

Mapping a Future for Transitional Justice by Learning from Its Past

Transitional Justice and the Arab Spring, eds. Kirsten J. Fisher and Robert Stewart. Routledge, July 2014, 244pp. ISBN: 9680415826365 – hardcover (\$135).

Transitional Justice in the Asia-Pacific, eds. Renée Jeffery and Hun Joon Kim. Cambridge University Press, November 2013, 311pp. ISBN: 9781107040373 – hardcover (\$99).

Transitional Justice and Memory in Europe (1945–2013), ed. Nico Wouters. Intersentia, February 2014, 416pp. ISBN: 9781780682143 – hardcover (\$105).

Transitional justice discursively occupies a two-dimensional space mapped by understandings of ‘transition’ and ‘justice.’ Transition is defined very broadly, understood as any regime change, however achieved, because transition is defined contingently, as something that is normatively presumed to have the goal of liberal democracy. The edited volumes under review, particularly that discussing the Arab Spring, thus include in their remit states where a regime has fallen but liberal democracy is far from being consolidated, where vicious civil wars are underway (as in Syria or Libya) or authoritarianism has been reasserted (as in Egypt). Justice, in contrast, is defined narrowly. While the idea of justice is presumed to be represented by a situation where the entirety of human rights law is respected, in both theory and practice transitional justice focuses largely on truth and accountability for past violations, prioritizing civil and political rights over other rights, rather than explicitly building justice for the future. The books reviewed here represent an extensive survey of the practice of transitional justice in recent decades and an articulation of global discourses of transition and justice. This review seeks to use the three volumes and the dozens of contexts they address to investigate this discursive space, to interrogate how in practice transitional justice is understood and articulated, and to suggest what a future practice could look like.

The future of transitional justice is increasingly driven by its past. Practice has become standardized and, as noted in *Transitional Justice and the Arab Spring*, a ‘transitional justice industry’ (p. 69) has emerged to advocate for particular approaches. These three volumes reveal the extent to which a global template exists for the mechanisms that are both advocated and often funded by an international network of

states, donors and nongovernmental organizations. While the Asia-Pacific and Arab Spring books articulate this globalized discourse, few of their constituent chapters acknowledge either the extent to which practice is mimetic or the politics that underlie it. As a result of the leading role played by actors from the global North, there is an intimate connection between transitional justice and an ideological liberalism, with significant implications for dealing with violent pasts.¹ While there has been a range of critiques of transitional justice that have impacted on rhetoric and scholarship, little fundamental change to practice has taken place in several decades. Since its emergence in the 1980s, the contexts in which transitional justice unfolds have shifted from postauthoritarian middle-income countries to postcolonial states facing legacies of conflict and extreme poverty. Despite this, transitional justice appears to have become ossified in an incarnation that is directly linked to the transitions of the post-Cold War era and the hubris of the 'end of history.' Practice takes little account of the new actors and ideological drivers of change beyond the liberal that have catalysed recent regime changes.

The books under review are histories in the sense that they seek to understand and analyse the past through a lens of addressing legacies of human rights violations. They represent three different eras of transitional justice practice: historical (in Europe), recent (in the Asia-Pacific) and future (the Arab Spring). The volume on Europe explicitly concerns the use of history and memory in transitional justice, and sees the history of the field as allowing for policy evaluation that can inform the future. It addresses three types of transition in Europe: approaches to the historical memory of the Second World War, transition from authoritarianism in Greece, Spain and Portugal, and transition from communism in Hungary and Poland. As such, much of the material refers to processes and policies that emerged before transitional justice was codified in the 1990s. The book does, however, put at its centre the traditional preoccupation of transitional justice: to punish or not? It confirms that in Europe following both the Second World War and the fall of communism, despite an initial wave of prosecutions, impunity was tolerated on a significant scale and a focus put on lustration in most cases. In this sense, the volume is hugely successful in challenging some of the shibboleths of transitional justice and showing that much of contemporary practice is not evidence based.

