

Introduction

Researching transitional justice: The highs, the lows and the expansion of the field

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Transitional justice is a field on an upward trajectory.¹ Originally viewed by many as an extension of the study of transition within political science,² particularly in relation to the transitions from conflict or authoritarianism in South America and Eastern Europe, or the preserve of lawyers seeking to ensure legal accountability in transitional states,³ as a field of scholarly enquiry and practitioner action, transitional

¹ On the evolution of transitional justice generally, see Paige Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’ (2009) 31(2) *Human Rights Quarterly* 321; Neil Kritz, *Transitional Justice: How emerging democracies reckon with former regimes* (United States Institute of Peace Press 1995); Ruti Teitel, ‘Human Rights in Transition: Transitional Justice Genealogy’ (2003) 16 *Harvard Human Rights Journal* 69.

² Samuel Huntington, ‘How Countries Democratize’ (1991) 106(4) *Political Science Quarterly* 579; Guillermo O’Donnell, *Transitions from Authoritarian Rule: Prospects for Democracy – Tentative Conclusions about Uncertain Democracies* (John Hopkins University Press 1986).

³ See for example: Diane Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’ (1991) 100(8) *Yale Law Journal* 2537; Carlos Nino, ‘The Duty to Punish Past Abuses of Human Rights Put Into Context:

justice has been a site of exponential growth. A vast academic literature, that this Research Handbook contributes to, is driven by scholars from a diverse array of disciplines, including law, criminology, sociology, theology, history, anthropology, philosophy and development studies, and has lent a significant intellectual energy to the field. Equally, a dedicated ‘International Centre for Transitional Justice’, specialist university courses and institutes and the growth of non-governmental organisations (NGOs) focused on dealing with past human rights abuses in societies in transition has contributed to the creation of a self-conscious area of practice.⁴

What is particularly striking is the speed with which transitional justice has been accepted as a distinct field of study and practice. Originally defined by Teitel as ‘exploring the role of law in periods of radical political transformation’,⁵ the term transitional justice has come to summarise debates over how successor regimes should deal with the human rights abuses of their authoritarian predecessors.⁶ The evolution and expansion of the mechanisms of transitional justice well illustrates this point. For example, the establishment of the ad hoc International Criminal Tribunal for the former Yugoslavia in 1993 and the International Criminal Tribunal for Rwanda in 1994 and creation of the permanent International Criminal Court in 1998

The Case of Argentina’ (1991) 100(8) Yale Law Journal 2619; Naomi Roht-Arriaza, ‘State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law’ (1990) 78 California Law Review 451.

⁴ Christine Bell, ‘Transitional Justice, Interdisciplinarity and the State of the “Field” or “Non-Field”’ (2009) 3(1) International Journal of Transitional Justice 5.

⁵ Ruti Teitel, *Transitional Justice* (Oxford University Press 2000) 4.

⁶ Tricia Olsen, Leigh Payne and Andrew Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (United States Institute of Peace 2010).

broadened the range of legal regimes and mechanisms that fell under the label of transitional justice. The establishment of truth commissions in Chile and South Africa in the 1990s marked a step change in the field, casting a spotlight on alternative mechanisms for dealing with the past and a move ‘beyond legalism’.⁷ The value of truth telling and truth seeking developed a considerable lure and truth commissions rapidly became the ‘go-to’ response in post-conflict contexts. This was paralleled by a growth in grassroots truth recovery projects and community-based conflict transformation initiatives.⁸ These mechanisms and others – including processes of memorialisation and commemoration and more established programmes of institutional reform, vetting and dismissals and reparations – are all now housed within the transitional justice tool box.

In 2004, the then UN Secretary General Kofi Annan publicly formalised the UN’s normative commitment to transitional justice, defining it as 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. It consists of both judicial and non-judicial processes and mechanisms, including prosecution

⁷ On the expansion of truth commissions more generally see Priscilla Hayner, ‘Fifteen Truth Commissions – 1974–1994: A Comparative Study’ (1995) 16(4) *Human Rights Quarterly* 597; Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Routledge 2010); Kieran McEvoy, ‘Beyond Legalism: Towards a Thicker Understanding of Transitional Justice’ (2007) 34(4) *Journal of Law and Society* 411.

