

## REPARATION, DECOLONIZATION AND INTERNATIONAL LAW: THE HEALING ROLE OF REPARATION

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Increasing awareness of the tremendous damage done to indigenous peoples by colonization has drawn attention to the importance of reparation and healing. Decolonization is the deconstruction of conflicts involving structural violence, characterized by discrimination and the unequal distribution of resources between advantaged and disadvantaged groups.<sup>2</sup> It involves rebuilding relationships and perceptions between groups following conflict, and this is fundamental for reconciliation.<sup>3</sup> The reconciliation process is interactive and focuses on healing the individual, the group and society in order to prevent further suffering, reduce injustice and avoid future conflict.<sup>4</sup> Justice is intrinsically concerned with individual wellbeing and societal functioning and, therefore, it is especially pertinent for reconciliation.<sup>5</sup> However, while conflict can lead to changes that reduce injustice, it can also increase injustice, and for peace to be lasting it is important to foster social harmony and healing.

Reparation can promote reconciliation and is a key element of transitional justice.<sup>6</sup> It is important for victims, who often struggle to deal with the consequences of their victimization. Traditionally in criminal law, reparation has focused on financial compensation for losses. However, there is growing recognition that reparation means much more than compensation, and includes symbolic and future-oriented forms of reparation: It may mean providing victims with medical, psychological, legal and social services aimed at promoting their healing (i.e.

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<sup>2</sup> NEVIN T. AIKEN, *IDENTITY, RECONCILIATION AND TRANSITIONAL JUSTICE* (2013).

<sup>3</sup> Arie Nadler, *Intergroup reconciliation : Instruments and socio-emotional processes and the needs-based model*. *EUROP. REV. OF SOC. PSYCH.* 26,93-125 (2012).

<sup>4</sup> Nurit Shnabel and Arie Nadler, *A Needs-Based Model of Reconciliation: Satisfying the differential emotional needs of victim and perpetrator as a key to promoting reconciliation*, *J. OF PERSONALITY AND SO. PSYCH.*, 94(1),116-132 (2008).

<sup>5</sup> Morton Deutsch, *'Equity, Equality, and Need : What Determines Which Value Will be Used as the Basis of Distributive Justice?'* *J. OF SOC. ISSUES*, 31 (2) 137-149 (1975).

<sup>6</sup> Ben Heylen, Stephan Parmentier & Elmar Weitekamp, *'The Emergence of « Holistic Reconciliation »: Lessons Learned from Victims and Offenders Inside the South African Truth and Reconciliation Commission'*, *INT'L PERSPECTIVES IN VICTIMOLOGY*, 5(1) 1-12 (2010). See also Emilie Raymond, *Justice pour les crimes contre l'humanité : point de vue et attentes des victimes* (Masters dissertation, Université de Montréal, 2010).

rehabilitation) and crime prevention measures (i.e. guarantees of non-repetition) aimed at preventing victimization from happening again in the future.<sup>7</sup>

Transitional justice refers to processes and mechanisms used to address past abuses and ensure accountability, which provide justice and achieve reconciliation.<sup>8</sup> According to Wendy Lambourne, transitional justice not only deals with the past but also establishes parameters in order to ensure justice in the present and in the future. Because transitional justice creates a long-term vision of justice, it is important to not only consider reparation for past injustices but also distributive justice for the future.<sup>9</sup>

### *Distributive Justice Theory*

How to distribute reparations in a way that is just and promotes reconciliation is essentially a question about distributive justice (DJ). DJ is concerned with the distribution of conditions, goods, outcomes and other resources, which affect the wellbeing of individual members of a group or community.<sup>10</sup> DJ is particularly salient with respect to decolonization where a history of unjust distributions and systematic victimization of entire groups created large numbers of victims and severely harmed intergroup relations. DJ theory identifies the criteria that lead you to feel you received a fair outcome.<sup>11</sup> In particular, it consists of general standards for allocating benefits or burdens among the members of a group or community.<sup>12</sup> Fair outcomes can

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<sup>7</sup> JO-ANNE WEMMERS, REPARATION FOR VICTIMS OF CRIMES AGAINST HUMANITY : THE HEALING ROLES OF REPARATION (2014), *See* chapter 3 especially p.42-3; WEMMERS, VICTIMOLOGY : A CANADIAN PERSPECTIVE (2017). *See* Chapter 11 on reparative justice and in particular p. 201; UNITED NATIONS, BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPATION FOR VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW (2005).

