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Better Integrated in all Places around the World

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Why the Theory and Practice of Transitional Justice Needs to be Better Integrated in all Places around the World⁽¹⁾

Jeremy Sarkin⁽²⁾

Abstract: This article explains and reviews the theoretical and normative contexts of transitional justice. Empirical studies and specific settings, particularly in the Arab region, need to be rooted much more in transitional justice theory. This would allow similarities and differences in models and practices to be debated and understood. If there were a rigorous theoretical application to such studies, especially if they were comparative in nature, much more could be learnt from those experiences. The article therefore aims to ensure that the models of transitional justice being suggested, and at times being implemented, in various places around the world, including Arab countries, integrate the theory and practice of transitional justice. Data and statistics need to be used and evaluated and there needs to be greater use of methodological processes including empirical studies. At present, this is not always the case. Often, models are designed or implemented without due regard to transitional justice theory. Similarly, when models are presented or critiqued by practitioners, little regard is given to transitional justice theory, or the context within which those models operated. Little context is provided and little is done to ensure that the material from one context can be understood and applied in other places. Therefore, it is difficult to see what lessons can be learnt for other places even where the context or circumstances are very similar.

Transitional Justice

Arab Countries

Truth

Reconciliation

Human Rights

Introduction

How a society decides to deal with past human rights abuses is a critical determinant of whether that society achieves peace and stability.⁽³⁾ As former South African president Nelson Mandela noted: "as [...] countries recover from the trauma and wounds of the past, they have had to devise mechanisms not only for handling past human rights violations, but

also to ensure that the dignity of victims, survivors and relatives is restored."⁽⁴⁾

Dealing with the past had become more important again in recent years because of the so-called "Arab Spring."⁽⁵⁾ But many of the countries that had begun democratic transitions have since fallen back into authoritarianism,⁽⁶⁾ and in fact many have regressed, to some degree,⁽⁷⁾ even

1 This study was originally published in Issue 47 (November 2020) of *Siyasat Arabiya*, a bimonthly peer-reviewed political science and international relations journal.

2 NOVA University of Lisbon Law School, Lisbon, Portugal, and Department of Criminology, University of the Free State, South Africa.

3 Ruti G. Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal*, vol. 16 (2003).

4 Nelson Mandela, "Foreword," in: Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. 1 (Washington, D.C.: United States Institute of Peace Press, 1995), p. xi.

5 Sebastian von Einsiedel, "Major Recent Trends in Violent Conflict," *Occasional Paper 1*, United Nations University Centre for Policy Research (2014), p. 2.

6 Themnér Lotta & Wallenstein Peter, "Armed conflicts, 1946–2013," *Journal of Peace Research*, vol. 51, no. 4 (2014).

7 Charles T. Call & Elizabeth M. Cousens, "Ending wars and building peace: International responses to war-torn societies," *International studies perspectives*, vol. 9, no. 1 (2008).

further from where they were when the processes to attain greater democratisation began.⁽⁸⁾ Governments in that region, to ensure that such movements do not re-materialise, have cracked down even further on civil society, and done much to control the media as well as others if they attempt to operate in ways that might undermine or criticise the state.

Transitional justice has become an important part of the process used by countries moving from authoritarianism to democracy over the last few decades. Dealing with past injustices has been a crucial test for the new democratic orders. Facing the tensions between truth, justice, reconciliation and peace, the transitional process has entailed tremendous challenges.⁽⁹⁾ Transitional justice reflects a transformation process in a country that has gone through a critical time of conflict and its move to democracy. However, that process does not have to happen exclusively within the country. This approach includes judicial and non-judicial mechanisms, including prosecutions, promoting the right to truth, reparations, reconciliation, and ensuring non-repetition of human rights violations by adopting various strategies, including law and institutional reform.⁽¹⁰⁾

This article aims to explain and review the theoretical and normative contexts of transitional justice. Empirical studies or specific settings need to be rooted much more in transitional justice theory.⁽¹¹⁾ This would allow similarities and differences in models and practices to be debated and understood.⁽¹²⁾ If there were a rigorous theoretical application to such studies, especially if they were comparative in nature, much more could be learnt from those experiences.⁽¹³⁾ As Neil Kritz says:

"Truth commissions have become almost routine; it has become standard practice. You have a transition and everybody immediately says we have to have a truth commission without any clear understanding as to why or what they are about. Except for some of the preliminary and good quality work [...] there is a real dearth of any serious empirical research on exactly what impact truth commissions actually have in any place, impact on victims, on perpetrators, on society as a whole."⁽¹⁴⁾ This is important, because far too little is known about transitional justice's impact and effect. Much more needs to be known about what works and how lessons can be used elsewhere. The use of other models will be most advantageous if the relevance of the model can be shown for advancing particular objectives. Effect is best quantified if various methodological tools are used. Using an array of tools would make it possible to quantify the results of transitional justice processes. While in some places the models adopted are critiqued as foreign, out of place with local conditions, unsuited to the specific context and as doing little to empower local communities and capacities, there is much to be learnt from all the examples.⁽¹⁵⁾ While international voices and institutions have at times ignored local understandings of justice,⁽¹⁶⁾ and have been ignorant about the existence of such concepts on the ground, the more rigorous the theory and the practice of transitional justice and the way they are integrated, the more these examples will be examined and tested.⁽¹⁷⁾ As the United Nations Secretary-General put it in 2004:

due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their

8 See: The Fund for Peace, *Fragile States Index 2015* (Washington, D.C., 2015), accessed on 12 November 2016, at: <https://bit.ly/3gqjtry>

9 Jeremy Sarkin, "The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of Gacaca Courts in Dealing with the Genocide," *Journal of African Law*, vol. 45, no. 2 (2001).

