

# Transitional Justice and Economic Policy

René Urueña<sup>1</sup> and María Angélica Prada-Uribe<sup>2</sup>

<sup>1</sup>Faculty of Law, Universidad de Los Andes, Bogota R6C 336, Colombia;  
email: rf.urueña21@uniandes.edu.co

<sup>2</sup>Faculty of Jurisprudence, Universidad del Rosario, Bogota, Colombia;  
email: maria.prada@urosario.edu.co

Annu. Rev. Law Soc. Sci. 2018. 14:397–410

First published as a Review in Advance on  
July 13, 2018

The *Annual Review of Law and Social Science* is  
online at [lawsocsci.annualreviews.org](http://lawsocsci.annualreviews.org)

<https://doi.org/10.1146/annurev-lawsocsci-101317-031259>

Copyright © 2018 by Annual Reviews.  
All rights reserved

## ANNUAL REVIEWS CONNECT

[www.annualreviews.org](http://www.annualreviews.org)

- Download figures
- Navigate cited references
- Keyword search
- Explore related articles
- Share via email or social media

## Keywords

transitional justice, development, distributive justice, socioeconomic justice, international economic law, international investment law

## Abstract

The field of transitional justice has faced several challenges in its relatively short life span. The latest of these challenges is the claim for broadening its scope to incorporate social justice– and development–related matters. And in just a few years, the possibility and adequacy of thicker or more holistic conceptions of transitional justice have become mainstream. Nonetheless, since their beginnings these new approaches have been subject to criticism from both within and outside the field. This article describes the trajectory of the scholarly debate on expanding transitional justice to encompass socioeconomic concerns, as well as its main limitations. It starts by exploring the main reasons that led to the historical marginalization of socioeconomic concerns in transitional justice theory and practice. It then considers the rationale for the implementation of broader approaches to transitional justice and closes with a discussion of the main challenges and limitations these proposals face.

## A SHIFTING CONSENSUS ON TRANSITIONAL JUSTICE IN A CONTEXT OF SCARCE RESOURCES

Many developing countries have been, are, or will be immersed in a postconflict situation, with the simultaneous need to redress past human rights abuses and to improve societal well-being.<sup>1</sup> In a context of scarce resources, many of them will have to make the choice to allocate resources to achieve one or the other objective (Duthie 2008). In this context, a more holistic approach to transitional justice is needed, one that incorporates social justice and developmental concerns.

Although the most common mechanisms of transitional justice continue to be trials and truth commissions, since the early 1990s the transitional toolbox has been expanded to include, among others, reparations, land restitution and institutional reforms (Sharp 2014d, p. 8). However, these mechanisms are directed primarily at addressing violations of civil and political rights, leaving aside broader considerations regarding inequality, poverty, and socioeconomic wrongs. Transitional justice risks weakening its objective if it fails to address the fundamental causes of conflict, such as inequality, land and resource redistribution, and socioeconomic violence (Brown et al. 2011, Gready 2010). The fact that new cycles of violence reemerged in countries that were once praised for their transitional justice processes, such as South Africa, Guatemala, and Peru, should give us pause to consider whether existing arrangements of transition are enough to achieve the goals of reconciliation and sustainable peace (Laplante 2008).

A critique to the narrow approach to transitional justice had been gaining momentum since the early 2000s (Mamdani 2000, Mani 2002, Schmid & Nolan 2014). However, it was not until 2006 that a turning point for the mainstreaming of economic policy concerns in transitional justice came about (Duthie 2009). In that year, the UN High Commissioner for Human Rights, Louise Arbour (2007, p. 2), invited transitional justice scholars and practitioners “to make the significant leap that would allow justice, in its full sense, to contribute as it should to societies in transition.” Such a leap meant applying a holistic interpretation of transitional justice to address the human rights violations that caused or contributed to the conflict, including violations of economic, social, and cultural rights. By 2009, the mainstreaming was complete: The main journal in the field, the *International Journal of Transitional Justice*, and the International Center for Transitional Justice had each published an edited volume arguing for expanding the scope of transitional justice to engage with economic, social, and cultural rights; corruption; and other economic crimes (see De Greiff & Duthie 2009, Mani 2008). The shift, however, seems to have been short-lived. Despite these advances, the initial push for a more holistic approach to transitional justice seems to be declining, and even its own proponents seem to have become more cautious regarding the possibility for success of the project.

This article describes the trajectory of the scholarly debate on expanding transitional justice to encompass socioeconomic concerns. It starts by exploring the marginalization of social and economic violence in transitional justice theory and practice through the three main lines of critique present in the literature. It then considers the rationale for the implementation of thicker or more holistic approaches to transitional justice. By doing so, it explains the principal nodes of intersection between transitional justice and socioeconomic wrongs that transitional justice scholarship has explored at large: first, the expansion of the transitional justice toolbox to incorporate socioeconomic forms of violence; second, the relationship that exists between transitional justice and development; third, the inclusion of economic crimes and corruption in the theory and

---

<sup>1</sup>The notions of postconflict and transition are used interchangeably throughout this article to denote a situation where violence has been reduced, even if a change of regime or political order has not occurred.

practice of transitional governance; and finally, the incorporation of transformative justice to the field through the use of reparation programs.

This article closes with a discussion of the main challenges and limitations these proposals face, as well as the more recent critiques that seek to put into question the whole project. It argues that thicker notions of transitional justice face two types of challenges: internal biases and external limits. Although the former have been more thoroughly discussed in transitional justice literature, the latter have not yet become an object of study in the field. This article suggests that transitional justice scholarship and practice need to be aware of the external limits that international economic law, especially international investment protection, may impose on the implementation of transitional justice mechanisms when it collides with transnational economic interests.

