

Jasmina Brankovic and Hugo van der Merwe

TRANSITIONAL JUSTICE IN POST-CONFLICT SOCIETIES: CONCEPTUAL FOUNDATIONS AND DEBATES

Over the past 25 years, transitional justice has emerged as an accepted approach to address legacies of past human rights violations worldwide. As noted by the United Nations, transitional justice comprises “the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation” (2004: 8). The “large-scale” nature of the abuses transitional justice seeks to address, namely systematic and grave human rights violations, is what distinguishes the field from efforts to address other forms of violence. The process of dealing with these violations during a transition from authoritarianism to democracy or from war to peace presents particular challenges and opportunities in the pursuit of justice.

Several mechanisms, which usually have limited time frames and specific mandates, have come to dominate the field of transitional justice and contribute in different ways to promoting rights to justice, truth, and reparations:

- Prosecutions, launched through the permanent International Criminal Court, the ad hoc International Criminal Tribunals for Rwanda and the former Yugoslavia, hybrid international and domestic courts such as the Special Court for Sierra Leone, or national courts (some with special sections for international crimes);
- Truth commissions, which generally seek to generate an ‘authoritative record’ about past abuses and operate in a range of ways, including with public or closed hearings, general statements concerning responsibility or detailed lists of perpetrators’ names, and reliance on existing information or use of subpoenas, among others;
- Reparations for victims, which can be individual or collective and take the form of material reparations (cash payments, the building of a school or community center) or symbolic reparations (public apologies, memorials);
- Institutional reforms, aimed at democratizing and building public trust in state institutions;

- Community-based or ‘traditional’ justice mechanisms, where local conflict-resolution and healing practices are adapted to address grave violations;
- Vetting and lustration of public officials complicit in past abuses.

Although these are the most commonly used mechanisms of transitional justice, a range of other processes, from rewriting history textbooks to public storytelling, vigilante justice, and amnesty, can also be considered as broadly falling within the field’s ambit.

While transitional justice is an established field, it is also fairly new and still evolving. This has given rise to lively debates concerning its goals among practitioners and scholars in disciplines as diverse as law, psychology, sociology and forensic science, to name a few. Transitional justice actors also come from and work in diverse contexts in both the global South and North, which has prompted discussion regarding the appropriate meaning and goals of justice, the centrality of human rights or reconciliation, and whether the process should be based on ‘universalist’ or local values. There is an increasing consensus, however, that transitional justice processes must respond to the specific context of the country in transition, instead of relying on a ‘one size fits all’ model.

This chapter provides an overview of the conceptual evolution of transitional justice. It then discusses challenges likely to be met in post-conflict transitional settings – namely, multiple armed groups, legal pluralism, ethnic and religious tensions, socioeconomic marginalization, and gender inequality – along with some of the strategies used to address these challenges. While other countries’ experiences can offer some guidance regarding transitional processes, each new context in which transitional justice is attempted provides an opportunity to reshape the field in ways that respond to the needs and interests of the local population, as well as to garner new insights into how transitional justice can be conceptualized and put into practice.