10 On the options available to a state, see: Jeremy Sarkin & Heather Sensibaugh, "Why Achieving Reconciliation in Iraq is Possible: Suggestions for Mechanisms and Processes Including a Truth and Reconciliation Commission," *The Fletcher Journal of Human Security*, vol. 23 (2008) p. 5.

11 Hugo Van der Merwe, Victoria Baxter & Audrey R. Chapman, *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, Audrey R. Chapman, Hugo Van der Merwe & Victoria Baxter (eds.) (Washington, D.C.: US Institute of Peace Press, 2009).

12 Claudio Corradetti, Nir Eisikovits & J. V. Rotondi (eds.), *Theorizing Transitional Justice* (London: Ashgate Publishing Ltd, 2015).

13 Oskar N. T. Thoms, James Ron & Ronald Paris, *The Effects of Transitional Justice Mechanisms: A Summary Of Empirical Research Findings And Implications For Analysts And Practitioners* (Ottawa: Centre for International Policy Studies, 2008).

14 Cited in: Conference Report Empirical Research Methodologies of Transitional Justice Mechanisms, Stellenbosch, South Africa (18-20 November 2002).

15 See: Patricia Lundy & Mark McGovern, "Whose justice? Rethinking transitional justice from the bottom up," *Journal of Law and Society*, vol. 35, no. 2 (2008).

16 See: Lars Waldorf, "Mass justice for mass atrocity: Rethinking local justice as transitional justice," *Temple Law Review*, vol. 79, no. 1 (2006).

17 See: E. Stanley, "Transitional Justice: From the Local to the International," in: Patrick Hayden (ed.), *The Ashgate Research Companion to Ethics and International Relations* (Ashgate, 2009), pp. 275-292.

often vital role and to do so in conformity with both international standards and local tradition. Where these are ignored or overridden, the result can be the exclusion of large sectors of society from accessible justice. Particularly in post-conflict settings, vulnerable, excluded, victimized and marginalized groups must also be engaged in the development of the sector and benefit from its emerging institutions.⁽¹⁸⁾

This has not always been respected and adhered to. Whilst lip service is often paid to these ideas, much more needs to be done to more closely align new models of transitional justice to those that have been traditionally available.

This article therefore aims to ensure that the models of transitional justice being suggested, and at times being implemented in various places around the world, integrate the theory and practice

of transitional justice. Data and statistics need to be used and evaluated. There needs to be greater use of methodological processes including empirical studies. It is necessary to use scientific methods and material as data in the forms of empirical evidence or information carefully collected according to the rules or procedures of science.⁽¹⁹⁾ At present, this is not always the case. Often models are designed or implemented without due regard to transitional justice theory. Similarly, when models are presented or critiqued by practitioners, little regard is given to transitional justice theory or the context within which those models operated. Little context is provided, and little done to ensure that the material from one context can be understood and applied in other places. Therefore, it is difficult to see what lessons can be learnt for other places even where the context or circumstances are very similar.

First: Conceptually Understanding Transitional Justice

Transitional justice, understood to mean establishing a comprehensive account of the past, is increasingly seen as a vital element of a successful transition to democracy.⁽²⁰⁾ This has become the norm over the last three decades.⁽²¹⁾ It is, however, the last two decades that have seen major developments in the field of international criminal justice and the possibility of bringing people to book for gross human rights violations.⁽²²⁾ These developments have seen the formation of criminal tribunals for Rwanda and the former Yugoslavia, as well as the entering into force

of the International Criminal Court.⁽²³⁾ Developments have also come about with a new hybrid breed of internationalised domestic courts, in countries such as Sierra Leone, Cambodia and East Timor. At the same time, giving greater rights to victims at international, regional and domestic level has also achieved growing status in both theory and in practice.⁽²⁴⁾ However, while reparations in domestic systems for victims of gross human rights abuses have been occurring, this has been the result of political processes rather than the courts.⁽²⁵⁾ The main field of study that

18 See: "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," *Report of the Secretary-General*, United Nations Security Council Doc. S/2004/616 (August 2004), paragraph 8, p. 12.

19 Lawrence W. Neuman, *Social Research Methods: Qualitative and Quantitative Approaches*, 7th ed. (London: Pearson, 2014), p. 9.

20 Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process* (New York: Intersentia, 2004).

21 Jeremy Sarkin, "Holding Multinational Corporations Accountable for Human Rights and Humanitarian Law Violations Committed during Colonialism and Apartheid: An Evaluation of the Prospects of Such Cases in Light of the Herero of Namibia's Genocide Case and South African Apartheid Cases Being Brought in The United States under the Alien Torts Claims Act," in: E. Brems & P. van der Heede (eds.), *Bedrijven en Mensenrechten* (Antwerp: Maklu, 2003), p. 174.

22 Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, The Norton Series in World Politics (New York: WW Norton & Company, 2011).

23 Linda M. Keller, "Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms," *Connecticut Journal of International Law*, vol. 23 (2007).

24 Jessica Almqvist & Carlos Esposito, *The Role of Courts in Transitional Justice: Voices from Latin America and Spain* (New York/London: Routledge, 2011), p. 39.

25 See: Jeremy Sarkin, "Reparation for Past Wrongs: Using Domestic Courts around the World, especially the United States, to Pursue African Human Rights Claims," *International Journal of Legal Information*, vol. 32, no. 2 (2004), p. 339.

examines these issues is transitional justice.⁽²⁶⁾ Whilst transitional justice as a distinct field has only recently come to the fore, for many, since the fall of the Berlin Wall, it has in fact been in existence for much longer.⁽²⁷⁾ Historically, many states have had to reckon with these issues as they have emerged from periods of mass human rights abuses.

