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BOOK REVIEW

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ABSTRACT

This anthology describes the shortcomings of transitional justice and the expected benefits of a shift instead to what the editors and others advocate as a transformative justice approach. The book is likely to appeal most readily to those interested in the general topic of the effectiveness of aid programming in fragile and conflict affected states. Part of the hypothesis of the editors and others who advocate for a shift to transformative justice is that the focus of aid should be redirected from state institutions in ways that might more successfully and durably reduce poverty and social and political conflict.

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This anthology describes the shortcomings of transitional justice and the expected benefits of a shift instead to what the editors and others advocate as a transformative justice approach. The book is likely to appeal most readily to those interested in the general topic of the effectiveness of aid programming in fragile and conflict affected states. But for a typical IACA member, however, not much is offered of professional interest, as little is said about the development of state sanctioned systems of justice or dispute resolution. Part of the hypothesis of the editors and others who advocate for a shift to transformative justice is that the focus of aid should be redirected from state institutions in ways that might more successfully and durably reduce poverty and social and political conflict. The book is arranged into fourteen chapters, the first being introductory and the last summarizing. Here is an outline of the substantive chapters with commentary as appropriate.

From Transitional to Transformative Justice: The editors describe transitional justice as the dominant methodology by which the United Nations, the World Bank and other aid donors have assisted fragile states in addressing legacies of a violent past. This methodology is said to be the product of ideas pursued via the post-Second World War “Washington consensus” and the “liberal peace” by which aid from international institutions have sought to introduce or reinforce free elections, procedural democracy, and constitutionalism and the rule of law, including criminal prosecutions, truth telling, justice institutional reform and victim reparations. The liberal peace, the editors say, has been widely criticized in fragile transitional contexts for prioritizing the creation of institutions over a contextualized engagement with the welfare of the population, creating ‘empty’ institutions paralyzed by a lack of capacity rather than responding to the everyday needs of citizens. The result, they say, is that transitional justice interventions tend to privilege top-down over bottom-up approaches, civil-political over socio-economic rights, corrective over distributive justice, and global templates over local needs. In contrast, the editors have coined the term *transformative justice*, defined as change which (i) emphasizes local agency and resources, (ii) prioritizes process rather than preconceived outcomes, (iii) addresses a violent past but in ways that acknowledge continuities between past and present, and (iv) challenges unequal and intersecting power relationships and structures of exclusion at both local and global levels. With the assistance of the authors of the other chapters, the editors seek to more fully define how truly transformative justice outcomes might be achieved by analyzing why transitional justice practices to date remain inadequate. They conclude that truly transformative justice in aid programming remains a work in progress.

Most non-academic readers would struggle to follow the distinctions the editors and their confreres draw between transitional and transformative justice. Until I read the book, I did not know that transitional justice was a term that had been defined to embrace all that has been done so far in offering law and justice project aid to fragile and conflict-affected states. The editors’ definition of transitional justice takes in a miscellany of interventions that aid agencies have funded over at least the last sixty years, which the editors conclude were not sufficiently transformative. Starting from this threshold conclusion, they argue that transformative justice is more likely to succeed, not necessarily by abandoning conventional transitional justice interventions, but by shifting the ‘focus’ of those interventions to also include those that are “context-specific, participatory, and bottom-up” in design and implementation. But I disagree with the editors’ premise that transitional justice fails. Law and justice programs concerned with human rights, access to justice, criminal prosecution, legal empowerment and institutional strengthening have succeeded in

degrees, though rarely are they judged to be unambiguous successes. These programs disappoint some observers or underachieve against their stated objectives regularly, perhaps always. But that does not mean that they failed or were not worthwhile. It is fair comment for the editors to assert that those programs could be better, even transformative, by being more context-specific, participatory, bottom-up and that would make for an interesting discussion. However, I think the framing of the problem and the likely solution in this way puts the onus on the editors to describe what a transformative justice intervention might look like. The book fails to do this. Rather, the editors review earlier critiques of transitional justice, restate their own concept of what transformative justice can achieve, and look to the other chapter authors to assist in refining that definition. But I don't think they succeed in doing this either.

What I think the editors and other commentators on transitional justice fail to acknowledge is the universal feature of aid programs: that transitional justice interventions are never unilaterally designed by the donor but are the product of a negotiated agreement with the recipient country government. They are always top-down in design and context and can only ever be bottom-up or participative in implementation. Further, aid programs are always limited by the size of their budgets, the scope of the intervention activities and the duration of assistance provided, which is rarely more than five years. In this sense, the seeds of underachievement and disappointment are sown at inception because negotiated agreements always entail compromises on both sides. This not only ensures that transitional justice outcomes are likely to disappoint at some level, but also that expectations of truly transformative justice outcomes are probably just as unattainable.

