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Deconstructing Transitional Justice

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ABSTRACT

Transitional justice as a field of inquiry is a relatively new one. Referring to the range of mechanisms used to assist the transition of a state or society from one form of (usually repressive) rule to a more democratic order, transitional justice has become the dominant language in which the move from war to peace is discussed in the early 21st century. Applying a deconstructive analysis to the question of transitional justice, the paper seeks to interrogate the core assumptions that underlie transitional justice literature in relation to the relationship between law, politics and justice. As a discourse, transitional justice is replete with antinomies or binary oppositions, that of war and peace being the most obvious. Therefore the essentially decsontructible structure of differánce already exists within the concept. By examining the ways in which legal and political narratives are framed and reproduced, the paper seeks to deconstruct the opposition between law and politics on which much of the transitional justice literature rests. The article does not purport to provide a definitive critical analysis of transitional justice but aims to provoke debate and to prompt critical scholars to engage with the themes raised by providing an introductory analysis of some of the core features of a field of inquiry which seems ripe for deconstruction.

KEYWORDS

Transitional Justice; deconstruction; violence; law; justice; politics

1. Introduction to Transitional Justice

Transitional justice as a field of inquiry is a relatively new one. Referring to the range of mechanisms used to assist the transition of a state or society from one form of (usually repressive) rule to a more democratic order, transitional justice has become the dominant language in which the move from war to peace is discussed in the early 21st century (Bell 2009). From its origins in political science, documenting the efforts of states to deal with the crimes of past governments, such as the military dictatorships in Latin America, transitional justice has taken on the form of a normative framework for dealing with political transformation (IJTJ 2007). Central to this evolution has been a resurgence of the idea of international human rights law and belief in the capacity of law to transcend partisan politics and therefore mediate social change. The rise of transitional justice has been stellar, but it is a field in which theory has failed to keep pace with doctrinal and empirical developments. While there has been significant critical engagement with the requirements of transition, notably but not exclusively from feminist legal scholars, this critique has focused on the need to ensure a more broadly defined and nuanced definition of transitional justice. To date there has been remarkably little theorisation of the concept of transitional justice itself and the way in which this new concept has shaped the way in which we think about law and politics.

Applying a deconstructive analysis to the question of transitional justice, the paper seeks to interrogate the core assumptions that underlie transitional justice literature in relation to the relationship between law, politics and justice. A number of features of transitional justice lend themselves particularly well to deconstructive analysis. As a discourse, transitional justice is replete with antinomies or binary oppositions. The most obvious of these are those of war and peace, and also that of peace and justice which characterised early transitional justice debates. However also included within the discourse are the oppositions between democratic and non- democratic, and repressive and transformed, with the distinction between good and evil that this implies. Similarly operating is the distinction between victim and perpetrator that shapes the boundaries of political inclusion and exclusion in transitional contexts. Opposition therefore goes to the very heart of transitional justice discourse and is the foundation upon which theorising has occurred. Therefore the essentially decsontructible structure of differánce already exists within the concept of transitional justice. It is not then surprising that research and advocacy in the field has also tended to rest on binary divisions, for example between procedural and substantive models of law, and the distinction between law and politics per se. However rather than problematising or interrogating these dichotomies, transitional justice scholars to date have tended to speak of law as a means of moving from one to the other. The assumption that appears to underlie much of the theorisation of the role of law in transition is that it is necessary to move from one to the other- from war to peace, for example, or from partisan politics to the rule of law. Also contained within this is an implicit assumption that the move from one to the other is teleologically determined progress (Teitel 2003). By examining the ways in which legal and political narratives are framed and reproduced, the paper seeks to deconstruct the opposition between law and politics on which much of the transitional justice literature rests. The article does not purport to provide a definitive critical analysis of transitional justice. Any one of the

themes raised in the article could be the subject of conferences, research papers and books. Rather it aims to provoke debate and to prompt critical scholars to engage with the themes raised by providing an introductory analysis of some of the core features of a field of inquiry which seems ripe for deconstruction.

The article is structured around three key moments in the development of transitional justice: the foundation of the disciplinary space; its constitutive exclusions; and the return of that which is excluded (Beardsworth 1996).

Section one will explore some of the central features of transitional justice. It will do this by examining it through the lens of transitional justice as a performative force which has shaped the boundaries of how we think about question of justice in the aftermath of conflict. It will consider the way in which transitional justice engages questions of violence, law and politics in transitional contexts and the idea that law can be regarded as playing a role that is distinct from that of politics.

Section two seeks to interrogate the underlying assumptions on which the discourse of transitional justice is founded, exploring the idea that law is the means by which justice in transition can be achieved. It will focus in particular on the way in which the boundaries of transitional justice are shaped by the juxtaposition of law with politics and the role that law plays in ensuring the ongoing preservation of the disciplinary space.