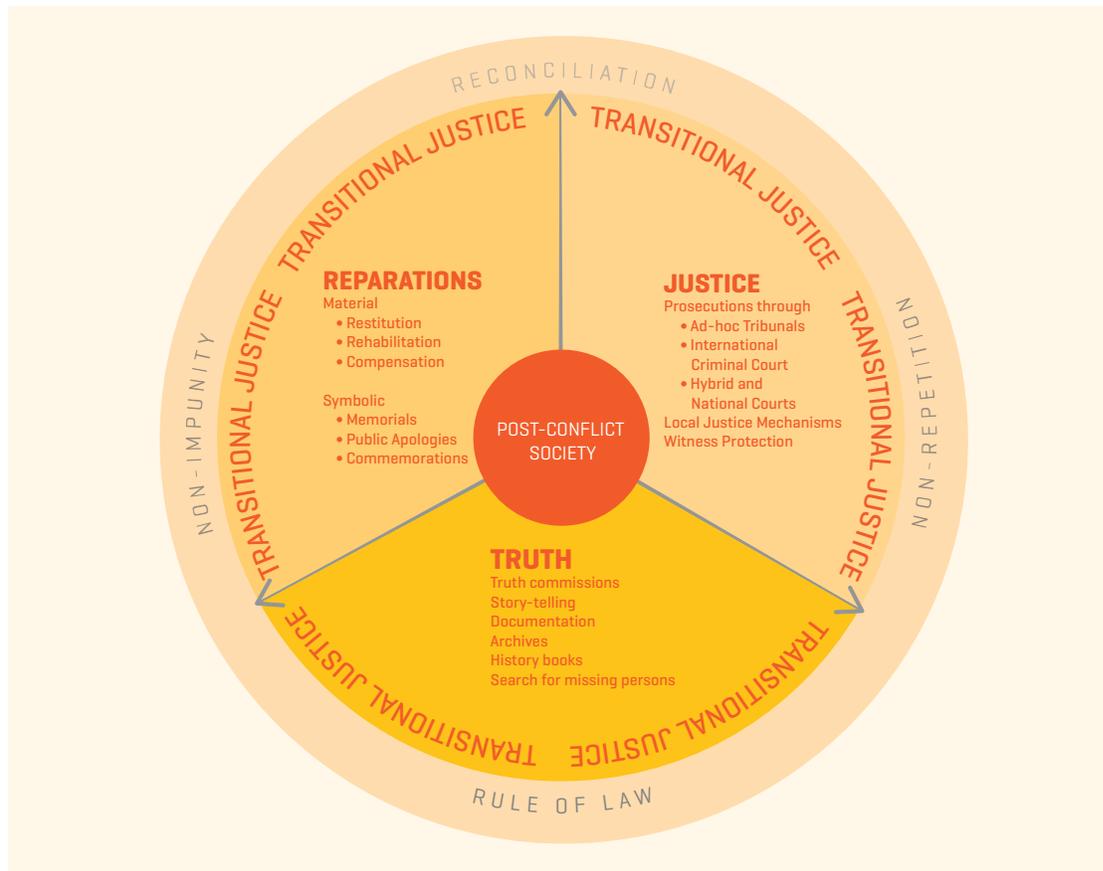
Evolution of transitional justice

Transitional justice as a field of practice emerged in the late 1980s and early 1990s with efforts to facilitate the transitions from authoritarianism to democracy in Latin America and Eastern Europe and to address the violations committed by outgoing dictatorships. These efforts were driven by the human rights movement and were based on a commitment to build liberal democracies – two influences that continue to shape the field.

In addition to their role in framing post-dictatorship transitions, human rights serve as one of the conceptual foundations of transitional justice. The human rights movement has achieved global legitimacy since its emergence after World War II through the adoption of international treaties, the establishment of international human rights law (and its incorporation into domestic law by a rising number of countries), and the enforcement of human rights norms by international courts, culminating in the creation of the International Criminal Court in 2002. Drawing on and buoyed by the ascendancy of human rights discourse, transitional justice has focused on states’ responsibility to ensure individual accountability for violations of international human rights standards.

While this human rights-based emphasis on individual accountability has helped to challenge impunity, it has also resulted in transitional justice being dominated by legal responses to past violations and a reliance on prosecutions (Teitel 2003). Combined with the human rights community’s historical tendency to privilege civil and political rights violations over economic, social, and cultural rights violations, this has led to a greater focus on direct violations of bodily integrity, such as murder, torture, and unlawful detention, which some argue are more ‘justiciable’ (Arbour 2007), as opposed to, for example, structural harms such as socioeconomic exclusion. Thus, while human rights norms have bolstered transitional justice as it has developed into an accepted response to political transitions, they have also shaped it into a largely legalistic field with an often narrow accountability focus.

The other significant driver of transitional justice – its perceived utility in facilitating democratization – has highlighted states’ responsibility to enforce human rights norms, but it has also demonstrated the political necessity of promoting alternative means of accountability. This has come in response to concerns that prosecutions alone could destabilize transitions in contexts where members



Three components of Transitional Justice

of the outgoing regime maintain political power. Thus, transitional justice actors have broadened their advocacy to include other mechanisms that have become central to the field, particularly truth commissions and reparations for victims.

