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The Fabric of Transitional Justice: Binding Local and Global Political Settlements

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Abstract

This essay addresses the state of the field in transitional justice, framing a new Transitional Justice library, Routledge collection suitable for teaching and researching transitional justice. The essay contrasts tool-kit approaches to transitional justice, with approaches which push at the boundaries of what the concept can cover. It suggests in conclusion ways to better understand the field.

Keywords

Transitional Justice, Human Rights, Lex Pacificatoria, Political Settlement, Conflict

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Binding Local and Global Political Settlements

Christine Bell¹

Looking for a new material that was tough, scientists developed one that also can stretch up to 20 times its original length without breaking. . . A typical hydrogel (a gel whose particles are dispersed in water) can stretch only a few times its length, if that. Even natural rubber can stretch only five to six times its length. But the new compound, made of alginate, polyacrylamide and water, proved to be far more stretchable and fracture-proof in tests. . . Incredibly enough, the stretchiness was just a side effect of the team's research, Suo said. (Live Science, <http://www.livescience.com/22945-super-stretchy-material-also-super-strong.html>)

Introduction

This Transitional Justice essay collection sits as part of a library of essays on different concepts of 'justice'. Yet transitional justice appears quite different from other types of justice. While a now established field of transitional justice clearly exists with specialist journals dedicated to it, fundamental ambiguities characterise the term and raise questions as to how it should sit alongside other concepts of justice. The adjective 'transitional' creates an ambiguous term that suggests three quite different ways in which it might be understood as a distinctive 'brand' of justice.

A first incarnation views the phrase transitional justice as a new philosophical concept of justice to operate in the peculiar situation of 'transition'. From this perspective transitional justice is a new concept of justice, aimed at a distinct set of legal and philosophical dilemmas involved in achieving political transitions. Like 'distributive justice' it is a normative concept whose contours are shaped by its function. A second possible meaning

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of the term, views transitional justice is simply the justice issues raised by political transitions: a set of questions as to how bodies of law such as domestic criminal law, international human rights law, international humanitarian law, or even international criminal law apply in transitions. To borrow Posner and Vermule's phrase, transitional justice from this perspective is just 'ordinary justice' manifesting in a slightly more tricky-than-usual fact-pattern, rather than a distinct and novel legal or philosophical concept (2004). A third conception of transitional justice posits it as a type of justice that is itself 'in transition': transitional justice as the movement of justice concepts and systems from one place or state to another. This is justice as the object of change rather than, or as well as, the subject of change (Bell, Campbell, & Ní Aoláin 2004). From this perspective justice discourse itself is in transition: it is the concept of justice which is in transition.

The origin of the term, however, is one that derives as much or more from the field and practice (Editorial Note 2007) as from theory. From the practice-based field perspective, transitional justice is sometimes rejected as a normative concept at all, and talked of in terms of a 'tool-kit'. The United Nations in its 'Transitional Justice and the Rule of Law' Report defines transitional justice as merely a grab-bag full of tools. Transitional justice for the UN 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: 4, para 8). This tool-kit approach adds a fourth possible conception of transitional justice as a set of institutional choices relating to where and how to institutionalise a response to past atrocities. In attempting to avoid any suggestion of a distinct philosophical or legal conception, this approach tries to evade any need to locate a normative concept of justice as underlying institutional choice or design, or to elevate transitional justice to a concept of justice at all.

In this it is only partially successful: even the toolkit approach cannot completely escape normative questions as to *when and where* these particular tools as oppose to others are to be used. When and under what circumstances is a truth commission a desirable or appropriate alternative to criminal trials? When should the International Criminal Court exercise prosecutorial discretion not to prosecute in the face of a peace process that may be undermined? These questions cannot be answered without some sort of decision as regards the normative imperatives underlying the choice. What normatively are these tools to be used for? Is the tool-kit to be understood as one which aims for 'accountability', or 'democracy', or 'peace' or even 'reconciliation'? Different decisions will lead to different results as regards what institutional alternatives to 'ordinary' criminal justice are permitted and even desirable. Or is the tool-kit to be understood as one which exists to enable trade-offs between these normatively driven outcomes or values, where they conflict? In a recent editorial attempting to capture the field, Makau Mutua argues that

Transitional justice is a subset, an offshoot, of the human rights movement. Its norms, devices – truth commissions, judicial processes, multisectoral reforms in the legal and law enforcement sectors, and open competitive political systems – carry a

definite vision of the society they seek to create. The choice of transitional justice as the medium of change implies certain values and end results. (2015: 3)

However, its origins remain more contested than this (Bell 2009), and even if they were so settled, there is currently no real consensus as to what the values and end results of transitional justice should be.

The ambiguities and even confusion over what type of concept 'transitional justice' *is* has led to a field that is at once beguiling and frustrating. Transitional justice has become at once everything and nothing. Recent attempts to capture and evaluate the field of transitional justice talk in terms of the need to understand transitional justice as a justice concept ever caught between dichotomies: hope and disillusionment; promise and reality; principle and pragmatism; transformation and retrenchment; local and global politics (ibid; Anders & Zenker 2014). These dichotomies appear and reappear throughout the current collection, I suggest because they are rooted in a concept that itself is generated by the fundamental dichotomy between the 'from' of the past, and the 'to' of the future that transitional justice aims to navigate between (Bell & O'Rourke 2007). Indeed, reflexivity about the difficulty of finding agreement over the meaning or goals or politics of the concept is a characteristic of the field.

