**Casual and Causal Links to the Rule of Law**

INTRODUCTION

Theorists of transitional justice (TJ) tend to assume that its practice coalesces with projects to (re)establish the rule of law (RoL). The expectation is that the two are mutually reinforcing, inasmuch as improvements in the justice sector contributes to TJ, and achievements in TJ strengthen the rule of law.[[1]](#footnote-1) However, studies on the relation between the two are few and far between, normative in their emphasis and misleadingly optimistic about prospects for change. TJ and RoL reconstruction activities are strikingly different, established in different sectors by different people for different ends, as likely to be antagonistic towards each other as supportive.[[2]](#footnote-2) Many ends are associated with the RoL, such as a government bound by law; equality before the law; law and order; predictable and efficient governance; and human rights.[[3]](#footnote-3) Clear causal links between these ends and a handful of trials, truth commissions or reparation processes are both difficult to establish and hostage to numerous fortunes like development, statebuilding and security.

The hope, if not the expectation, that such links exist is natural. The courts in post-conflict states are often considered untrustworthy, either because they are functionally weak and/or because they have been deeply implicated in past abuses by rationalising the pernicious structures that existed or by failing to restrain state power.[[4]](#footnote-4) Examples are legion of weakly institutionalised RoL in transitional states. The legal institutions of post-invasion Afghanistan barely functioned on account of fleeing judges and lawyers, who in turn were replacement by unqualified and illegally appointed replacements.[[5]](#footnote-5) Both before and after the Special Tribunal for Lebanon, the courts in Beirut demonstrated partiality, deep politicisation and selective adjudication. In addition, they were oriented towards securing the rule of elites vis-à-vis their communities.[[6]](#footnote-6) The post-independence government of East Timor inherited a court system that under prior Indonesian occupation was ‘perceived as complicit with the military, and generally it was not considered possible to challenge the legality or constitutionality of any law or government action,’ to say nothing of the fact that only 17 Timorese law graduates could be found with almost no experience of practice.[[7]](#footnote-7) The terminology we associate with such inheritances say more than examples can – ‘absent’, ‘dysfunctional’, ‘illegitimate’,[[8]](#footnote-8) ‘deficits’, ‘vacuums’, ‘lacunae.’[[9]](#footnote-9) The judiciaries in these states were incapable of restraining executive or legislative power before TJ process; there is little to suggest that afterwards they can now consistently assert accountability measures aimed either at curtailing or constraining their use of coercive power. As the former Liberian Minister of Justice argues, ‘[f]or these kinds of problems in post-conflict countries like Liberia, there is no quick fix, no textbook solution, no best practice.’[[10]](#footnote-10) Restoring the rule of law in such a context is a multidimensional problem incorporating human development, infrastructural capacity-building, socio-political re-engineering and normative change.

It is puzzling, therefore, why we believe TJ might offer a quick fix or solution to the problem of unrule of law. Given the complete debilitation of judicial structures in contemporary post-conflict states, any contribution made by TJ can only be partial, if it achieves even that much. Sometimes, TJ has no effect at all. After fifteen years of transitional trial at Cambodia’s Extraordinary Chambers, the national justice system approximates the ‘Beijing Consensus” model of RoL, whereby the rule of law is conceived of as ‘narrow, proceduralist,’ ‘divorced from democracy promotion,’ and oriented towards greasing the wheels of top-down economic and social control.[[11]](#footnote-11) The rest of this contribution presents a theory of TJ’s relationship to RoL that adjusts aspirations in light of the types of contextual starting point canvassed above. TJ can and should contribute to RoL, but we should caution against having too high expectations (a) of what can be achieved and (b) the relative importance of TJ to RoL. Instead, we should adopt a self-consciously pragmatic approach, foregoing heroic assumptions and carefully determining what TJ can contribute with reference to state capacity, complex institutional dependencies and parallel projects of international rule of law reconstruction. This is a less exuberant account than casual rhetoric about the inevitable link between the two. This chapter begins by establishing that this this rhetoric is, in fact, casual – it presents both RoL and TJ as dramatically undertheorised phenomena, which contributed to simplistic assumptions that the latter automatically conduces to the latter. It goes on to sketch a series of RoL shortcomings that TJ is not equipped to respond to. It shows how progress in terms of TJ and/or RoL is dependent entirely on factors of security, development and state reconstruction that lie far beyond the control of their practitioners. The chapter then demonstrates how the contribution TJ makes to RoL is dwarfed by parallel projects of international rule of law reconstruction and domestic assertiveness by the judiciary.