While these quasi-judicial mechanisms pose a lesser ‘threat’ to perpetrators than trials, they still draw a ‘bright line’ between the outgoing regime and the new government’s commitment to democratic governance and human rights, building its legitimacy in the eyes of the public (Daly 2008). Again, as these alternative mechanisms are framed in traditional human rights discourse, they focus more on civil and political rights violations and generally underplay the ways in which the structural harms of the past may be maintained in the new dispensation, which almost always embraces economic liberalization along with political liberalization.

The potential tension between the central aims of transitional justice – the legal ambition to ensure accountability and promote human rights standards through individual accountability for past international crimes, and the practical ambition to secure a successful transition to democracy – highlights some of the contestations intrinsic to the field (Bell 2009). This is reflected in the ‘peace vs. justice’ debate among transitional justice actors, which asks whether some degree of impunity must be accepted in order for opposing sides to reach a political settlement (Sriram and Pillay 2011). A less obvious, though perhaps more crucial contestation, lies in the question of whose interests are served by transitional justice: those of victims of grave violations, governmental elites working to establish their legitimacy, human rights entrepreneurs, experts with a stake in the international justice industry, or even those perpetrators who use transitional justice to focus international attention on the crimes of their opponents while deflecting it from their own (Kagoro 2012).

This question has become particularly salient since the increase in internal conflicts that characterizes the post-Cold War era and the attendant shift in transitional justice from addressing transitions from authoritarianism to democracy to addressing transitions from internal conflict to peace. The shift has increasingly involved applying transitional justice in contexts where a clear political transition has not occurred or where a conflict is still near the surface. In such contexts, the degree to which transitional justice can be manipulated to serve multiple and often conflicting interests is more evident, demanding attention from transitional justice actors.

A number of efforts have been made to take into account these conflicting interests, and two require mention. One is the use of local, community-based ‘traditional’ or ‘indigenous’ mechanisms, such as the Gacaca courts in

Rwanda or the Mato Oput conflict-resolution practices in Uganda. These mechanisms aim to be more relevant and accessible to local populations than ‘western’ processes such as prosecutions and truth commissions (Huysse and Salter 2008). The other is the use of local, civil society-driven transitional justice processes in addition to, or instead of, state-sponsored mechanisms. Similarly designed to be more locally relevant, these processes often focus on the needs of victims. This is in contrast to state-sponsored processes which often end up promoting the rights of perpetrators over those of victims, despite victim-centered rhetoric.

While many consider these country-specific and local-level approaches less rigorous than conventional, state-run mechanisms, they are a complement to narrow, legalistic transitional justice practice. They may serve to bring new voices into transitional justice debates, and represent an increasing desire within the field to be more context-responsive instead of relying on ‘one size fits all’ processes (McEvoy and McGregor 2008).

Key transitional justice challenges in post-conflict contexts

Transitional justice is an evolving field and a contested terrain. Its shifts and tensions are a response not just to a changing global context but also to the way that each society adapts transitional justice to address local needs. A context-based transitional justice approach is however not simply a process of synchronizing a global model to fit local particularities. It requires creativity to generate new solutions, and it requires problem-solving processes and serious negotiations to address competing claims and agendas.

Multiple armed groups

The involvement of multiple armed groups in a conflict is a frequent reality that provides both a challenge and an opportunity for transitional justice interventions. In countries where the state was responsible for almost all the violence, and the opposition did not adopt armed resistance, the morality of state violence is easily addressed through a human rights framework. State abuses are uniformly condemned by both society and the new post-conflict state, particularly where the Cold War provided justification for ideological repression that no longer seems relevant. Where violence was perpetrated by multiple sides of a conflict, the battle over the legitimacy of different forms of violence continues well beyond the end of the conflict. It is then much more difficult to establish a common value frame for judging the violence used by different actors when state repression and terrorist or guerrilla warfare are used by both sides as justification for their response.