One consequence of transitional justice's ambiguous nature has been its resultant capacity to ever-expand in reach. In its ambiguities transitional justice takes on the capacity, like the hydrogel of the Life Science quotation at the start, of a miracle fabric whose warp and weave contain an almost infinite stretchiness because it can envelop all of its possible meanings so as to reach out to ever new political contexts. Transitional justice is capacious and seems to invite new concepts of justice, new concepts of 'transition', and new 'tools' within its folds. As a result, as a legal concept transitional justice: is human rights, is international criminal justice, is humanitarian law, all merely finding instantiation in new institutional forms during transitions. As a normative concept, transitional justice: is ordinary criminal justice, is extraordinary criminal justice, is distributive and procedural justice, is global justice, and is intergenerational justice, all presenting as something extraordinary because of its distinctive setting in times of transition. As a set of tools it: is trials, is military tribunals, is vetting, is truth commissions, is commissions of inquiry, is amnesties, apologies, or anything that deals with wrongs of conflicts past. At a politically normative level transitional justice: is local justice, is global justice, is liberalising justice, is transformative justice, is restorative justice, depending on what we perceive and want it to be. Moreover, transitional justice in lacking a clear articulation of the 'transitions' to which it applies can be found in all sorts of transitions: transitions from authoritarianism, from conflict, from colonialism, from slavery, from child abuse, from long-past state transformations, from organised crime, and even perhaps from the on-going transition that is any attempt on-going attempt to pursue democracy and justice as a practice in the most stable Western settings, as this collection illustrates. Like the hydrogel referenced at the

start of this introduction, transitional justice as a concept has a resilience and strength that is closely connected to its stretchiness.

The Essay Collection and its Impulses

What then to do with an essay collection on transitional justice that, unlike the field, has a very finite capacity? This collection attempts to capture and portray – inevitably in an emblematic rather than a systematic way - three different dimensions of the field. Part I addresses the origins of the field which continue to bedevil it. Indeed the origins themselves are increasingly debated in what is an emergent and contested historiography of the field that assists in understanding its contemporary quirks and concerns. Part II addresses and sets out – in a very partial way – some of the ‘tool-kit’ of transitional justice, which could be understood as the canonical research agenda of the field. Part III tries to convey a sense of the way in which the field is un-folding and extending to new transitions, new tools, new theories of justice, and all with a heavy dose of self-critique.

In approaching the collection in this way I have tried to remain true to a number of impulses: the first, the impulse to convey something of where the phenomenon that is transitional justice has come from, including pieces which speak to its multiple origins in situations of authoritarianism, conflict and mass violence. This impulse is also one of conveying how the field has been generated by practice and academic legal argument working together to create and propel the concept. Part I tries to capture these dynamics and inter-relationships. The second impulse was to give as broad a sense as possible of what now stands within the transitional justice field, reflecting what might be the accepted ‘canon’ of transitional justice and also its unfolding new directions and the racy attempts to expand the field that characterise it. Parts II and III reflect this approach: Part I reflecting what might be considered the ‘canon’ of transitional justice and Part II the field’s new directions. The third impulse was the impulse to give a sense of transitional justice’s internal controversies, both at the level of specific debates, for example as regards the role of amnesty or trials in dealing with the past; and at the level of the discourse itself, where debates such as whether transitional justice is liberalising justice or transformative justice persist.

As a whole, the collection tries to walk a line between the two converse notions of the field: the first, the idea that the field has a coherent remit and set of inquiries as a field; and second, that there is something more elusive and disturbing about the field and a justice concept whose normative and legal underpinnings and goals are so difficult to pin down. The collection aims to demonstrate both the common content of the field and its elusive quality.

I: The Origins of the Field: From whence did it come and why does it matter?

The term 'transitional justice' emerged as closely connected to transitions from authoritarianism to democracy of the early 1990s. Paige Arthur has suggested that the term was coined with reference to transitions to democracy in Latin America, where it 'helped to legitimate those justice claims that prioritized legal-institutional reforms and responses – such as punishing leaders, vetting abusive security forces, and replacing state secrecy with truth and transparency – over other claims to justice that were oriented toward social justice and redistribution' (2009 321-2). One of the first publications to use the term 'Transitional Justice' was a three volume set of books by Neil Kritz, entitled 'Transitional Justice: How Emerging Democracies Deal with Former Regimes', published by the United States Institute of Peace (1995). Volumes one and three dealt with different 'tools' of transitional justice, similar to Part II of this collection, while the middle volume provided case studies, many historical, focused entirely on transitions from authoritarianism to democracy. Ruti Teitel's early and foundational book 'Transitional Justice' focused not just on South American debates, but also the authoritarian transitions of Eastern Europe, again pointing to the ways in which transitional justice aimed to mediate between a repressive past and a more liberal democratic future (2000; see also 2003). All three works suggested – in different ways - that the concept of transitional justice that emerged was closely linked to the enterprise of moving from authoritarianism to liberal democracy.

Transitions from authoritarianism appeared to present a common set of dilemmas because, as Kritz's volume title suggests, there was a degree of consensus that these transitions were 'about' the move from authoritarianism to democracy. In some of the early violent conflicts in which transitional justice emerged this was also the case. Guatemala, El Salvador, and South Africa clearly involved militarised intra-state conflict which any attempt to deal with the past had to reckon with; here too, however, the dominant and controlling international narrative of the conflicts understood armed conflict to be a symptom of lack of democracy and the authoritarianism of the state, rather than 'about' anything else. The language and mechanisms of transitional justice in these early conflicts, as with situations of authoritarianism per se, were understood to be in service to a liberal democratic transition, characterised by an attempted move to the political and legal institutions of liberal democracy. Transitional justice from this perspective was, as Mutua suggests, understood to be a product of human rights advocacy and closely related to the human rights project.

However, during this time the question of 'how to deal with the past' was also a central feature of attempted transitions from violent conflict in which the nature of the conflict, and the trajectory of the transition was much more contested. Peace processes in Northern Ireland, throughout Africa, and even in the Middle East, for example, all involved debate over how to account for past conflict atrocities, in contexts where the idea that everything would be dealt with by a straight-forward domestic criminal justice application was understood to be impossible and problematic politically from the outset. As O'Leary and McGarry point out, any transition from conflict must reckon with 'the conflict about what the conflict is about' (the meta-conflict) (2004:2). Accounts of the past are therefore

inextricably linked with the future, because they prescribe a particular future 'cure' to the conflict.

