes (Graybill, 2004: 1125). These ceremonies reflect a very communal atmosphere in Mozambique, in which reintegration processes for victims and reconciliation were seen as keys to political and social success. The fact that Mozambican society is predominantly Christian [15], and that Catholic leaders played a significant role in facilitating the peace process, means that shared religious beliefs represented a powerful set of principles on which to establish

social reconciliation processes requiring trust and a shared vocabulary of healing and peace. According to an ICTJ (2008: 43) report, the avoidance of trials and retribution and the emphasis on forgiveness was seen as necessary for political and social healing, and was legitimized as spiritually and psychologically healthy. As Honwana (1999: 30) argues, “recent studies of war-affected populations in Mozambique show that talking about traumatic experiences does not necessarily help patients to come to terms with their distress.” In fact, in some instances, it might add to that distress. Reconciliation is viewed most essentially between the living and the dead—one must cut one’s links with an evil past, and not continue to over-analyze what has already ended (Graybill, 2004).

Amnesty worked within the social and cultural context of Mozambique because the discourse of forgiveness resonated with broadly shared principles within society, and because this narrative provided a frame for action that met the political interests of mutually implicated former fighters and governmental elites while also responding to the fear among the population of re-igniting a destructive conflict. As an exception to the general finding that hybrid forms of TJ seem to produce more sustainable peace than cases that rely exclusively on restorative or retributive forms, Mozambique provides an important case to understand the social construction of peace and the role that specific cultural and political contexts play in influencing the effectiveness of different TJ mechanisms. Although systematic studies measuring the outcomes of different mechanisms across cases are very useful, Mozambique serves as a cautionary example of the limitations of broad generalizations *across* cases, and the importance of understanding the social and political interactions *within* cases. A more expansive, integrative and locally contextualized approach to determining what effective transitional justice looks like is an important contribution (Ben-Josef Hirsch et al, 2012).

Conclusion

At the outset, this study sought to understand a phenomenon which plagues any post-conflict State: how does a country deal with past atrocities? Much of the contemporary literature on this matter has focused on a dichotomy between retributive and restorative justice, often neglecting the hybrid forms that fall between these two models. Even the growing number of studies that do consider the value of 'hybrid' models often seek to establish generalizable conclusions about their effectiveness or ineffectiveness in producing a variety of outcomes, including improved human rights, democracy, and security. While this is a worthwhile endeavor, and more systematic empirical work is certainly needed (Thoms et al, 2010), there is a real risk of oversimplified policy recommendations when TJ theories ignore the social/historical context and the internal political incentives of particular cases in favor of blanket recommendations or rejections of a specific mechanism, like trials, amnesty, or truth commissions (Ben-Josef Hirsch et al, 2012).

The data from the medium-N comparison of post-conflict cases reinforces the 'justice balance' conclusions of Olsen et al (2010) that, all other factors being equal, hybrid TJ mechanisms tend to work better than either punitive or restorative mechanisms alone. This is a useful finding that suggests that their analysis of TJ mechanisms' effects on human rights and democracy improvements can also be extended to the establishment of stable peace. However, the in-depth mini case studies of El Salvador, Rwanda, and Mozambique also show the need for caution in drawing bold generalizable conclusions, since all other factors are often not equal, and

the political and social context of individual cases have an important role in shaping whether this general finding applies to any particular case.

The analysis in the preceding article leads to several observations about the way different TJ mechanisms are selected and their impact on sustainable peace. These should be considered to be suggestive and helpful in identifying areas for further systematic research, rather than being proposed as conclusive prescriptions. First, the specific TJ mechanisms that are chosen depend primarily on political interests, especially of elites who are responsible for negotiating the transitional institutions, and on the mechanisms that are 'available' (as a result of demonstration effects or technical advice through epistemic communities) in a given society. Second, the mechanisms that are available and accessible to post-conflict negotiators and policy entrepreneurs are influenced by the rhetorical and symbolic repertoires constructed by a given society (and the cultural, historical, religious shared understanding that give these repertoires shared meaning). Third, the availability of these rhetorical/symbolic repertoires are affected by the 'distribution of guilt' and relative victimhood of each side. A conflict in which the perpetration of violence was very unbalanced toward one side or the other (or one party can persuasively portray itself after the conflict as having been the main victim) can legitimize a moral high ground and a discourse of accountability by the side that suffered greater violence. This makes it more likely that retributive justice mechanisms are included in the TJ design, and that these mechanisms will gain greater acceptance and legitimacy. If both sides were equally implicated in widespread atrocious behavior, it may lead to less emphasis on backward-looking accountability, and retributive justice mechanisms are less likely to be perceived as legitimate. This is illustrated in the different mechanisms that prevailed in Rwanda, where a genocidal massacre was largely carried out by one group against another, and the post-conflict victorious power structure was led by the victims (who pushed for retributive mechanisms), in contrast to Mozambique, where both sides were implicated in the conflict, the post-conflict government relied more on a negotiated settlement, and amnesty was favored above trials. Of course, the power relations between victors and aggressors, and the way that the war ends (i.e. through military dominance, negotiated settlement, etc.) also significantly influences whether one party has the ability and interest to impose a particular form of transitional justice on the other.

Finally, and importantly, whatever the TJ mechanism(s) that are selected, the likelihood that they will succeed in producing stable peace in any given case is largely a function of how much the interests of elites draw on and 'match' the cultural/contextual factors within the broader society. As Andrea Bartoli argues, the effectiveness of any TJ mechanism depends on "the cultural coherence, how much elite and populations speak the same language at the same time, and how much the transitional justice that is proposed, pursued, and applied is actually expressed in that alignment." Tying this observation to the post-colonial statebuilding challenge, Bartoli observes, "Transitional justice is one of the many instances which a new state formation needs to be put together after a fundamental trauma. And so the credibility, the sustainability, the success of the formation is clearly dependent on the elite but it's also dependent on the people and if the design is palatable to both...the chances of the strategy to be successful is greater." [16]

The expanding activities of international tribunals, and the call to end impunity and amnesty, has led to a focus within the international community on the need for retributive justice. Yet, as this study shows, such a focus should be balanced with the importance of restorative mechanisms for preventing a cycle of vengeance, and this 'justice balance' hybrid approach seems to have a greater tendency to produce peace, all other factors being equal. As the

medium-N analysis showed, countries that utilized a hybrid of restorative and retributive justice were more likely to have a higher peace sustainability than countries which only utilized one mechanism—most commonly, failing to utilize international or criminal prosecution through trials. Such a broad sketch, however, needed further clarification, so the case studies of El Salvador, Rwanda, and Mozambique – each representing a paradigmatic example of one of the three TJ models – helped to unpack *why* certain mechanisms worked, and why others did not (not just *whether* or not they worked). A key insight that also should inform (and caution) policymakers and institutional designers is the realization that the cultural context, and the resonance of elite interests with widely held norms and narratives, can make all the difference in whether a specific TJ mechanism will successfully lead to greater peace: there is no one-size-fits-all prescription. This article should serve the international community at large and countries emerging from disaster as they seek to foster justice and peace for the common good of all.

Notes

1. Note, however, that this literature has been criticized by some who say that it overstates the ‘justice cascade’ effect by counting the frequency of trials rather than their rate as a proportion of all democratizing transitional countries, and that much of the growth is driven by increased democratization, which drives movement in all types of transitional justice mechanisms. See Olsen et al (2010).
2. Personal interview with Ricardo Lagos, former president of Chile, October 4, 2011, Providence, RI.
3. This index of political stability and the absence of violence/terrorism “reflects perceptions of the likelihood that the government will be destabilized or overthrown by unconstitutional or violent means, including politically-motivated violence and terrorism,” and captures the degree of ‘negative peace’ in the various countries, averaged over a seven year period between 1997 and 2005. Since all of these cases had conflicts that ended after 1980, the selection of this time frame attempts to measure the effects of TJ across a comparable temporal window.
4. Data is publicly available at <https://peaceaccords.nd.edu/>.
5. Payne, Olsen, and Reiter (2010). The Transitional Justice Database is publicly available at <http://www.tjdbproject.com/>.
6. It should be noted that peace here is not restricted to democratic regimes per se; yet because of the “voice and accountability” measure within the political stability score, the case is made that an oppressive authoritarian regime, which was nevertheless politically stable, would still not meet these criteria.
7. Data is publicly available from the Human Security Index web site: <http://www.humansecurityindex.org/>. This alternative indicator also allows a check on the longer-term peace and human security in each country, as it reflects more recent comparative data as of 2010.
8. Note that all of the states in this set issued at least some form of amnesty, with no state being listed as ‘no amnesty’. Measuring “amnesty” only as “high (number of issuances),” “medium,” or “low” appears to be insufficient, since a state could issue amnesty which covered a multitude of people, so the data set also includes an asterisk indicating which States had provisions for granting amnesty “to all,” or “to everyone.” This asterisk will prove useful in seeing which cases did maintain higher amnesty scores, in addition to the calculations just mentioned.
9. The mean values for states with hybrid forms of transitional justice on the political stability, peacefulness, and human security index, are -0.73, 0.08, and 0.56, respectively, while the respective mean values for states without hybrid forms are -1.15, -0.12, and 0.49.
10. It is also important to note that the political terror score measures organized political violence; it does not necessarily capture generalized criminal violence. In other words, it is more a ‘negative peace’ indicator of state-level peace than a ‘positive peace’ indicator of human security and well-being for individuals in the country. The importance of this caveat can be seen by El Salvador, which has improved its political violence score dramatically, but remains with one of the highest levels of criminal violence in the world (although this has also improved from its prior levels, as discussed below).
11. In the 25 cases included in the list here, there is no case that included only trials with no amnesty at all. Given this phenomenon, Rwanda was chosen as the paradigmatic case for retributive justice because of its substantive focus on trials and rhetorical rejection of amnesty.

12. Personal interview with Ruben Zamora Rivas, former presidential candidate of El Salvador, Monterrey, Mexico. June 25, 2003.
13. The gacaca courts were a modification of a traditional form of local justice administered by civilian justices of the peace, relying heavily on witness accounts and confessions above investigation and evidence collection (Megwalu and Loizides, 2010).
14. Skype interview with Andrea Bartoli, member of the Community of Sant'Egidio facilitation support team for Mozambique. February 16, 2015.
15. According to the CIA World Factbook, 56% of the population is Christian (half of these are Catholic), 18% is Muslim, and 26% identifies with some other religion or none.
16. Skype interview with Andrea Bartoli, former member of the Community of Sant'Egidio facilitation support team for Mozambique. February 16, 2015

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THE ‘EVIDENTIARY BIND’ IN POSTWAR LAND RESTITUTION: THE CASE OF SRI LANKA

Jon D. Unruh

Abstract

The enormity of the world’s dislocated population generated by contemporary conflicts has brought significant attention to a complicated process of returning housing, land and property (HLP) to their rightful occupants once conditions permit. As the complexity of large-scale HLP restitution becomes increasingly apparent, significant obstacles emerge that require examination. This article describes how the ‘evidentiary bind’ is such an obstacle. This bind emerges when large-scale HLP restitution processes require titles and deeds to be in the possession of the population who are the least likely to have them—the forcibly displaced. The technical, legal and political inability to acknowledge and accept alternative, informal, customary, or hybrid evidence for finding rightful owners means that the ‘evidentiary bind’ prevents returns, leaves a large amount of land in a state of limbo, produces grievances in the war-affected population, and invites corruption and the use of potentially destabilizing means to regain one’s HLP. This article looks at the case of Sri Lanka where the current HLP restitution process faces a particularly acute form of the ‘evidentiary bind.’

Keywords

Post-conflict rehabilitation, peace building, resettlement, refuge return, restitution of housing, land and property, evidentiary bind, Sri Lanka

Introduction

How to effectively engage in large-scale housing, land and property (HLP) restitution for those dislocated by armed conflict is a formidable social, legal, technical, institutional and political challenge. Frequently numbering in the hundreds of thousands to millions in today’s conflicts, dislocated populations seeking to return to their HLP face significant problems in proving how they are legally attached to their HLP. This issue entails obstacles to evicting secondary occupants, preventing the state or other actors from re-allocating their properties, managing (often historical) counter claims, resolving a variety of HLP disputes that inevitably arise after a war, or receiving compensation or other remedies. More broadly, the effective return of dislocated populations to their HLP is fundamental to postwar recovery, reconciliation and reconstruction. The evidence (which most effectively proves whether a returning household is the rightful owner or occupant of a property) is a legal document issued by a government, often in the form of a deed or title; it is the evidence that virtually all HLP restitution processes focus on (see Das and van Houtte, 2008; IBPCA, 2006; Leckie, 2003; van Haersolte, 2006; Crook, 2006; FAO, 2007). Despite such an expectation of the evidentiary documentation after a war, it is a requirement imposed on the populations who are the least likely to have them—returning refugees and internally dislocated persons (IDPs).

In reality, these claimants usually have only partial, non-relevant, or informal documents if they have any documentation at all. Often such documents were left behind while fleeing, lost or destroyed during the war or during a dislocation; they may have never existed in the first place

if HLP had been held under forms of informal, customary, tribal or religious tenure (Das and Van Houtte, 2008; Dabbas and Burns, 2011; Unruh et al, 2017). One study has found that 93 percent of Syrian refugees do not have formal HLP documentation while a survey in Iraq shows that 57 percent of IDPs do not have state property documents (NRC, 2017; IOM, 2016). At the same time, there is always a surge in falsified HLP documentation during and after a war; HLP offices and archives are often intentional wartime targets. Those who have taken over others' HLP during wartime (or illegally purchased them) can have an 'official' documentation, as they want to seek to solidify their possession later (Das and Van Houtte, 2008; Dabbas and Burns, 2011; Unruh, 2011). While all the restitutorial programmes prioritize documented evidence, an exclusive reliance on documentation is unworkable in the scenarios of postconflict returns. Thus alternative forms of evidence as well as the method of their technical processing need to draw our attention (Leckie, 2003; Das and van Houtte, 2008; van Haersolte, 2006; Unruh et al, 2017).

Some postwar states are more reluctant than others to move in this direction, to the very significant disadvantage of returning refugees. HLP is not likely to be returned to former owners or occupants if they do not possess a proper documentation; the restitution process often does not recognize alternative forms of evidence. Such an 'evidentiary bind' results in the stalling or prevention of HLP restitution. Consequently, a great deal of HLP has not been returned to rightful owners and occupants often with a failure to evict secondary occupants who may have even been involved in ethnic 'cleansing' and other forms of war crimes. Also lacking are compensation and other forms of other assistance for the returnees to recover from a damage and destruction.

Failed, partial, or prejudicial restitution efforts have serious repercussions in stability, recovery, reparations and reconciliation. The resulting grievances as well as a loss of trust and confidence in a restitution process can lead returnees to take matters into their own hands frequently in destabilizing ways. This is indeed a primary concern in post-war Iraq. At the same time, a large number of HLP cases face uncertainty, inviting corruption, land grabbing, and political manipulation. While a documentary bind can be stricter in some cases than others, the question needs to focus on what actually prevents some HLP restitution processes from moving to include alternative, corroboratory or other non-documentary forms of evidence. This article explores the case of Sri Lanka where the limitations of such an evidentiary bind are clearly manifested, presenting multi-faceted and complex issues involved in its application.

As one of the root causes of the war, "[l]and is a key issue for reconciliation in Sri Lanka" (CPA, 2016a). The evidentiary bind is particularly problematic in the country because it fuses upwards from the local and provincial level treatment of evidence to the national level; it involves questions about a rule of law, policy and narratives held by the Sinhalese and Tamil communities. It also implicates the international level where the UN pursues a particular vision for reparations and transitional justice. Transitional justice (TJ) needs to be examined in a variety of contexts—war, transition from authoritarianism/dictatorship, and humanitarian intervention, among others. While TJ needs to be discussed in several different contexts, this research sheds light on HLP mass claims. The Sri Lankan case is important because it illustrates that the post-war evidentiary bind can be much more complicated than a simple legal redefinition of evidence rules in a transitional justice context. It makes the 'evidentiary challenge' for HLP restitution formidable in Sri Lanka.

After introducing the HLP background to the Sri Lankan war, this author will briefly review the conventional HLP restitution process in a general context prior to its application to the Sri Lankan case, in particular. The article will provide an in-depth examination of the evidentiary bind in Sri Lanka, followed by a discussion of ways in which this bind might be loosened.

Background to the Sri Lankan War

Land rights problems were a primary cause of the 30 year war in Sri Lanka (Fonseka and Raheem, 2010;, 2011; CPA, 2016a; Bandara, 2010). It is important to one's identity and access to resources, always turning into a political struggle, particularly in the north and east of the country. Longstanding grievances, discontent and perceptions of government discrimination in land rights were hardened along ethnic lines prior to the conflict (CPA, 2016a; Fonseka and Raheem, 2011; Yusuf, 2017). Owing to poor management, inadequate recognition and enforcement of land rights, improper land settlement schemes and land grabs were allowed to dispossess significant segments of the population (Fonseka and Raheem, 2010). Lands were taken by various groups of individuals well connected to state institutions, elites and armed groups which aided personal gains through resource redistribution (Rajasingham-Senanayake, 2005; Fonseka and Raheem, 2011). While the neglect of these problems contributed to the onset of the conflict, they became overlain by additional land rights problems that emerged during the war.

The Liberation Tigers of Tamil Eelam (LTTE) pursued their own policies regarding the provision of land for the landless, and confiscated lands for their own use and for reallocation to specific individuals. For example LTTE evicted the entire Muslim population from the Northern Province and took over lands in the Eastern Province belonging to Muslims (Yusuf, 2017). LTTE also allocated some lands abandoned by those who fled the war, to people it felt were deserving and provided HLP documents to such persons. They also created forest reserves, declared certain areas 'restricted zones' (Fonseka and Raheem, 2011), and engaged in intimidation and violence against civilians under its control, resulting in large-scale displacement and duress land sales. More broadly there was widespread destruction and loss of HLP documentation by both individuals and the state during the war. This was aggravated by the increase in fraudulent documentation and by secondary occupation by a variety of actors, including other displaced civilians, the police and the military. Prior to the end phase of the war, the government estimated that over 58 percent of the housing stock in the north and east had been damaged or destroyed (Fonseka and Raheem, 2011). Large-scale population dislocation both internally and to other countries during the war resulted in a great deal of abandoned land and properties to which dislocates and their descendants are now returning.

