

ACHIEVING TRANSITIONAL JUSTICE: CHALLENGES TO RECONCILIATION, STATE-BUILDING AND DEMOCRATISATION

EDITORS' NOTE

The Centre for Legal Governance at Macquarie Law School provides a platform for research into legal governance and regulatory problems facing governments, businesses and communities, and contributes to the development of ethically informed legal and social policy. As such, its conferences have become the forum where new fields of scholarship are discussed and developed. The *Macquarie Law Journal* proudly uses these forums to harvest the most recent papers produced in these fields, thereby keeping us abreast of relevant and innovative knowledge.

In October 2013, the Centre for Legal Governance, in association with the Australian Academy of Law, hosted its Third Annual Conference on 'Tomorrow's Law' in Sydney, on the theme *Reparations and Reconciliation for Victims of Historical Injustice*. The aim was to bring together worldwide experts on transitional justice to review, expand and enrich this fairly new research field that sits between human rights and law.

The papers delivered at this conference explored: the legal challenges to the transition from conflict and state repression to reconciliation, the post-conflict establishment of viable rule of law and democratic legal orders, the institutional and human rights reforms needed for achieving transition and justice for past abuses and grievances, and the impact of history, national identity and memory on the viability of these processes. The conference was very well attended and received, and it succeeded in bringing together national and international like-minded practitioners and researchers so that they could network and share ideas on the different facets of transitional justice in its interface between human rights and history. Several of the conference speakers are featured in this edition, together with other contributors who are active in transitional justice research from all corners of the globe. We have ordered the articles so that researchers and students new to this important field may begin with the relationship between transitional justice and history, proceed to a variety of case studies that illustrate the complexity of the subject and its interdisciplinarity, and close with a contribution that argues for new legal frameworks for its future development.

Transitional justice is a fairly new field indeed and as such it has gone through different developmental stages from its original form. Emerging after World War II from the universal judicial attempt to bring to justice the perpetrators of the Holocaust, it started as a legal attempt to review and penalise injustices committed in the past. In more recent years, after the many episodes of human rights abuses committed in Latin America, Eastern Europe and Africa, the

term's definition has widened to encompass a more inclusive mission of bringing back or instituting the rule of law in these regions. Bell et al, in their review of the term, define it much more accurately for our times, recognising that '[m]eaningful societal change (of which accountability is likely to be a key part) requires the overhaul of political, legal and social institutions'.¹ They note also that the United Nations Secretary-General has added another twist to this definition by recognising 'an organic relationship between "transitional justice" and the rule of law'.² Hence, when embarking on research on transitional justice we need to acknowledge that there are many definitions and layers to this process. While it should by now be interpreted as an overhaul of political, legal and social institutions following a period of state violence, we often see that it is used as 'a by-word for a bundle of transformative efforts, mostly of a legal nature'.³ While academics have promoted 'four pillars' of transitional justice — prosecutions, truth-telling, reparations and institutional reform — the UN has recently added 'national consultation' as a 'fifth pillar',⁴ demonstrating the synergy that enriches this process.

It is always worth remembering that, at the core of the transitional justice processes, is the judicialisation of politics. That is, the attempt to turn political conflicts in a society into legal questions to deal with a legacy of systemic human rights abuses in order to promote social reconstruction and a better future for that society. Transitional justice, understood as such, provides the legal instruments to acknowledge, repair and compensate victims, and prosecute perpetrators and beneficiaries of systemic repression, during dictatorship. The general aim of transitional justice mechanisms is to 'de-collectivize injury and responsibility [and] re-describe systemic violence as individual crimes'.⁵ A simple example would be the abolition in Argentina of the Law of *Obediencia Debida*, which exempted the armed forces from any responsibility on the basis of the military's 'duty to obey commands'. By abolishing this law, each and every member of the military who acted against the people by repressing and torturing them became a perpetrator.