Section three will focus in more detail on the concept of justice in transition. It will examine some of the divergent priorities of transitional justice and consider these combine to shape an overarching narrative of justice in transition. It will examine the relationship between law and justice that is presented in the transitional justice literature, drawing on the work of Derrida to question the extent to which law is capable of delivering justice. In particular section three will ask whether the exclusionary structure of law itself means that justice is irreducible to law in transitional societies. It will do this in the context of the imposition of regulative ideals and the translation of transcendental ideas into empirical reality. Deconstructive analysis should reveal both the possibilities as well as the dangers of relying on law as a means of achieving justice in transition. For while it is clear that Derrida regards law as necessary, and as a means of pursuing justice, it is equally clear that law cannot in and of itself achieve justice (Derrida 1992). Therefore a balance must be struck when attempting to achieve justice through law. On the one hand law can provide a framework for the pursuit of justice, but on the other it should not be regarded as the same thing as justice.

2. The Performative Force of Transitional Justice

a. The emergence of practice

Transitional justice as a concept was unheard of in international law prior to the end of the Cold War. While retrospective claims are often made about the genesis of transitional justice in the trials at Nuremberg, the term itself was not applied until the 1990s (Arthur 2009)

Efforts at achieving what is now termed transitional justice during the 1970's and 1980s had been subject to political wrangling, subject to whatever concession on human rights could be secured politically rather than rooted in a normative (let alone international) obligation to pursue a particular course of action (Teitel 2003). Work in the field in the early years consisted primarily of the documentation of efforts that were already being made by states to deal with abusive governments. Dancy describes this phase as the "cataloguing of those structural realities within political transitions that harness the possibilities for victims' justice" (Dancy 2010, p 356). With the end of the Cold War and the apparent triumph of liberalism, a new found confidence allowed normative conclusions to be draw from this documentary work, and those conclusions to be drawn internationally as a means for dealing with past human rights abuse (Orentlicher 1991).

Although operating within distinct legal and political frameworks at the time, each of the regimes of post conflict reconstruction, human rights and international criminal law contributed to the emergence of an overarching conceptual field of transitional justice (McEvoy 2007)- one which sought to reconcile the key aims of each of these disciplines or endeavours within a coherent conceptual framework. It is in this immediate post Cold War period that a distinctive normative concept begins to emerge, resting on the twin pillars of providing justice for victims of human rights abuse while also supporting the emergence of democracy. Arthur, in her conceptual history of the field, suggests that those who were involved in debates at the time regarded the project as offering an intellectual framework that was previously absent for discussing issues that were raised in postwar societies such as Germany, Spain, Greece and Argentina (Arthur 2009, p 327). It was in this period, however, that law and legalism began to colonise the field. Transitional justice was initially narrowly defined, dealing solely with judicial responses to human rights abuse and operating alongside other regimes of post conflict reconstruction, such as state building and democratisation that operated in a less legal and more politically oriented framework. Transitional justice emerged as an international criminal law response to human rights abuse, entailing a strict understanding of "justice" as "criminal justice". Transitional "justice", in the form of prosecution for past human rights abuse, was simply one among many divergent tools that could be used to move a state from conflict to peace, as evidenced in the separate frameworks for action. Gradually, however, the scope of transitional justice expanded. Criminal prosecutions came to be seen as a means to address more broadly defined ideas of political and social transformation (Akhavan 1998), and the debate centred around the opposition between peace and justice. This then moved on to a division between truth and justice, and the extent to which truth either represented or denied justice. With each new step the field of transitional justice expanded to incorporate a broader range of objectives. The interplay of these seemingly oppositional concepts exposed the way in which the boundaries of transitional justice were subject to the ongoing and contested interpretation. For example, as seemingly peripheral concepts such as truth and reconciliation jostled for position and were represented as integral to justice rather than opposed to it, the parameters for inclusion within the definition of transitional justice expanded. In so doing transitional justice also began to encompass many of the political elements it had previously worked alongside (Bell 2009; cf IJTJ 2007). They became subsumed into a much broader narrative of transition, increasingly

regulated by law. This broadened (international) mandate was confirmed in the 2004 Report of the Secretary General on Transitional Justice and the Rule of Law in Conflict and Post Conflict Societies in which the goals of transitional justice were explicitly linked with those of peace and democracy, and in particular with the consolidation of the rule of law. Bell sums this development up as follows:

"The attempt to find and articulate a common legal framework gave rise to a situation where particularised relationships between dealing with the past and constitutional settlement ... were narrated as part of the one phenomenon of how to account for the past and satisfy international standards." (Bell 2009, p 16).

