



#### CLARA SANDOVAL

Clara Sandoval is a qualified lawyer and a Senior Lecturer in the School of Law at Essex University, as well as Director of the Essex Transitional Justice Network. She is the former Director of the LLM in International Human Rights Law, member of the Human Rights Centre, and Member of the Advisory Board of the Human Rights Clinic. She teaches and researches on areas related to the Inter-American System of Human Rights, Legal Theory, Business and Human Rights and Transitional Justice.

Email: [csando@essex.ac.uk](mailto:csando@essex.ac.uk)

#### ABSTRACT

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This article questions whether transitional justice can deliver social change. The author discusses the importance of re-assessing expectations so that transitional justice processes and the legal framework that drives them, including international human rights law, are used to achieve what they are able to deliver. By classifying social change in three categories, namely: ordinary changes, structural changes and fundamental changes, the author argues that a fundamental social change happens when social struggle is able to put forward a new dominant ideology inspired by radically different values to those that allowed the repression or the conflict to take place. While it is not realistic to expect transitional justice to deliver development, democracy, rule of law or peace, the author argues, transitional justice, when properly conducted, can indeed contribute to deliver fundamental change but it cannot deliver it on its own.

Original in English.

Received in June 2014.

#### KEYWORDS

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Transitional justice – Social change – Ideology – International human rights law



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# TRANSITIONAL JUSTICE AND SOCIAL CHANGE

Clara Sandoval

## 1 Introduction

International human rights law has become one of the languages of social change of our time. It has gained such a prominent role in States' political agendas that over almost six decades, several international human rights and related treaties have been adopted and work continues on new ones. Domestic systems have also been active in this area, engaging in the dynamic incorporation of such treaties and other international obligations into their domestic law. New constitutions and legislation have been enacted and institutions (judicial and non-judicial) have been created in order to apply this new language of change. Even in the majority of relevant political discussions today, international human rights law appears to set the limits or possibilities for change.

Transitional justice has also become a language of social change. While it is not a branch of international law, as international human rights law is, it is a field deeply influenced by the power of this law and of other branches of international law. Indeed, they constitute its normative framework, dictating the types of changes that are needed in society to reckon with the legacy of mass atrocities. Indeed, stake-holders are turning to it in the hope that through its various processes and mechanisms (justice, truth, reparation and guarantees of non-recurrence), all of which are intimately related to the existence of international obligations, it might deliver lasting peace, reconciliation, democracy, human rights protection and even, for some, development and poverty eradication.<sup>1</sup>

However, a few decades have passed since transitional justice began in the Americas region (Chile, Argentina, Guatemala, El Salvador and others) and in other parts of the world (South Africa), and legal and social operators are still waiting to enhance human rights protection and achieve these social goals. South Africa, for example, despite its very well-known truth and reconciliation commission's work, and despite various other measures taken to deal with the legacy of apartheid, remains

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a highly unequal State, poverty continues to be rampant (TERREBLANCHE, 2002, p. 5) and key human rights like the right to reparation of justice appear to be more theory than a social reality. So, what happened? Did transitional justice processes and mechanisms fail? What did South Africa do wrong?

If we look at other States that have engaged with transitional justice, the story is not that different. Consider, for example, Guatemala, Sierra Leone or East Timor. Therefore it is prudent to consider whether transitional justice can deliver social change and to re-assess expectations so that we use transitional justice processes and the legal framework that drives them, including international human rights law, to achieve what they are able to deliver.

This article shares some thoughts on this pressing question. Given space constraints, some issues cannot be explored in great detail but it provides the reader with some provocative thoughts so that all those interested and working in the field of transitional justice can take stock of what we have done and learned during these decades of work and project that into the future, with vision and realism about what is possible. It is there that the real potential of transitional justice for social change is to be found.

## 2 The normative framework of transitional justice

Transitional justice is a relatively new field. It is only a few decades old and it has emerged out of practice. Some of this practice is the result of strong campaigning carried out by human rights lawyers around the world to resist gross human rights violations and/or serious violations of humanitarian law (ARTHUR, 2009). That is how it began in countries like Argentina or Chile. At the time there was (and there still is) a strong need to fight impunity, and human rights law constituted a suitable tool to this end. Human rights lawyers began to advocate, quite strongly, that under international human rights law and other branches of public international law, there was an obligation to investigate, prosecute and, if applicable, punish perpetrators of human rights violations and serious breaches of humanitarian law (MENDEZ, 1997; ORENTLICHER, 1991, 2007) that there was a right to know the truth of what happened (HAYNER, 2001; UNITED NATIONS, 2006) and a right to reparations for harm suffered (SHELTON, 2005; UNITED NATIONS, 1997, 2005). It was also said that States had an obligation to adopt and implement guarantees of non-recurrence and institutional reform measures to ensure that what happened would not happen again (SHELTON, 2005; UNITED NATIONS, 1997, 2005).<sup>2</sup> Therefore, as can be seen, transitional justice processes (justice, truth, reparation and guarantees of non-recurrence) respond to and are driven by an international legal framework that includes international human rights law, international refugee law, international humanitarian law and international criminal law (UNITED NATIONS, 2004). Customary law and treaty law support the existence of these obligations under public international law. Therefore, any consideration of the potential of transitional justice to bring about social change is also a consideration of the potential of this legal framework to help towards that end.

