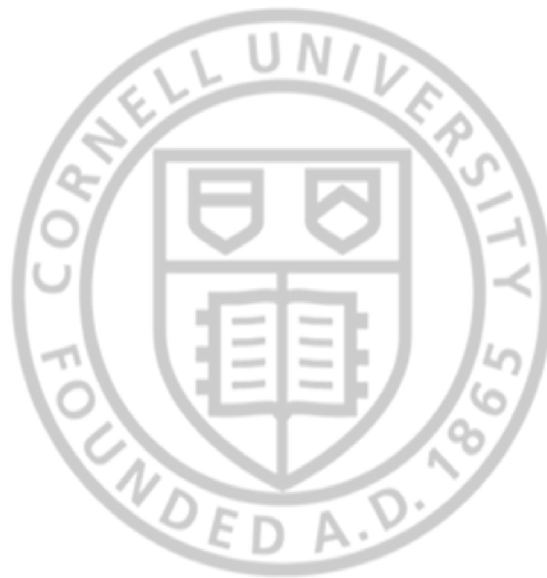
‘LEGAL TRANSPLANTS’ AND ‘FUNCTIONALISM’ IN TRANSITIONAL JUSTICE:

The West African Experience of Truth and Reconciliation Commissions

Being Dissertation for the Degree of

DOCTOR OF THE SCIENCE OF LAW (J.S.D.)



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December 2018.

TITLE:

‘LEGAL TRANSPLANTS’ AND ‘FUNCTIONALISM’ IN TRANSITIONAL JUSTICE: THE WEST AFRICAN EXPERIENCE OF TRUTH AND RECONCILIATION COMMISSIONS

A Dissertation, Submitted in Partial fulfilment of the requirements for the Award of the Degree of Doctor of the Science of Law (JSD) at Cornell University, Ithaca, New York, December 2018.

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ABSTRACT

It is almost axiomatic that transitional societies are usually faced with existential needs — redress of injustices, peace, and rebirth of social bearing. This has birthed *transitional justice*—a set of judicial and non-judicial measures aimed at redressing human rights abuses —which may include prosecutions, truth commissions, reparations, and such other transitional justice measures. Transitional justice is also about the desire to *unearth the truths* underpinning the injustices and creating a new paradigm of *societal living*—justice informed by truth. To fulfill these needs, legal ideas, and templates are readily borrowed —making transitional societies fertile grounds for legal transplants. Query — how well suited are these *legal borrowings* for the recipient society? What levels of critical scrutiny are given to basic social, economic and structural questions of the recipient normative order so as to ensure an effectual transplant? Post-Colonial Africa —West Africa — is a vast field of transitions. Legal Transplant of the transitional justice mechanism of Truth and Reconciliation Commissions (TRCs) has become quite common in the region. I argue that to understand the impact of the l transplant of TRCs,

there is a need to understand the *functions* of TRCs— manifestly and otherwise. One way of doing this is to further interrogate TRCs with the comparative law theory of functionalism. This interrogation I argue, will yield not only 'the manifest and latent functions' of TRCs but also strengthen its transformative capacity. More so, the analytical and comparative evaluation of the TRCs seen in parts of West Africa — Liberia, Nigeria and Sierra Leone — via legal transplant and functionalism, will help in sharpening TRCs are effective tools of transitional justice in ways that are not only economically transformative, but also social justice driven and capable of sustaining peace through human flourishing. It must be emphasized that the work seeks to infuse the TRC mechanism with a recipe of socioeconomic and political economic consciousness so that 'the felt necessities' of the communities — meaningful leaving, healing, food, education, shelter, access to clean water and capabilities; which often predisposes them to fragility — do not become the forgone alternative in transitional justice. Otherwise the TRC mechanism becomes merely grand gesture lacking in real impact on the wellbeing of transitional societies. In addition, the grand gestures about TRCs will continue to suffer the critique of producing modest results. In the end transitional societies want peace — a peace founded on truth, and justice – and I dare say that that economic justice is indispensable in that search. Economic justice is a legitimate expectation of transitional societies and this work inserts itself directly into the center of the ongoing scholarly debate about the impact of TRCs as mechanisms of transitional justice in the West African region. It does this using legal transplants and functionalism theories. It makes a case that economic and social justice should not be

treated as forgone alternatives of transitional justice process but as cornerstones of the entire transitional justice architecture.

BIOGRAPHICAL SKETCH

Cosmas is the first child in a family of five children. His parents were teachers and thus gave him an early inspiration to search for knowledge with unceasing curiosity. This has exposed him to reading, writing and listening to a wide range of literature, about several aspects of human endeavor. He has in the process, developed an eclectic taste for ideas—for living and learning in general. Growing up in South Eastern Nigeria, he saw first-hand the interconnections between learning, community service, and human flourishing —hence his interest and pursuit of all these with unflinching devotion. He holds a Master of Laws (LL.M.) from Cornell University Law School. Cosmas has also attended Professional Courses in International Law at the Hague Academy of International Law—the Hague Netherlands. Prior to Cornell University, he had attended and obtained a Bachelor of Laws (LL.B.) degree from the University of Nigeria. He later proceeded to the Nigerian Law School — Lagos Campus—to obtain his Bar Qualifying Certificate; thus, enabling his admission to practice law in Nigeria. He practiced law briefly and volunteered in community development efforts in his country — convinced that only a life of contribution is worth living. A combination of these experiences has illustrated to him, the concerns, complexity and entangled nature of law and social issues in a pluralistic society. He is pursuing a specialization in International and Comparative Law. His dissertation focus is on Transitional Justice—exploring and interrogating the mechanisms for peace building, human rights protection, democratization, institutional reforms, socioeconomic renewal and regeneration of community cohesion in fragile cum post-conflict societies. He is enthusiastic about life, music, and creative writing. He is enamored by ideas and frameworks that seek to

provide better answers to the complex problems of humanity. The splendor of Ithaca's natural environment and the increasing diversity of Cornell's community life has further made him discover a new hobby —the art of photography.

EDUCATION

Doctor of the Science of Law (J.S.D.) Cornell University Law School —2018

Master of Laws (LL.M.) Cornell University Law School — 2015

Bachelor of Laws (LL. B.) University of Nigeria —2006

DEDICATION

To my Parents:

Damian Sunday Madu Emeziem Ukwu, (Deceased) & Petronilla Nkechi Emeziem**,**

ACKNOWLEDGEMENTS

To acknowledge, is to recognize the existence of something; the fact of something and the larger implications of same. It may be some form of gratitude. It may also be the expression of affection; a reciprocation of same, and revalidation of the inherent virtue of earnestness and want of guile. I have had the rare privilege of being taught and supervised by uncommon teachers to whom I owe a debt of gratitude. In these years of sojourn in Ithaca, – in what seems like a travel to *Colchis* in the manner of Agamemnon in search of the *Golden Fleece* —I have been guided by bards of the law —Muna B. Ndulo, Mitchel Lasser, and Chantal Thomas. At times with their wit and steady hands, they have kept me away from seemingly 'serenading tales' that could have ordinarily derailed the journey. Much more than the values of legal knowledge, I have been kneaded into a finer product — I believe —by these hands using a special admixture of intellectual rigor flavored with ciceronian[1] *temperance*, *fortitude*, *prudence* and *justice*

[1] Cicero and many other philosophers in the Western tradition had espoused the four cardinal virtues. Both in Plato's dialogues and Aristotle's Nicomachean ethics they were highlighted in a number of ways. Thus the work of Plato is critical in understanding the very beginnings of the philosophical discourse of the theory of morals in western thought. More on this can be gleaned from Plato's Dialogues and other interesting commentaries that keeps flowing from it till today. See generally Kevin Timpe & Craig A. Boyd, *Virtues and Their Vices, Oxford*, Oxford

— social justice being the newest and most far-reaching arch of that pristine concern of humankind. Hence, the journey has had its turbulent times —the waters ebbing and flowing at different tidal dimensions — yet the company of great teachers kept the vessel afloat, kept the soul incandescent and now we have sighted the home shores. Did I slay the dragon, or did we slay it together to fetch the Golden Fleece? I would say we did it together. Though one would equally set sail soonest on a new voyage — because 'there is no time to stand and stare' and the life of learning is such a vast but obscure master piece — it suffices to say thank you, to them that made this one meaningful, purposeful and possible. I here say so with every breath I can summon. Thank you.

According to Marcus Aurelius —a leader in a time of troubled transition in the age of empires of yore, — "nothing has such power to broaden the mind as the ability to investigate systematically and truly all that comes under thy observation in life."[2] This ability I have sought to learn at this great citadel surrounded by beauteous gorges and cascading waterfalls. At times, I have had to walk the solitary but yet enchanting trails around to recalibrate and receive the fertilizing air of nature. The wintry winds and sometimes irascible snowfalls made the warmth of knowledge and resilient search

University Press, 2014; David Carr, *The Cardinal Virtues and Plato's Moral Psychology*, The Philosophical Quarterly, Volume 38, Issue 151, 1 April 1988, Pages 186–200,https://doi.org/10.2307/2219923 <accessed 11/6/18> ; Wallace, James D. *Virtues and Vices*. Ithaca, N.Y. Cornell University Press, 1978; P. Foot, Virtues and Vices, Oxford University Press, 1978; P. T. Geach, *The Virtues*, Cambridge, 1977; Edith Hamilton & Huntington Cairns(eds.) Plato: The Collected Dialogues (Princeton, 1961).

[2] Marcus Aurelius.', Meditations. Bk iii, sec. 2.

irresistible. It made one realize that, there is a need to keep an open mind in the search —instead of getting encased in frozen ideas and ideologies. For humanity at this age, needs refreshing ideas — ideas that transcend little minded identities, boundaries, ideologies and frozen perceptions. One is reminded in this encounter of the famous writ of Alexander Pope, "So vast is art, /so narrow human wit…/Pride, where wit fails, steps in to our defence, / And fills up all the mighty void of sense! /If once right reason drives that cloud away, /Truth breaks upon us with resistless day…/A little learning is a dangerous thing;/ Drink deep or taste not the Pierian spring:/There shallow draughts intoxicate the brain, / And drinking largely sobers us again."[3]

It is my hope that, a reasonable content of sobriety has settled in the very recess of my being during the course of this research. In humility therefore, I extend my thanks to the Dean of Cornell University Graduate School, the Dean of Cornell Law School, the Graduate Legal Studies Office —Aimee Haughton, Dawne Peacock and others — the Library Staff, and the Law School in general for making this experience worth the time and resources. Of course, many friends too numerous to mention have stood in the gap for me in all this experience. Many of whom accepted me despite my shortcomings. Let me also thank the Institute for African Development and the Administrative Staff —Jackie Sayegh – for all their support.

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[3] Alexander Pope, *An Essay on Criticism*, https://www.poetryfoundation.org/articles/69379/an-essay-on-criticism <accessed June 5, 2018>.

Indeed, I could not have done this without the absolute support of my immediate family – my mother Petronilla Nkechi Emeziem; my champion who first showed me the beauty of literature and language. My siblings—Kelechi, Amarachi, Chibuike and Nnaemeka – for their uncommon affection and devotion. To my father, Damian Madu Emeziem Ukwu —long gone to be with God —I owe eternal gratitude for being a great mentor —teaching me the indispensability of a purposeful living, and that integrity is everything. Continue to rest Papa, your boy has become a man. In all, my finest thanks are due to God — the author and finisher of life — for keeping faith with such a fragile being as me. It is not time yet to sing *Nunc dimittis, so* it suffices *to say*; not to us oh Lord, not to us, but to thy name be the glory. In the end I say *vita brevis est, ars longa — life is short, and learning is too long*. *Ka Chineke mezie okwu a*.

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Chantal Thomas, (Member) Professor of Law, Cornell Law School

DECLARATION

I certify that, the Dissertation I have presented for examination for the *Doctor of the Science of Law (JSD) Degree* of Cornell University Law School, is solely my own work; other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it). The copyright in this dissertation rests with the author. Quotation from it is permitted provided that full acknowledgement is made. This dissertation may not be reproduced without the prior consent of the Author. I warrant that this authorization does not to the best of my knowledge infringe the rights of any third party.

I further declare that my dissertation consists of 90, 000 words.

LIST OF ABBREVIATIONS

AI	—	Amnesty International
AIDS	—	Acquired Immune Deficiency Syndrome
AU	—	African Union (Previously Organization of African Unity)
AZAPO	—	Azania People's Organization
CPA	—	Comprehensive Peace Accord
ECHR	—	European Court of Human Rights
ECOMOG	—	ECOWAS Monitoring Group
ECOWAS	—	Economic Community of West African States
EU	—	European Union
EXIM BANK	—	Export Import Bank (China)
FARC	—	Fuerzas Armadas Revolucionarias de Colombia (The Armed Revolutionary Forces of Colombia)
GDP	—	Gross Domestic Product
HIV	—	Human Immune Virus
ICC	—	International Criminal Court

ICJ	—	International Court of Justice
ICCPR	—	International Covenant on Socioeconomic and Cultural Rights
ICTJ	—	International Centre for Transitional Justice
ICTR	—	International Criminal Tribunal for Rwanda
IMF	—	International Monetary Fund
OECD	—	Organization for Economic Cooperation and Development
SADC	—	Southern African Development Commission
TRC	—	Truth and Reconciliation Commission
UN	—	United Nations
UNAMSIL	—	United Nations Mission in Sierra Leone
UNGA	—	United Nations General Assembly
UNHRC	—	United Nations and Human Rights Commissions
UNMIL	—	United Nations Mission in Liberia
UNSCSL	—	United Nations Special Court for Sierra Leone
WTO	—	World Trade Organization

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PREFACE

"In seeking inspiration for change, it is perhaps natural

for lawyers to go browsing in a foreign law boutique."[4]

The reframing and reconstruction of post authoritarian and post-conflict societies seems to me as presenting one of the most challenging problems to legal practitioners and scholars around the world today. For international and comparative law scholars, it offers a fascinating field of activity. This is self-evident considering the near collapse of or deep rupture of rule of law and consequent human rights violations that are often prevalent in post-authoritarian and post-conflict societies. From Liberia to

[4] M. Damaska, *The Uncertain Fate of Evidentiary Transplants; Anglo-American and Continental Experiment*, American Journal of Comparative Law, vol. 45 pp. 839, 852, 1997.

Congo, Colombia to Cambodia – all around the world – transitional societies abound. Amidst these transitioning, the global society is also changing at a pace unprecedented in history, making it more imperative for transitional societies to quickly redefine themselves and get their societies once more on the path to stable growth and development.

It is therefore, almost axiomatic, that these transitional societies, are usually faced with the problems of redress of injustices, restoration of peace, and rebirth of social bearing. This apparent need has given birth to the idea of transitional justice – a set of judicial and non-judicial measures, implemented to redress the legacies of massive human rights abuses as a precursor to lasting peace and societal renewal. These measures include criminal prosecutions, truth commissions, reparations programs, lustrations, restoration, restitution, memorialization and various other forms of institutional reforms.[5] Embedded in transitional justice, — it is argued — is a great desire, to unearth the truth behind the injustices that occurred in the days of authoritarianism. This has resonance with the 'right to know' as it is called in the field. Equally, inherent in it, is the reconciliation of the populace[6] and the creation of a fresh

[5] Ruti Tietel, *Transitional Justice Genealogy*, Harvard Human Rights Law Journal, vol. 16, 2003; Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge University Press, 2004.

[6] Reconciliation here connotes many things to different people. One strand of it is the one that is linked with forgiveness. This has however been critiqued by several authors for the reason

course of societal living — re-enacting a wholesome[7] society. This in itself raises a number of spatial, geographical, historical, intertemporal and temporal questions; especially in the immediate aftermath of these regimes of violence and human rights degradation. The time element in transitional justice and its implications for transitional justice mechanisms is often a source of controversy. This is not to forget the fragility that often pervades such societies. The fragility sometimes becomes like hanging dark clouds over the community — thus creating an atmosphere of uncertainty and ultimately affects the mechanism to be adopted and the timeline implicated by the mandate of either the truth commissions or other transitional justice measures like criminal trials, amnesty, lustration and reparation. There is therefore often a question of; when is it best to take up a transitional justice process? Also embedded in the controversies is the question of; what timeline in the history of the country in issue is to be dealt with? Again, there is a further presupposition that certain implications either by way of criminal prosecutions, restoration, restitution and other reform processes will be impacted by whatever timeline chosen in the overall process of transition. Hence time issues become central in the conceptualization, integration and utilization of any mechanism of transitional justice.

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that it places undue burden on the victims. Many have argued and rightly so that the victim's primary right is the right to know and not the obligation albeit suggested obligation to forgive.

[7] Wholesome is used here quite in a lose sense because it could be argued philosophically that no society is wholesome. Thus, the idea expressed is about having a stable society where citizens can live their normal lives without grave apprehension about their safety.

Presently, there is a perception that lasting justice and peace cannot be achieved in transitional societies without giving high premium to truth. The evolution of this trend has been articulated by many a scholar and supported by many treaties and United Nations resolutions[8] in the recent past. Hence, to fulfill these needs; legal ideas, ideologies and templates are readily borrowed by transitional societies. This they perceive, as an indispensable part of the remedy for the actualization of justice, peace, and reconciliation. Equally, transitional justice measures linked to truth enjoys the support of global policy making bodies like the UN, hence post authoritarian states have both diplomatic and political incentives to take up transitional justice measures in the aftermath of grave human rights violations. For one it helps them avoid the pariah status which they may have had prior to the time of transitional justice. It is also often a foundational step towards fulfilling certain conditions which qualifies them for financial support via aids, sovereign debt restructuring, and economic bailout of many forms. It is also noticeable that because of the programs of the global financial institutions — particularly the IMF and World Bank — which encourages a business-friendly legal ecosystem, many of these states emerging either from authoritarianism or conflicts often have a broader incentive to project a good self-image in the doing business reports of the global financial institutions. It is therefore in their interest to showcase a country

[8] I shall return to this in the main body of the work. Suffice it to note that the UNCHR has made a number of study and publications about the evolution and emergence of the right to know in customary international law and how that has since created a duty *erga omnes* to states in international law.

where rule of law has been restored as not only a way of leveraging financial help but as a way of boosting investors' confidence. This is very important in an often-battered economy which these repressive or violent times may have occasioned in the country.

Equally, it is often the case that inequality and economic injustice is a significant concern in many transitional societies. This is so I would argue because part of what sustains tyranny and authoritarianism is uncanny capacity to devise means and measure for the economic emasculation of targeted groups and dissenters within the polity. It is also true that this idea of economic exclusion whether as part of the overarching political economy of the society in issue or deliberate policies targeted to achieve a skewed economic system which serves the ends of the controlling powers in society many a time precipitates war. It is therefore intriguing that often, the focus of transitional justice efforts is on civil and political rights. This focus ought to shift significantly to look at questions of economic justice and systemic foundations that may need adjustments through legal reforms, targeted interventions and proactive social justice efforts so as to produce lasting peace.

Faced with these existential realities — I would argue — these societies often become fertile grounds of legal transplants. However, the questions often omitted — either because of political expediency, or other undeclared and latent factors – are; how well suited are these legal borrowings for the recipient society? What levels of evaluation and critical scrutiny are given to basic societal problems of the recipient normative environment to guarantee an effectual transplant? What amount of borrowing is required — a wholesale or partial transplant? Is there any clear thought regarding the functionality or otherwise of these borrowings in the recipient society? What about

temporal questions and geographical dimensions linked to the societal problems at the time of transition?[9]

Post-Colonial Africa — and indeed West Africa I would argue — is a vast field of transitional societies. Societal rupture is almost common now, especially in the face of ongoing socio-political challenges and changes. 'Truth and Reconciliation Commissions' (TRCs)[10] are part of the measures of transitional justice efforts we have

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[9] These may seem like too many questions, but they are all interlinked. At a point they are the different layers of the attempt to meet the felt needs of transitional societies. I guess the key question is how may we ensure that the transplant of mechanisms is not just a mechanical effort but a reasoned and properly analyzed effort which puts in perspective the complexities and readiness of the said transitional justice society? The work will pivot around this question and seek ways of reconciling the need for legal templates and frameworks into transitional societies and ways making them more effective.

[10] Truth commissions are usually temporary, official non-judicial/quasi-judicial bodies mandated to investigate and report patterns of serious human rights violations committed over a given period of time. This is often during periods of conflict or state sponsored despotic and abusive use of powers. Their functions and mandate are often set out in the law establishing them. They often expected to make detailed reports of the investigations and hearings. They also make wide ranging recommendations to the authorities regarding compensations, reparations, victims' rehabilitations, law reforms and such other measures aimed at building lasting peace in post conflict or post authoritarian societies.

witnessed in West Africa.[11] It is sought in this work to examine these phenomena of (TRCs) in the West African sub-region using Liberia, Nigeria and Sierra Leone for comparative analytical study.

Legal transplants and *functionalism* — as key instruments of comparative legal studies — are essential methodical tools for this analytical study. It is argued that, truth commissions have currently become almost indispensable in the entire international law and human rights framework for transitional justice. Its utilization will predictably continue to increase. The reason for this is not far-fetched. One of such reasons is the potential for quick articulation of the way forward for the country in a reconciliatory rather than punitive atmosphere which in turn might engender further relapse to violence.

Another significant reason is the enormous material and resources that would go into criminal prosecution and the length of time it might even take. Often, the criminal justice system is gravely compromised in the era of repression and violence. Hence relying on the same grossly compromised system to give justice and restore confidence

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[11] Even now new calls are being made for the establishment of new Truth Commissions in places like the Gambia, and Togo. The Gambia saw the despotic military rule of Yahaya Jammeh which only ended in 2016 owing to a defeat in election and regional pressure by the Economic Community of West African States. Togo has been under the rule of one family for 50 years, presently there are agitations around the country for constitutional reform, term limitations and restorative justice efforts. In Tunisia transitional justice efforts through the instrumentality of a "Truth and Dignity Commission" was pursued and it is left to be seen what impact that will make in the overall renewal and building of democratic culture in that country.

in the rule of law would be too much of a stretch in a country still lacking capacity and coherence in national pathways in the aftermath of these violent regimes and sometimes outright civil wars. There is therefore a need for the careful analytical interrogation of truth commissions and their usage in transitional justice efforts. It is hypothesized that TRCs have produced limited results in the region. One thinks that its utilization is not tied so much to its functional contribution to those societies. Indicative of this is the evident lack of any clear means of measuring the contribution TRCs make in transitional justice efforts beyond the drama and ontologically induced "forgiveness and reconciliation." It is further argued that, they appear to have become emblematic — without much functional impact in the transitional justice efforts we have seen in the region.

This argument is anchored on the foundations that many of the socioeconomic contributors to fragility are often not affected by these TRCs. Beyond the proceedings of these commissions and their publication of reports, more needs to be done to actualize the aim of setting up truth commissions – truth, reconciliation, peace and non-recurrence. It is possible to study the instrumentality with an eye on the outcomes — particularly with respect to the larger questions of resources and in socioeconomic opportunities which are critical factors in finding sustainable peace. While the work makes no claims to any grand theory of transitional justice and truth commissions, it is aimed at trying to unbundle the tool, make it more productive and hence make some significant contribution in the field.

Two of such contributions being that; first, it will draw attention to the manifest and latent issues arising from the use of TRCs as cornerstones of transitional justice in

the West African sub-region. The dialectics that this creates, it is believed, will stimulate a more thorough going study and articulation of the contribution of truth commissions as an instrumentality of transitional justice. Second, it is also argued that this work would aid in developing more ways of utilizing TRCs as efficient mechanisms for achieving lasting peace and end of impunity in transitional West African societies. It is hoped that, this will also help in setting a new agenda for the use, of TRCs, its research and evaluation in the overarching field of post authoritarian law reforms. Transitional justice as a whole — and truth commissions in particular — needs to be unpacked in order to reenergize it. The field seems to be running on limited normative and empirical oxygen.

I argue so not only because of the focus on civil and political rights but also the temporal distance it maintains from questions of historical injustice in the global north. This detachment from historical injustice seems to give once again an impression that certain violations are beyond questioning. Indeed certain locations are centers of redress while others are not. It dichotomizes the centers from the peripheries. To wit; the center has nothing to redress whether by way of truth commissions or by other forms of transitional justice while the rest or communities living on the margins of international engagement must as a matter of course, engage in transitional justice measures adopting new rules, new policies, and governance systems in other to be readmitted into the committee of nations. Hence the need to examine what is going on in the field from a critical and analytical disposition.

Indeed, it is my argument that this is one area where comparative law can help. It is further surmised that unless this is done continuously, transitional justice and all its

mechanisms would seriously diminish in value if not become entirely imperiled. We have already seen this in the evolution and development of international criminal prosecution through the International Criminal Court. The critique of the field is growing and becoming louder because of the unbalanced structures of international law and general global enforcement of human rights. Many in Africa, especially the leadership perceive the international criminal court as targeting Africa. While I do not subscribe to this argument which I consider self-serving for the leaders of Africa since they have failed to provide a viable alternative, it seems to me that the appearance of bias for a distant observer cannot be missed. This is so when we consider that the appearance of impartial justice sometimes is as important as the justice itself —justice must not only be done but should be undoubtedly be seen to have been done.

The work is broadly structured into five unequal chapters. The idea is to as far as possible, cover the field of inquiry while preparing the ground for future research purposes. It is also intended to be a broad outline of what will form a lifelong work dealing with different aspects and contours of the intriguing field of transitional justice, legal theory, and international and comparative law. Because, ending impunity and creating a more fair and just polity is the beginning of domestic peace which is inexorably linked to global peace, the work seems to me of enduring value. The quest for a global peace, security and development are intertwined with the need for enduring justice, fairness and development in communities around the world. It is critical to global humanity and human flourishing in general. The ideas of *eudaimonia* and perpetual peace are significantly captured in the works of Aristotle and Kant respectively and we need to reinsert them into the overall architecture of global peace

and reform in fragile communities around the world. While this may sound idealistic and indeed utopic, I take solace in the fact that without such visionary living and ideas, humanity will be poorer. Thus, to think otherwise is to forget that justice, peace and development are some of the finest reasons for which humankind has fought wars and endured deprivations throughout history. The debates about just wars and unjust wars are only a tiny iteration of this articulation. Hence our present attempt to keep the conversation regarding transitional justice ongoing.

Chapter one —the introductory chapter — gives a general overview of the dissertation. It sets out the overarching outline of what the dissertation intends to do, and the contributions it will make in the field. This chapter will also highlight the distinctive concepts, lexicon and methodology of the work. It proceeds in chapter two, to illustrate certain theoretical aspects of transitional justice. Of note is the fact that a number of theories underpin transitional justice in general and truth commissions in particular. These theories form the spine and ribs of the field. Upon them the organic structures of the field are anchored and held together. It is therefore imperative to highlight them and show their linkages — though it is not possible to exhaustively do this within the limited outlines of this work. It will then, examine truth commissions, focusing specifically on the truth commissions that have taken place in the three West African Countries – Liberia, Nigeria and Sierra Leone in chapter three. At this point, it shall pivot towards examining an important — but unexplored —aspect of Truth and Reconciliation Commissions which is; the critical evaluation of the outcome or success or otherwise of truth commissions. It is also intended here to critique a number of foundational attitudes towards truth commissions. Especially, the impact of truth

commissions and the need to mainstream structural and systemic questions —like inequality, economic (in)justice, restorative justice and social justice into the machinery of truth commissions. This I believe, is the most important aspect of the transitional justice work going forward. The field has become ripe for a reexamination of what it has been doing in the recent past and how to further strengthen its mechanisms and ensure their continued viability. In chapter five, an attempt will be made to summarize the research and conclude the work with some recommendations for future research into the field. It is hoped that this work will be relevant to researchers, students and the public who are interested in rule of law, international law, constitutional reform, democratic policy and peace building efforts in West Africa and other parts of sub-Saharan Africa.

CHAPTER ONE:

1. INTRODUCTION AND RESEARCH PROBLEM

Truth and Reconciliation Commissions[12] (TRCs) have in the recent years become recurring features of transitional justice efforts around the world. I argue that this multiple use of Truth Commissions in the overarching architecture for post conflict peace and reconciliation efforts around the world is a specie of *legal transplant*. It is a significant legal diffusion though it morphs in different patterns and places in its attempt to respond to the various mandates under which the instrumentality is used in transitional justice situations.

Put in another way, TRCs represent a clear evidence of 'legal borrowing' and the transplant effect of truth commissions presents an intriguing study which is yet to be

[12] Truth Commissions and Truth and reconciliation Commissions are used interchangeably in the literature in the field. This is a response to the many varieties of bodies with the features of truth commissions set up in many post conflicts and post authoritarian societies as a means of finding lasting answers to the transitional justice problems of those communities. In some situations, we have seen them being named peace and reconciliation commissions. It can well be stated that the name often depends on the felt necessities of the particular society. One central attribute however is an attempt to create a space for people to tell the story of what happened and come to terms with the violations of human rights in the past devoid of the hostile atmosphere of criminal prosecutions. It is fair to say that the aim is not punishment but fact finding and documentation of nuggets of truth with the opportunity to make recommendation for future policy articulation and execution.

seriously interrogated in the field. The legal diffusion of TRCs can therefore be studied effectively with the comparative law methodology of legal transplants. But that is not enough because besides recognizing and studying the transplant, *the transplant effect* needs also a deeper interrogation. Otherwise, the perceived normative values of truth commission may remain, merely normative with limited effects and impacts in societies where they are deployed. One meaningful way of doing this is to look at what are the *manifest and latent functions of TRCs*.

The manifest functions, I argue includes research about what is often called the 'remote and immediate circumstances' of human rights violations in the transitional society. Also, the investigation and documentation about these human rights violations has prominence in the list of manifest functions of truth commissions. Further to this is the organization of public hearings for the purposes of hearing and recording witnesses and thus documenting for society the details of what happened during the period of violence and repression. Precisely, it constitutes itself through public hearings and witness testimonies into a space for remaking and reclaiming the public space hitherto expropriated by authoritarian regimes and violence. In these recordings, witness testimonies and researches truth – the *ultima ratio* of truth commissions – is also sought after and achieved, thus helping the community to know and solve problems of disappearances, seek redresses and set up new bulwarks against future reoccurrence. It thus fulfills the need for truth and the obligation of the state to investigate disappearances and such other human rights violations hitherto considered 'secret' 'classified' or 'irretrievably lost.' Therefore, some of the manifest functions includes articulating remedial measures for the violations and making far reaching

recommendations for the preservation of human rights, rebuilding of social equilibrium, racial harmony and reparation in the post conflict society. It is therefore not unusual to consider truth commissions as the nursery beds of ideas for the new society – ideas direly needed in post conflict and post authoritarian societies.

Reconciliation is also a bold – manifest – function of truth commissions. The pivot of TRCs towards the reconciliatory morphology in transitional justice situations, took a life of its own in the South African experience and also in the Good Friday Agreement.[13] The Good Friday Agreement not only proposed power sharing and other questions of executive legislative relations but also set out a section of its declarations to questions of reconciliation and victims' violence. Thus it was believed that it is essential to acknowledge the suffering of victims. This acknowledgement was seem as necessary for reconciliation and fulfilling the right of the victims to remember. Thus it was views that "the achievement of a peaceful and just society would be the true memorial to the victims of violence. The participants particularly recognize that young people from areas affected by the troubles face particular difficulties and will support the development of special community-based initiatives based on international best practice."[14] In the South African experience, the mantra "no future without forgiveness" seemed to have also heightened this manifest turn of truth commissions. Hence the

[13] The Good Friday Agreement was a political 'peace' deal aimed at producing lasting settlement between the UK and Northern Ireland. It was signed on April 10 1988. See further http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/4079267.stm.

[14] http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/07_12_04_ni_agreement_03.pdf

emergence of a tradition of Truth and Reconciliation as core functionality of truth commissions. Today it is not unusual to view reconciliation and an inexorable limb of Truth Commissions. The exemplary acts of forgiveness and the tone of leadership displayed by Nelson Mandela and other leaders in South Africa equally embedded this idea of reconciliation as a manifest function of Truth Commissions. This creativity I argue could be extended to larger economic and developmental questions.

On the other hand a number of perceptible latent functions of Truth commissions includes memory, healing or at least stopping the trajectory of trauma, unlocking the hidden and repressed pains – both at the individual and community level. It also serves as a grand symbol for a new beginning. Equally, collective memory and human rights education/orientation is another perceptible latent function. In the long term these latent functions manifest in the form of museum, public squares, sculptural representations, plaques and ad-hoc exhibitions. They are however not readily predictable since the power asymmetries in the society may assist their flourishing or frustrate them.

It is of note that these functions are often not so clearly demarcated. I have also based the analysis on the significant provisions seen in the mandate of truth commissions. Hence depending on the nature, society and framing of the mandate of TRCs, manifest and latent functions can become one of the other. There can indeed be swaps and diffusion across what seems like a permissible space between latent and manifest functions. Now the question that arises from this is – why is it not possible to make economic justice and reform of political economy a manifest or even latent function of truth commissions? The existing literature does not poke this matter straight in the face as it should ordinarily do. The circuitous scholarship around the subject of

economic justice is equally traceable to the mandate of truth commissions which are often general and sometimes furtive on questions touching on political economic and structural transformation.

Perhaps a number of other significant factors may be considered here. First is the global, regional and national/domestic significance of such a turn as it will not only challenge the dominant economic models in international law. The expansion of trade laws, bilateral investment treaties, arbitration and self-contained systems of dispute settlements will no doubt be implicated if any such turn of TRC functionality happens today. Equally, the issues around sovereign debts accumulated by authoritarian regimes may also send jitters since they may be implicated in the search for the truth regarding the utilization of the borrowed resources. I doubt however that the approach to this challenge and the often-visible immiserating communities often seen in transitional societies is to avoid the question. It appears to me that the TRC mechanism needs to embrace the need to bring up the question and thus also open a conversation regarding the place of corporations in the overall spiraling of violence and increasing human rights violations in post conflict societies. If corporations are legal persons, or quasi legal persons, definitely they can share burdens of violations conducted on their behalf. This also should be so where it is seen that they are they financial muscle of authoritarian states. This must be so because dictatorships cannot succeed without the manifest and latent support of major economic players within the community. This may well be an avenue for raising the much-needed resources for rebuilding broken states and reparation of victims of violent repressions. The need for this cannot be over emphasized because if TRCs are so empowered they can make recommendations mandating the

establishment of endowments as part of the overarching effort to heal the community and make amends for violations. Economic violations often ruin states and create manifest fragility for decades and why the communities should have a cold attitude toward examining it objectively with an eye at reform and sustainable peace is yet some kind of enigma to any objective observer in the field.

Another potential challenge that the manifest inclusion of social justice and economic justice and development limbs on TRCs may elicit is the subsistence of powerful individuals and other groups from the previous regime. Of course, they may well have deep apprehensions about the uncertain future. However, I do think that this may well become a negotiating tool for getting to the truth of other significant violations in the community. A farmer who knows that his farm will be confiscated if it is found that s(he) did not give testimony regarding a mass grave in his farm may well have a larger incentive to volunteer evidence. Same for a banker who knows that giving evidence of bank transfers which aided financing of weapons of violence may guarantee operational licenses and limited sentences is likely to respond positively to summons.

More so, while there may be fears about nationalization, it seems to me that the fears are ill founded because most states are today linked to the global economy. Equally investors are better protected today unlike they were in the 1960's. Communism does not present any much threat as it was perceived in the past since the wave of democratizations after 1989. Rather the clear and present danger to national peace, regional stability and global peace and security seems to me the many spaces of misery that dot the landscape. Even in the OECD[15] countries, questions about equal access to

[15] Organization for Economic Co-operation and Development.

education, health, and other opportunities is pushing very hard on the seam of society. These are questions that need answers else the present fault lines of identity and cultural pluralism may be heightened.

I perceive how it might also be argued that TRCs may well be over stretched if they were to assume such a disposition. This argument is not plausible because TRCs are often organized around committees with different expertise and because they are insulated from the need to win elections and maintain party relevance, the experts are actually better placed to study the problem and make a recommendation after evaluating available evidence objectively. Often parliaments are held down by political affiliations and the need to impress the electorate, yet we grant them the widest amplitude of powers to make laws on life and death issues affecting the society. Where is the wisdom in letting such an institution with often the lowest public rating to superintend the deepest questions of our lives while abdicating our capacity to generate foundational issues to push for a more meaningful human societal living? I argue that it is well within the capability of a well organized TRC to interrogate and come forward with viable recommendations on economic justice and living life possibilities in any community.

On the other hand economic justice and fundamental structural questions that fuel inequality and exclusion from the "pursuit of happiness" in the community can also be made latent functions of truth commissions. That way the commission will have it within its capacity to interpret its mandate in a broad sense so as to accommodate the questions of economic (in)justice. This is argued with the hope that the other elements for a viable truth commission like commissioners with integrity, proper financing, enabling law and required expertise are also put in place – *ceteris paribus*.

Of course, all these have to be properly contextualized bearing in mind the mood of the community and the temporality significance of such a turn. It seems to me however that no meaningful growth of the impact of truth commissions will be noticed in the near future unless it is ready to pay attention to questions of economic justice which most often disempowers a great majority of citizens while consolidating it in the hands of a select oligarchy and their courtiers. What such massive inequality of opportunity does is to create impregnable segregated spaces within other aspects of societies. Hence gated communities surrounded by massive poverty is not a lasting pathway to peace and prosperity in any transitional society. It also diminishes the participatory capacity of the citizens in the politics of the society. Hunger is a bad political decision maker.

These observations reinforce my conviction that that there is a need to bring in the relevant method of *legal functionalism* to bear on the TRC mechanism as a means of unveiling its transplant effect. This is significant and relevant today in this era when there is an increasing query about the clear and undoubtable contribution and impact of truth commission in the communities where they are deployed. Such an integrated integration of TRCs with the comparative analytical theories of legal transplants and functionalism will assist expert, scholarship and law reform.

Equally, to understand the transplants effects, it is also needful to find out the core functions and purposes of TRCs. This can be deduced from their mandates because a truth commission can be described as an officially sanctioned, temporary, non-judicial investigative body, usually granted powers for taking statements, recording proceedings thereof, researching, public hearing and preparation of a comprehensive report of all this within a specified period of time. Truth commissions by their nature are not meant

to become a replacement for criminal prosecutions but serve the purpose of providing some level of accountability as to the way forward considering the weakness of institutions in post conflict and post authoritarian societies. This explains why the nature of truth commissions may vary from one country to another.

Thus, in Sierra Leone for instance, the mandate of the TRC was articulated as, "to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lome Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered."[16] Continuing the enabling TRC Act also stated that, "without prejudice to the generality of subsection (1), it shall be the function of the Commission (a) to investigate and report on the causes, nature and extent of the violations and abuses referred to in subsection (1) to the fullest degree possible, including their antecedents, the context in which the violations and abuses occurred, the question of, whether those violations and abuses were the result of deliberate planning, policy or authorization by any government, group or individual, and the role of both internal and external factors in the conflict; (b) to work to help restore the human dignity of victims and promote reconciliation by providing an opportunity for victims to give an account of the violations and abuses suffered and for perpetrators to relate their experiences, and by creating a climate which fosters constructive interchange between victims and perpetrators, giving special

[16] See Section 6(1) of Sierra Leone TRC Act 2000.

attention to the subject of sexual abuses and to the experiences of children within the armed conflict; and (c) to do all such things as may contribute to the fulfilment of the object of the Commission.[17] This seems to be the general tenure of the mandate[18] of truth commissions.

What is clearly missing in the mandates as they are drafted is the question of issues relating socioeconomic and cultural rights. Though a broad a reading of investigation of human rights includes socioeconomic rights, I argue that they should be clearly mainstreamed into the structure of truth commission because when the smoke of cannon fire of war settles, questions of economic injustice persist. This is particularly so in those communities where forceful removal; dispossession and all forms of economic (in)justice formed the central cannon of the authoritarian political economy.

The United Nations Human Rights Commission has articulated a number of core principles of TRCs. First, it must be a national choice. What this means is that it must be the autochthonous decision of a country to adopt the mechanism of truth commission in its transitional justice effort. Thus, it is often preferred that the decision to set up a truth commission be the outcome of a wide consultation within the country. In these regards, members of the academia and civil society organizations offer a rich resource

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[17] Section 6 (2) of the Sierra Leonean Truth and Reconciliation Commission Act 2000 which sets out the 'object' of the Commission.

[18] Note that in most of the enabling laws establishing these truth commissions, the word mandate, object and function are seen to be used interchangeably. This suggests clearly what the communities seek to achieve through these truth commissions.

base which can be tapped into in formulation the truth commission agenda. As we shall see in the course of this work this is needful in order to avoid elite capture of the process and a mismatch between the mechanism and the society where it is sought to be used. It is also important to bear in mind the country specifics in adopting a truth commission. What this means is that no model of the TRC is one size fits all. In design adoption and implementation, attention should be focused on the specific developments in the country. Some level of country model should be expected.

Second TRCs are only a strand in the overall web of comprehensive transitional justice project. It is only an aspect of the lager transitional justice strategy. What this entails is that there should be a thoughtful consideration of the place of truth commissions in this strategy.

Another important factor is the existence of necessary political will to seek transitional justice through the mechanism of a truth commission. This is so because the success or otherwise of the commission will depend on the independence and capacity of the body to do its work. This will also entail that the political establishment is ready to provide information, release documents and where necessary provide the needed support as may be requested by the commission. This not only also helps the work of the commission but enhances its legitimacy before the public.

Equally international support may be needed in the course of the work of the commission. Efforts should therefore be made to provide TRCs with the necessary wherewithal for seeking cross border information regarding disappearance as the need arises. Because of the financial and general cost implications of truth commissions, there may be a need to leverage funding internationally – especially when the want of

resources and challenges that face post conflict and post authoritarian societies are put in perspective. It is also important in order to put in perspective the illicit flow of cash, drugs and war logistics in the time of conflict. For instance, it has been revealed that the civil wars in Liberia and Sierra Leone was financed through illegal mining of diamonds. Indeed, the terms of reference of truth commission may need to expressly set out the extent of international involvement and name and shame corporation, organizations and persons who may have participated in enable the violations during conflict. The idea is to encourage international action against impunity and also create a space for cross-border cooperation since the issues of human rights often implicated are universal.

Be that as it may, TRCs are the most utilized form of transitional justice mechanism in the last two decades. Other measures like criminal prosecutions, lustrations, reparations are also sometimes dependent on the outcome of truth commissions. Judicial panels of enquiry sometimes are also used in lieu of truth commissions. TRCs were also further seen as one of the mechanisms with which to create a rule of law index or for making a clean break from an otherwise conflicted past or authoritarian regimes. Their establishment played the immediate role of showcasing a new government which is poised to protect human rights and thus procures quick legitimacy for the regime. The need for this was also driven by the commitment of the Bretton Woods Institutions regarding rule of law and liberal market and democracy in the aftermath of the cold war as a pre-requisite for loans, development financing and other credit facilitations for many developing countries.

For many that period marked the second wave of democratization in African political evolution since the days of independence in 1960's. A combination of these

factors – economic, international law, and rule of law – helped unlock the frozen democratic space and hence the need for mechanisms of transition. Before then, efforts at TRCs seemed limited. But these developments in international law and global economic governance at the time seemed to have forced the climaxing of perceptions regarding truth commissions. Many scholars have tried to articulate the essence of truth commissions and their justification in post conflict and post authoritarian societies.[19]

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[19] Alison Bisset, *Truth Commissions and Criminal Courts,* Cambridge University Press (2012); Ruti Teitel, *Truth Commissions and Procedural Fairness*, Mark Freeman ,*International Journal of Transitional Justice*, Volume 2, Issue 2, 1 July 2008, Pages 244–245,https://doi.org/10.1093/ijtj/ijn011; Gibson, James L. *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?* Russell Sage Foundation, 2004. http://www.jstor.org/stable/10.7758/9781610442473; James L. Gibson, On Legitimacy Theory and the Effectiveness of Truth Commissions, available at http://www.law.duke.edu/journals/lcp; Wiebelhaus-Brahm, Eric. *Truth Commissions and Transitional Societies: the Impact on Human Rights and Democracy.* London: Routledge, 2010; Borer, Tristan Anne. 2006. *Telling the truths: truth telling and peace building in post-conflict societies*. Notre Dame, Indiana, University of Notre Dame Press.

Audrey R. Chapman & Patrick Ball, *The Truth of Truth Commissions: Comparative Lessons From Haiti, South Africa, and Guatemala*, 23 Human Rights Quarterly. 1 (2001); Lansana Gberie, *Truth and Justice On Trial in Liberia*, 107 African Affairs 455 (2008); James L. Gibson, *On Legitimacy Theory and The Effectiveness of Truth Commissions*, 72 Law & Contemp. Probs. 123

They are usually state established or commissioned non-judicial bodies mandated to investigate, interrogate, hear, record, collate, and prepare reports of all these proceedings and make recommendations for compensations, reparations, reforms and prevention of the reoccurrence of the human rights violations. It may well be just a body of ordinary citizens of a particular society or a mixture of citizens and others from other places with the necessary expertise to organize and carryout the investigation of the egregious violations of human rights in post conflict and post authoritarian societies.[20]

Significant aspects of it are that, they are often made not to be permanent but temporary features of the transitional societies. They are therefore often ad-hoc – having a time frame within which they must complete their work and publish or handover a report to the government. It is also notable that a good number of the truth commissions despite being set up by the government are insulated from government interference through carefully worded enabling legislations, mandates and provision of a reliable source of funding for the activities of the commission.

(2009); Tricia D. Olsen et al., *When Truth Commissions Improve Human Rights*, 4 International Journal of Transitional Justice 457 (2010).

[20] For instance in El Salvador, the truth commission was constituted mostly of foreign experts because the local community had expressed lack of confidence in the citizens of the country since many persons within the society were implicated in the civil strife and authoritarian regime that had bedeviled the state for many years. Judge Thomas Burgenthal and other international experts were therefore given the mandate of both the community and the international partners to carry out the truth commission work in El Salvador.

Be that as it may, despite this ubiquity of truth commissions – I argue – there seems to be a limited scholarly articulation of their overall contribution to transitional justice efforts beyond the normative claims made for them.[21] Whereas the normative claims are justified and intrinsically invaluable in setting out standards and aspirations for post authoritarian societies, it seems there is space for more articulation of the functional value or even actual utility of TRCs in transitional justice efforts. Equally, there is a great emphasis on civil and political rights while socioeconomic and cultural rights are considered collateral fall outs of the actualization of civil and political rights.

At worst socioeconomic and political rights are merely forgone alternatives in the overarching transitional justice policy frameworks. In other situations, they are seen to be matters better left for the consideration of future governments. Their definitions are often vague and limited making it almost impossible to form the basis of any direction individual or citizenship action for redress. It is my view that such attitude has a potential to undermine faith in the processes and equally dismiss unwittingly the

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[21] Maitangi Sirleaf has argued that there is also a gap in the literature regarding when and how best to use truth commissions. In the main her submission that truth commissions are best when they are used in post authoritarian societies as opposed to post conflict societies. To wit; 'while there has been growth in scholarly attention paid to truth commissions and trials following mass atrocity, much of the literature does not sufficiently account for the variation in truth commissions performances in various societies" See Maitangi Sirleaf (Supra) Cardozo Law Review Vol. 35: 22263, page 2268. She explained that the limited success of truth commissions in post conflict situations may be attributed to the collapse of state institutions unlike in post-authoritarian societies where the institutions are intact.

experiences of so many citizens. Surely, there should be more to the contribution of TRCs beyond the normative standards upon which they are founded?

One is therefore not in the least surprised by the strictures and apparent skepticism which has become the fortune of transitional justice efforts in general and TRCs in particular. Yet, amongst legal experts, policy makers, scholars, and institutions involved in the sub-field of transitional justice, TRCs continue to be viewed as indispensable – leaving one to wonder whether the contribution of TRCs to transitional justice situations is self-evident? I argue that the contributions of TRCs in transitional justice situations are not self-evident hence, their use in transitional justice efforts must be well thought out and deliberate. That being the case, my work aims to illuminate the many aspects – contextual and otherwise – that affect the viability and ultimate contributions of TRCs to transitional justice efforts. It is aimed at reassessing and unpacking the instrumentality of truth commission as a measure of transitional justice. The distinctive approach to be adopted in the work is an eclectic utilization of comparative law tools – legal transplant and functionalism – to study the TRC as a measure of transitional justice. If we utilized these instruments more we will see what exactly needs to be done to sharpen the TRC mechanism as a transitional justice tool.

This view is borne out of the fact that truth commissions need to understood better hence I make the following assertions. First, TRCs are significant transplants in this age. Having taken off from Latin America, they have continued to be borrowed and utilized in many places around the world. The use of TRCs is not going to go away soon seen they are often perceived as a half-way house between criminal prosecution and impunity. They are considered more benign and malleable to the conditions and

negotiating circumstances for the end of civil wars or the exit of an authoritarian governments. Equally they are perceived to be cheaper and capable of serving as a space for community collective healing and the recapture of the soul of the society.

Being therefore a transplant it has continued to morph and may well be seen in some situations an attempt by experts to interpret its foundational ideas and use same in serving their specific needs. These twists and turns in the ideas and use of truth commissions may well be form of legal translation and not transplant simpliciter. But one indispensable take-away is that there a movement, diffusion and borrowing of the TRCs as a mechanism of transitional justice.

Second legal transplants are only meaningful to the extent that they serve some purpose – the purpose for which they are borrowed. TRCs are therefore meant to serve some objectives. What are these objectives and how may we ascertain that they are being achieved? One way of looking at this is to use functionalist comparative methodology as a way of find out the transplant effect of truth commissions. This is important if we are to be able to make a meaningful comparative analysis of between truth commission on the one hand and between TRCs and other mechanisms like criminal prosecutions of the other. Functionalism therefore offers the important second lens with which a thorough-going analysis of the field can be done. This is so because this the sure way of revealing both the manifest and latent effect of TRCs. To understand the functionalism of truth commissions is to predict their transplant effects. To be able to predict their latent effects is also the better approach towards making rules, designs and policies targeted at restoring the rule of law and guarantee social justice and fundamental freedoms in transitional societies. A reformer who is ignorant of the

function of an adopted mechanism may well be 'legal carpenter' rather than a designer who can calibrate and predict reasonably the manifest and latent outcome of every rafter of law placed on the legal system. I shall come back to this at several points in this discourse but lets us first clear some of the cobwebs on our paths so that the discourse may become more productive.

First off, it would be remiss to delve into the work without an attempt to set out the linkages between law as part of the substratum of society; its means of transmission and what role(s) it plays in society. This is important in the nature of this work as it seeks to use the *legal transplant* theoretical framework in its analysis of truth commissions. Like Lon Fuller's – the case of the Speluncean explorers[22] – law, its nature, value and interpretation in society is of variegated colors. In the same vein, normative pluralism is a common feature of societies. Hence, law has been described as a sprawling mansion with many entrances and exists. These entrances and exits come with their peculiarities and complexity in modern society. This has even become more complex because of the several intersections of law, morality, culture, politics, economics and identity.

In no other situation – I would argue – are these intersections more visible as in a transitional justice situation. Authoritarianism and wars are often sustained by fault-lines of identity, exclusion and othering. It could therefore be said that often, the failure of societies and the collapse of rule of law are inexorably linked to the inability of such

[22] Lon Fuller, *The Case of The Speluncean Explorers*, Harvard Law Review, Vol. 62, No 4, February 1949.

societies to manage diversity and create an inclusive society where the burdens and benefits are fairly distributed.[23] In some cases it is actually a product of forced homogenization of the society. This often manifests itself by way of pogrom, genocide, removals and apartheid – to mention a few. Even where such forced homogenizations do not produce the extreme outcomes of genocide and apartheid, what it often entails is that the power structures are built around an individual or at best a limited group of individuals. Ethiopia was constructed in this type of power dynamics before the recent thaw in the tense climate owning to the charismatic leadership of Prime Minister Abby Ahmed.

Thus, it is easy for the community to buckle once these individuals are ousted either by wars or peaceful social movements. Hence, it is important at this juncture to highlight the nature of law and its linkages with justice, morality and transitional justice in general.[24] The place of law as the ligament for the constituencies and constitution

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[23] Georgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, Stanford University Press 1998; Toni Morrison, *The Origin of Others,* Harvard University Press (2017); Edward Baptist, *The Half Has Never Been Told: Slavery and The Making of American Capitalism*, Basic Books (2014).

[24] Critical Law theory led by Roberto Unger of course argues that law has no objective content. It is a subject matter filled with indeterminacy unlike the naturalists who believe there is a moral code which can be objectively determined by rationality. This has been deeply explored by the Hart Dworkin Debate on law Justice and Morality. See generally Roberto Unger, Knowledge and Politics, New York, The Free Press, 1975;______ *Law in Modern Society:*

norms in the polity is one that has generated much jurisprudential articulation. It is however aimed here to highlight quite a few to enable us to proceed on the larger work of transitional justice and the place of truth commissions in it all. Be that as it may, I would argue that law is a tool for the purposive ordering of society.[25] It underpins every

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Towards a Criticism of Social Theory, New York, The Free Press, 1976; _____*The Critical Legal Studies Movement: Another Time, A Greater Task,* Harvard University Press, 1983; Altman, Andrew, *Legal Realism, Critical Legal Studies, and Dworkin,* Philosophy & Public Affairs15, no. 3 (1986): 205-35. Available at http://www.jstor.org/stable/2265210; Hart, H. L. A. *The Concept of Law*, Oxford: Clarendon Press (1986); Duarte d'Almeida, Luís, James Edwards, and Andrea Dolcetti, *Reading HLA Hart's The Concept of Law*, Hart Publishing (2013).

[25] This view of law is not without criticism – many a writer has argued that law is mere a tool of power and class structuring. That it is used as a tool in the hands of the dominant group in society Max Weber, and Karl Max before them argue in favor of the structural effect of law thus challenging the overly altruistic perception of law.

aspect of human co-habitation.[26] Even the most rudimentary of societies[27] have resort to rules and laws as the basis of societal engagement. An aggregation of the laws of any

[26] "We live in and by law. It makes us what we are: citizens and employees and doctors and spouses and people who own this. It is sword, shield and menace; we insist on our wage, or refuse to pay our rent, or are forced to forfeit penalties, or are closed up in jail, all in the name of what our abstract and ethereal sovereign, the law, has decreed. And we argue about what it has decreed. And we argue about what it has decreed, even when the books that are supposed to record its commands and directions are silent. We act then as if law has mattered it doom, tool low to be heard distinctly. We are subjects of law's empire, liegemen to its methods and ideals bound in spirit while we debate what we must therefore do." Dworkin, Ronald. *Law's Empire* Belknap Press, Harvard University Press, Cambridge, 1986, page 5.

[27] The Historical and Sociological Schools of Jurisprudence are known to have deeply canvassed the social theories of law. Thus Law was not something imposed from outside. The will of the sovereign as it were but an emanation from the milieu of the people. The spirit of the people produced the law. Carl von Savigny is known to have pioneered the Historical school of jurisprudence. He had this to say; "in the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners, and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin." See Frederick

Charles von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, translated by Abraham Hayward (London, Littlewood, 1831; reprinted Birmingham, Legal Classics Library, 986) 24. So for the historicists, the organic evolution of law made for its uniqueness and development. It could not have been related to a borrowing from another place since it would not come from the spirit of the people. See also Augusto Zimmermann, The Darwin of German Legal Theory – Carl von Savigny and the German School of Historical Law, Journal of Creation 27(2) 2013. E. Paterson, Jurisprudence: Men and Ideas of Law, Foundation Press, Brooklyn NY 1953. However, the ideas of the historical school regarding law which evolutionary in its conceptualization and dealing only with the collective vision of law was to prove in the long run to be a double-edged sword leading willy-nilly to the problems of absolute legal positivism and in a sense a negation of the individual as the *summum bonum* of collective living and repository of inalienable rights. Hence it has been accused of laying the foundations for the emergence of Nazism which permanently scarred the conscience of humankind in the 20th century. Little wonder then that other scholars have chimed in that "among schools of jurisprudence, the historical school is the poor and slightly eccentric relation. Everyone is polite to it, and no one explicitly disowns it, but no one really takes it seriously. Some writers mention its contribution to historical scholarship or its role in building up the intellectual life of nineteenth century German Universities. Others found it a forerunner of sociological jurisprudence on one hand and Nazism on the other" - Rodes, Robert E., *On the Historical School of Jurisprudence* (2004) Scholarly Works Paper 858 available at http://scholarship.law.nd.edu/law_faculty_scholarship/858 <visited 09/12/18>. Maitland and his companions on the English Channel shared a lot of the sentiments expressed in the

particular society, is a window into the values, ethos and irreducible standards by which that community aspires to live.