Transitional Justice in the Asia-Pacific represents a recent history of transitional justice in a set of postcolonial Asian contexts, namely Sri Lanka, Aceh, Cambodia, East Timor, the Solomon Islands and South Korea. It is the most conventional of the three volumes, with an introduction that represents a concise and largely uncritical summary of thinking and practice around justice in transition, including a focus on debates – such as that of justice versus peace – from which scholarship has largely moved on. The book also reflects global approaches in emphasizing accountability as the key feature of justice in transition. The contexts examined here represent local manifestations of a globalized practice, and there is surprisingly little of the ethnographic trend in transitional justice scholarship that would mark the contexts of this region as different from any other.

1 Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections,' *Third World Quarterly* 29(2) (2008): 275–289.

Transitional Justice and the Arab Spring is focused not on the past but on the future of the Middle East and North Africa, and takes a largely thematic approach to examining the various actors, both local and international, and the dynamics at play in a region that has experienced more political change in the last five years than in the previous half-century. To their credit, editors Kirsten Fisher and Robert Stewart explicitly suggest that transitional justice approaches must push for ‘creativity’ and ‘local solutions,’ and that the Arab Spring can impact on transitional justice, as well as vice versa. The book also seeks to understand how a liberal transitional justice can engage with an often illiberal political Islam, as well as address the issues of poverty and unemployment that drove the revolutions of the Arab Spring. The timing of the book and the parlous state of the transitions of the Arab Spring dictate that much of it concerns regional and global examples rather than ongoing transitional justice mechanisms, although it is curious that so little attention in the book is given to Tunisia, the one Arab Spring context in which a broad transitional justice process is underway. The most interesting chapters are those that understand transition as being dependent upon political and social factors that are traditionally marginalized in studies of transitional justice, and those addressing political Islam and gender can most inform thinking on potential processes.

LEARNING FROM PAST PRACTICE

Transitional Justice and Memory in Europe draws attention to the problematic idea of learning from the past, given that the analogies made between past and present and the particular lesson extracted is always contingent upon the political context. In the introduction, editor Nico Wouters suggests that a historian can use analogous reasoning in a more nuanced and comparative way that evades the emotional and political response of popular discourse, discriminating between a detached positivism and political and sociological interest in the present. The limits of such positivism to steer transitional justice are however immediately apparent when one seeks to ask if a particular policy will work – a question that can only be answered contingently, depending on what one seeks to achieve. This demonstrates one constraint of contemporary transitional justice practice, in that an *a priori* assumption is made that liberal democracy is the overriding aim of any process, independent of what victims or citizens in any one transitional state might see as its goals. A section title in *Transitional Justice and the Arab Spring*, ‘Getting Arab Spring transitional justice right,’ is an apt representation of the tyranny of a prescriptive global practice, suggesting that there might be a single *correct* way of dealing with the past in the entire Arab world. This danger is further represented in the volume by chapters discussing transitional justice in Latin America and Central and Eastern Europe, where, despite multiple caveats about context, facile comparisons are inevitably made (e.g., Libya as Mexico, Yemen as Brazil or Chile, Syria as Central America and Egypt as Argentina in Andrew Reiter’s chapter). The relevance of Latin America in the 1980s to the Arab world in 2014 is unclear and likely little, representing a refusal to acknowledge that not only context but also the global political economy is radically different.

The objective of this positivistic model is, however, ultimately to be *predictive*. Implicit in seeking to learn from past practice is the assumption that universal mechanisms or causalities can be detected and isolated from the unique characteristics of

any particular time and place to construct what in the Europe volume is referred to as an ‘applied counterfactual history’ (p. 10). It is clear that useful knowledge can be extracted from past experience, but less clear that those seeking to do this in transitional justice are explicit in describing or even understanding the strict limits of such knowledge. This is well demonstrated by quantitative work in the field, as typified in the contribution of Leigh Payne and Kathryn Sikkink in *Transitional Justice in the Asia-Pacific*, where data from 76 contexts are used to draw conclusions, on the assumption that there is no significant dependence on any variable beyond the limited number of human rights-related variables identified by the authors. What the range of contexts discussed in the three books does demonstrate is the falsity of any assumption that culture, politics and history can be neglected in steering a transitional justice process. Luc Huyse in the Europe volume goes as far as to write that ‘practice and scholarship have led to the conclusion that all cases of justice after transition are unique’ (p. 351) – an observation that would seem effectively to deny that there is such a thing as transitional justice practice. One great contribution of *Transitional Justice and Memory in Europe* – since many of the processes discussed occurred before ‘transitional justice’ was acknowledged as such and its mechanisms standardized – is that the case studies demonstrate how broad the range of relevant processes for dealing with violent pasts can be, and how memory of the past emerges subject to a range of social and political processes often remote from the state. Memories of war and dictatorship have emerged subject to myth-making and fabrication, as well as from history, but predominantly from a series of narratives in which the institutional was never paramount. The book also challenges a contemporary preoccupation with truth recovery, claiming that ‘selective forgetting is even more important’ than remembering (p. 359). European history highlights that amnesty, increasingly challenged by a normative and absolute prohibition of impunity for the most serious crimes, has a long history that suggests it need not lead to the recurrence of violations. Instructively, the book sends a strong message that dealing with a painful past ‘is a process that stretches over several generations’ (p. 365).

