

Developments

Book Review – Pablo de Greiff & Roger Duthie’s (eds.) Transitional Justice and Development: Making Connections

By Basil Ugochukwu*

[PABLO DE GREIFF & ROGER DUTHIE (EDS.), TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS (Social Science Research Council, 2009); ISBN 0-9790772-9-6; 376 pp; \$30.00; Paperback]

A. Introduction

One mystifying aspect of legal and socioeconomic scholarship in successive years is that transitional justice¹ and development were discussed separately. How two fields making similar commitments to social transformation and economic recovery could have traveled such asymmetrical routes for so long without anyone noticing is even more surprising, but this had been the position until lately.² Even in the transitional justice arena itself, there exists a tendency to distinguish the justice in transition as vengeance and retribution for past wrongs from the justice in transition as re-establishing the rule of law, rebuilding legal institutions and unleashing their developmental capacities.³

*The author is a Ph.D. candidate and Legal Process Instructor, Osgoode Hall Law School, York University, Canada. He also holds an LL.M degree from Central European University, Hungary, and an LL.B (Hons.) from Abia State University, Nigeria. The author is grateful to the editors of the German Law Journal for their very helpful comments and suggestions on an earlier draft of this paper. Email: basilugochukwu@osgoode.yorku.ca.

¹ Defined by the United Nations as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.” *Transnational Justice*, United Nations Rule of Law, available at: http://www.unrol.org/article.aspx?article_id=29 (last accessed: 23 December 2011).

² See Aaron Wu, *The Mythology of Transition, Transformation and Development*, Unpublished working paper (2009) available at <http://ssrn.com/abstract=1567250> (last accessed: 23 December 2011): “The fields ostensibly share discourses of responsibility, transparency and accountability; foundations in Christianity and the Enlightenment; and combine a rationalistic and technocratic approach with a utopian vision of the future”.

³ Some authors, for example, have made reference to the “tension between the forward-looking economic goals of growth, development, and investment, and the backward-looking trials and truth commissions.” See Tricia D. Olsen, Andrew G. Reiter & Eric Wiebelhaus-Brahm, *Taking Stock: Transitional Justice and Market Effects*, Unpublished paper prepared for the 2010 Midwest Political Science Association Annual Meeting (2010), available at <http://ssrn.com/abstract=1666892> (last accessed: 23 December 23, 2011). See also Elizabeth Knight, *Facing the Past: Retrospective Justice as a Means to Promote Democracy in Nigeria*, 35 CONN. L. REV. 867, 868 (2003).

In the 1960s and 1970s similar questions to the ones being raised today about the linkage between transitional justice and development were also asked regarding the relevance of law to development. The dilemma of scholars who had been involved in that inquiry found powerful expression in a famous piece by Trubek and Galanter on the subject.⁴ The manner in which they approached the question does to some extent parallel the more recent efforts to link transitional justice and development, where the latter in their view is “assumed to involve an increase in man’s rational capacity to control the world, and thus in his ability to improve his material well-being.”⁵ On the other hand, they saw law as both a necessary element in development and a useful instrument to achieve it. Continuing, they claimed that “legal development would foster social development and improve human welfare”⁶

However, what is intriguing is that legal empowerment as discussed today in transitional justice and law and development literature is much like the law as referenced by Trubek and Galanter was in those days. We are, by some accounts, living under the impact of what is described as the second wave of the law and development movement.⁷ According to some of these accounts, law and development research is in fact now integral to one arm of a bifurcated transitional justice field. The first arm aims at discovering the truth and fixing culpability in societies whose transitions had been enabled in a somewhat negative way by rule of law rupture and prevalence of human rights atrocities. In this box, transitional law would be most effective only in showing off its retributive essence.