Predicaments of Transformative Justice in a Neoliberal and State-Centric World Order: Richard Falk begins with the proposition that the political atmosphere in countries that are subject to transitional justice program assistance are seldom supportive of transformative change. He suggests that in the aftermath of conflict, the political priorities of ruling elites weaken and make less relevant their citizens' expectations of pursuing retributive and restorative justice and can achieve positive humane outcomes only when they do not attempt to promote radical changes in economic and social structures. He concludes that elites will resist deeper challenges to their privileged positions. This, he says, poses a dilemma in seeking grass roots level reforms, as it discourages political demands for truly transformative change. His assessment is that the shallower the political mandate, the more limited the effort will be to extend justice to those with pre-transition grievances. Conversely, he says, a transformative outcome can be achieved if the transition is supported by highly mobilized societal forces, reinforced by external pressure, and is essentially unopposed by entrenched internal forces.

I think that especially in the context of justice system development, the author's conclusion is correct. The focus of justice institutional development in fragile states is invariably upon restoration of processes and services that predated the conflict, or which are considered aspirational by reference to international judicial practices. Seldom does conflict call for a new kind of justice, but more commonly for a correction of corrupt and unjust practices that have subverted accepted standards of justice. In Afghanistan, for example, while the Taliban has since regained control, support provided to the judiciary was always focused on the perennials of judicial needs – such as accurate and reliable record keeping, judicial skills development, case processing capacity and resisting corruption in case processing – all goals courts pursue regardless

of who is in power. The author's view is vindicated by the result in Afghanistan but, of course, that does not mean that assistance provided to its judiciary was not beneficial or was not of enduring value.

Rights and Transformation: Malcolm Langford examines the critiques claiming that pursuing human rights in transitional justice have contributed to the technicization, minimization, and individualization of distributive justice and participatory democracy rather than ushering in social transformation. Defenses of the use of human rights, he suggests, ignore the ways in which narrow human rights approaches and transitional justice paradigms may either undermine transformational politics or fail to represent democratic demands for alternative forms of justice, especially distributive justice. He considers the notion of a progressive or transformative approach to rights that are said to have transformative effects but questions whether that outcome is conceptually viable. He suggests that a truly progressive approach to human rights can only be achieved by, firstly, emphasizing the importance of a shift away from top-down technicism toward a people-centered focus on power and structural impediments; secondly, reframing political engagement from below to change the way people perceive themselves in relation to the government and other actors; and finally, by seeking to focus from the beginning on mapping the operations of power. He concludes that the idea that rights contribute to a progressive agenda of transformative justice should be challenged because of the inherent frailties which can readily lead to a failure to advance progressive, participatory, and alternative forms of justice.

The author's abstruse examination of the topic was mostly incomprehensible to me. Aside from the summary I have extracted above, and despite several attempts at re-reading the chapter, I still cannot explain why the author sees a problem with the pursuance of human rights in transitional justice.

Measures of Non-Repetition in Transitional Justice: The Missing Link? Naomi Roht-Arriaza examines the potential of the expanded use of measures of non-repetition of human rights violations (known as guarantees of non-repetition ("GNRs")) to be used as a transitional justice tool. GNRs are initiatives in transitional justice to prevent the recurrence of human rights abuses such as mass killings, enforced disappearances and torture. She points out that the apparent failure of transitional justice interventions is usually because fragile states tend to be riven by many competing challenges and few resources. Their political systems are characterized by clientelism/patronage, acute corruption, ethnic tensions and shaky post conflict compromises, while foreign aid tends to be short term and fickle. She argues that in these sociopolitical environments the concept of measures of non-repetition can help navigate between the insufficiency of current measures and the risks of overexpansion and continued overpromising that usually accompany a transformative agenda. She suggests that while transformative agendas are aimed at broadening the concerns and methods of transitional justice, they risk exacerbating the overreach and overpromising that have been integral to critiques of transitional justice. Thus, she suggests, transformative initiatives need to broaden the transitional agenda, but not by too much, and that measures of non-repetition can stretch the transitional justice agenda without breaking it. Applying those measures helps keep the focus on what the state can do substantively while not limiting its attention to the state. This would shift the emphasis from focusing on acts and symptoms to looking also at root causes and would move from a focus on individual rights to greater consideration of the collective. It would also lead to a broadening of institutional reform to include social and cultural concerns.

