From Transitional to Transformative Justice: A New Agenda for Practice

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Abstract

Transitional justice has become a globally dominant lens through which to approach states addressing legacies of a violent past. An industry of praxis has emerged, supported by dedicated nongovernmental organizations and large-scale funding from western donors. Yet, the performance and impact of transitional justice mechanisms have been at best ambiguous and at times disappointing. This article proposes a new agenda for practice, one that offers a concept of justice that is more ‘transformative’ than ‘transitional.’ The article starts by setting out the limitations of transitional justice, and recent responses to these limitations in transitional justice practice. A definition of transformative justice draws on this discussion as well as insights from related fields such as peace building and conflict transformation. A final section of the article, on tools for transformative justice, provides practical guidance on how to implement a more transformative transitional justice.

Keywords: transformative justice, structural violence, human rights, participation, empowerment

Introduction

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 state building. From its beginnings as a largely legal approach to human rights violations committed by departed regimes, understandings of transitional justice have expanded to encompass state-led
practices such as trials, truth telling, institutional reform and reparations processes. An industry of praxis has emerged, supported by dedicated nongovernmental organizations (NGOs) and large-scale funding from western donors. Yet, the performance and impact of transitional justice mechanisms have 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.’ This agenda also provides an alternative approach to dealing with state fragility, conflict and security. 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 article focuses on the potential for transformative justice during political transition, and specifically whether transitional justice can provide a platform for transformative change. Transformative justice is defined as transformative change that emphasizes local agency and resources, the prioritization of process rather than preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level.

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. Similarly, the tools of transformation will not be restricted to the courts and truth commissions of transitional justice, but will comprise a range of policies and approaches that can impact on the social, political and economic status of a large range of stakeholders.

The article sets out the limitations of transitional justice, and recent responses to these limitations in transitional justice practice. A distinction is made between foundational and secondary limitations. The former – the liberal peace and top-down, state-based approaches – remain largely unchallenged and condition the way in which practice evolves and responds to criticisms, such as through attempts to adopt more ‘holistic’ approaches or address socioeconomic rights. As such, reforms encounter secondary limitations and fall short of transformative justice. The proposed definition of transformative justice draws on this discussion as well as insights from related fields such as peace building and conflict transformation. A final section of the article, on tools for transformative justice, provides practical guidance on how to implement a more transformative transitional justice.

Inevitably, fitting this degree of ambition into an academic article

2 UN, Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice (2010).
3 The article draws on previous work by its authors, notably, Paul Gready, The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond.
requires compromise – the article presents an argument that is provisional and at this stage largely theoretical. A thicker description with regard to references and case studies will follow.

**Limitations of Transitional Justice – and Relevant Responses**

In this section, we examine the contemporary discourse and range of practices of transitional justice, demonstrating the constraints on current approaches (secondary limitations) and tracing these to the foundational limits of transitional justice discourse. Many of the deficits of current approaches to transition arise precisely from their inability to effect transformative change: these shortcomings will be used to distil criteria and definitional elements of transformative justice.

**The Foundational Limitations of Transitional Justice**

Transitional justice has been disseminated as an integral part of the globalization of a set of human rights norms linked to liberalism and neoliberalism. Transitional justice has become part of a hegemonic discourse that links development and peacebuilding to a liberal statebuilding project that sees liberal democracy as its endpoint. This article argues that this approach has certain foundational limitations, meta-processes that inform interventions and outcomes and the unquestioned assumptions of the transitional justice industry. Here, two foundational limitations, the liberal peace and top-down, state-based processes, are discussed, and in the section that follows the implications for practice and the resulting constraints on the transformative potential of transitional justice are outlined.

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, neoliberal economics, with interventions linked to the ‘Washington Consensus.’

In several contemporary settings (e.g., Afghanistan, Iraq), this template is augmented by often highly illiberal counterinsurgency or security measures. The liberal peace has been widely criticized in fragile transitional contexts for prioritizing the creation of institutions over a contextualized engagement with the welfare of the population, creating ‘empty’ institutions paralyzed by a lack of capacity rather than responding to the everyday needs of the new state’s citizens.


Transitional justice fits too neatly into this paradigm, most notably because it too has prioritized 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. With democracy and statebuilding reduced to a liberal template, the question is whether transitional justice has become the conscience of transitional globalization without troubling its essential characteristics.

The ‘state of the art’ in contemporary peacebuilding and statebuilding discourse is provided by the 2011 ‘New Deal’ for engagement in fragile states. While definitions of fragility remain contested, fragile states are defined in the New Deal as those that ‘lack the capability and/or the willingness to progressively promote the shared development of their citizens and are particularly vulnerable to external shocks and internal conflicts.’ The New Deal is an effort to create international partnerships for fragile states (i.e., with rich, stable states in the global North) to ‘pull them out of low-development–high-conflict traps.’ It contains five goals for peacebuilding and statebuilding, namely the promotion of: legitimate politics, security, justice, economic foundations and revenues and services. Many of the New Deal’s goals are crucial to transformation, notably the concept of ‘country-owned transitions.’ This language, however, is undermined by policy that emphasizes enhanced productivity and the role of the private sector as at the heart of development, couched in terms of ‘aid effectiveness,’ and which remains hostage to an entirely state-centred paradigm in which building the institutions of the state and building peace are considered largely equivalent. This is exactly the politics that has seen transitional justice practice, and the liberal peace in which it is embedded, fail in fragile states. This reveals the potential value in ensuring that justice is an integral component of approaches to fragile states, not purely in terms of accountability for crimes but also in terms of social justice. As a result of enduring poverty and marginalization, some states have remained fragile even while graduating to middle-income status, demonstrating the importance of ending inequality and injustice.

