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Advancing Feminist Positioning in the Field of Transitional Justice

Fionnuala Ní Aoláin*

Abstract¹

This article contributes to an ongoing conversation among feminist scholars about what constitutes feminist positioning with regard to the central issues that define transitions from conflict or repression towards more liberal polities. The analysis suggests that the feminist presence in transitional justice is complex, multilayered and still in the process of full engagement. Concentrating on the genealogy of this presence, the article reflects on what are commonly invoked scholarly and policy reference points, showing how little gender analysis and women's issues entered into the discursive fray in the public and political arenas where the terminology of accountability emerged. The challenge in assessing feminist positioning is that an uncritical and narrowly liberal conception of gender equality directs our gaze away from the cultural, material and geopolitical sites in which transitional justice practices have emerged. The article explores the connections between transitional justice and identification of harms done to women, the importance of acknowledging these harms and the need to centre discussions of agency and autonomy in feminist approaches to structural political change in deeply divided societies.

Keywords: feminism, women & women's rights, accountability, agency

Introduction

This article contributes to an ongoing conversation among feminist scholars engaged in transitional justice theory and practice about what constitutes feminist positioning with regard to the central issues that define political transitions from conflict or repression towards more liberal polities. It takes as its departure point the critical questions posed by Christine Bell and Catherine O'Rourke in a provocative essay that asked, 'Where are women, where is gender, and where is feminism in transitional justice?'²

This article suggests that the feminist presence in transitional justice is complex, multilayered and still in the process of engagement. Moreover, the full relevance

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² Christine Bell and Catherine O'Rourke, 'Does Feminism Need a Theory of Transitional Justice? An Introductory Essay,' *International Journal of Transitional Justice* 1(1) (2007): 23.

of feminist theorization is only slowly being revealed through ongoing debate and critique. Before identifying feminist threads in transitional justice practices, one must begin with the engagement of women *qua* women in the public and political arenas where the terminology of accountability emerged in repressive and conflicted states.³ This article undertakes a preliminary genealogy of female presence in transitional justice scholarship. The lineage identified does not present in a linear way and while the narrative of female and feminist presence in the field requires country-specific study, by concentrating on genealogy, the investigation reflects on what are commonly invoked scholarly and policy reference points. These show how little gender analysis and women's issues entered into the discursive fray during the emergence of transitional justice discourses.

Articulating an approach premised on a distinctly feminist positioning is not uncontroversial. There is a grave danger that 'feminist' here can be transcribed as essentialist. The challenge is compounded by the fact that an uncritical and narrowly liberal conception of gender equality directs our gaze away from the cultural, material and geopolitical sites in which transitional justice practices have emerged. In simple terms, the sites transitional justice most often engages are the exotic 'other' of locales, subjects, conflicts and repressions elsewhere (almost never in the western 'here'). The export of rule of law and transitional justice discourse can reflexively deploy an uncritical, liberal, feminist positioning with little capacity to recognize its own hegemony and privilege.⁴

Transitional justice discourse itself demands critical interrogation. Specifically, it should be recognized that transitional justice constitutes a form of discursive colonization in that its language and 'tool box' codify knowledge in ways that exclude and produce hierarchies of value through the course of political transition.⁵ A fully articulated postcolonial challenge to the hegemonic reach of legal liberalism as represented by mainstream transitional justice has yet to emerge, but any feminist analysis must be cognizant of this critique's relevance.

Despite the complexity of articulating a feminist position, it is useful to explore a distinctly feminist theory of transition and to consider how the deployment of a single theoretical model to guide and frame gendered transition might undercut a bottom-up, site-specific approach. It should also lead us to reflect on what the drawbacks might be to deploying western feminist discourse and political practice to transitional sites, and how other feminisms may be excluded as a result. Regardless of these critical concerns, it remains important to value unity and

³ A specific example of this is the emergence of early academic and policy analysis of truth commissions and processes (e.g., Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2002)) that almost entirely eschewed references to or recognition of gender as a relevant category.

⁴ On rule of law exports and the challenges for women, see, Michael Hamilton and Fionnuala D. Ní Aoláin, 'Gender and the Rule of Law in Transitional Societies,' *Minnesota Journal of International Law* 380 (2009): 380–402.

⁵ See, Christine Bell, Colm Campbell and Fionnuala Ní Aoláin, 'The Battle for Transitional Justice: Hegemony, Iraq and International Law,' in *Judges, Transition and Human Rights*, ed. John Morison, Kieran McEvoy and Gordon Anthony (Oxford: Oxford University Press, 2007).

coherence in addressing some universal experiences for women across transitional arenas. The lack of an integrated feminist narrative may undermine the capacity of women's collective interests to be expressed in politically strategic ways. This article takes as a starting premise that there are collective interests at play in transition for women that cut across jurisdictions and contexts. They include the experiences of systematic sexual and other violence, status as refugees and displaced persons, humanitarian aid dependency, lack of access to social and economic goods on an equal basis, exclusion from political processes and lower legal status across legal systems in which conflict or repression take place.

The identification of women's interests with transitional justice practices has a short record. Moreover, only relatively recently has some distinctly feminist language and methodology emerged in the field. As feminist engagement deepens, it meets a field that is rapidly expanding and has the fortune and disadvantage of being termed an 'industry.' The growth of transitional justice is both an opportunity and a warning. A new context gives rise to new opportunities, ideas and sites of intervention. Equally, newness often hides deep pitfalls of structural and entrenched gender discrimination. These snares have the tendency to come repackaged in the transitional context, where the presumed contours of the field give hope for gender transformation, but rarely deliver.

Feminists would do well to pause and reflect on the state of the field,⁶ and think about how best to avoid the constant sense of just catching up to where the field has expanded, so as to frame a feminist vision of transition that is not only responsive to expansion and opportunity but also could actually offer on its own terms the basis of engagement. How would a feminist vision incorporate non-hegemonic practices and be aware of the complexities and contradictions of its own dominant discourses? Given the diversity of transitional sites, can we meet the complexity of the situated female subject and 'unpack the material and discursive effects' of the legally infused categories and processes that go hand in hand with transitional justice?⁷ I argue that a greater awareness of the complexity of feminist positioning in relation to transitional justice is a means to guard against the reproduction of hegemonic feminist discourses and the perpetuation of elite feminist stratification towards the subjects and locales of transition. Moreover, the article challenges feminist scholars to address with more precision and imagination the experiences of harms done to women, finding new ways to acknowledge fully the complexity of harm for women in transitional contexts.

The article commences with an overview of women's presence and engagement in transitional justice discourses and action. I distinguish, when possible, between acknowledgement of women's increased and hard-fought presence in the

⁶ On the 'state of the field,' see generally, Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field,"' *International Journal of Transitional Justice* 3(1) (2009): 5–27.