Additional problems emerged during the war. HLP was bought and sold during the conflict without adherence to legal procedures and hence has not produced the necessary transfer documentation for postwar legal attachment to lands and properties (Fonseka and Raheem, 2011). Certain forms of spatial 'cleansing' occurred during the war that was not necessarily related to the conflict, but which took advantage of the fluidity and chaos of the wartime period. In one case a Muslim population in an area was forcibly dislocated by a Sinhalese group, followed by the takeover of the lands by a Tamil group. After the war the Muslim group has now returned and is intending to reclaim the land. More broadly the Muslim Rights Association has conducted a mapping exercise describing numerous land claims and conflicts for lands forcibly occupied by Tamils (MRO, 2003). There was also a long history of dual land administrative control in the north by both the state and armed groups. The repercussions of all these activities currently result in numerous highly contentious HLP disputes.

Dispossession from lands continues in some areas subsequent to the war as parts of government have acquired lands on national security grounds or for development projects or private ownership (LACSL, 2015; IDMC, 2016; Fonseka and Raheem, 2010). Secondary occupations

continue by private individuals and government entities, including the police, the military, the Forest Department, the Wildlife Department, the Archaeology Department, the Mahaweli Authority, religious authorities and the Urban Development Authority (MPRRRHRA, 2016; LACSL, 2015; Fonseka and Raheem, 2010). Some Forest Department officials refer to a 2005 Gazette Circular that indicates all lands that have been grown over with forest can be acquired by the Forest Department (LACSL, 2015). As well there are now investments (often large-scale) that have been made on lands acquired during and after the war; and there is a significant involvement of military elements in the administrative structures meant to decide contested land claims. Such secondary occupations aggravate the current widespread problems of contested claims, land disputes and restitution (Fonseka and Raheem, 2011).

Additional difficulties have emerged after the war. Land mines in some areas prevent returns, land reclamation projects have become politicized, and given the poor state of the cadaster system after the war, it is unknown how much land exists, where it is and how much needs to be returned. At the same time certain political actors at the district and provincial levels with no assigned jurisdiction over land and property issues are becoming involved in competing land claims. And there are a variety of powerful individuals becoming increasingly active in land issues facilitated by a lack of transparency regarding land policy and administration. Lands required for large-scale development projects in the north, including infrastructure projects, and the way such lands are acquired and the projects implemented, contribute to confusion over land rights (Sakalasuriya et al, 2016; Fonseka and Raheem, 2010; 2011; Høglund and Orjuela, 2011). In some cases there are fears among Tamil communities of a process of ‘Sinhalisation’ of some areas due to the suspicion of preferential treatment and economic incentives regarding land in the north provided to Sinhalese civilians from the south (LACSL, 2015; Fonseka and Raheem, 2011). But land conflicts often exist between Tamils as well. A frequent scenario is that a Tamil family flees the war and settles overseas. After the war they return to reclaim their land only to find that LTTE has given it to someone else who may have been occupying it for 10 years or more.

At the level of the individual, tenure insecurity for some IDPs and returnees is currently so severe that they believe that lands returned today can be taken away tomorrow (LACSL, 2015). There is also a lack of awareness among the civilian population as to the need for valid documentation relating to land and property and many have never had land documentation (LACSL, 2015). For others there is the issue of how land documents provided during the war will now be treated. Those civilians that received land documents from LTTE are unlikely to have these recognized and will probably lose their lands. It is unclear if land distributed and documented during the war by other armed actors and the state in the north and east of the country will face similar problems. In addition there are different understandings in the north regarding what constitutes legitimate land ownership, control and use. Some believe that simply having a piece of paper, regardless of how or from whom it was issued, constitutes ownership of HLP. Others believe that simple occupation provides ownership, still others believe that longer term occupation legitimizes their claims, while some believe that promises made by government or other political actors constitutes ownership (Fonseka and Raheem, 2011).

Overlain on these problems is the return of members of the Sri Lankan diaspora and their descendants to reclaim lands that others have occupied for years. Granting of citizenship for certain returnees is a major issue as they return from India with children and grandchildren who are not citizens and so have no access to land documents or inheritance of lands. At the same time

children born of wartime rape who are now young adults are discriminated against in a variety of issues including HLP.

While some reports indicate that 95 percent of all 'official IDPs' have been allowed to return to their HLP, a good number of these returnees have had a difficulty in actually accessing their lands. And a number of categories of IDPs are not included in the count of 'official IDPs'; namely those living with host families, and those that are termed 'old IDPs'. As well refugees who were not resettled are not included in this count. Marginalized groups, in particular, women, face significant hardship in (re)accessing lands after the war. Women headed households are particularly common in the north, due to loss of spouses in the course of the war.

The Conventional HLP Restitution Process

Housing, land and property restitution processes after wars have become critical components of peace-building processes in delivering the needed stability, reconciliation, reintegration and recovery (Leckie, 2009; FAO, 2007; Fay and James, 2009; Karrer, 2005; Holtzmann and Kristjansdottir, 2007; Van Houtte, 1999). Restitution in an HLP context includes a return of one's property or alternative remedies such as compensation, alternative HLP, employment, vouchers, shares or other options. Prevailing peace-building practice places a significant stress on transparent, rapid, and just HLP restitution in resolving wide grievances and establishing an enduring peace (Schwebel, 2007; van den Houte, 2006; Das and Van Houtte, 2008). Being left unattended, HLP grievances often become aggravated over generations; the descendants of the displaced may want to pursue claims by any means available to them, potentially laying the foundation for future instability (e.g., Fischbach, 2006; Moyo and Yeros, 2005; Fay, 2009).

Planning and organizing a restitution program usually begins after hostilities are concluded and returnees come to find that their HLP is occupied by others. It becomes part of a new political or ethnic landscape; intergroup relations are further damaged or destroyed when an access to HLP becomes difficult or impossible. The restitution process itself is predicated on a set of transitional justice measures comprised of legal procedures and concepts that should attend to fairness in processing postwar HLP restitution claims from hundreds of thousands and occasionally millions of returnees. The usual approach for operating a restitution program with HLP mass claims is establishing a land commission or other specialized institutions (Holtzmann and Kristjansdottir, 2007; Das and Van Houtte, 2008; Van Houtte and Delmartino, 2008). Given the necessity of legal and administrative expertise, the role of lawyers, judges and associated institutions has been supported and often required as a precondition for assistance subsequent to armed conflict by the international community. A legal basis and its legitimacy as well as institutional rules of operation and decisions have been anchored to both international and domestic laws (Das and Van Houtte, 2008; Holtzmann and Kristjansdottir, 2007; Van Houtte and Delmartino, 2008; McGovern, 1990).

Yet the treatment of evidence in conventional restitution programs constitutes a particular challenge. Claims processed under state laws almost always focus on the adequacy of documentary evidence, and a number of restitution programs likewise embody a 'documents only' operating approach (Das and Van Houtte, 2008). However, in transitional HLP restitution programs, such exclusive reliance on documentary evidence becomes highly problematic and necessitates an expanded approach and process (e.g., Fay and James, 2009; Haersolte, 2006). TJ evidence rules should be tailored to what IDPs and returning refugees do have. Evidence rules need to be relaxed, reversing the burdens of proof to favour the claimants along with the acceptance of al-

ternative forms of evidence. In addition, administering claims should permit the categorization of claim types, corroboration of evidence and rapid legal decisions for whole categories of claims at once—thus speeding up the overall process. The corroboration of evidence permits the use of records and other types of proofs directly tied to land rights, such as registries and lists of electricity, water and other service provision (e.g., McGovern, 1990; Crook, 2006; Das and Van Houtte, 2008; Holtzmann and Kristjansdottir, 2007; van Haersolte, 2006; IBPCA, 2006).

Reparations and HLP Restitution in Sri Lanka

Methods

Data collection is embedded in a case study approach, involving a fieldwork in Sri Lanka in February of 2018 comprised of individual and group interviews and discussions totaling 145 people. Among these were members of the Sri Lankan military at different levels, the Lands Department, the Sri Lanka Reparations Office, International Institutions working on restitution in Sri Lanka, Sri Lankan NGOs, the Secretariat of the Coordinating Reconciliation Mechanisms for Sri Lanka, the UN Country Team for Sri Lanka, District level government officials, the Office of the UN High Commissioner for Human Rights, the Rehabilitation of Persons, Properties and Industries Authority (REPIIA), the National Peace Council of Sri Lanka, World Health Organization-Sri Lanka, and the UN Peace and Security Section-Asia. Also surveyed were international diplomats in the country, international advisors to the government, international experts on reparation policy and practice, Sri Lankan journalists, members of Tamil and Sinhalese civil society, international reparation judges, and experts from other reparations and HLP restitution processes elsewhere in the world, including, Colombia, the Philippines, Guatemala, Peru, Bosnia, Sierra Leone, Canada, Nepal, East Timor, Northern Ireland, and Germany.

In addition, this research has depended on the review of relevant academic, donor, government, NGO and UN literature. This includes the Sri Lankan laws: the National Policy on Durable Solutions for Conflict-Affected Displacement, 2016; the Reparations Bill of, 2018; the Title Registration Act of, 1998, and the UN Resolution for Sri Lanka of, 2015.

Government and international restitution efforts

From the end of the war in 2009 until 2015, the Sri Lankan government did little to engage in reparations, HLP restitution or reconciliation after having won the war militarily. There was a lack of cooperation with the international community; and displaced populations were not officially recognized (MPRRRHRA, 2016). As a result, IDP and refugee returns and HLP restitution issues became aggravated and took on new forms. A change in a government in 2015 saw a change in willingness to pursue reparations, including HLP restitution and durable solutions to displacement (Yusuf, 2017). In 2016 the government enacted a ‘National Policy on Durable Solutions for Conflict-Affected Displacement’ which articulated a wide-ranging set of principles, rights, durable solutions and monitoring approaches (MPRRRHRA, 2016). In 2017, the government also enacted a ‘National Policy on Reconciliation’ (IOM, 2018a). In addition, the government established a ‘Presidential Taskforce’ to look into reparations, appointed a ‘Lessons Learnt and Reconciliation Commission’; an ‘Office for Reparations’ was established to address the issue of reconciliation (CPA, 2016b). The internationally recognized reparations program only started in February of 2017 and by 2018 was partly underway with a series of activities for the

government and affected communities, whereas other parts of the program were still under development, pending on a parliamentary approval.

A United Nations resolution co-sponsored by the new government was adopted by the 30th Session of the UN Human Rights Council (UNHRC) in October 2015 (GNPSL, 2016). The resolution, 'Promoting Reconciliation, Accountability and Human Rights in Sri Lanka,' has two components that address the restitution of HLP. While praising the government's initial efforts in HLP restitution, the resolution "encourages the Government of Sri Lanka to accelerate the return of land to its rightful civilian owners, and to undertake further efforts to tackle the considerable work that lies ahead in the areas of land use and ownership" (UNHRC, 2015). Because the Government of Sri Lanka is a party to this resolution stipulating restitution of HLP, it is internationally bound to this objective. The government bears a primary responsibility for designing reparations; it should be done in consultation with civil society so as to be as inclusive as possible. The UN High Commissioner for Human Rights (UNHCHR) also reminds Sri Lanka that reparation is not a charity but a right; the process needs to be speeded up. The UNHCHR also notes that the government is a signatory to a number of international agreements on restitution and reparations. As of the time of writing, however, no real timeframe has been provided by the government to reach the goals of the resolution, thus concerning the UN. It has been nine years since the end of the war, but the non-return of remaining IDPs and refugees is an ongoing and worsening problem. Meanwhile the Sinhalese majority continues to oppose certain provisions in the UN resolution that focus on prosecutions (UNHRC, 2017). The UNHRC notes a growing frustration on the part of IDPs and returning refugees who have not been given their land back (UNHRC, 2017).

In an HLP context, there has, in reality, been a very slow progress in finding solutions to HLP restitution in the country. The trust deficit between members of affected communities on one hand and the government and military on the other means that communities can be suspicious of any official plans as another means to dispossess them of lands. In some cases, just deciding which claim is most valid and legitimate has generated a potential for worsening tensions among communities and raising new questions about government intentions (Fonseka and Raheem, 2011). This distrust extends to government actors who have control over zoning (CPA, 2016a). There is also rigidity and a lack of awareness among the legal establishment about how to deal with different types of HLP evidence for a claim other than an optimal document. There is also a lack of a real consultation with IDP groups in ascertaining their priorities and evidence required for HLP restitution. Information campaigns for IDPs are lacking; consequently, they do not know about the relevant laws, policies, rules, options available to pursue a claim. Such a lack of information allows a greater room for manipulating information, the claims process, and HLP generally. As a result, with suspicions increasing, those impatient with a slow progress engage in protests, which are growing. And hardline political slogans from the extremes find fertile ground for agitation. At the same time, local elections in February 2018 did not favour the current government; an electoral success of harder line parties more aligned with the previous government impede the progress of HLP restitution and broader reparations (Economist, 2018).

Three HLP restitution efforts

Current HLP restitution activities in the country can be categorized into three efforts, two that are of primary significance and another that is more minor, but highly instructive. The first comprises the endeavours of the military. Parts of the military appear genuinely frustrated by three elements of the HLP restitution problem. The first is that they indicate that they have already turned

over a great deal of land to the government, but the government does not know how to administratively or legally then allocate the land to beneficiaries. The second is that there is frustration with the ongoing nature of the problem in the areas under military control, in that once a resolution is agreed upon with a group of IDPs, the agreement often does not last, and protests continue. Third, is their frustration at not receiving assistance from government in order to deal with the problem of HLP restitution or other remedies. They believe there is no effective government commission or capable institution they can turn to for assistance. As a result the different military commanders located in different parts of the country each try to deal with the problem on their own, but they indicate that they have no HLP administrative or judicial training or personnel that can engage effectively in mediation efforts.

The second primary HLP restitution effort in the country comprises a loosely organized effort by the current government together with support from the international community. The government pursues two primary legal approaches of varying utility. The first is the drafting of two legal tools, the 'National Policy on Durable Solutions for Conflict-Affected Displacement' noted above, and a recently approved 'Reparations Bill' with a minor HLP restitution component, passed by parliament in June 2018 (GoSL, 2018). The second legal approach is a measure (with some history) to issue 'permits' to occupy land. A significant number of IDPs have such permits which can be renewed every two years. There is some indication that in certain circumstances these can be turned into title deeds but this is apparently quite difficult and rare. More often is the attempt at renewal, however loss of permits is also common, as is their use in convoluted and confusing housing and loan schemes (LACSL, 2015). While a permit does allow access to lands, they are not available to everyone, are tenure insecure and are not restitution of lands. The permit holder is not able to transfer the land and only has limited rights, and the government is unwilling to convert permits to deeds due to the lack of a previous deed number to work from. As a result those with such permits remain in a state of tenure insecurity with rights of limited utility (Fonseka and Raheem, 2010). With regard to land disputes, at the time of writing there was no cohesive, effective, statutory approach for resolving disputes over land. Instead there are a variety of mediation, conciliation and local advocacy and discussions efforts by a variety of NGO actors (Selvakkumaran, 2017).

The more minor HLP restitution effort is informal (or semi-formal) and is applied in an irregular, patchwork way in some locations but not others, and is not officially recognized. However it does suggest considerable potential in terms of what works. This effort involves the occasional local level government official working on their own, without support of or liaison with provincial or national institutions, but who seek to move forward with returning lands as best they can through criteria that function locally. This more informal approach proceeds differently in different locations. One local official describes his approach in the following manner. When returning IDPs have deeds, other HLP documents, or when there is no counter claim or dispute (even if documents are lacking) he facilitates the direct return of their HLP. If documentation has been lost, and there is a counter claim or other type of dispute, the official tries to ascertain if the government has a copy of the relevant documents, and if so an effort is made to locate it and make a duplicate to provide it to the claimant. As well if a claimant does not have a document, but a neighbour does, then that neighbour may have the claimant's name on their document as sharing a border. In this case the evidence is enough for the claimant to return to their HLP. If a claimant or neighbour has no HLP documents at all the official then will focus more on mediation of any disputes or counter claims, and less on the application of actual law. In this regard he is less concerned with deeds, deed numbers and the need to build a historical chain of transfer on

deed numbers, than with resolving disputes and trying to determine who should go where in the near-term. A related approach for such a dispute is for the local official to work with the village leadership who knows where everyone used to live and farm and so can assist with a decision. In this case a village agreement is the operating foundation for a claim. An additional approach used in the absence of HLP documentation is to ask the claimants a series of questions relevant to the specific HLP. Depending on their answers (i.e., how well they know the details of the HLP and its history—intimate knowledge) he allows them to return to their lands or not. However it should be noted that arrangements that do not involve a deed number are not officially legal restitution and operate with an unclear form of tenure from the perspective of the state—is it ownership, permission to occupy, a permit, customary tenure, none of these? This localized approach reflects both neglect on the part of the state and the law, but also innovation coupled with a more localized priority to resolve HLP issues and pursue what works. For such local officials the process of re-attaching people to HLP is very localized, hands on, village by village, claim by claim and dispute by dispute.

