The Politics of Time, Transition, and Justice in Transitional Justice

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Abstract

As transitional justice seeks to reckon with a violent past in order to build a more peaceful future, its practitioners tend to operate on the assumption that the past, present and future are distinct periods. Globally, however, as different regions and states undergo different phases of transitional justice, it is difficult to identify linear processes of transition and of justice. When understood as a fluid process, transitional justice elicits questions about how governments, judiciaries, civil society, and victims engage with it as a vehicle for political change, repression, and justice. This engagement constitutes a complex set of interactions, ebbs, and flows that take place across space and time. With the benefit of hindsight and a mosaic of transitions, this special issue aims to recognise and interrogate the centrality and complexity of time in transition, justice, and transitional justice. The authors discuss five overarching dimensions of time: the timing of transitional justice interventions, the institutionalisation of time, the compartmentalisation of time, the politicisation of time, and ways to reconcile the temporal dichotomies of various transitional justice mechanisms

Keywords

time – transition – justice – transitional justice – international criminal law

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Transitional justice theory has moved on from linear, finite, episodic, ruptures of time.¹ Indeed, it has moved on from the assumption that a political transition is required in order to pursue transitional justice.² By complicating what constitutes a 'transition', transitional justice scholarship is increasingly interrogating the temporal structures and assumptions within this field of theory and practice.

This special issue contributes to this area of inquiry by examining the multiple aspects of time in transitional justice. The authors discuss five overarching dimensions of time: the timing of transitional justice interventions, the institutionalisation of time, the compartmentalisation of time, the politicisation of time, and ways to reconcile the temporal dichotomies of various transitional justice mechanisms.

What part of the past does transitional justice seek to address and why? Colonial, authoritarian and violent legacies are not entirely things of the past; they linger and shape the present and the future. Yet when looking back, transitional justice actors have focused their efforts on addressing certain *parts* of

1 See, for example, N. Mueller-Hirth and S. Rios Oyola (eds), *Time and Temporality in Transitional and Post-Conflict Societies* (Routledge, London, 2018); N. Mueller-Hirth, 'Temporalities of Victimhood: Time in the Study of Postconflict Societies', 32(1) *Sociological Forum* (2017) 186–206; T. Obel Hansen, 'The Vertical and Horizontal Expansion of Transitional Justice: Explanations and Implications for a Contested Field', in S. Buckley-Zistel, T. Koloma Beck, C. Braun and F. Mieth (eds), *Transitional Justice Theories* (Routledge, New York, NY, 2014), pp. 105–124; T. Obel Hansen, 'The Time and Space of Transitional Justice', in C. Lawther, D. Jacobs and L. Moffett (eds), *Research Handbook on Transitional Justice* (Edward Elgar, London, 2017), pp. 34–51; R. Christie and G. Algar-Faria, 'Timely interventions: Temporality and peacebuilding', 5 *European Journal of International Security* (2020) 155–178.

2 See, for example, N. Aboueldahab, *Writing Atrocities: Syrian civil society and transitional justice* (Brookings Institution, Washington, DC, 2018), available online at https://www.brookings.edu/wp-content/uploads/2018/04/transitional-justice-english_web.pdf (accessed 24 June 2021); T. Carothers, 'The End of the Transition Paradigm', 13(1) *Journal of Democracy* (2002) 5–21; D. Sharp, 'Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition', 9(1) *International Journal of Transitional Justice* (2015) 150–169.

the past, thereby marginalising major historical episodes that inform the present. A transitional present often constitutes a set of weak institutions inherited from the pre-transition period. This makes it difficult, if not impossible, to assert a disconnect between the past and the present in transitional justice theory and practice. The selectivity regarding which past to reckon with is ultimately rooted in political considerations, although resource constraints also shape the extent of truth and justice-seeking processes. Interim and post-transition governments tend to reckon with the transition period itself, rather than the period of atrocities leading up to it, for fear that their involvement in pre-transition crimes would be subject to scrutiny. At the same time, transitional justice advocates increasingly push for a reckoning with not only civil and political rights violations, but also with social and economic grievances that extend deep into the state's history.