The chapter offers a comprehensive and interesting history of the use of GNRs over recent decades, including experience in Guatemala, Colombia, South Africa and the Philippines. GNRs of course have a place in any justice program whether it be transitional or transformative.

Between Transition and Transformation: Legal Empowerment as Collective Reparations: Lars Waldorf expresses sympathy for the critiques of transitional justice that advocate a shift to transformative justice, but says he is wary of efforts to make that change, suggesting that there are too many problems with expanding the ambit and ambitions of transitional justice. He examines how transitional justice might be linked to development and rule of law through the vehicle of legal empowerment which he argues should be seen as a form of collective reparations, specifically legal rehabilitation for impoverished victims of mass atrocities. He concludes by explaining why a combination of transitional justice and legal empowerment as a vehicle for enhancing access to justice is preferable to transformative justice, suggesting that while transitional justice mechanisms sometimes encourage human development and access to justice, they only haltingly promote legal empowerment. He outlines the advantages of linking transitional justice and legal empowerment over transformative justice. He concludes that transformative justice is out of step with current thinking in legal empowerment and social accountability programs and that a combination of transitional justice and legal empowerment has a better chance of remedying the disempowerment that violence enacts on poor victims.

Although I agree with the author's view that legal empowerment and social accountability initiatives have been very useful in justice programming, and continue to be widely applied, his suggestion that it is better than transformational justice is perplexing. I would have thought a transformative justice agenda, such as legal empowerment, would be inclusive of any justice initiative as long it fell within the broad and still open-ended definition proposed by the editors.

Transformative Gender Justice? Fionnuala Ni Aolain argues that notwithstanding the claims to equal treatment and equality of outcomes for men and women in the application of transitional justice measures, gender parity remains elusive in implementation. A challenge to contemporary theorizing about transformative justice is that despite its commitment to radical and transformative change, the gender component of this shift is muted. Transformative justice theory has uniformly ignored radical feminist theorizing, broadly preferring to focus on equality and protective tropes as it includes women, but not men. It is the trope of the victim subject female who principally appears in recent additions to transitional justice theory, a direction the author suggests is a dead end for effective transformative justice. Central to a transformative justice agenda for women is change that will restructure gendered social relations and advance mitigating and replenishment strategies. Radical change, she says, demands the full recognition of structural harms to women as well as affirming the harms violence does to men, equal gender inclusion in peace processes and the reworking of gendered relationships that this obliges.

It is easy to agree with the author's view, but harder to conceptualize how, through mere foreign aid funded transformative justice programs, international donor influence could have such a radical and transformative effect. In the end, all transitional justice interventions are just that, interventions from outside with little or no prospect of securing revolutionary change at any level without the sustained enthusiasm of and investment by the recipient country government.

Memory and Democracy: Toward a Transformative Relationship: Elizabeth Jelin analyses the way memories and memorialization of political violence and repression after political transition may shape societal change as it affects institutional transformation, the pursuance of broader human rights and the development of active citizens. Commemorative practices, such as memorials, monuments, archives and testimonial reports, are often intended to have a pedagogical purpose to convey meaning to others so that the horrors of the past will not be repeated. She examines the role of memory in social transformation, i.e., the causal links to longer-term social and political transformation. She asks: Is it the violence, state repression and human suffering that should be remembered or the social and political conditions which allowed violent conflict to emerge? She notes that there are always confrontations and struggles between different interpretations of the past. To illustrate that tension, she contrasts the experience of Spain, Chile and Argentina in the aftermath of dictatorship, observing that despite there being no official recognition of past violence or explicit memory policies in Spain or Chile, an institutionally solid democratic system did emerge in both countries. The author admits that the chapter raises more questions than it answers. The past, she suggests, is subject to disputation and struggle, where diverse actors express, silence, emphasize, or conceal different elements in order to develop their own narratives.

This chapter is a satisfying profile of the potential power of memorialization. It illustrates one facet of the challenge in determining whether a transitional justice intervention is successful. The impact of the memorialization of a violent past may not be measurable for decades. The time it takes for the beneficial effects to be discernable is one reason why transitional justice programs are so readily judged by commentators to be failures. All donors expect measurable improvements within, at most, three budget years if not sooner. It is seldom possible to get substantively positive results in conflict affected countries within even ten years.

