

## Chapter 3 – Theoretical Framework

The preceding chapter evinced that reparation practice in transitional justice does not reflect the normative approach and rules identified in chapter one. Isolated incidents of such disparity could be brushed off as mere violations of the international law on reparation. However, the deviation is standard and responds to challenges inherent in the transitional justice situation – suggesting that not the practice but the norms are inadequate. To further substantiate that premise, this chapter will examine the question: *What is the purpose of reparation in transitional justice?*

The answer will provide a deeper understanding of how and why reparation in transitional justice differs from the international law on reparation. It will also enable teleological reasoning. Together with the practical insights of chapter two, this chapter will thereby constitute a further guide rail along which chapter four can adapt the international law on reparation to the unique challenges of transitional justice. Unfortunately, posing the question is more straightforward than answering it. Transitional justice is a rapidly growing field; it confronts scholars who want to engage with its fascinating enigmas with an unmanageable number of debates, perspectives, and opinions. The tremendous growth rate of transitional justice scholarship, its interdisciplinary nature, and the prevalence of descriptive, case-study-centered approaches makes it even harder to orient oneself. Anachronistically, de Greiff's lament that transitional justice is "tremendously undertheorized"<sup>883</sup> holds nonetheless. The wealth of scholarship does neither converge towards an accepted definition of transitional justice nor agree on its goals or the inner workings of its measures. Even whether it is an independent field of study remains open for debate.<sup>884</sup> The dearth of agreement on the theoretical foundations of transitional justice forecloses any appeal to authority, mandating that this study explicates and justifies its assumptions about the purpose of reparation in transitional justice. This first requires a vague definition of

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883 de Greiff, *Theorizing Transitional Justice*, in: Williams et al. (eds.), *Transitional Justice*, 2012, 27, 31f. Specifically for reparation with the same sentiment Posner/Vermeule, *Reparations for Slavery and Other Historical Injustices*, 2003 Col. L. Rev. 103, 689, 689 f.

884 Bell, *Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'*, 2009 Intl. J. Transit. Just. 3(1), 5.

transitional justice (A.) before the role(s) of reparation in transitional justice can be examined (B. and C.).

To prevent the argument from becoming entangled in countless tangential controversies, it will be restricted to what is necessary for answering this chapter's central question. For that, the argument concentrates on the purpose of *reparation*. It will not pursue implications for other transitional justice measures or transitional justice in general. Since this chapter aims to enable *legal* reasoning, the study takes a legalistic perspective. From that perspective, positive law must be followed without requiring further justification. The comfort of this perspective comes at a cost. The dominance of legalistic approaches in transitional justice has been rightfully criticized. They tend to overemphasize the law's effect and fail to capture the influence of non-state actors and non-legal mechanisms adequately.<sup>885</sup> The following account must plead guilty to the same charge. It ignores the contributions of these actors and mechanisms. It does so not for their lack of importance – they might be the true pillar upon which successful transitions rest<sup>886</sup> – but because the relevant body of law, human rights law, as of now centers on states.<sup>887</sup> The resulting blind spots call for “legal humility”<sup>888</sup>: Law is not the most effective, most advisable, or most important lens through which transitional justice can be viewed. Successful transitional justice processes require creativity and ingenuity, which the law cannot mandate. For that reason, the law cannot ensure the success of transitional justice processes. Nevertheless, concrete, shared, verifiable legal obligations can facilitate the implementation of justice under challenging circumstances. Within these limits, the law has

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885 McEvoy, *Beyond Legalism - Towards a Thicker Understanding of Transitional Justice*, 2007 J. L. Soc. 34(4), 411; McEvoy, *Letting Go of Legalism - Developing a 'Thicker' Version of Transitional Justice*, in: McEvoy/McGregor (eds.), *Transitional Justice From Below - Grassroots Activism and the Struggle for Change*, 2008, 47; Nagy, *Transitional Justice as Global Project*, 276 f., 278 f., 284 ff.; Sriram, *Beyond Transitional Justice - Peace, Governance, and Rule of Law*, 2017 Intl. Stud. Rev. 19(1), 53, 56, 64; Gready, *Analysis - Reconceptualising Transitional Justice - Embedded and Distanced Justice*, 2005 Conflict Sec. Dev. 5(1), 3.

886 The author had the privilege to witness the important work of non-state actors in transitional justice processes in Sierra Leone and Colombia especially through extensive interviews with John Caulker from Fambul Tok (Sierra Leone) and Yolanda Sierra León from the Universidad Externado (Colombia) and is extremely grateful for these inspiring discussions. For details see further below, Conclusion, F.

887 On the connection between non-state actors and state responsibility see above, Ch. 1 B.III.

888 McEvoy, *Beyond Legalism*, 425 ff.

an important role to play, regardless of its relative importance to other perspectives and methods.<sup>889</sup>

### A. Defining Transitional Justice

Discerning the purpose of reparation in transitional justice requires an understanding of what transitional justice is. While the Introduction above already introduced this study's understanding of the term, it only sketched the explanation and justification of that understanding.<sup>890</sup> As mentioned above, since no shared understanding of the concept of transitional justice exists, this does not suffice. Hence, the following section will justify why this study defines transitional justice as:

*A state's attempt to address a legacy of systematic human rights violations, which aims to transform society towards strengthened respect for human rights and generalized trust. The latter is defined as the expectation that other members of society and state institutions adhere to and support human rights.*

Transitional justice refers to a political practice, the scientific field studying that practice, and a body of law governing it.<sup>891</sup> The variety of political practices covered by the term grew by leaps and bounds throughout its short history.<sup>892</sup> Transitional justice started narrowly, defined solely as the transition from autocratic to democratic regimes. It soon evolved to cover the shift from conflict to peace. Lately, it was also applied to describe stable

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889 On legal humility see also above, Introduction, A. and below Conclusion, D.

890 See above, Introduction.

891 Eisikovits, *Transitional Justice*, in: Zalta (ed.), *Stanford Encyclopedia of Philosophy*, Online Edition 2016. An example of that legal approach is provided by Bell, *The "New Law" of Transitional Justice*, in: Ambos et al. (eds.), *Building a Future on Peace and Justice - Studies on Transitional Justice, Peace and Development*, 2009, 105.

892 Of course, it is difficult to pinpoint the origin of transitional justice. One possibility is to credit a 1979 conference on how emerging democracies reckon with past authoritarian regimes with starting the discourse, Zunino, *Justice Framed – A Genealogy of Transitional Justice*, 2019, 59 ff. Neil Kritz's three-volume study on the topic certainly was a milestone, Kritz, *Transitional Justice – How Emerging Democracies Reckon With Former Regimes*, 1995. For the development of the field generally see Mihr, *An Introduction to Transitional Justice*, in: Simić (ed.), *An Introduction to Transitional Justice*, 2021, 1, 7 ff. and, more detailed, Reiter, *The Development of Transitional Justice*, in: Simić (ed.), *An Introduction to Transitional Justice*, 2021, 29 ff.

democracies' attempts to deal with a violent past. Colombia contributed an example of transitional justice during an ongoing conflict to the field.<sup>893</sup> As a result of this expansion of potential transitional justice situations, the field's boundaries became ambiguous. Fortunately, an answer to the core question of the purpose of reparation in transitional justice does not warrant a complete definition of the term. Presumably, teleological reasoning will become the more precise, the better the definition is. But even a vague definition will give an idea of the goal of reparation, enabling solid – albeit not perfect – teleological reasoning.<sup>894</sup> Naturally, the subsequent attempt at defining transitional justice is not the first of its kind. On the contrary, the number of transitional justice definitions probably approaches that of transitional justice scholars worldwide. Hence, the definition presented here is nothing but a modified version of existing accounts.<sup>895</sup>

## I. Justice

There is virtual unanimity in scholarship and practice about what links transitional justice to justice: The field searches for ways to provide justice in the face of a legacy of systematic human rights violations.<sup>896</sup> This rare

893 Hansen, *The Vertical and Horizontal Expansion of Transitional Justice - Explanations and Implications for a Contested Field*, in: Buckley-Zistel (ed.), *Transitional Justice Theories*, 2014, 105, 109; Weiffen, *Transitional Justice - Eine Konzeptionelle Auseinandersetzung*, in: Mihr et al. (eds.), *Handbuch Transitional Justice*, 2015, 1, 7 ff.; Arthur, *How Transitions Reshaped Human Rights - A Conceptual History of Transitional Justice*, 2009 Hum. Rts. Q. 31(2), 321, 334 ff.; Huhle, *Transitional Justice*, in: Binder et al. (eds.), *Elgar Encyclopedia of Human Rights*, Online Edition 2022, para 18 ff, 23.

894 A vague definition tolerates borderline cases, which neither fall within nor outside its ambit, Sorensen, *Vagueness*, in: Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, Online Edition 2018.

895 The present account was heavily influenced by de Greiff, *Theorizing Transitional Justice*; de Greiff, *A Normative Conception of Transitional Justice*, 2010 *Politorbis* 50(3), 17.

896 UN Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies - Report of the Secretary-General*, S/2004/616, 2004, para 8; ICTJ, *What is Transitional Justice?*, 2009, 1; AU, *Transitional Justice Policy*, 2019, para 19; CEU, *The EU's Policy Framework on Support to Transitional Justice*, 13576/15 Annex to Annex, 2015, 7; Teitel, *Transitional Justice Genealogy*, 2003 Harv. Hum. Rts. J. 16, 69, 69; Seibert-Fohr, *Transitional Justice in Post-Conflict Situations*, in: Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Online Edition 2015, para 1; Eisikovits, *Transitional Justice*, subsec. 1. In line with the legalistic perspective, "justice" will not be further defined. It is assumed that the fulfillment of international legal obligations towards survivors and society in general constitutes justice.

occasion of harmony in the contested transitional justice world provides a safe foundation for a more detailed definition. To make it truly reliable, the term “systematic” requires some clarification. As will be argued below, transitional justice reacts to the specific consequences of systematic human rights violations.<sup>897</sup> Systematic norm transgression undermines the trust members of societies have in the validity of basic norms. This erodes and ultimately destroys those norms.<sup>898</sup> These consequences occur when human rights transgressions become normalized in society. It must attain such a probability that it influences large parts of the quotidian life of members of society.<sup>899</sup> The exact determination of this threshold is of limited relevance here. Suffice it to say that the quantity and quality of human rights violations are relevant for its determination. Since the erosion of trust relates to a subjective state of mind, not only the objective occurrence of such violations matters but also how members of society perceive their quantity and quality.<sup>900</sup> It suffices that norm transgression becomes normalized for a defined subset of the population, as trust can erode within such subsets. In the past, transitional justice hence responded to systematic violations, which only affected minorities, specific geographical areas, etc.<sup>901</sup>

## II. Transition

Transitional justice starts with a legacy of systematic human rights violations: It should be employed when systematic human rights violations occurred. That only denotes the situation in which transitional justice should start; but where lies the finish line? What does it mean to “address” a legacy of systematic human rights violations? In contrast to the unanimity encountered before, this question is highly controversial. Some evade it by employing a “toolbox approach” to transitional justice. They define a set of transitional justice measures – usually prosecutions, truth-seeking, reparations, and others –

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897 See below, A.II.

