6. The future of transitional justice: Mercy or impunity?

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Introduction

Transitional justice is the range of policies deployed by societies emerging from state repression or civil war to deal with systematic human rights violations. These include prosecutions of individual culprits, amnesty laws, truth commissions mandated to investigate and document human rights abuses, official apologies for past wrongdoing, policies of lustration, reparations to victims, and revision of history textbooks. Although transitional justice is generally state-led, grassroots initiatives led by civil society, victims groups, and non-governmental organisations (NGOs) have recently taken centre stage, thereby expanding transitional justice to new domains.

The key debate/dilemma in transitional justice is the thorny issue of whether to deal with the legacy of the violent past or wipe the slate clean. Which is the most effective policy? All societies emerging from violence have to deal with this question. It is not a new phenomenon: the need to peacefully reintegrate former enemies into the community forced leaders of Ancient Athens to craft one of the first amnesty laws in the aftermath of violence as a means of moving forward (Carawan 2013). Those responsible for the violence were pardoned, and citizens were prohibited from stirring up the divisive past (*μη μνησικακειν*). Amnesty stems from the Greek word *αμνηστία*, which means the official forgetfulness of the past.

In what follows, I explain why, despite this long history, it is only recently that issues of transitional justice, reconciliation, and human rights have come to the centre of international media and academic attention. I touch on the key debates and identify some gaps in the literature, including methodology, the sidelining of victims' mobilisation, the role of timing, and selection bias. I con-

clude by engaging with the future shape of transitional justice, handpicking a few issues likely to attract increasing attention as we move forward.

Evolution of transitional justice

Traditionally, 'Westphalian sovereignty', or the privileging of state sovereignty, set the stage for state leaders/authorities to escape punishment for human rights abuses against their own citizens. This perspective remained dominant until the end of the Second World War, and to that point, most conflicts ended with total impunity or 'victor's justice'.

The first challenge to Westphalian sovereignty came with the Nuremberg and Tokyo trials set up to hold Axis officials accountable for genocide and crimes against humanity. The reality of the Cold War and the privileging of international stability over accountability put such efforts on hold for many years. The second significant wave of interest in international accountability was driven by the democratic transitions in Southern Europe (1970s) and Latin America (1980s). Homegrown policies of accountability followed these transitions, including the prosecutions of the masterminds of the Greek military junta (1975) and the formation of the Argentine truth commission (1983). The 'big bang' of transitional justice happened in the 1990s after the genocide in Rwanda and the crimes against humanity in the Balkans. The creation of the first ad hoc international tribunals, the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia, was the turning point in the peace-building paradigm.

The early peace-building model presumed that the passage of time would be sufficient to enable former enemies to let 'bygones be bygones' ('negative peace'). Yet by the 1990s, the model was insufficient to deal with the novel challenges posed by the changing nature of warfare. More specifically, since the end of the Second World War, there has been a dramatic increase in the number of intra-state (civil) wars, with more civilian deaths away from battlefields. In sharp contrast to previous forms of conventional warfare where casualties were predominantly combatants, making the absence of violence a sufficient condition for the consolidation of peace, the higher number of civilian casualties in contemporary civil wars means that any peaceful transition requires a proactive policy of restoring social relations fractured by violence ('positive peace'). The much celebrated South African 'Truth and Reconciliation Commission' offered an effective solution. It received global attention for its successful introduction of truth recovery and restorative forms

of justice into a fractured society (Hayner 2010) and changed the focus of academic and policy debates to issues of national reconciliation, truth recovery, and transitional justice.

Big debates in the literature

There are two fundamental debates in the literature of transitional justice. The first explores whether post-conflict societies should set up a backwards-looking policy of accountability or pardon the culprits and by so doing draw a line with the divisive past and move forward. This 'peace vs justice' debate dominated the early scholarship in transitional justice in the 1990s and early 2000s and remains salient today.

