

# **'Human Rights Politics & Transitional Justice'**

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## ABSTRACT

This paper explores transitional justice as a way to bring an end to violence and consolidate peace. It approaches transitional justice as an expression of the 'never again' consensus to prevent or prosecute crimes against humanity. It explores transitional justice as an expression of globalizing law and the implications this has for the recovery of the 'rule of law' and 'political legitimacy' in the post conflict State. It takes Robert Meister (2002)'s formulation of the politics of victimhood, revenge and resentment in the relationship between the beneficiaries and the victims of injustice, as remaining at the centre of transitional justice politics in trying to decide on the balance between reconciliation and justice projects. It explores how human rights discourse has been used to de-politicise the 'victim' by adopting an individually embodied concept of violence as opposed to a structural one. It argues that transitional justice as an expression of globalizing law has been primarily directed at maintaining peace to achieve closure on past 'evil' but that the beneficiary-victim issue has re-emerged in the social justice movements and renewed desire for prosecutions.

### **Key words:**

transitional justice, human rights, victimhood, crimes against humanity, transnational governmentality

## **Introduction**

In the post-Cold War era there has been a dramatic expansion in the global ‘rule of law’ to manage political conflict and violence through the expansion of the application of international humanitarian law and human rights law (Teitel 2002). As well as the expansion of legal institutions courts and laws, international law has increased in scope not only regulating relations between States but also regulating relations between the individual and State. An important focus of this expanded international law in regulating political violence has been the prevention of crimes against humanity. Recent cases of mass atrocities – genocide in Cambodia and Rwanda, ethnic cleansing in Bosnia, mass disappearance in Argentina and Chile – has seen an international consensus forged around ‘never again’ projects to both prevent them before they happen (and at the very least to intervene when they break out) and to prosecute crimes against humanity after they have happened to uphold international law and justice as a deterrence.<sup>1</sup> Prevention has been associated with ‘humanitarian intervention’ and prosecution with ‘transitional justice’, the recovery of the rule of law and State legitimacy and peace-making. Both have involved the development of international law to justify intervention in sovereign States to stop violence, provide security and re-establish State legal and political legitimacy.

This paper will focus on the role of transitional justice, the legal and conflict resolution strategies associated with political transition from periods of mass violence to democracy, in preventing further violence and recovering legitimate political and legal authority. It explores the judicialisation of politics under transitional justice to bring an end to violence and consolidate peace. The paper takes as its starting point Robert Meister (2002)’s proposition of the unresolved relationship between the beneficiaries of injustice and the victims of injustice in situations of political conflict. The beneficiary-victim issue has been at the centre of transitional justice politics in trying to decide on the balance between reconciliation and justice projects. For Meister (2002) the role of human rights in condemning the unreconciled victim, what he calls the ‘revolutionary victim’, represents the de-politicising of the victim. The paper examines the limits of justice by examining the issue of accountability and State legitimacy, and the limits of human rights by looking at reconciliation politics. The paper argues that the course of human rights politics associated with transitional justice reveals that the beneficiary-victim issue remains a central issue and that human rights discourse has been used to promote and individually embodied concept of violence as opposed to a structural one.

## **Transitional justice**

Transitional justice refers to a range of judicial and non-judicial responses to crimes against humanity that have occurred as a result of internal political conflict. The primary focus of transitional is the global rule of law rooted in the expansion of international law and courts, the consolidation of regional human rights courts such as the Inter-American Commission of Human Rights (IACHR) and the European Court of Human Rights (ECHR) in the context of the crisis on national sovereignty and authority. It promotes strategies to promote reconciliation and justice after mass atrocities. While transitional justice is always case-specific, it has established itself as a standard approach for the management of political transitions to democracy employing comparative lesson-learning, model borrowing as well as the actual recruitment of practitioners/professionals from other conflict settings to apply their previous experience.

