Southern voices in transitional justice:
a critical reflection on human rights and transition

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William Twining famously reminded us that ‘[t]he dominant Western scholarly and activist discourses about human rights have developed largely without reference to other standpoints and traditions.’ He cautioned that claims to the universality of human rights should pay heed to other traditions, listening closely to the local and the specific, and seek out the voices of those who could meaningfully interpret and create distinct ‘Southern’ perspectives. His clarion call seems fortuitously placed as contemporary emphasis on transitional justice and rule of law discourses have taken on much of the same kind of presumed universality, and are produced at a substantial distance from those places and people that are most likely to be the subjects of transition and role of law proselytizing. In parallel, as Mark Fathi Massoud has noted, just as ‘human rights law [seems] to be promoted as a kind of carpet under which the dust and trauma of the war would be swept and left behind’, so too has transitional justice become the fixer for war and authoritarian ills in the post-Cold War era.

This essay sets out to explore the ways in which Southern voices, central to William Twining’s vision of an integrated cosmopolitan legal order, are heard (or not) in the cacophony of sound that comprises transitional justice theory and practice. In one sense, what follows is a study of marginality and exclusion, and carries some sense of déjà vu as transitional justice repeats old and known patterns of legal hegemony in new, generally Southern, places and spaces. These places and spaces include sites emerging from violent conflict, fragile states, and states in the tenuous process of building new legal and political

* This essay pays homage to the collection of papers edited by William Twining to which my home institution, the Transitional Justice Institute (TJI), Belfast contributed in some small part. Professor Twining was Leverhulme Emeritus Professor at TJI for one year (2007–8) and during that time we had the pleasure to host him as part of our intellectual community and to bring Yash Ghai, Upendra Baxi, Abdullahi An-Na’im and Francis Deng to Belfast for an intensive multi-day seminar. Professor Twining was also a great supporter of the Institute from its inception and gave advice consistently and thoughtfully through the early years of establishment and consolidation.

orders following the adoption of comprehensive peace agreements.\(^3\) Just as international law has been described as favouring ‘a falsely rigid, ahistorical, selectively chosen set of self-justificatory texts and practices whose patent partiality raises the question of exactly whose interests are being served and who come out on top’,\(^4\) critical approaches to transitional justice emphasize its elite grounding, its fundamental consistency in supporting status quo rules of international law, and the centrality of the public/private divide to addressing systemic human rights violations. Drawing on Massoud’s theory that legal systems in their intact liberal conception do not exist in failed states but rather that law plays a multiplicity of roles in maintaining and legitimizing repressive regimes,\(^5\) I assess the ways in which transitional justice may both combine a new cosmopolitanism in times of the transition yet repeat old habits, albeit in highly revised garb. In this context, I probe the extent to which repressive and old conflict regimes move strategically to manipulate law and legal resources to maintain elite interests, even in the face of what appear to be substantive reviews of and revisions to the legal order in transitional settings. They are often aided and abetted by institutions and states from the global North, whose multiplicity of interests in these sites span the economic, the strategic, the political and the symbolic. In this telling, transitional justice theory and practice is an integral part of the legitimization that accompanies change, and its limited dialogue with local legal orders reflects Upendra Baxi’s long-standing critique of human rights discourses as being commodified, professionalized by humanitarian technocrats, and – most worryingly – hijacked by powerful groups and states.\(^6\)

1. A short transitional justice history

Transitional Justice is a field that has rapidly expanded, and that has both the fortune and disadvantage of being termed a contemporary ‘industry’.\(^7\) ‘Transition’ (‘going across’) implies a journey with beginning and end points. In early conceptualization, the journey of transitional justice was from authoritarianism to democracy,\(^8\) with ‘justice’ challenges focused on authoritarianism’s legacy of human rights abuses. This produced scholarly and policy

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concentration on such questions as amnesty, criminal accountability, truth processes and lustration, the analytical leitmotif being ‘how to promote accountability and truth without destabilizing transition.’ It was implicitly assumed that such transitions were endogenous – driven principally by forces within the state and internal to it. In the post-Cold War period, the discourse of transition was applied to movement from conflict to peace (and typically in parallel to more liberal forms of governance). With this came a focus on post-conflict reconstruction, ‘demilitarization, demobilization and reintegration’ (DDR), reparations, and accountability for conflict-related crime. Overlapping, and in parallel, came a developing focus on rule of law reform, and on the construction of memory in highly conflicted societies. From these various streams a rich literature emerged, incorporating both in-depth explorations of these areas outlined above and a sustained focus on the field’s theoretical underpinnings. At its core lay a concept that could be termed ‘paradigmatic transition’: a shift from an authoritarian state structure (whether conflicted or not) to peaceful democracy.

