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What Is the Future of Transitional Justice?

Makau Mutua*

INTRODUCTION

The term 'transitional justice' evokes hope and renaissance. For more than a quarter-century, when the concept of transitional justice was first mooted, postconflict and other tormented societies have attempted to embrace it as a bridge to a more hopeful future.¹ A number of states in the depths of despair and countries wracked by seemingly endless cycles of violence see transitional justice tools as a possible midwife of a democratic, rule-of-law state. In many circles, transitional justice has become an article of faith as a catalyst for reclaiming societies in political and social imbalance and dysfunction. Senior statesmen and leading academics have endorsed the critical place of transitional justice in returning societies to civilization.² Diverse regions of the globe – from Europe and Central and Latin America to Africa and Asia – have latched on to the glimmer of hope offered by transitional justice ideas, processes and institutions. Almost three decades later, the body of evidence suggests a mixed record. There have been many successes of transitional justice initiatives, but there have also been many challenges. This special issue of *IJTJ* seeks to excavate these hopes and fears of a relatively novel idea. It has sought out new and divergent voices, many with a critical lens, to ask nagging questions about the enterprise of transitional justice.

The emergence of transitional justice roughly coincided with the end of the Cold War and the euphoria of the presumed triumph of free market ideologies and political liberation around the globe. In Africa, Asia and Latin America, one-party regimes and opaque dictatorships – most supported by either the West or the East – gave way to new experiments in democratic rule. Most were emerging from long nights of tyranny and despotism. Such global upheaval and regime change had not been witnessed since the era of decolonization. In Latin America, brutal military kleptocracies were in retreat, and in Africa military fascism and single-party states were put on their back foot by pro-democracy activists and human rights advocates. The close of the last century and the beginning of this one were marked by hope and the promise

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1 Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocities* (New York: Routledge, 2000).

2 See, e.g., Desmond Tutu, *No Future without Forgiveness* (New York: First Image Books, 1999); Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998).

of change. But transitions to functional postdespotic societies are difficult and challenging. Old orders and their entrenched elites reside in the sinews of society and are nearly impossible to uproot. Vested systems of dehumanization and the values of dystopia have an uncanny capacity to defy transformation. Yet the masses of the people want change in the immediate aftermath of the *ancien régime*. This appetite for change on the part of the populace can be harnessed to remake society if emergent political elites and the intelligentsia understand and are committed to a new open order. This is where the tools of transitional justice have been thought particularly useful to catalyze change.

In their bare form, transitional justice concepts imagine a two-step process of change. The first seeks to stabilize a postconflict society through temporary measures that signal a commitment to addressing the abuses of the past. Such measures include statements and practical steps by new ruling elites to build the public's confidence in a process of reconstruction. Absent these strong signals, the public is unlikely to believe that the new regime is serious about making a break with the past. The second component of transitional justice concerns the ethics and appearances of the processes and outcomes. The point is that in order to move forward to an inclusive and fair society, no major party can be left behind. Those who have been aggrieved must find justice in order to let go of the hatreds of the past. But equally important is the place of the perpetrators of the abusive past in the future of the society. While justice needs to be done, deep concessions must be made by each side in order to move forward to a shared and common future. By its terms, transitional justice is skeptical about a winner-take-all approach. In this, there is realization that impunity must be rejected and the most heinous offenders held to account. That is the only way a culture of accountability that stigmatizes impunity can be incubated. Even so, a successful program must avoid revenge and gratuitous retribution against former regime elements and their collaborators. Otherwise, bitter seeds, which would bring another day of reckoning, will be sown again to continue the vicious cycle of violence.