In the second arm, more emphasis is placed on rebuilding the damaged institutions of law, so they can provide empowering alternatives to those most hurt prior to the transition, rather than casting a backward glance at past atrocities and pursuing those who committed them. Within this arm, there is more commitment to how transitional justice can aid future development, as opposed to how it can punish abusers of past years. Therefore, there is transitional justice as retribution, in which development is only marginal to its overarching objectives, and there is also transitional justice in the sense of a vehicle for legal empowerment, and socio-economic development. In this latter understanding, certain aspects of development are central to the goals of a transitional process.

⁴ David Trubek & Marc Galanter, *Scholars in Self-estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, WIS. L. REV. 1062 (1974).

⁵ *Id.* at 1073.

⁶ *Id.* at 1074.

⁷ Okezie Chukwumerije, *Rhetoric Versus Reality: The Link Between the Rule of Law and Economic Development*, 23 EMORY INT’L L. REV. 383, 386 (2009).

But, could we draw a clear divide between transitions that emphasize transitional justice on the one hand, and those that emphasize transitional development on the other? Or could transitions harness both fields simultaneously without compromising the desired outcome? Is there a relationship between transitional justice as understood in the two senses earlier described, and development in a broader sense than as it is understood in the second leg of the transitional justice field? These are some of the questions answered by Pablo de Greiff and Roger Duthie's edited collection *Transitional Justice and Development: Making Connections*. The collection itself was the result of a two-year research project involving the International Center for Transitional Justice (ICTJ) the primary objective of which was to bring "into dialogue those who often work alongside each other in transitional and developing societies, but not always together in providing a coherent response to the interconnected concerns of development and justice."⁸

The editors of this collection recognize that reconciling transitional justice and development is not by any means easy, especially given that both concepts occupy contested terrains. Despite its popularity as an item of contemporary legal scholarship, the editors state that fundamental questions are still being asked about transitional justice, especially "about its meaning, the type of justice it involves, its objectives, its precise measures and activities, how it works, its impact, its appropriateness in certain contexts, its boundaries, and its relationship with other fields."⁹ What is true of transitional justice holds substantially correct for development as well –if not more so – since, according to the editors, "there is no set of measures that lead to an overlap among [development] practitioners."¹⁰

These difficulties notwithstanding, contributors to the collection converged on a set of meanings for these broad concepts. By transitional justice they refer to "measures to redress massive human rights abuses, which typically include criminal prosecutions, truth-telling, reparations, and certain kinds of institutional reform."¹¹ Development to them means "processes whose most general aim is to improve the socioeconomic conditions of people."¹² Given these two understandings, it would seem odd that the two concepts did exist in isolation for so long a time. This is especially so considering that both share goals of establishing a better society, whether applying forwarding-looking strategies (development) or learning the important lessons of life by avoiding the mistakes of history (transitional justice).

⁸ TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS 17 (Pablo De Greiff & Roger Duthie eds., 2009).

⁹ *Id.*

¹⁰ *Id.* at 18.

¹¹ *Id.*

¹² *Id.*

This essay is divided into four parts of which this introduction is the first. In the second part I present a synopsis of the collection, while in the third part I will present an analysis of the contributions with some attention to how the different parts fit into the entire collection. I make a brief conclusion in the fourth and last part. Following my analysis, I argue that for any meaningful connection to be made between transitional justice and development, the overall context for transition has to be understood. At the same time, the collection has opened the door for further research in this field, especially in those areas where there might be tension between transitional justice and development.

B. *Transitional Justice and Development: A Synoptic View*

De Greiff and Duthie's collection is organized into nine chapters around three broad themes that reflect the conceptual and practical insights that the authors bring to their analyses. The first three chapters explore the links between transitional justice and development at the theoretical and conceptual levels. The next four chapters examine the relationship between particular transitional justice measures and development. The last two chapters reverse this treatment by examining the relationship between transitional justice and development through a focus on specific development-related issues.

In the first chapter of the collection titled "Articulating the Links between Transitional Justice and Development: Justice and Social Integration," Pablo De Greiff takes on the task of unpacking the "fuzzy conceptual borders" of development and transitional justice, while at the same time attempting to contain the dissents he claims are internal and external to both.¹³ In accomplishing this task, he sees the need to explain why it is necessary to couple transitional justice and development and offers two related justifications for this.