The Evidentiary Bind

Conceptual Framework

Figure 1 below presents a conceptual framework for the evidentiary bind. On the left side of the

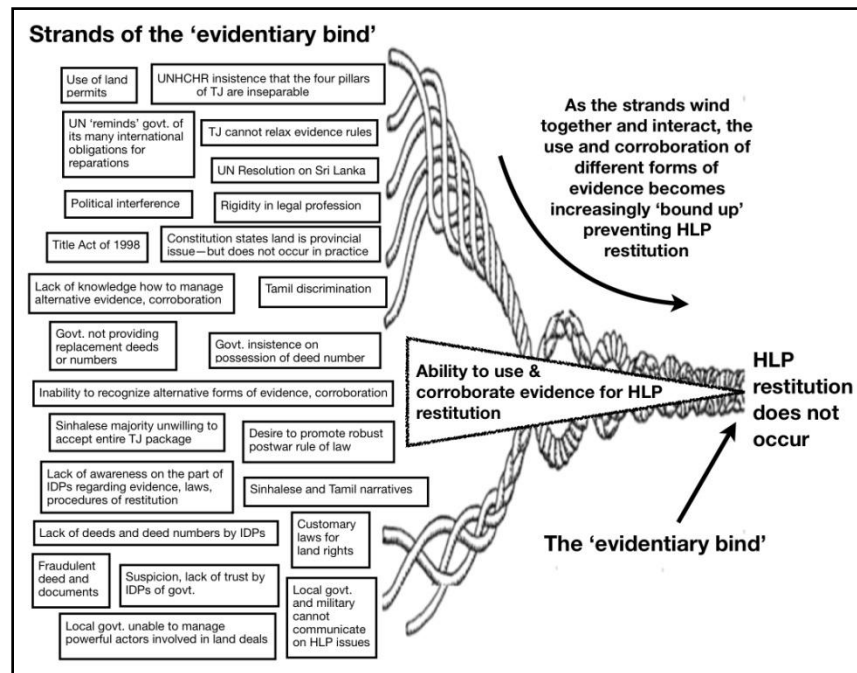


Figure 1: Conceptual framework for the social, legal, technical, institutional and political strands of the ‘evidentiary bind’. Graphic adapted from Scarborough (2018).

figure are the ‘strands’ of the HLP situation in Sri Lanka that become entwined to comprise a binding effect on the use of different forms of evidence for resolving HLP claims and moving forward with effective, large-scale restitution. The strands, combined together, comprise a tightly bound rope that provides an effective analogue for how the evidentiary bind works. Moving toward the right of the figure, as the different strands act together, becoming wound up in each

other, they ultimately constrict the use and corroboration of evidence, effectively prohibiting effective restitution of HLP. The section below describes how the different strands of the HLP scenario in Sri Lanka operate to create the ‘evidentiary bind’.

The functioning of the ‘evidentiary bind’

The evidentiary bind for postwar HLP restitution begins in Sri Lanka as it does in other war-affected scenarios—with an over-focus on the possession of valid HLP documentation in order to participate in the restitution process, but for a population that is least likely to have such documentation. The Sri Lankan government and the legal establishment are particularly preoccupied with the correct HLP documentation being in the possession of returning IDPs and refugees. The process relies in-part on the Registration of Title Act of 1998 which contains a large number of very precise stipulations involved in registration of land in order to obtain title (PDSRSL, 1998). The Act is quite bureaucratic involving numerous personnel and institutional steps that are easily and severely disrupted by armed conflict, particularly a long lasting one. This is problematic given that the law states that no claim to land that was once registered under provisions of the Act is valid unless any transfer has also been registered. The Act further states that entries in the title register are the “conclusive evidence” of ownership (PDSRSL, 1998). However during the war many of the forcibly displaced did not have time to collect their documents before fleeing and others experienced loss or destruction of their documents over the course of the 30 year war. Still others have documents but they are incomplete or they are supporting documents to a deed but out of date due to the war and so are not considered valid. As well access to registry offices was disrupted in some areas during the war, or not trusted by those sympathetic to the Tamil cause or otherwise distrustful of government. Others never had documents in the first place because they engaged in land tenure under informal village conventions, or inherited land while dislocated (LACSL, 2015). At the same time fraudulent HLP documents were created during the war, and are still created, as some individuals have access to those who can produce deed numbers. And in some areas of the country the government is not providing replacement deeds to those who lost them, even though it is in possession of the records. Such deed numbers are *the* key ingredient to a Sri Lankan HLP deed, and they are used to track the legal transactions of specific HLP over time.

The lack of deeds and deed numbers on the part of IDPs and returning refugees in order to follow the sequence of ownership and transfer over time is what confounds government efforts at legally re-attaching people to their HLP, including HLP turned over to government by the military. And yet the government restitution process is unable to legally or technically recognize other forms of evidence and techniques of corroboration as valid in order to issue new deed numbers even though most IDPs and returning refugees are in possession of or can obtain such alternative evidence. This is the evidentiary bind Sri Lanka faces. In this regard the government appears to truly be in a quandary regarding what to do about the absence of deeds, numbers and other HLP documents for returns, with no real plan for going forward. Alternative evidence that IDPs/refugees have or could obtain include: ancillary documentation (including detailed hand-drawn maps reflecting intimate knowledge of relevant lands and landscapes); detailed histories of specific lands; knowledge of the location of buried features (refuse, tanks, building foundations, wires, pipes, cables, etc.); photos of themselves or family members at the properties and areas lived in; attestations by village and civil society leaders, relatives and friends regarding HLP boundaries and history of occupation and ownership; non-party evidence (evidence held by

parties other than the claimant, such as lists or databases for electricity, water, banking and school services that include location information); and historical lineage occupations of lands that have been recorded or are widely acknowledged. In addition evidence patterns can be created whereby HLP abandoned, confiscated, destroyed or damaged at specific points in time for specific areas, in aggregate create patterns of similar evidence, with the pattern itself then becoming valuable evidence. While such forms of evidence individually are not as powerful as a deed, they do have corroborative power among themselves, and have been used in a variety of other HLP restitution scenarios in TJ settings (Das and van Houtte, 2008; Holtzmann and Kristjansdottir, 2007; van Houtte and Delmartino, 2008). Some countries dealing with HLP restitution have found customary laws regarding land to be useful (Roodt, 2003; IBPCA, 2006; Bailliet, 2003; du Plessis, 2003). And while forms of customary law are thought by some in Sri Lanka to be not relevant or not exist, and in any case are not recognized by statutory law, customary law in the north does have a specific history relating to land (Island, 2009; Bandara, 2010). And Dharmasiri (2017) and Senaratne (2015) consider customary law in Sri Lanka to be quite useful. Meanwhile Islamic law is only officially recognized for Muslims in areas of domestic issues—although this does include inheritance.

In Sri Lanka the evidentiary bind is also embedded in other legal and institutional constructs that work against recognition of non-deed evidence. There is a great deal of legal rigidity regarding even the prospect of temporarily changing the evidence rules for IDPs and refugees in order to facilitate restitution and other remedies. The culture of the legal profession, particularly within government is certainly a factor, made more difficult by a postwar desire to re-assert a robust form of rule of law so as to bring greater order to a chaotic postwar socio-legal environment, combined with a relatively low legal innovation capacity. Thus relaxing evidence rules and allowing for less than optimal HLP evidence in a TJ context can be seen as allowing greater legal fluidity to flourish when stricter adherence to the rule of law is held as a priority important to recovery. In this context the focus of the legal establishment is more on attending to the integrity of the law, as opposed to addressing socio-political concerns. But there are also other reasons for focusing exclusively on the deed. There can be a desire to reduce the volume of claims ostensibly so as to reduce the size of the restitution problem. And allowing alternative evidence into the restitution program would likely expand the inclusiveness of the claims process, and would be resisted by those who stand to gain from a narrow definition of HLP evidence. But at the same time there is also a lack of understanding and interest on the part of the legal establishment about how to technically structure the inclusion and treatment of alternative evidence into a restitution process.

Additional factors contribute to the bind. Even though land issues are legally a local government issue, local officials note that there is not enough actual devolution of power for them to really decide land issues, and actually reattach people to lands. Thus while the 13th Amendment to the Constitution states that land rights explicitly reside within the jurisdiction of the Provincial Councils (CPA, 2016a), the central government in fact controls land issues in the country, effectively precluding widespread use of local initiatives and innovations regarding use of alternative evidence. One provincial official noted that while the military has control over a good deal of land, he cannot talk to them, because he is a provincial level official and the military is unwilling to work with provincial officials on the issue. In addition, a variety of powerful actors have become more involved in land issues, making it quite difficult for the de-centralized parts of government to function without involving higher-level people (Fonseka and Raheem, 2011).

More broadly, the evidentiary bind is connected to land issues as a root cause of the war. While the war has been cast as an ethnic conflict pitting the Sinhalese majority against the Tamil minority, another analysis posits that the conflict was more about the Tamil campaign against what were viewed as discriminatory state structures and policies, including those regarding HLP, instead of against the Sinhalese community itself (Yusuf, 2017). Discrimination in HLP rights has as its basis the non-recognition of claims and evidence for claims. Thus state institutions and policies upon which non-recognition were based, created a situation similar to the current evidentiary bind prior to the war.

What contributes to the evidentiary bind in Sri Lanka still further, is that it connects to the roles and activities of certain international processes and organizations. At the center of this connection is the important element of TJ regarding the use of alternative evidence for HLP restitution noted earlier—the relaxing of evidence rules to allow for alternative forms of evidence and treatment of evidence to be used. While as a technical endeavor on its own this could be possible in Sri Lanka, this aspect of TJ is bound together with other components of TJ as promoted by the UNHCHR, such that four ‘pillars’ of TJ exist as one package with the insistence that they cannot be separated (also CPA, 2016b). One of these pillars is significantly problematic for the Sinhalese majority. The four pillars include: 1) the ‘right to know’ the truth regarding missing persons, results of commissions of inquiry and human rights violations; 2) the ‘right to justice’ involving victims and a fair remedy, and involving the duty of the state to investigate and prosecute perpetrators of human rights violations, 3) the ‘right to reparations’ which includes the return of HLP to civilians, and 4) the ‘guarantees of non recurrence’ involving domestic law, security sector reforms, and attention to international law (TCA, 2016; GNSG, 2010). It is the second pillar which is the primary obstacle to acceptance of the overall TJ approach as promoted by the UNHCHR. According to a number of those spoken to during the fieldwork, a good portion of the Sinhalese population do not have much of a problem with returning lands, or compensation. They do however have a problem with the accountability and punishment components of the TJ package. The prospect of prosecuting those in the military who are seen as responsible for winning the war is difficult to accept from the Sinhalese perspective. And while the Sinhalese population understands that reparations are about accountability for perpetrators on both sides of the war, they believe it unlikely that Tamil war crimes perpetrators will be brought to court, because they essentially cannot be found. They are either dead in battle, outside the country, or rehabilitated and released back into society; so that there are in reality only five or six individuals that could realistically be brought to court. Whereas on the side of the military, the numbers of individuals is potentially large. Thus there is considerable difficulty for a significant segment of the Sinhalese population in supporting the entire TJ package. And because the Sinhalese are in the majority, democratic forces are expected to facilitate their priorities. As a result the acceptance and implementation of the TJ package has proven difficult and has become political, with different politicians promising different things with regard to these TJ processes—implement them, stop them, disengage from the international community, etc. For the Sinhalese there is a good deal of reluctance to engage the international community on issues of accountability and prosecution for alleged war crimes committed during the war, and a strong reluctance to accept TJ pillar number two—with significant repercussions for effective HLP restitution.

Some of the various political arguments regarding acceptance (or not) of the TJ package resonate strongly among certain segments of the population. For some, the military is seen as deserving what they have obtained in the war—land, properties, investments, businesses, etc—and to now return these to those that supported the opposition is seen as objectionable. This nar-

rative has a good deal of history connected to it, and lumps Tamil civilians who lost land together with Tamil combatants who fought in the war. As well there is reportedly misinformation coming from certain politicians regarding giving HLP back to the dispossessed. One such perspective promotes the notion that the current government is selling out the country to the international organizations and the Tamils, both of whom want accountability for war crimes.

The broader narratives of the Tamils and Sinhalese population with regard to the war, reparations and restitution also feed into the bind. On the part of the Sinhalese, they believe they have given a great deal to the Tamil population in terms of recovery assistance. And that the reparations process is moving too fast, is too much in control of the international community and is detrimental to the country. The narrative on the part of the Tamils on the other hand, holds that the current government works against them. Their view is that TJ is moving too slow. The lack of progress in HLP restitution then feeds the narrative of suspicion on the part of the Tamil population. At the same time it has been nine years since the end of the war, and HLP restitution and returns have stagnated and pressure from Tamil civil society and the international community is mounting.

Loosening the Bind

Given the multi-faceted and multi-scalar nature of ‘the bind’ what might be potential ways forward? This section explores some of the suggestions provided by a variety of knowledgeable Sri Lankans and representatives of international organizations working in Sri Lanka, as well as the author. One of the more prominent suggestions is that there is a need to deal with the domain where TJ and narratives intersect. There is a poor understanding of the details, nuances and variations of TJ within the Sinhalese and Tamil narratives (also IOM, 2018b), but also arguably by the UNHCHR. Sri Lankans observe that both the government and the international community need to better engage the population in outreach, awareness raising and communication regarding how TJ proceeds, the options available and what it can entail, including the prospect of amnesty for Sinhalese war heroes; and that this engagement should be ongoing and not a one-time consultation. In reality there are multiple options regarding TJ and how it can proceed (GNSG, 2010) and how it could be tailored to Sri Lanka (Samararatne, 2017). The problem is that in the absence of a well articulated public awareness campaign, rumour, fear, and speculation (encouraged by some politicians) fill the void, causing considerable problems. At present the two sides are polarized in their narratives with regard to TJ and the Sri Lankans spoken to indicate that a priority should be for these narratives to move toward each other. One problem in this regard is that the media views reparations as involving communities (Sinhalese, Tamil) and not individuals. However the government and the international community view reparations as being about individuals, which is relevant to HLP restitution.

The Sri Lankans spoken to in the research note that the media, NGOs and community organizations should play a larger role to inform people about TJ and how it works. And that this role should become part of the overall reparations process while being independent from government. Sri Lankans point out that at present the efforts and activities of the government are not known by the public. And that the government needs to take greater control of the overall narrative in order to mitigate the negative aspects of the current narratives of the Sinhalese and Tamil communities. In this regard some international officials highlight that the fear of the Sinhalese population—that accountability in a TJ context will necessarily involve prosecution and prison terms for military personnel—could be mitigated by articulating that accountability in TJ does

not always mean such punishment. In many cases reparations are more about recognition of rights violated. But this is not widely understood among the population, or government. A number of countries have dealt with accountability by recognitions of wrongs done, followed by acknowledgement of accountability with forms of amnesties, apologies, etc. This can be particularly useful if the state does the apologizing and not the military or individuals (IOM, 2018a). The point of working with narratives in the HLP evidentiary context is to open up possibilities of moving forward with the broader TJ package, including the transitional acceptance of alternative evidence in the issuing of new deed numbers.

Sri Lankans also noted that the international community and especially the UNHCHR needs to be much more careful and more aware of the Sinhalese and Tamil narratives, and derive ways to engage these in a more nuanced way, as opposed to pressuring the government and reminding it of its international commitments and at what point the UNHCHR will “be satisfied” with Sri Lanka. This is important to how the UN and the international community is perceived in the country and therefore cooperated with or not in acceptance of TJ. Sri Lankans included in the research indicate that at this point the UNHCHR is making the situation unnecessarily risky. They suggest that the ‘four pillars’ of TJ that the UNHCHR is insisting on in Sri Lanka come across as clumsy, poorly thought through, unwieldy and blind to important national level specifics that can delay and potentially derail the process with this insistence. Instead, they argue that the TJ process needs a more tailored approach to the Sri Lankan case, needs to be more nuanced, sequenced, less one size fits all and more aware of what country level roadblocks exist, and derive ways to deal with them. And in fact the UN Guidance Note of the Secretary General describing the UN approach to transitional justice (GNSG, 2010) highlights the importance of taking into account political and country context and coordination with in-country rule of law efforts. More broadly there is currently an expansion within the field of TJ to include more than the preconceptions inherent in the four pillars (accountability, truth, reconciliation, and non-recurrence) toward more of a focus on correcting structural violence and inequality in matters of basic human needs (McAuliffe, 2017). This comes with the understanding that an over focus on atrocities and other crimes against humanity have rendered less visible the inequities that are often root causes of conflict—land rights problems, poverty, unemployment, and political discrimination—and that peace can only reasonably be attained by attending to such root causes (McAuliffe, 2017). Research among postwar populations indicate that such socio-cultural preoccupations are often more important than desires for criminal justice (Miller, 2013). Even the former UN High Commissioner for Human Rights, Louise Arbour called for a re-orientation of TJ towards attending to forms of discrimination and problems of economic and social rights during and after wars (Mani, 2002).

In a strictly HLP restitution context, the author suggests that alternatives to the over reliance on the deed number are needed in order to move forward with issuing new deeds and other HLP documentation. A better understanding by the legal establishment, particularly within government, of the HLP evidentiary aspects of TJ would be a valuable starting point. Important here would be the temporary nature of TJ evidence rules regarding use of alternative evidence for restitution purposes; the importance of attending to socio-political grievances over integrity of the law for its own sake; and the great deal of experience other countries have had in dealing with the same HLP restitution problem as Sri Lanka is experiencing. At the same time attending to Sri Lankan law that stipulates land issues are a provincial concern and not necessarily a federal issue, would allow for more locally tailored approaches to HLP restitution such as that described

earlier; and encourage military commanders and others to deal directly with local officials on restitution issues.

Examples from elsewhere illustrate the prospect of using alternative, non-documentary evidence in restitution processes. In Yemen, prior to the Houthi incursion in the south, the Southern Yemen Land Commission was in the process of engaging in large-scale land restitution and allowed a wide variety of historical, testimonial, informal drawings, and assertions into the claims process (Unruh, 2016). After Mozambique's long war ended in the late, 1990s, the land return process made legally equal the possession of title and informal evidence attesting to 'occupation' (Unruh, 2005). In postwar East Timor the Land and Property Unit allowed for the recognition of pre-Indonesian occupation rights along with customary evidence (du Plessis, 2003). And in Guatemala alternative forms of evidence, such as oral testimony were important to the re-establishment of customary land rights (Bailliet, 2003). What Sri Lanka can learn from these examples and others, is that there are effective ways to structure alternative evidence into the technical processing of restitution claims. And that the contributions to reconciliation and reparations that HLP restitution make, often need to take precedence over the integrity of the law.

