FAILING VICTIMS? THE LIMITS OF TRANSITIONAL JUSTICE IN ADDRESSING THE NEEDS OF VICTIMS OF VIOLATIONS

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Abstract

Transitional justice represents itself as both a discourse and practice that exists primarily to support victims of human rights violations and gains its moral legitimacy from the fact that victims are deserving and the claim that transitional justice has the aim of acknowledging victims and providing redress. Here, this claim is interrogated in the light of a practice that actually appears to be rooted in liberal state-building and for which victims are an essential instrument of prescribed mechanisms of transitional justice, such as trials and truth commissions. Evidence is presented that, despite a common rhetoric claiming that transitional justice is 'victim-centred', its principal mechanisms, namely trials and truth commissions, are actually driven by the needs of the state. A dominant legalism has seen mechanisms such as prosecution privileged over those that serve victims, such as reparation. One result of this institutionalisation of transitional justice processes is that victims have little agency in such processes and participate as instruments of those mechanisms, rather than on their own terms. Social and economic rights remain largely ignored by transitional justice mechanisms, despite these being central to both the addressing of victims' needs and the causes of conflict. It is posited that rather than being driven by victims, transitional justice is an arm of global liberal, and often neoliberal, governance, sometimes sustaining systems that create many of the needs that victims articulate.

Keywords: transitional justice; victims; human rights

1. INTRODUCTION

Transitional justice is now established as an approach that an array of powerful actors reflexively turns to when a state is emerging from conflict or authoritarianism. Rooted

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in a liberal discourse of human rights and democratisation, transitional justice seeks 'to address the past in a constructive future-oriented manner',[1] through dealing with legacies of human rights violations in order to prevent their reoccurrence. More than this, transitional justice is seen as a set of practices that are not only desirable but necessary in order to successfully complete a transition from war or dictatorship to peace and democracy. Transitional justice has been defined narrowly as 'the conception of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes',[2] and more broadly as 'that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law'.[3] It is worth noting that such definitions do not, however, reference victims. In practice, the mechanisms of transitional justice have long been perceived to have a core of essential institutional elements, consisting of trials, truth commissions, reparations processes and institutional reform, and a periphery of other mechanisms that include lustration processes, memorialisation and educational reform, among others. Whilst founded on a legal approach to defining violations, the practice of transitional justice has expanded to include many non-legal approaches.

A very large range of claims are made for what transitional justice processes can achieve, including recovery of the truth, reconciliation, the healing of both individuals and the nation, providing justice to victims, the reform of institutions, strengthening the rule of law, guaranteeing the non-repetition of human rights violations and promoting sustainable peace.[4] There remains, however, little compelling empirical evidence for many of these claims.[5]

Transitional justice has come to present itself as a discourse and practice that is centred on victims, but this is a significant evolution from its origins in Latin America as very much a state-centred approach to democratisation. The truth commission emerged as a compromise in contexts where judicial process against perpetrators was not possible. What has been called the 'restorative turn' in transitional justice saw a development from conceptualising justice as an alternative to retribution when trials were politically impossible, to a different type of justice of greater relevance to states in transition, and including restorative as well as retributive approaches. This maps onto the two dominant orientations in contemporary literature on transitional justice:

1 A. Rigby, *Justice and Reconciliation: After the Violence* 2 (Boulder, CO: Lynne Rienner, 2001).

2 R.G. Teitel, Transitional Justice Genealogy, 16 *Harvard Human Rights Journal* 69–94 (2003).

3 N. Roht-Arriaza, The new landscape of transitional justice. In Roht-Arriaza, Naomi and Mariezurrena, Javier (eds.), *Transitional justice in the twenty-first century: beyond truth versus justice*. (Cambridge: Cambridge University Press, 2006).

4 E.g. P. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd ed.) (New York: Routledge, 2011).

5 O.N.T. Thoms, J. Ron and R. Paris, *State-Level Effects of Transitional Justice: What Do We Know?* 4(3), Intl.Journal of Transitional Justice 329–354 (2010).

a legalist approach that is normatively driven, and a more pragmatic consequentialist approach, premised on achieving certain goals.[6]

The truth commission is claimed to be 'victim-centred', as a result of this process being primarily performative and focussed on victim testimony, institutionalising the truth claims of victims through public truth-telling with the social goal of reconnecting victims and society.[7] What making a transitional justice process victim-centred actually means remains unclear, despite the almost universal commitment of international actors involved to such a principle. The UN has discussed ensuring 'the centrality of victims in the design and implementation of transitional justice processes and mechanisms'.[8] There remains a tension, however, in all acknowledgements of the centrality of victims in transitional justice processes between victim priorities in seeing their needs addressed and a transitional justice practice that has always prioritised the building and legitimisation of the liberal state. It is precisely this tension that has led to the raising of victim expectations through the use of such rhetoric, and then ultimate victim frustration as the mechanisms of transitional justice – that remain necessarily state-centric – fail to deliver on them. Despite this, the language of victim-centrism has permeated all approaches to transitional justice, even around elements such as trials, where addressing victims' needs would appear to be very much a secondary goal. The Prosecutor of the International Criminal Court has, for example, claimed that 'the sole *raison d'être* of the Court's activities […] is the victims and the justice they deserve'.[9] The result of this is that transitional justice represents itself as a discourse and practice that exists primarily to support victims of human rights violations. It gains its moral legitimacy from the fact that victims are deserving and the claim that the practice of transitional justice has the aim of acknowledging victims and providing redress.