⁷ Emily Graham, Davina Cooper, Jane Krishnadas and Didi Herman, 'Introduction,' in *Intersectionality and Beyond Law Power and the Politics of Location*, ed. Emily Grabham, Davina Cooper, Jane Krishnadas and Didi Herman (London: Routledge, 2009), 2.

transitional justice domain and the articulation of a distinctly feminist view on the issues, policies and politics dominating the field. I then critique the centrality of law to transitional justice and, following decades of feminists theorizing, explore the hazards and limits of law as the domain for gender transformation. Finally, I address the problem of fully articulating and then addressing the harms experienced by women as they manifest in transitional justice mechanisms. The analysis explores new pathways for feminist articulations of gendered harm by conceiving of acknowledgement for female-centred harms in innovative ways.

A Brief History of Presence and Engagement

Articulating feminist perspectives on transition is not a straightforward matter. Feminist theorizing has made significant inroads in the academy across multiple disciplines,⁸ but despite a general tendency 'to assume a feminist orthodoxy, feminist scholarship within and beyond law is expressive of significant diversity and derives from a range of different political, cultural, and philosophical traditions.'⁹ Without situating this analysis in any single perspective,¹⁰ I seek to engage substantial elements of feminist methodology in an effort to identify where these have already been in play in the transitional context, and to distinguish where further use could be made of them. I also assess the extent to which a feminist approach comes with its own baggage, namely the tendency to frame political objectives with criminal justice strategies focused on victims and perpetrators in the transitional context to the fore.¹¹ Moreover, a significant body of gender-oriented work in transitional justice has mirrored the broader liberal legalism of the field by assuming *de facto* that all women in all settings implicitly prioritize certain issues (specifically, truth, justice, memorial practices and reparations). It has thereby downgraded other transitional issues, including social and economic equality, reproductive health and choices, cultural identity and the other criss-cross of interlocking identities in conflicted or repressive societies.¹²

This article primarily engages legal norms, institutions and processes and explores commonalities that exhibit in a feminist engagement with law. These are expressed by Joanne Conaghan as follows:

First, feminist legal scholars seek to highlight and explore the gendered content of law to probe characterizations positing themselves as neutral and, more specifically, ungendered. Second, they are part of a cross-disciplinary feminist effort to challenge

⁸ For example, Sandra Harding, *The Science Question in Feminism* (Ithaca, NY: Cornell University Press, 1986).

⁹ Joanne Conaghan, 'Reassessing the Feminist Theoretical Project in Law,' *Journal of Law and Society* 27 (2000): 357.

¹⁰ Including liberalism, socialism, Marxism, critical legal studies, critical race theory, poststructuralism and postmodernism. The approach can be described as eclectic theorization.

¹¹ See generally, Bronwyn Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (Cambridge: Cambridge University Press, 2011).

¹² Nadera Shalhoub-Kevorkian, 'Palestinian Women and the Politics of Invisibility: Towards a Feminist Methodology,' *Peace Prints: South Asian Journal of Peacebuilding* 3(1) (2012): 1–21.

traditional understandings of the social, legal, cultural, and epistemological order by placing women, their individual and shared experiences, at the centre of their scholarship. Thirdly, feminist legal scholars seek to track and expose law's implication in women's disadvantage with a view to bringing about transformative social and political change.¹³

I acknowledge that these premises are not without contention in the feminist legal community and that debate persists as to the costs (and benefits) of apparent fragmentation in feminist legal discourse. Moreover, any approach grounded in a feminist legal theory has reason to be modest and recognize its own restrictions.

The Presence of Women in Transitional Justice

To address gendered 'presence' in transitional settings, I distinguish here in a preliminary way between women as objects of transitional justice processes (primarily as victims) and women as exerting autonomous capacity in these processes (as negotiators, political actors and change agents). In examining the emergence of transitional justice and ascertaining where women were located, one is confronted with a field that was predominantly male in composition and masculine in its articulations. Not only were men the ones principally writing and present in the public spaces of elite discourse, but the early concerns that dominated the field – 'peace versus justice' discussions, amnesty trades for political participation, the legal limits of supranational legal accountability and so forth – were also articulated without reference to women's experiences.

Thus, women's engagement with transitional justice as both objects and independent actors started as a politics of presence. The challenge was to centre women in the frame of transitional justice discourse and practices, to make women and their experiences visible, primarily as legitimate objects of transitional justice attention. Presence was initially shaped by asking 'the woman question' in a discourse that was, in theory,¹⁴ occupied with questions of universal application but rarely brought the distinct experiences of women into view. The methodological inquiry of separating out 'woman' from 'feminist' in this exercise constitutes a potentially hazardous enterprise. It would be a mistake to conflate the two or to presume that emphasizing the inclusion of women within the discourse (adding women and stirring) involved any commitment to reordering gender relations so as to reconstitute structural exclusion, discrimination and pervasive violence against women. Moreover, bringing women primarily into view as victims posed its own contradictions and tensions, reinforcing stereotypes of women's fragility and need for protection. As feminist scholars have noted, calling international law into play to 'protect' women in such circumstances reinforces patriarchal patterns and may buttress rather than subvert gender hierarchies.¹⁵

¹³ Conaghan, *supra* n 9 at 359.

¹⁴ Katharine T. Bartlett, 'Feminist Legal Methods,' *Harvard Law Review* 103 (1990): 829–888.

¹⁵ Diane Otto, 'The Exile of Inclusion: Reflections on Gender Issues in International Law Over the Last Decade,' *Melbourne Journal of International Law* 10 (2009): 11–26.

While scholarly work has sought to clarify the origins of the field of transitional justice, throughout these accounts women and gender figure marginally in the story of why, how and in what forms transitional justice emerged. For example, Jon Elster grounds a narrative of transitional justice in a centuries-old telling of cycles of violence, retribution and accounting – to greater and lesser degrees growing in intensity over time.¹⁶ Ruti Teitel's genealogy of transitional justice is intimately bound up with the compact made to seek accountability for the atrocities of the Second World War.¹⁷ In a highly contemporary telling, Paige Arthur asserts that transitional justice emerged in the late 1980s as a consequence of the practical challenges human rights activists faced in a variety of Latin American settings.¹⁸ A macro women's history of transitional justice has yet to emerge, although fragmented accounts of women's experiences in national and transnational settings are available. A feminist genealogy is similarly scrappy and uneven, parsing out where interventions around women contained a transformative political agenda driven by equality and autonomy demands. The need for such a history is confirmed by the recent upsurge of meticulous scholarship showing the pervasive historical repression and systematic violence experienced by women, which is paralleled by absolute deficiency in accountability across jurisdictions and time.¹⁹

Bringing Women into Regulatory Frameworks

An investigation of distinctly feminist responses to transitional justice would commence with the formidable groundwork laid by Hilary Charlesworth, Christine Chinkin and Shelly Wright in the early 1990s. Their collective scholarship draws on wider feminist theorizing and recognizes how 'law privileges a male view of the universe,'²⁰ with an emphasis on the incorporation of the public/private distinction, 'operating in the public realm of the collectivity, leaving the private sphere of the individual untouched,' with evident consequences for women.²¹ These entrenched and deeply gendered practices in international and comparative law making have had a healthy cross-pollination with the emergence of the subfield of transitional justice.

