# Good Fences Make Good Neighbours

## Assessing the Role of Consociational Politics in Transitional Justice

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PAPER 3
JAN 2016

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This research is an output from the Political Settlements Research Programme (PSRP), funded by UK Aid from the UK Department for International Development (DFID) for the benefit of developing countries. The information and views set out in this publication are those of the authors. Nothing herein constitutes the views of the Department. Any use of this work should acknowledge the author and the Political Settlements Research Programme. For online use, we ask readers to link to the original resource on the PSRP website.

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# Abstract

This essay reflects on the relationship of transitional justice theory and practice and consociational theory and practice to conflict transformation in deeply divided ethnic polities. We address the identity politics of transitional justice and the political forms that enable, define, and instantiate transition with a particular view to their interaction with power–sharing and consociationalism-type arrangements in the aftermath of systematic atrocity or sustained repression. We provide a pragmatic, perhaps sceptical, account of the triumph of consociationalism as the preferred transitional accommodation and point to the 'dark side' of governance arrangements in post–conflict settings with implications for their capacity to generate cycles of violence and repeat conflict patterns. We are particularly drawn to exploring the ways in which, despite substantive acknowledgement of the limits of consociationalism, it continues to be the preferred solution offered by internationally and bilaterally mediated peace negotiations as a means to address the governance crisis of deeply divided societies. We address the synergies and dissonances of how transitional justice and consociationalism support and undermine each other, and make some practical suggestions. In so doing, we look at how transitional justice interacts with different forms of power-sharing; the tensions in the peace versus justice debates which are central to TJ theory and practice and how they interact with consociational forms of governance; the relationship between community versus individual rights in consociational settlements; and how the emphasis on TJ theory and practice on 'bottom-up, victim led' processes interact with consociational debate on grassroots versus elite interactions.

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**Brown, K., & Ní Aoláin, F. (2016). *Good Fences Make Good Neighbours: Assessing the Role of Consociational Politics in Transitional Justice* (PSRP Working Paper). Edinburgh: Global Justice Academy, University of Edinburgh.**

# a. Consociationalism and its Critics: Where Sits Transitional Justice?

Critiques of consociational approaches are decades old and have already been addressed substantively by other scholars, but it is useful to summarise the key line of attack: namely, that consociationalism is anti-liberal in prioritising groups over individuals, entrenches segmental cleavages, and leads to political immobilism. That political freeze is particularly damaging to divided societies, particularly those where the return to communal violence is present. Centripetalists (or integrationists) argue for mechanisms which incentivise interethnic co-operation prior to government formation.[1] Those in the power dividing camp favour a combination of checks and balances, powerful bodies to protect individual rights, and a dispersal of power that is not open to capture by communal or ethnic elites.[2] In response, consociational proponents have not remained static and have responded by nuancing their commitment to mutual veto, grand coalition, cultural autonomy and proportionality in governing structures, and arguing for liberal forms of consociationalism. This latter avoids processes of ascriptive identification, and so arguably makes segmental cleavages more porous and allows for greater space to build parties around cross-identity support. Liberal consociationalism is also less wedded to grand coalitions, deeming government representation of a plurality within each communal segment largely sufficient, and emphasises the importance of protecting human rights.[3] More recently, complex consociation or forms of 'power dividing' have surfaced employing a commitment to the bones of consociational theory whilst applying meat from centripetal and power dividing strategies via commitments to rights protections and the avoidance of ascriptive identification.[4]

Complex power-sharing presents itself as a hybrid between consociationalism and integrationalism, but if the Liphardt-ian genes remain dominant, it argues that it reflects the real world accretions and evolution that have taken place in the application of consociationalism in real world settings. It is also important to acknowledge that because of the growth of liberal consociationalism and notions of complex power-sharing, human rights frameworks have become more accepted as part of the mechanisms of power-sharing. This rights discourse represents the confluence of two streams: one which emphasizes equality and protection in the present but with a focus on individual rights, and a second which seeks to deal with the poisonous legacy of large scale human rights abuses in the past by insisting on ongoing accountability. In the former, human rights jurisprudence has shaped political choices through the insistence that governmental arrangements comport to fundamental norms of non-discrimination and procedural due process, which are largely individual in their framing with limited group implications.[5] In the latter context, transitional justice, as its name implies, attempts to engage with transitional accountability with a focus on past perpetrators. Both of these approaches are on a potential collision course with consociationalism: the equality approach because it places human rights in tension with some of the group focused solutions,[6] particularly those that have ascription to groups at their heart, and the accountability approach because it suggests that those political-military leaders that consociationalism places at the heart of the new order may be

1 Horowitz, Donald L. *Ethnic groups in conflict*. University of California Press, 1985.; Sisk, Timothy D. Power sharing and international mediation in ethnic conflicts. US Institute of Peace Press, 1996.

2 Roeder, Philip G., and Donald S. Rothchild. *Sustainable peace: Power and democracy after civil wars*. Cornell University Press, 2005.

3 McGarry, John, and Brendan O'Leary. "Iraq's Constitution of 2005: Liberal consociation as political prescription." *International Journal of Constitutional Law* 5.4 (2007): 670-698.; O'Leary, Brendan. "Debating Consociational Politics: Normative and Explanatory Arguments." In From Power-Sharing to Democracy: PostConflict Institutions in Ethnically Divided Societies, edited by Sid Noel, 3–43. Montreal: McGill-Queen's University Press, 2005.

4 Wolff, Stefan,. Situating Complex Power Sharing in the Conflict Settlement Literature available at http://www.stefanwolff.com/files/CPSbgrd.pdf

5 See e.g. ECHR In Sejdic and FInci, the Court addressed the issue of a post-conflict power sharing system and its compatability with equality norms. The case raised issues under P1-3 and Article 14 and also Protocol 12. The decision came under Protocol 12, and the court treated the matter as one of straightforward discrimination on racial grounds – "a particularly egregious kind of discrimination" which required "special vigilance and a vigorous reaction" from the authorities.