A state policy to deal with past human rights abuses normally takes into account the objectives of preventing the recurrence of human rights abuses and repairing the damage that has been caused.⁽²⁸⁾ Often it is a question of balancing the needs of the victims and the political reality of a new government that inherits a fragile regime without much political power or of an established regime that does not want to really deal with those issues.⁽²⁹⁾ Sometimes the political will is not present, but the state wants to do something to appease the international community or protestors within the country.⁽³⁰⁾

These are important issues, as the manner in which a nation deals with its past reverberates throughout its present and has a dramatic effect on its future.⁽³¹⁾ Local and international observers often measure the success of a new regime by its treatment of the past, including how victims and perpetrators are treated by each other and society in general.⁽³²⁾ While the redistribution of resources or retooling of the educational, health, housing or other welfare systems might be more important in the long run, as may be reconstruction tasks, issues such as constitutional development,⁽³³⁾ nation building and reconciliation are

almost as significant.⁽³⁴⁾ Given that past abuse often prompts transition, the public often wants assurances that the sacrifices they endured to change the regime were not in vain.⁽³⁵⁾ Reconciliation programmes are also a new government's most visible opportunity to distinguish themselves from the abusive regimes of the past. A government that openly eschews impunity demonstrates its commitment to justice and the rule of law, whereas a more conciliatory, victim-oriented stance models empathy and forgiveness. Regardless of which model a post-conflict government adopts, reconciliation policies put the past on the public agenda.⁽³⁶⁾ They also establish values of openness and transparency in contrast to the secrecy and suppression of the predecessor regime.

In preparing for its future, a government must prioritise the consolidation of democracy, as well as respect for the rule of law and human rights. Such goals will remain unattainable if they exist outside the framework of a functioning democracy. Post-conflict states have several options through which they may address these issues. For example, comprehensive accounts of the past are often sought as a useful tool to aid societies in their transitions from oppression to peace. However, atoning for the past is often seen as counter to the aims of national reconciliation, unity and institutional reconstruction.⁽³⁷⁾ While criminal trials and truth commissions each facilitate the revelation of details of past abuses, they are not mutually exclusive.⁽³⁸⁾ Rather, the specifics of balancing the two

26 Sarkin, *Carrots and Sticks*, p. 368.

27 Jeremy Sarkin & Tetevi Davi, "Examining the Criticisms Levelled Against Transitional Justice: Towards An Understanding of the State of the Field," *Human Rights and International Legal Discourse*, vol. 11, no. 1 (2017).

28 N. Roht Arriaza, "Forward," in: Merwe, Baxter & Chapman (eds.).

29 Alexander Laban Hinton (ed.), *Transitional Justice: Global Mechanisms and Local Realities After Genocide and Mass Violence* (New Brunswick: Rutgers University Press, 2010), p. 7.

30 Chanda Lekha Sriram, *Confronting Past Human Rights Violations* (New York and London: Routledge, 2004).

31 Colleem Duggan, "'Show Me Your Impact': Evaluating Transitional Justice in Contested Spaces," *Evaluation and Program Planning*, vol. 35, no. 1 (2012).

32 Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004).

33 See, for example: A. M. Gross, "Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel," *The Stanford Journal of International Law*, vol. 47 (2004), p. 40.

34 Kritz (ed.).

35 Eric A. Posner & Adrian Vermeule, "Transitional Justice as Ordinary Justice," *Harvard Law Review*, vol. 117, no. 3 (2004).

See: generally: Elster.

36 Janine Natalya Clark, "Transitional Justice, Truth and Reconciliation: An Under-Explored Relationship," *International Criminal Law Review*, vol. 11, no. 2 (2011).

37 Erin Daly & Jeremy Sarkin, *Reconciliation in Divided Societies: Finding Common Ground* (Philadelphia: University of Pennsylvania Press, 2011), p. 61.

38 See further: Jeremy Sarkin, "To prosecute or not to prosecute that is the question? An examination of the constitutional and legal issues concerning criminal trials," in: Charles Villa-Vicencio & Erik Doxtader (eds.), *The Provocations of Amnesty: Memory, Justice and Impunity* (Claremont: David Philip Publishers, 2003).

mechanisms must be determined on a case-by-case basis. Given the varying circumstances among states, it is impossible to impose uniform transitional justice mechanisms upon post-conflict situations. However, given that each emerging state must be founded upon a commitment to human rights and the rule of law, it is useful to consider a range of measures – including new laws and new (or transformed) institutions – that might aid in the transitional process.

With regard to what transitional justice is, many have striven to provide an accurate conceptual understanding of "transitional justice."⁽³⁹⁾ Some claim that, due to its growing complexity and relevance, transitional justice has the characteristics of an evolving or emerging field.⁽⁴⁰⁾ However, the conceptual foundations of transitional justice imply that one can find its origin either as part of the human rights movement, or as an entirely new field.⁽⁴¹⁾ Transitional justice can be identified as a distinct field considering that it: "1) is clearly distinguishable from the field out of which it emerged, which is the field of human rights; 2) it implies a set of actors who have a set of common aims, and who are thus oriented toward one another in their practice; 3) it has developed a variety of institutions to advance those aims; and, 4) it advances distinctive criteria of judgment and self-legitimation."⁽⁴²⁾ Other scholars claim that transitional justice is not a field but rather a "label or cloak that aims to rationalize a set of diverse bargains in relation to the past as an integrated endeavour, so as to obscure the quite different normative, moral and political implications of the bargains."⁽⁴³⁾

Regardless, it is generally accepted that transitional justice means a "set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law."⁽⁴⁴⁾ Another definition is "the array of processes designed to address past human rights violations following periods of political turmoil, state repression, or armed conflict."⁽⁴⁵⁾ For this reason, as Rosemary Nagy states, "transitional justice has become a well-established fixture on the global terrain of human rights."⁽⁴⁶⁾

Some commentators have suggested that transitional justice necessarily denotes a shift away from a despotic or autocratic regime, towards a democratic one.⁽⁴⁷⁾ However, whilst the question of how to deal with a legacy of human rights abuses is generally at issue when a new regime assumes power, it is not necessarily the case that there will be a move towards democracy. At times, new regimes are democratic in name only, and in no way comply with democratic ideals. In addition, transitional justice is not exclusively concerned with the past,⁽⁴⁸⁾ but is also concerned with ensuring mass violations do not reoccur in the future.⁽⁴⁹⁾ Restoring, or indeed fostering, respect for the rule of law, as well as ensuring sustainable peace, can do this.