Conclusions

The HLP restitution effort in Sri Lanka is an ongoing process, as is the broader reparations effort of which it is a part. While the evidentiary bind in postwar HLP restitution is not particular to Sri Lanka, it is unusually acute and multi-faceted in the country, extending well beyond the need to broaden evidence rules for restitution in a TJ context. Large-scale HLP restitution programs operate at the federal level with international support and a heavy reliance on laws, policies and procedures that attend to international standards. Even though these have their merits, important lessons can be learned from local approaches. The activities of some local officials acting on their own in certain parts of the country to re-attach people to their HLP deserve a serious attention. It may not be suitable to all types of restitution problems, but it helps get around the evidentiary bind for certain categories of restitution.

As HLP restitution continues to grow in importance as a critical component of postwar recovery, reconstruction, reconciliation and reparations, its complexity becomes apparent and important obstacles require examination. Most importantly, this article has shown that the 'evidentiary bind' is one such obstacle that needs significant attention by illustrating how it functions.

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Puzzles, Problems and Provention: Burton and Beyond

Terry Beitzel

Abstract

The following provides a brief overview of one of the founders of conflict studies, John Burton, and his Basic Human Needs theory. Since Burton is seldomly cited in contemporary scholarship¹ the following relies heavily on the reflections of David Dunn, published in 2004 and on a collection of writings written by Burton's colleagues in 1990. While a set of questions remain incredibly important — are needs universal, how do they differ from interests and desires, do they exist in a hierarchy of importance, and, what is the relation between needs and culture? — the following concentrates primarily on two features that deserve re-examination and further reflection: first, what is the significance of the difference between Burton's understanding of "puzzle-solving" and "problem-solving" and, second, how does Burton envision the term his created term of "proventing" conflict. Finally, does Human Needs Theory provide an emancipatory agenda for action or does it simply offer a critique of existing institutions and systems? Do we need to go beyond Burton?

Keywords

Basic human needs theory, John W. Burton, conflict prevention, problem solving, puzzle solving, David Dunn

Introduction

The starting point for John Burton's understanding of destructive conflict and a critique of social institutions is a basic orientation — a sociology of knowledge — that can be critical of received and accepted frames of reference and understanding. Said another way, the sociology of knowledge examines the ways different set if given variables are understood and utilized and are then placed within a given context, rather than simply being accepted as Truth. Burton's project, discussed below, follows this reasoning and is based on the premise that human needs theory provides a way to overhaul the numerous shortcomings Burton perceived in international relations theory and other fields that deal with human conflict. For Burton, unmet human needs are the engine that drive conflict, especially seemingly intractable conflict: for those with unmet human needs no amount of coercion and deterrence will bring compliance (in the longer run) to oppression. The following concludes with a discussion of Burton's vision for dealing with conflict: the implications of problem-solving workshops and *provention*.

David Dunn recently reassessed Burton's work and human needs theory in *From Power Politics to Conflict Resolution* (2004). A general search of the conflict and peace literature in the 1990's reveals that while the promise of human needs for theory development has never fully materialized, the promise of human needs for developing strategies of resolving conflict has been developed and has been fruitful (Druckman and Mitchell, 1995; Dukes, 1996; Fisher, 1997; Jabri, 1996; Jeong, 2018; Mitchell and Banks, 1996). The latest book on Burton and human needs does not suggest that Burton's influence reached into other fields or contemporary ideas outside of conflict resolution and peace studies (See Dunn, 2004, Chp 8). While conflict

resolution practitioners have been applying human needs in variations of the problem-solving workshop (Kelman, 2008; Lundy and Darkwah, 2018), it is less evident that scholarship in other fields has been influenced directly by Burton (Caballero-Anthony, 2016). Also, despite the tremendous influence of John Burton and human needs theory for the fields of conflict and peace studies (Jeong, 2008), Burton and needs theory specifically are rarely mentioned in the most recent conflict and peace studies literature. Furthermore, even though some claim the field of international relations to be in a crisis, Burton and needs theory is rarely mentioned nor are the insights of needs theory further developed in the emerging fields, each with their own journals, of security studies and transitional justice. However, the general insights of Burton are included in the focus on human security, conflict prevention, and transitional justice (see Barash, 2010; Caballero-Anthony, 2016; Cardone, 2011; Daase and Friesendorf, 2010; Howard, 2008; Jeong, 2016; Richmond, 2007; Rubenstein, 2017; Wood, 2018).

Conflict resolution scholar-practitioners have recognized that John Burton's Basic Human Needs theory is controversial and that opposing claims are made in connection with all the basic issues (Burton, 1990a). Nonetheless, conflict and peace practitioners and scholars acknowledge the way forward resonates within the dynamics and parameters of much of what Burton was exploring and pursuing. While this new research does not cite Burton and many of his associates, much of it complements and articulates the continuing ideas of Basic Human Needs. Burton (and his associates) were correct in identifying the problems—unmet human needs cannot be contained by coercion (for very long). Unmet human needs are at the root of conflict.

Burton offers a critique of human society — institutions are controlled by elites and serve elites, and individuals are expected to conform to the institutions controlled by elites. If individuals do not conform, they will be coerced. However, no amount of coercion will bring long-term stable order if basic needs are unmet. Also, Burton does suggest a method for moving forward—problem solving workshops. First, the situation must be assessed as to whether a *puzzle-solving* or a *problem-solving* approach is best, and second, that the *provention* of conflict by looking to the future and creating a new frame of reference with people (not institutions controlled by elites) at the center of analysis and policy. Bringing people to the center of analysis and problem-solving means that individuals are taken seriously and that individuals are essential for resolving conflict. Much has been written on Burton's Basic Human Needs—for example, a multi-volume work explores many facets and details of human needs theory (see Burton and Dukes, 1990a and 1990b).

“The primary level of analysis is the individual not the society or state. Following from this, need fulfillment is essential to the proper functioning of the human individual...not subservient or compliant...” (Dunn, 2004, p. 102). The organization of society is means to an end, not an end in itself. Individuals are neither innately good or bad but are profoundly social. It is authorities, seeking to maintain the functioning system that make wrong assumptions and often make a situation worse. Rather, society should serve the needs of the members; therefore, social systems need to be dynamic and malleable. The existence of conflict is central as it signals that needs are unmet. Systems commonly respond the symptoms of conflict—noncompliance to rules and norms—rather than the cause of conflict—unmet needs. Therefore, need to separate causes and symptoms, which requires understanding the needs of others and being responsive to them.

The following provides a very brief overview of needs theory by exploring writings of those who knew John Burton and therefore had direct connections to Basic Human Needs. While a set of questions are incredibly important — are needs universal, how do they differ from

interests and desires, do they exist in a hierarchy of importance, and, what is the relation between needs and culture?² — the following concentrates primarily on two features: first, what is the significance of the difference between Burton's understanding of "puzzle-solving" and, second, does need "problem-solving" and how does Burton envision the term his created term of "proventing" conflict. The starting point is a basic orientation — a sociology of knowledge — that can be critical of received and accepted frames of reference and understanding. Said another way, the sociology of knowledge examines the ways different set if given variables are understood and utilized and are then placed within a given context, rather than simply accepted as Truth. Additionally, the question is raised whether needs theory simply offers a critique of existing social arrangements and recognizes unmet human needs or if human needs does offer an emancipatory agenda for action. For Burton, unmet human needs are the engine that drives conflict, especially seemingly intractable conflict: for those with unmet human needs no amount of coercion and deterrence will bring compliance (in the longer run) to oppression. The following concludes with a discussion of the implications of problem-solving and *provention*.

John Burton discusses "the important topic of the relationship between theorist and practitioner" because the "theorist has a practical role to play" (1990, p. 154). While commonly separated analytically, the two are intimately connected if and when conflict resolution processes are applied because successful resolution requires an accurate definition of the situation (Burton 1979). Burton continues, an accurate definition of the conflict situation requires an appropriate theory of human behavior because "this is the starting point of any analysis of any situations of conflict" (1990, p. 155). For Burton, the starting point for conflict analysis is needs theory and "must be regarded as the core of the study of conflict, its analysis and resolution" (1990, p. 155). To state again, Burton insists that analysis and attempted resolution of conflict without the ontological assumptions of needs theory is faulty and perhaps dangerous. Burton follows that conflict "resolution depends on a thorough analysis of the needs to be satisfied, and the failings of societies to satisfy them" (1990, p. 150). Burton directs special attention to assumptions that underlie conflict analysis and the possible means of resolving conflict. The following briefly explores the assumptions of needs theory, the assessment of needs theory from the perspectives of various conflict scholar-practitioners, and finally begins to examine needs theory from Burton's problem-solving approach.

In defense of Basic Human Needs, Burton cautions that two orientations towards conflict can be inadequate and even detrimental to its resolution: conflict management and pragmatism. For Burton, neither approach is properly informed by the reflective nature of theoretical concerns. First, a "management" approach is "restricted and limited" because the training of the intervener is limited — they work within the current system. Therefore, deep sources of conflict may remain implicit, and, finally, if the deep issues are made explicit, they will frequently be mishandled by the management techniques.³ In this way, management techniques, while adequate for negotiations, are not adequate for conflicts that involve core "nonnegotiable" human needs.

Puzzle-solving

The first approach is taken by Joe Scimecca: "I will argue that the field of conflict resolution is best served via an emphasis upon a parsimonious modification of Basic Human Needs theory as a best available starting point for a prescriptive theory of conflict resolution" (1990, p. 205). Scimecca takes this position because, he continues, "I still believe that this human need theory

represents the most sophisticated and fully developed theory of conflict resolution available today” (1990, p. 207).

Scimecca attempts to shift attention away from biologically based needs to sociologically based needs by showing that ontological human needs can be derived from a non-genetically determined basis (1990, 207). Scimecca identifies freedom and self-consciousness as basic ontological needs. He recognized both positive and negative freedom as two basic types of freedom. Negative freedom is freedom in the existential sense, such as Jean-Paul Sartre’s curse of freedom as a burden for the modern individual (1992). Positive freedom exists as two subsets, the first is freedom from restraint and the second is the “freedom to develop” (Scimecca 1990, p. 212). This study is most concerned with freedom in the sense of the development of the individual’s capabilities, since “freedom to develop is more important than freedom from restraint.” Freedom in the positive sense is “Freedom to develop in consort with others, to learn skills, to accumulate knowledge, to develop self-reflexivity” (Scimecca, 1990, p. 213). This view is more in line with that of contemporary sociologists who stress the interaction of the individual and society for the fullest possible human development (Scimecca, 1981).

The second fundamental human need, Scimecca explains, self-consciousness, is based in reflexivity and predicated on choice and awareness. Drawing from sociological insights, choice and awareness are never totally free from social influence and are deeply embedded in social reality. Rather, all choices are made within a context.⁴ Freedom then is both individual and social, as is self-reflexivity; neither is genetically or culturally determined (Scimecca 1990, p. 214). Scimecca continues to draw upon development as crucial to freedom: “without freedom to develop, the mind is restricted and we become less than human beings” (1990, p. 214). Therefore, he suggests using self-reflexivity and the freedom to develop to judge whether or not societies fulfill basic human needs. Aside from stating that “authoritarian and totalitarian cultures” hinder self-reflexivity and freedom, Scimecca had little to say about the specific details of how to recognize self-reflection and development in the social world, and how to recognize if societies are fulfilling this basic human need. He does stress that societies are to meet these needs. Scimecca does not elaborate on exactly what society is and how society should determine and meet needs.

Karen Gillwald acknowledges that needs theory is capable of guiding clarification and creativity for conflict mitigation (1990, p. 115-124). However, Gillwald cautions that “the resolution of deep-rooted conflict goes beyond the capacity of needs theory and methodology” (115). She continues, while empirical research on “needs” focuses on specific satisfiers and can “help increase rationality in conflicts in two extreme cases — unconscious or repressed denials and counter-productive satisfiers” (1990, p. 121). The shortcoming of needs theory is that it fails to offer “instruments with which to regulate competing, conflicting, or mutually exclusive terms” (1990, p. 122). Gillwald’s complaint is that needs theory inadequately addresses, first, situations in which the different needs of one individual may be incompatible within the particular individual and, second, situations in which the needs of two or more individuals may be incompatible with others. Might we consider taking a problem-solving approach to examining Basic Human Needs?

Problem-solving

Richard Rubenstein begins the discussion of the problem-solving approach by acknowledging that human needs is a latent version of natural law approach to human social relations (1990, p.

340) and is therefore subject to the criticism of natural law thinking — universal, permanent, supreme, and abstract (1990, p. 338) — and must advance beyond the level of truism (1990, p. 343). Therefore, he continues, “if human needs theory is to escape the impact of this critique, reconstruction will be necessary” (1990, p. 340). For Rubenstein, “Unless [human needs] can be used to generate *new* insights, however, the utility of the approach for conflict analysis and resolution will be severely limited” (1990, p. 344). Can a new theory be built that avoids the pitfalls and limitations, can “historicity and concreteness” (1990, p. 344) be included in a theory for conflict resolution? Although not mentioned by Rubenstein, complementing basic human needs with basic human responsibilities is a way to keep the insights of human needs and to include history and locality. Rubenstein starts to move in this direction when he says that the human needs theory should move away from natural law by recognizing that structures are only “partial satisfiers of human needs” (1990, p. 347).⁵ The direction of inquiry is to explore what is implied in the self-reflective and development components of human needs.

At this point, Rubenstein cautions: “needs theory (like natural law theory) frequently seems to have this ‘additive’ character — one uses it to restate or to confirm conclusions already arrived at by some other method” (1990, p. 344). It is a foundation of human needs theory that social arrangements that obstruct the discovery or development of human nature should be changed (for the better). Human needs theory thus has transformative implications—change oppressive social structures and humans will live harmoniously. However, Rubenstein raises a complex and subtle point: “it is only through liberating struggle that humans discover what their true needs are, and how they may be truly satisfied” (1990, p. 349). This raises a complexity in evaluating the legitimacy of human action and hints at the positive aspects of tension for human development. Jack Donnelly⁶ writing on the positive role of struggle for human rights and the host of writers in the conflict tradition of sociology⁷ raise similar points. Rubenstein summarizes this position: “if needs theory is to be founded on human nature, it must transcend the purely subjective, egoistic, non-developmental view of humanity...” (1990, p. 351). He continues:

[Human needs] are watered fitfully by ‘satisfiers’ which, under present circumstances, do not and cannot satisfy fully and whose partiality continuously creates false stopping points in the development of human nature. They can flower only in a future which permits men and women to become masters of production, of the state, and of themselves... (1990, p. 352)

What Rubenstein seems to be implying is that human nature, to be fully realized, involves addressing the responsibility component of self-governing, both governing individual egoistic wants and desires and governing the state. The idea of self-governing is pursued in the following chapters. What remains to be explored is the developmental view of humanity and the possible role that conflict and tension can play in this positive maturation of the human being.

Mary Clark, agreeing with proponents of human needs theory that the problem of conflict does not lie in biological deficiency such as innate aggression of the individual, says the problem lies rather in “having become blind to the *kind* of society that satisfies our deepest human needs and having constructed, through a series of deficient social visions, institutions that deny rather than satisfy those needs” (1990, p. 37). Clark is especially critical of the institutions of modern civilization. For Clark, humans were first “social animals...wholly dependent on a supportive social structure, and it is in the *absence* of such a support system” that destructive behavior

occurs. Clark continues that “civilized” societies since the dawn of recorded history is largely a record of frustrated members of those societies:

It is perhaps not surprising that Hobbes misread the problem, for in his time the West was still largely ignorant of the evidence that would show that social institutions were failing to meet human needs, rather than that humankind suffers from some intrinsic behavioral maladaptation. (Clark, 1990, p. 37)

For Clark, humans are uniquely social beings and the problems of maladaptive, or anti-social, behavior of individuals stems from a maladaptive environment of civilization itself, not from the individual.

Clark emphasizes that social bondings are not merely temporary contracts merely for the convenience of individuals but are absolute requirements for human existence: “social embeddedness *is* the essence of our nature” (1990, p. 49). This is especially evident, in Clark’s analysis, because the Western attitude of logical and rational decision-making (rather than including emotions) are constructed from the point of view of an “isolated individual who ought to be as *free as possible from* social constraints...” (1990, p. 49). Therefore, social discussions “almost totally fail to ask why institutions of society are in fact acting against or even actively preventing social bonding” (Clark 1990, p. 49). The problem with contemporary Western institutions, for Clark, is a lack of the promotion of social bonding.⁸ Correlating with the decline in social bonding are the increasing costs of managing social *anomie*: increases in social welfare programs, more police, courtrooms and prisons, and more social workers and psychiatrists (Clark 1990, p. 54). For Clark, the large-scale institutional changes in the West bring more problems than they solve.

Mary Clark begins her exploration of human needs by cautioning that “human needs theory must carefully avoid becoming merely a description of the self-perceived ‘needs’ of the particular group that is developing the theory” (1990, p. 34). Referring to the development of human needs theory in the Western intellectual tradition, Clark warns that this “narrowness could have unfortunate consequences globally”, therefore, what is needed is “conscientiously to identify and critique as many of the assumptions underlying our own thinking” (1990, p. 34). Clark’s observations is that the western tradition is concerned primarily with the individual and that the “current fission of the concepts of ‘the individual’ and ‘society’ into separate, often warring, compartments blinds us to the fact that these are *one* thing” (1990, p. 37).⁹ Whether or not the concept of social bonding is best to describe “social embeddedness,” Clark is pointing in the direction that assumptions about needs and social relations need to be re-examined.

