

Editorial Note: From the Neocolonial 'Transitional' to Indigenous Formations of Justice

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It may seem odd that I am responding to the honor of the editors' invitation to write this editorial note by questioning the premise of the current conception of the field of 'transitional justice' itself. The implied assumption of this field, it seems to me, is that the 'developing' society under examination is in transition from the state of being A, which we know, to becoming B, which we can predict. The precise question or theme of the study may vary, but the underlying inquiry seems to be whether that society can still maintain an acceptable level of what we, the 'international community,' recognize as justice during transition.

I am not saying that this is true of every scholar or social actor in the field, but the explicit or implicit purpose of those whose work is informed by this conception of transitional justice seems to be as follows: Let us promote an intermediate level or degree of 'justice,' as we know or accept it to be, until the situation is ready for the next phase toward the ultimate goal of fulfillment of our vision of justice as it should be practiced everywhere in the world. Another possible purpose of scholars or social actors is to promote an 'appropriate' conception of justice for issues that are particular to 'transition,' such as finding an acceptable compromise on accountability for atrocities committed during a conflict in order to facilitate the process of 'peacebuilding.' In these or other similar scenarios, preference is given to a standard of justice that is mandated by the international community over indigenous or 'traditional' practices that are unacceptable because they are inconsistent with 'universal' human rights norms, as proclaimed by the international community. It seems to me that this external mandate is so much the presumed standard that even the possibility of an indigenous alternative conception of justice is not taken seriously at a theoretical or empirical level.

If or to the extent that what I am saying is true, transitional justice scholarship and strategies are neocolonial because they view indigenous conceptions of justice as a distraction from the grand 'modernizing' mission of North Atlantic societies,¹ in the guise of the so-called 'international community' this time. I am using

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¹ Famously called 'The White Man's Burden' by Rudyard Kipling in a poem first published in *McClure's Magazine* (12 February 1899). With the subtitle 'The United States and the Philippine Islands,' the poem was seen at the time as strong justification of the US' expansionist policies. I use the term 'North Atlantic' to indicate that both colonialism and neocolonialism are practiced by the US as well as by European powers.

the term 'neocolonial' here to signify an ideological attachment to a colonial denial of local self-determination in the name of liberalization and promotion of universal human rights. I do believe that human rights must by definition be universal because they are the rights of every human being, but I also see their universality as possible only through an overlapping cross-cultural consensus, and not by universalizing relativist liberal values.²

In this light, I believe I am honoring the invitation of the editors of the *International Journal of Transitional Justice* by raising questions that might contribute to bringing the field closer to its true rationale, perhaps by focusing on seeking local conceptions and experiences of justice, without the 'transitional' qualifier. I prefer to contribute to this purpose instead of presuming to supervise the passage of a postcolonial (including post-Soviet) society from a temporary deviation back to the presumed neocolonial script of peaceful stability and development as prescribed by former colonial powers. In that neocolonial perspective, the international community (read North Atlantic societies) is saying, 'This society has lost its way along the path prescribed by its colonial experience but now seems to be coming back to the fold.' As an aberration from the modernizing script of colonialism, it is assumed that such deviations can be corrected through the application of universal models of individual accountability, as dictated by universal human rights norms.

In contrast, it is taken for granted that what the international community is doing on behalf of the 'community in transition' is necessarily consistent with the local community's own sense of self-determination and conceptions of justice. The question whether what the international community is doing is conducive to peaceful transformation is not even asked. Such initiatives, like the International Criminal Tribunal for Rwanda or the Special Court for Sierra Leone, may be criticized for excessive delay and excessive costs, for instance, but their conception of justice and contribution to peaceful mediation of conflict are not questioned.

I am critiquing a neocolonial approach to justice that evaluates the experiences of former colonies in terms of the path set for them by colonial administrations. I am not accusing those who engage in this approach of doing so in bad faith or an as apology for colonialism. Scholars and social actors who may be self-consciously committed to the liberation and development for social justice in former colonies may still think in neocolonial terms because they have not considered the possibility of an alternative. My purpose is to advance an approach to justice in the indigenous terms of every society all the time as a matter of self-determination and not as dictated by some presumed neocolonial progression in transition. This approach would study what is happening in various situations as part of an integral, organic process of the development of those societies, not as instances of 'transitional justice.'

² See, for example, Abdullahi Ahmed An-Na'im, ed., *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia, PA: University of Pennsylvania Press, 1992).

I will now try to clarify this alternative view of indigenous formations of justice and briefly illustrate its application to the case of Darfur, Sudan.