First, he argues that a good number of transitional societies face immense developmental challenges, and a good number of developing countries face abiding "justice deficits" concerning massive human rights abuses in the past.¹⁴ Secondly, and more importantly, he links this connection to public expectations from transitional measures that often promise better living circumstances for the public. He also states that "it is unreasonable to think that unless people's overall living conditions improve in the aftermath of political transitions the implementation of transitional justice measures will over time become a series of inconsequential 'events'.... So, just as there are reasons for transitional justice promoters to take an interest in development, there are reasons for development promoters to take an interest in transitional justice."¹⁵

¹³ *Id.* at 29.

¹⁴ *Id.*

¹⁵ *Id.* at 30.

How is it possible for a development practitioner to conceive of her work in terms of its connection with transitional justice? This is the substance of Marcus Lenzen's contribution in chapter two, titled "Road Less Traveled: Conceptual Pathways (and Stumbling Blocks) for Development and Transitional Justice." He establishes a commonality between both concepts according to their process-orientedness, and given that both "are concerned with improving human lives and societies,"¹⁶ he states that there is a direct linkage between the two fields in the peace building arena, where both are concerned to some extent with contributing to the development of institutions and their capacities to ensure conditions for peaceful coexistence.¹⁷

In chapter three, Tony Addison examines "The Political Economy of Transition from Authoritarianism." He identifies five goals of societies in transition: transitional justice, distributive justice, prosperity, participation and peace. Authoritarian regimes, according to him, often leave behind distorted economies and high inequality which democrats may find difficult to change. "Democracy's prospects will then be endangered since expectations of social justice will be high but frustrated. Consequently, transition is unlikely to succeed unless its economic dimensions are adequately addressed."¹⁸ In terms of how transitional justice and development relate from this standpoint, Addison harnesses development seen as a technocratic endeavor which is about "getting the 'right' policies and institutions in place to build up, over time, society's stocks of human and physical capital – thereby delivering rising prosperity accompanied by absolute poverty reduction" and transitional justice as a developmental concept "rooted in social transformation, not just technocratic endeavor."¹⁹

Chapters four (Rolando Ames Cobián and Felix Reategui, "Toward Systemic Social Transformation: Truth Commissions and Development") and five (Naomi Roht-Arriaza and Katharine Orlovsky, "A Complementary Relationship: Reparations and Development") establish the relationship between development and two specific transitional justice measures— truth commissions and reparations. While according to Cobian and Reategui, truth commissions set the record straight, thus promoting the acknowledgement of abuses and the social recognition of the abused,²⁰ Roht-Arriaza and Orlovsky initially identify what seems to be a tension between reparations and development. Reparations often warrant

¹⁶ *Id.* at 77.

¹⁷ *Id.* at 83.

¹⁸ *Id.* at 111.

¹⁹ *Id.* at 114.

²⁰ *Id.* at 148.

additional social spending in transitional economies where budgets are finite and the competition for resources is particularly fierce.²¹

Yet truth commissions and reparations have clear junctures of intersection with development holistically defined. While all transitional justice measures enable victims and survivors of mass atrocities to (re)emerge “as social actors with the initiative, motivation, and belief in the future that derive from sustainable economic activity,”²² reparations alone constitute “its most concrete, tangible, and... personalized expression.”²³ This is so because even small amounts given to victims and survivors as reparations may unleash the energy and creativity of previously marginalized sectors of the transitioning society.²⁴ Truth Commissions share a similar goal because as a transitional justice measure, they are not just practiced for their own sake. The recovery of truth, which they promise “serves as both a cornerstone of justice and a triggering device for legal justice, reparations, and institutional reforms aimed at preventing massive abuses from happening again.”²⁵