THE PRODUCTS OF UNDERTHEORISATION

Two clichés tend to recur when we theorise about the rule of law. The first is that it is a *good thing*. For most scholars and practitioners, ROL ‘refers to an aspirational end state or ideal (perhaps impossible to attain in full) where the exercise of state power is controlled by law and restrained in the interest of the citizens.’[[12]](#footnote-12) There is a near-universal consensus that it is important, an ‘apple pie and ice cream’ concept no one can dislike.[[13]](#footnote-13) This brings us to the second cliché, namely that this observable enthusiasm is not attended by a corresponding consensus on what the rule of law is. Notwithstanding its apparent its centrality to numerous political projects, a recognition that RoL is ‘woefully undertheorized’[[14]](#footnote-14) is one that is broadly shared. Definitions oscillate between *thin* formal, institution- and rule-focused conceptions emphasising predictability, generality and publicity and *thick* versions that buttress thin outlooks with broader vision of a good, usually rights-based democratic society polity. The latter tends to dominate peacebuilding and TJ, for reasons explained below. The concept is therefore open ended, susceptible to wildly differing visions on the part of practitioners and academics about what attributes it has.[[15]](#footnote-15) Martin Krygier puts it best when he argues that RoL ‘means so many different things to so many different people ...that it is hard to say just what this rhetorical balloon is full of, or indeed where it might float next.’[[16]](#footnote-16)

This is all the more so in post-authoritarian and post-conflict states – the RoL is the ‘elixir of transitions’, the widely-accepted basis for a transition from armed conflict to peace.[[17]](#footnote-17) However, if the substance of the rule of law is ambiguous, then so are the paths to achieving it. There is no consensus on how catalyse RoL where it is absent and no record of policy accomplishment in its pursuit.[[18]](#footnote-18) The RoL reconstruction sector (explored below) is subject to widespread criticism for failure to deliver on its promises, a failure tied largely to this undertheorisation, which results in practitioners lacking a comprehensive understanding of how to develop it.[[19]](#footnote-19)

TJ replicates the problems of RoL in terms of indeterminacy and insufficient theorisation. Three interlinked problems emerge: (a) the failure to adjust to post-conflict states in the developing world; (b) a consequent overestimation of the malleability of post-conflict states, and (c) a lack of a theory of change that might ameliorate this problem. As to the first of these, the first Special Rapporteur in the field is correct in arguing that policy has failed to take into account the substantial differences between the post-authoritarian ecologies in which TJ theories were originally developed and the typically fragile environment that obtains in those post-conflict states where it is now predominantly implemented.[[20]](#footnote-20) TJ often occurs in shell-states that never developed economic, political and social structures/capacities that provided the basis for the functioning political orders prevalent in Latin America and Eastern Europe when TJ as a concept was first outlined. The Rapporteur further argues that the mechanisms and aspirations of TJ shifted from the post-authoritarian context to the post-conflict setting ‘with virtually no functional analysis’, with a resulting gap between the articulation of necessary ends in contemporary TJ discourse (like the rule of law, *inter alia*) and the means of realising it given the lack of a functional architecture for accountability and/or redress.[[21]](#footnote-21) Many of the aspirations for TJ (democratisation, redistribution, rule of law) are dependent on a high threshold of state efficacy that often barely exists beyond the OECD world. TJ, whether externally-driven, nationally-driven or bottom-up, is expected to accelerate or substitute for organic historical processes of development that did not occur earlier in a given post-conflict ecology.

This faith is only sustainable with a corollary belief that post-conflict states are malleable and that they can be induced to act in ways that historically have proven alien) ***if*** the demands of justice are articulated with sufficient resonance. Because theorisation is so prescriptive, scholars pay more attention to outcomes and opportunities for participation than those obstacles to change that are considerable in states where a ‘commonly shared and internalised conception of a political community to which all societal groups relate as parts to a whole’ is largely lacking[[22]](#footnote-22) and where administrative structures are rudimentary.

Because TJ is characterised primarily by normative, linear and mechanism-based claims with a relatively weak evidence base, Gready and Robins argue the field lacks a theory of change, by which they mean (and drawing on the work of Aragon and Macedo) a set of ‘underlying assumptions about the relationships between desired outcomes and the way proposed interventions are expected to bring them about.’[[23]](#footnote-23) In a literature characterised by taken-for-granted wisdom, the pathways that culminate in those long-term goals (like reconciliation, redistribution, democratisation, rule of law) and the connections between those pathways remain under-articulated, as are the panoply of interrelated contextual factors like state capacity, development, security and economy.[[24]](#footnote-24) Simply put, TJ lacks a sophisticated understanding of the levers of change and the timescales on which change might be accomplished.[[25]](#footnote-25)