¹⁶ Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004).

¹⁷ Ruti Teitel, 'Transitional Justice Genealogy,' *Harvard Human Rights Journal* 16(1) (2003): 69–94.

¹⁸ Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice,' *Human Rights Quarterly* 31(2) (2009): 321–367.

¹⁹ See, Antonia I. Castañeda, 'Sexual Violence in the Politics and Policies of Conquest: Amerindian Women and the Spanish Conquest of Alta California,' Cathy L. Gaca, 'Girls, Women, and the Significance of Sexual Violence in Ancient Warfare,' and Anne Curry, 'The Theory and Practice of Female Immunity in the Medieval West,' in *Sexual Violence in Conflict Zones: From the Ancient World to the Era of Human Rights*, ed. Elizabeth D. Heineman (Philadelphia, PA: University of Pennsylvania Press, 2011).

²⁰ Hilary Charlesworth, 'What Are "Women's International Human Rights"?' in *Human Rights of Women: National and International Perspectives*, ed. Rebecca J. Cook (Philadelphia, PA: University of Pennsylvania Press, 1994), 65.

²¹ Hilary Charlesworth, 'Feminist Method in International Law,' *American Journal of International Law* 93 (1999): 387.

A congruent feminist approach emerges with the work of scholars mapping the early lacunae of accountability for gendered crime and female experience in the post-Second World War period. This work has amply illustrated the extent to which women (and harms that directly affected women) were excluded from consideration in the treaty formulations, prosecutorial strategy and narratives of the Nuremberg, Tokyo and other trials.²² The disadvantage to women was palpable. If the legal roots of transitional justice lie in an amalgam of the fields of armed conflict, human rights and international criminal law, women's regulatory exclusions help explain the position women occupy as outsiders to the mainstream of contemporary legal norms. Feminist positioning illuminated harms, but it also came with a policy-driven agenda of shaping the legal frameworks across these intersecting fields so as to 'capture' harms to women done by law and to shape legal form to women's needs and experiences.

The legal ethnography shows international law's structural incapacity to address gendered violations. This early patterning extended the complex social consequences of failing to name those experiences as crimes under existing universal legal frameworks (whether under treaty or customary law) and pitching these lacunae into national systems. Scholarly and policy work that sought to bring a gendered perception to bear on these regulatory gaps had a pragmatic doctrinal dimension. For example, the failure to include rape as a 'grave breach' of the Geneva Conventions in 1949 underscored the lack of sanction for penetrative sexual violence in national legal systems. The prohibitions contained in the Geneva Conventions define rape as an offense against honour, which tells us not only that all-encompassing sexual crimes against women have historically been excluded from legal prohibition under the laws of war but also that, when included, they have been facets of male status violation underscoring and compounded the exclusion of female experiences from international law's full protection. The approach feminist international lawyers took to remedy the evident gaps were informed by mainstream feminist theorizing, with marked influence from the dominance stream of feminist scholarship fixed on the centrality of control and power to the experiences of women.²³

This mapping of absence and exclusion was not contemporaneous; it occurred decades after the Nuremberg trials and the negotiations on the Geneva Conventions as well as the Additional Protocols to the Geneva Conventions. In drawing attention to the absence of women (primarily as victims), scholars were critical of enshrining a gendered apparatus in international humanitarian law and the emerging field of international criminal law.²⁴ This approach emphasized, for

²² Fionnuala Ní Aoláin, 'Sex-Based Violence and the Holocaust: A Re-Evaluation of Harms and Rights in International Law,' *Yale Journal of Law and Feminism* 12 (2000): 43–84.

²³ Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987).

²⁴ Doris Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law?' *International Criminal Law Review* 11 (2012): 409–423; Otto, *supra* n 15.

example, the myriad ways in which the values and capture of international humanitarian law diverted attention from the harms women actually confronted in armed conflict. Such mapping is important and has a direct link to understanding how and why accountability for sex-based violence remains challenging in transitional settings. In the aftermath of the Cold War, Anglo-American scholars concerned with protecting women's human rights encouraged greater attention to women's individual experiences of violence, and specifically the perpetration of gendered crimes.

This development did not result organically but was precipitated by the (then) shocking knowledge of systemic rape in the former Yugoslavia. This stiffened feminists' resolve to pursue the institutional goal of including gender crimes in the Statute of the International Criminal Tribunal for the former Yugoslavia and making the operational work of the Tribunal gender sensitive.²⁵ This phase was firmly focused on the politics and practice of legal presence, with an emphasis on women as objects (victims) of harm. Feminists sought to forge the link between women's advocacy and forcing advances in the creation and enforcement of international criminal law. Doris Buss has neatly observed that some substantial feminist work has been done in this setting by recognizing and 'naming' certain harms experienced by women as international crimes, as well as by creating an authoritative space generating 'substantial "official" and scholarly knowledge about the gendered effects of conflict.'²⁶

The establishment of the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda gave a focal point to activism and secured visibility for sexual violence, as high-profile judgements on sexual violence as crimes against humanity and genocide ensued. The success of this effort required close tending, and apparent success in the form of some jurisprudential achievements should not be overstated.²⁷ For example, what are now lauded as lofty accomplishments in the Rwanda Tribunal's decision in the Akayesu case, which broke ground in identifying gender violence as genocide, occurred as a result of the initiative of two judges and the persistence of gender-focused international non-governmental organizations, not from enthusiastic prosecutorial initiative.²⁸ The recent approach of the Special Court for Sierra Leone to the crime of gender persecution,

²⁵ Rhonda Copelon, 'Towards Accountability for Violence Against Women in War: Progress and Challenges,' in *Sexual Violence in Conflict Zones: From the Ancient World to the Era of Human Rights*, ed. Elizabeth D. Heineman (Philadelphia, PA: University of Pennsylvania Press, 2011); Fionnuala Ní Aoláin, Dina Francesca Haynes and Naomi Cahn, *On the Frontlines: Gender, War and the Post-Conflict Process* (Oxford: Oxford University Press, 2011).

²⁶ Buss, supra n 24 at 414.

²⁷ See, Judgement, *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T (2 September 1998); Judgement, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T (22 February 2001).

²⁸ Richard J. Goldstone, 'Prosecuting Rape as a War Crime,' *Case Western Reserve Journal of International Law* 34 (2002): 277–285; Nienke Grossman, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?' *Chicago Journal of International Law* (forthcoming).

the addition of gender-based charges to indictments and articulations on the crime of 'forced marriage' all point to pitfalls in advancing a holistic feminist response to extreme atrocity, even as progress is made.²⁹ As scholars reflecting on the crime of forced marriage have noted, despite efforts to move beyond an emphasis on penetrative sexual violence, the jurisprudence remains bogged down in a preoccupation with the sexual aspects of this new category, to the detriment of expanding the legal consequences that follow from other equally humiliating aspects of forced marriage.³⁰ Despite jurisprudential successes, gender violence cases have been a small portion of the prosecution's focus in international criminal trials and a proverbial 'drop in the ocean' compared to women's experiences of sexual and other harms in each setting.

