

## **Transitional justice in sexual and gender-based violence**

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It is now fashionable in academic and activist circles to speak of transitional justice in normative, inflexible terms that suggest a utopian certainty. Nothing could be further from the truth. At the outset, we need to understand that transitional justice concepts are experimental – good experiments to be sure – but that they do not offer us tested panacea because they are essentially works in progress. This is not meant to diminish the utility of the concepts or to throw cold water on them as a beachhead for recovering societies with a legacy of traumatic conflict. Rather, it is to recognize their limitation so that we do not stampede to the temple only to find it empty of the goddess of truth. What is more useful for us to do is to imagine transitional notions as one incomplete vehicle through which we can understand and start the recovery of a tormented society. If we keep this perspective, then we are more likely to achieve a more realistic result.

In the last two decades, the concept of transitional justice has come to represent the midwife for a democratic, rule of law state [1]. The script for the construction of such a phase is now regarded as an indispensable building block for sound constitutionalism, peace-building, and national reconciliation in post-conflict societies or societies emerging out of abusive, authoritarian, and fractured periods [2]. In fact, policy-makers and statesmen now increasingly realize that a human rights state that internalizes human rights norms cannot be created unless the political society concretely addresses the grievances of the past. There is no future without a past, and the future is largely a result of the past. Unless we construct a future based on the lessons of the past, we are bound to repeat our own mistakes and retard the development of our society.

The term transitional justice captures two critical notions. First, it acknowledges the temporary measures that must be taken to build confidence in the construction of the post-despotic society. Secondly, by its own definition, transitional justice rejects a winner-take-all approach as a beachhead to the future. In other words, transitional justice calls for deep concessions on either side of the divide. No one party or faction can be fully satisfied. Unyielding, none concessionary demands can only foil the truce that is essential for national reconstruction. But equally important is the realization that transitional justice rejects impunity for the most hideous offenders. To shield egregious perpetrators would only encourage a culture of unaccountability for past abuses. Hence a balance must be struck between justice for the victims and retribution against offenders [3].

The vast majority of states lack the requisite political will to effect transformative transitions. That is why most political transitions are either still born or aborted affairs. For Africa, this calls for soul-searching at all levels of society – within the political class, among the intelligentsia, in civil society, and the general public. In other words, Africans must ask themselves: Is transitional justice a necessity for us if we are to create a

democratic polity? If so, what vehicles should we construct to effect transitional justice, and what mandate shall we give such vehicles? But even as we ask these questions, we must remain mindful about the cost of abandoning transitional justice measures. The reason for this is simple: We cannot exorcise the ghosts of the past without confronting them. The past will always be with us.

Even if we accept as a basic premise – which we do – that transitional justice processes and institutions are desirable and indispensable, we would be derelict not to interrogate the internal contradictions of the project. I say so because the human rights project, which encompasses transitional justice, is an incomplete doctrine that is afflicted by gaping holes [4]. One of the blind spots of the human rights movement was for a long time women's rights. There is no doubt that international law – which includes human rights – as a discipline has historically been inattentive to women's rights. In fact, Hilary Charlesworth and Christine Chinkin, leading feminist scholars, have accused international law of its male, patriarchal construction [5]. For a long time, at least until the 1995 Beijing UN Conference on Women, women's rights were a backwater in human rights, in spite of the existence of the Convention on the Elimination of Discrimination against Women. Only in the last decade have we seen serious attempts to remove women rights from the ghetto of the rights discourse.

This is our challenge at this conference, and in the human rights movement, particularly in the context of transitional justice in Africa. How do we demarginalize women's rights questions in the construction of transitional justice vehicles? In particular, how do civil society, academics, states, funding organizations, and intergovernmental organizations address – in serious ways – the problems of sexual and gender violence in transitional justice contexts? We know from the historical record that sexual and gender violence is arguably the most predominant abomination in civil conflicts and wars. Yet we also know that this egregious form of violence is either never reported, or rarely attracts the attention of the media. Even more distressing is the fact that gender and sexual violence is almost never calibrated in transitional justice processes, and is usually an afterthought when it is. This has been true in many of the transitional justice processes that have been put in place in the last two decades, although that is beginning to change.