6 McCrudden, C., & O'Leary, B,. *Courts and Consociations: Human Rights versus Power-Sharing Oxford:* Oxford University Press (2013); Christine Bell 'Power-sharing and Human Rights Law' (2013) The International Journal of Human Rights 17 204-37

held to account through criminal processes that would remove them entirely from the political process through investigation, indictment, prosecution, and conviction. Here, its potential linkage with power dispersal and the capacity to act as a power spoiler for consociational deals concluded after violent conflict is clear. Whilst notions of 'justice', and thus 'law', beat in the heart of this animal, it is a creature that must necessarily wade hip deep in the political waters of transition.

# b. Transitional Justice Meets Consociationalism

This positionality will have implications for TJ processes when they must necessarily interact with consociationalism. The inevitability of that engagement is a critical juncture in understanding the overlaps and tension points that frame a transitional justice-consociationalism interface. Underneath their broadly similar interests in underwriting new peaceful forms for regulating conduct in conflicted societies, TJ and consociational power arrangements differ in their respective ideological foundation. TJ has its origins in a discourse of human rights that has emphasized protecting the individual against infringing power as well as the independent right-bearing entitlements of individuals; this is expressed in a cosmopolitan frame elevating a common universal humanity, intrinsic to all, the protection of which is a touchstone of proper social and political organisation. TJ has embedded cornerstones of accountability and remedy that inevitably make claims upon political processes and political institutions. Thus, a central part of transitional justice processes involves institutional reform. Years or decades of large-scale abuses and/or conflict leave extremely weak state institutions that are incapable of delivering truth, justice, and reconciliation. State institutions are also to be reformed in cases where the entire state apparatus took part or tolerated human rights violations, such as with the army of security services. All these factors engage the local and international in change processes that criss-cross the lines between the political and the legal.

None of this need be inimical to consociationalism, but its starting point is the group and a recognition of the reality of associations that form lasting, authentic segmented cleavages. As such, the group (be it ethno-national, ethno-sectarian, or some other iteration of social boundedness) becomes its primary concern and default 'unit of analysis'. Therefore, in transitional moments its sights are firmly fixed on group access to power, proportionality of groups in governance, group vetoes, and a measure of autonomy for the cultural group. In some fundamental sense, groups are not subject to any a priori exclusions, limitations, or qualifications in a consociational framing; transitional justice increasingly defines the capacity to engage, negotiate, and participate in political settlements through the lens of atrocity crime responsibility, the boundaries of amnesty law, and the restrictions on the political participation of perpetrators.

This might imply that TJ and consociationalism will make an ill-fit in any realignment of the political order to which they are drawn. To be sure, it may seem that the centripetal approach speaks more readily to TJ's cosmopolitanism, or that power dividing draws from a well of constitutionalism and rights protections more palatable to its legal and universalist reference points. The power dividing and centripetalist prescriptions, it has been noted, have been polemically attacked as somewhat patronising and utopian, each underrating the authenticity and longevity of group identification[7] — would TJ deserve this pejorative label too? Given its insistence on the interrogation of some of the worst practices that humans, individually and in the name of the group, can inflict on one another, there is reason to doubt that it lacks a cold–eyed stare. Consociationalism deals with the embeddedness of group identification as a cold fact, to be recognised and regulated; dissolution or realignment of 'groupness' is placed further down the track, rather off the political horizon. If TJ might be uncomfortable with an emphasis on group accommodation as the centre of gravity given its genealogy, nurture—the hybridity of its practical experience—has meant that it can attempt to work alongside consociational processes. There is no magnetic repulsion between the two, but there are a series of real or potential encounters which can both compliment or complicate the goals of each.

7 Tonge, Jonathan. *Comparative peace processes.* John Wiley & Sons, 2014.

# c. Interactions—Mapping the Positive and Negative

These encounters will produce a range of interactions that may be complicated and, possibly, exist in tension. Yet other points of intersection between TJ and consociationalism may produce complementary processes and even mutual reinforcement. We map them, not altogether neatly, into 'negative' and 'positive' interactions.

*Negative Interaction*

If early motifs on transitional justice forcibly brought attention to the dilemmas of prosecution and the need for compromise (leading to practices of amnesty and forgiveness), there is now a greater contemporary reliance on the language of impunity and the imperative to prosecute where possible. This is particularly evident in the trenchant emergence of international criminal law, the retreat from using amnesty laws, and the emerging requirement that national legal systems perform a meaningful part in enforcing domestic criminal law. Other patterns are constant. These include the emphasis on a right to truth for victims, the value of victim acknowledgment and participation in legal processes addressing the past, and the need to provide repair and reparation to victims.

The first potentially negative interaction has been much discussed in the 'peace versus justice' debate and follows from these core focal points—the belief that TJ processes which frustrate amnesties by invoking the need to avoid impunity through prosecution will frustrate attempts to compose the elite accommodation necessary for power–sharing. Elite actors who face indictment for gross violations of human rights or humanitarian law will be unwilling to cut a deal which effectively grants power and legitimacy to the institutions which will lock them away; instead they are likely to either act as spoilers if they cannot leverage the deal to block prosecutions.[8] The argument runs that a commitment to prosecute will privilege justice for past wrongs at the expense of peace in the present and future, with the risk that a political vacuum will develop that may allow further violence to take place in the absence of a peace deal.

There are other potentially adverse interactions. Consociational institutions rely on a measure of elite control, not just accommodation. That control becomes highly problematized when elite leaders are identified as responsible for or tolerant of prior human rights violations. Levitt, among others, has argued that once one adds human rights norms into peace agreements establishing power–sharing deals with warlords or chronic human rights abusers, the deals not only become meaningless but also take on a schizophrenic character.[9] TJ processes may kindle the grassroots by picking at deeply held narratives of conflict or pursuing local actors who have strong local power bases. This "bottom up" TJ is often ignited by an emphasis on local harms, specific violations, and the transformative effect on political mobilizing that can follow from a rights-based awakening. Elite accommodation may exist at the top, but they might find certain power levers are unresponsive or resistant due to this kindling at the base. Attempts to deal with the human rights violations of the past may simply become displacement battles for both elites and grassroots, as hard conflict becomes translated into a battle between narratives that may ultimately undermine trust and seep into the everyday working of consociational institutions. Biting at the heels of these political interactions are concrete national and international processes of criminal law accountability that increasingly populate the transitional justice domain.