In summary, for Scimecca, Rubenstein, and Clark, needs theory provides a useful critique of contemporary society and contemporary thinking, yet is still incomplete and inadequate. Whether to proceed in a puzzle-solving mode or a problem-solving mode depends on ontological assumptions. All three scholars provide hints as to where to proceed from here: examine assumptions and explore the developmental view and reflectivity. For Oscar Nudler, needs — both “fundamental” and “derived” — are not easily compartmentalized because they “cut across the whole person and achieve a multi-dimensional inner resonance.”¹⁰ Nudler eschews the more common isolation of biological/psychological/social needs and rather views needs as making a system whereby fundamental universal needs are patterned around cultural and individual circumstances because basic (universal) needs are mediated by culture. These insights on the increased complexity of isolating human needs and a focus on human development lead in the

direction of human responsibilities and self-governing. Can we glean some insights in moving forward from Burton's discussion of conflict *provention*?

Provention

For Burton conflict *provention* — anticipating the peaceful future — comes directly out of a focus on opportunities for human development rather than on institutional constraints (1990, p. 253). For Burton:

We have a language of democracy, freedoms, rights and justice, and we sometimes fail to place these concepts in the context of their origins—that is, a reaction against repressive systems, the essential structures of which we have inherited. (1990, p. 73)

Burton mentions development as a human need several times and frames his analysis in terms of reactions to systems that oppress individuals. However, he did not explore what development means beyond the freedom for an individual to choose and the elimination of repressive structures that limit those choices. What he did not explore further are the dimensions of human development that also include individual responsibilities. What is required is a robust sociology of knowledge that applies a statement such as “The models, terms and concepts that we have inherited lurk in the back of our minds, frustrate the development of alternative theories, and distort our perceptions of the present” (Burton 1990, 74) to be directed back at a human needs approach to begin to explore what is involved in human development.

The importance of an adequate theory of conflict is restated when Burton addresses pragmatism, the second common approach in dealing with conflict. Burton cautions that a “pragmatic” approach to conflict is potentially problematic because pragmatism implies “and absence of knowledge...and theory” (Burton 1990, pp. 19-20). In this approach to conflict, a pragmatist, according to Burton, simply employs intuition and unconsciously held theories on a trial and error basis. While the intervener may happen to help resolve a conflict (or not), the risk in using this “method” is that the structural and institutional sources of the conflict may remain unexamined, and thus they are “likely to lead in the longer term to even more costly disputes and planning mistakes...and perhaps to [greater] social disruption” (Burton 1990, p. 21). Burton wants to be clear that while pragmatism may at times be necessary, pragmatism should still be understood as a “phase in knowledge development” (Burton 1990, p. 22). While pragmatism is a natural and inevitable phase in the development of a practice it should be recognized that it is a “phase in a paradigm shift...but not yet a switch to a new paradigm” (Burton 1990, p. 22). The problem arises when pragmatism moves from an intuitive trial and error attempt to being defined as a positive “science” (Burton 1990, p. 22). For Burton, this is “dangerous” because it is not connected to a theoretical base. Burton's assessment of the field of conflict studies is that, while making progress, “is still a field in which theorists and practitioners assert their preferences and make claims in the absence of any widespread understanding” (Burton 1990, p. 10). Burton is convinced that the framework of *Realpolitik* and deterrence are inadequate to the current socio-political conditions, yet he cautions about being overly confident at present with the current state of conflict resolution which is located primarily in pragmatism and “devoid of any theoretical base on which they can be assessed” (Burton 1990, p. 10).

In contrast to pragmatism, John Burton describes the “general thesis” of conflict resolution as resting on complete analysis of conflict and “underlying this general thesis is a theoretical assumption that parties to a conflict have shared goals — that is, the pursuit of human needs common to all” (1990, p. 328). Burton goes on to state that these “problems” are “located in relationships” such as “identity and recognition” and that these need not be in short supply, unlike physical resources (1990, p. 328). Burton does little to expand upon the relational aspect, except that it involves perceiving accurately the “depths of feelings and the frustrations experienced by the other” (1990, p. 328). It is the (empathic) relational social dynamic that remains the least explored by Burton. He reverts to a liberal social ontology — freedom from coercion — when he emphasizes that accurate analysis is located in “the extent to which apparently hostile behaviors are the consequence of environmental constraints” (1990, p. 328). His analysis is directed at those with power, force and control of resources, and not to *all* members of social community. To what extent, and how, are the oppressed to be involved in self-governing? This is an important point since we may ask to what extent are we all complicit? For example, Franz Fanon, writing on (and supporting) the revolution for independence in Algeria, cautioned that the oppressed must always be vigilant against simply reversing the terms and groups oppressed in their fight for emancipation (1964).

How is a conflict practitioner to approach Fanon’s concern? The following briefly explores some of John Burton’s insights concerning the role of the conflict resolution scholar-practitioner, especially towards “problem-solving” connected as a general orientation for conflict scholars. This leads directly to incorporating Burton’s own insights in reflecting upon the implications of his insights towards examining his own writings.

To review, Burton also changed the focus from states to people. Burton also explored deviance not as a threat to a system but rather as how deviance was defined, who defined it, and to illuminate the nature of the system or society that was classifying the behavior as “deviant”, or “deviant in relation to what exactly?” (Dunn, 2004, p. 97). People in conflict attempt to gain the same thing: security and certainty (Dunn, 2004, p. 97). Once the concept of needs was at the center of the conceptual map “other things were made possible” (Dunn, 2004, p. 98). Parson’s classical functionalist sociology emphasis society as self-equilibrating systems and tend to a condition of stability. Deviance therefore evokes conditions of control to counter and contain it. Functionalism emphasizes adaptation to the system rather than conflict with and within the system. Burton problematizes what is ignored in functionalism: why and to what extent should the individual adapt to the system and promote the system? (98). Borrowing from Sites, Burton posits needs at the socio-biological level. In this way, needs are ontological—they form a base and basis of individual human behavior. Socialization and conformity and the contrasting behaviors of resistance and deviance are conventions and norms held by collectives and groups. Those who are deviant can be marginalized, criminalized, incarcerated, and even executed.

John Burton (1979, pp. xi-xiv & 3-38) makes a deliberate distinction between “puzzles” and “problems”, between “closed systems” and “open systems”, and between “normal” or “applied” science and “pure science.” For Burton, the conflict scholar-practitioner is dealing with unsolved problems located in open systems that require pure science. A puzzle implies that a final solution exists in a closed system and can be solved by the application of available theories or techniques. However, problems, for Burton, are qualitatively distinct — “having the opposite characteristics” (1979, p. 5) — from puzzles because they exist in open systems and cannot be solved with the application of “current” theories or techniques (1979, p. 3-4). As open systems, problems lack final solutions because the solution is itself a set of relationships that

(potentially) contain a new set of problems and also interact in a larger changing environment. Finally, problems “frequently require a new synthesis or a change in theoretical structure” (1979, p. 5). Burton presents two different elements of problems related to complications in attempts at “solving” them. The first is the ontological condition of problems — they are embedded in social relationships that are not static but dynamic — and change themselves during investigation: “While the problem is being analyzed its nature is altering and the behaviour of the parts being analyzed is altering” (1979, p. 5). The second involves reflection and critique of the “dominant theories” of applied and normal science “to question all the implied assumptions, attitudes and theories, to put forward alternatives hypotheses...” (1979, p. 6). The first element of problems relates, again, to the dynamism in the ontological condition of human social being. The second element relates to the cognitive framework(s) by which human social beings understand (and are shaped by and shape) the social world.

Many conflict scholar-practitioners have focused on the first element of problems that Burton described, discussed above. Burton’s critique is against those, especially from the field of international relations and related fields, who have directed less attention at the second feature of addressing problems — a critique of the assumptions of dominant theories themselves. Burton outlines his “methodology” of problem-solving in the first chapter of *Deviance, Terrorism and War* (1979) by emphasizing the extent to which features of analysis are socially constructed and the role of a critical posture towards those social constructions, including theories of order, change and conflict.

The range of the indeterminate nature of the social world for Burton is evident in the methodological steps he prescribes. The malleability of investigation of social science is evident in Burton’s understanding of research, ranging from “selection of the problem” and “boundaries of the area of inquiry” to the demarcation of “relevant source material,” “defining the problem” and designing and evaluating interventions (1979, p. 10-38). Burton, in his critique of international relations based in *Realpolitik*, states that “it could be that we are tackling our apparently insoluble problems within a system of thought that...excludes the possibility of solution” (1979, p. 19) and offers the possibility that what may need examination is the “system of thought being employed by the investigator” (1979, p. 26). The remainder of *Deviance, Terrorism and War* is engaged in critical analysis that questions the underlying assumptions of current policies, for example, of conventional theories of deviant behavior. Burton’s diagnosis is to reexamine the frameworks of the analysts themselves “whenever policies are seen to fail to achieve objectives” (1979, p. 41). He states bluntly that part of the problem may reside in “conventional wisdom” and rather than pursuing more knowledge based and interpreted within this framework, the task is now to “ask ‘what are the assumptions on which ‘facts’ are selected and interpreted?’” (1979, p. 41). Burton is clear that his project is informed both by the flawed outcomes of intervention strategies and the policies which guide them. But his project is deeper: it is to question the assumptions on which strategies and policies are based, which include “prevailing value systems, definitions of problem behavior, conceptions of morality, notions of law and order and ideas about the role of authority” (1979, p. 41).

How does an analyst-researcher go about this task of questioning the underlying assumptions of conventional wisdom? For Burton, this requires “imagination”, “an ability to question conventional wisdom”, and “a willingness to be a dissident” (1979, p. 9) by not simply accepting “the ruling dogma of the day” and instead taking an approach that leads to an alternative set of assumptions” (1979, p. 6).

John Burton begins “The Two Paradigms,” by stating “When societies tackle their social problems there is a set of givens, a paradigm, that together form a generally agreed approach” (1979, p. 159) and acknowledges that shifts in values, norms, attitudes, behaviors and conditions do occur, but overall, they are understood within a given framework. For Burton, these frameworks represent fairly stable ontological frameworks and shifts represent only minor adjustments because “these shifts occur within an essentially unchanged set of givens or conventional assumptions about the nature of human behavior, of society and of the norms observed” (1979, p. 159). Therefore, Burton calls for a more radical examination of common assumptions (1979), to examine and escape from the restraints of these frameworks. Burton is asking for a change in thinking, away from the “assumptions inherent in conventional thinking” for two reasons: they do not explain observed behavior and they do not provide adequate long-term solutions to ongoing problems (1979, p. 161).¹¹

The question here is whether the framework of human needs and liberalism is best suited to address these concerns. Rather, as will become clearer, moving from a narrow framework of “needs” and “freedom from...” to include a broader framework of human responsibilities and liberty points in the direction of finding an “appropriate means” (1990, p. 328) to address the relational dynamic of conflict. For example, Burton describes security as need for everyone, and argues that increased security for one party of a conflict increases security for all parties. The problem is that usual means to security limit the possibility of it being shared.¹² A human needs approach, focusing upon what individuals require for themselves, alludes or pushes to the background, the possible necessity of including basic responsibilities that follow (possible) emancipation, or said another way, what comes after the revolution? The fundamental question, unaddressed by a human needs approach, is what is required to sustain self-governing — what is required to sustain a movement from violence to politics? A human responsibilities approach (that does not remove human needs) that expands social ontology to include ongoing participation in self-governing relationships is one answer. The freedom required in “human development” is crucial, but is it enough to sustain polities of participation? The following study will argue that human responsibilities are needed to complement human needs.

Burton adds another variable to his consideration of conflict — the future — and invents a new term to address it — *provention* (1990, p. 161). Burton explains: provention is a “more fundamental study and exercise...it is a decision-making process in which the future is analyzed and anticipated” (1990, p. 161). For Burton, the problem with different forms of governing, even representative political systems, is that no current political system has yet been discovered that gives adequate priority to the future. Such a system, accordingly, would be conflict avoidant in the positive sense. The move for conflict resolution as a discipline is to configure a political governing future as an “extension of analytical conflict resolution...because there emerges a whole new political approach to decision-making” (1990, p. 162). Burton shows no hesitation when he states it is “clear that provention must rest heavily on the theory and practice of conflict resolution” as the means by which insights are obtained into the nature of political problems (1990, p. 162) However, Burton restates that political philosophies must be oriented towards the future and “must rest on reliable theories of human behaviors” (1990, p. 163). Here Burton is combining two dimensions of social life, the moral philosophy of politics and the virtues of intersubjective decision-making, what could also be described as the responsibility of self-governing (1990, p. 164).

For Burton, human knowledge is part of a cultural evolutionary process, with the human needs approach contributing to the progression of knowledge. However, he allows that further

developments are necessary (1990, p. 177). Burton is committed to a human needs theoretical framework that defines more precisely what these needs actually are and therein developing “more understanding of the structural sources of conflict¹³ and the need to seek institutional policy options that cater to human requirements” (1990, p. 177). Rather than humans adjusting to institutional requirements, Burton sees this as a transitional period in which governing is no longer catering to “power-elite interests” and to “the nature of which is far from clear” (1990, p. 178). Burton rightly acknowledges that this transition is a confusing and difficult one, raising questions of “ethics, relevance, justice, constitutional rights, human rights, human needs and a host of others” (1990, p. 178). He ends assessing the current situation in human socio-political evolution declaring that system-preserving approaches are inadequate to address the fundamental issues of the future and the problems associated with ongoing and systemic oppression and suggests that problem-solving conflict-resolution leading to provention is going in the right direction.

Burton belongs to a counter-tradition in International Relations that, said one way, endorses Rousseau and dismisses Hobbes. For Hobbes, the primary human condition is that humans are self-interested and inherently aggressive and therefore social order and security requires a coercion and obedience to prevent a “war of all against all”. In contrast, for Rousseau, the civilization process itself has led to the accentuation of self-interest, emergence and protection of private property, and the development of laws that claim to serve all but actually serve elites and propertied and this has caused oppression and the civilization process has obscured social empathy. Therefore, Rousseau endorses the possibility and promise of large-scale social change since the oppressed have “nothing to lose but their chains.” Said another way, Hobbes promote the status quo through deterrence and social control to prevent violence while Rousseau promotes the possibility of revolution and the recovery of social empathy.

For example, for some globalization is a threat and for others it is an opportunity—whether the promise of international markets or the peril of cyberwar, and so on. For Dunn, in dealing with the change and uncertainty we do not need to reinvent the wheel, but we do need to be more aware that a number of disciplines are working on these areas of change, such as social theory, cultural studies, political economy, and so on, all informed by postmodernism (2004, p. 159). Postmodernist approaches undermine foundationalism, but do not “define the agenda nor do they exhaust it...[therefore] Burton’s stress on needs is a valuable opening to the agenda” (Dunn, 2004, p. 159). For example, for Burton, social and cultural change are central elements, yet significantly underdeveloped and under-theorized in International Relations because IR is state-centric and primarily concerned with short term order and stability.

Beyond Burton

For Burton:

“the transition that we are experiencing now from social policies based on allocation of values as determined by elites, to social policies that are influenced by the ontological needs of persons and communities is a dramatic and revolutionary one. It is this transition, and the inevitable defenses that are made against it, that best explain the high levels of domestic violence and communal and interstate conflict that are universal in contemporary world society (Burton, 1984, p. 153).

For Dunn, “this passage sums up so much of what Burton has to say, in so many thousands of words: “For Burton, the problem is the selective perception of decision-makers” (2004, pp.125). John Burton’s work is a critique of “current policies that are wrong in their assumptions, wrong in their implementations, and wrong in their accumulated consequences” (Dunn 2004, 172. Burton replaced the state as the center of analysis with the human individual as the center of analysis. Importantly, rather than individuals adjusting and conforming to malfunctioning systems, systems should adjust to the needs of individuals.

It is important to be clear that Burton emphasizes the behavior of the actors that ushers us to attend to the causes of the problem/conflict and distinguish them from symptoms. For Burton, individuals are not deviants because they are born ‘bad types.’ Rather, deviance is an expression, a symptom, of something deeper. For example, Palestinian youth armed with stones do not confront Israeli tanks because they are born that way or predetermined to be bad people. The behaviors emanate from unmet human needs and from the lived experience of the Palestinians. Burton is calling for nothing less than a “paradigm shift” in conventional thinking, drawing explicitly on the work of Thomas Kuhn (1962). For example, deviance is not a result of demoralization, deficiency, or pathology but rather a response to a social context.

John Burton critiqued the dominant theories in various fields that related to dealing with human conflict and he presented an alternative based in human needs. However, did Burton present a robust alternative? For example, Burton states numerous times that problem-solving leads to win-win outcomes. So, what exactly is a win-win situation and how does it proceed? Dunn confirms suspicions that Burton opened the door to a new way, but did not provide every answer when he states:

“...discussing the nature if win-win situations, is particularly illustrative of the Burton style. It is quick to challenge the existing sets of assumptions...He pithily makes and alternative, indeed at times radically subversive, point that challenges the very fundamentals of the established mode, and then leaves it, almost as if having made the point, then the implications are self-evident, the point made and the case can proceed. The discussion of win-win, so hugely significant in its implications, is here dealt with in fewer than five pages!” (Dunn, 2004, p. 122).

Burton is correct, in many ways, to draw these insights and distinctions; however, as Dunn states accurately “**the discussion needs filling out**” (2004, p. 123). For example, the critique offered by Burton that conventional international relations is not the reality of lived experience of humanity, but a game, similar to other sports, played among elites. So where do we go from here?

We should proceed with the notion that we might be wrong and how we might go about getting it right. However, Burton is first and foremost a classical liberal with an approach that is best designed to deconstruct and promote revolution. The terms he coined, provention, is part of another project, a constructive project—the problem-solving workshop. Burton’s project is to clear the debris and landscape to prepare the ground to support fertile growth. As Dunn recognizes, we cannot be definitive about provention since much remains to be done in relation to the development of the details and criteria of provention. Most of what constitutes provention is either implied or undetermined. The key to the indeterminacy is that in proventing conflict Burton introduces the uncertainty of the open-system problem-solving workshop.

