

GENDER POLITICS IN TRANSITIONAL JUSTICE

CATHERINE O'ROURKE

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Gender Politics in Transitional Justice

Transitions from violent conflict and authoritarian rule are believed to be transformative moments for women, unique conjunctures in public and private, international law and domestic law, with the potential to transform the gender order of a society. Transitional justice processes, though principally concerned with providing limited accountability for human rights violations of the past, are increasingly injected with transformative social and political goals for the future. What then is the impact of transitional justice processes on the human rights of women in states emerging from political violence?

Gender Politics in Transitional Justice draws on original comparative research on women's movements in Chile, Northern Ireland and Colombia, and on legal analysis of transitional justice processes in these case studies, to confront these issues. Catherine O'Rourke argues that human rights outcomes for women of transitional justice processes are negotiated and determined in the space between international law and local gender politics.

An essential resource for students and scholars of Law, Politics and Gender Studies, this book provides critical analysis of the potentially transformative intersection between law and gender relations.

Catherine O'Rourke is based at the Transitional Justice Institute at the University of Ulster.

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Catherine O'Rourke

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To my mum and dad, Catherine and Richard O'Rourke

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Catherine O'Rourke, Belfast, January 2013

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Part I

Introduction

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Introduction

From the popular feminist slogan of Latin American women's movements 'Democracy in the Country and in the Home' to the contemporary feminist peace slogan of 'No to war that kills us. No to a peace that oppresses us',¹ there is evidence of an enduring feminist belief in the potential of transitions from violent conflict or repressive rule to transform the status of women and gender relations. Moreover, the adoption of United Nations Security Council Resolution 1325 on Women, Peace and Security in 2000 marked formal political and legal recognition, at the highest international institutional level, that transitions from political violence *should* be transformative for women.² But what role do transitional justice processes play in determining outcomes for women of transitions from political violence? Transitional justice processes, though principally concerned with providing limited accountability for human rights violations of the past, are increasingly injected with transformative social and political goals for the future. What then is the impact of transitional justice processes on the human rights of women in states emerging from political violence? To what extent does international law determine these outcomes for women of domestic transitional justice processes? Or is the role of women's movements and local gender politics determinative of how women's human rights fare in domestic processes of transitional justice?

Gender Politics in Transitional Justice sets out to answer these questions. The book is interested in the extent to which transitional justice processes redress past violations of women's human rights, secure the non-recurrence of such violations, and empower women's movements as stakeholders in post-conflict and post-authoritarian societies.

Transitional justice refers to the legal, moral, and political dilemmas of providing accountability for the mass human rights violations that occurred during periods of violent conflict and repressive rule, while assisting the transition out of political violence. Transitional justice processes typically include some combination of criminal trials, truth-seeking, reparations and institutional reform. This book

1 This is a popular peace slogan amongst Colombian feminists. See further Cockburn (2007: 46).

2 United Nations Security Council Resolution 1325 (2000), S/RES/1325 (2000).

examines feminist engagement with transitional justice processes, and their human rights outcomes for women, in the selected case studies of Chile, Northern Ireland and Colombia. The comparative study sets out to understand and explain why some transitional justice processes produce better outcomes for women than other transitional justice processes. When, why and how does international law help to deliver progressive human rights outcomes for women in domestic processes of transitional justice? What are the optimum domestic political circumstances for international law to exert such a progressive influence? What are the strategies that can be effectively pursued by feminist advocates, practitioners and women's movements to deliver progressive human rights outcomes for women in states undergoing domestic processes of transitional justice?

BACKGROUND TO THE STUDY

The study is motivated by two factors. First, the proliferation of transitional justice mechanisms and the recognition of their significance for women's status and gender relations in post-conflict and post-authoritarian contexts. Second, growing feminist unease about the gap between ostensible feminist gains in international law and the actual impact of international law on women's daily lives.

Is transitional justice transformative for women?