In conflict settings a number of key differences with 'paradigmatic transitions' therefore pertained. First, the conflict settings in which transitional justice mechanisms were subsequently invoked were incredibly diverse, defying any 'one-size fits all' answer. The conflicts involved different levels of violence: from mass atrocity in fully-blown civil war, such as Rwanda or Sierra Leone; to long standing low-level conflict such as Northern Ireland and Sri Lanka where the states denied that conflict existed, and responded using criminal law processes tweaked through emergency law provisions. A further conflict context for transitional justice involved conflicts which were international in nature, but which reinforced forms of internal conflict that then came to be the subject of transitional justice interventions. International intervention in Bosnia, Kosovo, Afghanistan, Iraq and Libya, focused on regime change and created a need for substantial reconstruction in societies that were deeply divided internally. International actors attempted to promote forms of 'transitional justice' in some of these contexts, focused on accounting for abuses of the authoritarian regimes that had preceded the international intervention often using the name and 'tools' of transitional justice. Transitional justice here took place against the backdrop of inter-state conflict but saw international actors use transitional justice as a tool to address the on-going internal conflict occasioned by the externally enforced regime change. These contexts were often also entangled with an international criminal legal process, or took place firmly within its shadow.

A second variation from the 'paradigmatic' authoritarian context for transitional justice was that these varied conflicts had distinct levels of international intervention, distinct regional dynamics and responses, triggered distinct international and domestic legal regimes, and distinct balances of power and moral dynamics that made any consensus about the nature and direction of the 'transition' difficult. Unlike authoritarian transitions, in these transitions it was much less clear that a transition to 'democracy' was in train and could justify moral and political arguments for a distinctive transitional justice rooted in the need for institutions that would enable democratic outcomes. However, it is also difficult to specify in advance of specific cases exactly which legal standards will apply to which parties for which phases of the conflict. While a notion of 'no blanket amnesty' took hold as a 'crystallising norm of international law', which drew its substance from a kind of 'composite' reading of different branches of international law, from a positive legal point of view it remained difficult to decide which legal standards apply in which context in any abstract way that might provide clear guidance to negotiators as to what is and is not legal in terms of international law. Moreover, as pieces in the collection acknowledge, human rights bodies have rarely had to adjudicate directly on how competing rights, for example to accountability or to non-repetition should be balanced in a context in which amnesty has been crucial to enabling a peace settlement.

Third, it was much less clear in transitions that human rights law was the key legal frame of reference and that human rights values were propelling institutional design. Novel institutional arrangements could be justified in paradigmatic transitions to democracy as in service to accountability, offering some accountability rather than none, and therefore a step towards rather than away from human rights, even if only a very small one. However, in transitions from conflict, institutional design relating to how to deal with the past focused much more explicitly around the 'justice versus peace' trade-off. The context involved deals that were often less about transition from one regime to another, and more about trying to get military-political elites at the heart of violent conflict, to share power in fragile compromises whose future normative trajectory was uncertain. In this context, transitional justice could not justify its departures from 'ordinary justice' in terms of a future democratic outcome. Rather it had to settle for the rather less noble justification of being 'the lesser of two evils', or the 'least bad choice', in situations where the choice appeared to be between a very imperfect peace and a very perfect war. As a result, the trade-offs between justice and peace appeared to have little normative basis but to be primarily linked to balance of power dynamics between the warring elites, and calculations as to what would best stabilise the emergent political settlement between politico-military elites. Whether transitional justice really was a part of the human rights project was much less clear, in part because how human rights law views these type of normative/pragmatist trade-offs is unclear.

Understanding the field's dual beginnings, I suggest, remains important to understanding the contemporary field, its preoccupations, and its controversies. It points to the underestimated connection of transitional justice to processes of political settlement. There has been some literature attempting to disentangle the ways in which these different contexts have affected the take up and impact of transitional justice mechanisms. Paige Arthur, at the end of her article, pointed to a need to consider further whether transition to 'peace' was different in kind to transition to democracy, requiring new normative aims and different institutional mechanisms for transitional justice (2009). Fionnuala Ní Aoláin and Colm Campbell in 2005 considered in detail the relationship between authoritarian transitions as 'paradigmatic' transitions and transitions in 'conflicted democracies'. They suggested that there were indeed problems of 'translation' in terms of understanding the quite different challenges which transitional justice faced in 'conflicted democracies'. Fletcher, Weinstein and Roan, in comparing transitional justice choices in practice, noted that distinctness in context significantly affects the choice of transitional justice mechanism and its operation in practice (2009). They examined how transitional justice mechanisms were taken up in seven quite different contexts, and produced an account of the 'dynamic system in which transitional justice interventions occur', suggesting eight factors or differences in context, which in their view influenced design. This work explicitly avoided distinguishing between paradigmatic or non-paradigmatic transitions, or trying to measure outcomes in terms of goals precisely because it recognised that any specification of goals would be putative and contested. Finally, I have suggested that the very existence and growth of a field of transitional justice is owed to its capacity to 'cloak' similar mechanisms all aimed in some way at 'dealing with the past', but operating in very different contexts as

somehow dealing with similar problems in similar ways (2009). This is an idea that grounds this introduction and my approach to the collection, because it points to the ways in which different processes of political settlement start to give similar mechanisms very different meanings – an idea reflected in a number of essays.

However, the question of what motivates and ‘creates’ the field continues to haunt it. For example, a very recent report by the International Centre for Transitional Justice and the Kofi Annan Foundation has attempted to address the failings of truth commissions as a mechanism (2014). It has questioned whether the mechanism had been too easily ‘read across’ from authoritarian contexts to conflict ones, with something crucial ‘lost in translation’. The report viewed it important to understand what was ‘lost’ if different accountability outcomes for Truth Commissions that looked quite similar on paper, were to be understood and addressed.