As David Dunn summarizes: “So often, ‘conventional wisdom’ is incapable of solving problems of human relationships, since it is informed by the wrong ontologies and epistemologies. So often, people are made to fit into norms, structures and processes that are said to serve the goals of good, order, justice, stability, normality, community, and conformity. We can understand clearly the goal of order as this is understood in International Relations, where the alternative is assumed to be war and chaos...Yet order comes to be the dominant goal in itself: challenges to certain conceptions of order or coerced, change is prevented, and certain interests are served. The problem is defined as one of system maintenance rather than system adaptation (Dunn, 2004, p. 171). In contrast, from a provention perspective, people are primary, change is constant, and structures (such as states) are the means to human betterment. From the viewpoint of prevention, we are dealing with novelties that do not fit with conventional assumptions and we should stop trying to make them fit; we should change our assumptions.

Dunn offers a way forward. Following Banks (1985a), Dunn suggests that teaching the next generation is paramount to understanding the challenges and promises of different approaches to conceptual innovation. Research is also important to develop conceptual innovation. But Dunn is limited in his description of provention. The central component is the human being and a turn to focus on the causes and not simply the symptoms of social conflict. Burton’s focus is primarily on excavating the wrong assumptions, wrong definitions of the problem, and wrong policies. Said another way, Burton recognized the irony that explained peace as based on the threat to kill millions and render continents vulnerable to complete devastation. For Burton, the world is so only because we have constructed it that way. We can construct it in another way.

Next Steps

John Burton critiques “conventional wisdom” because it is not only wrong but ultimately harmful; at the same time, Burton hesitates that his human needs framework “is still at an immature stage” (1990, p. 179). Burton, with human needs theory, does provide a legitimate and convincing critique of dominant and traditional understandings of elite dominated social systems that thwart meeting human needs of numerous persons. However, does he offer a positive or constructive project? While looking to the future, Burton overlooks the promise of nonviolence in building a just social order in the process of revolution, of building the type of society that satisfies human needs in the connection between means and ends in nonviolent social relations and participation (Vahabzadeh 2019). The ends — a non-oppressive social order — must be connected to the means in which that governing order is achieved (Beitzel, 2010). What is required then, in the next of applying the insights of Basic Human Needs theory is to explore the complications and complexities of ethics and justice, not by abandoning a human needs approach completely, but by expanding Burton’s basic human needs ontology by adding human responsibilities as a complement to needs that lead finally towards self-governing and nonviolent problem-solving conflict resolution approach to maintain self-governance (Beitzel 2019, Marin et al, 2019). Nonviolence is implicit in Burton’s writings, but not explicit. For example, Burton cautions that the misapplication of a technique for dealing with conflict or a failure to properly understand the needs-basis of a deep-rooted conflict may only momentarily suppress a conflict and actually lead to further violence (1990, p. 8-9).

Therefore, the way forward is not abandoning human needs, but complementing human needs with something like human responsibilities (Zartman, 2019). To do so is to examine and

acknowledge the responsibilities persons have toward other persons needs in terms of the responsibility that individuals have both to themselves and towards others. Said another way, one way to transcend the egoistic view of humanity with an exclusive focus on needs is to include basic human responsibilities — responsibilities to oneself and to others. For the problem-solving workshops to function and deliver positive outcomes, needs of others be recognized and respected (O’Toole et al, 2019). The fundamental insight from Burton is that basic human needs are ontological and cannot be coerced out of existence (they can only be momentarily suppressed). To deal with unmet human needs, Burton develops the problem-solving workshop which is based in human relationships and this is a very large step toward examining and including responsibility in conjunction with needs. The problem-solving workshop in some variation or form, now utilized by those successfully working in conflict transformation, humanitarian intervention, transitional justice, and so on, is where to find and also nurture and build Burton’s insight for a way that is both positive and emancipatory (Marin et al, 2019; O’Toole, et al, 2019; Zartman, 2019). The challenging and liberating aspect is that this freedom to construct a different world brings with it uncertainty that accompanies indeterminacy.

Notes

¹ This is not necessarily alarming, nor does it suggest that Burton’s Human Needs Theory is irrelevant. For example, the argument, used by Burton, that elites control institutions and those institutions serve the self-interests of elites was developed by Jean Rousseau centuries earlier. It could be that Human Needs Theory became generally accepted at the level of normal science within the paradigm of conflict and peace studies.

² Similar questions are also raised by Oscar Nudler, “On Conflicts and Metaphors” *Conflict: Human Needs Theory*, ed. John Burton, St. Martin’s Press, New York, 1990, pp. 186.

³ In John Burton and Frank Dukes, *Conflict*, St. Martin’s Press, New York, 1990, pp.18-19. Burton explains: “It has to be noted that in many cases perhaps most cases, mediation processes do more harm than good... They provide an answer to the particular case and, if successful, help to preserve that system or set of circumstances that give rise to the cases treated” (Burton and Dukes 1990, p. 160).

⁴ See Fritjof Bergmann, *On Being Free*, Notre Dame, IN: Notre Dame University Press, 1977. Of course, sociologists have long made this contention.

⁵ In the section “Trends in Thinking about A Human Dimension”, Burton states that the reference point for understanding conflict is no longer in accord with the “Natural Law notion” of justice based on mysterious divine social order, but rather on “estrangement”⁵ due to “an absence of participation and social control” (1990, pp. 91). For Burton, the new reference point is based on psychological and physical needs of individuals. The social developments of modernization and the problems of legitimacy draw attention, for Burton, to the social problems and the impacts on individuals and point to analytical problem-solving processes to better address the social conditions that have led to estrangement of the non-elite individual — to increase the participation and control of all individuals (1990, pp. 91).

⁶ See Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd Edition), Ithaca, NY, Cornell University Press, 2003, for an extended discussion.

⁷ See Randall Collins, *Conflict Sociology: Toward an Explanatory Science*, New York, Academic Press, 1978, for a discussion of both the creative and destructive possibilities of social conflict.

⁸ Clark mentions three changes in Western civilization: the rise of the nuclear family, the “institution of competitive individualism” and “efficiency,” and the disappearance of sacred meaning (Clark 1990, pp. 49-51).

⁹ The idea of “bonding” is critiqued in a later section on civility and responsibility.

¹⁰ Oscar Nudler, “On Conflicts and Metaphors” *Conflict: Human Needs Theory*, ed. John Burton St. Martin’s Press, New York, 1990, pp. 186.

¹¹ Burton lists influences for solving widespread social problems

¹² Burton here implies, but does not make explicit, that the means typically pursued by the party with power and resources is that of (military, police, policy, or legal) force.

¹³ When discussing needs, Burton moves from his critical posture of “problem solving” when dealing with the field of international relations to a “puzzle solving” approach when seeking to explore needs within conflict studies.

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Re-Evaluating Burton's Human Needs Approach from Critical Theory Perspectives

Gavin John Bradshaw and Casper Lötter

ABSTRACT

An initial response to the thought-provoking critique of John Burton's conflict resolution approach by Laureen Park (2010), became a substantive re-evaluation of Burton's Human Needs approach. Her critique is based on the idea that Burton's basic human needs approach is 'biological', and overly deterministic, and therefore to be rejected out of hand. We defend Burton's position, using the ideas of the very Critical Theory/psychoanalysis and poststructuralist perspectives that she also uses, and point out that Burton's thinking is ultimately not entirely at odds with the central tenets of the first, second and third generation Critical Theory scholars such as Horkheimer, Habermas and Žižek, respectively. It is important for the conflict resolution field that Burton's perspective on basic human needs continues to be explored and further elaborated.

Keyword

Human needs theory, John W. Burton, Laureen Park, Critical Theory, psychoanalysis, poststructural approaches to conflict resolution

Introduction

In the 1990s John Burton published his 'conflict series' and other works as the culmination of his writing on conflict resolution; intended to provide an alternative to the then prevalent thinking on international conflict management, which seemed to him to be ineffective in its application to many of the intractable conflicts of his era.

Burton believed that much of the thinking in the field was deeply flawed, emanating as it did, from a largely 'Realist', state-centric, power-based model, which he often characterised as reducing explanations to 'black-box' thinking, that left the inner workings of the state out of consideration. The human element was for Burton all important, and he brought in the notion of basic human needs from other areas of scholarship. He emphasised the importance of second-track diplomacy, and his own approach – the problem-solving workshop as an approach to conflict resolution.

Although Burton was highly regarded by a number of scholars in the conflict resolution field at the time, especially Chris Mitchell, Sandole, Banks John Groom, etc, his work was sharply criticised by some, including Kevin Avruch, Peter Black, Vivienne Jabri, and Later Laureen Park. According to our reading, there has not been sufficient defence of Burton's ideas, as scholars have moved on to other concerns or, alternatively, have not given Burton's position on Human Needs sufficient thought and reflection.

Laureen Park (2010) has written a thought-provoking paper on Needs Theory (NT) from the perspective of both Critical Theory (CT, in the [post-] Marxist tradition of the Frankfurt School, although this is not stated explicitly) and psychoanalysis. Her paper contains much to be commended, but, as is the case with any contribution to the extant knowledge, is not above reproach and could possibly be fruitfully developed further. Ultimately, Park's critique of

Burton, through the lenses of critical theory and psychoanalysis, turns on her idea that Burton's needs concept is seen as 'biological' and therefore overly deterministic and rejected out of hand. This is particularly important, as Burton's approach is often criticised on the basis of its human needs content, and his very promising praxis (Fisher, 1997: 189; Clements, 2015) may have been discarded on the grounds of said critique.

Theoretical framework/methodology

In this contribution, we add a number of perspectives (such as an extensive overview of Habermas's contribution to Frankfurt School Critical Theory [CTFS] and a poststructuralist perspective on complex problems, namely conflict) which build on Park's insights/conclusions. This being said, we are not uncritical of the assumptions (in particular her out-of-hand rejection of Burton's so-called biological view of human needs) which she built into her otherwise valuable piece of work. We consider the convergence between Habermas's approach to communicative rationality (and the possibility of reaching consensus) and Burton's approach to Conflict Resolution uncannily similar even though they use different grammars. In our view, this observation underlines the value of an inter- and even trans-disciplinary approach to conflict and the possibility of conflict resolution, an issue on which both CTFS and CR agree. Putting Habermas and poststructuralist thought, on the one hand, and Burton, on the other hand, in conversation with one another has had the benefit of greatly enhancing our understanding and grasp of Burton's perspective on basic human needs. One such basic human need is language and its employment in communicating and reaching consensus between different groups with different concerns.

By way of example, Habermas's (1975a: 113) well-known 'ideal speech situation' (though anti-utopian and meant as a gold standard against which opportunities for consensus can be measured) and Burton's consensus-building workshops are, in our view, two amazingly talented ways, if approached from seemingly very different angles (philosophy and diplomacy), of addressing the problem of conflict management and the possibility of lasting consensus. Both are acutely aware of how vested interests can and do derail the possibility of broad-based agreement fostered in the general interest. Habermas (1975a: 113-114) refers to this phenomenon as special interests masquerading as general interests. Finally, both Habermas's (1970a) idea of 'systematic communicative distortions' and Burton's well-known wariness of agenda-negotiation (no doubt honed through his years of experience in the diplomatic corps) bring them close to the poststructuralist position. This is the denial of the possibility of reaching consensus rather than Gadamer's position of holding out for the fundamental possibility of agreement. Both Habermas and Burton also consider the need for institutional change embodying the principles of communicative rationality to be pressing (even though both advocate evolutionary, communicative or peaceful means to this end).

As such, we pursue a Marxist reading or methodology, as both Burton and Habermas are closer to Marx and his understanding of oppressive societal forces and the role of ideology in societal arrangements than to Weber. For these reasons, and those developed below, we focus on Habermas's so-called 'transitional phase' of the 1970s as he is the most articulate representative of CTFS in its contemporary reformulation. To this end, our discussion below on Habermas's contribution to CTFS methodology and in particular its (post-)Marxist moments, should add sufficient substance to our proposed theoretical framework/methodology. We also propose a different overall framework (within the context of a poststructuralist overview of the feasibility

of 'both/and' rather than 'either/or') which leads to altogether divergent conclusions, as well as a research approach which advocates greater inclusivity (but one to which Park herself would not be averse).

A Burtonian Perspective

From a Burtonian perspective, two further questions which demand consideration are:

- Can we prove the existence of basic human needs?
- Are needs necessarily always benign?

These questions, central to Park's rejection of Burton's pragmatic, if post-theoretical approach, will be considered and interwoven throughout the discussion below. As we argue below, Burton, a seasoned diplomat, was a pioneer in the field of Conflict Management/Transformation and his findings and/or approach was sometimes at odds with established theory. This might partially have been the result of outdated institutions not fit for purpose or the results of institutional outcomes geared toward managing conflict *ex post facto* rather than forestalling conflict pro-actively. Burton's well-known critique of (Western) institutional culture should be seen in this light and the fact the extant theory does/did not always support Burton's outcomes or processes, could almost certainly be the result of this paradigmatic shift in his thinking - hence our high-lighting his 'post-theoretical' (albeit not anti-theoretical) contribution. At the outset, we note that it is striking that Park structures her critique of Needs Theory around the pincer-movement of Critical Theory (CT) and psychoanalysis.

David Rasmussen (1996: 11) defines Frankfurt School Critical Theory (CTFS) as a peculiar intellectual framework aimed at generating a critical theory of society with an emancipatory vision based on the interaction of praxis and theory that found its motivation in the thinking of Marx and Freud (our emphasis). The Frankfurt School had its moorings in the work of Horkheimer, Adorno and Marcuse who were the most important representatives of the First Generation, and in the late twentieth century it found its contemporary reshaping in the work of Jürgen Habermas, especially. To Rasmussen's definition we should add that the work of Freud and Marx are critically reconstructed and appropriated to enrich the contributions of the corpus produced by three generations of scholars of Critical Theory in this tradition. Whereas Habermas is almost certainly the main exponent of the Second Generation, important names in the Third Generation are those of Axel Honneth, a student of Habermas, Sheila Benhabib and the well-known Slavoj Žižek. A number of issues arise from this definition.

Explorations of the CTFS

Firstly, the Frankfurt School is not the only orientation in the tradition of 'critical theory', but it has the distinction of developing inter-disciplinary perspectives of a critical theory of society forged on post-Marxist instruments and Freud's engagement with the unconscious. Catherine Belsey (2002) draws the valuable distinction between Frankfurt School 'Critical Theory' (with capitals) and other forms of 'critical theory' (with small letters) of which the latter encompasses any critical practice relating to the analysis of cultural, political or social phenomena. We

propose referring to the former tradition as more properly CTFS so as to distinguish it from other currents in the various traditions of critical theory.

When Park refers to CT, but only quotes intellectuals (notably Herbert Marcuse) in the Frankfurt School tradition, this distinction should be kept in mind. Paul Ricoeur, another scholar she refers to with approval, arguably belongs more plausibly to another contemporary German philosophical tradition, phenomenological hermeneutics of which Gadamer (referred to below) is arguably its most famous advocate, and certainly not to CTFS. We argue, however, that a cross-fertilization between CTFS and poststructuralism (currently the dominant philosophical tradition in France, considering that Ricoeur is also French and not German) would lead to considerably fruitful results, as we demonstrate below. Nothing turns on Park calling Ricoeur, albeit incorrectly, a figure in CTFS.

Secondly, we consider it curious that Park critiques HNT for its overly rationalistic approach to conflict resolution (CR) when the great divide between the various generations of Critical Theory in the tradition of the Frankfurt School (CTFS) is precisely the emphasis, or de-emphasis, the role of reason within the process of potential emancipation. Whereas the first generation of public intellectuals, notably Marcuse, but also Eric Fromm, placed great emphasis on interweaving Freud's corpus with Marx's body of work, Habermas focused on rehabilitating reason (to the exclusion of non-rational intervention) in the service of CTFS. In contrast, Fromm, who also features quite prominently in the canon of the conflict analytical literature, is well-known for his contestation with Konrad Lorenz on the extent to which conflict behaviour is hard-wired, or socialized into the human condition.

Rationality

Habermas's work had its rationale, though, since, in the wake of Horkheimer and Adorno's disillusion with reason's potential for emancipation after the horrors evoked by the Second World War and especially the Holocaust in Europe, it was deemed important to demonstrate that reason could nonetheless serve as a guide to emancipation. The third generation felt confident enough in reason's redemption (despite the indisputable foothold of the irrational in social comment as evidenced in the growing stature of post-Freudians such as Jacques Lacan) to forge either a feminist perspective (Benhabib) or a renewed fusion of Marx and Freud (Žižek) within the loop of CTFS.

Thirdly, although Park bases her criticism of NT on both CTFS and psychoanalytic theory (especially orthodox Freudian notions), Critical Theory in the tradition of the Frankfurt School could arguably be considered to embrace both pincers, especially in the context of the concerns of the first and the third generations, as we argue above. As we note above, CTFS fuses Marx with psychoanalysis (especially Freud's work and Lacan's orthodox interpretation of Freud) in its emancipatory vision of a critical theory of society.

Having related Rasmussen's definition of CTFS to Park's general treatment of HN in a Critical Theory context, we move now to consider her theoretical framework in greater detail. Park (2010) argues that positivism (and technocracy, its concomitant mindset) has been beset by the inability of HNT scholars such as Burton to consider and incorporate the social dimension of needs-based theory. By focusing largely on the biological basis of needs, HNT was unable to move beyond its positivistic trappings. This has resulted, according to Park, in Conflict Resolution being unable to grasp the socially engineered or conditioned nature of needs (i.e. the fact that needs are not biologically based) and the fundamental overlap of needs with values. Our

own position is that, although culture invariably shapes needs, universal basic human needs (food, shelter, recognition, love, etc.), as proposed by Burton, is an incontrovertible fact of the human condition.