However, the term "transitional justice" is often used by those working in the field, who are often activists, and usually government opponents. They use the term quite narrowly, to really emphasise retributive justice

39 Philip Clark, "Establishing a Conceptual Framework: Six Key Transitional Justice Themes," in: Philip Clark & Zachary D. Kaufman (eds.), *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (New York: Columbia University Press, 2008), p. 191.

40 See: Harvey M. Weinstein, "Editorial Note: They Myth of Closure, the Illusion of Reconciliation: Final Thoughts on Five Years as Co-Editor-in Chief," *International Journal of Transitional Justice*, vol. 5, no. 1 (2011), p. 1.

41 Christine Bell, "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'," *International Journal of Transitional Justice*, vol. 3, no. 1 (2008).

42 Paige Arthur, "How Transitions Reshaped Human Right: A Conceptual History of Transitional Justice," *Human Rights Quarterly*, vol. 31, no. 2 (2009), p. 324.

43 Bell.

44 Naomi Roht-Arriaza & Javier Mariezcurrena (eds.), *Transitional justice in the twenty-first century: Beyond truth versus justice* (Cambridge: Cambridge University Press, 2006).

45 Tricia D. Olsen et al., "When Truth Commissions Improve Human Rights," *International Journal of Transitional Justice*, vol. 4, no. 3 (2010), pp. 457-476.

46 Rosemary Nagy, "Transitional Justice as Global Project: Critical Reflections," *Third World Quarterly*, vol. 29, no. 2 (2008), p. 275.

47 Kritz (ed.).

48 Jeremy Sarkin, "Refocusing Transitional Justice to Focus Not Only on the Past, But Also to Concentrate on Ongoing Conflicts and Enduring Human Rights Crises," *Journal of International Humanitarian Legal Studies*, vol. 7, no. 2 (2016).

49 Sriram, p. 26.

or the punitive option. But it must be remembered that in both transitional and mature democracies, justice has many faces. This is because at the national level dealing with the past and achieving national reconciliation, building unity, and reconstructing the institutions necessary for stable political and economic systems are often seen to be in conflict with other issues, such as holding people accountable for their roles in human rights abuses in the past. The needs of victims and of society as a whole to learn the truth about what occurred⁽⁵⁰⁾ and the need to prosecute those responsible,⁽⁵¹⁾ especially high-ranking members of the present and former security forces, has to be balanced against the political reality of a new government, which may have inherited a fragile state and may have limited political power.⁽⁵²⁾ Critical questions that are often asked include what balance ought to be sought between these goals, as well as how much emphasis ought to be placed on reconciliation?

For this reason, when it comes to justice there are various goals, some of which are contradictory. These goals include retribution, correction, redistribution and restoration. Justice can be material or psychological and the mechanisms for promoting justice are many as well; they include lustration and restitution, as well as broader economic and social initiatives aimed at righting the wrongs of economic inequities.

Thus, opinions on how best to proceed with redressing a legacy of human rights violations have typically fallen into two distinct categories, with one side advocating *retributive* justice, and the other promoting the *restorative* or *reconciliatory* approach.⁽⁵³⁾ Those in favour of retributive justice believe that punishment should be of paramount importance and argue that punishment is essential, because without it, respect for the rule of law, which is often already

weak where many violations have occurred, will continue to atrophy.⁽⁵⁴⁾ Thus, they argue the restorative or reconciliatory approach does not promote formal accountability, encourages impunity, and will likely lead to further abuses in the future.⁽⁵⁵⁾ On the other hand, those who favour a restorative or reconciliation method argue that the retributive approach is often not appropriate for transitional contexts. However, either methodology in isolation can be problematic. Criminal trials for perpetrators of mass violence can be a means of helping communities rebuild by discovering and publicising the truth of past atrocities, through the punishment of perpetrators, responding to the needs of the victims, as well as promoting the rule of law in emerging democracies and reconciliation.⁽⁵⁶⁾ The debate about prosecution in transitional contexts often tends to focus on the goal of deterrence of future crimes and on the retributive function of trials.⁽⁵⁷⁾ Focusing the debate on these justifications could, however, lead policy-makers to argue that peace and justice are competing choices.

Those who support restorative or reconciliatory justice tend to prize peaceful co-existence and the redressing of the harms done to the victims of violent conflict over any immediate need to punish the perpetrators. They often argue that peace is more important than justice and that some transitional justice mechanisms exacerbate tensions and pressures already heightened within a society in the aftermath of mass abuses.

It is important to note, however, that peace and justice are neither polar opposites nor mutually exclusive; they can be achieved at the same time and can reinforce each other if pursued in a way that is not to the detriment of one or some of the parties. The opposing conceptions of retributive and restorative justice are reflected in the transitional justice

50 J. S. Abrams & P. B. Hayner, "Documenting, Acknowledging and Publicizing the Truth," in: M. C. Bassiouni, *Post-Conflict Justice* (Ardsey: Transnational Publishers, 2002).

51 David Wippman, "Atrocities, Deterrence, and the Limits of International Justice," *Fordham International Law Journal*, vol. 23, no. 2 (1999).