It accords rights. It guarantees recognition and due respect of rights hitherto unrecognized. Law regulates the many competing interests of society.[28] In a way, law

historical school but focused it more on the historical evolution of the common law. His work which is now largely historical was also groundbreaking in its time. See Maitland, F. W. *The Constitutional History of England*, Cambridge, Cambridge University Press, 1919; Macfarlane, A.(2002).*F.W. Maitland and the Making of the Modern World.*[Book].http://www.dspace.cam.ac.uk/handle/1810/195762< accessed 11/20/2018>. Dean Roscoe Pound was to subsequently lead the charge for the sociological jurisprudence. See Julius Stone, *Roscoe Pound and Sociological Jurisprudence*, Harvard Law Review 78, no. 8 (June 1965): 1578-158; Edwin W. Patterson, *Roscoe Pound on Jurisprudence*, Columbia Law Review 60, no. 8 (December 1960): 1124-1132; Roscoe Pound, *Sociology of Law and Sociological Jurisprudence*, University of Toronto Law Journal 5, no. 1 (1943): 1-20.

[28] Every form of law I would argue is permeated by some interest. The interest of the state or the interest of the dominant group in the state at the time. The dominant belief, ideology and perception of the 'the felt necessities of the time" also influences the making and content of laws. Such interest(s) need not necessarily be bad or intended to exclude. It can actually be an enlightened interest aimed at the common good. It is however critical to be open minded and thus alert to see what might be the manifest or latent interests that informs law making in any human community. To reach a common space of justice and inclusive society, it is not irresponsible to make a socioeconomic analysis of laws and hence be in a better position to

legitimizes power in society. It also orders human behavior in society and consolidates relationships between society and citizens on the one hand; and citizens and other citizens on the other hand. It ideally ensures cohesion.

I say 'ideally' consciously, bearing in mind that law is impregnated with interest. For one, that interest may mean exclusive enjoyment of the safeguards of private ownership of proprietary rights. For another it may just be access to bare needs of dignified living like water and sanitation. It can thus be framed in economic terms. Law can also be framed in many other ways not immediately revealed by the text of a law or to an untrained eye. It could actually be an obnoxious or unjust law.[29] Hence, managing the competing interests of humans in society is a common problem of law. This may well be the core problem which the social theory of law seeks to solve.

Thus, when law fails to perform its functions justly and fairly – which includes regulation of interests, rights and privileges – human rights suffer, and social stability and equilibrium may be ruptured. In extreme cases, there is a total collapse of law and mere anarchy is unleashed on society._It can be argued whether the laws are *de facto* as

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understand the best possible legal interventions, reforms to be made in law. The economic analysis of law today enjoys a wide following across the different scholarship spectrums. It is critical to understand the conversation; and to any legal reformer, this understanding is indispensable else such a reformer will be consistently be dogged by the high risk of legal dysfunctionality despite whatever best efforts are put into the work.

[29] In South Africa there were such laws which ran into volumes and only repealed in post-apartheid South Africa.

effective as they are stated to be *de jure*, however, the various roles of law in society ranging from 'normativization' *juridification* of claims, legitimization of privileges, justification of actions and regulating interests are simply indispensable.

Therefore, it seems to me that no one will effectively dispute the necessity of the existence of law.[30] It can also be contended, as to what is the justness or otherwise of a rule of law, but it would not be easily or sustainably argued regarding the imperativeness of law in society. No doubt, the necessity for law and order has sometimes been misconstrued to justify violations of the inherent dignity of human beings.[31] It is therefore also true that in authoritarian societies "law" can become an instrument of domination, conquest or pacification.

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[30] Even the anarchist argument is not hinged on lawlessness but on self-regulation because human beings possess the capacity to distinguish and make rational choices in their best interest and that of society.

[31] There is presently an argument regarding "rule of law" and "rule by law". It is this somewhat imprecision and the sometime inconsistent invocation of rule of law or its other mutations like 'law and order' that has made Richard H. Fallon to surmise what he refers to as the "four ideal types of rule of law." See Generally, Richard H. Fallon, Jr. "The Rule of Law" as a Concept in Constitutional Discourse, Columbia Law Review, Volume 97, No. 1 (1997) available at https://www.jstor.org/stable/1123446 Accessed: 20-11-2018 21:55 UTC.

Hence there are just laws and unjust laws – the debate regarding the content of law being a perennial problem of jurisprudence.[32]Under slavery, colonialism, and apartheid for instance; law was an instrument of social exclusion, expropriation, cartelization of human beings and imperial domination. It dehumanized and negated the inherent value of other human beings. It helped pronounce them worthless.

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[32] It is said that the principal question in law – according to legal positivists – is; where does it come from? The source and not the merits or demerits of its contents is the expression of what is law. Thus there is the sovereign who has the command of the plenitude of powers in a state and his acts and directions and therefore backed by sanction. Social positivist philosophers hold the sovereign out as having the monopoly of violence in society. Legal positivists like John Austin are of the view that "the existence of law is one thing; its merits or demerit is another. Whether it be or be nor conformable to assumed standard is a different enquiry"- see John Austin, The Province of Jurisprudence Determined (1932) (ed.) W. E. Rumble, Cambridge University Press, Cambridge, 1995. The debates have since then pivoted and navigated different aspects of law and society including the natural law theories of law and the questions of the integrity and obligations of law. See further, Leslie Green, *The Concept of Law Revisited* Michigan Law Review 1999-page 1687. John Gardner, *Legal Positivism 5 ½ Myths*: 46 American Journal of Jurisprudence 1999. John Gardner while looking at the historicity of the idea of legal positivism sought to extract its minimum restatement as "in any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of the system, depends on its sources, not on its merits". See John Gardner (Supra) at page 199.

Often, this misuse of law became contested grounds which can lead to societal rupture and conflict. Resistance by the victims of the abuse of law, many a time lead to wars and consequent violations of human rights. Even where there is no outright war, the powers of the state are often used to repress the resistance violently. In the aftermath of such violent rupture of society, or repression; legal reforms in several respects are often a dire necessity – hence legal transplant and efforts at transitional justice. But then, we are left with the questions; what is legal transplant? What is functionalism? What is transitional justice and how does it interact with legal transplant and functionalism? Let us now examine these general concepts so as to give ourselves a handle unto the work.

DISAMBIGUATION OF BASIC CONCEPTS

Legal Transplantation[33] is an idea whose articulation and elucidation has occupied many a scholar overtime.[34] The concept is at the core of comparative legal

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[33]Legal transplant is the method of adopting and enacting some legal ideas, framework or system from one jurisdiction or system to another in other to meet the legal exigencies of the adopting country. This borrowing of laws or enactment of new laws, on inspiration by some foreign examples is called legal transplant. See Alan Watson, *Legal Transplants an Approach to Comparative Law*, University of Georgia Press, 1993. Pierre Legrand and other notable scholars in the field of comparative law have criticized Watson's definition of Legal Transplants. To Legrand, Watson's definition of legal transplants reduces the meaning of the term *legal* to "*rules* – which are usually not defined but which are conventionally understood to mean statutory instruments and although less peremptorily, judicial decisions". See Pierre Legrand, *The Impossibility of Legal Transplants, 4 Maastricht J. Eur. & Comparative Law 111, 1997.* Despite this critique, the contributions of Watson in terms of opening a large vista of legal inquiry in the field of comparative law is still very relevant to contemporary legal debates. There is however potent point in the arguments made by Legrand and others as to the impossibility of legal transplants because societies are different, and the different dynamics changes what is transplanted. Maximo Langer has for instance called attention to the need to avoid a rigid perception or conceptualization of legal transplants. To him it might as well be a *legal translation* instead of a *legal transplant* simpliciter. See Langer, Maximo, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, Harvard International Law Journal, Vol. 45, No. 1, 2004. Available at SSRN: http://ssrn.com/abstract=707261. Undoubtedly, there are values

in the nuanced positions scholars represented by Legrand and Langer. However, no serious comparative law studies can validly ignore the revealing arguments of legal transplants. This is also very essential because of the continued default recourse to Legal transplants by International policy organizations as the default answer to legal problems especially in developing economies and post conflict societies despite the pitfalls noted by Legrand and others.

[34]With the publication of the seminal work by Alan Watson, *Legal Transplants: An Approach to Comparative Law (ibid)* greater attention was drawn to the idea of legal borrowing and its evaluation as an indispensable process of comparative legal enquiry. So much literature has emanated either from the exposition of the concept or a critique of the propositions made by Watson. Yet the idea of *legal Transplants* continues to be relevant especially in our now globalized world. Indeed because of the existence of many institutions of global governance like the International Monetary Fund (IMF), International Bank for Rehabilitation and Development, (World Bank), Organization for Economic Co-operation and Development (OECD), the World Trade Organization (WTO), International Human Rights Organizations and Institutions *et cetera,* the diffusion of legal ideas from one part of the globe to another has become rampant and almost seamless in recent times. This is because they engage government agencies and sometimes demand legal reforms in line with 'international best practices' from them as a condition precedent for participating in their activities. The existence of regional organizations like the European Union (EU), Southern African Development Commission (SADC), Economic Community of West African States (ECOWAS), have equally created further fertile grounds for legal transplants as these institutions are sometimes

studies. It has dominated a large part of the discourse, serving as the point of departure for many other aspects of comparative law. Thus, a broad and pivotal literature exists as to the nature, structure and content of the term 'legal transplant.' A very simplified explanation of legal transplants would be that it entails the transmission of legal ideas, concepts – and sometimes an entire legal system – from one tradition to another as a means of satisfying current or perceived necessities of the recipient society. Sometimes it is a question of adaptation, at other times an adoption – yet the means or methods of transplantation remains open to new approaches. A number of scholars have also used such terminologies as legal diffusion and legal translation to express the concept of legal transplantation as a complex network of means through which laws move from one domain or jurisdiction to another.

Thus, legal transplant may involve a mix of ideas, different approaches and methodologies. One 'common core'[35] however, is that there is a diffusion of legal ideas

influenced by the need for uniformity or pressure from development partners to adopt 'model laws' like arbitration rules as part of development agreements of treaties.

[35] I use the word common core in the ordinary English language sense. One must not confuse this with the common core movement in comparative legal studies aimed at unification or such other goals as championed by the eminent jurist Rudolf B Schlesinger. Common core has achieved a lot in the field of comparative law. Particularly significant is the contribution it has made to legal harmonization in Europe. What one cannot ignore however, is the criticism regarding questions of legal hegemony surrounding the movement. However, common core is still much useful in understanding the historical evolution of some multilateral legal

from one place to another. Many opinions differ as to this, but the major proponent had a peculiar perspective which resonated at the time of its publication and remains so even today in the field of comparative law. Thusly, if one was to offer a general explanation of Watson's theory of legal transplant, it can be asserted that the theory can be boiled down into three fundamental propositions.

First, Watson asserts that law is out of context much of the time and perhaps even most of the time. This he explains is due to the fact that legislations lie in the statute books for years without being in consonance with the developments in society, yet society tolerates such laws. For instance current controversies about big data, digital technology and artificial intelligence are obviously ahead of legal development. Many societies grappling with this problem are looking at different jurisdictions to see what can be done in regard to this problem.

It is Alan Watsons argument that such rapid changes in society notwithstanding, law often remains the same and even when amended only shifts the needle just enough not to violate the social equilibrium. Therefore, it often falls short of legitimate expectations in line with the changes in society.[36] The legitimate expectations also often vary from groups and communities to communities making therefore a further case for

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templates governing common market. There is also still now an attempt at legal harmonization on issues of trade and transnational transactions, and business.

[36] See generally, Alan Watson, *Society and Legal Change* (2nd Edition) Temple University Press 2001; Edward M. Wise "The Transplant of Legal Patterns, American Journal of Comparative Law, Vol. 38, 1990.

an examination of what is done elsewhere and seek to borrow as a way of finding fitting solutions to legal problems in society. Watson further argued[37] that though society has the capacity to make laws, changes in society both politically and economically are not often immediately followed by changes in law. The law he argued often remains the same or at best changes slightly.

This view was considered radical at the time since it challenged what had been taken as the holy grail of comparative law – the social theory of law. It challenged the axiomatic claims of the sociological school that the changes in society and law society are inexorably bound together since changes in law are often about the 'felt needs' of the society. However, this was not in the least a new debate. Friedmann in 1959 had written thus: "the controversy between those who believe that law should essentially follow, not lead, and that it should do so slowly, in response to clearly formulated social sentiment – those who believe that the law should be a determined agent in the creation of new norms, is one of the recurrent themes of the history of legal thought. It is tellingly illustrated by the conflicting approaches of Savigny and Bentham."[38]

Next, Watson proposed that when the law actually changes, it does so largely through legal borrowing – legal transplantation being the most outstanding way of legal development or change. Thus, whenever society overcomes it basic inertia and seeks to make required changes the favored means of legal change is through legal transplant – borrowing of norms, principles, legislations, procedures, and sometimes an entire

[37] Alan Watson, *Law out of Context*, Georgia, University of Georgia Press, 2000.

[38] Freidman Wolfgang, *Law in a Changing Society*, Berkeley University of California Press, 1959.

system of law. In the end, he surmised by saying that legal transplantations are socially easy and that legal ideas can travel from one place to another showing a lot of capacity to survive and resilience.

This he sought to support by tracing the spread of Roman law and its principles throughout Europe. He illustrated their uncommon capacity too to survive and thrive in the transplant communities for generations. The historicity evident in Watson's work evidences his understanding of Roman law and unique position which the Scottish legal system gave him in that endeavor. The frontier position of the Scottish system wherein it is on constant interaction with both the common and civil law tradition no doubt illustrated to Watson boldly the contours of legal diffusion and the possibilities that it holds. Watson however may have exaggerated some of the noted movements of law. He seems to have presumed the survival of the transplanted laws.

It is also arguable as to whether Watson paid much attention to the outcome of the transplants – the transplant effects in the new communities. The commitment seen in his work aimed at finding the connecting ligament of law from one jurisdiction to another may have also affected his appreciation of other factors affecting legal diffusion like conquest and imposition during the age of empires. Another critique of this disposition may well be the problem of focusing on similarities or letting imbibed categories and classifications affect what is seen and taken out of a given legal system or tradition.

It is therefore not surprising that many other scholars have criticized Watson's theory of legal transplant. Prominent among the critiques of the theory is Pier Legrand. He viewed the theory of legal transplant as *an impossibility*. Hence, for him the search

for similarities between legal systems misses the point about differences and equally adds nothing to the existing body of knowledge. Finding similarities does not help explain the legal pluralism which exists around the world. The cultural embeddedness of legal rules and norms seems not to have received the full warmth of Watson's intellectual rigor. Thus legal rules are not transplantable in that they are customized or purposefully created for a given society. Even when they are 'borrowed', they are first kneaded into a new and usable form for the new society. They therefore naturally change or mutate even if attempts were to be made to transplant them.

Legrand surmised by noting that transplants remove laws from their cultural milieu and thus they ultimately become dysfunctional. Legrand's view is critical to the extent that it draws attention to the need to understand and understudy the make-up of the recipient society as a first step towards an effective and functional transplant. One does not share the views as expressed by Legrand that transplants are not possible. But the contribution he makes regarding over concentration on similarities is well taken considering that looking for similarities via the common core[39] approach may have the unwitting consequence of excluding norms and laws which an author may not be familiar with.

[39] I am aware that several justification and explanations have been made for the common core approach to comparative law.

Interestingly, the nature of comparative law is that it also refuses to focus on law *qua* law as the only means to the proper understanding of law.[40] It also borrows hermeneutic tools – across the social sciences and humanities – to infuse new life to or better sharpen existing tools of comparative studies. The borrowing of tools from the other disciplines especially the social sciences has a long history.[41] In this light, *functionalism* has emerged as one of the tools and a testing rod for evaluating the effectuality or otherwise of legal transplants – ascertaining the transplant effect. It is seen both as an approach of legal comparison and a method of comparative legal

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[40] Merryman had once accused lawyers of being parochial and comparative law is an attempt to cure them of that malaise. Though this was said in the context of studying one branch of law or being immersed in one jurisdiction or legal tradition, it has become continually apparent in contemporary times that the tools of social sciences like empirical research methodology are relevant to understanding the role of law in society. See Mathias Siems*, Comparative Law,* Cambridge University Press, 2014.

[41] Dean Roscoe Pound and the Sociological School of Jurisprudence helped to popularize the idea of the social sciences offering broader analytical tools to the law than it would have had if it remained within the "province of jurisprudence" as canvassed by Austin and his disciples. Critical legal theory has taken that a notch higher by drawing attention to how existing tools of law can become an albatross to legal reform. Hence the need not to take law as given but to interrogate its contents and impact in society. Of course no legal theory is absolutely unassailable, but they offer insights into the overarching aspects of laws interaction with human society.

evaluation. Both limbs of the functionalist theory are key to understanding what purpose a given transplant may serve and how best this can be achieved.

Thus, *functionalism*,[42] is another means of understanding the duty or goal of any law and therefore better explains the value accruable from any legal transplant. It is also

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[42] Functionalism is a term that reoccurs frequently in many fields of learning. Different understandings of it therefore exist. For instance we see structural functionalism in the social sciences. The field of comparative law also relies on functionalism as a major aspect of its overarching methodology and epistemology. In some sense it deals with the operative aspect of law in society – law in action as opposed to law in the books. It has also more diverse meaning in jurisprudence which principally emphasizes the effectiveness of law in society as opposed to principles and standards as may be found in the statutes. However, the interest we have regarding functionalism in this work is to the narrow stipulations which it has in comparative law. For some writers, functionalism in itself is not a method but a principle of the comparative method of legal studies. Others like Ralf Michaels however have the sentiment that functionalism is a core methodology of comparative legal studies. This sentiment is in line with that expressed by Zweigert and Kotz. One notable thing however is that it is thesis of functional comparative methodology that the better approach to understanding and comparing legal systems or aspects of it is best via examination of the functions which the perform in the different systems. Thus laws that perform similar functions are comparable. See O Kahn-Freund, *Comparative Law as an Academic Subject*, Oxford Clarendon Press, Oxford 1965; B. S Markesinis, *Foreign Law and Comparative Methodology: A Subject and a Thesis*, Hart Publishing, Oxford 1997; K. Z. Zweigert and H. Kotz, *An Introduction*

useful for understanding the object and purpose of any instrument of transitional justice. Whereas legal transplantation is not an end in itself but a means of achieving some societal legal objectives.[43] Functionalism offers a medium for examining the goals legal

to Comparative Law, 3rd edn. Oxford University Press, Oxford, 1998; J. H. Merryman, *The Loneliness of the Comparative Lawyer*, Kluwer International, The Hague 1999; M. Graziadei, *The Functionalist Heritage* in P. Legrand and R. Munday (eds.) Comparative Legal Studies; Traditions and Transitions, Cambridge University Press, Cambridge 2003; G. Samuel, *Epistemology and Methodology of Comparative Law: Contributions from the Sciences* in M. Van Hoecke (ed.) Epistemology and Methodology of Comparative Law, Hart Publishing, Oxford and Portland Oregon 2004.

[43] Some of the reasons often adduced for legal transplants includes creating uniformity and universalism. This helps in producing common rules of trade, business, political culture, human rights and other forms of transnational engagements. It is equally epistemological in that they help in creating common cores across jurisdictions and systems. Legal development is another often-quoted reason for legal transplants – the enduring purpose of understanding legal transplants being to appreciate the causal connection between a rule of law and its origins. Thus the epistemological question of what the law is, is only properly understood and answered via the historical question: how did the law come about? Again, because of the complexity inherent in creating an entirely new system, it is argued, that it is easier for jurists to borrow from an existing structure or system of law rather than seek to reinvent the wheel. See further A. A. Saparova, *Legal Transplants: Nature and Structure of Content*, 10 Journal of Comparative Law, 93, 2015.

transplant. It also seeks to find a better approach towards legal reform. There are needs, purposes or ends for which legal transplants are made. One means of studying the extent of the fulfillment of these goals is through the method of functional comparison. It is a means of understanding what to compare else the study of transplants may become a metaphysical exercise disconnected from the true ends of a given legal instrumentality. The functionality is also linked to the source and normative legitimacy of a given rule of law or a given legal mechanism.

Hence the need to ensure that it is not decontextualized or examined from an epistemological, historical and social distance.[44] According to Ralf Michaels, "functional comparative (studies) focuses not on rules but on their effects, not doctrinal structures and arguments, but events. Consequently, its objects are often judicial decisions as reactions to real life situations, and legal systems are compared with regard

[44] If one may further argue the organization of a society being an interlinkage of several aspects of society which forms a whole, the proper appreciation of the law and mechanisms of rule of law in society is to be examined as an organic whole – a system tied at several ends. This is incredibly so in post authoritarian societies because to sustain absolute hold on power, nothing is ever left to chance or uncensored evolution of human interaction in society. Indeed ideologies and worldviews are consciously choreographed into the minds of the populace. For those citizens who may prove stubborn these are seared into their minds through all forms of state abuse including torture and incarceration. For others who may seem impervious, it is not unusual to find that the state crystalizes them out from the society and gets rid of them through several measures including disappearances and executions.

to their answers to similar situations."[45] As noted by Gunter Frankenberg "comparative law is somewhat like travelling. The Traveler and the comparatist are invited to break away from daily routines to meet the unexpected and perhaps to get to know the unknown."[46] In that endeavor he further opines, and rightly so that functionalist method guarantees objectivity and restraint.[47]

Significantly, one of the sustained critiques of international law is also its inability to take a close look at situations before imposing a legal order or dictating a

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[45] Michaels, Ralf, *The Functional Method of Comparative Law*, (Duke Law School Faculty Scholarship Series 2005) Paper 26. Available at http://lsr.nellco.org/duke_fs/26. In that essay, he began by noting that "*the functional method has become both the mantra and the bête noire of contemporary comparative law. For its proponents, it is the most fruitful, the only method ofcomparative law. For its opponents, it stands for everything that is bad about mainstream comparative law". Page 1.*

[46] Gunter Frankenberg, *Critical Comparisons: Rethinking Comparative Law*, Harvard International Law Journal vol. 26, 1985, page 439; M. A. Glendon, M. Gordon, & C. Osakwe*, Comparative Legal Traditions in a Nutshell* West Publishing, 1999.

[47] Zweigert and Kotz, have further expressed the same view about functionalist comparison when the noted that function is the start point and basis of all comparative law. It is the beginning and end of comparative law. To them this means that "the solutions (that) we find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen in the light of their function, as an attempt to satisfy a particular legal need." Supra note 37, 1-10(1977).

legal transplant in societies around the world. Instead of carefully examining situations, it is usually taken for granted that it will work despite the facts.[48] This critique has

[48]In a rousing critic of this international law and endorsement of functional approach to problem solving, Hans Morgenthau had this to say, "if an event in the physical world contradicts all scientific forecasts, and thus challenges the assumptions on which the forecasts have been based, it is the natural reaction of scientific enquiry to re-examine the foundations of the specific science and attempt to reconcile scientific findings and empirical facts. The social sciences do not react that way. They have the inveterate tendency to stick to their assumptions and to suffer the constant defeat from experience rather than change their assumptions in the light of the contradicting facts. This resistance to change is uppermost in the history of international law. All the schemes and devices by which great humanitarians and shrewd politicians endeavored to reorganize the relations between states on the basis of law have not stood the trial of history. Instead of asking whether the devices were adequate to the problems which they were supposed to solve it was the general attitude of internationalists is to take the appropriateness of the devices for granted and to blame the facts for the failure. When the facts behave otherwise than they are predicted, they seem to say, too bad for the facts. Not unlike the sorcerers of primitive ages, they attempt to exorcise social evils by the indefatigable repetition of magic formula." This view no doubt leans to the extreme functionalism which has its own inherent limitations. Its value however, lies in the reminder that we ought to have a good measure of skepticism in our transplant attempts and general conceptualization of legal solutions to problems of societies across the world. To do otherwise will ordinarily be quixotic and fail transitional societies in finding answers to their problems.

further been extended to transitional justice efforts especially as often chaperoned by global policy institutions like the United Nations.[49] It is important to note though that the UN is often driven by the need to meet humanitarian/human rights challenges and sustain international best practices. One important bit which is however gradually sipping into the pores of these international agencies, is the need to encourage a home driven (endogenous) processes for post conflict and post authoritarian state building processes. Increasingly and in hindsight from the lessons learnt from Kosovo, Rwanda, Afghanistan and Iraqi, technocrats are turning towards the flexibilities necessary to give mechanisms adopted in post conflict situations the needed contextualization and hence prevent the consequent alienation of the populace if the situation had been otherwise.[50]

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[49] The critiques of transitional justice efforts and its uncritical transplant of laws and measures has been explored by many scholars relying on a number of grounds. See Laurel E. Fletcher, Harvey M. Weinstein, & Jamie Rowen, *Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective,* Human Rights Quarterly Review Vol.31 (2009) 163 – 220. In this paper, the authors anchored their analysis and critique of truth commissions on certain significant influences. Some of those influences are strength and legitimacy of institutions prior to the transitional period; the strength of democracy prior to the conflict, the legacy of colonialism, the character of the country as a weak or failed state; the international intervention and the commitment of the governing parties to confront the past.

[50] It is important to note that that the debate regarding the limits or otherwise of international law has been quite long and varied – particularly since the end of the Second World War. The debates in the field focuses on the overall place of international law in the affairs of nations

and communities around the world. First there is the neo-conservative protecting the domain of nation states and their interests from the impact on international law. While they have no worries regarding the national interests shaping the evolution of international law, they are strongly opposed to international rules and obligations attenuating the peripheries of sovereign power. Hence, their proclamation of the limits of international law as an article of faith. For others, international law is not necessarily a top-down experience but also a bottom-up experience. There are also the bottom-up aspects of the development of international law and its overall evolution. Thus to insist on one against the other is to create a problematic binary which does not assist even the ultimate goals of nation states and the global search for peace and security the very essence of the Post-World War II order. Thus, national institutions and legal ideas and principles generate the ripples that often crystalize as the basis of international rules and obligations. Yet there are others who while perceiving the systemic problems of international law do not see it as a zero-sum game between nation states and their perceived interests. Rather, they see it as a problem not limited to the international law system but also seen in legal systems in general and requires deliberate thinking in other to find sustainable solutions to them. I am so much of this mind and it is the aim of this work to make efforts at reconciling the need for development of law in post conflict societies and the need for *endogeneity* and agency to the transitional justice society as to what best serves the interest of the peoples of that state. For a general appreciation of the debates see Jack L. Goldsmith & Eric A. Posner, *The Limits Of International Law,* Oxford, Oxford University Press, 2005. W. Michael Reisman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application, in Developments of International Law in*

Comparative law therefore becomes essential in an attempt to grapple with the problems of transitional societies.[51]

In the circumstance, one area of scholarly interest, wherein the essence of legal transplants has become poignantly crucial is in transitional justice and post-conflict law making. In recent times, a lot of legal borrowings are taking place in Africa and Eastern Europe as a panacea to the social and transitional needs of post authoritarian regimes in

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Treaty Making 16, 26 (Riidiger Wolfrum & Volker Ruben Eds., 2005), G. Hugo Whitehouse, *American Diplomacy*, 1900-1950, By George F. Kennan, Chicago; University of Chicago Press, 1951., 7 U. Miami L. Rev. 448 (1953); Hans J. Morgenthau, *In Defense of the National Interest* (1951); _____, Politics Among the Nations: The Struggle for Power and Peace, 1948 (6th edition, McGraw-Hill 1993); Janet K. Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 Yale Journal of International Law (2007).

[51] As has been explained, the value in this is that comparative law experiences and the richness of its outcomes is transferable. This can only be so because "comparative law offers …opportunities and risks. It can be an opportunity for learning, for organizing and allowing us intimacy in the world; it invites the comparatist to study other peoples' normative practices and ideas, their visions of a well-ordered community and the instruments and institutions they have designed to establish and sustain such order. Comparative legal studies might indeed inspire students to learn more about and rethink the basis of their own cultural and legal education." See Gunter Frankenberg (supra) page 412. He however advocates critical comparison as a better way of serving the ends for which comparative law had been conceptualized.

these regions.[52] The need for this is whetted by the fact that, transitional societies are often faced with the problem of redress of injustices and restoration of societal bearing.

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[52] One interesting aspect of conflict, foreign policy and strategic management in recent times is the idea of nation building. For instance, the experience of Afghanistan since 1989, wherein the departure of the soviet forces left a power vacuum which was filled quickly by radical elements has taught the world a bitter lesson. Hence there is a perception in the minds of global policy bodies like the United Nations that post conflict and post authoritarian societies need help and may have to enact new laws beginning with the Constitution first for the purpose of ensuring that there is no relapse to conflict and then to set the society on the path of stability and growth. The imperative nature of this is further emphasized by the global effect of terrorism which we saw in 9/11/2001 and such other related events around the world since then. Indeed, the negligence of the US and its Allies - "the coalition of the willing"- in helping Iraq stand on its feet in terms of institutions and legal foundations after the second Iraqi invasion has been said to have fueled the emergence of radical groups like ISIS. While this is still debated and not yet clearly set out with empirical facts it points to the global expectation that transitional societies ought to do something in terms of it governing legal culture and the international community has a role to play in helping the reform or indeed total change of legal regime governing the society. See Melanie Kawano, & Amy Mc Guire, *State-Building in Afghanistan* *http://www.du.edu/korbel/hrhw/researchdigest/reconstruction/afgstate.pdf*. The underlying issues of policy, economics, law and global peace in post-conflict or post-authoritarian states have been explored by the duo of Ashraf Ghani and Clare Lockhart. See

It was this need that inspired the idea of transitional justice as a special field. So, it has created the idea of 'transitional justice'[53] which entails '…a set of judicial and non-judicial measures… implemented… in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms.'[54]

Intertwined with transitional justice is a hunger for the truth behind the manifest impunity, gross violation of human rights and injustices. Amidst this clamor for truth, is also the indispensable need for reconciliation of the populace and creation of a fresh course of nationhood and societal living. To reknit the broken society and heal the wounds wrought both on individuals and society at large. This truth seeking is perceived as a way of 'making sense of the mass atrocity'[55] and equally ensuring that there is no relapse to violence or collapse of rule of law. Thus reconciliation, restoration

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Ashraf Ghani & Clare Lockhart, *Fixing Failed States – A framework for Rebuilding a Fractured World, Oxford University Press 2009.*

[53] Roht-Arriaza, *Transitional Justice in the 21st Century,* Cambridge University Press 2006.

[54] See the Report of the Secretary General of the UN on The Rule of Law and Transitional Justice in Conflict and post-conflict societies, S/2004/616. Also, the International Centre for Transitional Justice *www.ictj.org* visited last on February 25, 2018; Jens David Ohlin, *On The Very Idea of Transitional Justice*, 8 Whitehead Journal of Diplomacy & International Relations 51 2007; Neil Kritz, (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (1992).

[55] Mark Osiel, *Making Sense of Mass Atrocity*, Cambridge University Press, 2009.

and prevention of recurrence are key elements in the overarching conceptualization of transitional justice efforts. This is more important because in post conflict societies victims live together with and often encounter the persons who assailed them during 'the season of anomy.'[56] The proximity and sometimes simmering fears and apprehensions are still on the faces of citizens in these societies.

Thus, violence can easily be revived if not carefully handled. It is therefore perceptible that the search for justice in these transitional societies is one of the truest quests of the human spirit.[57] The search, is unique in many respects – unlike court focused search for justice in stable polities and democracies. It is often a multi-layered and multi-limbed search for justice. To wit: justice for the living who survived the societal rupture. Justice for the community whose social code and humanity was violated and justice to no less the dead victims who should also be accounted for. This accountability – especially for disappeared victims[58] – is founded on truth. The truth as

[56] Wole Soyinka, *A Season of Anomy*, Arena, 1988.

[57] No doubt despite this love for justice and truth, transitional situations usually pose a great deal of dilemma as to what is to be done because of the potential relapse to conflict inherent in transitional societies. This we hope to explore further as we progress.

[58] On disappearances see Velásquez-Rodríguez v. Honduras case Inter-American Court of Human Rights 1988. Here one Manfredo Velásquez and others were violently detained and disappeared by state authorities in Honduras. In a petition brought before the Inter-American Court of human rights the state was held liable since it did not carry out its obligation to respect the rights of the victims or to institute and carryout through investigation as to what happened

a matter of correspondence with the facts and also consistent in itself becomes fountainhead of other ancillary but no less important efforts at restorative justice and social healing in general.

This has been receiving judicial articulation from courts around the world. It is argued therefore, that the customary international law regarding accountability and truth has presently crystalized.[59] What happened? How did the victims disappear? Who were

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to them. See also *Bazorkina v. Russia*, No 69481/01 (ECHR- 2006); *Edriss El Hussy v. The Libyan Arab Jamahiriya*, No CCPR/C/91/D/1422/2005.

[59] Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 California Law Review 449 (1990). Available at: http://scholarship.law.berkeley.edu/californialawreview/vol78/iss2/4. This can be further seen in the articulation of several other international instruments on forced disappearances of persons. Prominent amongst these instruments are; the Declaration on the Protection of all Persons from Enforced Disappearance 1992 (UNGA Resolution 47/33) of 18 December 1992; The Inter- American Convention on Forced Disappearances of Persons 1994; The Rome Statute of the International Criminal Court 1998 which came into force in 2002; The International Convention for the Protection of All Persons from Enforced Disappearances which was opened for signature in 2007. The Rome Statute Particularly in its Article 7(1) (i) prohibited forced disappearance as a crime against humanity. It went further to describe forced disappearance as "Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on

responsible for the violations and who are the victims? These are now the indispensable questions. This search and reckoning with these violations take many channels. The search is neither circumscribed nor diminished by the passage of time. Indeed it resonates over times and regimes. Sometimes, the commonest legal challenge of a contemporary time is traceable to an unresolved legal dissonance of a past era.[60]In these

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the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period.

[60] For instance, in Australia there is the intractable conflict of rights regarding the aborigines and the contemporary Australian Society. The United States is equally yet to give full vent to racial issues and other questions of human rights violations of the past. There is a seeming piecemeal attention on this through some form of *affirmative action* and sometimes judicial intervention as in *Brown v. Board of Education of Topeka 347 US 488*. However, race remains a very sensitive point in the sociopolitical and legal landscape of the society hence the continuing tension as to *the disproportionate* impact of criminal justice system on Americans of color. See http://www.cflj.org/wp-content/uploads/2012/05/The-Disproportionate-Impact-of-the-Criminal-Justice-System-on-People-of-Color-in-the-Capital-Region.pdf Canada has also recently looked back into its history with a view to healing itself. In the interim report of the Canadian Truth Commission the Chairman Justice Murray Sinclair had this to say… 'Up until the 1990s, the Canadian government, in partnership with several Christian churches, operated a residential school system for Aboriginal children. These government-funded, usually church-run schools and residences were set up to assimilate Aboriginal people forcibly into the Canadian mainstream by eliminating parental and community involvement in the

circumstances, it would appear that 'the past is not a foreign country' but a living present. Ever with us. Ever within us and ever welling in our minds – the mind of the society by extension. Even where the society is in denial this truth telling and search becomes some societal psychoanalysis – a way of unlocking the problems and beginning the process of finding effective healing.

Prior to the current era, there appeared to be a concentration on criminal investigations, prosecutions, and other traditional means of redress as the only measures for seeking transitional justice.[61] Indeed, truth telling was generally seen as an outcome

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intellectual, cultural, and spiritual development of Aboriginal children. More than 150,000 First Nations, Inuit, and Métis children were placed in what were known as *Indian residential schools*. As a matter of policy, the children commonly were forbidden from speaking their own language or engage in their own cultural and spiritual practices. Generations of children were traumatized by the experience. The lack of parental and family involvement in the upbringing of their own children also denied those same children the ability to develop parenting skills. There are an estimated 80,000 former students still living today. Because residential schools operated for well more than a century, their impact has been transmitted from grandparents to parents and to children. This legacy from one generation to the next has contributed to social problems, poor health, and low educational success rates in Aboriginal communities today' See http://www.trc.ca/websites/trcinstitution/index.php?p=807 dated September 28, 2010 accessed 3/8/2015.

[61]At the end of World War II, the victorious allied powers led by the United States and Britain established the Military Tribunal at Nuremberg to try the War Criminals. The emphasis at the

of trials or at best the internal affairs of each country or the country in question to seek reconciliation and healing hence not of prime importance for international law.[62]

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time was on retribution (punishment) against the war criminals. Thus, though certain gory details of the violations of human rights emerged during the trial there was no commission (in the manner of present day TRCs) set up with a separate mandate to find the truth as a measure of lasting peace and reconciliation. See generally Beth Van Schaack, and Ronald C. Slye, *International Criminal law and Its Enforcement* (Foundation Press MN USA 2014). Similar trials were also carried out in Tokyo but till today the issue of reconciliation and transitional justice remains an ongoing discourse. Indeed, memorials/monuments have been set up in different affected communities as a way of honoring the victims and helping the living to come to terms with what has happened. See further Paige Arthur, *How 'Transitions' Reshaped Human Rights: Conceptual History of Transitional Justice* 31 Human Rights Quarterly 321 (2009).

[62]Interestingly despite efforts to just bury the past it fails to bring complete peaceful transitions. One case in point is Spain. During the Spanish Civil War (1936 – 1939), massive atrocities were committed, and, in the end, there was a 'pact of silence'. General Francisco Franco made sure there was no truth commission of truth telling about the civil war. The entire story line became anecdotal but more than 40 years after that war the time of reckoning came. See Michael Richards, *A Time of Silence: Civil War and the Culture of Repression in Franco's Spain 1936 – 1945*, Cambridge University Press 1998; J. Labanyi, *Memory and Modernity in Democratic Spain: The Difficulty of Coming to Terms with the Spanish Civil War,* Duke University Press 2007; Iosif Kovras, *Unearthing the Truth; The Politics of Exhumations in Cyprus and Spain, Taylor and Francis 2008;* ____ *Exhuming the Defeated: Civil War Mass Graves in 21*st – Century

Victims and their families had limited chances of getting to know what happened save for snippets that fell out of prosecutions or individually initiated processes of enquiry. Punishment or retribution enjoyed primacy and dominance. State commissioned inquiries were often superficial. Even criminal prosecutions had limited international dimensions save in cases of extradition.[63] The traditional approach to transitional justice was therefore more about criminal prosecution. This had a lot of obvious limitations which included the time, cost, and the number of persons to be prosecuted. Often it is also difficult to have confidence in the discredited institutions of state to provide the necessary judicial framework for proper prosecution. Trials in themselves are also not reconciliatory and may not meet the overarching need of achieving social equilibrium in post-conflict societies.

Spain, American Ethnologist, 40: 38 – 54; Giles Tremlett, *Ghosts of Spain and Its Silent Past*, Bloomsbury Publishing, 2008.

[63] The politics of the post-world war II international order may have unwittingly facilitated the near freeze in the legal accountability for human rights atrocities initiated after World War II. What it meant in essence is that why the ideological quest for accumulation of global powers and use of such powers to exert political and economic control enjoyed primacy, human rights became the forgone alternative. In the same vein all other matters which are key to the realization of human rights as articulated in the Universal Declaration of Human Rights 1948 and the International Covenant on Civil and Political Rights among others, suffered the same fate. They were relegated to the back while the global titans – US, UK, France, China, Russia – played the checkerboard of power.

More importantly too, is the fact that only in rare occasions do conflicts end on their own. The ends are often a product of negotiation and peace accords. The Liberian conflict was a subject matter of several negotiations and peace accords led by the UN and the regional body ECOWAS before the war came to an end. As we shall see, it was also the case in Sierra Leone and Nigerian's transition from military to civil rule in 1999 was also overshadowed by the possibility of refusal of the military to hand over and send the country spiraling down once more into the alley of conflict. Hence the primary considerations in these situations are often neither criminal prosecution nor other forms of punishment but to have political peace at all cost. This it is presumed will usher in relative stability and create new opportunities for the country. This may explain why many societies never talk about the conflict in the immediate aftermath of it many years after the cessation of hostilities.

It is also critical to note that because these negotiations for peace are done in the looming atmosphere of potential relapse to violence – real or imagined – the transitioning societies are left with limited choices. It becomes a question of what compromises are possible and what gains can be made to put the country on the path of recovery and reconciliation. As was alluded to in many of the literature, it is an attempt to find a bridge across the chasm of violence which may have lasted for many years. It is only when that chasm is crossed successfully that real conversations will happen but often many societies never develop enough courage to have that re-interrogation of their days of conflict. With time the dust of history settles on it and depending the development of its power structures and political economy, it may continue to be remote in the affairs of the community. Such historical forgetfulness that inures out of this type

of approach may not exactly be in the best interest of the community. It fuels denials and heightens resentment between communities. Hence in order not to lose it completely many communities resort to TRCs. This is because it is some kind of hybridization and the flexibility it offers may mean that the other significant transitional justice approaches can be carefully tailored into it. Hence as a coat of many colors it has the possibility of having lustration, amnesty, recommendation for criminal trials, memorialization and reconciliation woven into its overarching fabric.

It is therefore not surprising that in contemporary times, there is a widespread perception that lasting peace and justice cannot be achieved in transitional societies without giving high premium to truth.[64] Here the emphasis is on 'truth' as a core of

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[64]M. Kaye, *The Role of Truth Commissions in the Search for Justice, Reconciliation and Democratization: The Salvadorian and Honduran cases* (1997) Journal of Latin American Studies 29(3), 693-716. A. R. Chapman, & P. Ball, *The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala* (2001) Human Rights Quarterly, 23(1), 1-43. There are many other literatures highlighting the need for truth as a recipe for justice and reconciliation in post violent or transitional societies. There is also a perception that the right to truth is a fundamental right and should be given high regards. The United Nations Council on Human Rights is presently working on this. Because of the cases of disappearances and gross violation of human rights, survivors or the families of victims do not get remedy if they do not have the truth of what happened to their loved ones. For details see the UN Council on Human Rights document www.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_9_11.pdf. Accessed 05/15/2016.

transition and reconciliation as opposed to truth which is a secondary fall out of prosecution or retributive justice. It is a restorative justice approach to the problem of impunity. This is also seen as key to the state rebuilding process. It is considered as indispensable not only because it creates a platform for the articulation of new pathways to nation building,[65] it also addresses the factors which will ordinarily lead to another societal rupture if not resolved. One can thus aver that there is a causal connection between poorly resolved conflict situations and recommencement of belligerency in the future. The need to prevent recurrence therefore is cardinal in the contemporary approaches to transitional justice. This is also seen in efforts at disarmament, rehabilitation and reintegration of combatants. More so, there are often questions regarding power share and state resource allocation in peace agreements which often set the tone for post conflict state rebuilding processes.

To fulfill these lofty desires, legal ideas, ideologies and templates in other places become treasured assets. These transitional societies readily adopt these assets as part of the panacea for justice, peace and reconciliation in their societies. By these existential realities, transitional societies are fertile grounds for the transplant of legal ideas from one society to the other. Truth and Reconciliation Commissions – one of such legal ideas – have been severally borrowed in recent transitional justice efforts across the

[65] The terms; 'state building' and 'nation building' have been used interchangeably in this work as meaning the same. Certain puritan writers might quarrel with this, but it is hoped that this does not in any way create an irreconcilable ambiguity in the discourse.

globe.[66] How well suited is this borrowing for those recipient societies? What level of evaluation and critical scrutiny is given to basic societal problems of the recipient society to guarantee an effectual transplant? How best is this legal idea of TRCs to be adapted? Are there existing resistant strains of problems in the recipient system which should be excised before the transplant of TRCs can take place? What level of borrowing is needful – a wholesale or partial transplantation?

These may sound like the normal questions asked about legal transplants. Curiously however, often, these considerations are ignored because the society is in a hurry to achieve stability and peace. Thus, legal solutions about transitional justice are adopted – sometimes eclectically combining different sets of ideas – as part of law reform process. Sometimes, it would appear that the ideas are adopted without due evaluation of their functionality or chances of dysfunctionality within the new and transitional legal field. Consequent upon this, there is often the production of results which may not satisfy the yearnings of the society.

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[66] The number of truth commissions have continued to grow and there often incessant calls for more of such commissions. We have seen about 42 depending on whose account is adopted. The United States Digital Archive for such commissions has listed about 46 Truth Commissions and other bodies of enquiry in recent times. See the United States Institute for Peace Studies https://www.usip.org/publications/2011/03/truth-commission-digital-collection <visited 06/01/2018> Gambia has just commenced a Truth Commission mechanism to look into the atrocities and human rights violations committed during the military junta in that country.

Hence the transplant effect differs;[67]ranging from general systemic hiccups to sometimes outright rejection. The challenge of this in post conflict societies is self-evident. On reason for this is that many of them often are emerging from a legal system whose institutions have lost legitimacy in the eyes of the people. The weakness of the institutions therefore makes it more difficult to engraft legal structures and borrowings on them without a serious fresh look on the stem – the extant institutions – upon which the legal buds are to be grafted. Identifiably too is the question of personnel and expertise. Often the human capital in these communities especially in the justice administration system has either been depleted or compromised. The 'dirty hands' of yesterday as it were, cannot be called upon to clean the stable.

Truth commissions as part of the adopted legal tools of transitions in West Africa today needs more than a cursory attention. They require the warmth of functional comparative and analytical study. This is because truth commissions as presently championed in international law, are not original to the region though the philosophies and spirit behind them, are not alien to the African ideology.[68] Before the year 1990

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[67] Alan Watson, *Legal Transplants an approach to Comparative Law*, Athens, University of Georgia Press 1993.

[68] Reconciliation and peace are not strange to African thought. One such concept is what is referred to as UbuntuOne Archbishop Desmond Tutu tried to explain it thus; 'u*buntu* is very difficult to render into a Western language. It speaks to the very essence of being human. When you want to give high praise to someone we say, "Yu, u *nobuntu*"; he or she has *Ubuntu*. This means that they are generous, hospitable, friendly, caring and compassionate. They share

truth commissions were not deployed in the West African region. As at 1994, sub-Saharan Africa was also yet to come to terms with the idea of TRCs.[69]The South African and Reconciliation Commission however, changed all that. Its popularity and implications for the South African – who had been under a suffocating regime for years – seems to have had a boomerang effect on the continent and in West Africa particularly. Since then, we have had the Nigerian Human Rights Investigation Commission 1999,

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what they have. It also means that my humanity is caught up, is inextricably bound up, in theirs. We belong in a bundle of life. We say, "a person is a person through other people" (in Xhosa Ubuntu *ungamntu* ngabanye *abantu* and in Zulu *Umuntu ngumuntu ngabanye*). I am human because I belong, I participate, and I share. A person with *ubuntu* is open and available to others, affirming of others, does not feel threatened that others are able and good; for he or she has a proper self-assurance that comes with knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed, or treated as if they were less than who they are.' See also Mpilo Desmond Tutu, *No Future Without Forgiveness*, Random House Publications New York, 2000 pg34-35. It is our perspective however that in terms of form, content and procedure it is different in the West African environment.

[69] The Ugandan Effort in 1986 was not pursued with the vigor and commitment it deserved. Hence, it is often not counted as a true attempt at a truth commission.

the Sierra Leonean TRC of 2000, Ghana 2003, Liberia 2005, Cote d'Ivoire 2011, Mali 2014, and Gambia in 2017.[70]

Thus in terms of structure, constitution and procedure the present structure of truth commissions differs from the traditional perceptions regarding peace and reconciliation. Often, what has been seen is a judicial panel of enquiry whose findings may or may not be published. Indeed, sometimes all that the public will see is a 'government white paper.'[71] The question that readily comes to mind here is that if these findings are not made public, how can the truth be known? This seems to be the gap which truth commissions have come to meet since it is a key aspect of truth commissions that they must prepare and publish a report of their findings. It is therefore largely an international law concept which has germinated recently in the continent and has continued to grow with disparate results in different sub-regions including West Africa.

[70] In a number of other countries like Guinea, consultations are ongoing between the government and civil society groups regarding the modalities for setting up Truth Commissions.

[71]Government white papers are usually publications of the state on the outcome of panels of enquiry and they are usually summaries or limited outlines leaving a lot of gray or opaque areas. They are most often than not pro-government or quite conservative and main reports are most times classified as secrets and thus not within the domain of contemporary society.

Additionally, post-colonial Africa has a good number of transitional societies. About the year 1960[72], many countries in Africa began to emerge from colonial governance with diverse problems, cultural, religious and value differences. There is hardly any African society or country that has homogeneity in terms of faith, culture, language and general way of life. Poverty of the mass majority of ordinary citizens despite the abundance of resources means also that there are a lot of reasons for mass resentment and fragility. Equally, African societies were perceptibly small city states prior to their conquest and forced unification in the orgy of colonial enterprise in the decades before 1960.[73] The diversity inherent in these nation states curated by the

[72] It must be acknowledged that Ghana gained independence from British Colonial Rule in 1954 thus becoming the first Country in Black Africa to wean itself from the political paternalism of a western power. But effectively the 1960's was the watershed of independence of African States in the 20th century marking a new beginning from decades of colonial control.

[73] In West Africa for instance the Berlin Conference of 1895 saw the division of territories and creation of nations with irregular and arbitrary boundary lines by the European Powers. Some communities were bifurcated into different countries without the flimsiest consideration of the best interest of the indigenous communities. International law and politics at the time was quite Euro-centric and this played out in the conquest and colonization of the African peoples. See generally Kenneth Onwuka Dike, *Trade and Politics in Niger Delta, 1830 – 1885; An Introduction to the Economic and Political History of Nigeria,* Oxford Clarendon Press, 1962; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870 – 1960,* Cambridge: Cambridge University Press 2001. Anthony Anghie, *Imperialism,*

colonial powers appear to have held together in the face of the common goal of self-determination. However, once independence was achieved, the diversities reared their heads up – hence calling for leaderships that could rise above ethnic, religious, regional and cultural backgrounds and offer a common state policy inspiration for all. In this respect, African leadership was found wanting.

What this birthed was a structure of economic (mis)governance, exploitation and enjoyment of the resources of the country which was hijacked by the elites. Whereas colonialism created some of these structures, the leaders who should have reformed them and ensured inclusive prosperity perfected them for their own goals leaving most of the communities impoverished and disenchanted. The economic structures even today remain in this situation and does not encourage best efforts or a sense of patriotism within the countries. For instance, today Nigeria has the highest number of poor people in the world despite her enormous human and material resources. To illustrate how bad this is, Nigeria with a population of about 200 million people has a higher number of poor people than China with over 1 billion inhabitants. Yet the policies of Nigeria in

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Sovereignty and the Making of International Law, Cambridge University Press 2007. See also Fredrick Lugard, The *Dual Mandate in British Tropical the Africa*, William Blackwood and Sons, London, 1922.

terms of infrastructural development are dependent on loans from China EXIM Bank.[74] Sierra Leone and Liberia are still today categorized as highly indebted poor countries.[75]

The economic angle to these conflicts cannot be over emphasized. Land and its ownership are significant questions in these countries. In Liberia it is the question of ownership of lands and other means of production between the 'Americo – Liberians and the indigenous communities. In Nigeria a military decree in 1969 took away the mineral rights of all the regional governments and vested it in the federal government. Thus wherever mineral is found in any community in Nigeria today it belongs to the federal Government and the indigenous communities have no legal say in the matter. Whatever they receive is only a beneficent token from the federal and state governments. This fuels resentments as we shall further illustrate in the course of this research.

More so, by a military decree 0f 1978 all lands in the country were expropriated and vested in the state as a trustee of the people. Thus, communities cannot use their lands to access credit or mortgage same for other economic purposes without the

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[74] See Financial Times of London, China EXIM Bank loans to Nigeria to upgrade railway lines. https://www.ft.com/content/9a3b9b20-2aa1-11e7-bc4b-5528796fe35c < accessed 10 September 2018 >; China Loans to Boost Telecom, https://www.reuters.com/article/us-nigeria-china-tech/china-loans-nigeria-328-million-to-boost-telecoms-nigeria-presidency-idUSKCN1LH3MF.

[75] See World Bank Report of Highly Indebted Poor Countries Initiative 2017 http://pubdocs.worldbank.org/en/175131505738008789/WB-HIPC-stat-update-2017.pdf <accessed September 17, 2018>

consent of the Governor. This has only succeeded in creating a bureaucracy that serves the elite. The tedious process for acquiring a certificate of occupancy and governors' consent for transactions in land make it impossible to leverage the benefits of the lands for many ordinary Nigerians.

This avalanche of decrees has also succeeded in concentration powers at the center. Thus, the periphery is left in parlous states while the center is overwhelmed by graft and extensive illicit flow of resources. Oil mining licenses are issued by presidents who often do not have the time to visit the delta communities where these resources are exploited from. This is so because by a military decree in 1969 the ownership of all petroleum resources anywhere in the country was expropriated from the regional governments and vested in the federal government. By the extant provisions of the Act "The entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the State. This section applies to all land (including land covered by water) which— is in Nigeria, or under the territorial waters of Nigeria or forms part of the continental shelves; or forms part of the exclusive economic zone of Nigeria." [76] Efforts to produce a new Petroleum Industry Law Since 2002 has continued to flounder on the walls of politics and elite use of ethnicity and regionalism to sustain same.

Also, the Land Use Act on Nigeria (Military Decree No. 6 of 1978) expropriated all lands in the country and vested same in the state. The most significant provision in the law which was revolutionary as at the time it was made states that "subject to the

[76] Section 1, *Petroleum Act 1969* (Laws of the Federation of Nigeria) 1990.

provisions of this Decree, all land comprised in the territory of each state in the Federation are hereby vested in the Military Governor of that state and such land shall be held in trust and administered for the common benefit of all Nigerians in accordance with the provisions of this decree".[77] This law also created a monolithic tenure structure over lands in Nigeria. This was unlike what obtained prior to the decree. Essentially, those who owned land lands in rural areas were accorded what became known as a deemed customary right of occupancy.[78] To evidence this customary right for the purpose of alienation, mortgages, license or any other transaction in land, the owner by inheritance has to get a certificate to that effect from the local government authority in the area where the land is situated. This is the intendment of *section 6* of the Land Use Act. Such transactions must also be with the consent of the state authorities, otherwise the transaction is voidable.

The rights of citizens became merely *usufructuary* rights as opposed to ownership which they were not even deprived of during the colonial era. In a plural society like Nigeria, this has been a source of friction and has also limited the ability of citizens to leverage on their inherited property for credit purposes, mortgages and other land oriented economic activities. The cumbersome procedures and the burden it imposed on citizens before they can perfect land instruments and use same to secure transactions limits the economic potentials of the citizenry. Nigeria is poorer for it. The

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[77] *Section 1 Land Use Act of Nigeria 1978.*

[78] P. Ehi Oshio, *The Land Use Act and the Institution of Family Property in Nigeria*, Journal of African Law, Vol. 34, No 2 (1990) page 79 – 92.

situation is made more difficult because the Decree is made to become part of the constitution and therefore requires a very cumbersome process to amend. There is therefore a problematic consolidation of state powers and revenues at the center contrary to the letters and spirit of the 1960 constitution agreed upon after long drawn negotiation amongst the constituent parts of the country.

In the case of Sierra Leone, *the Mineral Act 2009* of that country provides in *Section 2(1)* thus: "all rights of ownership in the control of minerals in, under, or upon any land in Sierra Leone and its continental shelf are vested in the Republic notwithstanding any right of ownership or otherwise that any person may possess in and to the soil on, in or under which minerals are found. What this also means is that the pre-existing rights of indigenous communities are by such provision done away with. Indeed they are often left at the mercies of investors and corporations who merely do as much as is needed to hold the peace while they exploit the resources. This is also evident in other resource rich countries within the region.[79] Of course, it will be proper to highlight this more in the later chapters.

