



Feminist scholarship in transitional justice: a de-politicising impulse?



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SYNOPSIS

Gender and transitional justice is increasingly recognizable as a field of study in its own right. This essay identifies feminist scholarly priorities in transitional justice as, firstly, the inclusion of harms against women within the mandates of transitional justice mechanisms; secondly, the recognition of structural gender inequalities that makes women particularly vulnerable to these gender-specific harms; and finally, the participation of women in transitional justice processes and mechanisms. The essay recognises the important benefits of the coalescence of a feminist scholarly agenda in transitional justice, most notably the development of a relevant body of expertise, the ability to learn across transitional justice processes, and the growing policy traction of these scholarly priorities. The essay raises the question, however, as to whether there is a de-politicising impulse in feminist transitional justice scholarship, evidenced by a sustained reluctance to engage with the broader political dynamics that drive transitional justice in particular contexts.

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Introduction

In the burgeoning field of gender and transitional justice, scholarly literature has maintained remarkable consistency in its key organizing questions since its emergence two decades ago. The essay identifies feminist priorities in transitional justice scholarship as (1) the recognition of gender-specific harms against women in transitional justice mechanisms and processes; (2) the amelioration of structural gender inequalities that make women particularly vulnerable to certain harms; and (3) the participation of women in the processes and institutions of transitional justice. There are important benefits of the coalescence of a feminist scholarly agenda in transitional justice, most notably the development of a relevant body of expertise, the ability to learn across transitional justice processes, and the increasing policy traction of these feminist scholarly priorities.

I am cautious of the essentialising tendencies of overview pieces in feminist international legal scholarship and the particular risk of missing work that is new or 'at the margins' (Murphy, 2005: 80). In particular, I recognize that this overview fails to engage with the growing body of transitional justice

scholarship that engages with masculinities (for example, Theidon, 2009) and intersectionality (for example, Rooney, 2006). This essay nevertheless reflects on the three main thematic emerging from the most prominent gender literature in transitional justice as an important indicator of the state of the field.¹ The essay also reflects on the undoubted blindspots that persist in scholarly inquiry, most problematically, a reluctance to engage with the political dynamics that drive transitional justice in particular contexts and to examine the ways in which gender intersects with and cuts across those dynamics. This reluctance is evidenced by three distinct trends in the literature, firstly, the privileging of technical over transformative gains in transitional justice design (part I); secondly, the emphasis on gender harms that predate and survive political violence, instead of the specific ways in which political violence causes new gendered harms (part II); and thirdly, the instrumentalist invocation of women's participation in transitional justice as something apart from (and above) the ethnic or resource distribution dynamics that primarily drive political violence (part III). The essay raises the question, therefore, as to whether there is a de-politicising impulse to feminist scholarship in transitional justice.

Recognition of harms against women

The greatest traction to date of feminist scholarship in transitional justice has been achieved in respect of the recognition of gender-specific harms against women. I have argued elsewhere (with Ní Aoláin) that the defining characteristic of feminist scholarly interventions into transitional justice has been to broaden the range of harms recognized within its processes and institutions:

Feminist interventions aimed at shaping the field and scope of transitional justice have concentrated on widening the range of harms visible in the process of societal transformation (Ní Aoláin & O'Rourke, 2010: 1).

While the achievements in that regard have not been above criticism – indeed there is a rich seam of feminist critique of the relevant legal developments – feminist scholars remain highly engaged with the conceptual and practical challenge of securing recognition of harms against women within transitional justice. The argument in this section is, however, that focusing on the integration of gender-specific harms within transitional justice processes and mechanisms has privileged technical over transformative feminist gains in transitional justice.

The focus on activating criminal accountability for sexual violence perpetrated against women in conflict settings is a clear temporal trend in feminist literature from the 1990s. Startling revelations of widespread sexual violence in the Balkans conflict coincided with motivated transnational feminist activism to prohibit, prevent and punish violence against women more broadly, in order to generate this focus of advocacy and analysis (Chinkin, 1994). This multi-pronged work focused on advancing the necessary legal developments to ensure that rape in conflict was recognized as meeting the necessary harm threshold of torture (for example, Chinkin, 1994), and as constitutive acts of crimes against humanity (Copelon, 1994), and genocide (Askin, 1997). Work directed at advancing the operation of international criminal tribunals aimed to ensure that legal developments translated in practice to sensitive and effective prosecutions for conflict-related sexual violence (see, for example, Green, Copelon, et al., 1994; Ní Aoláin, 1997). Important empirical and conceptual work has been invested in bringing the full extent and subtleties of such harms to light, for example, in gendered experiences of displacement and refugee camps (Chrispus Okello & Hovil, 2007).