Indigenous Formations of Justice

In my view, appropriate and sustainable formations of justice are integral to the formations of conflicts on the ground. What is just and expedient in any given context must fit the injustice it is supposed to redress in the pragmatic realities of the situation. The premise of the approach I am questioning above is the presumed progression of former colonies into postcolonial stability and conditional eligibility for a relative degree of democratization and entry into a free market economy. This approach is neither likely to serve its alleged purpose of successful transition from one phase to the next in the presumed progression nor likely to succeed in realizing justice by any definition of the term in a post-*violent*-conflict situation. The transition model is false because there are in fact no predetermined phases for societies to go through in progression. It is also problematic because it is by definition intended to exclude indigenous conceptions of justice, regardless of the democratic will of the population. Let me briefly explain.

The transition model is inherently problematic because the process of transformation and change is organic and spontaneous for each society on its own terms and does not follow specific or predictable phases of any sort. For instance, as I have explained and illustrated in relation to what I call the incremental success of African constitutionalism,³ the process must be homegrown, emerging out of local context and adapted by the people themselves to the specific conditions of their country, through practice, and not as normative ideals imposed from above. Like constitutionalism, the practice of justice for every society can only emerge through an indigenous process of trial and error, whereby norms and institutions are built, gradually over time, in a process that combines lessons learned from bad experiences as well as benefits gained from good ones. What is justice, to which ends and how it works in practice are all matters for each community to experience on its own terms. If it does not make sense to the members of the community concerned in its local context, it is not justice to them. Yet, if the community is not motivated to engage in the process, then there is no prospect of peace or end of violence. This can be clearly seen in the case of Darfur.

Tribal communities in the Darfur region of western Sudan and neighboring eastern Chad, like the rest of the Sahel region across Africa, from Ethiopia to Senegal, have long had conflicts over land and water resources. This was unavoidable because the same land and water supply were needed by farming communities and nomadic herders. Large-scale violence, however, was much less frequent and more effectively contained when it flared up than in recent times. The need for close intercommunal agreement on sharing scarce resources made peaceful cooperation among various communities imperative. Whenever

³ See, generally, Abdullahi Ahmed An-Na'im, *African Constitutionalism and the Role of Islam* (Philadelphia, PA: University of Pennsylvania Press, 2006).

resource-based traditional conflicts developed into violence, tribal leaders were able to convene peace conferences to mediate differences and negotiate agreements over compensation for loss of life and property and allocation of resources in future relations of communities with varying systems of land tenure and use of water. Since the imperative of peaceful cooperation was appreciated by all sides, they all had a vested interest in minimizing the incidence and severity of violence.

What is new since the 1980s is the intensification of competition over water and land due to the heightened scarcity of both resources because of repeated draughts, which in turn have caused greater and faster loss of vegetation and creeping desertification. In other words, as regular supply of water decreased, trees, shrubs and other vegetation that used to protect the soil diminished, resulting in a simultaneous reduction of water, arable land and vegetation for grazing cattle, camels and sheep.

Another complication was the growing militarization of the region as a result of Libya's invasion and occupation of northern Chad in the 1980s and foreign interventions in the protracted civil war in Chad. As a result, more arms and military training became available to tribal militia and bandits in the area, increasing the level of violence of traditional tribal clashes while reducing the ability of tribal elders to contain violence and maintain peace. In addition, for instance, Muammar Gaddafi recruited and trained young men for his military interventions in Chad and infused them with Arab nationalist ideology. When he was defeated in northern Chad in 1988, he disbanded his irregular army, sending hundreds of politicized, highly trained and armed young men to their tribal areas, where they became unruly and difficult for their elders to control.

In short, the sharp rise in tribal and ethnic violence in western Sudan and eastern Chad in the early 2000s was the result of two factors: the long-term intensification of the militarization of traditional tribal conflicts over land and water and a resulting decline in the ability of tribal elders to mediate and control violence. The violence increased throughout the 1980s and 1990s, but became more politicized and difficult to mediate through traditional means around the turn of the 21st century. The shift of tribal conflicts into political problems for the postcolonial state in Sudan resulted in the emergence of political movements in Darfur that attracted a stronger military and political response from the government in Khartoum.

These emergent political groups claimed to speak in the name of various communities in Darfur, calling for more political autonomy from the government and a greater share in economic development for Darfur. One faction, the Sudan Liberation Army (SLA), was allied with the Sudan Peoples' Liberation Movement/Army (SPLM/A) of South Sudan. When the SPLM/A negotiated a separate peace agreement with the government, thereby ending the main civil war between the north and south of the country, the SLA felt betrayed and left out. Consequently, the government began to increase its military response and political repression of dissident and insurgent groups in Darfur out of fear that making

political concessions would encourage other regions to make similar demands, leading to the disintegration and collapse of the country.