Allied to the previous two points, TJ reckoning may provide a usable forum for ethnic entrepreneurs who chastise a communal elite with backsliding,[10] rather than supporting, the narratives and interests of the group. More

8 Vandeginste, Stef, and Chandra Lekha Sriram. "Power Sharing and Transitional Justice: A Clash of Paradigms?." *Global Governance* 17.4 (2011): 489-505.

9 See Levitt, "Illegal Peace? Examining the Legality of Power-sharing with Warlords and Rebels in Africa" (2006) Michigan Journal of International Law 495, 577

10 There is increased recognition that communal ethnic identity can be leveraged to consolidate legal advancement, political recognition, and social status across multiple spheres see e.g. Degart, Monica,. *Ethnic Entrepreneurs: Identity and Development Politics in Latin America* 2010, Stanford Univeristy Press.

assertively, victimhood of their own group as spotlighted by TJ may be used as a lever to advance narrow political goals. Either way, TJ can provide a space and resources for processes of ethnic outbidding.

TJ may also affect the legitimacy of consociational peace packages. It may act to partially corrode the legitimacy of the state institutions themselves, by continually shining a spotlight on mass violence that created certain 'facts on the ground' from which a power–sharing peace deal developed. Institutional complicity has also increasingly become the focus of investigation for command and control responsibility by both civilian and military leaders, a fact that keeps the impunity spotlight on individuals who paradoxically turn out to be central to the delivery of functional politics in transitional societies. The ethnic cleansing and genocide committed in Republika Srpska, rightfully highlighted by the International Criminal Court for the Former Yugoslavia (ICTY), is nevertheless used by Bosniak nationalists as proof that the Bosnian Serb Republic is an entity whose legitimate power is compromised because it is built on genocidal foundations.[11] Yet, if TJ is insufficiently searching in revealing rights abuses, this may eat away at the legitimacy of the consociational deal in total; this can have direct repercussions for the functioning of power–sharing deals. Across multiple transitional societies, the long reach of accountability and its capacity to vault generations underpins the tenacity of justice claims in transitional societies and their ability to hold moral and legal sway on the governance deals made. As Christine Bell argues, international rights bodies are more likely to challenge the workings of consociational mechanisms if they perceive weakness in the legitimacy of state institutions and founding constitutions.[12]

*Positive Interaction*

We can map a series of possible positive interactions, too. There are a number of ways that TJ might engage with identities that consociational deals are charged with hardening to the detriment of pluralism. By providing evidence of wrongdoing and allowing space for unheard stories, TJ may pick away at mythologies of conflict, self-regarding ethnic narratives that merely serve to validate a one–sided view of conflict. Thus, it can 'get at the scripts' of ethnic chauvinism, mitigating their excesses and creating a more complex mosaic from which political compromise and transformation may follow. In this way, specifically as TJ highlights the individualized harm of conflict and repression, the group hollows out and the essential common vocabulary of loss, grief, damage, redemption, and resilience can emerge.

By capturing and floating other narratives, TJ may serve to humanise the stories of conflict, opening out discourse about the past to encompass categories other than the major social and political cleavages. Narratives framed in terms of gender, youth, 'good Samaritans,' or smaller minorities that do not form part of the consociational package, may thereby partly reflavour and complicate ethnic identities and how communities interacted during periods of extremity.[13] In consociations that have an ascriptive approach to peoplehood when dispersing power, this may help to shift societal (and ultimately, institutional) discourse towards validating non-ascriptive identities, providing a crucial leavening that speaks to 'liberal consociationalism'. TJ may also help diminish ethnic fears. A key driver behind conflict is a sense of physical or cultural insecurity, something which the proportional dispersal of power in consociationalism attempts to address. By addressing large scale rights abuses, and bedding down commitment to human rights and the rule of law in its discourse, TJ may thus help to reduce fear of further conflict, or a belief that a group must remain subaltern and a target for future repression.[14] A line is drawn; if violence accentuated the initial rupture in group relations, processes of justice attempt a further and cleaner rupture with the past, digging a deep trench that makes a return to the logic of battlefields less likely. As claimed above, TJ may provide space for ethnic entrepreneurs to engage in outbidding as they cherry pick the outworkings of truth

11 Majstorovic, Danijela, and Vladimir Turjacanin. *Youth Ethnic and National Identity in Bosnia and Herzegovina: Social Science Approaches*. Palgrave Macmillan, 2013. Nettelfield, Lara J., and Sarah Wagner. *Srebrenica in the Aftermath of Genocide. Cambridge* University Press, 2013.

12 Bell, Christine. "Power-sharing and human rights law." *The International Journal of Human Rights* 17.2 (2013): 204-237.

13 Arthur, Paige, ed. *Identities in transition: Challenges for transitional justice in divided societies.* Cambridge University Press, 2010.

14 Arthur, *id.*

recovery or prosecutions, but it need not go wholly their way. The criticism that injecting TJ into a peace process will produce a tension reflecting justice versus peace, that the question of amnesties or opposing impunity will act as a solvent on peace making may be flawed as well. Calibrating amnesties, introducing gradations and conditions, can mould TJ processes in a way that can attach to peace processing without either stifling peacemaking or accountability; there is evidence that this trend is underway.[15] By supplying evidence that challenges or constrains ethnic myths of perpetual victimhood and providing narrative room for more nuanced forms of identification, TJ may act to constrain outbidding, if not erase it. Some cherries will remain out of reach, others will be as bitter as wormwood.