### **A LIMITED JUSTICE IN TRANSITIONAL JUSTICE: THREE LINES OF CRITIQUE**

The first step toward a more holistic approach to transitional justice is the critique of the marginalization of social justice and development issues from the field, put forward through specific global discourses and institutional arrangements within the transitional justice field. In a contribution that reflects well this line of critique, Miller (2008) has argued that transitional justice historically failed to recognize the importance of structural violence, inequalities, and economic redistribution to conflicts, thus creating a distorted narrative that naturalizes the separation of conflict and economic issues. The prevailing view of transitional justice has understood socioeconomic and development matters as alien concerns to the field. However, the problem with the separation approach is that, according to Miller (2008, p. 268), it

allows a myth to be formed that the origins of conflict are political or ethnic rather than economic or resource based. It suggests that inequality is a question of time or development rather than the entrenched ideology of elites, as well as that the need to memorialize the past does not require the narration of past economic oppression.

Recent literature has put forward three possible explanations for the invisibility of social justice in transitional justice. The first, and by far the most recurrent, points to the historical and normative roots of transitional justice. The second focuses on the relationship between this field and the transnational project of liberal peacebuilding. The last one provides a critical perspective on the growing technocratic nature of transitional justice, which has turned this field into an expert-dominated transnational arena. We now discuss each of these explanations.

### **Uncovering Transitional Justice's Legalism**

The marginalization of economic, social, and cultural rights in transitional justice is due, in part, to the latter field's narrow understanding of justice. As Arbour (2007, p. 4) has explained, transitional justice builds on a narrow conception of justice, circumscribing it "within a more traditional dispute resolution framework that primarily focuses on violations of civil and political rights." There is, in this sense, a legalistic bias of transitional justice (McEvoy 2007, Nagy 2008, Oomen 2005) emerging from its two juridical foundations: international criminal law and human rights law.

Transitional justice, this line of critique suggests, has prioritized criminal and retributive justice, thus neglecting socioeconomic and distributive issues. Beginning with the Nuremberg trials, transitional justice has foregrounded criminal law, individual responsibility, and individual reparations for individual violations—disregarding the socioeconomic conflicts from which such individual

actions emerged (Aguirre & Pietropaoli 2008, p. 376). In this context, the language of “victims” and “perpetrators” oversees structural causes of conflict and circumscribes the concept of justice to a traditional framework of dispute resolution that focuses on violations of civil and political rights (Arbour 2007, p. 4). Moreover, legalism in transitional justice conceals its political nature behind a generalized perception of neutrality, impartiality, and subjection to rules. This may legitimize some accounts of conflict while, at the same time, silencing others. Therefore, for this line of critique, transitional justice frames “the conflict in one dimension without providing an alternative vocabulary. Thus, apartheid in South Africa after the TRC [Truth and Reconciliation Commission] can become a story about racism or about specific, individual rights violations rather than about long-term, systemic abuses born of a colonial project with economic objectives” (Miller 2008, p. 280; see also Bond 2006).

### **Transitional Justice and Peacebuilding as a Liberal Project**

A second body of literature critiques transitional justice as a project rooted in the international quest to promote liberal peacebuilding (Sharp 2014c), understood as a range of activities undertaken by transnational actors (especially international financial institutions, intergovernmental organizations, nongovernmental organizations, and development agencies) to promote stability, democratization, and free market economies in postconflict societies (Lekha Sriram 2014, pp. 30–31).

Transitional justice as a field emerged, in its contemporary form, from the processes of transition from dictatorship to democracy that took place in both Latin America and the former communist countries. In this context, this line of critique asks whether the chosen goal of transition (democracy and market economy) in fact defines the kind of justice that transitional justice seeks. Would our understanding of transitional justice be different if a different frame were used? If the end is different (that is, if a transition to peace really is different from a transition to free market democracy), then the normative aims undergirding the transitional justice field must be either replaced or complemented (Arthur 2009, pp. 358–60).

Transitional justice thus prioritizes building specific institutional arrangements (such as democracy, constitutionalism, and the rule of law) and establishing a market-driven economy, while ignoring other possible arrangement that could also promote social justice and redistribution (Gready & Robins 2014, p. 341; see also Lekha Sriram 2007, Paris 1997). Furthermore, it has not only invariably linked transition with democratization but also promoted a particular and limited conception of democracy based on Western experience and ideology (Lundy & McGovern 2008, p. 274).

To be sure, the point of this line of critique is not to say that democracy or the rule of law is not important or beneficial, especially in the long term, for postconflict societies. Rather, the point is that liberal peacebuilding rests on the assumption that the best way to achieve peace is through liberal democracy and market-oriented economy (Paris 1997, p. 56). Such a rapid move to a free market in states that are emerging from conflict, and have no previous experience with this type of economic model, may in fact have destabilizing consequences, especially in the case of highly divided societies (Lekha Sriram 2014, Mansfield & Snyder 1995, Paris 1997). Moreover, transitional justice has been state centered and top down, promoting one-size-fits-all solutions that favor certain interests while (many times) overlooking the wants and needs of the population (Lundy & McGovern 2008). Thus, for example, transitional justice and peacebuilding may have produced reductionist accounts of conflict in Africa (Ruiz-Giménez 2011), focusing on a narrative of failed states and greedy warlords, while ignoring the diversity within the region and the negative impact of external factors such as external debt, structural adjustment programs, and foreign aid (Brown et al. 2011).