As the *ad hoc* Tribunals wind down, the accountability motif has maintained a strong resonance for feminists. Much energy has been devoted to augmenting and expanding the reach of international criminal law to account for the particular harms of sexual violation. Ongoing activism to ensure that the definitional advances contained in the statutes of the *ad hoc* Tribunals and the International Criminal Court shape norm development in domestic legal systems is still required.³¹ Yet, the emphasis on definitional advances, while highly attractive as a measure of progress for lawyers and legal scholars, may speak little to the perceived impact of transitional justice for women as they experience the reality of inequality, exclusion and ongoing vulnerability to violence. Recent reflections on the feminist dimensions of international criminal law stress how 'criminal law has always been a contradictory site for feminist activism,' accentuating the 'fundamental incompatibility between the structure of a criminal law focused on the punishment of individual crimes, and the "precepts and goals" of feminist activism directed at eradicating gender inequality.'³² A challenge to any feminist analysis, then, is whether the expressive dimensions of international criminal law are sufficient to satisfy transformative agendas, and, if not, how to advance such communicative effects.

As international legal norms were activated to address systematic human rights violations, the limits of criminal law to confront atrocity and advance reconciliation became acknowledged. As alternative mechanisms were identified – truth processes, lustration and reparations – shifting the perceived balance between accountability and political agreement became currency in the transitional justice arena. Here, women came belatedly to the conversation, seeking to insert voice

²⁹ Valerie Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments,' *Cornell International Law Journal* 44 (2011): 49–74.

³⁰ *Ibid.*

³¹ See, for example, *Women and International Criminal Law*, special issue of *International Criminal Law Review* 11 (2012).

³² Buss, *supra* n 24 at 415–416.

and experience into truth recovery and attendant processes.³³ The same ‘late arrival’ narrative has characterized interventions as well as discussions concerning amnesty for combatants and reparations for victims. The voice inserted was also generally that of the victim subject, seeking both to ‘name’ the harms experienced and have women’s voices validated in another authoritative space. Despite significant efforts, the presence of women in these sites remains variable and complicated by their unrelenting standing as victims.

Institutional and Peace Process Presence

As the voice of the female victim was projecting out from a range of legal and quasilegal spaces, other pressures to augment women’s presence in political processes aimed at negotiating and/or ending conflicts were emerging. In 1995, the Fourth World Conference on Women in Beijing addressed, *inter alia*, the challenges of women victimized by conflict. The Beijing Platform for Action, in discussing ‘Women and Armed Conflict,’ identified a set of strategic objectives in the gender/conflict arena.³⁴ Given that the post-Cold War period was marked by ethnic and state disintegration conflicts, varying peace negotiation processes followed. The absence of women as actors in these processes became glaringly evident and garnered institutional and policy attention.³⁵ The culmination of much advocacy and coalition building among international women’s organizations was UN Security Council Resolution 1325. Beyond reaffirming a victim-centred discourse and recognizing the disparate impacts of conflict on women and children, the resolution also expressly promotes a more active role for women as agents of transitional justice, peacebuilding and conflict prevention.

A 2004 report by the UN secretary-general reaffirms much of the content of Resolution 1325,³⁶ yet translating presence (more women as negotiators, lawyers, judges, non-governmental overseers and more) into concrete developments remains piecemeal. A review by the UN Development Fund for Women (UNIFEM) of 21 major peace processes conducted since 1992 shows that only 2.4 percent of signatories of peace agreements have been women, and that no women have been appointed chief/lead peace mediators in UN-sponsored peace talks.³⁷ A more recent study by Bell and O’Rourke of 585 peace agreements

³³ Fiona Ross, *Bearing Witness: Women and the Truth and Reconciliation Commission in South Africa* (London: Pluto Press, 2003); Fionnuala D. Ní Aoláin and Catherine Turner, ‘Gender, Truth and Transition,’ *UCLA Women’s Law Journal* 229 (2008): 229–279; Ruth Rubio-Marin, ed., *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations* (Cambridge: Cambridge University Press, 2009).

³⁴ UN, *Beijing Declaration and Platform for Action* (October 1995).

³⁵ See, for example, the UN Commission on the Status of Women’s 2002–2006 thematic work on the equal participation of women in conflict prevention, management and conflict resolution and in postconflict peacebuilding.

³⁶ ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,’ UN Doc. S/2004/616 (23 August 2004). These principles were reaffirmed in a follow-up report with the same title: UN Doc. S/2011/634 (12 October 2011).

³⁷ UN Development Fund for Women, *Women’s Participation in Peace Negotiations: Connections between Presence and Influence* (2009).

concluded since 1990 found that only 16 percent contain any reference to women and only 7 percent mention gender equality or women's human rights.³⁸ Resolution 1325 has increased the overall percentage of references to women from 11 percent to 27 percent but close study reveals that this should not be read as substantive engagement with the needs and issues women present in postconflict settings, and may constitute a wily form of gendered window dressing. Thus, presence alone may not fundamentally reshape women's engagement in transitional justice processes nor shape outcomes. Neither does it constitute a feminist intervention. That stated, it remains a necessary first step to forward-looking transformation for women.

In the authoritarian transitions that dominated the early construction of transitional justice, feminist discourse was largely absent.³⁹ More precisely, it was absent in the globalized settings that facilitated comparative exchange about how successor regimes would 'reckon with the past.' A more nuanced story can be told about ongoing feminist activism at the local level, directed by practical engagement with grassroots issues.⁴⁰ Here, the focus initially lay in bringing the harms women had experienced as subjects of repression into public view and on presence. For example, early work by key feminist scholars and activists in South Africa brought attention to the lack of a coherent gender strategy at the Truth and Reconciliation Commission (TRC), ultimately forcing a set of hearings on the experiences of women *qua* women under apartheid.⁴¹ While the TRC final report mutes women's voices throughout the narrative it endorses, grassroots activism around the TRC demonstrates the ongoing work of gendering the transition that occurs parallel to official transitional mechanisms in many societies.⁴² In Chile, the work of naming the gendered harms women experienced in detention during the Pinochet era did not come from mainstream human rights organizations but rather from feminist activists and scholars working off the radar.⁴³ More recently,

³⁸ Christine Bell and Catherine O'Rourke, 'Peace Agreements or Pieces of Paper? The Impact of UNSC Resolution 1325 on Peace Processes and Their Agreements,' *International and Comparative Law Quarterly* 59 (2010): 941–980.

³⁹ Arthur, *supra* n 18. See also, Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman, OK: University of Oklahoma Press, 1992).