Transitional justice has both developed from and reinforced a number of normative assumptions about what victims of rights violations seek. A 'rule of law' narrative has sought to assert that victims want punitive justice, and that assumption is used to support the primacy of prosecutions, while restorative approaches have been accompanied by claims that victims are willing to forgive perpetrators who confess, or that they merely seek acknowledgement and symbolic reparations. The challenge for a global discourse of transitional justice, typically instantiated in a limited set of institutional mechanisms, is both to address the needs of victims

6 L. Vinjamuri and J. Snyder, Advocacy and scholarship in the study of international war crime tribunals and transitional justice, 7 *Annu. Rev. Polit. Sci*., 345–362 (2004).

7 M. Humphrey, From Victim to Victimhood: Truth Commissions and Trials as Rituals of Political Transition and Individual Healing, 14 (2) *The Australian Journal of Anthropology* 171–187 (2003).

8 UN, Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice (New York: UN, 2010).

9 Statement to the Press by the Prosecutor of the International Criminal Court (Abidjan, Côte d'Ivoire, 20 July 2013). https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/statement-otp-20–07–2013.aspx.

effectively in a wide range of different and culturally diverse contexts and to address victims of a wide range of types of violation. In addition to diverse victim experiences and needs, often victims' demands will evolve in response to the passing of time and the emergence of mechanisms that claim to address their needs, as well as to the developing social, economic and political environment of a transitional state.

Empirical data collected from victims and affected communities after conflict confirm that they articulate a range of often complex and context-dependent demands.[10] During and in the immediate aftermath of conflict, a demand for security and basic needs is most often articulated, reflecting the insecurity and poverty that accompanies conflict and the fact that victims are likely to come from communities that suffered from pre-existing poverty and disempowerment and live in states where services are limited: 'the fact remains that if one's stomach is empty, if one does not have shelter or access to medical care when needed, the right to truth and accountability, among other civil and political rights, may seem a luxury'.[11] A failure of transitional justice to engage with basic needs such as those for food, health and education demonstrates the gap that exists between victims' needs as they are articulated and what a transitional justice framework seeks to deliver. The broader neglect of social and economic rights in transitional justice is discussed further below. It is also clear that victimhood has emotional, psychological and social impacts that transitional justice theory and practice have largely neglected.

This article will summarise contemporary critiques of the victim orientation of transitional justice in terms of its effectiveness in addressing the needs of victims. The first section will discuss the extent to which the core mechanisms of transitional justice (trials, truth commissions, reparations) address victims' needs, while the second will discuss the tensions between the broader discourse of transitional justice and victims' aspirations.

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10 A range of empirical studies have informed the 'victim turn' in transition justice, exemplified by empirical studies of victims' needs using largely qualitative but also quantitative approaches. Examples include: P. Pham and P. Vinck, Empirical Research and the Development and Assessment of Transitional Justice Mechanisms, 1(2) *The International Journal of Transitional Justice*, 231–248; S. Robins, Families of the Missing: A Test for Contemporary Approaches to Transitional Justice (New York / London: RoutledgeGlasshouse, 2013); G. Millar, An Ethnographic *Approach to Peacebuilding: Understanding Local Experiences in Transitional States* (Routledge: London, 2014). Additionally, Pham and Vinck have made a number of empirical studies, including in Uganda, D.R. Congo and Cambodia, that sought to interrogate attitudes to peace and justice that offer an excellent route to understanding the needs of victims in the absence of the assumption of any prior agenda, e.g. P.N. Pham, P, Vinck, M. Wierde and E. *Stover, Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda,* (Berkeley: Human Rights Center, UC Berkeley, 2005).

11 H. Saeed, Victims and victimhood in Afghanistan, 10 (1) *The International Journal of Transitional Justice*. 168–178. (2016).

2. VICTIMS AND THE CORE MECHANISMS OF TRANSITIONAL JUSTICE

Transitional justice has become increasingly prescriptive as its practice has become both widespread and sanctioned by an industry of practitioners and specialist agencies. What has become a global practice has emphasised the mechanisms of trials, truth commissions and reparation processes, and one result of an increasingly mimetic practice has been an *institutionalisation* of transitional justice process, where the creation of state or *supra*-state bodies is seen as its core role. Given that most contemporary transitional justice processes unfold in low-income states in the global South, such institutions serve to distance transitional justice process and 'to see victims or violence-affected communities as constituencies which must be managed rather than citizens to whom they must be accountable'.[12] Several studies demonstrate the limits of such institutions in achieving even the narrowest goals of transitional justice and the extent to which they reinforce ownership of the process by the state and elites.[13] Many in post-conflict states in Africa and Asia, and in particular the most marginalised in those states, live in worlds where local institutions, including the primary institutions of family and community, are more relevant to all aspects of their lives than those of the state in a remote capital.