⁸ Kieran McEvoy and Lorna McGregor, *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart 2008).

initiatives, facilitating initiatives in respect of the right to truth, delivering reparations, institutional reform and national consultations.⁹

While Annan's definition of transitional justice is not perfect and definitional wrangles persist concerning the reach and scope of transitional justice, the UN's recognition of transitional justice as a standalone discipline and area of practice points to two significant junctures in the evolution of the field. First, as Bell¹⁰ points out, once assumed to stand at odds with negotiated transitions by undermining efforts to reach elite compromises that would 'stop the killing', transitional justice was now adopted enthusiastically by policy-makers and viewed as necessary to sustaining ceasefires and achieving a successful transition from conflict. Second and for McEvoy and Mallinder,¹¹ it demonstrates how transitional justice has, in a short period of time, become 'respectabilised' as a field of study and practice.

Equally notable are the diverse range of contexts in which transitional justice has been deployed. As noted above, they include previously authoritarian countries in Latin America and elsewhere; Eastern European states following the collapse of the former Soviet Union; a range of post-conflict societies in Africa, Asia and Europe – including those jurisdictions undergoing transition as a result of the Arab Spring; in contexts of ongoing conflict such as the Middle East; and in more established

⁹ UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc S/2004/616 (2004).

¹⁰ Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field' (2009) 3(1) *International Journal of Transitional Justice* 5.

¹¹ Kieran McEvoy and Louise Mallinder, 'Politics, Theory and Praxis: The "Respectabilisation" of Transitional Justice' in Kieran McEvoy and Louise Mallinder (eds), *Transitional Justice* (Routledge 2016).

democracies including the USA and UK.¹² The term ‘post transitional justice’ has also been developed to refer to the recent resurgence of attempted prosecutions of past human rights violations associated with previous dictatorships and periods of military rule in Latin America.¹³ That notions of ‘truth’, ‘reconciliation’ and ‘apology’ firmly underpin contemporary debates on, for example, the role of Ireland’s Catholic Church in institutional child abuse and the forced assimilation and abuse of indigenous children at Canadian Indian Residential Schools – two ‘settled’ democracies – further reflects the maturing and intellectual mainstreaming of the field.¹⁴

Of course, all is not perfect with the study or practice of transitional justice and transitional justice is not a panacea for all ills. Explored throughout this volume,

¹² In 2012, leading British lawyer Michael Mansfield called for the creation of a permanent independent truth commission to monitor and investigate systemic abuse.

Michael Mansfield, ‘Hillsborough Shows Why we Need a Permanent Truth Commission’, *The Guardian*, 29 October 2012

<<https://www.theguardian.com/commentisfree/2012/oct/29/hillsborough-need-truth-commission>>.

¹³ Cath Collins, *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador* (The Pennsylvania State University Press 2010).

¹⁴ See for example Anne-Marie McAlinden, ‘An Inconvenient Truth: Barriers to Truth Recovery in the Aftermath of Institutional Child Abuse in Ireland’ (2013) 33(2) *Legal Studies* 189; James Gallen, ‘Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice’ (2016) 10(2) *International Journal of Transitional Justice* 332; Matt James, ‘A Carnival of Truth? Knowledge, Ignorance and the Canadian Truth and Reconciliation Commission’ (2012) 6(2) *International Journal of Transitional Justice* 182.

there are considerable debates concerning what transitional justice is or should be and its mechanisms – in whole and in part – have been the subject of lively critiques – from the dominance of legalism to the sidelining of the voice and agency of victims in international criminal tribunals and truth commissions alike. The influence of transitional justice ‘entrepreneurs’ who seek to reconstitute post-conflict societies in the image of Western liberal democracies – however socially or culturally ill-suited that may be or those who speak ‘for’ victims – is similarly problematic.¹⁵ The rapid expansion of transitional justice has left others questioning how to sustain its intellectual clarity and practical applicability.¹⁶

A measure of humility regarding the capacity of transitional justice is also required. Leebaw argues that transitional justice projects must render decisive judgments that define a break between past wrongs and present values.¹⁷ In reality, however, transitional justice often resembles a ‘creature of compromise’, ‘the art of imperfect solutions and difficult choices, in the context of competition for finite resources and delicate political dynamics’.¹⁸ Regardless of resources, rhetoric or

¹⁵ See for example, Jelena Subotic, ‘The Transformation of International Transitional Justice Advocacy’ (2012) 6(1) *International Journal of Transitional Justice* 106;

Tshepo Madlingozi, ‘On Transitional Justice Entrepreneurs and the Production of Victims’ (2010) 2(2) *Journal of Human Rights Practice* 208.

¹⁶ See Various Authors, ‘Transitional Justice: Does it have a Future?’ (2015) 9(1) *International Journal of Transitional Justice* (Special Issue) 1.

¹⁷ Bronwyn Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (CUP 2011).