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[79] The issue of expropriation of lands and refusal to reform land in an inclusive way or redistribute same is a significant factor in many of the conflict situations around the world. The domination of the state apparatchik by some oligarch and their refusal to concede even an inch of space to the many disposed and citizens or the "have nots" is a recurring factor in many of the conflicts. In Colombia the FARC Guerrilla wars and the tenuous peace which the country enjoys has a significant factor of land ownership and redistribution in it. The fragility this possess to the community does not affect the disposition of the elite. They are often ready

It suffices to note in the interim that the consequence of this was negative on the economic and political lives of the countries. Thus, an immediate problem that followed on the heels of decolonization was the struggle for power amongst the new (indigenous) elites. It was the struggle to control resources. It was a struggle to superintend the extractive industries and manage the rentier economies. The need to set the countries up on the path of progressive nation building – wherein the aspirations of the people are articulated, encouraged, championed and protected in peace, freedom and harmony was gravely sacrificed. Inclusive growth, economic self-reliance, social amenities – including access to health and education – and overall development of the people was left forlorn. The state having thus been mismanaged; institutional decay, and further ossification of discontent led to a near culture of strife, civil wars and political collapse. The immediate corollary to this, was the failure of rule of law, violations of human rights, and leadership and societal ennui. The masses suffered. The masses suffered

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to shoot their way through to preserve their privileges. Same is also seen in the quest for land reform in South Africa. While it is true that Land may not be the only subject of grievance in conflict and post conflict situations, the feeling of political exclusion, discrimination, economic marginalization and sheer hopelessness in searching for a peaceful resolution of disputes often offers a fertile ground for conflict. See United Nations Tool Kit and Guidance for Preventing and Managing Land and Natural Resources Conflict; Knut Andreas O. Lid, Land Restitution in Transitional Justice: the Case of Colombia, Norwegian Centre for Human Rights, UiO, August 2009.

since unlike the elites they had neither the resources nor the knowhow to seek survival elsewhere in the continent or other parts of the world.

There was therefore egregious violation of fundamental human rights of citizens. Citizenship for many was not even guaranteed since it could be denied based on what affiliations one may have. In the prominent case of *Shugaba Abdulrahaman Darman v. The Federal Minister of Internal Affairs* (High Court of Maiduguri)[80] a citizen of Nigeria was deported to a neighboring country despite the fact that he was born in the country before 1960 and was indeed a leader in the Bornu State House of Assembly. He sought redress and succeeded. But this success cannot be completely divorced from the fact that he was a prominent figure in the country. Coups and counter coup d'états

[80] The matter was determined at the High Court of Maiduguri on July 21, 1980. The Applicant who was a politician and the majority leader in the Bornu State House of Assembly within the Federal Republic of Nigeria brought an application for the enforcement of his fundamental rights. The facts being that sometime in January 1980, the government of Nigeria declared him a prohibited immigrant. His passport was seized, and he was deported from Nigeria to Chad. The Court held his deportation to be unlawful and in breach of his rights as a citizen within the extant laws of the country. The setting up of a tribunal by the same Government that is accused to be violating his rights for the purposes of determining the validity of his citizenship was considered incapable of obviating the jurisdiction of the Court to hear and determine the dispute. What is clear here is the brazenness with which the action was carried out. See further E. Lauterpacht, C.J. Greenwood, & A. C. Oppenhiemer, (eds.) *International Law Reports*, Vol. 103 pg. 268 (Cambridge University Press, 1996).

became the living norm in some of the countries.[81] Civil wars broke out in several place leaving many casualties[82] in their wake. Oppressive and repressive regimes were established to perpetuate the anomie. Elections and universal franchise where and when allowed,[83] were merely to put a glossy exterior on what is otherwise abrasive military

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[81] Nigeria for instance had 7 military coups between 1966 and 1993. Nigeria also fought a bitter Civil War (the Biafra Civil War) between 1967 and 1970. Liberia also had bloody military coups between 1980 and 2004. Liberia also fought civil war intermittently with several warlords and splinter rebel groups. One of the Rebel leaders at the time was Charles Taylor, who is presently serving a 50-year jail term for war crimes committed in Liberia and Sierra Leone. Sierra Leone on its part had 6 outstanding military coups and a decade of civil war with massive rape, deaths, amputations and other heinous violation of human rights.

[82] Clark-Bekederemo, J. P.*Casualties: Poems 1966-68.*New York: Africana Pub. Corp, 1970.

[83] Many examples of contrived elections can be seen in places like Uganda, Zimbabwe in recent years. See the Observer view on Presidential Elections in Uganda https://www.theguardian.com/commentisfree/2016/feb/21/observer-view-presidential-elections-uganda-museveni; Ugandan Opposition Leader Held for Fourth Time Amid Election Row https://www.theguardian.com/world/2016/feb/22/ugandan-opposition-leader-kizza-besigye-detained-election-row; Muna Ndulo & Sara Lulo, *Free and Fair Elections, Violence and Conflict*, Harvard International Law Journal, Vol 51, July 2010, 155 – 171.

dictatorship. In other cases, it was to endorse the self-serving process of transmutation of military juntas into 'civilian governments.'[84]

The stifling and sometimes strangulation of opposition voices became a prevalent creed of governance.[85] The greatest victim of this dissonance was human

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[84]This was the origin of life presidents in most African societies. For instance, Blaise Compaoré ofBurkina Faso,became military leader and ruled the country from 1987, after seizing power following a coup. He resigned on October 31, 2014, following days of violent protests. See details *http://www.britannica.com/EBchecked/topic/129602/Blaise-Compaore* Sassou Ngueso of Republic of Congo (Brazzaville) came to power in a military power struggle in 1979. There was an election in 1992 which led to his brief stay out of power, but he came back to power in 1997 after his militia had toppled the Government of his country. He is still in power till date. Yahya Jammeh in 1994 led a group of young military officers to topple the Government of Gambia led by Dauda Jawara. Notably the toppled president had ruled the country from 1962 till 1994 when he was toppled. Yahya Jammeh has been in power since 1994 and his human rights record is sore. There are other cases including Museveni of Uganda, Hissène Habré of Chad. General Sani Abacha of Nigeria was on the process of transmutation from military to civilian head of state before his death in 1998. At the time of his death he had been adopted by the five political parties of the time as their presidential flag bearer in the proposed presidential elections at the time.

[85]In Nigeria, we have had several human right violations. Particularly outstanding is the case of Dele Giwa, the first editor-in-chief of *Newswatch* (A Weekly National Magazine). He was killed by a mail (parcel) bomb in his home on 19 October 1986. The bomb was wrapped in form

rights.[86] Institutional decay and even a feeling of frustration made it impossible to seek redress for human rights before the courts. Judges in many circumstances feared for their lives and could not dispense justice according to the sacred oaths of their offices. In Nigeria, for instance, military decrees[87] carried clauses which not only circumscribed the rights of citizens to question the legitimacy and validity of such decrees, but also

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of a parcel and delivered to him in his office in Lagos Nigeria. Till date no person was arrested nor tried and an attempt to compel investigation and trial of the perpetrators failed. Till date it remains an unresolved mystery. See the case of *Fawehinmi v. Akilu (1987) NWLR (Pt. 67)797 2 (1987) 12 S.C 136.*

[86]There have been cases of civilian regimes which amended the constitutions to create tenure elongation. This we have seen in Zimbabwe, Uganda, Burundi, Cameroon, etc. The attempt to do so in Nigeria under president Obasanjo failed because the parliament rejected it.

[87] Decree 1 of 1984 Constitution (Suspension and Modification) Decree; Decree 2 of 1984 State Security (Detention of Persons) Decree; Decree 6 of 1984 Banking (Freezing of Accounts) Decree; Decree 13 of 1984 Federal Military Government (Supremacy and Enforcement of Powers) Decree 1984; Decree 16 of 1984 Civil Service Commission and Other Statutory Bodies, Etc. (Removal of Certain Persons from Office) Decree 1984; Decree 17 of 1984 Public Officers (Special Provisions) Decree 1984; Decree 23 of 1984 Military Courts (Special Powers) Decree 1984; Decree 34 of 1984 Regulated and Other Professions (Private Practice Prohibition) Decree 1984. Decree 8 Judgments of Tribunals (Enforcement, Etc.) Decree 1985; Decree 1 of 1986 Treason and Other (Special Military Tribunals) Decree 1986; Decree 2 of 1987 Civil Disturbances (Special Tribunals) Decree 1987.

ousted the powers of the courts, to adjudicate on matters arising from such decrees. The word of the military was law, and no recompense existed for any citizen whose rights hand been violated using such obnoxious decrees. Only a few courageous judges dared entertain disputes challenging the absolute powers of the military.

It is necessary to highlight some of the egregious human right violations of the period to enable us to put in perspective the problem and the need for a paradigm shift through clear transitional justice processes. For instance, extrajudicial killings were one of the most significant violations of human rights during the military era and the culture appears very entrenched that today there are still cases of extrajudicial[88] executions within the Nigerian Security architecture. According to Amnesty International Report on Nigeria in 1985 at least 111 people were publicly executed. Some 68 of them were tried by a special tribunal set up by the military which offered them no right of appeal. Particularly in Kwara State, six of them who were convicted of stealing cars were convicted on July 17, 1985, their sentences were confirmed the following day and by the next they were executed.

One outstanding case regarding the violation of the rights of citizens via unlawful/extrajudicial execution is the case of *Aliu Bello & Ors. v. Attorney General*

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[88] Extra judicial executions are used here broadly to encompass situations where citizens are executed even after "trials" before military tribunals. The idea is that military tribunal for civilian populations cannot by any measure guarantee the panoply of due process protections recognized and guaranteed in the constitution and the several human rights conventions like the – African Charter on Human and Peoples Rights – which Nigeria has acceded to.

Oyo State (1986) 5NWLR (pt. 45) 828. The unfortunate facts of the case are not in dispute. On 30th October 1980 the High Court sitting at Ibadan convicted the deceased of the offence of armed robbery punishable under section 1(2)(a) of the *Robbery and Firearms (Special Provisions) Act 1970* as amended by the Robbery and *Firearms (Special Provisions) Act 1974* and the court sentenced him to death. On 12th November 1980, within the time prescribed by law, he filed his notice of appeal against the said conviction in the Federal Court of Appeal and a copy of the notice of appeal was served on the Attorney-General of the Oyo State. On 21st April 1981 a copy of the records of appeal was also served on the Attorney-General. Thereafter, while the appeal was pending, the Attorney-General recommended to the Governor the execution of the deceased and in consequence thereof the execution was carried out on 5th September 1981. When the appeal came for hearing before the Federal Court of Appeal on 13th October 1981, the Solicitor-General of Oyo State informed the Court of the inadvertent execution of the deceased. Accordingly, the Federal Court of Appeal struck out the appeal. Thus, he was executed while his appeal was pending before a court of competent jurisdiction. His dependents brought an application in tort and succeeded at the supreme court of Nigeria. Interestingly at the Supreme Court, the defendant sought to defend this egregious violation as an administrative error. It is also important to bear in mind the original conviction of the diseased was under a military controlled tribunal. This is because in 1984, the Robbery and Forearms Tribunals were re-established.

These tribunals were each composed of a High Court judge, one military officer and one police officer. It goes without saying that an accused citizen brought before a 'judicial' panel – especially for alleged offences carrying the death penalty – will not

have a sense that justice will be done in his matter. Overall, "more than 2,600 death sentences were carried out under military governments since 1970, most of which were passed by Robbery and Firearms Tribunals."[89]

Equally, by another obnoxious decree – Decree No 2 State Security(detention of Persons) Decree 1984 – the state security authorities were empowered to detain indefinitely anyone suspected of being ' concerned with acts prejudicial to the state security or having contributed to the economic hardship of the country.[90] In a finding also made by Amnesty it was also the case that in January 1991, eighty demonstrators in Umuechem village in Rivers State Nigeria were extrajudicially execution of and about 500 hundred houses raised in October 1990 when villagers challenged by way of public protest the inadequate compensation for their land and environmental damage by multinational oil establishments.[91]

In terms of Sierra Leone, it was also the case that when at May 1993 there were about 264 political detainees, including nine women. The youngest of these detainees without trial was a 14-year-old boy. From the records also available at the time 20 of these detainees have been held since 1991. It was reported too that the original number of the detained was around 570. Most of the others died from torture, starvation or medical neglect in 1991 and 1992. Others were detained after the government of Captain

[89] Amnesty International Publications 2010 Index: AFR44/021/2010

[90] Amnesty International Report 1985

[91] See Amnesty International Report Nigeria (The January 1991 findings of a judicial commission of inquiry into a police massacre. AIR 1993)

Valentine E.M. Strasser came to power following a coup in April 1992. The excuse the government gave was that these were rebels or opponents of the new government. Amnesty reported however that there was no evidence of proper investigation of the allegations against the detainees. there has been no proper investigation into their cases. Overall, it was apparent that many of them were held under emergency detention orders made by the military junta and there could therefore be held as long as the regime so desired.[92]

In the face of this, the UN High Commissioner for Human Rights and the Commission expressed serious concern about the human rights situation in Sierra Leone. The violations noted by the High Commissioner included extrajudicial executions, mutilations, torture, rape and sexual abuse, forced labor, abduction, forced recruitment and use of children, as well as women, as soldiers, wanton destruction and looting of civilian property and massive internal displacement of persons.[93] This was corroborated by the UN Security Council *Resolution 1289(2000)* which directed the Secretary General to report to the Council every 45 days to provide assessment for security conditions and tasks performed. Part of that report *s/2000/ 455* made to the Security Council noted that " the human rights situations in some parts of the country

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[92] Amnesty international: AI Index: AFR 51/05/93

[93] United Nations Human Rights Report 2000 General Assembly Supplement No. 36 (A/55/36). http://www.un.org/documents/ga/docs/55/a5536.pdf

especially in those areas not under the control of the government remained an issue of very serious concern." [94]

The story of human rights violation was also not different in Liberia. With the coup d'état of April 1980, the Military took over power and proceeded immediately with the execution of the leaders of the overthrown government. They did not hesitate to also suppress dissenters and thus the descent of the nation into crisis began in earnest. It was therefore not surprising when the civil war broke out in late 1989. Thus 14 years of anarchy, plunder, and violence, decay followed and only came to an end with the *Accra Comprehensive Peace Agreement (CPA)* in 2003. With the war now in full swing all the warring factions competed with each other as to who could show more ruthlessness in the violation of the rights of citizens. All the warring factions committed serious human rights abuses including deliberate and arbitrary killings of unarmed civilians, torture and cruel, inhuman and degrading treatment of prisoners, summary executions, rape, hostage taking and forced displacement of civilians. [95]

Thus, the West African sub-region has had – and continues to have one would argue – its good share of these internal strife, wars, injustices, and gross violations of

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[94] See Paragraph 43 Security Council Report S/2000/455 (19 May, 2000).

[95] Amnesty International 1 October 1997 AI Index: AFR: 34/05/97: It has been noted that "it is very difficult to get an exact number of victims of serious human rights violations during the period. It is nevertheless estimated that about 200,000 people were killed. Some 700,000 were forced to become refugees and yet another estimated 1.4 million people, of a pre-war population of 2.8 million, were, and some still are, internally displaced."

human rights.[96] However, over time there appeared to have been a realization – a common consciousness – that there must be a change and a movement away from the repressive tendencies of the past. This led to a fragmentation of the conflicts and even an intra-military struggle for control of state powers and resources.[97] The people themselves had seen enough. Joining forces therefore with social movements, they began pushing for change.[98] There was a thaw and hope of new societies emerged through these movements.

Meanwhile, there had been a lot of rot, injustice and degradation hence the need for transitional justice. This transitional justice was perceived to be entwined with truth,

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[96]Most of the 16 countries in West Africa have had oppressive military regimes since independence.

[97]In Nigeria, there were divisions within the army and this brought about a lot of mutual suspicion, in Liberia there were several warlords and rebel groups so also in Sierra Leone. Indeed, some of the Rebel groups in Sierra Leone had their military training in Liberia and collaborated with Charles Taylor in Liberian Civil war and this was financed with the proceeds of diamonds mined illegally by these rebel soldiers http://ec.europa.eu/development/body/publications/courier/courier187/en/en_073.pdf .

[98]In Nigeria, there were several of such organizations. There was the civil liberties organization, the Movement for the survival of the Ogoni people, the Nigerian Labor Congress, The Academic staff Union of Universities amongst other who coalesced in opposition to continued military rule and despoliation of human rights.

restoration and reconciliation.[99] To achieve this peaceful transitional justice, the machinery of truth and reconciliation commissions was adopted and used across Africa and West Africa.[100] What is the functional comparative experience between the chosen countries – Liberia, Nigeria and Sierra Leone – vis-à-vis the larger West African region? To what extent can the experience of these chosen countries represent the transitional justice landscape of the West African sub-region? What are the limitations noted and what are the lessons inferable from the inquiry?

It is interesting, to note that, whenever truth commissions are mentioned with respect to Africa, the reference – and sometimes the only reference – is the South

[99] The reconciliatory linkage with truth commission was highlighted and given much prominence within the purview of the South African truth and reconciliation commission. This was highlight in the book by Arch Bishop Desmond Tutu, No future without forgiveness.

[100]It would appear, that there will always be a need for transitional justice in most West African societies for some time to come. Mali is having a civil war fueled by the Islamic forces; same for the insurgency in the Northern part of Nigeria, many communities in the North-Eastern Nigeria majorly along the Nigerian/Cameroonian border have been bruised by the Boko Haram insurgency. There is no end in sight yet. Burkina Faso just removed their leader, Blaise Compaoré was also recently removed by popular revolt. See http://www.bbc.com/news/world-africa-13072774 and indeed Yahya Jammeh of Gambia a military despot and all other remnants of despotism appear to be living on borrowed time.

African Truth and Reconciliation Commission.[101] Thus the other truth and reconciliation commissions that we have seen in West Africa[102] are rarely discussed. Again, there is a paucity of evaluation of these processes across the region to ascertain their reception and functionality in the search for truth, justice, peace and reconciliation

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[101]The South African Truth and Reconciliation Commission was set up in 1995 as a means of redressing the evils of the apartheid era in South Africa. In the words of the justice minister at the time Mr. Dullah Omar it was to enable South Africans to come to terms with their past on a morally acceptable basis and to find reconciliations. See *http://www.justice.gov.za/trc.* No doubt the South African truth and reconciliation commission enjoyed a lot of global prominence at the time of its operation and has therefore attracted more scholarly attention than any other such commission in Africa. Equally, it was pivotal in so many respects because, it was a conscious mix of truth telling and reconciliation. Its resonance was also quite significance because the challenge apartheid and other policies of racial profiling, exclusion and oppression had posed in the history of the Southern Africa. The South African situation was also interlinked with the problems in other parts of the region and general geopolitics of Africa at the time. At a point South Africa was a metaphor of the global struggle of all black peoples against white racial domination.

[102]Namely the Ghanaian National Reconciliation Commission 2002, Nigeria's Human Rights Violations Investigation Commission 1999, Sierra Leone Truth Commission 2002. Liberia Truth and Reconciliation Commission 2007, Cote d'Ivoire 2011.

in these transitional societies.[103] Where some level of work has been done its focus was more of a descriptive discussion of the individual truth commissions rather than an analytical comparative evaluation of these truth commissions. Often, the discussions are on transitional justice in general with few interlocutions on truth commissions. Interstate comparative analysis of truth and reconciliation commissions in the region is limited.

Thus, it is timely to commence an analytical interrogation and thorough-going comparative inquiry into the dynamics of the truth commissions that have berthed in West Africa in the recent past. This analytical inquiry will reveal their positive claims and functionality as instruments of transitional justice. It will also revivify the political will and seeming inertia which has become apparent in the post truth commissions era especially regarding the implementation of the recommendations of these commissions. It will stimulate a new desire to give meaning and effect to the findings of these truth and reconciliation commissions.[104]

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[103]Except for few general reports by United Nations agencies and the ICTJ (International Centre for Transitional Justice) wherein the Truth Commissions are discussed generally with other commissions around the world, one is yet to find a detailed study of the West African Experience of Truth and Reconciliation Commissions.

[104]The essential nature of this research is that because of the nascent nature of democracies in the region the value of efficient, proactive and result oriented use of Truth and reconciliation commissions will continue to resonate for some time to come. The culture of democracy is yet to deepen and with the shifting of the old structure there will arise a need for reassessment of the terms of collective nationhood and consequently truth commissions will play a significant

It will keep the dialogue of social reconstruction ongoing and help sustain the creation of a paradigm consciousness that impunity is evil and deserves redress, restoration, rehabilitation and restitution. It will help in stimulating ideas for proactive social movements that could enhance good governance and human dignity. That way we could help make TRCs not merely rituals nay emblematic gestures of transitions but major tools of social justice and peace in transitional societies in West Africa. This is the focus of our work.

1.01.1 RESEARCH PROBLEM

To what extent have the truth and reconciliation commissions set up in West Africa in recent times achieved any significant truth, peace, reconciliation and justice objective? Inherent in this question is how to evaluate the outcome of truth commissions and no existing literature in the field has answered it definitively. Thus, this question is significant because at present so many countries of the West African Sub-region are emerging from one form of authoritarian regime or military despotism.[105] A number of efforts at re-democratization are also taking place in countries like Nigeria, Togo, and Benin republic. Agitations for real transformative democracy and inclusive prosperity is significant also in the region.

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role. Its significance is further made manifest by the rise of insurgency and terrorism in the region as per Boko Haram and the influx of other terrorist elements from Libya and Mali.

[105] Chad, Ivory Coast, Togo, Sierra Leone, Liberia, Gambia, Ghana, are some of the states that are at different levels of transitions in the region.

In the past some countries in the region have had civil and armed conflicts, which left many bruised and dehumanized. Nigeria for one is fighting an insurgency while migratory cattle herders have also risen in their status in terms of the violence the meted out to communities who challenge their grazing access through farm lands and common water resources. In the Niger Delta Region of the country there is still a palpable resentment about environmental degradation caused by oil mineral exploitation and pollution arising therefrom. There is also still a feeling of marginalization within the region since the resources are channeled towards the federal government which reserves the right to cite development projects in different parts of the country. Many others are still operating what can be at best called a fragile democracy. Injustice, inequality in resource allocation, use of common resources and faulty foundational structures are still felt in most of these communities because they significantly fuel discontent and sometimes intergroup violence. Where there is a measure of peace, want of socioeconomic opportunities still creates tensions which could lead to a fragmentation of the society. In many of these communities, finding a harmonious polity and ensuring stability and non-violation of human rights is a felt necessity. Thus one approach which is adopted or at least contemplated in this entire process is the truth and reconciliation process.

More than a decade[106] after some of these commissions were set up, it becomes imperative to analytically examine that instrument of transitional justice. The importance of this examination is that it will interrogate the underlying assumptions and

[106] The Nigerian Truth Commission was set up on June 14, 1999.

also sharpen any significant bluntness in the tool. It will help attempt a coherent answer to the noted questions regarding the outcomes and evaluations of the contributions of these truth commissions. No doubt, clear answers to the question will go a long way in sharpening truth and reconciliation commissions as fundamental tools of transitional justice in the sub-region. The lessons learnt will be relevant beyond the confines of the West African region as it would become a template on how best to utilize truth and reconciliation commissions in searching for lasting peace and justice in transitional societies.

1.02.1. LITERATURE REVIEW AND DELIMITATION OF RESEARCH BOUNDARIES

There is quite a reasonable body of scholarly work on the idea of transitional justice and truth and reconciliation commissions. In the last decade, the field of transitional justice appears to have massively grown giving an impression that it has always been there in its present form.[107] It is believed that the post-cold war re-democratization efforts in many regions of the world gave a great fillip to this. Significantly many of the efforts in Africa and parts of Eastern Europe were tailored towards the truth commission mechanism because of its benign and overarching presumption that it will provide peace and justice with minimum potential for relapse to dictatorship or outright conflicts.

[107]Jens David Ohlin, *On the Very Idea of Transitional Justice* (2007) Cornell Law Faculty Publications paper 438 http://scholarship.law.cornell.edu/facpub/438.

However, amidst the volume of articles and scholarly publications, Truth Commissions in West Africa have received limited attention. This might not be an exception considering the marginality of the region in the overall strategic interest of frontline states like the United States. What is perceptible in the literature is the dominating narrative of the South African Truth and Reconciliation Commission. It is important to note here that I did not find a clear evidence of a cosmopolitan bias against West Africa, so other factors like access to study materials, proper documentation and the stature of Nelson Mandela, Desmond Tutu and the overall handling of the South African TRCs may have whetted the appetite of scholars to concentrate on it as an exemplar of what a truth commission should be.

Indeed, another point is that the length of time for which the world has watched the evolution of Apartheid and the symbolic significance it had come to bear in the evolution of global human rights movement meant that the demise of Apartheid remains an outstanding historical moment. That historic moment, no doubt provided an uncommon publicity of whatever process of transition linked to it. There was therefore an existing scholarly and global consciousness about South Africa which benefited the South African TRC process.

More so, with the benefit of hindsight, it is arguable that the South African TRC remains one of the most comprehensive TRC so far in the field of transitional justice. It was well envisioned and given enabling capacities and funding to carry out the assignments. This and the stature of the commissioners made the process attractive not only for emulation by other transitioning societies but a scholarship delight for

academics, policy makers and global governance institutions like the United Nations and its specialized agencies.

Be that as it may, none of the existing literature of the efforts at TRCs in the West African region have provided a comparative analytical study in the way I proposed in this dissertation. Again, apart from a general look on truth commissions around the world[108] one is yet to see any significant work which singularly examined the West African experience of truth and reconciliation commissions. More so, even on the global scale, a clear comparative law approach seems to be lacking in the existing literature making on TRCs, thus making the TRCs appear like a litter of thoughts and papers with no clear tread weaving them together. I concede that, a comparative study of TRCs is a difficult scholarship to embark on, considering the vast differences between communities around the world that have adopted or are seeking to adopt the mechanism for its transitional justice processes. It is important to point out here that for a more meaningful understanding, articulation and use of truth commissions, a comparative study of not only its normative claims but procedures vis-à-vis outcomes in different communities is inescapable if legal scholarship in this area is to become stable and properly defined.

This is part of the grounds of my interest in this study so that the comparative analysis of the process can truly commence with a view to weaving a reasonable web

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[108] See generally Lavinia Stan, & Nadya Nedelsky,(eds.) *The Cambridge Encyclopedia of Transitional Justice*, Cambridge University Press, 2012.

of law, and thus assist towards the articulation of the core norms of transitional justice particularly as they relate to truth and reconciliation commissions.

WHAT HAS BEEN DONE?

There is a near convergence of opinion amongst international law scholars, conflict experts and global policy institutions like the United Nations in recent years that truth telling is key to the search for peace, justice and reconciliation in transitional, post authoritarian or 'emergent democratic societies.' Jason Abrams and Pricilla Hayner[109] in a recent paper noted thus; "although they are not yet as developed as international legal obligations…emerging principles of international law have recognized the right of victims and their families to be appraised of the truth concerning human rights abuses and corresponding duty upon states to investigate and disseminate the truth.

These principles proceed from the dual notions that the truth is essential both to respecting and restoring the individual victim's human dignity and to the community's collective interest in understanding its history so that it can achieve reconciliation and prevent recurrence of the abuses." The emergence of this view is also inexorably tied to the development of the idea of truth commissions as a mechanism of transitional justice. Hence what began as factor of criminal investigation has since evolved into an

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[109] Cherif M. Bassiouni, (ed.) *Documenting, Acknowledging and publicizing the Truth* in *Post Conflict Justice* (New York transnational publishers 2002). ___Chicago Principles on Post Conflict Justice, International Human Rights Institute, 2007.

obligation on states to provide answers to regarding the violation of human rights whether in times of peace or in the aftermath of conflict.

To this effect, the United Nations General Assembly on December 20, 2006[110] adopted the international Convention for the protection of all persons from forced disappearance. The convention came into force in December 2010 in accordance with *article 39(1)* of the convention which provides that the convention shall enter into force on the 30th day of the date of the deposit with the secretary general of the UN of the twentieth instrument of ratification or accession. By this the UN affirmed the crystallization of the norm that persons whose rights have been violated through enforced or otherwise have the right to know what happened. The idea of the right to know was clearly captured in other instruments that also preceded the Convention on enforced disappearance of persons.[111] Thus the right of any victim to know the truth about the circumstances of an enforced disappearance and the right to seek receive and impart information to this end is now duly recognized as a norm of international law.[112]

Furthermore, *article 24* of the Convention defined victims to mean the disappeared person, and any individual who has suffered harm as the direct result of an enforced disappearance. Hence state parties are not only required to prevent forced

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[110] *Resolution A/RES/61/177*; Till date 97 Countries have signed the resolution and 58 have since ratified it and thus have become state parties to the convention.

[111] Prior to the adoption of the resolution, the UNGA had in its *resolution 47/133 of 10 December, 1992* made a declaration on the protection of all persons from enforced disappearances. The preamble emphasized the importance of the right to know.

[112] See the Preamble to the Convention on Forced Disappearance of Persons 2006.

disappearance but where it happens take all appropriate measures to search for, locate and release disappeared persons and in the event of their death, to locate, respect and return their remains. In a clear effort to cement the importance of this norm, the convention recognizes and imposes a duty on state parties to ensure that the right to reparation and prompt, fair and adequate compensations, reparations or restitutions are made to the victims. Notably too, the convention recognizes compensation to broadly include moral and material damages including rehabilitation, restoration of dignity and reputation, and guarantees of non-repetition. Indeed all these measures can be carried out without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified.

Of interest is also the views of the Economic and Social Council of the UN in its set of Principles on the Protection and Promotion of Human Rights Through Action to Combat Impunity (*E/CN.4/2005/102/Add. 1)* has further emphasized and teased out the iterations of the right to know. In its principle 3, it noted that states not only have a duty and responsibility to investigate disappearances or other types of human rights violations but a correlative duty to preserve memory. This is because the preservation of memory sustains the truth and equally continually reminds the community of the price of impunity.

Thus it notes that a people's knowledge of the history of impunity or violations in that community is part of its heritage and as such must be ensured by appropriate measures in fulfilment of the state's duty to preserve archives and evidence concerning violations of human rights and also facilitates the knowledge of these violations. It is targeted at making sure that the collective memory does not become extinct. This

forestalls denials and revisionism which is sometimes seen in post conflict societies – particularly after the passage of a few generations. The idea of memory in post conflict societies and the right to know permeated the truth commission measure. This may well explain why in some of the truth commissions like in South Africa, the tool of amnesty was used to encourage those who may know of violations in the days of apartheid to come forth and tell their story. One explanation given for this was that it was in the best interest of the community to collectively build a memory of what the community has gone through. It was also the best guarantees that anything would ever be known of the disappearances and violations that mat have happened in the time of conflict or authoritarian domination.

Indeed, it was one of the questions that came up before the South African constitutional court in the case of Steven Biko (*Azanian People's Organization & 3 others v. The President of the Republic of South Africa & 4 others (CCT 17/96).* The man Steve Biko was one of the outstanding leaders of the Black Conscious Movement in South Africa during the prime days of apartheid. He was subsequently arrested and died in mysterious circumstances in state detention in 1977. State sources failed to reveal the true circumstances of his death and like many other such deaths nothing could be done since those who were behind the crime had the full protection of the state in the apartheid era. With the end of apartheid in 1996 and the adoption of a new constitution which called for reconciliation and reconstruction of the country, the parliament established the South African Truth Commission. Associates and dependents of Steve Biko challenged the issue of amnesty which could be granted to the perpetrators of his

death under the TRC model and called for their criminal prosecution, and compensation of his dependents for hardship which his death would have caused them.

The suit brought to the fore the debate between punitive justice and reconciliatory justice which often comes up in post conflict and post authoritarian situations. In dealing with this matter the court in her judgement had to unpack the complex issue of amnesty, truth and reconciliation. It noted while quoting Marvin Frankel that “The call to punish human rights criminals can present complex and agonizing problems that have no single or simple solution. While the debate over the Nuremberg trials still goes on, that episode - trials of war criminals of a defeated nation - was simplicity itself as compared to the subtle and dangerous issues that can divide a country when it undertakes to punish its own violators. A nation divided during a repressive regime does not emerge suddenly united when the time of repression has passed. The human rights criminals are fellow citizens, living alongside everyone else, and they may be very powerful and dangerous. If the army and the police have been the agencies of terror, the soldiers and the cops aren’t going to turn overnight into paragons of respect for human rights. Their numbers and their expert management of deadly weapons remain significant facts of life. ... The soldiers and police may be biding their time, waiting and conspiring to return to power. They may be seeking to keep or win sympathizers in the population at large. If they are treated too harshly - or if the net of punishment is cast too widely - there may be a backlash that plays into their hands. But their victims cannot simply forgive and forget.

These problems are not abstract generalities. They describe tough realities in more than a dozen countries. If, as we hope, more nations are freed from regimes of

terror, similar problems will continue to arise. Since the situations vary, the nature of the problems varies from place to place."[113] The court was therefore of the view that the essence of the South African post-apartheid constitution was to provide a historic bridge between "the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice and a future founded on the recognition of human rights, democracy and peaceful coexistence and development opportunities for all South Africans."

What this meant in effect was that the state had the powers to make enactments in line with this set objective in order to reconcile and reconstruct the society and set it up once more on the path to peaceful, inclusive and wholesome living where fundamental freedoms are recognized, respected and protected for all citizens. Thus the violations are to be understood with a view to reconciliation and not vengeance because vengeance will not make for a proper closure of the books and unravelling of the necessary information needed for that catharsis and closure.

Indeed, it further noted that "the amnesties made available to individuals are indispensable if an essential object of the legislation is to be achieved, the object of eliciting the truth at last about atrocities committed in the past and the responsibility borne for them. The primary sources of information concerning those infamies, the perpetrators themselves, would hardly be willing to divulge it voluntarily, honestly and candidly without the protection of exemptions from personal liability, civil no less than

[113] Marvin Frankel & Ellen Saidman, *Out of the Shadows of the Night: The Struggle for International Human Rights,* Delacorte Press, New York, 1989.

criminal. The emergence of the truth, or a good deal of that at any rate, depends on no fear of the consequences continuing to daunt them from telling it, on their encouragement by the prospect of amnesties to reveal it instead. The shroud of silence that has enveloped their activities for too long would otherwise go on doing so. "[114]

It was equally the opinion of the court that enough evidence to make claims in civil action and effectual prosecution may never be found since often only the perpetrators know what happened and the only way to help them unlock the evidence in the recess of their minds is to allow them some slack via amnesty and immunity from prosecution which this entails.

Another noted difficulty which incentivizes truth commissions as opposed to prosecutions is that often prosecutions focus on perpetrators and has little or no clear intentions as to how to meet the needs of the victims. Like in Rwanda during the Arusha Trials, perpetrators who were on trial had medical facilities to attend to them, but the victims had no such provisions made for them. So even for victims who were infected with HIV/AIDS through rape had no remedy though the perpetrators were tried, and some were convicted.

Be that as it may, in a recent publication '*Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions,*'[115]Pricilla B. Hayner made a

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[114] See Paragraph 57 of *AZAPO & 3 Others v. The President & 4 others* (Supra).

[115]Pricilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn.) Routledge, New York, 2011. Many other papers on this crucial topic

remarkable attempt at a general and succinct survey of truth commissions around the world. But this study is over-broad as it looked at 40 (forty) truth commissions in a book of 356 (three hundred and fifty-six) pages. Her aim however was not to do a detailed study of any of them but a general review of the phenomenon of truth commissions. Equally, it goes to show the manifest popularity of the idea of truth commissions in recent times. The critical contribution of her book is that she produced by that effort a mini-handbook on the referenced truth commissions.[116] For the purposes of this research it justifies the need for a closer study and scrutiny of truth commissions – especially in the West African region.

Many other scholarly contributions are also not directly focused on the West African sub-region though they examined some crucial points like the issue of gender, reparations and prosecutions using some countries within the region to buttress the points made. In summary, many of them are structured as general narratives with limited and sometimes sub-optimal critical or analytical comparisons.[117] Bosire's work '*Overpromised, Undelivered: Transitional Justice in Sub-Saharan Africa*' attempted a

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are also general in nature with little or no comparison and we chose to highlight Pricilla's view because it is the most comprehensive so far.

[116]The author did well by putting together materials, websites, publications, essays of many kinds and made reasonable methodological suggestions on the study of truth commissions. It is therefore a very useful base material for this study. Indeed, Pricilla B. Hayner is not a law professional hence her look on the work is not in the line of real comparative legal studies.

[117]See generally Lydiah Bosire, *Overpromised, Undelivered: Transitional Justice in Sub-Saharan Africa*, New York International Center for Transitional Justice Occasional Paper Series, 2006.

regionally focused comparative reflection on Transitional Justice in Sub-Saharan Africa. This is one of the closest attempts at regionalization of the study of transitional justice in West Africa. Also, it further highlights the concern here that a thorough going comparative West African regional studies of Truth commissions is at present extremely important. The study has in fact become indispensable in the evolution of the politics and legal culture in the region in the face of the further dissonance which the emergence of radicalism – fueled by poverty and identity politics – has brought to her door steps.

WHAT IS THE NOTICEABLE GAP?

In the face of the general research in this area, there is a noticeable gap in the legal literature as regards the phenomenon of truth and reconciliation commissions in the West African region. This gap reveals itself even by a cursory review of the existing literature. This is not surprising being that the United Nations and other international organizations and local NGOs involved in the processes usually view them as peace building measures and not necessarily law-oriented research.[118] The point being that the emphasis is more on finding political solutions to often difficult conflict situations rather than the niceties of law. Faced with the difficult choices that has to be made, the default

[118]This can be seen in the general nature and scope of reports from these organizations in this field. The only area which is grounded on law (especially international criminal law and international human right/humanitarian law) is the area of criminal prosecutions for war crimes, crimes against humanity, torture and genocide as we saw in Rwanda, Sierra Leone and now the International Criminal Court in The Hague as an aspect of transitional justice.

becomes finding political answers which are often based on negotiations and sometimes power sharing models between different belligerent groups during the conflict.

It is argued strongly here that, it is imperative to understand that lasting peace building measures can only rest on clear normative or legal standards. A case in point is that since the emergence of the International Criminal Court some leaders within the region have learnt to think of the consequences of ignoring the outcome of elections thereby forestalling societal rupture and wars. It may well be argued that there is no empirical evidence for this – however the arrest of Laurent Gbagbo and his detention in the Hague pursuant to alleged war crimes committed following elections seems to have elevated the conversation regarding the propriety or otherwise of having a regional response to violations of human rights by way of an African regional court or otherwise.

Equally, the insistence of the Bretton Wood Institutions since the end of the Cold War era seems to have also created a further incentive for states to revisit their institutions and legal frameworks in a manner that respects rule of law and facilitates economic growth and liberal democracy in general. In this circumstance, the Doing Business Reports of the World Banks has become a significant barometer for measuring – albeit tangentially – the business and investment readiness of a country. It is also a bargaining tool for aid and global support in development projects which the leaderships in these countries have almost abdicated to international/global development institutions.

However, there is yet to be found a serious comparative legal studies approach to the study of truth commissions in the West African sub region.[119] Hence the intention here to focus in this region and at the same time draw attention to the need to set out strong measures, indicators and indices for evaluating truth commissions. Thus, besides developing the literature on TRCs in West Africa in particular, it is important to also improve on the literature concerning the means, ways, standards, indicators and scholarly structures for evaluating the impact of truth commissions.

WHAT DOES THIS DISSERTATION INTEND TO DO ABOUT THE GAP?

It is intended by this work to begin a conscious and true comparative legal study in this most interesting field of transitional justice – particularly on truth commissions in West Africa. This scholarly intervention on the idea of truth and reconciliation commissions in the West African sub-region uses Liberia, Nigeria and Sierra Leone ready exemplars. It is hoped that we would have in the end started to address the gap noticed in the existing literature in this fascinating field using the tools of comparative legal studies – giving prominence to legal transplants and functionalism.

1.03.RESEARCH METHODOLOGY

Methodology gives perspective to legal research hence this work uses a comparative, qualitative and analytical approach in finding answers to the research questions proposed. This approach it is argued is a meaningful way of attempting to

[119]Most of what is whimsically referred to as comparative studies in law as well as in transitional justice will leave many a comparatist befuddled because they do not possess the essential components of comparative legal studies.

address the gap in scholarly work in this area. Comparative approaches help a proper cognition of the new field. For instance, the researcher needs to develop the ability to assume a distance from his preconceived notions of norms and ideas regarding truth commissions. The enlightenment that comes from this detachedness, will undoubtedly give life to the need to meet the transitional society with an open mind to learn their challenges and how best to adapt legal templates to meet its need. It is further stressed that only such a combined methodology will be reasonable and efficient because of the nature and dimensions of transitional justice studies and truth commissions in particular.

Indeed, because of the intricate nature and interface between transitional justice, the social realities of transitional societies, law and legal outcomes, no responsible work can be done without a reasonable understanding of the dynamics and make-up of the transitional society. Hence the work not only draws inspiration from jurisprudence and legal theories – such as social justice and restorative justice jurisprudence – but also distills and utilizes their essence in seeking definitive answers to the research problems. The use of legal theory at this point is to underpin the justification for truth commissions in the first place. Thereafter their functionality and transplant effect form the more nuanced analytical concern pursued.

One important point is that, the intersection between law, history and society is very prominent in Transitional Justice and particularly the study of truth commissions. It is of note however that the inquiry into the historical or sociological antecedents of these societies is to give a background and enable a better understanding to the utility and functionality of truth commissions. They are not the priority of this research. In the circumstance, a breakdown of the methodology will be thus:

Tools – This work is comparative in nature and at various points employ the comparative legal study tools of legal transplantations and functionalism as basic research tools. It does a research analysis and review of reports of the different truth commissions. It also examines in the main, key judgements, legislations and publications of experts made in respect of these truth commissions from the time of their set up till date.

Focus – The centerpiece of the work is truth and reconciliation commissions as an aspect of the transitional justice architecture in recent times in the West African Region with Liberia, Nigeria and Sierra Leone as our case studies. What has worked and what has not worked in these transitional justice efforts via truth commissions? What factors are perceptible for the success or otherwise of these commissions? What was the impact of this TRC concept in these communities? In finding answers to these questions, effort was made to look at institutional responses to the reports of the truth commissions. The relevance of this lies in the fact that the failure of institutions was at the core of the breach of peace and the several human rights violations in the region which necessitated transitional justice. The countries were carefully chosen to allow for meaningful comparative studies.

Significant considerations in choosing these countries include the fact that they are all in the Anglo-American (common law) legal tradition; they have all seen civil wars and other forms of post-colonial conflicts since 1965; they have gone through one form of authoritarian dictatorship or another which led to violations of human rights; they have the same sociopolitical dynamics – multi ethnicity and misuse of state institutions to project parochial or sectional interests. They are also multi-religious – one can say

there is evident cultural pluralism in these countries. There are also significant differences in terms size, resources, history, institutions and human capacity which affect their respective societal dynamics. All these have helped in whetting the need for the reasonable comparative studies. They are also different in a number of ways. For instance, while Sierra Leone and Liberia have a history of returnee emancipated Blacks from Britain, and African Americans in the early 19th Century, Nigeria has no such history.[120]

Approach – As was stated above, this work is immersed in International and Comparative law hence our methodology will be governed by a comparative approach to all the issues. A comparative review brings out the iterations of the operation and utilization of truth commissions as tools of transitional justice in the chosen West African states. The differences in language and anthropological natures of these societies were duly noted. However, there are essential common grounds which guarantees a reasonable comparative study.[121] Equally, because of the intersection

[120] There are records of returnee blacks from the Caribbean's and Brazil, they settled mostly in Lagos it environs and did not have much population to constitute a separate identity. It could be argued that all that happened was that they very readily assimilated into the local population and had no reason to be concerned about their identities.

[121]For instance, all the countries chosen for case study share a common law origin or what we refer to as the Anglo-American legal background. But besides this they have suffered from repressive regimes at one time or the other. Indeed, all of them have experienced civil wars and internal conflict in recent time. Even as we do this proposal there is an on-going Boko

between politics, conflict studies and transitional justice it will not be out of place to allow from time to time an inflow of relevant cross-disciplinary ideas into the work. This must necessarily be so because, transitional justice is not merely legal justice. This argument about the overarching nature of justice in transitional societies has been made by many scholars. It must therefore receive the refreshing currents of other areas of human endeavor.[122] However, conscious effort was made to keep it firmly within the realm of classic legal research and not legal anthropology or the like.

Haram insurgency in Nigeria and this has gradually spread to neighboring countries in the region like Cameroon, chad and Niger. There are peoples of different origins and background. For instance, Liberia is the home of returnee slaves from America while Sierra Leone is the settlement ground of liberated slaves from England. Even at that there are different ethnic nationalities in these countries and that affects how they see state institutions, resources and use of state powers. There is therefore a need to do both a multifaceted comparison of the utilization of truth commissions in finding peace and reconciliation in these societies.

[122]Indeed, there is recent call for collaboration with other fields in legal scholarship which has enormous relevance with our work. See Generally, Annelise Riles, From *Comparison to Collaboration: Experiments with a New Scholarly and Political Form - a* text of the Paper presented at Kings College University of London on 14th January 2015. (Riles, Annelise, From Comparison to Collaboration: Experiments with a New Scholarly and Political Form (September 26, 2014). Law and Contemporary Problems, Vol. 77, Forthcoming; Cornell Legal Studies Research Paper No. 14-35. Available at SSRN: http://ssrn.com/abstract=2502126 accessed 03/03/2017.)

1.04. HISTORY AND POLITICAL BACKGROUND

"History is the first fruit of power, but power itself is never so transparent that its analysis becomes superfluous. The ultimate mark of power may be its invisibility: the ultimate challenge, the exposition of its roots."[123]The study of history has evolved with human evolution. From a time when it was closely associated with fiction,[124] it has emerged and come to be associated with concrete facts. From place to place, history is told in one form or the other. But sometimes the lines become quite hazy leaving the individual without the necessary epistemological skills unable to decipher what is historical fact as they call it and what is historical fiction.

Be that as it may, it has become an aphorism that every society has history. Meaning that, every human community has some articulation of power and the structures upon which it is founded. This may not be in the linear construction of history and time as found in western historiography. It may also be in a more complex and entangled perception of time and history in Africa and the East. One indubitable fact however, is that there is the existence of some form of ways and means of organizing social interaction in all societies.

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[123] Michael-Rolph Trouillot, *Silencing The Past: Power and the Production of History*, Beacon Press, Boston Massachusetts 1995.

[124] One is reminded of the writings of Herodotus. How much of that is historical fact and how much of it is fiction? How much of Vergil's Aeneid is not factual but a construction of the fertile imagination of the writer? What of Homer's Iliad and Odyssey are they fictional or a tale of realities as in classical antiquity?

Thus, within any human society, I would argue, be it empire or state, village or hamlet, there is often a sense of history mingled with structures of power which forms the complex brew that gives identity, meaning and form to whatever the society does. In a way history can be interpreted a s the construction of a world view and a perpetuation of such a world view in service of the dominant voice in that society. Hence, the question is often asked: how much of history is truth? How much of it is a construct made to serve pre-conceived ends? Indeed, what is the purpose of history? According to Michael – Rolph Truillot "the proposition that history is another form of fiction is almost as old as history itself and the argument used to defend it have varied greatly."[125]

The questions about truth, purpose and value of history vis-à-vis power structures in society are often essentially contested questions in society. Hence the explanations offered to it might differ depending of the world view of the makers of the history. The inescapable issue however is that history is important because it not only gives insight into the trajectory of a society but may as well highlight tools needed to for the purposes of finding answers to the most virulent problems of the present moment. This becomes even more so in transitional societies because they are critical to the determination of rights, privileges and responsibilities in such societies. Hence the attempt here to highlight the connectedness of history, power and transitional justice in the chosen countries – Liberia, Sierra Leone and Nigeria respectively.

[125] Michael-Rolph Trouillot, *Silencing The Past: Power and the Production of History* (Supra).

Much as a number of issues stretching back to colonial times will be included in the historical background, they are necessary only to the extent that they show the failure of democratization in the post-colonial era. Those who assumed leadership in the post-colonial era did not reform the system, rather, they consolidated it to serve some of their narrow interests – which they often coated with the gloss of ethnic nationality, religion and such other prejudices as long as such served the purpose of securing their hold on power. They are therefore obvious historical entanglements with the colonial architecture but the concern of the TRCs which is explored here is primarily the post-colonial evolution of the countries in issue hence the focus.

1.04.1. LIBERIA – HISTORICAL AND POLITICAL OVERVIEW

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[126] Source, Library of Congress. Geographically, Liberia is situated in the tropical region of Africa. It lies at 4' 2' N to 8' 30' N of the equator. This unique location near the equator makes Liberia a heavily drained area and with luxurious rainforests. It is bounded in the north easterly area by the Republic of Guinea (Guinea Conakry) and Cote D' Ivoire and the north westerly boundary Sierra Leone and in the South by s long coastline of 595 kilometers abutting the Atlantic Ocean. Liberia's landmass is put at 111, 370 square kilometers or 43,000 square miles – with marshy plains and a number of rolling hills is no doubt a natural beauty. A greater part of the hinterland is drenched by rivers and streams and other freshwater sources. By the population census of 2004, Liberia is estimated to have about 3.5million people with annual growth rate of 2.4 %. In terms of culture it has about 16 indigenous languages, but English

A. IN THE BEGINNING – LIBERIA A HISTORIAN'S DELIGHT

The country Liberia occupies a unique place in African political history. This is so because it is the oldest independent state in Africa besides Ethiopia. It shares also a unique position with Ethiopia as the only African members of the League of Nations. That significant position enhanced their frontline roles in the decolonization efforts in Africa especially regarding the self-determination of the German Mandate Territory – the South West Africa (Namibia).[127] Liberia attained independence in 1847 while Ethiopia was a continuous battleground epitomizing the resistance of colonialism till the end of World War II. Its history and place in Africa are both unique and checkered.

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remains the official language of the country. There are also 16 (Sixteen) constitutive communities or ethnic nationalities within Liberia.[126] It has 15 constitutive administrative units. There are also about 16 ethnic groups that make up Liberia's indigenous population. The Kpelle in central and western Liberia is the largest ethnic group. Americo-Liberians who are descendants of emancipated blacks that arrived in Liberia early in 1821 make up an estimated 5% of the population. Kpelle, Bassa, Gio, Kru, Grebo, Mano, Krahn, Gola, Gbandi, Loma, Kissi, Vai, and Bella. It is quite revealing how the administrative units almost fit perfectly with the ethnic nationalities that make up the country. While this may foster inclusion, it may unwittingly create situations hardline ethnic allegiances if no commensurate effort is made to strengthen a sense of pride in collective nationhood or a common vision of nationality. It seems to me that this is one area the Liberian people need to think deeply about.

[127] See the South West Africa Cases (*Ethiopia v. South Africa; Liberia v. South Africa*) ICJ Reports 1966.

It is a history that is in one stroke both a delight to scholars and a pungent recapture of a peculiar encounter between the nations on the West Coast of Africa and the European powers – an encounter that stretches as far behind as 1400's.

The delight regarding Liberia's history finds anchorage on a number of grounds. For one, it possesses many of the factors that make for a full historical plot. Namely, it has distinctive personalities that have played critical roles from its foundation and evolution since the later part of the 19th century till the present moment. Second, it has also produced its peculiar dynamic of class and social structural questions which have created fissures within the country. What has been referred to as "plantation class structures" became evident and dominated the sociopolitical history of Liberia till recently. Added to this, is the historical ambivalence Liberia has exhibited and continues to exhibit regarding identity, citizenship[128] and nationhood. It has in the last decade

[128] For instance on the issue of citizenship Liberia has not been able to overcome the early motivations of emancipation which led to the enactment of citizenship provisions which will today be judged racist and exclusionary. *Article 27 of the 1986 Constitution* of Liberia notes inter alia that:

a. All persons who on the coming into force of this constitution were lawfully citizens of Liberia shall continue to be Liberian citizens.
b. "In order to preserve, foster and maintain the positive Liberian culture, values and character, only persons who are Negroes or of Negro descent shall qualify by birth or by naturalization to be citizens of Liberia."

suffered a brutal civil war which decimated a great part of the country and left an orgy of violence, including rapes, amputations, forced displacements and poisoning of the fountains of national cohesion and togetherness.

In a striking introduction to a book[129] Dr. Richard A Henries[130]stated thus; " the nation's history is for the most part a saga of an historic struggle for survival from the very inception of the colonization enterprise that led to the nation's founding, the

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These provisions have been critiqued by many, yet it has remained a fixture in the constitutional foundations of the country. This is not withstanding that that Liberia has since evolved into a multi-racial society. Many have argued that this creates an inhibition for many who would have otherwise contributed to the development of Liberia and assist its rapid evolution into a flourishing inclusive and prosperous society. It is also seen as a factor in the continued distance which investor maintain with the society in that they do not see it as a space for settlement; but a space to be merely exploited and abandoned if there is any sign of conflict and instability. Constitution of the Republic of Liberia, 1847, Art. V, Section 14th, available at http://digital.library.cornell.edu/l/liberian/pdf/031/031b.pdf. John-Peter Pham, Liberia: Portrait of a Failed State, 52 (Reed Press 2004); Constitution of the Commonwealth of Liberia, 1839, Art. 9, available at http://digital.library.cornell.edu/l/liberian/pdf/001/001.pdf. Jaye, supra note 1, at 67; Dr. M.B. Akpan, *Black Imperialism: Americo-Liberian Rule over the African Peoples of Liberia 1841-1964*, Canadian Journal of African Studies, Volume VII, No 2, 1973, 217-236, at 235.

[129] Ernest Jerome Yancy, *Liberia A Nineteenth – Twentieth Century Miracle*, Nateev Printing and Publishing House Tel Aviv, Israel 1971

[130] A former Speaker of the House of Representatives, Republic of Liberia (1952 – 1980).

clashing opposition which it started set the pace for the difficult problems with which the country was to grapple for a greater portion of its existence commencing from the arrival of the early settlers in 1822, the new colony was far from being looked upon kindly both by the natives of the land and by the outside world. On the one hand it represented a threat to the status quo of the cherished traditions and mores of the natives; on the other hand, it stood as a refutation of the ill-conceived notion that members of the dark race were not sufficiently adapted for a civilized, democratic government and consequent threat to colonial ambitions in Africa. The resentment that this engendered set in motion a campaign of consistent machinations, both within and without calculated to undermine and stamp the country from the face of the globe.

This state of affairs coupled with cyclical financial crises made the road to independence an 'uphill, lonely, and difficult one. For a century after the declaration of independence in 1847, the tenacious will to preserve and defend the nation's sovereignty forced the actual task of nation building into secondary status. The nation's energies and resources were thus mobilized. The noble hopes and aspirations of the founding fathers that the fertile land of the new Republic shall nurture agricultural abundance, that schools shall foster lyceums of wondrous academic excellence and that its ports and harbors shall grow into nerve centers of world trade and commerce went unrealized for nearly a century". Happily, their realization now unfolds as Liberia marches on new frontiers of progress and prosperity."[131]

[131] Ibid pages 7 -8.

Evident from this is the high hopes expressed at the founding of Liberia in the later part of the 19th century. It came as an effort by the American Colonization society[132] to build a home in Africa for the emancipated slaves. However, the return of these emancipated slaves created a dynamic of its own from the beginning. First, they were resisted by the local communities as they were seen as not 'belonging.' Second after the initial resistance was overcome, the establishment of a distant and near disdainful social and political structures towards the "local people" seems to have also_further laid the foundation for future conflict. Because the returnees looked down on the local people, there was limited integration.

This limited integration as it can be called will consequently bring untold acrimony and deep resentment between the communities. It was therefore not out of place that the optimism which was professed in the beginning will give way to disillusionment. The other contributory actors like control of trade, domination of opportunities and benefits within the state and access to good education and general welfare are often intertwined

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[132] Note that. The American Colonial Society was in response to the efforts at the time to transfer or to deport all newly manumitted slaves and African-Americans from the United States. According to Joseph Tellewoyan, "the movement began in the late 18th century after the war of independence and took on national prominence during the second decade of the nineteenth century. The preliminary plan that the architects of colonization toyed with, was to expatriate all the newly manumitted slaves in one of these places: the western region that bordered the United States, the West Indies or back to their ancestral homeland in Africa. Fundamentally, the long-term goal was to segregate the black race from the white race."

with this original sin of the Liberian state. It is however of immense and intense historical debate regarding the depth of any of these factors or other factors that may have affected the political development of the Liberian state.[133]

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[133] There is however a clear convergence of opinion that this played a critical role in shaping the political development of Liberia. For instance not a few are convinced that the political, social and economic policies implemented by the Americo-Liberians created an oligarchy. This was supported, watered and fortified by more policies and government interventions as the years passed by. This created a minority domination because the Americo Liberian represented only 5 percent of the population but maintained a firm control of access to the opportunities both in governance and the economy thus fueling resentment and discontent in the indigenous populations. The indigenous peoples were considered subjects and not given the privileges of citizenship till the 1940's. Land ownership which offered the strongest structure of access to farming and agribusiness was also limited to the oligarchy created by the Americo – Liberians. More so, it was not permissible for indigenous Liberians to joining the ruling party thereby shutting them out from the potential benefits of participatory democracy. A further factor which deepened the disparities between the Americo –Liberians is the focus of government to development of the Monrovia and the coastal regions of the country without due attention to the hinterlands. Thus, while the country was low on the global development index and poverty standing among other countries, there was a significant mismatch between the infrastructure in the coastal areas and the hinterlands. This led to a consequent shortfall in infrastructure, access to education, agricultural development, foreign investment, and the provision of basic services in general to the Liberian hinterland. Of course this normally led to

However, the turning point in that history was the military coup led by Samuel Doe on April 12 1980. The execution of President William R. Tolbert Jr. and members of his executive weakened the foundations of an already fragile state. Before the Coup, there had been food riots in many parts of Monrovia which was harshly repressed by the government of Tolbert. The scarcity and prohibitive price of the popular staple rice was the major foundation of the riots.