898 See below, A.II.1.

899 Murphy, *The Conceptual Foundations of Transitional Justice*, 2017, 55 f.

900 For the latter point see Shelton, *Remedies in International Human Rights Law*, 121.

901 Examples of such limited transitional justice efforts are the Greensboro Truth Commission and Canada’s Truth and Reconciliation Commission, Magarrell/Wesley, *Learning from Greensboro - Truth and Reconciliation in the United States*; TRC Canada, *Summary of the Final Report*.

and concentrate on making them work under challenging circumstances.<sup>902</sup> While essential for transitional justice practice, such an approach is not suitable for this study. Teleological reasoning requires a normative account. Such accounts take transitional justice to be a transformative project, which responds to systematic human rights violations by seeking societal change. This begs the question of what that change entails. From a legalistic perspective, one goal of society's transition is evident. If states must adhere to their legal obligations, the change required after systematic human rights violations is cessation and non-repetition: Society must change towards general respect for human rights.<sup>903</sup> Of course, that goal in no way differs from the goal of human rights law generally. What makes transitional justice distinct is the societal situation it operates in. The societal effects of systematic human rights violations differ from those of isolated violations. As the following sections will detail, systematic human rights violations undermine and ultimately destroy the validity of human rights in society (1.). The usual tools to deal with human rights violations are inept at responding to this effect. They are geared to mitigate the individual consequences of isolated violations – e.g., through individual prosecutions, arithmetic reparation, etc. Hence, they cannot adequately respond to the challenge that systematic violations pose to the validity of norms.<sup>904</sup> In the transitional situation, the goal of respect for human rights is therefore too far removed from reality to provide guidance. A mediate goal to bridge that gap is needed (2.) – and a more thorough understanding of the effects of systematic human rights violations provides the key to find it.

### 1. The Erosion of Trust

Systematic human rights violations erode trust. Trust materializes in societal relations. For analytical purposes, these relations will be grouped into

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902 Naturally, such an approach is dominant – even though not exclusive – in more practically oriented publications on the subject, such as UN Secretary General, *The Rule of Law and Transitional Justice*, S/2004/616, para 8; Viane/Brems, *Transitional Justice and Cultural Contexts - Learning from the Universality Debate*, 2010 Neth. Q. Hum. Rts. 28(2), 199, 200; Sharp, *Addressing Dilemmas of the Global and the Local in Transitional Justice*, 2014 Emory Intl. L. Rev. 29(1), 71, 75 ff.

903 De Greiff seems to hint at this goal when stating that transitional justice should give “force to human rights norms that were systematically violated”, de Greiff, *Theorizing Transitional Justice*, 40.

904 de Greiff, *Justice and Reparations*, in: Miller/Kumar (eds.), *Reparations - Interdisciplinary Inquiries*, 2007, 153, 156 f.

relations between members of society on the one hand (horizontal relations, a.) and between members of society and state institutions on the other (vertical relations, b.).

#### a. Horizontal Trust

Trust finds its primary and paradigmatic application as horizontal trust in interpersonal relationships. In this realm, it denotes a three-way relationship, in which person A trusts person B with a thing or issue C. B has some discretionary power over C, which A trusts that B will use as A expects them to. This trust makes A vulnerable because B could disappoint their expectation.<sup>905</sup> The mere expectation of behavior is not sufficient to define trust. If B always smiles at A, A might expect B to continue to do so. If one day B does not smile because they have a bad day, A could hardly lament that they misplaced trust in B. In that case, A merely relied on B; they did not trust B.<sup>906</sup> The difference between reliance and trust lies in the reason for which A expects B to use their discretion over C in a certain way. Whereas reliance rests on the consistency of behavior over time, trust relies on normative expectations. A trusts B to behave in a certain way with C because B *should* behave that way for normative reasons. A can trust B not to take their wallet (C) because A expects B to adhere to the social and legal norm that one should not steal. Trust thus denotes reliance on the fact that another person will conform to normative expectations regarding a thing or issue over which they have discretionary power.<sup>907</sup>

In interpersonal relationships, trust can arise because a person proved trustworthy in the past. This mode of creating trust cannot be scaled up to a societal level because it relies on gaining information about a person's past

905 Baier, *Trust and Antitrust*, 1986 *Ethics* 96(2), 231, 235, 237; Baier, *Trust - The Tanner Lectures on Human Values*, 1991, 117.

906 On the distinction see Goldberg, *Trust and Reliance*, in: Simon (ed.), *The Routledge Handbook of Trust and Philosophy*, 2020, 97, 97 ff.

907 Jones, *Trust and Terror*, in: Desautels/Walker (eds.), *Moral Psychology - Feminist Ethics and Social Theory*, 2004, 3, 6; Frost-Arnold, *Imposters, Tricksters, and Trustworthiness as an Epistemic Virtue*, 2014 *Hypatia* 29(4), 790, 796; Walker, *Moral Repair - Reconstructing Moral Relations After Wrongdoing*, 2006, 79 f. With that, this account follows a normative expectation approach to trust. For an overview of criticism of that approach and alternatives see McLeod, *Trust*, in: Zalta (ed.), *Stanford Encyclopedia of Philosophy*, Online Edition 2020.

behavior. Societal trust does not rely on interpersonal information but shared societal normative expectations.<sup>908</sup> These, in turn, often rely on social roles.<sup>909</sup> The most crucial role in the present context is that of Member of Society.<sup>910</sup> Each member of society expects from other members of society that they adhere to basic norms. To give an example, probably all societies around the globe expect their members in principle not to kill or otherwise harm fellow members of society. Since one knows any given individual to have the role of Member of Society, one can expect every individual to adhere to such basic social norms. Put else, one can trust them to do so.<sup>911</sup> Horizontal societal trust thus hinges on the existence of basic social norms.

These norms exist if enough persons within a reference group prefer to follow the norm because they have the empirical expectation that other persons in the reference group will do the same and the normative expectation that other persons expect them to do what the norm demands. This can be illustrated in a slightly simplified way by the following formula:

$$R \rightarrow P' \in P = ee + ne$$

where R is a social norm, P' a sufficiently large subset ( $\in$ ) of reference network P, ee empirical expectations and ne normative expectations.<sup>912</sup> To give an example, if A observes that from all inhabitants of his village (reference

908 Walker, *Moral Repair*, 75 ff.; de Greiff, *Theorizing Transitional Justice*, 45.

909 Jones, *Trust and Terror*, 7; Jones, *Trustworthiness*, 2012 *Ethics* 123(1), 61, 68; Walker, *Moral Repair*, 73, 81. Social role is defined with Dahrendorf as the bundle of expectations towards the behavior of someone in a certain social position. Such expectations exist in any human group, Dahrendorf, *Homo Sociologicus - Ein Versuch zur Geschichte, Bedeutung und Kritik der Kategorie der Sozialen Rolle*, 16th Edition 2006, 37, 39, 53.

910 Contrary to lamentable developments in national and international politics around the globe, Member of Society is used here to designate all persons, who take part in the daily life of a society. This includes refugees, persons without a legal status, minorities etc.

911 de Greiff, *Theorizing Transitional Justice*, 44 f. The notion of a social role of Member of Society was introduced into the argument by the author. Individuals must have a reason to expect exactly the person they interact with to adhere to basic norms. Such an expectation towards a concrete person must be based on information. That other persons are members of society is the only information, an individual has about virtually any person they interact with, which can justify the expectation of adherence to basic norms. Similarly on the role of "citizen", Hardimon, *Role Obligations*, 1994 *J. Phil.* 91(7), 333, 342 ff. For a complementary theory of similar conventional roles as relevant for this account see below, C.I.

912 Bicchieri, *Norms in the Wild*, 2017, 36; Bicchieri, *The Grammar of Society*, 2006, ch. 1.



network, P), a large number goes to church on Sundays, he expects them to do the same in the future (empirical expectation, ee). Suppose A also thinks that the other inhabitants of his village expect him to go to church on Sundays (normative expectation, ne). In that case, he will believe that a corresponding social norm exists. If enough village inhabitants (subset of reference network P, P') form the same empirical and normative expectations as A, such a social norm (R) will form within that village.<sup>913</sup> For now, it is assumed that most societies have basic social norms, with which they expect all members of society to comply, and which correspond to a degree with some human rights.<sup>914</sup> There are, for example, social norms not to kill, not to treat persons inhumanely, etc. To emphasize, it is only claimed that basic social norms *correspond to some human rights to a degree*. First, it is not claimed that human rights cause social norms or vice versa. Second, not all human rights have a corresponding social norm everywhere. Lastly, the content of the corresponding norms is not necessarily congruent. This already follows from the fact that they have different addressees. Whereas social norms address members of society, human rights address the state. They might also differ materially. There might be a social norm not to discriminate and not to treat persons inhumanely. Contrary to the corresponding human rights norm, in some communities, that social norm seems reconcilable with gross abuse of certain groups, e.g., people of color or refugees.<sup>915</sup> Still, the material content of human rights and basic social norms can correspond to a degree. As a result of this overlap, systematic human rights violations will often violate not only legal but also social norms:

913 For the purpose of this study, it is immaterial, how this process of norm formation starts. For different possibilities see Brennan et al., *Explaining Norms*, 2013, 96 ff.

914 This description resembles Rawls' "well-ordered society", Rawls, *A Theory of Justice*, Revised Edition 1999, 4 ff. It will be argued below, in this section, that this empirical requirement is not necessary.

915 Amnesty International, *Living Insecurity - How Germany is Failing Victims of Racist Violence*, 2016, 41 ff.; HRC, *Report of the Working Group of Experts on People of African Descent on its Mission to Germany*, A/HRC/36/60/Add.2, 2017, para 30 ff., 42 ff., 52.

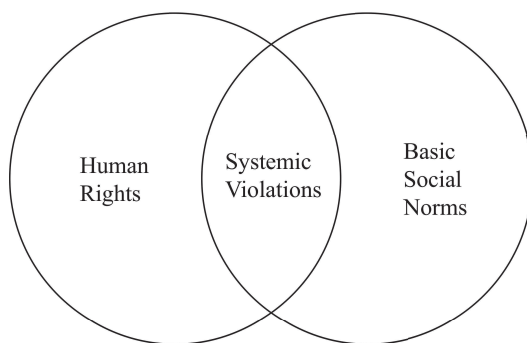


Figure 3: *Human Rights and Social Norms (created by the author)*

Since social norms rely on the empirical observation that a sufficiently large number of persons adhere to them, their systematic violation weakens and ultimately destroys them.<sup>916</sup> If that happens, any given person can no longer expect members of society to adhere to basic social norms, undermining the basis of generalized horizontal trust. Hence, systematic human rights violations weaken and ultimately destroy generalized horizontal trust.<sup>917</sup>

#### b. Vertical Trust

A similar process occurs for the vertical relationship between members of society and state institutions. The conceptualization of vertical trust needs to be adjusted, though, because state institutions are abstract entities that cannot commit to social norms. They have, however, an ethos or culture, which all members of the institution are expected to follow.<sup>918</sup> Based on this,

916 Brennan et al., *Explaining Norms*, 106 ff.; Bicchieri, *Norms in the Wild*, 109 f., 124 f., 137 ff.; Bicchieri, *The Grammar of Society*, 26 ff.