Despite this initially quite narrow focal point for transitional justice politics and practice, the expanding universe of transitional justice is now understood as relevant to a variety of sites. In post-Cold War settings, it is now associated with the move away from armed conflict to co-existence, even where the thresholds of violence do not meet the stringent criteria of the law of armed conflict. There is also evidence of its extension into democratic settings, or at least the use of transitional justice mechanisms to address sustained human rights abuses within democratic polities, though, as I explore below, this may often be to circumvent stringent accountability rather than to advance it. Its relevance now seems particularly acute in settings where violence or repression occurs within tightly bounded communities, when harms are not only perpetrated by strangers or those who are external to a community, but also when the most destruction is perpetrated by relatives, neighbours and those in the extended ‘known’ community.


9 Lustration is one of a number of terms (such as ‘vetting’, ‘screening’ and ‘administrative justice’) used to describe processes that exclude or purge certain officials of prior regimes and other human rights violators from public office. See generally Alexander Mayer-Rieckh and Pablo de Greiff (eds), Justice as Prevention: Vetting Public Employee in Transitional Societies (Social Science Research Council, 2007).


Transitional justice is also emerging as a repeat player in a number of sites, as the notion of post-Transitional Justice (also termed ‘late Transitional Justice’) has assumed greater potency in consolidated Latin American democracies.\textsuperscript{14} In this telling, there is accountability engagement beyond the transitional justice models of the 1980s and a reopening of what were generally understood as ‘closed deals’ on amnesty, impunity and accountability. As a result, an emboldened range of actors, strategies and institutions have led calls for revisiting transitional accountability, creating new trajectories and timelines on the transitional clock.

Despite these expansions of the field, some scholars and practitioners have argued for much less ambitious goals for and understandings of Transitional Justice. Adrian Vermeule claims that Transitional Justice at very best can only operate as ‘rough justice’. Vermeule’s instincts are readily identifiable to those operating at the coal face of transition – namely that the perfect transition is rarely available and that ‘preference satisfaction is not the yardstick by which ordinary people judge.\textsuperscript{15} More broadly, with Eric Posner he has distinctly challenged the notion of any exceptionality inherent in transitional justice as doing justice differently.\textsuperscript{16} Despite this claim that transitional justice is merely a species of ordinary law, the argument to conventionality is tenuous, and the exceptional in transitional justice seems exceptionally hard to ignore.\textsuperscript{17} Even the less ambitious versions of transition share multiple common traits with their more ambitious scholarly fellow travellers. In parallel, the pared-down vision remains substantially disconnected from the situated contexts of transitions and the local communities that have experienced direct harms. A narrowed vision still mandates a set of priorities and values for the field, and sets a clear hierarchy on what can be achieved, primarily by legal means, via transitional justice mechanisms.

One response to the elite-driven nature of the academic and policy analysis of the field has been the ‘transitional justice from below’ motif, which has addressed the important role of grassroots organizing and mobilization in the successes (and failures) of transitional justice claims.\textsuperscript{18} On preliminary inspection, transitional justice from below might seem ‘to take a modest first step towards de-parochializing . . . [the] juristic cannon’ of transition justice.\textsuperscript{19} For

\textsuperscript{14} Cath Collins, Post-Transitional Justice: Human Rights Trials in Chile and El Salvador (Penn State University Press, 2010).
\textsuperscript{15} Id. at 154.
\textsuperscript{16} See also Eric Posner and Adrian Vermeule, ‘Transitional Justice as Ordinary Justice’ [2004], 117 HLR 761.
\textsuperscript{17} Ruti Teitel, Transitional Justice (Oxford, 2000).
\textsuperscript{18} Kieran McEvoy and Lorna McGregor (eds), Transitional Justice from Below: Grassroots Activism and the Struggle for Change (Hart Publishing, 2008). While the book provides an important critical analysis of standard scholarly transitional justice work, it is notable that the majority of the scholars represented in this collection come from North American or European universities, with a couple of notable exceptions, e.g. Catalina Diaz, ‘Challenging Impunity from Below: The Contested Ownership of Transitional Justice in Colombia’ at 189.
\textsuperscript{19} Southern Voices, supra note 1 at 1.
example, a scholarly focus on community-led initiatives is an important one, and undercuts some of the elite actor concentration that has dominated transitional justice discourses in such key areas as peace agreements, DDR and Amnesty negotiations. But, regrettably, transitional justice from below still has much work to do if it is to fully address the embedded ethnocentric tendencies of the canon as it has emerged.

Elite focus remains a problematic aspect of both mainstream and ‘from below’ perspectives. As Kris Brown and I have argued elsewhere, transitional agreements – primarily though not exclusively peace agreements – increasingly function as necessary scaffolding and limiting straitjacket in one handy package, preventing disintegration in highly fractured societies but also stunting growth.  