Sergeant Doe thus violently ended the unbroken succession of Americo-Liberians from 1847 to 1980.[134] But like the say in that part of the world, it is not enough to shoot down an elephant it is about what to do with all that meat and how to appease the gods that own it. Hence this military intervention will become the onset of a fierce rivalry

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efforts at resisting the government which was often repressed by government force. This remained largely so till the 1980's when the first military coup was carried out thus setting the stage for the cycle of violence and civil wars that followed it. Till today the nagging question in Liberia still remains how to improve social amenities, create a transparent government and improve the management of state resources and apply same frugally towards issues of social justice and inclusive property. See Magnus Jorgel, *The Mano River Basin Area: Formal and Informal Security Providers in Liberia, Guinea and Sierra Leone*, 2007; Eric Smyth, Camille François, Kyle Schneps, Victoria Lausedo, & Chisom Adimorah, *Breaking the Cycle: Applying Lessons from Cote d' Ivoire, Liberia an Niger to the Crisis in Mali* Columbia University, CIPA Report, 2013; American Bar Association, *Analysis of the Aliens, and Nationality Law of the Republic of Liberia,* 2009.

[134] Michael A. Innes, *Enemies of the Revolution: Radio, Propaganda and National Development in Samuel Doe's Liberia, 1980 – 1989*.

and struggle for power within different factions of the nation's army and led to a cycle of civil wars. It also led inexorably to the destruction of the economy and the social fabric of the country.

a. LIBERIA'S CIVIL WARS

Samuel Doe's military coup opened the Pandora regarding the fissures that have been glossed over regarding the history and place of different groups and identities in the political history of Liberia. Thus, the seeming indigenous popular support of the military junta which he established (the People's Redemption Council), soon fizzled out. The attempt to subdue dissenting members of the military and others not in synch with his approach to governance further created dissidents within the military. Hence there was an attempt to forcibly remove him in 1985 which failed. In response to this he cracked down on the ethnic Gio and Mano groups in the Nimba County area. The only reason for cracking down on this group was because the alleged coup plotters were of the same ethnic nationality as them. This created further resentment – fracturing further an already broken socio-political fabric.

Meanwhile Charles Taylor has mysteriously escaped from prison in the United States and found his way to Libya wherein he themed up with Gadhafi, trained as guerrilla fighter and also recruited his own soldiers which he trained with the hope of invading Liberia at some point. Thus between 1985 and 1989 Charles Taylor built up his insurgent group and armed them for the mission of invading Liberia forcibly taking over the reins of power. On Christmas Eve 1989, Taylor and his group struck and effectively plunged the country into its first civil war.

Despite ECOWAS' Intervention and attempt to forestall a total collapse of the country in preservation of human rights, Doe was gruesomely executed. Different rebel groups were also to emerge and continued to hold control of different parts of Liberia. The ECOWAS Community attempted at several occasions to make peace between the warring factions.[135] This culminated in the elections of 1997 which ushered in Charles Taylor. Presumed peace will however not last because the peace agreement broke down in the circumstances the factions went back to the war. The Second phase of the Liberian Civil war thus began in 1999 and continued like that until 2003.

The war became a regional concern. Taylor found sympathies in some communities living outside Liberia and thus was able to encamp and train his soldiers in those territories. His linkages with Gadhafi further fortified his source of weapons. The war in Liberia was also not just a Liberian affair because. It had ramifications with the conflict and civil war in Sierra Leone. The diamond and rubber resources in Liberia and Sierra Leone will in the end become the major source of illicit funding for the war on both sides.

Many a scholar have argued that the minerals and resources found in the two countries became a great incentive to continue the war rather than end it. Because of the

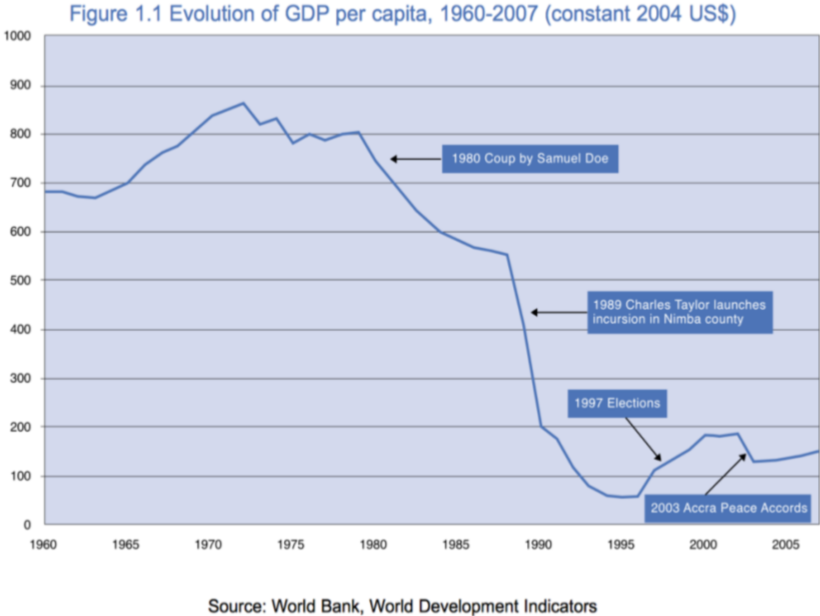
[135] Banjul III Agreement (1990-10-24); Bamako Ceasefire Agreement (1990-11-28); Banjul IV Agreement (1990-12-21); Lomé Agreement (1991-02-13); Yamoussoukro IV Peace Agreement (1991-10-30); Geneva Agreement 1992 (1992-04-07); Cotonou Peace Agreement (1993-07-25); Akosombo Peace Agreement (1994-09-12); Accra Agreements/Akosombo clarification agreement (1994-12-21); Abuja Peace Agreement (1995-08-19

illicit nature of the trade it is difficult to tell how much of Liberia's mineral and rubber resources went into the war. Recent reports have however estimated it to be in millions of dollars.[136] Deservedly, it attracted international attention and subsequent interventions through the ECOMOG[137] and the United Nations Peace Keeping efforts. However the military intervention in the political life of the country affected drastically its economic fortunes. While the civil and political right questions are often the first line in the discourse about the country, the socioeconomic and cultural right of the people is the one that has deeper resonance and ramifications for the citizens. Their life, social connections, livelihoods and subsistence was destroyed by the problems of collapse of rule of law and conflict. Illustrative of this is the economic progression of the country

[136] Liberian civil war and illicit sale of diamonds and rubber resources under Charles Taylor has been a subject matter of a PBS documentary and other publications. See also page – of the TRC report in Liberia.

[137] ECOMOG – ECOWAS Monitoring Group which is the peace keeping infrastructure dedicated to regional stability in the region. In the recent civil wars in the region particularly in Liberia and Sierra Leone, ECOMOG has intervened with the mandate of the leaders of the region to bring Peace and return to democratic rule. It has often collaborated with the UN Peace Keeping Mission in these efforts. Many would argue the ECOMOG is an exemplar of a. reliable regional initiative for regional peace and security.

within the period as depicted by World Bank development indicators.



Source: World Bank, World Development Indicators

It is clear from the figure above that the national economic fabric was destroyed, and many were rendered destitute by the violence. Unfortunately, the civil war lasted long and spread even beyond the country sides of Liberia into neighboring Sierra Leone and guinea. The heavy green tropical forests therefore became the training grounds for militant forces and dare devil war lords. The war decimated the land and created a litter of grave and egregious human rights violations. The civil war ended in August 2003. This was pursuant to the signing of the Comprehensive Peace Accord by all the factions supervised by ECOWAS Community Leaders.[138]

[138] A summary of the number of factors that contributed to the Liberian civil wars are: first an elite that was not representative of the population. Secondly, the exploitation and use of government resources and revenue just for the benefit of minority while leaving a vast population of the country in penury and locked away from the opportunities that education,

This was after 14 (fourteen) years of intense conflict. By virtue of this Comprehensive Peace Accord, Charles Taylor the then president left the country for Nigeria. He would later be arrested in Nigeria and handed over to the international community for trial before the Special United Nations Tribunal[139] for Sierra Leone for war crimes. In the ensuing calm and relative peace, the country needed to rebuild and reform itself for growth and democratic governance. One of the efforts at this

primary health care and quality nutrition can offer. The failure of institutions like the military and want of common purpose amongst the constituent groups within the military and parts of the political elite. This created disjointedness and the rise of centrifugal forces built around ethnic warlords and a motley of groups that arose in response to the vacuum created by the failure of government institutions. The different interests off international and regional actors not only exacerbated the situation but also made the crisis a protracted event.

[139] In the face of the egregious violations of human rights which had taken place in Sierra Leone during the years of conflict, the UN pursuant to a request made to it by the Sierra Leonean Government established the Special Court for Sierra Leone in the year 2002 to try those guilty of the most egregious violations of human rights. The Court which was 'hybrid' was unique at the time and it was under this court/tribunal that Charles Taylor Was Charged and later convicted for war crimes in the country.

democratic renewal and social reconstruction was the establishment of the Liberian Truth and Reconciliation Commission in 2006. [140]

These strands of the Liberian experience are full length subject matters of historical curiosity. Thus, this work only attempts to highlight a number of the historical and pivotal points in the life of the country in order to give us a perspective to the TRC which was deployed in the aftermath of the civil conflict in Liberia.

These arrays of intertwined issues have deepened the crisis of identity and contested networks between the different constituent societies and communities within the country. For instance, citizenship remains an issue and poverty, lack of capacity, mutual distrust between the elite and the masses remain consistent questions that bug the country. Some would argue however that, Liberia is once more at its feet going by the successful transition from one civilian government to another despite the screaming index of poverty and lack of capacity in the country. Recently, the immediate past president of the country Ellen Sirleaf Johnson was awarded the Mo Ibrahim leadership award.[141]

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[140] The 9 Member Commission was established and inaugurated in February 2006 and Commenced their work i.e. hearings in June 2006. We shall get on this as we move along in the work.

[141] The citation by the Award Committee stated thus "The Prize Committee of the Mo Ibrahim Foundation announces that Ellen Johnson Sirleaf, former President of Liberia, is the 2017 Ibrahim Prize for Achievement in African Leadership Laureate. The Prize Committee found that, confronted with unprecedented and renewed challenges, Ellen Johnson Sirleaf

SIERRA LEONE

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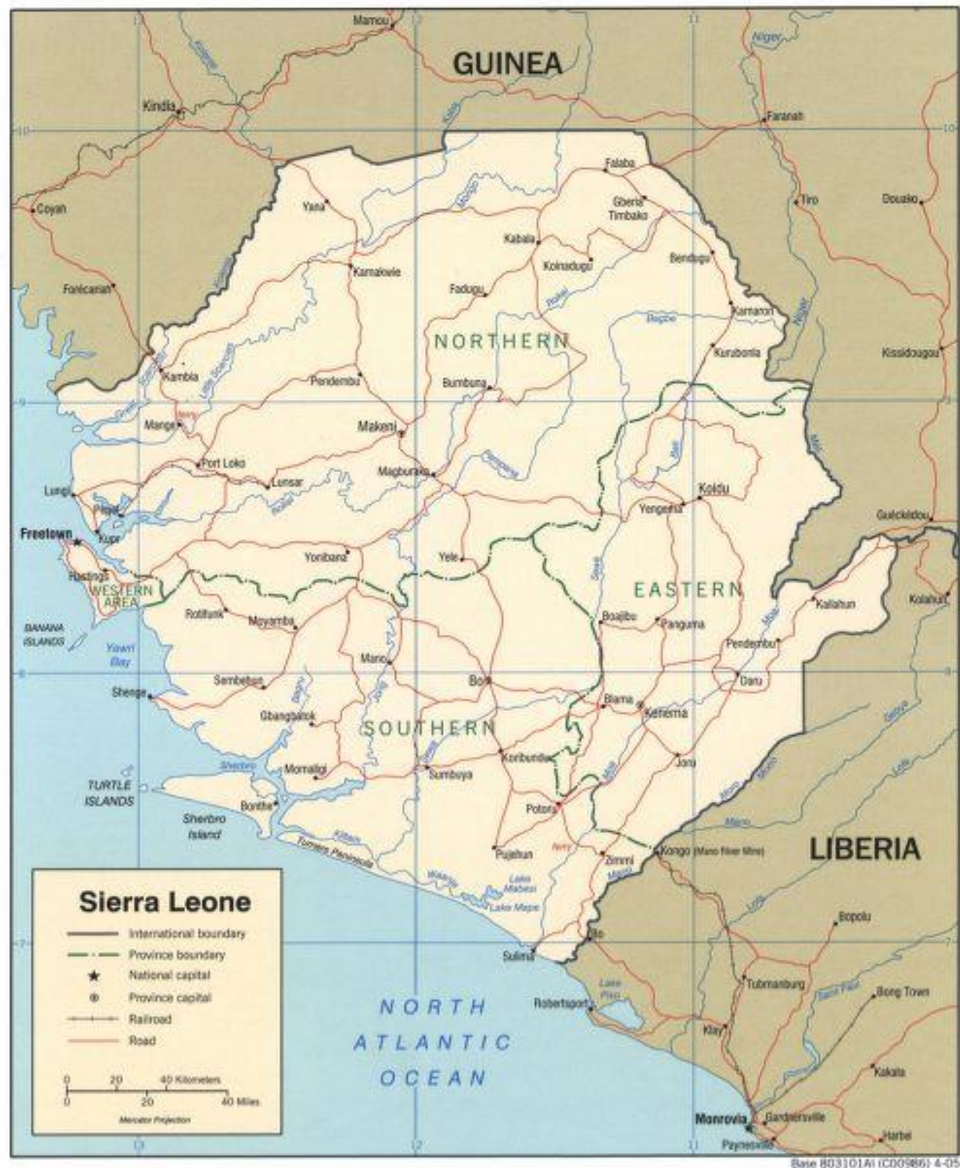
demonstrated exceptional and transformative leadership. She took over a country that was devastated and broken by 14 years of civil war and was later struck again by the Ebola crisis. Such a journey cannot be without some shortcomings. Today, Liberia continues to face many challenges. Nevertheless, during her twelve years in office, Ellen Johnson Sirleaf laid the foundations on which Liberia can now build. In the process, she restored Liberians' dignity and pride in their country. Throughout her time in office, she staunchly maintained her priorities and her determination to succeed on behalf of the people of Liberia. Since 2006, Liberia is the only country, out of 54, to improve in every category and sub- category of the Ibrahim Index of African Governance. From 2006 to 2014, before the Ebola crisis hit the country, the Liberian economy grew at an average annual rate of over 7%. Ellen Johnson Sirleaf endured imprisonment, exile, and personal risk on the road to leadership, and yet persevered in her demand for honest government for her people. She courageously embraced opponents and fought for generational change and paved the way for her successor to follow. Her achievements have inspired and given confidence to millions of women in public service. Apart from her leadership in her country, she has always been a champion for Africa. Her success is Africa's success and testament to the power of exceptional leadership. Today, Ellen Johnson Sirleaf stands tall in victory, as the recipient of the 2017 Ibrahim Prize for Achievement in African Leadership." See http://s.mo.ibrahim.foundation/u/2018/02/11224345/2017-Ibrahim-Prize-Citation.pdf?_ga=2.162997492.916224338.1522374533-67131002.1514953064 <accessed March 29, 2018>.



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A highlight of the political history of Sierra Leone can be approached from some vantage points. First, the foundation or beginning era with the indenture and general

[142] Source, Library of Congress.

resettlement of returnee emancipated blacks and other people of color from the United Kingdom and parts of the Americas. Then the Colonial period and independence. The post-independence period and military rule is also another reasonable vantage position. Finally, the civil wars and post-civil war efforts at rebuilding the country's institutions and entire state architecture provides another significant vantage position. Each of these positions, makes for a full length political and historical enquiry and debate. Therefore, the attempt here is merely to point a number of issues which have the potential of helping us situate the transitional justice efforts. It helps us situate our conversation and interrogation of the unfolding post conflict nature of things in the country.

First off, it is important here to give some perspectives regarding the communities that make up modern Sierra Leone. This country of an estimated population of about 7.5 million people has 16 (sixteen) noted ethnic groups. Each of these groups have their respective cultures and languages. Even within some of these groups there seems to be a number of decipherable subgroups but that is not a problem. Thus, there is the Temne which is considered the largest cultural group. They are said to constitute about 35% of the population.

Also, there is the Mende ethnic group which is about 31% of the population. Geographically, the Temne group are dominant in the Northern Sierra Leone and areas around the capital, while the Mende live mostly in the South-Eastern Sierra Leone and the Kono District. The Limba who live mostly in the northern part of Sierra Leone is considered to be about the 8 Eight percent of the population. Then the Fula – Fulani – who are believed to have migrated from the Guinea into their present abode within Sierra Leone. Other are the Kono, Mandigo, Krio, Kurano, Loko, Kissi, and Sherbro.

Islam and Christianity are the dominating religions in the Country. Thankfully religion has not been a significant factor or basis of conflict in Sierra Leone. Sierra Leone has a young population with 42% of its population under 15, and a rural population with 62% of people living outside of the cities.

b. ENCOUNTER WITH EUROPE, RESETTLEMENT AND COLONIALIZATION

It is important to understand the entangled history of this country as a way of increasing the appreciation of its present problems. It is not meant to just bemoan the past nor exculpate the present generation from its failures but to create a more reasonable mirror through which we can understand the societies and thus be better place to make recommendations for legal reforms, that are responsive to the felt necessities of the communities at this moment. Thus, Africa's encounter with the wider world in contemporary history is an encounter of immense contemplation. It has variegated colors.

Many critical scholars also view it as hugely negative. Others are content to only be contemptuous about it. One would however qualify it as encounter of mixed feelings. This is so because at different intersections of that encounter the violence done to Africa and her peoples is palpable and speak volumes in themselves. The level of inhumanity and destruction of the communities is one that cannot be over emphasized. That broader story fits into the story of the making of modern Sierra Leone. Now, we must note that though indigenous populations have always lived in what is today known as Sierra Leone, the history of modern Sierra Leone is linked closely with the coming of Portuguese merchants and other fortune explorers to the area in about 1462 AD.

Indeed, the word Sierra Leone is from the Portuguese word Serra de Leão (meaning, Lion Mountains). With the arrival of the Portuguese, a trade post was established near Freetown. This was because the Portuguese built a fort and a harbor in the area. The idea was first, to facilitate transportation of goods. This later and quickly metamorphosed into trade in human cargo – slave trade. The Dutch, French and British also later joined in the scramble. The scramble of commodities the principal of which became human beings. For years[143] – with no qualms of conscience and even justified by the civilization mission – this trade was sustained, protected and duly recognized. Slaves could be used as collateral to secure credit. They offered incentives to raid communities along the coast or to encourage intertribal wars and raids. It is therefore not surprising that, Sierra Leone would thus become a massive slave port on the West Coast of Africa throughout the period of invidious and vile trade in human beings

It is on record that Sir John Hawkin bought three hundred slaves in 1562 AD thus critically inserting Britain into the obnoxious trade in human beings across the Atlantic. This trade continued for decades. Of course, as with all human rights violations one the greatest of which is slavery, the victims had little or no capacity to stop the trade or challenge the slave merchants who themselves had royal charters protecting their slave ships and securing their right of navigation on the high seas. Further to this, in 1787[144], it was decided that London's black poor and white women be transferred to the

[143] 400 years of trans-Atlantic Slavery is a story yet untold.

[144] In this same year the Society for the Abolition of Slave Trade was established by some public minded individuals. Clarkson, T., *An Essay on the Slavery and Commerce of the Human Species,*

coast of sierra Leone. They were so transported in May 15, 1787[145] and accompanied by some English tradesmen.

It is also of note that this was to mark a turning point in in the liberation history as the formation of the Slavery Abolition Society began in England. Its works and campaigns finally led to the abolition of Slavery Act in England on March 25, 1807. This did not change the life of the emancipated slaves, many of them were subsequently to be moved back to places like Sierra Leone either as a maids or indentured servants. Many others were also person who were captured from their slave ships and resettled in Sierra Leone.

However, and for a long time, much of this resettlement was limited to the coastal areas referred to as colonies. These returnees were later to be known as Krio, Creoles and were often more western oriented than many of the other persons within

particularly the African(first published 1785), Miami, 1969; Clarkson, T., *History of the Rise, Progress and Accomplishment of the Abolition of the African Slave Trade by the British Parliament*, London, 1808; Cugoano, O. (ed. Carretta, V.),*Thoughts and Sentiments on the Evil of Slavery*, London, 1999; Edwards, P. and Rewt, P.,*The Letters of Ignatius Sancho*, Edinburgh, 1994; Hurwitz, E. F., *Politics and the Public Conscience*, London, 1973; Midgley, C., *Women against Slavery: The British Campaigns 1780-1870*, London and New York, 1992; Reyahn King et al.,*Ignatius Sancho, an African Man of Letters*, National Portrait Gallery, 1997; Walvin, J.,*An African's Life: The Life and Times of Olaudah Equiano 1745-1797*, London, 1998.

[145] Maeve Ryan (2016) 'A moral millstone'?: British Humanitarian Governance and the policy of liberated African apprenticeship, 1808–1848, Slavery & Abolition, 37:2, 399-422, DOI: 10.1080/0144039X.2015.1130323

the indigenous communities. What this did was to also create a class and cultural distinction which will also become a significant factor in the politics and history of Sierra Leone. It was therefore not out of place that these returnees would subsequently perceive themselves as potential leaders for the advancement of the region. The Berlin Conference 1895 would hasten integration of the hinterlands and the coastal places because the British needed to show actual control. Hence the continued transfer of the British staff to the country. The Krios were latter to become the perceived rivals of the British Colonial authorities in the later part of the colonial enterprise.

According to David Harris "it could be summarized that Krios are a cohesive group which is acknowledged as African but is striking in it cultural and linguistic difference from the mass of the population and in mores that are partially derived from the metropole.[146]Perhaps, most interesting about these groups is their relationship with the hinterland peoples. There are elements of the mission *civilisatrice* or civilizing mission of French British colonialism which can be seen in creole attitudes. Until the 1970's the Liberian Constitution referred to the enlightenment of the benighted continent."

[146] There were also those referred to as the 'creoles' which essentially means those of Portuguese ancestry.. It has become culturally offensive in some communities to use some of these terms to describe people of mixed races or resettled communities at the end of the slavery and commencement of colonization. This is largely so because such descriptions have become convenient tools of discrimination against the groups or communities so identified. In some other communities, it is still evolving while many others do not feel targeted but consider same as a unique identity which they are very proud of.

Although not formally enshrined as such in the Krio, the stance was similar."[147] The Krio became well educated and involved in commodity businesses around the coast of West Africa. They were what could pass as the some of the earliest intelligentsia within the region and thus pioneered many of the professions[148] including law, medicine, divinity and accounting. People like Ajayi Crowther became the major propagator of the Anglican faith within the region.

There is no gain saying therefore that the rise and the decline of this group became significant in the political and historical arch of the colony until the time of independence in 1961.[149]

c. COLONIALIZATION

It is important at this juncture to highlight that the importance of the information about the state's colonial entanglements is to provide nuance. The further essence of this is to deepen an appreciation of the background to a cursory reader. This furtive glance into the colonial enterprise must not be mistaken as focusing unduly on colonial times instead of the post-colonial state. The post-colonial states and their failures to

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[147] David Harris, *Sierra Leone – A Political History* – Oxford University Press, 2014 pages 12 – 13.

[148] The Founding of Furah-Bay College in West Africa in 1827 which later became an affiliate of the University of Durham is significant in the educational history of West Africa in particular and the Continent in general.

[149] But Krios were not the only people in land. There were other groups the Colony and the Protectorate as we have shown. The highlight here is to mark the significant position which they occupied at the time in the complex colonial situation in the region at the time.

envision and build countries of prosperity and inclusive development remains the cardinal focus of the research and the effort at retooling truth commission which the research aims at.

Be that as it may, the British Colonial enterprise in Sierra Leone bears a lot of resemblance with that of Liberia – though the idea of Colony in Liberia was later abandoned for self-governance. Thus, it was the idea of settling freed slaves on the West African Coast initiated and carried out by of British philanthropists in the later eighteenth century that led to the colonization of the area known today as Sierra Leone. Before the Colonial establishment and for a very longtime, British activities was restricted to the coastal areas. In the course of the19th century and in the time of scramble for Africa, the British then expanded their "sphere of influence." Thus, even when they did not have effective administrative control, the colonial administrators began to treat any area of the countryside not within the control or alternate 'sphere of influence' of the French or Liberia as protectorates. The British Protectorate over the entire Sierra Leone was then proclaimed in 1896. Freetown Settlement was proclaimed a British Crown Colony in 1808.

According to Hargraves "Colony is applied to the peninsula and island originally settled with few predominantly tribal areas around the river Sherbro; the term 'protectorate" to territories the size of Ireland, which form the great bulk of the area marked 'Sierra Leone" on modern map whose social organization was at the time

exclusively tribal." [150] what can then be seen was this great difficulty in seeking to manage and exploit for British interest the territories within the effective and loyal control of tribal and clan heads in many places. The limitations of the British Colonial administration in terms of resources – personnel, finances, and infrastructure made it impossible to rely entirely on the British colonial staff. In the circumstance they had to find local hands and staff who can do the jobs. This led to the appointment of and recruitment of some other people.

Hence, the Krio, and Creole who were the most associated with the European attitudes and preferences became the available resources to exploit. The imposition of hut taxes[151] on the chiefs of the communities was thus a source of problems and was resisted and sometimes in a most violent manner. They pacify the communities there was the formation of the frontier force and this led to the use of African persons as

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[150] Hargreaves, J. D. *The Establishment of the Sierra Leone Protectorate and the Insurrection of 1898*, *The Cambridge Historical Journal*12, no. 1 (1956): 56-80. http://www.jstor.org/stable/3021053 <visited September 11,2018).

[151] The intriguing thing about the idea of sphere of influence and protectorate as operated by the British over all of Africa and particularly in the West African region is that it dealt with large expanse of the countryside often with autonomous communities with their peculiar administrative dispositions. Their unification, designation and divisions into colonial protectorates was therefore such an arbitrary patchwork. There is no gain saying that the interest of the tribal communities was neither the interests of the communities nor their opinions were sought in the processes that led to their designation as protectorates.

soldiers and police officials against their fellow Africans. Thus, mistrust became rife as those who worked on the side of the British became the perceived collaborators of disruptive foreign force and harbingers of cultural aggression. This marked some timeless impressions in the mind of the many who felt short changed in the British colonial enterprise.

Thus, it was not unusual to hear echoes of these historical traumatic situations in the contemporary literature of the political history of Sierra Leone.[152]

These separate constituting parts of modern Sierra Leone was thus kept apart and administered as such – Colonies and Protectorates. In 1947 the two units were merged together in preparation for independence. But at this time interest had already become vested along groups and entities – the indigenous groups, the settler communities, creoles, Krios, the educated and often Western oriented elite of Freetown. Party allegiance was also as much of a ground of contestation and divisiveness as ethnicity, class or regional prejudice in the battle over who should succeed the British. In all Sierra Leone was granted independence in 1961.

d. INDEPENDENCE

[152] "Rather than constructing a unified Sierra Leonean state, the colonial government effectively created two nations in the same land. The divide between the entities known as the 'Colony' and the 'Protectorate' had far-reaching implications for issues such as citizenship, land tenure rights and conflict of laws" – See The Report of the Sierra Leonean Truth Commission, Volume 2 (Executive Summary) page 5 paragraph 11.

The Sierra Leone People's Party (SLPP) took the reins of political power. However, and like in most of the communities and countries of West Africa, the attainment of colonial independence was merely the first step in an otherwise long walk to true freedom and democracy. Immediately after independence, party politics, identity contestations and elite struggle to replace the colonial structures and privileges took center stage. The arduous task of forging a critical mass of the people into a tool of development and advancement of the community solidarity was yet to begin.

Coupled with this is the fact that Colonial administrations left a limited infrastructure behind. There was nonexistent infrastructure. Schools, hospitals and other social amenities were equally limited. But even at that Serra Leone because of the unique place of the returnee emancipated members of the community had a leading position in terms of professional and basic social amenities. But it was not an easy task at the time to build a virile community or states from the diverse and poor society left behind at independence.

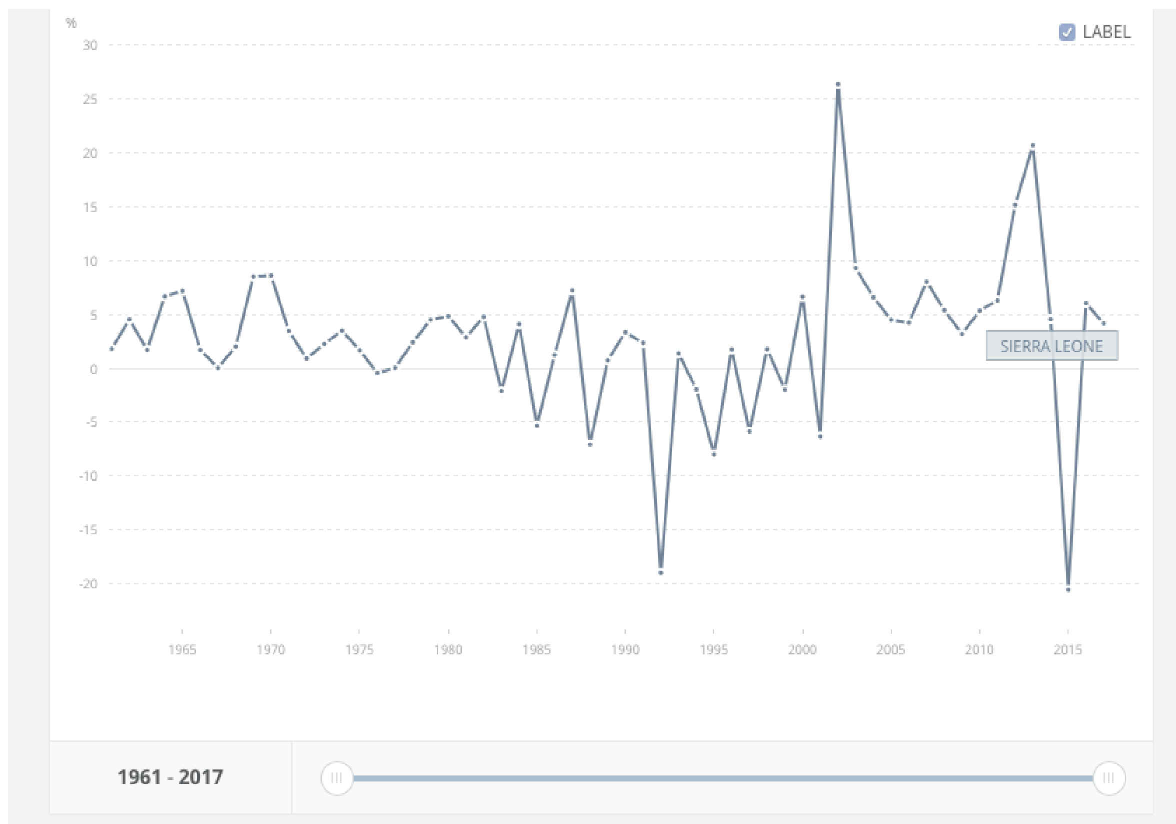
Despite the urgency of the moment and the amount of work to be done the elite were preoccupied with self-serving politics. Thus, the elite struggle for power, domination and the corruption that followed it will subsequently make the euphoria of independence a mirage. The first independent government, formed by the majority Sierra Leonean Peoples party, seems to have further polarized public opinion in the country. It is also accused in many existing literatures of having laid the foundation for nepotism, cronyism in many state institutions. They are also accused of preparing the grounds for the subsequent military intervention in political life of Sierra Leone. It further fueled the divisions in the country.

It was therefore not unforeseeable that the election of 1967[153] would mark the beginning of a downward spiral of the country. Series of military interventions by way of coups and threats of same will continue in Sierra Leone and subsequently into a full-blown civil war in the 1996.[154] This was not unexpected as the miss-governance of the country has led to a decay an economic collapse.

The cost of misrule, military intervention, corruption and misuse of state resources and socioeconomic dysfunction could be seen in the trend of human development in the country.

[153] Fisher H. Elections and Coups in Sierra Leone 1967, *The Journal of Modern African Studies,* (1969) *7(4), 611 – 636. Doi: 10.1017/S0022278X00018863.*

[154] The First Military Coup took place in 1967 deposing Premier Siaka Steven's government. This was followed by another intervention from the military in which reinstated him in 1968. The fragility in governance and consolidation of power by groups within the elite and with the support of the military would continue until the outbreak of civil in in 1991 when junior army officers led by Foday Sankoh commenced his attacks against the government.



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What is evident from this figure is the dept of economic uncertainty that the country has been facing since independence. Clearly, the society has not been able to make the best use of its resources and apply same through proper policies aimed at developing their communities and championing the best opportunities for their

[155] Source: World Bank National Accounts Data, and OECD National Accounts Data Files. Annual percentage rate growth of GDP at Market Prices which are based on constant 2010 US dollars. Equally GDP is described as the sum of gross value added by all resident producers in the economy plus any products taxes and minus subsidies not included in the value of the products.

communities. This can be contrasted with Namibia which has managed her mineral resources frugally and to the best interest of the country In comparison to Sierra Leone Namibia is categorized not as a highly indebted poor country but as a country on the top tier of development index. It is also ranked very high on ease of doing business and peace transfer of power through elections is a respected nation ethos.[156]

Thus, the activities of the military elite facilitated the state decay and subsequent onset of civil war. It would therefore seem that the leaders were never interested in what impact their decisions will produce on their country. This was to continue for another ten years as the war was only officially declared ended in January 2002. This was followed by dismemberment and rehabilitation and reintegration of both civilian and rebel combatants.[157]Then began the arduous task of reconstructing and rebuilding the broken society which included a UN backed criminal tribunal to try those responsible for the most egregious crimes of war and violations of human rights including amputations, rape and use of child soldiers.

1.04.2. NIGERIA

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[156] Source: World Bank. The Gross Domestic Product of Namibia as at the end of the Financial year 2016 is put at 11.309 Billion dollars. For Sierra Leone, it is put at 5.015 Billion dollars as at the end of the financial year 2004. See https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=NA-SL

[157] According to the United Nations, over 70000 civil war combatants were disarmed and rehabilitated. Equally about 45,000 other fighters attached to rebel groups were rehabilitated after they had been disarmed.

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The political history of Nigeria is quite a painted canvas. It is also a significant political canvas within the West African region in particular, and Africa and in general. Interestingly too, the significance of Nigerian democracy in Africa is a major factor in

[158] Source: Library of Congress.

engendering rule of law, respect for human rights and the entrenchment of democracy in the region. Get it right in Nigeria and you are half way towards getting right in the continent. Alas, Nigerian democracy remains nascent or at best in a deeply fragile situation.

Thus, the attempt here is to provide a basic mapping of that political history. It is hoped that that will give us enough background to understand the remaining discourse. We shall focus the political history on the following key epochs: the state of affairs within the societies of the West African state before 1914. Thus, there will be a highlight of the pre-colonial society without necessarily dwelling on it. Second, would be to give a broad articulation of the Colonial establishment and its impact on the Nigerian space. The fissures and fissiparous tendencies that came with it and the 'birth' of Nigeria and the era of independence. Then there would be a general pivot to the immediate politics of 'independent' Nigeria and the military intervention and civil war in Nigeria between 1967 and1970 – and the continued dissonance since then. This I believe, will give even a mere general reader the needed latitude of background to understand the problems that confront the politics of the country in the present moment.

a. PRE-COLONIAL NIGERIA TILL 1914.

The land and Peoples of Nigeria have existed since time immemorial. However, January 1, 1914 remains a significant date in the political history of Nigeria. The significance of this date is that before the first of January 1914, there was no unified country or territory called Nigeria. In British colonial parlance what existed was the Northern and Southern protectorates; and the Crown Colony of Lagos. There have however been human communities inhabiting these territories since the earliest possible

record of human history in the region. Recent archeological findings have laid credence to this assertion.[159]

Nigeria as a country today has about 350[160] language communities. They inhabit different parts of the country and speak about these 350 languages with varied cultural differences. Its population is estimated to be about 185 million and grows at the rate of about 2.8 per annum. This vast population lives within a landmass of 9000 square

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[159] For instance, in the Igbo-Ukwu in South Eastern Nigeria have dated the area to be inhabited by the Igbos since about 900AD. Among other communities in the lower Niger and around the Benue River trough reveals also an incredible amount of archeological materials linking the communities to their habituations to a very distant past. Equally Terra Cotta figurines found in the Jos Plateau in the North Central part of the Country have been carbon dated to about 2,500 years ago. See Allsworth-Jones, P. *The earliest human settlement in West Africa and the Sahara*, West African Journal of Archaeology, vol. 17, 1987; F. N. Anozie, *Early iron technology in Igboland. West African Journal of Archaeology,* vol.9, 1979 ; F. N. Anozie, V. E. Chikwendu, & A. C. Umeji, *Discovery of a Major Prehistoric site at Ugwuele-Uturu, Okigwe*, West African Journal of Archaeology, vol. 8, 1978; C. V. Bellamy, A West African smelting House, Journal of Iron and Steel Institute, vol. 66, 1904. V. E. Chikwendu, P. T. Craddock, R. M. Farquar, T. Shaw, & A.C. Umeji, A. C., *Nigerian Sources of Copper, Lead and Tin for the Igbo-Ukwu Bronze*, Archaeometry, (1989) 31, 27-36.

[160] In no particular Some of the precolonial societies in Nigeria with full array of societal organizational structures included the Gwaris, Igala, Ikwere, Ibibio, Hausa, Fulani, Idoma, Egbira, Igbo, Edo, Bini, Ishan, Igbanke, Yoruba, etc.

kilometers. Before colonialism, the different communities that make up Nigeria were living in their different domains and were equally self-sufficient and administered themselves in all spheres of life. There were significant empires and kingdoms.[161] There were also renowned leaders whose influence were felt across the communities.

A great majority of the communities like the Igbo were not structured around kingships but around council of elders and such other structures of government. There were also matrilineal communities in parts of Igboland.

The communities traded amongst themselves and also carried out other economic activities like farming, fishing and craft making. The trade routes crisscrossed the hinterland and often terminated at the coastal towns. Particularly in the south - palm oil, rubber, timber, and spices were major trading commodities. In the north, trade in spice and hides and skins was popular. However, this was majorly a trans-Saharan trade and limited trade. A number of warlike groups lived in the northern fringes of the Sahara Desert and around the Lake Chad also having long history within the Songhai which is later today referred to as part of the Sahel region.

There were therefore also great empires in this part of the country including but not limited to the Kanem–Bornu Empire, later in between 1802 and 1804, the establishment of the Sokoto caliphate.[162]

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[161] Benin, Oyo, and Nri, Igbo-Ukwu etcetera.

[162] Much has been written about the foundations of the Sokoto Caliphate and its impact on the peoples of Nigeria particularly in the northern region. Much of it has been conflated by religion and identity politics. It is still very much an area that offers fertile research ground as

The encounter of the coastal states of the lower Niger with Europeans dates as far back as the 1400. However, these coastal territories fought and resisted European invasion till the later part of the 19th century. The record of resistance is still a subject matter of critical historical studies. It began first with the attempt first to dominate the trade and determine the price of commodities. Then, it proceeded to signing treaties of "protection". These treaties were to serve as evidence of 'influence and control" amongst the European powers.

One illustrative example is the case of the British and the Oba of Benin. History has it that when the British came to take control of the trade routes, the Oba of Benin – Oba Overanwem Nogbaisi, resisted it hence the consistent fight with the British traders till the later part of the 18th and 19th century.[163]In the end, most of the territories and the potentates were pacified.[164] Instructive also is the fact that in the struggle for the control

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regards the dynamics in the region, the economic questions in issue and how religion becomes a convenient cover or otherwise in all the noted social dissonance. Moreover, a careful study of this is needed in order to tease out the several issues involved and how that connects with the ongoing controversy over land, water and general resources between farmers and herders in the region. This is however a matter beyond the ken of the present research but has a contributory effect to the overall democratic advancement of the Nigerian state.

[163] Kenneth Onwuka Dike, *100 Years of British Rule in Nigeria, 1851 – 1951*: Being 1956 Lugard Lectures, Lagos, Nigeria, Federal Ministry of Information, 1960.

[164] The word 'pacify' ordinarily connotes maintaining peace. However, in some creative ways, writers have used same in some sense to expose violence and the arrogance of power. For

of the territories ended up in wars with local potentates – many of which ended with a scorched earth sacking of many other communities and in some cases the killing or exiling of the leadership.[165]

The colonization process was first initiated by charter companies from Britain and missionary societies who followed on their heels. Hence the Royal Niger Company[166] was instrumental in putting up the foundational policies towards the

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instance, in the famous book 'Things Fall Apart' by Chinua Achebe, the writer concludes the prose by drawing attention to the musings of the District Commissioner – the Colonial Officer whose duty is to carry out the colonial policies of the imperial powers in Nigeria and other parts of 'British West Africa' – about the book he will write. The book will be titled "The Pacification of the Primitive Tribes of the Lower Niger". This the District Commissioner could do because he does not seem to see the violence or the clash which his presence brought the communities. Thus, conflict and violence can be made to look benign by referring to it as pacification. See also Mai Elliot "The Terrible Violence of 'Pacification', New York Times, January 18, 2018.

[165] The Case of Jaja of Opobo, Nana of Ishekiri, Oba of Lagos and others.

[166] The Royal Niger Company (RNC) played a very significant and historically indispensable role in the British Colonial acquisition of the entire territory today know as Nigeria. It was chartered in 1886 and granted sovereign rights to the exclusion of any other over the areas of its commercial activities. It exercised those powers in very obnoxious ways as has been documented elsewhere. However, before 1886 the company only existed not as RNC, but a collection of other smaller trading companies owned by British businessmen at the time. It

George Tubman Goldie who persuaded his companions to merge their respective businesses in 1879. This merger was convenient first as a way of increasing the stock and capacity of their business to take advantages of the economic opportunities. Second, and more profoundly so as a way of staving off other business interests and by so doing insulate the territories from the competitive rivalry which other businesses from other European Powers – particularly the French and the Germans. Goldie then proceeded to establish an army – a constabulary of 241 Men – highly equipped with which he was able to defend and advance the interest of the company and the British Empire in the region. With this he was also not only able to control the trade and prices of commodities in the region and territories, he also prevailed on the indigenous leaders of the respective communities to sign 'treaties of protection' with him as the representative of the British Crown for which he was knighted Sir George Tubman Goldie. As at 1892 he had signed 360 such treaties. It would not be out of place to note that the overall influence of the RNC gave Britain the bargaining leverage it needed to claim the territories at the Berlin Conference in 1895. However the exploitative activities of the RNC and the unfair trade conditions it imposed on the communities led to incessant rebellions which were often violently put down. This was to culminate in the revocation of the charter of the company by December 31, 1899. See Onwuka N. Njoku, Royal Niger Company, 1886 – 1898, Encyclopedia of African History, volume 3, pages 1292 – 1293; _____*Economic History of Nigeria: 19th and 20th Centuries*, Magnet Business Enterprises, 2001; E. J. Alagoa, *The Small Brave City State: A History of Nembe – Brass in the Niger Delta*, Madison, University of Wisconsin Press, 1964; A. N. Cook, *British Enterprises in Nigeria*, London, Frank Cass, 1964; J. E. Flint, *Sir George Goldie and the Making of Nigeria*, London: Oxford University Press 1960.

colonial administration in Nigeria. Gradually but consistently and with the gun boats and military support of the Britain, the merchants took over the coastal territories, penetrated the hinterlands, overawed any resistance on their ways and completely imposed themselves on the peoples of pre-colonial Nigeria. [167]

b. COLONIAL ENTERPRISE

By 1900[168] Britain has effectively pacified the peoples of Nigeria and imposed its rule on it. Later and in response to the exigencies of the colonial administration, these territories will be amalgamated and called Nigeria in 1914. The amalgamation of the Northern and Southern protectorate was borne out of such exigencies as; the limited number of colonial administrators to cover the large territory and serve as the control points for the colonial power. It was also a function of strategic economic decision in that the regions will support and, in some cases, subsidize the development of the other parts of the country. This was seen in colonial administrative records found in the archives.[169] With the amalgamation of the southern and northern protectorates in 1914,

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[167] Kenneth Onwuka Dike, *Trade and Politics in the Niger Delta, 1830 – 1885*, Oxford; Oxford University Press, 1956.

[168] Nigerian peoples by 1900 have all come under one form of British suzerainty or the other. Some were designated as colonies like Lagos and others like Calabar, Port Harcourt, Bonny, Kano and others were considered as protectorates.

[169] See Fredrick Lugard, *Memorandum on the Development of Northern Nigeria*, November 2, 1899 CO 446/8/30397; Fredrick Lugard, Administration of Tropical Africa, July 11., 905, CO 879/88/789; Fredrick Lugard, Confidential Memorandum; Administration at Home and Abroad 1907, Lugard Papers S. 65/247.

Nigeria became not only the largest country in the region but also one of the most diverse countries in the world – I would argue. The diversity noted can be found in dress and other elements of culture – which subsist till this day. The collapse of these diverse group into one country offered both opportunity for great growth and also challenges of managing diversity and the want of capacity and feared domination by different groups in the country.

Also, religion was also a very broad ground of diversity. The question of religion played its role particularly in northern Nigeria. Namely, the Islamic conquest of the 19th century gave birth to a large caliphate – the Sokoto caliphate with emirates paying allegiance to the ruler in Sokoto in places as far away as Ilorin in South western Nigeria. The conquest of Ilorin by the followers of 'Uthman *dan* Fodio from the Old and equally renowned Oyo Empire is still a subject matter of intense historical analysis within the academia in Nigeria. It also created foundations upon which the British built the 'Indirect Rule' in Nigeria and other parts of West Africa. This however, became a subdued matter until the time of independence struggle and post-independence Nigeria.[170]

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[170] Iheanyi M. Enwerem, *A Dangerous Awakening: The Politicization of Religion in Nigeria*, Ibadan Institut Français de recherche en Afrique, 1995; Niels Kastfelt, *Religion and Politics in Nigeria: A Study in Middle Belt Christianity London*, British Academic Press, 1994; Hassan Kukah, *Religion and Ethnic Politics in Northern*, Ibadan; Spectrum Books, 1993. Hassan Kukah is now the Catholic Bishop of Sokoto Diocese in the North Western part of Nigeria.

With the amalgamation of Nigeria and the opportunities it offered for the many Nigerian youngsters became 'British protected persons.' Thus, the passport they carried was that which stated that they were British protected persons. The irony of this British protection is the inherent segregation and in it because as members of the British Empire they ought to have been granted citizenship but instead they were given a lower recognition as British protected person. This was so across the entire British colonies in Africa and in North America.[171] The Southern part of the country had also hugely through the missionary schools embraced western education and thus empowered themselves to challenge colonialism using the same tools of the western enlightenment ideas. It was therefore challenged not only on grounds of exploitation but the violation for the collective rights of self-determination. It was deemed as not in consonance with the autonomy and the right of peoples to chart their own course. Teachers, administrators and other personnel from the south were to proceed to the other regions – particularly the north which has educational index – to work. The integration of the federal civil service let to some reasonable movement of people out of their provincial spaces to other parts of the country.

This was seen as positive in the sense that it encouraged learning and human development. It also encouraged community building and human interaction across tribal and provincial lines. In other circumstances, it was also a source of friction and

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[171] See Chinua Achebe, *The Education of a British Protected Child: Essays*, London, Penguin Group, 2009; _____ Things Fall Apart, London, Heinemann, 1996;_____ Anthills of the Savannah, London, Heinemann, 1988.

worry for some including but not limited to minority communities who felt that they might be disadvantaged by the inflow of others who are not necessarily of the same immediate culture and background. In that regard it became the foundations of the earliest forms of ethnic frictions in the country in Colonial Nigeria.

In a positive sense however, it also helped in the creation of a north-south coalition which will metamorphose into social movements for the beginning of the struggle for independence. Economically speaking, two railway lines – the Eastern[172] and Western railway lines formed the colonial transportation backbone of the country. It remains so and to the shame of Nigerian leadership elite since independence. What this did was to create a cluster of trading posts and towns along the railway lines. It also created mini-cosmopolitan towns made up of traders, railway workers, miners, farmers, clerks, clergy and other groups. These were also to become the mobilizing grounds and frontiers of the quest for independence in the years to come.

The contributions of trade unions to the expansion of the independence struggle is deducible from the roles played in the contest of the workers for better conditions of service in the later part of the 20th century. The liberation struggles in the continent were often the first fruits of articulate trade union struggles. Thus, what often began as

[172] The Easter Railway line runs from Port Harcourt in the Niger Delta to Kaura Namoda in the Northern tip of the Country. The Western Railway Line Runs from Lagos in the South west Region to Nguru, near Maiduguri in Northern Nigeria towards the Lake Chad area.

demands for better conditions of services ended up as agitations for self-rule and resource self-determination.[173]

At the end of the Second World War in 1945 the British had lost a lot. Europe was in in financial throes. The continent needed a lot of bailout – the Marshall Plan – to survive the consequences of World War II. Many of the West African contingent also returned to support the quest for independence. The participation of the African contingent in the World War II was secured partly by promises of freedom by the colonial powers. The continued colonization of the people was therefore no longer tenable. Equally the formation of the United Nations created a shift in the disposition of the international legal order. The immorality and indefensible nature of colonialism and apartheid, discriminations based on racial inequality could no longer be defended. It became impossible I would argue to continue to colonize the peoples of Africa when

[173] The role of trade unions in both decolonization and post-independence Africa is still a subject matter of great interest. Their evolution is also a subject matter of interest since they seem to have lost their edges with respect to social movements and mobilizations for inclusive development and good governance. See Generally, Frederick Cooper, The Dialectics of Decolonization, in Frederick Cooper & Ann Laura Stoler, (eds.) Tensions of Empire, University of California Press, 1997 available at https://dx.doi.org/10.1525/california/9780520205406.003.0013.

Europe and America had just finished fighting a war that sought to prevent the Nazis from conquering and dominating them.[174]

The Universal Declaration for Human Rights in 1948 gave further credence to it. This fueled the already strong campaigns for self-governance in Africa at the time. Despite the initial difficulties amongst the leaders of the different regions and peoples of Nigeria to come to a consensus[175] regarding the governance architecture and timeline of the independence, Nigeria attained independence in 1960.

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[174] There is a debate out there in the literature as to whether the decolonization processes in Africa came out of a benevolent attempt on the part of Europe. I do not in the least share that that sentiment. Decolonization came at huge cost to Africans and the colonial powers were ready to postpone it as long as it was necessary. The colonial project became deeply unviable after the Second World War. In circumstance the colonial powers needed to disengage in a manner that at least protected their economic interest in the region.

[175] The want of consensus is traceable to many factors including the upscale in ethnic and provincial feelings as independence neared-by. The Willink's Commission for Minority interests in 1957 was a pointer to the fears of minority groups in Nigeria regarding their potential domination by the major ethnic Nationalities. Recall the motion for independence made by Anthony Enahoro in 1954 this was not supported by members of parliament from the North. They were therefore booed by the public in Lagos which led to a lot of resentment and further deepened the ethnic bias. Internal self-governance was granted to the West and the East in 1952. The north preferred to delay this till 1958 as the regional leaders felt that the region was not ready. There was also in some sense unhealthy Rivalry of National Council of

c. INDEPENDENCE, COUP D'ÉTATS AND CIVIL WAR 1960 – 1999.

At independence in 1960, Nigeria viewed as a country with lots of hope and potential for the African Continent and the Black race. It was hailed across the world. On his part, Dr. Nnamdi Azikiwe, the first Governor General of Independent Nigeria had this to say – "As for me my stiffest earthly assignment is done, my country is now free, and I have been privileged to be its first head of state, what more can a man desire."[176]

In retrospect this statement at independence was a misreading of the time. The journey of state building and democratic entrenchment was just at its most incipient stages. There was not yet a truly melded state with common goals and aspirations. The complexity of the communities forcefully put together by the British was yet to be sorted into a set of social and political structures that would accommodate the aspirations of different groups and the assurances of the best possible benefits and egalitarian state to all including the minorities. What this meant was though the jubilations were high in

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Nigeria and Cameroon (NCNC) and Action Group on the one hand in the South and the rivalry on Northern People's Congress (NPC) and Northern Elements Progressive Union (NEPU – led by Aminu Kano) in the Northern Region on the other hand. These political parties in one way or the other had regional orientations and areas of dominance. There were case of political parties not being able to campaign in one region or the other due to the feeling that they are not welcome in that region or due to fear of violence.

[176] Speech of Dr. Nnamdi Azikiwe on October 1, 1960.

the air following the independence, as at 1st October 1960,[177] there was not yet a country animated by common goals, destiny and coherent national philosophy. I would argue that it was uneasy peace and the fear of domination was merely muffled by the provisions of human rights in the constitution – they were not entirely eradicated. Hence, the rivalry was to begin immediately beginning with the ill-advised politics of domination. The general discrimination in appointments and recruitments into the military and the attempted manipulation of elections particularly in western Nigeria. This led to a crisis in that region.

There also emerged an elite that were provincial in their perception of the Nigeria state. The three regions – East West and North rivaled each other for domination. The true Nigerian citizenship was yet to be created and this rivalry soon played into the conundrum. This was to manifest itself as soon as there the realities of government and allocation state resources and benefits showed up on the horizon. Census and other demographic issues were considered controversial because it offered

[177] The 1960 Constitution was set up in the Lancaster model and even appeals were still to the Privy Council in London. There was also a parliamentary system of government and the first prime minster Tafawa Balewa was to be the head of government. It has been a source of heated debate as to why the leadership of the nation at the time would be tailed by the British colonial administrators to give the levers of power to the north and when at the time there was palpable lack of human capacity at the time. Historians have wondered while the likes of cerebral and highly educated Nnamdi Azikiwe and Awolowo were to be bypassed in favor of Balewa with much limited education.

a foundation for political power and manipulation. Thus in 1962 riots broke out in western Nigeria and politicians in opposite camps attacked each other and hence a state of emergency was imposed.[178]

This and many other crisis and the poor election in Nigeria in 1965[179] culminated in the military coup of January 1966.[180] The military men who organized this coup

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[178] Declaration of state of emergency in Nigeria 1962 to 2013. See Abubakar Tafawa Balewa, the Crisis in Western Nigeria – May 1962. See also John P. Mackintosh, *Politics in Nigeria: The Action Group Crisis of 1962*, Political studies vol. 11, Issue 2, pp 126 – 155. The Action Group which was formidable in Western Nigeria fell into internal strife and fingers were pointed at the central government. However, the majority of the literature surveyed reveals that the Action Group crisis of 1962 is traceable to the elections of 1959. In that election, Chief Awolowo had surrendered his premiership of Western Nigeria in other to contest for the National Premiership which he lost. Chief Awolowo therefore became the leader of the opposition in parliament. Note that Nigeria was practicing parliamentary system of government at the time. Akintola became the premier of Western Region and the attempt by Chief Awolowo to keep control of the Action Group party apparatchik and the resistance of same by those loyal to Akintola would lead to the riots in the Western Region and the declaration of state of emergency in 1962.

[179] Diamond L. *The Western Election Crisis and the National Crisis of Confidence*, 1965. In: Class, Ethnicity and Democracy in Nigeria, Palgrave Macmillan, London 1988.