It is important to locate feminist approaches to transitional justice within broader feminist approaches to transitions from political violence. The adoption of United Nations Security Council Resolution 1325 on Women, Peace and Security in 2000 marked formal international political and legal recognition that both political violence and its resolution are gendered. To say that political violence and its resolution are gendered involves two linked insights: first, that the origins and maintenance of political violence are linked to gender relations in the societies in which such violence prevails; and second, that gender is a determining factor in how one experiences political violence. Neither greater policy attention, nor growing political recognition, of the gendered nature of political violence emerged from the unprompted enlightenment of the international community. Rather, women's movements, and transnational feminist advocacy to target international institutions, have been at the heart of the advancement of women in the international agenda on peace and security (see generally Reilly 2009). This focus of transnational feminist advocacy on women, peace and security has been motivated by the exigencies of political violence: the felt need to respond to widespread and egregious violations of women's rights in these contexts. But this focus is also motivated by a belief in the transformative opportunities offered for women and gender relations by transitions from political violence.

The extreme social disruption caused by political violence can allow for some loosening of gender norms and create space for women to take up atypical gender

roles.³ For example, either through the death or absence of men, contexts of political violence can offer new opportunities for community leadership by women.⁴ Extremes of poverty and deprivation can motivate mass mobilisation amongst women to meet daily needs, to oppose political power-holders and to demand that greater attention be paid to the needs and rights of women.⁵ Further, these mobilised groups of women may be well placed to make demands for women's rights and equality on political elites when an end to political violence is being either imposed or negotiated (Bell 2005). Moreover, substantial political and legal reforms now typically form part of transitions from political violence, often with extensive provision for the protection of human rights.⁶ The advent of a panoply of new political and legal institutions in states emerging from periods of sustained political violence suggest an opportunity 'to build some of these ideas [of women's rights and women's inclusion] in with the bricks' (Mackay 2011) of post-conflict and post-authoritarian state institutions.

Feminist political science approaches to democratisation transitions were motivated particularly by the prospect of radical democratisation, and the construction of more participatory models of democracy that eschewed the exclusionary tendencies of the liberal democratic model (Jaquette 1989). Prolific feminist analysis of transitions has now turned to more sober feminist assessments. In particular, feminist analysis has questioned the transformative potential of political changes that engage exclusively with public political and legal institutions in which men predominate, to the neglect of the arrangements of the private sphere in which women experience most persistent inequality. As Georgina Waylen has cautioned: 'Institutional democratisation does not necessarily entail a democratisation of power relations in society at large, particularly between men and women' (Waylen 1994: 329).

Analysis of transitional justice has followed a similar trajectory. First, the range of important long-term and non-legal implications of transitional justice processes for societies emerging from conflict or repression has been emphasised. Transitional justice mechanisms of selective trials, truth commissions, reparations and institutional reform are now broadly linked to degrees of reconciliation (Hamber 2009), economic development (Mani 2002), security sector performance (United Nations Secretary-General 2004) and political equality (de Greiff 2007) in post-conflict and post-authoritarian societies. This realisation prompted optimistic perspectives on transitional justice, as a vehicle for the dissipating broader social conflict, and for securing the radical redistribution of political and material resources in transitional societies (Mani 2002). This optimism has, however, been dampened by more sober longer-term assessments of the political and economic dispensation of states

3 The author has written elsewhere (with Bell) about 'the perverse equality gains of war'. See Bell and O'Rourke (2007: 41).

4 For example, during the conflict in Northern Ireland. See McCoy (2000).

5 For a discussion of these dynamics in Latin America, see further Craske (1998).

6 For example, within the provisions of negotiated settlements to end conflict. See Bell (2000).

emerging from transitions (Miller 2008). There is increasing caution about a 'project of envisaging utopias recognised as elusive even in western liberal democracies, but now arrogantly attempted in the most dystopic situations where all the political precursors appear to be missing' (Bell 2009: 7). In terms of its outcomes for women, the preoccupation of transitional justice with providing accountability for public harms underpinned by political violence in transition tends to marginalise and make invisible the manifold harms experienced by women that are deemed to be private and non-political. Elsewhere (with Bell), the author identified this gendered solipsistic focus on public harms as the consequence of the perceived 'from' (male-defined political violence) and 'to' (liberal democratic frameworks) of transitional justice discourse (Bell and O'Rourke 2007: 23).

