

Transitional Justice, Institutions and Temporality: Towards a Dynamic Understanding

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Abstract

This article examines the impact of institutionalisation of governance, bureaucracy and rule of law on the timeframes employed for transitional justice. It argues that the urgency of transitional justice has consistently given way to temporally extended justice projects as state strength permits revision of initial leniency in terms of truth, criminal accountability and vetting, while state weaknesses compel the delay of projects pending institutional development or consolidation through long-term peacebuilding missions. Furthermore, a more recent focus on transformative social change that looks at economic root causes of conflict would require states and policy-makers to use a longer, multigenerational timeframe for action. In the absence of theoretical work on how these multi-generational commitments might be realised, this article draws on literature in the field of development to outline a plausible model for how transitional justice, peacebuilding and development are dynamically realised over time. It argues that for transitional justice to be even minimally transformative, it must be embedded in top-down developmental institutions of government sufficiently robust to implement recommendations. It must also be embedded in bottom-up developmental coalitions whose everyday political contests can shape the structure and effects of these institutions over time.

Keywords

transitional justice – development – post-conflict – post-authoritarian – transformative justice – peacebuilding

1 Introduction

As its very name would suggest, transitional justice (TJ) is inherently defined by its temporality. Initially positioned as a radically discontinuous interregnum between a distinctly 'bad' *before* and a liberal democratic *after*,¹ TJ's distinctive feature was always its liminality in distinct periods of political change as both constituted by the transition, but also constitutive of it.² This *before* and *after* was initially conceptualised as a paradigm of change moving from 'less to more democratic regimes' in the Third Wave of democratic transitions, most notably those in the Southern Cone in the late 1980s and the glut of transitions in East-Central Europe after the fall of the Cold War.³ The concept was later applied to shifts from civil war to post-conflict settlements characterised by elections, security sector reform and economic reconstruction. The backwards- and forwards-looking nature of TJ mechanisms like reparations or vetting means it has always balanced, sometimes uneasily, questions of 'righting the past' and catalysing idealised visions of the human future.⁴ Within these teleological shifts from one state to another, TJ cannot be understood outside of time factors—'how past injustices are to be given meaning as political practices, whether this meaning is transformed or interrupted or kept open across time, and the relationship of these questions to present day responsibility.'⁵

Given the centrality of time to TJ, one would be forgiven for expecting temporal factors to be deeply theorised in the context of policy-making. However, it is clear that TJ theorists and practitioners have largely proven unable to incorporate time in a meaningful sense into analyses of what to do and how to do it. While the challenges of 'power, elitism, exclusions, preferences and privilege'⁶ are foregrounded in both mainstream and critical literatures, time itself is not.⁷ Scholars

1 D. Dyzenhaus, 'Leviathan as a Theory of Transitional Justice', in M. Williams, R. Nagy and J. Elster (eds.), *Transitional Justice* (New York University Press, New York, NY, 2012), pp. 180–217, p.182.

2 D. Shelton, 'Justice in Times of Change', 63(2) *Review of Politics* (2001) 400–403, p.401.

3 R. Teitel, *Transitional Justice* (Oxford University Press, New York, NY, 2000), p.5.

4 J. Torpey, *Making Whole What Has Been Smashed: On Reparations Politics* (Harvard University Press, Cambridge, MA, 2006), p.7.

5 S. Maddison and L. Shepherd, 'Peacebuilding and the Postcolonial Politics of Transitional Justice', 2(3) *Peacebuilding* (2014) 253–269, pp. 254–255.

6 E. Rooney and F. Ní Aoláin, 'Transitional Justice from the Margins: Intersections of Identities, Power and Human rights', 12(1) *International Journal of Transitional Justice* (2018) 1–8, p. 2.

7 A number of exceptions that grapple meaningfully with time are highlighted in this article, most notably work by Collins, Horne, Skaar, Elster and Hansen. Another notable exception is N. Mueller-Hirth and S. Rios Oyola (eds.), *Time and Temporality in Transitional and Post-Conflict Societies* (Routledge, London, 2018), which explores how time is experienced, constructed and used in everyday life transitional and post-conflict societies.

and policy-makers acknowledge that it is a crucial, perhaps even paramount, factor in the process of reckoning with past wrongdoing in the service of a better future, but seem unable to make use of it, to sequence interventions, to measure aspirations against concurrent progress in terms of good governance, democratisation or development. This may owe to the possibility that the field has largely evacuated the concept of time. TJ's initially circumscribed interpretation of transition as *to democracy* has been tested and expanded to incorporate newer iterations of justice (distributive, postcolonial, transformative) as it became transposed to other ecologies. So fungible is the concept that some suggest the notion of 'transition' could eventually be dismissed as a mere syntactical error and a specifically transitional framework dispensed with entirely.⁸ As Hansen suggests, because TJ has extended itself beyond the paradigmatic post-authoritarian and post-conflict contexts where revolutionary short-term exigencies offered unprecedented scope for change to comparatively static non-transitional repressive governments and consolidated democracies, it has lost that connection to a 'moment' in time that initially defined the field.⁹

This relative inattention to time is to be regretted given the evident reality that the development of institutions over time critically conditions the pursuit of TJ. The first Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has drawn much-needed attention to the gap between the articulation of necessary *ends* in contemporary TJ discourse and the *means* of realising it. He argues that in contemporary post-conflict states any comprehensive architecture for accountability and/or redress is located within broader reforms of a socioeconomic, administrative and fiscal nature that go beyond the remit of TJ.¹⁰ Progress (or even regress) in these areas over time must surely condition the prospects for truth, accountability, transformation. As this article goes on to argue, the initial time horizons for TJ in its earliest sites of application in Latin America and East-Central Europe could be extended to the medium-term as a result of the relatively strong domestic institutions in the states concerned. In contemporary post-conflict states, where institutions are much weaker and aspirations for TJ comparatively more expansive, these time

8 P. Arthur, 'How Transitions Reshaped Human Rights: A Conceptual History of Transitional Justice' 31(2) *Human Rights Quarterly* 31 (2009) 321–367, pp. 325 and 363.

9 T. Obel Hansen, 'The Time and Space of Transitional Justice', in C. Lawther, D. Jacobs and L. Moffett (eds.), *Research Handbook on Transitional Justice* (Edward Elgar, London, 2017), pp. 34–51 at p.35, citing K. McEvoy and L. McGregor (eds.), 'Transitional Justice from Below: An Agenda for Research, Policy and Praxis' in *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart, London, 2008) pp. 1–14, p.6.

10 UN Secretary-General, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, UN Doc. A/HRC/36/50 of 21 August 2017, p. 7.

horizons extend far into the long-term. Of course, the more time that passes from transition, the more the conjunction of intersecting trajectories of other long-term processes like development, economic growth or democratisation condition prospects for accountability, redress or the institutionalisation of rights than any given TJ policy can reasonably plan for in the long-term. The longer peace persists, the more it imposes its own rhythms with irregular phases of stagnation, instability, fluctuation and rapid change. Increasing assertiveness about the need for more ambitious or holistic forms of TJ meet situations of long-term indeterminacy—political choice is bounded by structural factors of continuity and change that cannot be fully anticipated. After more than thirty years as a self-conscious object of study, it is now clear that TJ in the developing world does not conform to a technocratic ideal of rational sequences on which the strategic objectives of accountability/redress promoters are built.¹¹

The travails of TJ in many if not most sites of intervention have generated two commonplaces about temporality as the field itself moved from a foundational impulse to established practice, then expansion and self-critique. The first is that deeply entrenched injustices from the past like poverty, underdevelopment and horizontal inequalities tend to endure into the future, notwithstanding the apparent political rupture that transition represents. Newer fields of inquiry have therefore complicated the issue of time. Scholars have moved away from the idea that transition is itself uniquely discontinuous to go backwards exploring old legacies of colonial violence across past centuries¹² and forwards to examine systemic wrongdoing beyond the ostensible transition as problems like poverty, racism and gender-based violence remain ongoing problems. This has led to calls for TJ to be more transformative in addressing underlying economic and political structures that underpin the types of poverty and underdevelopment that catalyse conflict and repressive government.¹³

This 'transformative turn' has led to a second critical commonplace relating to time, namely that TJ can no longer serve *merely* as epiphenomenal special-purpose institutions applied on a time-limited basis to mediate the shift between two distinct regimes. Genuinely transformative TJ, holistically understood, lies beyond the time span of generational turnover (about 25 to

11 J. Quinn, 'Chicken and Egg? Sequencing in Transitional Justice: The Case of Uganda', 14(2) *International Journal of Peace Studies* (2009) 35–53.

12 The limits of 'presentist' and linear temporal focus of TJ to respond to historical injustice in settler colonies are explored in J. Balint, J. Evans and N. McMillan, 'Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach', 8(2) *International Journal of Transitional Justice* (2014) 194–216.

13 P. Gready and S. Robins (eds.), *From Transitional to Transformative Justice* (Cambridge University Press, Cambridge, 2019), pp.131–149.