[180] The January 1966 coup is the beginning of the decay of democracy and respect, protection and fulfilment of human rights in Nigeria. The power tussle between the elites of the different

explained the reasons for their attack on the fragile fabric of the nation as follows: "My dear countrymen, no citizen should have anything to fear, so long as that citizen is law abiding and if that citizen has religiously obeyed the native laws of the country and those set down in every heart and conscience since 1st October, 1960. Our enemies are the political profiteers, the swindlers, the men in high and low places that seek bribes and demand 10 per cent; those that seek to keep the country divided permanently so that they can remain in office as ministers or VIPs at least, the 'tribalists,' the 'nepotists', those that make the country look big for nothing before international circles, those that have corrupted our society and put the Nigerian political calendar back by their words and deeds."[181]

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parts of the country has found its way into the army and would lead to the death of the Prime, Minister -Sir Abubakar Tafawa Balewa, the Premier of Sokoto, Sir Amadu Bello, Okotie-Eboh – Federal Commissioner for Finance and others.

[181] Fredrick Forsythe*, The Biafran Story, Penguin*, 1969; Nnamdi Azikiwe, *Military Revolution in Nigeria*, London, C. Hurst 1970; A. H. M. Kirk- Greene & C. C. Wrigley, *Biafra in Print*, African Affairs 69, 275, 1970; Ralph Uwechue, *Reflections on the Nigerian Civil War: Facing the Future* (Paris Jeune Afrique, 1971); A. H. M. Kirk- Greene, *Crisis and Conflict in Nigeria : A Documentary Sourcebook*, 2 Vol. London: Oxford University Press, 1971; John De St Jorre, *The Brother's War: Biafra and Nigeria*, Boston, Houghton Mifflin 1972; Alexander Madiebo, *The Nigerian Revolution and The Biafran War, Fourth Dimension Publishers*, 1980; C. H. Enloe, *Ethnic Soldiers: State Security in a Divided Society*, Penguin, 1980; Adewale Ademoyega, *Why We Struck: The Story of the Nigerian Coup*: Evans Brothers 1981; J. N. Garba, *Revolution in Nigeria, Another View*; Africa Books Limited, 1982.

With these words the young military officers plunged Nigeria into a path of blood and a season of anomie. That became also the tipping point and large grounds of the military politics in post-independence Nigeria. The coup was unfortunately interpreted as an attempt by the Igbo to dominate the politics of Nigeria. Hence, there was a reprisal coup in July 1966 which led to the death of General Thomas Umunnakwe Aguiyi Ironsi and Adekunle Fajuyi. This subsequently spilled over to the streets as citizens of Igbo extraction were being killed and their property either destroyed or looted in many parts of Nigeria – particularly in northern Nigeria. This led to a standoff between the federal government and the government of western Nigeria and thus the declaration of the republic of Biafra and the subsequent Nigerian Civil war was only a matter of time. Therefor between 1967 and 1970 (30months) Nigeria fought a very bitter civil war. This ended up further traumatizing the conscience of the country. Innocent civilians particularly of Igbo extraction were starved to death because the federal government imposed a food blockade on the region.[182]

I would argue that these violated the Geneva conventions.[183] The debate about the Nigerian Civil war and the after effect of the actions of the successive military regimes on the political landscape of Nigeria is one debate that has not been had in a very deliberate and public way targeted at creating a system that guarantees non

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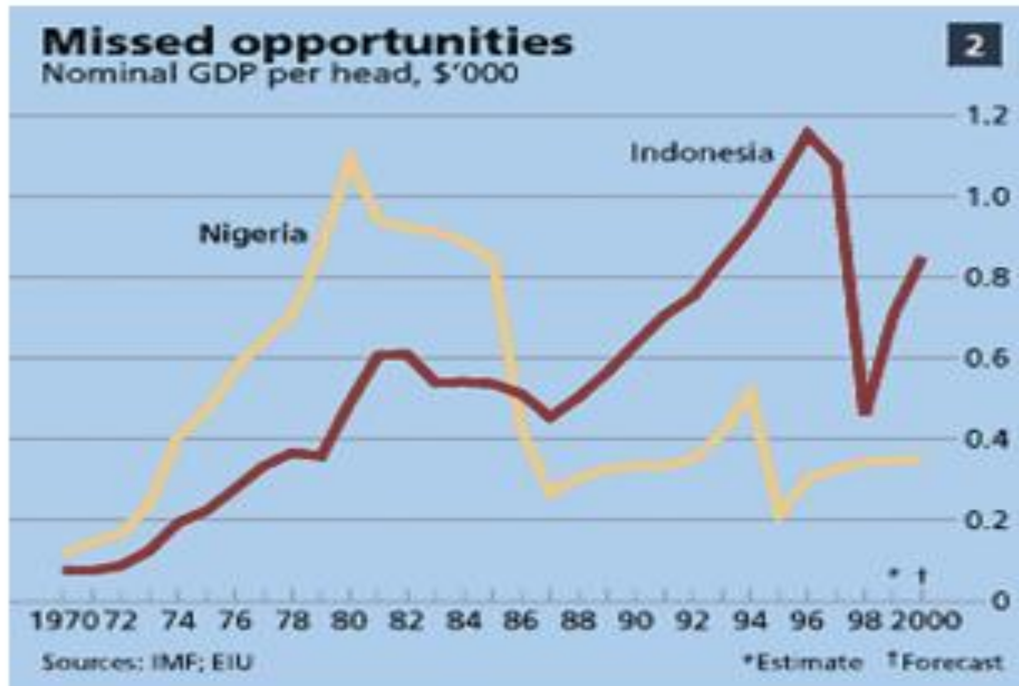
[182] More than two million people died in that conflict and in the end no peace accord was signed. An instrument of surrender was executed by the Biafran side in January 1970.

[183] The Geneva conventions regarding the protection and prevention of violence against civilian populations in times of war.

repetition of those events. What happened however has been an attempt to deploy state powers in keeping the structures of state powers and social equilibrium the way it is. Consistent abuse of human rights particularly excessive use of state force to crush public dissent became the nature of governance in Nigeria. Military coups became the default rule in change of governance in Nigeria. Between 1966 and 1999, Nigeria had six military regimes which had a crushing effect on human rights and the social psyche of the Nigerian people.

Further to the human rights violations was also the creation of systemic inequality by the political establishment who easily helped themselves to the resources of the state. The oil resources of the country which could have been applied to the development of the country ended up being a cash cow for the political elite and the willing collaborators. The direct price of this is that though Nigeria has a population of about 200 million, as compared to China or India which has more than a billion people, Nigeria has the highest number of poor people on the earth. This is a through won for the nation by the failure to manage her vast human and material resources in was that will guarantee the best opportunities for her citizens.

To illustrate this, in a recent publication, the guardian highlighted the management of the oil resources between Indonesia and Nigeria and it is revealing how much Nigeria has mismanaged and lost through graft and leakages since the 1970's.



[184]

In analyzing this parlous situation the economist has this to say; "To understand the scale of Nigeria's failure, it is helpful to compare it with Indonesia. The two countries are superficially similar. Both are huge, populous (Indonesia has 200m people; Nigeria 100m), and ethnically diverse. Both countries have suffered military rule and, at times, terrible violence. At independence, in 1945 and 1960 respectively, both Indonesia and Nigeria were extremely poor; most of their people were subsistence farmers. But then both struck oils, and after the sudden quadrupling of the oil price in 1973-74 both were deluged with floods of petrodollars. Nigeria has received some $280 billion in oil

[184] A Tale of Two Giants, The Economist, January 11, 2000. <https://www.economist.com/special-report/2000/01/13/a-tale-of-two-giants>

revenues since the early 1970s. Through foolish investments, graft and simple theft, this vast fortune has been wholly squandered.

In fact, because successive Nigerian governments borrowed billions against future oil revenues and wasted that money too, it is fair to say that Nigeria blew more than its entire oil windfall. Nigerians are, on average, poorer today than they were in 1974, despite the recent surge in the oil price, and the country is saddled with debts of about $30 billion.[185] Income per head in 1998 was a wretched $345, less than a third its level at the height of the boom in 1980." [186]

This was the nature of affairs until 1999 when a new attempt at transition to a society based on law and respect for human rights was once again started. Hence at the beginning of the government of President Olusegun Obasanjo from May 1999 efforts was made to seek a proper investigation of the Human Rights violations in Nigeria from 1966 till 1998. This was the Human Rights Investigation Commission of Nigeria, 1999. Its findings till this day have not been officially published. However, it has been published privately by those who had access to it through civil society organizations. This was hardly surprising for careful observers of the politics of Nigeria. Since then it does not seem that there is a better respect for human rights and there has equally arisen the problem of terrorism in the land.[187] Thus even at this moment the question of what contributions the Human Rights Investigation Panel contributed to Nigeria is

[185] The interesting thing is that today, the debt profile of the country has further metastasized. Today the external debt outstanding for Nigeria is put at 46billion; Source IMF Country Report No 18/63 of March 2018.

[186] A Tale of Two Giants, The Economist, January 11, 2000 (supra).

[187] See Amnesty International Report, 20017/2018 Page 282.

one that is still raging in the country. It is in this that we find further inspiration in the work and we shall further interrogate this in the subsequent chapters.

SO WHAT?

A general reader going through the discourse so far: about the historical and political background of the countries in issue – Liberia, Nigeria and Sierra Leone – might be tempted to ask the question; so what? So, whereas an attempt was made all through the discourse to put the history and background in perspective – regarding how they connect to transitional justice in general and truth commissions in particular – I consider it expedient to restate the 'take-aways' from all that discussion. The aim is to help a cursory reader to appreciate the distinctive legal, political and historical entanglements in the overall objectives of transitional justice and truth commissions.

First, the background waters the ground for the understanding of legal transplants and what potential effects it has in societies. It is interesting therefore to note that structures of societies and socioeconomic inclusion is a major take away from the introduction of legal instruments like the idea of "black only citizenship" as was the case in the formation of Liberia and its overall trajectory of the community and consistent questions of who counts in the society. The normative idea of seeking exclusive enjoyment of the rights of citizenship and allodial ownership of property I would argue is a transplanted phenomenon from the plantations. It is not only of historical importance but also of significant economic impact and thus implicates the strident questions of redistribution of land and identity that it connotes which in turn shares linkages with fragility and relapse to violence.

Second, colonialism is the single most important instrument of legal transplant in the West African Region. With the introduction of Laws of Applicable in England as

at 1900 in Nigeria by a Royal Ordinance the entire nature and content of the legal system changed. There was often no attempt at understanding the functional equivalents and for most of those communities who neither had the expertise nor the material wherewithal to interpret and apply English laws, it was a universe of change. The received English Law in Nigeria and Sierra Leone brought with it certain view of law and society which also created a radical binary between those with access to property and those who have not. It created Crown Lands and also vested in the colonial authorities the owners to allot, alienate and grant license to land or mineral resources. It took away the capacity of community heads who were then subject to the Governor General. For instance, the idea of property tax and the discontent it created in many of these communities are still significant factors in understanding the nature of the disputes in these communities.

What happened at independence is that these laws were not reformed, the new political establishment stepped into the colonial privileges that the laws created and in most cases consolidated them. The "British Quarters" which hitherto was the residence of colonial officials became – Government Residential Areas (GRAs) and now the residence of the new political elite. When this is combined with the pump and circumstance which some feudal leaders enjoyed even before the colonial times, it becomes clearer how this might become a steep obstacle towards inclusive prosperity and transformative transitions.

Thirdly, colonialism ended more than fifty years ago. In that period many opportunities for real transformative transitions and development have offered themselves. Sadly most of them have been missed or actually abused. Most leaders

instead of setting out clear agenda of development and economic self-reliance have only settled for an indolent reliance on foreign assistances – particularly from OECD countries and nonprofit organizations and UN agencies. So it is important to realize that we cannot insist of self-reliance in our national pronouncements while in the same breadth basing our national budgets on aide and handouts from the global north. A home-grown approach – endogenous and strategically targeted to give the best opportunities possible to the citizens in the region seems to be a more plausible way of looking at things.

This highlight of the backgrounds also touches on the need for proper periodization of transitional justice. Time and place questions in transitional justice is critical. To that effect, the concentration of this work is the post-colonial time. The aim of this is to seek answers looking at what the states have done since independence. The failure of democratization and the weaponization of ethnic groupings and religious dispositions amongst others for the purposes of expropriating public powers is a dominant concern of this work. This is so because no meaningful transitional justice can be carried out without due attention to these questions. Of course, colonialism brought into existence these communities and the various identities under them as they exist today. However it is not the intention to pursue the overarching nature of colonialism and its impact as that is being done elsewhere.

In the long run, the historical and political background properly situates the works and countries in issue in the overall global space and time of transitional justice. This is so because, international law impacts transitional justice. It is therefore a major conduit for legal diffusion. An understanding of the background gives the experts and

other global policy makers the relevant contextual insight regarding potentially better approaches to transitional justice efforts in the states in issue. It helps them in navigating the often-difficult terrain of negotiations during conflicts and adoption of certain mechanisms of transitional justice – be it truth commissions, criminal prosecutions, hybrid processes or any other mechanism.

Finally, it may offer an insight into the social psychology of many communities within the states. Post-colonial memory is important in order to appreciate what transitional justice interventions may be needed. While the colonial powers appeared to be 'common enemy' of the colonized peoples, the postcolonial leaders found a way around the coalition of progressive forces by manipulating groups and identities. It is interesting then to understand the resonance this has especially those who have felt "marginalized" by their comrades in the overall shape of things and in access to the 'dividends' of independence. Of course, the mismanagement of the post independent Africa is a full-length subfield of intellectual enquiry.

Having highlighted these points, it is critical to pivot the discussion to some of the underpinning theoretical and normative foundations of transitional justice. What are some of the justifications that are often set out for transitional justice? What are some of the themes that pervade the discussions in the field? To what extent are these themes exhaustive or merely indicative of the fluidity of conceptions and legal developments in the field? The idea in the following segment is to courageously take a leap of faith into these questions. I say a leap of faith because, there is not much reliance on empirical outcomes. They are ideas pursued with a mindset that transitional justice efforts like

truth commissions can be better utilized if adequate attention is paid to these theoretical and conceptual foundations.

2.0. CERTAIN THEORETICAL ASPECTS OF TRANSITIONAL JUSTICE

Transitional societies are peculiar societies – I would argue. They are peculiar because often they have gone through devastating political, economic and social upheaval.[188] Further to this, there is often a living apprehension about potentiality of relapse into violence or authoritarianism. The noted violent changes often leave despair, disappearances, distortions of legal landscape and dissonance in the society. In some situations, it is still a near state of anarchy – with resilient pockets of violence.[189] Equally, authoritarian accumulation and abuse of state powers may have also created a near impregnable system of rent seeking, expropriation of property, inequality, poverty and denial of fundamental human rights to the generality of the citizens. This not only creates unequal political structures, it fosters economic inequality and preserves the

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[188] The broad categories of 'social, political and economic' upheaval can indeed obfuscate what often is the dire case of transitional societies. But when you think of Germany the immediate aftermath of the Second World War, South Africa after the end of official policy of apartheid, Chile after Pinochet, Iraq after Gulf War II, Libya presently, Liberia, Sierra Leone and Nigeria at the end of long years of military dictatorships. The challenges are often far reaching and goes beyond simple questions of recession, famine or natural disasters.

[189] The Colombian situation comes to mind here because though there was relative stability and negotiations towards creating an inclusive polity in Colombia, the FARC and government forces often seemed to clash over concerns regarding control of resources particularly in the farming rural communities.

foundations of resentment and social rupture. This not only has implication for the method of transitional justice to be adopted but also for the time period regarding the transitional process. Is it to be carried out immediately or to wait for some time after which the society must have gained some stability? How do you manage the real potential that evidence might be destroyed or lost irretrievably?

Amidst this evident decay, confusing questions and ennui, citizens often find themselves wondering how best they can deal with the questions of human rights violations, personalization of state powers, and economic inequality while at the same time keeping the peace. Thus, they find themselves in a dilemma regarding the search for peace, justice and truth – the felt necessities of the communities. It is my argument that, understanding these dilemmas is critical to the methods of evaluating and thinking through the different mechanisms of transitional justice in transitional societies. It is intended in this segment, to highlight these dilemmas and draw attention to the salient issues that they often implicate in transitional societies.

A dramatic entry into this is perceptible in this excerpt regarding Macbeth's traumatized mind as depicted by Shakespeare thus: "Where is the knocking? /…will all great Neptune's Ocean, / Wash away this blood clean from my hand? / No, this my hand will rather the multitudinous Seas, Incadine, / Making green one red".[190] The idea of dirtiness and traumatization and the dilemma of how to look at things is also a deeply embedded theme in the work of Sartre when he wrote, "You cling so tightly to your purity, my lad! / How terrified you are of sullying your hands. / Well, go ahead then,

[190] Shakespeare Macbeth – Act 2, Scene 2 page 4.

stay pure! / What good will it do, and why even bother coming here among us? / Purity is a concept of fakirs and friars. / But you, the intellectuals, the bourgeois anarchists, / You invoke purity as your rationalization for doing nothing. / Do nothing, don't move, wrap your arms tight around your body, put on your gloves. / As for myself, my hands are dirty. / I have plunged my arms up to the elbows in excrement and blood. / And what else should one do? / Do you suppose that it is possible to govern innocently?"[191]

From the foregoing a number of dilemmas and questions can be deciphered. First, who are the victims? How does one confirm the victims, and is there any way of compensating them? What are the possible alternatives to be utilized in reconciling the citizens? Is there any authentic way of reconciling the citizens? What do you do to identifiable assailants or violators of human rights? Where do you draw the line in terms

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[191] Sartre, Jean-Paul.*No Exit, and Three Other Plays.*New York: Vintage Books, 1955. The sentiment expressed by Sartre echoes back to classical philosophy where Socrates was reported to have stated thus, "be sure, gentlemen of the jury, that if I had long ago attempted to take part in politics, I should have died long ago, and benefited neither you nor myself. Do not be angry with me for speaking the truth; no man will survive who genuinely opposes you or any other crowd and prevents the occurrence of many unjust and illegal happenings in the city. A man who really fights for justice must lead a private, not a public, life if he is to survive for even a short time – Socrates, in Plato's *Apology,* 31d–32a. See Plato, *Five Dialogues: Euthyphro, Apology, Crito, Meno, Phaedo* Translated by G.M.A Grube, (1981) Hackett Classics, Indianapolis.

of time frame of investigation, prosecution or other transitional justice measures? How wide should we cast the net in search of those responsible for the most egregious violation of human rights? How up the chain of command should society look to attribute responsibility? What quality or standard of evidence will be required in order to set a reasonable proof of allegations of violations?

Sometimes, the complexity and the far-reaching nature of the violations that have occurred in transitional societies leads to the inescapable questioning regarding – what is the make-up of the minds of the individuals or structures of society that perpetuated the violations? What motivated the atrocities? What is the prevailing ideological motif for the violation? Was it a spontaneous rupture or a structurally embedded contestation? Indeed, what is the social psychology that informed this egregious violence?[192] So at different levels of conceptualization and interrogation we see different questions and dilemmas – the dilemmas of transitions.

Thus, one can see that it is trite, that post authoritarian societies face enormous human rights and institutional challenges. Practically, 'hands soaked in blood' and victims of human rights abound in those communities.[193] Many such assailants are caught either in an attempt to purge themselves – with regrets pervading their inner

[192] Fyodor Dostoyevsky, *Crime and Punishment*, Gutenberg eBook 2006.

[193] For a number of years after the Rwandan crises the government left the bones, broken skulls and remains of the victims of the genocide in 1994 to lie in churches, schools and other public spaces where they fell as a memento of the season of anomie. This is an interesting way of memorializing the episode. Maybe it harkens to the idea that we must not forget.

person. For others, there is an attempt to justify what roles they played and reasons for so doing including 'merely obeying orders' or doing what is needful are not in short supply. Many also think that the State can do no wrong.[194] The State must be protected, and any act or omission aimed at protecting the state cannot be wrong. The state to them being the ultimate definition of ethics. Thus, whatever may be the content of the state decrees, they are legitimate and deserve obedience. This idea of absolute sovereign supremacy is found in both literature and defenses proffered in criminal tribunals from Nuremberg to the ICC in the present moment. These category finds solace in ideologies.[195] Yet in-between is a litter of a wide variety of other questions, expressions, justifications and concerns about what happened and what should be done.

Be that as it may, what is indisputable is that in the immediate aftermath of wars or authoritarianism, there is often a need to restructure and also seek redress for human rights violations. This period between the cessation of hostilities or replacement of the hitherto authoritarian regime and the realignment of the institutions in a manner responsive to human rights, justice and peaceful co-existence – that is moving from the broken society to a new one – is called a period of transition. The array of efforts, policies and actions like criminal trials, truth commissions, reparations, lustrations and blacklisting, forms the core of activities which are together called transitional justice. It would however be important to understand what justice is and how it gels with this idea

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[194] Michel Foucault, *Ethics Subjectivity and Truth*, edited by Paul Rainbow: Translated by Robert Hurley and others, New Press New York, 1997.

[195] See Václav Havel, *The Power of the Powerless* , London: Hutchison, 1985.

of transition or adjustment of the bearings of society in post conflict or post authoritarian societies.

Undoubtedly, justice and its attributes remain one of the perennial debates of human society. The debate transcends boundaries of culture, religion, languages, thought, ideology and what you may. It wells in the hearts of millions – even those who cannot express themselves in full understanding of the legalities surrounding the debate display their thirst for justice in many other ways. The many protestations; either by way of 'civil disobedience' or no 'tax without representation' are often different iterations and languages of justice. I find this fascinating. Hence, I would argue that despite the vast effluxion of time – from the cave to the computer age, the search for justice remains a lively quest.

It is a quest animated in perpetuity by new paradigms that emerge on the ever-extending frontiers of human community living. According to Hans Kelsen, "behind Pilate's question: [in the holy writ] what is truth? There rises from the blood of the crucified, another and still weightier question, the eternal question of mankind: What is justice? No other question has been so passionately debated; for no other has so much blood, so much bitter tears been shed; on no other have the noblest minds – from Plato to Kant – brooded so deeply. And yet today this question remains unanswered as ever. Perhaps, because it is one of those questions of which a resigned wisdom would tell us, that man can never discover a final answer to it but can only attempt to ask it better."[196]

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[196] Hans Kelsen, *What is Justice?* in Essays in Legal and Moral Philosophy, D Reidel Publishing Company Boston USA 1973.

Thus, the question of justice still occupies the human consciousness and forms the desideratum of most conversations regarding human community living. Equally, its interpretations and contents may vary from one generation to another, or community to another – though certain irreducible minimum forms the foundation of justice. This raises a number of questions – particularly in transitional societies.

First, there are questions of temporality – time. It is said in law that delay defeats equity and justice delayed is justice denied. There is therefore a temporal component to the problems that face transitional societies. Thus, – can the passage of time reduce or wipe away the culpability and responsibility for violations of human rights? Is there a chance that; time sensitive decisions regarding inquiries can affect the quality of justice available to the victims? How do you link this question of time with concerns about restitution, reparation, and restorative justice? Being about societies in transition – at what moment do we put our time mark? The zero hour. Where is our 'ground zero' in the search for justice in transitional societies? How far forward may the society attempt to reach in the process of creating new and reconciled societies? How far behind may it look? Do we just go forward and forget? It does appear to me that transitional justice like the face of Janus must attempt to look well on both sides.[197] It should indeed turn on several hinges of society in order to get a good view of things. 'Perspectives' as opposed to 'perspective' become imperative. It does not have to be ambivalent. It just

[197] The advantage in so doing is to create a platform that is not only inclusive but fosters a healthy and thoroughgoing evaluation of what happened and also articulate some sustainable answers. It forestalls the alternate ascendancy of one single story over another.

has to be able to avoid binaries and see the several possible intersections which may harbor nuggets for harmonious, just and peaceful co-existence.

This leads us to the second concern namely, memory. Within that vortex of introspection regarding temporality is the issue of memory. If it is true that 'remembrance is the secret of redemption', how do we remember what happened? What is it that is remembered? Who remembers – whose memory? How do we remember those who had been consumed by the societal collapse which often is found in transitional societies? What of the collective memory of the society? Indeed, the question of memory is now such an essential aspect of transitional justice. It has been said to have the value of not only recalling but also helping to stimulate healing both individually and collectively within the community. Memory therefore is an interesting aspect of transitional justice. The intersection of this with justice is one question worthy of exploration and more time will be devoted to it in the latter part of this work. Because in transitional societies the casualties of violation and abuse are often not just those who are dead or gone, interred in concentration camps, prisons, and gulags.[198]

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[198] In the words of a Nigerian Poet – John Pepper Clark – The Casualties are not only those who are dead. They are well out of it. The casualties are not only those who are wounded, though they await burial by installment. The casualties are not only those who are lost, persons or property, hard as it is. To grope to a touch that some may not know is not there. The casualties are not only those led away by night. The cell is a cruel place, sometimes a heaven. Nowhere as absolute as the grave." J. P. Clark "The Casualties" (supra).

Akin to the questions of time and memory is the question of trauma. There are often those who had been crushed by the repressive era not – necessarily on the outside but deep within. This is often traceable to either what they had experienced, witnessed or participated in. Like Macbeth and Lady Macbeth they experience at different levels the psychosomatic impact of the era of violence. Remember, the hallucinations of Macbeth? "Is this a dagger I see before me?" [199]This traumatic experience is also not often just private and individualistic – it often pervades the society. Hence the collective trauma becomes an issue for transitional justice. While this type of concern may not be a mainstream question for justice according to law, transitional justice often finds these questions inescapable.

Truly, Transitional justice goes further to ask questions regarding how much of this has been transmitted from one generation to the other. Is there anything like generational or intergenerational trauma? Thus, the question of intergenerational trauma has now gradually gained traction in questions of justice in transitional justice situations. Else, nothing will explain the establishment of truth commissions and attempts at some palliatives in Canada, Australia, and South Africa in an attempt to come to terms with the impact of segregation, discrimination and apartheid on the black communities in the latter part of the 19th century and the early 20th century. Indeed, some critical race scholars have advanced the argument that slavery has overall etched in the minds of African- Americans and other black communities around the Caribbean and South

[199] Shakespeare William, Act II Scene I (lady Macbeth's Hallucinations). This is interpreted in some literature as part of post-traumatic stress disorder.

America a perpetuity of generational trauma. Their inner selves are thus shaped by a world view which perpetuates the prejudices which are constructed to humiliate them over time.

More so, identity, power constructions and structures are particularly very key foundational questions in transitional societies. Who counts as a member of a particular society? How are these persons identified? Is there a fair way of allocating the best of the society to citizens? Essentially, the question of creating some fairness heuristic for social interaction is a core matter in most ruptured societies. Hence, the theoretical foundations of transitional justice seek to accommodate this as part of the overarching arc of justice which should be pursued in transitional justice situations. There is often a felt necessity for power restructuring and inclusive identity modalities as an integral aspect of justice in transitional societies. In the Rwandan genocide and indeed in other genocides – identity prejudices and constructed 'goodness' and 'superiority' of one group as opposed to the pejorative perception of 'others' 'the other side of the neighborhood' as inherently inferior or indeed undeserving of the best the society can offer is the beginning of annihilation and some of that violence which "affront human conscience."[200]

This is so – I argue – because authoritarian societies are usually classic examples of the concentration of powers of state in one man, one class, one clan, one tribe or an amalgamation of willing collaborators across the different divides in the society to serve the goals which they set for themselves and which often are at variance with the best

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[200] Tony Morrison, The Origin of Others, Supra.

interest of the society. What this entails is that those who oppose this gang of power wielders and their cohorts are naturally excluded from the best the society can offer. Those who dare to challenge this are made to disappear in the extreme cases or pay other steep prices of injustice. They are denied their dues as citizens of the community either because of their ideology or simply their ethnic group, color of skin, religion, gender, sex or such other mundane considerations. It seems to me therefore, that some of the most outstanding questions of injustice inherent in transitional justice is the question of social exclusion.

Law plays a key role in this. That is why understanding sociological realities and questions of transitional societies are indispensable to the proper articulation of answers to the justice questions of post conflict societies. This is core in the philosophical and theoretical foundations of transitional justice. Thus, identity, time, trauma, memory are intimate parts of the interpretation of what is justice especially in transitional societies. The creation of structures of a new society must therefore embrace all these parts. It seems to me that the various hues and shades of justice as we can perceive from society and various thinkers is indicative of its indispensability as an ingredient in human flourishing and development. Little wonder then the exclamation of Augustine "what are societies without justice but robber bands on a large scale."[201]

Be that as it may, transitional justice has grown out of this concern that justice in transitional situations needs a more expansive articulation so as to accommodate the

[201] St Augustine, *Civitas Dei*, in The Oxford Handbook of Jurisprudence and Philosophy of Law – Coleman & Shapiro (eds.), Oxford University Press, 2002.

many aspects of rights violations in post authoritarian and post-conflict societies. Namely, it pursues the idea that societies in transition either from autocratic dictatorships or emerging from war situations ought to take account and hold responsible those who are responsible for the most egregious violations of human rights. This accountability is seen as central in that it helps restore social order and forestalls a culture of impunity. This I argue, is also informed by the fact that one of the strongest incentives to human rights violations is the fact that nothing will happen. It is an attempt at different levels to wash the blood of human rights violations off the hands of society through different mechanisms aimed at articulating different forms of justice.

At one level, it seeks punishment – crime and punishment become the principal concern and approach to the problem of post authoritarian societal rebuilding.[202] Remarkably, criminal prosecution has been the immediate and basic reaction of policy makers in post authoritarian and post-conflict societies. Often there is a demand for criminal trial and punishment. The immediate fear about this trial and punishment has also been suggested as a contributory factor to the elongation of conflicts and repressive regimes. However, it has come to be appreciated that crime and punishment often does not meet the felt necessities of transitional justice societies.[203] Hence, a broader

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[202] The Nuremberg and Tokyo Tribunal in the aftermath of the Second World war, the Arusha Tanzania Tribunal, the Yugoslavia Tribunal and the International Criminal Court represents this first position.

[203] The Steve Biko Case (AZAPO case) is a critical illustration of the problems inherent in using prosecutions only as the way out of transitional justice problems.

approach in search of justice in transitional societies is adopted. To this effect, another level of the search becomes a reclamation of the voice, memory and societal equilibrium in the transitional society. The need for this explained by the fact that society is often in dire need for a purge of the difficult violations which had taken place.

This purgation happens at different levels both individually and otherwise, culminating at a collectivized level – the society. The reclamation therefore has a multiple utility amongst which are: providing a ground upon which the memory of the victims of the era of authoritarian rule are recreated and kept alive. In a way, it becomes a parchment upon which these violations are recorded for posterity. Thus, it memorializes and etches on the mind of society the fact that those events occurred and that never again would they recur. The essence of this is further attributed to the contest of memory and power which is often a ground of sometimes very bitter conflicts in transitional societies.

Equally, at another level it aims at reconciling the populace or creating a space where in an open and deep conversation about the society and its immediate past can take place in the community. This has trappings of religiosity, and moral considerations. Part of this can be found as a deep feature of truth commissions. Truth commissions have often been considered as a middle ground between punitive justice and reconciliatory justice. It has also been viewed as a means of archiving the issues and factors that led to the crisis originally. It is a ground for stock-taking and a bank of information regarding the society.

Other levels of engagement and approaches to transitional justice includes efforts at transformative and restorative justice, distributive justice, lustration, amnesty,

social justice in general and other mixed procedures. Critically, even the face of settling civil and political rights the questions of socioeconomic and cultural rights should not be forgotten. The struggle for most the communities whether in Liberia, Sierra Leone, South Africa or East Timor is how best to seek economic inclusion which often transcend civil and political rights. It has become manifest that economics shapes political outcomes in these societies and the violence often persists because there is a fear that unless clear agreements are made about economic opportunities the contest would become a zero-sum game. In Indonesia – the fact that oil resources and strategic coastline and resources existed around East Timor made the transitional process difficult. Indeed the long-drawn conflict between the East Timor and Indonesia was mightily dominated by the question of resources. In Southern Africa the issue of land and land redistribution is still a sore point in the transitional justice proceeds and outcome. Transitional societies therefore grapple with these economic concerns not only in the Short term but in the long run development of the country. What this means is that questions of truth, rights, peace, and justice are intricately woven into the fabric of transitional justice. Thus, transitional justice theories have been an attempt to articulate many of these questions of transitional justice and transitional societies. How can these questions and concerns be best answered? What approaches should be adopted? In what ways are those different from normal justice? What adjustments or compromises are possible? What strategies are to be adopted? In this segment, an attempt will be made to articulate some of the epistemic foundations of transitional justice and other questions of justice in transitional societies.

1.05.1 JUSTICE AND TRANSITIONAL JUSTICE – AN OVERVIEW

"Honeste vivere, alterum non laedare, suum cuique tribuere: to live honorably, not to injure another and to give to each his due."[204]This classic conception of justice attributable to the Justinian institutes clearly illustrates in that single sentence the struggle by many scholars over the ages to articulate justice and its contents. It may well also symbolize the confusion that exists in the world of ideas regarding justice and what it portends in society. The complexity regarding the different definitions of justice can be illustrated using a number of theoretical debates in the field.

Jeremy Bentham in his defining works on law and political theory argued that the role of institutions in society was to ensure happiness and this happiness can be found using the object of utility. In other words, utility maximization is the ultimate end of law and justice.[205]In furtherance to this, Bentham propounded that nature has imposed

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[204] Justinian Institutes book 1, Title 1 section 3.

[205] See Generally, Jeremy Bentham's Works: An Introduction to The Principles of Morals and Legislation, 1789; A fragment of Government, 1776; A Manual of Political Economy 1843. It is also important to note that though Jeremy Bentham's image has come to dominate the theory of utilitarianism, other thinkers like J.S. Mill and David Hume – An Enquiry Concerning the Principles of Morals – are other know admirers of this theory. However, while Jeremy Bentham seems to emphasize 'quantitative happiness', J. S. Mill focused on the qualitative aspects of utilitarianism. Indeed he considers it an ignorant blunder that utility should in any way be made to equate only to pleasure and pain. Hence in his words, "a passing remark is all that needs be given to the ignorant blunder of supposing that those who stand up for utility as the test of right and wrong, use the term in that restricted and merely colloquial sense in which

on mankind what he called two sovereigns – pleasure and pain. These sovereign masters govern us in all that we do. Even when we refuse to acknowledge them, they are ever present and dominate our existence. In fact, he argues, that every effort we make to throw them off or disavow them becomes a reaffirmation of their powers over us. The utilitarian argument was further translated to mean the greatest happiness for the greater majority of the people. Was Bentham, right?

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utility is opposed to pleasure. An apology is due to the philosophical opponents of utilitarianism, for even the momentary appearance of confounding them with any one capable of so absurd a misconception; which is the more extraordinary, inasmuch as the contrary accusation, of referring everything to pleasure, and that too in its grossest form, is another of the common charges against utilitarianism: and, as has been pointedly remarked by an able writer, the same sort of persons, and often the very same persons, denounce the theory "as impracticably dry when the word utility precedes the word pleasure, and as too practicably voluptuous when the word pleasure precedes the word utility…Those who know anything about the matter are aware that every writer, from Epicurus to Bentham, who maintained the theory of utility, meant by it, not something to be contradistinguished from pleasure, but pleasure itself, together with exemption from pain; and instead of opposing the useful to the agreeable or the ornamental, have always declared that the useful means these, among other things. Yet the common herd, including the herd of writers, not only in newspapers and periodicals, but in books of weight and pretension, are perpetually falling into this shallow mistake." – J. S. Mill, *Utilitarianism: What Utilitarianism Is,* (1863) chap 2.

A common critique of this theory is that the happiness of the greatest number of people if pursued uncritically can lay the foundations for the violation of the fundamental rights of minorities. Its efficacy in ensuring a dependable basis for interrogating social justice has been found wanting. Say for instance in the days when lynching was common, it was often advertised with regards to place and time for people to watch. Often, it was a public spectacle enjoyed by many – the greater majority in society. Often, the lynched were minorities. In some communities it in the past, it was perceived as serving ultimate good to kill albinos. Was this right? It gave happiness and interestingly a satisfaction to those who came to watch. The minority could be minority in terms of religion, race, or other circumstance of birth which are simply not within the capacity of the minority to change. Another angle to this is also the possibility of 'utility' being defined from the perspective of the dominant voice based on class and economic capacity. The 'landed gentry' can actually be treated as majority when in fact they are the minority though they exercise the coercive powers of state.

No doubt, no rational human being can at this moment in human development argue that such gory spectacles are ideal. The 'justice' of the situation is now clearly obliterated by the inhuman treatment. If we take the hypothesis a little backward, we can recall that in the Roman Empire, the gladiators fought in public arena until one killed the other. Such spectacle was a source of great joy – entertainment – to many within the city including the royalty who reverie in it. Was this also a just case – a case of happiness for the greater majority? How do making people fight until they die give the limb of justice any meaningful support? There is a tendency to think that this is quite a stretch or a straw man situation of the philosophical debates about utilitarianism.

However, if one considers the potential capacity of ideas to set the foundation violations of human rights and how that has been used in history, it become important to pay attention to the questions around it. I wager to argue that there is a lot left unanswered by utilitarian ideals. Indeed the justification of social actions merely on utilitarianism might be symptomatic of a deep problem in the society that champions it. Thus the philosophy in itself must not be divorced from the potential realities they pose to society and human flourishing.

It is interesting therefore, that, Jeremy Bentham views justice from what might be tagged epicurean in classical philosophy.[206] He viewed human nature as an admixture of pain and pleasure. This instinctive search for pleasure on one hand and consequent avoidance of pain on the other hand; he argues is the defining feature of human nature and human society. We avoid pain and we seek pleasure. Justice therefore is that which guarantees happiness for the greater number of human beings in society. This he called utilitarianism. The utilitarian ideal of justice therefore emphasizes majoritarian enjoyment of rights and privileges may be provided by states. This has been criticized for a number of reasons.

As we noted above, can at best whittle down the rights of minorities and how these can be safeguarded. Of course, we have seen the incredible violence that such disposition can have on human flourishing and the content of justice. Injustice has no

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[206] Epicurean not in the derogatory sense as it is used sometimes in certain literature in the field of philosophy but in the sense of pleasure and pain being the sovereigns of human encounter.

better name than minority violence often construed as majoritarian happiness. Thus, a number of questions or incidents of injustice like segregation, holocaust of World War II, genocide in all its forms, exclusion and violations of rights of people whether they are Blacks, Jews or Rohingyas in Myanmar, or indigenous communities may be justified or normalized if we uncritically adopt utilitarianism. It might unwittingly suggest that certain segments of the society can be sacrificed in other to save many more others. The moral judgements as to the intrinsic worth of every human person becomes imperiled when such positions are adopted.

Second, Bentham's view fails to examine or explain what has been described as the intrinsic worth of the human person – the Kantian categorical imperative that we should treat every human being as if he was an end in himself falls flat on its face. It is true then that every human person has an intrinsic worth. This intrinsic worth means that the individual deserves to be treated as an end but according him justice. Since it is the minimum recompense which society owes him. To deny him justice, or to think that is to diminish his personhood and to essentially declare him worthless". If we accept therefore that every human being is worth something invaluable, we may well become skeptical about Bentham's exposition of justice. I am so much of the skeptical mind in considering the Benthamite view of justice.

More so, Bentham's pleasure pain binary appears to me to be so sharply demarcated that it is made a weak tool of analysis regarding such a profound question as; what is justice? It is even more problematic and blunt when the dilemmas of transitional justice are weighted against Bentham's views. To that effect, he ignores the vast spectrum of issues and factors that animate the human community and the search

for justice whether at the individual or collective level. Hence, he fails to explain the other far reaching considerations which motivates and grounds action in society. If pain was to be so repulsive a factor in the pursuit of human flourishing, human civilization would no doubt be poorer. What then explains the attitude where human beings go frontally against pleasure in their search for good? Bentham was thus considered not holistic in his espousal of the concept of justice. It is undoubtable that the purity of legal positivism may have influenced his overall perception of the concept of justice. But Bentham remains an influential theorist and it is important to understand his propositions because the knowledge of it is best safeguard and critique against policies and legal measure only aimed at the cannons put forward by this eminent philosopher.

J. S. Mill took the utilitarian gospel a little further when he wrote that: "According to the Greatest Happiness Principle, …the ultimate end, with reference to and for the sake of which all other things are desirable (whether we are considering our own good or that of other people), is an existence exempt as far as possible from pain, and as rich as possible in enjoyments, both in point of quantity and quality; the test of quality, and the rule for measuring it against quantity, being the preference felt by those who in their opportunities of experience, to which must be added their habits of self-consciousness and self-observation, are best furnished with the means of comparison. This, being, according to the utilitarian opinion, the end of human action, is necessarily also the standard of morality; which may accordingly be defined, the rules and precepts for human conduct, by the observance of which an existence such as has been described

might be, to the greatest extent possible, secured to all mankind; and not to them only, but, so far as the nature of things admits, to the whole sentient creation."[207]

Kant on his part, was inspired by the concern regarding, how to find sustainable answers to two basic problems of society, – managing the tension between individual freedoms of citizens on the one hand; and the regulated organism of the state. He therefore sought a different answer. His strategy was to see a way of reconciling individual liberties with the needs of organized societal living. At least amongst the 'civilized' communities as Kant and others viewed it, there was a need for finding this equilibrium point. These two questions – individual freedom and communal stability – I would argue – are still definitional problems and concerns of transitional societies. Some of the reasons for crises in societies is often the privileged accumulation of state powers and resources by some groups be it an ethnic group, an oligarchy of military elites, or such other coalitions to the exclusion of many others in the society. Kant in an attempt at reconciling these two concerns, did set out two essays in which he tried to reconcile the perceived tension. Namely, he sought to reconcile the *a priori*[208] reason or what has been referred to as synthetic knowledge with *a posteriori*[209] experiences or

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[207] J.S. Mill Utilitarianism (Supra).

[208] This means things that can be known by the mere fact of reason. These things are said to be a priori. Kant cemented this concept in philosophy. Posteriori are things knowable by experience hence they are based on analysis of those experiences as can be found in data material things.

[209] See note 206 (ibid).

what is also called analytical knowledge.[210] What this meant that human reason is able to comprehend the fact of the individual freedom and the need for harmony in society. The Kantian ideal was enunciated then as acting in such a manner as would be expected of all rational beings. It was also surmised as considering every member of the community as an end unto himself. This is called the 'categorical imperative'. This categorical imperative in Kant's view, is the truest measure of justice. A great weight of justice is decipherable from the Kant's categorical imperative. Yet, the forest of justice theorization, still contains several blooming fields of nuggets.

Therefore, John Rawls took the discourse on justice to a different dimension when he argued that: "justice is the first virtue of social institutions, just as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue: likewise, laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust." [211] Thus, justice in strict

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[210] Immanuel Kant, The Critique of Common Reason 1788; Categorical Imperative 1781; Immanuel Kant Fundamental Principles of the metaphysics of Morals (59) Gutenberg eBooks (2005).

[211] John Rawls, A theory of justice page 3, Harvard University Press, 1999; Clearly, there is an echo of classical philosophical restatement of the concept of justice; to wit; an unjust law is no law – *Lex injusta non lex est.* Amongst the naturalists Augustine, Aquinas, John Finnis, it is almost axiomatic that a law which is unjust is no law and therefore do not command obedience or obligation. Again this is one of the most debated issues in legal philosophy. See H. L. A Hart, The Concept of Law, Clarendon Law Series 1961; John Finnis, On the Incoherence of Legal

sense can be conceived as that which is guaranteed by law. It may also be used in a more liberal sense to mean questions of morality, fairness, equality, freedom and respect for autonomy. Rawls further states that "existing societies are of course seldom well-ordered in this sense for what is just is usually a dispute. Men disagree about which principles should define the basic terms of their association. Yet we may still say, despite this disagreement, that they have a conception of justice. That is, they understand the need for and they are prepared to affirm a characteristic set of principles for assigning basic rights and duties for determining what that takes to be the proper distributions of the benefits and burdens of social cooperation." [212]

Rawls tried to create a theory of justice not filled with uncertainty but a theory practical and applicable in a democratic setting. His idea of justice was not only aimed at achieving a just political space but to as far as possible diminish the chances of uneven application of law or distribution of the goods which that society has to offer. Though paying attention to the autonomy of person and what has been referred to as individuality Rawls set out an idea of justice which he referred to as justice as fairness. This fairness heuristic – though not alien to older articulations of justice to wit giving to everyone his due – was given a fresh verve in the works of John Rawls. But unlike Kant and others this fairness he argues is not a metaphysical concept. He argues that this is so because, metaphysical conceptions of justice seem to place reason above

Positivism, Notre Dame Law Review vol. 75 Issue 5 2000; Jeremy Waldron, Lex Satis Iusta, Notre Dame Law Review vol. 75 issue 5, 2000.

[212] John Rawls, ibid page 5.

positive law. The way to cure this deficiency is by creating a theory of justice that not only responds to the natural zeal of human beings but is also founded on positive law.[213]It is important to consider that Rawls restatement of justice as fairness has resonated greatly in the contemporary legal and political theory.

In particular, the Rawlsian idea is that in a constitutional democracy, the public conception of justice should be as far as possible devoid of, and independent of controversial philosophical and religious doctrines. Rawlsian theory is best illustrated by what can be called the cutting the pie standard – namely, "imagine that you have a pie to divided among eight people, including yourself. Assume that they are all very hungry and all love pie very much. How do you divide it among them in a way that is fair? If you cut a larger slice for yourself people may complain or feel cheated. You decide to elect one person to cut the pie into several slices, and then everyone else pick their slice first (the pie-cutter picks last). He further hypothesizes that perhaps the pie cutter is very hungry and definitely wants some pie, how do you think the elected pie cutter will cut the pie into eight equal slices so that the distribution is fair?"[214]

Rawlsian thinking, I would seek to restate is that the wealth of society should be distributed in the manner depicted in the pie cutting hypothesis. This outcome of imagining what a situation it would look like, if we envision a society where no one knows what the outcome of the situation or place in the scheme of things would be, is

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[213] John Rawls, Justice as Fairness: Political not Metaphysical, 14 Philosophy and Public Affairs 223 – 251 at page 223(1985).

[214] John Rawls(supra) page

what he calls *the veil of ignorance*. This situation is the original situation marked by a number of material particulars. Everyone is on the same footing in terms of the possible outcomes of the principles of justice to be adopted in that society.

Remarkably, in that "original – situation and as a first principle – no one knows his place in society, his class, position or social status, nor does anyone know his fortune in the distribution of national assets and abilities, his intelligence, strength and the like… I shall assume that parties do not know the particular circumstances of their own society. That is, they do not know its economic or political situation…no information as to what generation they belong."[215] In this postulation it was Rawls' persistent view that 'the veil of ignorance' is a natural condition that something like it must have occurred to many.

Rawls' position though a dominant one in the contemporary discourse on justice has justifiably receive several interrogative reading and examination. Many of his conclusions and premises are seen to be circumscribed by the contractarian conceptualization of justice. To wit the idea of contractors who are entering into an agreement with limited knowledge of what might be the outcome. This it is argued leaves a large chunk of the sphere of justice consideration limping. Particularly at the international level one may wish to ask – who are the contractors? This is critical because inequality or injustice is not limited within one society. Hence it is foreseeable that the decisions made in one society can have a just or an unjust outcome in another society. Thus, such decision is worth the consideration of those who may seem far

[215] Rawls Theory of Justice page 118 – 119.

removed from the scene of policy. Amartya Sen is one of those who has argued along these lines.

Sen is undoubtedly one of the leading voices in the arena of justice debate in the present moment. Though an economist by training, his intellectual rigor regarding justice and questions that lie at the intersection between law, ethics and economics radically diminishes what our classic perception of an 'economist' is. Drawing from his experience as a proponent of welfare economics for which he won a Nobel prize in economics, he opines that the contractual model of justice as enunciated by Rawls is not comprehensive. In many respects, it is lacking. Though he accepts in principle the concept of justice as fairness, he persuades us to think of the different mode of looking at justice. This he says is beyond the ken of contractual model of justice which perceives societies as being self-contained, sufficient and independent – citizens get in or out of these societies by birth or death. The contractual model makes presumptions about capacities and capabilities which are not irrefutable. To this effect capacities like knowledge/information asymmetry affects legal outcomes hence justice as fairness must look beyond the idea of contract for its normative foundations.

Thus, Sen's idea of justice is built on different foundations which goes beyond the enlightenment theories of justice as previously captured by Bentham, Smith, Mill, Kant and Rawls. While he appreciates their contributions, he is uncomfortable about the bifurcation which seems to exist between the analyses of institutions of justice on the one hand; and the substance of justice on the other hand. He highlights three critical foundations of his idea of justice to wit; – cognitional aspects of justice; how to manage the different or conflicting considerations about justice; and the careful considerations

of day by day transgressions of justice rather than focusing on institutional short comings in our overall evaluation of justice.[216]

It is thus true that the approach adopted by Sen is significantly an expansion of the idea or concept of social choice which he deployed expansively in his social justice and welfare economic models throughout his career both as a teacher and adviser to global governance institutions.[217] He argues most persuasively that the notion of social

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[216] In a way this is an extrapolation with necessary innovations of his idea of development as freedom where he focuses on human development and capabilities as critical indexes of freedom and development. This he did by asking development professionals to limit its infatuation with GDP or GNI in its analysis of economic development. I find this intriguing and an innovative and more productive way of looking at issues. In the empirical study of access to justice for instance, the concern of lawyers and practitioners in the field are often on questions of procedure and institutional responses on how to provide just out comes. Thus, judicial interpretation, legal representation, legal aid, time of filing processes, composition of courts, jury and jury regulations take a huge chunk of the allotted time. This is a drawback to larger questions of social justice which sometimes dwarfs the procedural conceptualization and pursuit of justice.

[217] It is critical that the notion of "social choice" is highlighted and differentiated from "rational choice theory". Whereas the social choice theory deals with the collective decision-making process and procedures, rational choice is purely about individual decision making. Thus, social choice is theory is in strict sense not a model but could be called a collection of models used to track preferences, judgments and welfare questions in economics. It equally pays detailed

choice, is important in our appreciation and articulation of the impact of different policies. In his Nobel Prize speech, Sen attempted to set the outlines of the social choice theory in the following words "a camel is a horse designed by a committee …a camel may not have the speed of a horse, but it is a very useful and harmonious animal – well coordinated to travel long distances without the food and water. A committee that tries

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attention to outcomes like collective decisions and group preferences. It has been applied in the study of a wide range of social, political and economic issues. How does a group choose a winning outcome and what significant impact does this have on public policy? Kenneth Arrow and Amartya Sen are some of the proponents of the social choice theory. It is interesting to consider the blurred outlines between law, economics and justice. Social choice is one theory used to draw attention to some of the questions of social justice by Amartya Sen. Again, this is in contradistinction with the rational choice theory which presumes that individuals are passionately self-interested. Rationality is therefore the pursuit of that individual self-interest. To Sen this is a misconception because inherent in itself interest is fairness which is a reasonable concern for the interests of others. See generally, Amartya Sen, "*A Possibility Theorem on Majority Decision*", Econometrica, 1966, Volume 34, pg. 491 – 499; "*The Impossibility of a Paretian Liberal*" Journal of Political Economy, 1970a Vol. 78: pg. 152 – 157; "*Collective Choice in Social Welfare*, 1970b San Francisco: Holden day; "*On Weight and Measures: Information Constraints in Social Welfare Analysis*" Econometrica. 1977 Volume 45 pg. 1539 – 1572; "*Choice Welfare and Measurement*", 1982 Blackwell Oxford; "*Liberty and Social Choice"*, Journal of Philosophy, 1983, Vol. 89 pg. 5 – 28; "*The Possibility of Social Choice*", Nobel Lecture, December 8, 198, Stockholm.

to reflect these diverse wishes of its members in designing a horse could easily end up with something far less congruous: perhaps a centaur of Greek mythology, half a horse and half something else – a mercurial creation combining savagery with confusion. The difficulty that a small committee experiences may be only greater when it comes to decisions of a sizable society reflecting the choices of 'the people, by the people, and for the people'. That …is the subject of social choice …if there is a central question that can be seen as the motivating issue that inspires social choice theory, it is this: how it can be possible to arrive at cogent aggregative judgements about the society (for example, about social welfare or the public interest or aggregate poverty) given the diversity of preferences, concerns, and predicaments of the different individuals within the society?"[218]

On the third iteration of his argument he hinges it on capability. Using the concept of *niti* and *nyaya* drawn from his culture, he seeks to explain the complexities which focus on institutions seems to overlook. While niti draws attention to just

[218] This offers a clear depiction of the difficulty inherent in focusing on institutional design and committee decisions regarding what get to be done about justice in society. To design an institution does not necessary mean to have solved the problem of injustice. We must trust our instincts to recognize the day to day infractions of justice which may not have been captured by institutional measures. This is important because what happens in society may not be able to be explained by institutions. Hence his illustration regarding the girl child in India. In the book a Nation of First Boys, he argues that the imperatives of that we associate with our shared humanity need not be mediated through our collectives such as nations or citizenry.

procedures, *nyaya* is more embracing and draws from a larger scope of resources. It extends and seeks to embraces a larger boundary of the concept of justice. It is more comprehensive unlike the contractarian or libertarian conceptualization of justice. Drawing further even from the Smithian argument regarding an impartial spectator, in basing the judgement or evaluating the demands of fairness, he noted that the social contract perspective of justice cannot accommodate a number of possibilities; including; "dealing with comparative assessment and not merely identifying a transcendental solution; taking note of social realizations and not only the demands of institutions; allowing completeness in social assessment, but still providing guidance in important problems of social justice, including the urgency of removing manifest cases of injustice; and taking note of voices beyond the membership of the contractarian group, either to take note of their interests, or to avoid our being trapped in local parochialism."[219]

Ubuntu as Justice – is uniquely African. However, the values and the views of society that it portends are not exclusive to the African idea of justice. It is an African concept of human interaction which transcends the many abstractions of justice we see in the jurisprudence of justice. It defies precise definition. The difficulty in defining it may be explained by the fact that it is a concept that permeates the African world view. It is both practical and metaphysical. It is practical in that it seeks to explain in simple ways the inherent worth of the human person and the interdependence of human beings. It is metaphysical in that it conceptualizes human encounter as not just about the

[219] Sen Idea of justice ibid page 70.

physical but the spiritual and ontological harmony which should permeate the daily living of one with others in society. It articulates norms and those unwritten but deeply etched ethos that serve as the world view and guiding principles of human societal living. Expressed in full as per the Zulu language it is umuntu ngumuntu ngabantu translated to English – a very poor translation – "a human being is a human being because of other human beings." The essence of our being is interpreted as being with others.

Thus, *Ubuntu* is not only a philosophy of life, but also in its most fundamental articulation represents its personhood, humanity, and respect for others. Thus "the meaning of the concept becomes even clearer when its social value is highlighted. Group solidarity, conformity, compassion, respect, human dignity, humanistic orientation and collective unity have among other things been identified as key social values of *Ubuntu*. Because of the expansive nature of the concept, its social value will always depend on the approach and the purpose for which it is depended on".[220] This social solidarity expressed as *Ubuntu* further finds meaning and articulation in the work of Chinua Achebe - though in a place seeming distant from South Africa – when he wrote "we cannot trample upon the humanity of others without devaluing our own. The Igbo always practical put it correctly in their proverb thus; onyeji onye na ani ji onwe ya" – He who will hold another down in the mud; must stay in the mud to keep him down."

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[220] See J.Y. Mokgoro, *Ubuntu and the Law in South Africa* Konrad-Adenauer- Stiftung Seminar Report Johannesburg 1998.

OTHER LEXICA OF JUSTICE RESONANT IN TRANSITIONAL JUSTICE

Beyond the major ideas of justice, there are various other lexicons of justice which is often seen in the literature in the field. Perceptible in these lexica is the effort at finding a justice approach that is comprehensive enough to offer meaningful answers to the so many questions of transitional societies. The strategy is to keep alert and seek to rethink many of the foundational conceptualizations of justice with the particularities of each community in view. The evident lexicons of justice in respect of – but not in any way exclusive to transitional justice societies – are ; restorative justice, distributive justice, social justice, reparation/restitution. Sometimes, these words are used in exchange for "positive justice", "substantial justice," etcetera. In a sense there are not theories of justice – I would argue but functional approaches to justice. They look at the outcomes and not necessarily the infallibility of justice processes or what can be called canonical purity in conceptualization and articulation of justice. Thus, the concern here is not a semantic evaluation, neither is it a sublime theorization. It is rather an attempt to draw attention to several possible approaches to justice which should be considered in finding meaningful answers to transitional justice situations. To that effect, a broad canvas of them is presented in this segment.