### 3 The meaning and the possibility of social change and transitional justice

It is often taken for granted that States have the quality to free themselves from anything that oppresses them or keeps them from developing. This idea is based on the assumption that changes and progress are possible. This is a key belief of modernity. This idea is also present in international human rights law and the transitional justice field. It is believed that a process by which the attainment of a certain objectives, be they reckoning with the legacy of mass atrocities, establishing the rule of law, achieving peace, human rights, democracy and others, enabling perpetrators, victims and society as a whole to move forward, is achievable. This means that it is possible to transform the social, economic and political conditions and behaviour that made the atrocities possible. This possibility of social change, however, is very often taken for granted, while the capacity of social conditions to remain unchanged is usually overlooked.<sup>3</sup> Yet this is not to suggest that change in the field of transitional justice does not occur. As with other social elements, change and fixity are present in the field of transitional justice and they can set limitations or possibilities on the former.<sup>4</sup> These elements should be carefully scrutinised. This point is of extreme importance when approaching transitional justice, as we have to deal with different types of changes occurring in different tempos, which suggests that there are certain transformations which are natural to the system and others which conflict with the nature of the system transitional justice ought to transform. However, for the purposes of this article, it can be said that because the social conditions, broadly speaking, are susceptible to change, progress is possible, without all change implying progress.<sup>5</sup> Indeed, change can take place in the middle of contradictions and complex transformations, which does not imply progress as a consequence, much less that the objectives of transitional justice have been achieved.

Three types of social changes are present in social struggles in the field of transitional justice and more broadly: *ordinary changes*, *structural changes* and *fundamental changes*. The key to distinguish each one of these forms of change is their relationship between what changes and the ideology that allowed atrocities to happen. If the change taking place in the field of transitional justice does not transform the ideology that supported the conflict or the repressive regime, we have ordinary or structural changes. For example, the enactment of an amnesty law or statutes of limitation constitutes a form of ordinary change that often happens during a transition. These laws are enacted and, most of the time, drafted in order to maintain the ideology that made the atrocities possible. They might be the result of a strong political struggle and might face a lot of resistance but at the end of the day, they do not threaten or transform the existing regime. They perpetuate it.

A structural change is a bit more complex and can give the illusion that fundamental change is at stake. For example, the enactment of a new Political Constitution, as happened in South Africa with the Interim Constitution of 1993 or the Political Constitution of 1996 (post-apartheid) or with the Colombian Constitution of 1991, is often considered to be a fundamental change, given that the foundational piece of the legal system has been transformed. However, this is

far from being the case. These *structural* transformations might be necessary but are not sufficient for the production of this type of change. The enactment of a new Constitution, an important guarantee of non-repetition, will not constitute a fundamental change unless it is able to transform the ideology that supported the old system and this does not simply happen with the enactment of a new foundational law. The case of South Africa is again illustrative in this respect. An important interim and a new constitution were enacted that established civil, political, economic, social and cultural rights, along with various remedies for individuals and important social institutions to transform the status quo established by the apartheid regime. Still, despite the significant work carried out by institutions like the South African Constitutional Court to protect rights, the majority of South Africans do not have their rights protected and it remains a deeply unequal society, which was entrenched already during apartheid. Therefore, important elements of the apartheid ideology remain present in South Africa's society today.

The establishment of transitional justice mechanisms such as truth commissions, commissions of enquiry, civil and criminal tribunals as well as reparation programmes could also be seen as structural changes. While often they have such a nature, this is not the case in all situations, given that some of these mechanisms are established not to achieve the aims they seek—truth, justice and reparation or prevention—but to give the illusion that things are changing, when in reality, the objective of those in power is to maintain the *status quo*.