TJ has also attempted to reduce the ethnic appropriation of court judgements, by individualising crime—projecting crimes against humanity as the result of individual criminal actions rather than the deeds perpetrated in the name of entire communities, something which would act as a splinter under the skin of any consociation. However, mass human rights abuses, by their scale and nature, contain an undeniable collective dimension. Such violations or certain patterns of abuses create a collective trauma and affect entire communities and the society as a whole. There are countless instances in the Democratic Republic of Congo (DRC) of local communities being identified by reference to a massacre that took place during the war. Atrocities committed by the Lord Resistance Army (LRA) in the DRC, Uganda, South Sudan, or the Central African Republic lead international actors to talk of "LRA-affected communities". Revealing the truth about prior abuses becomes a condition (sine qua non) for the affected communities and society as a whole to recover. The purpose of transitional justice processes and mechanisms is then to also consider this collective dimension to address how a post-conflict society as a whole can recover. These individual and collective dimensions may also account for the complex nature of the truth in post-conflict societies. First, the expectations, imperatives, and solutions when addressing the legacy of large-scale abuses will vary depending on whether one considers the viewpoint of victims as individuals or the society as a whole. The need to uncover the comprehensive truth/accountability will not be dealt with according to the same criteria and motives when addressing it as a collective matter. Second, this collective dimension sheds some light on another element of truth and accountability dynamics. It is one thing is to establish the facts; it is another thing is for an entire community to accept and acknowledge them. The relationship is no longer between a victim and a perpetrator but is about a collective recognition. The work carried out by a researcher in the case of post-conflict societies in the former Yugoslavia and the efforts to establish the truth illustrates this complexity and the role of denial by a local community. Janine Clark insists that in Bosnia-Herzegovina, "there are essentially three ethnic versions of truth – the Bosnian Serb, the Bosnian Muslim and the Bosnian Croat – that quintessentially disagree on what happened during the country's three year war, on who were the aggressors and who were the principal victims". And this is so despite the ICTY's numerous trials.[16] She points out that, due in part to the importance of denial, "truth in post conflict societies is a far more ambiguous and problematic concept than supporters of criminal trials and truth and reconciliation commissions sometimes appear to assume".[17]

Yet, here we can determine a significant failure. The ethnic frame of society and politics more usually depicts acquittals of one's own group members or prosecutions of a communal 'other' as vindication for one's group. Successful pursuit of members of one's own group is often downplayed or cast as proof of the inherent group bias against an ethnic community by international or domestic mechanisms. Ethnic identity is a strong adhesive, and in nationalistic forms proves effective in selectively marshalling the past to its purposes. Consociationalism recognises the adhesive and mobilising power of ethnonationalism; yet TJ has something to add, too, as it acts in the same ecology as ethnonationalism—the contested past.

15 Mallinder, Louise. *Amnesty, human rights and political transitions: bridging the peace and justice divide*. Bloomsbury Publishing, 2008; Mallinder, Louise, and Kieran McEvoy. "Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies." *Contemporary Social Science* 6.1 (2011): 107-128.

16 Clark, J (2011) Transitional Justice, Truth and Reconciliation: An Under-Explored Relationship, 11 International Criminal Law Review, pp. 247-249.

17 *Id.*, p. 242.

# d. Ethnonationalism and Transitional Justice—The Mutual Pull of the Past

Consociationalism is an institutional approach to governance that takes segmental cleavages seriously as authentic, deep–seated facets of social organization. In the most deeply divided societies in which consociational government has been tried, such as Northern Ireland, Bosnia, Lebanon and (historically) Cyprus, these cleavages are organized around ethnonational or ethnosectarian communities. These divisions crystallise around identities that have been underpinned and shaped by historical understandings that serve as warehouses of myth and symbol and as route maps to the present and future. Ethnonationalism draws readily on these myth and symbol complexes from the past in creating boundaries between identities and fostering the narratives that foment or constrain group action. In the cases suggested above, we can see how ethnic narratives have prioritized mobilizing narratives of the past that spotlight boundaries and sharp contestation between ethnic groups. Given that a key aspect of deeply divided societies is not just the existence of segmented political organization, but potential (often violent) contestation of the legitimacy of state structures, we can see how TJ, just as consociationalism, will be interested in mechanisms that bind ethnonational groups to a new, hopefully legitimate, dispensation. For consociational proponents, this legitimacy flows from appropriately and proportionally dispersing the levers of power; for TJ, legitimacy flows from an accounting for past harms, the better to bed in new adherence to the rule of law. Each approach then has reason to take ethnonationalism seriously.

Ethnonationalism and TJ appear to be at opposite ideological points. The ethnic identities that form segmental cleavages are entities which draw up social boundaries and communicate in terms of the particular, not the universal. TJ is arguably a branch of the growing human rights discourse, which has a universal frame of reference. Yet, if we examine ethnonationalism and TJ in action we can discern structures that produce a similarity of focus. Each understands the influence and utility of the past as providing values, symbols, and resources. It is seen as having a socializing, norm–creating role in the contemporary field of action. TJ and ethnonationalism each understand the past as number of things: a zone of contestation for legitimacy, a narrative guide for moral action in the present, and a storehouse of mobilizing symbols. Each may instrumentalise the past as a force for contemporary policy; TJ may use the past to underwrite norms that dissolve impunity and promote acknowledgement and reparation for historic harms; ethnonationalism reimagines narratives and events of the past to spotlight the endurance of identities and the necessity of group solidarity. This comparable reach for the past is not the result of an ideological similarity—there is no genetic linkage between TJ and ethnonationalism. Rather, it is the outworking of each being formed out of the same historical and contemporary environment. The long twentieth century has seen rapid processes of democratization requiring mobilizing narratives (with which the past is replete), and violent and extended phases of state formation, warfare and decolonization, which have ensured that the 'past' remains sometimes emotive, in many cases politically 'unfinished', and still structuring relations in society. In recent decades the past's importance has been further amplified by a cultural 'memory boom' and a scepticism surrounding the future focused ideologies of the left or right.[18]

# e. Ethnonationalism and Transitional Justice: The Importance of Victimhood and Trauma

TJ and ethnonationalism not only share a similar orientation in time, they can apply similar organizing frames in terms of narrative and individuals. Both place victimhood at their moral core. TJ processes must be 'victim centered'

18 Torpey, John C. *Making whole what has been smashed: On reparations politics*. Harvard University Press, 2006; Nora, Pierre. "Between memory and history: Les lieux de mémoire." Representations (1989): 7-24; Winter, Jay. "The memory boom in contemporary historical studies." RARITAN-A QUARTERLY REVIEW 21, no. 1 (2001): 52-66.

or they are regarded as deficient; the extent to which victims sit at the heart of policy and implementation is used as a barometer of TJ's effectiveness and resonance with local populations. To be 'victim centered' implies the empowerment and raising up of the silenced and excluded, fuller acknowledgement of harm, greater access to a range of experiences, and greater access for social and legal remedies. But this approach to victimhood signals more than the rebalancing of power relations and a wish to open out justice meaningfully and democratically. It also has an emotional and symbolic connotation: the experience of traumatic suffering brings with it 'deep moral knowledge'. Victims may then be strategically essentialised as 'moral beacons' providing insight into not only the immorality of harms visited upon them, but the moral worth of their forbearance, resistance, or forgiveness.[19]