In Africa, as indeed in other parts of the world, women are the pillar on which the fabric of society is built in the home and outside of it. In a very real sense, both the public and private squares are made possible by women, although in the former their invisibility is obscene. This invisibility pertains to the official public square in terms of public power defined as official positions within the state, civil society, and the market. Paradoxically, the invisibility extends to women victims and survivors of sexual and gender-based violence in the public square during civil conflicts and wars. The challenge for Africans is to develop both conceptual tools and strategies – at the political and intellectual levels – to smash the walls of invisibility and exclusion so that sexual and gender-based violence can be exposed to the sunlight of the public domain. Without this first critical step transitional justice mechanisms will continue to exclude sexual and gender-based violence.

## VEHICLES FOR TRANSITIONAL JUSTICE

Transitional justice measures can be effected through a number of avenues. While truth commissions or similar vehicles stand out, there are many other possibilities. For instance, one could think of institutional reformist measures that are legislative, judicial, political, economic, social, administrative, educational, sectoral, or a combination of some, or all of the above. To complicate the picture, civil society – broadly defined – could also initiate its own transitional justice measures, including peoples' commissions or mock tribunals. However, in spite of this wide array of possibilities, the truth commission has since the 1980s been regarded as the most effective tool for coalescing the agenda of transitional justice [6]. Even so, cognizance must be taken of the fact that the truth commission has performed its political and social functions with mixed results. The reason for this has not been with the instrument of the truth commission per se. Rather, the varying degrees of success of the truth commission have been in the particular conception and construction of each specific truth commission. In most instances, the truth commission was deeply compromised by former regime elements. In others, the emergent ruling elites were either too timid or hypocritical in their understanding of transitional justice. Most importantly, however, is the reality that most truth commissions have focused on a narrow, limited agenda that did not have the potential to transform society or provide the possibility of social justice.

But truth commissions are not the only vehicle for realizing transitional justice. There is a rich tableau of devices that have the possibility of creating a bridge between an unforgiving past and a hopeful future. Regimes can opt for sectoral reforms that, when put together, amount to an aggressive transitional justice agenda. One can imagine judicial reforms – such as purging corrupt and incompetent judges; aggressively prosecuting perpetrators of past abuses; writing a democratic constitution; repealing repressive legislation; and reforming law enforcement agencies – as a credible transitional justice approach. While all these measures are critical and necessary to reconstruct and heal society, they should not preclude a truth commission, the only omnibus instrument that has the potential to create a cathartic experience for the whole society. To center women's rights in a transitional justice project, one can imagine the repeal or enactment of laws that make the female gender visible in the legal system. These would include, but not be limited, to laws that sanction without pity sexual and gender-based violence. Or one could think of educational initiatives that develop a gender consciousness in the judicial system such that sexual and gender violence is not an afterthought or absent from the minds of judges.

In this paper, I argue that African states need both truth commissions in certain cases, and the specific, targeted sectoral reforms in other cases to overcome the deep distortions and legacy of despotism and social hatreds that afflict their bodies politic. But I want to argue – rather emphatically – that Africa should avoid the traps of most transitional justice programs that have focused on the so-called human rights violations alone while leaving completely untouched the equally important arena of economic crimes, which are intrinsically connected to sexual and gender based violence.

In fact, I would argue that economic powerlessness – which is connected to political powerlessness – lies at the root of sexual and gender based violence. I regret to say that this blindness of targeting civil and political rights violations while completely overlooking economic, social, and cultural rights is one of the major drawbacks of the human rights corpus. In my view, such an approach cannot address the real causes of powerlessness – which ought to animate the human rights agenda [7]. We must remember that rights are fights over resources, and not abstract struggles taking place in the outer orbit without going to the fundamentals of the human condition. That is why no credible transitional justice program can fail to address the difficult, but necessary, subject of economic powerlessness for women.