Connecting the Egregious and the Everyday: Addressing Impunity for Sexual Violence in Sri Lanka: Chulani Kodikara points out that unlike other forms of war-time violence, violence against women does not end when war ends, but continues and, in Sri Lanka, has increased since its civil war ended in 2009. She describes international efforts to add gender to transitional justice responses in post-war countries which have been most prominent in the legal treatment of sexual violence in war. This has led to recognition of rape and sexual violence as a crime against humanity, a war crime, and as constituting genocide along with the successful prosecution of war-related sexual violence. However, as a feature of international transitional processes, she argues that recognition of rape in war has done little to raise consciousness of rape and sexual violence when conflict is over. It has instead tended to reinscribe the understanding of war-time rape as exceptional violence, doing little to challenge impunity of sexual violence offenders within ordinary criminal justice systems. She points out that impunity for sexual and gender-based violence is generally the norm, whether related to war or not, and that the abysmal record of Sri Lanka's justice system is not merely overlooked by reports on the post-war transitional justice process, but denied or misrepresented. She argues that international justice processes can more meaningfully support transitional justice if they take serious cognizance of the local context and local struggles, refrain from misrepresenting local realities, and eschew the tendency to exceptionalize the phenomenon of sexual violence in war.

This case study illustrates the limitations on the influence of international agencies in Sri Lanka where the governing party elites have remained in power throughout and have steadfastly resisted attempts to make government agencies accountable for their conduct of the civil war and its aftermath. International agencies have had only narrow avenues of engagement in that time and then only in areas that the government was willing to tolerate international scrutiny, one of them being the treatment of conduct in war as crimes against humanity via the human rights convention. Engaging more deeply in improving the criminal justice system has, despite numerous international assistance programs since 2009, been resisted by the inertia of government ministries and a suborned judiciary. So while it is true that the focus of sexual violence in transitional justice programs in Sri Lanka has been limited to war-related crimes, the fault cannot be attributed to the donors.

Participation and Transformative Justice: Reflections on the Brazilian Experience: Laura Trajber Waisbich and Vera Schattan P. Coelho describe how the civil-military dictatorship in Brazil from 1964–1985 left a legacy of widespread torture, forced disappearances and murder. In 1979, during the dictatorship, an Amnesty Law was made granting official impunity for most perpetrators. Few conventional institutional reforms were conducted following the end of authoritarian rule, particularly in the security and justice systems which left the transitional justice process incomplete. However, the authors point out that other social measures to rebuild inclusive democracy and reshape power relations were pursued, principally by enacting a progressive rights-based ‘Citizens’ Constitution in 1988 which introduced participatory democracy, offering a transformative approach to justice, albeit focusing on political processes rather than justice institutions. The authors discuss two participatory experiments enabled by this “constitutionalization of participation” – municipal health councils in the city of Sao Paulo and Brazil’s participation in the internationally sponsored Open Government Partnership to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance. The authors conclude that these two cases pointed to connections between the functioning of participatory mechanisms, the democratization of the policy process, and the implementation of policies that are expected to be more responsive to citizens’ needs and thus have the potential to expand access to social services.

I see the merit of this case study as an example of as an initiative in improving constitutional governance where the state has been unwilling to bring to account the crimes of the military dictatorship. But I do not follow the authors’ view that this offers a transformative approach to justice when it explicitly has no impact on either the perpetrators or the victims of those crimes, or the institutions that will need to deal in future with the continuing effects of impunity.

The Restitution Assemblage: The Art of Transformative Justice at Parramatta Girls Home, Australia: Anna Reading considers the features of restitution as an element of transitional justice programming. She starts with the Western notion of restitution after war, atrocity, colonialism and genocide as being economic, primarily involving the return of property. She describes conventional efforts to provide restitution under a transitional justice framework as assuming that finality of restitution will be achieved by a particular act or acts. But she argues that this assumption is counter to the fact that violence and conflict are rarely one-off events, and the process of reconciliation and healing is ongoing for those directly affected by human rights abuses. She suggests that instead of viewing restitution as a final, discrete or bounded process toward a goal, it should be better understood as an *assemblage* of acts and

processes across space and time that includes seeking transformational, spiritual, and affective capital. To illustrate this point, she profiles the history of the Parramatta Girls Home in Australia which between 1821 and 1974 served as both a reformatory and orphanage where inmates including the children of convicts and indigenous groups experienced very little education, lived in deprived conditions and were compelled to work without wages in a climate of bullying, neglect and sexual abuse. The restitutorial assemblage provided to communities affected by that experience comprised campaigns and activities in six categories: economic (return of property, artifact repatriation), judicial (coroner's inquests, survivor testimonials), political (official government and church apologies), symbolic (monuments, restoration of indigenous languages, public dramatizations of victim experiences), spiritual (spiritual ceremonies of commemoration) and affective (individual and group therapy, money compensation and everyday support to victims). The author argues that restitutorial assemblage goes beyond earlier critiques of restitution and should be pursued as an ongoing process involving a range of actions over different time and space thresholds that are more likely to be transformational.