⁴⁰ Catherine O'Rourke, *The Law and Politics of Gender in Transition: A Feminist Exploration of Transitional Justice in Chile, Northern Ireland and Colombia* (PhD diss., University of Ulster, 2010). See, for example, Women's Resource and Development Agency, *A Gender Critique of the Draft Consultation Documents, Programme for Cohesion, Sharing and Integration* (2010). See also, Alison Crosby and M. Brinton Lykes, 'Mayan Women Survivors Speak: The Gendered Relations of Truth Telling in Postwar Guatemala,' *International Journal of Transitional Justice* 5(3) (2011): 456–476.

⁴¹ Beth Goldblatt and Sheila Meintjes, 'South African Women Demand the Truth,' in *What Women Do in Wartime: Gender and Conflict in Africa*, ed. Meredith Turshen and Clotilde Twagiramariya (New York: Zed Books, 1998).

⁴² Pumla Gobodo-Madikizela, with contributions by Fiona Ross and Elizabeth Mills, *Women's Contributions to South Africa's Truth and Reconciliation Commission* (Denver, CO: Hunt Alternatives Fund, 2005).

⁴³ Ximena Bunster-Burotto, 'Surviving Beyond Fear: Women and Torture in Latin America,' in *Women and Change in Latin America: New Directions in Sex and Class*, ed. June Nash and Helen I. Safa (South Hadley, MA: Bergin and Garvey, 1985).

in Afghanistan, women activists worked to ensure that grassroots women's activism would be included in the Bonn Conference and faced a similar dynamic of being 'lost in translation' to the elite political locales in which the conflict-ending and political structure decisions are made.

Once again, teasing out what constitutes 'feminist' positioning in this context is challenging, as many of the prime agents participating in the political and legal work would not necessarily frame their efforts as feminist *per se*. Nonetheless, the translation of the language of equality, inclusion and addressing gendered relations in the political accounting process contains elements foundational to feminist doing. Women's activism is a classic version of 'transitional justice from below,'⁴⁴ in which women's civic participation and ongoing work by women's organizations on 'women's issues' (rape, domestic violence, family breakdown or disappearance of family members) is maintained under authoritarian rule. This activism provides concrete examples of feminist consciousness rising in a microsetting where women are able to articulate common experiences of harm, thereby recognizing the patterns of gendered brutality being foisted upon them.⁴⁵ This activism provides a distinct counterpoint to the overarching human rights narratives produced by local and international non-governmental organizations, as well as the scholarly interventions that rely on them, which tend to displace or obscure women's experiences and contributions.⁴⁶

Notably, such local agitation and advocacy have rarely received national or international attention. However, grassroots confrontations mean that women have remained in a process of sustained engagement with justice and its absence at the local and particular level. Disjunctively, the forms and content of their activism were only partially reflected in the abstract theorizing that framed the construction of transitional justice. While much attention is focused on the appearance of the term 'transitional justice' and identifying who can claim ownership of it,⁴⁷ little emphasis is given to articulating the kinds of biases that have been imbued in the term's domain by virtue of who happened to be driving certain kinds of social and political movements challenging repressive political forces. An important point of intersection here is feminist articulation of the ways in which discourse itself is constructed.

'Seeing' Gender

In conceptualizing repressive politics and their accompanying human rights violations, scholarly and policy rejoinders to the phenomena of political repression generally failed to take account of the experiences of women. I move the analysis

⁴⁴ Kieran McEvoy and Lorna McGregor, eds., *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Oxford: Hart Publishing, 2008).

⁴⁵ Heather Ruth Wishik, 'To Question Everything: The Inquiries of Feminist Jurisprudence,' *Berkeley Women's Law Journal* 1 (1985): 64–77.

⁴⁶ Jelena Subotić, 'The Transformation of International Transitional Justice Advocacy,' *International Journal of Transitional Justice* 6(1) (2012): 106–125.

⁴⁷ Arthur, *supra* n 18.

here to a discussion of the specificity of women's experiences in both repressive and conflict contexts and to a reflection on recent scholarly work that seeks to capture these experiences and thereby reposition modalities of harm analysis. I have previously noted the extent to which conceptions of political violence as captured by transitional justice practices ignore accounts of the violence women experience and import a sharp version of the public/private divide squarely into transitional justice discourses.⁴⁸

Recent research by Conway Henderson has called upon scholars and non-governmental organizations to revise the concept of political repression in a way that makes it gender sensitive⁴⁹ and recognizes that women experience repression differently from men. As Henderson observes,

Besides the well-known acts of detention, disappearance, torture and murder, women are also the unfortunate recipients of sexual harassment and degrading treatment . . . Women often face their imprisonment by being forced to share quarters with men. They are sometimes subjected to virginity exams and regularly denied articles for female hygiene. Women may find themselves subject to coerced prostitution or pregnancy. Usually it is women whom authorities take hostage to force political suspects to turn themselves in to police. Threats of rape are common for female political prisoners . . . Authorities [in to] both women in public roles and women associated with men in public roles.⁵⁰

Henderson's empirical work demonstrates the viability of generating gender-specific data on the forms of gendered repression under authoritarian and illiberal regimes.⁵¹ It stands at odds with much of the literature articulating a universal narrative on the contents of the transitional justice paradigm – as it speaks to law, morality and politics – but the broader scholarly literature remains contradictory in its imprecise capture of women's experience.⁵²

Importantly, the early dominant (and supposedly universal) transitional narrative was not devoid of contradictions and pressures. For example, scholars debated whether transitional justice was too narrowly conceived to capture the extent to which various legal, political and historical processes confronted, addressed or overcame the past, but these identified fault lines were largely devoid of gendered content.⁵³ Such internal dissensions did not take gender

⁴⁸ Fionnuala Ní Aoláin, 'Political Violence and Gender during Times of Transition,' *Columbia Journal of Gender and Law* 15 (2006): 829–849.

⁴⁹ See, Conway W. Henderson, 'The Political Repression of Women,' *Human Rights Quarterly* 26 (2005): 1028–1049.

⁵⁰ *Ibid.*, 1032.

⁵¹ The work demonstrates, *inter alia*, that variables representing empowerment and vulnerability have meaningful relationships with repression. *Ibid.*

⁵² The scholarly and activist group identified as central to the emergence of a transitional justice field includes prominent women scholars, most notably Ruti Teitel and Diane Orentlicher, but the leaders/activists identified in a number of the 'tellings' are predominantly men (José Zalaquett, Neil Kritz, Aryeh Neier, Carlos Nino, Thomas Buergenthal, Theo van Boven, Philippe Schmitter, Samuel Huntington, Juan Linz and John Hertz).

⁵³ Timothy Garton Ash, 'The Truth about Dictatorships,' *New York Review of Books*, 19 February 1998.

exclusions into account or even bring them into the frame of self-reflection on the field. The reasons for such omissions cannot be regarded in isolation. They were part of a broader scholarly and policy blind spot in which conceptions of human rights and international norms were envisioned as all encompassing, and they have led to a broader set of feminist interventions about the patriarchal bias that imbues these norms.⁵⁴ Moreover, these omissions necessarily bring attention to the construction of the transitional justice discourse itself, revealing persistent patriarchal fault lines no different to other legally dominant frames.