Indeed, a thorough reading of Burton and his HNT predecessors, would see individual cultures as specific manifestations of different processes of human needs satisfaction. Habermas, incidentally, has made the same accusation as Park levels against Burton, against philosophy and social science in general. In view of Habermas's seminal, albeit nuanced position in CTFS, we devote considerable space to an overview of the early Habermasian contribution, keeping in mind both his post-Marxist move and his abandonment of Marx's empirical philosophy of history with practical intent, in favour of a reconstructed theory of the human species by way of a fresh take on social evolution (McCarthy, 1978: 264).

Habermas' Contribution to CTFS

Perhaps Habermas's greatest contribution to critical theory, methodologically speaking, is his insistence on forging the emancipatory goal of social inquiry in a post-positivist frame by aligning that project with the best of the intellectual heritage of the modern world. He sought to combine classical (or traditional) theory with the methodological rigour of modern science (Habermas, 1973: 79). In so doing, Habermas aims to reach beyond the understanding of philosophy as a 'first philosophy' to a notion of a social inquiry that paves the way for social change (practical intent) based on communication structures free from unnecessary domination (McCarthy, 1978: 128-133). Since the late fifties, when he published his first paper on Marxist methodology, his project has undergone substantial revisions and we can do no more here than sketch the outlines of his work insofar as it impinges on our methodological exploration of Critical Theory. In the words of Thomas McCarthy (1978: 127), we shall also "be concerned only incidentally with questions of the [chronological] development" of Habermas's work. In fact, our overview may even appear to be circular.

We attempt, in particular, to outline Habermas's on-going reformulation of the Marxist project of a critical theory of society (Roderick, 1986: 69-73) by focusing, for the reasons stated, on his so-called 'transitional phase'. This is the period from the appearance of the German edition of *Knowledge and Human Interests* [1968, English edition 1971] until the publication of the English version of *Communication and the Evolution of Society* [1979]. We limit our exploration of Habermas's valuable project for two reasons. These are to keep the discussion manageable as well as the fact that we found the intermediary period of Habermas's oeuvre most profitable for the purposes of this article. Bohman & Rehg (2014) describe these ten years of Habermas's intellectual development as his 'transitional phase.'

In this transitional phase from *Knowledge and Human Interests* to *The Theory of Communicative Action*, Habermas's basic philosophical endeavor was to develop a more modest, fallibilist, empirical account of the philosophical claim to universality and rationality. This more modest approach moves Critical Theory away from its strong transcendental framework, exemplified in the theory of cognitive interests with the unmistakably Kantian language of object-constitution.

We consider two formulations below, which mirror Habermas's so-called weaker transcendental framework, for the reasons noted below. Despite the fact that Habermas (1994) explicitly rejected these earlier formulations of transcendental reconstruction in his later mature,

post-metaphysical work, we consider it most valuable for explicating his position in the Critical Theory corpus as it relates to an understanding of Human Needs Theory. Considering Habermas's distaste for technocratic thinking (in which only 'useful' notions are acceptable), he would, in our opinion, not be averse to our utilizing his earlier, if discarded, ideas. These are Habermas's epistemologically-based critical theory of society with practical intent and his later theory of social evolution conceived of as a "materialistically transformed transcendental reflection" (Roderick, 1986: 71).

First Reformulation of the Marxist project

As with Horkheimer (2002/1937), Habermas understands knowledge to be both historically and socially contextualized. Unlike Horkheimer, however, he replaces Horkheimer's differentiation between traditional and critical theory with his own three-layered notion of 'knowledge-constitutive interests' (Roderick, 1986: 53). In *Knowledge and Human Interests* (1971/1968), Habermas advanced the argument that knowledge forges three sets of different human interests.

Firstly, empirical-analytical sciences imply a (technical) interest in control. Examples of such are chemistry, geology and physics. Secondly, according to Habermas, hermeneutical-historical sciences aim to understand the human condition and are guided by a practical interest. Examples of such are sociology, politics, conflict management and psychology. Overlap between these interests is legion. Foucault (2006/1961) notes that the social sciences (notably medicine, pharmaceuticals and psychiatry) are employed to legitimate repression. Lacan (2007: 20-22, 24) indicates that the master is only interested in knowledge which has the potential to justify the status quo. Philosophical reflection, according to Habermas (1971/1968: Preface and 68etc.), is central to emancipatory practice so as to counter positivism in the extant knowledge, namely historicism in the social sciences and scientism in the natural sciences.

Thomas McCarthy (1978: 135-136) states the Frankfurt School Critical Theory's case against positivism as follows: "This double reflexivity distinguishes it not only from the objectivism of the exact sciences but also from the self-sufficiency of traditional philosophy." Historicism is the mistake of grasping social phenomena solely in their historical context (McCarthy, 1978: 170). The so-called 'objectivity' and 'value-free' findings of the positivistic sciences, which McCarthy refers to, and the social sciences infected by historicism, could not, however, account for the well-known notion of the dearth of meaning in Western modernity, as proposed by Weber.

Emancipation

Finally, Habermas contends that critical sciences (such as Critical Theory) have an interest in emancipation which goes beyond the technical and the practical. The question needs to be asked, however, why, in the light of Habermas's distaste for positivism, these emancipatory practices should be labeled 'sciences' at all. His favorite examples of emancipatory sciences or practices are Marxism and psychoanalysis (Habermas, 1973: 9). Curiously, it is precisely these two bodies of knowledge; Marxism and psychoanalysis, which Karl Popper labelled as pseudo-sciences as they are by their very nature non-falsifiable. Nevertheless, Marxism is famous for its emancipatory potential. Breuer's patient, Anna O. (as is generally known), called psychoanalysis the 'the talking cure'.

Emancipatory practices such as spirituality (as opposed to organized religion), feminism, literature and vegetarianism (from an ethical position), come to mind. Thomas McCarthy (1978:

53), a respected commentator on Habermas, expresses the view that Knowledge and Human Interests represent "Habermas's first attempt to present his position systematically [...]." McCarthy argues that this work attempts to re-evaluate and unblock discarded avenues of reflection which is the result of the domination of positivism since the late nineteenth century. We concur with McCarthy's argument on the importance of this source for an understanding of the 'transitional' Habermas; both in terms of stating his position systematically and his sustained attack on the presence of positivism, in both philosophy and the social sciences in general.

Positivism manifested itself in the almost obsessive insistence on objectivity in both the social and the natural sciences in the twentieth century. It was the linguistic turn in philosophy that superseded the previous emphasis on consciousness (Rorty, 1982: 195). Habermas became convinced that since his own point of view is not free of ideological distortion, it was necessary for him to devise a comprehensive theory of society 'free' of knowledge-constitutive interests – his efforts found expression in a theory of the species' universal communicative competences. Ironically, Habermas's (1982: 231) revulsion for immanent critique found a home in internal criticism.

This practice of internal criticism of various texts over a number of different disciplines to gauge their strengths and weaknesses (a 'philosophy of history with practical intent') is a *modus operandi* which Habermas borrowed from Marx (McCarthy, 1978: 137). Its aim is to devise a comprehensive, integrated methodology for critical theory of society with emancipatory intent. Habermas (1970: 188, McCarthy's translation) suggests that regaining meaning in the sense of 'Verstehen' is vital for the possibility of a trans-disciplinary understanding of the encompassing reality, which led him to coin the phrase "[the] gate through which methodology must pass if positivistically paralyzed reflection is to be brought to life again."

Habermas's post-Marxist moves

Habermas argues that human beings find agreement in the language use that they have in common with one another as this is basic to their form of life. Habermas points out the fallaciousness of Wittgenstein's overlooking the essence of the translatability of an idea into the investigator's home language, (Habermas, 1970b: 244-245) and its relevance here is the malleability of language.

This is also the point of departure which Habermas, briefly referred to above, following Chomsky, employs in his thinking on universal pragmatics, to ground his theory of communicative competences. McCarthy (1978: 169) comments that:

If it were possible to develop a universal theory of language, the "grammars" of different language games could be given standard descriptions in a theoretical language [...] it could be undertaken "in a theoretical attitude."

Curiously, as we noted above, the celebration of subjectivity that came with the discovery of the grammars of different life forms became a platform, once again, for objective rules which all grammars are meant to obey: Habermas's universal pragmatics are a case in point. Habermas borrows his concept of 'developmental logic' from Piaget in his attempt to explain the logic which drives the various stages of developmental trajectories (Roderick, 1986: 100). In his debate with Gadamer on the proper limits of the critical hermeneutical project (to use Hurst's valuable classification), the latter proposes the case for critical hermeneutics in the following terms:

The hermeneutic problem is not therefore a problem of the correct mastery of a language [...] Such mastery [...] is a precondition for understanding in dialogue. (Gadamer, 1975: 362; McCarthy's translation at 1978: 172)

Despite their disagreement on a great number of details, Habermas and Gadamer are both interested in the preconditions for achieving consensus in dialogue. We note below that the linguistic turn in philosophy (a central feature of twentieth century philosophy on both sides of the Atlantic) in fact confirms Burton's notion of universal human needs. Habermas's differences with Gadamer are useful in showing the reach of the former's goal for his conception of social inquiry, namely nothing short of the pursuit of a comprehensively integrated methodology for a critical theory of society. We proceed to consider his theory of social evolution insofar as it relates to, or explains Habermas's methodological direction or programme for rational reconstruction.

Further reformulation of the Marxist project

It is Habermas's attempt to deal with Gadamer's critique of the ideological dimension of critical theory in the broad sense of the word (McCarthy, 1978: 264) as well as his awareness of the conflation between critical reflection and transcendental reflection (referred to below), which convinced him to abandon Marx's empirical philosophy of history with practical intent for a reconstructed theory of the species in the form of a theory of social evolution (McCarthy, 1978: 264).

This move into a post-Marxist paradigm implies two new directions for Habermas's critical theory of society. Firstly, his insight that a critique of ideology based on the idea of systematically distorted communication must rest on a theory of ordinary communication, necessitating a reconsideration of Critical Theory's foundation from a theory of knowledge to a theory of communication (Roderick, 1986: 71).

Secondly, Habermas conceives the theory of social evolution as a rational reconstruction of historical materialism (McCarthy, 1978: 232-237) which presents yet another deviation from the classical Marxist project. Since orthodox Marxism's revolutionary agent has fallen by the wayside (Habermas, 1971/1968: 25-63; 1973: 195-252), Habermas envisions an evolutionary model of the development of the species' universal communicative competences. It concerns itself with a history of the species in the sense of a "reflective appropriation of its self-formative processes" (McCarthy, 1978: 263).

It was only after he concluded the first German edition of *Knowledge and Human Interests* (1968, second edition 1973), that Habermas (1975b: 182) understood that the traditional use of the word 'reflection' confusingly includes both 'rational reconstruction' and 'critical self-reflection'. Since these terms are "at the heart of his most recent work" (Held, 1980: 327), it is worth considering the difference between them. According to Habermas (1973: 22), rational reconstruction is an exercise that deals with reorganizing anonymous rule systems. Anybody can comply with these rules provided he or she has acquired the necessary competence. Reconstruction thus does not encompass subjectivity, within the horizon of which alone the experience of reflection [understood as self-reflection] is possible.

In contrast, self-reflection brings "to consciousness those determinants of a self-formative process which ideologically determine a contemporary praxis and conception of the world"

(Habermas, 1973: 22). Whereas a rational reconstruction is aimed at a 'pure theory' (devoid of any constitutive interest), critical self-reflection is projected only for the purpose of emancipatory change. It should be clear, however, that despite the differences between the two concepts, Habermas is at pains to point out that the two processes enhance each other and build on one another. Rational reconstruction bolsters self-reflection in the sense that it makes the range of possibilities explicit and limits human action. In particular it necessitates a "successful participation in a functioning rule-governed context" (Held, 1980: 327). Critical reflection, however, will allow space for the former to unfold because new avenues, previously foreclosed through ideological distortion, are now available for consideration and appropriation. Subsequent remarks by Habermas (1973: 24; 1975: 184) indicate that he would not be averse to such a conclusion. Since a normative-theoretical foundation for critical self-reflection is provided by the results generated by rational reconstruction, Habermas (1975b: 184) argues that the

[c]ritical sciences such as psychoanalysis and social theory also depend on being able to reconstruct successfully general rules of competence. To give an example, a universal pragmatics capable of understanding the conditions that make linguistic communication at all possible has to be the theoretical basis for explaining systematically distorted communication and deviant processes of socialization.

Critical self-reflection and rational reconstruction work hand in glove to achieve the goals of a positive prognosis for a society without communicative distortions, and hence without oppression. According to Habermas (1975a: 113), 'the suppression of generalizable interests', or in Burtonian terms, 'agenda-negotiation', prevents the attainment of the former's well-known 'ideal speech situation' (re)constructed along the following lines:

[H]ow would the members of a social system, at a given stage in the development of productive forces, have collectively and bindingly interpreted their needs (and which norms would they have accepted as justified) if they could and would have decided on the organization of social intercourse through discursive will-formation, with adequate knowledge of the limiting conditions and functional imperatives of their society?

The notion of the ideal speech situation, explored briefly above, feeds into Habermas's motivation of reconstructing orthodox Marxism's notion of historical materialism. What are Habermas's reasons for reconstructing historical materialism? David Held (1980: 323) suggests that Habermas was convinced that historical materialism (the hallmark of classical Marxism) had to be "reformulated as a critical theory of society which incorporates the insights of the psychoanalytic model, particularly its insights into the significance of self-reflection." Freud's three-tiered therapeutic model (of metatheory, general interpretation to sustain a rational narrative and a specific application) was very influential in shaping Habermas's first reformulation based on a theory of knowledge (Habermas, 1971/1968: 214ff.), and it was Gadamer's critique, among other criticisms, of critical theory's potential ideological deformation that led the former to seek out a rational reconstruction of historical materialism as a theory of social evolution.

Likewise, Burton's theory provides a critique of the social order or *status quo* and in this sense, he mirrors Habermas's concern with formulating a critical theory of society with an emancipatory vision. Thomas McCarthy (1978: 378) contends that "even in his more recent writings on the theory of social evolution [...] Habermas maintains that at least the analysis of contemporary society has an irreducible practical dimension: if the past can be systematically reconstructed, the future can only be practically projected." Habermas (quoted in McCarthy 1978: 265-266, the latter's translation) is as concerned as Burton with "structural possibilities that are not yet institutionalized (and will perhaps never find an institutional embodiment)". This commitment to societal change on an institutional level shows, perhaps more than any other feature, how close both Habermas and Burton are to Marx in their critique of the *status quo*.

We conclude this overview of the relevance of Frankfurt School Critical Theory for a reflective, critical reconsideration of Human Needs Theory, in noting that Horkheimer, as the second director of the Institute for Social Research, proposed to infuse the institute's research programme with a Marxist-inspired perspective of a critical theory of society. Although Horkheimer and Adorno (both Jews forced to leave Germany during its Nazification in the 1930s) later turned increasingly pessimistic over reason's emancipatory potential, the early Horkheimer (1993/1931: 6-11,14) eloquently defined Critical Theory in this distinctively German tradition. Its great illustrious predecessor Hegel, who had such ground-breaking influence on Marx, suggested that reason was driven by an internal logic or teleological (goal-directed) historical mandate of ensuring increasing human emancipation. In his inaugural lecture, Horkheimer (1993/1931) took up this well-known Marxist kernel and advocated that philosophy and the empirical social sciences should work hand-in-hand with the former in the role of a Diagnostic Philosophy with practical intent verifying its findings or policy recommendations by way of empirical research for changed historical circumstances. This feeds into Burton's contention that practice has often been at cross-purposes with established theory, as we conclude below.

Revival of interest in Marxism as a methodology

Even though Marxism has subsequently all but disappeared (Grondin, 1994: 9) from the German philosophical scene – 'necessitated by' the historical contingencies of the destruction of the Berlin Wall and the collapse of the Soviet Union – Horkheimer's reformulation was the first of many post-Marxist instruments and predicated on the reverse of Marx's insistence that philosophy will only come into its own by negating itself, as we note below.

The appearance of studies such as Terry Eagleton's *Why Marx was Right* (2012), written from a literary perspective, Thomas Piketty's *Capital in the Twenty First Century* (2013, English translation 2014), written from an economic perspective, and R.W. Johnson's *How long will South Africa Survive? The Looming Crisis* (2015), written from a historical-political perspective, although he is not explicit about his methodology, has since spurred renewed interest in Marxism as a useful form of analysis in late capitalism.

Before their adoption of Marx's well-known critique of Hegelian idealism, the early members of the Frankfurt School attempted to formulate a critique of 'instrumental reason'. Weber's (1958/1904-5: 180-183) well-known thesis on the 'iron cage' of reason and its colonization of modernity in the West, became their central focus. This view of the instrumentality of reason in the modern era led, according to Weber, to the irrevocable undermining of meaning and freedom, and the Frankfurt School Critical Theory group concluded

that their mandate, as the advocates of an inter-disciplinary approach of a critical theory of society, was to grapple with the evolving role of reason within the context of the project of human emancipation (Habermas, 1971: 194). To this end, Habermas (1971: 68-69) was convinced that the project of emancipation hinges on the possibility of rehabilitating reason, since reason, understood as reflection, is crucial in combatting the infiltration of positivism. Positivism is nothing if not “the denial of reflection”, according to Habermas (1971: 68-69).

Habermas drew a seminal distinction between instrumental action (e.g., labour) and communicative action (intersubjective networking) and we suggest that this difference between the two concepts is vital to his venture as a whole. It also has the advantage of illuminating a certain line of continuity between Habermas and the first generation of scholars of the Frankfurt School. This distinction, which weighs so heavily with Habermas, is of prime importance for our discussion of conflict management or transformation since it illustrates the set of conditions (namely alienation as opposed to goodwill and the mutual acceptance of bona fides among interlocutors) which causes conflict and/or is indicative of its resolution, management and/or transformative potential (as the case might be). McCarthy (1978: 20) explores this idea well by suggesting that whereas Marx demanded the negation of philosophy as pivotal to enable scientific critique, Habermas and the members of the first generation insisted that the elimination of scientism (the notion that only empirical scientific findings are ‘properly’ knowledge) was a precondition for embracing Marxism as social critique. It ties in well with Burton's view that the ‘received wisdom’ of the conflict management practice are not always indicative of successful outcomes on the ground.