In *Transitional Justice and the Arab Spring*, Hugo van der Merwe makes the point that while the transitional justice agenda has grown beyond simply balancing retribution and peace to including addressing the roots of conflict through the socio-economic, healing and reconciliation, it is still centred on a few core mechanisms. As a result, ‘the debate . . . becomes constrained by the already-existing set of tools established in other (possibly unrelated) transitional contexts’ (p. 228). One threat this presents is that the task of addressing past legacies of rights violations may be assumed to be limited to a finite number of well-defined mechanisms, labelled as such. This has led to an extensive literature in which the impact of transitional justice mechanisms is evaluated in detachment from the broader social and political context, resulting in an overemphasis of the importance of such mechanisms in comparison with the end of conflict and the wider political, social and economic impact of the liberal peace. *Transitional Justice in the Asia-Pacific*, for example, falls into this trap by seeing the fact of prosecutions as impact – a strange and limited way to judge the institutionalization of justice. In the conclusion, editors Renée Jeffery and Hun Joon Kim then undermine this focus on accountability by stating that ‘it is unclear whether a correlation exists between levels of accountability and outcomes,’ here understood

in liberal terms as ‘rights, peace and democracy’ (p. 247). Particularly in the postcolonial contexts of Africa and Asia, which have become the main stage for 21st-century transitional justice, questions have emerged over the extent that formal mechanisms have a significant impact on the everyday lives of ordinary citizens. In her chapter on the Extraordinary Chambers in the Courts of Cambodia, for example, Kirsten Ainley points out that the Court is largely unknown to Cambodians, a fact that must surely limit its impact. All three books are characterized by the absence of empirical work that understands how victims and citizens are affected by authoritarianism and violence and by efforts to address their legacies.

Creating a practice that can be led by its presumed impacts leads directly to asking *how* transitional justice works. Implicit in any understanding of transitional justice is a theory or theories of change that by addressing past violations future respect for human rights will be enhanced. More particularly, given the limited types of mechanisms that have become standard, it is understood that by telling truths about violations, prosecuting their perpetrators and providing reparations, positive change will occur. The theories of change that underpin the discourse remain implicit, and one role of volumes such as those reviewed here, addressing multiple contexts globally, is to shed light on what those theories of change are and to probe their validity. Surprisingly little of the massive literature of transitional justice probes such theories of change, or even seeks to make them explicit. Of the books under review, only the volume on Europe begins to seek to explain *how* transitional justice operates. If a mechanism for impact can be postulated, it can be tested, potentially revealing the process by which social and political change occurs in transition. What the field needs to demonstrate its impact is a theoretical, rather than purely normative, basis and empirical research that uses observation to accumulate evidence for or against that theory. That it lacks such a framework strongly suggests that transitional justice is driven as much by political considerations as by the understanding that it changes people’s lives for the better.

UNDERSTANDINGS OF JUSTICE

The dominant critique of human rights centres around an understanding that they represent a political project situated in historical, social and economic contexts, with which they dynamically engage. As such, human rights produce not only their intended effects but also a broader range of impacts, instantiating a variety of political subjects and cultures. Transitional justice, as an integral part of the liberal state-building project, represents ‘a particular form of political power carrying a particular image of justice,’² even while its advocates claim rights as above and beyond political concerns. The idea of justice that transitional justice represents, and the political value it carries, is demonstrated by the case studies in the books discussed here.