Generally (though with notable exceptions), feminist scholars (and women activists concerned with women's specific experiences) were not involved in the production of knowledge leading to the conceptual formation of transitional justice discourses. This observation is relevant in whatever one accepts as the starting point for the transitional justice field. As transitional justice's contours expanded beyond the confines of the move-to-democracy model and its mechanisms began to be seen as applicable to transitions from violent armed conflict, some gender shifts became apparent. An engaged history of feminist activism, combined with a substantial scholarly agenda on the issues of war and peace as they affected women, influenced the emergence of feminizing transition.⁵⁵

A diverse and growing feminist challenge brings an array of scholarly insights, sharpening and expanding the extent to which transitional justice is seen to engage issues involving women. Feminist scholars have disputed the presumed advantages of key mechanisms, particularly the restorative justice practices offered as meaningful alternatives to formal justice systems.⁵⁶ An array of interventions, from reparations to those that highlight intersectionality, is emerging and shaping how key concerns impinging on women's lives could be reframed in transitional contexts.⁵⁷ That the expansion of transitional justice to the postconflict domain has engaged women more substantively is an interesting, if unpredictable, move.

Moreover, the feminist influence has had a looping effect, pushing feminists to reassess the 'third wave' of transitions, as the recent work of political theorist Georgina Waylen demonstrates.⁵⁸ Here,

⁵⁴ See, Hilary Charlesworth, 'The Hidden Gender of International Law,' *Temple International and Comparative Law Journal* 16 (2002): 93–102.

⁵⁵ Copelon, supra n 25; Cynthia Cockburn, *The Space Between Us: Negotiating Gender and National Identities in Conflict* (London: Zed Books, 1998); Cynthia Enloe, *Bananas, Beaches and Bases: Making Feminist Sense of International Politics*, 2nd ed. (Berkeley, CA: University of California Press, 2001); V. Spike Peterson, ed., *Gendered States: Feminist (Re)Visions of International Relations Theory* (Boulder, CO: Lynne Rienner, 1992).

⁵⁶ Catherine O' Rourke, 'The Shifting Signifier of "Community" in Transitional Justice: A Feminist Analysis,' *Wisconsin Women's Law Journal* 23 (2008): 269–291.

⁵⁷ See, Fionnuala Ní Aoláin and Eilish Rooney, 'Underenforcement and Intersectionality: Gendered Aspects of Transition for Women,' *International Journal of Transitional Justice* 1(3) (2007): 338–354; Ruth Rubio-Marin and Pablo de Grieff, 'Women and Reparations,' *International Journal of Transitional Justice* 1(3) (2007): 318–337.

⁵⁸ Georgina Waylen, *Engendering Transitions: Women's Mobilization, Institutions and Gender Outcomes* (Oxford: Oxford University Press, 2009).

some of the triumphalism evident at the height of the third wave in early 1990s has dissipated as many democracies are of low quality and the number of states have either suffered ‘reversals’ or outcomes in the ‘grey zone.’⁵⁹

This body of research takes a close look at the neglected arena of variable gender outcomes in posttransition contexts, with a particular emphasis on the way in which politics in democratization are gendered.

Finding the Feminist Space

With this backdrop, identifying how scholars created analytical space and brought attention to the ‘woman question’ allows us better to understand the pragmatic dimensions of feminist engagement with transitional justice discourses. As transitional justice is rooted in the immediacy of political moves (and institutional reformulations that follow), feminists face the oft-encountered challenge of using the group identity of ‘woman’ to shape and define political process. Such processes are generally structurally inclined to exclude women but provide complexity in framing who is being argued for and what is being sought for them. One has to walk the tightrope of what Ann Scales has termed ‘incorporation’⁶⁰ – losing your own project by being harnessed to another – and this challenge is one perpetually faced by feminists involved in the political realities of making transitions work for women.

I suggest that feminist scholars’ initial emphasis had a hard-headed and practical edge. The goal was first and foremost to ‘bring a gendered perception of legal and social arrangements to bear upon a largely gender-neutral understanding of them.’⁶¹ Making visible the experiences of women as victims and objects upon whom violence was committed was one evident and early stream of inquiry, quickly followed by agitation concerning the need for women’s presence in negotiations, peace agreements and political settlements. I am not suggesting that women were not present to human rights violations as victims, observers, agents and perpetrators in repressive and conflicted societies – the Mothers of the Plaza de Mayo in Argentina attest otherwise – but rather that women often appeared as archetypal female figures, invoking images designed to confront repressive regimes with readily accessible notions of womanhood often appropriated by such regimes for their own purposes. They exposed the harms to woman as mother, wife and grandmother, and thereby revealed a fraud of appropriation as well as the specific harms visited upon women. An evident essentialism was necessary and appropriated by women themselves to engage in this confrontational politics with a deeply gendered hue. This strategic essentialism has advocates within the feminist political, advocacy and scholarly communities, who claim ‘that it permits political invocations of “woman”/“women” as categories without assuming the existence of a unitary female identity or denying its discursive

⁵⁹ Ibid., 1.

⁶⁰ Ann C. Scales, ‘Towards a Feminist Jurisprudence,’ *Indiana Law Journal* 56 (1981): 377, 435.

⁶¹ Conaghan, *supra* n 9 at 359.

derivation.⁶² In this context, the politics of presence – literally holding the public space of confrontation against the state *as women* – can be regarded as an important ingredient of moving women into view as relevant actors in the transitional justice drama.

Invocation and essentialism have their costs, and the difficulty remains that calling women into view in ways that affirm stereotypes can undercut arguments that mandate treating women as fully engaged actors with independent, cross-cutting and competing needs.⁶³ This bind cuts across the issues addressed later in the article, as the importance of agency and women's autonomy is advanced in transitional sites. In its earliest guise, this stereotype presented women primarily as object victims of human rights abuses, and principally as secondary victims, functioning largely as testimonial shells to the harms experienced by men and those families and communities to whom they had connection. These narrative and documentary roots that emphasized women as victims pose some challenges to mandating and reinvigorating the presence of women as agents of change. Thus, a warning: As the landscape of transitional justice increasingly invokes the dependent sexualized female subject, the danger that strategic essentialism may affirm rather than confront 'the racist, ethnocentric and heterosexist tendencies in essentialist feminism' is omnipresent.⁶⁴

A feminist scholar engaging with transition is in danger of making some fundamental mistakes, which include not seeing one's own position in the project of moulding the field. One's colour, ethnicity, religion and sexual orientation are all relevant to framing the theoretical field(s) upon which one should or does stand. It should be obvious that the discussion of representation risks being trapped in the snare of equality/inclusion feminism, where an emphasis on including women to match off the presence of men fails to address the hierarchies of race, ethnicity, religious affiliation and social status that privilege elite women partly because their biographies look the most like those of the men present and included in transitional processes. Equally evident is that 'gender essentialism has dominated the discourse in feminists' arduous work to eradicate sexism, thereby marginalizing issues of class, ethnicity, race and culture,' leaving out the multidimensional experiences of women for whom race, class and sexual difference are discrimination and violence multipliers.⁶⁵ Thus, in positing a feminist analysis of or within the field of transitional justice, some complex interweaving must be done.