Part I in its first two sections sets out foundational accounts of transitional justice that were themselves critical in shaping and ‘creating’ the field. Paige Arthur and Ruti Teitel provide explanations of the field’s creation in terms of authoritarian-democracy transitions; while myself and my colleagues, and the pivotal UN Transitional Justice and Rule of Law Report of 2004 articulate the connections between transitional justice and conflict. Lia Kent’s final piece in a sense pulls these threads together by making the connection to practice, illustrating how different conceptions and mechanisms of transitional justice played out in East Timor. She shows the ‘daunting’ set of goals which transitional justice is expected to achieve: ‘providing ‘justice’ to victims and their families, fostering healing, reconciliation and nation-building, acting as a deterrent to future human rights violations, and protecting the integrity of the UN itself’ (2013: 11). She also demonstrates how globalised concepts and processes are given meaning in ‘specific places and times’, and how they may be reshaped in unexpected directions (ibid: 17). Her observations again point to the resilience and strength of the discourse in meaning different things to different actors. Pointing to the connection between theory and practice Kent interrogates the appropriate and ethical research methods for investigating transitional justice, a matter that also recurs throughout the collection.

II. Transitional Justice Toolkit: Fencing in a coherent field

As the UN report in Part I demonstrates, one approach to understanding transitional justice as a coherent field of inquiry that offers either a way to embrace different accounts of its origins, or eschew them altogether, is to lay aside theoretical and ‘field-origin’ questions, and examine the mechanisms or ‘tool-kit’ of transitional justice. Part II, following Kritiz’s early work, is structured around the ‘tool-kit’ approach. This approach constructs the field as having a coherent research agenda and even a centre of gravity with a canon of work that cuts across contexts. There are many potential tools in the tool-kit and of necessity the collection focuses on a selection of tools choosing those that have been accepted as such since the field’s inception: amnesty, trials, truth commissions, vetting and reparations. The

inclusion of the newer tool of 'apology' reflects the growing repertoire of the field: apologies for 'the past' cut across not only authoritarian and conflict contexts, but began to bring apologies as diverse as the Irish state's apology for its involvement in institutional sexual abuse, or the Australian government's apology for the treatment of aboriginal people, within the transitional justice field. Part II, however, includes discussion of reconciliation, which I suggest below can be positioned as both a tool and a goal of transitional justice.

The pieces selected for each of these topics have been chosen from a vast repository of possibilities, as each 'tool' has its own sub-literature. I here tried to select pieces that both explain the tool, and point to transitional justice's underlying controversies focused on how and when the tools should be used. Each of the tools in the tool-kit is often framed and discussed in terms of 'when and whether to choose it or not'. However, internal debates over whether, when and in what form to use, criminal trials, amnesties or vetting, quickly open up to more fundamental dilemmas over the normative consequences of these choices for transition that ensues.

Amnesties

Turning to amnesties - at the centre of the discourse, questions persist as to whether amnesties are always bad, or whether it depends on how they are framed. Questions include: when and how do they occur; when and under what circumstances are they legally permissible; do liberal democratic outcomes require tolerating them, or outlawing them? The amnesty debate continues to illustrate persistent questions over whether the validity of amnesty is different in conflict-peace transitions than in transitions from authoritarianism to liberal democracy. Hence, I have included Orentlicher's revisiting of one of her early foundational pieces (2001) regarding the legality of amnesties under human rights law this earlier piece having been key to arguments that post-transition accountability requirements remained post-transition (1991). I juxtapose the piece with the more contemporary revisiting of the relationship between transitional justice and peace in the concurring opinion of Diego Garcia-Sayán in the *El Mozote* case dealing with a massacre in El Salvador (2012). In this concurring opinion Garcia-Sayán suggests that the Inter-American court's existing amnesty jurisprudence is not automatically to be understood to apply to the context of a peace process with a justice v peace dilemma, where a truth mechanism has been put in place along with a form of amnesty, as an attempt to move from conflict to peace. Garcia-Sayán argues that in post-conflict contexts, rather than considering amnesties as a violation of rights against impunity, they need to be considered in terms of a set of rights that include the right to non-repetition, not all of which will be able to be achieved simultaneously. Both Orentlicher and Garcia-Sayán grapple with the trade-offs between justice and peace, and between the different rights that are at play in transition. For Orentlicher the project is to counter the assumption that human rights obligations end with authoritarian regime change and ensure on-going accountability. In democratisation contexts such accountability can be understood as part and parcel of the democratisation

process with its commitment to rights and the rule of law. However, for Garcia-Sayán the project is to try to set out relevant factors that would help evaluate the legitimacy of an amnesty put in place to enable a transition from conflict to peace where commitments to justice appear to clash with commitments to peace (as in ending of armed violence). In juxtaposition the two pieces not only illustrate the different considerations in the application of transitional justice in authoritarian and conflict contexts, but how human rights positions and political analysis of context and the application of transitional justice changes over time.

Trials

The desirability or undesirability of trials has similarly remained central to transitional justice discourse, whether domestic trials or international ones, and recurs in different ways throughout the essays. One of the originating questions of transitional justice was whether trials of former regime agents destabilised or stabilised a rule of law future. Surprisingly perhaps, a human rights movement that was deeply sceptical about criminal trials, punishment and deterrence with respect to 'ordinary decent criminals' in the domestic context, often seemed to view criminal justice and punishment as the ultimate gold standard for former human rights abusers. Trials are here seen as synonymous with accountability and the rule of law. Sikkink, famously has talked of a 'justice cascade', in which human rights norms cascaded across contexts and from international to local level, in part through human rights activism focused prosecuting former political leaders for past human rights abuses (2012). The justice cascade theory in a sense articulates and celebrates the successes of transitional justice as a global project of inaugurating democracy and the rule of law.