A second and related foundational limitation is that the success of transitional justice as a global political framework has led to its practice being dominated by an elite international professional and donor network rather than locally rooted movements. Repeated calls for local control and adaptation should not overlook

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7 Ibid.
the power that an industry such as this has to influence the repertoire of options imagined and donor funding. Some observers are surprisingly sanguine about this reality.10

In addition to the transitional justice agenda being externally driven in many contexts, 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, as 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. Furthermore, privileging discourse that is often alien to victims, such as the predominantly legal discourses of transitional justice, can empower elites and outsiders at the expense of victims, particularly the most disempowered, who have both the greatest need for and least access to the language of rights. This is an articulation of the fact that in a state where only elites know what rights are, they can become something that is largely claimed on behalf of victims rather than by victims themselves. As Tshepo Madlingozi notes,

Understood in this way the human rights discourse is actually often detrimental to the empowerment of victims as it produces a lack of agency . . . Despite all the talk about victim empowerment then, the victim produced by transitional justice NGOs and others in the international human rights movement is a hapless, passive victim dependent on NGOs and others to speak for her and argue her case.11

Contemporary Practice and Secondary Limits to Transitional Justice

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. Here, some of these efforts are discussed and used both to demonstrate the limits to their transformative potential and to point to how a genuinely transformative justice should be defined.

The Normative versus the Empirical Basis for Transitional Justice

Transitional justice remains normatively driven, with empirical traditions rooted in the study of transitional mechanisms through a normative idealism (‘human rights are universal,’ ‘interventions will lead to liberal democracy’) or a largely descriptive approach, rather than in research that uses observation to accumulate


evidence for or against theory.\textsuperscript{12} Empirical research needs to go beyond narrowly framed surveys of what kinds of transitional justice interventions local populations and victims want,\textsuperscript{13} or equally narrow impact assessments of institutional mechanisms, to provide a more open-ended assessment of priorities among wider populations and extending to societal and social responses.\textsuperscript{14} While high-quality empirical research on transitional justice processes exists, it has not substantially impacted on practice. A transformative approach will need to be context dependent, driven by the local and particular understandings of rights in any context and consider the diversity of understandings that might exist. It will challenge a purely normative approach with a base of evidence.

\textit{‘Holistic’ Definitions}

As the practice of transitional justice has spread, so definitions have broadened, with a growing tendency to adopt holistic understandings.\textsuperscript{15} These may include not only criminal prosecutions, truth telling, institutional reform and reparations as core interventions, but also commemorative practices and memory work, educational reform, reconciliation initiatives and more. Such ambition provides connections between transitional justice and broader notions of peacebuilding and postconflict reconstruction. A holistic approach is one that treats all rights as universal, interdependent and indivisible and situates violence on a continuum that spans interpersonal and structural violence, rather than simply focusing on acts of political violence. Such understandings have driven the broadening of transitional justice approaches, moving beyond legal and institutional responses to include wider political and social processes, and integrating official, top-down mechanisms and unofficial local initiatives. These trends mark a shift from substitution to complementarity, acknowledging that interventions may be mutually constitutive. For example, while in the past it was often assumed that truth commissions would be a compromise where trials could not take place, now it is argued that the two can, and should, coexist.\textsuperscript{16} The holistic prism also seeks to avoid dichotomies, such as the peace versus justice dichotomy, by arguing that justice should include both judicial and nonjudicial measures and look to the


\textsuperscript{15} E.g., Eric Stover and Harvey Weinstein, eds., My Neighbor, My Enemy: Justice and Community in the Aftermath of Atrocity (New York: Cambridge University Press, 2004).

future as well as to the past by including reform of the security and judicial sectors and indigenous or community-based accountability processes.\(^{17}\)

This holism has not been transformative, however, because it has not dislodged legal and state-based approaches from their dominant position, and because it comes with no decision-making mechanism for the selection, prioritization or sequencing of interventions in the context of finite resources and delicate political dynamics. Transformative justice should be holistic in seeking to use a far wider range of approaches, and will expressly integrate both social and economic policy that promotes social justice, as well as grassroots-driven approaches that impact directly on communities. It will also have to question the process by which goals are set and mechanisms initiated. A transformative approach is likely to demand broad participation in steering process.

**Institutions and Fragile States**

As the context of transitional justice is increasingly fragile states, and justice, security and development agendas have converged, strengthening institutions as one element of a holistic approach becomes both imperative and hugely challenging. Institutional reform can be supported by truth commission recommendations (e.g., around issues of corruption) and by a judicial process that seeks to build the capacity of the legal system. Vetting can punish perpetrators of human rights abuses and contribute to transforming institutions.