What I have sketched above is the backbone of the doctrine of transitional justice. Its execution in theory would renew society and set it on a path to prosperity. But experience has shown that transitional justice projects are complicated and prone to collapse. Many societies that have tried to use them for reform have regressed, or conflicts have recurred. In others, old regime elements have clawed their way back into power. In these cases, the old order was simply too stubborn to be overcome. The political will for such transformation is rarely present in new leaders. After an initial burst of enthusiasm, the political rhetoric cools and old habits and cultures of repression and corruption reemerge. This is how many a transition has been aborted. These drawbacks beg several questions. Does transitional justice really work, and are there clear-cut cases where transformation can directly be attributed to it? If it has worked in some cases and not others, why so? Are there any conceptual defects in transitional justice, or in its application to different political contexts and traditions? Is the vehicle of transitional justice defensible as an intellectual project given its shortcomings in practice? Simply put, after almost three decades, what is the future of transitional justice? These are some of the questions that the articles in this special issue address. They grapple with the doctrine, theory and practice of this innovative

concept and give society a fund of knowledge to conclude that it should not throw out the baby with the bathwater.

THEORY AND NORMATIVE COHERENCE

Transitional justice as a product of intellectual labor does not exist in a theoretical vacuum. It is an enterprise with a theoretical anchor in the larger project of human rights. Its normative seeds are in the garden of liberal theory. That is why any interrogation of transitional justice would be impotent without a grasp of the normative, political and cultural debates that attend the human rights project. Transitional justice is a subset, an offshoot, of the human rights movement. Its norms and 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. That choice is not without debate, not only about outcomes but also with regard to its ability to deliver a humane postconflict society largely free of the privations that led to violence in the first place. In effect, questioning transitional justice amounts to critiquing the human rights project. The post-1945 corpus arguably spawned the most important movement of our time. Louis Henkin, one of the intellectual icons of the movement, termed ours the ‘age of rights.’³ He meant to convey the unqualified universalist view that the idea of human rights had triumphed across cultural, religious, political and historical borders. Philip Alston, another leading thinker of the movement, has argued that christening a claim a ‘human right elevates it above the rank and file of competing societal goals’ and bestows upon it the ‘aura of timelessness, absoluteness and moral validity.’⁴ These claims evidence an intellectual confidence that suggests that one should not question the liberatory potential of human rights. But they are very large claims that require scrutiny. This is especially true because the promise of transitional justice directly rises from them.

What, then, are the normative deficits of the human rights project that are attributable to transitional justice? The voices that dissent from human rights have made three key arguments. First, they contend that the human rights corpus and its movement are not truly universal. The rights language is assailed as particularly liberal and a western construct, as a tool for organizing society and mediating its relationships. The charge is that human rights have emerged from the liberal tradition and are quintessentially of a Eurocentric hue. Thus any attempt to transport them across cultural borders constitutes an attack on non-European societies. This claim was given credence by leading western scholars Antonio Cassese⁵ and Virginia Leary,⁶ who stated categorically that the West imposed its philosophy of human rights on the rest

3 Luis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990), xvii.

4 Philip Alston, ‘Making Space for New Human Rights: The Case of the Right to Development,’ *Harvard Human Rights Yearbook* 1 (1988): 3.

5 Antonio Cassese, ‘The General Assembly: Historical Perspective 1945–1989,’ in *The United Nations and Human Rights: A Critical Appraisal*, ed. Philip Alston (Oxford: Clarendon, 1992).

6 Virginia Leary, ‘The Effect of Western Perspectives on International Human Rights,’ in *Human Rights in Africa: Cross-Cultural Perspectives*, ed. Abdullahi Ahmed An-Na’im and Francis M. Deng (Washington, DC: Brookings Institution, 1990).

of the world because of its geopolitical power at the UN and across the globe. This argument stems partly from the identities of the drafters of the founding human rights documents after 1945. The key drafters were either westerners or individuals educated in the West and steeped in its cultural and intellectual traditions. This is not a minor charge. Largely absent from the table were cultural and political ideas from the African, Asian, Muslim and Hindu traditions. This deficit of multiculturalism remains a bone of contention today. But 2014 is not 1948, and much has changed in the way norms are formulated at the international level. The question is whether more inclusivity and participation of cultures and traditions from the global South have cured these drawbacks.