Advocates of human rights prosecutions maintain that using punitive justice can benefit nascent democracies in a number of ways. Some argue that prosecuting those responsible will have a 'deterrence' effect, whereby other groups will think twice before using violence to resolve conflicts in the future, strengthening stability. Such critics say human rights trials have a positive impact on the quality of an emerging democracy by fostering respect for human rights and diminishing state repression (Kim and Sikkink 2010; Sikkink 2011). Other scholars in this camp argue for the positive impact of international criminal tribunals on guiding domestic judicial reform and legitimising a new democratic regime (Nettlefield 2010; Higonnet 2005). Importantly, by individualising guilt, human rights prosecutions can minimise the risk of collective scapegoating (Huyse 1995). Overall, the logic of the criminal justice system is to establish the guilt of individuals (leaders and warlords) for their crimes, thereby distinguishing individual from collective responsibility. This can greatly benefit societies emerging from ethnic conflicts based on collective identities (Huyse 1995).

In contrast, realist scholars maintain that 'justice does not lead; it follows' (Snyder and Vinjamuri 2003). Creating the conditions for peace, stability, security, and justice, they say, may necessitate offering incentives, such as amnesty, to violent groups who could derail the peace process. In effect, amnesty laws act as a 'midwife' for peace (Snyder and Vinjamuri 2003). Despite the increasing calls for international accountability and the development of new legal provisions to facilitate human rights prosecutions, amnesties remain the most frequently used mechanism of transitional justice (see Lessa and Payne 2012; Boesenecker and Vinjamuri 2011; Mallinder 2012) and are often seen as a 'necessary evil' in post-conflict settings. Proponents argue that

successful peace processes require the inclusion of former enemies, making amnesties an efficient tool (Cobban 2007). For example, the amnesty provision in the Good Friday Agreement that ended three decades of violence ('The Troubles') in Northern Ireland definitely benefited the peace process (McEvoy and Mallinder 2013). Amnesty laws can also provide flexibility to political elites in times of transition; they can be applied selectively, offering immunity to rank and file soldiers, while, at the same time, pursuing a policy of retributive justice for the 'big fish', or those responsible for the most serious human rights violations. Finally, amnesties can be used as a carrot to incentivise perpetrators to reveal the truth about heinous crimes. The families of the missing in Cyprus have benefitted from a similar provision; trusting in amnesty for their previous actions, perpetrators/eyewitnesses point to gravesides, enabling families to identify the remains of their loved ones, bury them according to their rituals, and reach some closure (Kovras 2012).

The second central dilemma, also known as the 'retributive vs. restorative' justice debate, asks if punitive measures are the most effective way to foster reconciliation. Can other mechanisms restore relations of trust between victims and perpetrators? In spite of the manifold positive effects of trials on democratisation, scholars have criticised the focus of retributive approaches on perpetrators, noting the sidelining of victims and their needs (Braithwaite 1999, 2002). Restorative approaches prioritise transitional justice mechanisms with the potential to restore social relations in countries emerging from trauma; these include official apologies, truth commissions, or even rewriting history textbooks to create more inclusive narratives about the past.

Truth commissions are particularly important, serving as a venue for perpetrators and victims to share their traumatic experiences. Truth recovery processes can have a cathartic effect on both individuals and the larger society; as the maxim goes, 'revealing is healing'. According to Rotberg (2000), truth commissions can address some of the victims' most pressing questions (Who gave the orders? What happened to the missing?). Without concrete answers, it may be impossible to move on and begin the healing. Similarly, truth commissions have the potential to 'reduce the number of permissible lies' circulated in public debates (Ignatieff 1996). Conspiracy theories and denials of past crimes thrive in post-conflict societies; if they go unchallenged, they can set the stage for another cycle of violence. As truth commissions offer an authoritative version of the truth, based on documenting past crimes, they can curtail this possibility. Truth commissions can also serve as a learning device: once they document the crimes, they can make recommendations for institutional reform to prevent the repetition of violence (der Merwe 2001). The final reports often make recommendations geared towards addressing

victims' needs, such as reparations (Graybil 2002). The South African Truth and Reconciliation Commission is probably the best known example of this mechanism (Gibson 2004).

Admittedly, truth commissions have shortcomings. Some scholars argue that truth recovery can destabilise extremely fragile peace processes.[1] In addition, most truth commissions have a restricted timeframe. Is it plausible to thoroughly investigate years or even decades of systematic human rights abuses in a few months? Finally, the mandate of truth commissions is usually to examine the most pressing and obvious crimes, excluding less visible ones. The mandate usually reflects political priorities and/or compromises, and this inevitably colours the final report. In short, instead of revealing the full 'Truth', they usually document a version of truth (Chapman and Ball 2001).