A fundamental social change happens when social struggle is able to put forward a new dominant ideology inspired by radically different values to those present during the repression or the conflict. It is hard to think of an example to-date where a change has been so fundamental in a society undergoing a transition that the old ideology has been defeated. Transitional justice, in my view, is due to provide us with such example. This also means that the majority of changes happening in the transitional justice field are ordinary, with some structural ones also taking place. Once again, look at South Africa. While apartheid and racial discrimination were defeated—key tenets of the dominant ideology until then—inequality is still present at various levels and particularly, but not only, affects the black population.

This does not mean that change in the transitional justice field is not important or that it is not possible. Indeed, transitional justice is only possible in States where the old ideology has been weakened, is under threat and has lost legitimacy, as happened with the apartheid regime or with the dictatorships in the Southern Cone. This constitutes a unique moment, a unique window of opportunity, even if small, to contribute to the transformation of that old ideology that permitted or consented to the atrocities that took place. Therefore, transitional justice offers important opportunities that are not often present in other political struggles.

### *3.1 What kind of change is achievable in the field of transitional justice?*

While change (ordinary, structural and/or fundamental) in the field of transitional justice is possible, as has been suggested, it is important to remember that most often the expectations about what it can deliver are without grounds. To expect transitional

justice to deliver development, democracy, rule of law or peace is beyond what it can achieve, even if it might contribute to some of these goals. It is better to see the field of transitional justice in *realistic terms* without over dimensioning its potential. In such terms, transitional justice is about reckoning with the legacy of mass atrocities, and in that context, it is about achieving justice, truth, reparation and setting the grounds for such atrocities not to happen again. This is meant to contribute to a fundamental transformation of the ideology that allowed such atrocities. These are goals that transitional justice can work to deliver, using the various forms of change already indicated. This is not to set the bar too low. Indeed, transitional justice has struggled for decades to deliver this realistic view.

Transitional justice also delivers change at the individual level. For example, certain victims or perpetrators may feel that things have changed for them and that those changes are more than significant, as happens when a State recognises international responsibility for what it has done, apologises to the victims or finds the whereabouts of a disappeared family member. Others can feel and believe that changes have not happened at all, despite evidence that some things have changed. While the views and feelings of those who have been part of the repression or conflict, or suffered their consequences, are relevant to considering issues of social change, in this article I am concerned with changes of a universal nature, changes that affect society as a whole and not only few of its members. For example, from a justice perspective, structural change would mean that the majority of perpetrators (intellectual and material) have been investigated, prosecuted and punished, even if some of them were not, because their crimes were not proven beyond reasonable doubt.

### *3.2 How to maximise the potential of transitional justice processes to deliver social change?*

Pablo de Greiff, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence reminds us that transitional justice is not a package of processes from which States can pick and choose (UNITED NATIONS, 2012, paras. 22-27). All processes of transitional justice should be used as they complement each other and are interdependent (UNITED NATIONS, 2012, paras. 22-24). Also, the success of these mechanisms in achieving their aims depends strongly on their capacity to co-exist and reinforce each other. However, States have been very selective about the processes they are ready to engage with and even if they implement some of them, they do so with various limitations (financial, legal and human). For example, truth is usually prioritised in order to avoid justice and or reparation as was the case of El Salvador. Reparation is often neglected, as has happened in East Timor, despite the recommendations made by CAVR (The Commission for Reception, Truth and Reconciliation) and very few examples exist where States have taken seriously the need to redress victims. Guarantees of non-recurrence are the missing part of the puzzle in almost every State undergoing a process of transitional justice.

Persuading States of the need to consider the aggregate value of all transitional justice processes and mechanisms is a challenge. Various questions remain outstanding about how to link the various mechanisms in a way that enhances their potential to

achieve their aims. There are also questions about whether sequencing is necessary. However, as the field of transitional justice evolves and new experiences take place, we continue to learn about the value added using all of these measures together. Even more, the will of States to reckon with the past can be tested by their capacity to engage in a holistic way with transitional justice mechanisms. The less mechanisms of transitional justice they are willing to engage with, the more that their will to deal with the legacy of mass atrocities can be questioned.

Equally, transitional justice processes cannot be used in isolation from other important public policies that are adopted in a State moving away from conflict or repression, something De Greiff has also noted. Transitional justice should find ways to complement and enhance development projects, to work closely with DDR (disarmament, demobilisation and reintegration) and with other similar policies or programmes that take place in parallel to transitional justice, always aiming to maximise its lasting impact (UNITED NATIONS, 2012, para. 50). Transforming in a fundamental way the ideology that made the atrocities possible requires sustained social, economic, cultural and political efforts that use transitional justice processes but that go beyond them.