The pragmatism of certain forms of elite and non-state actor power-sharing has, we argue, had a singular effect on deepening nationalist identity and rewarding its expression through political power that enables clientalism, resilience and the intensification of traditional identities and militant expressionism. The structured reproduction of ethnonational identities may be harmless in itself, but it may be accompanied by tight boundary-making and the fostering of politically-charged narratives of threat and historical hostility. Thus, we argue that the elite accommodation of power-sharing, and especially consociationalism, has a much shallower reach into transitional settings than the spectacle of former combatants uniting in government suggests. In this context, it remains prescient to pay attention to the work being done at the micro civic and social level in transitional societies as a counterbalance to the concentrations of elite dominance, and broader effects that follow on the quality and experience of transition.

In the context of the work on ‘transitional justice from below’ it is worth noting that much of the scholarly work represented in this vein comes from the post-conflict/transitional setting of Northern Ireland. The production of knowledge here is, I suggest, cast slightly differently and in ways that cut across a neat North/South divide. As a protracted internal armed conflict (where the threshold of conflict as a matter of humanitarian law was disputed) taking place within an established Western democracy (the United Kingdom), whose history involves legacies of entrenched social and economic discrimination, disenfranchisement and a post-colonial legacy, as well as fractious cultural and religious divides, this site is atypical. It does not fit into neat binaries and the subjects of transition are not distanced from the scholarly and policy producers

20 Kris Brown and Fionnuala Ni Aoláin, ‘Through the Looking Glass: Transitional Justice Futures through the Lens of Nationalism, Feminism and Transformative Change’ [2015], 1 IJTJ 127.
21 One counterexample is the Colombian litigation by an assorted group of nongovernmental organizations and right-wing political actors that sought to prevent the governance reward for a non-state militant group. ‘Colombia Court Bars Rebels Guilty of Atrocities from Public Office’ Reuters (Bogotá, 6 August 2014) www.reuters.com/article/2014/08/07/us-colombia-farc-court-idUSKBN0G703Q20140807 accessed 11 January 2015.
of knowledge. The narrow gap between the producers of transitional discourses and the subjects of transition in Northern Ireland is unusual. This stellar scholarly engagement, a form of presence strongly consistently modelled by William Twining,\(^{23}\) tells us much about the importance of grassroots engagement, presence and validation as a means to bridge the gap in knowledge production and experienced realities of harm in societies where systematic atrocity crime is a lived reality. It also brings attention to the salient fact that the means to produce knowledge in many transitional societies are limited and the gap in empowered engagement is immeasurably wider in some transitional sites compared with others. Perhaps what the close connections between the producers of knowledge about transition, civil society and the experience of the conflict itself in Northern Ireland teaches us is the importance of those connections, and the value of intimacy between producers of ’knowledge’ and the subjects of harm. This kind of ‘active research’ model, one that commits to knowledge building in partnership with the communities and individuals who experience harm, affirms the broader need for an ethics of research in divided, transitional and conflicted societies.\(^{24}\) This implicit ethic of knowledge production, always a hallmark of William Twining’s work, is one that can and should make a lasting imprint across legal fields, including transitional justice.

2. Missing in action

As we think about the ‘missing pieces’ of Transitional Justice, there is an evident under-conceptualized state of the field with respect to particular place and spaces. A number of general observations can be made on what has been lost, ignored or under-appreciated in defining the contours of transitional justice theory and practice. These disregarded elements have a particular salience for the roll-out of transitional justice in Southern settings.\(^{25}\) The dearth of attention to these dimensions of transitional processes functions to obscure Southern voices in transitional justice theorizing, thereby rendering a partial and selected visibility to the vast number of geographical locales in which transitional justice processes are applied. I canvass these general

\(^{23}\) It is worth noting that William Twining encouraged this type of engagement and it was reflected in his own life’s work; e.g. William Twining, et al., *Emergency Powers: a Fresh Start Fabian Tract* (London: Fabian Society, 1972).

\(^{24}\) This requires, I suggest, going beyond existing theoretical understanding of grounded research practice; see e.g. Barney G. Glaser and Anselm L. Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine, 1967).

\(^{25}\) A good cross-section of transitional justice work sites is found in the work of the New York-based International Center for Transitional Justice (ICTJ) www.ictj.org/our-work. Listed countries include Burundi, Cote d’Ivoire, The Democratic Republic of Congo, Kenya, Liberia, South Africa, Sudan and Uganda. In Latin America, countries include Argentina, Brazil, Colombia, Guatemala and Peru. In Asia, work is pursued in Afghanistan, Myanmar, Cambodia, Indonesia, Nepal and Timor-Leste. In the Middle East and North Africa, work sites include Algeria, Egypt, Iraq, Israel and the Occupied Palestinian Territory, Lebanon, Morocco and Tunisia.
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limitations and then address the implications of such gaps for the visibility and influence of ‘Southern voices’ in transitional justice.