The Cold War struggle over whether human rights should prioritize the civil and political or the social and economic was decisively won by a liberalism that is now hegemonic. The impact on how the justice of transitional justice is perceived has been profound, and this is reflected particularly in the Asia-Pacific volume, where justice is understood largely as accountability for violations of bodily integrity. The

2 Wendy Brown, “‘The Most We Can Hope For . . .’: Human Rights and the Politics of Fatalism,” *South Atlantic Quarterly* 103 (2/3) (2004): 451–463.

Arab Spring collection does most to challenge this narrow vision of justice through an engagement with the demands of the Arab revolutions to confront poverty and unemployment. Such discourses challenge structural violence, typified by the horizontal inequalities that have traditionally been perceived as beyond the remit of transitional justice. Despite discussions about what the justice of transitional justice means, in recent postconflict contexts it has typically delivered ‘poverty with rights’³ by prioritizing accountability over the broad guarantee of all rights. While not discussed in detail in the Asia-Pacific book, this is a charge that can be levelled against processes in East Timor, the Solomon Islands and Cambodia. Liberal hegemony has permitted globalization, not just of rights but also of neoliberal economics, and it is no coincidence that the goals of transitional justice align perfectly with the integration of transitional states into global markets: ‘Transitional justice has become the conscience of transitional globalization without troubling its essential characteristics.’⁴

While the politics that accompany transitional justice deny the social and the economic as justice issues, the Arab Spring has confronted the discourse with transitions driven by slogans such as ‘bread, freedom and dignity.’ The revolutions in Egypt and Tunisia were catalysed by graduate unemployment and rapid rises in the prices of basic foods. This presents both a challenge and an opportunity for approaches to justice in transition, in terms of looking beyond electoral democracy and civil and political rights. In Tunisia, for example, the Organic Law on Transitional Justice has created a novel class of transitional justice actor by defining groups of individuals who have been socially marginalized or excluded as ‘collective victims.’⁵ What exactly this means in terms of both the work of Tunisia’s Commission for Truth and Dignity and its transformative potential for regions and populations that have been systematically marginalized is unclear. The implication is that the way other truth commissions have interacted with victims – receiving testimony, writing histories of victimization and recommending reparative approaches – can be replicated, with the community as a collective victim.

The integration of neoliberalism into rights practice in transition has seen transitional justice largely neglecting what Habib Nassar in *Transitional Justice and the Arab Spring* calls ‘crony capitalism’ (p. 58) led by a corrupt economic elite with deep connections to a political establishment. The narrow lens of transitional justice has sought to bring justice and accountability to those politically responsible for acts of violence but not to the economic elites who steer the logic of structural violence that underpins chronic violations of social and economic rights. The extent to which the Tunisian process is able to challenge the neoliberal economics that fed the inequality that sparked the revolution remains to be seen, given the pressures, not least from

- 3 Oliver Richmond, ‘Welfare and the Civil Peace: Poverty with Rights?’ in *Whose Peace? Critical Perspectives on the Political Economy of Peacebuilding*, ed. Michael Pugh, Neil Cooper and Mandy Turner (London: Palgrave Macmillan, 2014).
- 4 Paul Gready and Simon Robins, ‘From Transitional to Transformative Justice: A New Agenda for Practice,’ *International Journal of Transitional Justice* 8(3) (2014): 342.
- 5 Republic of Tunisia, Ministry of Human Rights and Transitional Justice, Technical Commission Organizing the National Dialogue on Transitional Justice, Organic Law on Establishing and Organizing Transitional Justice (2013).

global institutions such as the International Monetary Fund, that have pushed Tunisia's new rulers to maintain the macroeconomic approach of the Ben Ali regime. It will be fascinating to see how the politics of social and economic justice promised by the transition confront or compromise with neoliberalism.

A POST-LIBERAL TRANSITIONAL JUSTICE?

The vision of the liberal state that is the foundation for transitional justice assumes the universality of linear forms of social progress, with transition perceived as 'a normative process of becoming.'⁶ This is a modernist paradigm that has long dominated development thinking and which transitional justice has embraced. As a result, perhaps the greatest challenge the discourse confronts in contemporary transition is the challenge to the liberal consensus on which it is built. In societies such as those of the Arab world and some of the Asian states discussed in the books under review, the secular assumptions of a globalized liberalism are rejected by significant sections of the population, as well as important political actors. In such contexts one can ask what justice means and how it informs efforts to address the legacies of violence. In an age where the hegemony of liberalism and human rights appears to have reached its limit,⁷ what would a post-liberal, nonideological approach to addressing legacies of past violence look like?