Challenges to this valorisation of the 'human rights trial' are varied. Vinjamuri's review of Sikkink illustrates a challenge to Sikkink's claim that such trials reduce repression, and to any idea of an uncontroversial normative link between trials, accountability and legitimacy (2012). Koskenneimi, in his account of the paradoxes of the 'show trial', points to a deep critique of the limits of the trial as linked to the limits of liberalism itself with respect to post-conflict political demands for accountability (2002). Many transitional justice debates have taken place against the backdrop not just of domestic trials, but of the Nuremberg trials, which are sometimes credited as an original jurisprudential source of transitional justice. This retrospective discovery of transitional justice arises in part because the debate over whether and how to institute the Nuremberg court pre-rehearsed many of the post-conflict trial dilemmas of to-day. In his revisiting of Nuremberg, however, Koskenneimi points out how post-conflict 'show trials' in a sense embody the central paradox of liberalism itself: for the trial model to be vindicated it must contain the possibility of acquittal inherent in the rule of law notion of fair trial and due process. Yet, the political legitimacy of the legal institution and any rule of law and peace dividend, may require that what is 'known' politically – namely that the perpetrator is guilty - be validated by the court. In this way, the paradox of the trial can be understood as a microcosm of the paradox of

liberal democracy itself. Liberalism premises its commitments and institutions on neutrality between political visions, however at some point political threats to the liberal political order itself tempt it to abandon those commitments and institutions and in a paradoxical way move to dismantle itself to save itself. Ultimately, the flourishing of liberal democracy appears to either depend on an article of faith that 'good will out' or to require violating its own tenets where (paradoxically) political threats to liberal democracy appear to require it to.

Truth Commissions

Truth commissions have often been offered as honourable alternatives to trials. In providing some accountability and forgoing the punishment end of criminal justice, they appear to offer a compromise between goals of accountability and negotiated ends to conflict: an institutional choice to square the circle, as Hayner's work illustrates. However, Shaw's work, like Kent's, demonstrates the complexity of the truth commission terrain when examined in its local context. Shaw argues that Truth Commissions have instituted 'redemptive verbal remembering' as a 'global paradigm that has acquired a strong momentum in practice' (2007:186). Examining the truth commission in Sierra Leone, she interrogates the local-global dichotomy. She walks a line between viewing global paradigms as 'powerful forms of knowledge embedded in institutional and everyday practices' which 'reconfigure the field of action, subjugating alternatives and creating new forms of power and inequality' on one hand, but acknowledging the capacity of local agency to subvert even powerful global paradigms on the other (ibid). However, Shaw also tells a story of the journey of the truth commission from tool of post-authoritarian transitions to liberal democracy, to 'truth *and reconciliation*' commissions as tools for transitioning from conflict to peace. She argues that they have inaugurated a new global approach of dealing with victims by focusing on inter-personal catharsis and 'coming-together' in public dramas of encounter, which were quite foreign to Sierra Leonean ways of processing trauma and memory. Through these dichotomies Shaw shows a truth commission that neither liberated Sierra Leoneans, nor subjugated them entirely, but in a sense muddled through without meeting the fundamental material needs that Sierra Leoneans persistently insisted and believed the truth commission should deliver, but which appeared unintelligible in terms of established transitional justice discourse.

Vetting

These types of dynamic permeate the other tools: De Grief's discussion of vetting illustrates its norms and functions, but also how institutional arrangements must be crafted to meet competing demand of the future in particular converse demands for continuity and for change (2007).

Reparations

Reparations, like truth commissions, offer a mechanism that does not require a direct choice between accountability and stability. Rather they would appear to be something which can sit alongside different modes of achieving accountability. Yet, like our other areas, institutionalisation of reparations embodies a variety of difficult choices as to how to achieve due process, how to ensure capacity to deliver and to pay, how to choose between individual and communal approaches to reparations, and how to ensure fairness in terms of how broader social needs are being met, as set out in Roht-Arriaza's essay. This essay also illustrates the technocracy of reparations and institutional choices as to 'how' to pay, illustrating how the reparations debate has also become inter-twined with larger questions of how transitional justice deals with development and socio-economic rights issues addressed in Part III. Rubio-Marín's piece illustrates the relationship of reparations to gender, because patterns of combatants and victims are particularly constructed by gender and the relationship of gender to the conflict. In this her work represents a wider transitional justice turn to 'ask the woman question' picked up further in Part III. So here again, reparations both offer an example of the richness of each sub-debate and the dilemmas of institutional choice, but also illustrate how those dilemmas and choices open up much wider normative discussions as to the nature and direction of the transition and its inclusions and exclusions.

Apologies

Apologies are a more recent new-comer to the transitional justice field. In a recent collection Mihai and Thaler and Smith set out a political conceptualisation of apologies which again points to the relationship with political settlement, while trying to locate the normative content and function of different types of apology.

Reconciliation

Reconciliation perhaps sits uneasily in this section, as it looks much more like a putative outcome than a 'tool' in the tool-kit. However, reconciliation is often offered both as technique or tool as much as a justification for institutional choice. Shaw's piece on Sierra Leone again illustrates with its assertion that the act of verbalising is often equated with 'healing'. Similarly, the South African Truth Commission also was not only promoted as a means to reconciliation, but itself viewed as offering reconciliation in action through public testimony, catharsis and coming-together. However, Schaap re-frames debates over reconciliation by contrasting inter-personal reconciliation with 'political reconciliation' (2008). He draws a distinction between reconciliation as an ideological (usually conservative) concept, to reconciliation as an agonistic 'processing of a wrong, a demonstration of the fundamental wrong on which the polity is founded which is brought into view by the friction between reconciliation as ideology and politics'. His suggestion points to the possibility that political reconciliation may be at play in what look like individual reconciliation 'failures'.

Although Part II sets appears to set out a 'tool-kit'/cannon approach to transitional justice, the essays selected very much point to the ways in which the choice between transitional justice tools is never just a technical institutional choice, but quickly exposes the tensions and dichotomies of the field which continue to define and mark it as a distinctive justice discourse which in a sense elides between all three of the conceptualisations of transitional justice set out at the start of this essay.

III. The Permeable Boundaries of Transitional Justice: The politics of what is 'fenced out'

Having understood and set out some of the 'canon' of transitional justice by examining some of its core 'tools' or institutions, Part III turns to the alternate approach of understanding transitional justice in terms of competing normative inquiries. This section explores this approach by pointing to a number of seemingly possible boundaries for fencing in the field of transitional justice. However, in fencing in, we also fence out (cf. Conaghan 2009). Here, I have chosen a number of intersecting boundaries that also offer an opportunity to explore the current direction of travel of transitional justice as a field.