In her study of transitional justice interventions, Rosaline Shaw has observed that much of the applicable academic work is characterized by a ‘high altitude’ approach.\textsuperscript{26} From this observation, I take it that much less attention has been paid to the routine ways of \textit{doing} transitional justice in transitional societies than to the abstract study of broadly demarcated transitional justice (TJ) mechanisms. Attention to routine practices and the domestication of TJ has been sidestepped by the foregrounding of the ‘input’ and ‘output’ of international institutions.\textsuperscript{27} This approach, combined with a lack of sustained attention to the specific cultural contexts absorbing TJ (including the institutional cultures doing the transposition of transitional justice theory to practice), means that there is sparse understanding of how local settings realize, adapt and reframe the concepts and practices of the field. The distance from local, ordinary and everyday instances demonstrate how the input of international institutions remains ‘aloof and apart from the social and political relations in which they are immersed and embedded’.\textsuperscript{28} As Tobias Kelly and Marie Dembour have succinctly articulated, international justice never exists ‘above and beyond the local’ and it is ‘inherently given shape and meaning in specific local contexts’.\textsuperscript{29} I acknowledge that the ‘local’ remains an important mantra in some transitional justice work, and case studies of various transitions and mechanism in particular country settings abound,\textsuperscript{30} but this is not quite the same thing as fundamentally addressing the theoretical implications of local specificity in transitional justice theory and practice.

A defined feature of transitional justice theory and practice has been a persistent emphasis on naming, acknowledging and accounting for certain kinds of human rights violations over others. However, the encapsulation of human rights violations in repressive or conflicted states has generally mapped onto the civil and political rights that have been prioritized by the preponderance of states as having agreed enforcement traction in international law. This process typically marginalizes accounting for numerous other harms and


\textsuperscript{27} This is a particularly salient observation with respect to international criminal law. There are notable exceptions. See e.g. Louise Chappell, ‘Nested Newness and Institutional Innovation: Expanding Gender Justice in the International Criminal Court’ in M. Krook and F. Machay (eds), \textit{Gender, Politics and Institutions: Towards a Feminist Institutionalism} (Palgrave, 2011) 163–180.


\textsuperscript{30} Erin Baines, ‘The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda’ [2007], 1 \textit{IJTJ} 91.
generally leaves social, economic and cultural rights violations at the margins of transitional justice accounting.\textsuperscript{31} I have argued elsewhere, in the context of addressing the harms experienced by women in repressive and transitional settings, that there is a pressing need to articulate both a cogent theory of harm that is sufficient to address the depths of gendered harms, and to make such a theory generalizable to the myriad of conflict and repressive contexts in which harms are encountered.\textsuperscript{32} More broadly, in the context of Southern transitions, it seems particularly apt to draw attention to the centrality of material inequality and the lack of redistribution in post-colonial contexts where abject poverty, sustained economic disenfranchisement and lack of access to social and political capital are enduring legacies. There is an obvious point relevant to post-colonial settings, foregrounded by victims’ groups in a number of African transitional settings, which articulates the view that transitional justice programmes ‘ought to deal with injustices that originated as far back as the colonial and precolonial encounters’.\textsuperscript{33} This challenge, central to the resolution of long-standing social and economic injustices, begs the broader question of what the chosen starting point for harms will be for the purposes of transition, and who benefits and who loses on the line-drawing.

Another appreciably overlooked dimension of the transitional justice oeuvre has been attention to non-state actors in framing the terms, experience and success of transition in multiple settings. Theoretical and policy explorations from Ruti Teitel’s foundational work onwards assume the centrality of the state to the framing of transitional justice discourse.\textsuperscript{34} In this telling, one needs to reform and remake the state (and law), and in this transition/transformation one gets (potentially) the remaking of law and legal institutions. The state, in the classic discourse that emerged around the failings of the authoritarian states in Latin America in the 1970s, is in need of rescue.\textsuperscript{35} In the examples that both fed and spawned the discourse of state rescue through transition, the classic sites of transitional justice transformation – namely amnesty, truth commissions and reconciliation – were the means to restore the state and the normality of the


\textsuperscript{32} Fionnuala Ní Aoláin, ‘Advancing Feminist Positioning in the Field of Transitional Justice’ (2012), 6 IJTJ 205.

\textsuperscript{33} Khanyasela Moyo, ‘Mimicry, Transitional Justice and the Land Question in Racially Divided Former Settler Colonies’ [2014], IJTJ 1, 7.