¹⁸ Paul Gready, *The Era of Transitional Justice. The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (Routledge 2011) 1, 6–7.

expertise, transitional justice mechanisms will not be acceptable to all and cannot offer the magic silver bullet of political harmony, full truth, complete physical and psychological healing or socio-economic rejuvenation. A commitment to not over-sell its spoils and a continued effort on the part of activists and scholars to critique, analyse and refine the field is essential to the future study and practice of transitional justice.

That said, it is not our intention in this introduction to offer a detailed or lengthy exposition of the field of transitional justice. Rather, the relevant debates and more are taken up with considerable skill in the following 25 chapters of this book. The collection is set out in four parts: concepts; actors; mechanisms; and practices of transitional justice. This delineation was designed to capture the theoretical and practical development of transitional justice; the complexity and diversity of the transitional justice ‘tool-kit’; the different contexts in which mechanisms of transitional justice have been employed; and in a cross-cutting fashion, to draw greater critical attention to the intellectual maturing of transitional justice and the high points and low points of the evolution of the field.

The first part of the collection addresses the theoretical development and challenges of transitional justice. Quinn’s opening chapter explores the development of the field, tracing the life of the four most common transitional justice instruments – criminal prosecutions, reparations, amnesties and truth-telling. Quinn also considers the ‘growing pains’ of the flourishing scholarship and practice of transitional justice and its parameters and challenges. Hansen explores the temporal and spatial dynamics of transitional justice. He argues that transitional justice is increasingly being dragged away from its mainstay of post-conflict societies transitioning to democracy, to being used in settled democracies and at levels beyond the state. Turner builds on the

critiques of transitional justice by mapping out the critical perspective and its important contribution to developing the field. Examining the internal and external critiques of the field, she finds that narratives of transition are not fixed in time or temporally progressive, but may be non-linear and dynamic. McAuliffe's chapter examines claims concerning the contribution of transitional justice to the rule of law. He argues that transitional justice does not necessarily allow the restoration of the rule of law, and at most may be symbolic. Instead and in the interests of clarity and success, he suggests that efforts to strengthen the rule of law should be disaggregated from justice processes designed to deal with the past.

Continuing the conceptual development of transitional justice, Mégret and Vagliano explore the intersection between transitional justice and human rights. They argue that while human rights have served as a catalyst for transitional justice processes, at the same time, they have acted as a constraint on measures available to post-transition governments. O'Rourke's chapter traces the gender themes in transitional justice. She identifies the continuing challenges in operationalising gender mainstreaming in practice in transitional societies and the wider gender-related structural inequalities in scholarship and policy development. Sharp's chapter explores the nature of 'local' justice in transitional justice. While transitional justice has been critiqued as Western and top-down, Sharp evaluates development of local or traditional approaches to transitional justice that often come into conflict with human rights standards or are inappropriate when expanded to contexts of mass atrocity. In the conclusion, he cautions that the future of transitional justice as a global project requires reaching a more inclusive understanding of global and local approaches. The final chapter in this first part of the collection is by Dixon and discusses the growing interrelation between transitional justice and development. He outlines parallel

structures and debates in the two fields, but the use of radically different concepts and language. Dixon argues that the under-examination of economic violence in transitional justice has prevented a more substantive engagement with development studies and calls for greater critical scrutiny of this area.

The second part of the collection examines key actors in the transitional justice field. Davidian and Kenney open this section with their chapter on the role of the United Nations. While highlighting tensions regarding domestic implementation and state sovereignty, they draw attention to the value of transitional justice and note how diplomatic engagement can provide an important avenue for civil society and victims to advance transitional justice processes. Dezalay's chapter analyses the role of international NGOs in the development of transitional justice, in particular the International Centre for Transitional Justice (ICTJ). Drawing from interviews with ICTJ staff, she identifies a number of factors concerning the success of international NGOs in expanding the field of transitional justice. The broader role of civil society is discussed in Merwe and Schkolne's chapter. They outline the role of civil society in advocating, supporting and monitoring transitional justice processes, as an integral element to ensuring their effectiveness and independence. They also problematise the engagement of civil society in official government processes designed to deal with the past and make a number of recommendations designed to help navigate these tensions and challenges.