This was all done within the framework of increased emphasis on rule of law responses to conflict, increasingly through the implementation of international law standards (UN 2004 & 2011).Adopting a more broadly defined purpose and modus operandi was central to the evolution of the concept, which is in large part defined by this mandate of achieving peaceful and lasting change in transitional societies. The centrality of this mandate can be seen clearly in the theorisation of the concept of transitional justice.

b. Theorisation of the model

In 2000 Ruti Teitel published her seminal text *Transitional Justice*, in which she outlined what she saw as an emerging conception of the field and its core underlying assumptions. This text is chosen as illustrative of thinking in the field at the time. Teitel brings together discussion of previously disparate mechanisms for dealing with the past, including trials, truth commissions, lustration and constitutional reform, each of which had their own distinct aims and objectives, and discusses them within the new conceptual framework of transitional justice. A significant focus of this inquiry is the role that law can play in facilitating political transition. From the year 2000 transitional justice, it has been argued, has existed as a "self conscious field of practice and study..." (Bell 2009, p 8) the label used to denote a general conception of justice in political transition characterised by legal responses to past injustice (Teitel 2000). In particular the shift that occurred at this time was one from viewing justice that operated alongside other political mechanisms in transition, to transitional justice as necessary to deliver successful transitions – peace through justice. In particular, Teitel's conceptualisation of the field highlights the shift in understandings of the role of law in post conflict situations, moving away from existing and clearly defined regimes of legality to one which is more contingent and shaped by the circumstances in which it operates. The re-conception of law as fluid and capable of providing a framework for transformation laid the foundations for the domination of the field by law. Once the traditional rigidity of law and legal process had been stripped away almost any reform or transformative initiative could be justified using the mantle of law. From the turn of the century what has emerged is a new juridical concept of transitional justice. The emergence of this concept represents a performative event of considerable force in international law. The effect of this performative event has been the delimitation of a "theatrical space" within which all efforts at peace making must play out (Derrida 2001, p 29). The effect of this performative force is not limited to the evolution of the academic discourse of transitional justice. In very practical

terms the conceptualisation of transitional justice as a distinct field of endeavour has profoundly influenced the way in which it has developed in practice. The two are therefore integrally linked.

The emergence of a theorised concept of transitional justice represented the constitution of a new field, a new way of constructing meaning in relation to justice. Once a normative element was established in transitional justice literature, all efforts at peacemaking became subject to evaluation according to the requirements of that framework itself. This was clearly evident in respect of the belief in the rule of law inherent in transitional justice thinking. This new international order facilitated the emergence of new normative frameworks for action and evaluation (see generally Bell 2006). Despite the existence of a complex web of interrelated claims to the genesis and aims of transitional justice, an overarching narrative emerged dominant, evidenced in a convergence of opinion that certain unifying principles of justice in transition exist and that these normative principles are embodied in mechanisms such as trials, truth commissions and reparations (Subotic 2012, p 120). Transitional justice initiatives could be evaluated on the extent to which they delivered "justice" as defined in international law and action in transitional contexts came to be legitimated by the label of transitional justice. In this way the emergence of the model of transitional justice can be seen as a performative event – a coup de force or rupture with the preceding order (Derrida 1992). The coup de force was one in which the role of politics which had been the dominant force both nationally and internationally, was usurped by that of law. The way in which this force was legitimised, however, was the promise of a new beginning, that the new model of transitional justice represented a new system to replace the corrupt or immoral system it replaced (Douzinas 2005, p 175). In this way the field of transitional justice holds itself apart from earlier (failed) models which are found wanting in terms of their compliance with set standards of justice. The new model represents a break from the need to trade justice against peace, and promises a future in which peace will be based on justice. The emergence of this concept of transitional justice is also intimately linked with the narration of the "end of history" whereby the end of ideological conflict created the conditions for a universalised and post political language of human rights and international justice (Turner 2011).

The implications of the performative force of transitional justice remain as yet unclear. Derrida himself acknowledges that the force of the emergence of related concepts such as "crime against humanity" or even "human rights" can be seen either as "an immense progress, an historic transformation" or alternatively as "a concept still obscure in its limits, fragile in its foundations"(Derrida 2001, p 30).What is clear, however, is that with the emergence of the model of transitional justice came an exclusionary force whereby those who seek redress must do so in the language of transitional justice, thus inherently delimiting the narration of violence and justice (Nagy 2008, p 276). The effect of this is homogenising (McCormick 2001, p 406). Where one concept or one way of seeing the world is placed at the centre of meaning and prioritised over all other ways of thinking, the effect is to marginalise or exclude all other ways of interpreting meaning. The pursuit of the foundational concept becomes a quest for absolute truth which can legitimise subsequent action as neutral and just. This is characterised by the belief that there is one self evident meaning of justice,

and one correct way to pursue it, and alternative approaches are marginalised from debate (Fitzpatrick 2005). Transitional justice, despite (or perhaps because of) attempts to introduce greater interdisciplinarity into the field (Bell 2009), remains a resolutely legal field, resting on a number of core assumptions surrounding the capacity of law to mediate social change.

3. Setting the Boundaries –Transitional Justice and the Role of Law

As outlined, the unifying feature of transitional justice has become the idea that law can be a means to achieve justice. The promotion of the rule of law through international human rights norms underpins the entire discourse of transitional justice. It is therefore worth explaining in more detail how the role of law is characterised in transitional justice and how law is viewed as responding to the particular circumstances of post conflict societies.