In the decade since the anti-government Arab uprisings in 2010–2011, there have been a series of high-level domestic prosecutions, reconciliation initiatives, a truth commission, some reparations programmes, a surge in the pursuit of universal jurisdiction avenues, and International Criminal Court (ICC) arrest warrants. During the same period, several parts of the region have experienced resurgent authoritarianism and violent conflict, generating new victims on a daily basis while subjecting older victims to renewed trauma and marginalisation. The present thus intertwines with the past, day-in and day-out.

The politicisation of time was front and center during deliberations concerning transitional justice processes throughout the Arab region over the past decade. In many ways, the so-called transitional justice approach that unfolded immediately after the ouster of political leaders, in particular prosecutions, was much like clearing up a crime scene quickly without examining the series of events that led up to it. The result was—and continues to be—a conscious effort on the part of the perpetrator state and its complicit allies to isolate time periods—to consciously erase the linkages between past, present and future to avoid a meaningful reckoning with this complex web of perpetration, inflicted harms, and grievances. State-led transitional justice processes throughout much of the Arab region, with the exception of Tunisia, meant that there was a political reckoning with the transitional period itself, as opposed to the decades of historical injustices that led up to it.³ Making temporal connections between past, present and future would draw a much more complex picture of historical injustices, grievances, and ongoing crimes. Crucially, it would

3 N. Aboueldahab, *Transitional Justice and the Prosecution of Political Leaders in the Arab Region: A comparative study of Egypt, Libya, Tunisia and Yemen* (Hart, London, 2017).

implicate a much larger segment of the political establishment than a more narrow, temporally restricted focus would.

Time is thus intensely political. The more we expand the parameters of time under scrutiny, the wider the accountability gaze against more powerful actors—including their transnational allies. Bahraini, Libyan, Syrian, Sudanese, and Yemeni domestic and diasporic victims, activist lawyers, and civil society professionals have, for instance, been seeking accountability through universal jurisdiction cases that target multi-national corporations and other foreign actors complicit in the perpetration of crimes against humanity in those countries.⁴ Consequently, they constitute a critical transitional justice group of actors who constantly contend with the constraints placed on time by domestic and international political elites who seek to evade justice.

Undoubtedly, there are practical implications for expanding the parameters of time under scrutiny in this way, especially for those seeking truth and justice within contexts of ongoing armed conflict and authoritarian rule. The challenge concerns a daunting task of addressing a much longer past without the resources or the institutions necessary to conduct such a process in a robust and meaningful way. The inclination among many justice-seeking actors, then, is to focus on present, ongoing crimes, as well as crimes committed during a recent timeframe, such as the latter ten years that have seen multiple and contested transitions. The marginalisation of other historical episodes of injustices thus emerges both as a result of resource constraints on the part of transitional justice advocates, as well as a result of a very conscious effort by perpetrator states to manipulate time by reducing its scope to evade accountability.

What, then, are societies transitioning from and what are they transitioning to? While the way in which this question is posed presumes a sense of linearity in transitions, it leaves open the question of time experienced and time interpreted. Adam Crawford draws connections between past, present and future by underscoring the importance of the ‘very real differences between lived and represented time’. He explains:

Time affects and informs the experience and perception of justice and our understanding of regulatory practices in diverse ways. Feeling secure demands not only the absence of direct harms in the moment but also a

4 N. Aboueldahab, ‘Transitional Justice as Repression and Resistance: Practices in the Arab World’, *Oxford Handbook of International Law in the Arab World* (Oxford University Press, Oxford, forthcoming 2021).

reasonable confidence that the conditions assuring our safety will continue into the foreseeable future.⁵

The experience of time is thus subjective and open to interpretation, thereby heavily impacting the shape that transitional justice processes take. Memory, collective memory, collective amnesia, and historical narratives all influence the politicisation, institutionalisation, and interpretation of time, transition, and justice.