Transitional justice offers great hope to victims of serious human rights violations. It provides a new vocabulary of accountability and repair for those who have lost hope in the capacity of ordinary legal system to provide meaningful redress. In addition to a vocabulary of harm, claim, and repair, transitional justice also provides important institutions and structures to process crimes of mass atrocity, including truth commissions, lustration and vetting procedures, administrative and judicial reparations schemes, and apologies. However, it is obvious that the scale of atrocity crime in most societies makes full repair, absolute accountability, and meaningful redress highly elusive. For a variety of practical reasons, including budgetary constraints, transitional justice always works with partial capacity to meet the needs and expectations of victims. Accountability for those most responsible inevitably means that many will go unpunished. Limited resources mean that reparations will be partial or limited in their scope and reach. By virtue of the nature of the crimes committed evidence will be difficult to produce, communities and individuals will be dispersed, and making legal systems work in the aftermath of atrocity can be a limited exercise. All this goes to say that the burdens of expectation are high for transitional justice, but some pragmatism and modesty is required given the real-time, real-life limitations of implementing transitional justice on the ground, a set of tensions that co-exist with the lived realities of deals made with perpetrators that de facto compromise the expectations and needs of victims.

Victims also have a representational role within the discourse of ethnonationalism. They are symbols and carriers of stories in relation to historic wrongs, witnesses to the perfidy of the communal 'other', and the suppression of a community. If ethnonationalism views the 'nation' as an organic natural entity, and can project it rhetorically as a great personhood, then victims become the metonyms for this national being—the national story in living miniature. They thus have a deeply symbolic existence within the ethnonational frame, often linked to the narrative of communal struggle and resistance. They also help to shift the symbolic into the concrete; their stories provide often verifiable evidence for the narrative and add to it an emotionally accessible human face.[20] For ethnonationalism, the memory of victimhood has still more resonance. Nationalist narratives certainly encompass stories of heroes and victories, but still more significance is given to martyrs, a category who usefully merge the status victim and hero. This provides a clue to an especially effective narrative type: nationalisms have an attraction to traumas and defeats.

We can offer four reasons for this lure towards the traumatic. Firstly, it may underline a connection between the modern ethnonational grouping and the past, and explains the dormant or politically unfulfilled status of the group. Secondly, it supplies a historical injustice around which a grouping can mobilise, and a 'sore thumb' with which to illicit international support; it also presents the community as a durable, tested entity in ways that narratives of victory or satisfaction cannot—the group demonstrates its steadfastness. Lastly, it presents a narrative of the sacrificial, useful in channeling many forms of political resistance. Large-scale death becomes emblematic, group members died 'for' something; the trauma may even serve to carry a nationalistic narrative or moral obligation. The exemplary trauma of the last hundred years, genocide, has been used both as a driver within the universalist

19 Thomas, Laurence Mordekhai. "Suffering as a moral beacon: Blacks and Jews." The Americanization of the Holocaust (1999): 198-210

20 Smyth, Marie Breen. Truth recovery and justice after conflict: managing violent pasts. Routledge, 2007. BreenSmyth argues 'the construction of the narrative about the victim's experience plays a central role in both individual and collective identity formation' leading to a foisting of the role of 'moral beacons' upon them'.

human rights discourse and as a mobilizing frame by ethnocratic states and ethnonationalist movements to reinforce their own nationalistic projects.[21] TJ and ethnonationalism thus inhabit the same historical waters.

# f. Transitional Justice in the Grassroots—Consociational Compliment or Constraint?

Consociational structures operate at the elite level; the understanding is that communal leadership will be able to manage its respective constituencies while meshing the gears of accommodation and co-operation at a higher level. A criticism is that it in focusing on the elite level, and in working to underwrite communal control via processes such as cultural autonomy, it is in fact entrenching division at a wider societal level right down to the grassroots. The argument is that elites will do little to undercut their own bases of support—communally framed political parties—and civic forms of representation are thereby squeezed. Indeed, liberal consociation proponents do envisage non–ascriptive forms of identification finding room and may eventually hope that elite accommodation slowly filters down to communities by a process of example setting. Yet, they do not provide a detailed understanding of how this may actually happen; this is understandable given that in consociations such as Lebanon, Northern Ireland, and Bosnia, civic forms of political representation remain minority undertakings. Even peaceful Belgium, at the heart of the European project, has witnessed increasing communalisation rather than its withering, and the ferment of extremist violence whose relationship with the underlying state political project remains uncharted. As recent research has argued, a structure inhabited by ethnic tribunes may result in wider societal buy in to the system, and resource allocation may be more susceptible to moderation, yet perpetual ethnic outbidding on issues of identity, culture and symbolism may still combust and be far less amenable to accommodation in the long run.[22] This appears to draw a thick question mark through the aspiration of power sharing as an example of co-operation for wider society. Critics of a consociational elite focus have instead tended to shift the focus on to activating and nourishing civil society actors as a way of transforming social relations; civil society can act to challenge the narratives and identities of elite configurations and create the space for themselves to help evolve different civic forms of representation over time.[23] This seems ambitious, but proponents critique consociationalists for their naivety in assuming that anything that entrenches segmented cleavages can produce a sustainable, workable system.[24] Of course, the fact that in divided societies civil society groups are often themselves expressions of segmental cleavages, overloaded with bonding capital and exhibiting less in the way of bridging capital means that it may also be simplistic to consider civil society as always providing a civic, transformative force.[25]

Might TJ add something missing to the elite focus of consociational systems? We have argued that partisan ethnic cleavages are embedded in the local, and that consociational approaches, even in their liberal form, are not best placed to engage with these given their elite focus and institutional strengthening of communal forms of representation.[26] We will now consider whether processes of TJ can act to fill this gap between top and bottom level

21 Feldman, Jackie. *Above the death pits, beneath the flag: Youth voyages to Poland and the performance of Israeli national identity.* Berghahn Books, 2008; MacDonald, David Bruce. *Balkan Holocausts?: Serbian and Croatian Victim Centered Propaganda and the War in Yugoslavia*. Manchester University Press, 2002.