52 See: Jeremy Sarkin, Van De Lanotte & Y. Haeck (eds.), *Resolving the Tensions between Crime and Human Rights: European and South African Perspectives* (Antwerp: Maklu, 2001).

53 Keller, p. 212.

54 Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *Yale Law Journal*, vol. 100, no. 8 (1991).

55 Jaime Malamud-Goti, "Transitional Governments in the Breach: Why Punish State Criminals?," *Human Rights Quarterly*, vol. 12, no. 1 (1990), p. 6.

56 Sikkink.

57 Louise Mallinder, "Amnesties' Challenge To The Accountability Norm," in: Francesca Lessa & Leigh A. Payne (eds.), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge: Cambridge University Press, 2012), pp. 69-96.

mechanisms employed by societies attempting to deal with a legacy of human rights abuses.⁽⁵⁸⁾ Whilst some societies have chosen to adopt principally retributive justice mechanisms, such as criminal prosecutions and lustration or vetting,⁽⁵⁹⁾ others, believing more in the virtues of restorative or reconciliatory justice, have chosen truth commissions and reparations programmes to address their legacy of human rights abuses.⁽⁶⁰⁾ Of course, transitional justice mechanisms are not always implemented in isolation. For this reason, some societies have implemented a number of mechanisms in an attempt to redress a legacy of mass human rights abuses.⁽⁶¹⁾ Sometimes the sequencing of the various mechanisms has been problematic. However, it has more frequently been the case that a society will pursue one dominant type of justice.⁽⁶²⁾ This is ultimately a weakness, as for a society to deal with such problems it should utilise a confluence of mechanisms that may achieve a broader range of objectives such as accountability, peace and justice.

A particular failing of transitional justice is that the range of tools at its disposal is not often understood. If it is understood, despite that the focus often is on justice at the expense of the other aspects of transitional justice. But in fact there are five aspects to transitional justice: truth, justice, reparations, guarantees of non-recurrence and reconciliation.

Conceptually, there is little agreement on whether transitional justice has four pillars or components (truth, justice, reparations and guarantees of non-recurrence), which then lead to reconciliation or five pillars or components including reconciliation as one of them. This can be seen in the fact that the United Nations Special Rapporteur dealing with transitional justice has the title "Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence." Reconciliation is

not mentioned in the title. This implies that the UN seemingly recognises reconciliation as an intrinsic pillar or component of the other four aspects of transitional justice. It should be noted that it may be better to use the term "component" rather than "pillar," as pillar suggests completely separate parts, while "component" connotes a looser, less separately defined characteristic. Critically, however, reconciliation should be a component on its own, and should be an issue that is pursued on its own at times. Reconciliation certainly does overlap on occasion with facets of the other aspects or pillars, but then all the various aspects of transitional justice overlap with the other pillars or aspects, at least to some degree. Thus, justice is also a part of the guarantees of non-repetition, as justice promotes deterrence and positively affects levels of impunity, depending on how it is exercised. Reparation overlaps with guarantees of non-recurrence, as does truth recovery. Thus, reconciliation and processes to promote reconciliation are not always dependent on the notions of truth, justice, reparations and guarantees of non-repetition. Then again, Special Rapporteur Pablo de Greiff argued: "reconciliation should not be conceived as ... an aim that can be achieved independently of the implementation of the comprehensive approach to the four measures."⁽⁶³⁾ However, reconciliation processes can be developed and implemented alone without specific reference or dependence on the other pillars or component parts. As noted, this is not to argue that the other four pillars or components do not often play a role in influencing the greater attainment of reconciliation. However, much can be done to promote reconciliation without a specific connection to these other issues. Much more work is needed so that the critical role of reconciliation in guarantees of non-recurrence is sufficiently brought to the fore.⁽⁶⁴⁾ Reconciliation needs to be treated as

58 Marth Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), pp. 19-21.

59 Lavinia Stan (ed.), *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past* (Abingdon: Routledge, 2008).

60 Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007), p. 561.

61 Eric Brahm, "Getting to the Bottom of Truth: Evaluating the Contribution of Truth Commissions to Post-Conflict Societies," paper present at the 20th Annual Conference Wisconsin Institute for Peace and Conflict Studies (2004).

62 Brahm.

63 "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff," *Report*, United Nations General Assembly Doc. A/HRC/21/46 (9 August 2012).

64 Jeremy Sarkin, "The Interrelationship and Interconnectness of Transitional Justice and the Rule of Law in Uganda: Pursuing Justice, Truth, Guarantees of Non-Repetition, Reconciliation and Reparations for Past Crimes and Human Rights Violations," *Hague Journal on the Rule of Law*, vol. 7 (2015).

an independent aspect. Not doing so misunderstands that reconciliation and such processes are also stand-alone issues. This is essential, as while the discourse often raises the various components of transitional justice pillars as independent objects, they ought to be seen as parallel, supportive, overlapping and mutually beneficial.⁽⁶⁵⁾ This is not always the case, as sometimes the pillars or components of transitional justice can be contradictory and in conflict with each of the other aspects of transitional justice. For example, prosecutions can be seen to be at odds with truth seeking, as perpetrators are less likely to cooperate if they fear accountability.