30 years). As Nesiah notes, 'a focus on transformative social change that looks at root causes/structures of impunity would require donors to use a longer time frame in assessing the work of different strategies'.¹⁴ Though the increase in the ambition of TJ to meaningfully address historical abuses and secure economic justice on a sustainable basis is both commendable and necessary, observers have begun to contrast what TJ might realistically accomplish with the ever-more challenging contexts of underdevelopment in which it must be implemented.¹⁵ In particular, little or no concentrated attention is given to what this longer timeframe would look like or how TJ may evolve over this multi-generational time period.¹⁶ The increasing ambitions for TJ, and particularly those in the developing world, need to reflect the long-term complexity of institution building in chronically weak states if they are to be minimally credible—'below a certain institutional minimum ... transitional justice measures can be implemented, but they cannot be expected to yield desired outcomes'.¹⁷ Without a plausible account of how TJ might evolve and adapt over time as multi-generational processes of stabilisation, statebuilding and development occur, arguments that TJ needs a long-term focus are mere rhetoric.

This article attempts to redress this temporal gap by adopting an explicitly institutionalist perspective, emphasising the co-imbrication of TJ with institutional reform in distinct post-authoritarian and post-conflict ecologies. Section 2 examines how the initial, 'now-or-never' urgency that characterised TJ in the formative Latin American and East European transitions gave way to an appreciation that institutionalisation of democracy, rule of law and the state bureaucracies could extend timelines for what became known as 'post-transitional justice.' Section 3 looks at the challenges posed by far more weakly-institutionalised post-conflict states. Over time, scholars and policy-makers have come to realise that the traditional goals of TJ like reconciliation, political liberalisation and rule of law are conditioned by the protracted timescales of parallel peacebuilding processes. Section 4 looks at the emerging realisation within

14 V. Nesiah, *Transitional Justice Practice: Looking Back, Moving Forward: Scoping Study*, available online at www.impunitywatch.org/docs/scoping_study_FINAL.pdf (accessed 4 March 2021), p.23.

15 R. Kerr, 'Transitional Justice in Post-Conflict Contexts: Opportunities and Challenges' in R. Duthie and P. Seils (eds.), *Justice Mosaics. How Context Shapes Transitional Justice in Fractured Societies* (International Center for Transitional Justice, New York, NY, 2017), pp.116–139, p. 118.

16 On the general lack of any decision-making mechanism for the selection, prioritisation or sequencing of TJ interventions, see P. Gready and S. Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice', 8(3) *International Journal of Transitional Justice* (2014) 339–361, pp. 345.

17 L. Bosire, *Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa* (International Center for Transitional Justice, New York, NY, 2006), p. 32 at footnote 1.

transformative justice scholarship that the further back we look in time for the structural roots of conflict, the further forward we must look in terms of entry points for action and outcomes. Section 5 draws on literature in the field of development to outline a plausible model for how TJ and broader peace-building are dynamically realised over time. It argues that for TJ to be even minimally transformative, it must be embedded in top-down developmental institutions of government sufficiently robust to implement recommendations, plus bottom-up developmental coalitions whose everyday political contests can shape the structure and effects of these institutions over time. Until this happens, TJ is likely to be an intermittent patchwork of ad hoc projects or mechanisms realised over a number of years, as opposed to a comprehensive restructuring of the state based on a transformative strategy involving all relevant actors in relative policy coherence.

2 The Early Days: from 'Urgent' Justice to 'Late Justice'

In the earliest days of TJ as a conscious policy choice, the mechanisms employed emerged from negotiations with authoritarian regimes and were oriented towards acknowledging a relatively narrow spectrum of (bodily) human rights violations. An inherently teleological concept, it was assumed that this acknowledgment-as-accountability would institutionalise the rule of law and facilitate the transition to democracy while also serving the normative goals of peace, reconciliation, accountability and truth.¹⁸ As post-authoritarian states in the Southern Cone and Eastern Europe wrestled with problems of accountability and redress, the transition within which justice would be pursued was understood as a limited and linear interregnum between the repressive past and a democratic future.

The concept of transition here, as elsewhere, operates within a particular political temporality ... The past has passed; the relationship between past and present is one of discontinuity.... The present is a period of change; state and society are moving towards a future which will be characterized by peace and democracy.¹⁹

¹⁸ P. McAuliffe, *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship* (Routledge, London, 2013).

¹⁹ K. Braun, *Transitional Justice, Political Temporality and the Injuries of Normality*, *Institute für Politikwissenschaft Working Paper No.1/2017*, available online at https://politikwissenschaft.univie.ac.at/fileadmin/user_upload/i_politikwissenschaft/IPW_Working_Papers/IPW-Working-Paper-01-2017-Braun.pdf (accessed 4 March 2020), p.12.

Transition in this sense was understood as a critical juncture, a comparatively brief period of time (relative to the duration of the path-dependent process it instigated) where there was a materially greater likelihood that the choices of agents would decisively shape outcomes over the *longue durée* before re-emerging institutional constraints constrain once more.²⁰ The assumption was that the causal impact of early events like truth commissions or trials would be significantly stronger than subsequent events in shaping outcomes. Urgency was therefore among the defining characteristics of this novel field of inquiry. Transitions were understood as ‘instances of strategic action and negotiation’—accountability was seen as an immediate imperative because the co-existence of crisis, democratic enthusiasm and new groupings like victim organisations created opportunities that were not possible in ordinary times.²¹ Trials for crimes like torture became thinkable in the ‘primordial moment’ of systemic political change before other issues crowded the agenda.²² Truth commissions were viewed as ‘short-lived phenomena that give rise to intense mobilization of wills.’²³ Reparations were urged as an immediate means of having a direct, tangible impact on victims. Elster urged that TJ should be pursued immediately because the emotions that might lend it urgency had a short half-life and decay over time.²⁴ Gradualism would prolong pain and instability, thereby risking all accountability—‘maximal benefit’ would come from early TJ, whereas late enactment was seen as inherently harmful.²⁵

However, as we move temporally further away from the moment of transition, observers began to note that an unexpected ‘tortoise versus hare’ dynamic began to emerge. Those states that achieved a threshold level of stability allied to functional government and some political consensus about how to approach accountability began to demonstrate greater success than those that immediately responded to civil society demand or acquiesced to the promptings of

20 G. Capoccia and R.D. Kelemen, ‘The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism’, 59(3) *World Politics* (2007) 341–369, p. 348.

21 R. Ames Cobián and F. Reátegui, ‘Toward Systemic Social Transformation: Truth Commissions and Development’, in P. de Greiff and R. Duthie (eds.), *Transitional Justice and Development: Making Connections* (Social Science Research Council, New York, NY, 2009), pp.142–169, p.154.

22 L. Weschler, *A Miracle, A Universe: Settling Accounts with Torturers* (Pantheon Books, New York, NY, 1998), p. 242.

23 Cobián and Reátegui, *supra* note 21, p. 154.

24 J. Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press, New York, NY, 2004), pp. 220–229.

25 C.M. Horne, ‘The Timing of Transitional Justice Measures’, in L. Stan and N. Nedelsky (eds.), *Post-Communist Transitional Justice: Lessons from Twenty-Five Years of Experience* (Cambridge University Press, Cambridge MA, 2015), pp.123–147, p.123.

foreign donors and NGOs.²⁶ In Latin America, criminal accountability was initially seen 'as an urgent task of democratisation, as it highlights the fundamental character of the new order.'²⁷ However, of the three precedent conditions necessary for trials, namely a competent judiciary, lack of military threat and civil society demand,²⁸ only the latter was available. Authoritarian rulers in Argentina, Chile and later Peru forced through amnesty for themselves, meaning that the mechanism they employed was the ostensibly 'softer' option of truth commissions.²⁹ Chile's Rettig Report (1991) focussed only on politically motivated murders and disappearances that occurred while Pinochet was President, and did not include other human rights violations.³⁰ Information collected by Argentina's CONADEP was welcomed by victims and civil society actors, but by this time even reconciliation 'was rightly considered an excessively ambitious project for the early years of transition.'³¹ Transitions in East-Central Europe saw a similar cycle of short-term optimism and medium-term winnowing of ambition. Transfers of power in these countries were based on peaceful accommodations between communists and dissidents with implicit and/or explicit promises of amnesty. A policy of forgiveness characterised by a *soi-disant* 'thick line' that avoided accountability was initially agreed.³²

The initial relative impunity in these states began to erode over time as institutions of governance and rule of law strengthened. This was facilitated by the reality that Southern Cone states like Argentina and Chile or East-Central European states were already relatively well institutionalised. Understood as rules, norms and practices that organise social relations, institutions order political life by shaping opportunities and constraints of political, economic

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- 26 L. Fletcher, H. Weinstein and J. Rowen, 'Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective', 31(1) *Human Rights Quarterly* (2009) 163–220, pp. 212–213.
 - 27 J.E. Méndez, 'In Defense of Transitional Justice', in A. James McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame Press, Notre Dame, IN, 1997), pp.1–26 at p.1.
 - 28 E. Skaar, *Judicial Independence and Human Rights in Latin America: Violations, Politics, and Prosecution* (Palgrave Macmillan, New York, NY, 2011), pp. 67–68.
 - 29 L. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes', 49(1) *Virginia Journal of International Law* (2009): 915–984, pp. 922–926 and pp. 944–950.
 - 30 M. Ensalaco, 'Truth Commissions for Chile and El Salvador: A Report and Assessment', 16(1) *Human Rights Quarterly* (1994) 656–675, pp. 659–660.
 - 31 C. Collins, 'The End of Impunity? Late Justice and Post-Transitional Prosecutions in Latin America', in N. Palmer, P. Clark and D. Granville (eds.), *Critical Perspectives in Transitional Justice* (Intersentia, Antwerp, 2012), pp.399–424 at p. 402.
 - 32 A. Szczerbiak, 'Explaining Late Lustration Programs: Lessons from the Polish Case', in Stan and Nedelsky (eds.) *supra* note 25, pp.51–70 at p.51.