None of these approaches, however, has a strong track record. For example, where vetting has been attempted, the challenges are indicative of the difficulties of reform under conditions of fragility,\(^{18}\) and recent examples have seen vetting abused as a political tool against certain constituencies.\(^{19}\) In fragile states, there is a tension between a strong focus on human rights that targets reform of the security and judicial sectors and the need to ensure service delivery. There is a further tension between legitimacy and capacity: Is it better to have tainted institutions that still basically work or purer institutions that essentially do not?

A transformative approach will need to balance pursuing wrongdoers with whatever best institutionalizes peace and effective service delivery, and as such it is likely that principle and pragmatism will cohabit in approaches to institutions. But it will also question the prevailing models of peacebuilding and state-building, championing institutional reform to address local needs rather than reform aligned with external security and neoliberal economic agendas.

**Economic and Social Rights and the Causes of Conflict**

Commentary on transitional justice and socioeconomic issues also emerges naturally from a holism that seeks to confirm the indivisibility of all rights, as well as a

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practice that claims to address the roots of conflict. However, impacts have to date been limited because transitional justice mechanisms have not usually investigated structural inequalities that underpin poverty and conflict, nor provided remedies, redress or accountability for economic and social rights violations. While contributions to the debate about transitional justice and developmental concerns have increased, they have been thin on conceptual inspiration and had only modest impact on practice.

There are several reasons why transitional justice needs to take economic and social rights more seriously. First, economic and social rights matter because they are often prioritized by victims and local populations. Second, a socioeconomic focus would enhance the potential of transitional justice to address the root causes of conflict, as discussed further below. Third, the human rights field itself has moved on to stress the equal importance and indivisibility of civil-political and socioeconomic rights. An example in the transitional justice sphere is that impunity for violations across these categories of rights can clearly be mutually reinforcing. Finally, highlighting economic and social rights could act as a ‘springboard’ for the embedding of such rights, and a fuller conception of justice, in new democracies.

How transitional justice should work on economic and social rights has received little attention. The truth commissions in Liberia, Peru, Sierra Leone, Timor-Leste and Kenya investigated and made recommendations on economic, social and cultural rights. The report of the Kenyan Truth, Justice and Reconciliation Commission (TJRC), for example, states,

Historical grievances over land constitute the single most important driver of conflicts and ethnic tension in Kenya. Close to 50 percent of statements and memorandum received by the Commission related to or touched on claims over land.

Despite this, the TJRC’s recommendations relating to land are restricted to technical points that target the National Land Commission and ignore redistribution and tenure reform. This illustrates how in transitional justice practice social and

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22 E.g., Robins, supra n 3.
economic rights are often narrowly framed and divorced from broader policy debates.

The transitional justice mechanism with the greatest potential for socio-economic impacts is reparations, which can offer both corrective and distributive justice. To maximize the impact requires that reparations look at harms done and the structures underpinning such harms, rather than at decontextualized acts of violence, and understand that the role of reparations in unequal societies is not to return poor victims to poverty and discrimination but to transform their circumstances and in so doing address the injustice that drives conflict.

In this regard transitional justice encounters significant limitations. In both the legal judgments around reparations and practice more broadly, there is caution in venturing beyond restitution and also a danger that reparations become a substitute for development. Among the challenges facing collective reparations are how to define the target group (narrow groups of victims or entire local populations); how to avoid discriminatory and exclusionary development that could fuel future conflict; what roles the state, donors and other actors should play; and what the difference is between reparations and the requirement that a state deliver basic services. In Colombia, this tension has been encapsulated as, ‘Must our communities bleed to receive social services?’ Pamina Firchow argues that in the Colombian case, short-term, reparative project funding occurred in the absence of a comprehensive development policy.

An additional and related reason to prioritize social and economic concerns is research which suggests that armed conflict results from a combination of factors that include inequality, poverty, exclusion and marginalization, as well as a broader absence or weakening of social cohesion in a society. It is however the nature rather than the extent of inequality that determines the likelihood of violent conflict, with horizontal inequalities – that is, those that align with cultural, ethnic or religious identities – more likely to lead to violence. Often forms of inequality, exclusion and marginalization interact and compound each other: unequal access to land and natural resources, for example, is linked to a lack of access to power and decision making. Grievances due to actual or perceived exclusion based on a collective identity can foster group mobilization and fuel violent conflict.

29 For a legal judgment that frames reparations as transformative redress rather than restitution, see, González et al. (‘Cotton Field’) v. Mexico, Inter-American Court of Human Rights (ser. C) No. 205 (16 November 2009).
31 E.g., Dan Smith, Trends and Causes of Armed Conflict (Berlin: Berghof Research Centre for Constructive Conflict Management, 2004).
At present, transitional justice mechanisms do little to map or address horizontal inequalities as a cause of violence. To prevent the reemergence of conflict it will often be necessary to target the grosser aspects of social exclusion and address basic needs. This is a test of the limits, assumptions and methodologies of transitional justice as victims seek to confront the poverty and marginalization of the past, rather than return to it through a purely restitutive process.

