The Use and Misuse of Transitional Justice: The Case of Egypt
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Introduction:

Transitional Justice is understood to comprise of judicial and non-judicial processes that are implemented in contexts of post-conflict and/or post-authoritarianism to redress legacies of massive human rights abuses. It emphasises criminal justice, institutional reform and reparations as part of a process of democratic institution-building. The term, along with the more general 'democratic transition', have been frequent features in media and policy coverage on Egypt almost as soon as Hosni Mubarak was removed from office in February 2011.

However, I argue that premature calls for implementing transitional justice in politically fluctuating contexts can lead to situations where its very procedures are utilised for the benefit of continued autocracy. Specifically, I use the case study of post-‘Arab Spring’ Egypt, where a rising autocratic order has been able to establish transitional justice measures as a means of legitimisation. In other words, I argue that elements of transitional justice can be used to establish contradictory contexts of state repression on the one hand, and limited, procedural democracy on the other. The field of transitional justice therefore needs to develop a stronger and more nuanced conceptualisation of political and social change, including the possibility of transitions occurring within authoritarian systems.

The aim of this paper is to engage critically with the theory and practice of transitional justice and its stated aim of aiding democracy-building. I shall do this by firstly providing a genealogy of transitional justice as a field of knowledge and practice. I argue that transitional justice’s emergence in the 1980s was heavily influenced by its parent field of transition studies or ‘transitiology’. This is most evident in transitional justice’s understanding of transition and the appropriation of concepts such as ‘consolidation’ and ‘breakdown’. I shall then use the Egyptian example to illustrate how this conceptualisation leads to a problematic push for the implementation of transitional justice. This “rush to transition” has led to a context whereby Egypt has appropriated the procedures of transitional justice to strengthen its position with regards to local, regional and international pressures.

Transitional Justice: The Emergence of a Field

The International Center for Transitional Justice ([ICTJ]), the leading non-governmental organisation working on the issue, defines transitional justice as “the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses”¹. It emphasises the rights of victims to know the truth of what happened,

to see perpetrators punished and to receive reparations for their losses. Truth commissions should therefore be established in order to investigate and document events for the dual purpose of future criminal prosecutions and for historical narrative.

Because such violations tend to be systematic and wide-scale in nature, they affect both the direct victims and societies as a whole. A state should also take steps to ensure such systematic human rights violations will not reoccur in the future (the guarantee of non re-occurrence). This includes reforming corrupt and abusive state institutions such as the security sector. Mechanisms such as vetting are also employed as a means to remove from public office those personnel involved in abuse and corruption in a fair and balanced manner.

In a relatively short space of time, transitional justice has grown to be considered an essential component of post-conflict reconstruction and reconciliation. Transitional justice has emerged as a dedicated field of practical and academic engagement with the normative aim of facilitating a transition to democracy. By ‘field’, I refer to Bell’s definition of “a sphere of knowledge, interest and activity, held together by distinctive claims for legitimacy”2. The transitional justice field is comprised of two spheres, one of scholarship and academic knowledge and one of practice and activity, with a praxis relationship between the two. What separates transitional justice from its parent field of human rights, is its stated normative goal of facilitating transitions to democracy.

However, it was only around the year 2000 that a “self-conscious” field of transitional justice came into its own. In that year, then United Nations Secretary-General Kofi Annan’s report on the topic illustrated how transitional justice was now “adopted enthusiastically by policymakers and viewed as necessary to sustaining ceasefires and achieving a successful transition from conflict”3. Since then, the UN, the European Union, the OSCE and African Union have all put in place transitional justice strategies with the explicit aim of contributing to democratisation processes. This institutionalisation of transitional justice has meant that it is now viewed as a normal rather than exceptional practice in situations of political upheaval.