917 As indicated above, A.I., this can either happen in general society or in subsets of society affected by systematic human rights violations. For empirical studies supporting this assumption see Cassar et al., *Legacies of Violence - Trust and Market Development*, 2013 J. Econ. Growth 18(3), 285, 286 f.; Rohner et al., *Seeds of Distrust - Conflict in Uganda*, 2013 J. Econ. Growth 18(3), 217, 230 f.; de Luca/Verpoorten, *From Vice to Virtue? Civil War and Social Capital in Uganda - LICOS Discussion Paper Series 298/2011*, 2011, 19 f.

918 Miller, *The Moral Foundations of Social Institutions - A Philosophical Study*, 2009, 49 f.; Offe, *How can we Trust our Fellow Citizens?*, in: Warren (ed.), *Democracy and Trust*, 1999, 42, 70; Miller, *Social Institutions*, in: Zalta (ed.), *The Stanford Encyclopedia*

state institutions can embody basic *institutional* norms. Generalized trust in state institutions then denotes the expectation that the persons running those institutions adhere to basic institutional norms, and that a sufficiently large subset of society supports these norms, guaranteeing the institutions' continued existence.<sup>919</sup>

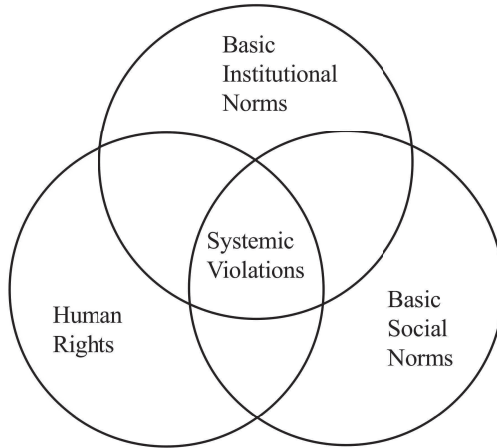


Figure 4: *Human Rights, Social Norms, and Institutional Norms (created by the author)*

If institutional norms are constantly violated, there is no reason to expect institutions and other members of society to uphold them, destroying the basis for generalized trust in state institutions.<sup>920</sup> Subject to the same caveats as above, it can be assumed that some basic institutional norms correspond to a degree to some human rights and some basic social norms. Hence, systematic human rights violations also violate social and institutional norms:

In sum, systematic human rights violations also violate basic social and institutional norms. Empirical and normative expectations uphold both so

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of *Philosophy*, Online Edition 2014; Bahdi/Kassis, *Institutional Trustworthiness, Transformative Judicial Education and Transitional Justice - A Palestinian Experience*, in: El-Masri et al. (eds.), *Transitional Justice in Comparative Perspective*, 2020, 185, 189; Rawls, *A Theory of Justice*, 47 ff.; Hartmann, *Vertrauen - Die Unsichtbare Macht*, 2020, 126 ff.; Walker, *Moral Repair*, 83 f.

919 de Greiff, *Theorizing Transitional Justice*, 45 f.; Offe, *How can we Trust our Fellow Citizens?*, 70 f.

920 For an empirical study to the same effect see Hutchison/Johnson, *Capacity to Trust? Institutional Capacity, Conflict, and Political Trust in Africa, 2000–2005*, 2011 J. Peace Res. 48(6), 737, 749.

that systematic norm violation weakens and ultimately destroys both. Since basic social and institutional norms form the basis of generalized trust in horizontal and vertical societal relationships, systematic human rights violations ultimately destroy generalized trust in society.

## 2. Restoring Trust

Above, transitional justice was partially defined as a state's attempt to address systematic human rights violations. This suggests that transitional justice must deal with the consequences of systematic human rights violations. Therefore, transitional justice should restore generalized horizontal and vertical trust. Beyond its connection to the consequences of systematic human rights violations, restoring trust is also intrinsically and instrumentally connected to transitional justice's ultimate goal – strengthening respect for human rights. Human agency lies at the core of human rights.<sup>921</sup> Generalized trust strengthens agency because it allows persons to form stable expectations about the behavior and attitude of members of society and state institutions. Such stability enables persons to form life plans. It frees resources to carry them out, which would otherwise be needed to control one's environment. As Luhmann put it, trust allows persons to get up in the morning.<sup>922</sup> To give an example, a constant fear of getting killed forces a person to invest mental and economic resources in their protection, which they cannot employ for other goals. Investing in long-term plans becomes less appealing because the person fears that premature death will deprive them of the benefits. Loss of generalized trust thus greatly diminishes agency.

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921 For one account of autonomy being the core value of human rights see Griffin, *On Human Rights*, 2010, mainly ch. 2. For assessments of the role of agency within the larger discourse on the foundations of human rights see, Biletzki, *The Philosophy of Human Rights*, 2020, 77 ff.; O'Byrne, *Human Rights - An Introduction*, 2013, 49 ff.; Cruft et al., *The Philosophical Foundations of Human Rights - An Overview*, in: Cruft et al. (eds.), *Philosophical Foundations of Human Rights*, 2015, 1, 11 ff.

922 Luhmann/Poggi, *Trust and Power*, 2017, 5, 27 f. On this function of norms see Brennan et al., *Explaining Norms*, 106 f. Walker describes a similar phenomenon under the notion of default trust, Walker, *Moral Repair*, 83 ff. Baier writes that "we inhabit a climate of trust as we inhabit an atmosphere and notice it as we notice air, only when it becomes scarce or polluted", Baier, *Trust and Antitrust*, 234. Of course, trust can also impair agency, if it pertains to normative expectations, which prohibit certain behavior. However, as will be argued below, in this section, transitional justice aims at creating social norms, which correspond to human rights, so that they too have agency at their core.

Several instrumental reasons also connect generalized trust to strengthen human rights. If social and institutional norms correspond to a legal norm, they make compliance with the latter more likely. People internalize social and institutional norms, obtaining an intrinsic motivation to follow them.<sup>923</sup> Reinforcing legal with social norms brings social means of enforcement into play: Society and state institutions usually incentivize compliance with social and institutional norms, whereas they sanction deviance through stigma, ostracism, and other means.<sup>924</sup> Since formal law enforcement is weak in many transitional justice situations, social enforcement mechanisms become essential. Even formal norm enforcement relies on generalized trust. People are more likely to cooperate with law enforcement institutions if they trust them. Without such cooperation, norm enforcement often becomes impossible.<sup>925</sup> Beyond these more obvious connections, it will further be argued below that the concept of restoring trust also provides a way to understand more generally how transitional justice mechanisms can restore respect for human rights in society. Therefore, the concept can bridge the gap mentioned above between that ordinary goal of human rights law and the inability of ordinary means to reach it when dealing with systematic violations.

With that, two independent reasons justify assuming the restoration of trust as a goal of the transition: its connection to the consequences of systematic human rights violations and its connections to the ultimate goal of transitional justice, strengthening respect for human rights. The independence of the latter justification from the former has an important implication. The argument that generalized trust addresses the consequences of systematic human rights violations requires that such consequences actually occurred. That, in turn, requires that basic social and institutional norms corresponding to human rights had existed before systematic human rights violations weakened and destroyed them. In most societies, that assumption will hold. Yet, societies might exist without such basic social and institutional

923 Elster, *The Cement of Society*, 1989, 99 f., 130 ff.; Bicchieri, *Norms in the Wild*, 118 f.

924 Elster, *The Cement of Society*, 99 f., 130 ff.; Bicchieri, *Norms in the Wild*, 118 f.; Coleman, *Foundations of Social Theory*, 1990, 278 ff., 310 f.

925 de Greiff, *Theorizing Transitional Justice*, 47 f.; de Greiff, *Justice and Reparations*, 462 f.; Hartmann, *Vertrauen*, 126 f. Some empirical support for this argument can be derived from, Levi et al., *Conceptualizing Legitimacy, Measuring Legitimizing Beliefs*, 2009 *Am. Behavioral Scientist* 53(3), 354, 356 ff., 363 ff. The researchers found significant correlation between *inter alia* the relationship between perceptions of trustworthiness and procedural fairness of the government and cooperation. Both indicators overlap to a degree with the notion of generalized vertical trust employed here.

norms. Because of the intrinsic and instrumental connections between generalized trust and the transition's ultimate goal of strengthening human rights, the mediate goal of generalized trust can still apply to such societies. Transitional justice can then aim at strengthening respect for human rights by creating trust in new basic social and institutional norms, which correspond to human rights.

### III. Conclusion: A Vague Definition of Transitional Justice

Based on the preceding argument, transitional justice can be defined as follows:

*Transitional justice addresses a legacy of systematic human rights violations. It aims to transform society towards respect for human rights and generalized trust. Generalized trust means that a person can expect other members of society and state institutions to adhere to and support basic social and institutional norms, which correspond to human rights.*

A definition of the often-mentioned transitional justice situation<sup>926</sup> can be derived from this definition of transitional justice. A transitional justice situation is every situation in which systematic human rights violations occurred and which therefore calls for the employment of transitional justice to restore respect for human rights and generalized trust.

### IV. Challenges

Three challenges can be brought against the preceding definition of transitional justice. It could be over-inclusive, under-inclusive, or incapable of adequately capturing the great variety of situations it supposedly applies to. The first two challenges become less pressing when one recalls that this study's aim only requires a vague definition of transitional justice. Even if it turns out that the definition lacks conditions or includes unnecessary ones, it can still help adapt legal standards to the transitional justice situation.

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926 Note that this study uses the terms “transitional justice environment”, “transitional justice situation”, “transitional situation”, “transitional justice context”, “transitional context” and “transitional society” interchangeably with the term transitional justice situation.

Regarding the challenge of over-inclusiveness, many definitions of transitional justice are stricter because they encompass more goals of the transition or more attributes of the transitional justice situation. Many scholars assume that transitional justice aims at reconciliation, the rule of law, or democracy.<sup>927</sup> Others name structural inequality as a necessary attribute of the transitional justice situation.<sup>928</sup> Naturally, a complete rebuttal of such arguments is only possible against concrete proposals. Since academic discussion abounds with such proposals, this section cannot comprehensively refute the challenge of over-inclusiveness. Instead, some general remarks must suffice as an imperfect defense of the preceding argument. As a preliminary point, the narrow legalistic perspective makes the challenge of over-inclusiveness less pressing. The goal to adapt universal legal standards warrants the concentration on necessary conditions of the transitional justice situation. Nothing keeps a state from making the political decision to include further goals in its transitional justice process. For other types of research, other possible attributes of the transitional justice situation might provide valuable insights. Likely, such added goals and attributes would not change the interpretation of the international law on reparation much. Beyond that, two general points can defend the assumption of only two features of the transitional justice situation. First, transitional justice addresses the distinct societal effects of systematic human rights violations. As soon as such effects exist, the route to employ transitional justice should be open. If a definition includes requirements unrelated to the consequences of systematic human rights violations, it might foreclose applying transitional justice measures when they would be an adequate response. Second, the definition proposed here serves to identify cases, which warrant a transformation of legal standards. To guard against extralegal considerations justifying the

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927 An account which comprises all three goals is proposed by de Greiff, *Theorizing Transitional Justice*. His account strongly influenced the present one. Thus, his definition of reconciliation is close to what has been termed here "generalized trust". Other accounts comprising further goals of the transition are for example, Winter, *Towards a Unified Theory of Transitional Justice*, 2013 Intl. J. Transitional Just. 7(2), 235 ff.; Sharp, *Emancipating Transitional Justice From the Bonds of the Paradigmatic Transition*, 2015 Intl. J. Transitional Just. 9(1); Hansen, *Transitional Justice - Toward a Differentiated Theory*, 2011 Oregon Rev. Intl. L. 13(1), 1, 47 ff.; Fletcher/Weinstein, *Violence and Social Repair - Rethinking the Contribution of Justice to Reconciliation*, 2002 Hum. Rts. Q. 24(3), 573, 624 ff.; Crocker, *Reckoning With Past Wrongs - A Normative Framework*, 2012 Ethics Intl. Aff. 13, 43.