Research controversies and the future of transitional justice

Methodological pluralism

Although transitional justice has been around in one form or another since Ancient Athens, it is a relatively new academic discipline marked by methodological polyphony and little (multi-method) synthesis (Backer 2009; Bell 2008; Thoms et al. 2010; Wiebelhaus-Brahm 2010). The early literature is dominated by normative and prescriptive accounts geared towards identifying the strengths (or limitations) of specific policies of transitional justice. These are typically single (or a small-n) qualitative studies of the operationalisation of a specific transitional justice mechanism (Chapman and Ball 2001; Thoms et al. 2010), often immediately after a transition.

More recently, a second wave of scholarship has emerged. Its objective is to measure the impact of different transitional justice mechanisms. Spearheaded by political scientists, the new trend is to use global databases of various transitional justice tools, including trials (Kim and Sikkink 2010), truth commissions (Wiebelhaus-Brahm 2010), amnesties (Mallinder 2008), or a combination of these (Dancy et al. 2014; Olsen et al. 2010). Most such analyses develop models to establish relations of statistical significance among different variables and draw causal inferences based on large-n studies. Yet these databases often stretch concepts in an effort to make them measurable and comparable across different regions of the world (Mallinder and O'Rourke 2016; Clark and Sikkink 2013; Landman and Carvalho 2009). Despite establishing the overall

impact of transitional justice mechanisms, this research and its concomitant abstractions can sideline complex and significant political/historical processes, such as the role of victims' groups in shaping or changing political agendas. In turn, the absence of in-depth understanding of complex causal processes has stalled the development of theoretical frameworks with broader explanatory power.

Both strands of the literature have something valuable to offer, yet their inability to communicate inhibits the creation of new knowledge. Although databases can become an area of methodological synthesis generating new knowledge in transitional justice (Mallinder and O'Rourke 2016), the growing influence of quantitative-oriented databases in the discipline has created misconceptions about the use of the databases in transitional justice and has discouraged scholars who prefer qualitative tools from drawing on these useful instruments. This is unfortunate, as 'qualitative historically oriented' databases could drive the quest for new theoretical knowledge (Lieberman 2005).

In my recent book, *Grassroots activism and the evolution of transitional justice: The families of the disappeared*, I introduced a database of countries with disappearances and missing persons as a result of political violence since 1975. I showed that qualitative-driven databases can serve four important functions: mapping geographic trends in the development of a phenomenon; testing theories; refining theories by developing new hypotheses which can then be tested in small-n comparative analyses; and guiding case selection by minimising selection bias (Kovras 2017). To sum up, global databases can be used to test and refine theory, especially when coupled with in-depth small-n analysis.

Is there a future for transitional justice?

The emergence of transitional justice in the 1990s – both as a field of practice and an area of scholarship – overlapped with an intense focus on international liberal order. The latter concept gained global currency largely as a result of the willingness of international organisations and powerful states to invest resources in costly enterprises, including criminal tribunals, fact-finding missions, and pro-accountability NGOs. The 2008 Great Recession changed things. Will these organisations and states be willing to continue to sponsor such enterprises, especially with the rise of nativist demagogues who sideline issues related to international accountability? Will citizens disenchanted by austerity and populist politicians be willing to put pressure on domestic political leaders to support transitional justice processes in distant places? If the answer to both questions is 'no', the future seems untenable for transitional justice. International developments and shifting priorities may put further

developments on hold. Just as the Cold War realities curbed the initial enthusiasm for international accountability by prioritising security and stability, so too we may be heading for another 'freeze' after a 'justice cascade'.

Yet this is only part of the story. Transitional justice is not necessarily tied to international influences. Historically, it has been domestic grassroots groups affected by violence, predominantly victims' groups, who launch some of the most successful pro-accountability campaigns (see Brysk 1993). Victims have limited access to political power. They are not professional lobbyists or campaigners, yet they have been remarkably successful in setting up truth commissions or building criminal cases against perpetrators (Kovras 2017). The mobilisation of the Mothers of the May in Argentina and the Chilean families of the detained-disappeared immediately come to mind. True, the international context was supportive, and transnational actors like Amnesty International were instrumental in the 1980s and the 1990s. But these were opportunities; the drive for transitional justice was domestic.