The Arab Spring represents perhaps the first large-scale transitional context where the liberal presumptions of transitional justice are not entirely shared by either the elites implementing posttransition policy or by the larger population, and which cannot be enforced under donor pressure. In all the transitions (and nontransitions) of the Arab Spring, Islamist actors who reject many of the assumptions of western secular rights language are leading players and yet have been largely ignored by transitional justice practice. An excellent treatment of the challenges of engaging political Islamists in a transitional justice process is provided by Line Khatib in the Arab Spring volume. Islamists largely reject the universal claims of human rights, stressing rather the specificity of local needs and contexts and a different set of norms, as Khatib illustrates using recent events in Egypt, Tunisia and Syria. However, the positionality of rights activists – and the politics they bring to the discussion – inevitably defines the relationship between addressing histories of violations and Islamists as confrontational. Khatib, for example, claims that 'principles of human rights, democracy, equality, justice and democracy are the frame of reference in the Arab region' (p. 144) and describes Islamists as 'bad liberal democratic actors' (p. 131), ably demonstrating how transitional justice practitioners seek to fit a context and its prevailing ideologies to their own liberal template, rather than to create a practice which resonates with the range of values in a society. All the contexts of the Arab Spring demand some acknowledgement of the tensions between a liberal rights framework and Islamic understandings.⁸

6 Mark Duffield, 'Complex Emergencies and the Crisis of Developmentalism,' IDS Bulletin 25.4 (Brighton: Institute of Development Studies, 1994).

7 Stephen Hopgood, *The Endtimes of Human Rights* (Ithaca, NY: Cornell University Press, 2013).

8 There has indeed been significant scholarship around how human rights and Islamic principles might relate to each other, for example, Mark S. Ellis and Anver M. Emon, *Islamic Law and International Human Rights Law* (Oxford: Oxford University Press, 2012).

An additional challenge to liberal presumptions in transition is presented by case studies in the Asia-Pacific volume. Lia Kent discusses East Timor's transitional justice process and mentions the importance for families of the dead – many of whose bodies remain missing – to conduct traditional rituals that can facilitate the journey of the spirit to the sacred world. In the same volume, Renée Jeffrey describes how in the Solomon Islands the transitional justice process was predated by 'long established methods of dispute resolution' (p. 212) known as *kastom* that sought to restore relationships in a complex society of kinship lines, clans and social connections, perceiving justice as rooted in forgiveness and compensating both sides. In both contexts, traditional understandings of spirits and dispute-resolution processes run counter to rights-based approaches, but neither author seeks to confront this challenge to a practice rooted solely in a universalized human rights. Transitional justice and human rights more generally are constructed on the understanding that changes in law and behaviour impact on people in certain ways. An alternative understanding of political causality is that which emerges from a religious or spiritual outlook in which consequences flow from sin or virtue or from the actions of spirits and communities. The traditional Timorese confronted with human rights discourse is told that she should abandon her belief in the agency of the spirits that have long sustained her community and rather pursue the legal and political routes to action that underlie modern notions of political causality. Liberal modernity constructs her not as a member of a community, linked to family, clan and ancestors through blood and spirit, but as an autonomous agent whose humanity alone determines what she can be. The radicalism of this agenda is consistently underestimated by those who advocate it, for whom the 'naturalness' of individual rights is self-evident. If transitional justice is to address legacies of violence in ways relevant to the communities it seeks to serve, it must find ways to integrate divergent understandings and accommodate community norms with origins beyond secular liberalism. This is not to adopt a culturally relativist position of seeing rights versus culture, but rather to emphasize rights *as* culture, where rights in the real world both compete with and complement local mores.

