

Tóth-Kuthy Márton

Transitional justice and structural violence – Sickle and torch?

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Social violence in post-conflict societies is a complex and challenging problem, nevertheless a problem that must be faced. This essay focuses on what structural violence is, how transitional justice is able tackle it on its own, what instruments does it have and how effective they are. I will conclude that even the best implemented transitional justice process has its limits while addressing the complex issue of structural violence.

1. Introduction

At the end of Cold War, the field of Transitional Justice emerged from many different scholarly traditions addressing violations in the past [QUINN 2017:1]. (It is worth mentioning that Latin America has an even older experience within this field) From the retroactive justice of Nuremberg this field has become much wider and nowadays described as “*the range of judicial and non-judicial mechanisms aimed at dealing with a legacy of large scale abuses of human rights and/or violations of international humanitarian law*” [KERR-MOBEKK 2007:3]. The development of Transitional Justice is evident, however, there are two main charges against it, not without contradictions.

Firstly, Transitional Justice fails to address its aims, and there is a need for a thicker understanding and wider range of measures [MCEVOY 2017:440].

Secondly, Transitional Justice has already gone beyond its original aims, and it has lost focus on them (e.g.: reparation of victims of large-scale human rights abuses), therefore it should be more focused [TURNER 2017:52].

Transitional justice is between the conflicting concepts of thicker understanding and over-expansion. This conflict is evident when transitional justice faces the problem of structural violence. The two conflicting points of view must come to an agreement to answer the urging question: to what extent can transitional justice tackle structural violence?

The last three decades of transitional justice shed light on a very important fact. Dealing with crimes of the past cannot be done with leaving the structural conditions that made the violence possible intact [UN Guidance Note of the Secretary General 2014:8]. Therefore, to address the issue of structural violence is crucial. There is no point of an international tribunal’s prosecution against a former dictator who has committed mass abuses in the past and victim reparations if the structural system of inequalities remains intact and generates further violations on a daily basis. The issue of reparations for the transatlantic slave trade or

the ongoing social-structural violence in South America and in South Africa shows that there is a need for a more transformative approach that can address structural violence.

If transformative justice wants to succeed in bringing peace and justice into a post-conflict, transitional society it must tackle structural violence. However, the current practice of transitional justice and the predominant legalistic approach is unable to solve these questions. Transitional justice has to accept the fact that alone it cannot fully address structural violence. This acceptance is not a fatalistic surrender, since transitional justice has other priorities to focus on. To achieve long-lasting transition and social justice, it should work together with other non-legalistic fields like economics, politics and psychology.

1.2. Structural Violence

Structural violence is an increasingly challenging problem. *Structural violence* refers to limitations that society places on people thus constraining them from meeting their basic needs and achieving the quality of life that would be otherwise possible [LEE 2019:123].

These limitations can take various forms and can be economical (e.g., cut out of home-mortgage market), political (e.g., no right to vote), legal or even cultural. They are embedded in society; therefore, they are not always visible and are not easy to be recognised. Structural violence is, well, structural, because it is a result of orchestrated limitations, imposed by state institutions or by those with authority as part of a continuous policy. And it is violence, since it results in long term deprivation of certain human and/or political rights, e.g., right to liberty, life and the security of person or right to take part in conduct of public affairs.³² It is the background of many problems within society, like poverty-trap, gender-inequality and political marginalisation.

This type of violence crystallises in the long-lasting historical injustice against people with African origin in the USA. The discrimination first had political, legal, then later economic and cultural nature. Its consequences and remnants are still visible and are among the main causes of the widening gap in the American society [COATES 2014]. The social inequalities in South Africa are the offspring of the former apartheid system. Truth commissions have been held, perpetrators have been convicted and prosecuted and a nationwide transition process has been done, even a new flag was implemented. Still, social inequality is on a higher level than it was in the 1990's [IMF 2020].

In a society laced with structural violence the crimes of the pre-transitional state take on new forms; they grow back like the heads of a hydra that has been cut down. In the last 30 years the concept of transitional justice was developed to deal with the hydra of transition, but it is still controversial, whether it is capable not only to cut off all the heads of the monster, but to cauterise the wounds as well.