Transitional justice rests on the paradox that it seeks to address past failings of the law by replacing it with law. While transitional justice may operate in contexts where law and order has irreparably broken down, in many conflicted societies what is at issue is not the existence of the law but rather its legitimacy in the eyes of the population. Legitimacy may be contested, with ongoing struggle for "ownership" of the law, leaving debates polarised between those who seek to maintain the continuity of law and those who reject the legality of the existing law and demand reform or overthrow of the system (Turner 2010). To try and mediate this dispute, the role of law (and indeed the rule of law) in transition has been vested with particular meaning whereby the stability and continuity of the "rule of law" is maintained, but the substance of the law is re-envisaged as a substantive model that encompasses clearly defined principles of justice. As Teitel states, the role of law in transitional contexts is to "mediate the normative shift in values that characterises these extraordinary periods." (Teitel 2000, p 11). Law in transition is constructed in relation to the nature of the injustice of the previous regime, deemed to be illegitimate and discredited. This, according to Teitel, provides legitimacy for legal change. What is being advanced, therefore, is not only a shift in understanding of the politics of law in the transitional phase, but also a fundamental shift in understandings of the role and function of law itself. One of the core and accepted premises of transitional justice is that the role of law in transition is fundamentally different from that in ordinary or settled regimes. The operation of law in transition speaks directly to the idea that there is a need to move from one form of society to another, thus responding to the history and narrative of conflict and therefore law. Teitel highlighted three key features of law in transition. These were that law was socially constructed; that international law could transcend domestic legal understandings; and finally that the rule of law could transcend politics.

a. Law and the Model of Transition

The concept of transitional justice emerged as an overarching conceptual framework for negotiating the move from war, conflict or repression, to a more peaceful society. However as discussed above, the emergence of concept of transition, and consequently of transitional justice, represents a moment of performative force, a moment at which new boundaries are

imposed on the meaning of political reform. Once this moment of performative force has occurred, the new concept comes to legitimise all subsequent meaning invested in the concept. However to maintain this, an ongoing act of interpretation is required. In practical terms this means that transitional mechanisms are evaluated within the new parameters of transitional justice, but in conceptual terms it means that the necessity for these mechanisms and reforms must also be interpreted in light of the concept. This ongoing process of interpretation represents a constative force whereby the force of the establishment of the concept itself is constantly re-affirmed through these processes of interpretation (Derrida 1992). It is therefore necessary for the discourse of transitional justice to be justified with reference to the boundaries of meaning established by the origin of the field. Once a concept has been established, once the field had been constituted, the concept assumes legal form of its own. To survive and establish its own authority it must become independent of its history, must assume institutional form in its own right (Derrida 2002, p 47-48). This means that although the force of the origin remains inscribed within the concept itself, the implementation of the new law is re-interpreted as a necessity, as a demand of legality (Douzinas 2005, p 175). This process of interpretation at once conceals and perpetuates the originary force with which the concept was constituted, thus revealing the "differential contamination" between performative force and its preservation (Derrida 1992, p 42). In seeking to deconstruct the relationship between the foundation of law and its ongoing authority, Derrida suggests that there can be no rigorous separation of these two types of force, but rather that the story of the origin of the law will be continually repeated in order to reinforce the legitimacy of the law. The way in which the performative force is maintained is clearly visible in the way in which the role of law in transition has been conceptualised by scholars of transitional justice, and in particular how the role of law has been framed to maintain the distinctness of transitional justice.

Central to transitional justice is the idea of a shift from one illegitimate form of government to a more democratic order. Fundamentally, it is assumed that there is a gap between the "law as written" and "law as perceived"- the legitimacy of the law depends on popular understandings of legality. This gap between law and popular perceptions give rise to many of the key antinomies of transitional justice (Campbell & Ní Aoláin 2005). Of particular note are the distinctions between the "is" and the "ought" of law, and between procedural and substantive democracy. These are held out as the key points of tensions in repressive or conflicted societies, the points around which conflict over the legitimacy of law is most likely to arise. These distinctions are also integral to the raison d'etre of transitional justice in that it is precisely these gaps that transitional justice aims to close, using legal form itself to move from one form of legality to another. This is not an altogether uncontroversial claim from a legal point of view. All instances of transitional justice will give rise to conflict over the desirability of maintaining legal certainty as opposed to justifying a new and distinctive conception of law forged in response to an existing set of circumstances, one clearly rooted in history and narrativity. To try and obviate some of this criticism, transitional justice theorists have sought to shift the locus of legal legitimacy from the domestic order to the international, looking particularly to international human rights law as a standard external to the parties which can provide guidance on the necessary course of action (Bell et al 2004, p 306).