A transformative justice approach will prioritize socioeconomic rights as key to addressing local needs and preventing future conflict. In doing so, the focus will be on intersections between economics and power, on discrimination and exclusion and on changing the future rather than returning to the past.

**Continuities of Conflict**

Violence in myriad forms is now widely acknowledged to be a characteristic of transitional societies. Explanations for such violence include both the ruptures in dominant political and economic arrangements caused by ‘conflicts over liberalization’ and related conflicts over the terms of accumulation and distribution of wealth. This leads to a continuum of violence in late capitalist transitions, from the enduring structural violence of poverty, inequality and discrimination to weak states with an inability to secure a monopoly over the means of violence.

In short, a key challenge for transitional justice is the fact that transitional moments and democratization processes – that is, precisely the times when transitional justice is discussed and implemented – are likely to be characterized by high levels of violence. Graeme Simpson has argued that the evaluation of transitional justice mechanisms, such as the South African Truth and Reconciliation Commission, must be placed in the context of the linked challenges posed by justice in transition and violence in transition. He argues that patterns of violence and social conflict are reconfigured and redescribed during political transition rather than brought to an end. In essence, the past returns in the future, but in forms that transitional justice mechanisms often fail to anticipate.

To catalyse transformation, transitional justice should anticipate both that social conflict will play itself out in different ways in the future and that violence and conflict that may appear new is often both historically informed and rooted in ongoing experiences of social marginalization, political exclusion and...
economic exploitation. This implies that transformation will require new framings of how violence is perceived and tackled.

**Local Approaches**

The ongoing tension in transitional justice practice between a global discourse that often appears mimetic and prescriptive and contextually contingent needs in transitional societies has encouraged debate about localism and the need for locally particular mechanisms with cultural resonance. Timor-Leste’s Community Reconciliation Process was an element of a national truth commission that took place in communities and engaged traditional leaders, while Rwanda’s gacaca courts provided a retributive process adapted from traditional practice. In both cases, however, the interventions have been critiqued as being a coopting of traditional process, with little connection to authentic practice. Nevertheless, the need to engage with traditional justice processes, most typically with a restorative element, has been increasingly discussed, resonating with understandings of ‘hybrid’ approaches to peacebuilding. One aspect of local efforts to address legacies of violence that remains underexplored is the spontaneous initiatives of communities to address local impacts, which are often invisible to national processes and international audiences. Another underexplored area is the diverse range of relationships between local, informal mechanisms and national, official mechanisms. Finally, it is important not to romanticize the local, which can be a site of competing victims’ claims, discriminatory practices (e.g., against women) and low capacity.

The limits to localism in transitional justice appear to be set by approaches that prioritize institutional change and often instrumentalize local conflict resolution to serve national, state agendas. Transformative change should be locally driven because such change is most likely to be informed by the local and particular needs of people in communities where legacies of violence play out. Securing popular access to and participation in all aspects of transitional justice processes (design, implementation, evaluation), and encouraging culturally resonant mechanisms that resist global models, can be seen as an opportunity to challenge a range of exclusions and power relations at both the local and the international level.

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This section has outlined how transitional justice has adapted to critiques and evolved over time but fallen short of delivering transformation. Transitional justice has not critiqued the globally dominant practices of which it is a part, hence its foundational limits. Constraints on current approaches (secondary limitations) can be traced back to transitional justice’s foundational limits, the liberal peace and top-down, state-based approaches. Global norms are too one-dimensional and remote to trigger transformative change; holistic responses and institutional reform are necessary, but remain slogans without a strategy; framings of socio-economic remedies and violence/conflict are narrow, and interventions as a result constitute an impoverished form of redress rather than transformative change; and, finally, localism is too often instrumentalized to ‘higher’ objectives. From this discussion, it is clear that transformative justice requires more.

Defining Transformative Justice

To devise a workable definition of transformative justice, we both critique contemporary transitional justice practice and look at how transformation is understood in related sectors, specifically peacebuilding, conflict transformation, human rights-based approaches to development, work on gender and agency and actor-oriented approaches. A handful of attempts have been made to define and champion transformative justice in the transitional justice literature. It is indicative of the lack of clarity about the term that authors adopt starkly different points of reference when defining transformative justice – peacebuilding, reconciliation and restorative justice. The survey of how transformation is defined in related fields is illustrative rather than exhaustive – insights could also have been gleaned from social movement theory or liberation theology, for example – but it indicates a striking convergence in the characterization of certain core elements of a transformative approach. As such, these points of convergence are presented as a starting point for a definition of transformative justice.

Peacebuilding and Transformation

As a future-oriented approach to the past, an ultimate aim of transitional justice is to create the conditions for a sustainable peace, and in this sense it is an intrinsic part of peacebuilding. Contemporary definitions of peacebuilding see its role in terms of ‘sustainable peace and development,’ differentiating between the absence of conflict in which the conditions that caused violence remain and a positive peace that eliminates the causes of violence, focussing on broad social

injustice and exclusion. The shift towards a positive peace echoes the demands of transformative justice.