But where did transitional justice come from? It is important here to contextualise the historical moment the term emerged in is crucial to understand how the concept of transition is conceptualised and practiced. Transitional justice emerged at a very specific context in the 1980s as a result of a series of interactions among human rights activists, lawyers, policymakers and journalists “concerned with [...] the dynamics of “transitions to democracy””4. At this

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2 This is contrasted with the concept of a ‘discipline’, described as “body of knowledge with its own background of education, training, procedures, methods and content areas”. See Christine Bell, “Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field’”, The International Journal of Transitional Justice, Vol. 3, 2009, 5-27: p.6-7
3 Ibid, p.9
moment, thinking and approaches to political and social change were strongly informed by the upheavals underway in South America and Eastern Europe. Transition, and specifically ‘transition to democracy’, was the “dominant normative lens through which political change was viewed at this time”\(^5\). As a product of the human rights movement of the time, transitional justice was strongly influenced by law\(^6\)- in particular criminal law, hence the focus on prosecutions and state reform.

**The Meaning of Transition**

Crucially, at this time there existed an almost uncritical acceptance that transitional justice was something to be undertaken by ‘emerging’ democracies. An early work on the subject, by Richard Siegel, understood transitional justice as “the choices made and quality of justice rendered when new leaders replace authoritarian predecessors [...] in the wake of the ‘third wave of democratization’”. Transitional justice was therefore assumed to be a relatively short-term process, so short term, as Arthur states, that it “could be dealt with specifically during a “transitional” period”\(^8\).

This is an important point, as the understanding of ‘transition’ has been strongly informed by the changes in thinking on issues of political and social change at the time\(^9\). Transition studies in the 1980s understood social change as “an outcome dependent upon the specific strategies and choices of a distinct political elite”\(^10\). Specifically, the work of ‘transitiologists’ such as O’Donnell, Schmitter, Linz and Stepan emphasised elite decisions and pact making ahead of structural conditions in the push for political change. These pacts- initiated by institutions such as the army as well as business and political elites- lead to ‘transitional moments’\(^11\), which would eventually result in a democratic transition through elections and legal-institutional reform. Furthermore, transitiologists developed a conceptual vocabulary to delineate the assumed transition to democracy: this included, for example, concepts such as ‘breakdown’, ‘consolidation’ and ‘sequencing’.

\(^5\) *Ibid*, p.325


\(^8\) *Supra note 4*, p.333


\(^10\) Nicolas Guilhot, *supra note 9*, p.235

Transition studies were strongly critiqued for its depiction of transitions to democracy on a “fundamentally linear [...] taxonomy defined by two prescribed end points—totalitarianism and liberal democracy”\textsuperscript{12}. What is crucial for this discussion is that the related field of transitional justice appropriated this understanding of transition as primarily a move towards democracy- as well as the conceptual vocabulary developed by transition studies theorists\textsuperscript{13}. The tendency to equate transition with regime change has remained the primary method for analysing political change in both transition studies and transitional justice, as becomes clear when turning our attentions to Egypt.

**Egypt: A Transition 'From' and 'To' What?**

The terms “transitional justice” and “democratic transition” have been a constant feature in media and policy coverage on Egypt since Hosni Mubarak was removed from office in a February 2011 popular uprising. Following Mubarak’s removal, Egypt was considered to be in a “transitional period”. The Supreme Council of Armed Forces (SCAF)- which assumed control of the country after Mubarak- was to work towards a viable “transition to democracy”. However, soon after SCAF’s reign began, numerous human rights abuses occurred which prompted Egyptian activists to view talk of democratic transition with suspicion. Despite this, on the international level, there was continuous interest in the implementation of transitional justice. This interest focused on the punishment of former high-level officials, the purging of the public sector and the rebuilding of state institutions along the principles of the rule of law. Subsequently, conferences on transitional justice were held in the ensuing months with the aim of advising the government on the necessary steps to be taken in a transitional justice process\textsuperscript{14}.