The Limits of Law

Transitional justice emerged from compelling arguments for accountability in transitional settings. Any engagement with legal reform for feminists, however,

⁶² Ibid., 369.

⁶³ Otto, *supra* n 15.

⁶⁴ Rosemary Hunter, 'Deconstructing the Subjects of Feminism: The Essentialism Debate in Feminist Theory and Practice,' *Australian Feminist Law Journal* 6 (1996): 156

⁶⁵ Berta Esperanza Hernández-Truyol, 'Las Olvidadas – Gendered in Justice/Gendered Injustice: Latinas, Fronteras and the Law,' *Journal of Gender, Race and Justice* 1 (1997): 353–404.

has to be undertaken with awareness of the structural barriers inherent for women in legal norms and institutions. While transitional justice emerged from multi-jurisdictional and multisystem experimentation, across these systems the normative is, to paraphrase Berta Esperanza Hernández-Truyol, white, male, Judeo-Christian, dominant language-speaking (English, Spanish), educated, moneyed, propertied, heterosexual and able bodied.⁶⁶ As the lynchpin of transitional justice practice, legal form and substance offer the attraction of tapping into a tradition that gives reverence to its association with the values of consistency, universality, objectivity and fairness.⁶⁷ Allowing transitional justice work to be done under the banner of law enables certain issues to be characterized as 'legal issues' and not merely matters of political choice. The characterization can hide the ways in which law is colonized by politics and can be used to advance political decision making.⁶⁸ One fault line demonstrated by the critical legal studies movement is captured by Mari Matsuda's phrasing of how 'to articulate a theoretical basis for using law while remaining deeply critical of it.'⁶⁹ Feminists engaged in transitional justice practice must remain attuned to the inherent bias of transitional justice as a grounding structure while utilizing it gainfully to advance women's interests. This is another variation, as Martha Minow notes, of the broader challenge for legal discourse in grappling with the ideas of difference, duality and the tantalizing promise of law itself.⁷⁰ And so, feminist scholars of transitional justice must remain wary (as critical scholars in other contexts have cautioned) of engaging in deconstruction 'just for the sake of it.'

In assessing the limits of law for feminist positioning, one can extract some germane analysis from literary-based discourse theory. Critical discourse analysis studies the 'discursive strategies that legitimize control'⁷¹ or allow one group to establish hegemony over discourse. Feminists might usefully reflect on how hegemonic discourses are much in play in transitional justice and thereby underscore the resistance to both 'naming' gendered harms and the appropriate legal and political mechanisms to address them. Julie Mazzei articulates the issue effectively:

The power of discourse dominance lies in the ability of a hegemonic group to influence 'social cognition' – the social understanding or interpretation of conditions in the political environment. The message of the dominant group may be contested – that is the nature of the discourse. Nevertheless, the dominant group establishes hegemony

⁶⁶ Ibid.

⁶⁷ David Kairys, 'Introduction,' in *The Politics of Law: A Progressive Critique*, 3rd ed. (New York: Basic Books, 1998).

⁶⁸ David Kairys, 'Law and Politics,' *George Washington Law Review* 52 (1984): 243–257.

⁶⁹ Mari J. Matsuda, 'We the People: Jurisprudence in Color,' in *Where Is Your Body? And Other Essays On Race, Gender and the Law* (Boston, MA: Beacon Press, 1996), 24.

⁷⁰ Martha Minow, 'The Supreme Court, 1986 Term – Foreword: Justice Engendered,' *Harvard Law Review* 101 (1987): 10–95.

⁷¹ Teun A. van Dijk, 'Principles of Critical Discourse Analysis,' *Discourses and Society* 4(2) (1993): 249–283. See also, Norman Fairclough, *Discourse and Social Change* (Cambridge: Polity Press, 1993).

and stable domination, with the ability to direct social cognition, creating boundaries of what is considered relevant, appropriate, legitimate and reasonable. Such conditions contribute to self-sustenance of the hegemony.⁷²

Moreover, drawing on Teun van Dijk, she notes how discourse scholars have recognized ‘an important link between ideology, discourse and power relations on the one hand, and the “materialization” of ideology through institutions and social hierarchies, on the other.’⁷³ We could view these concepts and processes as useful to framing what happens in transitional contexts, particularly where states and masculine elites have not really shifted in composition or power locales. While transitions may make some evident demands on these entities, they are not really required to engage fully with the structural causalities of policies and responsibilities that have underpinned systematic gender exclusions, discriminations and violence for women. If such masculine power structures are fundamentally left intact by peace agreements or acknowledgement compacts, and those in control of powerful institutions remain dominant, then penetrating the discursive legacy is unlikely. Moreover, the discursive frame of transitional justice as rooted in legal discourse may bolster rather than challenge dominant hierarchies given the field’s patriarchal roots.

In the context of transition from conflict, Colm Campbell and Catherine Turner note that ‘the limitation of accountability to categories which are prescribed by law . . . excludes a large part of everyday experiences of those, particularly women, who live in conflicted societies.’⁷⁴ The very structure of law and its normativity may be the utilization of relatively rigid categories. If violations ‘fit’ the specific category, they are included; if not, they are not visible and the harm is not recognized as a legal matter. This rigidity has markedly negative consequences for women when their experiences have generally not been included within the overarching legal categories. The limits of law are, of course, also connected to law’s ‘hegemonic quality . . . its tendency to buttress the status quo.’⁷⁵ These criticisms have particular ‘bite’ in transitional contexts.

Much of the attention on integrating a gender perspective into transitional justice practice has been focused on the political and legal agreements facilitating a move from authoritarianism to more liberal forms of governance and from conflict to peace. Accompanying these macro moves are consistent calls for political and legal accountability, drawing on the argument that without accountability for systematic human rights violations, neither peace nor political stability is possible. Inherent in this conversation is a complex interplay that links positive

⁷² Julie M. Mazzei, ‘Death Squads, Security Forces and Private Justice Organizations: Paramilitaries in Contemporary Latin America’ (PhD diss., American University, 2006), 437–438.

⁷³ Julie M. Mazzei, ‘Finding Shame in Truth: The Importance of Public Engagement in Truth Commissions,’ *Human Rights Quarterly* 33(2) (2011): 446. See also, Teun A. van Dijk, ‘Social Cognition and Discourse,’ in *Handbook of Language and Social Psychology*, ed. Howard Giles and W. Peter Robinson (Chichester: Wiley, 1990).