Burton's emphasis on Universal Needs

Clearing away the cobwebs of positivism allows for critical reflection enabling the emancipation project to get off the ground. And with ‘emancipation’, CTFS has in mind nothing less than the integration of marginalized groups which resonates so well with Human Needs Theory. Burton argues that denying people their basic needs is precisely what perpetuates conflict in society. Lauren Park contends that Burton's insistence on the ‘biological’ nature of needs (while denying their social origins) is yet another unwelcome manifestation of positivism. We are in partial agreement with her. We do argue, however, that we should at least leave open the possibility that some behaviour is neurologically/biologically co-determined. Latest research is pretty unequivocal in this regard (Clark and Grunstein, 2004; Feldman Barrett, 2017). The facts mitigate against the assumption that there is nothing universal in respect of human behavioural manifestation. We argue that Burton's emphasis on universal human needs is justified for the reasons enumerated.

We contend that there is something uncomfortable in an approach, such as Park's, that rejects certainty as a matter of course, being so certain in its rejection of another's position. To his credit, Burton himself is not categorical on the exact nature or role of basic human needs. He sees evidence for them, and suggests that a more coherent, more reliable picture will emerge in the course of research into these issues of contention, in due course. From a CTFS perspective, support for Burton's (albeit equivocal) position on the neurologically/biologically co-determined nature of needs is to be found in communicatively-orientated theorists, such as Habermas and Apel's, insistence on language as central to our humanity. Habermas is skeptical about the possibility of reaching consensus on deeply seated issues of conflict on the basis of what he calls ‘systematic communicative distortions’ (essentially vested interests distorting the conversation) but he concedes that embedded in human language use is also the possibility of reaching

consensus and resolving, or at least managing, conflict. To this end, Habermas envisages a counter-factual ‘ideal speech’-situation which is meant to gauge the potential conditions of existing disputes for resolution on procedural grounds and which is not available to us because of the presence of ‘systematic communicative distortions’ (as we indicate above). Gadamer, although he was a great deal more sanguine about the possibility of reaching consensus than members of CTFS, expressed this idea famously in the following words: “Being, insofar as it can be understood, is language.” We suggest that humans’ peculiar need for and use of language is a prime example of the neurologically/biologically co-determined nature of needs, as Burton contends.

Curiously, as Park also points out, both Marx and Freud felt convinced at some stage in their development that Marxism and psycho-analysis respectively were ‘sciences’ in the orthodox, natural science sense of the word. These examples of positivism, as they manifested themselves in the late nineteenth and early twentieth centuries, took root (quite understandably) in the spirit of the belief in progress and general optimism over the prospects of science to improve the human condition (Baumer, 1977: 305-314). But if needs are evolutionarily functional, they are likely to be predominantly aligned with positive human development, and so will not be malignant unless they become frustrated – which is Burton’s whole point. Because humans are social creatures, evolutionarily-engendered needs must be generally socially benevolent. Needs are not malignant until frustrated, in which case they ‘drive’ anti-social behaviour; whether against other individuals, or against institutions. Under conditions of wholesale oppression (needs denial), it is therefore likely that violence (even so-called irrational violence) will be brought to bear against others, or even the institutions that may be ideologically legitimated by society. Burton does indeed frequently make the point, that in a conflict between needs-satisficing individuals, and needs denying institutions, individuals must ultimately prove successful. Burton (1984: 27) does make the point that behaviour is not necessarily benign, and acknowledges the harmful effect that authoritarian personality of leadership can have on politics. Even if some needs are benign, it is perhaps high time that we come to terms with our darker, often neglected, side, as Freud and a long line of post-Freudians have argued about the role of the unconscious in human behaviour.

Park’s critique is, of course, around basic human needs – that is what she sets out to do, and she manages this through the bifocal lense of Critical Theory/Psychoanalysis. Others (notably anthropologists, such as Avruch and Black, 1987) have also taken aim at Burton for daring to propound a universalistic view of human nature, and sociologists and the humanities in general (for daring to privilege nature over nurture.) But the important point needs to be made that although Burton’s contribution in cementing basic human needs within the study of social conflict is an important element of his approach, he was first and foremost a pragmatic conflict manager, albeit one who sought to develop a theoretical underpinning for his practice.

While not denying the importance of Burton’s breakthrough in respect of the introduction of basic human needs to conflict scholarship (he was not the first, but perhaps the most important) – we are in danger, as was Burton, of a reliance on needs as an explanation to the exclusion of other factors. This emphasis in Burton sets him up for unwarranted critique, as everything begins to turn on basic human needs – acting as a sort of lightning conductor for criticism. Burton, along with figures such as Johan Galtung, provided impetus for a complexity-based understanding, of (especially) deep-rooted social conflict, and Burton in particular risks being caricatured/crucified on the cross of basic human needs, which is only a small aspect of his total

invaluable contribution, which includes the following ten valuable, cardinal points all of which have become core elements of the canon of conflict resolution thinking:

- Making distinctions between disputes and deep-rooted social conflict
- Accepting that social conflict is an important, indeed positive part of the human life-world
- Making distinctions between settlement and resolution of social conflict
- Bringing human beings to the front and centre of conflict management, and relegating institutions to a lower level of importance
- Recognising the destructive role of self-legitimizing ideology in everyday governance
- Disentangling the artificial (academic disciplinary) boundaries between the international and the other levels of human behaviour
- Acknowledging the exceedingly important role of analysis in conflict management
- Recognising the weaknesses of negotiation and mediation as universal forms of conflict management
- Asserting the desirability of institutionalising conflict management
- Legitimizing the role of the 'scholar practitioner' in the conflict field.

Poststructuralism and the ideal of inclusivity

Park notes that Burton's approach to Human Needs Theory has been criticized for being ethnocentric, and falling short of the claim to universal application. The same is true for CTFS (Roderick, 1986: 104; Galtung and M. Kuur-Sørensen, 2007). Park covers the argument relating to Burton's Human Needs Theory and we intend to briefly do the same for CTFS so as to prepare the way for our own proposed conclusion, namely an argument in favour of advancing the prospects of the caring society. The idea of the caring society has received considerable attention from feminists, such as Carol Gilligan (1993), who argues that women inhabit a different moral dimension from that of men. According to Gilligan, whereas men rationalize their moral choices and decisions by prioritizing their own needs, a woman decides matters in terms of the preferences of her own intimate circle as opposed to her personal needs, namely relationally. The idea of an 'ethic of care' has been developed by feminists in response to overly rationalistic theorizing, such as that ascribed to Habermas, on the prospects of a more equitable and just society. Feminists such as Martha Nussbaum (2000) and Fiona Robinson (1999) have developed Gilligan's work further and they have rejected the idea of abstract 'rights' to guide social justice in a world teeming with neglect and want. Instead, practical care is urgently demanded.

Poststructuralism and complex problems

This ethics of care as part and parcel of a revival of practical philosophy can also justify a much more inclusive approach in terms of ‘both/and’ rather than ‘either/or’, a position that finds increasing support among poststructuralists. Hurst (2004: 42) attempts to define poststructuralists as follows:

If these thinkers have to be categorised at all (and not one of them is likely to appreciate any kind of categorisation), then they belong to a tradition of ‘critical’ postmodernism or poststructuralism. Here, thinkers (whom, following John Caputo, I have subsumed under the title of ‘radical hermeneutics’) share a common attempt to think in a way that differs fundamentally from the ‘either/or’ logic that has, until recently, governed Western theory. These thinkers, in various ways, attempt to retain some sense of a shared understanding, against the radical particularity and transitoriness celebrated by ‘freeplay’ postmodernists, without at the same time invoking the rigid structures of universality. In simpler terms, this means that they try to do justice to the cultural diversity and differences in the world without sacrificing our ability to think.

Poststructuralists, such as Derrida, Foucault and Lacan, have evolved a convincing argument that the complexity of the postmodern condition demands as many perspectives as possible in the hunt for possible solutions to complex problems in our postmodern world. We are in agreement with Hurst’s (2004: 7, 9-10) suggestion that the social world is a complex phenomenon. She argues that “[k]nowledge in these disciplines [the social sciences] depended not so much on perception and abstraction, as on understanding (Verstehen) – that is, the ability to enter sympathetically into the experience of others, as a consequence of our common humanity” (Hurst, 2004: 12). Bert Olivier (2015) contends that the “post-structuralist turn” has a competitive edge over the traditionalist approach of a thoroughgoing single theoretical lens.

Olivier (2015: 349-350), with whom Hurst (2004: 42) seems to agree, proffers the ‘neither/nor’ (or, alternatively, ‘both/and’) inclusive poststructuralist notion of theory appropriation instead of ‘either/or’ thinking favored by scholarly ‘purists’ (a left-over of Aristotelian thinking). He explores ‘neither/nor’-logic by utilizing Lacan’s (1977) understanding of the three registers of meaning, namely the real, the symbolic and the imaginary. Olivier (2015: 349) is of the view that these “ontological registers from the complex intertwinement of which human subjectivity (or ‘being’ for that matter) can be understood.”

During the imaginary phase the subject (mis)recognizes herself in the mirror image while the symbolic register allows the subject to acquire language. Both these registers presuppose the register of the so-called ‘real’ which remains a lost memory forbidding return, but which may be experienced in an overlapping fashion in the sense of reliving a traumatic incident. Lacan (1981: 52-64, cited in Olivier, op. cit.) refers to a traumatic experience as the phenomenon of ‘what if’ or ‘if only’ which continues to evade human appropriation. We can never know the ‘true’ nature of the easy chair we occupy since time and space structure our understanding of all perception.

The limits of human experience illustrate Olivier’s (2015) argument on the value of an eclectic selection of available theoretical offerings (as the situation calls for) rather than one dominant theoretical lens, as traditional research would have it. Stated differently, poststructuralism has a decided preference for methodological and theoretical pragmatism (an

idea Galtung and Burton would agree to) over (unexamined) dogmatism in its scholarly work. Eclectic theory appropriation (dictated by the scholar's continuous attempt to approximate the real) has a striking correlation with Frankfurt School-critical theory's preference for interdisciplinary (and, as is the case with Habermas, even trans-disciplinary) investigation of complex social problems.

It is this emphasis on the 'ethics of care', on the one hand, and the need for inclusivity, on the other hand, which supports our conclusion that the better argument is not a choice between different philosophical positions. Taking our cue from both Burton and Johan Galtung's complexity-based understanding of social conflict (noted above), we contend that contemporaneous positions within French poststructuralism have made a convincing case for addressing the understanding and possible resolution of complex problems (such as deep-rooted social conflict) by bringing as many perspectives as possible to bear on the problem in question. This is the inclusive notion of 'both/and' rather than the traditional 'either/or.' Mansilla, Duraisingh, Wolfe and Haynes, (2009: 337) define interdisciplinary understanding as "the capacity to integrate knowledge and modes of thinking in two or more disciplines or established areas of expertise to produce a cognitive advancement – such as explaining a phenomenon, solving a problem, or creating a product – in ways that would have been impossible or unlikely through single disciplinary means." Mansilla, Duraisingh, Wolfe, and Haynes, (2009: 334) argue that "[a]t the dawn of the twenty-first century [...] [s]ocio-environmental challenges such as mitigating climate change or eliminating poverty demand interdisciplinary solutions." The authors (2009: 335) quote with approval the American National Science Foundation's mandate which encourages "investigations that cross disciplinary boundaries and require a systems approach to address complex problems". Whereas simple social problems could be approached by way of only one body of scholarship (sociology or economics, for example), complex problems in a postmodern, post-colonial, increasingly cosmopolitan world, demand as many approaches as possible to make sense of multi-faceted, complex problems. Burton's own decidedly inter-disciplinary approach to conflict management/resolution underscores this view of reality.

Conclusion

In conclusion, we argue that although Park's critique of Burton's position is not without value, her own argument is not above reproach either. Tied in to our approach is our caution against the tendency to over-theorize, since if praxis continually returns good results for Burton's methods (Clements, 2015; Fisher, 1997: 189), we should be careful of rejecting them simply because they offend the sensibilities of a particular school of thought. Although we do not deny the value of theory, we note that Marx himself remarked famously that philosophers have only interpreted the world, but the urgent contemporaneous demand is to change the world. By the same token, Freud's well-known insistence on the pivotal role of the irrational unconscious in human behaviour further illustrates our assertion that theory, valuable as it no doubt is in providing a heuristic framework (Rabaté, 2002), is unable to provide a comprehensive explanation for basic human needs which includes communication, a cardinal interest of CTFS. Burton's work has further been vindicated by Habermas's distrust of 'systematic communicative distortions' in public life and Foucault and Lacan's exposure of the ways in which the extant knowledge is used to legitimate the *status quo* (as we argue above). In this respect, we are confident that our utilization of (post-) Marxism – adjusted from its classical core to meet the demands of a changing world – as a methodology and/or theoretical framework, has added impetus to the

growing realization of its value and importance as a critical (if economic-based) analysis of late capitalism with its 21st century-face depicting deepening inequality and right-wing populism on a global scale.

Our defence of Burton's Human Needs approach would be incomplete without a reference to the (equivocal/nuanced) treatment of positivism within both CTFS and Burton's own (not inconsiderable) corpus. Habermas's somewhat harsh critique of the role of positivism in modern science and philosophy (referred to at length above) is balanced by Horkheimer's insistence on the partnership between philosophy and the empirical sciences and Burton's own equivocal position on the co-determinants – both biological/neurological and otherwise – of basic Human Needs, as displayed in his discussion on the topic in *Violence Explained* (1990: 37). These considerations, among others, lead us to conclude that it is fair to characterize the status of positivism in CTFS and Human Needs Theory, at least as far as Burton is concerned, as nuanced. The truth, as has often been argued, is rarely simple. The result of this witch hunt against the remnants of positivism in Burton's work, as exemplified by Lauren Park's contribution, however, has led to the unfortunate and perhaps unintended consequence of his valuable and considerable scholarship being unjustifiably dismissed *en masse* out of hand. This, in our view, is an injustice to Burton's scholarship and the discipline of conflict management/transformation as a whole and demands redressing. Burton's own position was that the basic human needs approach needed further research and elaboration insofar as it pertained to conflict resolution. In reaching this perspective, a comprehensive overview of both French and German contemporaneous, continental philosophy has proved to be invaluable.

Burton has thrown down the gauntlet to the field of conflict scholarship regarding a very promising direction for further inquiry. Beyond the critique of the few scholars some of whom we have mentioned above, we note a singular lack of response in taking up the challenge, as much of the recent literature in the Peace and Conflict Resolution field seems to largely concern itself with praxis, rather than the pursuit of a research agenda designed to refine the theoretical understandings proposed by John Burton (and others). We therefore stand with Tim Jacoby (2008) who makes the important point that much of the recent scholarship in the conflict management field has been on the partial abandonment of the scholarly pursuit of theoretical explanation for apprehending the causes of conflicts, in favour of how best to respond. Hopefully, this humble contribution will constitute a gentle nudge in the opposite direction.

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Information about the Authors

Jeffrey D. Pugh is Assistant Professor in the Department of Conflict Resolution, Human Security and Global Governance at the University of Massachusetts, Boston. He is also the Executive Director of the Center for Mediation, Peace, and Resolution of Conflict (CEMPROC) in Quito, Ecuador, and he previously taught political science at Providence College. His research focuses especially on the role of non-state actors as peacebuilders in Latin America.

Jon Unruh is Professor in the Department of Geography at McGill University in Montreal. He has over 25 years experience of developing and implementing research, policy and practice on land and property rights in war-affected regions of the Middle East, Latin America, Africa, and Asia. He has worked with the UN, the World Bank, USAID and other multilateral and bilateral donors in Liberia, Somalia, Mozambique, East Timor, Sierra Leone, Ethiopia, Uganda, Zambia, Malawi, Madagascar, Cambodia, Angola, Cameroon, Jordan, Colombia, Peru, Zanzibar, Kenya and Saudi Arabia. Most recently he has assisted the UN with housing, land and property (HLP) restitution programmes in Sri Lanka and Yemen as well as a digital media approach to mass HLP restitution claims for refugees and internally displaced persons in Syria and Iraq.

Terry Beitzel is Director of the Mahatma Gandhi Center and Associate Professor in Justice Studies at James Madison University. He teaches about social responsibility and justice as related to war, violence and nonviolence, and revolution. His work at the Gandhi Center focuses on peace through students' involvement in the refugee community, prisons, and Peace Camp. Professor Beitzel's research interests include nonviolent revolutions, conflict theory, peacebuilding, restorative justice, and international human rights.

Gavin Bradshaw is the founder of the largest postgraduate programme in Conflict Transformation and Management in the Southern Hemisphere at the Nelson Mandela University. Besides having played a leading role in the South African National Peace Accord, Prof Bradshaw has gained an outstanding international reputation for his contribution to conflict management in Sudan. In this regard, Professor Bradshaw facilitated problem-solving workshops between North & South Sudanese leadership groups (2005) and designed and presented a leadership programme for Southern Sudanese leaders (2009) in collaboration with Africa Educational Trust. He also trained the UN Peacekeeping Mission in South Sudan (2015). Prof Bradshaw's recent publications include *Conflict Management for South African Students* (2008), *Ground Rules: Considerations in Respect of Resolving Conflicts Around the Land Question In South Africa* and *Towards a Measure of Social Cohesion for South Africa* (2017).

Casper Lutter is a comparative criminologist (from a trans-disciplinary philosophical perspective) with an interest in conflict management or resolution. Dr. Lutter's publications include *the Integration of Ex-Offenders in South Africa*. He is currently collaborating with the Department of Politics and Conflict Studies at the Nelson Mandela University. His most recent research focuses on a re-appraisal of John W. Burton's work and conflict resolution.