

From Transitional to Transformative Justice: A new agenda for practice

Paul Gready and Simon Robins

Transitional justice has become a globally dominant lens through which to approach states addressing legacies of a violent past, most often implemented as a component of larger efforts at liberal statebuilding. From its beginnings as a largely legal approach to human rights violations committed by departed regimes, understandings of transitional justice have expanded to encompass largely state-led practices such as trials, truth-telling, institutional reform and reparations processes. An industry of praxis has emerged, supported by dedicated NGOs and large-scale funding from Western donors. Yet, the performance and impact of transitional justice mechanisms has been at best ambiguous and at times disappointing – critiqued, for example, for treating the symptoms rather than the causes of conflict. This suggests the need for a new agenda for practice, one that offers a concept of justice that is more ‘transformative’.

Transformative justice is a concept that can clearly be applied anywhere and at any time to address concerns such as structural and everyday violence – this briefing focuses on the potential for transformative justice during political transition. While transformative justice does not seek to completely dismiss or replace transitional justice, it does seek to radically reform its politics, locus and priorities. Transformative justice entails a shift in focus from the legal to the social and political, and from the state and institutions to communities and everyday concerns. Transformative justice is not the result of a top-down imposition of external legal frameworks or institutional templates, but of a more bottom-up understanding and analysis of the lives and needs of populations.

Transformative justice is understood as *transformative change that emphasises local agency and resources, the prioritization of process rather than pre-conceived outcomes, and the challenging of unequal and intersecting power relationships and structures of exclusion at both local and global levels.*

The table below summarises the difference in approach between transitional and transformative justice.

Transitional Justice	Transformative Justice
Predominantly legal approaches	Multi-disciplinary and multi-sectoral approaches; predominantly social and political in emphasis
Grounded in international law, rights and norms	Empirically and evidentially driven, grounded in context; some normative reference points e.g. PANEL principles
Prioritises civil and political rights	Considers rights indivisible and interdependent, gives equal consideration to social and economic rights
Addresses acts of political violence against individuals	Focuses on collective experiences of structural and systemic violence
Change driven by state-centric institutional mechanisms	Change driven by multi-level processes, but emphasising processes created in communities at the local level
Defined and driven by their outputs: e.g. trial verdicts, truth commission reports	Defined and driven by processes and process-outcome links
Victims and citizens participate as witnesses or spectators in events	Participatory approaches are more inclusive and sustained e.g. defining victimhood broadly and informing all elements of

Justice and human rights understood in the terms outlined above e.g. legal, outcome driven, focusing on C-P rights

interventions, from initiation to evaluation

Justice and human rights understood in the terms outlined above e.g. local, process led, C-P and E-S rights

Limitations of Transitional Justice – and Relevant Responses

This briefing examines two main limitations facing contemporary transitional justice: the liberal peace and top-down, state-based responses. The liberal peace in which transitional justice is embedded emerges from two dominant strands of contemporary globalization. The first strand privileges liberal paradigms of civil and political rights through an emphasis on elections, procedural democracy, constitutionalism and the rule of law, and various backward-looking truth and justice measures. The second strand is market driven, neo-liberal economics. The liberal peace is now widely critiqued in transitional settings for handing power from one elite to another, and for failing to challenge underlying patterns of inequality and exclusion.

Transitional justice fits too neatly into this paradigm, most notably because it too has prioritised civil-political rights, emerging from a tradition where acts of violence are of greater interest than chronic structural violence and unequal social relations. Contemporary transitional justice discourse too rarely extends to an analysis of the liberal peace that ultimately shapes local realities far more than transitional justice itself.

A second, and related foundational limitation is that transitional justice as a global political framework is dominated by an elite international professional and donor network rather than locally-rooted movements. Repeated calls for local control and adaptation should not overlook the power that an industry such as this has on the repertoire of options imagined and on donor funding. In addition, the state-centric focus it brings to examining violent pasts discourages the engagement of affected populations. Transitional justice measures limited to institutional mechanisms militate against participation: a small number of citizens engage with such mechanisms in highly prescribed ways, as witnesses, defendants, or through the giving of testimony. Typically those most affected by violations have little or no opportunity to impact upon the goals of the process or the nature of particular mechanisms.