CASUAL LINKS BETWEEN THE RULE OF LAW AND TRANSITIONAL JUSTICE

It should be clear at this point that with both RoL and TJ, so many goods have been associated with each that it is difficult to define, in concrete terms, what it will take to realise them. It should nevertheless come as no surprise that links are drawn between two such amorphous concepts, or that this link is an article of faith at UN level.[[26]](#footnote-26) Randle deFalco presents one of the most succinct encapsulations of this link:

‘Operating within this perceived absence of law, [judicial] institutions are commonly portrayed by their proponents and quite often actively portray themselves as, amongst other things, sowing the seeds for the reconstruction of the rule of law by combatting impunity while upholding fair trial standards and more generally demonstrating how the law ought to be administered.’[[27]](#footnote-27)

While intuitively appealing, it is worth interrogating the discursive and political convergence of the two concepts in the post-Cold War era of transition when this link was first established. While an entire intellectual apparatus has been built around TJ in the years since, when first enunciated in the late 1980s and early 1990s in Latin America and Eastern Europe, we forget how TJ emerged intuitively and in a seemingly pre-theoretical way, a set of ‘experiments’ responding to novel contingencies.[[28]](#footnote-28) Debates over justice versus amnesty and/or impunity characterised the debate. The case for accountability had not yet been garlanded with consequentialist teleologies, but rather was posed as a counterfactual – what if there is no justice? Could policymakers entrench a culture of impunity by placing some people above the law? The initial case, therefore, was deontological - where the crimes concerned are as reprehensible as crimes against humanity, they must be prosecuted. It was in this way that TJ’s ‘main metaphor’ became criminal justice.[[29]](#footnote-29) It was only after (i) a consensus among experts that the pertinent question is not *whether* to punish but when and how to pursue accountability in transition emerged and (ii) a global accountability norm (the ‘justice cascade’) fostered the development of international legal norms to underpin it, that broader non-moral and non-legalistic cases began to be made for TJ. Put another way, the initial legal/moral obligation to address the past only gradually became a strategic policy for the amelioration of society.

There was, of course, no shortage of justifications for transitional accountability beyond legal compulsion. These were largely based in democratic and rights-based theories. TJ was posited to, *inter alia*, create or restore relationships based on a commitment to the equality of citizens, to provide victims with recognition/acknowledgment for past abuses, and to draw a line in the sand between a repressive past and a more promising future by vindicating the currency of hitherto-abrogated human rights norms. Rule of law could have amounted to merely one more justification among many. Why it became so central owes less to the capacious metanorm of justice than to the nature of the transition itself. Modern democratic states were being reconstructed, and they were presented as an inherent combination and balance of three sets of institutions – the State, democratic accountability and a (consequently thick) version the rule of law.[[30]](#footnote-30) Ideas of the RoL have roots in every ancient culture and every Lockean theory government grounded in popular consent – in short ‘it has been fundamentally intertwined with the idea and construct of sovereign statehood, and with the essential questions about coercion, authority, legitimacy and accountability intrinsic to the modern State.’[[31]](#footnote-31) We see this in the UN General Assembly’s ritual ‘reaffirmation’ in its annual Declaration on the rule of law, that ‘human rights, the rule of law and democracy are interlinked and mutually reinforcing.’

There are echoes here of Raz’s warning that we equate the rule of law with whatever we take the good to be[[32]](#footnote-32) and Krygier’s observation that all sorts of goods are promiscuously claimed to flow from it, such as economic development, security, democracy etc.[[33]](#footnote-33) However, the assumption that TJ was a mandatory part of transition and that rule of law defined the character of the transitional state conduced to a facile association between the two concepts, an imagined Venn diagram where values at their intersection occupied more space than those outside. If Latin American military authoritarianism, Socialist rule *by* law or Apartheid legal nihilism were the order of the day, then accountability processes that contradicted these values were inherently restorative of the rule of law. For post-conflict states, the absence or breakdown of the RoL became regarded as a major contributor to instability and civil war.[[34]](#footnote-34) In response, TJ scholarship developed a standard narrative wherein the atrocity crimes it responded to flowed from the ‘climate of social chaos’ occasioned by the breakdown in the rule of law,[[35]](#footnote-35) a breakdown that could only be remedied if 'the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice.’[[36]](#footnote-36)

Peace and democracy became unthinkable without a rule of law culture, which itself became unthinkable with TJ. Criminal justice (as opposed to other forms of accountability such as truth commissions) began to be justified on the basis of the contribution they make to RoL in the long term, rather than short-term or particularised interests like retribution or deterrence.[[37]](#footnote-37) They did this by

(1) demonstrating the new State's renewed commitment to criminal justice and human rights,