Chapters six and seven discuss two reform issues centering on development, but are ones which the authors believe could supply additional insights towards the developmental objective in transitional situations— security sector and judicial reforms. In “Enhancing Justice and Development through Justice-Sensitive Security Sector Reform,” Alexander Mayer-Rieckh and Roger Duthie fixed security sector reform in the realm of development. However, this is not conclusive of the fact that it does not have links to transitional justice. Citing vetting measures aimed at excluding human rights abusers from security sector institutions in the course of a transition as an example, they argue that “there is potential for security sector reform and transitional justice to complement each other... and to a certain extent to converge in the notion of a justice-sensitive approach to security sector reform.”²⁶

In chapter seven Muna Ndulo and Roger Duthie couple judicial reform, development and transitional justice in their contribution titled “The Role of Judicial Reform in Development and Transitional Justice.” This chapter draws connections between judicial reform, transitional justice and development through the relatively narrow notion of judicial reform while borrowing extensively from Amartya Sen’s theory that “development as a

²¹ *Id.* at 173.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 148.

²⁶ *Id.* at 215.

whole cannot be considered separately from legal development”²⁷ and that “the overarching idea of development is a functional relation that amalgamates distinct developmental concerns respectively in economic, political, social, legal and other spheres...”²⁸ Ndulo and Duthie conclude that judicial reform can enable transitional justice or in fact be a precondition for it. Conversely, transitional justice can contribute to judicial reform.

The last two chapters of this collection discuss two important development-related issues: natural resources and land tenure reform, and how these interact with transitional justice. In chapter eight Emily Harwell and Philip Le Billion enter the discussion with their piece “Natural Connections: Linking Transitional Justice and Development through a Focus on Natural Resources,” while in the last chapter Chris Huggins supplies an analysis under the title “Linking Broad Constellations of Ideas: Transitional Justice, Land Tenure Reform, and Development.” Harwell and Le Billion note a bifurcated role of natural resources in post-conflict countries. If well managed, natural resources can make significant contributions to post-conflict development and help build and protect human security in all its forms. On the contrary, where natural resources are mismanaged, they present not only lost economic opportunity but endanger both long-term economic development and human security as well.²⁹

Huggins, for his part, notes the relatively little scholarship available on the relationship between land issues and transitional justice. Where a nexus has nonetheless been established between the two, land rights have tended generally to be discussed only in terms of restitution of property rights to those deprived of them during a period of conflict or authoritarianism, while avoiding such historically relevant injustices as, for example, colonialism. Huggins observes a relationship between transitional justice and land through the concept of the rule of law, often articulated in terms of its positive impact on development. Further, in the rule of law field, there is considerable progress towards ensuring that rule of law programs address issues relating to land rights.

There is a sense in which *Transitional Justice and Development* could be considered very apt for the times, especially given emerging trends in the literature to integrate the two fields examined in the collection. Moreover, the collection would seem invaluable both for the themes it addresses and those left out, but more particularly for the latter which now provide focused points of entry into the debate for scholars and practitioners interested in

²⁷ Amartya Sen, *What is the Role of Legal and Judicial Reform in the Development Process?*, Unpublished paper presented at the World Bank Legal Conference on the Role of Legal and Judicial Reform in Development (2000).

²⁸ *Id.*

²⁹ De Greiff, *supra* note 8, at 283.

this area of scholarship.³⁰ What this makes very plain is that while *Transitional Justice and Development* has broken a path long neglected, it has not spoken the final word on the themes addressed.

C. *Transitional Justice and Development: An Analytic Critique*

My understanding is that this collection is not a judgment or an inquest into the effectiveness of either the developmental or transitional justice measures addressed by specific contributions. There is not much of a critique of these measures. Rather, there is what appears to be a narrowing of the analyses to simply coupling transitional justice and development at a level more theoretical than practical. Thus, "making connections" between these two fields trumps a deeper reflection on the effectiveness or appropriateness of the connections established. Not surprisingly, only in a few of the contributions are actual case studies analyzed. Yet, an evaluation of these connections is one that strongly recommends itself, if only to understand more clearly the levels at which they advance the core goals of both development and transitional justice.