The end of the 'the end of history,' the emergence of newly globalizing ideologies (including Islamic currents) and the persistence of often invisible local understandings that resist liberalism confirm the decreasing relevance of the grand, integrative and totalizing concepts that have organized ideas about politics. In practice, one can see that the idea of justice instantiated in transitional justice is in fact a product of the collision of the strategies, institutions and norms of a global practice with the everyday lives of local actors impacted by violations. The engagement with the everyday realities of those affected by rights abuses remains highly limited, however, constrained by a commitment to a rights lens that excludes other worldviews. The result is a transitional justice driven far more by the precedent of practice and a global community of experts than the realities of those most affected by the violations. The challenge becomes one of *agency*: how can those most affected by histories of violence, and their priorities, drive efforts to address legacies of violations? While a rhetoric of consultation and participation has become standard in transitional justice, the books under review predominantly reflect not the values and priorities of citizens of the contexts discussed (there is little empirical work, for example) but rather a decontextualized practice whose precise value is its presumed universal validity.

The alternative is a rights practice that seeks to engage with the everyday,

a space in which local individuals and communities live and develop political strategies in their local environment, towards the state and towards international models of order . . . engaging with needs, rights, custom, individual, community, agency and mobilisation in political terms.⁹

Rather than denying the politics of addressing violations, one must make them explicit and seek to ensure that the power relations that led to them, locally, nationally and internationally, are challenged. The hybridity that results is one that ideally incorporates acceptance, cooptation, resistance and rejection of the global transitional justice model. It will also acknowledge and be built around local social processes that are ongoing in any transitional society, but are largely invisible to the national and international transitional justice community. Where a national process sees resistance, a hybrid approach will see novel agencies and acknowledge a critique and a potential alternative that may be more relevant in the particular context. A hybrid approach cannot offer a template for practice, but rather a set of alternatives to a liberal model that could be welfare and public service driven, rooted in popular democracy and organized around custom or traditional forms of governance and alternative political or cultural models.

Such a transitional justice will have to engage with ‘uncivil society,’ a range of actors who do not share the liberal assumptions of rights advocates, but who – like the social movement-led protests of the Arab Spring and the Islamic current they unleashed – have increasingly driven transition. An example is provided by the protests in Bosnia in 2014 that sought to challenge the postconflict settlement and ‘the fetish of difference and reification of ethnicity, that is enforced by the alliance of ethnic oligarchs and the members of the so-called “international community.”’¹⁰ This movement understood justice as accountability for both the violations of wartime and the economic crimes, driven by corrupt privatization, of peacetime. Its tactics diverged radically from those of global rights practice, including burning government buildings and open, direct and transparent democracy in public gatherings. Social movements such as this, or those that drove the revolutions of the Arab Spring, broaden the range of conceivable possibilities and socialize people to critical perspectives, both through an exchange of ideas and through participation in collective action that is empowering, particularly for those traditionally excluded from political processes and transitional justice mechanisms. As change and political action increasingly revolve around such actors, an opportunity is presented to forge a contextualized and emancipatory politics of transition that rejects existing templates.

9 Oliver Richmond, ‘Resistance and the Post-Liberal Peace,’ *Millennium: Journal of International Studies* 38(3) (2010): 6.

10 Damir Arsenijević, ‘Protests and Plenum: The Struggle for the Commons,’ http://www.academia.edu/6599512/Protests_and_plenums-the_struggle_for_the_commons (accessed 3 December 2014).

CONCLUSIONS

Transitional justice as a discourse and a practice now faces a choice perhaps more stark than any since the coining of the term in the 1980s. While reference to transitional justice and the resources devoted to it are greater than ever before, its practice has become a decontextualized mantra that appears ever more subordinate to the global political and economic forces that drive it. The future of transitional justice would seem to demand either a continuation of its now ritualized mechanisms, despite lack of evidence of their positive impact, or a reinvention that engages with exactly what the terms ‘transition’ and ‘justice’ mean in any one context, and seeks to advance both. These volumes contribute to this task by encapsulating how transitional justice is understood today and how its practice has been both ritualized and subordinated to the broader ‘liberal peace.’

One approach to making transitional justice relevant to the populations it purports to serve is to disconnect it from a universalized practice that is the product of a particular time and place. Such a transitional justice would distance itself from a dependence upon the goals and institutions of liberal democratic politics and neoliberal economics and instead seek an elicitive approach grounded in the realities with which the citizens of transitional states live. This could drive a hybridized practice, in which contexts and communities could be supported to find their own routes to dealing with the past, not restricted to a human rights lens but taking from global liberal practice what is useful, and seeking whatever process most resonates with local needs.

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