\textsuperscript{34} Ruti Teitel, Transitional Justice (Oxford University Press, 2000).

liberal legal and political order. Part of what facilitated the discourse of transition was also the idealized ‘clean break’ phenomenon, whereby the transition was the break and the site of change ultimately bringing the state back to order and stability. Despite the centrality of the state to the development and maturing of transitional justice discourses, the state has not in practice had a complete monopoly on the framing of the transitional context or its solutions. The non-state actor has been distinctly less visible in framing and articulating the theory and practice of transitional justice. It states an obvious reality that the non-state actor has significant purchase in transitional societies.

As I have noted elsewhere, there are broadly three main categories of non-state actor that have considerable shape and influence on the transitional landscape. The first is the non-state armed group. The purchase of the non-state armed group is largely negative but extraordinarily powerful. In a number of the Southern states in transition, the non-state actor rivals the formal power of the state in its capacity to act militarily and to exercise quasi-state-like functions. The non-state armed group may hold territory, perhaps even instituting a parallel justice system or quasi-state-like institutions (indeed, even where not directly linked to violent non-state groups, the operations of local legal systems and institutions are generally viewed with suspicion as a competitor by the fragile state). In this narrative, the non-state actor is the outsider (to the state), is violent, oppositional, seeks change often in radical ways, and may be fractured and highly unstable to the existing legal and political order. The second broad category of non-state actor with purchase over the transitional landscape is civil society. One paradoxical and highly relevant lens has been the broadly positive view of civil society groupings, and women’s groups in particular, taken by elite actors in conflict management and ending processes. Civil society groups are often supposed to be agents of positive social change in relation to the ending of violence, or as conduits to facilitate conversations towards a cessation of hostilities with less palatable violent actors. The third broad category of non-state actor is the international community, in its political (intergovernmental organizations such as the United Nations) and economic (multinational corporations) manifestations. In practice, the political and material resources of the international community become very important in the inclusion and privileging of certain local non-state actors, and the marginalization or exploitation of other non-state actors. Thus, the finer details of the relationship between the international and local can be determinative of the transitional distribution of political power. In paying sustained attention to the importance and depth of presence by non-state actors, not only are core prejudices of transitional justice discourses more fully revealed, but the modalities of engagement themselves are more fully exposed.

Reflecting on these developments in recent years, the intellectual histories of transitional justice comprise various starting points and various threads of concentration on justice, accountability, the role of memory, reconciliation, and repair. In many of these narratives, victimhood rhetorically stands at the moral centre of TJ’s normative analysis. In important ways, the vocabulary of transitional justice (truth, acknowledgement, repair, reconciliation) appears to offer a universal language to mediate stories of violence and harm and translate the experiences across linguistic, geographical and social divides.

In Transitional Justice, the very term ‘victim-centred’ is a concept that is repeatedly used to validate or evaluate response to human rights violations. It is a concept associating TJ with speaking truth to power, acknowledgement of harms, breaking silence, ensuring reparation, and rebalancing power relations. Yet, individual satisfaction and engagement with transitional justice by scholars and policy makers is both over- and under-estimated, and getting a firm handle on the engagement and satisfaction of victims with the modalities and outcomes of transitional justice mechanisms is an elusive enterprise. The focus on victims thus prompts the question of what victims want and need in any particular context in the immediate aftermath of systematic and sustained human rights violations. Who speaks for and about victims in such circulations?

While the ‘textbook’ transitional justice response might suggest an easy and common repertoire of claims among victims across transitional settings, growing empirical knowledge suggests otherwise. For example, a study in the Central African Republic surveying attitudes to reparations found that women were more likely than men to demand apologies and punitive measures for those responsible for violations and to demand recognition of their suffering than men. In the DRC, victims have acknowledged the importance of symbolic reparations and public apology, but at the same time underscored the need for ‘tangible benefits to address the more concrete needs of victims, to


38 For a pithy analysis of the role of language and translators in ‘translating’ harms for the purposes of international criminal justice, see Jonneke Koomen, ‘Language Work at International Criminal Courts’ [2014], 16 *IFJP* 581.