(2) vindicating equality before the law in the criminal justice system and the State generally of hitherto untouchable military/political/economic elites and/or sections of society

(3) holding perpetrators accountable and removing them from those previous positions of power that maintained systemic impunity

(4) vindicating the rights and dignity of victims.[[38]](#footnote-38)

In so doing, the process would prove as important as the outcome. Fair prosecutions would signal to society that the law, exercised and applied through the criminal justice system by an independent, impartial, and effective judiciary, could be applied uniformly and without discrimination across society.[[39]](#footnote-39) It became routine, if not rote, to insist that the pursuit of criminal justice was vital to restore and ensure the rule of law.[[40]](#footnote-40)

THE GAP BETWEEN TRANSITIONAL JUSTICE AND RULE OF LAW: THREE FACTORS

In a context where both RoL and TJ were envisaged primarily as systems that flowed from democratisation and civil-political rights, it is not surprising that they were associated with each other in the ‘all good things go together’ euphoria of the post-Cold War moment.[[41]](#footnote-41) However, history has demonstrated that theorisation about their relationship had a circular or tautological dynamic that was plausible on its face but belied by the complexity of post-authoritarian and post-conflict societies. Put another way, thirty years of practice has shown that progress in one does not guarantee an advance in the other. At best, as Anderson notes,

‘[T]here's a loose but not essential association between the two. We pursue justice, and we pursue rule of law, and sometimes, maybe coincidentally, if we're really good or lucky, they reinforce one another. Really?! If that's the case, and I fear that, more often than not, it is, then there's something seriously wrong with the way we're thinking and doing both transitional justice and rule of law.’[[42]](#footnote-42)

Why have the links between the two proven so underwhelming? Three reasons are put forward, one of which is familiar and two of which are less so.

1. Inherent Limitations

The familiar explanation for TJ failing to catalyse RoL (and for that reason, summarily described) is that too much of the former contradicts the latter.[[43]](#footnote-43) The potential for trials to enhance the legitimacy of the rule of law would obviously revolve around the degree to which trials ‘were, or were perceived as, independent, discriminatory, highly politicized, acts of revenge, or victors’ justice.’[[44]](#footnote-44) Theorists had to grapple with the impossibility of guaranteeing timely, fair trial with equality of arms between prosecution and defence for systemic crimes. Trying even a fraction of the perpetrators would overwhelm a legal system, to say nothing of the obvious *lex retro non agit* difficulties raised by prosecuting acts commanded by the old regime. ‘Cut corners’, victor’s justice and impunity were often produced.[[45]](#footnote-45) Shortfalls in state compliance with the duty to prosecute can often be explained by the government’s prioritisation of more urgent development challenges like restoring infrastructure and services over resource-intensive (and often divisive) accountability processes.[[46]](#footnote-46)

Where trials proved impossible, truth commissions were welcomed over time, but many of the wearily familiar truth versus justice debates they occasioned revolved around the idea that exchanging amnesty or pardon for confession to crimes to which an *erga omnes* obligation to prosecute attached did or did not violate RoL principles. The acts listed in lustration and vetting laws were not illegal at the time they were committed – while undoubtedly immoral, punishing them administratively raised obvious problems of retrospectivity and of unequal treatment before the law. The response to these qualms was to interpret ‘accountability’ broadly and to deem non-criminal processes unproblematic in rule of law terms. Insofar as they assigned responsibility, acknowledged abuse, sanctioned individuals, catalysed institutional reform and/or provided remedy for victims, they satisfied a necessarily elastic, transitional rule of law. As Ohlin argues, a distinctively ‘transitional’ justice is produced by exceptional and limited moment where certain circumventions of strictest legality may be permissible.[[47]](#footnote-47) In this way, a narrative or symbolic understanding of RoL came to the fore, exemplifying the argument that labels such as RoL can come to represent vague storylines to which concerned actors relate to discursively and practically, but only on the basis of different, somewhat incompatible understandings of what it is constituted.[[48]](#footnote-48) For some, the attempt to fit truth commissions, vetting, limited criminal sanction and conditional amnesty within a concept of the rule of law will seem unduly Procrustean. As Sadurski notes:

‘Failure to comply with the classical rule of law may be justified by many arguments of a political or moral nature but it remains exactly what it is: a failure to comply with the rule of law. It may be defensible, all things considered, but it remains deeply problematic to those for whom the rule of law is at the apex of values of liberal democracy.’[[49]](#footnote-49)