Both development and transitional justice contain worthwhile promises for social and economic improvements at the abstract level. This presents perhaps, the strongest explanation for the connection that De Greiff and Duthie's collection is making between them. Where they fail to deliver on these promises, there might be the tendency to question this connection without as much as considering the factors that may have played a role in their failure.³¹ Sometimes, there may not have been absolute failure but the fruits of the measures delay in ripening. As David Backer submits, "transitional justice issues in post-conflict settings often entail processes that will and should unfold over an extended period of time – a decade, if not considerably longer."³² Continuing, he states that "[i]n many cases, measures are implemented piecemeal or progressively in stages. In others, initial steps are limited, halted or even reversed, but are occasionally revisited at a later time...."³³

³⁰ See, e.g., Olsen, *supra* note 3. The authors examine the effect of transitional justice mechanisms (trials, truth commissions, and amnesties) on the perceptions of private investors.

³¹ These factors include domestic prosecutions that are neither systematic nor timely, truth-seeking and reparations measures implemented in the contexts of political compromise and limited resources and a general weakness of state institutions. See Lydia Bosire, *Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa*, Unpublished Paper, International Centre for Transitional Justice, Occasional Paper Series 1 (2006).

³² David Backer, *Watching a Bargain Unravel? A Panel Study of Victims' Attitudes about Transitional Justice in Cape Town, South Africa*, 4 INT'L J. TRANSITIONAL JUST. 443, 444 (2010).

³³ *Id.* at 444.

Might it not be necessary to bear these possibilities in mind while forging the connection between transitional justice and development? While some contributions in *Transitional Justice and Development* adumbrated connections between specific transitional justice measures and development, at the practical level, those measures may impair broader social goals, including development. Backer, for example, reports on a panel survey conducted between 2002-2003 and 2008 involving 153 victims of apartheid-era violations in South Africa. According to him, “[d]uring the interval between the two waves of the survey, both undertaken after the Truth and Reconciliation Commission (TRC) completed its work, government policies concerning reparations, prosecutions and pardons undermined the compromises that were central to the TRC process and integral to the democratic transition.” While public enthusiasm about the South African TRC’s unique conditional amnesty program was high at inception, it fell dramatically by 2008, with those surveyed showing both an increased sense of unfairness at the program and dissatisfaction with the extent of truth recovery.³⁴ In another report, the authors contended that Truth Commissions tend to have a negative impact on human rights.³⁵

Most of the contributors to this collection appeared to adopt the definition of transition as a destination rather than a journey. They also view the justice of the transitional process sometimes as the very transitional justice measures themselves, and at other times, as the benefits that accrue to those targeted by those measures. Imagined in this sense, the transition is completed once the mechanisms established for the purpose (TRCs, prosecutions, reparations, lustrations, elections) terminate their tasks. But I would rather view a transition as a journey, because it is only by so doing that the proper connection to development can be drawn. To some scholars, the etymology of transition makes clear the fact that it is indeed a journey.³⁶ How long should transitional processes last? Assuming transition is a continuum, at what point should its benefits in the form of tangible developments start counting?

Backer sets a ten-year period for transitional justice issues in post-conflict settings to unfold.³⁷ While contributors to the collection were not this pointed, they shared similar sentiments to a large extent. But this, to me, seems too rigid a position to take. It ignores to a substantial degree the context for transition and how protracted its processes could

³⁴ *Id.* at 443.

³⁵ Tricia Olsen, Leigh Payne, Andrew Reiter & Eric Wiebelhaus-Brahm, *When Truth Commissions Improve Human Rights*, 4 INT’L J. TRANSITIONAL JUST. 457, 458 (2010).

³⁶ Fionnuola Ni Aolain & Colm Campbell, *The Paradox of Transition in Conflicted Democracies*, 27 HUM. RTS. QTR’LY 172, 173 (2005).