## Transitional Justice as an Elite Project

Finally, the field of transitional justice has also been read as the undertaking of an elite group of international professionals, especially lawyers and donor-affiliated professionals, that may marginalize the impact of social, victims', and other locally rooted movements (Gready & Robins 2014, p. 342; see also Madlingozi 2010, Robins 2009). The focus on technocratic arguments has contributed to the further depoliticization of the field, while concealing its ideological origins. More problematic still, experts and technocrats in the field may have been reproducing global arrangements for transitional justice mechanisms, transplanting the same institutions and structures from one country to another without taking into account differences and particularities.<sup>2</sup>

From this perspective, the technocratic side of transitional justice leads to the implementation of top-down solutions that regularly decontextualize violent pasts and individual subjects, creating a common historical account of conflicts and essentializing individuals as victims or perpetrators. Complex and multilayered causes of violence are thus left aside, while the complex (and sometimes conflicting) roles played by individuals in conflicts are sometimes simplified (Miller 2013).

The critique of technocracy has led to calls to democratize, or at least to make more accessible, the creation and implementation of transitional justice to local populations (see the contributions in McEvoy & McGregor 2008). One proposal, for example, is the process of "reverse translation," in which the vocabulary of experts is decoded and substituted with a vocabulary that is both accessible and politically contestable (Nesiah 2014). Another option is to question the assumption that foreign experts are always knowledgeable and politically neutral and more capable than local governments in the implementation of transitional justice mechanisms (McDougal 2014).

## NEW PROPOSALS TO EXPAND TRANSITIONAL JUSTICE

In line with this critique, a growing body of literature is calling for a broader and more encompassing definition of the transitional justice field—in particular concerning the relationship between conflict, socioeconomic violence, and transitions. Four nodes of intersection are important: (a) the inclusion of past socioeconomic violence as a fundamental concern of the transitional justice toolbox; (b) the role of development-related objectives in transitional justice; (c) the connection between economic crimes, corruption, and transitional governance; and (d) the link between transformative justice and reparations.

### Broadening the Scope of Transitional Justice to Address Past Socioeconomic Wrongs

Why address past socioeconomic wrongs in transitional justice? One argument is pragmatic: To guarantee long-lasting peace and stability in postconflict societies, transitional justice needs to address the underlying causes of the conflict, which in most developing countries include issues of poverty, inequality, and land redistribution (Lekha Sriram 2014, p. 37). If transitional justice leaves historical social and economic inequalities unaddressed, it cannot really provide guarantees of nonrepetition (Laplanche 2008, p. 333)—a mindset accepted by the UN Secretary General, for whom "festered grievances based on violations of economic and social rights are increasingly recognized for their potential to spark violent conflict" (United Nations 2011).

---

<sup>2</sup>For example, Hayner (2002, p. 67) shows how the mandate of the truth commission in Burundi was very similar to the one in El Salvador, because they were drafted by a UN envoy who had previously served as part of the organization's negotiation team in El Salvador.

Beyond this pragmatic reasoning, the field's legalism may also prevent past socioeconomic wrongs from being considered in transitional justice arrangements. The division between civil and political rights and economic, social, and cultural rights, inherited by transitional justice from international human rights law, is artificial (Lekha Sriram 2014, p. 37). Not only are these rights indivisible and mutually dependent (Laplante 2007), but "violations of civil and political rights are intrinsically linked to violations of economic, social, and cultural rights" (Arbour 2007, p. 4). Thus, socioeconomic wrongs should be incorporated in transitional justice as a way to rectify the field's bias toward legalism.

Another argument for including socioeconomic wrongs is redistributive justice. For those defending this line of reasoning, transitional justice mechanisms must consider three different dimensions: legal justice or the rule of law, rectificatory justice, and distributive justice (Mani 2002). Peacebuilding and development programs focus on legal justice, whereas rectificatory justice has been the core focus of transitional justice mechanisms. However, distributive justice remains neglected, or largely rhetorical. To include it, distributive justice constitutes both a backward- and a forward-looking response to the demand for rectification of past injustice and inequities in distribution. It implies that transitional justice mechanisms must look further back, beyond the traditional concerns of rectificatory justice, and find the actual causes underlying the conflict. Subsequently, distributive justice would be forward looking and address traditional priorities of distributive and social justice (Mani 2002, pp. 179–80). In a similar line, Kalmanovitz (2010) has argued that in cases of generalized destruction, if the justification and normative foundations of transitional justice and human rights are put into question, rights and duties associated with social justice should take priority over corrective justice. Thus, in those specific cases, reconstruction efforts should focus on guaranteeing social minima, such as housing, health, and education, instead of compensating for past wrongs (Kalmanovitz 2010).

Finally, empirical research suggests that victims question the field's sharp distinction between transitional justice and social and economic justice. Vinck & Pham (2008) conducted a survey in the eastern Democratic Republic of Congo on attitudes toward peace and justice and found that most victims and survivors prioritized meeting basic needs and achieving social justice and development over traditional concerns of transitional justice. Robins (2011), in turn, came to a similar conclusion through a survey in Kenya, according to which victims' reparative demands were driven by basic economic needs, such as the need for housing and livelihoods.

Addressing past socioeconomic wrongs in transitional justice can be practically challenging. A first problem is that courts or truth commissions might not be able to investigate and provide remedies for all violations of social, economic, and cultural rights. For that reason, specific criteria must be developed to determine which violations should be addressed (Arbour 2007, p. 13). Moreover, it might be useful to expand the truth commissions' mandate to analyze violations not only of civil and political rights but also of economic, social, and cultural rights (Laplante 2008, p. 333). Some truth commissions have already addressed issues of social and economic justice; for example, commissions in Peru, Kenya, Liberia, Sierra Leona, and East Timor have made some findings and recommendations on the violations of economic, social, and cultural rights (Duthie 2008; see also Sharp 2014b). However, in most of these cases, the commissions failed to order reparations to redress violations of those rights (Arbour 2007, p. 13).

## **Transitional Justice and Development**

A second link between conflict, socioeconomic violence, and transitions is the role of development-related objectives in transitional justice (Duthie 2008, Lenzen 2009, Lyons 2010, Mayer-Rieckh & Duthie 2009). The challenge, from this perspective, is to articulate the normative foundations of two different communities of practice: transitional justice and development (Lenzen 2009).