History is then the engine that moves the transitional justice processes. It is because of the weight of history that these processes need to take place to be able to build a new present and a better future. Its main objective is to make justice to that past legally available through trials, truth commissions and other mechanisms and, symbolically, through acts of remembrance, public recognition and acknowledgement. The problem with historical events is that they have a 'restless nature',⁶ and as such they have significant and durable transformational effects. The past is elusive. We can only reassess it and, through that process, achieve a different interpretation/perspective that can lead to a different 'truth', which in turn can lead to justice, forgiveness and reconciliation. Historical events also have a genealogy within any society that

¹ Christine Bell, Colm Campbell and Fionnuala Ní Aolain, 'Transitional Justice: (Re)Conceptualising the Field' (2007) 3 *International Journal of Law in Context* 81. For a genealogy of the term see Ruti G Teitel, 'Transitional Justice Genealogy' (2000) 16 *Harvard Human Rights Journal* 69.

² Bell et al, above n 1, 83.

³ Ibid.

⁴ *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (10 March 2010) 9.

⁵ Robert Meister, 'Ways of Winning: The Costs of Moral Victory in Transitional Regimes' in Alan D Schrift (ed), *Modernity and the Problem of Evil* (Indiana University Press 2005) 92.

⁶ Robin Wagner-Pacifici, 'Theorizing the Restlessness of Events' (2010) 115 *American Journal of Sociology* 1351.

connects with national identity. This needs to be acknowledged, as we cannot aspire for a universal recipe for transitional justice that fits all cases. Seeking the truth in the past is one of the pillars of transitional justice. This requires exploring how the past articulates with memory and justice, a quest that is essential to understanding these transformative processes.

Given the pivotal role that history plays in transitional justice, we are delighted to begin this issue with an article by Berber Bevernage, a colleague from Ghent University, who explores the relationship between transitional justice and historiography. He argues that the evaluation of the relationship between transitional justice and history is dependent on special ways of perceiving the nature of both practices. Many historians feel tempted by the idea of closure to historical interpretations that some of the transitional justice mechanisms bring about. The possibility that a truth commission could determine unquestionably the reality of the past, and lock it in forever, is tempting but controversial. Historiography then turns into an exercise of truth searching and a resistance to forgetting the past. While this is important, Bevernage argues that transitional justice should also pay attention to the 'politics of time' or 'historicisation'. If it does not, it could encounter ethical issues as this historicising discourse symbolically delimits the borders between past and present.

Michael Humphrey from the University of Sydney explores further the relationship between law and memory in the context of a discussion on the Amnesty Laws in Spain. Looking at the role of law in shaping collective memory of past violence, he analyses it as another example of the judicialisation of politics. In the same way that there are laws against the denial of the Holocaust and the Armenian genocide, there are also laws that address the memory of victims of past state violence by recognising their suffering and promoting accountability and reconciliation. Humphrey argues that by legislating on these matters, 'memory remains under the surface of law and sometimes becomes the object of laws'⁷ that, although created on the basis of global human rights standards, lack political consensus. These laws need to be undone to make those rights realisable for the entire population.

Wendy Lambourne, from the Centre of Peace Studies at the University of Sydney, has presented a case study of Burundi, analysed as an example of how external transitional justice models were applied to restore the rule of law. Lambourne illustrates how 'the four pillars of transitional justice', as taught to a forum of local community facilitators to restore democracy, proved to be lacking. She claims that these four pillars — prosecutions, truth-telling, reparations and institutional reform — failed to achieve the pivotal aim of accountability and reconciliation, despite following UN transitional justice frameworks. Lambourne also provides us with an overall view of the different theoretical frameworks proposed by academics and practitioners in this field and calls on us to gain 'a genuine engagement with local communities in the co-creation of a contextualised approach to transitional justice'. It is within each community that the key to the mechanisms of transitional justice may be found. There are no suitable general rules but a different model for each country.

Of a similar position is the paper by Kamal M Showaia from the Centre for Security Governance, who analyses the current challenges and future prospects of the Libyan case.

⁷ Vivian Grosswald Curran, 'History, Memory and Law' (2011) 16 *Roger Williams University Law Review* 100.

Showaia calls our attention to the important role that tribalism and religion play in the transitional justice processes and invites us to incorporate them into a better model for achieving the rule of law in that troubled country. This paper confirms again the impossibility of having one set of rules that is applicable to all cases.