<sup>8</sup> KAI AMBOS, 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC,' in BUILDING A FUTURE ON PEACE AND JUSTICE: STUDIES ON TRANSITIONAL JUSTICE, PEACE AND DEVELOPMENT THE NUREMBERG DECLARATION ON PEACE AND JUSTICE, ED. KAI AMBOS, JULIE LARGE AND MARIEKE WIERDA, (2009), 19-103; *Report of the Secretary General - United Nations, General on the rule of law and transitional justice in Conflict and Post-conflict Societies*, 23 August 2004, UN Doc. S/2004/616.

<sup>9</sup> Wendy Lambourne, *Transitional Justice and Peacebuilding after Mass Violence*, INT'L J. OF TRANSITIONAL JUSTICE 3, 28-48 (2009).

<sup>10</sup> MORTON DEUTSCH, DISTRIBUTIVE JUSTICE (1985); E. ALLAN LIND AND TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988).

<sup>11</sup> MORTON DEUTSCH, *Justice and Conflict*, in THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE, 41-64, eds. MORTON DEUTSCH & PETER T. COLEMAN (2000).

<sup>12</sup> Daniel Druckman and Cecilia Albin, 'Distributive Justice and the Durability of Peace Agreements,' REV. OF INT'L STUDIES, 37 (3) (2011), 1137-1168.

foster effective social relations and promote individual wellbeing, which is important for reconciliation.<sup>13</sup>

Three essential values, which can be used as a basis of distributive justice identified in the literature are: *equity*, *equality* and *need*. Equity refers to the proportionality of the outcome in relation to the contributions or losses of group members. In other words, those members who have given up the most should receive the most benefits. Equality means treating all members of a group equally.<sup>14</sup> This does not necessarily mean that everyone gets the same outcome but rather it means recognizing the equal social value or worth of everyone in the community.<sup>15</sup> In a need-based distribution, outcomes are proportional to the level of need. In other words, the most needy receive the most outcomes. According to Morton Deutsch, determining which values will be employed as the basis of justice depends on certain conditions such as the goal of the distribution with respect to the wellbeing or the maintenance of the community.<sup>16</sup> Injustice occurs when the moral or ethical standard for a fair distribution is violated.<sup>17</sup>

*Equity*, according to Deutsch, is the dominant principle of DJ in cooperative relationships in which economic productivity is the primary goal. However, while equitable distributions promote economic productivity within society, over the long run, the equity principle is likely to be dysfunctional for the wellbeing of the group. Equitable distributions tend to foster the introduction of economic values in all aspects of social life and result in a diminished quality of life.<sup>18</sup> While equitable, a proportional distribution would not, according to Deutsch, promote collective or individual healing. Instead, equity fosters competitiveness, selfishness and leads to clashes within the group. Whereas distributive systems based on equality and need are associated with more *cooperative* feelings.<sup>19</sup>

In cooperative relations, in which fostering personal development and personal welfare is the common goal, need is the dominant principle of distributive justice. This approach draws attention to the idea that there are fundamental human needs, such as physiological needs, the need for security, the need for a positive identity and the need for positive connections to other people.<sup>20</sup> Healing the individual requires that victims' basic human needs be met.

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<sup>13</sup> MORTON DEUTSCH, "*Justice and Conflict*" in CONFLICT, INTERDEPENDENCE AND JUSTICE: THE INTELLECTUAL LEGACY OF MORTON DEUTSCH, ed. PETER COLEMAN 95-118 (2011).

<sup>14</sup> *Supra*, note 10.

<sup>15</sup> Morton Deutsch, 2011, at 97-98. *Supra*, note 13.

<sup>16</sup> *Supra*, note 11, at 42-44; 2011, at 97-98; Morton Deutsch, *Equity, Equality, and Need: What Determines Which Value Will Be Used as the Basis of Distributive Justice?* J. OF SOC. SCIENCES, 31,3,137-149 (1975).