Feminism and international law

Feminist engagement with the institutions and processes of law is seldom straightforward. Feminists encounter a recurring dilemma of how to engage the law to advance a feminist agenda. Carol Smart has succinctly captured the dilemma thus: 'Law is so deaf to the core concerns of feminism that feminists should be extremely cautious of how and whether they resort to law' (Smart 1989: 2). '[W]hile some law reforms may indeed benefit some women, it is certain that all law reforms empower law' (Smart 1989: 161). The key concern of Smart, and others,⁷ is the deradicalising effect that campaigns for law reform tend to have on women's movements. The very process of formulating a campaign for legal change means translating social and political problems, which require dramatic social and political responses, into legal deficiencies that require incremental technical change. In the process, initially radical feminist analysis tends to become flattened into reformist demands for more or 'better' law.

Feminist dilemmas over engagement with law are arguably more acute at the international level. The gap between law-in-the-books and law-in-action exists in peaceful democratic states; thus it would be naive to assume a correlation between the legal prohibition of a particular practice and the actual elimination of that practice at the level of individual states. It is even more naive to assume that the prohibition of particular offences or the guarantee of particular rights at the international level will achieve their stated effect as, to quote Cassese: 'the *normative* role of [international] law is more powerful and effective than its *repressive* function' (Cassese 2008: 8, emphasis in the original). The coercive capacity and compliance pull of international law is highly questionable.

The antecedents of what we now recognise as the sub-field of gender and transitional justice lie firmly within the feminist approaches to international law that emerged in the early 1990s. Feminist theoretical and practical engagement with international human rights law in that period – to both critique and reform the

7 See also MacKinnon (1983); Fineman (1992); Munro (2007).

canon – inaugurated a feminist approach to international law more generally of simultaneous engagement and critique. Feminist interventions into the terrain of international criminal law secured some prominent gains in the legal recognition and prohibition of gender-specific harms experienced by women in contexts of political violence. Over a decade has passed since the adoption of United Nations Security Council Resolution 1325 on Women, Peace and Security (2000). That period has been accompanied by further Security Council resolutions dealing with the protection of women experiencing wartime sexual violence.⁸ The UN has recently reorganised its gender work to more specifically focus on issues of post-conflict justice for women. A permanent International Criminal Court, of which feminist advocates were prominent supporters, is now up and running. Regional human rights courts have become increasingly assertive in imposing positive legal obligations on states to protect and promote the human rights of women. The application of these legal obligations to states experiencing or emerging from political violence is attracting increasing policy attention, most notably from the Committee on the Elimination of All Forms of Discrimination against Women. There is a sense in which the doctrine and institutions of international law have never been more supportive of delivering positive human rights outcomes for women from domestic processes of transitional justice. Moreover, the institutions and practice of transitional justice proliferate in contemporary responses to political violence.

However, these ostensible feminist gains in international law have more recently motivated strongly critical-reflective scholarship questioning the value of such gains to women's daily lives (see especially Otto 2009). Criticism of the gendered shortcomings of criminal trials, truth commissions, reparations programmes and institutional reform within states emerging from political violence is both trenchant and persistent (e.g. Harris-Rimmer 2010). Feminist criticism points to the frequent exclusion of women from transitional justice processes on the ground in transitional states, the elision of gendered harms and the damaging preoccupation of these processes with public harms and the 'primary' cause of political violence (Ní Aoláin 2006). This criticism suggests a chasm between feminist optimism about transitions, the promise of international law and the implementation of transitional justice on the ground in states exiting political violence.

We need to understand why this chasm exists.

OBJECTIVES OF THE BOOK

Many critical feminist scholars of international law would attribute the gap between ostensible feminist gains in international law and human rights outcomes

⁸ See especially United Nations Security Council Resolution 1820 (2008), S/RES/1820. See also United Nations Security Council Resolution 1888 (2009), S/RES/1889 (2009) and United Nations Security Council Resolution 1960 (2010), S/RES 1960.

for women of transitional justice to the conceptual shortcomings of international law. These conceptual shortcomings are said to privilege the use of force, the state over the individual, and the resolution of public incidences of violence over the private harms that occur daily in contexts of political violence.⁹ A focus on domestic political factors might lead to the belief that immutable patriarchies hold power at the domestic level within transitional states and that transitional justice processes that emerge from elite-driven negotiated resolutions to conflict will inevitably disserve women. Alternatively, it has been suggested that negative outcomes for women of transitional justice evidence ‘complementary patriarchies’ operating between domestic and international actors (Ní Aoláin 2009: 1057). But none of these approaches tell us why some transitions are better for women than others, and why some transitional justice processes and mechanisms produce better outcomes in terms of women’s human rights than other processes and mechanisms. Moreover, each of these approaches fails to account for women’s political agency in influencing the operation and outcomes of transitional justice processes.