Alice Diver from the Transitional Justice Institute of the University of Ulster discusses the Irish case. She analyses the recent controversies around the issue of removing the Union Flag from public buildings in Northern Ireland, which was an attempt to extinguish an ‘uncomfortable reminder of the troubled history and politics’ of the country. Diver demonstrates how this gesture was read as a symbol of the erosion of Protestant cultural heritage and identity. She calls our attention to the fact that

[o]ne of the factors inhibiting the development of a political, civic and communal commitment to dealing with the past, is a deep suspicion that opponents only want to excavate a truth which they can manufacture into ammunition with which to continue the conflict.⁸

The author argues that long-held ‘other-side’ fears and perceptions should be acknowledged and respected, as should symbolic items of cultural heritage that ‘belong’ to new minorities in the community. For Diver, transitional justice processes should be guided by principles of international human rights law on cultural heritage rights and the fiduciary obligations that guarantee peacemaking. She deals extensively with the relevant legal instruments and includes a ‘peacekeeper’ checklist of processes to follow to avoid making similar mistakes that could jeopardise the consolidation of new democracies. This interest in cultural heritage opens up a whole area of research dealing with the relevance of important symbols in the affected communities that should be respected and used to strengthen mutual trust.

Spencer Wolff, recently from the University of Cape Town, presents us with a South African case study, where the issues of human dignity and freedom of speech are explored in the wake of Nelson Mandela’s death. Using three recent controversies as examples, Wolff denounces how the pillars of the Truth and Reconciliation Commission have been undermined using a piece of German legislation that protects ‘personality rights’ — reputation, honour and privacy — over freedom of expression with the aim of shielding public figures, especially politicians, from civic scrutiny. The undermining of constitutional protections for an independent press and judiciary has enhanced this change in perspective. Wolff wonders whether the commission’s principle of speech-empowering will eventually be abandoned in the new democracy in favour of the speech-protection paradigm, thereby sabotaging the principles of human dignity and freedom of speech that inspired Mandela.

Rodrigo Acuña and Estela Valverde from the Department of International Studies at Macquarie University present a case study about the Venezuelan experience with transitional justice. The authors look at the different mechanisms used in this country to facilitate transitional justice processes, from state institutional reforms in the constitutional and judicial areas to a thorough review of the police and prison systems. They argue that President Hugo Chávez had a double

⁸ Commission for Victims and Survivors (Northern Ireland), *Dealing with the Past: Advice to Government* (June 2010) 38 [178] <http://cain.ulst.ac.uk/victims/docs/cvs/cvs_280610.pdf>.

political project: to redress social inequality and to implement a new rule of law, two elements that they see as intrinsically related. The authors claim that the *Caracazo* revolt — the worst case of state repression in Venezuela before Chávez was in office — became a politically symbolic event for him because it addressed both aspects of the Bolivarian experiment: inequality and implementation of the rule of law. The authors look at the advances and contradictions within the Venezuelan transitional justice processes during the Bolivarian experiment (1999–present) and argue that, although the opposition is running a harsh campaign to discredit President Maduro's government, the advances made in redressing social inequality might be strong enough to provide the pillars to edify a stronger rule of law.

Presenting an important contribution to this edition, Jennifer Balint from the University of Melbourne explores the relationship between transitional justice and state crime, a burning problem in many new democracies. She argues that because of the high reliance of transitional justice on the institution of law 'as a companion to the political goal of enabling political transition and effecting justice in the wake of state crime', the law finds itself lacking in many instances. Law's traditional interest in accountability for particular individual crimes heralds the need for new political-legal concepts to adapt itself to the larger transitional justice programs of institutional and social reform. Balint argues it is essential to develop new concepts and frameworks to support the legal task of achieving the rule of law in post-conflict societies, as legal bodies such as truth commissions and international tribunals are ill equipped to deal with these broader issues.

The depth and breadth of these diverse, yet complementary, articles represent an exemplary sample of where the field of transitional justice is venturing at the moment, its interdisciplinarity and the paths it might take in the future. This edition is a comprehensive collection to be added to the readings of any transitional justice course and an outstanding contribution to the scholarly body in this field. We would like to express our sincere thanks for all the efforts of the authors in making this new research available to our readers and to all the peer reviewers and student editors who generously helped to make this edition possible.

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