Duthie (2008) proposes four ways in which transitional justice and development relate. First, at a broad level, both fields complement and reinforce each other in pursuit of shared long-term goals—especially goals directed at transforming society. Second, development may inadvertently affect transitional justice, because it determines the state’s capability and willingness to pursue justice. Third, transitional justice and development may be coordinated to reduce tensions and increase synergies. Duthie (2008) identifies reparations, memorials, and restitution programs as mechanisms that may contribute to development. Finally, transitional justice and development may directly engage each other when the former addresses violations of socioeconomic wrongs and the root causes of conflict. Although it would be difficult to quantify the effect of these measures at the macro level, “by directly addressing development issues, transitional justice measures may play a role in drawing attention to such issues, in contributing to development, and in shaping development policies in such a way that they become more sensitive to the causes and consequences of past human rights abuses” (Duthie 2008, p. 302; see also De Greiff 2009).

The practical challenges are again worth considering. Institutionally, truth commissions seem better suited to draw attention to the need to implement long-term transformative development policies (Ames Cobián & Reátegui 2009). In terms of specific sectors, developmental initiatives focusing on natural resources and the security sector are pivotal. Regarding the former, recent research has shown that a key way to link transitional justice and development is to expand the former to encompass natural resources issues (Harwell & Le Billon 2009; on the link between transitional justice and natural resources, see generally Jensen & Loneragan 2012, Lujala & Rustad 2012, UN Environ. Progr. 2009). Moreover, development-focused security sector reforms can complement transitional justice by preventing the recurrence of violence (Mayer-Rieckh & Duthie 2009), and development initiatives focused on judicial reform and transitional justice can complement each other (Ndulo & Duthie 2009).

The development field, though, seems to be more reluctant to incorporate transitional justice concerns and mechanisms; some literature even suggests that transitional justice might be a waste of resources that should be allocated to development or other growth-enhancing programs (Boettke & Coyne 2007; Dancy & Wiebelhaus-Brahm 2015, p. 52). Even advocates of more holistic approaches of transitional justice recognize the dilemma faced by resource-limited societies when deciding how to allocate their budget between transitional justice and development programs (Gready 2010, Mani 2002). In this context, several years after his influential contribution, Duthie (2014) concludes that transitional justice’s most significant impact on development will be indirect and long term.

## **Economic Crimes and Corruption**

The third link between conflict, socioeconomic violence, and transitions is economic criminality. Conflicts often involve the violation of socioeconomic rights, which need to be dealt with by transitional mechanisms, for example, systematic discrimination in access to basic goods or services or forced evictions (Arbour 2007). In practice, some international and national courts have slowly started to deal with these kind of violations, if they rise to the level of war crimes or crimes against humanity [*Prosecutor v. Kupreskic* (2000), para. 628–31]. However, this approach seems too narrow, as it reproduces the mainstream mandate of transitional justice mechanisms, focusing on individual accountability and prosecution, and thus neglecting accountability for corruption and other economic crimes to ineffective domestic institutions (Carranza 2008, p. 311). Criminal law, both national and international, is likely to be less effective in addressing economic crimes than in addressing those that constitute violations of civil and political rights, because of the “overarching structural limitation” of the criminal justice system regarding socioeconomic crimes (De Greiff 2009, p. 40).



Corruption is also a crucial and oft-neglected concern in transitional justice mechanisms, particularly in postconflict situations where corrupt practices favor lack of accountability for atrocities (Carranza 2008, p. 315). Moreover, addressing corruption is crucial to rebuilding civic trust in public institutions as a whole, particularly after conflict (Robinson 2015, p. 35).

Here, again, practical challenges to incorporate economic criminality and corruption in transitional justice abound. National and transnational economic elites may attempt to obstruct transitional justice processes that decide to address these issues (Andrieu 2012, Robinson 2015). For this reason, some scholars defend the separation between the mechanisms that prosecute human rights violations and those that deal with corruption (Andrieu 2012), asking whether transitional justice is the adequate forum to deal with corruption or whether that issue should be left to ordinary national and international justice. Nonetheless, truth commissions may be an effective mechanism to address corruption and economic violations within transitional justice (Cavallaro & Alubja 2008); for example, the Kenyan Truth, Justice and Reconciliation Commission and the Tunisian Truth and Dignity Commission have included an explicit mandate to address corruption (Robinson 2015).

### **Transformative Justice and Reparations**

Reparations are one of the most promising tools with which to address socioeconomic issues within transitional justice, as they are more victim friendly and victim focused than trials or truth commissions and, therefore, are more able to integrate victims' concerns and needs (Sandoval-Villalba 2017). Three links between development policies and reparations have been identified (De Greiff 2009, pp. 37–38). First, compensating victims of human rights violations through capital asset transfers can have an impact on their economic capacity, which in turn may provide a boost for development efforts in the country more broadly. Second, programs of property and land restitution serve development goals by clarifying property rights through the formalization of titles. Third, large-scale reparation programs and collective reparations have opened the door for the distribution of measures that go beyond monetary compensation, such as health and education.

The efforts to bring transitional justice and socioeconomic concerns together through the use of reparation programs should be understood in light of the debate between promoting corrective and restorative or distributive justice in postconflict societies. This discussion has focused on reshaping the notion of reparations, which have sought to achieve restorative justice by returning the victims to their state prior to the conflict (Uprimny Yepes & Saffon 2009, pp. 31–32). Full reparations and corrective justice are not adequate to achieve the objectives of transitional justice in “disorganized” or “unequal and resource-limited” societies (Kalmanovitz 2010, Saffon & Uprimny Yepes 2010).