More legalistic transitional justice processes approach this tension by seeking a common (or generally international) legal definition of abuses that can facilitate an even-handed approach to treating victims and perpetrators in a consistent manner. At a deeper level, more process-oriented and participative transitional justice endeavors (such as many traditional or community-based mechanisms) have also sought to move beyond seeking 'fairness' at a formal level. Through the use of public dialogue, these processes aim to facilitate mutual understanding of the motivations and roots of conflict. While clarifying who committed more abuses or who killed more civilians can be very important, understanding the historical dynamics that gave rise to armed rebellion or the establishment of militias may be just as critical in facilitating a process of reconciliation.

Legal pluralism and competing conceptions of justice

Despite the dominance of formal legal systems at the international and national level, the role of such systems in managing conflict within local communities is debatable. Even in western societies, critics question the ability of courts to provide adequate redress for victims, resolve conflicts, or prevent future violations. In societies with functioning alternative legal traditions (Islamic, local cultural practices, etc.), questions about the legitimacy of formal, law-based approaches to social order reach even deeper.

Transitional justice interventions have been associated with a strong 'rule of law' agenda. While this is generally a welcome alternative to the rule of force or the unfettered authority of the state that characterizes many post-conflict contexts, it often presents a threat to existing state or community-based systems of knowledge and conceptions of justice. While not dismissing the need for a fair system that is uniformly applied, transitional justice approaches have been cautioned to not ride roughshod over local forms of justice that serve as a resource for managing conflicts within a community (Huysse and Salter 2008).

Transitional justice processes have learned to draw on these local justice mechanisms to complement formal accountability and truth-seeking mechanisms, as in Rwanda, or their values and approaches have been incorporated into the more traditional institutions, as in Uganda or Timor Leste. Tensions between these approaches are likely to emerge as they often comprise alternative sources of authority with different understandings of the values that should guide a new society (Liff 2012).

One of the common legacies of intense, long-term internal conflicts is that mechanisms for resolving conflict become compromised and delegitimized. This



Photo: Elia Finocchiaro

Gacaca courts established in 2001 in Rwanda after the genocide of 1994

legacy may affect both state institutions and alternative local justice processes when they become harnessed for political purposes by either side in the conflict. The need to address this legacy through reform of such systems is often suggested as the first step in them becoming appropriate tools for resolving human rights abuses.

Innovation in reforming or adapting traditional justice processes is also required in order to make them suitable for dealing with disputes that go beyond the bounds initially anticipated for these systems. Conceiving of appropriate punishment or compensation for systematic torture or terror attacks is generally seen as overextending their mandate. They are also stretched in their attempts to deal with conflict between individuals or groups who come from communities with competing legal traditions.

A key concern that has been raised in various post-conflict contexts is that transitional justice approaches should not be one-off interventions that deal simply with past abuses. The fragile nature of these societies and the high potential of future violence indicate the need to build local capacity within communities and the state to deal with such tensions on a sustainable basis. Thus, transitional justice interventions should contribute to rebuilding foundations for local institutional and cultural capacity to deal with conflict when it emerges again.

Ethnic and religious tensions

In addition to having competing perspectives on how conflict should be resolved, cultural, ethnic, and religious groups may embrace fundamentally different histories of the conflict. Transitional justice processes are often