Aiming to reckon with the legacy of mass atrocities is a big challenge. Removing ideologies that have been present and that have allowed and have consented to such atrocities is not a task for a few years or days. It takes generations to change ways of thinking about humanity, what is right and wrong, and what goals should be pursued in society. Unfortunately, transitional justice mechanisms and processes continue to be thought of as extraordinary mechanisms that are only needed for a few years, after which, the work is done. This approach is a tremendous error. While it might be the case that they do not need to be permanent mechanisms, for social change to take place, of the kind that transitional justice can deliver, it is essential to invest in it in a holistic way for various years. But the reality is that States moving away from repression or conflict, with or without international cooperation, only back up such processes for a short period of time and then abandon the projects, as if the goals had been achieved. Sustained investment (human and financial) is essential in countries reckoning with their past. It is not only that structural and particularly fundamental change takes time to materialise, but also that States engaging with transitional justice have to constantly adjust their policy interventions in this area.

Chile is a good example of the decades involved in moving forward and transforming ideologies. In the case of Chile, more than 24 years have passed since Pinochet left power and Patricio Aylwin assumed as president of the country. Nevertheless, the Chilean Constitution is the same constitution of Pinochet from 1980 (although it has been amended on various occasions), and the amnesty law (Decree 2191/1978) remains part of the legal system. This is not to suggest that ordinary and structural changes have not taken place. Without a doubt, Chile has had an important experience with transitional justice processes that includes reparations, memorialisation, truth and, lately, justice measures. However, it did not deliver on these fronts right from the beginning. Indeed, while its first truth and reconciliation commission was established in 1990 to clarify the truth about the disappearances and killings and related violations to such atrocities like torture (CHILE, 1990), it

was not until September 2003, thirteen years later, that the Valech Commission was established to identify the victims of detention and torture for political reasons (CHILE, 2003). This means that even in States like Chile, where transitional justice has been an on-going project, the achievement of transitional justice goals remains an objective to be pursued.

Finally, transitional justice processes should always aim to empower victims and those most vulnerable from the conflict or period of repression. Only by getting them to understand that they matter for society and that they are agents of social change will they help transform old ideologies. Otherwise, they will always be marginalised and victimised. Therefore, all transitional justice mechanisms should see victims not as objects to achieve aims, as often happens with criminal investigations, but as rights holders. In this regard it is particularly relevant to empower women, children, minorities, the elderly and the disabled, among others (UNITED NATIONS, 2012, paras. 29-35).<sup>6</sup>

## 4 Conclusions

Without a doubt the field of transitional justice has articulated the language of social change. However, it is important to re-dimension its real potential to bring about any kind of change in society. In the transitional justice field, we find examples of ordinary and structural changes, and it is even possible to consider that it can contribute towards fundamental social change.

To be able to understand what changes take place in transitional justice and to be able to measure its ability to achieve them, it is necessary to clarify the kind of goals that could be pursued through transitional justice processes and mechanisms. In this regard, it has been suggested that a realistic approach is more likely to deliver changes. It is reasonable to expect transitional justice processes to deliver justice, reparation, truth and non-recurrence and to contribute in important ways to fundamental social change by helping to transform the ideology that permitted atrocities to happen. It is there that their potential for social change should be sought, and it is in the summation of the various tools it offers (truth, justice, reparation and non-repetition) that its real ability to deliver social change has to be pursued.

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## NOTES

1. See for example, Roht-Arriaza; Mariezcurrena (2006), Teitel (2001), Minow (1998), Arthur (2009), Turner (2008).
2. Updated Set of principles for the protection and promotion of human rights through action to combat impunity.
3. Nisbet, in his book *Social Change and History*, develops a powerful argument to show the priority of fixity over change in the social reality. He claims that, "Change is, however, not 'natural', not normal, much less ubiquitous and constant. Fixity is" and then continues, "In the realm of observation and common sense, nothing is more obvious than the conservative bent of human behavior, the manifest desire to preserve, hold, fix and keep stable. Common sense tells us that, given the immense sway of habit in individual behavior and of custom, tradition, and the sacred in collective behavior, change could hardly be a constant, could hardly be ubiquitous" (NISBET, 1969, p. 271).
4. Just think, for example, how difficult it is to enact a new constitution, especially inside rigid legal systems, or to enact a new treaty in the international arena. Most of the changes in the law are gradual changes that have to follow certain patterns not to violate the essence of the system where they are taking place.
5. For interesting insights into the concept of emancipation within modernity, see: Leader (1998), Berman (1983), Laclau (1996), Santos (2002) and Nisbet (1969, 1980).
6. In this report De Greiff reminds us of the importance of recognition and trust for victims. They are goals that transitional justice should aim to achieve.