With the election of Mohamed Morsi in June 2012, it was hoped that a process towards accountability for past crimes would begin. Indeed, a fact-finding commission was established to investigate and report on cases of killing, torture and enforced disappearances from January 25th 2011 to June 30th 2012. Since the report was submitted in January 2013, however, little was done to implement its findings and the report itself was hidden from the public, even though parts of it were leaked in local and international newspapers.

When the armed forces- led by General Abdel-Fattah El-Sisi- removed Morsi in July 2013, the situation in Egypt was once again described as a “transitional period”. This period, under interim president Adly Mansour, was defined by a huge increase in human rights abuses. For example, the excessive use of force in the dispersal of two pro-Morsi sit-ins in Cairo that were later on labelled “the

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\textsuperscript{13} Arthur, *supra note 4*

worst acts of violence in Egypt’s modern history”. At the same time, this period also saw the creation of the Ministry of Transitional Justice, the first of its kind. The government also set up a new Fact Finding Commission to investigate abuses committed directly before and after June 30. The international community largely welcomed these steps. Despite the increase in human rights violations since 2013, international practitioners continued to push for the implementation of transitional justice measures in the country, citing it as an urgent and necessary priority for the country’s “democratic transition”. Furthermore, it was argued that the lack of progress in Egypt’s transition to democracy was due to the absence of any transitional justice measures taken by the government.

Therefore in 2011 Egypt was assumed to be on the path to a democratic transition, and the implementation of transitional justice measures would have significantly aided in that transition. Conversely, Egypt’s perceived “failed transition” in 2013 has been blamed on the decisions taken (or not taken) by elite groups, rather than through structural and situational causes, which “continued to drive social mobilisation and protest”. It would therefore be more accurate, I argue, to describe Egypt as undergoing a “transformation without transition”, as the structure of governance has remained intact while at the same time exhibiting features of a transformation; for example, trials for past leaders and the drafting of new constitutions.

Transitional justice- and transition studies more broadly- have been unable to formulate an understanding of such contexts. Instead, the field focuses on elite decision-making in relation to the success or failure of a transitional period. One such formulation would be similar Steven Heydemann's theory of Authoritarian Upgrading, whereby states would reconfigure “authoritarian governance to accommodate and manage changing political, economic and social conditions”.

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In such a context, it is possible to view the Egyptian state forming fact-finding commissions, holding elections and passing new constitutions as “box-ticking”: transitional justice mechanisms in this case are simply used to actively strengthen and legitimise an ascendant autocratic order. A closer analysis of the Egyptian Ministry of Transitional Justice’s approach to the issue shows that it has been “highly skewed, exclusionary, and directed at one faction”\textsuperscript{21}. The regime has focused exclusively on the Muslim Brotherhood’s tenure in power, in a way that corroborates the charges levelled against them prior to and during their rule. The very procedures of transitional justice were therefore utilised for the benefit of continued autocracy.

Conclusion

In this paper, I have focused on two interrelated points. Firstly, I gave a genealogy of transitional justice as a field of knowledge and practice, in order to highlight the strong influence of transition studies on the field. I argue that the transitional justice field grew out of a specific historical context where political change was viewed primarily as a transition to democracy. This leaves the field vulnerable to blind spots to the destination of transitions: that social and political transformation- and even regime-change- does not necessarily equate to a transition. The “rush to transition” ignores the possibility that transitions can occur \textit{within} autocratic state structures and the immediate calls for the implementation of transitional justice procedures can result in them being used solely in the interest of regime legitimation.

Secondly, I use the case study of post-‘Arab Spring’ Egypt to illustrate the above point. The post-Morsi order in 2013 has actively upgraded itself, utilising transitional justice concepts such as fact-finding commissions and criminal trials for past leaders to legitimise its own discourse against its political enemies.

In lieu of a conclusion, I want to argue for transitional justice (and transition studies more generally) to engage in a critical and frank discussion on the nature of transition and democratisation beyond narrow procedural understandings. This is necessary for the field, particularly the practical side, to avoid it becoming merely another easily manipulated procedure of democracy-building.