1. The Problem of Scope

RoL is not merely a set of institutions like courts, constitutions and prisons; nor does it amount only to a government embedded in a legal framework that is accepted by officials. It is also a normative system that resides in the minds of its citizens.[[50]](#footnote-50) It requires not only that state authorities abide by legal limits on their power, but also that citizens come to rely on state institutions to adjudicate disputes. One of the animating beliefs behind TJ is the notion that judicial decision-making would touch not vindicate the expectation of those victims most immediately concerned, but also resonate with a broader public that came to mistrust legal institutions. However, even if TJ could avoid the limitations sketched in the previous subsection, the idea that judges sitting in a transitional trial could help people believe that the new political order will respect their status as rights bearers[[51]](#footnote-51) may exaggerate the relevance of TJ to faith in legal institutions. Little about TJ affects the prevailing legal *form* (that is, what national legal institutions, constitutions statutes or procedures look like) or the legal system’s *functionality* (i.e. what it actually does in an everyday sense). An impeccable trial and punishment of a former genocidaire or kleptocrat in an apex court or specialised (possibly even internationalised)[[52]](#footnote-52) tribunal may not help the domestic judiciary to pass that most important test of RoL, i.e. whether people turn to legal institutions for solutions to problems that would normally be considered legal. As Chesterman puts it, “what would a woman do if her property were stolen—go to the police? Or what would a man do if his brother were murdered?”[[53]](#footnote-53) Matters more prosaic than this tend to define attitudes towards the judiciary, such as its ability to secure/enforce accountability in public administration issues like building permits, rubbish removal, or banking regulations.[[54]](#footnote-54) As such, TJ replicates equates RoL primarily with the criminal justice sector and civil-political rights to the neglect of areas like administrative law, public governance and economic regulation that may do far more to condition general acceptance of RoL.[[55]](#footnote-55) This bias might be unavoidable given TJ’s understandable focus on atrocity, but it should serve to temper claims made about how TJ can build or undermine cultures of legality. How the courts deal with patronage, water rights and land registration may say more about RoL’s prospects than whether it prosecutes the former nomenclatura for abuse of office or militias for a massacre. On a more rarefied level, we have insufficiently theorised how TJ might affect the nonretroactivity, clarity, non-arbitrariness and constancy of law passed or administered outside its relatively circumscribed remit, to say nothing of the congruence between legal norms and the actions of officials, on which the rule of law depends.[[56]](#footnote-56)

1. No Short-Term Fixes: The Problem of History

When we focus on what TJ cannot do, it reminds us of the myriad deficits canvassed in Section 1, to which it can at best make a partial contribution – ‘lack of political will for reform, a lack of institutional independence within the justice sector, a lack of domestic technical capacity, a lack of material and financial resources, a lack of public confidence in Government, a lack of official respect for human rights and, more generally, a lack of peace and security.’[[57]](#footnote-57) These shortcomings are the result of broader state failures that attend civil war or repression, widespread insecurity and collapse or ineffectiveness of central authority. As UNDP notes, re-establishing the rule of law is a ‘Herculean task’, incorporating the intersection of justice and security, good governance, socio-economic issues and psychological factors.[[58]](#footnote-58) It should be clear, therefore that RoL is dependent on interconnected and interdependent elements. Any impact TJ has on RoL can only arise from multifarious parallel processes rather than from a linear chain of cause and effect. There are no short-term fixes. It is an attempt to change fundamental patterns of governance in states where these patterns were poor to begin with. RoL requires ‘a daunting set of institutional prerequisites that appear the result only of very long-run historical process.’ [[59]](#footnote-59) Two are briefly worth examination, namely security and governance.

RoL is inconceivable in a state that has not shifted from mass violence to relative non-violence, even if it remains divided by a range of political conflicts. States unable or unwilling to adequately assure the provision of security cannot enjoy the rule of law because this degree of insecurity calls both the legitimacy of government and the effectiveness of its authority too much into question. Observers note that as state fragility increases, rule of law scores invariably decrease.[[60]](#footnote-60) There is some sense in the idea that the end of conflict or authoritarian rule by itself might improve RoL simply by reducing political pressures for its attenuation.[[61]](#footnote-61) However, RoL is impossible without a threshold degree of security sector reform in the sense of effective *and*accountable military and police. It also requires an end to violence between state and nonstate authorities.