An institutional approach necessarily restricts the interest of a transitional justice process to the minority of victims whose cases will be brought before some formal mechanism. Such approaches, premised on a Western model of 'liberal proceduralism',[14] are remote from the communities they claim to serve. Such approaches have been challenged by those who assert that recovery from conflict must be rooted in an understanding of how mass violations have impacted on and transformed affected populations. In extreme cases, we see communities and victims – in contexts such as Cambodia and Timor-Leste – who are unaware that a national judicial process or truth commission has even happened.[15] Questions of access, to national as well as the international processes that are most globally visible, are a huge challenge in many contexts, not just due to physical or geographical constraints but because such institutions can address only a small number of victims. Seeking that such processes

12 K. McEvoy, Beyond Legalism: Towards a Thicker Understanding of Transitional Justice, 34 (4) *Journal of Law and Society* 411–440 (2007).

13 *Supra* note 10, p. 3.

14 P. Gready and S. Robins, From Transitional to Transformative Justice, 8 (3) *The International Journal of Transitional Justice* 339–361 (2014).

15 S. Robins, Challenging the Therapeutic Ethic: A Victim-Centred Evaluation of Transitional Justice Process in Timor-Leste, 6 (1) *The International Journal of Transitional Justice,* 83–105 (2012); P. N. Pham, P. Vinck, M. Balthazard, J. Strasser and C. Om, Justice for victims in trials of mass crimes: Symbolism or substance?, 21 (2) *International Review of Victimology* 161–185 (2015).

provide recognition and redress to conflict-affected communities leads to a form of justice that unintentionally produces exclusions, deferrals and marginalisations.[16]

As a result of being centred on a few core mechanisms, in any particular time and place discussion of transitional justice is constrained by the already existing set of tools established in other (possibly unrelated) transitional contexts. One threat this presents is that the task of addressing past legacies of rights violations may be assumed to be limited to a finite number of well-defined transitional justice mechanisms, labelled as such. This has led to an extensive literature in which the impact of transitional justice mechanisms is evaluated in detachment from the broader social and political context, resulting in an overemphasis on the importance of such mechanisms in comparison with the end of conflict and the wider political, social and economic impact of peace and the political processes that accompany it. Victims are likely to be far more strongly impacted by the social, economic and political circumstances in which they live every day than a remote and short-lived institution.

2.1. TRIALS

It is almost universally presumed that prosecutions benefit victims and that impunity is in itself traumatic for survivors. Despite these claims, there has been little empirical work on the issue of whether prosecutions of violators are of benefit to the victims of those tried. Indeed, one of the few scholars to address the issue calls this an 'intellectual void'.[17] O'Connell interviewed therapists and human rights lawyers who had worked with victims of violations (largely in Argentina and Chile) to determine the effect trials had on victims. His conclusions are that impunity inflicts 'psychological pain' and that trials can be cathartic and provide acknowledgement through the breaking of social silence. However, trials could also retraumatise victims and perpetrators failing to be convicted was highly traumatic. Those victims who participated in trials, as plaintiffs, witnesses or deponents, felt different effects. Some victims describe the process as 'validating', with one saying power 'flowed back from the accused to me'.[18] Other scholars, however, deny that there is any therapeutic element for victims in trials,[19] while Hamber claims that the context in which testimony is given is crucial

16 S. Kendall, Beyond the Restorative Turn: The Limits of Legal Humanitarianism, in C. De Vos, S. Kendall, and C. Stahn (eds), *Contested Justice: the Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015).

17 J. O'Connell, Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims? 46 (2) *Harvard International Law Journal* 295–346 (2005).

18 E. Stover, Witnesses and the promise of justice in the Hague. In Stover, Eric and Weinstein, Harvey M. (eds.), *My neighbour, my enemy.* (Cambridge: Cambridge University Press, 2004). 118–119.

19 L. E. Fletcher and H. Weinstein, Violence and social repair: Rethinking the contribution of justice to reconciliation, 24 *Human Rights Quarterly* 573–639 (2002).

and that a trial is often not the best environment.[20] O'Connell concludes that many victims are potentially damaged by giving testimony in an adversarial process, while some who had themselves fought for and found justice claimed that it changed them positively. He concludes that judicial action should not be considered a 'healing' experience for victims on the basis of current evidence, and that attention should be paid to non-judicial alternatives to address victims' psychological needs.

2.2. TRUTH COMMISSIONS

The truth commission claims to deliver both individual and national healing through truth-telling, specifically by institutionalising the truth claims of victims. The trope of truth as reconciliation underlies a broad range of recent transitional mechanisms and yet appears to be rooted in little empirically tested practice. Despite the South African Truth and Reconciliation Commission (TRC) having been the object of huge study, rather little data is available about how its work is perceived by victims.[21] The most comprehensive study of victims' responses to the TRC suggested that victims expressed the view that their role in the TRC process was not sufficient and that they would be interested in meeting with perpetrators – an echo of the idea of *encounter* that is a pillar of restorative justice.[22]

The real goal of a truth commission is the transformation of traumatic memory into therapeutic history.[23] This social engineering is achieved through victims' testimony, legitimated by their suffering, creating new narratives for states to build their legitimacy upon. As such, truth commissions operate through the continuing objectification of the victim to support the broader aims of the state. Although there is a link between the plight of individuals and inter-communal reconciliation, care should be taken not to conflate the concepts of individual and societal healing.[24] For individual victims it is unclear that participation in such a process is positive.[25]

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20 B. Hamber, The Need for a Survivor-Centered Approach to the Truth and Reconciliation Commission. *Community Mediation Update*, 9 (Community Dispute Resolution Trust, Johannesburg, South Africa), Jan. 1996, at 5, available at www.csvr.org.za/wits/articles/artrcdrt.htm [Accessed 05/04/11].