928 Murphy, *The Conceptual Foundations of Transitional Justice*, 43 ff.

curtailment of rights, the definition's attributes should be searched solely within the notion of systematic human rights violations.

The opposite view that the account is under-inclusive could argue that transitional justice should not prescribe any goals. Instead, it can be a toolbox for societies to achieve the transitional goals they set for themselves. Here again, the legalistic perspective does not inhibit a state from choosing additional goals. It excludes further goals only for its narrow legalistic purpose. That exclusivity is in order because adapting legal standards to an extraordinary situation must make them more flexible. Assuming respect for human rights and generalized trust as the only necessary goals of the transition ensures that states only enjoy the benefit of more flexible legal standards to safeguard human rights under extraordinary circumstances. A broader notion of transitional justice risks making human rights obligations flexible to a degree that significantly weakens the human rights regime.

The account could also be under-inclusive because it assumes a transition as a necessary goal of transitional justice. Examples of transitional justice processes in stable democracies or during ongoing conflict led some scholars to argue that transitional justice emancipated from the need to pursue a transition.<sup>929</sup> New Zealand accounted for human rights violations against its native population, and Canada dealt with its residential school system through transitional justice measures. Upon closer analysis of New Zealand, Canada, the United States, and Australia, Winter convincingly concluded that transitional justice processes in stable democracies still seek to alter the fundamental norms governing state authority.<sup>930</sup> The same holds for the paradigmatic example of transitional justice during an ongoing conflict, Colombia. In all these cases, systematic human rights violations questioned the validity of fundamental norms governing the relations between the state and society or the affected subset of society. While the respective societies and state institutions remained more or less stable, they still showed their systematic disregard for the human rights of subsections of society. These subsections hence lost their generalized trust. Consequently, these processes do not only aim at individual justice, but also at “healing”, “reconciliation”,

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929 Sharp, *Emancipating Transitional Justice*, 156. Such a position risks nurturing the narrative that the Global North, with which many definitions of “stable democracies” coincide, is not implicated in transitional justice. For a critique of that position see below, Conclusion, E.

930 Winter, *Towards a Unified Theory of Transitional Justice*; Winter, *Transitional Justice in Established Democracies - A Political Theory*, esp. ch. 3 and 5.



etc.<sup>931</sup> By encompassing broader societal change, the notion of transition captures the necessary response to these broader consequences.<sup>932</sup>

Lastly, one could doubt whether a unitary definition is even feasible given the extreme contextual varieties transitional justice situations exhibit. As the present chapter attempts to create a unitary definition, it attempts to refute that challenge. Undeniably, transitional justice situations vary greatly on numerous levels. In response, both goals of the transition – respect for human rights and generalized trust – are sufficiently flexible to be adapted to different contexts. Human rights are inherently flexible and count with different tools to be adapted to different circumstances.<sup>933</sup> Since social and institutional norms arise through societal processes and only correspond to a degree to human rights, the concept allows for flexibility. Thus, even though the aims of the transition should always be to restore respect for human rights and generalized trust, the concrete shape of the two goals will vary with the context they operate in. Ultimately though, in light of the author's heavy natural bias in favor of his own attempt to provide a unitary yet flexible definition of transitional justice, it must be left to the reader to judge its success. As a substitute, the legalistic perspective can justify not the feasibility but the necessity of a unitary definition of transitional justice. From a legalistic perspective, transitional justice is based on universally applicable law, which needs to be adapted to the transitional justice situation.<sup>934</sup> Accordingly, a universal standard should tell norm-addressees, under which circumstances those norms are transformed.

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931 TRC Canada, *Summary of the Final Report*, 183 ff.; Art. 7.01 ff. Indian Residential Schools Settlement Agreement. An example from New Zealand is the apology by the government in accordance with the Deed of Settlement of the Historical Claims of Ngati Tuwharetoa (Bay of Plenty), 48. An overview of some reconciliation efforts in New Zealand can be found in Sullivan, *The Politics of Reconciliation in New Zealand*, 2016 Pol. Sci. 68(2), 124. For Colombia see Final Agreement, e.g. point 2.2.4.

932 See above, ch. 2, E.II.

933 Consider for example the margin of appreciation in the European human rights system. For further details see below, ch. 4, B.III and Brems, *Human Rights - Universality and Diversity*, 2001, 341 ff.

934 This is no statement on the debate about the universality of human rights. The comfortable legalistic perspective can simply rely on the fact that at least the human rights commonly of concern to transitional justice form universal customary international law. For a comprehensive introduction to the debate see, Brems, *Human Rights - Universality and Diversity*. An important contribution to this debate was made by, Mutua, *Human Rights*.

B. *The Role(s) of Reparation in Transitional Justice*

Through defining transitional justice, the present chapter established two goals of the transitional justice process. While an essential stepping-stone, these goals need not equal the purpose(s) of reparation in transitional justice. The following two sections will detail the relationship between the ordinary aim of reparation to provide corrective justice and the transition's objectives.

I. The Deontological and Instrumental Role of Reparation

Since reparation is a transitional justice measure, it seems intuitive that it should further the aims of the transition; for how should transitional justice achieve its goals if not through its measures? The question is whether these aims replace reparation's ordinary aim to provide corrective justice or whether the different aims coexist.<sup>935</sup> The answer depends on one's conception of the nature of transitional justice. Roughly, three positions shape that debate. For the first, transitional justice is a special form of justice with unique features and challenges. Within this framework, transitional justice measures fully serve the goals of the transition. Ordinary justice conceptions are inapplicable.<sup>936</sup> The opposite view disputes the supposedly exceptional character of transitional justice. According to its proponents, all allegedly unique transitional justice features are present in stable democracies as well. Rather than as unique political situations, transitional justice and stable democracies are regarded as opposite ends on a continuum.<sup>937</sup> Accordingly, transitional justice efforts are measured solely against the demands of ordinary justice. That the particular challenges in transitional situations can make it impossible to fulfill those demands completely must be acknowledged and accepted.<sup>938</sup> The third opinion occupies a middle ground between the previously mentioned extremes. Its proponents conceptualize transitional justice as ordinary justice applied in a principled manner to

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935 On corrective justice as the ordinary aim of reparation see above, ch. 1, E.

936 Examples are cited in de Greiff, *Theorizing Transitional Justice*, 40, fn. 71. A particularly apt example of this kind of reasoning is Murphy, *The Conceptual Foundations of Transitional Justice*. For examples in the realm of reparation see below, ch. 4, E.I.

937 Posner/Vermeule, *Transitional Justice as Ordinary Justice*, 2004 Harv. L. Rev. 117(3), 761.

938 Ohlin, *On the Very Idea of Transitional Justice*, 2007 Whitehead J. Dipl. Intl. Rel. 8, 51, 60.

extraordinary circumstances. With that, they anchor transitional justice in ordinary justice while acknowledging that the situation requires modifying it through principled reasoning to fit the extraordinary circumstances of transitional justice.<sup>939</sup>

This last approach provides the most attractive conceptualization of transitional justice. Seeing transitional justice as nothing but ordinary justice, because all phenomena associated with it are also present in stable democracies, misses the essential point. It is not the presence of certain phenomena, which makes transitional justice distinct; it is the extent to which they are present. While instability and norm violations exist in stable democracies, they become normalized in transitional justice situations, fundamentally altering basic norms governing society and eroding generalized trust. The same applies to transitional justice measures. While stable democracies regularly apply some transitional justice measures, e.g., replacing civil servants and unsettling property rights, they do not use them as tools to alter society's norms.<sup>940</sup> They follow ordinary, individualistic justice conceptions, such as corrective justice, and hence cannot appreciate the broader societal effects of systematic norm transgression. Simply put, ordinary justice conceptions leave no room for the transformation necessary in transitional justice situations.<sup>941</sup>

Still, the ordinary justice view should make transitional justice scholars cautious of excessive exceptionalism. Proponents of the special justice view convincingly show why transitional justice has extraordinary demands. They fail to demonstrate why these extraordinary demands render ordinary justice inapplicable. Dismissing ordinary conceptions of justice creates a normative gap. In the contentious political settings of transitions, such a gap risks being filled by unnecessarily low standards or by an extreme form of contextualism, which denies the applicability of general standards altogether. Special justice accounts also easily succumb to a full instrumentalist view of transitional justice measures, seeing them as mere means to achieve societal transformation. Salient demands for individual justice are then in peril of being sacrificed too readily for society's greater good.<sup>942</sup>

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939 de Greiff, *Theorizing Transitional Justice*, 59.

940 Posner/Vermeule, *Transitional Justice as Ordinary Justice*, 777 ff., 783 ff., use these examples to illustrate similarities between transitional and stable situations. A similar argument is made by Teitel, *Transitional Justice Genealogy*, 92 f.

941 Murphy, *The Conceptual Foundations of Transitional Justice*, 96 ff.

942 Ohlin, *On the Very Idea of Transitional Justice*, 54. See also below on extraordinary conceptions of reparation in transitional justice, ch. 4, E.I.

The middle ground view, which conceptualizes transitional justice as ordinary justice applied in a principled manner to extraordinary circumstances, guards against both its competitors' perils. On the one hand, it firmly anchors transitional justice in ordinary justice, countering contextualism, pure instrumentalism, and the arbitrariness of new standards. On the other hand, it allows modifying ordinary standards to accommodate the societal effects of systematic norm transgression. But what exactly does it mean to apply ordinary justice in a principled manner to extraordinary circumstances? Ordinary conceptions of justice still apply. In addition, de Greiff apodictically concludes that transitional justice measures must support restructuring society.<sup>943</sup> Above, it was shown that such restructuring should lead to strengthened respect for human rights and enhanced generalized trust.<sup>944</sup> With that, transitional justice measures attain the dual role of achieving ordinary justice and furthering the transition. That dual role is necessary to provide true justice under the extraordinary circumstances of the transition:

Reparation could hardly achieve corrective justice in transitional situations absent broader societal restructuring.<sup>945</sup> The case studies in chapter two and the previous section evinced that systematic human rights violations cause a distinct form of societal harm. They destroy societal relationships and sow distrust. This harm reverberates back on individuals, deepens their harm, and takes away possible coping mechanisms. Survivors of sexualized violence in Sierra Leone, who had to stay with the RUF, did not only suffer from the violations' immediate physical and psychological effects. Once they returned to their communities, they also encountered discrimination and ostracism, *inter alia*, because they were perceived to belong to rebel forces. Coupled with weak infrastructure and an almost complete lack of economic opportunities after the conflict, many survivors found themselves entangled in a web of overlapping harms, escape from which was extremely difficult. Sierra Leone's example shows that, if left unmitigated, harms on a communal and societal level can undermine any attempt to repair individuals.<sup>946</sup> Under these circumstances, reparation can hardly erase all harm without societal restructuring.