The constraints imposed by the liberal and top-down framing of transitional justice remain largely unchallenged, but efforts have been made to respond to more specific critiques and develop a broader practice. In the following table, some of these efforts are discussed and used to both demonstrate the limits to their transformative potential and to point to how a genuinely transformative justice should be defined:

<i>Normative vs empirical basis for TJ</i>	TJ normatively driven: <ul style="list-style-type: none">- 'Human rights are universal'.- 'Interventions will lead to liberal democracy'.- Norms are abstract, prescriptive and non-contextual. Transformative alternative: <ul style="list-style-type: none">- Driven by empirical and evidential approaches.- Context dependent.- Considers diverse understandings of rights and norms, and relies on light-touch normative framework e.g. PANEL principles.
<i>'Holistic' definitions</i>	A growing tendency in TJ to use holistic understandings: <ul style="list-style-type: none">- Criminal prosecutions, truth-telling, institutional reform and reparations complemented by commemorative practices and memory work, educational reform, reconciliation initiatives etc.- Has failed to dislodge legal and state-based approaches from their dominant

position.

- Comes with no decision-making mechanism for the selection, prioritisation or sequencing of interventions.

Transformative alternative:

- Integrates social-political and economic approaches that promote social justice, and grassroots mobilisations.
- Demands broad participation in setting goals, making tough decisions about prioritisation, and steering process.

Institutions and fragile states

Many TJ contexts are fragile and corrupt states:

- Support institutional reform by truth commission recommendations, and judicial process that builds capacity of the legal system.
- Vetting can punish perpetrators of human rights abuses and contribute to transforming institutions.
- In TJ, none of these approaches has a strong track record e.g. vetting often weakens rather than strengthens institutions.

Transformative alternative:

- Balances pursuing wrong doers with whatever best institutionalises peace and effective service delivery.
- Principle and pragmatism will co-habit in approaches to institutions.

Economic and social rights and the causes of conflict

TJ needs to take economic and social rights more seriously:

- Economic and social rights are often prioritised by victims and local populations.
- A socio-economic focus would enhance the potential of transitional justice to address the root causes of conflict.
- Human rights has moved on to stress the equal importance and indivisibility of civil-political and socio-economic rights.
- Highlighting economic and social rights could act as a 'springboard' for the embedding of such rights in new democracies.
- TJ lacks a coordinated approach to economic and social rights and to other important issues such as horizontal inequalities, i.e. those that align with cultural, ethnic or religious identities are most likely to lead to or reignite armed conflict.

Transformative alternative:

- Reparations that maximise their impact must look at harms done and the structures underpinning such harms rather than decontextualised acts of violence.
- Role of reparations in unequal societies is not to return poor victims to poverty and discrimination (restitution), but to transform their circumstances and address the injustice that drives conflict.
- Other approaches (e.g. truth commissions, memorialisation and education) can also use socio-economic rights as a diagnostic lens on the need for transformation.

Local approaches

TJ has acknowledged tension between global discourse and contextual needs:

- Some experimentation with locally particular mechanisms with cultural resonance.
- Traditional justice with restorative element has fed 'hybrid' approaches.
- Spontaneous initiatives of communities to address local impacts, remain invisible to national processes and international audiences.
- Tendency to instrumentalise the local to national, state agendas.

Transformative alternative:

- Explores the potential for hybrid approaches, independent local initiatives and autonomous local spaces to facilitate transformative change.

Defining Transformative Justice

To devise a workable definition of transformative justice we both critique contemporary transitional justice practice (above), and look at how idealised transformation is understood in related sectors, specifically peacebuilding, conflict transformation, human rights-based approaches, work on gender, and actor-oriented approaches (below). The following table summarises the latter.

Emancipatory peacebuilding and transformation	<ul style="list-style-type: none"> - Context specific. - Participatory. - Bottom-up. <p><i>Hybrid approaches:</i></p> <ul style="list-style-type: none"> - Informal as well as formal governance. - Grounded in local culture and context, hybridised with global discourses and mechanisms.
Conflict transformation	<ul style="list-style-type: none"> - Understand conflict as normal, and a driver of change, - Importance of local resources, addressing root causes and holistic responses. - Conflict as an opportunity. - Cyclical - rather than linear – evolution to violence and conflict.
Human rights based approaches to development	<ul style="list-style-type: none"> - Developmental and socio-economic needs seen as entitlements rather than charity. - Principle-based: participation, accountability, non-discrimination, empowerment, and international human rights law. - Build capacities of rights holders and duty bearers. - Interventions defined by process, not by outcome. - Renders participants more accountable and tackles root causes.
Gender and intersectionality	<ul style="list-style-type: none"> - Physical and political violence against women in conflict are linked to cultures that limit women's rights in peacetime. - Address causes as well as the consequences and address structural and everyday violence that underlies and enables physical and political violence. - Add complexity to understandings of identity, equality and power (intersectionality); emphasise bottom-up approaches. - Move beyond the legal to include wider political and social responses.
Agency and an actor-oriented approach	<ul style="list-style-type: none"> - Rooted in everyday perspectives and local contexts. - Rights are shaped through actual struggles informed by the understandings of those claiming them. - Acknowledge and challenge inequalities linked to power and hierarchy. - Cast rights in explicitly transformative terms.