International human rights law is regarded as a means of bridging the gap in understandings of the role and function of law in transition. Whereas the antinomies of positive and natural law, and procedural and substantive law present dilemmas for the domestic law theorist, Teitel suggests that international law can successfully mediate this tension. She states; "grounded in positive law but incorporating values of justice associated with natural law, international law mediates the rule of law dilemma."(Teitel 2000, p 21). This emphasis on the incorporation of the values of justice into the substance of law both highlights the link being made in transitional justice between law and justice, but also the fundamental shift from established notions of legality. Where the legality, rather than the existence, of the law is called into question, the new regime speaks directly to the experience of injustice or repression, implicitly acknowledging the failure of law in the past. The role of international law is simply to ease the passage of this new vision of legality, providing as it does independent standards against which the action can be judged (Bell et al 2004, p 308). The importance of incorporating international law, and with it values of justice, in a transitional context is also reflected in Teitel's third understanding of the role of law in transition – that it is capable of transcending the passing politics of the time. This understanding goes to the heart of transitional justice, and in particular the use of law to achieve transitional outcomes. "Rule of Law" is viewed as a means of simultaneously preserving the continuity of legal form yet marking a break from the old regime and enabling normative change. Although critical of the turn to legalism, McEvoy succinctly outlines what he terms the "seductive qualities of legalistic analysis". He states

"Claims that the rule of law speaks to values and working practices such as justice, objectivity, uniformity, rationality etc are particularly prized in times of profound social and political transition." (McEvoy 2007, p 417)

Although Teitel and others acknowledge the politically contingent nature of law in transition, most agree that law fulfils an important symbolic function in such contexts. Campbell and Ní Aoláin see law in transition as providing the means to confront human rights abuses through the application of legal procedure to narrative forums, and providing a "safe and stable" means to assist the journey (Campbell & Ní Aoláin 2005, p 188). The conception of law in the transitional justice literature is also regarded as a key source of democratic legitimacy. Rather than being held hostage to politics, the application of legal form is seen as a means of transcending existing political conflict and allowing a society to move towards a new form of governance, shielded by the formality of law and legal procedure. The rule of law is represented as providing a new site of contestation, bounded by legality.

In this way the interpretation of the role of law in transition ensures the ongoing constitution of the field. Transitional justice, as outlined, above, emerged in attempts to deliver legal accountability at times of political change. It is therefore foreseeable that the field should be concerned with maintaining its essence of legal normativity. This is done through the juxtaposition of law with politics in transitional contexts. Law is represented as embodying values of justice that are absent from politics. It is further portrayed as a necessary means of transcending politics and ensuring that just outcomes are achieved. Each time law is interpreted or applied in this way the performative force of the concept of transitional justice

is repeated. The patterns of inclusion and exclusion inherent in the constitution of the field are replicated through the interpretation of some mechanisms as falling legitimately within the scope of transitional justice and others as falling outside that scope (for examples of this tension see Dugard 1997; Sarkin 2001). Politics remains the excluded trace which helps to define the limits of transitional justice. This contrast with politics helps to provide law in transition with its own identity, uniqueness and unity. The boundaries of transitional justice are determined by a system of positive laws and conventions which define its character (Derrida 1987). It must be clearly visible what is contained within the concept and what remains outside. This limitedness provides the basis for the legitimacy, and for the acceptance of the idea of transitional justice as a distinct field, as separate from passing politics and therefore having the capacity to deliver change (Davies 2001). The legitimacy of this new model of transitional justice depends on it being able to distinguish itself from other values such as politics and morality. The definition of conceptual boundaries to the field of transitional justice opens up the possibility for deconstruction of the field itself. The act of naming processes as "transitional justice" serves to further define the boundaries of the field (Derrida 1987). Therefore he or she who is vested with the power of decision making also exercises the power of definition of the very boundaries of the field itself. The moment of decision serves to maintain the structure of the institution. This raises significant questions over who decides, according to what criteria, the content or narrative of transitional justice? Who sets the priorities? And what effect does this have on competing narratives? These questions are not just of rhetorical interest. They illustrate practical difficulties with establishing a normative regime such as transitional justice which has the power to define and shape processes of social reform.

b. Law and "Non Paradigmatic" Transitions

Analysis of transitions dominated by dichotomy heavily influenced the constitution of the field and the model of transitional justice that emerged. Early transitions represented "paradigmatic" transitions – those punctuated by the antinomies of war and peace; democratic and non-democratic (Campbell & Ní Aoláin 2005, p 182-184). Teitel's conception of transitional justice in particular assumes that one can reasonably easily distinguish legitimate from illegitimate uses of law, for example, or repressive versus transformed societies. The rise of non-paradigmatic transitions has presented new challenges in terms of the scope and definition of the field.