Nor do I think the new economic realities will stop international organisations and states from playing a key role in transitional justice. First, by participating in peace-building missions across the globe, they have set a moral precedent, making it almost impossible to disengage now. Doing so may discredit their legitimacy. A more likely scenario is a future with fewer direct interventions and fewer resources invested in transitional justice activities, but accountability will remain on the agenda. Second, and more cynically, reactive policies are less costly than proactive ones. Setting up a transitional justice mechanism in the aftermath of conflict is less expensive (electorally and financially) than military intervention. Finally, and most importantly, new technologies make it more feasible to implement some of the policies of transitional justice. Amassing incriminatory evidence has never been easier. Forensic groups collect evidence from graves to use in a court of law; satellite images, drones, and smartphone apps offer ever new ways to collect evidence, and the technology is getting better and cheaper.

Impact of technology on transitional justice

Conspicuously absent in the literature are discussions of the way forensic technologies have benefitted the quest for accountability after conflict. This is surprising, as the use of new technologies has been instrumental in the efforts of societies to reconstruct their violent past, with the epistemic community of forensic experts profoundly influencing the course of contemporary transitional justice (Rosenblatt 2015; Kovras 2017). It is impossible to explain the evolution of transitional justice without taking into account how forensic tools

have revolutionised the quest of post-conflict societies to come to terms with their past.

For one thing, exhumations are able to address the pressing humanitarian need for closure among the victims of clandestine crimes; by identifying their missing loved ones and burying them according to religious and cultural rituals, thousands of families are able to start the healing process (Mikellide 2017; Kovras 2013; Congram and Sterenberg 2009). But exhumations have never been considered a distinct policy of transitional justice. More typically, the scholarship has emphasised the influence of lawyers, therapists, and religious leaders as professionals who influence transitional justice discourses and practices. This underrates the astonishing impact of forensic sciences, now used in more than 35 post-conflict countries.

Furthermore, forensic technologies have been instrumental in the global diffusion of other transitional justice policies. A number of restorative or retributive practices would not have been possible without forensic tools. For the first time in human history, science offers a way to use undeniable incriminatory evidence from graves to secure the conviction of those responsible for heinous human rights violations in a court of law. This is pivotal in explaining not only the outcome (a growing number of culprits end up in jail), but also the original decision to set up trials. In the past, in the absence of these technologies, it was extremely difficult for political leaders to initiate criminal proceedings, as without concrete evidence, they ran the risk of destabilising transitional processes. Their availability makes the deployment of human rights prosecutions a more appealing tool.

For all these reasons, coupled with the de facto diffusion of forensic missions around the globe, we need more detailed accounts of the impact of technology on accountability and reconciliation.

Expanding the boundaries of transitional justice

As a research discipline, transitional justice is continually expanding into new areas. The early 'transitology' literature in the 1970s focused on whether prosecutions could harm the prospect of democratisation, but today, the literature is interdisciplinary and has expanded exponentially, with two specialist journals and several book series (McEvoy 2018). It has also entered into some new and fascinating areas of research. For example, recent studies have discussed 'post-transitional justice', policies of dealing with the past several years or even decades after the original crimes were committed, looking at countries like Spain, Chile, or Cyprus (Collins 2011; Aguilar 2008; Kovras 2013). At the

same time, researchers are probing the role of new actors in transitional justice processes, including the support of multinational corporations for corrupt regimes responsible for human rights violations (Michalowski 2014).

The future could include further expansions. As I see it, the analytical framework of transitional justice could have much broader relevance. It could be used to explain how countries deal with issues of accountability in the aftermath of all major crises, including economic ones. As we know from the 2008 Great Recession, the adverse consequences of economic crises leave no one unaffected. Not surprisingly, people mobilise around the quest for accountability, at times expressing their discontent in violent street protests (Andronikidou and Kovras 2012; Trimikliniotis 2018). I have already done some work in this area. As my collaborators (Kieran McEvoy and Neophytos Loizides) and I show in a project funded by the Economic and Social Research,[2] the framework of transitional justice could be useful in the examination of economic crises for four reasons.