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943 de Greiff, *Theorizing Transitional Justice*, 64.

944 See above, A.II.

945 See also below, ch. 4, E.I.

946 See above, ch. 2, II. For further examples see the case studies on Sierra Leone, Colombia and the ICC and the sources listed there, ch. 2, B.-D.

Vice versa, it is also doubtful whether macrosocial reconstruction is possible without addressing the damages to individuals and their relationships.<sup>947</sup>

Applying corrective justice in transitional situations uncritically, without considering its transitional-justice-specific goals, can also produce unjust results. Systematic human rights violations rarely occur out of a void. They usually are the consequence of preexisting injustices, such as structural inequality, discrimination, etc.<sup>948</sup> Corrective justice restores survivors to the status quo ante. When employed uncritically, it thus risks returning individuals to such previous, unjust states. Tasking reparation with furthering the transition can mitigate that risk.<sup>949</sup>

Additional pragmatic reasons justify opening reparation to the transitional-justice-specific goal of societal restructuring. Societal restructuring is an arduous task with an unclear outcome. Each policy employed to that end has its weaknesses, and all available policies must be combined to increase the chance of success.<sup>950</sup> Further, reparation in transitional justice is often a high-profile policy in times of normative uncertainty. As such, it will have some effect on society. The very least a state can do is trying to steer this effect in a preferable direction.

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947 On different aspects of the micro- and macrosocial processes at play in transitional justice generally and reparation specifically see, Sveaass/Lavik, *Psychological Aspects of Human Rights Violations - The Importance of Justice and Reconciliation*, 2000 Nordic J. Intl. L. 69(1), 35, 43 f.; Hamber, *Narrowing the Micro and Macro - A Psychological Perspective on Reparations in Societies in Transition*, in: de Greiff (ed.), *The Handbook on Reparations*, 2006, 560, 563 f.; Lykes/Mersky, *Reparations and Mental Health - Psychosocial Interventions Towards Healing, Human Agency and Rethreading Social Realities*, in: de Greiff (ed.), *The Handbook of Reparations*, 2006, 589, 592 f.

948 This was researched particularly comprehensively regarding sexualized violence, CEDAW, *General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations*, CEDAW/C/GC/30, 2013, para 34; *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation*, 2007, Preamble; HRC, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, Rashida Manjoo, A/HRC/14/22, 2014, para 24, 31; Rubio-Marín, *The Gender of Reparations in Transitional Societies*, in: Rubio-Marín (ed.), *The Gender of Reparations - Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, 2009, 63, 85; Duggan/Abusharaf, *Reparation of Sexual Violence in Democratic Transitions - The Search for Gender Justice*, in: de Greiff (ed.), *The Handbook of Reparations*, 2006, 623, 624, 627. More generally see the sources in the following footnote.

949 Yepes, *Transformative Reparations of Massive Gross Human Rights Violations - Between Corrective and Distributive Justice* 2009 Neth. Q. Hum. Rts. 27(4), 625, 633 f.; Rubio-Marín/de Greiff, *Women and Reparations*, 2007 Intl. J. Transitional Just. 1(3), 318, 325. Still, it is not necessary to abandon corective justice. For details on that debate and the limits of the related transformative reparation discourse see below, ch. 4, E.I.

950 de Greiff, *A Normative Conception of Transitional Justice*, 19.

In sum, transitional justice should be conceptualized as ordinary justice applied in a principled manner to extraordinary circumstances. This characterization provides the answer to this chapter's core question: All transitional justice measures play a dual role. They continue to fulfill the demands of ordinary justice while they also support the goals of the transition. Therefore, the purpose of reparation in transitional justice is to provide corrective justice and to strengthen respect for human rights and generalized trust in society. The former demand can be called reparation's "deontological role" because corrective justice demands reparation regardless of its broader consequences.<sup>951</sup> The latter demand is fulfilled by reparation's "instrumental role" because, in this role, reparation serves the instrumental purpose of bringing about the transition.<sup>952</sup>

## II. The Relationship Between the Roles

Assuming a dual role of reparation creates a challenge of priority in case the two roles conflict. Since both fulfill justice demands, and neither provides full justice on its own, no role takes evident priority over the other. A lexical priority is therefore inadequate.<sup>953</sup> Instead, both demands for justice should be maximized. Reparation must therefore search for a Pareto-optimum<sup>954</sup> in the fulfillment of its dual roles. Since individual rights give rise to both roles, one cannot be wholly sacrificed for the other's sake. Reparation must hence aim to achieve a subclass of Pareto-optimums, in which it fulfills both

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951 cf. Alexander/Moore, *Deontological Ethics*, in: Zalta (ed.), *Stanford Encyclopedia of Philosophy*, Online Edition 2016.

952 For a similar distinction between the instrumental and inherent value of transitional justice mechanisms see Duthie, *Introduction*, in: Duthie/Seils (eds.), *Justice Mosaics - How Context Shapes Transitional Justice in Fractured Societies*, 2017, 8, 10; Méndez, *Accountability for Past Abuses*, 1997 Hum. Rts. Q. 19(2), 255, 271 f. Famously, Zalaquett analysed the transitional situation in somewhat similar terms, albeit on a different level, referring to Weberian ethics of responsibility and conviction, Zalaquett, *Balancing Ethical Imperatives and Political Constraints - The Dilemma of new Democracies Confronting Past Human Rights Violations*, 1992 Hastings L. J. 43(6), 1425, 1430 ff.

953 On the problem of priority and lexical orders see Rawls, *A Theory of Justice*, 36 ff.

954 A pareto-optimum is a condition, in which it is impossible to increase one preference criterion, without making another one worse off, Mock, *Pareto Optimality*, in: Chatterjee (ed.), *Encyclopedia of Global Justice*, 2011, 808. Translated to the realm of conflicting roles of transitional justice measures, it means that one cannot increase the fulfillment of one role, without decreasing the fulfillment of the other.

roles to an adequate degree.<sup>955</sup> The far ends of the Pareto-optimum-curve are thus out of bounds. The identification of possible Pareto-optimums must consider that the repairing agent has no complete control over the success of reparation's instrumental role.<sup>956</sup> Reparation can merely induce people to trust and respect human rights with a certain probability. In contrast, the repairing agent can fulfill the demands of corrective justice at will. The following graphic illustrates the preceding considerations:

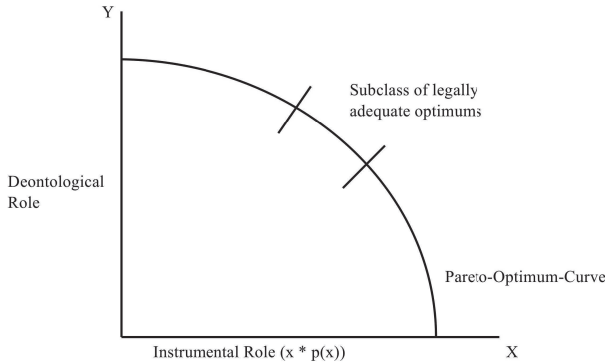


Figure 5: *The Relationship Between the Roles of Reparation in Transitional Justice (created by the author)*

To give a simplified example, imagine a situation in which individual compensation payments had no effect on furthering respect for human rights and generalized trust but were necessary to overcome survivors' harm. Conversely, a memorial contributed little to overcoming individual harm but was necessary to enhance respect for human rights and generalized trust. The state's resources did not suffice to implement both measures to the full extent. Since both measures were necessary to achieve the deontological and instrumental role reparation, the state could not fully implement one measure

955 In the strongest form of the doctrine, only one Pareto-optimum is legally adequate: The one in which both roles are fulfilled to an equal degree. However, it is implausible that this optimum is practically identifiable. For reasons of practicality, a subclass of optimums, in which both roles are fulfilled to an adequate degree, but one role is fulfilled more than the other, is deemed permissible. The size of this subclass will depend on the situation at hand. This concept resembles Rawls' expanded notion of Pareto-optimality coupled with a principle that can justify selecting certain points on the Pareto-curve over others, Rawls, *A Theory of Justice*, 59 f.

956 de Greiff, *Theorizing Transitional Justice*, 52.

at the other's expense. That course of action would correspond to the far ends of the Pareto-optimum-curve. Instead, the state would need to limit both measures' costs, implementing them to a degree with the maximum amount of resources it can spare. Only then is a Pareto-optimum within the legally adequate range achieved.

### III. Summary: The Purposes of Reparation in Transitional Justice

Considering the goals and nature of transitional justice leads to a dual purpose of reparation in transitional justice. Reparation still aims to fulfill the demands of corrective justice. In this deontological role, reparation aims to erase all harm human rights violations caused to an individual. Fulfilling this role alone would, however, not lead to full justice in the transitional justice situation. As every transitional justice measure, reparation must also mitigate the societal effects of systematic human rights violations by furthering the goals of the transition: general respect for human rights in society and generalized horizontal and vertical trust. When these two goals conflict, an adequate balance between the two must be struck, realizing both to the maximum degree, without entirely disregarding either one.

#### C. *The Instrumental Role of Reparation*

In contrast to its deontological role, reparation fulfills its instrumental role only indirectly. Whereas each benefit given to a survivor as reparation brings them closer to the state of affairs demanded by corrective justice, it does not automatically create respect for human rights and generalized horizontal and vertical trust. Therefore, a complete understanding of reparation's instrumental role warrants an account of how reparation can support the aims of transitional justice. This section will attempt to create such an account based on the theory of symbolic interactionism.<sup>957</sup> Before diving into that attempt, some notes of caution are in order. The account does not pretend to provide a complete explanation of how reparation programs contribute to respect for human rights and generalized trust in practice. It is incomplete because it analyses a highly-idealized situation with a theory that might not fully capture the processes at play. The account would need to be amended with complic-

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<sup>957</sup> On the origins and content of that theory see below, C.I.



ating factors and processes to describe any actual situation. The account is also incomplete because symbolic interactionism is not the only approach to explain the instrumental role. The author chose the theory because it provides a convincing conceptualization of reparation's instrumental role, offering entry points for further legal inquiry. Other approaches will yield different results, probably not farther from the truth. Nevertheless, this incomplete account can have explanatory force. In Hempel's terminology, it resembles a potential explanation of the instrumental role of reparation – whose truth cannot be guaranteed because its component laws and assumptions are not necessarily valid.<sup>958</sup> Such an explanation can be defective because it relies on incomplete or false assumptions or laws or because another process than the one described caused the explained phenomenon.<sup>959</sup> Fact- or law-defectiveness need not be fatal. False factual assumptions or laws can be sufficiently close to the truth to yield explanations with explanatory power.<sup>960</sup> If assumptions or laws are missing from the explanation, its value can lie in a partial explanation, only concerning certain aspects of the phenomenon studied. It might also be possible to add known complicating factors to the explanation if need be.<sup>961</sup> If another process caused the phenomenon, the described process might still contribute to understanding if it is coherent and could have caused the phenomenon or if it is close to the actual process.<sup>962</sup>

Obviously, estimating how close the laws, facts, and processes at the basis of the account are to the truth requires knowledge of that truth<sup>963</sup> – which

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958 Hempel, *Aspects of Scientific Explanation and Other Essays in the Philosophy of Science*, 1965, 338; Nozick, *Anarchy, State, and Utopia*, 2013, 7 f.