21 See however the edited collection: A. R. Chapman and H. van der Merwe (eds) *Truth and Reconciliation in South Africa: Did the TRC Deliver?* (Philadelphia: University of Pennsylvania Press, 2008).

22 Centre for the Study of Violence and Reconciliation, Survivors' Perceptions of the Truth and Reconciliation Commission and Suggestions for the Final Report (1998).].

23 C. J. Colvin, 'Brothers and Sisters, Do Not be Afraid of Me': Trauma, History and the therapeutic imagination in the new South Africa. In K. Hodgkin and S. Radstone (eds.), *Contested pasts: the politics of memory*. (London: Routledge, 2003).

24 J. Doak, The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions, 11 *International Criminal Law Review* 263–298 (2011).

25 D. Summerfield, A critique of seven assumptions behind psychological trauma programmes in war-affected areas. 48(10) Soc Sci Med., 1449–1462 (1999); M. Eisenbruch, From post-traumatic stress

The emergence of trauma as the lens through which to understand societies emerging from mass violence is dominated by approaches that co-opt psychoanalytic concepts of cathartic release and apply them to societies as a collective.[26] Imposing the frame of trauma on victims implies a diagnosis of post-traumatic stress disorder and a consequent need for 'therapy', in contrast to potentially more relevant and local understandings of how they might respond to the impact of victimisation. This entirely Western lens largely neglects alternative approaches to addressing the impact of conflict, privileging prescriptive solutions imported from a global discourse that 'analyses political, economic and social issues in terms of cycles of emotional dysfunction'.[27] Additionally, the therapeutic ethos implies that once truth has been told and its performative role is complete, the victim (like the nation) will be cured.[28] In practice, such testimony can as often be damaging as therapeutic and after victims have disappeared from the national stage that a Truth Commission provides, their suffering continues.[29] Victimisation clearly has the potential to be accompanied by emotional and psychological impacts that can be severe, but transitional justice has yet to make psychosocial support to victims central to its practice, despite continuing reference to the therapeutic capacity of public testimony.

A Truth Commission necessarily individualises victims in ways which divorce them both from their communities (membership of which was very often the reason they became victims and which represent the most accessible source of support and solidarity) and from the political and other motivations of the violence to which they were subject.

2.3. REPARATIONS

In many transitional contexts reparations may be the most tangible manifestation of the state addressing harms suffered by victims of conflict.[30] Reparation also has a significant socio-political role, to impact on the broader society through the drawing of a line under past violations and the reinforcing of a commitment to the rule of law.

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disorder to cultural bereavement: Diagnosis of Southeast Asian refugees, 33(6): *Social Science & Medicine*, 673–680 (1991).

26 D. Summerfield, Cross cultural perspectives on the medicalisation of human suffering. In G. Rosen (ed.), *Posttraumatic Stress Disorder. Issues and Controversies.* (London: John Wiley, 2004).

27 V. Pupavac, Human security and the rise of global therapeutic governance, 5(2), *Conflict, Security & Development* 161 – 181 (2005).

28 Colvin, *Supra* note 23, p. 6.

29 D. Silove, A.B. Zwi, Anthony B. and D. le Touze, Do truth commissions heal? The East Timor experience, 367 *The Lancet* 1222 – 1223 (2006); T. de Ridder, *The Trauma of Testifying: Deponents' difficult healing process*, 6 (3 & 4) Track Two (1997).].

30 P. de Grieff, Repairing the past: Compensation for victims of human rights violations. In P. de Grieff (ed.), *The Handbook of Reparations.* (Oxford: Oxford University Press, 2008).

Indeed, it is seen that the reparative demands of victims often demand the changing of state behaviour.

Reparations are an approach to political violence that attempt to link the addressing of individual needs – emotional, psychological and livelihood-related – with norm-setting processes in society that aid recovery. Reparations are the one mechanism that should be intrinsically victim-centred and such efforts will fail to be reparative if victim needs are not considered. Yet very often reparation schemes fail to consider victims' wishes in their design and implementation.[31] The literature of reparation consistently blurs boundaries between the rights of victims as outlined in legal instruments and their needs as they express them. The UN *Basic Principles of Justice for Victims* do not mention the word 'need', but state that '[r]eparation should be proportional to the gravity of the violations and the harm suffered'.[32] This is an acknowledgement that needs must play a role, even though there is a reluctance for the rights vocabulary to accommodate such language on the understanding that it is the violation that creates a right to reparation and not the harm suffered.

Reparation, whilst potentially providing material compensation to victims, is primarily about *acknowledgment* of what has happened and the responsibility for it, and is thus intimately linked to concepts of truth; in some contexts, victims seek that the state or perpetrators themselves provide such recognition. The financial component is a way of demonstrating this and not an end in itself. Thus, reparation can have a beneficial effect on victims as part of the rehabilitative process, although the impact of reparations on victims is little studied. A major gap in the literature is in the area of follow-up studies of survivors who have (or have not) received reparation. In the absence of studies into the effects of reparation, one is faced with speculation and generalisations.[33]

One study of ex-political prisoners in the Czech Republic showed that only a minority of victims was satisfied with financial reparation, but that money increased access to rehabilitation and symbolised social acknowledgement and justice.[34] A review of reparations processes suggests that reparation that prioritises action by perpetrators rather than the recovery of victims replicates the role of victims as passive objects: 'programs that enable victims to play a part in critical societal

31 C. Waterhouse, The good, the bad and the ugly: Moral Agency and The Role of Victims in Reparations Programs. 31(1) *University of Pennsylvania Journal of International Economic Law* 257–294 (2007).