First, in the aftermath of the recent Great Recession, a number of European countries affected by the crisis developed policies closely related to transitional justice, including (1) 'truth commissions' tasked to document the causes of the financial meltdown, (2) official apologies offered by politicians and bankers acknowledging past wrongdoing in the lead-up to the crisis, and, obviously, (3) prosecutions of those responsible (Kovras et al. 2018). Iceland is a representative example of post-crisis transitional justice. Only a few days after the Crash that wiped out approximately 97 per cent of the banking sector, political authorities set up a 'Special Investigation Commission' mandated to identify the causes and those responsible and to make recommendations to protect institutions from a future crisis. This is essentially a truth commission. They also created a new prosecutorial authority (Office of the Special Prosecutor) tasked to investigate and prosecute bankers for criminal activities (market manipulation and fraud) leading to the collapse of the economy. The Office of the Special Prosecutor has been remarkably successful, prosecuting more than 40 bank executives (Kovras and Pagliari 2018). Of course, human rights violations and white-collar crimes are apples and oranges – they are totally different types of crime. Still, both feature grassroots demands to punish those responsible for a crisis that affects everybody in society.

Second, a crisis of the magnitude of the 2008 Crash can weaken state institutions and fracture state–society relations. There will be societal pressure on political elites to explain why trusted institutions failed to prevent disaster. Providing an authoritative account is critical to regain trust and, in the case of an economic crisis, to convince people to participate in painful adjustment

programmes with strict austerity policies. In societies where the economic burden of a bailout is perceived to be unjustly distributed among social partners, the readiness to support reforms is minimal, curtailing quick recovery. As economic crises challenge entrenched moral frameworks of justice and affect everyone, people will take to the streets if truth and accountability are not forthcoming.

Third, truth commissions and other truth recovery initiatives are mandated to uncover and publicly acknowledge something 'hidden', whether disappearances in Latin America or economic failure in Europe. Contemporary financial crises are complex and technical, often occurring in distant or virtual locations, so only a few experts will understand their root causes (see Helleiner and Pagliari, 2011). Economic truth commissions, like their sister commissions in Latin America, have the capacity to uncover complicated processes unseen by most citizens but affecting their daily lives. Truth commissions can establish simplified, yet authoritative, narratives of the causes of crisis that can be easily understood by the general public. These backward-looking mechanisms document patterns of political, economic, or institutional failure; their mandate is restricted temporally, and they are assigned investigative powers.

Fourth, transitional justice is conceptually based on the assumption that transitions are 'critical junctures', and decisions made at this time have the long-term potential to determine the quality of the emerging democracy (Olsen et al., 2010; Sikkink, 2011). Thus, it implicitly considers learning from the past to be an instrument of political and institutional reform. The intuitive question in most transitions is whether societies who do not deal with past policy failures or look for the causes of a crisis are condemned to repeat their mistakes, including in the economic sphere. To give a comparative example, despite dealing proactively with the human rights abuses of the 'dirty war' (1976–83; Sikkink 2011), Argentina does not seem to have learned from its experience and has not addressed the causes of its economic collapse in the early 2000s. In a successful example of learning, after the Great Depression of the 1930s, the United States Senate mandated the Pecora Commission to identify the causes of the 1929 Wall Street Crash. In addition to analysing the preconditions, Pecora suggested innovative institutional reforms, resulting in the Glass-Steagall Act; this led to the separation of commercial from investment banking, protecting protected markets from another financial crisis for several decades.

As the preceding argumentation makes clear, political leaders face similar dilemmas during democratic transitions and economic hard times. In transitional settings, political leaders are usually asked to maintain a delicate balance

between two conflicting priorities, the 'logic of appropriateness' and the 'logic of consequences'. On the one hand, they have to accommodate growing popular calls for truth and accountability, so society can move forward and not repeat its mistakes. On the other hand, any meaningful transition necessitates stability and the inclusion of constituents who may have skeletons in their closets and resist attempts to account for the past; therefore, any effort to hold perpetrators to account has the potential to derail a peace process. This debate is equally central when the crisis is economic in nature. Leaders are torn between accommodating popular calls for accountability and the need for stability and cooperation with highly resistant coalition partners. The balance between the logic of appropriateness and the logic of consequences permeates all considerations. Ralf Dahrendorf refers to such crises as a 'valley of tears': societies have to enter this valley and address the problems of the past if they are to achieve a better future.

Notes

1. Mendeloff offers a comprehensive critique of the utility of truth commissions (2004).
2. For more information about the project, see www.accountabilityaftereconomiccrisis.com/.

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