959 The first case is described by Nelson, *Explanation and Justification in Political Philosophy*, 1986 *Ethics* 97(1), 154, 165 f. as a missing component process explanation. The other cases are termed by Nozick, *Anarchy, State, and Utopia*, 7 f. as fact-defective, law-defective and process-defective explanations.

960 Nelson, *Explanation and Justification*, 161 ff. Nelson specifies what the author sloppily termed “close to the truth” in the case of laws as the reduceability of the law employed to the correct law. On the notion of reduction see Schaffner, *Approaches to Reduction*, 1967 *Phil. Sci.* 34(2), 137.

961 Nelson, *Explanation and Justification*, 162, 165 ff.; Woodward, *Explanation in Social Theory - Comments on Alan Nelson*, 1986 *Ethics* 97(1), 187, 193.

962 Nozick, *Anarchy, State and Utopia*, 7 f.; Nelson, *Explanation and Justification*, 165 ff.

963 Woodward, *Explanation in Social Theory*, 189 f. Woodward suggests some criteria to replace the “approximation to truth”-criterion, 190 ff. Since they are geared towards the natural sciences, this author will not rely on them. They might however provide inspiration for analogous criteria for the social sciences. Especially the criterion of robustness and continuity, meaning that variations in assumptions or even their replacement does not lead to fundamentally different results, proves useful in this regard.

the author cannot pretend to have. Still, he hopes that the coherence and plausibility of the account indicate sufficient proximity. Furthermore, the account is open for amendment with complicating factors arising in any concrete transitional situation. Explanations derived from other approaches can supplement it. Lastly, this author is comforted by the fact that the following account is merely a building-block for a stepping-stone based on which teleological reasoning can transpire. The telos of reparation stands independently of the following account of how reparation could further that telos. So even if the real road towards the goal ends up being different, a slightly misled attempt to find that road can still illuminate how the international law on reparation should be interpreted so that it travels in the direction of its telos. The following sections will search for the road by introducing symbolic interactionism (I.). On that basis, they will examine the state's role in that theoretical framework (II.) before turning to the role of reparation (III.).

## I. The Theoretical Basis: Symbolic Interactionism

Respect for norms and trust are individual attitudes, which rely on and find expression in human behavior. An account of how reparation can induce a change in individual attitudes and behavior can rely on H.G. Mead's symbolic interactionism. The theory rests on the assumption that individuals construct a social world by interpreting the physical world around them.<sup>964</sup> Interpretation turns objects into social objects endowed with meaning to the individual. Social objects are anything that persons can refer to: other persons, abstract ideas, oneself, past events, future events, hopes, wishes, etc.<sup>965</sup> Individuals arrive at their interpretation of social objects primarily through interaction with other persons.<sup>966</sup> This interaction happens through symbols, usually in speech, writings, gestures, or body language. People understand symbols through interpretation so that symbols are social objects too.<sup>967</sup> If

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This author hopes that the following account will exhibit this kind of robustness and continuity.

964 Charon, *Symbolic Interactionism - An Introduction, an Interpretation, an Integration*, 10th Edition 2010, 43 f.

965 Blumer/Morrione, *George Herbert Mead and Human Conduct*, 2004, 36. For a list of examples see Charon, *Symbolic Interactionism*, 47.

966 Mead et al., *Mind, Self, and Society*, 2015, 77 f.; Shibutani, *Society and Personality - An Interactionist Approach to Social Psychology*, 1961, 480 ff.

967 Charon, *Symbolic Interactionism*, 48 ff.

people interact in a group over an extended period, their interpretations often converge and attain stability within that group.<sup>968</sup> To give an example: A sees a wooden object. She interprets it as a chair because she heard her parents call it that and saw them use it. Maybe her parents reprimanded her when she stood on the chair and told her how to use it properly. Thus, through interaction with her parents, A arrived at a specific interpretation of the wooden object before her. It is safe to assume that A's society developed a similar, stable definition of "chair" and upholds it through constant interaction at meetings, parties, cafés, etc.

Not all social objects are inanimate. They can include concrete or generalized persons, such as a friend, neighbors, the book club, or the ruling party. In contrast to inanimate social objects, these concrete and generalized persons have views, attitudes, and feelings. To interact with them, a person must attempt to interpret these subjective states of mind correctly. For that, the interpreter must take the other person's role and imagine how they will perceive and react to the interpreter.<sup>969</sup> Conventional roles facilitate both individual and generalized role-taking. Groups, e.g., a society, form stable conventions around specific roles. These roles determine how lawyers, police officers, parents, etc., should act and feel in certain situations; not because of their personality, but because society expects them to fulfill their conventional role.<sup>970</sup> To come back to the example: If A's mother reprimands her daughter because she stands on the chair, she must take her daughter's role. That allows her to imagine which words A understands and how A will react to the reprimand. A's mother might take roles of generalized others to imagine how, for example, society reacts to the situation. If the scene happens in the presence of guests the mother does not know personally, she can rely on the conventional role of "guest" to imagine how they will react.

How do this interpretation and role-taking influence attitudes and behavior? When faced with a situation, an individual interprets every social object of relevance to it.<sup>971</sup> This situation definition includes possible actions a person can take in response to the situation. When contemplating such actions, a person interprets how social objects will relate to the action. The person takes

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968 Shibutani, *Society and Personality*, 115 ff., 127 ff.; Blumer, *Symbolic Interactionism - Perspective and Method*, 1969, 71 f.; Blumer/Morrione, *Mead and Human Conduct*, 40.

969 Charon, *Symbolic Interactionism*, 105 ff., 158 f.; Mead et al., *Mind, Self, and Society*, 154 ff.; Shibutani, *Society and Personality*, 142 ff.

970 Shibutani, *Society and Personality*, 46 ff.

971 Blumer/Morrione, *Mead and Human Conduct*, 36 f.

the role of other persons and generalized others to interpret how they react to the contemplated act. A person also regards themselves as a social object and imagines how the act will reflect on their self. This all-encompassing situation definition shapes a person's attitude towards a situation and the social objects in it. It also influences how they interpret a particular act and, thereby, whether they engage in that act.<sup>972</sup>

To return one last time to the example, when the mother defines the situation that her daughter stands on a chair, A, the guests, and kitchen objects become relevant social objects. She takes the role of the unknown guests and society and imagines their disapproval of the situation. She interprets the candles on the table as a potential danger to the child and arrives at a protective attitude. Through interaction with the child and others, A's mother has come to interpret her child as rebellious and stubborn, making persuading A to come down from the chair an unfeasible course of action. Consequently, she contemplates fetching A of the chair. When taking A's role, she imagines a negative reaction. She considers her wish to have a good relationship with her daughter in the future as a social object and interprets that her contemplated action would negatively influence that social object. She also interprets how the act will reflect on her self. She considers herself an anarchist, opposed to society's norms. So, after taking the guests' and society's role, imagining their approval of fetching the child of the chair, she decides that not doing so is better in line with her self-perception. She removes the candles to avert the danger and lets A play on the chair, silently enjoying the guests' indignation.

In sum, how a person interprets all social objects relevant to any given situation shapes their attitude and behavior. Their interaction with others, role-taking, and conventional roles influence their interpretation. Certainly, a parent's reaction to their child standing on a chair bears little resemblance to a society repairing systematic human rights violations. So how does symbolic interactionism work in that situation?

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972 Blumer/Morrione, *Mead and Human Conduct*, 63 ff.; Charon, *Symbolic Interactionism*, 118 f.; Shibutani, *Society and Personality*, 91 f., 195 ff., 260 f., 277; Mead et al., *Mind, Self, and Society*, 141.

## II. The Role of the State in the Symbolic Interactionist Framework

Reparation is state action.<sup>973</sup> As such, it is a symbol through which the state communicates. This communication influences the situation definition of individuals and, with that, their attitudes and behavior. Uncovering how a communicative act by the state influences individuals' situation definitions requires to discern first, the interpretation of which social objects state action influences (1.) and second, how it influences them (2.).

### 1. Objects of State Communication

State action can influence the interpretation of three critical social objects: the State, Society, and Member of Society. First and most directly, it communicates the stance of the state on specific issues. Put differently, state action enables individuals to take the state's role, imagining its interpretation of and reaction to any given situation. Taking the role of the state can be of vital importance to many situation definitions. Interpretations of behavior as "lawful", "unlawful", or "rebellious" depend on how the state conceptualizes an action. Many definitions of the self develop by contrast with the state's stance: "law-abiding", "good citizen", "rebel", "terrorist", etc. Individuals must also know the state's stance to interpret the consequences of many acts, most obviously potentially criminal acts.<sup>974</sup>

Communicative action by the state can also influence the interpretation of the social object Society. The state is a powerful communicative actor in most societies. It permeates society on many levels. State and society are thus not two separate and independent spheres but interact and influence each other.<sup>975</sup> The relationship runs deeper, considering that states ensure

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973 State action is understood widely as action by state officials and institutions as well as legislation. This section oversimplifies in large parts by reducing communication between the state and society to the communication between two unitary actors. Of course, in reality, different state institutions communicate differently with different sectors of society, Sellers, *State-Society Relations*, in: Bevir (ed.), *The SAGE Handbook of Governance*, 2011, 124, 125.

974 The importance of these interpretations of course varies with the presence the state has in the lives of the relevant individuals.

975 Bank, *Societal Dynamics and Fragility - Engaging Societies in Responding to Fragile Situations*, 2013, 26 ff.; Weakliem, *Public Opinion, Political Attitudes and Ideology*, in: Janoski et al. (eds.), *The Handbook of Political Sociology - States, Civil Societies and Globalization*, 2005, 227, 241 ff.; Migdal, *State in Society - Studying how States and Societies Transform and Constitute one Another*, 2001, 49 ff.; Migdal, *Strong Societies*

their legitimacy by claiming to represent their citizens' will. While this applies to democracies by definition, even authoritarian regimes cannot survive without some form of public support. They often claim to represent their constituents through mock democratic procedures and discourse.<sup>976</sup> Given these links between state and society, state communication is likely to influence how individuals interpret society's values and expectations. Of course, state communication's influence on the interpretation of Society varies with the state-society relationship in any given scenario. As Migdal put it, in every society, a *mélange* of actors struggles over the power to determine societal rules. The state is but one of them, and its relative power varies from society to society.<sup>977</sup> Still, to varying degrees, the state can influence individuals' interpretation of Society. This interpretation is vital for many situation definitions. Whether attitudes and actions are "leftist",

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and Weak States - State-Society Relations and State Capabilities in the Third World, 1988, 24 ff. This assumption is central to certain liberal theories of international relations, see Schieder, *Neuer Liberalismus*, in: Schieder/Spindler (eds.), *Theorien der Internationalen Beziehungen*, 2010, 187, 195; Moravcsik, *Taking Preferences Seriously - A Liberal Theory of International Politics*, 2003 Intl. Org. 51(4), 513, 518.