The second challenge addresses a different kind of inclusivity and universality. The critics charge that the human rights corpus is too limited normatively. In spite of great strides to expand the original narrow focus of the founding human rights texts, still much of the movement hews toward civil and political rights at the expense of economic, social and cultural rights. The indictment here is that the human rights idiom speaks largely in the language of the entitlements that are germane to a liberal, market democracy. It focuses on the so-called core rights that are essential to securing the people against political tyranny, but does little to ward off the privations that come from economic despotism. This attack became louder as the globalization picked up pace and market ideologies rolled back the thick welfare wherever they had been realized, especially in Scandinavia. Nor are the critics mollified by the more positive movement in the last decade by human rights groups and multilateral bodies to address questions of economic and social plight. They see this as the normative congenital defect of the Cold War that continues to disrupt a universal consensus on the utility of the human rights corpus. Critics point to the relative flaccidity of the International Covenant on Economic, Social and Cultural Rights, 'the other covenant,' in contrast to the International Covenant on Civil and Political Rights. The political capital expended to make the latter effective has been absent from the former. This criticism has been more poignant in the global South, where the ravages of underdevelopment have taken a larger toll than in the industrial democracies of the West.

The last significant normative objection to the human rights corpus focuses on the place of individualism in the fingerprint of the project. The argument is that the placement of the individual by the human rights corpus at the center of the moral universe in addition to the unrelenting focus on individualism erodes the cultural legitimacy of human rights because it overlooks the central role of the community. The individual egoist, who is valorized by human rights documents, puts a wedge between members of society and detracts from a more humane solidarity. The individual is one of the important foci, but her hyperelevation over community fails to account for much of humanity that values social bonds. Furthermore, individualism remains a source of social alienation, a booster for destructive greed and an excuse for runaway market ideologies that despoil the environment and contract empathy in society. It justifies arguments and actions that reject social responsibility as an obligation for all actors, especially corporate. Any schema of rights discourse that fails to interrogate this schism risks exacerbating social crises and consigning vulnerable populations to the margins of society. These critiques of human rights are attributable to transitional justice measures and cannot simply be overlooked.

RETHINKING TRANSITIONAL JUSTICE

Dogmatic universality is a drawback to an imaginative understanding of transitional justice. In matters of social transformation, close attention must be paid to context and location. That is why it is intellectually indefensible to create a transitional justice blueprint ready for export. This is the Achilles' heel of the dominant transitional justice programs based in the West, which have become a cottage industry. This approach has spawned a college of professionals with prescriptive country antidotes at the ready. This is a paternalistic and imperialistic approach that should be rejected out of hand. What will work in country X in Africa may completely fail in country Y in Asia. The trick is for thinkers and actors in transitional justice to reconstruct notions of transitional justice that are informed by a wider moral and social universe. The key to a more robust project is to craft an agenda that assumes a more holistic approach to repairing human relationships in postconflict and especially postcolonial settings. Concepts that pivot on reparative, retributive and adversarial notions of justice are necessarily of limited utility. Victims may question them. Criminal sanctions against perpetrators are important, but they too have a narrow impact because they tend to focus on criminal, individual, civil and political sanctions. While sanctions play an important role in signaling a rejection of impunity and impose responsibility on the individual wrongdoer they nevertheless are not truly victim-centered. They are society's revenge against the perpetrator, but may bring little comfort to the victim. The question is how should transitional justice deal with the injured soul of the victim, and the corruption of the nation's moral fiber?