and social actors.³³ Though undergoing momentous transition in terms of *regime*, transition marked a critical juncture in the ongoing maturation of the broader, pre-existing and functional set of state *institutions* that could assure stability and channel collective action. Societal consensus quickly emerged on the locus of decision-making authority, how decisions are made and how rulers would be empowered. Organised violence became consolidated in military and police forces cabined by gradually increasing civilian control. East-Central European countries were in an even stronger position, enjoying state structures in the modern sense of the word for as long as many Western European states.³⁴ Similarly, by the late 1980s, Chile and Argentina had 'relatively strong state institutions' where underlying rule-making frameworks were stable and effective even before they adopted a constitutional vision of the future.³⁵ The model of bureaucratic authoritarianism there ensured that they, like their East-Central European counterparts, had capable Weberian administrations, autonomous institutions that exhibited their own preferences, had the strength to act upon them and could use legal-rational methods to implement policies. As we will see later, institutions needed to be purged, but not rebuilt or created *ab initio*. Stable expectations developed quickly about others' behaviour under accountable public institutions, which lengthened time horizons and broadened policy options.

This institutional strength allowed Chile and Argentina to pursue what Collins labels 'post-transitional' or 'late' justice in the decades after that transitional period of precarity where trials were imagined impossible.³⁶ In Chile, the settlement of amnesty and limited trial was revisited as democratic rule consolidated under the centre-left *Concertación* coalition and civilian control of the military increased. Reform of the practices and personnel in the justice sector, combined with a deliberate desire on the judiciary's part to signal autonomy against other branches, opened Chile to a series of trials of over 250 state agents as disappearance cases were reinterpreted as kidnappings and brought outside the amnesty law.³⁷ Though governments in Santiago retained a 'softly-softly' approach that ostensibly maintained the commitment to

33 J. March and J. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics*. Free Press, New York, NY, 1989).

34 R. Egnell and P. Haldén. 'Laudable, Ahistorical and Overambitious: Security Sector Reform Meets State Formation Theory Analysis', 9(1) *Conflict, Security & Development* (2009) 27–54, p.42.

35 R. Duthie, 'Introduction', in Duthie and Seils (eds.), *supra* note 10, pp. 8–39 at p.13.

36 Formulations used in Collins, *supra* note 31, pp. 399–423.

37 C. Collins, *Post-transitional Justice: Human Rights Trials in Chile and El Salvador* (Pennsylvania State University Press, University Park, PA, 2010), p. 145.

amnesty, bureaucratic reform allowed mid-level state agents to take it upon themselves in a 'routinized' fashion to resolve Pinochet-era disappearances through pre-existing as well as specially-created institutions.³⁸ The limited and aforementioned Rettig Commission gave way to the more 'daring' Valech commission (mandated to document abuses of civil rights or politically motivated torture) in a pattern of truth accumulation over time as government and states slowly reformed.³⁹ With the orderly transition in Argentina from the Alfonsín to the Menem administrations, it became apparent that democracy and civilian control over the army had been institutionalised. Judicial independence from the executive was strengthened over time and constitutional reform expanded grounds for judicial review, meaning that courts felt able to apply international law more and carve out limitations to earlier amnesties to the extent that exceptions generally became the rule.⁴⁰ As Dancy and Wiebelhaus-Brahm noted, post-transitional justice was primarily a function of the continual evolution of stable institutions over time.⁴¹

A similar dynamic played out in East-Central Europe where the dominant approach was that of 'protracted' TJ.⁴² Here, lustration was employed as the paramount 'yardstick for measuring the progress of transitional justice' as both a form of de-communisation and truth revelation.⁴³ Only Czechoslovakia adopted a lustration law early, in 1991. Other states waited for some degree of institutional consolidation, like Hungary (1994 and 1996), Poland (1997), Bulgaria (1998) and Romania (1999).⁴⁴ By the mid-2000s, Poland could extend the scope of lustration as a reflection of, and contribution towards, the improvement in the quality of its democracy.⁴⁵ In other European countries like Romania, Slovakia and Czech Republic, 'late lustration' was connected

38 C. Collins, 'Transitional Justice "From Within": Police, Forensic and Legal Actors Searching for Chile's Disappeared', 10(1) *Journal of Human Rights Practice* (2018) 19–39.

39 O. Bakiner, 'Truths of the Dictatorship: Chile's Rettig and Valech Commissions as State-Sponsored History' in B. Bevernage and N. Wouters (eds.), *The Palgrave handbook of state-sponsored history after 1945* (Palgrave Macmillan, London, 2018), pp. 669–684.

40 Skaar, *supra* note 28, pp. 47–93.

41 G. Dancy and E. Wiebelhaus-Brahm, 'Timing, Sequencing, and Transitional Justice Impact: A Qualitative Comparative Analysis of Latin America', 16(4) *Human Rights Review* (2015) 321–342, p. 340.

42 Horne, *supra* note 25, p.127.

43 L. Stan (ed.), 'Introduction: Post-Communist Transition, Justice, and Transitional Justice' in *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past* (Routledge, London, 2009), pp. 1–14, p. 12.

44 A. Czarnota, 'Transitional Justice in Post-Communist Central-Eastern Europe: Decommunisation and the Rule of Law', in Palmer, Clarke and Granville (eds.), *supra* note 31, pp. 425–442.

45 Szczerbiak, *supra* note 32, p.51.

to policies institutionalising democratisation and anti-corruption.⁴⁶ Initially short expiration dates for lustration often gave way to open-ended processes that endure in some cases to this day. Horne argues that a decade after transition was the 'peak moment' for passing reforms and that delayed lustration and file access were probably the most effective. She found that the magnitude effect of measures enacted early in transition was similar to measures brought into effect fifteen years later, contradicting the hypothesised relationship between timing and potency in which early reforms were assumed most efficacious.⁴⁷ A worldwide 2009 study of a series of post-authoritarian and post-conflict transitions concluded that early trials for serious crimes are more the exception than the norm, observing a shift towards zealous prosecution only in the period of six to eight years after transition.⁴⁸ Understanding temporal factors manifest in discrete phases has become essential in comprehending and shaping the course of TJ in its immediate and 'late' iterations.⁴⁹

Political entrepreneurship was important in all of these countries, but ultimately mattered less than the reality that stable foundational institutions already existed to successfully execute trials, truth revelation or reforms of personnel.⁵⁰ Institutions, of course, were not everything. Generational changes in attitude, correlations of political forces and international pressure, plus imaginative campaigns by victim groups fundamentally altered initial transitional conditions that compel impunity.⁵¹ Nevertheless, within a decade of TJ's establishment as a policy option, it had become apparent that 'justice does not lead; it follows'; successfully implementing universal standards of criminal justice for human rights abuses depends on first achieving political and institutional preconditions.⁵² However, while theories of 'late', 'post-' and 'protracted' TJ can help us understand the inter-relation between time and institutionalisation in the Southern Cone and East-Central Europe, these experiences did not equip policy-makers and theorists for post-conflict states in the developing world which are distinctly different to the post-authoritarian settings existent when the model of transitional justice was originally designed. As the Special

46 C.M. Horne, 'Late Lustration Programmes in Romania and Poland: Supporting or Undermining Democratic Transitions?', 16(2) *Democratization* (2009) 344–376.

47 Horne, *supra* note 25, pp. 124 and 125–126.

48 Fletcher, Weinstein, Rowen, *supra* note 26, p. 298.

49 Dancy and Wiebelhaus-Brahm, *supra* note 41, p. 323.

50 N. Nedelsky, 'Conclusion: Some Lessons Learned', in Stan and Nedelsky (eds.), *supra* note 25, pp. 296–299 at 299.

51 P. Aguilar, 'Transitional or Post-Transitional Justice? Recent Developments in the Spanish Case', 13(4) *South European Society and Politics* (2008) 417–433, p. 430.

52 J. Snyder and L. Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies on International Justice', 28(3) *International Security* (2003–2004) 5–44, p. 6.