976 That authoritarian regimes need some kind of popular support was shown by Hannah Arendt in her essay *On Violence*, printed in Arendt, *Crises of the Republic*, 1972, 140; Geddes, *What do we Know About Democratization After Twenty Years?*, 1999 Ann. Rev. Pol. Sci. 2(1), 115, 125; von Haldenwang, *The Relevance of Legitimation – A new Framework for Analysis*, 2017 Contemp. Pol. 23(3), 269, 271. Nowadays, authoritarian regimes increasingly resort to claims that they represent the will of the governed through democratic procedures, Dukalskis/Gerschewski, *What Autocracies Say (and What Citizens Hear) - Proposing Four Mechanisms of Autocratic Legitimation*, 2017 Contemp. Pol. 23(3), 251, 257 f.; von Soest/Grauvogel, *Identity, Procedures and Performance - How Authoritarian Regimes Legitimize Their Rule*, 2017 Contemp. Pol. 23(3), 287, 296. For special forms of these claims see Mayer, *Strategies of Justification in Authoritarian Ideology*, 2001 J. Pol. Ideologies 6(2), 147, 161 ff. Further examples, including on how the claims might differ with their target audience are given by Omelicheva, *Authoritarian Legitimation - Assessing Discourses of Legitimacy in Kazakhstan and Uzbekistan*, 2016 Cent. Asian Surv. 35(4), 481, 488, 493; Edel/Josua, *How Authoritarian Rulers Seek to Legitimize Repression - Framing Mass Killings in Egypt and Uzbekistan*, 2018 Democratization 25(5), 882, 885, 893 f.

977 Migdal, *State in Society*, 49 ff.; Migdal, *Strong Societies and Weak States*, 24 f., 32. As regards questions of legitimacy, the legitimation claims by the government and corresponding demands by the population must be distinguished from the level of popular endorsement of those claims and the degree to which the state can fulfill the demand for legitimation, von Haldenwang, *The Relevance of Legitimation*, 273 ff.; Dukalskis/Gerschewski, *What Autocracies Say*, 260. For different degrees of success in legitimation in Uzbekistan and Kazakhstan see, Omelicheva, *Authoritarian Legitimation*, 489 ff., 494.

“right-wing”, “normal”, “deviant”, etc. depends to a degree on society’s judgment. Interpretations of Society can influence social norms. Social norms exist when individuals form empirical and normative expectations towards other persons.<sup>978</sup> Interpretations of Society can support such expectations. If a person interprets Society as Christian, for example, they can assume a greater chance that people visit the church on Sundays.

Relatedly, the state can influence the definition of the conventional role of Member of Society. Members of society are generally expected to follow legal and certain social norms.<sup>979</sup> The state decides upon and upholds the content of legal norms. Since it represents society to a degree, it also influences social norms. Its actions thereby shape the expectations towards members of society. The importance of the role of Member of Society cannot be underestimated. Member of Society is the only role an individual knows every other person to fit into. In most quotidian situations, it is the only role that individuals know the persons they interact with to have. Thus, the interpretation of Member of Society is crucial to many situation definitions.

## 2. Content of State Communication

The state can communicate many things about the three social objects State, Society, and Member of Society. Four potential messages are particularly relevant for reparation. First, state action can affirm values.<sup>980</sup> The prohibition of manslaughter, for example, does not only prohibit an act. It also communicates that life should be valued.<sup>981</sup> Beyond value affirmation, legislation

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978 See above, A.II.1.

979 See above, A.II.1.

980 Kindermann, *Symbolische Gesetzgebung*, in: Grimm/Maihofer (eds.), *Gesetzgebungstheorie und Rechtspolitik*, 1988, 222, 230 f.

981 Some state actions carry less symbolic value, some more and some are almost exclusively symbolic. Art. 22 of the German Constitution determines that the flag of the Federal Republic of Germany shall be black, red and gold. This prominent determination is a belated decision in the flag controversy, which engulfed the Weimar Republic. During Germany’s first and highly contested democratic phase, monarchists campaigned for a red, white and black flag, whereas democrats insisted upon a black, red and gold flag – the colors of early German democratic movements. By opting prominently for the latter, the drafters of the 1949 constitution firmly placed the new Federal Republic of Germany in the family of democratic states and in a historic lineage to the earliest champions of democracy in Germany. Fundamentally, Art. 22 of the German Constitution therefore serves as a symbolic statement that the Federal Republic of Germany cherishes democratic values. The example is a more detailed ac-



designates what should be considered legally deviant behavior. Since the state claims to represent society, it can also, to a degree, designate socially deviant behavior.<sup>982</sup> In the simplest case, the state legally prescribes or proscribes behavior, marking non-abidance as deviant. Beyond that, the state counts on numerous other forms to condemn or applaud behavior, e.g., public speeches, acts of parliament, awards, etc. Third, state action can communicate the valuation or devaluation of groups in society. Apart from doing so directly, the state can value or devalue norms, principles, behavior, etc., which are closely associated with a group. If the state prescribes behavior associated with one group, it enhances that group's standing in society. Vice versa, proscribing such behavior decreases the group's standing.<sup>983</sup> Through this mechanism, the state demonstrates that it considers a group's views when devising policies. It can also decide group struggles over status in society. Both measures are especially significant if there is doubt about the relative

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count of Noll, *Symbolische Gesetzgebung*, 1981 Zeitschrift für schweizerisches Recht 100, 347, 350.

982 Gusfield, *On Legislating Morals - The Symbolic Process of Designating Deviance*, 1968 Cal. L. Rev. 56(1), 54, 54 ff.; Sunstein, *On the Expressive Function of Law*, 1996 U. Pennsylvania L. Rev. 144(5), 2021, 2031 f.

983 Gusfield, *Symbolic Crusade - Status Politics and the American Temperance Movement*, 1963, 173. Gusfield famously analyzed the prohibition of alcohol in the United States in these terms. By outlawing the sale of alcohol, the United States delegitimized the newly arrived immigrants from Ireland and Germany, who were associated with drinking. At the same time the prohibition law legitimized the temperance movement, which mostly consisted of rural, evangelical US-Americans, who immigrated several generations before, and reassured its members of their status in society. A summary can be found on p. 5 ff. Gusfield's analysis is criticized mainly on the assumption that his example, not his theory, is wrong Noll, *Symbolische Gesetzgebung*, 350; Friedman, *The Legal System - A Social Science Perspective*, 1975, 51. A more contemporary example could be European bans on religious symbols in public. These more or less thinly veiled attempts to ban muslim symbolism from public life rest on essentializing, for example, headscarves as symbols for a supposedly "politicized" religion, incompatible with "Western" values. By banning such symbols from public life, the state takes a stance on whom gets to be part of society, and the status of muslim minorities. See Vrielink, *Symptomatic Symbolism - Banning the Face Veil 'as a Symbol'*, in: Brems (ed.), *The Experience of Face Veil Wearers in Europe and the Law*, 2014, 184, 190 f.; Fadil, *Asserting State Sovereignty - The Face-Veil Ban in Belgium*, in: Brems (ed.), *The Experience of Face Veil Wearers in Europe and the Law*, 2014, 251, 254 ff. and the excellent analysis of the German debate by Barskanmaz, *Das Kopftuch als das Andere - Eine Notwendige Postkoloniale Kritik des Deutschen Rechtsdiskurses*, in: Berghahn/Rostock (eds.), *Der Stoff aus dem Konflikte Sind - Debatten um das Kopftuch in Deutschland, Österreich und der Schweiz*, 361, 361, 372 ff.



power of groups in society.<sup>984</sup> Lastly, state action can carry future-oriented messages. While that is clear, e.g., for government programs, legislation also fulfills such a function.<sup>985</sup> Norms create a counterfactual image of society and mark that state as desirable. Legislation thereby allows the state to distance itself from society's current situation and pledge to work for a positive vision of the future.<sup>986</sup>

### III. The Role of Reparation in the Symbolic Interactionist Framework

To recall, state action can affirm abstract values, designate deviant behavior, value and devalue societal groups and designate goals towards which the state pledges to work. State action can thereby influence how individuals see the state, society, and their fellow members of society. It remains to be seen how reparation can use these social objects and messages to further respect for human rights, vertical and horizontal generalized trust.<sup>987</sup>

Reparation is state action. As such, it communicates with its direct addressees – survivors – and society at large.<sup>988</sup> The following section will

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984 Gusfield, *Symbolic Crusade*, 172 ff., 177, 189 ff.; Edelman, *The Symbolic Uses of Politics*, 1964, 189.

985 The following part is based on Möllers, *Die Möglichkeit der Normen*, 2015. It must be noted at the outset that Möllers does not intend to provide an account on how law can influence society. Rather, he tries to define the term normativity. The application of his theory to the present question is thus not within the ambit of Möllers' work, but solely a doing of the author.

986 Möllers, *Die Möglichkeit der Normen*, 13 ff., 127, 131 ff.

987 The following account focuses exclusively on these societal aims of reparation. Of course, beyond mere corrective justice, reparation can also pursue further individual goals. Many commentators identify recognition as such a further individual goal, see e.g. de Greiff, *Theorizing Transitional Justice*, 42 ff. The author readily subscribes to the importance of recognition and the great potential the concept has in transitional justice. It plays no role in this chapter because it has little relevance for the chapter's limited aim. Excellent discussions of the concept are provided by Honneth, *The Struggle for Recognition*, 1996, and, especially concerning the relationship between recognition and remembrance, Assmann, *Der Lange Schatten der Vergangenheit*, 74 ff.

988 This communicative function of reparation bears resemblance to Günther Jakobs' theory of punishment, Krefß, *Einleitung*, in: Kindhäuser/Krefß et al. (eds.), *Strafrecht und Gesellschaft – Ein Kritischer Kommentar zum Werk von Günther Jakobs*, 1, 21 f. Given that prosecution and punishment are a central element of transitional justice processes and that the theory developed can be transferred to such other elements, the author draws some comfort from the fact that it offers points of connection to existing, recognized theories for one of the most sensitive transitional justice measures

decipher possible messages of reparation to survivors and society (1.) and analyze how they influence individuals in furtherance of the transitional justice goals (2.). Both steps are, at the same time, too basic and too ideal. They are too basic because the following account does not look at any concrete reparation program. It will analyze the messages of reparation's essence – a benefit the responsible state gives a survivor of a human rights violation to erase the resulting harm in acknowledgment of wrongdoing. This approach makes the account too ideal because it aggregates the state and society into two coherent and completely distinct actors. It describes how one-sided communication from the state to society influences the latter without disturbance by other factors. The clinical nature of this account should be apparent. Metaphorically speaking, it looks at the source of a river to determine what happens in its delta. A complex web of circumstances influences the actual communicative content and consequences of any real reparation program. As any ideal, the following account should be considered an unreachable goal, which can orient real efforts. Complicating factors presenting themselves in any concrete transitional justice situation can be factored into the account so that its ideal character is not fatal to its explanatory power.<sup>989</sup>

### 1. Reparation's Message

Reparation's message can be split fourfold. First, a necessary precondition for reparation is to acknowledge that human rights are valid. If they were not, they could not be violated and could not produce a valid claim to reparation. Second, reparation redresses the harm a concrete action by a specific actor caused to a specific survivor. Thereby, reparation brings human rights down from the realm of lofty goals and proves that they can provide normative guidance in the messy reality of daily life. In a word, reparation shows the applicability of human rights to quotidian life. Third, reparation is a form of human rights enforcement. It communicates that survivors can turn to the state to enforce their rights. Fourth, the state makes considerable material and immaterial efforts to administer reparation on a large scale. It thereby communicates that it values human rights as important. Lastly, when states embark upon comprehensive reparation efforts, they create a vision

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that require greatest justification. I thank Claus Kieß for this comforting and thought-provoking reference.