Which transitions?

The first permeable boundary is that of the type of transition to which transitional justice discourses apply. I chose to illustrate using three key 'new' contexts that have generated or are generating significant debate. The first is the question over whether and when transitional justice can be a tool in on-going conflict. As Engstrom sets out, transitional justice is increasingly embedded in conflict resolution and peace-building efforts and increasingly there is a trend towards judicial intervention in ongoing conflicts. He suggests that this trend is owed to two developments, the intractability of armed conflict, and the rise of the 'global accountability regime'. Engstrom's focus is primarily on international criminal law interventions. However, the scope of transitional justice in on-going conflict is broader. Often cited as a key example is Colombia where after a series of failed peace processes, President Uribe negotiated a peace deal with right wing paramilitary groups who were alleged to have close connections to right wing governments, including Uribe's. He implemented a Law of Justice and Peace, under the guise of 'transitional justice' which set up a form of demobilisation linked to a form of truth-telling and de facto non-prosecution. Here the label of transitional justice was used, but also was contested, because there was no transition, and because the mechanism was understood not as a compromise between justice and peace but as a form of impunity with a self-interested dimension. However, Uribe's mechanism deliberately and cleverly deployed the 'tool-kit' and the discourse of transitional justice to achieve ends that seem antithetical to transitional justice as accountability or human rights. In some ways, this move exposed the difficulty of 'reducing' the discourse to a tool-kit, shorn of normative goals or justifications.

Since that time, transitional justice has been mooted as a tool in other quite different on-going conflicts, from Sri Lanka, to Gaza, to Syria. But there have also been precursors, notably in the Bosnian war of the early 1990s. It is easy to forget that the Inter-national

Criminal Tribunal for former-Yugoslavia, began life during the conflict as a mechanism for limiting the conflict but also for saving the face of an international community that was embarrassed by its impotency in ending the war. It was only when its operation was 'saved' into the Dayton Peace Agreement that it was secured as a post-conflict mechanism.

From a simple semantic point of view, it is unclear what makes innovative institutions for accountability in conflict a form of 'transitional' justice, beyond the fact that mechanisms traditionally associated with transitional justice – the tools in the 'tool kit' - are reached for. What distinguishes transitional justice in conflict, from any other pressure and mechanism to monitor and account for human rights atrocities during conflict or at any other time?

Closely related to this inquiry, is the new revolutionary / authoritarian / conflict context of the Middle East and North Africa (MENA). The 'MENA revolutions' of the Arab spring constitute an attempt to apply transitional justice in contexts that in a sense cut across authoritarian and conflict transition-types. However, in their combination and complexity and their on-going unresolved nature these uprisings and their aftermath also pose a new context completely. Here, key questions arise as to the relationship between the precise 'past' focused on by a transitional justice mechanism, and the extent to which there is on-going 'conflict', or a pro-democracy transition in play which is serviced by labelling that particular 'past' as the unjust one to be transitioned from. I am writing in a week in which the 'post-conflict' Prime Minister Morsi, after being deposed in a second 'revolutionary coup', has been given a death sentence for escaping from jail during the pre-first-revolution regime of Mubarak, who himself was tried as a former political leader during the first phase of the revolution. It is difficult from a distance, not to view Egypt as a battle ground and transitional justice as a discourse through which to gain strategic instrumentalist advantage in the battle. As van der Merwe points out, the Arab Spring does not just prove a challenge for the application of transitional justice but prompts questions about 'transitional justice's fundamental assumptions, methods and goals, as well as who does and who should define these' (2014). He identifies this as a pivotal moment for the field, which in his view needs a new consensus as to what transitional justice is trying to do.

In apparent stark contrast is the application of transitional justice in entirely settled contexts. Beitler's article on North America has been chosen as emblematic of this emerging practice, because it questions how different phases of state-building and constitutional development, and the justice inclusions and exclusions that characterised them, link to very local truth-seeking initiatives (2014). The wealth of initiatives Beitler presents in the US are interesting, as is his documentation of the link between these initiatives and transnational activism on truth-seeking, which he identifies as reaching transnationally to less settled contexts in an attempt to 'un-settle' historic narratives in the US.

Together these different contexts and their asserted 'peculiar' applications of transitional justice – itself already a 'peculiar' form of justice - illustrate the wide range of possible

application of transitional justice inquiries. They also illustrate the tensions between an expansive approach to the field, and maintaining it as coherently a distinct 'field'. As I have pointed out the field is increasingly striking for the fact that no clear concept of 'transition' bounds it. Rather the 'transitions' of transitional justice are increasingly understood in a rather circular way, to be all those transitions in which the 'tool-kit' is used (Bell 2009).

However, such a fluid concept of transition carries risks. First, it points to the field as depending not on the integrity of the concept of transitional justice, but to the entrepreneurship of academics and activists. As such it is vulnerable to that entrepreneurship. Once everything is defined as transitional all justice becomes 'transitional' justice. Moreover, can a field be sustained that owes its existence and traction to the sociological dynamics of field creation, rather than consensus over some core normative propositions on which the field might be grounded? In fact, all politics involves on-going political bargaining over the nature of the state, and the direction in which it is travelling in terms of essentially contested concepts such as 'democracy' or 'peace' or 'the rule of law' (Gallie 1956). These concepts are not simple 'things' to be achieved, but are dynamic and brought into being by the very arguments over what their essence involves. In some sense transitional justice mechanisms can be understood as contributing to a wider social negotiation as to what concepts such as democracy, peace or rule of law demand and should look like in the particular context.