32 United Nations General Assembly *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Adopted by General Assembly resolution 40/34 of 29 November 1985. New York: UN General Assembly. (1985) (7: IX, 15).

33 S. Cullinan, *Torture Survivors' Perceptions of Reparation: Preliminary Survey*, (London: The REDRESS Trust, 2001): 50.

34 R. David and S. Choi Yuk-ping, Victims on Transitional Justice: Lessons from the Reparation of Human Rights Abuses in the Czech Republic, 27 *Human Rights Quarterly* 392–435 (2005).

institutions offer a more thorough remedy to past harms by fostering victims' moral agency'.[35] Victim agency in transitional justice processes is discussed below.

One of the greatest challenges to reparations achieving their potential in addressing victims' needs is the failure of such processes to occur. In many cases truth commissions have recommended a comprehensive reparations process and authorities have chosen not to implement it. In other instances, reparations programmes are insufficiently funded and thus fail to meet their objectives. Reparations remain the poor relation of transitional justice mechanisms, in terms of funding, broader support and even academic interest, despite having the potential to have the greatest impact on victims.

3. TRANSITIONAL JUSTICE IN PRACTICE

3.1. LEGALISM IN TRANSITIONAL JUSTICE

Law remains the dominant discipline in which transitional justice is situated, despite the fruitful engagement of a diverse range of disciplines with the issues at its core. As a result, transitional justice has been accused of having become 'overdominated by a narrow legalistic lens'[36] that has led to a 'thin' transitional justice that is institutionalised and driven by legal processes. This echoes broader critiques of legalism in other fields: '[L]egalism […] has led to the construction of rigid systems of formal definitions. […] This procedure has served to isolate law completely from the social context in which it exists.'[37] The isolation from the social that legalism implies serves to alienate the practice of transitional justice from victims whose needs, experience and agency are entirely rooted in the social worlds in which they live.

Despite the rhetoric of restoration that has permeated transitional justice, prosecution remains a mechanism that is privileged above all others. This is reflected in the devotion of very substantial resources to tribunals (national, international and hybrid), which often dwarf spending on mechanisms – such as reparations – which directly address victims' needs. This echoes a legal absolutism that has overturned previous thinking that mechanisms such as the truth commission were an alternative to trials, and now presents the prosecution of serious crimes as an obligation of states. Individual prosecution has become the overwhelming emphasis in the practice of transitional justice and is credited with the ability to deliver on a large range of goals despite the lack of empirical support

35 Waterhouse, *Supra* n,31, p.8.

36 K. McEvoy, Beyond Legalism: Towards a Thicker Understanding of Transitional Justice, 34 (4) *Journal of Law and Society* 411–440 (2007). 412.

37 J. N. Shklar, *Legalism: Law, Morals, and Political Trials.* (Cambridge, MA: Harvard University Press, 1986): 2.

for such claims. An extreme view is that prosecution and victim redress are one and the same thing: 'Victim redress amounts to holding individual perpetrators criminally accountable for human rights violations and violations of international humanitarian law. Punishment itself is seen as a form of redress.'[38] This lawyerly fantasy superimposes upon the complexity of post-conflict contexts a single dominant approach to transition that claims unique importance to victims, despite the massive diversity of ways in which violence is experienced. It homogenises the many complex and varied demands of victims, arising from their unique experiences of conflict, into something that can be addressed by a single institution. It is also readily contradicted by a mass of empirical data concerning victims' needs.[39]

Because of the primacy of prosecution in legalist rights discourse, efforts to understand victims' priorities have often been distorted to fit such assumptions.[40] However, when studies are performed with an unbiased methodology it is seen that a desire for prosecution is often only one of many demands, and frequently not the first priority of victims of violations, at least in states where other needs remain urgent.[41] The prevalence of legalism has resulted in debates in transitional justice being centred on the extent to which retributive justice is possible in the light of a need for peace to be sustained,[42] despite the potential lack of priority given by victims to such process. An emphasis on law and the legal skews debates in directions led by lawyers and human rights workers, rather than by victims of violations, or even by the broader needs of societies emerging from conflict.

Legalism also serves to translate 'thick' issues, deeply embedded in the history and culture of a context, into 'thin' legal representations. This facilitates a mimetic approach, allowing external experts to present prescriptive solutions derived from a global discourse as solutions to the dilemmas of transition. Several studies have shown that such approaches, driven by an abstract discourse of rights, fail to address the principal needs of victims, largely as a result of their being divorced from the social basis of those needs.[43] Legalism is articulated through a rights discourse that is seen as emphasising justice claims precisely because of its base in law and claims to universality. It is, however, this very universality that reduces the capacity of law

38 Discussing the work of Teitel in S. Kendall, Beyond the Restorative Turn: the Limits of Legal Humanitarianism, in C. De Vos, S. Kendall, and C. Stahn (eds), *Contested Justice: the Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015).

39 *Supra* note 10, p.4.

40 E.g. S. Robins, Whose voices? Understanding victims' views in transition, 1(2) *Journal of Human Rights Practice*, 320–33 (2009).

