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Authors(s)	Valk, Sophie Van der, Keenan, Marie, Albert, Alley, McAlinden, Anne-Marie, Gallen, James
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INNOVATIVE JUSTICE RESPONSES FOR NON-RECENT INSTITUTIONAL ABUSES: RESTORATIVE, TRANSITIONAL AND TRANSFORMATIVE JUSTICE

How and why should society remember and what are the challenges involved?

March 2024

Dr Sophie van der Valk (University College Dublin), Dr Allely Albert (TU Dublin), Professor Anne-Marie McAlinden (Queen's University Belfast), Dr James Gallen (Dublin City University), and Dr Marie Keenan (University College Dublin).

Introduction

Non-recent institutional abuse refers to the harm, marginalisation, and shame organisations and states have inflicted on individuals, nations, and entire groups of peoples. It can include physical, emotional, sexual, or cultural abuse and neglect within state and non-state institutions.

Institutional responses to such harms have historically focused on 'bad apples' and the actions of individual perpetrators (Keenan 2012). However, structural factors are increasingly recognised as contributing to such issues, with aspects such as gender, age, race, disability, and power relations playing a role in oppression and inequality, demanding different approaches (Penhale 1999).

Thus, although individuals within institutions can be responsible for specific acts of abuse, harm may also be more widespread or systemic.

Currently, victim/survivors of non-recent institutional abuses can pursue justice through criminal prosecution, civil litigation, inquiries or commissions of investigation, and redress schemes, most commonly resulting in apologies and monetary redress (Hamber and Lundy 2020).

Despite these measures, much of the literature indicates that current legal systems premised on retributive justice are not adequately responding to the needs of victim/survivors.

In a search for other approaches, this paper explores three additional justice paradigms of relevance to historical (or non-recent) institutional abuses: restorative justice (RJ); transitional justice (TJ); and transformative justice. Each will be explored in turn.

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Restorative Justice

Restorative justice (RJ) offers a way of humanizing crime and justice that centres on repairing the harm and deepening acknowledgement and accountability by those responsible. RJ characterises crime not only as a violation of law but also as a violation of relationships and communities. RJ emphasises stakeholder participation - victims, offenders, and their communities - in generating solutions (Zehr 2002).

Traditionally used with young offenders involving low tariff crime, more recent developments have seen the use of RJ for all crime types (including sexual violence) with adult as well as youth offenders. RJ practices include victim-offender dialogue, restorative conferences, family group conferences, healing circles, and circles of support. Outcome agreements, including reparation, can form part of the process. Some RJ schemes operate independently of the state, while others function in tandem with it.

In recent times RJ has also developed frameworks for restorative inquiries (Province of Nova Scotia 2019) and restorative responses to institutional abuses more generally (O'Connell and Walshe 2023; Wailling et al. 2019). 'Consequentialist' (Walgrave 2021) or whole-system (Keenan and Zinsstag 2022) perspectives of RJ underpin such innovations. These processes are collaboratively designed with a healing, accountability, and restorative focus.

Key principles include:

- Repairing harm and wrongdoing
- Healing for victim/survivors
- Promoting accountability and amends-making
- Respect, collective participation, and inclusion
- Generating mutual understanding
- Reintegrating victims within families and communities
- Reintegrating perpetrators
- Promoting institutional reform
- Promoting nonrecurrence
- Transforming criminal justice

Research has reinforced the idea that RJ provides meaningful experiences for victim/survivors in healing trauma, promoting accountability, facilitating reintegration, engendering the recovery of social capital, and fostering empowerment (Johnstone and Van Ness 2013).

RJ is critiqued for being perceived as a 'soft' option, fostering net-widening, coercing victim/survivors,

Transitional Justice

Transitional justice (TJ) arose in response to conflict situations as a way of moving society forward while acknowledging the harm caused by prolonged violence. TJ encompasses processes used to address mass atrocities or serious political violence. It is often characterised as both 'backwards looking' and 'forwards looking' due to its aim to deal with the past while establishing a just future (Mihir 2021).

In more recent developments, TJ has expanded from its application in post-conflict settings to include systemic human rights violations and large-scale abuses in settled societies (sometimes considered 'post-transitional justice') (Reiter 2021). It has become more focused on healing and reconciliation, and, in line with the turn in peacebuilding, is more embracing of local and indigenous values (Waldorf 2021). As a discipline, it has also broadened from a legalistic basis to include social sciences and humanities.

Key objectives include:

- Transitioning away from mass violence/conflict or towards a new regime
- Dealing with abuse
- Establishing truth/acknowledging harm
- Promoting accountability
- Healing
- Reconciliation
- Empowering victim/survivors
- Ensuring nonrecurrence of abuses
- Developing societal trust
- Re-building state legitimacy

TJ may be used to investigate power dynamics and structures that enabled non-recent institutional abuses and any continued political power over victim/survivors and to explore the potential of redress, memorialisation, or other processes (O'Donnell et al. 2022).