Consequently, we need a more subtle and nuanced understanding of when, why and how international law helps to deliver progressive human rights outcomes for women in domestic processes of transitional justice. What are the optimum domestic political circumstances for international law to exert such a progressive influence? And what are the strategies that can be effectively pursued by feminist advocates, practitioners and women’s movements to deliver progressive human rights outcomes for women in states undergoing domestic processes of transitional justice?

Gender Politics in Transitional Justice sets out to answer these questions.

APPROACH AND STRUCTURE OF THE BOOK

The book draws on original comparative empirical research on women’s movements in Chile, Northern Ireland and Colombia, and legal analysis of transitional justice in the case studies, to illuminate the relationship of international law to local gender politics in transitional justice. This section details the approach and structure of the book.

Comparing human rights outcomes for women

In examining the human rights outcomes for women of transitional justice processes, the book will focus on the right of women to live free from violence and women’s reproductive rights. This study maintains a focus on the female body for a number of practical and conceptual reasons. To focus on the body provides a boundary to the empirical and legal phenomena under analysis. Further – and

9 For the classic statement of this critique, see Charlesworth *et al.* (1991).

at the acknowledged risk of reifying gendered shortcomings of established legal categories – substantial developments in the treatment of violence against women and women’s reproductive autonomy within the international human rights canon have been made since the beginning of the 1990s. Importantly, these two issues have been selected for priority feminist concern in both local and transnational women’s organising (e.g. Reilly 2009; Joachim 2007). In examining the relationship of women’s mobilisation to legal change, the issues of violence and reproduction therefore suggest themselves for analysis. Principally, however, the focus on the body has been selected because it exposes the crude and arbitrary nature of a starkly gendered distinction between ‘public’ bodily harms cited for rebuke, retribution, redress, reparation and legal reform in transitional justice, and the ‘private’ bodily harms that remain invisible within the prevailing legal paradigm.

Women’s movements: a term of art? Theoretical and methodological challenges

Substantial scholarly disagreement prevails in respect of how to define and identify a women’s movement.¹⁰ Disagreement persists over the size, mandate, level of autonomy and relationship to the state necessary to constitute a women’s movement. In this book, the term ‘women’s movement’ is used broadly, to refer to women’s collective action, without seeking to settle the questions and differences identified in feminist scholarship. However, the term ‘women’s organisation’ is used rather more specifically and selectively. In this volume, reference is made to women’s organisations that mobilise to end violence against women and to advance women’s reproductive rights. Violence against women and reproductive rights need not be the exclusive or primary concern of these organisations, but it must feature within their overall mandate. Further, reference in the book is frequently made to ‘feminist’ engagement with transitional justice. The women’s organisations examined in the book tend to be feminist, though they are not all necessarily so. Instead, specifically feminist engagement is identified by a commitment to challenge the exploitative gender order and advance the status of women in a transitional society, and approaching transitional justice processes as an opportunity to that end. Both women’s organisations and feminist organisations are distinguished from organisations and movements of which women are present or prominent (for example, mothers of the disappeared, or women in the mainstream human rights movement), but which do not principally define their mandate in terms of work to advance the status of women.

Adopting this definition does not, however, resolve definitional challenges. It can be difficult to speak coherently of often diverse and poorly co-ordinated women’s organisations. The problem here is both theoretical and practical.

10 For a comprehensive overview of these debates, see Molyneux (1998).

Unified feminist positions on the questions under study are not apparent. The past three decades of feminist theory teaches us that apparently unified feminist responses to political questions should (rightly) be suspected for their hegemonic and silencing tendencies. But how is this theoretical dissonance to be translated into a coherent data collection strategy in investigating feminist engagement with transitional justice in transitional societies? The task proved both easier and harder than initially expected – easier because women’s organisations often vocally disagree with one another. In each of the transitional contexts examined in the book, clear ideological cleavages existed within the women’s movements that interest the book. They differed principally on their position to the state, and to the political violence in which their organising was inevitably enmeshed. They differed in their relationships to combatant women, and to human rights movements more broadly. Thus, to present unified feminist positions on the questions under study would be poor science. However, capturing diversity and disagreement within women’s movements was also harder than expected for two reasons: first, protagonists of women’s movements are often reluctant to articulate the reasons for disagreement, in particular to an outsider; and second, while identifying the main political cleavage within each women’s movement allowed me to identify two distinct sets of ‘feminist’ positions, it concealed a much wider canvas of less dramatic political and theoretical differences within those movements. This limitation is acknowledged.