41 *Supra* note 10, p.3.

42 E.g. J. Snyder and L. Vinjamuri, Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice, 7 *Annual Review of Political Science* 345–362 (2004).

43 *Supra* note 10. p.3.

to address needs that emerge from a very specific and local set of circumstances: rights has become such a dominant emancipatory vocabulary that it makes others invisible. For a truly victim-centred approach, normative criteria and universalist rights claims must be complemented as the sole basis for addressing needs with what victims perceive will aid most in their recovery from the impact of the violation.

3.2. AN EXCLUSIVE VICTIMHOOD

In principle, a victim is defined as such by what has been done to them, with this codified in the violations defined by various bodies of law. In practice, victimhood does not emerge naturally from the experience of being harmed, but is constructed socially and subjectively, with a range of factors determining who will be accorded victim status. Rombouts and Vandeginste call these 'public recognition selection processes',[44] in which some 'have the 'power' to enforce recognition (socially and legally)'. Most formally, transitional justice mechanisms, such as truth commissions or prosecutorial bodies, will determine who is considered a victim, with victimhood in this sense an identity that is regulated through jurisdictional standards, such as time and place and the subject matter of crimes.[45] More locally, in many contexts victims' groups and NGOs will engage with victims and define criteria that may impact on understandings of victimhood within communities.

Victims demand a diversity of responses and understand justice differently, but find themselves confronted with an inflexible transnational discourse that seeks 'objective' definitions of both victims and the appropriate responses to their experience. In practice, victims constitute a part of the contested terrain of the memory of the conflict, at both national and local levels, often creating a hierarchy of victimhood that may be validated or repudiated by a formal mechanism. The truth commission represents the formalisation of this process, in which victim memory is transformed into public knowledge, sanctioned by authority. In some contexts, victims must be 'innocent' to be worthy of the appellation: in Peru, for example, anyone who had been a member of the Maoist guerrilla group *Sendero Luminoso* was excluded from being considered for reparation, regardless of violations to which they may have been subject.

Most perniciously, transitional justice has largely excluded victims of the structural violence of social and economic rights violations from its purview, understanding justice as linked almost exclusively to violations of bodily integrity. This is a direct result of the liberal roots of the discourse and is discussed below.

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44 H. Rombouts and S. Vandeginste Reparation for Victims of Gross and Systematic Human Rights Violations: The Notion of Victim. *Third World Legal Studies* 89 – 114. (2000–2003).

45 Kendall, *Supra* n.16, p.5.

3.3. VICTIM AGENCY AND PARTICIPATION IN TRANSITIONAL JUSTICE

Agency is considered important because it reflects an ethical imperative: 'The doctrine of action has become essential to our recognition of other people's humanity'.[46] Agency is understood primarily as the autonomy of the subject, both as individual and community: the sense in which victims are in control of their own destiny and are agents in processes to address their needs. Victims are subordinate not only because of their victimhood, but in many cases prior to their victimisation for reasons of marginalisation by poverty, gender or ethnicity. Their needs often result from the confluence of long-term marginalisation and the violations of conflict; it is thus crucial that victims themselves have agency and voice in the process to address these impacts, and this has become a staple of the international rhetoric around transitional justice. This challenges the use of the term *accountability*, currently understood as accountability to law, with the concept of a transitional justice process that is accountable to victims.

What distinguishes rights from needs is that while both offer analyses of deficits that impact on human life, needs are a simple articulation of that deficit, while rights provide a tool for action. Rights are asserted to empower their subjects and since they are actively *claimed* they are understood to give victims agency.[47] Critics of the rights discourse, however, see it as constructing victims as subjects on the terms of the atrocities committed against them:[48] victims are perceived as defined by their experience and its codification in law in a way that denies them agency over their own identity. Scholars from post-colonial states have taken this critique further: Mutua uses the metaphor of 'saviours', in which those with access to the rights discourse intervene to redeem victims.[49] The impact of this for the subject of rights, the victim, is that her subjectivity is constructed entirely upon the basis of this external discourse. Mamdani echoes this, seeing the rights discourse as representing victims as 'wards needing Protection', constituting 'a depoliticising discourse whose effect is to transfer agency from victims to their "protectors"'.[50]

In the highly unequal societies in which much contemporary transitional justice process unfolds, rights constitute a discourse that is preferentially available to the

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46 T. Asad, Comments on conversion. In P. van der Meer (ed.) *Conversion to modernities: The globalization of Christianity.* (New York: Routledge, 1996).

47 E.g. M. Ignatieff, Human rights as idolatry. In M. Ignatieff, Michael. K. A. Appiah and A. Gutmann (eds.) *Human rights as politics and idolatry.* (Princeton: Princeton University Press, 2003).