41 Progress of the World’s Women, at 7 (citing Patrick Vinck and Phuong Pham, Human Rights Center University of California, Berkeley ‘Building Peace, Seeking Justice: A Population-Based Survey on Attitudes about Accountability and Social Reconstruction in the Central African Republic’ (2010)).
which a symbolic component might be attached. In one study, by the Trust Fund for Victims in the Central African Republic, it was found that women prefer individual approaches to reparations over collective remedies. The examples illustrate gendered, intersectional, country-specific and context-specific differences in victim priorities. Moreover, these examples point to some disjunction between the overwhelming emphasis on criminal accountability and impunity discourses in scholarly discourses in the global North, and the range of distinct priorities and demands in sites that have experienced conflict and cyclical peace processes in the global south. It is not by accident that the analysis, normative development and enforcement of reparations for harms have fallen significantly behind in transitional justice discourse and practice: there is significant discomfort with providing reparations by international institutions, and reparations figure low in the priorities of states providing aid, humanitarian support and post-conflict reconstruction funds. The unease can be connected to fears about the acceptance of responsibility that follows from assuming obligations for repair, as well as unwillingness to inherit the liabilities of prior regimes or provide salve for the harms caused by particularly nefarious individual human rights violators. This is but one set of examples whereby externally set priorities for transitional justice (including sequencing or choices of mechanisms) trump local priorities for transitional justice. These priorities and values are exemplified by deploying one set of transitional mechanisms over others – a process which occurs at a sizeable distance from the sites of transition and with little meaningful exchange with those who have experienced ‘torture and tyranny, deprivation and destitution, pauperization and powerlessness, desexualization and degradation’.

Despite the debates within contemporary Transitional Justice scholarly and policy domains, there is a sustained absence of critical and non-mainstream voices from many of the key scholarly and policy sites where the field is named, fixed and applied. In spite of the notable absences from elite knowledge production there is much greater expression of critical left, situated, post-colonial, site-specific and feminist voices to be garnered across many of the local engagements with transitional justice than are generally revealed in visible TJ scholarly and

46 Id.
policy discourses. The majority of the voices that have entered into transitional justice conversations are those of the Western/non-transitional ‘here’ speaking to the experiences and choices of the non-Western, ‘othered’ ‘there’. The ‘subaltern peoples’ are distinctly missing and are spoken for and to but are rarely given meaningful space to speak to the experience of suffering on their own terms.\(^{48}\)

The challenge is not only theoretical, but is compounded by the fact that an uncritical and narrowly liberal conception of the transition directs our gaze away from the cultural, material and geo-political sites in which transitional justice practices have emerged. These sites have become the subject for protracted angst, in part because of a heightened sensitivity to human suffering, but it can at times be deceptively easy to give heightened attention to suffering without fundamental engagement with the causes of that suffering or with any view to structural amelioration. In simple terms, the sites that transitional justice most often engages with are the exotic ‘other’ of locales, subjects, conflicts and repressions elsewhere (never in the Western ‘here’).\(^{49}\) The export of rule of law and transitional justice discourse can reflexively deploy an uncritical, liberal and hierarchical positioning with little capacity to recognize its own hegemony and privilege.\(^{50}\)

Transitional justice discourse, in all its standard forms and straightjackets, thus demands critical interrogation. Specifically, seeing transitional justice as a form of discursive colonization, whereby its language and ‘tool box’ appropriate and codify knowledge in ways that exclude and produce hierarchies of value through the course of political transition, should be recognized.\(^{51}\) A fully articulated postcolonial challenge to the hegemonic reach of legal liberalism as represented by mainstream transitional justice is emerging primarily from Southern feminist scholars,\(^{52}\) and yet scholars and practitioners in the global North remain largely uninformed of this critique’s relevance.

\(^{48}\) Here I borrow Baxi’s terminology, and his reliance on Gramsci’s use of the term.

\(^{49}\) As I have noted elsewhere in my work, this is particularly acute with respect to transitional justice discourses addressing violence against women. See e.g. Fionnuala Ni Aoláin, ‘Advancing Feminist Positioning in the Field of Transitional Justice’ (2012), 6 IJTJ 205.

\(^{50}\) On rule of law exports and the challenges for women in particular, see Michael Hamilton and Fionnuala Ni Aoláin, ‘Gender and the Rule of Law in Transitional Societies’ [2009], 18 MJIL 380.


3. Southern voices in transitional justice

It still remains to be seen what the fulsome articulation of voices from outside the global North would bring to the discussion of transitional justice in the global South. What we can surmise is that colonialism, sequential transition, intergenerational harms, land rights, subsistence rights, the relationship of transition to development, the complexity and compounded nature of gendered harms, and the responsibility of states and entities in the global North in terms of supporting, enabling and prolonging conflict and repression through the provision of funds, weapons, political cover and selective humanitarian intervention all figure prominently in the emerging analysis. In parallel, the relevance of transitional justice to the hegemonic practices of states in the global North (generally not the preoccupation of transitional justice theory and practice) is opened up.

There has been little differentiation between transitional justice processes driven primarily by a country’s internal dynamics (e.g. 1980s Chile), and those driven largely by outside actors (e.g. Japan in 1945). In previous work Colm Campbell and I have termed the former ‘endogenous’ and the latter ‘exogenous’. Yet, to conflate the two risks simplification to the point of distortion: trial processes in exogenous situations (typically involving some form of international tribunal, utilizing international criminal law) are likely to have quite different dynamics from those in endogenous processes (typically, domestic tribunals employing national law). Transitional justice theory and practice frequently conflates the two with quite substantial consequences for ascribing agency and capacity to endogenous processes.