In any case, as a matter of logic and conception, it is nonsensical to imagine the human rights corpus as a bifurcated dogma of two unrelated and completely independent categories of entitlements. There can be no watertight distinctions between civil and political rights, on the one hand, and economic, social, and cultural rights, on the other. Every right, no matter its ideological categorization, has at its core aspects of both sets of rights. To reduce the argument to the level of absurdity, we may want to ask: Can a person really eat the right to vote? Conversely, how can the right to food be guaranteed if citizens do not have the franchise to elect a responsible and accountable government? The right of women to own land and to control it and other economic resources is central to combating the kind of powerlessness that leads to sexual and gender-based violence. Human powerlessness and human dignity does not know these categories. That is why it would be spurious for us to address one set of rights violations, and not the other [8].

## **RECONCEIVING WOMEN AND GENDER**

In virtually all societies around the world – even in the liberal industrial democracies of the West – women still labor under an avalanche of disadvantages. The patriarchy, a system of social ordering that has historically placed the male as the superior of the female, is the conceptual justification for the insubordination of women to men. Hetero-patriarchy, hetero-normativity, and phallocentrism – or male-centeredness, to be simple – describe a world view in which the male occupies a hallowed place in human civilization. Pseudo-scientific, religious, cultural, moral, and biological attempts to justify this gender hierarchy have held sway over millennia [9]. As a result, discrimination and privation has been the lot of the majority of the world's women. Not even formal equality and abstract autonomy, the two key tenets of liberalism, have sufficed to combat the deep seat of gender bias and misogyny. Africa's patriarchal cultures mirror others elsewhere in the world, although they are exacerbated by the continent's underdevelopment and its grinding impoverishment in an unforgiving global economy. Nevertheless, progress on limiting the cancer of the patriarchy and ultimately eliminating it in Africa is both a conceptual and material task.

But this is a task that is easier said than done. Social transformation is an arduous task. But taking a cue from CEDAW, we can identify several starting points. One cannot overemphasize the importance of early learning in the home. Children initially learn through mimicry and the modeling of those within the home. To raise new men – and

women – it is absolutely essential that what is learned at home in the early stages of life is not misogynistic. Keep in mind that both men and women can teach misogyny. This is the first line of defense against the patriarchy. It is important that parents, if they are more than one, model the right behavior in the home for children. This early consciousness about the sharing of labor in the home, the relationships between the genders in the family, and the absence of pre-conditioned male dominated hierarchies within the home is likely to create more gender sensitive progeny. But this begs the question. Where do parents get gender and political awareness that allows them to transmit those values to their offspring? This, I believe, is fundamentally an obligation of the state to create an educational system that forges a citizenship that is averse to misogyny. This requires a curriculum and an instructional faculty in primary and secondary schools that is designed to transform the individual. Waiting to develop a different citizen after these stages is an often futile exercise. NGOs and intergovernmental organizations such as UNESCO and the UN High Commissioner for Human Rights can play important roles in curriculum conception and teacher training in gender and human rights. There is new scholarship on masculinities that opens a dialogue on how to create a better man devoid of the hatred of women [10]. In my view, changing worldviews at the earliest stages of human development will be key to reformulating our understanding of sexual and gender-based violence.

But this alone will not suffice. The society as a whole needs to undergo a catharsis about women as human beings, and not objects of sex or work. Societal stereotypes which are based on myths of misogyny need to be combated at various levels. For example, there is no reason why women's rights work is seen as the preserve – or responsibility – of women's rights organizations. In Kenya, for instance, FIDA and the League of Kenya Women Voters have been tagged as the groups invested with this mandate. Many other human rights organizations have marginal programs on women's rights. Even when so-called mainstreaming of women's rights was all the rage, nothing fundamentally different happened. It was a song for donors without a political commitment. What we realize today is that women's rights have to be explicitly part of the agenda of every civil society organization. But beyond that, the state in all its iterations must address women's rights. This means the full inclusion of women in its political, economic, judicial, and bureaucratic structures so that they are not aliens in decision-making where laws and public policies are determined. In other words, the entirety of society must be engendered.