Its main forms include truth-telling about the past (via official investigations), prosecutions of individual perpetrators, symbolic or material reparations (via apologies or monetary redress for survivors) and policy reforms. In many countries across the world, a combination of these measures have been used in response to non-recent institutional abuses.

However, the use of TJ within non-conflict settings, including with non-recent institutional abuses, can produce certain challenges. In particular, problems can arise with the continuity of church and state institutions and the mixture of transitional and 'ordinary' justice mechanisms (such as criminal or civil cases), as there is less of a clear break with the past (Álvarez Berastegi 2017). There are also questions of sequencing in terms of whether 'truth' should come before reparations, as well as common issues with structuring and resources. Nonetheless, clear and consistent actions by institutional actors, and a firm commitment to follow-through on their promises of redress, can create effective institutional responses to non-recent institutional abuses that acknowledge wrongdoing, repair harm, and restore confidence in institutions.

Transformative Justice

Building on the principles of RJ and TJ, transformative justice encourages changes in relationships and structural reform at local, state, and international levels with a focus on grassroots efforts and empowerment. Werle and Vormbaum (2022: 9) characterise transformative justice as a 'general umbrella term for alternative approaches to conflict resolution' that explore underlying causes of conflict. Gready et al. (2010: 2) further explain that transformative justice focuses on 'the communities affected by systemic violence with the aims of seeking forms of justice that break with the structures that may have led to violence in the first place'.

Key principles include:

- Promoting inclusive participation and ownership
- Acknowledging continuity between past and present so as to address past violence in a forward looking manner
- Challenging power dynamics and unequal structures
- Prioritising holistic, multi-level processes centred on healing and accountability
- Empowering local individuals and communities

Processes which adopt transformative justice principles must be holistic, integrated, and comprehensive in vision, aiming for lasting change. This requires structural transformation, addressing socioeconomic, political, legal, psychosocial, symbolic and ecological issues. Lambourne (2013) contends this may include material compensation, restitution, reparation, distributive justice, and political justice, as well as institutional reforms that ensure fair representation and participation and prevent impunity.

Some argue that while aiming to address the shortcomings of RJ or TJ, transformative justice has merely identified problems without offering viable solutions (see e.g. Sharp 2022). It is also sometimes critiqued for not being clearly delineated from RJ, and the fact that its conceptual boundaries can be quite blurred (Rossner and Taylor 2024). More generally, it is challenged as being too optimistic without addressing the feasibility or likelihood of success (Gallen 2023). (2013) contends this may include material compensation, restitution, reparation, distributive justice, and political justice, as well as institutional reforms that ensure fair representation and participation and prevent impunity.

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Conclusion

There are overlapping values in restorative justice, transitional justice and transformative justice based on truth, accountability, reparation, reconciliation, acknowledgement of wrongdoing, and the shunning of exclusively adversarial or retributive approaches. However, transformative justice goes further than either RJ or TJ by championing the complete overhaul of systems, seeking to dismantle the root causes of injustice. It therefore holds not just individuals or specific institutions to account, but also the wider systemic structures at the heart of previous wrongdoing and abuses. In seeking to establish lasting change, it fosters collective empowerment from the bottom up, and recognises the importance of local, sustainable solutions.

Due to the scale of the task and ambitions, however, its aims can appear unattainable. In this respect, the field of transformative justice is still in its infancy, and largely without empirical testing to date.

An ongoing project conducted by a research team from Queen's University Belfast (McAlinden), University College Dublin (Keenan) and Dublin City University (Gallen) is exploring the potential of a new transformative justice response to non-recent institutional abuses and what this might look like. Based on extensive empirical research, including 74 in-depth interviews with key stakeholders across the island of Ireland, North and South (victim/survivors and church and state actors), this work highlights the potential of more innovative justice responses to address non-recent institutional abuses. This ability lies in the capacity of transformative approaches to justice to address not only the individual or structural elements which made abuses possible but also the individual, societal, institutional and ideological changes which are fundamental to non-repetition of abuses.

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Authors

Dr Sophie van der Valk (University College Dublin), Dr Allely Albert (TU Dublin), Prof Anne-Marie McAlinden (Queen's University Belfast), Dr James Gallen (Dublin City University), and Dr Marie Keenan (University College Dublin).

Corresponding author: Prof Anne-Marie McAlinden, Queen's University Belfast.
E-mail: a.mcalinden@qub.ac.uk

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For further details of the project and other outputs see: <https://transformingjusticeproject.org/>



Queen's University Belfast
University Road
Belfast
BT7 1NN
Northern Ireland
United Kingdom

Queen's Policy Engagement
w: <http://qpol.qub.ac.uk>
e: qpol@qub.ac.uk
[@QPolAtQueens](https://twitter.com/QPolAtQueens)