The liberal peace is a peace ‘from above,’ imposed by the powerful according to a global prescription that serves to reinforce existing hierarchies of power and neglects the social, economic and political needs of those most affected by conflict.46 The transformative alternative proposed by those critiquing this approach is an emancipatory peacebuilding, rooted in the lives of ordinary people:

Emancipatory postconflict peacebuilding...would reflect what a majority of the population needed after mass direct violence has been checked. And, rather than the locus of such discussion involving solely elite institutional democratization, it would be concerned with matters identified by the population, from below.47

The lessons for transformative justice from emancipatory approaches to peacebuilding are that prescriptive and mimetic approaches to transition should be jettisoned in favour of those that are context specific, participatory and bottom-up – what John Paul Lederach has called ‘elicitive’.48 Given that national change is a prerequisite for transformation in many contexts, the processes likely to emerge from such an emancipatory approach to transition will necessarily be hybrid in nature, dependent upon informal as well as formal governance, grounded in the cultures and context from which they emerge, and more or less hybridized with global discourses and mechanisms. Examples of hybrid peacebuilding are dominated by those where indigenous approaches have either resisted or complemented nationally driven efforts.49

Conflict Transformation

While definitions of conflict transformation vary, conflict is usually understood as normal and as a potentially positive driver of change. It is seen as a process, not an event, that draws on local resources. The approach focuses on immediate problems as well as underlying causes, short-term gains as well as long-term perspectives. Such an approach is holistic, operating at various levels (personal, relational, structural, cultural).50

Conflict transformation is a comprehensive approach, addressing a range of dimensions (micro- to macro-issues, local to global levels, grassroots to elite actors, short-term to long-term timescales). It aims to develop capacity and to support structural change, rather than to facilitate outcomes or deliver settlements. It seeks to engage

46 E.g., Oliver Richmond, Maintaining Order, Making Peace (London: Palgrave Macmillan, 2002).
with conflict at the pre-violence and post-violence phases, and with the causes and consequences of violence conflict, which usually extend beyond the site of fighting.\textsuperscript{51}

This approach emerged from changes in the nature of conflict, several of which are relevant to transitional settings, such as modern conflicts being characterized by inequalities of power and status and being protracted, moving in and out of violence and shifting between different forms of violence.\textsuperscript{52} The breadth of conflict transformation’s ambition is characteristic of all transformative approaches, for which the key challenge is how to translate this ambition into practice.

While the fields of conflict transformation and transitional justice have seen minimal exchange,\textsuperscript{53} transitional justice can learn from conflict transformation the importance of using local resources, addressing root causes and adopting holistic responses, and from the insights it provides into conflict as an opportunity and as cyclical rather than linear in its evolution.

### Human Rights-Based Approaches to Development

A recent convergence of development and human rights has been brought about by work on economic and social rights, human rights-based approaches to development (HRBAs) and the right to development.\textsuperscript{54} This section will focus on HRBAs in the belief that they have both practically feasible and potentially transformative lessons for transitional justice. A diverse range of HRBAs have been adopted by a large number of intergovernmental organizations, NGOs and grassroots and social movements,\textsuperscript{55} rooted in the conviction that developmental or socioeconomic needs should be defined as entitlements rather than through the prism of service delivery or charity. Interventions are defined by two core components: the PANEL principles of participation, accountability, nondiscrimination, empowerment and international human rights law, and a focus on building the capacity of rights holders to claim rights and duty bearers to meet their obligations.

There are a number of ways in which this approach could be incorporated into transitional justice to render it more transformative. First, the priority is on process, rather than predetermined outcomes. The PANEL principles inform how interventions should take place, leaving the outcomes to be largely determined through the process itself, and specifically a reconfigured understanding of process.\textsuperscript{56} Rights-based participation can be seen as rejecting a technical and

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\textsuperscript{52} Ibid.


\textsuperscript{56} It is important to note that the meaning of these principles remains contested. E.g., on participation, see, Bill Cooke and Uma Kothari, eds., Participation: The New Tyranny? (London: Zed
managerial approach in favour of a focus on advocacy and mobilization that can allow participation to be empowering, for example for victims of rights abuses, and thus to challenge power relations. Additionally, by working with duty bearers and rights holders HRBAs suggest a way of overcoming both the challenge of interventions being exclusively top-down and of locally informed initiatives not being scaled up in a manner that is necessary if they are to transform structures beyond the local. Working with both sides of the rights equation, and building complementary capacities, can create multistakeholder platforms for dialogue about how rights are understood and what interventions are most appropriate.

Proponents of HRBAs also argue that these approaches have enabled development organizations to reorient their work to address the deep-rooted inequalities, exclusion and unequal power relations that underlie poverty. An HRBA to transitional justice could therefore reconfigure processes and build complementary capacities to effectively make use of such processes, rendering participants more accountable and tackling root causes.

HRBAs do present some challenges. The evidence base for their impact is thin, and a focus on process can lead to challenges to power remaining local and fragmented, rather than systemic and transformative.