Alex Boraine offered an intriguing matrix of a 'holistic' approach to transitional justice that is seductive. He built it on a five-legged stool that sits on accountability, truth recovery, reconciliation, institutional reforms and reparations in one overarching schema that encompasses social reclamation.⁷ Boraine was no doubt informed by the positive outcomes of the South African transitional justice experience, but he was also acutely aware of the limitations of that experiment and the many critiques levelled against it. It is clear that a wide array of tools and innovative approaches are necessary to combat powerlessness in many of its stubborn manifestations and dimensions. These include diverse statuses, identities and locales—social, economic, political, gender, community and others. The question is how to repair society by deepening the legitimacy of public power and the democratic polity. One way of thinking about a multidimensional and culturally effective transitional justice project is to recall the notion of *ubuntu*, a South African variant of the African philosophy of community and individual wholesomeness.⁸ This would acknowledge the normative incompleteness of traditional iterations of transitional justice and bring to the fore the necessity of legitimizing more fully the promise of the project. It would realize the obvious normative limitations of transitional justice practices in addressing deeply embedded injustices in societies that, even though they have accepted the

7 Alex Boraine and Sue Valentine, eds., *Transitional Justice and Human Security* (Cape Town: International Center for Transitional Justice, 2006).

8 Yvonne Mokgoro, 'Ubuntu and the Law in South Africa,' *Buffalo Human Rights Law Review* 4 (1998): 15–23.

liberal constitution, spring from traditions that are not originally from the liberal tradition.

Evidence suggests that a number of highly visible traditional transitional justice processes suffer from the challenges outlined here. This is particularly true of both international criminal tribunals and truth commissions. Take the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY), for example. The ICTR followed the script of the Nuremberg trials. But it is clear that, as constituted, the ICTY was intended to achieve neither the abolitionist impulses nor the just ends trumpeted by the UN. The Tribunal was disarticulated from political reconstruction and the normalization processes necessary to reclaim Rwanda after the horrific genocide of 1994. In effect, the ICTR has been impugned as a tool for the victorious Tutsi regime, which has manipulated the genocide and the Tribunal to recreate a Tutsi supremacist regime. The ICTR would have made more sense in the context of a holistic and comprehensive settlement domestic with international components to address the foundational problems that unleashed the genocide. Instead, the Tribunal has orbited in space, suspended from political reality and removed from both the individual and the national psyches of the victims as well as the victors in the Rwanda conflict. The same analysis is applicable to the ICTY, where Serbs have seen themselves as its victims. It is unclear what good the Tribunals have done absent any concrete evidence of substantive justice and social reconstruction.

The other poignant example is the Special Court for Sierra Leone, which had mixed but arguably more promising results because it was situated inside the country, and not outside like the ICTR and ICTY, although it is worth noting that the Court's most significant trial, that of former Liberian head of state Charles Taylor, took place at The Hague. The fragility of the political environment and Taylor's possible ability to sabotage the trial were given as reasons for locating that trial outside the region. The Iraqi Special Tribunal, however, though situated in Iraq, was largely a sham from both domestic and international perspectives. It lacked credibility with Sunnis, for whom it was merely a tool for revenge by Shiites and the occupying American forces. Its unacceptably unfair, biased and compromised procedures and the absence of due process protections made it a mockery of transitional justice.

It remains to be seen whether the International Criminal Court (ICC) can address some of these deficits or will continue to be simply a darling of lawyers who see its utility as developing international criminal and humanitarian law and of western politicians who see it as an instrument for assuaging their conscience for societal failures they did nothing or very little to stop. The early verdict on the ICC has been less than promising, given its woes in prosecuting a number of cases, including those of President Uhuru Kenyatta of Kenya and his deputy William Ruto. Kenyatta's case collapsed amid charges of witness tampering and sabotage.⁹ The ICC has become a highly polarizing institution in Kenya, and has ironically been used to

9 See, International Criminal Court, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta,' 5 December 2014, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx (accessed 16 December 2014).

foster intolerance and entrench impunity. This is illustrative of the difficulty of the international criminal tribunal as a funnel for justice and reconstruction.