The idea of a restitutorial assemblage is a valuable contribution to the development of better transitional justice programs. It emphasises that to be transformative in outcomes, interventions should not be constrained by their scope, the resources applied or the time it takes to adequately implement them, each of which invariably constrain the capacities of international transitional justice assistance in fragile and conflict-affected states.

Indivisibility as a Way of Life: Transformation in Micro-Processes of Peace in Northern Uganda: Pamina Firchow and Roger Mac Ginty describe the results of the Everyday Peace Indicators Project conducted in three communities affected by civil war in northern Uganda in 2013. Focus group participants were asked questions about how they determined peace and safety in their communities. Three main issues were discussed by focus groups: the treatment of formerly abducted persons, the local and social nature of peace, and the emphasis on economic justice such as access to goods, services, and resources. The authors say it was a surprise to them that focus groups did not bring up conventional issues of civil and political justice, such as the need for better courts, trial amnesties, truth commissions, or the International Criminal Court. Instead, respondents nominated indicators connected with economic rights – freedom of movement, security, economic progress, and community ties in their immediate locality. The authors conclude that the apparent lack of interest in conventional mechanisms of civil justice in the communities affected by war suggest that the driving force for the transitional justice agenda comes from international rather than local expectations. They point out that these results are in keeping with earlier critiques of transitional justice that draw attention to such disappointing outcomes as the failure to prosecute the worst offenders, short sentences after lengthy and expensive trials, lack of interest in great power violators, lack of reach, patchy impact, and the mismatch between rhetorical intent and actual delivery. The pursuance of human rights, the authors argue, should be matched by the pursuance of economic rights and that these should be considered indivisible if transitional justice interventions are to be truly transformative.

I have difficulty sharing the authors' surprise that focus group participants made no mention of the need for conventional methods of civil justice, preferring to talk only about their immediate, mostly economic needs. I would not have expected people in locations of deep poverty, illiteracy and trauma at the hands of the Lord's

Resistance Army to have had any experience or knowledge in their own language of conventional civil justice methods. It seems to me that they were only likely to express the needs that were most pressing to them at the time, i.e., economic needs not yet met. However, the authors do make a point that can be more readily accepted: that economic rights should be considered indivisible from human rights and that transformative outcomes can only be expected if both are pursued.

HIJOS: Breaking Social Silence and Another Kind of Justice: Marina Sitrin describes the organization known as HIJOS (Hijos y Hijos por identidad y justicia y contra el olvido y silencio – Daughters and Sons for Identity and Justice and Against Silence and Forgetting), children of the Argentine disappeared. Between 1976 and 1983 the military dictatorship in Argentina unofficially kidnapped, tortured and murdered 30,000 Argentinians. After the transition to democracy most of the perpetrators continued to enjoy impunity from prosecution in collusion with subsequent elected governments. HIJOS was formed as a social activist organization in response to continued official and community silence about these atrocities by children of the Disappeared. The principal strategy HIJOS employed is to make an *escrache*, meaning to put into evidence, disclose to the public, reveal what is hidden. This entails researching to identify a perpetrator who is still in the community and outing them by educating communities in their neighborhoods. An *escrache* can take the form of a crowd demonstration outside a perpetrator's home, musical choral singing describing who they tortured, street theatre re-enactments, distributing leaflets to neighbors or placing public signs on their homes such as: "Here lives a person who has committed genocide". The author characterizes the HIJOS methodology as a different kind of justice that is organized from below and speaks to society rather than those in positions of power. She describes HIJOS as a kind of transformative justice but distinguished in two ways. Firstly, because it does not place demands upon government, but to address society as a whole; and secondly, because justice does not depend on an institution that embodies it, but on an action that produces it.

This case study is interesting as an example of political activism as a means of responding to the failure of governments to challenge institutionalized impunity for crimes against humanity. But it is not clear to me how it can be said to be a kind of transformative justice when it makes no demands on the government or state institutions.

COMPETING INTERESTS

The author has no competing interests to declare.

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