**Gender and Transformation**

Critiques of the neglect of the social in transitional justice, which has emphasized public violence perpetrated by or at the behest of the state or its political opponents, resonate with feminist discourse that has long held that the distinction between the public and the private depoliticizes the domestic space. This has led to the marginalization and invisibility of everyday violence perpetrated against women, notably violence occurring in families and communities, in contrast to an approach that seeks to reconceptualize justice on the basis of women’s lived experience. The literature and practice around gender issues in transitional justice emphasize sexual violence against women, and more particularly judicial processes to address such violations. This discourse reduces women to their injury in a violation- and perpetrator-centred way, rather than discussing the gendered power relations that lead to violations. Physical violence against women in times

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of conflict and violence is intimately linked to cultures that limit women’s rights in peacetime. Tackling the causes as well as the consequences of such physical violence demands addressing the structural and everyday violence that underlies and enables it. An extreme illustration is South Africa, where violence against women has continued across the transition and indeed worsened since the end of apartheid.62 These continuities of violence challenge the understandings of ‘violation’ and of ‘transition’ as privileged by transitional justice processes.

Feminist discourse has also for some time championed the notion of intersectionality – an approach that explores the way gender intersects with other identities to produce both opportunities and oppression or multiple forms of discrimination.63 Such a perspective has led to demands for a ‘holistic approach’ to violence against women,64 one that treats all rights as universal, interdependent and indivisible, comprehends violence as comprising both the interpersonal and the structural and accounts for the violence of structural discrimination and analyses social and economic hierarchies. Such feminist approaches usefully add complexity to understandings of identity, equality and power, emphasize bottom-up approaches and move beyond the legal to include wider political and social responses.

**Agency and an Actor-Oriented Approach**

Actor-oriented approaches to human rights are rooted in everyday perspectives and local contexts: rights are shaped through actual struggles informed by the understandings of those claiming them. This transforms the normative parameters of human rights debates and expands the range of claims that are validated as rights.65 An actor-oriented approach asks how people articulate rights claims in specific situations and for whom a given strategy works, and thus acknowledges that any given intervention can serve to reinforce as well as challenge power differentials and hierarchical relationships. By explicitly acknowledging and seeking to challenge inequalities linked to power and hierarchy, and by arguing that human rights are defined by struggle and born of experiences of deprivation and oppression, rights are cast in explicitly transformative terms.66 Human rights emerge in opposition to oppression rather than necessarily in congruence with the law. These insights have important implications for practice:

What is of particular importance in an actor-oriented approach to rights, is that it constitutes a conceptual force in order to emphasise the importance of working

66 Ibid.
hand-in-hand with marginalised people to develop a rights consciousness that is meaningful and transformative in their perspectives rather than ‘teaching them their human rights’ as they stand in law and assuming they will individually act or collectively organise to claim them.67

Drawing on the critique of contemporary transitional justice practice and the analysis of transformative approaches in adjacent fields, we propose the preliminary definition of transformative justice presented at the beginning of the article.

**Tools of Transformative Justice**

Transitional justice is about unleashing transformative dynamics, not about creating transformation all by itself.68

A significant challenge facing all transformative approaches is the difficulty of translating their breadth and ambition into policy and practice. In this section, we outline concrete ways in which transitional justice can become more transformative. These strategies speak to the previously mentioned shift in focus from the legal to the social and political, and from the state and institutions to communities and everyday concerns. Transitional justice mechanisms are challenged to do some current activities better, encouraged to take on new roles and supplemented or critiqued by new interventions.

**Framing for Transformation**

Issues are framed so as to resonate with already accepted norms, attract funding, consolidate partnerships and networks, and encourage action. Frames enable activists to ‘create’ an issue and insert it onto the transitional agenda. For transitional justice to become more transformative will require a reframing of both the problem it seeks to address and related responses and interventions.

Sociopolitical interventions such as truth commissions, memorials and education reforms have the greatest potential to take on a transformative agenda through urgently needed reframings of socioeconomic rights and continuities of conflict. While truth commissions, for example, have dabbled in socioeconomic rights, there is nothing approaching a coherent theoretical or practical framework for such interventions. Transformative justice provides a point of departure, in that work on socioeconomic rights should emphasize local agency, prioritize process and challenge unequal and intersecting power relations and exclusion. Key rights will need to be selected as a ‘diagnostic lens’ on the past and present. Demonstrating the indivisibility and interdependence of rights is a powerful and practical tool in the argument for holistic, transformative responses.

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For example, in many countries land not only provides a vivid commentary on poverty and socioeconomic exclusion, but also underpins conflict and therefore civil and political rights violations.