These understandings inform the definition presented on page 1.

Tools of Transformative Justice

A significant challenge facing all transformative approaches is the difficulty of translating their breadth and ambition into policy and practice. Here, we outline concrete ways in which transitional justice can become more transformative.

- ***Framing for transformation:*** For transitional justice to become more transformative will require a reframing of both the problem it seeks to address and related responses and interventions. Socio-political interventions such as truth commissions, memorials and education reform have the greatest potential to take on a transformative agenda through urgently needed reframings of socio-economic rights and continuities of conflict. The documentation of resistance – a new role for transitional justice – also has the potential to be transformative, in that resistance ‘illuminates possibilities for agency, solidarity, and innovation... and offers a more promising basis for political reconciliation’ (Leebaw, 2011).
- ***Participation in the mechanisms of transitional justice:*** Participation, and a focus on process as well as outcome, is a tool of transformation precisely because, if carried out rigorously, it is potentially *emancipatory*. Nominal and instrumental modes of participation engage victims in transitional justice mechanisms as performers (as in trials and truth commissions), but offer them little or no agency in challenging power

relations or in determining what mechanisms occur or how they are implemented: they have no transformative potential for victims. As such, transformative justice seeks a form of participation that engages with, but transforms victimhood. Transformative participation should shape all elements of the transitional justice 'project cycle', from problem analysis to evaluation, transforming both the people involved (their views, skills, levels of organisation) and their situation.

- **Empowerment beyond the mechanisms of transitional justice:** Processes of empowerment concern the 'politics of location' (Cornwall and Nyamu-Musembi 2004), necessarily shifting the context of rights-talk from the metropolis and official spaces to the communities where violations occur. Empowerment demands a move from the 'invited spaces' of institutions, framed by those who create them, to 'new democratic spaces' situated at the interface between the state and society (Cornwall and Coelho 2007), where people challenge established ways of working, and where alternatives are modelled. To be transformative and empowering interventions often have to evolve from targeting particular abuses or events, to a wider concern with social justice. In terms of the ambition of transformative justice, empowerment clearly moves beyond enhancing the efficacy of transitional justice to the potential of transitional justice to 'unleash transformative dynamics' beyond its particular spaces, times and issues of focus.

Some key questions

- What is gained by linking the notion of transformation to the concept of justice?
- If the track record of TJ is weak, should practitioners be attempting to do more or less?
- Is the right response to TJ's weaknesses reform or a more radical overhaul?
- What role should human rights play in transformative justice?
- What should be the core normative assumptions of transformative justice?
- Does transformative justice place too much faith in process and participation, and pay too little attention to institutional reform and the state?
- How can process and outcome be linked to maximise transformative potential?
- Where are alternatives to dominant discourses emerging e.g. in hybridity, or in more autonomous spaces that reject the language and terms set out by dominant approaches?

Some key texts

Association for Women's Rights in Development (AWID), *Intersectionality: A Tool for Gender and Economic Justice* (Women's Rights and Economic Change, No. 9, August 2004).

Louise Arbour, 'Economic and Social Justice for Societies in Transition,' *New York University Journal of International Law and Politics* 40(1) (2007): 1–27.

Andrea Cornwall and Celestine Nyamu-Musembi, 'Putting the 'Rights-based Approach' to Development into Perspective,' *Third World Quarterly* 25, 8 (2004): 1415-1437.

Andrea Cornwall and Vera Schattan P. Coelho, 'Spaces for Change? The Politics of Participation in New Democratic Arenas'. In Andrea Cornwall and Vera Schattan P. Coelho, *Spaces for Change? The Politics of Participation in New Democratic Arenas* (London / New York: Zed Books, 2007).

Oskar Thoms and James Ron. 'Do Human Rights Violations Cause Internal Conflict?' *Human Rights Quarterly* 29, 3 (2007): 674-705.

Bronwyn Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (Cambridge: CUP, 2011): 146

Roger Mac Ginty, *International Peacebuilding and Local Resistance: Hybrid Forms of Peace*. (London: Palgrave Macmillan, 2011).

Roland Paris, *At War's End: Building Peace after Civil Conflict*. (Cambridge: CUP, 2004).

Oliver Richmond, *Maintaining Order, Making Peace* (London: Palgrave-McMillan, 2002).

Rodrigo Yepes, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice,' *Netherlands Quarterly of Human Rights* 27, 4 (2009): 625-647.

Contact:

paul.gready@york.ac.uk
simon.robins@york.ac.uk

Centre for Applied Human Rights
University of York
Yorkshire House
6 Innovation Close, York Science Park
Heslington, York YO10 5ZF
+44 (0)1904 325830