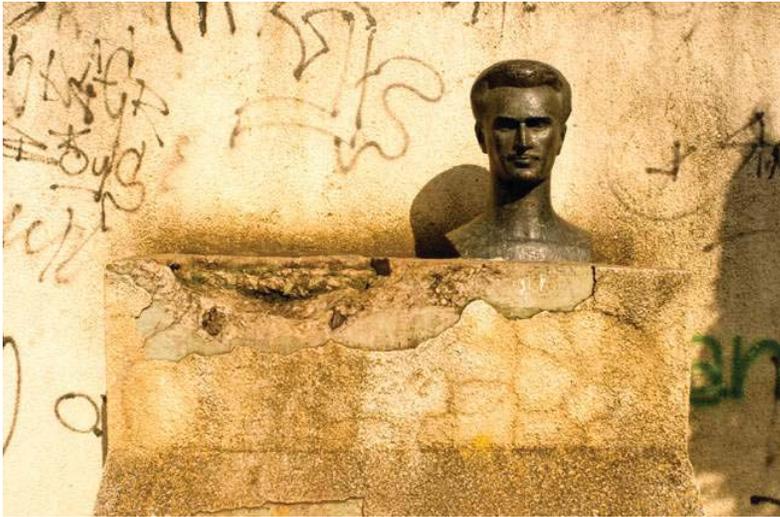


Photo: Marko Kojac

Monument to Boro Vukmirović and Ramiz Sadiku in Pristina, Kosovo.

thought to facilitate better dialogue (and even a shared identity) across these social divisions. Severe conflict and mass trauma in particular often cement competing memories and interpretations of past events. Rather than simply addressing individual experiences of victimization and personal accountability, transitional justice seeks to speak to communal audiences. Both formal legal processes and truth commissions portray themselves as avenues to present a common narrative or at least a common set of objective facts that can form the basis for an 'authoritative record' of the past. Some transitional justice processes, however, emphasize the importance of the dialogue process they facilitate between groups, rather than the outcome, as the key element in rebuilding such relations.

The psycho-social dynamics of collective trauma are still not fully understood by the transitional justice field. In particular, the impact of processes such as public storytelling, apologies by political leaders, joint healing ceremonies, and other symbolic processes of dialogue and exchange are unclear. Within deeply divided societies, positive outcomes may be highly dependent on the ability of these societies to create meaningful forms of cross-cultural communication. In addition, symbolic public processes that address deeply traumatic events are often seen as empty symbolism or mere ritual (Celermajer 2013). They need to be linked to tangible shifts in behavior and concrete measures addressing victims' concerns if they are to serve as a meaningful indicator of a change.

Where divisions between groups are embedded in deeper socioeconomic inequalities and legacies of exploitation, processes of dialogue and sociopolitical reform are likely to have limited impact if not linked to broader economic and social transformation.

Socioeconomic marginalization

In the past decade, transitional justice actors have increasingly called for the expansion of the field's narrow focus in order to address (more sustainably) the roots of conflict and grave violations. The target for such calls has largely been socioeconomic inequality and systematic marginalization. These are often sidelined in transitional justice practice because of the field's characteristic concentration on violations of political and civil rights violations over economic, social, and cultural rights. This is reinforced by a hesitation to upset the political balance by threatening elites' economic interests. A debate has emerged between those who understand transitional justice as a long-term program for social change that only begins with the 'transition moment', and those who understand it as a necessarily short-term project with 'realistic' goals that can be achieved within the limited remit of dedicated state-sponsored mechanisms.

The main approach to incorporating socioeconomic issues into transitional justice has been through the promotion and enforcement of economic, social, and cultural rights. Some transitional justice actors have argued for going beyond the human rights discourse toward a more 'transformative' justice discourse, questioning the liberal political and economic agendas that underpin the field. They point out the power of transitional justice processes to reveal the continuities between past and present socioeconomic exclusion and structural harms (Gready 2011).

The field's engagement with this topic has been largely theoretical to date. Only a handful of truth commissions – such as those in Peru, Guatemala, and particularly Kenya, which included a chapter on land misallocation and misuse by political elites in its final report – have discussed histories and ongoing practices of socioeconomic marginalization of specific identity groups. Some reparation programs, like in Peru and Uganda, have framed development projects as collective reparations for past systematic exclusion of specific communities, although this can be problematic in equating a state's developmental obligations with its duty to redress victims. Attempts to address socioeconomic marginalization through transitional justice are an area of growing interest and evolving practice for both state-sponsored and civil society-driven processes.

Gender inequality

While transitional justice has attempted to address gender issues since its beginning, the past decade has seen the focus broaden from efforts to ensure accountability for systematic sexual and gender-based violence against women to programs aimed at increasing gender equality during and after transition. A more 'transformative' agenda identifying the continuities between past and

present exclusion based on gender is often linked to the similar discourse concerning socioeconomic exclusion (Ní Aoláin 2012).