Finally, it is not possible to reconceive women without unpacking the myth from fact about sexuality, gender-based violence, and womanhood in a cultural, legal, social, and political context. In most cultures, including African ones, the woman is viewed primarily as a sexual object for the pleasure of the man. It is not an extreme view to state that many cultures see women as akin to property for possession by men. In such cultures, women's bodies and their sexualities are not the preserve of the individual, but of the community and the man. In Uganda, for instance, these dehumanized conceptions of women result in rape, defilement, and various brutalities against girls and women [11]. In other cultures, even the concept of rape may not exist within marriage, or outside of it, and sexual assaults and other forms of gender-based violence are blamed on the victim.

How does society re-educate men – and sanction them when they deviate – to understand that women’s bodies are not chattel? Many laws on the books either condone sexual stereotypes, men’s control over women’s bodies, or proscribe the ability of women to control their own sexuality. To transform these deep-seated and utterly backward universes will require new constitutional and legal orders, a judiciary and state with the political will to stand up for women, and inclusion of women at all levels of social and political engagement.

## **UNPACKING SEXUAL AND GENDER-BASED VIOLENCE**

In the history of civil conflict and wars, the most vulnerable populations are usually women, girls, and the elderly. However, only women and girls are targeted for their gender. In the most recent conflicts in the former Yugoslavia, Rwanda, Darfur in Sudan, the Democratic Republic of Congo, Iraq, Afghanistan, and even in Kenya after the disputed elections in 2007, women and girls have borne the brunt of the atrocities. This is often the case even though women and girls are rarely direct participants in the conflicts, or the bearers of arms. Since women are regarded as property in many cultures, violating them is seen as a diminution of the men who “own” them. That is how women and girls become weapons of war and for which men fight over. This view of the woman as the appendage of the man has deep rooted bases in religion and traditional notions of nationalism. Imagine, for instance, the biblical story of the woman as having been created out of a single rib of a man!

Antiquated notions of masculinity and nationalism still hold sway in forging misogyny. In the case of the former Yugoslavia, for example, Serbians sexually violated Bosnian Muslim women with a view to committing genocide. In one particularly chilling incident, Serbs carried out a massive rape of as many as 20,000 Bosnian Muslim women [12]. Todd Salzman characterized the violations as “an assault against the female gender, violating her body and its reproductive capabilities as a weapon of war [13].” He traced the genesis of these atrocities to a Serbian culture that usurps the female body and reduces the woman to “her reproductive capacities in order to fulfill the overall objective of Serbian nationalism by producing more citizens to populate the nation [14].” According to him, this view of the female body is deeply rooted in Serbian culture, the Serbian Orthodox Church, and Serbian official policies. This view of the woman is analogous to some African cultures in which men who are HIV positive defile virgin girls to “cure” themselves. Obviously, infecting the girls is unimportant to them, as long as it “cures” the men.

Sexual and gender-based violence in Sierra Leone, Rwanda, and now in Darfur is a sadistic impulse on the part of the perpetrator, and is intended to psychologically “kill” the victim. Frequently, the sexual predator actually physically kills the victim. This certainly was the case in Rwanda, as demonstrated in the famous Akayesu case before the International Criminal Tribunal for Rwanda [15]. In that case, it was clear that Hutu attackers targeted Tutsi women and their bodies as an instrument of genocide. The same has been largely true of the atrocities of the Janjaweed in Darfur. However, what has been so disturbing is that public outrage and international opinion still fails to understand

the gender dimensions of genocide – that women are targeted at several levels as a racial or ethnic identity in addition to the fact of their gender. This failure to center gender in the understanding of sexual violence erases women from the face of genocide and treats them as non-existent. As a result, responses to women as such are few, if any. This means that women who survive sexual and gender-based violence have no place to turn for their traumas. Their communities often regard them as “damaged” and official transitional justice institutions have generally had little to offer.