These aspirations – non-violence, efficient, accountable, rule-based security – take us into the second prerequisite of RoL, which is effective governance. Constraint on, or accountability for, the use of coercive power, connote Weberian aspirations for the state with a monopoly on the use of force. With this comes the entire package for at least semi-effective statehood – a state in Mann’s sense where ‘a differentiated set of institutions and personnel embodying centrality, in the sense that political relations radiate to and from a centre’ exists with a threshold degree of despotic power on the part of the state to compel obedience and some degree infrastructural power to penetrate society.[[62]](#footnote-62) The World Governance Indicators show extremely high correlation between RoL and governance quality – there is a .95 correlation between the rule of law and government effectiveness, plus a .91 correlation with regulatory quality.[[63]](#footnote-63) Indeed, in Haggard and Tiede’s study of 47 cases where conflict ended between 1970 and 1999, they found that the cessation of conflict had at most at a modest effect on the rule of law and that on average, states revert to the pre-conflict rule-of-law levels. In short, the level of pre-conflict RoL is the best indicator of post-conflict RoL.[[64]](#footnote-64)

RoL, therefore, is dependent on development of security and governmental effectiveness in a context where the *status quo ante* is more likely than not. This is cause for pessimism, particularly given that we know little about how to construct effective states and the reality that some domestic and international actors deliberately seek to maintain the state weakness in their own interest.[[65]](#footnote-65) As such, processes to support legitimate and effective justice
institutions need policy-makers to look beyond the laws, capacity,
technologies or symbolic initiatives like TJ we associate with development, to look instead at the domestic political economy over a period of decades, i.e those ‘processes of elite bargaining, collective struggle and normative change that shape institutions
over time.’[[66]](#footnote-66) For all its salutary effects, there is little reason to think TJ can kick-start these epochal changes or contribute significantly on its own. It can only contribute as part of a broader change. Two of those broad changes must be surveyed, before pinpointing how TJ can modestly contribute to RoL.

EXTERNAL AND INTERNAL STIMULANTS TOWARDS ROL

Most states where TJ is undertaken will be subject to a greater or lesser degree of rule of law reconstruction. Some of this work will flow from post-conflict peacekeeping where the UN’s Department of Peace-Keeping leads work in strengthening legal and judicial institutions, police and law enforcement agencies, prisons and other aspects of security support.[[67]](#footnote-67) This is keeping with the aforementioned supposition that lack of rule of law is a key factor in catalysing armed conflict. This might be augmented, overshadowed or made redundant by parallel, state-centric rule of law work by international development agencies that also work on the supply side of court administration, judicial and prosecutorial training, indigenous and/or community based justice and dispute resolution mechanisms, as well as the demand side of civil society assistance and public education designed to build demand for justice.[[68]](#footnote-68) This work is undertaken on the assumption that RoL and development are mutually reinforcing and that the advancement of RoL at the national level ‘is essential for sustained and inclusive economic growth, sustainable development, [and] the eradication of poverty,’[[69]](#footnote-69) to say nothing of growth. The rule of law here is seen less as a security or human rights imperative than as something essential to modern governance – indeed, insofar as it encompasses everyday security sector management, democratic functioning and economic restructuring, RoL reconstruction may come ‘to look like governance writ large.’[[70]](#footnote-70) Issues like land and property, administrative justice and commercial law and legal empowerment of the poor are key foci in long-term rule of law reform, in contrast to the immediate moral imperative toward TJ. Amidst parallel developments in constitution-making, reforming law enforcement institutions, gender equality, and land disputes, external actors must outline those legal reforms most needed in a given post-conflict society.[[71]](#footnote-71) Given that most regard the restoration or de novo construction of functional legal systems in states emerging from armed conflict as a form of ‘institutionalisation before liberalisation’ this institution-building approach will logically precede the liberalising impetus of human rights-based trials.[[72]](#footnote-72)

As a result of all this parallel activity, TJ’s indispensability to RoL is not borne out by actual practice - is often neglected, marginalized or simply not pursued at all in rule of law reconstruction.[[73]](#footnote-73) None of this is to argue that RoL reconstruction actually lives up to its promises. The empirical record of rule of law promotion in places like East Timor, Tunisia and Guatemala is strikingly weak.[[74]](#footnote-74) This may flow from the loose theoretical grounding surveyed earlier, though the withdrawal of necessary co-operation by post-conflict elites threatened by systematic accountability is a recurring Achilles’ heel.[[75]](#footnote-75) What should be noted, however, is the relative marginality of TJ to justice sector reform amidst a much, much wider security-development nexus that underpins RoL.