Rapporteur for TJ puts it, 'the rapid dissemination of transitional justice may have obscured this otherwise obvious fact [that t]he early successes of transitional justice depended on the close fit between problem and remedy, between context and solution, something that is less apparent'⁵³ in the relatively weak environments of post-conflict states where institution-building was less about reform or lustration than starting from scratch.⁵⁴

3 Transitional Justice in Peacebuilding: Towards Multi-Generational Commitments

As TJ mechanisms were transferred from post-authoritarian states to post-conflict states like East Timor, DR Congo, Burundi, Colombia and Liberia, a similar temporal shift from urgency to forms of gradualism contingent on institutionalisation once more became evident. Peace agreements often contain detailed combinations of criminal and restorative justice processes. During the initial 'peace versus justice' debates that characterised the late 1990s and early 2000s it was assumed that post-conflict accountability should be undertaken immediately given the belief inherited from Latin America that the transitional period constituted a short-term 'window of opportunity' in which human rights actors and civil society could advance their goals.⁵⁵ A prompt start to trial would preclude amnesty and the 'peace now, and justice some other time' ethos that underpinned it.⁵⁶ Indeed, 'undue delay' was seen as a key indicator of unwillingness or inability in the ICC's complementarity regime. Truth commissions in the likes of Guatemala were established in the immediate aftermath of transition⁵⁷ and often given as little as one to three years to report.⁵⁸

However, it became apparent that trial, reparation and vetting bodies could not function as anticipated in these states. These mechanisms are dependent

53 Report of the Special Rapporteur, *supra* note 10, para. 33.

54 C. Sandoval, 'Reflections on the Transformative Potential of Transitional Justice and the Nature of Social Change in Times of Transition', in Duthie and Seils (eds.), *supra* note 10, pp. 166–201 at 188.

55 Y. Sooka, 'Dealing with the Past and Transitional Justice: Building Peace through Accountability', 88(1) *International Review of the Red Cross* (2006) 311–326, p. 317.

56 M.C. Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability', 59(1) *Law & Contemporary Problems* (1996) 9–28, p. 12.

57 Dancy and Wiebelhaus-Brahm, *supra* note 41, p. 329.

58 J. Braithwaite and R. Nickson, 'Timing Truth, Reconciliation, and Justice after War' 27(1) *Ohio State Journal on Dispute Resolution* (2012) 443–476, p. 443.

on certain institutional preconditions,⁵⁹ and commonly founder on professional incapacity, weak legitimacy and resource constraints. For example, El Salvador's truth commission admitted that the state 'has no system for the administration of justice and which meets the minimum requirements of objectivity and impartiality so that justice can be rendered reliably'.⁶⁰ Pointing to the travails of states like Haiti and Guatemala, Segovia has argued that the effective implementation of reparations policy is negatively affected by structural factors like the malfunctioning of state institutions.⁶¹ The Special Rapporteur's report on vetting found that the weakly institutionalised nature of settings like Liberia or Burundi render it significantly more difficult to implement in post-conflict states than in post-authoritarian regimes.⁶² As temporary bodies, truth commissions were relatively less constrained by these problems, but the weak surrounding institutional environment 'can present implementation problems and administrative delays, disincentives for participation, and difficulty in implementing recommendations'.⁶³ The wide-ranging recommendations of the East Timorese and Sierra Leone truth commissions, for example, went mostly unimplemented.

These institutional shortcomings reflected broader structural problems endemic to post-conflict states as diverse as Sierra Leone, East Timor or El Salvador. Those states where TJ was mooted or implemented were often those that lacked the most basic capacity to control their own population or territory. They uniformly suffered from weak governance, a problem exacerbated by government unresponsiveness to groups like the poor, women and minorities. Their low levels of social cohesion and state legitimacy was both root cause and product of domestic instability. Post-conflict states are best understood as 'very imperfect worlds', i.e. societies characterised by systematic violation of norms and the reality that there are significant difficulties attaching to any attempt to enforce compliance against the vested interests of powerful groups.⁶⁴ Given these post-conflict realities, TJ would inevitably become

59 L. Waldorf, 'Institutional Gardening in Unsettled Times: Transitional Justice and Institutional Contexts' in Duthie and Seils (eds.), *supra* note 10, pp. 40–83, at p. 60.

60 UN Security Council, *Report of the Commission on Truth for El Salvador: From Madness to Hope*, UN Soc. S/25500, paras 178, 182–184.

61 A. Segovia, 'The Reparations Proposals of the Truth Commissions in El Salvador and Haiti: A History of Noncompliance' in P. de Greiff (ed.) *The Handbook of Reparations* (Oxford University Press, New York, NY, 2006), pp. 154–176, p. 167.

62 UN Secretary-General, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, UN Doc. A/70/438, 21 October 2015, p. 7.

63 Duthie, *supra* note 35, p. 14.

64 P. de Greiff, 'Theorizing Transitional Justice', in Williams, Nagy and Elster (eds.), *supra* note 1, pp. 31–77 at p. 35.

merged with the process of institutional reconstruction in peacebuilding, either as an integral part or as an adjunct thereof.⁶⁵ Considerations of space preclude a detailed consideration of the phenomenon, but the task of peacebuilding is essentially to accelerate the institutionalisation of democratisation, state administrative reach and rule of law that, left to their own devices, would occur too slowly or not at all. It was inevitable that TJ would have to take cognisance of its timeframes.

The 'big bang' approach of the mid-1990s saw a widely-shared intuition that the widest scope for external peacebuilding intervention was immediately after the conclusion of conflict during an internationally-brokered peace process.⁶⁶ This fostered a temporal 'impossible dream' that peacebuilders could in a matter of years engineer what took European states centuries to achieve.⁶⁷ However, this post-Cold War optimism over peacebuilding proved illusory as it became apparent in states as diverse as Bosnia and DR Congo that these goals would require involvement long beyond the timespans associated with a single mission. Peacebuilding activities would have to synchronise with the state's evolving absorptive capacity over time. A distinction was drawn between the critical phase at the end of hostilities and the more longer-term challenges of rebuilding war-torn states through slow, incremental institutionalisation.⁶⁸ Short- and medium-term ambitions have therefore winnowed. Legitimate order and functioning state structures are viewed as prerequisites for security sector reform. Without this, any gains in terms of democratisation cannot be sustained.⁶⁹ Though democracy is systematically promoted, elections in the years after peace in places like Mozambique, Nicaragua and Bosnia work differently, serving mainly as stabilising rituals and as ratifications of power-balances. The quasi-democracies inaugurated after peace settlements amount to what Levy calls 'personalised-competitive' regimes where, in the absence of institutional preconditions like rule of law and good governance, elections define who governs but the rules of the game actually governing the

65 C. Baker and J. Obradovic-Wochnik, 'Mapping the Nexus of Transitional Justice and Peacebuilding' 10(3) *Journal of Intervention and Statebuilding* (2016) 281–301.

66 A. Suhrke, T. Wimpelmann and M. Dawes, *Peace Processes and Statebuilding: Economic and Institutional Provisions of Peace Agreements* (Chr. Michelsen Institute, Bergen, 2007), p. 59.

67 M. Barnett and C. Zürcher, 'The Peacebuilder's Contract: How External Statebuilding Reinforces Weak Statehood' in R. Paris and T. Sisk (eds.), *The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations* (Routledge, Abingdon, 2009), pp.23–52, p. 23.

68 M. Berdal, *Building Peace After War* (Routledge, Abingdon, 2009), p. 20.

69 Egnell and Haldén, *supra* note 34.

polity remain personalised and clientelist.⁷⁰ As with non-transitional developing states, 'good enough governance' was adopted as a placeholder for more ambitious visions of political reform.⁷¹ Though judicial reform would proceed, meaningful rule of law reconstruction would await broader 'processes of elite bargaining, collective struggle and normative change that shape institutions over time.'⁷² Indeed, 'institutionalisation before liberalisation' became the order of the day – strategies began to prioritise embedding institutions across a number of years over early pursuit of the international community's favoured signifiers of liberal democracy such as elections, market economies or TJ.⁷³ The process by which the *organisations* established under peacebuilding (governments, elections, courts) become *institutions* of the sort long present in Eastern Europe and Latin America (i.e. 'significant and established rule making practices' perceived by citizens and rules as real solutions to problems') came to be seen as multi-generational.⁷⁴ The label of 'post-conflict' no longer connoted a specific bounded temporal period, but became understood as a process involving the attainment of diverse milestones being incrementally locked in over time.

Peacebuilding is best understood therefore as the achievement of a critical mass of mutually reinforcing projects over a period of at least decades, of which TJ is but one, and a relatively minor one. As Egnell and Halden note, the attempt to achieve goals like security democratisation, good governance and rule of law (and, it might be added, TJ) synchronically 'will be highly difficult because, historically, these developments were preconditions of each other'. Because the multiple elements of the liberal peacebuilding toolbox operate simultaneously according to their own temporal logic, no authoritative sequencing of functions emerges. As they go on to argue, 'the policy implication stemming from this understanding is that programmes must be extremely long-term if they are to achieve the more ambitiously formulated goals in countries where structures of polity, state and society are weak, recent

70 B. Levy, *Working with the Grain: Integrating Governance and Growth in Development Strategies* (Oxford University Press, New York, NY, 2014), p. 16.

71 M. Grindle, 'Good Enough Governance: Poverty Reduction and Reform in Developing Countries', 17(4) *Governance* (2004) 525–548.

72 D. Porter, D. Isser and L.-A. Berg, 'The Justice-Security-Development Nexus: Theory and Practice in Fragile and Conflict-affected States', 5(2) *Hague Journal on the Rule of Law* (2013) 310–328, p. 310 (Preamble).