48 M. Humphrey, Reconciliation and the Therapeutic State, 26(3) *Journal of Intercultural Studies* 203 – 220 (2005).

49 M. Mutua, Savages, victims and saviors: The metaphor of human rights, 42 *Harv. Int'l Law Journal* 201–246 (2001).

50 M. Mamdani, Response to Gonzalez-Cueva, Eduardo: review of M. Mamdani, Saviors and Survivors: Darfur, Politics and the War on Terror, 3(3) *International Journal of Transitional Justice* 470–473 (2009).

powerful: rights are saturated with what Habermas described as a 'technocratic consciousness'[51] and this serves to restrict access to such discourse, which can become a tool for power to be exercised, potentially denying the disempowered agency. Additionally, rights are mediated by the actors who articulate them: in an unequal society, as with any other discourse, they become subject to existing power relations. This is a demonstration of the disjuncture between the epistemology of human rights and the social ontologies in which they are embedded.[52] Privileging discourse alien to victims, such as that of rights, can empower elites and outsiders at the expense of victims, particularly the most disempowered, who have both the greatest need of and least access to the language of rights. In a state where only elites know what rights are, they can become something that are largely claimed *on behalf of* victims rather than by victims themselves. The result is that victims must be represented by human rights experts, substituting empowerment for passivity and dependence upon others.[53]

The restorative turn in transitional justice has emerged in parallel with the recognition of victims' rights as of central importance to a transitional justice process, and restorative approaches are seen as natural complements to the accountability-driven process of trials. There is a tension, however, between the idea of a process centred on the needs of victims and an increasingly prescriptive global approach to transitional justice. The understanding of victim participation in transitional justice processes is at the heart of this dilemma: as the essential elements of a process have become increasingly standardised, what room is there for these to be impacted in form and implementation by victims' agendas? In practice, participation has been distilled into demands for national consultations, which, in most contexts, have had rather minimal impact on the subsequent unfolding of processes very much moulded on the global model.

Participation in transitional justice processes is understood in a wide variety of ways that can be conceptualised in terms of typologies of the quality and extent of participation. The literature around participation, notably in development, perceives participation as concerned with the expansion of agency and thus with processes of empowerment: the challenging of power relations which exclude certain categories of people from playing particular roles in a process. Ultimately, such participation offers the prospect of transformation for both victims and processes. White has defined a *ladder of participation*, representing ascending degrees of participation.[54]

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51 J. Habermas, *Towards a rational society.* (London: Heinemann Hamilton, 1971). 112 – 113.

52 M. Goodale, Introduction: Locating rights, envisioning law between the global and the local. In M. Goodale and S. A. Merry (eds), *The practice of human rights: tracking law between the global and the local.* (Cambridge: Cambridge University Press, 2007).

53 T. Madlingozi, On Transitional Justice Entrepreneurs and the Production of Victims, 2 (2) *Journal of Human Rights Practice* 208–228 (2010).

54 S. White, 'Depoliticising Development: The Uses and Abuses of Participation, in J. Pearce (ed.) Development, NGOs, and Civil Society: Selected Essays from Development in Practice (Oxford: Oxfam, 1996); S. R. Arnstein, A Ladder of Citizen Participation, 35 (4) JAIP 216–224 (1969).

The institutional approaches to transitional justice that emerge from the standard global framework, despite making often extravagant claims for victim engagement, can be seen to be almost exclusively nominal or instrumental in how victims participate, delivering little to victims but often being necessary for a process to occur. Victim representation sometimes occurs in truth commissions or around consultations to steer transitional justice processes, but this has not become standard practice. It remains the case that as long as the nature and form of transitional justice mechanisms are prescribed by global practice, implemented by national elites and constrained by legalist approaches, a transformative approach to victim participation – and true victim agency – is impossible. A transformative approach is to ensure that change is made by empowering victims themselves, rather than by others acting on their behalf, permitting victims to engage on their own terms in ways that are empowering, and providing a route to political change driven by victims. Such consultative processes are the first step towards challenging top-down process with perspectives 'from below'. Such an approach has been articulated as 'transitional justice from the bottom up'[55] and a need to 'explore ways in which […] institutions of transitional justice can broaden *ownership* and encourage the *participation* of those who have been most directly affected by the conflict'.[56]

3.4. THE NEGLECT OF SOCIAL AND ECONOMIC RIGHTS

Whilst the rights discourse claims to address all rights equally, in practice civil and political rights are prioritised over others, notably the social, economic and cultural, and this is especially true in transitional justice.[57] In principle, there is 'interdependence and indivisibility' of all rights, but in both the global rights discourse and in praxis, social, economic and cultural rights are far less emphasised. This is seen where victims of conflict are cast as such, overshadowing the broader needs that both pre-existed the conflict and that are exacerbated by the impact of the violation. The effective hierarchy of rights, which subjugates victims' own perceptions of their priorities to an agenda that elevates civil and political rights, drives legalistic approaches to transitional justice. Constraining victim identity to deriving exclusively from the violence of conflict neglects the structural violence of poverty and marginalisation, despite evidence that many victims prioritise exactly the basic needs that are marginalised by the rights discourse.[58] Thus, rights come with their own priorities, which serve not

55 K. McEvoy and L. McGregor, Transitional justice from below: An agenda for research, policy and praxis. In K. McEvoy and L. McGregor (eds.) *Transitional justice from below: Grassroots activism and the struggle for change.* (Oxford: Hart, 2008).

56 Ibid: 5, emphasis in original.

57 L. Arbour, Economic and social justice for societies in transition, 40 *NYU Journal of International law and politics*, 1–27 (2007).

58 R. Rubio-Marin, The Gender of Reparations: Setting the Agenda. In R. Rubio-Marin (ed.), *What Happened to the Women? Gender and Reparations for Human Rights Violations* (New York: Columbia University Press, 2008).

only to reduce victim agency but to depoliticise the discussion of peacebuilding, marginalising agendas of social and economic justice in favour of a legalism that privileges the civil and political.