## **LEGAL, POLITICAL, AND STRATEGIC RESPONSES**

It is clear a full frontal approach to the problem of sexual and gender-based violence is indispensable to understanding and addressing the problem in whatever transitional justice vehicle is chosen by a country. A number of responses should be contemplated because of the multifaceted nature of the problem. For instance, criminal sanctions against perpetrators are necessary, even in the context of a truth commission. Thus adjudicatory responses form one of the core vehicles. We should keep in mind that adjudication has several purposes – these can be punitive, deterrent, compensatory, or correcting a historical wrong. They can also be civilizational. Some of these focus on the perpetrator, others on the victim or survivor. But others can and should be rehabilitative – that is, seeking to heal the traumas of victims and survivors as well as their families. Here, one of the purposes is to ease the reintegration of the survivors and their families back into society. Sometimes truth telling and public acknowledgement will play a role in this process.

Whatever strategies are employed, it is essential to have a legal and policy framework for addressing these societal deficits. It is clear to us that the law – itself a product of the patriarchy in virtually all states – is woefully underdeveloped in dealing with sexual and gender-based violence. This is doubly the case in the wake of civil conflicts and wars where the fabric of society has been badly damaged or even decimated. Imagine that in peacetime it is virtually impossible to get most societies to deal honestly with sexual and gender-based violence. This is true whether such abuses take place with the home or outside of it in the workplace or other locales. The machinery of the state and law enforcement have never been eager in any society to interrupt the lives of perpetrators. This means that civil society must work extremely hard and remain vigilant to make sure that the requisite laws are passed and that enforcement authorities do their job.

The law has not been a great friend to women. Take for example, the international criminal law in this area. Both the statutes of the Yugoslav and Rwanda tribunals did not exactly center sexual offenses in their frameworks, although they recognized rape as an egregious offense. That is why the Akayesu opinion, which is a path-breaking ruling in terms of making international law, is so important. It recognized for the first time in such a tribunal the seriousness of rape and other sexual offenses in the context of conflict and war as an element of genocide and crimes against humanity. Why it took so long for an international tribunal to make such a critical finding is ample demonstration of the blindness of international law to gender. This is a blindness that is directly lifted from

municipal laws. It is this lacuna that has to be filled at the jurisprudential level if sexual violence is to be addressed seriously.

One of the major challenges for any transitional justice vehicle is finding the facts about sexual and gender based violence. Often, the victims may not report such abuses, even to truth commissions. This was the case with the South African truth commission. Women either refuse to come forward, or minimize their own suffering, when they do. As Priscilla Hayner has written:

Even with a flexible mandate and the intention of fairly gathering information about all patterns of abuse, a commission [truth] may well fail to document certain widely experienced abuses. Perhaps the most commonly underreported abuses are those suffered by women, especially sexual abuse and rape. Many commissions have received far less testimony about sexual abuse than in the numbers or proportion that they suspected took place [16].

This is both a political, cultural, and legal problem. Societies in transition need to destigmatize sexual and gender-based violence so that women can come forward to report such atrocities. A number of approaches, such as testimonies given without revealing the identity of the victim may yield better results in more conservative societies. In other cases, women statement-takers may be more successful than their male counterparts in getting information out of survivors. Whatever the case, it is important that transitional justice mechanisms be victim-centered in sexual and gender-based violence situations. Otherwise, women and girls will stay away because they will feel either as a means to an end they do not understand or endorse, or as pawns in a larger political game. There is no substitute for making sure that reparatory measures are put in place to assist victims and to raise public consciousness of the problem. This is true no matter what transitional justice vehicle is adopted. Ultimately states and societies in transitional justice contexts need to arrive at a high national consensus or convergence on the importance of tackling sexual and gender-based violence otherwise nothing much will happen.

## **CONCLUSION**

The invisibility of sexual and gender-based violence in society in general, and transitional justice contexts in particular, is intrinsically bound up with the invisibility and marginalization of women in public life. Until societies decide that women are as important as men – and that human dignity means dignity for all genders – the failure to take seriously and address sexual and gender based violence will persist. Unfortunately, this means that the fundamental reforms that societies emerging out of conflict or war need will not be thoroughgoing. A society's progress can be measured by the way it treats women. That's because the patriarchy – the source of most subordination – thrives on the exploitation of the female gender. If transitional justice is to become a bridge to the society of the future, it will have to center the rights of women in its agenda.

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