The documentation of resistance – a new role for transitional justice – has the potential to be transformative. Traditionally, human rights documentation prioritizes violations and victimhood, and transitional justice has followed a similar trajectory in neglecting resistance. Bronwyn Leebaw suggests that truth commission investigations explore three areas: the failure to resist or withdraw support from political systems that engaged in atrocities; organized political resistance to violence and abuses; and privileged resistance by individuals who break ranks with their own communities.69 Ron Dudai’s work on rescuers develops the notion of individuals breaking ranks in important ways, in part by emphasizing ordinariness as well as privilege, thereby providing an approach better suited to communal and everyday violence.70 Interventions on rescuers from within communities would contribute to conflict transformation and reconciliation between groups by moving beyond collective dehumanization of the ‘other’ and establishing a broader truth about the past. They would respond to the legacy of passive bystanders, challenging the claim that ordinary people did not know and could not act. The aim of documenting resistance is essentially transformative, in that resistance ‘illuminates possibilities for agency, solidarity, and innovation . . . and offers a more promising basis for political reconciliation.’71

Transformation requires that transitional justice, and particularly associated sociopolitical interventions, document not only resistance from the past but also resistance in the present, specifically resistance to transitional justice and the emerging politics of the transition era. The latter requires a reframing of the goals of transitional justice, emphasizing the need for a future marked not just by unity and reconciliation but also by disagreement and ongoing activism for change. As such, transitional justice mechanisms should provide a forum for debate about the meaning of justice, peace and reconciliation, as well as alternative visions of transitional justice and transitional politics.72 For example, truth commissions can contribute to broad national debates about economic models in the present, especially where economic injustices are endemic and economic differences fuelled conflict in the past.73 In short, drawing a line under the past – a core goal of transitional justice – often amounts to drawing a line under resistance and struggle. Drawing a line between the past and present – a core goal of transformative justice – requires the identification of ongoing channels for

71 Leebaw, supra n 69 at 147.
73 Servaes and Zupan, supra n 68.
resistance in a new dispensation, and discourses of resistance beyond narrow, ‘neutral’ human rights and transitional justice. The rest of this section seeks to identify such channels and discourses.

**Participation in the Mechanisms of Transitional Justice**

Participation, and a focus on process, is a tool of transformation precisely because, if carried out rigorously, it is potentially emancipatory. Such a perspective permits a critical approach to forms of participation in transitional justice mechanisms, by understanding typologies of participation. 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. The truth commission has been widely lauded as ‘victim-centred’ but is an institution that often operates through the objectification of the victim to support the broader aims of the state. It is not clear that the victim as the essential performer in the exercise actually benefits. Both a trial and a truth commission are events, not processes, and they fail to engage substantively and over time with those most affected by the violations they seek to address on their own terms. An extreme example is the dehumanization and retraumatization experienced by rape victims before the International Criminal Tribunal for the former Yugoslavia, described by Julie Mertus as a process that was actively disempowering, despite the successful convictions: ‘Tribunals alone do not serve their need for creating a record, achieving justice, remembering or forgetting.’

A further challenge for transformative justice is who should participate. We have previously noted both the imperative for transitional justice mechanisms to engage with victims and victims’ organizations in new ways and the dangers of victimhood as a narrow and exclusive form of identity politics in postconflict settings. Victim identities can denote passivity and a lack of agency; create one-dimensional actors shorn of other, equally important identities (e.g., activist, perpetrator); create competitive cultures of victimhood that deny victim status to the ‘other’; and embed victim identities as a form of partisan politics, rather than seek to transform them as a benchmark of democratic politics.

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78 Gready, supra n 3.
As such, transformative justice requires a radical rethinking of participation in transitional justice interventions. It seeks a form of participation that engages with but transforms victimhood. It defines victimhood broadly, and is participatory and transparent about whose voice is heard and which organizations gain a seat at the table. Transformative participation should shape all elements of the transitional justice ‘project cycle,’ from problem analysis to evaluation, and stress the interdependence of process and outcomes (without an outcome, process can be delegitimized). It should transform both the people involved (their views, skills, levels of organization) and their situation. As such, it chimes with Paolo Freire’s notion of conscientization. A process-based approach to transformation also challenges power relations: participation then becomes a key element of empowerment that sees the marginalized challenge, access and shape institutions and structures from which they were previously excluded.

This article argues that transformative justice and transformative participation require more focus on process, on the interface between process and outcomes and on mobilization, and less focus on preconceived outcomes. Such mobilization can take place around court proceedings, truth commissions or reparations advocacy, or simply around the needs of victims and citizens. It can seek to support, shape or contest such mechanisms. For example, the potential for shifts in agency and power relations around reparations resides mainly in the fact that reparations campaigns usually evolve over time, from below, as a result of civil society and victim/survivor mobilization and in the face of official opposition. Herein lies the possibility for participation, constituency building and the acquisition of new skills, and fresh patterns of engagement with the state through and beyond reparations campaigns.

Empowerment Beyond the Mechanisms of Transitional Justice

To shift from participation to the broader goal of empowerment requires not just attention to power and process but also to space, time and issue focus. Processes of empowerment concern the ‘politics of location,’ shifting the focus of rights talk from the metropolis and official spaces to the communities where violations occur. In development, this has also been discussed in terms of the spaces in which politics occurs, with empowerment demanding a move from the ‘invited spaces’ of institutions, framed by those who create them, to ‘new democratic spaces’

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situated at the interface between the state and society.\textsuperscript{83} New democratic spaces are likely to be those where people challenge established ways of working and where alternatives are modelled.