When I developed the call for papers for this special issue, I experienced difficulty soliciting pieces on the Arab region by scholars in the region. After a decade of transitional justice developments since the Arab uprisings (though truth and justice-seeking efforts in the Arab region far precede these historic events), I was keen to showcase crucial insights from Arab scholars and practitioners, something which continues to be severely under-explored.⁶ The reasons for this challenge are complex. The rapidly unfolding and tumultuous events in several states across the region where institutions are in flux is one of them. Importantly, however, victims, lawyers, and civil society are busy on the ground attempting—and sometimes succeeding—to put in place processes of truth and justice-seeking as their governments continue to clamp down on them both at home and abroad. The constraints that they face as they race against time to pursue transitional justice in such challenging contexts means that the lengthy and rigid process of academic publishing leaves little room for the contributions of many of these actors. The ‘processes and politics of knowledge production’ within transitional justice scholarship and practice thus continue to exclude the possibility of generating additional valuable bodies of literature and insight on transitional justice in varied contexts.⁷

The contributing authors of this special issue brilliantly outline the complexities of time, transition, and justice. In ‘Transitional Justice, Institutions and Temporality: Towards a Dynamic Understanding’, Pádraig McAuliffe discusses the restraints that institution building and peacebuilding processes impose on both the timing of transitional justice interventions and the temporal parameters of its scope and implementation. He demonstrates how

5 A. Crawford, ‘Temporality in restorative justice: On time, timing and time-consciousness’ 19(4) *Theoretical Criminology* (2015) 470–490, at 472.

6 In an effort to begin to remedy this, see N. Aboueldahab, *Innovation in Transitional Justice: Experiences from the Arab Region*, Brookings Institution (2020), available online at <https://www.brookings.edu/opinions/innovation-in-transitional-justice-experiences-from-the-arab-region/> (accessed 24 June 2021).

7 B. Jones and U. Lühe (eds), *Knowledge for Peace: Transitional Justice and the Politics of Knowledge in Theory and Practice* (Edward Elgar, Cheltenham, 2021).

the trajectory of peacebuilding and development cannot be extricated from the design and implementation of transitional justice policies and projects. Drawing on the work of Brian Levy, McAuliffe emphasises the importance of the long-term purview of transitional justice projects whereby they ‘work with the grain of societies’ they are attempted in. Ultimately, McAuliffe underscores the need for policy research agendas that better understand the political and developmental conditions for structural change over time so that transitional justice actors could develop more effective projects designed to be implemented within such dynamic reform processes.

Zinaida Miller introduces the idea of ‘temporal governance’ to describe how the institutionalisation of transitional justice has obscured the relationship between time and justice by placing emphasis on discrete time periods. In ‘Temporal Governance: The Times of Transitional Justice’, she contends that ‘Analysing temporality in the language of governance exposes the ways in which the transitional justice enterprise has exercised power—and how it has equally become an important site for contestation over time and justice’. The false temporal linearity imposed by such governance confines individual and collective trauma in ways that render certain groups and harms more visible while erasing others. Temporal governance thus foregrounds a particular past, its harms, its narrations, its judgements, its memories all while marginalising others. Miller calls for transitional justice to employ a temporal governance that engages the continuities of the past in the present ‘rather than closes them off as repaired or complete’.

In ‘The Multiple Aspects of “Time” Rendering Justice for War Crimes in Iraq’, Thomas Obel Hansen outlines how the United Kingdom (UK) instrumentalises the passage of time by pursuing legal reforms that block cases that examine its past actions in Iraq. Lingering domestic investigations over time have prevented the ICC from taking up these cases because its complementarity regime prohibits it from doing so. As a result, the passage of time then diminishes the prospects for meaningful accountability for atrocities committed in Iraq. Hansen draws attention to the UK government’s enactment of measures designed to also block justice processes in the future: ‘In this sense, we see a connection between the past and the present, in that concerns about legal scrutiny arise out of past conflicts but the aim is equally to block legal claims associated with the military’s conduct in future conflicts’. Consequently, Hansen argues, the ICC’s complementarity principle ‘can pose an obstacle to justice, at least to the extent ICC officials take up an overly stringent conception of “unwillingness”, as was regrettably done in the Iraq/UK situation’.