RESTORATIVE JUSTICE

The word *restoration* has its roots in Latin – *restituere* – meaning to repair; to renew. It is therefore not unexpected that transitional societies which are often broken or fragile societies with deep social and psychological fissures will need restorative approaches to justice. Thus, restorative justice is an approach to justice which in its

various iterations and connotations involves the victims, offenders, and social networks and justices' agencies in a given community. It has often been associated with criminal justice theories but has since evolved to involve the larger fields of law and now a positive approach to reform in post conflict societies. What it then means is that restorative justice is adaptable to several situations and because of its inherent flexibility unlike criminal justice, it is seen to be more compelling and comprehensive for transitional justice situations. Its resurgence and expansion could be explained by a number of factors including the difficulties inherent in institutionally based models of justice. The massive failure of the institutional or traditional models to meet the demands of justice particularly when new and complex situations of abuse of human rights emerge. It is also explainable by the limitations of capabilities or the inequality of victims vis-à-vis their violators. Of course, a great many other concerns are possible regarding this problem. To surmise one would say that: first criminal prosecution was seen to be inadequate for the purposes of providing real dividends of justice in post conflict societies. For instance, the prosecutorial capacities in these societies are often either limited, compromised or virtually no existent. Thus, criminal accountability based just on the prosecution of alleged offenders may end in fiasco leaves the society still yearning for real justice and renewal.

Another critical factor is resource allocation. Indeed, it is often seen that limited economic and human resources in these communities hampers real work of transitional justice in terms of criminal accountability based on the traditional models. Often times, the existing laws in the post conflict societies are even crafted in the best interest of the old structures of authoritarianism. It is often therefore difficult to find relevant legal

foundations or provisions that will make for justice. For instance, in South Africa where there was a prevailing policy of state is discrimination, it was clearly difficult how a prosecution based on such criminal justice system can give real justice to the victims of the most egregious violations of human rights.

Indeed, because of such principles as non-retroactivity in law it looks futile to begin any process because the question of legal standing to bring such action become therefore a near impossibility. The strategic thing to do in such situations I would argue is to seek resources either through well targeted tax policies or economic inclusion policies to help in the overall remediation of the lopsided nature of resource consolidation. Without meaning to discountenance private ownership, it seems to me that overall consolidation of resources in one segment of the society diminishes competition and creates monopolies which end up impoverishing the community. A society where there is a wide disparity in resource allocation and control is an inherently fragile society.

Also lack of trust in the existing institutions – including courts, law enforcement agencies and executive bureaucracies – make it imperative to look for alternative approaches to justice delivery in these societies. This is further, coupled with the needs of victims which often transcends punishment of the offenders. Often the victimhood also transcends those who are alive and embraces those who are wounded, disappeared and kept in gulags. The traditional approach to justice does not answer the needs of this wide list of victims. It may well be that there is no identifiable offender in that the offence may have been committed in situations where the assailants are not easily recognizable. Indeed, can punishment of these alleged offenders assuming they can be

ascertained bring back a missing person? Would suffice for a family who family support system has been destroyed during the crisis? How about the missing limbs? Consider also the possibilities of continued intimidation or deep searing fears regarding giving testimonies? Many questions are left unanswered by the traditional approaches hence the restorative justice approach.[221]

It is also imperative to highlight the fact that restorative justice does not only serve the best interest of victims but stretches a hand of fellowship and potential restoration of the inner peace and dignity of the perpetrators. Despite the aridity of hope and soul searching in some transitional justice situations, new and inspirational things can happen through alleged perpetrators when they are given a platform to make amends and contribute in restoring the society or individuals they have violated. Violence serves as a great barrier sometimes to the perpetrators too. In seeking forgiveness and offering to give a hand to every effort to forestall a repetition, perpetrators often become living symbols of a new society. Of course, this not hard, but transitional justice needs a large

[221] The international Criminal Court has recently embraced restorative justice approaches, and this has also been adopted by a number of United Nations Specialized agencies. For instance, the international criminal court has even gone further to establish in 2002 a trust fund with the mandate to provide reparations and assistance to victims of international crimes. This was as global first at the time. It has however, successfully put the best interest of victims on the frontline of issues to be considered particularly in post conflict and post authoritarian societies. The ICC *Victim's Trust Fund* is financed from a combination of awards made against convicts before the court and private donations. It was created pursuant to *Article 79* of the Rome Statute.

dose of optimism and restorative justice brings a bunch of it to the arena of justice. This is also one of the foundations of TRCs in the overarching architecture and mechanisms of transitional justice.

It goes therefore without mincing words that the restorative justice programs emphasize the interest of victims without diminishing the interest of perpetrators. It is therefore imperative that this is placed in perspective. Otherwise the whole aim of community and real justice may become farcical in the face of weak and sometimes inexistent institutions with capacity to provide justice in post conflict societies. In that sense some articulated features of restorative justice processes are;

I. Flexibility of responses to circumstances of each case and each community in other to allow for individual cases to be given appropriate attention which also helps the overarching need for community healing and justice;

II. With attention to individual cases victim's interests will be enhanced;

III. Overreliance on community interest might unwittingly diminish the experience of victims;

IV. Respecting the dignity of those impacted and seeking ways of ensuring non-recurrence;

V. Victims and offenders or their social connections have the opportunity of working together to achieve justice and social harmony;

VI. Understanding that restorative justice is not divorced from the traditional criminal justice protocols and proceedings but could be utilized as a framework

for efficiency and better outcomes. The functionality of these institutions can be improved by looking at them through a restorative justice lens. [222]

DISTRIBUTIVE JUSTICE

Distributive Justice – has been described as "justice owed by a community to its members, including the fair allocation of common advantages and sharing of common burdens".[223] The economics of transitional justice is the most difficult aspect of the transitional justice. Looted resources in times of war and conflict often don't return easily. Pearls and belonging forcefully taken from victims often end up as irretrievable and lost in perpetuity. Sometimes depending on the outcome of conflict and the manner of settlement, the structures of economic control and access changes radically. Law in its nature and its definition of the provinces of individual, community and group freedoms has great economic and distributive impacts.

It is therefore an aphorism to declare that the laws of any society have implications for how the benefits and burdens of that society are accorded, shared and borne. Many would not see this as a direct outcome of law. Some would even opine that it is not the duty of the state as the ultimate guarantor of rights in society to consider the distributive nature or impact of law. Others would argue that rule of law is what is important – whatever distributive impact of law is a not a conscious outcome. The autonomy of citizens demands that they be left to enjoy proprietary rights as their

[222] See the UNODC.org documents on restorative justice.

[223] Black's law Dictionary page 995

ownership rights cannot be attenuated based on the ideas of *distributive justice*. For others, because of the many ways that law is implicated in setting the structures of society, it is the primary duty of law is to seek a distributive approach to justice.

Thus, for the libertarians it is seen as unjust to make – say tax, property, corporate – laws which have the impact of creating a redistributive effect on how benefits and allocations of burdens in society are borne. It is not surprising then that a great controversy often arises each time tax policies are put forward even if it is aimed at providing universal basic education, primary health care, or basic access to water and food. This then punctures the argument that law is a neutral omnipresence in society.

To my mind, law might be blindfolded by it hears the several voices and reverberations in society. This might as well explain while legal proceedings are preceded by hearing before determination. Hence, the justice of any society can be measured by the quality of hearing possible for citizens before the tribunals of that society. If we are to take the argument further, liberty and autonomy – are they just neutral economic concepts or do they pose some important considerations for distributiveness of law in society? Is economic activity dis-embedded from society and the law? Why should the law even pay attention to this?

Before now, and throughout major part of history it was deemed that human beings are born into a given community or circumstances of life. These circumstances are almost fixed, ossified and enduring. Born a slave; died a slave seemed to be a fitting epitaph for many. It was explained as destiny in some circumstances. It was predeterminism and its articulation in the vast literatures and modernities are simply breathtaking. In other contexts, it was considered as divinely mandated and hence

beyond human capacity to regulate, let alone change. This I would argue became the bed rock of social death of many in different cultures even before they were dead. A human being was just a predetermined being. Social equilibrium was maintained by folks keeping to their natural station. Even Plato who categorized the aspects of human nature as made up r*eason, sprit and appetit*e – depicting intelligence, free will and feelings – did not find it incongruous to classify social structures as about those born as *guardians* or into other categories and who should abide by those categories.[224] He set out in his works the special education which should be granted to men who were to be the guardians of the state. Women were even not given any prominence in that affairs of city states.

Think indeed about epistolary articulation of Paul in the Bible which bears out what is the prevailing atmosphere at the time. Namely the letter to Philemon a slave holder and Onesimus – a run-away slave – asking that the slave be accepted back without punishment; has been a ground for several interpretative readings and articulation. Paul rather than condemn the idea of human chattel was seeking to persuade the slave owner to soften his disposition towards the slave since he has now become a brother by virtue of the Christian faith.[225] Again, in Sophocles we hear him say "as

[224] Plato's The Republic.

[225] Many scholars find this fascinating and the use of such scriptural provisions for justifying slavery and use of human labor for free is a matter of broad literature in the history of slavery – particularly the trans-Atlantic slavery beginning in the early part of the 1400 and lasting to

grasshoppers are in the hands of wanton boys, so are we in the hands of the god's, they kill us and use as their sports."[226] This pre-deterministic view finds expression in models of social classification and stratification.

The law can therefore model structures of economic engagement. Because economics is about interest, law regulates it and provides the instrumentalities of its governance. For instance, one clear area of such regulation is the field of corporations. Recall the classic example and the possible distributive effect of law as can be found in *Salomon v. Salomon*.[227] In the English case of *Salomon v. Salomon* – a *locus classicus* within the common law tradition of corporation law – Aron Salomon a British leather merchant owned a business where in he was making and selling all kinds of boots. At the beginning the business flourished as a sole proprietorship kind of business. He was thus not just the alter-ego of the business, he was the business.

According to reported facts of the case, by 1892 his sons took interest in the business. He therefore decided to incorporate a company and sell the shares of the business to the newly incorporated company. This became Salomon & Company – a limited liability company under the Companies Act.

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the later part of the 19th century. Its structural implications are yet to give way and the struggle for due acknowledgement of same seems still not half won.

[226] Sophocles, *Oedipus Rex*, Edited and Translated by Hugh Lloyd-Jones, Harvard University Press 1994; Shakespeare William, *King Lear* Act 4, Scene 1.

[227] *Salomon v. Salomon* (1897) AC 22.

Due to the requirements of law he needed at least seven persons at the time to set up the company as shareholders. In the circumstance, the company's shares which were 20,007 (twenty thousand and seven) in all were allotted by Mr. Salomon as follows;

a. To himself 20,001 (twenty thousand and one shares);
b. His wife, daughter and four sons 1 (one) share each.

Furthermore, the shares allotted to himself were secured by debentures. By the nature of the corporate laws, debentures are special creditors and their loans are given priority in terms of any mishap particularly those leading to the liquidation of the company. As it turned out, the company's business subsequently failed and became the subject matter of liquidation. Mr. Salomon sold the business to a new corporation for about 39,000 (thirty-nine thousand) pounds of which (ten thousand) 10,000 pounds was a debt to himself. He was therefore not only the company's chief shareholder, but also the principal creditor to the company. Of course, this was challenged by the liquidator of the company on the grounds that the transaction was fraudulent.

The principal argument of creditors of Mr. Salomon was that the debentures/guarantees for the debts were not valid. Hence, fraud was alleged which on the face of it which should void the transaction. The High Court upheld the arguments of the liquidator holding that Mr. Salomon was liable to the privileges which the legislator intended to create for bona fide and independent shareholders. The Court of Appeal also upheld the liquidator's argument and ruled against Mr. Salomon, on the grounds that he had abused the privileges of incorporation and limited liability. The shareholders as intended by the legislator were supposed to be shareholders who are

capable of independent mindedness and not those who are merely puppets of Mr. Salomon. The Appeal Court variously described the company as a myth and a fiction. Indeed, it interpreted the incorporation of the company by Salomon as a mere scheme to enable him carry on what he has been doing before as a sole proprietor but with limited liability.

But as is usual with astute businesses, Mr. Salomon proceeded on appeal to the House of Lords[228] to challenge this decision. After an examination of the matter and the arguments proffered by the parties, the House of Lords unanimously overturned this decision, rejecting the arguments from agency and fraud positions. In the opinion of the law lords, Salomon followed the required procedures to set up the company; and in issuing the shares and debentures of the company. It was further held that the company has been validly formed since the Act merely required 7 members holding at least one share each. There was no fraud as the company was a genuine creature of the Companies Act as there was compliance and it was in line with the requirements of the Registrar of Companies. It further held that the company was at law a separate person, distinct from the person of Mr. Salomon though he is a principal shareholder of the company and its principal shareholder.

Thus, it is either the limited company was a legal entity, or it was not. If it were, the business and all transactions belonged to it and not to Mr. Salomon. If it was not, then the company does not exist and there will not be anything to be an agent to. Thus,

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[228] The House of Lords was the highest decision-making body at the time. This has since changed as the Supreme Court of Britain was set up in 2005.

the company was at law a different person all together from the shareholders. This principle established at the time the doctrine of the veil of incorporation and thus effectively shield limited liability shareholders from personal liability once the bare provisions of law on incorporation has been fulfilled.

This judgment illustrates the economic impact of law in many respects. One, law can create a fictional phenomenon and give it a life of its own like the idea of corporations. It can further fortify this creation with a number of privileges that give it edge in some respects. The privileges created can have impact on the distributive nature of rights – including rights of economic engagement and resource allocation.[229] In post conflict societies this is important. The importance of the economic standing of the state and the distributive impact of the transitional justice effort is a very lively debate. In the sphere of sovereign debts especially debts accumulated by hitherto despotic and authoritarian regimes come under serious scrutiny in transitional justice situations. Hence, the idea of distributive justice as a theory of law. The distributive theory of law

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[229] Mind you the value of a law or its impact on society can be both manifest and latent. The manifest intent of a legislation might be to secure transactions or offer a choice between two possible economic decisions. The latent effect which is often not manifested in legislative intent it may be dissatisfaction with the quality of services or consolidation of wealth in some hands. No doubt, there are other greater concerns in societies. I would even further illustrate this by drawing attention to the foundations of Anti-Trust Laws in America and other competition laws in other jurisdictions.

and justice is premised on the foundations of opportunities – especially economic opportunities as illustrated above.

However, with the shifting of access to knowledge in the age of enlightenment – and the continuous and better interrogation of hitherto sacred texts, ethos, and rights of kings – there has now arisen a widespread acknowledgement that, the distribution of economic goods, and costs can be influenced either by legal ordinances or government public policies. The administrative powers for which policies are made thus are founded in law – rule of law envelopes the idea of democracy. The topic has therefore become a daily staple on the menu of public debate.[230]

For instance, in a recent report by the World Bank concerning the distributional impact of taxes and transfers using evidence from eight developing countries, revealed very interesting outcomes. One of the key findings was that taxes and transfers can increase poverty even if they reduced inequality. In places like Mexico, Russia and South Africa, it was revealed that taxes and transfers reduced poverty. However, for other places like Ghana, Ethiopia and Sri Lanka, poverty increased despite taxes and direct transfers. What was determinative being that indirect taxes like value added taxes outweighed the gains of direct transfers.[231]It is debatable though whether the World

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[230] Davies, James B. "The Distributive Effects of Wealth Taxes."*Canadian Public Policy / Analyse De Politiques*17, no. 3 (1991): 279-308. doi:10.2307/3551637.

[231] See Gabriel Inchauste, Nora Lustig (eds.) *The Distributional Impact of Taxes and Transfers – Evidence from Eight Low and Middle-Income Countries*, World Bank Report 2017 < accessed April 21, 2018> It is important to note that the report was prepared using the Commitment to

Bank has the final word on this. This is so because, the nature of tax applied may bring a different outcome. It seems to me that what is not disputable is that taxes can adjust the scale of resources available to different segments of societies. It is therefore not out of place to be strategic in transitional societies using carefully tailored tax models to cause a shift in the resource pool and give more in the society access to a meaningful life. Property or development tax as use in the mining fields have a way of making it impossible for prospectors to hold unto large swathes of property without development. This is so because there is an incentive to act fast of get out of the land so that others can have a chance of applying the existing land recourses to other possible economic usages.

On the international sphere the distributional impact of trade laws, financial regulation policies, development policies of the World Bank, free trade and bilateral investment treaties have also put the debate regarding distributive justice in the mainstream of the legal discourse. Thus, the distributive justice theory has shifted the conversation and focused it on principles that can provide a guide to law making and policy implementation knowing full well that such laws and policies can significantly impact opportunities like jobs, labor rights, inequality, education and health care.

Law's empire and the role it plays in the economic affairs of society is very important for a true understanding of law. Beyond the Marxian arguments, there are other relevant issues of law and its distributive impact in society. Globalization has

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Equity Index Designed by the Institute of Equity at Tulane University using its comprehensive fiscal incidence diagnostic tool.

further given vent to the overall impact of legal regimes, human development and inclusive prosperity. In transitional societies, this debate is rife. Th Piketty in his work[232] has outlined the growth of inequality across the globe. Many otherwise liberal economic apostles have also shown the disparate impact of regulations and inequality around the world. How does this inequality affect transitional societies?

Stiglitz[233] for one has argued that one of the critical problems which is causing the global increase inequality is the nature of the global economic governance instruments. He is of the view that the structural adjustment which was introduced in the 80's in Africa contributed greatly to the weakling of the states and deindustrialization of the African region. That singular fiscal policy imposed on states in the region not only diminished their capacity to invest in the welfare of the citizens, it also rendered them fragile. Thus from 1986 till the 1990's riots over social amenities broke out in places like Sudan, Liberia, Sierra Leone, and Nigeria. In turn many of the states sought help and ended up borrowing a lot to sustain either their grip on power or sustain their bloated civil service which was the only institution that can employ anybody. Many jobs were lost to global competitors, and institutions became deeply compromised and thus could not sustain democracy. To my mind understanding these

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[232] Thomas Piketty, Capital in the Twenty-First Century, Translated By Arthur Goldhammer, Harvard University Press, Cambridge Massachusetts, 2014.

[233] Joseph Stiglitz, *Democratizing the International Monetary Fund and the World Bank*: Governance and Accountability<https://www8.gsb.columbia.edu/faculty/jstiglitz/sites/jstiglitz/files/2003_Democratizing_the_International_Monetary_Fund.pdf<accessed September 19, 2018>.

key questions are essential to understanding the best possible transitional justice undertaking in any society that needs it. It will also facilitate a careful consideration regarding legal borrowing bearing in mind that laws have functional consequences in society. It is also key to understanding the privileges that law creates and how it affects what we do in society.

Indeed, it is the view expressed by Stiglitz that the Washington consensus[234] policies which emphasizes market economy for countries in transition have negative outcomes. He goes as far as saying that African states like Ethiopia only started seeing meaningful economic development when they abandoned the Washington Consensus model of economic development. This is an important observation for transitional societies. Legal transplants from global institutions are not an end in themselves. The regulations the portend are sometimes disempowering for sovereign nations. This is because these societies need a different set of tools to deal with their immediate problems since the often lack the capacity to compete with global corporations and others who have the capacity of taken advantage of liberalized markets.

They need to enjoy a great level of regulatory wiggle room in order to achieve the best for their communities. It then means that debt rescheduling, aid and foreign investment in these countries should not be made conditional to the liberalization of markets and defunding of social welfare financing. This is one area where the United Nations and other global governance organizations interested not only in peace, but

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[234] Joseph Stiglitz, From the Washington Consensus, Towards a 21st Century Consensus on Development (Text of Paper Presented in Stockholm, September 2016).

sustainable peace should help transitional societies in negotiating better conditions which gives them real flexibilities to champion the important socioeconomic questions which are often aggravated in transitional societies.

In transitional justice theories, it seems to me that the concept of distributive justice has been left in the margins of the whole conversation. The libertarian domination of the general debate on global governance and end to impunity seems to have played a great part in this near silence on issues of transitional justice relating to socio-economic and political rights. The anxiety of losing proprietary interest both in trade rights and control of equities and potential expropriation seems to have also reinforced the difficulties. But I argue that the distributive justice theories hold a lot of value in terms crafting policies and designing transitional justice mechanism is these societies. Global governance institutions must assist in setting out knowledge resources in this regard. It seems to me that inequality and lack of development anywhere in the world is a clear and present danger not only to those societies but to global peace and security. Transitional societies are worse of and incapable of keeping the peace if there is no system of opportunity for citizens to actualize themselves. Self-actualization is a top interest of all human beings.

Therefore no matter how institutions are designed and consolidated they are meaningless to societies where citizens do not have opportunities for growth and development. Thus, no other society needs a more robust appreciation of the laws that create the economic opportunities in a way that is accessible to all like the transitional communities. An inclusive economic structure seems to me to be one of the most essential insurance of peace and prevention of recurrence of violence. From Colombia

to North Eastern Nigeria. Afghanistan to Somalia, the fragility of society is fueled by extreme violence.

It is therefore revealing that the trend of concentration of attention in most post-conflict and post authoritarian articulations of mechanisms by the global governance institutions focused much more on civil and political rights in these transitional societies. At times instrumentalities of real reforms are avoided and the duty of reconstruction is left to "donor agencies and humanitarian and not for profit organizations". Take for example the UN Security Councils preoccupation has always been – criminal tribunals, recommendations for prosecutions, and the like. What has happened is that instruments setting up these tribunals focus much on the retributive aspects of justice in line with enforcement, recognition, respect, protection and fulfillment of civil and political rights. [235] Equally the United Nations Handbook on Rule of Law and Transitional Justice focused its directive principles and measures of transitional justice on the ideals of Civil and Political Rights.[236] Suffice it to state that

[235] For instance, except for general provisions regarding the prevention of destruction of means of livelihood especially when such is targeted at affecting the survival or capacity to procreate of a particular group as can be seen in *article 6 (b)* of the Rome Statute of the ICC, socioeconomic rights do not feature much in the debates and instrumentalities for peace making or preventive diplomatic efforts.

[236] The 21-page document in its entire 65 paragraphs dealt with the issues of criminal justice and civil and political rights. The emphasis is so manifest that even when context is taken. Into account it the political context as opposed to the economic contest. One significant outcrop of

the socioeconomic aspects of transitional justice are yet immature in its articulation and overall utilization in the entire gamut of machineries for transitional justice. It is a field that requires more research.

I argue that the best form of peace building or peaceful settlement of dispute is equal economic opportunity not minding religion, region or race. The geography of poverty and the overwhelming distributive impact of global economic structure – much to the favor of the frontline states and the global north – fundamental to the quest for global peace and security. The UN must have the political will to put questions of right to development and the need for a reform of global governance instruments to encourage inclusive development and prosperity to bear in framing policies under Chapter VI of the Charter.

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this is that global corporations and organizations with less than viable corporate social responsibility do not hesitate to have transactions with repressive regimes. From Congo to Liberia, concessional rights or mining licenses issues in the times of conflict or authoritarian regimes do not lose their investments and international law enforcement efficacy. Sovereign debts acquired in the protection of the political elite that created the civil and political rights violations remain in that and often like the victims are meat to repay these for years. What is noticeable therefore is that economic rights in the transitional justice situation has been bedevil by the global lethargy to progressively engage in their recognition, respect and fulfilment unlike civil and political rights. It is y argument that the distinction in rights and the relegation of socio-economic and cultural rights to the margins of transitional justice is increasing challenging the value and overarching contribution of transitional justice efforts to social transformation in post-conflict societies.

While every transitional justice project may not necessarily be tailored toward economic and social injustice, it is critical to consider same and decide on what is to be done instead of a broad disregard of same as a forgone alternative to civil and political rights. The difficulty in ignoring socioeconomic rights in the agenda for peace is often found in the fact that even the most infamous governmental agreements regarding mining concessions are often respected and enforced in international law after the conflict. The perpetuating argument is that of preserving stability of business and safeguarding investments.

One negative externality of this is that conflicts in places like Congo and Colombia have lasted decades because some investors take advantage and make fabulous deals with war lords regarding the mining of rare metals and other resource exploitation. The Washington consensus has the capacity to disrupt this source of financing for conflicts by imposing sanctions on corporations that wade into such conflicts. It not enough to forbid the purchase of blood diamond, it is more proactive to forbid investment in states where there is high incident of authoritarianism and fragility. It is difficult and expensive to trace the source of the resources since the organizations that are involved in them are highly syndicated with a resilient network of global collaborators. It is therefore time enough to pivot that focus towards the economic aspects of transitional justice and how the measures of transitional justice could be crafted to be more responsive to them.[237]

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[237] Sam Szoke-Burke, Not 'Only Context': Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights, Texas International Law Journal, Volume 50,

SOCIAL JUSTICE[238]

Social Justice is that form of “justice that conforms to the moral principle such as that all people are equal. It is also deemed as that form that seeks more equitable resolutions sought on behalf of individual and communities who are dis enfranchised, underrepresented, or otherwise excluded from meaningful structures with the ultimate goal of removing barriers to participation and effecting social change.”[239] According to David Miler, “the reader searching for enlightenment on the subject of social justice is now presented with a large array of theories of justice from which to choose; monolithic or pluralistic; rights-based meritorian or egalitarian; Aristotelian, Hegelian feminist and so on.” [240]obvious from the above is the persistent concern in the field that the idea of

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2016: Dustin N. Sharp, *Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice*, 35 FORDHAM INT’L L.J. 780, 781–83 (2012); Evelyne Schmid & Aoife Nolan, *‘Do No Harm’? Exploring the Scope of Economic and Social Rights in Transitional Justice*, 8 INT’L J. TRANSITIONAL JUST. 1, 3–4 (2014)

[238] Amnesty International recently started a conversation towards the crossing of the exiting artificial bifurcation between socioeconomic and. Cultural rights on the one hand and civil and political rights on the other. See https://www.amnesty.nl/content/uploads/2015/10/can_human_rights_bring_social_justice.pdf <accessed April 24, 2018>.

[239] Black’s Law Dictionary Supra page 996

[240] David Miler Principles of Social Justice, Harvard University Press, Cambridge Massachusetts, 2003.

social justice does not yet enjoy enough conceptual clarity. This has been used as a major foundation for its critique by a range of scholars. [241]

Yet the definitional or conceptual purity of a principle of law or justice in other circumstances has never been the only decisive factor in its utility as a tool of justice delivery or allocation of rights and privileges in community. For instance, what is equity? What is equity of redemption? What is this thing called good conscience, bona fides or its alternative mala fides in law? Why do we worry about principles of law and justice in society? Indeed, the Hart – Dworkin Debate on law and the jurisprudence of it dwells on these issues and the purity of the conceptualizations of principle and theories in law. Even Hans Kelsen's pure theory of law,[242] I would argue, did not enjoy conceptual purity. Its contribution remained its analytical depth and articulation. It becomes interesting then why there is a seeming insistence on definitional purity when

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[241] Hayek comes to mind here. He criticized the idea of social justice denouncing it as an empty concept, a mirage, a vacuous concept, a quasi-religious belief with no content whatsoever. See Fredrick A. von Hayek, Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy (London, Routledge and Regan Paul, 1982); - Social Justice, Socialism and Democracy, Sydney Australia, The Centre for Independent Studies 1979; see also, Andrew Alister, The 'Mirage' of Social Justice: Hayek Against (and for) Rawls, Oxford Centre for the Study of Social Justice SJ017 June 2011.

[242] For general appreciation of the contribution of the pure theory by Kelsen see William Ebenstein, The Pure Theory of Law: Demythologizing Legal ought, 59 Cal. L. Rev. 617 (1971). Available at: h p://scholarship.law.berkeley.edu/californialawreview/vol59/iss3/2

it comes to fundamental ideas and principles with the potentiality of transformative impact on society.

One argues that, there are two basic explanations[243] – structural solidarity and the apprehension of slightly discomforting outcome. Structural solidarity, in that the existing status quo in society often resists change. Also discomforting outcome because the existing status quo entails privileges which may be whittled down by the adoption of certain ideas. However, it seems to me that social Justice is not an idea focused on zero-sum outcome of law and justice in society. In transitional societies, this is an argument that cannot be ignored. Rights matter – life is a summation of how much of these rights and privileges are recognized, respected and fulfilled for the individuals in society.

Hence, it has been argued that the proper recognition and fulfilment of these individual rights and their flourishing is the ultima ratio, the *summum bonum* of societal living. This appears to me to be the basis of the articulation of the intrinsic worth of the human person. That intrinsic worth it is further articulated is neither diminished nor attenuated by circumstances of nativity. If it were to be so, human civilization would have remained in the doldrums of strife – the Hobbesian state. It is therefore true that idea of personal liberty, human autonomy and other individual rights are not mutually exclusive from the idea of enlightened self-interest in society. These flow from the safe fountain of rights. The social aspects of rights are therefore important as well.

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[243] There is a great possibility of other plausible explanations but the noted two above just sticks out even to a mere cursory observer.

It is thus, a subject deserving of critical articulation whether there is a possibility for the enjoyment of individual rights dis-embedded from society? It may well be debated as to the extent this is possible but individual rights are rights enjoyed in being with others. Social solidarity reinforces rather than diminishing individual rights. Thus article 22 of the Universal Declaration of Human Rights notes that everyone as a member of society has the right to social security and is entitled to realization through national effort and international co-operation and in accordance with the organization and resources of each state of the economic and social and cultural rights indispensable for its dignity and free development of his personality. Article 23 provides for the right of work, free choice of employment, just and favorable conditions of work.

It further guarantees a "just and favorable remuneration ensuring for (a human being) himself, and his family an existence worthy of human dignity, supplemented if necessary by other means of social protection"[244] In transitional societies where in a transformative paradigm is needed, it may well be strategic to keep the idea of social justice as a reliable tool for change and inclusive recapture and rebuilding of the soul of the society. It seems to me therefore that social justice is a metaphor of transcending the metaphysical constructions of justice which has not much practical implications in terms of the welfare of citizens in society.

Thus, what is obvious is that many theories of justice abound as have been propounded since the ages. Its discourse remains inimitable and evergreen in the corridors of philosophy,

[244] The tenor of the provisions of *article 26* – education, *article 27* – Participation in the cultural life of the community, *article 28* – Social and International order for the full realization of the rights set out.

law, history and ordinary human encounters. From Saint Augustine to Immanuel Kant, Sartre to Sen – different approaches to explaining the idea of justice has been adopted. It is important to highlight a few of those theories of justice at this juncture. The aim is to show the scope of the concept and how different ideas about it permeate society. Equally, since we shall all through this work be employing this lexicon, it is only reasonable to contextualize it and hence sharpen the focus of our discourse. For Augustine, justice is the pillar of the social code. It is the fiber of human societal living.

Hence his classic perception that societies without justice are essentially a gang of robbers on a large scale. While some of the perceptions about justice are conceptually contractarian – in line with the social contract theories – others fluctuate within the spaces in between on social choice ideas and social solidarity. What we have seen therefore is an amalgamation of the processes that impact justice particularly in transitional justice situations. In transitional justice these approaches to justice can be integrated to accomplish the best possible within the society. The value of this is further underscored by the United Nations when it articulated that "…in matters of justice and the rule of law, an ounce of prevention is worth significantly more than a pound of cure.

While United Nations efforts have been tailored so that they are palpable to the population to meet the immediacy of their security needs and to address the grave injustices of war, the root causes of conflict have often been left unaddressed. Yet, it is in addressing the causes of conflict, through legitimate and just ways that the international community can help prevent a return to conflict in the future. Peace and stability can only prevail if the population perceives that politically charged issues, such as ethnic discrimination, unequal distribution of wealth and social services abuse of power, denial of rights to property or citizenship and territorial disputes between states can be addressed in a legitimate and fair manner. Viewed this

way prevention is the first imperative of justice."[245] Nothing can better explain the importance of a broad and transformative attitude and idea of justice in transitional justice situations.

2.01.2. TRUTH, RIGHTS AND TRANSITIONAL JUSTICE

What is truth? How may we know it? Is it spatially located or is dispersed? Where does it come from – perception, reason or experience? These are very fascinating questions. Their contentions and debates are equally intriguing. One may say however that it is always refreshing to consider some of those questions that define who we are as human beings. But I have come to realize that certain questions are at best a continuous rhetorical sound off of existence. In sense they cannot be defined with definitiveness. To define them with definitiveness may seem to freeze them in time and thus lose their transformative capabilities.

The idea in this segment of the work therefore is to draw attention to some of the debates in the field and see what lessons we might keep in mind for the purposes of transitional justice. This I say knowing that the inherent dynamic between truth, right and justice are perpetually in need of rediscovery. I argue that, these questions of what truth is, is an epical question of philosophy. It is also in another sense a vexed question of law, philosophy, and society – whether asked by Pilate as a Roman Consul, by Cicero in pursuit and prosecution of the Cataline Conspiracy or by a judge in Manhattan seeking answers to the vexed murder of a citizen.

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[245] United Nations Security Council, Report of the Secretary General S/2004/616 "The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies" August 2004.

Hence the truth of the matter is that 'truth' is an immense value for us human. It is therefore not uncommon to hear in our daily conversations that – 'she is a true friend'. James is 'truly' a dependable colleague. These observations not only articulate but also validate and evokes a sense of responsibility and goodness on the individuals referred to. It goes then without saying that in transitional justice and transitional societies, the desirability of truth is further heightened. One can even say that the truth is indispensable in the search for the lost soul[246] of the society. In the jurisprudence of human rights this is also a very critical search.

This I argue, is explainable by that fact that truth is critical in the recognition, respect, protection and fulfilment of fundamental rights. The unavailability of truth limits the capacity of the individual or persons close to her to proceed either administratively or through the courts for remedial measures. It is important to know the truth else the rights and privileges guaranteed under both international and domestic instruments of human rights may just be mere poetic renditions without meaningful impact on the lives of citizens. Laws are meaningless if they offer no remedy. Indeed the incapacity of law is a calamity to the most vulnerable in society.

But first, it is wise at this point to articulate some of the ideas about truth and how they interact with rights and justice in transitional societies. Now imagine a court

[246] I use this metaphorically to highlight the situation sometimes found in transitional societies. These societies which are often emerging from a very difficult conflict situations or authoritarian regimes can be said to have lost their souls bearing in mind the egregious violations of human rights which often occur in these societies.

setting as we know it. For the purposes of this, I will like that we adopt the common law tradition for court settings. Think of the atmosphere that pervades the court in session. Now at some point in the proceedings the Court in a grand voice says to counsel – "you may bring your witness to the witness box." At this point the judge, the jury, counsel on both sides, parties and the general public are all in their respective places in court. Recall the nature of that grandeur and watch the demeanor of the judge – who may sometimes appear aloof or even hostile. This is the laws empire and the law fully robed in her majesty. This majesty is seen to be indispensable to the functionality of the institution.

Alas, the law despite her apparent majesty, is incapable of proceeding until it gathers evidence – truth.[247] The weight of evidence determines the outcome of the proceedings and this we call justice delivery. The court in issue can be a local Court in Nigeria, Liberia or Sierra Leone. It can also be a tribunal like the International Criminal Tribunals in Rwanda (Arusha), for Yugoslavia or indeed the International Special Tribunal for Sierra Leone or the International Criminal Court. In the circumstance, the witness has to supply the evidence. She is called up as is often the case before these tribunals. Sometimes she may seek to testify behind curtains for a number of reasons

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[247] Again, some might argue regarding the truthfulness of the truth as found in legal proceedings especially in the Common law system which is fiercely accusatorial. An illustrative example of this is the trial of OJ Simpson which became a *cause celebre* in the United States. Not quite a few are confused regarding the content of the truth of the proceedings. While not taking any side in that debate, it is interesting to note the controversies that remained around the trial and decision despite the best efforts of the court.

ranging from personal safety to trauma. She has to be on oath[248] – swearing by whatever is deemed to command her most salient moral candor. Now she goes thus "I swear before this court that the evidence I shall give shall be the truth, the whole truth and nothing but the truth, so help me God."[249]

One thing recalled by the scene described above is the premium placed on truth and how critical it is in the justice administration process. The witness who is there to testify is either doing so in exercise of her right or in support of another's right of fair hearing. Hearing is the only way of balancing the scale of justice. To hear only one side to the proceeding will be unjust. It would not meet the requirements of the guaranteed rights of due process. It goes then without saying that it is an indispensable aspect of transitional justice. To take two important grounds of this; It helps in meting out prosecutions and sanctions against those guilty of the most egregious violations of human rights; It helps facilitate closure for families who have lost some one; It is critical for remedial measures for those left behind like little children who have lost their parents.

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[248] Now the instrument of oath taking may differ from jurisdiction to jurisdiction. Even within jurisdictions, the individual may determine what to swear with or just to affirm without the need of a Bible, Koran, the Veda, Talmud or such other holy writ as may be permitted by the court.

[249] Several Jurisdictions have one version of this oath or another. They are critical seen as indispensable in the judicial process. Hence evidence not given on oath is often interpreted as having less evidential value.

Significantly, the diversity of faith, culture and worldview creates a further need for the articulation of the relationship between truth and transitional justice. This is not made simpler by the existence of many other issues of plurality – including race, ethnicity and even ideologies. This in turn creates a broad range of opinions, points of view and claims about truth. To be aware of them is to be better armed in transitional justice situations. This is because on this pluralistic mural, we must place our footholds of truth and rights without relativizing it. A survey of the theories in the literature reveals a number of articulations about truth resting on the following tripod: the *correspondence theory of truth*; *the theory of coherence*; and a number of theories that straddle the middle ground between correspondence and coherence. Above all, it is not an uncommon feeling amongst some thinkers in the field that it is just futile to seek an unassailable theory of truth. The value in the discourse is then to sharpen our wits regarding the on-goings in the field.

The correspondence theory of truth finds warmth in the works of Bertrand Russel.[250] Accordingly, he notes that "… as regards knowledge of truths, there is a dualism. We may believe what is false as well as what is true. We know that on very many subjects different people hold different and incompatible opinions: hence some beliefs must be erroneous…. There is, however, a preliminary question which is rather less difficult, and that is: What do we mean by truth and falsehood?"[251] Thus in further

[250] Bertrand Russel "Truth and Falsehood Chapter 12 of the Problems of Philosophy, Oxford: Oxford University Press 1912.

[251] Russel ibid

elucidation of the theory he goes further to state certain criteria for sifting the correspondence theory of justice. Namely three basic points/conditions which any theory of truth must fulfill. He argued that these are the "three requisites which any theory must fulfil."[252]

First, the theory he notes must be of such "as to admit of its opposite, falsehood. … In this respect our theory of belief must differ from our theory of acquaintance, since in the case of acquaintance it was not necessary to take account of any opposite."[253] What this means is that the theory needs to find validity on an alternate position which is falsehood. To be true means therefore that the alternative is false. To be false also entails the same binary. Russel again goes on to say as the second point of his correspondence theory analogy that "it seems fairly evident that if there were no beliefs there could be no falsehood, and no truth either, in the sense in which truth is correlative to falsehood. …"[254] Thirdly and more importantly as he seemed to suggest, …as against what we have just said, it is to be observed that the truth or falsehood of a belief always depends upon something which lies outside the belief itself… He surmised by noting that going by the above three points – especially point three – " leads us to adopt the view—which has on the whole been commonest among philosophers—that truth consists in some form of correspondence between belief and fact. It is, however, by no means an easy matter to discover a form of correspondence to which there are no

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[252] Russel ibid

[253] Russel ibid

[254] Russel ibid

irrefutable objections." Russel it would appear seemed to have adopted a sort of practical theory of truth. It is a question of opposites – a truth and a falsehood. A belief which is factual and thus true and a belief which is not facture and thus untrue. It seems to me though that this approach though epistemologically correct may not be resilient to other questions about truth and society. The possibilities of a truth that does not need anything outside of it to serve as a corresponding validation did not seem to draw much of Russel's sympathies.

Hence his theory has been critiqued by scholars and have also become the point of departure in the debates. One is however minded to credit Russel greatly for helping tease out some of the recondite aspects of the debate and setting out a theory which is very useful in the field. The further lesson which we must not miss out is that in legal proceedings and transitional justice situations, we must not fail to pay attention to the various possible outcomes that can emerge either from adopting a particular mechanism of transitional justice or by utilizing a particular set of facts. This is more so in a truth and reconciliation commission where the need to record the truth of the encounters and events which has impacted different people differently. [255]

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[255] It is also plausible to state that the argument for the existence of a relationship of falsehood vs truth is at the very core of the challenge to the correspondence theory of truth. If A and B are in a relationship (Love, Romance and whatever) and it happens that A begins to go after C too. Then this may create some resentment or ill-will in B. The jealousy though in relationship to A is corresponding to A, but out if the activities of a third party. Though a rough example, it illustrates the analogy above regarding the correspondence theory of truth. The possibilities

The coherence theory is another important theory of truth. It was developed partly to illustrate the shortcomings of the correspondence theory of truth. The proponents of this theory are essentially of the view that the truth can be self-sufficient in itself and not necessarily in a relational position to some other extrinsic thing which is false or otherwise. It is therefore a systematic characterization of the whole.[256] Perceptibly they describe it as one that is coherence and includes all known facts. It goes beyond mere consistency or regularity. It seeks to analyze the truth as a concept of truth in a more classical way so as to reveal the nature of truth for other scholars, it seeks to set out the conditions upon which it will be proper to apply the concept of truth. To this effect some thinkers have approached coherence theory as a tool of recognizing the conditionality upon which the concept of truth can be applied. Thus, they lean more towards the correspondence theory of truth, they adopt the coherence theory instrumentality as a test rod for the relational analysis of truth – the correspondence theory.

It is also further articulated as the joint consistence and comprehensiveness of the proposition so expressed. It would seem on the face of it that the coherence theory of truth is idealistic. This however is a fact that could be both useful and be a draw back

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must however not becloud the need to guide against *relativism* or the idea that nothing is actually true - the philosophical position that all points of view are equally valid and that all truth is relative to the individual.

[256] Cohen, L. Jonathan. "The Coherence Theory of Truth."*Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*34, no. 4 (1978): 351-60. http://www.jstor.org/stable/4319261.

in some situations. The high conceptual pitch which the coherence theory bears is good in terms thinking through the objective logic of a given situation or propositions. A body of evidence may therefore be evaluated based on the coherence of all its parts viewed as one coherent unit. It helps therefore in articulating a model framework. It may also be useful in analyzing existing systems of justice delivery or transitional justice mechanism. This no doubt is a great value in the functional evaluation of an adopted system of transition.

In summary many theories of truth exist. Popular amongst them is the correspondence theory of truth and the coherence theory of truth. Truth is the ultimate goal of all our human pursuits. Its search is the eternal search of human existence. The answer to the finest questions of our origin, meaning and morality and destiny. It is therefore the underpinning element in the search for the origins of social harmony, the meaning of collective leaving, the moral consciousness of the society expressed in rules and laws and the ultimate destiny of the community. These are critical concerns of transitional societies. So, the theories of coherence and correspondence both offer us a great insight into the nature and conditionalities of truth. So, a truth must be able to answer the question – does it correspond with reality or fact?

This is the primary point of correspondence theory and it is highly championed by realist philosophers. Next it must comprehend the question – does it have coherence when all its parts are put together. For instance, when you gather all the evidence and piece them together as they were told in the cause of investigation or hearing, does it have a unit coherence? To text all these, we subject them to logical consistency,

empirical adequacy and experiential relevance. In law these manifests quite often because an ordinarily factual situation may have no relevance to the subject matter.

In transitional societies and situations, it is critical not to be structuralist else nuggets of truth might either be avoided or unwittingly missed. This is precisely so because, truth in post conflict situations often need a measure of incentives for it to emerge. Unless therefore that it is incentivized through clear policies like forgiveness, amnesty or other lawful assurances, it is possible that not much will be achieved because "no one has ever doubted that truth and politics are on bad terms with each other, and no one as far as I know, has ever counted truthfulness among the political virtues. Lies have always been regarded as necessary and justifiable tools not only of the politicians or demagogues but also of the stateman's trade."[257] The aim is to find ways that will facilitate as much information and truth as possible. This is therefore very critical in conceptualizing, designing and implementing transitional justice measures.

THE DILEMMAS OF TRANSITIONAL JUSTICE.[258]

Like the doctor in George Bernard Shaw's classic work,[259] societies emerging from conflict, repression or one form of authoritarianism or another, are often faced by

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[257] Hannah Arendt, *Truth and Politics*, The New Yorker, 1967.

[258] Stensrud, Ellen Emilie. "New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia."*Journal of Peace Research*46, no. 1 (2009): 5-15. http://www.jstor.org/stable/27640796.; Lyn S. Graybill (2012) Peace Versus Justice? The Dilemma of Transitional Justice in Africa, Canadian Journal of African Studies/La Revue canadienne des études africaines, 46:2, 345-348, DOI: 10.1080/00083968.2012.705609

[259] George Bernard Shaw, The Doctor's Dilemma, New York, Brentano's 1909.

a number of dilemmas. This is not uncommon because in most of those communities, the social fabric has been ripped apart. Equally, the citizens have been violated in many ways. Human rights have been grossly abused and citizens are left wondering how to reclaim their humanity and dignity. Some have disappeared, and some have been rendered functionally dead because of the deeply entrenched trauma they have suffered. At times the suffering is still subsisting and those responsible for it are very much within the society waiting for opportunities to return to power. The balance of power in these societies between rebel groups in case of civil wars, is also a source of challenging dilemma. Added to this miasma of complex dilemmas is often the divisions in these societies. The divisions might range from ethnicity to race, class, gender, religion and such other group identities. Navigating these complexities is therefore often a dilemma which transitional justice processes must pay attention to.

Illustrative of this is the observation made by Archbishop Desmond Tutu regarding the South African Truth Commission thus "A nation divided during a repressive regime does not emerge suddenly united when the time of repression has passed. The human rights criminals are fellow citizens, living alongside everyone else, and they may be very powerful and dangerous. If the army and police have been the agencies of terror, the soldiers and the cops aren't going to turn overnight into paragons of respect for human rights. Their numbers and their expert management of deadly weapons remain significant facts of life.... The soldiers and police may be biding their time, waiting and conspiring to return to power. They may be seeking to keep or win sympathizers in the population at large. If they are treated too harshly – or if the net of punishment is cast too widely - there may be a backlash that plays into their hands. But

their victims cannot simply forgive and forget."[260]The dilemma is real because the alleged perpetrators are often the only ones who can say what happened.

As can be deduced from above, it is readily arguable that the dilemmas of transitional justice and transitional societies offer a great field of studies for deeper exploration. Such a study undoubtedly will be a fitting introduction to experts regarding the many dimensions of law's encounter with these dilemmas and how they affect the transitional societies. It would be a good reminder to experts, that ignorance when dealing with transitional societal issues – whether it is about the choice of a mechanism of transition, recommending a policy choice or designing institutions – ignorance of these complex dilemmas cannot be bliss. Equally, resolving the dilemmas requires knowing/understanding the alternatives and the possibilities they portend in society. Thus, there may not be a perfect template to adopt. Hence, functional evaluation and comparison may be useful in articulating a better approach to the transitional justice process.

Prior to the present era, the approach had often been that of criminal prosecution and punishment of war criminals. This is often seen also in the popular clamor for prosecution. This was considered imperative because it not only made sure that human rights violations are taken seriously, it was also aimed at creating a deterrent effect on

[260] See the Forward to the Report of the South African Truth and Reconciliation Commission, by the Chairperson Archbishop Desmond Tutu quoting Judge Mahomed, then Deputy president of the South African Constitutional Court – Judge Marvin Frankel "Out of the Shadows of the Night: The Struggle for International Human Rights. Page 6

those who may be contemplating such other violations in the future. It also helped the idea of community since those who responsible for these violations are punished either via executions or terms of imprisonment. The other important but latent outcome of prosecution was also the idea of creating a public archive largely through the courts via the documents file and information flow in the proceedings. Indicative of the general disposition towards criminal prosecution which is critical in post conflict societies is the establishment of a number of international criminal tribunals and the professed rationale behind them.

For instance, the preamble to the Rome statute noted that "the most serious crimes of concern to the international community as a whole must not go unpunished and their effective prosecution must be ensured by taking measures at the national level and enhancing international cooperation".[261] It also went further to profess its determination to put an end to impunity for the perpetrators and by so doing prevent the recurrence of such crimes. Along those same lines the United Nations resolution establishing the Rwandan Tribunal while professing the determination to end impunity noted the importance of "putting measures in place to bring to justice the persons who are responsible for them." [262]It is important to also note that there are lots of complaints about the court processes since they are often technical, remote and expensive for the communities concerned to access.

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[261] See the Preamble to the Rome Statute of the ICJ 2002.

[262] See also the UN Security Council Resolution Establishing the Rwandan Tribunal – UNSC Res 955, 49, 1995 (S/RES/955).

Along these lines, the UN Security Council Resolution had this to say regarding the Sierra Leonean Special Tribunal "Deeply concerned at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity, …holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law, Reaffirming the importance of compliance with international humanitarian law, and reaffirming further that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law, Recognizing that, in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace…"[263]

This whole idea of prosecution has often been referred to as the "Nuremberg Legacy."[264] This is so because the prosecution in Nuremberg and Tokyo Tribunals of

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[263] United Nations Security Council Resolution S/Res/1315/2000.

[264] It has been argued finely in a recent paper that "a lasting legacy of the Nuremberg and Tokyo military tribunals is the assertion that individuals are subjects of international law and should be held criminally responsible for perpetrating war crimes and crimes against

those responsible for the most serious violations of human rights were held personality responsible. There are therefore abundant justifications for prosecution since it will render the provisions of the many instruments of international law prohibiting gross human rights violation especially in times of war if there was to be a feeling that they will never be prosecuted.

Again, the danger is that once there is felt to be so, it will create an incentive for impunity. However, some have argued that prosecutions may not be the best way to transformative transitions in post conflict and post authoritarian societies. A number of reasons have been adduced ranging from the cost of prosecution in terms of the enormous resources – human and material needed to engage in the proper and effective prosecution of those who are responsible for the most egregious violations of human rights.

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humanity. Building upon the Nuremberg legacy, the emergence and proliferation of modern international (ized) tribunals has ushered in a new era in international criminal justice, whereby states seek to end impunity for international crimes through criminal trials." While examining some the criticism set out elsewhere in the literature regarding the propriety or otherwise of utilizing the instrumentality of criminal trials to seek redress especially for collective community violence and abuse of human rights it has been argued that "criminal prosecutions remains an enduring legacy of Nuremberg, supported by both international actors as well as victim communities"- Brianne McGonigle Leyh, Nuremberg's Legacy Within Transitional Justice: Prosecutions Are Here to Stay, 15 Wash. U. Global Stud. L. Rev. 559 (2016),

Equally, it is also the case that these alleged violators of human rights may still be wielding enormous powers within the communities. Hence the dilemma that it poses to these communities. Thus, it intended here to highlight two of those dilemmas namely; Truth and justice on the one hand and Justice and Peace on the other hand. The choice of these two particular dilemmas is borne out by the fact that they are arguably, the most important concerns of transitional societies. How does the society make sure it does not abdicate the responsibility to recognize, respect and fulfill the rights of citizens by prosecuting those who have violated these rights? How does it maintain peace and prevent a reversion, repetition and recurrence of a cycle of violence? These many concerns thus pose a dilemma to the transitional communities. The stiffest arguments for prosecution stems from the prevention of impunity literature. It is believed by analysts in the field that prosecution insulates the society from prosecution and secures the foundations of justice.

This is so because without this there will be no need to have the lofty provisions, conventions and declarations articulating human rights protections which are not only available to individuals but transcends national boundaries. These are considered universal human rights and to refuse or ignore to prosecute them is to render them impotent. This is because law and human rights are the first victims of tyranny. To ignore prosecution therefore is to reinforce tyranny.

Moreover, it in a sense gives legitimacy to the new wielders of state powers and clearly sets out their commitment to be different from their predecessors. The decision not to prosecute may unwittingly diminish the legitimacy of the new regime since they will be viewed as still in cahoots with the previous regime or those who were responsible

for the destruction of the fabric of the society. In a way, it also sets the platform for the interrogation of the new regime since it will be judged by a higher standard since it has professed its commitment to the higher standards by prosecuting egregious violations of human rights. On the other hand, the question of peace and the need to consolidate whatever fragile polity that is in place in post-conflict societies is one that comes up too often the discourse in the field. Indeed, this is the strongest argument I find, and its echo is found so large in the literature. [265]

It must however be noted that both desires for justice and peace are not mutually exclusive. Better approaches can always be worked out to the best interest of the transitional community. What is important is that we ensure that we do not lose either the peace or abandon the search for justice. This can only be so because justice without peace is incomplete. It is not sustainable. Peace without justice is equally a mistake and will not stand the test of time. However, time considerations may play a part in the design and articulation of methods and processes of transitional justice. But to forget entirely – "get over it" – in the name of peace may not be the best outcome for the society.

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[265] Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, The Yale Law Journal Vol. 100. Diane articulates carefully a number of the arguments for and arguments against prosecution and the dilemmas of restoring rule of law in transitional societies. See also Emilie Steasrad Ellen, *New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia*, Journal of Peace Research vol. 46. No. 1 (Jan., 2009) pp. 5 -15.

Hence it has been noted that "in keeping silent about evil, in burying it so deep within us that no sign of it appears on the surface, we are implanting it, and it will rise up a thousand-fold in the future. When we neither punish nor reproach evildoers, we are not simply protecting their trivial old age, we are thereby ripping the foundations of justice from beneath new generations." [266]

2.02.TEMPORALITY, LAW AND TRANSITIONAL JUSTICE

"Delay defeats equity" [267]is a popular maxim in law. Its resonance is felt everywhere on the fabric of such areas of law as criminal liability, torts, contracts, and

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[266] Solzhenit͡syn Aleksandr Isaevich,*The Gulag Archipelago 1918-1956: an Experiment in Literary Investigation.*1St Perennial Classics edition, New York: Perennial Classics, 2002. The same can also be said about the violence that happens in society. In burying it so deep and seeking to forget without providing remedy either through one means or a combination of measures we postpone the evil day. It will come back in manners we may not imagine and may be costlier in the end. It is however a matter that has to be carefully thought through with a view to doing what is best by the society in issue. Increasingly this is becoming the narrative particularly in the face of the establishment of the international criminal court and the trials that have taken place there in recent times. Many have also argued that the fear of prosecutions may have unwittingly made it impossible to put an end to the wars in Sudan and the Congo.

[267] 6th Maxim of equity. See John McGhee (ed.) *Snell's Equity*, 32nd Edition, London, Sweet & Maxwell, 2010. For Common Law oriented scholars, the maxims are quite familiar. They are neither normatively exhaustive nor procedurally determinate. The maxims however represent

general procedural requirements in both criminal and civil litigations. Temporality issues in law are thus daily staples on the schedule of legal experts. They bestride different legal traditions and intersect many disciplines. These temporal questions give

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an attempt to give a precise articulation of the principles which guided the decisions of the Courts of Chancery. They were originally formulated to ameliorate the hardships which were caused by the rigors of the Common Law. Hence equitable remedies in law like equity of redemption, specific performance, rectification were developed pursuant to these principles. Overtime the Courts of Chancery were merged with the Common law Courts – via the English Judicature Acts. This subsequently led to the adoption of these principles as inherently part of what is known today as the Common Law. There are significant tools of law making particularly judicial interpretations and decisions. Snell – a respected legal authority at the time – is known to have laid them down in a rather remarkable way hence they are today referred to as "Snell's Maxims of Equity." See John Indermaur, *A Manual of the Principles of Equity: A Concise and Explanatory Treatise Intended for the Use of Students and the Profession,* 17th Edition, London, G. Berber, 1913. The temporal dimensions of equity are seen in cases involving limitation of time, laches, prescription and the like. They can be very definitive in probate proceedings and property law in general. It may be necessary to see what significance this has in transitional situations especially in considering policies of exclusive expropriations of proprietary rights in such communities. It resonates deeply over questions of restitution, reparation, land reform and compensations. This seems to me a juicy issue that can be interrogated regarding the theoretic underpinnings and the economic aspects of transitional justice. It is however, beyond the scope of the present research to delve into this thrilling aspect of schorlarship.

different hue to different shapes and forms of modernity and law. Questions of temporality equally affect socio-cultural significance of laws in different societies.