By the end of the twentieth century the nature of the situations to which the label of "transition" was being applied had altered significantly. Rather than dealing with inter state conflict or military dictatorship, the majority of transitional justice activity was arising as a result of negotiated peace settlements (Bell 2000). The end of a conflict by negotiated agreement meant there were no clear winners or losers. Peace agreements rarely spell out precise transitional requirements, therefore while an agreement can serve as a means of bringing transitional justice on to the agenda, fundamental disagreement can remain over its scope and definition. The power of the label of transitional justice can lead to struggle over ownership of the concept itself and conflict over the scope, definition and priority to be afforded to transitional mechanisms (Turner 2010). Take for instance the example of

Northern Ireland. Since the signing of the Belfast (or "Good Friday") Agreement in 1998 Northern Ireland has undergone wide ranging legal reforms aimed at redressing past failures of law. It is common to speak of Northern Ireland as being in transition (Campbell et al. 2003), and yet there remains a distinct tension over the application of the label of transitional justice and the underlying rationale for human rights reforms (Turner 2010). Well documented, for example, is the perception that demands for dealing with the past are simply part of a broader Republican agenda to discredit the state and re-write the narrative of the conflict (Rolston 2006; Simpson 2009).

The model of transitional justice assumes a rupture with a prior regime which is held to be discredited on account of breach with public support and perceptions of legality. It also assumes that this moment of rupture, most often the physical manifestation of conflict, can be isolated from political and social dynamics that have preceded it and be addressed as an exceptional event rather than part of ongoing contestation of norms. In these contexts the very definition of transitional justice can make certain courses of action controversial. In particular the idea that transitional justice requires acknowledgement of past failures can be problematic. Transitional justice itself rests on what Derrida terms "semantic instability" (Derrida 2003, p 105). The application of the label of transitional justice will make an inherent value judgement, make pronouncement on the origins and sustenance of the conflict (Bell 2009; Campbell & Ní Aoláin 2005). In this regard the concept of transitional justice itself is revealed as an external force which is brought to bear on post conflict societies. Within this relationship of force Derrida describes how the dominant power is the one that manages to impose and thus legitimate (indeed legalise) on a national or world stage, the terminology, and thus interpretation that best suits it in a given situation (Derrida 2003, p 105). Thus, rather than maintaining a presence that is independent of politics or morality, the distinction between the legal field of transitional justice and the politics that it aims to transcend is revealed to be an illusion. Far from existing independently from history, politics and morality, transitional justice bears within it traces of all of these influences. This can be seen in the use of the terms "acknowledgement" and "denial" – the assumption being that acknowledgement is a necessary component of transitional justice (see generally Derrida 2001). The implicit demand is that one side concede their story, their experience of the conflict and their narrative must give way to that of the other side. Where there are contested narratives of the conflict at play this demand for acknowledgement is not a value free assumption. Applying the label of transitional justice allows one side to take control of the direction of reform in a way that simply replicates the politics and the violence of open conflict. Yet the interpretation of the concept of transitional justice in a way which seeks to apply ostensibly neutral legal principles to mediate reform serves to replicate patterns of inclusion and exclusion on a micro level (Simpson 2007). Adopting one narrative of conflict over another and favouring it through the application of the rhetoric of transition simply represents the maintenance of the original performative force through the process of interpretation.

These three understandings of the rule of law in transition demonstrate the way in which law is regarded both as a means to deliver justice for past human rights abuses, and also deliver

sustainable political reform in conflicted societies. Law under this conception has a role to play in telling the story of the conflict, in forging narratives of right and wrong and in responding to those charges. The application of legal form is in and of itself regarded as assisting with the establishment of democratic legitimacy and providing a mediated framework for political conflict.

4. Transitional Justice and the Regulative Ideal

Knowledge in transitional justice is constructed around the core of a particular conception of justice – that of the application of human rights law to respond to past human rights abuse. This can have a backward looking element, in terms of delivering justice for victims, embodied in mechanisms such as trials and truth commissions, but it also contains a forward looking element where justice is deemed to consist of the application of human rights law in a way which marks a break from a repressive or abusive past and ensures justice in the future, through for example processes of constitutional reform. From either perspective the interpretation of justice that emerges from the transitional justice literature is legal justice. Justice in transition remains determined by legal rules and standards.

In addition to this characterisation of the role of law in transition, however, is the way in which transitional justice as a field (or as a concept) has been characterised. Transitional justice mechanisms are represented as the necessary means of achieving or concretising the abstract concept of justice. In this way transitional justice mirrors a Kantian vision of ethically determined action whereby principles of law and political action can be deduced from transcendental standards. This vision of law is evident in Teitel's claim that international law incorporates standards of justice associated with natural law. Thus "good" law serves as the bridge between the realms of natural justice and positive law. Derrida notes that it is a common presupposition of both natural and positive lawyers that just ends can be achieved by just means (Derrida 1992, p 32). Purportedly natural law principles are transformed into juridical ones, prescribing rules and setting limits on political action. Central to this vision is the assumption that what ought to be done can be done, and that there is an identifiable means of achieving the demands of ethical action (La Caz 2007). This idea of "good" law that can be deduced from the transcendental realm displaces law from the social to the natural realm (Newman 2001, p 17). Rights are viewed as essential, founded in natural law and therefore having an existence that can be determined independently from history or genesis. Law should be universal – applicable to each individual as if it were a universal law of nature. This transcendental concept of right mediates the relationship between law and politics and becomes the foundation and legitimating concept for the construction of knowledge in respect of right. In this context there is little or no questioning of the right of law (Derrida 1992, p 34). In the case of transitional justice the concept of right takes the form of justice. Following a Kantian logic, there is a standard of justice that can be deduced from transcendental principles and this is translated through law (most notably human rights law). The idea of justice becomes a fixed regulatory ideal, a means of determining action (for a critique of fixed regulatory ideals in this context see Derrida 2003).