Randle De Falco then discusses the perils of compartmentalising time in international criminal law (ICL) and transitional justice. In ‘Time and the

Visibility of Slow Atrocity Violence', he calls for an expansion of the horizons of ICL and transitional justice by re-contextualising and historicising instances of mass violence. He argues that ICL's overwhelming focus on the most shocking, spectacular, and visible forms of violence, such as genocide, leave multiple decades of longer-term processes of mass killing and abuse unaddressed. Using examples from Cambodia and Myanmar, he explains that such a narrow conception of time entails the 'oversimplified compartmentalisation of time periods and harms' rather than asserting and addressing 'harms as connected and continuous'.

Maja Davidović offers a way to address this compartmentalisation that DeFalco warns against through her examination of the 'temporal dichotomies' between some of the mechanisms of transitional justice. In 'Reconciling Complexities of Time in Criminal Justice and Transitional Justice', Davidović argues that the processes of education and memorialisation possess temporal attributes of timelessness and circularity as compared with the more rigid time-boundness of criminal justice. Findings from her field research in Bosnia and Herzegovina show that 'distinct experiences of temporality in transition can be and are accommodated through memorialisation and education processes, reflecting some of the non-linearity and circularity of time and violence'. Davidović proposes an alignment of transitional justice's temporal regimes whereby 'documents produced by criminal justice institutions' would be used 'as factual foundations for memorialisation and education', thereby having a legitimating effect. Reconciling transitional justice's temporal regimes in this way would prolong 'the afterlives of criminal justice' and, over time, develop a historical, political consensus.

Jayson Lamchek and George Radics discuss the politicisation of time in the Philippines, where the Duterte government's federalism proposal presents a competing vision of time and justice when compared to the Bangsamoro peace agreement's transitional justice measures. In 'Dealing with the Past or Moving Forward? Transitional Justice, the Bangsamoro Peace Agreement and Federalism in the Philippines', Lamchek and Radics contend that the federalism proposal advances a 'moving forward' from the past approach through promises of rapid economic development and 'stability'. As such, it excludes the implementation of transitional justice measures that would address the past before moving on from it. Their article illustrates how such political proposals instrumentalise and obscure the complex temporality that a transitional justice process would assert. As a result, competing formulas for how to deal with the past emerge, with the promise of economic development and a redistribution of administrative power to the Filipino regions as incentives to 'move on'.

Finally, Eric Wiebelhaus-Brahm and Dylan Wright examine how truth commission recommendations have evolved over nearly 40 years of practice. In 'Temporal Patterns in Latin American Truth Commission Recommendation Formulation and Implementation, they use new data collected by Skaar et al. on the nearly 1000 recommendations produced by 13 truth commissions established in 11 Latin American countries between 1983 and 2014. They explore 'temporal patterns of implementation' of truth commission recommendations and find that the timing of truth commissions in a country's political development has implications for the likelihood of the implementation of recommendations. The findings are important: the recommendations of transitional truth commissions are 'more than twice as likely to be implemented as their post-transitional counterparts'. As Wiebelhaus-Brahm and Wright observe, 'This strongly suggests that the dynamism and fluidity of transitional periods creates greater opportunity for legal, institutional, and social change'.

I extend my deepest gratitude to the authors of *Time, Transition, and Justice* for their engaging contributions, as well as to the *International Criminal Law Review* for the opportunity to guest edit this special issue. Beyond transitional justice, this issue will be of interest to scholars and practitioners across multiple disciplines, including international criminal law, socio-legal studies, education, politics, transitional governance, and history. As the scholarship on the politics of time in the design and implementation of transitional justice continues to grow, policymakers will find it increasingly difficult to address transitional justice issues separately from peacebuilding and governance. The contributors to this special issue powerfully demonstrate that the centrality of time to transitional justice reflects a politics of time that does not neatly follow a linear timeline of 'progress'. Rather, the theory and practice of transitional justice demand our full attention to the complex temporal relationships between the past, present and future.

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