Along similar lines, TJ process might pale in comparison to other domestic initiatives to develop/restore some approximation of the rule of law. As noted earlier, scholars and policy-makers have consistently, if somewhat unclearly, posited a relationship between the independence of the judiciary and TJ. Even if we accept this argument as plausible, it is but one of many process that can strengthen its independence. Perpetual constitutional and administrative law does more to define the boundary between executive and judiciary and to regulate the exercise of state power than ephemeral processes of TJ.[[76]](#footnote-76) Necessary reforms like constitutional reform to enshrine separation of powers, appointment processes for judges rewarding competence and expertise rather than political affiliation, budgetary and administrative autonomy and assignment of cases on the basis of objective criteria may make more direct contribution to judicial independence or public esteem than the inherently polysemic process of transitional criminal trial. Indeed, El-Masri convincingly argues that changes, capacities and attitudinal reforms like these may logically precede TJ, as opposed to flow from it.[[77]](#footnote-77) In developing countries like The Gambia, prosecution of complex cases requires, *inter alia*, ‘training and education, the employment of capable staff willing to dedicate careers to the public service, and the training of investigators, prosecutors, and judges” before transitional criminal processes can be meaningfully tackled.[[78]](#footnote-78)

Beyond the high politics of executive-judiciary relations, the other main strand of the posited TJ-RoL nexus is the potential for the former to ground trust in the latter – as de Greiff argues, ‘the most that transitional justice can do is give reasons to individuals to trust institutions.’[[79]](#footnote-79) However, transitional trial is not the only place where apex courts can restore trust by making judgments in politically significant cases. As Hadjigeorgiou argues, there are any number of political disagreements in issues like language policy or economic opportunity, ‘that go to the heart of the transition process in the country’ and where failure to resolve them risks delegitimising the transition.[[80]](#footnote-80) Furthermore, she argues that constitutional reforms often push the judiciary to assume a more active role in the resolution of political dilemmas – in particular, courts can resolve dilemmas where members of the executive and legislature unable or unwilling to resolve the conflict at hand.[[81]](#footnote-81) For example, post-transition reforms to judiciaries in Kosovo, Bosnia-Herzegovina and North Macedonia equipped them to deal with high-profile cases on politically contentious issues like ethnic balancing and flag usage.[[82]](#footnote-82) To take more familiar examples, sometimes these trials can revolve around TJ laws (as opposed to being the stuff of TJ itself). On two separate occasions in 2013 and 2014, the Nepalese Chief Justice held that amnesty provisions inserted in laws establishing the national Truth and Reconciliation Commission were unconstitutional and ordered their amendment.[[83]](#footnote-83) National courts in the likes of Argentina, Guatemala and Peru have revoked amnesties or declared them unconstitutional, publicly preventing the legislature from obstructing legal accountability processes.[[84]](#footnote-84) While no single decision or set of decisions guarantees public support for the judiciary or belief in the rule of law,[[85]](#footnote-85) there is reason to believe that any illustration of the courts’ capacity to deal with post-conflict disputes and can advance the transition to a more substantive rule of law. Where the constitution and emergent legal culture empowers courts to resolve high-profile cases and the judiciary actually does so, it can publicly demonstrate the supremacy of law and the separation of powers as well, if not better, than any transitional trial.

CONCLUSION

This chapter has so far argued that the apparently ‘tremendous coherence and alignment between the RoL and transitional justice’[[86]](#footnote-86) is something of an illusion, born of the undertheorised nature of both goods. Although TJ theorists and international lawyers speak as if they understand well the normative link between TJ and the RoL, they in reality do not. The difficulty in establishing causal connections between TJ and RoL is not solely due to the weakness of theorisation sketched in the first third of this chapter - it is also due to the fact that complex socio-political processes like these never follow linear cause and effect trajectories. Initial theorisation on the presumed linkage between the TJ and RoL can be understood as a retrospective rationalisation of a moral impulse towards accountability born of a counterfactual (what if there is no accountability?) and a legal impulse born of international and domestic law. In the in the intoxication of the ‘End of History’ post-Cold War moment, it became natural to assume that liberalisation, democracy, TJ and RoL were mutually-reinforcing phenomena. However, it should have been apparent that the claim TJ could restore the rule of law was overstated in countries that suffered from conflict, underdevelopment and the decimation of what limited legal capacity existed previously. The exceptionality and limits of TJ in the face of mass criminality mean it will always call RoL values into question that no feats of intellectual legerdemain can wish away. The RoL, in any case, is too wide in scope and too hostage to the fortunes of development for TJ to make a defining contribution. This is all the more so the case when we remember that RoL reconstruction work and domestic legal-constitutional reform will inevitably do more to holistically and sustainably begin the work of (re)establishing the rule of law.