Comparing transitional justice?

Transitional justice is a burgeoning and proliferating field of analysis, and its exact boundaries and parameters remain highly contested. This contestation becomes particularly apparent in more recent efforts to expand the concerns of transitional justice to address socioeconomic needs in transition (Mani 2002; Miller 2008) and to include alternative ‘traditional’ or community-based accountability mechanisms for dealing with the past (McEvoy 2007; Lundy and McGovern 2008). To date, efforts to ‘map’ the field’ (Bell 2009), or to document its evolution (Arthur 2009), highlight – rather than overcome – this ongoing contestation about just what is meant conceptually and substantively by the term ‘transitional justice’. This confusion presents particular challenges of ‘what to compare’ when constructing a comparative legal and empirical study of transitional justice in three case studies. While the book does not pretend to resolve disagreements over the exact contours and components of transitional justice, the comparative study of trials, truth, reparations and institutional reform has been arrived at inductively and deductively. Deductively, the foundational work of Ruti Teitel,¹¹ and broader

11 Teitel organises her path-breaking study of the role of law in transitional justice around: the rule of law, criminal justice, historical justice, reparatory justice, administrative justice and constitutional justice (Teitel 2000).

gender scholarship in transitional justice,¹² posits these devices as significant for studying the outcomes for women of transitional justice. Inductively, both the cases under study, and broader gender work of practitioners in transitional justice,¹³ point to the significance of trials, truth, reparations and institutional reform as sites for delivering gains to women in transitional justice. These devices are significant to outcomes of transition across the three case studies, in terms both of women's mobilisation to engage domestic transitional justice processes, and in terms of gender legal outcomes of transition.

Comparative analysis and case selection

The book explores strategies adopted by women's movements towards transitional justice, and the ultimate legal treatment of women's human rights within transitional justice, in Chile, Northern Ireland and Colombia. Comparative research proceeds from the premise that, where patterns in a given phenomenon can be discerned across different cases, 'we can learn more about any of them by comparing their dynamics than by looking at each on its own'.¹⁴ David Nelken cautions, however, that in comparative legal research explicit attention must be 'given to clarifying what a given comparison is for and how a given aim can best be achieved' (Nelken 2005: 247). The comparative study in this book examines transitional justice devices for their implications for the legal treatment of violence against women and women's reproductive rights in the respective case studies. Strategies of local women's movements for engaging transitional justice are examined. Comparative analysis can determine whether the gender dynamics in each of the case studies is simply the product of the local political context, or whether there is a gendered pattern of compromise in the negotiation of legal change in transition that leads to common outcomes across the three case studies in terms of women's human rights.

Legal analysis of transition has been able to draw together a broader range of case studies than comparative political science analysis of transitions. The particular question of how a successor regime deals with the crimes of the past posits ground for comparative analysis across a range of democratisation and conflict-to-peace transitions. In seminal work in the area, Priscilla Hayner notes:

12 See, for example, Askin (1997) (criminal trials); Ní Aoláin and Turner (2007) (truth commissions); Rubio-Marín (2006) (reparations). Compare Nesiah (2006).

13 In 2010 the United Nations reorganised its gender work to focus more specifically on issues of post-conflict justice for women. The UN Secretary General's Action Plan for Gender Responsive Peacebuilding cites prosecutions, truth commissions, reparations programmes and rule of law reform as key areas of transitional justice activity requiring 'gender responsiveness' (United Nations Secretary-General 2010: 15).

14 This is the rationale underpinning social movements theorists McAdam, Tarrow and Tilly in their systematic analysis of the common dynamics of social mobilisation in very diverse processes of strikes, revolutions, nationalism and democratisation, through an encompassing notion of 'the politics of contention' (McAdam *et al.* 2001: 4).