This idea of a regulatory idea, or rules that can and ought to determine action, speaks directly to the conception of law in transition. Law in transition is represented as marking a fundamental shift from notions of legality, translating transcendental principles into law and providing a more responsive model of law that speaks directly to justice (Teitel 2000, p21). In this way the relationship between ethics (or right) and politics is mediated by law, represented as being based on neutral and impartial principles. Law, following this logic, can therefore legitimately regulate politics. To this extent the form or structure of law (the law of law) is significant. Law is portrayed as having its own unique identity separate to politics and morality. It is this that vests it with its authority and allows it to mediate this divide between transcendental ethical principles and empirical political action. For example, the reduction of human rights to writing increases certainty in what exactly human rights are. In this way the transcendental requirements of justice are translated into the empirical reality of law. Rights are no longer simply the subject of philosophical speculation, they exist because they are posited in internationally ratified instruments. The boundaries of this law are defined by criteria established by positive law and convention (Derrida 1987). As a result law should be capable of providing justifiable solutions to the problems of transition. Similarly, monitoring bodies may engage in interpretation of the precise scope and requirements of posited rights (Mechlem 2009). There can be authoritative and legitimate pronouncement on the content of the right. This again means that rights are not subject to political horse trading but are rather the subject of clearly defined legal obligation. Adjudication can be undertaken on the basis of a legally determined rule, independent of political influence. This separation of legal arguments from political or moral arguments is regarded as a key means of overcoming disagreement (Kingsbury 2002). Where there is a clash or competing conception of right, of morality or of justice, that which is enshrined in law will prevail. Where balancing is required this can be undertaken within the parameters of law itself, under the doctrine of relative indeterminacy. The simple fact of having to balance rights should not undermine the objectivity of the law per se. For transitional justice scholars, the rule of law is regarded as transcending politics and in particular as fulfilling and important symbolic function. Precisely because of the inevitable disagreement over the meaning of justice in transitional societies, law steps in to replace politics as the basis for authoritative decisions (Kingsbury 2002). This apparent depoliticisation of law is a central feature of transitional justice. In the drive towards justice, politics is to be neutralised. Principles of justice are the foundations upon which the new state is to be constructed. They are represented as neutral and objective principles against which the success of transition can be measured (Turner 2008). In this way justice forms an ethical horizon, a pre-determined outcome achieved through the implementation of legal rules. However it is with this question of the foundation of the law that cracks begin to emerge in this concept of law in transition.

Transitional societies are defined by political conflict. Where transitional justice mechanisms have sought to foster political reconciliation through legal means, this has often been at the expense of genuine political engagement. The idea of justice, understood as legal justice, is so securely rooted in the foundations of transitional justice that it leaves no space for the ongoing contestation of these concepts of right, law or justice themselves (Sokoloff 2005). In transitional contexts the temptation is to maintain stability at all costs, even where this

prevents any meaningful engagement with the underlying assumptions of the transitional project. Politics is relegated to the sidelines of public life, viewed as a threat to the stability of the rule of law (see generally Chandler 2000). The distinction between law and justice collapses, and law becomes the dominant means of regulating difference It is the foundation and inherent limitations of this vision of law that a deconstructive analysis reveals. Deconstruction reveals how law and the discourse of transitional justice, rather than transforming violent conflict, conceal violence at their very foundation.

a. Transitional justice as autoimmunity?

As outlined, transitional justice aims to be both backward and forward looking. Central to the rationale for transitional justice is the idea that it not only responds to past events but that it seeks to prevent those events from recurring in the future. Seen in this way transitional justice responds to traumatism where the evil comes from the possibility of repetition (Derrida 2003). Although ostensibly seeking redress for past injustice, transitional justice is equally concerned with guarantees of non-recurrence (United Nations 2011). The emphasis placed on rule of law underscores the sense of threat posed by failure to deal with past events and therefore risk a return to violence. In order to address this threat, transitional justice mechanisms such as trials and truth commissions set limits of temporal jurisdiction which define the scope of the events to which a response is required. In doing this the discourse seeks to isolate a certain set of events and represent them as extraordinary, as something which had a beginning and an end and which are somehow separate from normal politics. The events under investigation are represented as fleeting, as simply one event in a long history that must be dealt with and moved on from.