73 R. Paris, *At War's End: Building Peace after Civil Conflict* (Cambridge University Press, New York, NY, 2004).

74 M. Ottaway, 'Rebuilding State Institutions in Collapsed States', 33(5) *Development and Change* (2002) 1001–1023, p.1004.

or non-existent.⁷⁵ Peacebuilding was therefore reconceptualised from a relatively short transition to an open-ended consolidation period. The international community engaged in an increasing number of long, intensive missions that endured without a clear exit strategy, shifting towards more 'ordinary' international development once initial transitional tasks like DDR, elections and return of refugees was completed.⁷⁶ Consolidation takes years of relationship-building and problem-solving—ten to fifteen years is usually posited as the timeframe within which the endurance of a peace agreement can last.⁷⁷ Respectful, non-violent social discourse between enemies may be the stuff of decades.⁷⁸ Even the most condensed form of statebuilding takes at least ten years to achieve a degree of stable statehood.⁷⁹ Basic 'inclusive enough' democracy takes a number of election cycles, as much as 15–20 years.⁸⁰ Whereas democratisation in its more substantive sense of consistent control of public decisions by citizens took months in East-Central Europe and Latin America, 'decades rather than years, centuries rather than decades' may be the timescale for post-conflict democracy.⁸¹

TJ needed therefore to grapple with its place in this prolonged temporal sequence of causally connected institutional development through political, social and structural peacebuilding. Any parsimonious treatment of a long-run, complex phenomenon like TJ needs to acknowledge the reality that other peacebuilding factors (and the timescales they operate on) critically shape the political and economic conditions that determine the possibility for justice.⁸² Once TJ is recognised as an incremental process, it became possible for policymakers to form judgments about prerequisites and possible sequential characters of the processes around which governments and donors could shape

75 Egnell and Haldén, *supra* note 34, p. 41.

76 R. Paris and T. Sisk (eds.), 'Conclusion', *supra* note 67, pp. 304–315, p. 314.

77 J. Bercovitch and L. Simpson, 'International Mediation and the Question of Failed Peace Agreements: Improving Conflict Management and Implementation', 35(1) *Peace & Change* (2010) 68–103, p. 72.

78 R. Bleiker, 'Conclusion – Everyday Struggles for a Hybrid Peace', in O. Richmond and A. Mitchell (eds.), *Hybrid Forms of Peace* (Palgrave Macmillan, London, 2011), pp. 293–309, p. 298.

79 V. Fritz and A. Rocha Menocal, *Understanding State-Building from a Political Economy Perspective* (Overseas Development Institute, London, 2007), p. 41.

80 C. Zürcher, C. Manning and K. Evenson, *Costly Democracy: Peacebuilding and Democratization after War* (Stanford University Press, Stanford, CA, 2013), p. 43.

81 J. Braithwaite, 'Conclusion', in B. Bowden, H. Charlesworth and J. Farrall (eds.), *The Role of International Law in Rebuilding Societies after Conflict: Great Expectations* (Cambridge University Press, Cambridge, 2009), pp. 270–288, p. 285.

82 Kerr, *supra* note 15, p. 134.

programmes. The OECD, for example, has argued that governance, security and the rule of law should all be sequenced before TJ, seeing the latter as the means by which the putatively post-war state legitimises itself.⁸³ Likewise, the UN Department of Peacekeeping Operations has argued that TJ may need to occur after securitisation.⁸⁴ Some aspects of peacebuilding can clash with TJ, most notably the tendency of power-sharing to compromise any will to pursue justice.⁸⁵ In a notable study, Fletcher, Weinstein and Rowen have demonstrated that termination of conflict influences when mechanisms are employed and that initially modest post-conflict accountability can be expanded over time.⁸⁶ Policy-makers and theorists have begun to assess feasibility and capability more carefully, combining more holistic approaches but working towards 'good enough' rather than ideal forms of TJ. Tethered to non-linear peacebuilding, TJ will never conform to a technocratic idea of rational sequences—it will inevitably be an organic, multidimensional process that admits of a high degree of uncertainty in what is done and what ends are pursued.⁸⁷

Nevertheless, as in East-Central Europe and Latin America, justice tracks institutionalisation. A publicly acceptable minimum level of accountability is dependent on the prior achievement of stabilisation and restoration of some semblance of the rule of law.⁸⁸ Indeed, that reconstitution of judicial systems should precede criminal prosecutions is now approaching TJ orthodoxy.⁸⁹ Far from settling a consensus history and reconciliation that build peace, critics point out that truth commissions are more likely to be a consequence of democratic development than a catalyst of it.⁹⁰ It is for these reasons that domestic trials and truth commissions on average start nearly five

83 Fritz and Menocal, *supra* note 79, p. 29.

84 Resource Note: Sector Planning for Police, Justice and Corrections in Post-Crisis and Transition Situations, United Nations Global Focal Point for the Police, Justice and Corrections Areas in the Rule of Law in Post-conflict and other Crisis Situations, Civilian Capacities Initiative (1 July 2014), p. 5.

85 P. McAuliffe, 'Dividing the Spoils: The Impact of Power Sharing on Possibilities for Socioeconomic Transformation in Postconflict States', 11(2) *International Journal of Transitional Justice* (2017) 197–217.

86 Fletcher, Weinstein and Rowen, *supra* note 26, pp. 166 and 206.

87 Nickson and Braithwaite, *supra* note 58, p. 447.

88 M.B. Ndulo and R. Duthie, 'The Role of Judicial Reform in Development and Transitional Justice', in de Greiff and Duthie (eds.), *supra* note 21, pp. 250–281.

89 J. Iverson, 'Transitional Justice, Jus Post Bellum and International Criminal Law: Differentiating the Usages, History and Dynamics', 7(3) *International Journal of Transitional Justice* (2013) 413–433, p. 423.

90 D. Mendeloff, 'Truth-seeking, Truth-telling, and Postconflict Peacebuilding: Curb the Enthusiasm?', 6(3) *International Studies Review* (2004) 355–380, p. 373.

years after transition.⁹¹ The weakness of the surrounding institutional environment meant that the elevated expectations in early TJ theorisation had to be qualified. De Greiff, for example, began to argue that some goals of TJ like recognition and civic trust could be 'mediate' in the sense that they flow from the pursuit of TJ, but others like reconciliation were final in the sense that their temporally distant achievement depended on a set of factors largely beyond the control of any mechanism like trials or truth commissions.⁹² Andrieu, similarly, notes that the longer-term goals of TJ, like democratisation and rule of law reconstruction, 'will only affect victims' lives indirectly, and concern their children and grandchildren more than themselves.'⁹³ Reconciliation is increasingly understood as a generational project, again a matter of decades rather than years.⁹⁴ In the meantime, TJ in the context of peacebuilding must be reimagined as an open-ended, ongoing process where 'hooks' can be inserted at different junctures to enable new forms of accountability at those later stages when more accountability appears more feasible.⁹⁵ As experiences in Latin America and East-Central Europe suggest, TJ is most likely to achieve at least some of the goals set for it in tandem with institutional development of the state bureaucracy, security forces and rule of law over the course of a peacebuilding mission. It is becoming increasingly apparent that post-conflict states may sometimes enjoy more than 'one bite at the apple... countries may attempt different accountability strategies at different times, and may choose to revisit choices made previously 5, 10 or even 30 years later.'⁹⁶

4 'Justice to Come'—Futurity and Transformative Transitional Justice

As TJ mechanisms failed to catalyse meaningful justice and social change because their efficacy was tied up in the limitations of broader aspects of

91 G. Dancy, 'Choice and Consequence in Strategies of Transitional Justice', in C. Coyne and R. Mathers (eds.), *The Handbook on the Political Economy of War* (Edward Elgar, London, 2011), pp. 397–431 at p. 407.

92 De Greiff, *supra* note 64, p.40.

93 K. Andrieu, 'Transitional justice: a new discipline in human rights', Online Encyclopedia of Mass Violence, available online at <https://www.sciencespo.fr/mass-violence-war-massacre-resistance/en/document/transitional-justice-new-discipline-human-rights.html> (accessed 4 March 2021).

94 Braithwaite and Nickson, *supra* note 58, p. 449.

95 C. Bell, 'Contending with the Past: Transitional Justice and Political Settlement Processes' in Duthie and Seils (eds.), *supra* note 15, pp. 84–115, at pp. 92–93.