In relation to time, there is a need to understand local and national histories and overlapping and intersecting political processes, for example transitional justice processes alongside policies on criminal justice and the economy, and both longer-term, structural and institutional change and the potential for ‘catalytic moments.’\textsuperscript{84} Longitudinal studies are also crucial to the transformative justice project. Finally, with regard to issue focus, 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 mechanisms to the potential of transitional justice to ‘unleash transformative dynamics’ or draw on such dynamics beyond its particular spaces, times and issues of focus.

There is some evidence that transitional justice interventions can be the platform or trigger for such empowerment. In the case of the Peruvian Truth and Reconciliation Commission, it has been argued that an officially sanctioned form of truth telling, and a process that linked truth telling with human rights consciousness raising, was the first step in breaking down entrenched habits of fear, silence and distrust and in empowering victims and survivors to participate in grassroots movements pursuing truth and justice. Lisa Laplante writes, ‘Victims-survivors are beginning to reject passive telling to third-party authors, and instead are appropriating their own agency in disseminating memory.’\textsuperscript{85} As such, the author continues, it is ‘the change in personal and political status as truth-tellers, and not just the content of this truth’ that makes truth telling important. Such conscientized citizens could, with time and support, act as keepers of memory, watchdogs against repression and midwives of democracy.

Mobilizations such as this are an indication of the potential for deeper forms of participation and empowerment, as each positions victims and survivors of human rights abuses as agents rather than objects of intervention, and gestures to ongoing processes of inquiry and activism beyond particular interventions. Such mobilization needs to be sensitive to diverse spaces of influence, short and long time-frames and focused as well as broadly defined agendas. It enables victim and survivor groups to become active citizens and develop what Madlingozi calls ‘civic competence’\textsuperscript{86} – the ability to sustainably champion justice and contest marginalization, thereby challenging narrow, exclusive notions of victimhood.

\textsuperscript{84} Sam Hickey and Giles Mohan, ‘Towards Participation as Transformation: Critical Themes and Challenges,’ in Hickey and Mohan, supra n 56.
\textsuperscript{86} Madlingozi, supra n 11.
In short, mobilization of this kind provides channels and discourses for ongoing resistance.

Conclusion

In this article, we have sought to set out a new goal for transitional justice practice: transformative justice. To do so, we have outlined the macro-level limitations on transformative justice (the liberal peace and top-down, state-based interventions) and how existing responses to critiques of transitional justice fall short of a transformative approach, in part because of these foundational limits. Change depends on addressing big questions as well as redesigning specific interventions and projects. A definition of transformative justice is assembled from an analysis of why the evolution of transitional justice practice to date remains inadequate and of conceptions of transformation in relevant adjacent fields. Finally, the article shifts from theory to practice, to look at how such an ambitious agenda can be realized, and in particular the contribution that transitional justice could make to transformation.

Beyond the need for a thicker description of transformative justice, two specific challenges stand out as potential areas for future action and research. First, the arguments set out above require a rethinking of the role that outsiders can play and a new ‘theory’ of intervention. ‘Intervention’ – in the sense of an outside engagement with communities in transition – is about creating space in which locally led transformation can occur and facilitating change through the provision of resources, material and intellectual. The intervening outsider must attempt to ensure what Oliver Richmond calls ‘contextual legitimacy’ in such a situation, finding ways in which those with access to resources can support empowerment without imposing external agendas. The privileged outsider, perhaps positioned as an ‘accompanier,’ can however become a valuable partner of the disempowered seeking transformative change, in a role as facilitator, advocate and interpreter at both the national and the international level. This approach requires a mix of perspectives (anthropologist, social scientist, development worker, human rights activist) and skills, including cultural competence, an ability to communicate with community partners, reflexivity and a willingness to share power over decision making.

A second challenge for transformative justice itself is how a ‘theory’ of intervention that prioritizes process and the local can scale-up its challenge to institutions and structures of exclusion and inequality at national and international levels. Scaling up often irrevocably alters the initial, local intervention. Other approaches to transformation provide some guidance. Hybrid peacebuilding approaches combine local mechanisms and discourses with global counterparts.


while human-rights based approaches build the capacities of both rights holders and duty bearers towards new forms of responsiveness and accountability. Sam Hickey and Giles Mohan argue that for participatory approaches to be transformative ‘the locus of transformation must go beyond the individual and local and involve multi-scale strategies that encompass the institutional and the structural.’ The authors argue that a radicalized notion of citizenship provides a starting point. A radical citizenship refers not to legal rights and responsibilities conferred by the state but to multiscale agency and activism in the spaces, time scales and broad issue areas outlined above as characterizing empowerment.

Transformative justice as an agenda for practice is work in progress. This article provides a critique of existing practice and mindsets, but also some suggestions about how an ambitious transformative alternative might be operationalized. Thicker descriptions and assessments of transformative justice in relation to specific groups (e.g., victims and survivors, women, indigenous groups) and geographical settings are now needed.

89 Hickey and Mohan, supra n 56 at 14.