Corrective or retributive justice is past oriented, as it assumes that any injured person has the right to reparation or compensation for their loss (Kalmanovitz 2010). The main objection to a mere corrective approach to reparations is that it cannot respond to the underlying practices of social injustice and marginalization that triggered violence to begin with. Furthermore, to restore a person to her preconflict state of poverty violates fundamental principles of justice (Attanasio & Sánchez 2012, p. 12). On the contrary, distributive justice is forward looking and seeks to conceptualize justice in terms of equality (Muvungi 2009, p. 166).

In this line, transformative reparations become crucial. Reparations should look not to decontextualized acts of violence but rather to the structural underpinnings of harms (Gready & Robins 2014, Uprimny Yepes 2009). This should shift the emphasis of reparations from the restoration of the status quo (which in the case of unequal societies would mean returning poor victims to poverty and discrimination) to the transformation of victims' circumstances as a form of addressing the injustices that drive conflict (Gready & Robins 2014, p. 347).



In transitional practice, transformative reparations can be found in Colombia's peace process with the Fuerzas Armadas Revolucionarias de Colombia (FARC). In both the 2011 Victims Law [L. 1448, 2011 (Colom.)] and the final agreement between the Colombian Government and the FARC (Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace, 2016, p. 182), the idea of transforming the structural conditions that led to victimization is present. Furthermore, the UN Guidance Note of the Secretary-General on Reparations for Conflict-Related Sexual Violence also incorporated as a guiding principle that "reparations should strive to be transformative, including in design, implementation and impact" (United Nations 2014). And in a ground-breaking decision [*González et al. "Cotton Field" v. Mexico* (2009), para. 450–51], the Inter-American Court of Human Rights recognized that

Bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State...the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable.

This expansion of reparations, though, has also been subject to some skepticism. If reparations are stretched to directly solve development problems or structural factors, the two separate obligations of transitional institutions—to provide reparations and to provide for social services—may be subsumed and become indistinguishable (Pérez Murcia 2013, Roht-Arriaza & Orlovski 2009). Even collective reparations, an important mechanism to incorporate social justice into transitional justice practice, may risk becoming indistinguishable from developing programs (Roht-Arriaza 2014).

## THE LIMITS OF A THICKER CONCEPTION OF TRANSITIONAL JUSTICE

More than 10 years after Arbour's call to expand transitional justice, the initial support may be fading away. More recent articles are being more cautious about the ability, or even the desirability, of transitional justice to solve structural socioeconomic problems. The main concern seems to be where to draw the line between thicker conceptions of transitional justice and development or social policy. Where does transitional justice end and social justice and development begin? Activists and scholars seem to be trying to expand the scope of transitional justice while, at the same time, trying to avoid losing its *raison d'être*. Broadening the content of transitional justice presents a conceptual challenge to the normative foundations of transitional justice, because it risks overstressing it and diluting its core objectives (Robinson 2015, p. 34).

### Internal Biases

Doubts of a thicker notion of transitional justice, though, have been raised since the beginning of this debate (Roht-Arriaza 2006, p. 2). Concerns regarding the feasibility of broader concepts of transitional justice have been echoed by other transitional justice scholars and practitioners (Drumbl 2009, Lambourne 2009). Even Mani (2008, p. 255), an early proponent of an expanded transitional justice, has acknowledged that the already existing mandates of transitional justice institutions are "overcharged, their responsibilities too heavy, public expectations too unrealistic and finance already too lean."

Practical difficulties are paramount in this context. Waldorf (2012) has argued that transitional justice mechanisms face enormous practical difficulties in incorporating socioeconomic concerns, as they are already overstretched and underfunded and have a timing problem: Whereas

transitional justice mechanisms are supposed to have a short life span, socioeconomic justice is a long-term political project.

Furthermore, incorporating an economic dimension into transitional justice risks focusing a discussion of best practices in peacebuilding and development, thereby depoliticizing the question of wealth distribution. For this line of critique, “the exclusion of the economic from transitional justice is neither accidental nor in conflict with its aims. Rather it is central to transitional justice as a concept of political change” (Franzki & Olarte 2013, p. 204). A broader link between transitional and socioeconomic justice might reproduce the technocratic logic and biases that, in the first place, caused this separation. Thus, even the most progressive forms of transitional justice—the ones that advocate for thicker conceptions—have failed to provide a credible emancipatory project, because they continue to present their claims as apolitical and to presume a consensus around transitional justice mechanisms as the most legitimate language in which to advocate for social change (Franzki & Olarte 2013, pp. 210, 217).

### **International Limits?**

The integration of socioeconomic concerns in transitional justice also faces international limits, in particular, from international economic policy. Transitional justice literature has not explored the relationship between transitional justice and international economic law, especially investment protection regimes (Zrilić 2015). International investment protection is contained in international investment agreements, which can take the form of bilateral investment treaties or free-trade agreements, that establish the rules that govern investment and the rights of foreign investors and grant jurisdiction to arbitral tribunals over disputes between private investors and the host state.

Nonetheless, investment arbitration is not just a form of international adjudication; it has become a powerful mechanism of global governance that affects local decisions in at least two ways. First, investment arbitration reviews domestic regulation for possible violations of standards contained in investment treaties, and second, investment arbitration tribunals contribute to the definition of standards of domestic governance (Urueña 2016a, pp. 102–3). Therefore, one issue in need of attention is how investment protection regimes can become part of the limits that international economic law imposes on the implementation of transitional justice mechanisms.

Foreign investment is not, in itself, contrary to transitional justice. On the contrary, the capital brought by foreign funds is fundamental for the implementation of its increasingly large and complex institutional framework. However, the implementation of a thicker version of transitional justice may collide with transitional countries’ obligations toward foreign investors, which emerge from a complex legal framework of bilateral investment treaties and free-trade agreements (Urueña 2016a, pp. 199–201).