Therefore, one is not surprised in the least that time is one of the most debated concepts in philosophy – a phenomenon of immense disputations. Its epistemic significance is yet intriguing despite the length of time and volumes devoted to its understanding, articulation and exposition. It permeates every aspect of human inquiry. It measures, and gazettes. It enhances or diminishes other material realities depending on what is known or unknown about them with the effluxion of time. Indeed not a few philosophers have argued that time transcends material reality. It is cast in marble sediments; it is lost in denuding currents – yet time itself remains timeless. It could therefore be said, that the human conceptualization of any aspect of existence – including law, justice, government, morality, rights, wealth – is largely a question of temporality and spatiality.[268]

Time and space forms the crucible wherein we brew all these other necessities of human societal living. Time connotes a certain sequence of things. It may also be viewed in a Cartesian-like ordering and coordinates. It is also a sort of interposition of or intersection of events between one terminus and another. Thus, no oracular perception

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[268] Albert Einstein's Theory of Relativity is deeply entrenched in this time-spatial equation. I however disclaim any ability to examine the physical laws and normative claims that inform the profound theory of relativity as envisioned by Einstein and other great physicists in contemporary times. It is only intended to draw attention to the pervasive nature of time questions on all that we do. Time therefore is an existential reality, yet it remains something we have not completely unraveled.

is needed to assert the articulation of existence as an aggregation of time and spatial slices. Be it physics or metaphysics; being, nothingness, becoming; life or death – it is a question of time. But how relevant are all these articulations of time to transitional justice? How much attention or critical evaluation should we place at the temporality aspects when considering possible transitional justice measures in post conflict or post authoritarian societies? This paper aims to draw attention to the issues of temporality in transitional justice. It hopes to make a case for a more deliberate consideration of the issues of temporality that underlie transitional justice. If one concedes that transitional justice involves a set of measures aimed at redressing mass violations of human rights, reconciling citizens and setting up a more inclusive, cohesive and progressive society, then one must be attentive to the place of time in the intricate equation of transitional justice processes. The lived experience of the society is important in fashioning out transitional justice efforts and tools.

I argue that though decisions relating to time – particularly regarding periodization of the transitional justice mechanism, be it criminal prosecution, truth commissions and such other mechanisms – are made, they are often political calls and legal scholars often take it as given without more. It seems to me however that, there is need to engage the temporality questions that are multi-faceted in transitional justice situations as a way of enriching the literature. This I believe will deepen the transitional justice studies and equip it with a further tool of navigating the often-difficult legal landscape of transitional justice societies.

Alas, temporality in law and transitional justice is not a minor discourse. It is rather, a deep field of legal theory and many a scholar have been left unfulfilled by the

seemingly recondite debates about time questions in law and transitional justice. But in the fields of philosophy and physical sciences, many ideas have been brilliantly espoused. The exposition of the time questions in physical sciences can stretch as far as classical philosophy. It has also resonance in different traditions and societies. To this effect, it interacts and intersects with different cultures, values, systems, beliefs and world views. However, the concern in this work is not on the physical aspects of time but rather on the experiential or human activities caught within time. In this particular respect, human activities in transitional justice situations.

An appreciation of this fact is of immense importance to transitional justice. This is so because an amalgam of a number of these factors influence the conceptualization and operation of transitional justice mechanisms. Understanding the views regarding time or temporality in any post conflict or post authoritarian society, may well hold the key regarding how best to fashion a fitting transitional justice measure in that particular society. Of course, one is convinced about the forgoing assertion because it is now almost settled that the best transitional justice mechanism is that which puts in perspective the values of any given society. At no point however, must the transitional justice effort forget the fact that that imprescriptible and universal values like human dignity and worth of the human person. These areas of common humanity and human rights need not be diminished by the different value systems and time sensitive questions. The point being made being that the time issues gives transitional justice experts another formidable tool of inquiry – which may be the most crucial tool in some situations.

TEMPORALITY – WHAT IS IT?

"If no one asks me I know; if I wish to explain it to one that asketh, I know not."[269]"The long unmeasured pulse of time moves everything. There is nothing hidden that it cannot bring to light, nothing once known that may not become unknown. Nothing is impossible."[270] By way of etymology, "temporality is traceable to the Latin word 'temporalis' or 'temporalitas.' In one sense, it is a noun pertaining to the state of existing within time. It is about having some relationship with time.[271] On the scientific plane existence as we know it began with a big-bang. If we accept that as our premise for instance, it could then as well be interpreted as the beginning of all things including time. For others, there is nothing like objective time – whether construed as lineal, teleological, cyclical or a combination of these. To wit, no matter how these are integrated – whether horizontally or vertically – it is merely a subjective construction by the human mind and imposed on reality. It is what our minds project for us to make sense of reality.

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[269] St Augustine*, The Confessions*, Book XI

[270] Sophocles, *Electra and Other Plays,* (Penguin Classics) Translated by E. F. Watling, Penguin Books England, New York, 1953, page 40; ______, *Ajax, Electra, Oedipus Tyrannus*, Edited and Translated by Hugh Lloyd-Jones, Harvard University Press, Cambridge Massachusetts 1994.

[271] In another sense, it may be used to refer to 'a secular possession, especially the properties and revenues of a religious body or a member of clergy. This paper uses the word temporality as it relates to time and not to secular possession of property or powers by ecclesiastical bodies. See Oxford Dictionary of English, Oxford, Oxford University Press 2015; Bryan A. Garner, (Ed.) *Black's Law Dictionary 10th Edition*, Thomson Reuters, St Paul MN, 2014.

A great many others have argued in the opposite – namely; that time is not just a subjective creation of the human mind. Time is objective and a knowable phenomenon. It is arguable that a large segment of the questions and debates in phenomenology – existence, being and nothingness – pivot around this question of objectivity or otherwise of time as a concept. The litter of arguments from Kant to critical theory tell of a vibrantly contested idea.

Even before Augustine, thinkers like Heraclitus and Parmenides have argued that things are always in a flux. Meaning that there is no static state of being – there is always a becoming. For others, the evolutionary interpretation of existence as can be gleaned from the layers of fossils is only but a layering of what was. It is therefore intriguing how we are all caught in time yet facing the unknowability of its movement and how that intersects with our social orderings. However, we are not going to keep ourselves hostage to the debates. All that is intended here is to seek out the issues of temporality that permeates transitional societies and how that is usefully both in the design and implementation of transitional justice measures in those societies. Thus, David Hoy while exploring the views of Kant noted that though the main questions about time revolves around whether what Kant calls 'the starry skies above is objective or subjective, that is mind dependent or independent, real or ideal.

However, David opined that the same question cannot be asked of temporality for a number of reasons. First, human experience is temporal whether or not we are conscious of it. Equally, it appears to be quite difficult to deny that we are conscious of temporality. This is distinct from the questions regarding the source of time. Hence, he states that: "clearly, human experience is temporal, whether or not we are conscious of

the temporal" Thus, it is a tedious task to seek to competently deny temporality considerations regarding existence.[272] Though many metaphysical questions arise regarding the ideality or reality of time, the temporality thereof is undeniable. David Hoy argues that ignoring these metaphysical contestations will allow us concentrate of the subject matter of temporality.

Examples of time sensitive issues found in transitional justice is the usual timeline given for either criminal prosecution or truth commission or any other transitional justice process that is to be carried out. For instance, the Liberian truth

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[272] Charles Darwin in his work the origin of species had considered reality and existence as having evolved from the minutest species over millennia to the present moment. It is still evolving some will argue. Even for the creationists and those believing in original design or intelligent design, there is equally a beginning. Namely, the *terminus aquo* – in the beginning was the word says the holy writ. There is also the *terminus ad quem* – the times – many religions and cultures believe in this end time though they interpret it in several ways. For some the end time is nirvana, for others it is paradise for others, yet it is *mahapralyi* and for others it is just nothingness – beyond this existence there is no existence. See Wole Soyinka, *The Credo of Being and Nothingness*, Michigan State University Press, 2000; Martin Heidegger, *Being and Time*, Translated by Joan Stambaugh, State University of New York Press, 1996; Jean-Paul Sartre, *Being and Nothingness: An Essay in Phenomenological Ontology*, New York Citadel Press, 1964; ____*Essays in Existentialism*, Edited by Wade Baskin, Citadel Press Kessington Publishing Corp., 1993; Charles Darwin, *On the Origin of Species by Natural Selection*, London, John Murray 1859.

commission mandate provided for investigation and hearing on violations that occurred. There are equally some temporal dimensions to the measuring of the impact of transitional justice. An instance of the temporal dimensions of this transitional justice impact is perceptible in the German situation. P. Hazan, opines that, "until the 1960's most Germans saw the war crimes tribunal – the Nuremberg Tribunal – only as rendering justice of victors. To their mind, the blanket-bombing of Dresden, Hamburg and Berlin by the US and the UK Air Forces was the price already paid by German Society for Nazi crimes. It was not until the 1990's that the Nuremberg Tribunal became an integral part of the German frame of reference and played a part in the younger generations' questioning of their elders' attitude during the war, a questioning reflected in the rapid rise of pacifism". [273] This means much in terms of knowing when best to situate a transitional justice process, what mechanisms to be adopted and the time frame of such processes.

Having highlighted the time attribute of transitional justice, it is imperative to proceed to the other contested grounds within transitional justice process – namely public memory. What does society remember about a particular war, conflict or social breakdown arising from authoritarian leadership? How does society remember and what determines what is to be remembered and how does this conversation link-up with the overall architecture of transitional justice? This will be the next pivot of our discourse.

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[273] Pierre Hazan, *Measuring The Impact of Punishment and Forgiveness: A Framework for Evaluating Transitional Justice*, International Review of the Red Cross Vol. 88 No 861 March, 2006.

2.02.1. CONTESTED GROUNDS – PUBLIC MEMORY AND TRANSITIONAL JUSTICE.

"Public memory refers to the circulation of recollections among members of a given community. These recollections are far from being perfect records of the past; rather they entail what we remember, the ways we frame it and what aspects we forgot." [274] It is important not to mistake this with official history because though official history may create the context and inform the content of public memory it differs in that it emanates from the consciousness of the members of a given group in the society. It could also ultimately become the public memory of the society in entirety. "Clearly, memory has many different meanings, ranging from the recollection of individual experience to the reality of "sedimented experience," through which the past guides our actions in the world at an [275]often-subconscious level.

When scholars and practitioners discuss memory in the context of post-atrocity societies, however, they are most often referring to interpretations of the past that impact

[274] Matthew Houdek & Kendall R. Phillips, *Public Memory*, Oxford Research Encyclopedia of Communication http://communication.oxfordre.com/view/10.1093/acrefore/9780190228613.001.0001/acrefore-9780190228613-e-181 <accessed 04/18/2018>.

[275] Whigham, Kerry E., *Remembering to Prevent: The Preventive Capacity of Public Memory*, in Genocide Studies and Prevention: An International Journal: Vol. 11: Issue 2: (2017) 53-71. This essay did a great work of articulating the preventive value inherent in public memories and greatly surveyed the literature in the field. Much of the work also anticipated the debates about the forgetting as an alternative. I gained a lot from the way it was presented.

the present." Public memory is therefore more diverse, informal and temporal. Indeed, it is perceivable in the scholarship in the field that close scrutiny should be given to these informal recordings as they appear to have a more direct touch to those who produce it. In a sense it could be a ground for humanizing the events or experiences because it exudes the breath of those whose lives gave birth to it. Thus, public memory means the acts, actions, processes and ways through which memories which are ordinarily that of the individual transcends the individual spaces and becomes the shared memory of a community or group. The collectivization of these leads to a common perception of what it is that is sacred, dear and important.

This, one argues is so because, human's existence in society is an intense phenomenological encounter. The realities – albeit imagined realities sometimes – and constructions of being, nonbeing, becoming and all that vast spaces between these dialectical positions are matters of immense study and interrogation. It is therefore not surprising that, the mind's construction and articulation of existence is often an interaction between experience, reason, remembrance/recollection and encounter. To think, is to combine some of these variables and juxtapose them with our present. How one individual mind or being does this may yet differ from how a great many others within the same milieu may do it. How to aggregate these reconstructions, remembrance or experience may also become a field of deep contestation? To privilege one narrative or memory may unwittingly diminish another hence the need to pay particular attention to the nuances.

This is especially so in transitional societies. Yet, what is our present or past is a question of temporality – transient – and only a slice of it can we capture in pictures,

records, sculptural works or such other memory making figurines. Meanwhile, Faulkner argues that, "the past is not dead, it is not even past."[276] Faulkner's views do not in any way suggest not 'moving on' but rather an appreciation of the fact that the present may not be properly understood unless we are to put in perspective the past. Some have argued that to remember is to create a ground for reawakening of conflict. For many others, remembering or creating a public memory is a ground for social cohesion and does function as a preventive reminder of the cost of following the path of perfidy which the society has followed in the past. Hence the echo of George Santayana that to forget the past is to pay the price of repeating it. [277]

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[276] William Faulkner, *Requiem for a Nun*, Vintage International Books, New York, 2011.

[277] Aleida Assman, *Cultural Memory and Western Civilization: Functions, Media, Archives*, Cambridge, Cambridge University Press, 2011; Paul Connerton, *How Societies Remember*, New York, Cambridge University Press, 1989; Marianne Hirsch, *Family Frames: Photography, Narrative, and Post memory*, Cambridge, MA, Harvard University Press, 1997; Marianne Hirsch, *The Generation of Post-memory: Writing and Visual Culture After the Holocaust*, New York: Columbia University Press, 2012; Andreas Huyssen, *Present Pasts: Urban Palimpsests and the Politics of Memory*, Stanford: Stanford University Press, 2003; Elizabeth Jelin, *State Repression and the Labors of Memory*, Translated by Judy Rein and Marcial Godoy-Anativia, Minneapolis: University of Minnesota Press, 2003; Dominick LaCapra, *History and Memory after Auschwitz*, Ithaca: Cornell University Press, 1998; ______, *Writing History, Writing Trauma*, 2nd ed. (Baltimore: Johns Hopkins University Press, 2014); Alison Landsberg, *Prosthetic Memory: The Transformation of American Remembrance in the Age of*

However, the mind is the most viable crucible of memory. In that crucible is forged the ideas, memories and interpretations of our experiences.

Hence, these questions – about memory and its interconnections with public memory – have dwarfed the most curious minds and continues to dominate the cognitive sciences whether as literature, language, or philosophy. Indeed, their epistemic value remain indispensable to who we are as human beings. If we are to adopt the social theory of the society being an organic structure,[278] – then it becomes natural to talk of the social organism having a mind of its own – a social psychology. This social psychology, can therefore be informed, kneaded and baked into a particular frame. Its experience and interpretation of same may just be the post most potent tool of social violence, domination and destruction. The grave yard of human rights violations is first and foremost the human mind – by extension the social mind or consciousness. The decapitations and denial of humanity are first conceived, constructed, transmitted and

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Mass Culture, New York: Columbia University Press, 2004; Michael Rothberg, *Multidirectional Memory Remembering the Holocaust in the Age of Decolonization* Stanford: Stanford University Press, 2009; Diana Taylor, *The Archive and the Repertoire: Performing Cultural Memory in the Americas*, Durham: Duke University Press, 2003; James Edward Young, *The Texture of Memory: Holocaust Memorials and Meaning,* New Haven: Yale University Press, 1993; ______, *The Art of Memory: Holocaust Memorial in History*, New York: Prestel, 1994;_______, *At Memory's Edge: After-Images of the Holocaust in Contemporary Art and Architecture*, New Haven: Yale University Press, 2002.

[278] Emile Durkheim, *The Division of Labor in Society*, Free Press New York 2014.

executed in social consciousness before they manifest in the physical. The minds construction may well be of immense positive value when kneaded appropriately.[279] Politicians harken to it in search of validation. Demagogues deploy it in rousing their relevant audience. It can therefore become catastrophic when viciously applied to construct a poor social, collective visualization or memory of communities or others in society.

Hence, the place of public or collective memory in transitional societies cannot be overemphasized. One way of looking at it is to note that, "the story teller creates the memory that survivors must have otherwise their surviving would have no meaning …the anthill survives so that new grass will have the memory of the fire that devastated the savannah during the previous dry season." [280] The significance of this can be seen

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[279] Carl Becker noted that the duty of historians is to construct a governing ethos for the society. See Becker, Carl L. *Everyman His Own Historian: Essays on History and Politics.* New York: F. S. Crofts & co., 1935.

[280] Chinua Achebe, *Anthills of the Savannah*, London, Heinemann Publishers, 1986. Achebe highlights the value of the articulation of public memory in post-conflict societies. The metaphor of anthills and the fire of the previous dry season is a fitting metaphor and keys into the temporal dimensions regarding the period of violence and gross abuse of human rights. It could also recall or depict the resilience of strongly held values. The anthill in this circumstance having the value of being the undying truth of the period. Stretching the metaphor of young shoots could equally be what can be called new hopes on the horizon and such other optimism that arises in transitional societies despite the violence of the period before. I argue that this

in the long and yet untold story or memory of slavery, holocaust and other genocidal happenings we have seen in modern history. The critical nature of the contest for that memory is ever present in public discourse. Why is the story so important? Why does it matter whose memory is recalled and how it is recalled? Who should be remembered? The far reaching symbolic, existential and metaphorical importance of the memory is one reason why it is a ground for great legal fermentation and contestation. One would then wonder – aren't we all the product of symbols? Is it society built on symbols, and memories? "In our political parties, compute the power of badges and emblems …see the power of national emblems. Some stars, lilies, leopards, a crescent, a lion, an eagle or other figure …shall make the blood tingle under the rudest or most conventional exterior."[281]

I would argue that, it is therefore quite perceptible that human societies are animated by symbols – symbols make us. Symbols capture our memories. They idealize our existence. They tell our essence. They give meaning to some of our most cherished possessions. Thus, they are often of great potential in communications in the public space. Depending on who has the capacity, symbols can also be a tool of power hence

important and keys into the need to remember and keep efforts geared towards approaching the history of the country. In yet another segment of the book, Achebe had this to say, "story tellers are a threat. They threaten all champions of control, they frighten usurpers of the right to freedom of human spirit …in state, in church or mosque in party congress in the university or wherever."

[281] Ralph Waldo Emerson, The Poet, https://www.poetryfoundation.org/articles/69389/from-the-poet <accessed 11/6/18>.

it is a ground of heavy contestation in post conflict societies. It is also my point that they are also the stuff of human and social psychology – and this further heightens their importance. The point being made here is that memory in transitional justice situations has increasingly become a place of contestation.

From being a marginal matter in the area of transitional justice it has come to the centerspread of the conversations around public acts of remembrance and closure in post conflict situations. Before now it did not seem to be considered an integral part of justice in post conflict and post authoritarian societies. The main field that focused on it was possibly geography, urban planning and history. Hence law and justice are late comers to the conversations regarding institutional, collective and public memory.[282]

The question that therefore seeks elucidation here is – what then is public memory and how does it intersect or play out in transitional justice situations? The literature of collective memory is very prevalent in the fields of sociology, history, geography and the like. It is broadly debated as can be seen in the works of Émile

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[282] The increasing prominence of this issue of public memory is traceable to the transitional justice questions that faced the Eastern European states at the end of Soviet political control at the turn of the millennium. Before then no doubt a number of public memory subjects had been done – example the holocaust memorial, the World War II memorials and the slave memorials. It was more in the field of humanities and arts in general. But the events of the 1990's have squarely placed it at the center of transitional justice efforts.

Durkheim[283] and Maurice Halbwachs.[284] Both scholars agree that, memory was not just about looking at the attributes or properties of a subjective mind but an examination of how the mind works together with the society. It is also a question of how the minds operations and attributes are structured and encapsulated by social arrangements. For then individuals normally acquire their memories in society.

It is therefore practically difficult to remember in a consistent and coherent way outside their group. The group conceptualization of memory thus gives individual recollections or forgetting a new meaning unlike it would have otherwise been.[285] The shared memories are often neither uniform nor without controversy. But on a broad note, they give expression the social realities within the community. It is sometimes referred to as collective memory. Bearing in mind the nature of problems that confront transitional societies and the potency of memory making in policy formulation and implementation in such societies, it is often a ground for vibrant and sometimes violent contestation in those societies. It is therefore critical to examine the process to be adopted and how it gives credence or otherwise creates a forgetfulness for a particular group or public memory. Little wonder that it is true that powers brokers in society are

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[283] Emile Durkheim, *The Elementary forms of Religious Life,* Translated by Joseph Ward Swain, Dover Publications, INC., New York, 2008.

[284] Maurice Halbwachs, *The Social Frameworks of Memory*, 1925.

[285] Winter Jay, Remembering War: The Great War Between Memory and History in the Twentieth Century, Yale University Press, New Haven 2006.; Olick Jeffery K. and Joyce Robbins, Social Memory Studies: From Collective Memory to Historical Sociology of Mnemonic Practices Annual Review of Sociology 24, 105 – 140.

often frightened by story tellers. It is not far-fetched to imagine such in post authoritarian societies.

CHAPTER THREE: OVERVIEW OF REPRESENTATIVE TRUTH COMMISSIONS IN WEST AFRICA – LIBERIA, SIERRA LEONE AND NIGERIA.

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The work here focuses on the representative truth commissions which have been carried out in Liberia, Sierra Leone and Nigeria. However, it is imperative to situate the countries within the West African region. This helps in contextualizing the discourse and also geographical situate it in the mind of readers who might not be very familiar with the region. The West African sub-region of Africa has been quite at the forefront of the historical and political evolution of Africa. Particularly, it can be put forward that,

[286] Source: ECOWAS

the region is pivotal in the evolution of sub-Saharan African encounter with Europe and the global north beginning from about the 1400.[287] It is arguable that it was the nursery bed of pro-independence activities in Africa. It has also remained very progressive in the attempt to redefine and transform the African political and development landscape. It will not be outlandish to say that in the writings of and political activism of the likes of W.E.B Du Bois, Cheik Anton Diop, Leopold Seder Senghor, Sekou Tore of Guinea, Kwame Nkrumah of Ghana, Nnamdi Azikiwe of Nigeria, the liberation struggle for the region was born.[288] Indeed, the nature, substance and continuum of the politics of Africa cannot be well articulated without due acknowledgement of the peculiarities and contributions of the West African zone.

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[287] We are mindful of the many other encounters of the people of this region with other parts of the world long before this date. But it is safe to say that except for the movements across the Sahara from the Maghreb and other parts of north/central Africa, West Africa's encounter with the wider world did not produce as much radical disruption and social change as the encounter in the 1400's did. Again, our reading of the history is borne out of contemporary questions of modernity as we know it in the region today. This must not however be interpreted as if to say other encounters were benign or did not produce their proportionate dissonance in the region.

[288] A broad biographical text about these individuals will give context to their place and contributions to the development of the West African Region. The role of Nkrumah and his peers in the formation of the Organization of African Unity with its predecessor as the African Student's Union made a great impact in the decolonization struggle.

Geographically, the West African Region is located on the west of North Axis and lies close to 10 degrees east longitude. The brilliant blue waters of the Atlantic Ocean form an impressive wall around the south and west of the West African region. The long coastal line offers it both an uncommon beauty and equally serves as the harbinger of many of her fortunes and misfortunes throughout history. The epochs of her history are definable by the events that came through the Atlantic Ocean. It was for instance the platform for slavery and trans-Atlantic slave trade which thrived along those shores for centuries until the abolition of the trade in the 19th century. The Atlantic Ocean served therefore, not only as her precious access to the world but the graveyard of many of her children throughout that pernicious era. The northern border of the region is the Sahara Desert, with the Ranishanu Bend considered the northernmost part of the region. This peculiar geography is significant in the way its peoples have evolved – culturally, economically, politically and otherwise. The eastern boundaries of the region lie in-between the Benue trough and a line[289] running from mount Cameroon to Lake Chad.

[289] These are arbitrary lines drawn in colonial times. It is today such an interesting conversation - regarding the boundary lines of the territories and countries that form the western African region and indeed other African regions. One particularly outstanding issue is that the colonial boundaries are in principle frozen as they are owing to the doctrine of *uti possidetis* which the OAU (AU) adopted via the Cairo Declaration on boundaries. Benue Trough, and a line running from Mount Cameroon to Lake Chad. Colonial boundaries are still reflected in the modern boundaries between contemporary West

Cumulatively, the region has 15 (fifteen) countries[290] and an estimated population of about 400 million. Many indigenous languages are spoken by the peoples of West Africa. However, on a national scale many of the countries have adopted the language of their colonial governments as the common language of the countries. This in most case is informed by pragmatic considerations as doing otherwise will mean creating a new language that will embrace the, multiple groups and identities in the country. It therefore has French, English, and Portuguese speaking countries. Within the region Ghana, Nigeria, Sierra Leone and Liberia are oriented towards the common law legal tradition. The remaining countries operate the French and Portuguese versions of the civil law tradition. Most of these countries became independent in the later part of the 19th century through decolonization and hence efforts at state building has been on.

The cold war no doubt affected the political development of the countries of the region. This was not helped by the poor leadership in the region and hence political fragility has been a great problem for the entire region since the 1990's. There is a great

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African states, cutting across ethnic and cultural lines, often dividing single ethnic groups between two or more states. The region has a territorial area of about 5milion square kilometers.

[290] The countries that make up this region include; Benin Republic, Burkina-Faso, Cote D'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.

effort at integration within the region.[291] Hence, the Economic Community of West African States – ECOWAS – has a uniform passport for its citizens. For the region a number of truth commissions have been adopted. However, our work focuses on that of Nigeria, Liberia and Sierra Leone.[292]

Illustrative of the fragility in the zone, is the fact that it has fluctuated from one civil war to another; coups and radical – unconstitutional – change in government. Even now pockets of radical ideologies and insurgency has been bedeviling the region. The military interventions in the region is still an issue. Thus, in response, many of the emerging democracies channel efforts towards community reconstruction, rebuilding and reconciliation. In recent times many of the countries have established truth commissions or some form of public hearing mechanism – in the case of Sierra Leone a mixed method – in the search for the way forward in the remaking of their broken

[291] The Charter of ECOWAS highlights this integration. It is highly important considering the fact that the boundary lines are often artificial in the sense that you could find communities split in between countries instead of just being within one country territorial borders.

[292] While the debate rages regarding the functionality of truth commissions in the larger landscape of transitional justice there is no gainsaying that it is still highly valued in the transitional justice architecture hence its wide deployment in the transitional justice architecture of the region.

communities.[293]Nigeria,[294] Liberia,[295]Ghana,[296]Sierra Leone,[297] Gambia,[298]Côte D'Ivoire,[299]either have considered at some point or adopted the Truth Commission

[293] The effort at putting together truth commission is often an aspect of the peace accords between government and warring groups with these countries. In the case of Liberia there was a Comprehensive Peace Accord made under the auspices of the Economic Community of West African States in Accra Ghana in August 2003.

[294] Nigeria instrument no. 8 of 1999. The curious aspect of the Nigerian Human Rights Investigation Commission is that it was not given an enabling statutory standing. Unlike in the other countries where a strong enabling act was provided, it was not so in the case of Nigeria hence it became a problem to seek enforcement of the invitation of the top-ranking members of the military.

[295] The Liberian Transitional Legislative Assembly – Truth and Reconciliation Act, Enacted May 12, 2005.

[296] National Reconciliation Commission Act No. 611 of 2003.

[297] Established by The *Truth and Reconciliation Act of Sierra Leone 2000*. The Commission was however inaugurated on July 5, 2002.

[298] Gambia has just set up a Truth Commission in March 2018 to seek a record and investigation of the twenty-two years of the rule of Yahaha Jahmmeh.

[299] Because of the violence and crisis that followed the elections in the Country in 2010 – 2011, a Commission on Dialogue, Truth, and Reconciliation (*Commission Dialogue, Vérité, et Réconciliation, CDVR)* to promote reconciliation, uncover the truth about past human rights violations, and provide recommendations on how to prevent future abuses and provide to

mechanism in attempting to solve this problem. What this multiple adoption of the truth commissions reveals is that the instrument is seen as popular in the region. One can predict that it will continue to be used in the near future considering the dissonance presently in the region in the face of Boko Haram and the insurgency in Mali, Senegal, and the ongoing push for change in the long-term rule of many leaders in the region. In this segment of the work we intend to examine three of these truth commissions – Liberia, Sierra Leone and Nigeria. A number of factors set these three apart. First of these factors is time. Second is the related nature of the crisis between Liberia and Sierra Leone. Note also the connectedness of the political history of Liberia and that of Sierra Leone – as settlement nations for emancipated blacks in America and British Territories respectively – though they have evolved differently. Finally, Nigeria in terms of its size and political position in the region is very strategic. Its military capacity was significantly utilized through the ECOWAS Monitoring Group in stopping the civil wars and also in maintaining regional stability. Yet Nigerian democracy is still fragile. Its fragility has been further exacerbated by the emergence of radically minded terrorist organizations in Nigeria, Mali – the Sahel and the northern peripheries of the West African region. It is therefore of critical importance in terms of building institutions and setting out templates that will help prevent impunity and restore socioeconomic development in the region. We shall proceed with the Liberian truth Commission and then progress unto Sierra Leone and Nigeria.

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victims. The CDVR took testimony from about 72, 000 Ivoirians and the Commission concluded its hearing in September, 2014.

1. THE LIBERIAN TRUTH AND RECONCILIATION COMMISSION

There is no gain saying that the Liberian civil war between 1989 and 2003 left untold hardship and violence in its wake in that country. It destroyed the fabric of the community, led to the death of many and left so many others displaced as refugees and internally displaced persons within and beyond the West African region. Liberia which ordinarily should be the bastion of African democracy had at this time become a desolate ground needing transformative repair and reconstruction. There was therefore a gapping need for articulating how to heal and mend the society which had hitherto been deeply destroyed. This was also needed because economically Liberia had been destroyed. According the World Bank development indicators were in the negative. Seventy percent of the population lived below the poverty line. Life expectance was put at 53, and GNI per capita stood at eighty dollars.[300] Broken infrastructure, broken institutions and broken lives littered the field. The most egregious violations of human rights including murder, amputations, and rape, had happened in the country.[301] It is estimated that about 250,000 Liberian citizens lost their lives to the war. Another 1.5million were also displaced in several parts of the continent and the world. Thus, there was need for healing, reconstruction, reconciliation and remaking of Liberia. In the comprehensive Peace Agreement signed in Accra Ghana, it had been set out and agreed to by the warring factions in the Liberian civil war that there will be a Truth and Reconciliation

[300] See World Bank Report https://data.worldbank.org/country/liberia <accessed 11/6/18>.

[301] Credit must be given to the women of Liberia for the indispensable role they played in ending the civil war they were awarded Nobel Prize for Peace in 2004/2003.

Commission.[302] So following this intention evinced in the Comprehensive Peace Agreement a Truth and Reconciliation Commission was set up in Liberia on the ….2005. It is intended here to look at this truth and Reconciliation Commission paying particular attention to the constitution, mandate, duration and publication of reports of the truth commission. These we believe are significant in understanding these truth commissions and equally in appreciating the subsequent interrogation of the functionality and impact of the chosen truth commissions in their respective countries.

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[302] Article xiii of the Comprehensive Peace agreement had noted that "A Truth and Reconciliation Commission shall be established to provide a forum that will address issues of impunity, as well as an opportunity for both the victims and perpetrators of human rights violations to share their experiences, in order to get a clear picture of the past to facilitate genuine healing and reconciliation. In the spirit of national reconciliation, the Commission shall deal with the root causes of the crises in Liberia, including human rights violations. This Commission shall, among other things, recommend measures to be taken for the rehabilitation of victims of human rights violations. Membership of the Commission shall be drawn from a cross-section of Liberian society. The Parties request that the International Community provide the necessary financial and technical support for the operations of the Commission." See the Comprehensive Peace Agreement Executed between the Government of Liberia (GOL) the Liberians United for Reconciliation and Democracy (LURD) The Movement for Democracy in Liberia.

It is safe to say at this stage however, that their adoption as a tool of transitional justice is prima facie in line with our transplant hypothesis.[303]

A. THE CONSTITUTION[304] AND MANDATE OF THE LIBERIAN TRUTH COMMISSION.

A 9(nine) member truth and reconciliation commission of Liberia was sworn in pursuant to the intendments of the National Transitional Legislative Assembly Act of 2003 on May 12, 2005. The members who were all Liberian nationals included lawyers, social workers, clergy and nurses. They were also all persons considered to be representative of the different social and economic backgrounds within the Liberian

[303] Before 1999, there is no record of any truth and reconciliation commission are any of its mutations in the West African region. This was despite the fact that a great many violations of human rights have been taken place. Argentina, and other parts of Latin America. Nigeria was the first to attempt it in 1999, this was then followed by Ghana and Sierra Leone in 2002. Liberia began in 2006 and the trend suggests a continuation of this trend of adoption.

[304] By constitution here is meant the membership of the Panel. This is critical in understanding the work it did and situating it in the larger questions of impact, perceived success or otherwise of the Truth Commission vis-à-vis other truth commissions within the region

community at the time. The members were; Jerome Verdier[305], Dede Dolopei,[306] Oumu K. Syllah,[307] Sheikh Kafumba F. Konneh,[308] Pearl Brown Bull,[309] Gerald B.

[305]Councilor Jerome J. Verdier, Sr. is a practicing attorney, credited for rendering pro bono legal services to indigents, civil society activists and journalists, while also leading civil society adversarial legal teams in several successful lawsuits against the government of Liberia. He holds a Bachelor of Business Administration (BBA) from the University of Liberia and a Bachelor of Laws Degree (LLB) from the Louis Arthur Grimes School of Law. Apart from working in the private and public sectors as a senior accountant, comptroller, and executive director, he has been instrumental in strengthening civil society advocacy. Cllr. Verdier served as executive director of Liberia Democracy Watch (LDW), as chairman of the board of directors of The National Human Rights Center of Liberia (NHRCL), as board chairperson of the Foundation for International Dignity (FIND), as senior staff attorney for the Association of Environmental Lawyers (Green Advocates), and as the first research and program officer of the Catholic Justice & Peace Commission (JPC).

[306] Dede Dolopei is an administrator, manager, social worker and peace activist. She is a graduate of the University of Liberia, holding a Bachelor of Business Administration (BBA) in accounting. She served as a member of the board of directors for NAWOCOL and the Christian Foundation for Children and the Aging. Commissioner Dolopei has been instrumental to the promotion and protection of women rights in Liberia. She is well known for her efforts and expertise in peace building, conflict resolution, and psychosocial counseling.

[307] Oumu K. Syllah is a registered nurse, HIV/AIDS counselor, and social worker. She holds a Bachelor of Science degree in nursing from Cuttington University College, Bong County, Liberia,

and a certificate in nursing as a state registered nurse (SRN) from the National School of Nursing in Freetown, Sierra Leone. Commissioner Syllah has worked as a professional nurse and social worker at Cannaught Hospital in Freetown and St. Joseph Catholic Hospital in Monrovia. She has also acted as a trainer/ facilitator and participant in numerous workshops in the field of social work.

[308] Sheikh Kafumba F. Konneh is a leader in the Liberian Muslim community who has a long record of conflict resolution and peace building efforts. In addition to his theological (Al-Islamic) achievement, Commissioner Konneh studied secular law through apprenticeship. He held several positions in the Liberian civil service, including Justice of the Peace, Associate Stipendiary Magistrate, and County Commissioner. He has also served as Secretary General and Managing Director of the Liberian Muslim Union, as well as Secretary General and National Chairman of the National Muslim Council of Liberia. Commissioner Konneh was born in Nimba County.

[309] Councilor Pearl Brown Bull has been a lawyer and Liberian politician since the late 1970s. She has a Bachelor of Arts in political science from the University of Liberia and a law degree from Quinnipiac University, USA. Cllr. Bull also served as a professor of Management & Supervision in Law Enforcement and Criminal Evidence at Shaw University, USA. In the public sector, Cllr. Bull served as a member of the Interim Legislative Assembly, the Constitutional Advisory Assembly, the Public Procurement and Concession Commission, the Panel of Experts for the Selection of Commissioners of the Independent National Human Rights Commission of Liberia, and as Vice President of the International Federation of Women Lawyers.

Coleman,[310] John H. T. Stewart,[311] Massa A. Washington,[312] and Arthur F. Kulah.[313] They represented a wide-range of the Liberian citizenry and came from different walks

[310] Rev. Coleman is an electrical engineer and project manager by training, having completed a master's degree in electrical engineering (M.S.E.E.) and post graduate studies at Northeastern University, USA. Rev. Coleman is the Spiritual Elder and founding national missionary of the Uni cation Movement of Liberia and has worked with the mission for over 25 years. In 1996, he was commissioned Ambassador and Special Envoy of the Government of Liberia to the Far East. During this period, he worked for the peaceful transition to civilian government by facilitating several peace-building, scholarship, cultural exchange, and food-aid programs between Asia and Liberia. In 2000, Rev. Coleman helped launch the Inter-Religious & International Federation for World Peace of Liberia (IIFWP-Liberia). The National Transitional Legislative Assembly asked Rev. Coleman to help facilitate the establishment of the current TRC, a process which culminated in the final passage of the TRC Act of Liberia in June 2005.

[311] John H. T. Stewart is a Liberian journalist and activist in Liberia. He was educated at the University of Liberia and has held numerous positions including local consultant for the Media Foundation for West Africa, reporter for Channel Africa, regional coordinator for the Catholic Justice and Peace Commission, information assistant for the United Nations Population Fund (UNFPA), and National Assistant Field Security Advisor to the United Nations Development Program. Commissioner Stewart's advocacy efforts include work with the Citizens of Liberia Against Gambling (COLAG), Citizens of Liberia in Defense of Albert Porte (COLIDAP), and the Movement for Justice in Africa (MOJA). He has been an advocate for the past 30 years and has

suffered imprisonment as well as physical and mental torture as a result of his efforts. As a journalist, he served as associate editor of the New Democrat Weekly and presenter of the Radio Veritas Topical Issues program.

[312] Massa A. Washington is a journalist with more than 20 years of experience. She holds a B.A. in mass communication from the University of Liberia and took a leave from graduate studies at Temple University School of Social Administration and Management, USA, to take up her post as a commissioner. Her past positions include Public Relations Officer of the Liberian National Red Cross Society, Senior Reporter for the New Liberian Newspaper, and News Editor for the Independent Inquirer. Commissioner Washington covered the Liberian crises extensively, reporting in a column in the Inquirer dedicated to Liberian women. She is a women's rights and civil society activist and is a member of the Liberian Women Initiative (LWI) which has been at the vanguard of peace advocacy in Liberia. She has represented the women of Liberia at peace conferences including the Accra Clarification Conferences and the Abuja Conference. Commissioner Washington has worked with Liberians in the diaspora, serving as Chairman of the Association of Liberian Journalists in the Americas (ALJA), Delaware Valley Chapter, and co-owned and published the Iwina Heritage Newspaper targeting the African immigrant community in the United States.

[313] Bishop Arthur F. Kulah is a well-known Methodist prelate who traveled throughout Liberia during the civil war, spreading hope to the people. He holds many degrees in theology and other disciplines from Cuttington University College, Bong County, Liberia; St. Paul Theology Seminary, Kansas City, MO, United States of America; and Wesley Theological Seminary, Washington, DC, USA. Commissioner Kulah began serving as pastor of the United Methodist

of life and experiences. It is important to pay attention on the composition of truth commissions as they are pivotal to many factors that may affect the outcome and ultimately the impact of truth commissions. Some aspects that readily come to mind regarding the pivotal place of composition of a truth commission panel could be articulated as follows;

a. They are incredibly important in terms of commanding the needed confidence and legitimacy to the truth commission;
b. Their expertise and experience and understanding the legal, cultural, religious and sociopolitical environment of the conflict is critical in shaping the investigations and the general competencies and trajectory of the truth commission;

Church in Liberia in 1980 and held numerous prominent positions until his retirement in 2000, including Resident Bishop of the Liberia Annual Conference/United Methodist Church. As an educator, administrator and author, Bishop Kulah has served as Dean of the Gbarnga School of Theology, and Dean and Principal of the Theological College and Church Training Center in Freetown, Sierra Leone. He has written several books and articles including Liberia will Rise Again and Theological Education in Liberia: Problems and Opportunities. In June 1990, Bishop Kulah and others organized a sixty-thousand-person peace march that initiated the creation of an interfaith committee and helped build a foundation for the 2003 peace process in Liberia. *Bishop Kulah resigned his position on the Liberian TRC in March 2008, to become the Interim Bishop of the United Methodist Church of Nigeria.

c. Equally they are the face of the country's effort at transformative transition. In a way they can readily suggest to a curious bystander whether or not the country is interested in pursuing the much-needed truth and reconciliation in transitional societies.

These concerns regarding the composition of a truth and reconciliation commission are indispensable. Hence, it will form part of the fulcrum of our analysis of the issues in the course of this work.

The mandate of the Liberian truth commission as set out in the TRC Act of 2003 was to among other things foster truth, ensure reconciliation, reparation and healing in the country. Thus, it was asked to the following:

a. Document and investigate the massive wave of human rights violations that occurred in Liberia during the period January 1979 to October 2003;
b. Establish the root causes of the conflict and create a forum to address issues of impunity;
c. Identify victims and perpetrators of the conflict;
d. Establish a forum to facilitate constructive interchange between victims and perpetrators to recount their experiences in order to foster healing and reconciliation;
e. Investigate economic crimes and other forms of human rights violations and determine whether these violations were part of a systemic and deliberate pattern of violations or isolated events of violations;
f. Conducting a critical review of Liberia's historical past to acknowledge historical antecedents to the conflict and correct historical falsehood;

g. Adopt specific mechanisms to address the experiences of women and children;
h. Make recommendations to the government of Liberia for prosecution, reparation, amnesty, reconciliation and institutional reforms where appropriate to promote the rule of law and combat impunity; and
i. Compile a report and submit same to the government and people of Liberia.

On the face of it, the mandate is broad covering a period of 25 years 1979 – 2003. These are the years of significant intervention of soldiers in the political succession of the country. Thus, by the military intervention and Coup of 1980 an era in the political history of Liberia came to an abrupt and violent end. In terms of timing, the 1979 date was therefore quite important. You could say that besides the time of settlement and the declaration of Liberian independence in 1847, it was the ground zero in the modern political history of Liberia. Beginning with the brutal repression of 1979 of the riots regarding increase in the price of commodities prominent of which was rice and climaxing with equally ruthless military coup and execution of 13 government ministers and President William Tolbert, the violation of the fundamental rights of citizens and the consistent elimination of the perceived political enemies of the government became a normal state policy. Those identified as sympathetic to the course of any perceived enemy whether as members of the same tribe or political affiliation were also not spared the brutal wrath of the military power contestation.[314] With two civil wars – or one civil

[314] It is often interesting to see the explanations given by the military all over Africa to be about corruption and discrimination. But the military often ends up being the most corrupt institution and source of corruption whether in Nigeria, Liberia or Sierra Leone.

war with two phases – with the period of 25 years massive violations of human rights took place. The time line was therefore fitting for the inquiry. I make haste to add however that the scope of work to be done was too much for an ad hoc panel with limited material and human resources.

Also outstanding in the mandate as provided is the provision regarding the finding out of the remote causes of the conflict and its impact on women and children. With this the truth commission was deeply thrown into the history and sociology of the Liberian state. It therefore speaks to the understanding of what role specific sociological, historical and political structures can have in the evolution and rupturing of community and fabric of cohesion. It helps in also understanding the functionality of existing institutional models in terms of their responsiveness to concerns of the different communities and subgroups that make up a community. It seems to me that nobody was in doubt that a number of the factors that led to the violent destruction of human rights in Liberia at the time and its subsequent collapse into a civil war is traceable to the social stratifications and structures that permeated the country and continued to grow since the earliest days of independence. Of course, there may have been misunderstanding and misperceptions but if we adopt the theory of social communication by Habermas's[315] It

[315] Jürgen Habermas is a contemporary German philosopher renowned in many ways particularly for his work in *the theory of communicative* action. In which actors in society seek to reach common understanding and to coordinate the actions by reasoned argument and consensus and cooperation rather than strategic action strictly in pursuit of their own goals. By this theory three structural components of the life world correspond to these functions;

is these misperceptions that lay the foundations for crises hence they must be understood and proactively engaged to prevent the failure of state and its consequent cost in human rights and social stability.

In carrying out its mandate the Commission adopted a number of methods. It acknowledged that in terms of the methodology for the utilization of truth commissions as instrumentalities of transitional justice, there seems to be no clear or settled method or approach. In some cases, it involves a combination of investigation, and public hearing. It may also be hearing in secret especially where the identity or safety of the witness may be needed in other cases which the commission might have legitimate interest in. Often there is also a clear set of rules of procedure regarding the processes adopted in appearing, summoning, issuing notices and calling parties before the commission. The Liberian truth commission therefore did acknowledge that there is no perfect methodology and upon a thorough review of its mandate and the perceptible expectations of the country on the TRC – especially in terms of normative and doctrinal contributions to the rebuilding of the broken society – sought to develop a method that will respond to these concerns.

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culture, society and personality. At the level of culture, cultural reproduction relates to the transmission of interpretation schemes consensually shared by the members of the life world. At the level of social interaction, social integration refers to the legitimate ordering of interpersonal relations through the coordination of actions via inter-subjectively shared norms." See Mathieu Deflem, Introduction: Law in Habermas's Theory of Communicative Action vol. 20 Issue 4, pp 1 – 20 1994.

The TRC defined its work both qualitatively and quantitatively. It also perceived its work as that of a quasi-judicial body and thus designed and adopted rules to guide its work. It sought therefore to maintain flexibility in its procedures while at the sometime sustaining standards of fair hearing as the minimum standard for the search for truth as a measure of transitional justice.

Important to this was the publication of a number of bulletins[316] aimed at giving a wide publicity of these approaches and procedures thus making it permeate a large area of the populace. It also had the extra-contribution of imbuing the commission with the clout of legitimacy and public confidence which it desperately needed to pursue its mandate. These bulletins were released during the county hearings in March 2008. The second bulletin was that dealing with the general immunity for TRC witnesses.

[316] In all the Commission adopted 7(Seven) of such bulletins. The number one in the list of bulletins was that on public hearing and all other issues connected to it including but not limited to the procedures for such hearing. The TRC's public hearings series started in the capital, Monrovia (Montserrado County), in January 2008 and lasted for over a year. Commissioners then began four months of county hearings that would take the TRC to Liberia's remaining 14 counties. Through these county hearings the TRC was able to reach a large number of Liberians and heard testimony from 607 witnesses, of whom 499 were conflict survivors. The civil society was a major stake holder in the hearings and did a lot to keep them going on. There were also thematic hearings for instance focused purely on the women, children and the Liberian conflict. See TRC report page…

Confidentiality of the statement giver during statement taking was insisted upon, and anonymous statements allowed. In camera hearings were confidential and off limits to any member of the public or TRC staff. The bulletin articulated what would amount to be the protection of witnesses and thus giving them more confidence that if they did testify it would not net become a problem for them. Such is quite needful in post conflict societies whereby the perpetrators of crimes and their victims are still living side by side.

Indeed, sometimes those who were the violators during the era of conflict are still around and very capable of intimidating witnesses. There was also a restatement of the right of counsel bulletin. This was known as bulletin number three. Bulletin number four dealt with reparation, prosecution and amnesty while bulletin number five clarified issues around in camera and confidential hearing. Finally, bulletin number six dealt with application for amnesty and warrants, and compulsory processes.

It is also significant that after the commissioners of the TRC were confirmed on February 20, 2006, they did embark on various forms of training and courses regarding the history and origins of the truth commissions as a mechanism of transitional justice. This included understanding the functions, objectives and the goals of this important tool of transitional justice. There was an attempt to study what was perceived as best practices. Indeed the 9-member commission visited South Africa on training and had the opportunity of meeting and interacting with previous members of the South African Truth and Reconciliation Commission.

The aim no doubt was to encourage transmission and diffusion of ideas about truth commission as a tool of transitional justice. This does seem to me to be one of those

ways of legal transplantation – diffusion of legal ideas from one place to another. The question which may not have been asked thoroughly at the time was whether truth commissions as operated in places like South Africa will have the same functional capacity in societies like Liberia at the time where there was palpable collapse and near decay of infrastructure and state architecture.

At the end of its hearing the commission did publish a report.[317]

The report is both an attempt to summarize the political history of the Country and at the same time make recommendations for the rebuilding of the country in the aftermath of conflict in line with its mandate. The Report proper is structured around headings and thematic aspects: the executive summary[318] and introduction[319] sets the stage highlighting the background and preparatory work done regarding the truth commission. It also generally introduces one to the political history of Liberia which undoubtedly has resonance throughout the TRC its findings and ultimately its recommendations. It then moves to highlight the mandate and methodology of its work,[320] the background to the conflict,[321] post-World War II Liberia 1944 – 1979,[322]

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[317] The Final and Unedited Copy of the Liberian Truth and Reconciliation Commission Report is dated the 29th day of June 2009.

[318]Liberia Truth and Reconciliation Commission Report, page 2

[319] Ibid page 14.

[320] Ibid page 36

[321] Ibid page 66

[322] Ibid page 89

the Liberian Civil War 1990 – 2003,[323] the Truth Commission,[324] Impact of the Conflict on Liberia and her peoples,[325] Findings of the TRC,[326] and Determinations.[327]

It proceeded to the such other headings as recommendations on accountability extra-ordinary criminal tribunal;[328] recommendations on accountability domestic prosecutions;[329] recommendations on accountability, public sanctions generally, [330] recommendations on accountability 'national palava' hut commissions;[331] recommendations on economic crimes, investigations and prosecutions;[332] recommendations on reparations; [333]recommendations to the government of Liberia;[334]

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[323] Ibid page 119.

[324] Ibid page 140

[325] Ibid page 220

[326] Ibid page 240

[327] Ibid page 264.

[328] Ibid page 268

[329] Ibid page 270

[330] Ibid page 271

[331] Ibid page 273

[332] Ibid page 274

[333] Ibid page 276

[334] Ibid page 278

recommendations related to the Liberian diaspora;[335] other recommendations; [336]and recommendations to international community.[337] In its findings the Liberian TRC reported that it conducted interviews with over 500 (five hundred) primary sources. Equally, it took 20,000 TRC statements during the testimonies heard from 17,000 witnesses and perpetrators. It also collated and examined reports from international human rights organizations for the period 1979 – 2003 particularly those from amnesty international, the Human Rights Watch and Global Witness. The TRC in a radical manner also gave a list of persons indicted to have been involved in the egregious volitions of human rights. While some of these persons were named for prosecutions, others were listed for public sanctions and such other punishments.[338]

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[335] Ibid page 284

[336] Ibid page 286

[337] Ibid page 290

[338] Annexure 3 of the TRC Report had 98 (ninety-eight) such names – including all the Warlords like Charles Taylor who were recommended for war crimes prosecution. It also listed the violator groups and affiliations of the persons listed either for prosecution or public sanctions. The noted significant violator groups included National Patriotic Front of Liberia (NPFL), Liberians United for Reconciliation and Democracy (LURD), Liberian Peace Council (LPC), Militia, Movement for Democracy in Liberia (Model). Others are, United Liberation Movement (ULIMO), Armed Forces of Liberia (AFL) Unknown, United Liberation Movement – K (UUMO - K), Independent National Patriotic Front of Liberia (INPFL), United Liberation Movement – J (ULIMO – J), and Anti-Terrorist Unity (ATU).

Further along these lines and in an attempt to pre-empt the implementation of the findings the Commission also made a draft proposal of a statute for the establishment of the Extra-ordinary Criminal Court of Liberia. This according to the Report was to be an "internationalized domestic court to combat the culture of impunity, secure justice for victims and ensure that Liberia adheres to, respects, and protects prevailing international law standards."[339]

It is interesting how far reaching this provision appeared and one feels that it was borne out of lack of confidence in the criminal justice system in that country. Again, this is not uncommon in post-conflict societies because of the violence which the system often suffers in the course of the conflict. It highlights the dilemmas inherent in transitional societies – either to preserve or radically change the justice administrative system.

THE SIERRA LEONEAN TRUTH COMMISSION

a. ESTABLISHMENT

The Sierra Leonean Civil War came to an end in July 7, 1999 by a Lomé Peace Agreement of that date executed by President Ahmed Tejan Kabah on behalf of the Government of Sierra Leone and the Revolutionary United Front (RUF) represented by Corporal Foday Sankoh.[340] The Agreement while recalling the initiatives of ECOWs

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[339] See Article 1, Annexure 2 Draft Statute "Establishing the Extra Ordinary Criminal Court of Liberia".

[340] By a letter dated the July 12, 1999, the Chargé D' Affaires AD Interim of the Permanent Mission of Togo to the United Nations addressed to the President of the United Nations

member states noted the "imperative need to meet the desire of the people of Sierra Leone for a definitive settlement of the Fratricidal War in their country and for genuine national unity and reconciliation."[341]

Further in its article IX, the Lomé Peace Agreement provided for pardon and amnesty apparently in order to bring lasting peace. In the words if that provision it provided that "in order to bring lasting peace to Sierra Leone, the government of Sierra Leone shall take appropriate legal steps to grant corporal Foday Sankoh absolute and free pardon." In terms of other combatants in the respective fighting forces, it was also agreed that they too were to enjoy the same kind of immunity absolutely granted to the RUF leader.[342]

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referenced S/1999/777 he stated as follows "I have the honor to transit herewith the text of the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front Concluded at Lomé on 7 July, 1999."

[341] See the Preamble to the Lomé Peace Agreement paragraph 3.

[342] "After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free Pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives up to the time of signing of the present Agreement." The section continued by noting that that "to consolidate the Peace and Promote the Cause of national Reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex- SLA, or CDF in respect of anything done by them in pursuit of their objectives as members of those

This Lomé Peace Agreement and the absolute and overarching immunity it guaranteed under the laws of the Sierra Leone to all the actors in the Sierra Leonean theater of war and carnage would subsequently become contentious.[343]

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organizations since March 1991, up to the present time of the signing of the present agreement

[343] Not quite a few argued that the immunity cannot be granted for crimes against humanity and international humanitarian law like genocide and rape as a tool of war. Thus, the Lomé Peace Agreement though a bulwark of protection in favor of the perpetrators of crime during the war was to be revisited. Hence and as the post conflict realities unfolded coupled with the activities of civil society organizations and the United Nations through its offices on human rights accountability became a felt necessity. Thus, it would seem – I argue - that the Lomé Peace Agreement had to be technically modified because there was a need to stamp out impunity. This modification came when the Government of Sierra Leone wrote the Security Council of The UN asking for the establishment of a Special Tribunal in Sierra Leone to try the most egregious violations which had taken place at the time. In a letter dated 12 June 2000, President Ahmed Tejan Kabbah requested the United Nations Security Council*to help set up a special criminal court in Sierra Leone*. This led to a series of exchanges between the Government of Sierra Leone and the United Nations Security Council. On 16 January 2002, the Government of Sierra Leone reached agreement with the United Nations for the establishment of a Special Court with jurisdiction over pre-Lomé offences, irrespective of amnesty or pardon. The agreement was subsequently endorsed by Parliament in March 2002, when it adopted The Special Court Agreement, 2002, Ratification Act, 2002. In May 2002, the Government of

Thus, with time it became the pivot of debate around what is to be done about the victims of these violations since their perpetrators had been granted absolute immunity and amnesty. Some opinions held out that some compensation be made to the victims. Yet this does not answer the questions – who are the victims? How do you ascertain them? What criteria do you use in the compensation? This state of affairs and the activities of civil society organizations sparked up a real debate about these issues. Thus, at the invitation of the Government of Sierra Leone, the office of the High Commissioner for human rights in collaboration with civil society organizations commenced efforts aimed at setting up a truth and reconciliation commission for in Sierra Leone. This line of debate and consultation will ultimately lead to the enactment of the Sierra Leonean truth and Reconciliation Act of February 22, 2000. This was followed in July 5, 2002 with the swearing in of the seven-member commission appointed from a cross section of Sierra Leone. Each step of the way, the Truth Commission idea was followed and coordinated by the office of the Commissioner for Human Rights. Thus, it is significant to see the detailed preparation towards the establishment of the Truth Commission. It seems therefore that unlike in Liberia, there was a clearer effort at public education, research of traditional dispute resolution and selection of commissioners and even preliminary identification of facilities for the

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Sierra Leone proceeded with the establishment of the Commission. The seven commissioners were named by President Kabbah and duly sworn into office in July 2002. The dynamics between this court and the TRC would later become a matter of interesting scholarly debate.

commission. The truth and reconciliation commission Act of 2000 by its section 2(1) "established a body known as the Truth and Reconciliation Commission." It guaranteed it as a body corporate[344] and thus capable of having a common seal and enjoying all the privileges of a legal personality under the laws of Sierra Leone. It was therefore on firmer grounds than most of the other truth commissions in the region.