The key ultimately is to understand that none of these processes—truth commissions, tribunals, sectoral reforms, prosecutions and others—will suffice alone. They must be thought about and implemented in a holistic context that addresses the multiple, and often conflicting, vistas of powerlessness. Here, building a democratic culture that is not just premised on political rights, and tackling impunity, is key to the society of the future. The argument here is not to turn away from traditional systems of transitional justice. Rather, the claim is that these systems are incomplete and ineffective because they do not focus on people and victims, but are rather concerned with vindicating their own internal norms. Ultimately, transitional justice processes can become more effective if they are backed by contending political elites and have deep and broad purchase within the general population.

THE FUTURE OF TRANSITIONAL JUSTICE

The authors in this special issue have grappled with these issues, some more directly than others. But each one of them has provided new and invigorating insights into the debate about the normative, practical and contextual questions that need to be asked to breathe new life into the project of transitional justice. The articles were carefully chosen to weave a tapestry of new and established voices from both the global North and the global South. The issue mixes the voices of those who have practiced in the field with those who have written and thought about it for substantial periods. It even includes some who have lived through transitional justice experiences. What all the authors have in common is a commitment to academic excellence in the tradition of significant and emerging scholars in human rights and transitional justice. Thematically and regionally, the pieces are diverse if complementary in their outlooks.

Several of the articles wrestle with the conceptual and normative boundaries of transitional justice, and suggest a more robust reconstruction of the project to make it effective and meaningful for victims. In 'Enabling Transitional Justice, Restoring Capabilities: The Imperative of Participation and Normative Integrity,' Thomas Bundschuh argues for a more complete understanding of victim powerlessness that goes beyond abstraction to substantive capabilities. In this sense, transitional justice is stillborn unless it empowers victims to engage as citizens in reclaiming their own dignity and place in society. The article contends, correctly, that effective reconstruction through transformation must be grounded in civil and political rights as well as economic, social and cultural rights. The substantive equality of citizens and their potential for full participation cannot be realized where rights are bifurcated in the traditional dichotomies. The article stretches thinking about the place of economic powerlessness in the transitional justice project.

In her article, 'Truth Commissions and Anti-Corruption: Towards a Complementary Framework?', Isabel Robinson broaches a similar subject except she focuses on whether corruption—a major economic and social rights issue—should be placed squarely in the transitional justice project. She explores the cases of Kenya and Tunisia, where attempts to address corruption in a transitional justice context have been made with mixed results. Traditionally, transitional justice projects have shied away from excavating economic crimes committed in the context of corruption,

even though the link between the gross violations of civil and political rights and corruption is usually strong. Violations of basic freedoms are generally committed to protect an unjust kleptocratic economic system. Limiting transitional justice to civil and political rights initiatives would not get to deeply embedded national psychosis and dysfunction.

Eric Wiebelhaus-Brahm and Geoff Dancy's 'Bridge to Human Development or Vehicle of Inequality? Transitional Justice and Economic Structures' falls in the cluster of articles that interrogate the place of economic, social and cultural rights in the transitional justice project. It uses a statistical method to explore whether transitional justice positively impacts on economic inequality or detracts from serious efforts to deal with economic powerlessness.

In 'Mimicry, Transitional Justice and the Land Question in Racially Divided Former Settler Colonies,' Khanyisela Moyo provides a compelling critique of the limitations of conventional transitional justice in addressing postcolonial land conflicts. The article explores the tensions between western liberal conceptual frameworks, international legal norms and postcolonial justice agendas in the context of racial inequities. It shows how limiting such approaches and strategies can be in the face of entrenched racial hierarchies, as was the case in South Africa and Zimbabwe. There is a clear need to reach beyond existing transitional justice blueprints to get at historical pathologies that defy simplistic and reflexive rule-of-law solutions.