22 Mitchell, Paul,. Geoffrey Evans, and Brendan O'Leary. "Extremist outbidding in ethnic party systems is not inevitable: tribune parties in Northern Ireland." *Political Studies* 57.2 (2009): 397-421

23 Although it is increasingly recognized that civil society actors also constitute their own elite in transitioning and conflicted societies, a factor to be accounted for in placing undue or singular emphasis on their transformative capacity. See e.g. Fatton, R Predatory Rule: State and Civil Society in Africa Boulder: Lynne Rienner Publishers 1992; Ishal, Jad,. The NGO-isation of Arab Women's Movements IDS Bulletin 35, No 4 (2004): 34-42; Schuller, Mark,.Gluing Globalization: Ngo's as Intermediaries in Haiti *Political and Legal Anthropological Review* 32, no 1 (2009): 84-104

24 Dixon, Paul. "Paths to peace in Northern Ireland (I): Civil society and consociational approaches." *Democratization* 4.2 (1997): 1-27;

25 See e.g. Farrington, C,. Models of Civil Society and Their Implications for the Northern Ireland Peace Process IBDS Working Paper 453.

26 Brown, Kris & Ni Aolain, Fionnuala,. Through the Looking Glass: Transitional Justice Futures through the Lens of Nationalism, Feminism and Transformative Change (1) *International Journal of Transitional Justice* 127 (2015)

interactions, or merely circle that plughole.

*The Local Turn in Transitional Justice*

Recent scholarship, whether seeking to establish new norms of interaction or supplying case studies of truth recovery and memory work, has shifted to a level of magnification that is designed to capture local processes of dealing with contentious pasts. Macro level TJ, it is argued, may be too legalistic in its approach, preferring to 'see like a state' and, in so doing, fails to adequately engage with the complexities of transition at the local level through skipping over certain claims and narratives, failing to provide for meaningful, substantive input from victims, and ultimately losing relevance and legitimacy in the eyes of those at the grassroots level. If we take the example of the states of the former Yugoslavia, we can see that evidence is mounting that higher–level TJ processes can indeed be resisted if they threaten ethnonational narratives, be appropriated if they valourise the same, or simply be ignored.[27] Releasing legalism and stepping away from the 'state level' horizon of interpretation has thus been championed as a necessary way of increasing relevance for local communities by allowing a fuller examination of context, engaging them as actors and not merely as subjects, and allowing voices to emerge which might have been previously screened out by elite level discourses be they either judicial or ethnonational.[28] As Huma Haider warns 'Day-to-day lived realities in divided societies influence whether new narratives that may emerge from court decisions or truth commissions alter, reinforce or have no effect on dominant stories and myths'.[29] It is necessary, therefore, for TJ to get access to the workings of ethnonationalism in order to engage with its discourses. As argued above, it already wades in the waters of victimhood and the past. What is needed are locally based (and collaborative) designs which can channel its norms and discourses into the local mix of a deeply divided society. Narratives that establish identity content and boundaries are very much like velcro, fastening to the local group and individual as multiple hooks and eyes at the micro level.[30] If identity content comprises hooks that fasten hostile, simplified narratives of militancy and threat, or boundaries that are over communicated and encapsulating, neither macro TJ or elite level consociational approaches will be able to partially unpick it. We should not imagine that localising TJ will be a simple case of a higher gear cog changing down and meshing with a lower one; the process produces friction and can cause the assumptions of macro TJ to fracture.[31] Yet, it can also throw open new and unforeseen possibilities.[32] Grounded forms of TJ may enable understandings of the past that are more meaningful to communities and can differ strikingly from higher political levels, foregrounding experiences that are at variance with ethnonational elite focus on militarism and resistance or international elite narratives of closure and reconciliation.[33] The process may thus be one of vernacularisation, where ideas and practices of TJ are shaped and communicated in a way that produces resonance with local values.[34] If there is a fear that locally–based TJ could simply supply a displacement

27 Subotić, Jelena. "Hijacked justice: domestic appropriation of international norms." Human Rights and Human Welfare Working Paper 28 (2005); Victor Peskin & Mieczyslaw P. Boduszynski, *Balancing International Justice in the Balkans: Surrogate Enforces, Uncertain Transitions and the Road to Europe*, 5 (1) INTERNATIONAL JOURNAL OF TRANSITIONAL JUSTICE (2011); Subotic, Jelena. "Remembrance, Public Narratives, and Obstacles to Justice in the Western Balkans." *Studies in Social Justice* 7.2 (2013): 265-283.

28 Shaw, Rosalind, Lars Waldorf, and Pierre Hazan. *Localizing transitional justice: Interventions and priorities after mass violence*. Stanford University Press, 2010; McEvoy, Kieran. "Beyond legalism: towards a thicker understanding of transitional justice." *Journal of Law and Society* 34.4 (2007): 411-440; Kent, Lia. "Local memory practices in East Timor: Disrupting transitional justice narratives." *International Journal of Transitional Justice* 5.3 (2011): 434-455; L. Bickford, "Unofficial Truth Projects," *Human Rights Quarterly* 29 (2007): 994–1035.

29 Haider, Huma. "Social repair in divided societies: integrating a coexistence lens into transitional justice." *Conflict, Security & Development* 11.02 (2011): 175-203.

30 Hearn, Jonathan. "National identity: banal, personal and embedded." Nations and nationalism 13, no. 4 (2007): 657-674

31 Hinton, A. L. ed., *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence* (New Jersey: Rutgers University Press, 2011); Orentlicher, Diane,. "Settling Accounts Revisited: Reconciling Global Norms with Local Agency," International Journal of Transitional Justice 1 (2007): 10–22

32 Shaw, Rosalind and Waldorf, Lars,'Introduction,' in Localizing Transitional Justice: Interventions and Priorities after Mass Violence, ed. Rosalind Shaw and Lars Waldorf, with Pierre Hazan (Stanford, CA: Stanford University Press, 2010).

33 Kent, Lia. "Local memory practices in East Timor: Disrupting transitional justice narratives." *International Journal of Transitional Justice* 5.3 (2011): 434-455.