Instead of understanding the nature of the problem and responding accordingly, the Sudanese government aggravated the situation by arming tribal militia from western Sudan to use against the SPLM/A in South Sudan. The military government of Omar Hassan al-Bashir, which came to power with a coup on 30 June 1989, did not start that policy but rather continued the practice of the preceding 'civilian' government of al-Mahdi. The practice of al-Bashir's government, however, was more intensive, supplying sophisticated arms to tribal militia from western Sudan, who came to be known as the Janjaweed, to make them more effective. When the civil war in South Sudan ended, the Janjaweed returned to their traditional tribal regions, where the government used them again in fighting the mounting insurgency in Darfur, especially after one of the political militias in Darfur launched a devastating attack on the airport of the provincial capital, al-Fashir, in 2003.

Different Questions and Process

The preceding remarks are not intended to support or oppose the insurgent factions in the violent conflicts in Darfur or to condone the response of the Sudanese government. My purpose is to explain the development of the violent conflict and the severe humanitarian crisis in Darfur in ways that already suggest the appropriate indigenous formation of justice. The tragedy in Darfur, as in the South and other marginalized regions of Sudan, was a result of decades of neglect and manipulation by successive governments in Khartoum, both civilian and military, since the independence of Sudan in 1956. What was new for Darfur by the early 2000s, which might still happen in other marginalized regions of Sudan, was the rise of military and political resistance that resulted in more violent clashes, which were aggravated by the regional factors mentioned above. The government reacted by trying to suppress the rebellion militarily, but because it lacked the necessary troops it resorted to arming and using tribal militia, exploiting ancient tribal divisions among Darfur tribes.

It is clearly wrong, in my view, to approach issues of justice and peace through judicial individual determination of responsibility and punishment in a region that lacks any presence of state law enforcement in terms of human or material resources. Even prior to all the recent violence and disorder, one would travel for days without encountering a single police officer, let alone criminal investigation and judicial structures. Individual juridical accountability is practically impossible in this setting due to such factors as the physical environment, tribal affiliations and alliances, motivation and causation of turning to violence in some situations and not others.

In contrast, the indigenous approach of convening peace conferences to mediate disagreements and negotiate settlements through payment of compensation for loss of life and property and allocation of resources is the most expedient and

just way to go. This traditional system can achieve and sustain enduring peaceful mediation of conflicts that are bound to arise, as explained earlier. In this light, I would respectfully suggest that the idea of prosecuting al-Bashir and some ranking government officials and tribal leaders before the International Criminal Court is probably the most futile and counterproductive attempt at 'transitional justice' imaginable. To be clear on the point, it is not that any of these men are innocent or that individual criminal responsibility would not be just and appropriate in some parts of the world. Moreover, some form and measure of individual accountability may be appropriate through the appropriate indigenous conceptions of justice in this context. Rather, my point is that local communities must be the primary source of methodologies and processes for mediation of conflict in the case of Darfur.

I must note here a strong caveat. What I am proposing is very much shaped by my own cultural orientation and personal experiences as a lawyer and human rights advocate from Sudan. My proposal is also somewhat defined by my focus on the recent violent conflict in Darfur. Other approaches and methodologies would be appropriate for other types of conflict in different parts of the world. My plea here is for asking different types of questions, and addressing different sorts of issues, than those that are commonly raised under the present neocolonial approach. I am confident that the field now called 'transitional justice' will be even more vibrant and engaging for scholars and social actors with time, but I expect the questions addressed in this field also to be more relevant to people's lives in the communities concerned.

For instance, the overarching challenge facing my approach is the fact that local violent conflicts are no longer local or traditional in their causation and dynamics. As illustrated by the impact of regional militarization with Libyan invasions of Chad and the protracted civil war in that country, local dynamics of traditional conflicts over scarce resources in Darfur have already been transformed by the interventions of regional and global actors competing for oil, minerals and geopolitical advantage. Another factor to consider is the nature of the postcolonial state, which is deemed sovereign under international and constitutional law without being sufficiently sovereign empirically on the ground to be able to control the internal or external national security of the state or its international economic and political relations.

In this light, specific questions that may arise include the following: How can local leaders, who may not necessarily be traditional elders, regain control over the mediation and reconciliation of conflicts within and among their communities? How can local actors succeed in curtailing violence that is now thriving on massive external funding for extremely advanced armament and military equipment? How can community-based mediators apportion responsibility and material resources to promote inter- and intracommunal cooperation outside the framework of the legal system of the country and its international human rights obligations? Granted that some external involvement in conflict mediation is necessary, at least in relation to the role of external military and financial

interventions, how can that be organized without undermining the integrity and efficacy of community-based mediation?