In their article on 'The International Criminal Court as a "Transitional Justice" Mechanism in Africa: Some Critical Reflections,' Obiora Chinedu Okafor and Uchechukwu Ngwaba return us to the subject of postcolonialism and international criminal justice concepts. They unpack and complexify the tensions in the ICC and its interventionist focus on Africa. They critique linear approaches that do not appreciate the deleterious effects of the ICC's role in Africa. Do transitional justice orthodoxies, which are driven by their own supposedly infallible logic, do more harm than good in contexts that may require a more flexible calculus to balance peace, justice and reconstruction? The article makes an energetic case for rethinking the model of the ICC as an instrument for transitional justice within an international legal order that is perceived as biased against Africa and the global South.

George Nickolas Fourlas' article 'No Future without Transition: A Critique of the Liberal Peace' departs from most thinking on transitional justice and points an accusing finger at the largely retributive American criminal justice system. He proposes reforms that would put restorative justice at the center to instill confidence in political institutions and structures of governance that alienate many groups and individuals, especially on the basis of race and ethnicity. Not much has been written about how transitional justice tools can be deployed as a response to the challenges of communities of color in the US and their relationship to the coercive apparatuses of the state, like the police. Mass incarceration of persons of color is clearly an industry of control and coercion that does nothing to create just communities or respect the dignity of large swathes of the American populace. This article offers a more innovative approach to address a stubbornly degrading system.

'Through the Looking Glass: Transitional Justice Futures through the Lens of Nationalism, Feminism and Transformative Change' by Kris Brown and Fionnuala

Ní Aoláin wrestles with somewhat related questions of identity and how deep social change can be induced through progressive reinterpretations of political struggles. Feminist perspectives introduce new dimensions to the transitional project that create new pathways for a more inclusive and caring society.

'Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition' by Dustin Sharp takes issue with liberal notions and assumptions that underpin peacebuilding in transitional justice contexts. It argues that transitional justice should not be seen as a special process for only postconflict states, but rather as a continuous exercise and cyclical dynamic that should be embraced by all societies. This 'normalization' of transitional justice into an 'everyday' peace seems necessary for social balance and stability.

Sebina Sivic-Bryant's 'The Omarska Memorial Project as an Example of How Transitional Justice Interventions Can Produce Hidden Harms' is a novel ethnographic study of an unsuccessful attempt to create a memorial for victims. It goes to who owns narratives about past abuses, and whether the voices of victims can be appropriated by others. In what circumstances, for example, can nonvictims speak for victims? Is history owned by victims? Can any group, in fact, own history? This is a rich and textured story that illustrates the struggles around memory and remembrance to write the past in popular history.

Finally, Simon Robins' essay 'Mapping a Future for Transitional Justice by Learning from Its Past' reviews three edited volumes on a range of transitional justice processes in Europe, the Asia-Pacific and the countries of the Arab Spring. Analyzing the historical, present and potential future approaches to transitional justice represented in the books under review, Robins offers a critique of an ossified transitional justice practice rooted in liberal ideologies as well as a glimpse of a hybridized, context-responsive approach to transitional justice that rounds out the special issue.

CONCLUSION

This special issue was designed to provoke debate and to question the underlying conceptual and normative framework and assumptions about transitional justice. We wanted to look back and ask what transitional justice has yielded, where it has traveled and how it might be rethought based on lived experiences. We cast the net wide and asked for an open-ended debate on the future of the project. The responses were exciting. The result is an issue that tackles the question of transitional justice at a depth that is difficult to match. The authors have delved into issues that animate discourse on transitional justice, but they have done so by pushing the boundaries of convention and giving us a fresh and critical lens on transitional justice and the larger human rights project. They have opened up new vistas with their keen insights and questions about the validity, promise and effectiveness of the normative and theoretical frameworks and philosophical underpinnings of transitional justice. Like other intellectual inquiries, the articles in this issue should be seen as a continuation of the debate, and as an attempt to ask and answer questions about one of the most important transformative projects of our time. If this provokes further thought, as we think it does, and spurs policy makers, thinkers and activists to be more reflective, then it will have succeeded.