96 C.L. Sriram, O. Martin-Ortega and J. Herman, *Evaluating and Comparing Strategies of Peacebuilding and Transitional Justice* (JAD-PbP Working Paper Series, Lund, 2009), p. 35.

post-conflict reconstruction, theorists began to critique the 'to' and the 'from' of transition. They contended that the imagined temporalities of 'to' and 'from' were themselves inherently a matter of political contestation and power balances.⁹⁷ It was argued that TJ actively shaped the discourse around justice, assigned significance to certain wrongs but not others, positioning them within or outwith its scope of moral concern. The narrow legalistic focus on bodily integrity abuses failed to address systematic abuses like horizontal inequalities and poverty that caused (and were exacerbated by) conflict. Trials, truth commissions and reparations individualised guilt but in so doing obscured structural violence.⁹⁸ The 'underlying temporality' of TJ that posited a sharp distinction of before/past and after/present and presented an unduly whiggish understanding of time where apparent progress diverted attention from continuities of state underdevelopment, poverty and institutional weakness.⁹⁹

[T]ransitional justice assumes a linear notion of time as progress, in which the past and the future are seen as separable and successive, instead of intertwined and co-implicated. This makes it difficult for transitional justice adequately to acknowledge, and hence redress, the enduring structural arrangements that may have resulted in past as well as present injustice and the ongoing effects of past inequities on present and future generations.¹⁰⁰

Deprivations of socio-economic rights were treated at best as mere background context for the civil and political rights abuses that dominated the field. These blindspots were deemed to flow from the relatively limited remit of peacebuilding in reducing violence and constructing rule-based governance institutions. Critics argued that the traditional concern for security that TJ shares with peacebuilding has marginalized questions of socio-economic development.¹⁰¹ The emphasis within TJ on affirming democratic change appeared to make socio-economic justice 'irrelevant' in terms of the legitimization of post-conflict regimes.¹⁰² Similarly, critics contended that TJ's roots in statebuilding elevated

97 Baker and Obradovic-Wochnik, *supra* note 65, p. 287.

98 Braun, *supra* note 19, p. 14.

99 *Ibid.*, p. 29.

100 Balint, Evans and McMillan, *supra* note 12, pp. 200–201.

101 I. Muvingi, 'Sitting on Powder Kegs: Socio-Economic Rights in Transitional Societies', 3(2) *International Journal of Transitional Justice* (2009) 163–182, p. 167.

102 H. Franzki and M. Carolina Olarte, 'Understanding the Political Economy of Transitional Justice: A Critical Theory Perspective' in S. Buckley-Zistel, F. Mieth, T. Koloma Beck and C. Braun (eds.), *Transitional Justice Theories* (Routledge, London, 2013) pp. 201–221, p. 203.

the interests of choices by elite groups over the interests of citizens and meant the field functioned to maintain existing political hierarchies at national level over the interests of the many.¹⁰³

However, as should be clear from the previous section, the liberal peacebuilding goals of stabilisation, state reconstruction, rule of law and democratisation were seldom even partially realised by the time TJ was attempted. These critiques to an extent risk what Huntington calls ‘Webbism’—the tendency to impute to a political system characteristics that are assumed to be its final objective rather than those that actually capture how it functions.¹⁰⁴ The institutions of state, security and democracy were still more hollow-shell *organisations* mimicking the form of their Western equivalents than *institutions* that actually regulated behaviour on a consistent basis. The most compelling critiques, therefore, were those that married a commendable awareness of the limitations of peacebuilding to an understanding of the temporal factors at play. ‘Justice to come’ was inherently conditioned by ‘politics to come’ – meaningful justice was delayed rather than inherently precluded by these emergent processes. Rooney and Ní Aoláin, for example, noted the crisis-driven nature of peacebuilding and the attention to its normative legal architecture, which meant that systemic structural inequalities were ‘de-prioritised and treated as policy matters to be dealt with “down the road.”’¹⁰⁵ TJ processes applied as a standard toolkit fostered an ideal of transition as inherently short-term and conservative with a ‘conscious postponement of social democracy’.¹⁰⁶ Some explicitly endorsed this view. Waldorf, for example, argued TJ was inherently short-term—‘the reduction of longstanding inequality is necessarily “post-transitional”—something to be accomplished as part of creating a new and hopefully more democratic order.’¹⁰⁷

However, in light of the evidently greater concern from victim populations for welfare needs over mechanisms that deal with justice issues and reparation,¹⁰⁸ the temptation to postpone a reckoning with the economic order was eschewed. TJ began to address broader historically situated vulnerabilities,

¹⁰³ Arthur, *supra* note 8, p. 347.

¹⁰⁴ S. Huntington, *Political Order in Changing Societies* (Yale University Press, New Haven, CT, 1968), pp. 1, 93–139, 460–461.

¹⁰⁵ Rooney and Ní Aoláin, *supra* note 6, p. 1.

¹⁰⁶ Franzki and Olarte, *supra* note 102, p. 213.

¹⁰⁷ L. Waldorf, ‘Anticipating the Past: Transitional Justice and Socio-economic Wrongs’, 21(2) *Social & Legal Studies* (2012) 171–186.

¹⁰⁸ See, for example, P. Vinck and P. Pham, ‘Ownership and Participation in Transitional Justice Mechanisms: A Sustainable Human Development Perspective from Eastern DRC’, 2(3) *International Journal of Transitional Justice* (2008) 398–411.

social exclusions and marginalisation. By 2010, the UN Secretary-General was calling for the field to ‘take account of the root causes of conflict and repressive rule, and address violations of all rights’, most notably discrimination, exclusion, and violations of ESC rights, with the ultimate goal of significant social transformation.¹⁰⁹ Scholars and policy-makers began to tentatively accept that trials might tackle corruption, truth commissions might interrogate longstanding historical inequalities, reparations might be imagined as transformative projects. While some theories were moderately grounded in values of local agency and the prioritisation of participation and needs over preconceived outcomes,¹¹⁰ others were strikingly ambitious in positing that TJ could redress ‘deep-rooted iniquities’ and achieve redistributive justice.¹¹¹ Contemporary TJ practice is noticeably more proactive in addressing structural inequalities, even if starting from a very low base. For example, reparations policy in Colombia’s 2011 Victims’ Law has involved restitution of land as part of a consciously distributive agenda.¹¹² The Specialized Administrative Unit for Land Restitution set up to administer it has seen less than a fifth of the anticipated claimants. The failure of government institutions to function effectively, particularly in rural areas, is one of the reasons suggested for this deficiency. If it closes as originally planned in 2021, ‘there will have been no tangible impact.’¹¹³ Tunisia’s 2013 Transitional Justice Law was consciously designed as a holistic process that would take cognisance of the field’s more economic turn, with reparations attuned to regional disparities and a truth commission (with a remit including corruption and socio-economic issues) given the task of proposing economic reforms.¹¹⁴ The disappointing results we see are in part the product of limited domestic institutional capability. As Salehi notes, ‘TJ addresses relevant problems – indeed today better so – but its implementation is marked by a skewed nexus between justice problems to be

109 United Nations, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, available online at https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf (accessed 4 March 2021), pp. 1 and 7.

110 Gready and Robins, *supra* note 16.

111 As noted by E. Schmid and A. Nolan, “Do no harm”? Exploring the Scope of Economic and Social Rights in Transitional Justice’, 8(3) *International Journal of Transitional Justice* (2014) 362–382, pp. 371–372.

112 K.A. O Lid and J. García-Godos. ‘Land Restitution in the Colombian Transitional Justice Process’, 28(1) *Nordic Journal of Human Rights* (2010) 262–288.

113 H. Wiig and P. García-Reyes, ‘Bread or Justice – Land Restitution and Investments in Montes de Maria, Colombia’ 91(1) *Land Use Policy* 91 (2020) 1–8, p. 3.

114 M. Salehi, ‘Trying Just Enough or Promising Too Much? The Problem-Capacity-Nexus in Tunisia’s Transitional Justice Process’, 15(2) *Journal of Intervention and Statebuilding* (2021) 1–19.

addressed and the capacities of institutions in transitional contexts to properly deliver on the promises made.¹¹⁵

If TJ were to become embedded in these broader projects of socio-economic justice and structural change, the notion of time would need to become more sophisticated and long-term to take account of (potentially) increased institutional strength. This flows from the recognition that the potential for social change on the part of those urging transformation had largely been 'taken for granted' in this literature—the fixity of those aspects of the political economy that prevent transformation had heretofore gone underexplored.¹¹⁶ Likewise, almost none of the institutional or political prerequisites for transformation like highly mobilised social forces, compelling external pressure and/or the acquiescence of entrenched national elites are necessarily present at the point of contemporary post-conflict transitions.¹¹⁷ Few, if any, post-conflict states have 'an uncontested authority to set and sustain a consistent vision over time.'¹¹⁸ For reasons already canvassed in Section 3, mechanisms like truth commissions, trials and reparations programmes lack the administrative capability, resources or political support to achieve traditionally more circumscribed goals like truth and historical accountability, let alone broader socio-economic change.¹¹⁹ TJ actors by themselves will not transform the power, interests or preferences of major political forces. Transformative approaches to TJ are therefore unlikely to initiate new causal paths that fundamentally change underlying dynamics of poverty, but can only ever occur as part of parallel change processes within other paths of peacebuilding (in the medium-term) and development (in the long-term). Pro-poor policy-making requires sustained change in the month-by-month, year-by-year, decade-by-decade practices of dozens of political, social and economic institutions. Arguments that TJ should foreground socio-economic rights have therefore generally been premised on progressive realisation, reflecting the recognition that achievement of socio-economic rights can be hampered by a lack of resources and can be achieved only over a period of time.¹²⁰ As Andrieu notes, the short, fixed conception of transition as interregnum must therefore 'be broadened to embrace an array of stages and measures needed to truly transform a society

¹¹⁵ *Ibid.*, 5.

¹¹⁶ Sandoval, *supra* note 54, p. 180.