In the mid-1990s, the International Criminal Tribunals for Rwanda and the former Yugoslavia broke new ground, prosecuting systematic sexual violence against women as a crime against humanity. In addition, efforts were made to ensure the representation of women not only in transitional justice processes but also at the negotiating table beforehand. It has been noted, however, that a greater number of women in such institutions does not necessarily translate into gender equality on the ground.

Discussions on reparations have engaged with this issue as well, as it has been recognized that the principle of restitution to the pre-conflict situation might not always make sense. This is particularly the case in contexts where women have obtained an unprecedented degree of socioeconomic and political independence in the course of the conflict (Valji 2009).

Increasing nuance in gender analyses has also led to awareness of the need to deal with gender-based violence against men and boys, as well as violence based on sexual orientation or gender identity. In sum, recent approaches addressing systematic gender-based violence broadly defined and gender inequality as a structural harm have reinforced the understanding that gender cannot be a separate component of transitional justice mechanisms but rather must be integrated into all aspects of the transition process.

Conclusion

Transitional justice is still an emerging and contested field. International bodies and policy makers in all parts of the world have embraced it with enthusiasm and loaded its processes with ambitious mandates. Yet in many countries the failure to deliver quick-fix solutions has resulted in skepticism about whose goals transitional justice processes serve. The huge challenges presented by transitioning countries with devastating legacies of conflict clearly require more long-term and contextually informed interventions.

Transitional justice processes have not been sufficiently evaluated to present clear answers to the myriad of problems faced by countries emerging from long conflicts. While international experts have contributed by documenting experiences from many countries facing similar challenges of how to deal with the past, the relevance of those lessons can only be judged by those who understand local challenges and local resources and who own the agenda for (re)building a new society.

References

- Arbour, Louise (2007): Economic and Social Justice for Societies in Transition. In: *International Law and Politics* 40(1): 1–27.
- Bell, Christine (2009): Transitional Justice, Interdisciplinarity and the 'Field' or 'Non-Field'. In: *International Journal of Transitional Justice* 3(1): 5–27.
- Celermajer, Danielle (2013): Mere Ritual? Displacing the Myth of Sincerity in Transitional Rituals. In: *International Journal of Transitional Justice* 7(2): 286–305.
- Daly, Erin (2008): Truth Skepticism: An Inquiry into the Value of Truth in Times of Transition. In: *International Journal of Transitional Justice* 2(3): 23–41.
- Gready, Paul (2011): *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond*. London: Routledge.
- Huyse, Luc and Salter, Mark (2008): *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*. Stockholm: International IDEA.
- Iliff, Andrew R. (2012): Root and Branch: Discourses of 'Tradition' in Grassroots Transitional Justice. In: *International Journal of Transitional Justice* 6(2): 253–273.
- Kagoro, Brian (2012): The Paradox of Alien Knowledge, Narrative and Praxis: Transitional Justice and the Politics of Agenda Setting in Africa. In: Moses Chrispus Okello et al. (eds.), *Where Law Meets Reality: Forging African Transitional Justice*. Cape Town: Pambazuka, 4–52.
- McEvoy, Kieran and McGregor, Lorna (eds.) (2008): *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*. Oxford: Hart Publishing.
- Ní Aoláin, Fionnuala (2012): Advancing Feminist Positioning in the Field of Transitional Justice. In: *International Journal of Transitional Justice* 6(2): 205–228.
- Sriram, Chandra Lekha and Pillay, Suren (eds.) (2011): *Peace versus Justice? The Dilemmas of Transitional Justice in Africa*. Suffolk: James Currey.
- Teitel, Ruti G (2003): Transitional Justice Genealogy. In: *Harvard Human Rights Journal* 16(1): 69–94.
- United Nations Security Council (2004): The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General. UN Doc. S/2004/616. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf>
- Valji, Nahla (2009): Gender Justice and Reconciliation. In: Ambos, Kai; Large Judith and Wierda, Marieke (eds.), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development*. New York: Springer, 217–236.