But while its focus is the global rule of law, transitional justice has become an interdisciplinary field encompassing criminology, international law, sociology, anthropology, political science, psychology,

and public health concerned with the intersection of ‘democratization, human rights protections, and State reconstruction after conflict’ (McEvoy 2007: 412). The diversity of disciplinary interest reveals the competing perspectives on strategies to contain violence, heal victims and bring about social peace and the desire for global discourses to frame them. The term transitional justice refers to approaches to State accountability and the recognition and compensation of victims during political transitions to democracy, with the aim of bringing an end to conflict. Teitel (2003: 69) describes transitional justice as a discourse directed at ‘preserving a minimalist rule of law identified with maintaining peace’. Transitional justice refers to range of judicial and non-judicial strategies aimed at the rehabilitation of divided societies through the accountability to the rule of law and the recovery of the legitimacy of State authority and administration (Teitel 2000; Kritz 1995; Elster 2004; Roht-Arriaza & Mariecurrena 2006). Its core elements have included prosecutions, local truth recovery, criminal justice reform and new constitutionalism. While the popular public image of transitional justice has been the role of truth commissions in promoting healing through truth and forgiveness in practice it has largely been the business of the State concerned with strengthening itself for the delivery of justice and security (McEvoy 2007).

There is a great distance between transitional justice as globalizing law and the victims of human rights abuse whom the State has failed to protect. The connection between globalizing law and victims occurs through the former reaching down or the latter reaching up. Reaching down has taken the form of prosecutions in international criminal tribunals and, sometimes, national courts; reaching up has involved victims seeking recognition and support to take their claims to transnational human rights bodies, usually with the support of human rights lawyers, international NGOs and the global media. Reaching involves the legalization of claims and processes. From the top-down perspective of the State and its supporting infrastructure, transitional justice is about legal accountability for political crimes, law reform and national reconciliation (Clarke et al. 2008). From the bottom-up perspective of victims, transitional justice involves the pursuit of claims by victims through ‘injury narratives’ (Engel 2005), with the aim of realizing rights allocated to them as citizens. Expressing claims through a rights discourse helps to establish a ‘subject position’ as victim, to formulate claims that are based in humanity, not just citizenship, and to demand that those in authority be accountable for wrongdoings. Since rights claims usually represent a demand for justice where legal remedies are unavailable or absent, they signify a broadening of demands beyond the State and its immediate apparatus, to appeal to ‘societal accountability’ (Smulovit 2007) by gaining greater visibility through simultaneous *mobilization* (public protest), *mediatization* (informing and shaping public opinion) and national or international *legalization* (court proceedings).

The emergence of the transitional justice project represents a particular moment in the history of citizens’ struggles to realise rights. As Gledhill (2004) points out, corruption and impunity have long been the focus of protest in Latin America and did not just arise from recent political transitions to democracy after dictatorship (Gledhill 2004). However what is distinctive about this historical moment in the struggle for rights is the new relationship of the citizen to globalizing law beyond the State. On the one hand, the State becomes a partner in globalizing law through the adoption of transitional justice policies; on the other hand, individuals articulate their claims as human rights in transnational legal courts, tribunals, international human rights NGOs and in the global media. Teitel (2002: 385) argues ‘what is new in the notion that law itself can define what constitutes peace and stability internationally, and further that it could somehow displace politics to resolve international conflicts.’

‘Transitional justice’ has been a strategy to manage ‘political transition’ which suggests duration, process and destination. As a consequence the study of transitional justice has usually been framed as a dramatic, temporary and transformative event. It has been conceived as having the structure of a rite of passage in which transition is a liminal stage from one social status to another (van Gennep 1977). Hence the victim-centred truth commission has frequently been analysed as a dramatic ritual (Borneman 1997; Feldman 2002; Humphrey 2002, 2003; Wilson 2001, 2003). However with a longer perspective on the outcomes of transitional justice strategies now available – the first truth commission was held in Argentina in 1983 (Teitel 2003)<sup>2</sup> – the dramatic aspect of transitional justice is better understood as a stage in a more protracted process involving ongoing State reconstruction, law reform, trust building, reconciliation and justice. The initial period of political transition assumes a different significance in the light of the ongoing problems democratizing States have faced in trust in State institutions, especially law and policing. Teitel (2003) goes as far as to describe transitional justice as having become a normalized condition of global politics expressed in the creation of the permanent International Criminal Court to prosecute ‘crimes against humanity as a routine matter under international law’ (Teitel 2003: 90). Duffield’s (2001) concept ‘global liberal governance’ – the idea of transnationally networked governance through international NGOs, international agencies, business and the State to manage failed States - suggests a similar normalisation of the management of conflict in the context of diminished sovereignty and the resort to political violence. The protracted character of transitional justice points to the difficulty in politically separating off the past and re-establishing State legitimacy through legal processes.