Nonetheless, the capacity to frame almost any justice inquiry as a 'transitional justice' inquiry carries two risks. The first is that the field becomes a non-field – intellectually incoherent because it has little organising concept. That of course is an academic concern regarding academic activities. The second, however, is a practical concern relating to the apparent ease with which transitional justice can be strategically instrumentally used to pursue a variety of claims as to the future. The discourse of transitional justice in part has power because it can be used politically to 're-frame' assumptions as to what is 'settled' and suggest an alternative direction of travel. This can be a progressive re-framing, such as where transitional justice discourses in Spain are used to re-interrogate and push the compromises between democracy and authoritarianism that continue to shape, constrain and even trouble Spain's post-Franco political and constitutional settlement. However, it can also be a more negative re-framing, as with Uribe's use of transitional justice discourse and mechanisms in Colombia, which sought to reframe what might otherwise have been viewed as one-sided impunity for pro-state groups with close relationships to elements of government, as something more progressive and related to 'peace'. From this perspective, questions of which timeframe, which conflict, which transition, take on a deeper significance because they construct the rights and wrongs of the past and the associated consequences for the future direction of travel. The MENA transitional justice debates in particular have illustrated how contention over which timeframe, which conflict, which former regime, themselves become a vehicle for competing strategic instrumental attempts to define the relevant 'conflict' from which the transition proceeds, in ways which stitch up the transition's nature and outcomes. Whoever defines the transition defines 'the peace'.

Which wrongs?

A second permeable line from which to interrogate the normative boundaries of transitional justice is from that of asking: 'which wrongs' does it apply to? This debate asks in a different way: to which conflict does the mechanism apply? This pushing out of the parameters of the discourse expands the reach of transitional justice by expanding the concept of 'conflict' or 'harm', rather than its geographic or historical reach. The three examples included in the collection represent two strong and persistent challenges and one more recent but growing one. O'Rourke's piece questions how we are to understand the gendered nature of the 'wrongs' recognised by transitional justice (2012). While transitional justice often has a 'from' and 'to' in mind, its articulation of the 'from' and 'to' is often deeply gendered. Rather than the harms of conflict and the non-harm of 'peace', O'Rourke – along with others – asks how women experience conflict and transition and points to the mismatch between an experience of women of continuities of violence whose form tends to mutate rather than disappear, and a discourse that assumes it 'knows' what the from and to comprise.

A second challenge to transitional justice's concept of harm questions its focus on civil and political rights to the exclusion of socio-economic rights. Transitional justice mechanisms have often been exclusively involved with the former – most of the 'tools' in the tool-kit implicitly engage with civil and political rights exclusively or disproportionately. This is a different form of presuming 'the wrong'. Increasingly, work challenges this focus to transitional justice. Waldorf considers arguments – made with increasing popularity – that transitional justice should focus more on socio-economic violations (2012). Even more recently, writing – of which Carranza forms an early example - is emerging considering whether transitional justice should engage with corruption and economic crimes – in a sense looking at the 'criminal' justice component of socio-economic rights (2008).

This second set of boundary dilemmas suggests that transitional justice discourse uses the wrong frame of vision when asking which wrongs to account for, so distorting the end goals that transition is focused on. In leaving out, corruption, organised crime, socio-economic rights, or the experience of women, the discourse is accused of understanding the conflict to be resolved in terms of merely one of its dimensions, and so reducing the potential for transformation. The critique operates not just as a critique of the remit of the field as currently constructed, but as a critique of the discourse more broadly.

However, the debates over 'which wrong' can also be understood as an attempt to have transitional justice engage with the mutating nature of conflict pre, during and even post ('the') conflict. Whether the focus is women, socio-economic development, or corruption, each illustrates how conflict and forms of repression often mutate rather than being eliminated, and points to the connection between non-military 'wrongs' and the 'central' military conflict in complex ways. The 'what wrongs' question, points to the uneven gains of

peace processes and the variable geometries of violence. In this sense, this boundary discussion also grapples with 'what conflict' question, as it examines whether it is ever enough to deal with 'the' conflict which most overtly stands to be resolved, or whether we have to deal with the structural conflicts that come before it and come after it and are intimately bound up with it in complex ways. For some the broader approach is hopelessly utopian, while for others it is a necessity.

What political ends?

This brings us to our last boundary debate: the debate as to the actual and appropriate ends of transitional justice. In some senses this is the boundary debate implicit in all the others. While, as the debate over the origins of transitional justice illustrated, there was some consensus in authoritarian transitions as to what the nature and role of transitional justice was, this consensus is now under attack. Some attack transitional justice as something which has not achieved what it set out to achieve (whatever that 'it' is – one pays one's money and one takes one's choice). This attack suggests a failure in reaching the destination rather than the wrong choice of destination. However, the more fundamental charge here is that transitional justice institutions and mechanisms inevitably fail to deliver on their promise. This failure is often wrapped up in the wider failure of 'imposed' liberal democracy, often attributed to charges of lack of political will of international intervener, or lack of institutional capacity or competence, or all three, as Kersten's account of the International Criminal Court in Libya illustrates (2014).

However, others attack the project of transitional justice as having the wrong goals in the first place. Nagy's essay provides a succinct summary of the consequences of the boundary decisions over 'for what', 'for who', and 'when', pointing to transitional justice as 'depoliticised in its application', despite its considerable political power (2009). She calls for transitional justice to adopt a broader approach 'that encompasses structural violence, gender inequality and foreign involvement' within its purview (ibid: 287).

Two last pieces mount slightly different attacks from specific case studies, focusing on the power of the discourse and forms of resistance to it. Branch examines traditional justice practices or 'ethno-national' justice in Northern Uganda, which he views as a reaction to the liberal critique of transitional justice (2014). Yet, he shows the limitations of how traditional practices are deployed as a transitional justice mechanism to exclude the pluralism of justice practices in a complex society, in favour of brands of traditional justice that offer forms of certainty and closure. In a sense Branch challenges the power of the transitional justice discourse to limit and constrain local development even when it overtly eschews global liberal projects. Madlingozi's piece on 'transitional justice entrepreneurs' and victims, points to how a victim's group in South African tried to navigate the discourse's need to produce victims in a particular image (2010). He illustrates the complex 'dance' that local actors need to play, to respond to use global transitional justice norms and practices to meet local narratives and needs, again speaking to a discourse of constraint.