³² Rights that are mostly covered by The Universal Declaration of Human Rights or by the International Covenant on Civil and Political Rights.

2. The system of transitional justice

It is very important to recognise that transitional justice in itself is not one coherent body of law, it is rather a dynamic collection of many different schools, theories and philosophies, it is anything but “*one big happy principled family*” [TIEMESSEN 2011]. But in the many different and sometimes conflicting ideas within transitional justice we can differentiate at least four pillars, that have the goal of dealing with the consequences of mass human rights violations [QUINN, 2017:1]. All of them have different focuses and methods; therefore, they entail different possibilities (if any) to tackle structural violence and social injustice. These four pillars of transitional justice are criminal accountability, amnesties, truth-seeking and reparations.

2.1. Criminal accountability

Criminal accountability is one of the oldest pillars of transitional justice. The International Military Tribunal in Nuremberg, the International Criminal Tribunal for Rwanda and many other tribunals and hybrid courts were all steps taken to deal with the legacy of large-scale abuses in the past. This (predominantly legalistic) approach can help solidify jurisprudence and provides a new legal model for a state in transition. It succeeds in “taking out” those who are the most responsible for violations, but it fails at two other important points. The big fish policy often leaves the mid-leaders and the abusive systems itself intact. Then the head of violence is replaced soon, and the structure remains intact. The ICC’s situation in Kenya also shed light on how hard it is to successfully engage into prosecution against those who are still in power. So, to held to account those who are liable in constructing structural violence is necessary, however, not enough to reach peace within society.

2.2. Amnesties

The second mean by which transitional justice operates is the use of amnesties, vetting and lustration processes. Amnesties may help to stabilize a post-conflict society, but they usually (and should not) operate with the aim of deconstructing structural violence. Vetting is an administrative justice process of personnel reform which can be defined “*as assessing integrity to determine suitability for public employment*” [UN, 2009:4].

2.2.1. Lustration

Lustration is a form of vetting, but it has a specific historic background (post-communist transitional states in Eastern-Europe), a broader scope and longer duration [HORNE, 2017:430]. A personnel reform is crucial in a transitional society, especially in certain prioritised sectors (justice, military, police, intelligence etc.). With vetting/lustration the former abusive state structures can be “cleansed” and the new personnel can help to reconstruct the post-conflict society. If the former regime was entrenched in public positions, an employment expulsion may open up possibilities for those who were previously excluded from positions on the basis of sex, political views, race or even religion. Lustrations in Hungary for example resulted in decommunization, thus giving new job opportunities in the public sector for those who were previously excluded (like those without membership in the

communist party). In the post-conflict Bosnia and Herzegovina, the police force consisted only of Bosnian male officers. However, after the successful vetting process, 10% of the officers were from an ethnic minority and 3% of them were female [UN 2006:39]. This personnel reform clearly helped to tackle gender inequality and marginalisation of minorities. A properly designed vetting process (if escorted by other means of transitional justice) is in some cases inevitable to fight structural violence.

2.3. Truth-seeking

Truth-seeking in the form of a Truth and Reconciliation Commission plays a vital part in every successful transitional justice process. Understanding the violence itself must be the beginning of any successful change in society [QUINN, 2017:22]. Truth recovery can provide a clearer picture not only on the past but also on the present. Truth-telling process in Australia started in 2020, to formally recognise wrongs and ongoing violence against the aboriginal people, thus ending the “*great Australian silence*”. It is evident that crime and violence cannot be addressed if it is covered by silence and denial. The acceptance and realisation of the crimes of the past, their consequences and even the ongoing structural violations fills the gaps between the society and the marginalised groups and urges the ruling political elite to take the necessary steps. The Truth and Reconciliation Commission in Canada played a vital role in fighting racism and furthering reconciliation between indigenous people and Canadians [TRC.CA 2020]. After the Commission’s findings a \$2 billion reparation program was implemented, and its work has been transferred to the National Centre for Truth and Reconciliation to continue the ongoing de-colonisation process in Canada. Truth seeking processes therefore directly and indirectly (by giving rise and base to other transitional justice mechanisms) contribute to reconciliation and help to handle social injustice.