B. MANDATE POWERS AND FUNCTION OF THE COMMISSION

The enabling law was clear and crisp in given the Commission guaranteed powers to pursue its mandates. The pithy provisions of the law are that "the object for which the commission is established is to create:

I. Create an impartial an impartial historical record of the violations and abuses of human rights and international humanitarian law related to the armed conflict from the beginning of the conflict in 1991 to the signing of the Lomé Peace Agreement;

   a. To address impunity;
   b. To respond to the needs of victims;
   c. To promote healing and reconciliation;
   d. And to prevent a repetition of the violations and abuses suffered."

It went further to highlight the functions of the commission as including the investigation and reporting on the causes, nature and extent of the violations and abuses in the conflict. It was also the duty of the Commission to ascertain to the fullest degree possible the antecedents, the context in which these violations and abuses occurred, the

[344] Section 3 of the TRC Act.

question of, whether those violations and abuses were the result of deliberate planning, policy, or authorization by any government, group or individual and the role of both internal and external factors in the conflict. It was also to work towards restoring the human dignity of victims and promote reconciliation by providing an opportunity for victims to an account of the violations and abuses suffered and for perpetrators to relate their experiences and by creating a climate which fosters constructive interchange between victims and perpetrators, giving special attention to the subject of sexual abuses and to the experiences of Children within the armed conflict.[345]

C. METHODOLOGY

In pursuance of the very broad mandate or object of the TRC in Sierra Leone TRC also began with public education, research and articulation of procedures for all its programs. It also did create linkages for technical support. It conducted hearings and subsequently published a report. The report was also adapted for video production and a children's version of the report was also made to encourage the education of future Sierra Leoneans regarding the war and its consequences on society.

THE NIGERIAN HUMAN RIGHTS VIOLATIONS AND INVESTIGATIONS COMMISSION – THE OPUTA PANEL

[345] There was also an omnibus power granted to the Commission to "do all such things as may contribute to the fulfilment of the object of the Commission." See generally *Part III Section 6 of the Sierra Leone TRC Act 2000*. There were many administrative powers granted including the powers to summon, request police assistance or do other needful things for the purposes of fulfilling the mandate of the Commission.

Nigeria's political trajectory as we noted earlier is one that is bedeviled by military interventions through coup d'états. This also yielded in many ways egregious violations of human rights and humanitarian laws. The Nigerian civil war is one of the most violative of humanitarian laws in the 20th century. Till today much of what happened is still muffled and deeply censored by the Nigerian state. Many of the books[346] written about the Nigerian Civil War appear to have been consciously avoided discussing the details of the war. Some of them are merely a personal memoir – a collection of self-adulations with no significant contribution to public discourse and history. Thus, since after the civil war and the consequent impunity of military dictatorships in Nigeria, no collective conversation about the impunity that became the life blood of the state since 1966 has been had. The extent to which it is known is based on the reflections of many of the participants in the events that led to the war and the war itself.

These active participants, I would argue lack a certain detached objectiveness which the analysis of such an epochal event in the life of the country demands. Often, the argument in justification of the censorship is the fear that the military will come back or that there will be a relapse to another civil war. It would seem therefore that there is a specter of the military hunting the Nigerian state and the Nigerian democracy in particular. This can only be so considering that the military keeps acting like a 'benevolent' dictator regarding the political evolution of Nigeria – their obvious

[346] See note 174 (Supra).

malevolence notwithstanding. Like *abiku*[347] the military continues to reincarnate in the politics of Nigeria. It continued to do so for a long time – with few civilian governments inserted at different points in that checkered history.

A significant attempt for the establishment of one of such civilian governments was by the military government of Ibrahim Babangida between 1985 – 1993. The junta at the time had raised the hopes of the citizens that the vice grip of the military will be removed in the year 1993. Thus grew a palpable interest in the polity at the time for a true transition to democratic governance. Hence, citizens participated patiently and endured the several postponements and revisions of the elections time table. However, after the conduct of the elections on June 12, 1993, the outcome of the Presidential election was annulled. This led to riots and deaths in several parts of Nigeria. The military repressed the demonstrations. With this atmosphere, the Military Head of State at the time – Babangida – stepped aside. He handed over to an interim government which was created by a military decree and constituted by persons handpicked by himself. This interim government led by Ernest Shonekan was challenged because the

[347] In traditional African society, Abiku means, a child who dies inly to return back in order to die again. It is believed to be animated by malevolent spirits since it is predetermined from birth to continue the circle of death and rebirth. It is seen as a punishment from the gods and as such can only be stopped from coming back by appeasing the gods. In a way the politics of Nigeria since 1966 has been like a politics of appeasement of the military institution and all her acolytes in the larger society. Even retired generals walk about with a hubristic swagger that makes the tireless contributions and the sacrifices of the Nigerian people pale into insignificance. They are entrenched in all areas of the economy and politics.

instant constitution at the time (the 1979 Presidential Constitution) did not contemplate an interim government. This was quickly removed once again by the military led by General Sani Abacha.

The Abacha Junta – November 1993 – June 1998 was to become one of the most violent military regimes in the political history of Nigeria. There were cases of open assassinations and attempted assassinations – especially of the members of the press and civil societies organizations. Many of the civil society leaders escaped and lived abroad during this time. Abacha was also the military leader that supervised the violent repression of the Niger Delta particularly – the environmentalists and campaigners challenging the destruction, pollution and general lack of accountability for the environmental degradation following exploration activities of oil producing companies the Niger Delta. The end point of the several agitations was the arrest, trial by a military tribunal and execution of some of the leaders of the Niger Delta. Particularly Ken Saro Wiwa[348] and Eight other Ogoni leaders were in November 1995 executed.

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[348] The story of Ken Saro Wiwa is only a minor aperture through which we can view the violence which the Nigerian state has unleashed on her citizens since independence. This case reverberated around the world because Saro Wiwa was a known poet and his case involved one of the biggest global corporations in Nigeria – Royal Dutch Shell. The case became a subject of litigation in a number of international litigations. This was also to culminate in the setting up of a united nations Environmental Committee to investigate the pollutions in the Niger Delta. See generally Ken Saro Wiwa, Africa Kills Her Sun; The United Nations Report of the Pollution and Cleaning of the Ogoni Land. In one of the cases that went to court in the USA,

This further fouled the fountains of national unity and cohesion. It heightened the agitation for return to democratic rule. The junta hunted down voices of dissent. Nigeria was suspended from many international organizations and its leadership placed on global sanctions. The death of General Sani Abacha in office in 1998 opened a new vista of hope. General Abdulsalami Abubakar took over powers of state and hurriedly conducted elections, issued by military decree a draft constitution – the 1999 Constitution[349] of the Federal Republic of Nigeria. With this a new democratic regime was inaugurated on May 29, 1999. The new administration led by Olusegun Obasanjo who was also a political prisoner during the military junta of Abacha was persuaded by civil society and the international community to commit to the establishment of a truth commission. This was the genesis of the Nigerian Human Rights Violations Investigations Commission 2000.

MANDATE OF THE NIGERIAN HUMAN RIGHT INVESTIGATION COMMISSION

Shell agreed to pay a lump sum of 15million dollars in settlement for the violations in Ogoni land. See https://www.theguardian.com/world/2009/jun/08/nigeria-usa

[349] The 1999 Constitution is one of the major obstacles to true constitutional transformation of Nigeria since 1999. It confiscated state powers and centralized same. What this means is that the central government has the ,monopoly of control of police and all other coercive institutions in the country. It also centralized control of resources. What it has done is to create dissonance in the polity. Over centralization of powers makes it difficult for regional flexibilities needed for the rapid development of the country.

The commission was inaugurated on June 14, 1999 by the then president Olusegun Obasanjo. In his inaugural speech he did set out what can be called the central duty of the commission namely to initiate a process of healing "the wounds of the past and quickly put the ugly past behind so as to continue to stretch our hands of fellowship and friendship to all Nigerians for complete reconciliation based on truth and knowledge of the truth in our land."[350]

The president also noted that the commission was aimed at helping the country scale over an unprecedented wicked and oppressive era in the history of the country and also set parameters that will help prevent a repetition of that same ugly past. It is important to mention here that President Obasanjo was one of the political detainees during the time of Late General Sani Abacha between 1995 and 1998. He therefore understood the level of human rights violations that took place at that time. Thus by a legal Instrument No. 8 of 1999, the president constituted the commissions in exercise of the powers granted to him under Section 1 of the Tribunals of Inquiry Act 1966.

TERMS OF REFERENCE

The Commission was empaneled to do the following;

I. "ascertain or establish the causes, nature and extent of all gross violations of human rights committed in Nigeria between the 15th day of January 1966 and the 28th day of May 1999;

[350] Except of the Presidential Inaugural Address as contained in Volume 1 of the Oputa Panel Report page 27.

II. identify the person or persons, authorities, institutions or organizations which may be held accountable for such gross violations of human rights and determine the motives for the violations or abuses, the victims and circumstances thereof and the effect on such victims and the society generally of the atrocities;

III. determine whether such abuses or violations were the product of deliberate State policy or the policy of any of its organs or institutions or whether they arose from abuses by State officials of their office or whether they were acts of any political organizations, liberation movements or other groups or individuals;

IV. recommend measures which may be taken whether judicial, administrative, legislative or institutional to redress injustices of the past and prevent or forestall future violations or abuses of human rights;

V. make any other recommendations which are, in the opinion of the Judicial Commission, in the public interest and are necessitated by the evidence;

VI. to receive any legitimate financial or other assistance from whatever source which may aid and facilitate the realization of its objectives." [351]

By law, the Commission which was required to produce a report and where it deems necessarily make interim report to the president from time to time. It was however required to submit a final report within one year from its date of first hearing.

METHODOLOGY AND PROCEEDINGS

[351] Panel Report vol. paragraph 2.36 page 29

The Commission carried out research, investigation and public hearings in several parts of the country and also received petitions and memoranda from individuals, families, civil society organization and even ethnic nationalities like the Ogoni regarding the complicity of the military government in the unlawful execution of Ken Saro Wiwa and other Ogoni leaders for challenging the violations of their rights to health living environment by oil producing companies in the Niger Delta. Significant too was also the contested history of the factors that led to the Nigerian Civil war and the issue of 'abandoned properties' and other violations meted out against Igbos between July 1966 and January 1970.[352] The public hearings were publicized on national televisions.

There was however a problem from the beginning. There was no clear appropriation and source of funding for the commission. The commission therefore had its activities stalled after inauguration and save for the intervention by MacArthur Foundation, it appears the outcome would have been different.

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[352] For instance, the Arewa Consultative Forum a Northern Regional Organization is known to have presented a different argument in opposition the views expressed by Ohaneze Ndigbo. Afenifere – a Pan Yoruba cultural Organization and many other groups in the country also had their explanation and understanding of what are the remote and immediate causes of the human rights malaise in the country. One thing decipherable from the presentation is how much of Nigeria' s post-independence history is still contested and how much of that history is a matter of conjecture since there is almost a code of silence adopted by the political establishment over these things.

The Commission received more than ten thousand petitions from the public. The petitions covered a range of violations including murder, and state sponsored assassinations, disappearances/abductions, harassments and intimidation of citizens using state secret service and other coercive authorities, prolonged detentions – generally without trial or trial by military tribunals. It was revealing how the commission's work was embraced by the generality of the Nigerian masses but challenged by the military establishment. In the end the commission submitted a report of its findings and recommendations.

It noted amongst other factors that the immediate causes of the of the violations and establishment of the commission was the collapse of the first republic through military intervention and subsequent civil war, and the inherent arbitrary logic of military rule especially between January 1984 and May 1999.

The report also highlighted the attempt to use state powers to favor particular ethnic groups and to disempower other ethnic groups as one of the factors responsible for the political fragility and human rights violations in the country. A culminating factor is also the annulment of the June 12, 1993 Presidential elections and the Military Governments use of political assassinations, torture and judicial murder to perfect the silencing of opposition voices and thus fasten its grip on power. [353] In the end the Commission also made many recommendations in its report aimed at helping the country retrace its economic, social and human right bearing.

[353] Vol. 1 of the Truth Commission's Report paragraph 2.31

Significantly it called for the expansion of the political space with a view to ensure that all groups within the country feel a sense of ownership in the political legacy of the country. It therefore noted the need to adopt an alternative political platform since there is a persisting frustration expressed by many Nigerians regarding the existing federal structure. Indeed, it was the expressed view of the panel in the report that the fears, frustrations and anxieties of Nigerians regarding the state of their country are legitimate. Thus "the political class must not panic every time citizens question the basis of the federation."[354]

Equally the Commission made firm recommendations regarding some of the Generals who were in charge of the Nigerian state when many of these atrocities were carried out. To wit; General Muhammadu Buhari, General Ibrahim Babangida and General Abdulsalami Abubakar.

"On General Muhammadu Buhari, the Commission was of the view that the general has a case to answer in regard to the killing of three young men referred to in the petition of Kenneth Owoh family. There was evidence to show that the execution of the three young men fell well outside the frame allowed by the decree under which they were tried. The Commission recommended that he should render an unreserved apology.

On general Ibrahim Babangida, we are of the view that there is evidence to suggest that he and two security Chiefs, Brigadier General Halilu Akilu and CoL A. K. Togun are accountable for the death of Dele Giwa by letter Bomb. On the government

[354] See paragraph 13 vol. 7 page 46 HRVI Report

of General Abdulsalami Abubakar, the case against him had already been well argued by one of the witnesses , Col. Idenhere, who testified in the case. Although he has not directly mentioned in the death of Chief Abiola, the inconsistency on the testimony of his chief security officer, Lt. Col Aliyu show that the government of the day knows much more about the circumstances leading to the death."[355] It is also interesting to note that these Generals defied the commission by refusing to answer summons served on them by the commission.

The anti-climax of the commission was the refusal of the government to publish the report of the commission till date. What we have which we have relied upon for this work is the report as published by civil society groups through their independent sources. This no doubt has affected the overall assessment of the impact of that Human Right Violations investigation in Nigeria since it concluded its work about 20 years ago. The evident lesson from this is not only the question of timing of truth commissions and other transitional justice mechanisms but also a look at the potential influence of previous power brokers within the polity.

This and a number of other factors like funding and political will are indispensable to the success or otherwise of TRCs as mechanisms for transitional justice. It is important at this point therefore to shift our attention towards approaches and method for examining the impact of truth commissions in post-conflict and post-authoritarian societies.

CHAPTER FOUR :MEASURING THE IMPACT OF TRUTH COMMISSIONS

[355] The HRVI Report vol. 7 page 68 – 69.

4.0. INTRODUCTION

The functionality of truth commissions as mechanisms of transitional justice and how to ascertain the details of it is the subject of critical debates in the field presently. This debate has not stopped the continued use of instrument and the concern in the field is not to discard the instrument but to interrogate it and thus assist its utility. As we have noted in this work, the establishment of truth commissions is premised on a number of focus points namely: they contribute to the acknowledgement of victims and those affected by human rights violations during the violent period.

Equally it is deemed to produce a public and objective record of what happened and thus create an archive to guide policy and national rejuvenation and discourse regarding the wellbeing of the state. This is often manifest in the mandate of the truth commissions which considers investigation and documentation of what has happened as an important aspect of the function of the truth commission. Thus the publication of the results of the outcome become prima facie a success. I shall come back to these. But beyond these broad outlines there is a bigger debate regarding the impact of Truth and Reconciliation Commissions in Transitional Justice situations.

It would be correct to say that the impact, contribution and position of truth commissions in the entire field of transitional justice is one area of transitional justice studies that does not seem to be clearly articulated yet. It therefore offers a unique space for scholarship and engagement in the field. Even in situations where the commission is believed to have been properly used in terms of organization, funding, hearing, victims' compensations, reparations and publication of reports, certain questions are

still left unresolved – namely what more is there to truth commissions in terms of contribution to progressive social change.

One significant issue that is driving the critical commentary and interrogation of truth commissions is the idea that despite their overall help in articulating the records, often the structures of economic inequality and exclusion seem to continue in the societies. An exemplar would be the South African Truth and Reconciliation Commission which is deemed to have been successful. Down the line and the passage of time questions are still being asked as to: what is its manifest contribution to the development of human rights and social reconciliation in South Africa? This is so in the area of socioeconomic rights and the festering problem of land reform and redistribution. It seems to me that the passage of time often highlights the missed opportunities regarding economic and social inequality and sets in motion a near state of disillusionment regarding TRCs.

Some of the enduring questions include: how might we evaluate the impact of truth commissions? Viewing impact in terms of achievements, what types of achievements might we be looking for? If there are limited achievements – what might be the challenges that limit the achievements? What measures might be adopted to ameliorate these challenges? These are important concerns and Truth Commissions should from the outset have them in mind both in their mandates and proceedings so as to maximize the opportunities that truth commissions present.

Bearing in mind the broad mandates which we have seen in terms of reference of the truth commissions in issue, it seems to me certainly indispensable to seek a further understanding of how we might solve this problem – evaluating the impact of truth

commissions. It is arguable that this would be critical if we must not compromise the functionality of truth commissions in the field of transitional justice.[356]

Thus, this segment will look at the existing literature and approaches on evaluating truth commissions and explore possible "better approaches" or a combination of approaches that could help further tease out the impact of truth commissions as essential mechanisms of transitional justice.

4.0. IMPACT OF TRCS AND EVALUATING SAME

The ubiquity of truth commissions today depicts a model of transitional justice whose normative claims and general acceptability in international law seems settled. It is therefore repeatedly adopted in many peace settlement efforts across the world as essential to national reconciliation, healing, social reconstruction, investigation, documentation, peace building, collective memorialization and the prevention of reoccurrence. It is also seen as a critical aspect of democratization and shared societal living.

What is benign in the literature however, is a more deliberate, interrogation of the ways in which the contributions of the instrument can be measured or properly evaluated. Questions are presently being asked as to whether truth commissions are just

[356] Even among those that have professed that truth commissions affect policy and development of post conflict and post authoritarian societies there is a concession that the impact may actually be limited. See Onur Bakiner, Truth Commission Impact: An Assessment of How Commissions Influence Politics and Society, The International Journal of Transitional Justice, vol. 8, 2014, 6 – 30.

hot – air balloons?[357] This sentiment has been stressed by a number of authors in the field. In one of such expressions it was noted thus "in spite of the broad international consensus about the multiple positive effects of TRCs, empirically assessing the assumed positive effects has been challenging. In fact, there is little knowledge and next to no consensus about the actual long-term consequences and impacts of truth commissions, moreover, there are virtually no established mechanisms for measuring these consequences and therefore for assessing the overall success of the commissions in achieving their stated objectives."[358]

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[357] Johannes Langer, (2017) Are Truth Commissions Just Hot Air Balloons? A Reality Check on the Impact of Truth Commission Recommendations. Johannes argues that "during the last decade, there has been a continued debate as to whether or not TJMs actually work and what impact they have." The paper analyzes the non-implementation of recommendation of truth commissions.

[358] Michal Ben-Josef, Hirsch, Megan Mackenzie, and Mohammed Sesay, Measuring the Impacts of Truth and Reconciliation Commissions: Placing the Global 'Success' of TRCs in Local Perspective, Journal of Cooperation and Conflict vol. 47(3) 386 – 403. They argue further in their paper that there is some level of enduring bias in the several existing sociological approaches to studying the impact of truth commissions. It is also their case that analysis based on large number quantitative data does not consider local contingencies and therefore weak. It was also argued that survey methods often used in the social sciences are flawed fundamentally at the epistemic level since the concepts used are technical concepts like

WHAT THEN IS TO BE DONE?

Indicative of the understanding of the need to measure the impact of truth commissions is the fact that scholars in the field of transitional justice like their counterparts in the human rights field, use a number of measures and indicators to articulate the progress or otherwise of transitional justice measures. This is necessary not only for the reasons highlighted above but also, for their overall protection and utilization in the future. Also the UN and her specialized agencies like the UNHRC are increasingly under pressure to justify expenditures and resources channeled towards transitional justice measures including truth commissions.

It suffices to bear in mind that despite the critical comments, TRCs should ordinarily be considered as the first steps towards the larger questions of reform, devolution of powers, resources management, restructuring of the economy and democratization in transitional justice situations. Hence, the need to have a balanced expectation regarding truth commissions in general. In the existing literature[359] there have been attempts to

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justice, transitional justice and these have loads of knowledge implications which are often beyond the ken of the audience being surveyed.

[359] Amnesty International, Truth, Justice and Reparation: Establishing an Effective Truth Commission (2007). 9 Brian Grodsky, 'International Prosecutions and Domestic Politics: The Use of Truth Commissions as Compromise Justice in Serbia and Croatia,' International Studies Review 11(4) (2009): 687–706.; Office of the High Commissioner for Human Rights, Rule of Law Tools for Post Conflict Societies: Truth Commissions (2006); Eric Wiebelhaus-Brahm, Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy (New

develop approaches to measuring the impact of truth commissions. Some of them are based on social theories, others are founded on normative principles and many are based on combination of both qualitative and empirical approaches. I proceed to highlight a number of them here.

A. THE CAUSAL PROCESS APPROACH –

According to Onur Bakiner "many of the shortcomings of the literature… can be addressed if the research strategy pays close attention to 'causal processes' rather than 'correlations between a truth commission' and outcomes of interest such as democracy, human rights and the rule of law."[360]This I have for the purposes of this work stated as the 'causal process approach.' He argues quite plausibly that; the impact assessment of truth commissions should focus more on the causal effect of truth commission processes – both at the individual and institutional levels.

He noted however that there are epistemological and methodological challenges regarding the establishment of causality as we know from experiences in the social

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York: Routledge, 2010); Hunjoon Kim and Kathryn Sikkink, 'Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries,' International Studies Quarterly 54(4) (2010): 939–963; Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, Transitional Justice in Balance: Comparing Processes, Weighing Efficacy (Washington, DC: US Institute of Peace Press, 2010); James L. Gibson, 'The Contributions of Truth to Reconciliation: Lessons from South Africa,' Journal of Conflict Resolution 59(3) (2006): 409–432. 15 James L. Gibson, 'Truth, Reconciliation, and the Creation of a Human Rights Culture in South Africa,' Law and Society Review 38(1) (2004): 5–40.

[360] Onur supra note 285

sciences and humanities. It is often not a situation where you can readily see the 'smoking gun'. Making this more complicated is the fact that different truth commissions have different time line and sequence in terms of its mandate, hearings, reports and implementation of recommendations or otherwise.

Often, they have different time frames within which they have to conclude their work and produce a report. This overarching temporal ramifications implicate the assessment of the impact of these TRCs in the main. It also potentially constraining as regards the quality of work done and subsequently the perceptible contribution or impact the commission makes in the transitional society. The ad hoc nature of TRCs also reduces the ability of the commissions to dictate the trajectory or what amount of relevance is place on its recommendations by political authorities in the overall goals of peace, democratization and respect for human rights. There may nor therefore be a continuum of TRCs related activities in the community let alone finding a causal linkage between it and democratic or human right outcomes as the case may be.

A high illustrative point of this is the fact that, different truth commissions function within different timelines as usually set out in their mandates or the law establishing them. In Liberia for instance the TRC was to examine the political timeline between 1979 to 2003 while at the same time articulating the "remote and immediate" – historical and sociological causes – of the conflict and violations of human rights that it unleashed on the economy. In Nigeria it was from 1966 to 1999 which is like the entire post-independence political history of the country.

The matter is even made more tedious in that expertise and archival resources may be lacking in terms of the work to be done and how it has to be done. What this means

is that most of the TRCs are put on overdrive from the beginning and the temporal issues related to all these affect their perceived impact and contribution to human rights protection, democratization and socioeconomic renewal of these often-broken societies. It would seem also that TRCs may be on weak position in terms of stipulating specific policies for economic reform and restructuring. However, this must not detract from their capacity to identify economic dissonance within the society thus priming the country in question for possible content specific economic restructuring interventions.

He further argues that due to the usually high expectations placed on truth commissions, it is often the case that other policy failures are attributed to the failure of truth commissions. He suggests that we ought to be cautious in attributing every policy failure to the failure of truth commissions. There are other aspects of public policy that bears the burden of transitional justice. For instance, if the post conflict or post-authoritarian executive – or any other organ of that government – refuses to implement the recommendations of the TRC, it cannot be said that the TRC did not impact on the human rights or democratization credentials of the post conflict society. It would be incorrect to so argue. One critical example of this for instance being Nigeria where though the commission produced a report the government refused to publish same officially thus rendering the report futile. Over all he conceptualizes truth commissions impact as a set of political, institutional, societal and judicial transformations resulting from truth commissions processes during transition processes. Thus truth commissions do impact democracy and produce significant progressive developments in favor of human rights.

This however should not be exaggerated as a number of other factors outside the control of truth commission may impinge of the causal linkages between the work of the TRC and ultimate impact on society. It is also important to bear in mind that TRCs are ad hoc and their recommendations are often non-binding hence their impact is ordinarily circumscribed by their nature and conceptual foundations.

B.“**BROADER SOCIAL EFFECTS APPROACH”**

A number of scholarly papers in the field have tried to articulate the impact of truth commissions based on what is called the broader “social effects approach.” Namely, how does the truth commission affect social changes in the post authoritarian society vis-à-vis the previous period of domination, war and violations of human rights. Eric Brahm notes rightly that in the light of the growing popularity of truth commissions, what is of greater value regarding truth commissions is their “broader social effects”. He argues however that despite the general complexity that this problem presents, that truth commission reports are in themselves great tools of social reconstruction and reconciliation. This is so because the reform disposition of truth commissions in general gives the mechanism uncommon access to the knowledge of the weaknesses of the institutions in the society. These identified weaknesses are thus critical in terms of social reforms. It is therefore an important tool of measuring the impact of truth commissions.[361]

[361] This thought is also reinforced by the views expressed by authors like Abrams and Hayner 2002; Bronkhorst 2003; Freeman and Hayner 2003; Hayner 2001).

What is noted is that there are several methods presently adopted by scholars to find a clear path through the ticket of ideas and potential approaches to measuring the impact of truth commissions.[362] The social effects approach to evaluation also focuses on the reports and hopes that it will form the foundation for changes in society. These changes are not limited to direct legislations, judicial interventions or efforts and creating inclusive economic opportunities. It involves the expansion and broadcasting of civic education, civil society engagement and participatory democracy. For one the TRCs reports can be converted into national reorientation documents and teaching aids for civil society organizations and the intangible social impacts will continue to increase

[362] Brandon Stewart and Eric Wiebelhaus-Brahm – The Quantitative Turn in transitional Justice Research: What have we learned about impact? Stewart, Brandon and Wiebelhaus-Brahm, Eric (2017) "The Quantitative Turn in Transitional Justice Research: What Have We Learned About Impact?" Transitional Justice Review: Vol. 1: Iss. 5, Article 4. Available at: https://ir.lib.uwo.ca/tjreview/vol1/iss5/4\. They drew attention to the Methodological Pluralism in the field but ultimately make a case for the impact of truth commissions. Thus because of methodological pluralism, there are both qualitative and quantitative approaches to researching the impact of truth commissions. So, "qualitative and quantitative approaches each can provide contributions to the project. Quantitative tools are useful in identifying patterns across a large number of countries. In this instance, they can tell us whether there is something unique about countries that have conducted truth commissions, or whether different types of truth commissions have different consequences. Quantitative approaches, however, often do less well at helping us determine why those patterns exist. This is where qualitative methods prove crucial in identifying mechanisms."

over time as democracy is consolidated. In Sierra Leone, it is seen that certain aspects of the TRCs reports and history surrounding the war have been printed and distributed as part of children's book. This is a plus, but its overall impact may not be easily evaluated – at least in the interim.

C. THE USE OF INDICATORS APPROACH

A number of organizations in the field of economics and political science have developed the consistent use of indicators to test the outcome of policies like poverty reduction, inclusive development and other aspects of socioeconomics. They are also used to study trade policies and the efficiency of institutions like banks, courts, ports and other factors of production within an economy. The time spent between the filing of a commercial claim and the time of judgement and final enforcement of the judgement can be used as an indicator of access to justice and security of investments and transaction within that economy. These issues which are ordinarily perverse, and intangible may now be estimated or meaningfully studied using certain indicators.

These indicators might be tagged 'human development indictors,' 'poverty indicators' and the like. These indicators are applied in the study of millennium development goals and now sustainable development goals. Based on these, global policy institutions and state parties can monitor the progression of any particular state in implementing set out development objectives and institutional reforms required for their effective implementation. Today many of these indicators command influence in the field. For instance the World Bank Group uses such issues in their assessment of the

‘ease of doing business’[363] from country to country. It is argued here that indicators can be developed and continually improved for the purpose of studying the outcome, impact and progression of transitional justice efforts like truth commissions.

The problem of indicators however is that the categories are often framed outside the domain of the state to be evaluated. More so, in post conflict societies where there is little to no capacity of institutions to put together the needed empirical data, indicators might turn out becoming anecdotal. However, it is an encouraging endeavor and may yet utilized with little modifications to meet the contextual realities of the particular country in question.

D. THE FOUR STEP IMPACT EVALUATION APPROACH – PLUS 1

A recent attempt has been made to carefully put together a four-step evaluation approach of transitional justice mechanisms in general. According to the proponents[364], the approach can be used to evaluate all the mechanisms of transitional justice including TRCs, Criminal Prosecutions, Amnesty and restitution or reparation efforts. The approach acknowledges the need to be particular about the functionality of the transitional justice efforts hence the attempt to develop the integrated approach to transitional justice evaluation. Thus – and as we have noted earlier – a number of factors

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[363] The Ease of Doing Business Report is often published annually and has been used in several cases as an indicator to determine the nature of legal reforms that countries have to embark upon.

[364] Elin Skarr, Camila Gianella Malca, Trine Eide, After Violence. Transitional Justice, Peace and Democracy kindle edition.

must be considered in choosing a transitional justice mechanism for any society. In the same vein the four-way integrated impact assessment model has to pay attention to the society in choosing the evaluative tool for any transitional justice mechanism sought to be evaluated. Broadly speaking therefore, addressing the particulars of each truth commission in the evaluation of the impact of each truth commission within the state where it deployed.

Thus these four steps are identified as critical tool of analyzing the impact of different transitional justice mechanisms namely:

a. Understanding the national, regional and global context of the Transitional Justice mechanism (in our case the truth commission);
b. Assessment of the Truth Commission;
c. Examining/evaluating implementation of the recommendations of the mechanism;
d. Selection the variables upon which the impact has to be measured – in this case, peace, democracy and institutional reform. These are the constants in the overall evaluation of the impact of the truth commissions. Plus –
e. The impact on structural inequality and socioeconomic inclusion.

The justification of this model in the impact assessment of truth commission is articulated as follows:

I. It situates the truth commissions within the larger political and socioeconomic developments within the nation, the region and the international community at large. To this effect, it contextualizes the work with a view to understanding some of the motivations for its adoption, in lieu

or in conjunction with other mechanisms of transitional justice. For instance, a state emerging from civil war might have a different environment to implement a truth commission as opposed to a state where there has just been a change in authoritarian government. The period of time between the end of the war and the establishment of the truth commission may also influence the potential outcome and impact of the truth commission.

II. The Assessment of the Truth Commission should bear in mind the need for comparison and the potential limitations of large number statistics in evaluating the impact or otherwise of the truth commission. The tendency for large number statistics to obfuscate the particularities of a given mechanism whether on the regional note or other circumstances must be taken into account. Hence the need for some level of deliberate specificity in evaluating transitional justice mechanisms – truth commissions.

III. The next level in that four-step structure of evaluation is the evaluation of implementation of the reports and recommendations of the TRCs. It is important that this is evaluated because an implementation of a given recommendation of the Commission will be a direct impact of a TRC. However, it is clearly not within the capacity and mandate of TRCs to pursue implementation of reports. Thus it is important to moderate expectations placed on truth commissions regarding the implementation of their reports. Nonetheless, governments and other permanent institutions of the society may be evaluated with an eye to see what steps they have taken in implementing the reports of TRCs and by that extension the impact the TRCs

is having on the socioeconomic and political development of the transitional society.

IV. Impact of Peace, Democracy and Institutional Reform. I must note here that Erin Skarr and company who are the proponents of this four-step evaluation mechanism focused on the impact on peace and democracy as the core of the evaluation or impact assessment. Thus peace and democracy are the constant variables and the determinant factor in the overall evaluation. To seek for them in the stretch of impact arch of truth commissions a number of joint procedures including interviews, data sets from governments and institutions outside the government. I have added the element of institutional reform to this toe of that step of evaluation.

V. The fifth step – ***which I call four-step-plus 1*** – is the impact on socioeconomic activities and structural inequality. This is justified because peace and democracy are often the fig leaves that cover the deeper questions of structural economic inequality which in turn lead to fragility in post conflict and post authoritarian societies. My readings and study of social conditions even in democratic societies reveals major questions of social and economic exclusion. It can therefore be misleading sometimes to let the light of democracy and ambience of peace seduce the reader into thinking that violence is out of the way. Hence I shall add it to the structure of evaluation

already articulated and proposed by Erin Skarr and her cohorts at the Michelsen Institute (MI) Bergen Norway.[365]

My argument in this respect is informed by the fact that every human society is an economic society and humans themselves are *homo economicus*. Epistemically, economics has certain accepted classical fundamentals – the scarcity of resources, the insatiability of wants, a relationship between choice and forgone alternatives, and the need for the protection of the rights of all to a fair share of the resources. Otherwise it will be a war of all against all. These accepted fundamentals therefore permeants modern societies and influence who gets what and who is excluded in the overarching sphere of economic opportunities. More so, the Smithian perception and definition of economics has encouraged not only the private ownership of property and resources but also the emergence of global capital and accumulation. However, without inclusive prosperity, predictable access, equal opportunity and a fair chance of self-actualization, society becomes an amalgam of oligarchies and oligopolies. They create undue resentment and fragility. The potential fusion of both the power of production and instrumentalities governance/coercion in the same private or corporate hands deepens the fissiparous tendencies in society. It must therefore be an indispensable focus

[365] I have gained a lot by the work the group did and how that is helping reshape the thinking in the field regarding how to solve the problem of evaluation of truth commissions and other transitional justice measures.

of transitional justice efforts – TRCS – to identify particularities of economic exclusions whether on the municipal, national, regional or indeed international economic framework that affects the state and the wellbeing of her citizens to which the state may pursue deliberate policies to ensure better societies through transformation. This must be the irreducible minimum because nation states bedeviled by spaces and chasms of misery – especially in the face of abundant resources accumulated, often expropriated and warehoused by a few gilded elite – may never achieve sustainable peace. The effort at reform has to be structural and recommendations by TRCs must emphasize this rather than leaving it as mere moral suasions to leaders. It creates disillusionment in the populace when the structural inequality and political economic issues that precipitated conflicts are glossed over with transitional justice mechanisms. The tendency to think that there was no genuine interest at creating an equitable society after the crisis plants the seeds of future conflicts. Whether it is land resources, water, minerals, and such other economically determinant issues, transitional justice measures must make recommendations that will enhance some level of equilibrium in society. Overall, this is a topic to which the literature in the field has a limited intervention – though in the context of peace studies, there is an increasing scholarship about the economics of arms deals and warfare in many communities around the world. It is time enough to mainstream this conversation in terms of transitional justice efforts.

CHALLENGES – THE BALANCE OF FORCES

Having highlighted some of the approaches to evaluating the impact of truth commissions, it is germane to look at some of the challenges that often impact on the contribution of truth commissions in transitional societies. My argument is that a better appreciation of these challenges and keeping them in view when conceptualizing, designing and implementing transitional justice measures – truth commissions – will help in retooling the mechanisms for maximum impact in the communities where they are implemented.

Be that as it may, "it must be considered that there is nothing more difficult to carryout nor more doubtful of success nor more dangerous to handle than to initiate a new order of things; for the reformer has enemies in all those who profit by the old order, and only lukewarm defenders in all who would profit by the new order." [366] Transformative transitions and social change – usually a radical pivot away from a period of impunity to a new era of recognition, respect, protection, promotion and enforcement of human rights – is often a difficult phenomenon. In no situation is this more illustrated one would argue than in post conflict and post authoritarian societies. There are many identifiable reasons why this is so. Structural transformation is often the ardent need and the mandate of truth commissions have often expanded to accommodate these. Even where they are not clearly set out in the mandate, such issues as the "remote" and "immediate" causes of wars, the question of "economic crimes' often ends up bring to the fore of the debate and truth commission work the need for a

[366] Machiavelli, Niccolò, and David Wootton. 1995.T*he Prince.* Indianapolis: Hackett Pub. Co.

fundamental transformation in the entire architecture of justice, citizenship and community living. The intertwined nature of these elements makes them deeply inseparable and incomplete when detached from each other. It seems to me therefore that it is a whole web and network of structures, elements and components within the transitional society which must be reconfigured and re-engineered if the society must move on to the part of justice and inclusiveness which is often lacking in deeply divided and transitional societies. The need to move away therefore from the impervious and arcane structures that created the space for human rights violations and impunity is therefore one that cannot be overemphasized.

Even more fascinating and evident is the fact that the structural difficulties in these transitional societies are not docile. They are often in the whole process of attempting to reshape the society. Intriguing is the fact that many in the old order often consider themselves threatened by the new order – not quite a few in fact take steps to truncate either the truth commission process or the outcome of such processes. Of interest therefore is the balance of forces – at individual and group levels – at play in transitional societies to shape the outcome and trajectory of the post-conflict and post authoritarian society. Thus from the outsets TRCs have become the new battle grounds for the soul of communities in transitions. A testimony I would argue of its potency towards contributing to the reformation and reconstruction of social ethos, values and human rights protection in post conflict societies. Indeed it is a memorial ground of sorts and no one wants to be cast in marble stones of ignominy. It is therefore, not out of place that these commissions face challenges of different shapes and shades. Some of the readily perceptible challenges are, legal challenges; socio-economic challenges;

religious challenges; and Institutional Challenges. We shall now proceed to examine these seriatim.

CHAPTER FIVE: RECOMMENDATIONS AND CONCLUSION

Thus far we have examined the instrumentality of truth commissions and its deployment in transitional justice efforts in the West African Region – using Liberia, Sierra Leone and Nigeria for our comparative studies. While looking at the transplant of this measure of transitional justice, we have also sought to give it more context by drawing from the functional methodology to see the impact of these commissions. This has produced some revealing experience regarding the impact of truth commissions. The difficulty posed by attempts to measure this impact has equally stood out. One would argue that this is the next frontier of the transitional justice studies. We have seen a number of methodologies – reflecting on the pros and cons. It seems to me that there is much work to be done in terms of the examination of these measuring tools and methodologies. Transitional justice is indeed waiting eagerly for the balm of new thinking in this respect. For the purposes of the continued study of this noted problem in the field, we intend to put forward a number of recommendations.

5.1. RECOMMENDATIONS

Truth Commissions have come to stay as instrumentalities for recapturing the wholesomeness of transitional societies. It is not surprising therefore that they are the most utilized and a number of reasons have been advanced for this. The claims for it is that it nor only enhances the investigation, recording and consolidation of public memory, it also serves as the vehicle with which societies can cross the bridge of violence into a new society of hope. Besides it helps through its recommendations to set

out a new vison of nation building and peaceful coexistence and management of economic and social justice questions that often lead to conflicts. Its studies have therefore become a major interdisciplinary engagement. The question in the present is as regards how to evaluate the contribution of truth commissions to the overarching goals of peace, respect for human rights, institutional reform and restoration of social bearing.

While it may not be readily acceptable to make economic justice a manifest function of truth commissions, it is possible to insert them as latent functions of truth commissions. The difficulty with the manifest adoption of TRCs as a functionally oriented towards economic justice is the inherent fragility and subsistence of centripetal forces on transitional societies. The old order may yet resist effectively the process. As a point of departure therefore, TRCs must enact in their mandate and procedures a framework for achieving an open society founded on rule of law and social justice.

This function is well within the capacity of truth commission and could generate the needed foundational framework under which social movements can coalesce.

From our discussion so far, it is revealing how much work still needs to be done in order to continue to sharpen this implement of transitional justice. For that purpose and for the larger goal of keeping the scholarship fermenting with potential research pathways, it is necessary to make some recommendations here.

First, TRCs must be seen for what they are – a strand in the big web of transitional justice mechanisms. They work best when their focus is well defined and when other frameworks including but not limited to criminal prosecutions, restitutions, institutional

reforms and broad political will are careful tailored into the entire transitional justice linen.

Second, TRCs do not work well where and when there is no significant degree of multiparty support for the initiative. The society in question hold the ace in terms of what they want their new society to look like and what role a truth commission can play in that project. Nothing can be destructive of the proposal of a truth commission than apathy by significant segments of the society. The segmentation may be based on class, religion, region, ethnic bias or indeed sheer fear of the unknown by those who used to hold the realms of power. It is strongly recommended therefore that civil society, general citizens and broad sections of the elite should be encouraged to participate in the process. General buy-in give TRCs legitimacy and in the long-run implicate their potential impact on peace, democracy, human rights, institutional reform and economic inclusion.

Temporality is a great question in conceptualizing, designing and sequencing a TRC for maximal outcome. It may not be feasible in post conflict societies to immediately set up a Truth Commission. This is so because, a number of factors that led to fragility previously may still be clear and present. Such factors as the need to disarm former soldiers and other belligerent parties in post conflict societies are sometimes paramount. Another factor is the lack or financial and human resources to do a good job of truth commissions. It is often the case – particularly in post-war situations – that resources are lacking. It is also the case like in Sierra Leone that resources may be more needed for rebuilding essential public infrastructure. It is therefore important to weigh carefully the timing for the establishment of the truth

commissions considering that the timeliness or otherwise may affect the outcome and consequently impact of truth commissions. Closely following on this, is the need to provide adequate resources to fulfil its mandate. The idea of relaying on international donor agencies for the provision of resources needed for truth commissions is a bad idea.

TRCs must be granted powers to act in its enabling establishment laws and mandates. Such laws must also have independence de jure and de facto. To this effect truth commission mandates should be able to set up realistic expectations and timeline for the conclusion of work and report of the TRC.

Implementation of the reports of truth commissions can be made an aspect of the enabling laws of the truth commission mandates. If it was made clearly part of a TRC mandates that their recommendations will have an authority of law, it will help in forcing the hands of governments to implement their outcomes thus maximizing their impacts on society.

The idea of memorialization has become a huge question in post conflict societies and often there is a recommendation of creating such memories with a view to searing in the conscience of the society the narrative of what happened. This idea of creating public memory arising from the outcome of truth commission is highly recommended because of the potential for many to forget after a few years. In South Africa for instance, there is an increasing feeling that the youths who were born after 1994 do not understand the intricate and highly entangled history of inequality in that country. This limited understanding of the history of the new South Africa makes it difficult for them to appreciate the limitations which the society faces in the continued

search for a more diverse and inclusive South Africa. Memorialization in places like Rwanda have also deepened the understanding and also serves as a space for respecting those who died in the conflict. Perhaps it is important to mention here that memory can also be weaponized – especially when it tells and tilted narrative of what happened. It is critical therefore for transitional justice experts to remember the need to keep the 'memory' balanced.

Beyond the physical memory, the memory as per record of proceedings and outcome of investigations should be carefully and preserved and safeguarded. It has been found that these documents which are often a mix of narrative and forensic facts are necessary for future generations to understand what happened and give them a tool to navigate potential questions of social harmony in the future. Beyond the politics of the day, these records may hold the nuggets for the future. With this in mind the place of memorialization which I broadly categorize as not only physical and material memorialization but also preservation and dissemination of record of proceedings and finding in electronic and other ways is critical to the preservation of collective memory. "The past...is another country. The way its stories are told and the way they are heard change as the years go by. The spotlight gyrates, exposing old lies and illuminating new truths. As a fuller picture emerges, a new piece of the jigsaw of our past settles into place. Inevitably, evidence and information about our past will continue to emerge, as indeed they must. The Report of this Commission will now take its place in the historical landscape of which future generations will try to make sense-searching for clues that

lead, endlessly, to a truth that will, in the very nature of things, never be fully revealed."[367]

While it is true that truth commissions often focus of civil and political rights, it seems to me that both in its mandate and overall efforts at reform in the transitional should consider centralizing socioeconomic opportunities instead of the present periphery which that occupies. Of course the fact that violations of civil and political rights led to the emergence and growth of the field, it is important to note that sometimes the primary causes of violence and struggle for control of the coercive machinery of the state is about socioeconomic opportunity. From South Africa, to Sierra Leone, Nigeria to Liberia, the most significant factor of fragility or potential fragility of states is identifiably socioeconomic inequality.

The sharp split between the poor and rich is one factor that must be focal in framing transitional justice frameworks like truth commissions. To ignore this is to postpone the conflict to a later day or generation. It seems to me that the best approach would be to confront the structural issues that diminish the chances of economic opportunities, human flourishing and development for the citizens. This will not only provoke conversations as to how best to solve the problem, but also perform the necessary ground work for deliberate policy implementation to overcome them. Equally the will inspire confidence and necessary goodwill that will enhance the work of the

[367] Archbishop Desmond Tutu, Chairperson South African Truth and Reconciliation Commission, Forward to the South African Truth and Reconciliation Commission Report Vol. 1 paragraph 17 – 18.

TRCs and thus enhance its potential for bringing peace, development and respect for fundamental freedoms in transitional societies.

Above all, it is recommended that efforts should be made from the outset to manage public expectations regarding the potential contributions and impact of truth commissions in transitional societies. The need for this is informed by the fact that though truth commissions hold a lot of promise, they are only a bridge to the future. They are foundational works of a renewed society. Much of the work of transitional justice and the harvest of positive outcomes for the society must continue in the future through policies, social movements, direct engagement of citizens and collaboration along several ethnic, religious, cultural, professional and institutional groups within the society. Truth commission is not a trophy, neither is it a destination. It is only a pathway in the search for the collective destiny of the society. Citizens must be ready to take the long walk of national development and inclusive human flourishing rather than relapse to the seductive but largely unproductive quibbling and illusive expectations about TRCs and how it should have been the answer to all the socioeconomic and political problems of the society.

5.2.CONCLUSION

There is a great literature in the field regarding the nature, functions and purpose of truth commissions. Many of the foundational and normative claims made for truth commissions ranges from articulating a common range of records, ideas, recommended reforms and potential development platforms in post conflict societies. It has been celebrated for its cathartic function, and public memory and memorialization function. It is regarded as a veritable tool of peace building and conflict resolutions. It then means

it is yet another arrow in the quaver for lovers of peace, liberty, development and human flourishing. Ultimately in post-conflict and post authoritarian societies, it serves the end of agenda setting for the society. It is therefore not surprising that its publications like reports, bulletins, video scripts and such other recordings are seen as an end in themselves. They have equally become the harbingers of justice, forgiveness, empathic healing and reconciliation in transitional societies. The arena of justice has been broadened by truth commissions I would argue owing to their flexibility, limited proceeding unlike the arcane and often distant processes in formal courts. Bishop Desmond Tutu is reputed to have said that in post authoritarian societies, there is no future without forgiveness.

These fundamental grounds and propositions ricochet a great deal with the jurisprudence and ideals of justice, social equilibrium and common good – the eternal debates of lawyers and advocates through the ages. Cicero would say – history and the search for truth is the most important preoccupation of humankind. For the Justinian – it means an egalitarian society where everyone is given her due. It means treating the state and all its appurtenances of power, wealth and policies as the – *res publica* – the thing of the public. Ownership of all these should be to serve the welfare of the people which is the supreme law.[368]For the Augustinians it entails keeping the state safe and making justice flow unceasingly. Of course, what are societies without justice but robber

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[368] Cicero, On Government: On Laws, Translated by G. W. Featherstonehaugh, New York, G & C. Carvill 1829.

bands on a large scale? It is about shared prosperity rather than a zero-sum game of vain accumulation and gilded flourishes.

These philosophical and jurisprudential resonations however do not immediately translate into practical outcomes. Hence, and despite the flow of energy that has been generated by truth commissions and other transitional justice measures, it has reached a new temporal phase. The phase of examining not the first principles though they remain alive and pungent but the impact of these first principles on the trajectory of society. The trajectory which is marked often by broken lives, disappeared faces and mangled consciences. This background no doubt heightens the urgency and invigorates the need for a re-examination of the methodologies and approaches for which the impact of truth commissions can be ascertained. It is therefore not surprising that the importance of being able to better investigate, interrogate and meaningfully shift these mechanisms – particularly truth commissions – has increasingly become the question in the field. This iteration of the work has looked at the existing models and attempted as it is to set out the newest dimensions and research agenda for the future. It is this writer's belief – and it is hoped that the belief will produce correspondence with the realities in the future – that the field work which the retooling for the purposes of measuring impact will be critical in driving the velocity and indeed lifespan of truth commissions as tools of transitional justice. Already certain cynical voices are furtively putting themselves out in the field. These I argue are not borne out of an enlightened interest in advancing human rights and checking the abuse of state powers in transitional society. They do not guarantee a better approach to enlarging human freedom and actualizing a just and peaceful humanity.

It is gratifying that attempts presently in the field lean towards producing a wide range of approaches for the purpose of measuring the impact of truth commissions. Among these are qualitative and quantitative methods. The qualitative methods deal with much of the analysis of the outcome of truth commissions like reports using indicators like the number of persons heard, publication of reports, climate of hearing, and utilization/implementation of recommendations in general. These have improved the knowledge base and understanding in the field. They are however fraught with epistemological concerns which are relevant. First, the cold analysis of records has the unwitting possibility of removing the process and records from the milieu that produced them. Hence, the contextual realities may be lost leaving a great knowledge gap that could have greater implications for policy makers. It may equally limit the understanding of the more perverse factors which may have precipitous consequences for the transitional society.

Another potentially difficult epistemological bind is the fact that the reader may be analyzing the document from a given professional orientation. This professionalism may without more diminish the validity in some of the finding because of its informal and often not well-defined constructs. This does not mean that professional perspectives are not good, nay, they only suggest that though professional perspectives may have the plausibility to pass the examination of fellow professionals they may not be speaking to the felt necessities of the citizens in the transitional society.

Another difficulty is that the templates of analysis are neither self-sufficient nor universal. So the choice of the given frame of analysis may result in a given outcome. It is therefore important to be mindful of this aim at eliminating same to the barest

minimum. For instance, interviews, surveys and polls may produce results that is in dissonance with the society and polity. The favorite critique of these touches both have empirical and normative dimensions. First on empirical levels, the samples might be focused on a particular group and place and therefore cannot speak to the larger constituency. Second, the special limitation is further complicated by time limitations. It may just be a question of what the recollection of those who were interviewed or the study group in the survey is. The methodological difficulties even become more complicated when one remembers that the truth commissions are indeed more perverse and differ both in content, mandate, temporality and capacity. More along these lines are the known limitations of relying on giving facts as can be found in reports or collated data. Your analysis is therefore as good as your data collection process and its collation. Empirical methods on their part however, it seems to me is a qualitative attempt at studying the outcome and impact of truth commissions.

5.3.POSTSCRIPT

"Human beings suffer,/They torture one another,/They get hurt and get hard,/No poem or play or song/Can fully right a wrong./ Inflicted and endured…/ History say, don't hope /On this side of the grave./ But then once in a lifetime/ The longed – for tidal wave/ Of justice can rise up/And hope history rhyme."[369]

The place of truth commissions in the pantheon of transitional justice is settled. It is now one of the most significant instruments in the field and sets out a clear model of legal transplant in recently history of comparative and international law. It has offered

[369] Seamus Heaney, From the Cure at Troy, 1961. `

comparative and international lawyers a new field of legal scholarship beyond the now 'lethargic' *common core approach* to comparative and transnational legal studies. It has equally challenged the methodologies for comparative legal studies that have been in existence. Its diffusion, dispersal and movements has been from obscurity in the 1970's to an era of dizzying visibility and affection in the 1990's. Its golden age – in terms of normativization – came with the South African Truth and Reconciliation Commission. Its resonance since then has pivoted around the template set in South Africa suggesting another level of transplant which translation is – a situation where a legal idea or template is borrowed but adjusted to fit purposes in the new legal environment. Maximo Langer has explored this idea of legal translation in his work from transplant to translation; the movement of the plea bargain in Latin America. Its transmission, transplant, diffusion and translation has pushed the justice cascade and reinvigorated the questions around historical injustice, social choice, and structural transformation in post conflict and post authoritarian societies.

It has given legal geographers new lexica of jurisprudence like justice as recognition; justice as reconciliation; and justice as development. It has enhanced the fundamental ideas about distributive and social justice thus enlarging the perceptible and conceptual possibilities for human living in post-authoritarian societies. I argued that this been the trajectory of truth commissions in this era. Thus, it is the situation that its normative foundations have become the leitmotif in the jurisprudential debates of the moment. It continues to push the margins of what we know – particularly previous notion of silence in the aftermath of violence, and egregious human rights violations. Practically the bones of violated citizens buried deep in the debris of authoritarian

regimes in places like Spain, Argentina, South Africa and more are resurrecting in the face of probing questions for the truth.

The bones have risen and are speaking to the new generation in uncommon language name the right to know and the need to seek a better understanding the history from the mouth of the victims. New voices of legal disputations and with resilient percussion are playing out there. Many of the scholarship in the field have claimed that these are in themselves intrinsically the impact of truth commissions. This sentiment is shared by this author and the only concern is how to keep the tool more sharpened and engage it in the larger search for truth, justice and human flourishing. This is as far as it goes, because despite its transplant TRCs face a number of challenges which have impacts its efficiency. These challenges ranges from the presence of the old order – or its mutations in ways that make it difficult to seek answers to the egregious violations of human rights in the previous era – to financing and institutional capacity in post authoritarian societies.

More so, these mutations are often inoculated by social constructs like patriarchy, clan, tribe, race, religion and such other sentiments often at the crossroads of transitional societies. There malignancy may well be continually fed by uncommon access to state resources like land, oil, rare metals like gold, diamond, copper, silver and the like. There is therefore often a great incentive to frustrate the TRCs or at worse render their finding nugatory and invalid in the post conflict society. But this is where strategy regarding the time, composition, mandate and general environment of truth commissions becomes extremely important.

However, as the transplant and seeds of truth commissions disperse around the world, it has begun to attract genuine questions regarding its impact in post conflict societies. To this effect a new agenda in the field of transitional justice in general and truth commissions in particular is how to seek and set out better approaches to the use of transitional justice and maximize its impact. I do believe that a combination of methods will have to be used and this includes a functional methodology. The idea being that this will help to contextualize and understand the challenges that ultimately affect the impact of truth commissions. Understanding the transplant effect is critical in evaluating the manifest and latent function of TRCs. On then shall be possible to see what works and what does not work. It also helps in finding lasting processes and legal instrumentalities for transforming the society in a manner that is inclusive and economically empowering for the mass majority of citizens. It will also generate more enthusiasm and reduce the critique of TRCs.

Whatever approach adopted in retooling TRCs must of necessity integrate issues of temporality and distributive justice. Citizen ownership of the process and social movements set around the recommendations of truth commissions will no doubt push the frontiers regarding the impact of truth commissions. However, such ownership and social movements will not take off unless citizens can see the potential of the TRC outcome changing society – particularly dismantling structures of perpetual inequality, poverty and ignorance. There is no need hoping that the truth commissions will produce transformative and structurally dismantling impact if there is a sense of inertia and docility within the citizenry. It is therefore the duty of citizens to seek the best outcome of TRC processes through active participation and challenge of the legal and social

impediments to human flourishing in their society. TRCs are not magic wands but they are ladders with which societies can climb out of difficult chasms in their national evolution. The strength and productivity of it will differ from society to society and will depend a lot on the people and what they can make of it.

At this juncture, it is my hope that we have commenced a real discoussion on the functionality and impact of truth commission. The further iterations will come in the near future. But as a great thinker once wrote "far must thy researches go, / Would thou learn the world to know; / Thou must tempt the dark abyss, / Would thou prove what being is; / Naught but firmness gains the prize, / Naught but fullness makes us wise, / Buried deep truth ever lies."[370] It has been my attempt in this work to tempt the dark abyss and thus far the journey may well have just begun.

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[370] Schiller, Friedrich (2010) "Proverbs of Confucius,"*The Open Court*: Vol. 1905: Issue. 5, Article 9.

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