When it comes to the issue of truth recovery, this has become more accepted in recent years as a legal right that exists for victims. This is because establishing the truth about what occurred is often a key concern for a variety of actors, most centrally of whom are victims. Since the first truth commissions of the 1970s, many countries have established processes and institutions to try and establish the truth about the past. These processes and institutions have various roles to play, including reducing deniability about past crimes. Victims can receive public acknowledgement of their suffering. By attaining official recognition of what has occurred to them, victims may be able to have their legal status issues addressed and other problems resolved. If there has been a disappearance, for example, it should be possible to obtain a presumption of death certificate allowing the person's financial affairs to be dealt with. Truth in its wide, or

in its narrow, form also benefits from such processes. Truth discovery at the macro level allows the society at large to learn about the bigger picture – what was done, by whom it was done, to whom it was done, and why this occurred. Thus, a historical narrative is drawn up which allows for a fuller version of the history to be reclaimed and settled. At the same time, the smaller accounts of what occurred are collected, as well as the individual accounts, in order to paint a macro version of what occurred. In this way, the idea that it was rogue elements embarking on unsanctioned activities becomes very hard to justify. A public report, drafted by a credible legitimate and diverse process can be a long-term benefit to that society and help to prevent violence as well as rebuild the state. However, if the process is tainted by perceptions of bias, lack of representivity, or an understanding that the process was not thorough or was insufficient in some way, the process itself might not be enough for people to believe that the issues have been adequately dealt with. Thus, there might be a demand in the future for the issues to be dealt with again. The understanding may be, in at least some quarters of that society looking back, that the pain of the past has not been addressed properly. As a result, violence and conflict may occur. While many believe that time heals the past, the passing of time does not mean that people forget. It does not allow the issues to be erased. In many parts of the world, there are those who seek answers for events that happened decades and/or even centuries ago.

Second: Why Integrating Transitional Justice Theory and Transitional Justice Practice is Crucial

Transitional justice is at a critical juncture.⁽⁶⁶⁾ Much work is being done in various countries that are within a transitional justice focus. However, in many places where the work is being done, the theory and practice do not always, or do not sufficiently, coincide.⁽⁶⁷⁾ The

same is true of the various disciplines that apply to transitional justice.⁽⁶⁸⁾ Transitional justice is not just an issue within law. Law is just one element of transitional justice. In fact, it is clear that is made up of many different fields and disciplines.⁽⁶⁹⁾ These

65 Jeremy Sarkin, "Providing Reparations in Uganda: Substantive Recommendations for Implementing Reparations in the aftermath of the Conflicts that Occurred over the Last Few Decades," *African Human Rights Law Journal*, vol. 14, no. 2 (2014).

66 Jaya Ramji-Nogales, "Designing Bespoke Transitional Justice: A Pluralist Process Approach," *Michigan Journal of International Law*, vol. 32, no. 1 (2010).

67 Susanne Buckley-Zistel et al., *Transitional Justice Theories* (New York: Routledge, 2013).

68 Bell.

69 Ibid.

include: law, psychology, anthropology, sociology, criminology, human rights, peace studies, political studies, international relations, dispute resolution, art, music and theatre, to name a few. This is because transitional justice has greatly influenced multiple fields and increasingly takes part in the political, social, economic, historical, ethical and legal discourse. Theoretically, all of these disciplines should work to enrich the field of transitional justice. However, in practice, these disciplines bring to transitional justice different understandings, different ethos, different languages and rhetoric, and different desired outcomes. Thus, there is inevitable discord, and understandings about what transitional justice is, and what it is supposed to do, differ enormously. Furthermore, as researchers in all of these various disciplines come from numerous places and have different experiences, it is not surprising that transitional justice is so differently conceived of and tackled by people in different areas. Thus, the various disciplines and fields that work within transitional justice remain separate and apply different terms and understandings.⁽⁷⁰⁾ This sees people talking about different things, in different ways, and with different understandings. The various disciplines apply and follow transitional justice in different ways that are very relevant to this topic. This often means that people talk past each other on transitional justice. Transitional justice has a vital opportunity to be interdisciplinary and multidisciplinary. If this is to be the case, then the concepts and terms need to be understood and used similar ways.⁽⁷¹⁾

The problem of the application of the theoretical concepts of transitional justice in normative contexts is often absent in practical contexts where transitional justice is seen to be a political movement to deal with political opponents. It is often used as a tool to oppose the state or deal with the state in an era of more tolerance for tackling past human rights abuse. In such cases, especially where the former regime is toppled,

there is often a primary focus on accountability and not really on other aspects of transitional justice, such as truth, reparations, guarantees of non-repetition and reconciliation. There is also frequently a lack of understanding that transitional justice is not only domestic in nature, but also has the possibility for international, regional and sub-regional actions to be taken. While there is often a belief that the role of external actors is only about prosecuting or assisting other actors in the roles they play, these actors have a variety of other roles as well. Another issue relates to the conceptualisation of the term "transitional justice" itself.⁽⁷²⁾ This is because the term is relevant not only simply to transitional contexts but also to others. One could argue, however, that no country is static and also that they are in some type of transition on a continuing basis. The issue really is whether there is radical or limited change of transition. The same conceptual difference applies to the term "justice," because in reality, as will be evaluated in this article transitional justice is about much more than about justice. In fact, justice in this context has many facets.

While some have argued that transitional justice theorists are overly concerned with what the implementation of transitional justice after a period of mass abuses *should* or *ought to* accomplish,⁽⁷³⁾ the excessive focus on the potential benefits of transitional justice has led to a dearth of empirical enquiry into precisely how transitional justice is experienced and perceived at the local level. This is particularly concerning as evidence suggest that experiences of transitional justice at the "micro-level" tend *not* to conform with the universalistic expectations hypothesised in much of the literature. However, that is changing with a greater focus on empirical studies.⁽⁷⁴⁾ Nevertheless, those studies do not always integrate theory and practice, and usually focus on one case study. They do not generally draw lessons for other contexts. It is for this reason that there have been criticisms, because of what is

70 Susanne Buckley-Zistel, "Transitional Justice Theories: An Introduction," in: Buckley-Zistel et al.

71 Kerry Clamp & Jonathan Doak, "More than Words: Restorative Justice Concepts in Transitional Justice Settings," *International Criminal Law Review*, vol. 12, no. 3 (2012).