Fletcher and Weinstein's chapter critically analyses the acclaimed victim-centred nature of transitional justice. While victims are often invoked in the legitimisation of transitional justice mechanisms, Fletcher and Weinstein highlight the flaws and contradictions in the assumption that transitional justice is truly 'victim-centred'. Breslin's chapter considers the role art can play in complementing formal

transitional justice mechanisms, such as truth-telling and memorialisation. In this chapter, Breslin highlights how art can provide a platform from which to widen social engagement with, and understanding of the past, and provide a space for more marginalised voices. Hodzic and Tolbert examine the relationship between the media and transitional justice. Drawing from their extensive experience with numerous transitional justice contexts and actors, they identify the role of the media in shaping the success or failure of transitional justice efforts and argue that early engagement between the media and the relevant mechanisms of transitional justice is needed to develop their long term of impact.

The third part of the book discusses the challenges of transitional justice mechanisms, their complementary and, at times, contested relationship with each other. Gallen begins this part with his chapter on the International Criminal Court's (ICC) interaction with transitional justice. Although the ICC has the potential to engage more with transitional justice than its predecessors, given its provisions on complementarity, victim participation and reparations, Gallen argues that it cannot be expected to comprehensively deal with transitional justice, but can more modestly contribute to domestic conversations on dealing with the past through a transitional justice lens. Fichtelberg's chapter follows on from Gallen's analysis of the ICC to explore the role of hybrid tribunals in reaching some middle ground between top-down and local transitional justice efforts. He discusses how hybrid tribunals can contribute to the goals of transitional justice while providing an alternative between trials and truth-telling. Lawther continues this discussion through her examination of truth commissions. While truth commissions can enable a society to understand the past and help it to move on, Lawther examines the extent to which such commissions create a fiction in dichotomising the identities of victims and perpetrators. She argues

that greater understanding of the complexity of identities and involvement of different actors in violence is necessary if we are to truly understand the complexity of the past.

Hadden's chapter tackles the controversial role of amnesties in transitional societies. Drawing from the Belfast Guidelines on Amnesties and Accountability, he argues that the increasing normative prohibition on amnesties for international crimes needs to be tempered by political realities. Instead a more flexible approach is required that does not always prioritise the duty to prosecute and punish over obligations to end hostilities, establish truth and prevent recurrence. Moffett's chapter evaluates the role of reparations in transitional justice and their designation as 'victim-centred'. Reparations go to heart of contested narratives about the past – including who was harmed or who is responsible, meaning that they are often called for, but rarely implemented. In this chapter, Moffett argues that political wrangling over reparations in transitional societies is often confronted by human rights claims at regional courts. Next, Harwood discusses the role that the United Nations' International Commissions of Inquiry can play in advancing transitional justice in countries facing mass atrocities. She finds that, while Commissions of Inquiry have been broadened out from their traditional mandate of identifying those responsible for violations and now engage with wider truth, justice and reparations goals, their effectiveness is compromised by challenges over domestic implementation. In the last chapter in this part of the collection, Horne examines the role vetting and lustration can play in advancing the goals of transitional justice.

The final part of the collection discusses the ongoing practice of transitional justice in four sites: Guatemala; Cambodia; Palestine; and Eastern Europe. In her chapter on Guatemala, Roht-Arriaza outlines the numerous transitional justice programmes that have been adopted to tackle conflict and genocide as well as the

continuing challenges for a country that has, in transitional justice terms, ‘done it all’. In contrast, Killean’s chapter on Cambodia discusses the role of the People’s Revolutionary Tribunal and the Extraordinary Chambers in the Courts of Cambodia in dealing with the legacy of the Khmer Rouge. She finds that, while these tribunals have been shaped by their political and social context, they have provided a valuable space for victims to testify about their experiences and have promoted greater understanding of the atrocities committed by the Khmer Rouge.

Browne’s chapter examines the recently internationally recognised country of Palestine and the difficulties of engaging with transitional justice in the face of ongoing conflict and periodic occupation. In particular, he explores the contrast between ‘bottom-up’ memorialisation initiatives and the ‘top-down’ interventions of the ICC. The final chapter by Stan examines transitional justice in Central and Eastern European countries after years of occupation under successive Nazi and Communist regimes. She notes that, while access to files and programmes of lustration have been contested, prosecutions limited and other transitional justice mechanisms flawed, together they have helped to improve understanding of the past and the challenges of democratisation after years of dictatorship.

In all, the breadth of the topics – ranging from the development of transitional justice to transitional justice and the ‘plight’ of victimhood, to the use of amnesties and the lessons for transitional justice stemming from the Guatemalan case – demonstrates not only the reach of transitional justice, but also the rich level of scholarly expertise. Accordingly, we welcome the inclusion of these chapters in this volume and thank the authors for their commitment to the task and their patience with our requests. We hope that on reading this handbook, our readers have the same

engaging experience and pause for critical reflection that we have enjoyed in putting this collection together.