<sup>17</sup> Zinta S. Byrnes and Russell Cropanzano, '*The History of Organization Justice: The Founders Speak*,' in JUSTICE IN THE WORKPLACE : FROM THEORY TO PRACTICE, Vol. 2, ed. RUSSELL CROPANZANO (2001), 3-26.

<sup>18</sup> *Supra*, notes 11 and 13.

<sup>19</sup> *Supra*, note 10.

<sup>20</sup> See JO-ANNE WEMMERS, VICTIMOLOGY : A CANADIAN PERSPECTIVE, Chapter 6 (2017); Eric Staub, *Notes on cultures of violence, cultures of caring and peace and the fulfilment of basic human needs*, POL. PSYCH., 24, 1, 1-21 (2003).

In cooperative relations in which the fostering or maintenance of positive social relations is the common goal, *equality* will be the dominant principle of distributive justice. This is particularly salient in the context of reconciliation where the aim is to heal relations between groups. Equality, which recognizes the dignity of all individuals, reflects a human rights approach to justice and healing.<sup>21</sup> With its emphasis on victims' humanity, equality fosters cooperative feelings towards others and the development of friendly attitudes.<sup>22</sup>

Sometimes all three goals (i.e. economic productivity, personal welfare and positive social relations) are important and in these situations, the three distributive principles (i.e. equity, equality and need) should be applied in a manner that is *mutually supportive*.<sup>23</sup> Concretely, this means that equity, equality, and need-based distributions are combined in a way that is positive and generates social harmony and healing. In order to promote social harmony, the equal social value of everyone in the community is affirmed and no distinctions are made between those who are recognized and those who are not, while at the same time, the community may revere individuals who made uniquely important sacrifices. Also, the equal worth of every human being means ensuring that those who are especially needy receive the help they need.<sup>24</sup> The idea is to create a win-win situation in which one person's gain does not mean that the other group members have lost something.

As we saw, reparation encompasses a variety of forms, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The many different forms of reparation provide flexibility and an ability to tailor a response that meets these different goals. Hence, a just distribution might acknowledge those who made great sacrifices (e.g. commemoration), while distributing reparation in a manner that recognizes the humanity in everyone, and provides help to those in need (e.g. rehabilitation).

In contrast, a *mutually contradictory* application of the principles of DJ creates conflict. If, for example, the equity principle is applied in a manner that suggests those who lost more are more worthy, and entitled to superior treatment generally, then social harmony and cohesiveness are impaired. It becomes a win-lose situation in which one person gets all and the others get nothing. Similarly, if the equality principle leads to a sameness or uniformity in which the value of unique individual contributions or sacrifices is denied, then productivity as well as social cohesion is impaired. As Deutsch points out, the combined application of these different principles of justice is a delicate balance that often tilts too far in one direction or the other.<sup>25</sup> If not done properly, reparation may actually hinder reconciliation, creating competition and selfishness, which may fuel new clashes in the future.

### Conclusion

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<sup>21</sup> See Michael Ignatieff, 'The Attack on Human Rights,' FOR. AFFAIRS, 80, 102-116 (2001); Jo-Anne Wemmers, *Victims Rights are Human Rights: The importance of recognizing victims as persons*, TEMIDA, 15,2,71-82 (2012).

<sup>22</sup> *Supra* note 13 at 97-98.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

Reparation, and in particular, how it is distributed, can impact reconciliation. The unjust distribution of reparation can increase injustice, fuel conflict and hinder reconciliation. In the context of decolonization, it is important to implement standards for distribution that foster positive social relations. In order to promote reconciliation, reparations should, therefore, follow a human rights approach and recognize the dignity of all victims.<sup>26</sup> Specifically, the distribution of reparations should be based on the principles of equality and need in order to foster healthy intergroup relations and individual healing. Exceptional sacrifices can still be recognized, but only if it is done in a way that does not undermine the equal moral value of all victims. By bearing in mind the impact of distributive justice on relationships, the healing role of reparation can be fulfilled.

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<sup>26</sup> See JO-ANNE WEMMERS, *VICTIMOLOGY : A CANADIAN PERSPECTIVE*, Chapter 11, *Reparative Justice*, (2017).