34 Sally Engle Merry, Human Rights and Gender Violence: Translating International Law into Local Justice (Chicago, IL: University of Chicago Press, 2006).

battlefield that could hinder the ability of elites to manage constituencies within a power–sharing framework, we should acknowledge that but also point out two facts of life within deeply divided societies. First, that the 'local' may already be the happy hunting ground for ethnic entrepreneurs and 'spoilers' if they cannot yet acquire representation at governmental level; and second, that in matters of cultural and narrative contestation, the powersharing elites may themselves tack to ethnonational scripts at the local level, as a default.[35]

*What Might This Local Transitional Justice Look Like in a Deeply Divided Society?*

Given the social capital of ethnonationalism at the local level, reflecting resilience, authenticity, and narrative depth, it would be foolish for TJ processes to attempt a foisting of pre-digested norms that will be regarded as lacking context and relevance, and as something of an external intrusion. Rather, TJ could open up a space for agonistic debate, in which narratives and claims freely emerge and encounter one another but are also subject to challenge. Agonistic pluralism neither expects nor asks for a definitive end product to emerge, there need be no agreed narrative, full closure, or final reconciliation. It does envisage a fundamental respect for other discourses, allowing a liberal circulation of narratives, but the ability of any narrative to be robustly contested is axiomatic.

Rather than attempt to foist a series of norms that may be regarded as an intrusion or confection, and for which it lacks the ground level social capital to transplant in any case, a different course could be navigated. Looking forward, we suggest that it may be that TJ should allow spaces for agonistic (as opposed to antagonistic) debate, allowing these narratives to encounter one another.[36] It could work to facilitate these narratives in both the national arena and at local levels. But the process of engaging in this agonistic discourse is predicated on respect, the free circulation of narrative, and the ability to challenge those narratives. Rather than 'understanding reconciliation in terms of restoring a relationship between alienated co-members of a moral community we should attempt to free space to allow ethnonational orthodoxies to be routinely challenged, from both within and without the community'.[37] It is thus a process of diffusion and complication, not of reconciliation between binaries, one which acknowledges 'multiple pasts whilst offering the tools necessary to challenge all settled identity claims'.[38] This is the broad model, and other scholarship has advocated similar deliberative approaches that accept robust contestation, if not couched in an agonistic frame.[39] But such a model could, however, flip easily into simple antagonism where the past continues to pump into the present and local forms of ethnonationalism just become adept at lawfare. We can certainly expect challenges around victimhood, so central to both TJ and ethnonationalism, to be particularly hot and recurrent. But to help prevent this model toppling into antagonism, TJ can provide several avenues of approach.

*Rules of Encounter*

Whilst agonism is non-prescriptive and open–ended, it does require a framework in which contested narratives and claims may productively interact. Examples may be usefully drawn from a range of truth commissions, which could assist in shaping the terrain in which agonistic actors can meet, and productively work out how narratives may be presented, engaged with, and challenged. Narratives need not merely encounter one another in a quasi-legal setting, or in a truth commission format; local forms of agonism could adopt forms which more broadly based types of transitional justice have implemented such as oral history projects, exhibitions, or school curricula.

35 Hayward, Katy, and Milena Komarova. "The Limits of Local Accommodation: Why Contentious Events Remain Prone to Conflict in Northern Ireland." *Studies in Conflict & Terrorism* 37.9 (2014): 777-791.

36 Schaap, Andrew,. "Agonism in divided societies." Philosophy & Social Criticism 32, no. 2 (2006): 255-277; Schaap, Andrew, ed. Law and agonistic politics. Ashgate Publishing, Ltd., 2009; Bell, Duncan. "Agonistic democracy and the politics of memory." Constellations 15, no. 1 (2008): 148-166

37 Schaap, Andrew,. "Agonism in divided societies." *Philosophy & Social Criticism* 32.2 (2006): 255-277. P.268

38 Bell, Duncan,. "Agonistic democracy and the politics of memory." *Constellations* 15.1 (2008): 148-166. P.162

39 Payne, Leigh A. *Unsettling accounts: Neither truth nor reconciliation in confessions of state violence*. Duke University Press, 2007; Rangelov, Iavor,. *Nationalism and the Rule of Law: Lessons from the Balkans and Beyond.* Cambridge University Press, 2013.

*Providing Claims Making Tools*

In processes of memory making, commemoration, and shaping narratives of the past, law can be invoked in inventive ways. Actors outside of an obviously legal context have creatively employed statutes, international law, 'soft' law, declarations, and even case law.[40]

This could inflect claims which have relied on partisan and particularist frameworks and which have therefore closed off dialogue rather than opening it out to agonism. Law can also be used to open up archives and push new evidence into the wider public sphere; this could enhance agonistic processes and not just by adding extra facts to bolster argument. As new information emerges, perhaps confounding simplistic views of a conflict, fissures within ethnonational structures and discourses could develop. Within these openings there may be greater space for reflexivity, disruptive thinking, and intersectionality. Increasingly, too, there is recognition that the opening up is cyclical, as discourses of post-transitional justice reveal, TJ may well be more of a loop than an end point. A rapidly developing form of TJ has been that of memorialization and commemoration; as well as providing some measure of symbolic reparation, commemoration can serve as a sounding board to articulate claims in public spaces. These may be 'single identity' but not expressly in an ethnonational frame, shifting robust, critical engagement into a different type of discourse.[41]

*A Means to Draw Out or Test Narratives*

There is a strong role for historical commissions if they can be linked to local settings. Employing a broad range of historians, social scientists, and lawyers, commissions might prove useful in testing the reliability and accuracy of locally–based narratives, and also simply providing a circulation of these narratives that provides them with a wider public space.[42] Such narratives also provide the means to engage in active "myth-busting," undoing misconceptions and even deep factual inaccuracies that have permeated popular consciousness in deeply divided societies. These myths often underpin deep and intractable victimhood pathologies and the 'othering' that occurs between ethnically, religiously or socially divided groups. In parallel, feminist scholarship has much to add here as it champions a willingness to detect and uncover silences and provides a focus on the 'everyday' thereby offering a different understanding of communal harms.[43] An agonistic process precludes definitive verdicts on truth claims but militant or essentialising mythologies may be weakened by historical commissions. Alternatively, if agonistic actors accept group claims as convincing, they may seep through ethnonational boundaries, having been provided with a degree of validation. We might imagine it in this way: the evidential standards of the academy, together with legal processes, are important validating resources to which an ethnonational actor is attracted; but in reaching for and using them, groups could well be obliged to moderate the particularism of their own truth claims. Notions of equality, fair dealing, and respect for pluralism which are often built into consociations would thus be telescoped to the local level. It could introduce pluralism at an intra–communal level, too. Ethnonational frames can put simplifying screen memories in front of intersectional claims of internal sub groups, and so any shift to universal norms may also provide a challenge to insider elites.[44] TJ and historical inquiry may also be useful in illuminating patterns of harms that occurred in ethnonational struggles; this could work to broaden the definition of harm in ways that disrupt simple ethnonational framing. TJ could also provide a simple but particularly helpful function: tallying the extent of harms accurately could work to dissolve mythologies of sole suffering and the outbidding instrumentalisation of victimhood.