2.4. Reparations

The fourth pillar of transitional justice is reparations; and perhaps this field has the most to do with structural violence. It goes without saying that monetary compensation has a very important place in a reparation process but there are many other means within this transitional justice mechanism. The UN Basic Principles elaborate on five different forms of reparations [UNGA RES 60/147 2005: para 18.]. *Restitution* aims to restore the original situation before the violations, by restoration of liberty, citizenship or return of property, etc. However, in case of structural violence this can be challenging. Many scholars rightly argued that the restoration of *status quo ante* may entrench (pre-)existing frameworks of structural violence, for example by supporting abusive gender hierarchies. The situation is similar to the development aids that contribute to the structural violence of societies in Africa [MILLER 2008:289]. However, the current practice of restitution by reparations already left behind the narrow understanding of corrective justice [WALKER 2015:117]. To avoid the restoration of former deficient status the Nairobi Declaration furthers the transformative nature of reparations. It argues that restitution itself is not a sufficient goal of reparation when the origins of violation predate the conflict [NAIROBI DECLARATION 2007:3]. Restitution (if properly implemented) is a *sine qua non* condition and a viable method of the successful transitional justice when it seeks to address structural violence.

2.4.1. Compensation

Compensation is provided for economically accessible damage. Monetary compensation contributed to the stabilization of many post-conflict society and to the destruction of social injustice, with due regard to indigenous people. However, money alone cannot solve every problem. For example, it cannot compensate emotional distress of oppression or trans-generation poverty and other disadvantages. Nevertheless, to tackle the reproductive circle of structural violence, social inequalities must be overcome [MILLER, 2008:278]. Some states hide behind the argument of lack of resources when it comes to pay compensation. However, the necessary resources can always be found, it is usually a question of political will not of monetary situation. Transitional justice takes place in a transitional society; therefore, the circumstances can provide the necessary “push” (political willpower) to achieve wider, structural changes in society. As Winston Churchill put forward, “*never let a good crisis go to waste!*” Therefore, may it seem to be controversial, a conflict can further the implementation of structural change via compensation.

2.4.2. Rehabilitation

Rehabilitation is very important on the individual level, but it should not aim at the deconstruction of social violence.

2.4.3. Satisfaction

Satisfaction however entails many possibilities ranging from cessation of continuing violations to public apology. The Canadian prime minister’s formal apology to LGBT Canadians clearly opened a new chapter in addressing gender discrimination [CBC News, 2017]. However, apology alone is not always sufficient. As the case of the Aboriginals in Australia showed, evidently, they found the apology as a poor substitute for monetary compensation [QUINN, 2017:20]. Still, commemorations, verification of the facts and restoring the dignity of those who have suffered (and may still suffer) from structural violence is a very important step that must be taken to make transitional and social justice possible. For example, if there were a proper satisfaction policy addressing the situation of the Afro-Americans in the USA, the Black Life Matters movement would have lost a lot from its momentum.

2.4.4. Guarantees of non-repetition

Among all, perhaps the *guarantees of non-repetition* offer the widest array of measures when facing the challenge of structural violence. The importance of this field is highlighted by the fact that 60% of conflicts reverts back to violence in 5 years. If there is no valid guarantee that violations will not happen in the future, it seems that they will soon re-emerge. Guarantees are quasi commitments of states that they will never engage in practices that results in violations, entailing not only negative but positive obligations as well. *Inter alia* the UN Basic Principles explicitly mentions “*reforming laws contributing to or allowing gross violations*” [UNGA, 2005: para23(h)]. To address widespread social inequalities and marginalisation of certain groups judicial, legal or administrative review may be needed. If handled properly, guarantees can assure that after cessation of violence the same patterns of social injustice will not emerge again in a different form. In the USA for example, after the

Abolitionism structural violence reappeared in other forms, thus protracting the unequal status of Afro-Americans up till now [COATES, 2014].