All three boundary debates can be understood in terms of the evolution of the praxis-based agenda by those who have found themselves excluded from the discourse, whether women, or victims of socio-economic rights violations. In fact, our first two boundary debates, in suggesting both new contexts and new 'wrongs' with which the discourse must reckon, use these boundary dilemmas as a form of challenge to what the discourse 'fences in' and 'fences out', and the political and justice consequences of this choice. These essays all explicitly challenge how the discourse constructs its power and the costs for individuals and for communities and societies. They suggest a complex interplay between global imposition and local resistance and agency that runs throughout the collection.

However, the critique can also be understood as part of a broader 'era of disillusionment' with transitions and their outcomes. If transitional justice emerged as a hopeful discourse linked to the possibility of progressive change, it now stands charged as yet another failed project. This charge is made by those who sought progressive transformation of oppressive and violent societies. However, it is also a charge made by some of the less progressive global forces that wish to replace what was a tentative move in the early 1990s towards negotiated ends to conflict with more force-based approaches. The move towards negotiated settlement was significant in replacing unthinking international endorsement of the state's monopoly on the use of force whatever the nature of the state, with an approach that understood shades of legitimacy and promoted negotiated peace as a better way to end conflict than either a wait-and-see approach of letting local parties fight it out, or a tilting-the-outcome approach of intervening militarily. Against this last backdrop there are also reasons to be critical of some critical approaches to transitional justice discourse, as themselves part of the sociology of field-creation and a 'coming of age' of the discourse as it shifts from praxis-based discourse rooted in human rights advocacy to 'legitimate area of academic study and critique' by those who have little connection to the praxis that was the originating dynamic of the field.

What effect?

This brings us to our last set of pieces. In response to emerging critique there has been a move towards attempting to 'measure' whether transitional justice mechanisms have delivered on the goals attributed to them. Do they achieve greater accountability? Do they correlate with more peaceful outcomes? Or more 'rule of law'? While in the early 1990s transitional justice's multiple goals could be lightly asserted to justify the adoption of new transitional justice mechanisms, twenty five years on donors want to measure which mechanisms achieve which goals, and make future decisions on what to transitional justice measures to support in the light of some sort of 'scientific' evidence. Transitional justice institutions and interventions are increasingly subjected to forms of evaluation or measurement. Yet, measuring outcomes presumes that we know what the goals of transitional justice are, and that those goals are measurable. The project of measuring and

evaluating also implicitly assumes that we will learn how to 'do it better' from understanding gaps between goals and outcomes.

The question of measurement might not look like a 'permeable boundary' in transitional justice, but I suggest it is. The boundary is the one outlined at the start and which has run throughout the collection: between transitional justice as 'tool kit' whose effectiveness can be measured, and transitional justice as a process and battlefield over what the normative content of justice is, that inevitably will remain unresolved and on-going. Both Dancy and Duggan's pieces challenge any simple approach to 'measurement' that would deny the contested nature of the practice and its possible goals.

Conclusion

In conclusion I offer some thoughts of my own on what is now understood as a 'cross-roads' for transitional justice (van der Merwe 2014). In this introduction and in my selection of essays, I suggest that transitional justice discourse has always stood at a cross-roads: a cross-roads between normative concept, tool-kit (to be used for good or evil), and a cross-roads between local tool or globally imposed 'solution'. Having purveyed the field after being involved in it for many years, my own response to the 'cross-roads' for transitional justice would be to in a sense relabel the project of 'transitional justice' as a project of 'contending with the past'. In my view, what best connects all the areas and debates outlined above is that they are all attempts to 'deal with the past' – or better still 'contend' with the past (Haas Report 2013). This re-labelling relieves transitional justice of its normative 'justice' burden, but also leaves us able to consider the types of normative, political, legal, and moral function particular spaces and mechanisms for contending with the past play in their particular local and global context.

I suggest that we best make sense of the field by understanding transitional justice debates as attempts to examine the political and legal spaces in which societies can 'contend with the past' in ways that attempt to bridge to achieve the multiple goals necessary to stable inclusive and open political settlements. These goals include that elites pact successfully move from violence to political cooperation; that stable political and legal institutions are fashioned; that new aggrieved constituencies or 'spoilers' are not created; that a form of social transformation takes place capable of delivering peace as having some sort of meaning in terms of improved life capabilities.

From this perspective the key question for institutional design is not how to arrive at some sort of end-of-history communal moment. Rather, the key question is how to find spaces in which to contend with the past constructively and peacefully, in ways that lead away from that past rather than back to it. This approach will involve different institutional responses, with different relationships to law, at different stages of conflict and peace process, in different ways in different contexts. Reducing talk of 'transitional justice' and increasing the focus on 'how to contend with the past', would caution global actors to be prepared to

adopt long-term views, and to live with mess and multiple institutional approaches, all the time aware of the on-going connection of any attempt to contend with the past to the political economy of how actors are contending over the future. The past will need to be contended with on an on-going basis, and it will need to be contended whatever the institutional choices of local or international elites. Often the very process of transitional justice design and implementation will involve contestation that is itself a process of contending with the past.

The key project question when deciding whether and how to establish a transitional justice mechanism, is not how to define goals and tailor institutional design to achieving them. Rather the key question is whether it is useful and important to have a constructed dedicated space in which to contend with the past, and how it can best be designed to improve the lot of those most damaged by the past, and lead to more justice rather than less in the future. In my view, this approach would lead to more modest and realistic approaches to what transitional justice can achieve. It would encourage people to view transitional justice spaces as ones where we create as much as apply justice, because justice must always be brought into existence by combining both universal global norms with particular local instantiations of justice. However, this more modest conceptualisation of transitional justice would also signal more clearly what is at stake in failing to address the past. Failure to provide constructive spaces for contending with the past will not lead to contention being postponed, or magically somehow disappearing. Rather, failure to provide space in which to constructively contend with the past will displace contention to other arenas. These are likely to be the spaces of the political and legal institutions of post-conflict state, who will face contention over their legitimacy whether peaceful or otherwise.

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