A largely under-appreciated form of transitional justice that is, by its nature, exogenous involves the forceful removal of an authoritarian regime by a democratic state, and the installation of democratization and transitional justice processes in the target state. A benign example is the post-war creation of the Federal Republic of Germany (FRG) out of the zones occupied by the Western Allies. This followed shortly after the Nuremberg trials, and overlapped with those under Control Council Order No. 10 and with a ‘de-Nazification’ process. A much more contentious recent example is the US–UK intervention in Iraq, entailing not only invasion and elections but also trials of former regime members and the highly controversial and ultimately discarded ‘de-Ba’athification’ processes. The contemporary salience of this intervention lies partly in the degree to which it involves the exercise of hegemonic power by the world’s most powerful democracy, strongly supported by another leading democracy (the United Kingdom). Crucially, however, the justification of manifest aggression by the target state was absent in this case (in contrast with the

53 Ni Aolán and Campbell, supra note.
54 This analysis was first developed by Christine Bell, Colm Campbell and Fionnuala Ni Aolán, ‘The Battle for Transitional Justice: Hegemony, Iraq and International Law’ in Morrison and McEvoy and Anthony (eds), Human Rights, Democracy and Transition: Essays in Honour of Stephen Livingstone (Oxford University Press, 2007).
wartime cases of Germany and Japan). Rather, as claims over ‘weapons of mass destruction’ waned, the imperative to ‘democratize’ and bring ‘justice’ were increasingly relied upon. Such assertions were open only to the democratic state, which could buttress its position by reliance on emerging international law norms about a ‘right to democratic governance’ and the value of ‘transitional justice’. It could also point to broader tensions about the compatibility of non-democratic regimes with the robust protection of generally agreed human rights obligations. ‘Transitional justice’, therefore, became partly the justification for the exercise of hegemonic power, enhancing the salience of the state’s deployment of the discourse.

Yet, in the aftermath of regime change, and its abject failure, the human rights excesses of the democratic state were largely placed beyond the reach of both regular and transitional justice mechanisms. There has been some accounting in the United Kingdom, specifically concentrated within the terms of defining the extraterritorial reach of the European Convention on Human Rights to the actions of military actors in Afghanistan and Iraq. However, this kind of partial and individualized adjudication loses sight of the broader state collapse followed by state rebuild mandate engaging the military in both countries. Transitional justice is externalized and not internalized in any meaningful way. In the United States, the originator of military expansions and use of force, impunity reigns. There is a broad political consensus on de facto amnesty for military and political actors, virtually no criminal prosecutions of substance, and ongoing obfuscation of the facts of the harms caused. There is little support for the kinds of necessary compensations that ought to follow for systematic torture, extra-judicial killing, extensive detention without trial and a myriad violations engaging both derogable and non-derogable rights under international human rights law.

These contemporary realities require acknowledgement of the dynamics of contemporary political processes whereby deployment of the rhetoric of ‘trans’ is perceived as beneficial to achievement of the hegemon’s goals. In theory, of course, the risks may point both ways and would give rise to a hazard whereby the democratic hegemon might be faced with transitional justice-like dilemmas in relation to its own violations, in addition to dilemmas affecting the target state. In practice, there has been patchy evidence of this, despite the evidence that the United States as hegemon has consistently used law-based arguments in its transitional justice justifications and deployed a rhetoric of law and justice while acting unlawfully. The evidence that transitional ‘justice’ has done little to stem the excesses of powerful Northern states operating in and around Southern states may simply reflect what critical scholars have consistently argued: namely that international law (and now read transitional justice) has little residual ‘pull’ on hegemons.  

55 Cf. With regard to centrifugal and centripetal tensions in law, Christopher McCrudden, ‘State Architecture: Subsidiarity, Devolution, Federalism and Independence’ in Mark Elliott and David
Examination of transitional justice discourse in Iraq has an analytic currency in respect of this ‘Southern-focused’ analysis: firstly, it throws light on the nature of the hegemonic project and its relationship to law. Secondly, it provides a new perspective on the fluidity of contemporary transitional justice discourses and their openness to manipulation. It also starkly reveals the absence of Southern voices in transitional justice discourses. Most importantly, it shows the importance of transitional justice discourse to the hegemonic project, revealing a point of resistance for those asserting the normative force of international law in general and the importance of its human rights norms in particular.