### **law and State legitimacy**

The recovery of the rule of law is a key strategy in transitional justice. However, the proposition that the rule of law is able to confer legitimacy on the State has been problematized by anthropologists. They have argued that the dominant paradigm of law as rational and neutral is ideological more than analytic. The State invokes the authority of law ‘to make things definite within the continuous flow of uncertainty by imposing itself from the outside’ (Asad 2004: 287). Legality has assumed a dominant role in formulating and thereby giving visibility to what is to be governed and how it is to be governed (Rose et al. 2006). But for citizens, for whom the State and law are usually distant and abstract, law oscillates between ‘rational’ and ‘magical’ modes (Das 2004). Law as fetishism conjures up the belief that legal instruments can produce social harmony, legal language can construct facts and language, diversity and difference can be transacted in a universal discourse, and the State can employ law as an instrument of governance to represent itself ‘as the custodian of civility against disorder’ (Comaroff & Comaroff 2000: 329). This has led anthropologists to argue that sovereignty lies not so much in the application of laws and regulations, but in State ritual spectacles and performance (Das 2004; Comaroff & Comaroff 2000). The State is brought into being for citizens through a ‘social imaginary’ of it. Hence, Comaroff & Comaroff (2000: 529) argue, democratization and the rule of law offer the ‘magical capacity to promise new beginnings.’ The rule of law is as much about generating order as conferring legitimacy on State authority.

However, the recovery of State legitimacy through the ‘rule of law’ is being constrained by the impact of globalisation on State sovereignty and the State–citizen relationship (Merry 2006). Gupta & Ferguson (2002) have coined the term ‘transnational governmentality’ to describe the extent to which States both remain territorially sovereign and inclusive of their populations and incorporated within transnational mechanisms of governance. They argue that sovereignty has been displaced upwards and

downwards, and that State-like functions are being assumed by supranational bodies and international NGOs. Consequently, the State–citizen relationship is being increasingly reconfigured by transnational governmentality, with globalizing law mediating the State–citizen relationship. The displacement of sovereignty upwards and downwards has served to reinforce the idea of the State/civil society divide, in which society is seen as in need of protection from the State as well as legitimating external intervention against it. This has become particularly apparent in States that are in crisis, where the disarticulation of citizenship and State has produced global networked management of conflict arising from international intervention in and support for ‘civil society’, often against the State (Duffield 2001). The phenomenon of transitional justice is a particular instance of transnational governmentality from above, seeking to establish the global rule of law as a decentred source of international authority.

Transitional justice can also be understood as an expression of the globalisation of regulation. The regulatory State based on governance through rule regulation first developed in the United States and the Europe Union (Shore 2006), and subsequently exported globally. It is characterized by the division between State and society, increased delegation, new technologies of regulation, self-regulation in the shadow of the State, and the supervision of experts (Levi-Faur 2005). Governance through rule regulation has expanded globally to manage different kinds of uncertainty and risk and to promote trust and security (Espeland & Vannebo 2007). Braithwaite (2000) calls this preventive government or ‘prudentialism’. Significantly, governance through rule regulation is no longer confined to States but has become transnational.