In doing this, however, it can be argued that transitional justice itself simply ends up reproducing and regenerating patterns of conflict which it seeks to disarm (Derrida 2003). This is seen in the way in which law is relied upon as the means of achieving justice, in particular the way in which the boundaries of the concept of transitional justice are defined to exclude not only alternative mechanisms for dealing with political conflict, but also to silence dissenting voices that do not fit neatly into the narrative of transition. Inclusion and exclusion from the new political regime is shaped by the narrative of transition and the extent to which groups and individuals are willing or able to articulate their positions in the language of transitional justice. In the quest to immunise against recurrence, transitional justice adopts rigid structures which may ultimately work to destroy that immunity. The desire to achieve closure on past events, to reach a solution in the present that will safeguard the future places boundaries or limits on the possibility of justice.

b. Law is not the same as justice

The pursuit of human rights in transition tends towards the equation of law, and the implementation of international human rights law, with justice. This is evidenced most clearly in the drive towards legal mechanisms for responding to trauma. International blueprints provide frameworks for justice that reduced the singular to the general- that impose generalised rules, norms and universalised imperatives on societies “in transition”.

The originary concept of transitional justice provides a determinate existence – a solid foundation –for the system of meaning, and for the interpretation of "justice". The assumption that underlies this model of transitional justice is that the application of rules and programmes for action is a means of achieving justice. When seen through a deconstructive lens, the effect of this, while seeking to achieve the impossible – seeking to achieve justice - is simply to deliver the possible in its place (De Ville 2008, p 105). What this means is that in the effort to enshrine principles of justice into the originary act of founding a law (the terms of reference for a tribunal or truth commission, or the drafting of a constitution, for example), a regulatory horizon of expectation is imposed In this act the essence of justice is lost. The imposition of calculated rules buries the possibility of justice (Derrida 1992). Once the outcome of law becomes fixed and determinate the responsiveness that allows law to pursue justice is lost. This is not to suggest that there should be no normative orientation to transitional justice. Rather what is central is the ability to recognise the potentially coercive effects of the determinate element of law. Relying too heavily, or without question, on law and the inviolability of law, can deny the responsiveness of law and reduce it to an ultimately arbitrary standard. Where law, or any other determinate concept, comes to be regarded as fixed and inviolate, the risk is that the centrality of this concept ceases to be subjected to scrutiny (Sokoloff, 2005). The ongoing process of questioning that Derrida advocates as necessary in order to achieve justice is lost, and with it the ability of law to deliver meaningful change. As Fitzpatrick states, "'In God We Trust' can relieve us of trusting each other" (Fitzpatrick 2005). The unquestioning acceptance of norms and systems becomes not only possible but commonplace. In situations defined by political conflict, by competing narratives, placing too great an emphasis on the application of norms also absolves responsibility for openness to the other. Where ones position can be reinforced by reference to law there is no longer any need to engage with the other.

As Derrida himself describes, "droit claims to exercise itself in the name of justice and ... justice is required to establish itself in the name of a law that must be enforce."(Derrida 1992, p 22). Transitional justice scholars have tended to equate justice with law, or to view justice as something that can be achieved through the enforcement of human rights law. However, to the extent that justice can be present in law and (reformed) institutions, it is only as a possibility (Derrida 1992). It should not be treated as an identifiable end point such as a particular model of democracy or governance, or as the enforcement of legal rights. Justice should have no horizon of expectation, regulative or messianic (Derrida 1992, p 27). Justice represents a call to a more consequential change "not simply in the naïve sense of calculated, deliberate and strategically controlled intervention, but in the sense of maximum intensification of a transformation in progress, in the name of neither a simple symptom nor simple cause." (Derrida 1992, p 9).

5. Conclusion : The (Im)possibility of Transitional Justice?

Derrida himself suggested in Force of Law that it was “foreseeable and desirable that studies of deconstructive style should culminate in the problematic of law and justice” (Derrida 1992, p 7). It seems equally foreseeable and desirable that studies of transitional justice should culminate in deconstruction of the concepts of law and justice on which the field is founded, for deconstruction itself is a problematisation of the foundations of law, morality and politics. In the preceding sections it has been shown how questions of law, morality and politics are intimately linked in the context of transitional justice, to the extent that rigid distinction between the concepts themselves can no longer withstand scrutiny. In transitional justice the urge must be resisted to look for determinate frameworks of justice. Law, and human rights law in particular, should not be instrumentally subordinated to a determined outcome. Law must remain open to the possibility of justice. For justice exceeds rules and calculations. It is not simply a juridical or a political concept, but it opens up for the future the possibility of transformation, of re-casting or re-founding law and politics. The challenge to remain open to critical engagement is rooted in the idea of an infinite idea of justice that is irreducible to law. It is in this ongoing process of questioning that justice lies – in the openness to the other, the existence of whom is immanent to the idea of transition. In this way deconstruction is transitional justice.

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