

Analysis: Flexibility in Transitional Justice

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From the declaration of independence of Kosovo in 2008, Kosovars have treated the “four pillars of transitional justice” – truth, prosecutions/criminal justice, reparations and institutional reforms – as though they were the four simple goals for achieving transitional justice through societal changes and development. However, as so often happens, context requires flexibility. David Tolbert[1] noted the pillars can be applied too formulaically. Consequently, “…in the hands of some the four pillars approach has become a kind of “check the box” approach that is formulaic or ‘paint by numbers’ in nature”, whereas transitional justice is anything but formulaic — it needs to be responsive to the local conditions and situations.”[2] Transitions from war to peace are driven by what Tolbert referred to as ‘active social forces’, which include not only civil society as usually conceived as including victims’ groups and human rights activists, but also unions, religious groups, and other interested social groups.[3]

Criminal law, one of the pillars, cannot deal with radical evil in society all by itself. The fight against individual impunity from retributive justice is not only for the courts. Social justice must be achieved. To do this, other concerns need to be addressed such as the needs of victims through reparations programs seeking to recognize and compensate, materially and symbolically, the injuries that victims have suffered. The importance of acknowledging the truth of what happened to victims, their suffering, their heroic struggle, and the fact that they have been wronged must be recognized and addressed.

Institutions of the international community have perceived criminal prosecution as the most forceful tool in transitional justice in Kosovo. These institutions include the UN Mission in Kosovo (UNMIK), the International Criminal Tribunal for the former Yugoslavia (ICTY), the EU Rule of Law Mission (EULEX), and lately, the Special Chambers in The Hague, which will deal with wrong-doings committed by the members of Kosovo Liberation Army. These institutions acted on the basis that the criminal pillar was the best means to apply pressure to the Government of Kosovo to make the “right” political decisions such as: fighting impunity, supporting minority rights and improving multiculturalism. They have not vigorously promoted other transitional justice mechanisms, which often more directly satisfy the needs of victims and society at large, such as reparations and truth commissions. Transitional justice as a comprehensive response to past abuses is not yet a priority for the international community in Kosovo.[4]

Civil society in Kosovo continues to seek justice for the voiceless both nationally and regionally, despite only two formal initiatives by the Kosovo Government: first, to produce a strategy for transitional justice and the President’s initiative to set up a Truth and Reconciliation Commission. Pierre Hazan has described the assertion by civil society groups of the western Balkans of a need for a regional approach to transitional justice because no less than seven small states emerged after the bloody conflict in the Former Yugoslavia, and this is unquestionable.[5] Consequently, the fact that transitional justice in Kosovo was initially conceived within a national framework may need a new philosophy and restructuring.

Three of these seven states lack mutual recognition. Serbia and Bosnia and Herzegovina did not recognized Kosovo. They are not likely to succeed individually in dealing with their past when they are confronted with issues that have regional implications. The lack of state recognition results in problems in cooperation in matters of judiciary and extradition of criminals /perpetrators. In contrast to the states’ inability to cooperate, civil society in the region of the Former Yugoslavia continues cooperating in the realm of transitional justice and advocates to set up a regional truth commission RECOM.

The experience of the former Yugoslavia’s civil society offers a wealth of educational opportunities. Bearing in mind that the ICTY failed to meet the demands of victims, several NGOs from the Former Yugoslavia joined forces to establish the Regional Commission RECOM and investigate the past wrong doings on a regional scale. RECOM’s advocates keep taking the initiative and think outside the scope of the new states’ national borders to reflect the reality of the wars of the 1990s and the crimes committed.[6]

Denisa Kostovicova has observed how the transition from a nationwide discussion to a regional one changes the nature of the conversation, creating the possibility of writing a pluralist history of the conflicts that caused extensive bloodshed in the former Yugoslavia.[7]

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5. Pierre Hazan "Beyond Borders: The New Architecture of Transitional Justice?" *International Journal of Transitional Justice*, 2017, 11, 1–8.Oxford
6. Denisa Kostovicova, Seeking Justice in a Divided Region: Text Analysis of Regional Civil Society Deliberations in the Balkans: Denisa Kostovicova* Associate Professor of Global Politics, London School of Economics and Political Science, UK. Email: d.kostovicova@lse.ac.uk Search for other works by this author on: Oxford Academic, I J Transit Justice (2017) 11 (1): 154-175
7. *Ibid*.