40 Savelsberg, Joachim J., and Ryan D. King. "Law and collective memory." *Annu*. Rev. Law Soc. Sci. 3 (2007): 189-211.

41 Brown, Kris. "'What It Was Like to Live through a Day': Transitional Justice and the Memory of the Everyday in a Divided Society." *International Journal of Transitional Justice* 6.3 (2012): 444-466

42 Ingraor, Charles. "Confronting the Yugoslav controversies: The scholars' initiative." *The American Historical Review* 114, no. 4 (2009): 947-962; Gavrilović, Darko, and Vjekoslav Perica, eds. Political Myths in the Former Yugoslavia and Successor States: A Shared Narrative. Republics of Letters, 2011.

43 Ni Aolain, Fionnuala & Turner, Catherine,. Gender, Truth and Transition 16 UCLA *Women's Law Journal* 229 (2007)

44 O' Rourke, Catherine, Gender Politics in Transitional Justice Routledge (2013)

*A Need for Caution and Realism*

When engaging with the 'grassroots' in a deeply divided society, levelheadedness and realistic expectations are necessary. We can perhaps see this in consociationalism's unwillingness to commit itself to prescriptions much beyond elite management; it will settle for agreement at the top which will constrain conflict and just possibly set the mood music for deeper accommodation. The lessons of ethnic tribune politics show that this music is often a contrapuntal rhythm and difficult to stay in step to. If we advocate a grounded focus for TJ as a way of addressing this, we do so in the full knowledge that the local ecology can be a thicket that can work to repel interlopers. Hence the agonistic approach, which sees civil society as producing thorns as well as nectar.

We can speedily delineate the problems of engagement. West European and North American thinking on civil society frames it as promoting liberal democratic norms and creating a new civic space, one in opposition to particularist claims; this reflects an incomplete understanding of ethnonationalism as being irrational, the product of scheming elites, and which ignores the importance of ethnic bonds in societies.[45] It is rather the case that civil society groups can be inflected by ethnonational memberships to a greater or lesser extent. In many instances, they may be more appropriately seen as particularist, not integrative, as ethnic civil societies.[46] They may also be 'captured' by state institutions;[47] less of a problem in a consociation one might think, but if the power–sharing deal encompasses federalism then this leaves the possibility of capture by federal entities. Our agonistic approach whilst factoring in endemic contestation, also requires certain fundamentals: a wish to engage and an acceptance of reciprocal rights to be heard. These need not be forthcoming from the grassroots, where disagreement over equivalence, sequencing, timeframes, and overall intent of projects, speedily work to dissolve local engagement.[48] More fundamentally, local dialogue may be greatly inhibited because whilst in a more consensual society many interpretive horizons are accessible to citizens as part of their everyday lives, in a divided society 'the capacity to choose from these interpretative horizons is constricted, both in terms of discourse and in terms of socially acceptable behaviour.'[49] In other words ethnonationalism has powerfully narrowed what are deemed appropriate ways of looking at society, despite attempts to push past these boundaries, but it need not prevail in every case of engagement and interaction.[50]

Within this discussion we have presented TJ as neither confection nor constraint but rather complement to consocationalism. We have a constructively critical approach to consociational structures that acknowledge that it allows for the pursuit of claims at the elite level but has avoided how sectional identities and claims play out at the local. This has meant that any benefits of elite cooperation can fail to transfer to the grassroots—a major problem given that the 'local' is the forcing house of ethnonationalism in all its varieties, militant or otherwise. TJ, if properly attuned can get at the local in ways which consociationalism does not. Consociationalism by necessity has an institutional focus, whereas TJ has a narrative sensitivity, which is conversant with the power of historical accounts, and attuned to the discourse of victimhood and trauma. The local model we have sketched, drawing on a grassroots turn in TJ, is about robust engagement within a setting of co-existence rather than reconciliation. It is one that encourages pluralism, and may defuse the worst of combustible mythologies, whilst allowing space for intersectional voices, and unheard stories to complicate simple binaries. It does not provide Potemkin village initiatives of brief, symbolic harmony. Expectations need to be set realistically. The environment is difficult. This is not

45 McGarry, John. "Explaining ethnonationalism: The flaws in Western thinking." *Nationalism and Ethnic Politics* 1.4 (1995): 121-142.

46 Alexander, Jeffrey C., ed. *Real civil societies: Dilemmas of institutionalization*. SAGE Publications Limited, 1998; Haklai, Oded. *Palestinian ethnonationalism in Israel*. University of Pennsylvania Press, 2011.

47 Doyle, Jessica Leigh. "Civil Society as Ideology in the Middle East: A Critical Perspective." *British Journal of Middle Eastern Studies* (2015): 1-20.

48 McCurn, Caitlin, and Anna Di Lellio. "Engineering Grassroots Transitional Justice in the Balkans: The Case of Kosovo." *East European Politics & Societies* (2012):

49 Hayward, Katy, and Milena Komarova. "The Limits of Local Accommodation: Why Contentious Events Remain Prone to Conflict in Northern Ireland." *Studies in Conflict & Terrorism* 37.9 (2014): 777-791

50 Kovras, Iosif. "De-linkage processes and grassroots movements in transitional justice." *Cooperation and Conflict* 47.1 (2012): 88-105.

reconciliation, but neither TJ nor consociationalism have been shown to assuredly deliver that. Both could however work together in a complementary fashion, providing a 'top' and 'bottom' engagement that acknowledges but is not subservient to group difference.

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