Transitional justice as ‘prudentialism’ represents not so much the recovery of sovereignty but a strategy for global risk management of political conflict through the judicialization of international relations. International law is used to manage risk, promote trust, and make authority legible. Teitel (2002) argues the present expansion of international law represents a ‘new international legalism’, which has emerged from the greater institutionalization of international law and the weakened State, especially transitional ones. Justice beyond the State draws upon transnational law from above and on the promotion of programmes of local community restorative justice from below. In the language of the regulatory State, reliance is on local risk management through ‘self-regulation among communities of shared fate’ (Braithwaite 2000).

### **Human rights discourse and victimhood**

Transitional justice is an expression of attempts to achieve the global regulation of political violence, especially the prevention of and protection against crimes against humanity (Teitel 2003). It is the most recent ‘never again’ project – the historical attempts to stop atrocities happening - focused on the protection of victims of gross human right violations. This global politics of human rights is based on a growing international consensus to prevent atrocities as an ‘incontestable evil’ (Meister 2005: 1). From the top-down perspective transitional justice has been about the recovery of the rule of law and State legitimacy, from the bottom up the realization of the human rights of victims.

At the centre of this human rights discourse is the suffering victim. However this ‘victim’ is not merely a bearer of unrealized rights but also viewed as a political agent potentially motivated by the politics of revenge or resentment towards the perpetrators and the beneficiaries of past injustice. These feelings constitute an individually embodied violence that needs to be managed in order to prevent further violence. The politics of transitional justice, Meister (2002) argues, has involved de-politicising the

victim. In the politics of victimhood the victim is faced with a choice about ‘what to do with their grief: should it be harnessed as the politics of grievance or suppressed as the politics of resentment?’ (Mesiter 2002: 93). The project of liberal transitional justice has been to distinguish between perpetrators and beneficiaries of injustice by individualising crimes and then to reconcile the beneficiaries of past injustice and victims of past injustice by producing a consensus that the ‘evil’ is in the past. The thrust of this strategy is based on stopping the victims of injustice continuing to think of themselves as victims. This effectively splits the ‘evil’ of the past regime into the innocent and the guilty, the beneficiaries of ‘evil’ and victims of ‘evil’ on the one hand and the perpetrators of ‘evil’.

For Meister (2002) transitional justice continues the earlier twentieth century revolutionary and counter-revolutionary perspectives on the victim and victimhood in these internal political conflicts. The revolutionary perspective saw 'social suffering and the struggle to overcome it' as virtuous. In other words, the revolutionary project continues after victory through ongoing efforts to deny beneficiaries of past injustice the right to retain those benefits. By contrast, the counter-revolutionary perspective was defined by the fear 'that these victorious victims would come to exercise a militant and punitive form of rule' (Meister 2002: 93). They believe the beneficiary-victim relationship engendered a morally damaging victimhood, which would not allow for reconciliation. The challenge of transitional justice has been conceived of as balance, something ‘if practiced in just the right amount, and with just the right degree of restraint, can bring about a cultural transformation that will leave liberal democracy secure’ (Meister 2002: 94). This calibrated justice has been at the heart of reconciliation politics in which the beneficiaries and victims are the central players and partners.

Even where trials and truth commissions have appeared to be successful transitional justice has effectively reinstated the counter-revolutionary project – it reassigns ‘political responsibility for past injustice from the larger collectivities that benefited to the individuals who implemented the old regime’s policies’ (Meister 2002: 94). This distinction between perpetrator and beneficiary is presented as being required by the ‘rule of law’. What it offers the victims is a moral victory based on their ability to reconcile with the beneficiaries of past injustice. By being able to put their victimhood in the past they appear as ‘undamaged’ victims – i.e. not wanting to continue to seek revenge beneficiaries of past injustice. The beneficiaries (the counter-revolutionaries) are thereby reassured that the victims are ‘morally undamaged (“they didn’t hate us after all”) that there is no longer a reason to condone, or deny, past acts of repression’ (Meister 2002: 94).