Again, the Colombian Peace Process is a good example of this concern. The Peace Agreement integrated many redistributive justice concerns as part of its transitional justice framework, in an attempt to address the socioeconomic roots of the armed conflict, especially regarding land and agricultural policy (Huneus & Urueña 2016, p. 164; see also Urueña 2016b). However, these redistributive policies may collide with foreign investment protections. For example, in 2008, AngloGold Ashanti was given a concession for gold mining in the territory of an indigenous Colombian community, the Emberá, who had been victims of forced displacement owing to combat between the FARC and the Colombian military forces. Several years later, the Emberá community sought land restitution through existing transitional justice mechanisms, and AngloGold opposed the restitution before the Colombian judiciary and lost the case. This is the kind of dispute over foreign-directed investment that can be raised before international investment arbitration as a result of the protection awarded to investors under bilateral investment treaties (Urueña 2016b).

Similar cases have already been brought before investment arbitration. For example, in the *Piero Foresti* case, a group of Italian investors argued that South Africa had expropriated their share in a mining operation company through the implementation of postapartheid mining law, which required that 26% of ownership of the company be given to historically marginalized South Africans [*Piero Foresti v. South Africa* (2010)].<sup>3</sup> Similarly, in *Funnekotter*, the arbitral tribunal ruled that the Zimbabwean government had violated Dutch investors' rights under the investment by implementing a controversial reform that sought to redistribute land from white owners to the black population without compensation [*Bernardus Henricus Funnekotter v. Zimbabwe* (2009)].

Transitional justice scholarship must demand that international investment regulation consider transitional context when ruling on measures governments undertake as part of a transitional justice process. Although the case law of investment tribunals is not encouraging, it seems important that arbitrators take in these cases a more deferential standard as a form of acknowledging the humanitarian dimension of their responsibility as adjudicators, instead of focusing on investment standards in isolation of their context (Urueña 2016b, p. 203).

## CONCLUSION

Transitional justice scholarship has seen important challenges in its relatively short life span (Balasco 2013, Teitel 2003). Most of those challenges have been catalyzed by dissatisfaction with the field, which has led scholars to propose transformations in it. The latest of these challenges is the claim for broadening its scope to incorporate social justice— and development-related matters. And in just a few years, the possibility and adequacy of thicker or more holistic conceptions of transitional justice have become mainstream.

Scholars have thus sought to understand the reasons leading to the exclusion of socioeconomic concerns and suggested different reasons and justifications for the expansion of transitional justice mechanisms. Nevertheless, this first wave of acceptance seems to be fading, leading to more cautious and limited proposals of integration. Moreover, the expansion faces the limits that derive from transitional justice's own internal biases, in terms of technocracy, depolitization, and North–South dynamics, and external limits in terms of international economic agreements that could hinder the ability of transitional institutions to engage in local transformations, if they affect transnational economic interests—such as foreign investor rights.

The question remains whether more holistic approaches to transitional justice are practically and theoretically workable. From the practical point of view, it remains to be seen whether transitional countries are able to implement increasingly complex transitional justice arrangements that require not only more resources but also higher levels of expertise and institutional capability, without tearing apart the expectations generated by a broader promise of justice. From the theoretical point of view, scholars are still struggling to find an adequate way to simultaneously expand the scope of transitional justice mechanisms and preserve its transitional or exceptional nature. This is not a small challenge: The more the scope of transitional justice is stretched, the blurrier the line between it and ordinary justice becomes.

## DISCLOSURE STATEMENT

The authors are not aware of any affiliations, memberships, funding, or financial holdings that might be perceived as affecting the objectivity of this review.

---

<sup>3</sup>The case was settled by the parties.

## LITERATURE CITED

- Aguirre D, Pietropaoli I. 2008. Gender equality, development and transitional justice: the case of Nepal. *Int. J. Transit. Justice* 2(3):356–77
- Ames Cobián R, Reátegui F. 2009. Toward systemic social transformation: truth commissions and development. See De Greiff & Duthie 2009, pp. 142–69
- Andrieu K. 2012. Dealing with a “new” grievance: Should anticorruption be part of the transitional justice agenda? *J. Hum. Rights* 11(4):537–57
- Arbour L. 2007. Economic and social justice for societies in transition. *N.Y. Univ. J. Int. Law Politics* 40:1–27
- Arthur P. 2009. How “transitions” reshaped human rights: a conceptual history of transitional justice. *Hum. Rights Q.* 31(2):321–67
- Attanasio DL, Sánchez NC. 2012. Return within the bounds of the Pinheiro Principles: the Colombian land restitution experience. *Wash. Univ. Glob. Stud. Law Rev.* 11:1–53
- Balasco LM. 2013. The transitions of transitional justice: mapping the waves from promise to practice. *J. Hum. Rights* 12(2):198–216
- Bernardus Henricus Funnekotter v. Zimbabwe*, ARB/05/6, Award (ICSID April 15, 2009)
- Boettke PJ, Coyne CJ. 2007. Political economy of forgiveness. *Society* 44(2):53–59
- Bond P. 2006. Reconciliation and economic reaction: flaws in South Africa’s elite transition. *J. Int. Aff.* 60:141–56
- Brown G, Caumartin C, Langer A, Stewart F. 2011. Addressing horizontal inequalities in post-conflict reconstruction. In *Rethinking Transitions: Equality and Social Justice in Societies Emerging from Conflict*, ed. G Oré Aguilar, F Gómez Isa, pp. 11–30. Cambridge, UK: Intersentia
- Carranza R. 2008. Plunder and pain: Should transitional justice engage with corruption and economic crimes? *Int. J. Transit. Justice* 2(3):310–30
- Cavallaro JL, Alubja S. 2008. The lost agenda: economic crimes and truth commissions in Latin America and beyond. In *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, ed. K McEvoy, L McGregor, pp. 121–42. Oxford, UK: Hart
- Dancy G, Wiebelhaus-Brahm E. 2015. Bridge to human development or vehicle of inequality? Transitional justice and economic structures. *Int. J. Transit. Justice* 9(1):51–69
- De Greiff P. 2009. Articulating the links between transitional justice and development: justice and social integration. See De Greiff & Duthie 2009, pp. 28–75
- De Greiff P, Duthie R, eds. 2009. *Transitional Justice and Development: Making Connections*. New York: Soc. Sci. Res. Council.
- Drumbl MA. 2009. *Accountability for property crimes and environmental war crimes: prosecution, litigation, and development*. Pap., Int. Cent. Transit. Justice, New York
- Duthie R. 2008. Toward a development-sensitive approach to transitional justice. *Int. J. Transit. Justice* 2(3):292–309
- Duthie R. 2009. Introduction: incorporating transitional justice into the response to displacement. See De Greiff & Duthie 2009, pp. 17–27
- Duthie R. 2014. Transitional justice, development and economic violence. See Sharp 2014a, pp. 165–201
- Franzki H, Olarte C. 2013. Understanding the political economy of transitional justice. A critical theory perspective. In *Transitional Justice Theories*, ed. S Buckley-Zistel, T Koloma Beck, C Braun, F Mieth, pp. 201–21. New York: Routledge
- González et al. (“Cotton Field”) v. Mexico, preliminary objection, merits, reparations and costs. Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009)
- Gready P. 2010. *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond*. Oxford, UK: Routledge
- Gready P, Robins S. 2014. From transitional to transformative justice: a new agenda for practice. *Int. J. Transit. Justice* 8(3):339–61
- Harwell EE, Le Billon P. 2009. Linking transitional justice and development through a focus on natural resources. See De Greiff & Duthie 2009, pp. 282–331
- Hayner P. 2002. *Unspeakable Truths: Facing the Challenge of Truth Commissions*. New York: Routledge