989 See the discussion above, C.

of a society that settles legitimate claims and upholds human rights. This future-oriented message of reparation cuts across all previously mentioned ones and lends them stability.<sup>990</sup>

## 2. Reparation's Influence

How can the message of present and future validity, applicability, enforceability, and importance of human rights change individual attitudes and behavior towards strengthened respect for human rights and generalized trust? Answering that question warrants a closer analysis of the sender and the receiver of the message. As established above, the state communicates for two actors: itself and – to a degree – society. The state, in turn, is always represented by its institutions. Reparation, therefore, communicates that state institutions and society deem human rights valid, applicable, important, and enforceable. Concretizing the receiver(s) of that message takes the analysis directly to the question of how the message can generate trust.

As discerned above, generalized trust in human rights relies on the normative and empirical expectations that state institutions and members of society adhere to human rights in their societal relationships. Trust in state institutions was termed vertical trust, trust in members of society horizontal trust.<sup>991</sup> Reparation's fourfold message directly implicates vertical trust. When the state communicates the validity, applicability, importance, and enforceability of human rights, it communicates that state institutions will apply, attach importance to, and enforce human rights in their vertical relationships. Since the state also communicates partially on behalf of society, the fourfold message also suggests that society supports and demands human rights compliant state institutions. This gives individuals reasons to form the normative expectation that state institutions adhere to human rights and that the state and society will hold them to account if they do not.

Reparation has a more challenging time to influence horizontal trust. It must give individuals reasons to form the normative expectation that members of society will adhere to human rights in their horizontal relationships. Member of Society was defined above as a conventional role entailing adherence to legal and social norms.<sup>992</sup> In principle, what the state

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990 These are of course not the only messages attributable to reparation. Other examples can be found in Hamber, *Narrowing the Micro and the Macro*, 568.

991 See above, A.II.1.

992 See above, A.II.1.a.

communicates about its institutional norms says nothing about the norms governing personal relationships. However, when reparation communicates that state and society expect adherence to human rights from state institutions, individuals can reasonably assume that similar expectations apply to members of society. This would be a coherent position valuing individual rights, regardless of the actor that endangers them. Reparation says as much when it repairs violations committed by private individuals, based on the state's failure to protect or fulfill human rights. Such reparation presupposes that members of society must adhere to human rights in their horizontal relationships. Especially if implemented for violations of human rights in personal relationships, reparation therefore also communicates that the state and – to a degree – society deem human rights valid, applicable, important, and enforceable in horizontal relationships.

Reparation's fourfold message thus gives individuals reason to form the normative expectation that state institutions and members of society will adhere to human rights in their societal relations. This can change the interpretation of the social objects State, Society and Member of Society and make them trustworthy. Reparation's future-oriented message lends stability to these new interpretations, as it does not only signal the current validity, importance, enforceability, and applicability of human rights. It also signals the state's commitment to upholding human rights in the future. As detailed above, normative expectations are necessary but not sufficient to form trust. They must be coupled with congruent empirical expectations, meaning that state institutions and members of society must actually adhere to human rights for trust to arise. A critical mass of persons needs to form these normative and empirical expectations for horizontal and vertical trust in human rights to take hold.<sup>993</sup> This can only happen incrementally, and reparation is but one factor influencing this delicate process.

If successful, the process also contributes to strengthened respect for human rights as the ultimate transitional justice goal. The fourfold message changes the importance of the social object Human Rights for individuals' situation definition. When systematic human rights violations erode the trust that other members of society and state institutions adhere to human rights,<sup>994</sup> Human Rights cease to be relevant for individuals' situation definitions. Communicating the validity, applicability, enforceability, and importance of human rights raises their relevance. It communicates that

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993 See above, A.II.1.

994 See above, A.II.1.

human rights guide the state, society, and members of society. When taking these roles to define their situation, individuals must therefore pay attention to human rights. If individuals contemplate violating human rights, they must consider that the state and society mark such behavior as deviant and threaten legal and social enforcement action.

#### IV. Summary

In sum, reparation fulfills its instrumental role in transitional justice by acting as a symbol communicated by the state, which changes individuals' interpretation of four important social objects: Human Rights, the State, Society, and Members of Society. Affirming the validity, applicability, enforceability, and importance of human rights increases their relevance in individuals' situation definitions. State institutions become trustworthier because reparation shows that the state and society demand human rights compliance on their part.<sup>995</sup> Other members of society become trustworthier because reparation signals that the state and society expect them to adhere to human rights and threaten negative consequences if they do not. The future-oriented message of reparation lends stability to these interpretations. Naturally, this account is idealistic and will not be realized in the purity described here. It rather functions as an ideal that real reparation programs can thrive to achieve.

#### V. Challenges

The account of reparation in transitional justice suffers from a critical problem: It relies on the state's power to influence people through communication. Such an influence depends on the state reaching people who are ready to hear the message. The first issue is problematic when the state is of little importance to parts of society, e.g., in regions where state services and institutions only have a limited reach. If that is so, the preceding account of the state's communicative action is not necessarily wrong, but the circumstances might strip it of any effect. Again, this calls for legal humility. If the law is insignificant to people, there is little it can influence. Other measures and perspectives are then more effective.

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995 For an empirical approach to communication as a trust-building measure see Wong, *How can Political Trust be Built After Civil Wars? Evidence From Post-Conflict Sierra Leone*, 2016 J. Peace Res. 53(6), 772, 775.

Even if people listen to the state's message, it is fair to speculate that after witnessing and suffering massive state wrongdoing, a major part of the population will not be inclined to embrace the state's or society's new-found passion for human rights. There is a good chance that the state's persuasive force is the lowest when it is needed the most. Some features of reparation put it in a unique position to mitigate this challenge. It is the only transitional justice measure that directly addresses those whose trust in state institutions and other society members suffered the most: survivors. Reparation requires the state to take sides, allowing it to send a strong message of group valuation. For better or for worse<sup>996</sup>, reparation categorizes people into "survivors" and "perpetrators". By giving the former benefits in response to the latter's unlawful actions, the state sides radically with survivors. It values them over perpetrators. It also demonstrates its ability to take the perspective of survivors and govern for them. Several factors further underline the sincerity of reparation's message. Reparation is resource-intensive, requiring visible effort from the state. It entails an unequivocal acknowledgment of wrongdoing. Reparation thus enables the state to distance itself from and devalue the past regime. Reparation efforts take time and entail lasting objects such as letters of apology, monuments, etc. The state continuously renews its commitment to human rights and builds trust incrementally over time. This longevity can also sustain faith in the profoundly idealistic vision reparation creates. According to Möllers, a failure to realize norms' future-oriented claims within an adequate time delegitimizes them. The further removed the norm's stated ideal is from current reality, the harder it is to immunize the norm from delegitimization.<sup>997</sup> Publicly visible reparation acts over a long period can continuously affirm reparation's vision, bridging its aspirational gap.<sup>998</sup> Lastly, the message that the state will enforce human rights decreases the costs of misplaced trust. Individuals can treat the state as insurance against the costs of having their rights violated.

Beyond these factors, the circumstances of transitional justice might help to achieve the instrumental role of reparation. While the communicator might be far from ideally placed to convey the messages discerned above, their content might fall on fruitful soil. Crises bring norms, values, and perspectives

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996 It is too rarely acknowledged that transitional justice measures tend to label persons strictly as survivors or perpetrators. Often, too little space is given for the biographical grey areas conflict inevitably produces. See below, ch. 4, C.II.1.

997 Möllers, *Die Möglichkeit der Normen*, 322 ff.

998 cf. Möllers, *Die Möglichkeit der Normen*, 328 ff.

in flux because they shatter old ones without establishing new ones. In that scenario, people might be particularly perceptible to reparation's new messages.<sup>999</sup> Still, the instrumental role of reparation faces an uphill battle in the complex reality of transitional situations.

Beyond the challenge that the state might not be in a position to communicate successfully, a similar challenge to the one against the unified definition of transitional justice given above presents itself: Can one set of messages capture the functioning of reparation across a broad spectrum of contexts?<sup>1000</sup> Unsurprisingly, the answer is similar – and may be similarly unsatisfying – to the one given above. The messages discerned provide a framework. Their concrete form depends on the context. The kind of monument a state erects, the form an apology takes, the kind and amount of material benefits given may vary significantly from context to context. The exact messages these actions send may also vary. Still, at their core, they can provide a message of present and future validity, applicability, enforceability, and importance of human rights.

*D. Summary: The Purposes of Reparation in Transitional Justice*

A veritable tour de force across some of the most controversial questions currently debated in transitional justice led to an account of the goals of reparation in transitional justice and how it might achieve them. Naturally, covering such a broad spectrum of controversies within such limited space makes an argument fragile. It relies on many laws and assumptions, each of which can be challenged. However, even if the argument is defeated at one point or the other, it may still give a general idea about the functioning of reparation in transitional justice. Even a partially defeated account might provide guide rails, which are sufficiently close to the “correct” road – if there is one – to enable the transformation of legal standards through teleological reasoning.

The account started by defining transitional justice as a state's attempt to address a legacy of systematic human rights violations, which aims to transform society towards strengthened respect for human rights and generalized trust. The latter was defined as the expectation that other members

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999 Shibutani, *Society and Personality*, 300; Blumer/Morrione, *Mead and Human Conduct*, 40.

1000 See above, A.IV.

of society and state institutions adhere to and support basic social and institutional norms, which correspond to human rights. Since transitional justice is ordinary justice applied in a principled manner to extraordinary circumstances, reparation – as any transitional justice measure – serves a dual purpose. In its deontological role, reparation fulfills the demands of corrective justice. However, under the extraordinary circumstances of the transition, corrective justice alone does not suffice to achieve complete justice. Reparation must fulfill an additional instrumental role: furthering the goal of the transitional process. The answer to this chapter's core question – what is the purpose of reparation in transitional justice? – thus is:

*Reparation in transitional justice serves two goals. First, it must render corrective justice by erasing all harm a survivor endured as far as possible. Second, it must further the goals of the transition by strengthening respect for human rights as well as generalized horizontal and vertical trust in society.*

In case the two roles collide, the state must seek to establish a Pareto-optimum, which fulfills both roles to a sufficient degree. Reparation does not fulfill its instrumental role automatically. Its communicative content can merely induce people to respect human rights and trust that other members of society and state institutions will do the same. Reparation sends the message of present and future validity, applicability, enforceability, and importance of human rights. Doing so strengthens respect for human rights by increasing the importance and influence of the social object “human rights” in individuals’ situation definitions. It also makes state institutions and members of society trustworthy by providing different reasons to believe that they will uphold human rights in their societal relationships.

These messages will not take the same form in any two situations. Their effectiveness depends on how adequately they are tailored to the context they operate in. Even then, success is far from guaranteed. On the contrary, reparation’s effect may be limited. On the one hand, this provides a reason to approach transitional justice holistically, employing all possible measures to increase success. On the other hand, the argument comes full circle by reverting to legal humility: Law is but one avenue to success and probably not the most effective one. Still, it is grounded in ordinary justice and valid legal obligations. Hence, there are intrinsic demands of justice to take that avenue, regardless of whether it leads to the noble goals, which are – maybe naïvely – sought at its end.