In South Africa the role of the Truth and Reconciliation Commission was to define how the evil of apartheid had been morally defeated. ‘The past suffering of victims could be honoured as a claim to moral victory precisely insofar as they were willing to accept moral victory as victory enough, and to forego the demands of revolutionary justice’ (Meister 2002: 95). In human rights discourse distributive justice has been off the agenda except as ‘reparation’, which has usually consisted of symbolic acknowledgement more than remedies for past suffering. Certainly restorative justice in which perpetrators contributed to undoing the harm they had caused has not been seriously canvassed. The objective of the Truth and Reconciliation Commission of South Africa (TRC) was effectively to ‘de-politicise the unresolved victim-beneficiary issue’ and represent it as ‘superseded by a moral consensus on the *means* used to resolve them: violent or non-violent, constitutional or “terrorist”’ (Meister 2002: 95). The construction of ‘evil’ (the evil of apartheid) as something that can be put in the past also reinforces this de-politicising of the victim. Thus ‘unreconciled victims who continue to demand

redistribution at the expense of beneficiaries will be accused of undermining the consensus that the evil is past; it also means that continuing beneficiaries who act on their fears that victims are still unreconciled will be accused of undermining the consensus that the past was evil by “blaming the victim” ((Meister 2002: 96). Moreover the politics promoted – human rights culture, civic activism – is conceived as preventing ‘past evil’ from returning. Yet the litigation initiated by the South African Kulumani Victim Support Group in New York in 2002 reveals the disturbance unreconciled victims can produce for the post-apartheid, post-reconciliation State. Kulumani filed claims under the Alien Tort Claims Act against corporations who they allege aided and abetted the apartheid State. The ANC government’s response was to oppose the legal actions as a threat to the national economy and undermining the good relationship they had established with global corporations (Bond 2008).

The social justice orientation of contemporary post-apartheid human rights politics reveals how in fact the beneficiary-victim issue remains unresolved, despite the rhetoric of closure on the past. The enormous expansion of human rights activities in post-apartheid South Africa, and in fact in many post-transition States, is a response to the legacy of structural inequality produced under apartheid and the new neo-liberal democratic compact between the State and international business undermining any prospective to recover a redistributive developmental State (Humphrey & Valverde 2008). This represents a combined protest that the evil of apartheid (at least its consequences) is not in the past and that redistribution was the expectation of the victims (of the system of apartheid) in the post-apartheid State. Perhaps the victims did not really grasp that the consensus forged on the moral meaning of the past through the TRC came at the cost of forfeiting future claims.

## **Conclusion**

Transitional justice is an expression of the judicialisation of international relations which has both prevention and prosecution aims. It represents the promotion of the global ‘rule of law’ in the management and regulation of political conflict and violence. Thus international humanitarian and human rights law has been instrumental in forging the international consensus around the prevention of crimes against humanity, the latest expression of which is the R2P (“responsibility to protect”). The role of human rights politics has been vital in making visible crimes against humanity and putting pressure on governments to be made accountable for their actions. However the use of human rights discourse in constructing claims and framing the subject position of victim in the transitional justice project has resulted in the victim being redeemed for a new moral consensus to permit political compromise. As Meister (2002: 95) argues, human rights discourse has shifted from ‘an aspirational ideal to an implicit compromise’ in which victims of past injustice are offered ‘a moral victory on the understanding that the ongoing beneficiaries get to keep their gains without fear of “terrorism”.’

Two issues have surfaced in post-mass violence societies, which might suggest transitional justice is a tactic of the State, a ritual performance to enact new beginnings, rather than an actual closure of the evil past. These are the rapid expansion of human rights politics in the direction of social justice issues and the ongoing demands for accountability and the new prosecutions of perpetrators in those States that had closed the investigation of the past through amnesty laws. In other words, the beneficiary-victim issue has only been temporarily de-politicised through transitional justice strategies because of the legal focus on the perpetrator-victim relationship.



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## Notes

<sup>1</sup> While crimes against humanity are commonly associated with transitional justice, R2P crimes also include genocide and war crimes, each with distinct legal definitions in the Rome Statute.

<sup>2</sup> The Argentine National Commission on the Disappeared (CONADEP) was not called a 'truth commission' nor was its aim to promote reconciliation.

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