¹¹⁷ R. Falk, 'Predicaments of Transformative Justice in a Neoliberal and State-Centric World Order', in Duthie and Seils (eds.), *supra* note 15, pp. 57–81, at p.60.

¹¹⁸ Levy, *supra* note 70, p. 213.

¹¹⁹ The now-classic iteration of this argument is in Waldorf, *supra* note 107.

¹²⁰ Schmid and Nolan, *supra* note 111.

after war.¹²¹ Those who advocate reorienting the focus of TJ towards redressing power-balances at the local level accept that this broadening necessarily extends timeframes to decades.¹²²

5 Towards a Dynamic Understanding of Time

Beyond this rhetorical acceptance of the need for greater temporal breadth in TJ theorisation, understanding of the relationship between continuity and change over the *longue durée* as regards deeply rooted structures of poverty, inequality and underdevelopment has not gone very far. Transformative theories have been strong in proposing desired outcomes, but less oriented towards providing *ex ante* knowledge of likely trajectories of evolution in the political economy of post-conflict states. The ends desired by advocates of less liberal-legalist forms of TJ do not arise in a vacuum—meaningful engagement with socio-economic governance means understanding how institutional underdevelopment shapes the incentives of policymakers. As noted above, post-conflict states exhibit low levels of internal coherence, have limited ability to apply rational-legal methods to allocation of public goods, and seldom implement policy in ways faithful to written law. Most economic, social and political institutions that underpin structural underdevelopment and/or maldistribution are ‘slow moving’ and develop incrementally over decades.¹²³ Inadequate understanding of these dynamics reinforces a fundamental mismatch between expectations and the actual capacity of the state to deliver. Transformative TJ is only possible where cumulative processes of peacebuilding and development have generated formal state institutions of governance, law and welfare that can be relied upon to domesticate change for specific purposes like welfare or redistribution. It is for this reason that scholars increasingly urge the linkage of TJ to development (i.e the cumulative historical process by which economies grow through productivity and political systems aggregate political preferences) if it is to be effective in transforming societies.¹²⁴ Only with development can state bureaucracies achieve a threshold functionality and rights

121 K. Andrieu, ‘Civilizing Peacebuilding: Transitional Justice, Civil Society and the Liberal Paradigm’, 41(5) *Security Dialogue* (2010) 537–558, p. 544.

122 L. Arriaza and Naomi Roht-Arriaza, ‘Social Reconstruction as a Local Process’, 2(2) *International Journal of Transitional Justice* (2008) 152–172.

123 G. Roland, ‘Understanding Institutional Change: Fast-moving and Slow-moving Institutions’, 38(4) *Studies in Comparative International Development* (2004) 109–131.

124 See Duthie and de Greiff (eds.), *supra* note 21.

might be extended to all social groups.¹²⁵ However, it is not enough simply to posit the relevance of development theories. Any paradigm that attempts to explain how internationally- or locally-generated theories of TJ can transform society that does not take the generic developmental trajectories of unstable, weakly-institutionalised states as its centrepiece will lack adequate power to explain the constraints and opportunities of domestic policy-makers.

In seeking insights into the conditions under which minimally welfarist forms of state capacity or elite commitment to redressing economically unjust structures emerge and become sustained, the work of Brian Levy is instructive. His work explores the conditions by which developmental leaderships and coalitions emerge over time in states with low incomes and weak governance to foster better development outcomes and stronger institutions. As such, his focus is the challenges of initiating and sustaining forward development momentum and how, over a span of decades, virtuous circles can link institutional improvement, responsive government and the fuller goal of social justice implied by concepts like inclusive growth or transformative justice. Three things in particular mark his work as of particular relevance to TJ. Firstly, his work is a conscious attempt to find an orienting framework for how complex interdependent institutions of state-building, peacebuilding and development evolve with leads and lags in their interplay to identify when and how policy projects (like TJ) can be a 'good fit' within these trajectories.¹²⁶ Though clear that there is no defined pathway given the diversity of states, his goal is a relatively parsimonious ideal-type framework that clarifies how policy priorities can be realised over time, allowing policy-makers to build hypotheses on deviations and variations within it. Secondly, he adopts a 'with the grain' approach that acknowledges the need for reform to be aligned with institutional and political realities of chronically unstable states. He envisages change in evolutionary, as opposed to engineered terms, and so redirects attention from optimal theories that characterise much of the most ambitious TJ theorisation towards incremental change.¹²⁷ Even strong advocates of economically emancipatory forms of TJ acknowledge the need to pursue policy located between the 'conservatism of incremental pragmatism and the potential utopianism of the critical literature', emphasising progressive realisation over time over literal transformation.¹²⁸ Thirdly, and most valuably, he situates his theory within the

¹²⁵ L. Waldorf, 'Between Transition and Transformation: Legal Empowerment as Collective Reparations', in Gready and Robins (eds.), *supra* note 13, p. 132.

¹²⁶ Levy, *supra* note 70, p. 9.

¹²⁷ *Ibid.*

¹²⁸ D. Sharp, 'What Would Satisfy Us? Taking Stock of Critical Approaches to Transitional Justice', 13(3) *International Journal of Transitional Justice* (2019) 570–589, pp. 587 and 588.

types of 'personalised-competitive' types of democracy contemporary peace agreements give rise to (as noted in Section 4), with attendant shortcomings in terms of good governance, state capacity and rule of law, and outlines the distinct incentives and constraints this platform for development creates for policy-makers.¹²⁹ As Baker and Obradovic-Wochnik argue, TJ needs to be rethought in the context of these types of states, which are 'the rule, rather than an exception, in the global state system.'¹³⁰

Levy posits that as states develop along this personalised-competitive trajectory typical of nascent (quasi)democratisation, the basis for stability, governance and policy shifts. As politics departs from the zero-sum struggle for dominance represented by conflict, the sorts of personalised relationships that underpin power-sharing like elite bargaining and clientelist elections guarantee a precarious stability. Over time, political contestation can take on a more iterated or rule-constrained political character redolent of the democracy peacebuilding missions ultimately attempt to foster.¹³¹ Until such arrangements are institutionalised, the inherent instability of a new political settlement and the lack of faith in other institutions of state mean that time horizons are short—there is little incentive for leaders to invest in long-term tasks like inclusive development, welfare or redressing structural inequalities. Far-reaching policy reforms of the type envisaged in transformative visions of TJ 'will be low on the agenda.'¹³² However, continuity in terms of stability and governance means actors develop expectations of stability, which create incentives for reform-minded elites to unite rather than splinter, and to approach social problems with extended maturity horizons. Over time, a critical mass of mutually reinforcing policies can transform the environment in which TJ is pursued by institutionalising the deeply conflictual processes of social and class transformation. Improvement in the security situation might evoke complementary improvements in economy. As the economy grows, pressure might come from elites and/or citizens for institutions that can underpin more sophisticated policy-making and economic interactions. Patronage-based state bureaucracies might become more rule-based institutions committed to the provision of public services. Programmatic political competition and the types of effective grassroots civil society envisaged in some transformative theories of TJ can emerge to foster elite commitments

The need for, or reality of, 'progressive realisation' is also noted in Waldorf, *supra* note 59 at p.45, plus (as already noted) in Nolan and Schmidt, *supra* note 111.

129 Levy, *supra* note 70, pp. 40 and 35.

130 Baker and Obradovic-Wochnik, *supra* note 65, p. 294.

131 Levy, *supra* note 70, p. 32.

132 *Ibid.*, pp. 34–35.

to responsive government, though the imperatives of democratic politics may favour modest, incremental reform over thoroughgoing structural change that threatens the interests of powerful groups. Civil society is key to instigating inclusive forms of TJ as coalitions of survivors or victims make demands on elites or generate horizontal solidarities, but can only do so successfully where state-society relations and accountable governance structures have reached a threshold degree of resilience.¹³³ Receptivity to normative ideas that operate at the global level becomes more thinkable as value-based forms of rationality replace the instrumental-factional logic of stabilising the peace settlement.

In short, institutional predictability can enable political leaders to privilege long-term rewards over short-term gratification—underlying political settlements can change from personalised to impersonal, exclusionary to inclusionary, predatory to developmental. Distributions of power can change within a maturing political settlement, while relations can change between ruling coalitions and civil society, creating space for ideas like transformative justice to legitimise and catalyse certain bargains between state and society or to inform an inclusive development strategy. Development in this sense is an evolving, interdependent system sustained by virtuous circles where change in governance and the economy is initiated, momentum is built and sustained over time until institutions are at least minimally aligned with the incentives of a critical mass of political and civil society stakeholders.¹³⁴ This understanding places an emphasis on the dynamics of the political settlement established during peacemaking, above all how it stabilises and broadens over time to include different interests, goals and communities.