My purpose in this short editorial note is simply to explain and illustrate the importance and viability of engaging indigenous formations of justice. What I have described above clearly calls for multiple approaches and strategies because of the eclectic nature of the issues. While conceding, and in some respect welcoming, the notion that local conflicts and their mediation are no longer matters of exclusive local concern, I would still insist that the answer is not simply to concede to the neocolonial ‘transitional justice’ paradigm. The relevant and appropriate possible approaches to be applied and how some of them can be combined and implemented in situations of violent conflict in different parts of the world are the sorts of questions this hybrid field of theory and practice, of normative analysis and institutional development, should engage.

Contents of This Issue

While the contributors to this issue of *IJTJ* do not explicitly engage with notions of indigenous justice, they similarly seek to critique and expand the parameters of ‘transitional justice,’ at times echoing the concerns described in this editorial note.

Stiina Löytömäki’s article focuses on the legacy of colonialism in France, illustrating the extent to which the state has used the law to maintain a particular narrative of French colonialism that is increasingly contested by postcolonial memory politics. Similarly, using New Zealand as an example, Stephen Winter argues for theorizing transitional justice in established democracies. Drawing on liberal theory to develop a legitimating account of transitional justice, he argues that this case study not only offers ways of replying to those who critique the transitional justice aspirations of established democracies but also constitutes a response to those who argue against the coherence of transitional justice as a theory.

Taking a different approach to history, Paloma Aguilar compares Spain, Chile and Argentina in order to understand the impact of their contrasting histories of repression on how they have dealt with their violent pasts. She assesses whether greater levels of legal repression and more direct judicial involvement in repression explain why there is more resistance to accountability measures. Once democracy has been consolidated, she argues, a country’s history of judicial complicity is key to understanding a lack of reform of the judiciary, which in turn accounts for the presence or absence of judicial accountability. Ronen Steinberg similarly stretches the conventional historical focus of transitional justice scholarship by examining transitional justice in the age of the French Revolution. By focusing on the dilemmas faced by French society in the aftermath of the Reign of Terror, he makes the case for a broader view of the history of transitional justice, as well as for greater inclusion of historians in ongoing debates in the field.

Other authors draw attention to particular dimensions of transition. Danielle Celermajer argues that although many transitional justice processes involve ritual, it is a dimension that is often dismissed as lacking efficacy with respect to the key objectives of transitional justice. By focusing on the case of political apologies, she challenges some of the assumptions that lie behind this dismissal, providing empirical support for a more robust understanding of ritual as socially transformative, while also reflecting on why existing rituals may not be achieving such potentially transformative effects. Jo-Marie Burt, Gabriela Fried Amilivia and Francesca Lessa analyze the implications of the Uruguayan parliament voting to overturn the 1986 Expiry Law, a law long criticized by human rights advocates for preventing the criminal prosecution of human rights abuses committed during the country's military dictatorship. The authors argue that although a number of factors contributed to this surprising outcome, including a more permissive opportunity structure (the successive election of two left-wing governments) and the willingness of some judicial operators to challenge the Expiry Law, the key explanatory variable to understanding these recent developments is the persistent demands of civil society groups, which developed innovative strategies and incorporated new groups that gave renewed strength to the resurgent struggle against impunity in Uruguay.

Focusing on Serbia, Jelena Obradović-Wochnik focuses on the way in which the public is often 'silenced' or treated as indifferent in transitional justice processes. She focuses on both the 'silent' public and the ways in which transitional justice itself is complicit in silencing the public. Based on ethnographic research, her article argues that the public, which appears silent and indifferent, is, in fact, engaged in confrontations and discussions about the past. However, these narratives are often disassociated from – and even subversive to – organized transitional justice initiatives.

In their Notes from the Field piece, Doris Gray and Terry Coonan present testimonies of female former political prisoners in Tunisia, seeking to ensure that the voices of Islamist women detained under the Tunisian dictatorship are no longer absent from the national discourse on transitional justice. The piece is set in a context in which the newly elected provisional government has established a Ministry of Human Rights and Transitional Justice, yet in which there is concern that the transitional justice process may be captured by political agendas.

Transitional justice continues to be a vibrant source of intellectual engagement across multiple disciplines and contexts. As scholars and practitioners continue to question the assumptions that undergird the field, it is hoped that we can improve on the approaches and frameworks adopted to promote and sustain the justice that is appropriate to the need.