What role then for TJ in relation to the rule of law? To argue the potential impact of TJ on RoL is greatly exaggerated is not to say it cannot bolster what Krygier refers to as its ultimate teleology, which to limit the arbitrariness of political power.[[87]](#footnote-87) Indeed, to revert to that aforementioned counterfactual of ‘what if there is no justice?’, high-profile impunity over atrocity or extreme politicisation of accountability must complicate the courts’ critical governance roles of ordering behaviour, ordering contestation and, particularly, ordering power.[[88]](#footnote-88) As such, it can *signal* a commitment on the part of the State to the rule of law in the future. This is so even if we accept that a polity where elites themselves consistently accept the law’s limitations is dependant on the wider evolution of a medium- or long-term justice-security-development nexus in which TJ enjoys at most a marginal role.[[89]](#footnote-89) In this sense, TJ can be salutary in signalling how individuals and organs of state power like the executive, legislature or security forces must recognise that they are subject to the law (or alternative processes of accountability), but larger claims that TJ can somehow bootstrap state actors into accepting robust institutional or normative constraints on the exercise of their power should be tempered. Bahdi and Kassis capture a sense of this moderation and contingency when they argue that ‘[t]rustworthy courts help set the normative conditions for successful transitions by connecting the promises of change inherent in the transitional moment itself with the longer-term promise of a new and different future.’[[90]](#footnote-90)

As to state-citizen relations, there is some sense in the idea that institutions like courts are intersubjectively constructed, produced by shared understandings through social interaction of what an institution is and what should be.[[91]](#footnote-91) TJ’s distance from the regulation of everyday existence in areas like land, traffic, planning etc means it may have less effect on the degree to which citizens rely on state laws and institutions to adjudicate disputes or vindicate rights than was initially believed. It is also the case that transitional trial does not enjoy a monopoly on affirming human rights, fairness and due process, or of empowering the courts to resolve political conflicts. Perhaps the most that can said is that if the courts are ‘so tainted with complicity that it is virtually impossible for them to gain trust without a major vetting or screening of their personnel’,[[92]](#footnote-92) securing some form of accountability represents a first, if far from sufficient step, in rebuilding credibility. It is hard to imagine a court that vindicates legal certainty, the prohibition of arbitrariness, respect for human rights and equality before the law could undermine faith in the rule of law, though Payne does remind us that acquittals despite overwhelming (but circumstantial) evidence of guilt can do more harm to building RoL than no trial at all.[[93]](#footnote-93) We may, of course, be looking down the wrong end of the telescope. If we take the argument seriously that even achieving a one standard deviation improvement in the ‘rule of law’ (as measured in the World Bank’s governance indicators) takes an average of 41 years in the 20 quickest-reforming developing countries,[[94]](#footnote-94) we may need to revise upwards how substantive the short-term impact of ‘successful’ TJ might be. To the extent that RoL reconstruction agencies tend to focus on organizational form (laws passed, buildings, courts, training courses etc. are more visible and measurable) over culture at elite and/or citizen level, a process that redefines the rules of coercion by state and non-state actors can amount to a significant quick win.

The more entrenched the culture of impunity in the past, the greater the potential expressivist value of prosecutions for RoL.[[95]](#footnote-95) By the same token, the more entrenched the culture of impunity the more things outside TJ have to go right if RoL is to be vindicated. TJ cannot by itself substantiate or catalyse the wider dream of comprehensive RoL (that is, governance-oriented but people-centred, democratic, efficient, accountable, legitimate). This more modest conception may enjoy scant support from the admittedly dwindling bands of exuberant TJ theorisers who valorise RoL for its links with human rights, justice and democracy. However, it remains difficult to theorise TJ’s contribution to RoL in developing world and/or post-conflict configurations not grounded in consolidated modern statehood where these values are already somewhat consolidated. As always, as Jones argues, ‘the representation of a choice to be made in transitional justice between what is ideal and what is possible invites us to accept a clear distinction between the practical, the ideal, the visionary and the realistic.’[[96]](#footnote-96) We should be wary of having excessively high expectations of the possibilities for TJ to meaningfully ground the rule of law. Instead, we can at most posit what outcomes are plausible in each site of intervention - incremental change, humble and pragmatic aspirations. These outcomes remain hostage to fortunes often beyond the control of transitional government or international interveners.

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17. Thomas Carothers, ‘The Rule of Law Revival’ (1998) 77 Foreign Affairs 95, 99. [↑](#footnote-ref-17)
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reparation and guarantees of non-recurrence*, UN Doc. A/hrc /36/50 of 21 August 2017, 8-10. [↑](#footnote-ref-20)
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40. ###  See for example Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, UN Doc. A/HRC/48/60 (2021) para. 18

 [↑](#footnote-ref-40)
41. A tendency noted, for example, in Sannerholm (n 13) 76 [↑](#footnote-ref-41)
42. Andersen (n 2) 307. [↑](#footnote-ref-42)
43. See McAuliffe (n 2) for extended treatment. [↑](#footnote-ref-43)
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