- Huneus A, Urueña R. 2016. Introduction to symposium on the Colombian peace talks and international law. *AJIL Unbound* 110:161–64
- Jensen D, Lonergan S, eds. 2012. *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding*. Abingdon, UK: Earthscan
- Kalmanovitz P. 2010. Corrective justice versus social justice in the aftermath of war. In *Distributive Justice in Transition*, ed. M Bergsmo, C Rodríguez-Garavito, P Kalmanovitz, MP Saffon, pp. 71–96. Oslo: Torkel Opsahl Acad. EPubl.
- Lambourne W. 2009. Transitional justice and peacebuilding after mass violence. *Int. J. Transit. Justice* 3(1):28–48
- Laplante LJ. 2007. On the indivisibility of rights: truth commissions, reparations, and the right to development. *Yale Hum. Rights Dev. J.* 10(1):141–77
- Laplante LJ. 2008. Transitional justice and peace building: diagnosing and addressing the socioeconomic roots of violence through a human rights framework. *Int. J. Transit. Justice* 2(3):331–55
- Lekha Sriram C. 2007. Justice as peace? Liberal peacebuilding and strategies of transitional justice. *Glob. Soc.* 21(4):579–91
- Lekha Sriram C. 2014. Liberal peacebuilding and transitional justice: What place for socioeconomic concerns? See Sharp 2014a, pp. 27–49
- Lenzen M. 2009. Roads less traveled? Conceptual pathways (and stumbling blocks) for development and transitional justice. See De Greiff & Duthie 2009, pp. 76–109
- Lujala P, Rustad SA, eds. 2012. *High-Value Natural Resources and Post-Conflict Peacebuilding*. Abingdon, UK: Earthscan
- Lundy P, McGovern M. 2008. Whose justice? Rethinking transitional justice from the bottom up. *J. Law Soc.* 35(2):265–92
- Lyons D. 2010. Maximising justice: using transitional justice mechanisms to address questions of development in Nepal. *Trinity Coll. Law Rev.* 13:111–32
- Madlingozi T. 2010. On transitional justice entrepreneurs and the production of victims. *J. Hum. Rights Pract.* 2(2):208–28
- Mamdani M. 2000. The truth according to the Truth and Reconciliation Commission. In *The Politics of Memory: Truth, Healing and Social Justice*, ed. I Amadiume, AA An-Na'im, pp. 176–83. London: Zed Books
- Mani R. 2002. *Beyond Retribution: Seeking Justice in the Shadows of War*. Cambridge, UK: Polity
- Mani R. 2008. Dilemmas of expanding transitional justice, or forging the nexus between transitional justice and development. *Int. J. Transit. Justice* 2(3):253–65
- Mansfield ED, Snyder J. 1995. Democratization and the danger of war. *Int. Secur.* 20(1):5–38
- Mayer-Rieckh A, Duthie R. 2009. Enhancing justice and development through justice-sensitive security sector reform. See De Greiff & Duthie 2009, pp. 214–49
- McDougal TL. 2014. The trilemma of promoting economic justice at war's end. See Sharp 2014a, pp. 51–77
- McEvoy K. 2007. Beyond legalism: towards a thicker understanding of transitional justice. *J. Law Soc.* 34(4):411–40
- McEvoy K, McGregor L, eds. 2008. *Transitional Justice from Below*. Oxford, UK: Hart
- Miller Z. 2008. Effects of invisibility: in search of the “economic” in transitional justice. *Int. J. Transit. Justice* 2(3):266–91
- Miller Z. 2013. (Re)distributing transition. *Int. J. Transit. Justice* 7(2):370–80
- Muvingi I. 2009. Sitting on powder kegs: socioeconomic rights in transitional societies. *Int. J. Transit. Justice* 3(2):163–82
- Nagy R. 2008. Transitional justice as global project: critical reflections. *Third World Q.* 29(2):275–89
- Ndulo MB, Duthie R. 2009. The role of judicial reform in development and transitional justice. See De Greiff & Duthie 2009, pp. 250–81
- Nesiah V. 2014. The trials of history: losing justice in the monstrous and the banal. In *Law in Transition: Human Rights, Development and Transitional Justice*, ed. R Buchanan, P Zumbansen, pp. 289–308. Oxford, UK: Hart
- Oomen B. 2005. Donor-driven justice and its discontents: the case of Rwanda. *Dev. Change* 36(5):887–910