With ostensible successes in the prosecution of conflict-related sexual violence has also come critique. Foreshadowed importantly by longstanding work of feminist legal theorists of criminal justice in steady-states, growing practice in the prosecution of sexual violence under international criminal law has prompted much interesting and persistent introspection from feminist international lawyers as to the appropriateness of (international) criminal tribunals for delivering progressive gender outcomes (see, e.g., Zinstag, 2013). Recurrent here is the failure of court processes to provide a forum for women to tell their story, with the emphasis instead on proving an offence. Julie Mertus' identification of 'the legal counter-narrative' (2004: 110) is a particularly eloquent characterization of what happens in court settings when women's stories of harm and survival meet legal exigencies of establishing the requisite action and intent by the perpetrator. This analysis has not ended with the

ad hoc tribunals, but has been extended into more recent innovations, such as hybrid domestic–international tribunals. Kelsall and Stepakoff (2007), for example, contrast the narratives of sexual victimhood that emerge from survivors' testimony in legal proceedings at the Sierra Leone Special Court with the grander narratives of resistance and survival articulated by those same women in interviews with the authors. Chappell, Greyy, et al. (2013) examined gender bias in the International Criminal Court's approach to issues of complementarity and the Office of the Prosecutor's gender bias in overlooking embedded gendered shortcomings in domestic criminal institutions when determining a state's willingness and ability to proceed with domestic prosecutions.

In parallel with transitional justice practice of multiple and alternative mechanisms for accountability, feminist scholarship has attended in detail to the recognition of harms against women within non-retributive mechanisms. Fiona Ross's (2003) work on the South African Truth and Reconciliation Commission unarguably remains the most important feminist text on truth-telling and commissions. Ross's text is a salutary intervention into the broadening practice of truth commissions to respond to mass violence and human rights violations. Written in 2003, *Bearing Witness* was a powerful caution regarding the limits of truth-telling for capturing a comprehensive picture of women's experience of political violence and the potential for women's individual narratives to be subsumed by broader agendas of victimhood and nation-building. Since then, overview pieces of gender and transitional justice (see, e.g. Bell & O'Rourke, 2007) document a largely progressive trajectory in the recognition of harms against women within truth commission mandates, though problems persist. Interventions such as Lia Kent's (2014) account of the failure of truth-telling in Timor Leste to capture the full breadth of sexual violence in the conflict continue to make robust claims for the recognition of harms against women in official truth-telling processes. Evidencing the broader penetration of this feminist analysis of restorative approaches to transitional justice, whereas Priscilla Hayner, 1994 and 2002 cited no feminist work and gave no specific attention to accounting for gender-specific harms against women, the 2011 revised edition included a specific chapter on gender ('The Truth about Women and Men', Hayner, 2011: 85–90), which included extensive attention to the importance of accounting for sexual violence against women in truth commissions.

Further, the entry of the International Center for Transitional Justice (ICTJ) into gender work in reparations has been defining of one of the most productive seams of feminist scholarship in transitional justice (Rubio-Marin, 2006, 2009). This work has been paradigmatic of a three-pronged feminist analysis that seeks the recognition of gendered harms, an understanding of structural gender inequalities and the participation of women. Similarly, Duggan, Paz y Paz Bailey, et al. (2008) identify great feminist promise in the focus of reparations upon victims to bring attention and accountability for violations of women's sexual and reproductive rights, a quintessentially gendered harm experienced disproportionately by women and girls. The increasing traction of this feminist focus on reparations within advocacy (Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, 2007; see further Couillard, 2007) and policy circles (Guidance Note of the Secretary-General, 2014) evidences the practical dividends of scholarly questioning.

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