72 Ibid.

73 Anna Macdonald, "From the Ground Up: What does the evidence tell us about local experiences of transitional justice?," *Transitional Justice Review*, vol. 1, no. 3 (2015).

74 der Merwe, Baxter & Chapman.

seen as the non-contextual approaches that many have adopted when analysing the effectiveness of transitional justice mechanisms.⁽⁷⁵⁾ Thus, some have criticised the empirical research reliance on isolated periods of time. These truncated periods of time do not provide reliable guidance as to the effectiveness of any transitional justice mechanism. Instead, it is argued that knowledge of how people felt before the implementation of a transitional justice mechanism will be of help so that the effects can be measured. However, while there are many individual studies on a particular country's dealing with the past, they are not conceptually empirical in nature.⁽⁷⁶⁾ Many studies suffer from an absence of theory and methodology.⁽⁷⁷⁾ In addition, as noted by Alexander Hinton, local level transitional justice suffers in a number of ways: "However well-intentioned, transitional justice needs to more deeply grapple with the messiness of global and transnational involvements and the local, on-the-ground realities with which they intersect, complexities that are too often glossed over, due in part to the privileging of a cluster of liberal normative goods, such as the rule of law, peace, reconciliation, civil society, human rights, combating impunity, and justice."⁽⁷⁸⁾

In fact, there is a great absence of empirical design methodology in many country studies. For this reason, the results of the studies of transitional justice mechanisms that have been used in post-conflict societies vary enormously.⁽⁷⁹⁾ There are few methodological tools that are used consistently across studies. In fact, the terms and understandings of the issues differ enormously. While academic

research has studied a greater variety of processes in a number of countries, using various approaches to analyse those events, such studies often do not build on previous work undertaken. Moreover, few have made comparative studies in the region.⁽⁸⁰⁾

These are important issues because transitional justice calls into question the perspectives of those providing the critique, perspectives coloured by the political, geographical, gender, cultural, religious, linguistic and racial backgrounds of the people concerned.⁽⁸¹⁾ It depends on the type of situation and what leads the people there into that position. It is value-laden by the socio-economic conditions, economic class and background of the person. It is determined also by the type of harm that a person has had to endure, as well as a plethora of other experiences. Thus, contestation has resulted from almost all transitional justice issues. Furthermore, without the application of theory and other methods and methodology, the various studies undertaken cannot really be applied outside that specific context. The lessons learnt cannot be seen to be useful outside that specific context. Without the ability to learn from individual processes which use the same theory or same understandings, or which bring out the lessons learnt for other processes, much is lost that can be applied to future processes. It is important to understand whether processes now are still focused too heavily on violations of civil and political rights.⁽⁸²⁾ It is important to see whether socio-economic rights are being sufficiently focused on.⁽⁸³⁾ It also needs to be determined whether sufficient weight is being devoted to a range of other matters, such as adequately including women in transitional

75 Laurel Fletcher & Harvey Weinstein, "Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective," *Human Rights Quarterly*, vol. 32, no. 1 (2008).

76 Thoms, Ron & Paris.

77 Béatrice Pouligny, Bernard Doray & Jean-clément Martin, "After Mass Crime :Methodological and Ethical Problems: A Trans-Disciplinary Approach," in: Chesterman Schnabel Pouligny (ed.), *After Mass Crime: Rebuilding States and Communities* (Tokyo: United Nations University Press, 2007).

78 Hinton.

79 Pouligny, Doray & Martin.

80 David Backer, "Cross-National Comparative Analysis," in: Audrey R. der Merwe, Baxter & Chapman (eds.).

81 Paloma Aguilar, Laia Balcells & Hector Cebolla-Boado, "Determinants of attitudes toward transitional justice: An empirical analysis of the Spanish case," *Comparative Political Studies*, vol. 44, no. 10 (2011).

82 See: Ruben Carranza, "Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?," *International Journal of Transitional Justice*, vol. 2, no. 3 (2008).

83 See: Matthew Evans, "Structural Violence, Socioeconomic Rights, and Transformative Justice," *Journal of Human Rights*, vol. 15, no. 1 (2015).

justice processes and ensuring that a gendered effect of transitional justice is realised.⁽⁸⁴⁾

These are important issues to take into account as many also argue that transitional justice mechanisms are often insufficiently victim-orientated in the way that they operate.⁽⁸⁵⁾ However, more evidence of this is needed with regard to how this deficiency can be addressed. Furthermore, it has been argued that there ought to be "transformative change that emphasizes local agency and resources, the prioritization of process rather than preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level."⁽⁸⁶⁾ Hinton has noted that in recent times, transitional justice has become more all-embracing and has been "extended to encompass a larger set of outcomes, such as advancing development and social justice."⁽⁸⁷⁾ Whether this is true needs to be tested empirically.

There is also much more to constituting transitional justice in practice. It is important to note that in many parts of world, including for the Arab world, many see an absence of transitional justice in practice outside of truth commissions and a few examples of other processes. Thus, in the Middle East, beyond the example of the Moroccan IEC and the Bahraini Commission, outside the region few see much in way of transitional justice. This is far from the case, as much is happening but remains unknown outside of each country. This is deeply problematic and reflects a lack of focus on the countries in the region and in fact on the region as a whole in the academic transitional justice literature, specifically. Much work needs to be done to ensure the research being conducted in countries in the area is made available outside the area. That means that publications need to be published in other languages besides Arabic and journals with a wide international readership need to

be published in. Many lessons can be learnt from the experience of the multitude of processes that have occurred in many of the countries in the region. This remains largely unknown outside the region.