The four main pillars of transitional justice provide various different methods to various situations. It is worthy of note that these measures were never intended to be used by themselves. They address different aspects of the complex legacy of large-scale violations, therefore they must be orchestrated and used together within the framework of transitional justice. However, in reality even a perfectly structured and implemented transitional process may fail to adequately address and eliminate the regrowing head of the hydra: structural socioeconomic violence.

3. Schools addressing the narrow nature of transitional justice

Traditional transitional justice is narrowly constructed to deal with certain crimes, therefore, it does not address every types of violations, like many violations of socioeconomic right. This (perhaps) controversial nature of transitional justice was not left unnoticed by scholars of the field. There are at least three different approaches in the literature addressing the relationship between transitional justice, social justice and structural violence [TURNER, 2017:59].

3.1. First school

The first school argues that there are certain socioeconomic rights that fit in the structures and scope of transitional justice. Based on this view, there is no qualitative difference between human rights and civil/political rights and some social or economic right. Therefore, to fight structural socioeconomic violence only the scope of transitional justice has to be expanded to include those special rights.

3.2. Second School

The second approach states that transitional justice differentiates between human/civil/political rights and socioeconomic rights and prioritizes the former at the expense of the latter. This approach claims that transitional justice is “*treating inequality or structural violence as contextual background rather than central issues in transition (...)*” [MILLER, 2008:266]. These violations are mentioned as mere circumstances where more serious violations happen and then they are dismissed. Therefore, these remedies can further problems in the background. Both schools demonstrate the absence of accountability for violation of socioeconomic rights.

3.3. Third school

The third school therefore aims to expand the conceptual boundaries of transitional justice to include social justice and structural equality. However, the capacities and resources of transitional justice is more like a zero-sum game, therefore in every case the spending must be carefully examined. If one concentrates only on one aspect of transitional justice (e.g., criminal accountability), another aspect may be overlooked (e.g., victim reparation). One may

wonder what could have happened if the \$250 million annual budget of the ICTY was spent instead on development programs and stabilization of the affected regions [ZACKLIN, 2004]. (For comparison, the total budget of the WHO for the financial period of 1994-1995 was around \$890 million.) [WHO, 1993] What is more important: to hold accountable ten perpetrators for war crimes or to rebuild ten villages of a persecuted indigenous community? To address the expanded list of violations there is a need to re-evaluate the priorities of justice itself.

4. Conclusion

And that is how we arrive to a possible solution. It is clear, that in order to deal with the legacy of mass abuses (including structural violence in the form of socioeconomic violations) the many “branches” of transitional justice must be orchestrated and used with a more holistic approach. But even with the best possible means and methods we have to admit the limits of transitional justice. It is not a panacea for all social problems that transitional societies may face [SRIRAM-GODOS, 2013: Chapter 14]. Bearing its limits in mind, transitional justice cannot forget (perhaps) its most important duty: redress for victims. Victims are in the centre of this field and their only hope for justice comes from here. They are the cornerstone and *sine qua non* parts of any possible framework of transitional justice. Transformative steps are important, but they should not be done at the expense of recognition, relief and support of victims [WALKER, 2015:122].

Transitional justice is predominantly legalistic. It should be left to do what it is the best at: bringing justice for victims where it was previously impossible. By doing so, it must act with a holistic view and collaborate with a range of other fields from psychology to economy. The holistic approach would provide the basis for justice and a long-lasting solution and redress for victims. But justice does not exist in vacuum, therefore, there is a need for special economic, environmental and social policy to address the remaining structural violence. But this solution is (mostly) not a legal matter, it is a factual question of other social sciences. Not only the different branches of transitional justice need to work together, but also transitional justice itself must cooperate with other fields if it seeks to address the complex problem of the multiheaded structural violence.

Heracles may have been able to chop off the heads of the Lernaean hydra with his sickle, but he still needed the help of his nephew Iolaus to cauterize the wounds with a torch. Transitional justice should follow his example. It should deal with the heads of states, organisations who orchestrated the violence, provide redress for victims and bring justice for the crimes committed in past. By doing so, it should cooperate with a variety of fields of social sciences to address the wider structural problems and violations within post-conflict societies. Otherwise, the hydra of structural violence would regrow two heads for every head that has been chopped off.

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II. Természettudományok