In addressing the other challenging dimensions of transitional justice’s oeuvre, it is useful to address the ways in which ‘the pivots of liberalism’ remain the end results of TJ, and more specifically what TJ, shot through with liberal democratic discourse, contributes to places and spaces that share little liberal or democratic heritage. In response to this framing, it is useful to unpack broad themes within this liberal discourse. Liberalism presupposes the individual citizen (as opposed to the state or communal group) as the primary unit in society. While there is room for the individual’s sovereignty to be overridden, this emphasis on the individual as opposed to a ‘collective’ is what sets the liberal schema apart from other ideologies. As Brown and I have argued elsewhere, ‘[t]aking the individual as its normative base, liberalism then postulates that individual freedoms should be promoted, and indeed are universal. Acknowledging that individuals’ interests can clash, it argues for tolerance, pluralism and equal opportunities.’

An attached tendency is that liberalism retains a certain ‘whiggishness’: a belief in reformability and progression. While this is a simplified thumbnail sketch, it captures something of the amalgam of the liberal discourse. One can readily see that its point of origin is the global North, or more specifically the industrialized nations of Europe and North America. It is here that critics of the ‘liberal peace’ have entered. Chandra Lekha Sriram was the first to bring this critical lens to bear on Transitional Justice discourse and practice, pointing out that the liberal peace was conjoined to transitional justice in the peace-building schema constructed by international actors. These international actors have complex motives and goals in the use of transitional justice frames, and the extent to which local actors retain any substantial control over the contours of the ‘deals’ made (and substantially enabled, supported and financially propped up by key states and institutions) is debatable.

56 Brown & Ní Aoláin, supra note 20.
Sriram and others warn that transitional justice, much like the liberal peace-building model with which it partners, has insidious effects, not least that it is often a poor fit for local legal and political cultures contributing to sustained instability in post-conflict societies.

**Conclusion**

The expansion of transitional justice is still a work in progress, and insofar as the new expansive approach remains inadequately developed and affirmed, several weaknesses associated with the traditional accountability matrix remain. Some of these limitations have been outlined above, but it could also be explicitly underscored that transitional justice remains unduly selective. This weakness follows largely from the uneven attention paid by powerful states to different transitional societies. In certain (usually marginal) post-conflict or post-repression states, the absence or deficiencies of accountability mechanisms are created or compounded by powerful outside actors, whereas in other contexts, powerful states have endorsed the idea of calling rights violators to account. This selectivity is manifested by the creation of criminal justice mechanisms such as ad hoc war crimes tribunals for some states, but not for all. The point is not that international or hybrid legal tribunals are entitlements of transitional societies and therefore ought to be guaranteed by international actors, but rather that choices in fact define whether they are created in the first place. Second, traditional transitional justice is partial. Even where accountability is sought, at best only a fraction of those who have committed serious human rights violations may face trial or 'truth.' For many societies this compromise of 'some truth and some justice' is an agreed concession to allow for an end to atrocities and to provide a route to reconciliation with adversaries who do not come with clean hands. The partiality invariably creates tensions with the stated commitment to 'victims' and the victim-centred nature of transitional justice theory and practice. Moreover, as this essay has explored above, once one acknowledges partiality, there is a need to deeply unpack the layers of partial justice and to track the patterns of 'who gets' and who does not. Finally, transitional-justice-as-accountability may be characterized as myopic – in particular, the practice catches only a small fraction of the context that enables human rights violations to take place. Most evidently, expansive transformations may not be uniformly positive, particularly if driven by external (including international) political communities while also lacking an organic internal dimension. Nevertheless, there is good reason to hope that the success of transitions will be more deeply felt when a multitude of measures come into play in a way that responds to the real

needs of fractured societies and to those communities and individuals who have experienced the greatest harms. Given all these caveats, one might easily advocate the abandonment of transitional justice and a move to other frames and mechanisms of accountability and acknowledgement. This essay ends on the positive note that while there is much revision to be done, and greater access to the language, creation and forms of transitional justice to be encouraged, there is also significant room for that revision, review and restatement in a field that is still being created, and that in many fundamental respects remains unsettled. Thus, as one Southern scholar has recently noted:

. . .[wh]reas transitional justice’s foundational concepts, namely human rights, justice, liberal democratization and rule of law, were invented by patriarchal societies and colonial masters and are sometimes appropriated for neocolonial ends, transitions create opportunities for members of former colonies to input into this discourse.61

William Twining’s lifelong commitment to surfacing Southern voices, reframing his own work in the context of those contributions and ideas, being prepared to question accepted scholarly canons at every point as he engaged ‘geographies of injustice’,62 consistently addressing representation and the importance of critical voice, and the unfailing desire to counter parochialism, stand as a clarion call to scholars of transitional justice to hear, to read, to respond and to engage on the same terms.

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60 Some moves in this direction can be seen from the recent spurt of scholarly enthusiasm for *jus post bellum* as an organizing frame of justice and accountability in post-conflict societies.
62 The term belongs to Upendra Baxi but is deployed by Twining, *Southern Voices*, supra note 1, at 212.