Another issue of importance especially is that transitional justice does not and should not only focus on the past. Crucially and conceptually, the past is not about years ago. The past is also about what happened yesterday. This understanding is important when the context of Arab countries is focused on, where there are many ongoing human rights violations. Transitional justice has a role to articulate some of these problems. While autocratic states often do not tolerate prosecutions or other accountability tools, there are many other measures that can be used to ameliorate some of the effects of the state.⁽⁸⁸⁾ There are also steps that can be taken to prepare for a future transitional justice process and at the same time serve as a deterrent for those who are committing human rights violations.

In states where massive crimes have been committed, after the conflict, or when one of the groups is able to control the country, there is often a desire for justice. The state then attempts to embark on a process of prosecuting people for their role in the conflict. Justice is then often directed at those who lost the conflict, or those excluded from the new political establishment.

However, justice needs to occur, but it needs to be delivered in an even-handed fashion and not as a version of victor's justice. If justice is perceived as being done for political reasons or biased against one group or another, it will be illegitimate and will result in less than the desired effect. Ensuring that at least some trials occur, and that reparations in some form or another are provided, as well as that reconciliation between all groups occurs, regardless of political or other affiliation, should have major

⁸⁴ See: Wendy Lambourne & Viviana Rodriguez Carreon, "Engendering Transitional Justice: a Transformative Approach to Building Peace and Attaining Human Rights for Women," *Human Rights Review*, vol. 17, no. 1 (2015).

⁸⁵ Simon Robins & Erik Wilson, "Participatory Methodologies with Victims: An Emancipatory Approach to Transitional Justice Research," *Canadian Journal of Law and Society/Revue Canadienne Droit et Société*, vol. 30, no. 2 (2015).

⁸⁶ See: Paul Gready & Simon Robins, "From Transitional to Transformative Justice: A New Agenda for Practice," *International Journal of Transitional Justice*, vol. 8, no. 3 (2014).

⁸⁷ See: Hinton, p. 2.

⁸⁸ Malamud-Goti.

long-term beneficial effects.⁽⁸⁹⁾ It must involve punishing leading offenders found on the territory of other states, as well as other courses of action, such as assisting victims in a variety of ways.

As far as steps to be taken inside a particular state are concerned, often the post-conflict society sees

the winners make decisions on how to deal with the past in ways that do not sufficiently promote the transitional justice issues of truth, justice, reparations and reconciliation for all.⁽⁹⁰⁾ This is particularly critical as many societies where massive human rights violations occur have cleavages based on religious, cultural, racial, ethnic, linguistic or other differences.

Conclusion

What is clear is that transitional justice conceptually, and as applied in specific contexts, has not always been rigorously applied. The effectiveness of transitional justice, as well as its application in specific settings and in particular transitional justice mechanisms, needs to be continually worked on. This is because when states introduce transitional justice mechanisms, they are designed to promote a range of benefits concerning democracy and human rights. This is particularly critical as many societies where massive human rights violations occur have cleavages based on a variety of identity issues.

While transitional justice is probably not going to be able to play a direct role in ending conflicts, it can at times play a part in smoothing the path for dealing with the issues in the future. For this to occur, much more is needed to ground the work in the field with the theory.

With respect to the contestations concerning transitional justice, what it is, its composition, as well as when and how it is to be used, must be assessed in light of the fact that transitional justice always operates in a given political context and climate.⁽⁹¹⁾ However, those circumstances need to be fully understood and must be able to be applied fully to determine how that model can or cannot be applied in another context. Thus, the fact that transitional justice is political, in that the questions it deals with, by whom it is dealt with, the purposes it plays, and impacts it has, all take place in the political arena.

This must be understood as having deep political effects. Often it is not sufficiently understood, and for this reason, transitional justice has been, and can be, manipulated in some cases.⁽⁹²⁾ In fact, the decisions taken by states on these issues are highly political. Thus, transitional justice has been used for political purposes and as a result of this manipulation some damage has been done to the reputation of transitional justice. However, what is clear is that transitional justice has definitely been subject to a much more rigorous critical analysis in recent times.⁽⁹³⁾ This has raised questions about the effectiveness of the concept of transitional justice, and specific transitional justice mechanisms, to fully redress mass human rights atrocities. Moving forward, an evolution in the field of transitional justice is needed. In certain ways and to some degree, this evolution is already taking place. No longer can societies be content to simply implement transitional justice mechanisms based upon weak understandings of concepts such as "truth and reconciliation." Neither can they opt for criminal prosecutions in the wake of a period of mass abuses with the understanding that they are a panacea to cure all ills. Now, partly because of the criticisms that have proliferated in transitional justice scholarship, far more questions have to be asked by societies looking to implement transitional justice. These questions include: What is truth? What is reconciliation? How do the goals of truth, reconciliation and others inter-relate? Are these

89 Eric Daly & Jeremy Sarkin, *Reconciliation in Divided Societies: Finding Common Ground* (Philadelphia: University of Pennsylvania Press, 2011), p. 21.

90 Ibid., p. 61.

91 Jeremy Sarkin & Tetevi Davi, "The Togolese Truth, Justice and Reconciliation Commission: Lessons for Transitional Justice Processes Elsewhere," *Peace and Conflict Studies*, vol. 24, no. 1 (2017).

92 Elizabeth Bird & Fraser M Ottanelli, *The Performance of Memory as Transitional Justice* (Antwerp: Intersentia, 2014), p. 26.

93 Ramji-Nogales.

goals simultaneously attainable? Can these goals be achieved, and to what degree in the aftermath of mass human rights abuses? Further questions also arise, such as: When should transitional justice be implemented? Can transitional justice occur even before a transition? For transitional justice to be effective, must it be carried out by the state? By answering these questions, a better approach to transitional justice can be realised, as well making it more practically attainable in many more situations.

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