- Paris R. 1997. Peacebuilding and the limits of liberal internationalism. *Int. Secur.* 22(2):54–89
- Pérez Murcia LE. 2013. Social policy or reparative justice? Challenges for reparations in contexts of massive displacement and related serious human rights violations. *J. Refug. Stud.* 27(2):191–206
- Piero Foresti v. South Africa*, ARB(AF)/07/01 (ICSID Aug. 4, 2010)
- Prosecutor v. Kupreskic*, trial judgment, IT-95–16–T (ICTY Jan. 14, 2000)
- Robins S. 2009. Whose voices? Understanding victims’ needs in transition. *J. Hum. Rights Pract.* 1(2):320–31
- Robins S. 2011. “To Live as Other Kenyans Do”: A Study of the Reparative Demands of Kenyan Victims of Human Rights Violations. New York: Int. Cent. Transit. Justice
- Robinson I. 2015. Truth commissions and anti-corruption: Towards a complementary framework? *Int. J. Transit. Justice* 9(1):33–50
- Roht-Arriaza N. 2006. The new landscape of transitional justice. In *Transitional Justice in the Twenty-First Century*, ed. N Roht-Arriaza, J Mariezcurrena, pp. 1–16. Cambridge, UK: Cambridge Univ. Press
- Roht-Arriaza N. 2014. Reparations and economic, social and cultural rights. See Sharp 2014a, pp. 109–38
- Roht-Arriaza N, Orlovski K. 2009. A complementary relationship: reparations and development. See De Greiff & Duthie 2009, pp. 170–213
- Ruiz-Giménez I. 2011. Gender in post-conflict reconstruction processes in Africa. In *Rethinking Transitions: Equality and Social Justice in Societies Emerging from Conflict*, ed. G Oré Aguilar, F Gómez Isa, pp. 231–64. Cambridge, UK: Intersentia
- Saffon MP, Uprimny Yepes R. 2010. Distributive justice and the restitution of dispossessed land in Colombia. In *Distributive Justice in Transition*, ed. M Bergsmo, C Rodríguez-Garavito, P Kalmanovitz, MP Saffon, pp. 379–420. Oslo: Torkel Opsahl Acad. EPubl.
- Sandoval-Villalba C. 2017. Reflections on the transformative potential of transitional justice and the nature of social change in times of transition. In *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, ed. R Duthie, P Seils, pp. 166–200.
- Schmid E, Nolan A. 2014. “Do no harm”? Exploring the scope of economic and social rights in transitional justice. *Int. J. Transit. Justice* 8(3):362–82
- Sharp DN. 2014a. *Justice and Economic Violence in Transition*. New York: Springer
- Sharp DN. 2014b. Economic violence in the practice of African truth commissions and beyond. See Sharp 2014a, pp. 79–107
- Sharp DN. 2014c. Emancipating transitional justice from the bonds of the paradigmatic transition. *Int. J. Transit. Justice* 9(1):150–69
- Sharp DN. 2014d. Introduction: addressing economic violence in times of transition. See Sharp 2014a, pp. 1–26
- Teitel RG. 2003. Transitional justice genealogy. *Harvard Hum. Rights J.* 16:69–94
- United Nations. 2011. *The rule of law and transitional justice in conflict and post-conflict societies*. Rep. Secr.-Gen., S/2011/634, Oct. 12. [https://www.un.org/ruleoflaw/files/S\\_2011\\_634EN.pdf](https://www.un.org/ruleoflaw/files/S_2011_634EN.pdf)
- United Nations. 2014. *Reparations for conflict-related sexual violence*. Guide Note, Secr.-Gen., United Nations, June 2014. <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>
- UN Environ. Progr. 2009. *From Conflict to Peacebuilding. The Role of Natural Resources and the Environment*. Nairobi: UN Environ. Progr.
- Uprimny Yepes R. 2009. Transformative reparations of massive gross human rights violations: between corrective and distributive justice. *Netb. Q. Hum. Rights* 27(4):625–47
- Uprimny Yepes R, Saffon MP. 2009. Reparaciones transformadoras, justicia distributiva y profundización democrática. In *Reparar en Colombia: los dilemas en contextos de conflicto, pobreza y exclusión*, ed. C Gómez, NC Sánchez, R Uprimny Yepes, pp. 31–70. Bogotá: Int. Cent. Transit. Justice, DeJusticia
- Urueña R. 2016a. Subsidiarity and the public-private distinction in investment treaty arbitration. *Law Contemp. Probl.* 79:99–121
- Urueña R. 2016b. The Colombian peace negotiation and foreign investment law. *Am. J. Int. Law* 110:199–204
- Vinck P, Pham P. 2008. Ownership and participation in transitional justice mechanisms: a sustainable human development perspective from eastern DRC. *Int. J. Transit. Justice* 2(3):398–411
- Waldorf L. 2012. Anticipating the past: transitional justice and socio-economic wrongs. *Soc. Leg. Stud.* 21(2):171–86
- Zrilić J. 2015. International investment law in the context of *jus post bellum*: Are investment treaties likely to facilitate or hinder the transition to peace? *J. World Invest. Trade* 16(4):604–32