³⁷ See Backer, *supra* note 32, at 444.

be.³⁸ It also masks unproven assumptions about the success of transitions. Where transitional measures should herald an end to massive human rights abuses and authoritarianism, the reality on the ground in most cases is that often dictatorship and impunity only give way to illiberalism under the subterfuge of democracy. For example, in those countries in Africa where some positive results are ascribed to their transitional justice measures, this has long been tempered by an air of disappointment, as those most hurt prior to the transition are still waiting to be vindicated. In some instances, their situations have become much worse in the transitory aftermath.³⁹

Granted that development is often victim to authoritarianism and human rights abuse, the developmental situation will also not improve when transitional justice measures aimed at those legacies fail. Addison is among the contributors who posit that many transitions take place against a backdrop of economic failure.⁴⁰ For this reason mainly, it may be difficult to set terminal dates for transitions, because doing so would have consequences for the developmental agenda. However, transitions viewed as on-going processes in which matters seemingly settled today may qualify for revision tomorrow assures the flexibility that is ordinarily a part and parcel of any developmental agenda. Therefore, there is a likelihood of a synergistic reinforcement between transitional justice and development in the manner that Addison prescribes.⁴¹

There is added significance for the above position when it is considered that many countries, even developed ones without any previous authoritarian experiences, are going through varying transitional catharses of their own. Consequently, Posner and Vermeule differentiate between regime transitions and the wide variety of transitions that occur in consolidated democracies. They argue that legal and political transitions lie on a continuum of which regime transitions are merely an endpoint.⁴² Transitional justice will

³⁸ This is probably why it is very important to clarify "transition" especially in the context of "developing societies." Some of the questions may be: "What constitutes a 'transition'? Is the transition marked simply by the political choice to use of the rhetoric of justice and reconciliation, even in a context of minimum breach in the past, perhaps in order to 'create the democratic possibility to re-imagine the specific paths and goals of democratization'? Can a country have a succession of transitions and apply transitional justice measures each time? Are these measures appropriate even in contexts of weakly institutionalized states without a history of Western-style democratic tradition"? See Bosire, *supra* note 31, at 8.

³⁹ Ruth Hall & Lungisile Ntsebeza, *Introduction*, in *THE LAND QUESTION IN SOUTH AFRICA: THE CHALLENGE OF TRANSFORMATION AND REDISTRIBUTION 2* (Lungisile Ntsebeza & Ruth Hall eds., 2007). See also Jody Kollapen, *Keynote Address to the Opening Session of the Japan International Cooperation Agency and International Centre for Transitional Justice Workshop on Enhancing Socio-Economic Justice in Societies in Transition: Case Studies on the African Continent*, Cape Town, South Africa (2008).

⁴⁰ De Greiff, *supra* note 8, at 130.

⁴¹ *Id.* at 130.

⁴² Eric Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 763 (2004).

obviously have a more tangible connection to development if understood in this sense and as part of an on-going process that integrates development as well.

It should also not be assumed without criticism that all transitional justice measures sit well with the developmental goal or its most important elements. As there are areas of convergence, there are obvious areas of conflict between transitional justice and development. *Transitional Justice and Development* has only expanded an ongoing discussion of which further insights need to be gleaned about the different ways in which specific transitional justice measures may conflict with other policy goals, development included. For example, it is claimed that reparations may unsettle property rights and interfere with economic reform by creating new claims against existing property holders.⁴³ A similar point was made by Roht-Arriaza and Orlovsky.⁴⁴ A more critical analysis of the exact boundaries of transitional justice and development would most likely expose more of such areas of conflict with the possibility of developing remedial measures to address them.

D. Conclusion

One fact about *Transitional Justice and Development: Making Connections* cannot be ignored. It has placed theoretical emphasis on an issue that transitional justice and development practitioners have grappled with more recently. The treatment given to the two fields by the contributors to the collection and the symbiotic relationship now established between them assures a better understanding of both. This understanding in turn makes that relationship more meaningful for future research at the conceptual plain and, even more so, for their integration at the practical level. Without a doubt, defining the more detailed strands of this relationship invites further research.

⁴³ *Id.* at 766.

⁴⁴ De Greiff, *supra* note 8, at 173.