Even where potential compensation and economic support for victims is discussed, this is invariably framed in terms of a legally based 'right to reparation', essentially reframing the issue as a civil/political right. That social and economic rights are secondary has been implicitly acknowledged, in principle in recognition of developing states' challenges in realising such rights, through the concept of 'progressive realisation'[59] of social and economic rights. In transitional justice, the lack of emphasis globally on social and economic rights has been acknowledged at the highest level:

> By reaching beyond its criminal law-rooted mechanisms to achieve social justice, transitional justice could contribute to expand our traditional and reductive understanding of 'justice' by rendering it its full meaning.[60]

While human rights has become a central pillar of development work and civil society globally has engaged with rights-based approaches, in transitional justice practice human rights agencies in particular have proved themselves unable or unwilling to articulate the economic and social needs of victims and to challenge entrenched hierarchies that ensure most remain poor. The retributive roots of transitional justice and the narrow agenda of its practitioners continue to prevent the emergence of a practice that can deliver a broader justice after conflict that includes addressing the social injustice that led to conflict and thus address the broad needs of victims.

4. TRANSITIONAL JUSTICE AS GLOBAL LIBERAL DISCOURSE

Transitional justice has become a globally dominant lens through which to approach states addressing legacies of a violent past, most often implemented as a component of larger efforts at liberal state-building. A global community of agencies and donors – including powerful states – exists that seeks to mobilise the rights discourse to advance a particular agenda in political transition, following global mimetic practice. Transitional justice has been disseminated as an integral part of the globalisation of a set of human rights norms linked to liberalism and neoliberalism and has become part of a hegemonic discourse that links development and peacebuilding to a liberal state-building project that sees liberal democracy and open markets as its endpoint.

Transitional justice uses a narrow legalism to ignore the politics that underlie situations that are the result of unequal power relations: 'legalism […] incessantly

59 International Covenant on Economic, Social and Cultural Rights 1966, Article 2.

60 Arbour, *Supra* n.57 at p. 14.

translates wide-ranging political questions into more narrowly framed legal questions'.[61] This result is a human rights regime that has:

> [A] Western centric and top-down focus; it self presents (at least) as apolitical; it includes a capacity to disconnect from the real political and social world of transition […] and finally it suggests a predominant focus upon retribution as the primary mechanism to achieve accountability.[62]

As such, rights work in conjunction with existing social and economic power relations as a regulatory discourse, at once normalising certain relations of power and co-opting more radical political demands.[63] As a consequence, transitional justice becomes an arm of global liberal, and often neoliberal, governance, sometimes sustaining systems that create many of the needs that victims articulate. The evidence of a significant body of empirical data is that the global transitional justice discourse, prioritising trials and national truth processes, fails to address the most important needs of victims. Meanwhile, a legalist perspective has led to a normative bias that has permitted transitional justice to resist this evidence base and empiricism more generally.

5. CONCLUSIONS

It has been argued here that there is a fundamental tension at the heart of the goals articulated by transitional justice advocates. Whilst the discourse has become something that sustains a global project to reconstruct states – particularly those in the global South – in Western liberal democratic terms, it continues to claim that victims of violations are at the centre of its practice. The empirical evidence reviewed here suggests that despite the claim of victim-centrism, transitional justice does not in practice effectively address the needs of victims as they prioritise them. The use of the charisma of victims as a justification for the necessity and value of transitional justice appears to be an effort to legitimise it and serves to aid its presentation as a technical and non-political practice. One impact of this is to raise significant expectations in victim communities that are rarely satisfied, and as a consequence victim disenchantment has become a given in many recent transitional justice contexts.

Victims have become a fetish in transitional justice, fetishism being concerned with the difference between subjects and objects. While the language of participation and agency is increasingly used to describe the relationship between victims and

61 W. Brown and J. Halley. *Left Legalism / Left Critique* (Durham & London: Duke University Press, 2002): 19.

62 McEvoy and McGregor. *Supra* n. 55 at pp.14–24.

63 S. Speed, At the Crossroads of Human Rights and Anthropology: Toward a Critically Engaged Activist Research, 108(1) *American Anthropologist* 66–76 (2008).

processes of transitional justice, they remain almost entirely their object with no capacity to exert significant impact on a prescribed process that unfolds according to a global model, largely unchanged by rituals of consultation. There remains no consensus on the role of the victim in transitional justice despite the rhetoric that surrounds her, while the structural limitations of the dominant mechanisms of trials and truth commissions accommodate victims only as nominal or instrumental actors. Instrumentalisation appears to be the defining characteristic of the relationship between victims and the mechanisms of transitional justice: such institutions require victims, but the benefits to victims of their role appear limited.

The gulf between the demands of victims and what transitional justice processes deliver are encapsulated by the difference between procedural justice and the substantive justice sought by victims that sees changes in their everyday lives. A truly victim-centred approach is likely to demand moving reparation from the periphery to the centre of transitional justice and building processes that can deliver repair and healing to victims on their terms. This would include making psychosocial approaches central, rather than seeking to justify the therapeutic value of mechanisms deigned to advance the interests of the state. It will also demand the challenging of purely institutional approaches, which are necessarily exclusive and remote, and embracing an actor-oriented approach that is driven by victims.