Though Levy is primarily concerned with typical developmental priorities like governance and growth, there are lessons to be drawn for TJ as it wrestles with the temporal dilemmas of transformation given that well-intentioned TJ efforts are more likely to be undermined by obstacles that are institutional or political in nature, rather than financial or technical. The value here is not the ability to draw reliable or practicable policy conclusions for TJ activity. TJ is inevitably hostage to multiple fortunes and cannot be predicted or steered with certainty as to effects. However, as a set of theorised mid-range suppositions, work like Levy's is an initial platform for outlining informed hypotheses for understanding how the developing political order might permit those aforementioned TJ 'hooks' to be inserted at different junctures. Their success or failure is conditioned by

¹³³ E. Wiebelhaus-Brahm, 'After Shocks: Exploring the Relationships Between Transitional Justice and Resilience in Post-Conflict Societies', in Duthie and Seils (eds.), *supra* note 15, pp. 140–165 at p. 153.

¹³⁴ Levy, *supra* note 70, p. 30.

incentives and capabilities shaped by ideas, distributions of power and institutionalisation. While trials, truth commissions and reparations are typically attempted relatively early in transition, if TJ is to have that broader transformative impact, it must (as it did in Latin America and East-Central Europe) ‘work with the grain’ of the societies it is attempted in. It can do this by finding entry points within the long-term process change where forward movement in terms of governance, economic development or state capacity brings with it the possibility of gain in other areas. None of this is inevitable—the history of post-conflict peacebuilding in the likes of Liberia, East Timor and El Salvador suggests that reversal and stagnation where institutional capability is too weak for policy implementation is more likely than this scheme of incremental improvement. However, without some degree of pre-existing institutional strengthening in terms of governance, state capacity and rule of law, governments have little incentive to respond to the concerns of any stakeholders outside the immediate circle of power with latent capacity to resume violence.

Without these elements of governance, dynamics that transformative TJ is dependent on like inclusive development or pro-poor policymaking are unlikely to emerge beyond the most local grassroots projects. However, where violence is monopolised, some democratic responsiveness develops and where ‘good enough’ governance takes root, a with-the-grain approach would allow a form of TJ that ‘builds on strengths, works around constraints, and leverages the momentum’ of these developments to foster projects oriented around poverty reduction or inclusive development.¹³⁵ Of course, the incrementalism fostered by best-case scenario peacebuilding operates within the parameters of existing institutions and can deflect attention from more difficult reforms. The underlying structure of the economy may remain unchanged—as Falk notes, typical post-conflict transitions are not revolutionary, but instead involve grudging consensus and accommodation between government and oppositional forces that leave the privileged economic status of certain elites intact.¹³⁶ However, institutional development can provide multiple windows of opportunity over time for transformative approaches to TJ insofar as it establishes ‘a set of stability-enhancing rules for channelling collective action and citizen engagement’ that transformative theories are premised on.¹³⁷ As Bell notes, these iterative forms of elite bargaining determine the outcomes of individual TJ institutions and indeed the entire political transition, but have been ‘under-theorized and

¹³⁵ *Ibid.*, p. 40.

¹³⁶ Falk, *supra* note 117, p. 59.

¹³⁷ Levy, *supra* note 70, p. 115.

'under-researched' in the TJ literature.¹³⁸ There is of course no guarantee that governmental responsiveness or state capacity will automatically be oriented towards transformative ends, but for TJ to become even minimally transformative, it must be embedded in top-down developmental institutions of government sufficiently robust to implement recommendations and bottom-up developmental coalitions whose everyday political contests can shape the structure and effects of these institutions over time.

To the limited extent that temporal factors are considered in the literature on transformative justice, it is generally imagined in Elster's terms as 'protracted transitional justice' that starts immediately and lasts until all issues are resolved.¹³⁹ However, given that it is dependent on stability levels, domestic institutionalisation and donor willingness, policymakers might more realistically approach TJ as an intermittent patchwork of ad hoc projects or mechanisms over a number of years, as opposed to a comprehensive restructuring of the state based on a transformative strategy involving all relative actors in policy coherence. The over-emphasis in critical TJ literature on comprehensive transformation has a high risk of being counter-productive. As Levy notes, 'it takes well over a decade to get real traction for some very specific public purpose—to define a clear, implementable set of tasks; to build the requisite internal capabilities and alliances; and to follow through with implementation to a point of sufficient critical mass to resist reversal'.¹⁴⁰ Elster's alternative paradigm of 'postponed transitional justice' that takes place ten or more years after the start of transition might be more apt.¹⁴¹ Though of little comfort to those with immediate needs catalogued in most TJ fieldwork involving victims, longer time horizons bring their own advantages—the speed of reform can be traded off against its sustainability and effectiveness.

While critiques of TJ are correct, therefore, to argue that reorientation towards transformative social change will require much longer time-frames than liberal-legalist approaches,¹⁴² these time-frames must take cognisance of need for stability, some degree of governmental responsiveness and state capacity to reach a certain level before transformative approaches can achieve efficacy. It may be the case that TJ mechanisms can be implemented to generate early wins that might support more ambitious follow-up projects or

¹³⁸ Bell, *supra* note 95, pp. 102 and 103.

¹³⁹ Elster, *supra* note 24, pp. 75–76.

¹⁴⁰ Levy, *supra* note 70, p. 220.

¹⁴¹ Elster, *supra* note 24, pp. 75–76.

¹⁴² Nesiah, *supra* note 14, p. 23.

dissipate resistance through gradualist methods that build public support. However, we need to be honest about trade-offs and priorities in worlds where the institutionalisation it depends on is contingent and discontinuous. Sharp, for example, argues that scholars need to manage expectations about what success looks like in more holistic approaches to TJ—transformative approaches might best be conceptualised as an entry point to ‘hard “real world” choices’ thrown up by weakly institutionalised states.¹⁴³ TJ interventions must become selective, more realistic about the level of ambition for any given project, and better attuned to the incentives created by the national political economy. The longer timeframe must also be sufficiently porous to allow a series of short-, medium- and longer-term strategies to be applied at national and subnational levels when opportunity arises. One of the corollaries of a ‘with-the-grain’ approach is a principled agnosticism about what to do next and when.¹⁴⁴ Opportunities for breakthroughs are most likely to emerge during instances of dynamic change where the underlying peace settlement changes and the state becomes more responsive, more developmental or simply more wealthy. By tracing and comparing the course of transformative projects in other states, it may be possible for TJ policy-makers to understand when these instances of dynamic change might emerge across a manageable timeframe. It should, however, be clear from this paper that transformation is not an outcome to be brought about by struggling for it directly, but is a best-case effect of a developmental process that is not on the immediate horizon for most post-conflict states. Patience and commitment are imperative.

6 Conclusion

This article has argued that the history of TJ is less a case of bold visions realised than a consistent incrementalism conditioned by institutional factors of politics and the economy that influence the capacity of states and the international community to engage in TJ. This reflects the reality that while TJ processes ‘can contribute to the transformation of dominant ideologies, they do not lead to such changes on their own but rather only in combination with other structural changes.’¹⁴⁵ The underlying conditions for TJ are shaped by the conclusion of particular types of political transitions that catalyse an iterative interplay with (re)emerging, and later consolidating, institutions over time.

¹⁴³ Sharp, *supra* note 128, p. 572.

¹⁴⁴ Levy, *supra* note 70, p. 10.

¹⁴⁵ Sandoval, *supra* note 54, p. 182.

The greater the longevity, legitimacy and functionality of these institutions, the better the prospects that TJ mechanisms can achieve a threshold degree of efficacy.

The experiences of Latin America and East-Central Europe demonstrated that windows of opportunity that foster so much urgency around TJ policy-making are ultimately much longer than was initially believed—as Horne puts it, ‘if early reforms are not always better and late reforms not always bad’, then policy options might expand as institutionalisation progresses over the course of decades.¹⁴⁶ However, what initial post-authoritarian and later post-conflict contexts made clear is that TJ in its traditional liberal-legalist guise can only succeed where there is forward institutional movement in terms of stability, good governance and economic development that brings the prospect (not promise) of incremental gains with the potential to cumulatively achieve more thoroughgoing forms of justice over time. Policymakers in post-conflict states need to move from a static yet utopian conception of TJ as the midwife of democratisation and the rule of law to a dynamic one that focusses on processes to exploit ongoing interactions of medium-term peace-building and long-term development as they shape and reshape each other.

As the examples of Colombia and Tunisia demonstrate, the more ambitious struggles transformative justice seeks to advance (i.e land reform, poverty reduction, redistribution) are also dependent on even longer-term institutional change where the state can coalesce and amass sufficient authority, capacity and legitimacy to collectively deliver public goods. Transformation depends on evolving interdependent systems, carried forward by interactions between security, development, governance, and democratisation. Transformative justice as understood in contemporary TJ discourse may only be possible where the political leadership’s policy horizon extends temporally from the short-term exigencies of immediate post-transitional survival to a more institutionalised form of stability. It is only at this point that political behaviour has been routinised and institutional structures incentivise leaders to make more long-term investments in the state and its people. I have drawn on the work of Levy to discern plausible (if admittedly generic) pathways by which states and societies reach the point of sustaining effective and responsive institutions sufficient to identify entry points for TJ activities, while avoiding the fallacy that such change might follow a linear trajectory. Analysis like this can catalyse a policy research agenda oriented towards better understanding the conditions under which the political space for structural change is created over time for developmental or pro-poor governance, and within which TJ actors

¹⁴⁶ Horne, *supra* note 25, p. 142.

can create context-specific projects or mechanisms that build upon dynamic reform processes.

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