⁷⁴ Colm Campbell and Catherine Turner, ‘Utopia and the Doubters: Truth, Transition and the Law,’ *Legal Studies* 28(3) (2008): 377.

⁷⁵ *Ibid.*, 378.

political movement for state and nonstate actors with normative developments addressing impunity and treaty and customary law obligations for states, as well as an overwhelming pressure from victims. Whether state or nonstate actors want the conversation or not – and not infrequently despite their differences and the broad collusion between them to avoid or minimize it – accountability sits squarely in the transitional justice conversation. As advances in international criminal law have gathered pace, criminal accountability is a trenchant reality. Yet, it was precisely the perceived limitations of formal justice mechanisms that gave rise to the terrain of transitional justice, in which other law-based mechanisms were developed to address the range of needs in a postconflict or postrepression society that criminal law is unable to tackle.⁷⁶

Both criminal law norms and the alternatives have certain similar fault lines, primarily the narrow range of harms for which remedy or accountability is sought. Thus,

transitional justice and human rights need to do more to address structural violence, and in particular poverty/inequality and social and criminal violence, as these have emerged as stubborn legacies from an oppressive or war-torn past in many parts of the world.⁷⁷

To date, the encapsulation of violations in repressive or conflicted states has generally mapped onto the civil and political rights that have been prioritized by the preponderance of states as having enforcement traction in international law. They have typically excluded many of the harms women experience and excluded them as violations, or viewed them as violations of lesser status.⁷⁸ The challenge for a feminist theorization of transition is both to articulate a cogent theory of harm that is sufficient to address the depths of gendered harms experienced by women and to make such a theory generalizable to the myriad of conflict and repressive contexts in which harms are encountered.

Despite a lack of all-encompassing statistical information, women are easily identifiable as victims in the context of repression and conflict. Placing the economic and social status of women squarely in the frame of analysis is critical to understanding why transition often fails to deliver for women. Generally speaking, equality, economic redistribution and social justice are off the table for the purposes of transition.⁷⁹ Commitments to socioeconomic transformation are

⁷⁶ Reparations here include formal understandings, namely ‘the attempts to provide benefits directly to the victims of certain types of crimes,’ as well as symbolic reparations. Pablo de Greiff, ‘Justice and Reparations,’ in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2006), 453.

⁷⁷ Paul Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (London: Routledge, 2011), 3.

⁷⁸ Fionnuala Ní Aoláin, ‘Sex-Based Violence and the Holocaust – A Re-Evaluation of Harms and Rights in International Law,’ *Yale Journal of Law and Feminism* 12 (2000): 43–84.

⁷⁹ See, for example, Ismael Muvingi, ‘Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies,’ *International Journal of Transitional Justice* 3(2) (2009): 163–182; Tafadzwa Pasipanodya, ‘A Deeper Justice: Economic and Social Justice as Transitional Justice in Nepal,’ *International Journal of Transitional Justice* 2(3) (2008): 378–397.

generally articulated as vague principles and not as binding rules. No transitional agreement includes benchmarks for progress on discrimination, health, education, housing and food security as central to its articulation of the transformation necessary for a peaceful or more politically liberal polity. This leads to a clear enforcement gap that cuts across both genders but is, for the reasons outlined above, acutely felt by women.

A fundamental question that many feminist theorists grapple with is whether the ongoing efforts of forcing legal reform ultimately deliver the enduring social and economic shifts that establish the long-term conditions conducive to transforming women's lives.⁸⁰ Across a range of arenas, the limited or skewed reach of law in fully accessing women's lives has been demonstrated, so why pay particular attention to transitional contexts? There is a broader conundrum that crosses legal systems and issues. But transitional states offer a unique moment(s) for renegotiation of the social and political compact. It is precisely because core assumptions, systems and institutions are up for renegotiation that the transitional state offers a unique site for feminist intervention. Moreover, as feminist theorists have grappled with the 'reality gap' between theorizing and the stark realities of women's daily lives marked by inequality, transitional societies offer a redemptive site for the practical endeavour of advancing women's material interests and equality.⁸¹ For this site to deliver, however, old tools of legal modification with an emphasis on incremental change and working with legal resources may not be sufficient. Even when we substantially engage and utilize the law, we need to start with a theory of capture that is sufficient for women's experiences as they manifest in transitional contexts.⁸² Nancy Fraser's call to focus intellectual and political attention on material inequality and redistribution seems particularly apt in the transitional setting, where the abject poverty, economic disenfranchisement and dependency experienced by women are the overwhelming and dominant certainty.⁸³ Having, in part, conceptualized the scope of the challenge and scale of transformation required, we proceed to having a fuller sense of the task at hand.

Feminist Capture and Female Harms

A recurrent theme in this reflection on feminist positionality is the question of why there is a capture problem with gendered harms. Feminist scholars have

⁸⁰ See, for example, Valerie Oosterveld, 'Forced Marriage and the Special Court for Sierra Leone: Legal Advances and Conceptual Difficulties,' *Journal of International Humanitarian Legal Studies* 2(2) (2011): 127–158.

⁸¹ See, Ann Brooks, *Postfeminisms: Feminism, Cultural Theory and Cultural Forms* (London: Routledge, 1997).

⁸² Fionnuala D. Ní Aoláin, 'Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies,' *Queen's Law Journal* 35 (2009): 219–234.

⁸³ See, Nancy Fraser, *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (New York: Routledge, 1997). For a compelling journalistic account, see, Ann Jones, *War Is Not Over When It's Over: Women and the Unseen Consequences of Conflict* (Los Angeles: Metropolitan Books, 2010). See also, Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition,' *Yale Journal of Law and Feminism* 20 (2008): 1–24.

systematically, across legal spheres, identified what law fails to grasp about the exclusionary power of legal practice and categorization. Potent examples include the historical failure of law to account for and address sexual harassment, marital rape, pornography, emotional harms and domestic violence. The value of demonstrating the gap in capture has been substantial, and this gap has been particularly evident in the transitional justice realm. Moreover, the binary quality of legal analysis tends to occlude intersectionality, and thus makes invisible the compounded and overlapping harms that women experience in situations of extremity.

Judith Shklar has written that ‘no theory of either justice or injustice can be complete if it does not take account of the subjective sense of injustice and the sentiments that make us cry out for revenge.’⁸⁴ What might transitional justice theorizing that places the female victim’s negative experiences of domination, cruelty, suffering, exclusion and discrimination at its centre look like? This call evokes a central strategy of feminist methodology, namely woman-centredness as a political and intellectual approach, with particularly strong resonance in legal scholarship. In looking at the world through the lens of the woman victim, feminist scholars not only

highlight the inadequacy of current social arrangements in their failure to properly address or, often, even recognize women’s concerns, but also show how those arrangements tend to privilege and accommodate the needs and aspirations of men.⁸⁵

Women-centred strategies have a solid pedigree in feminist thinking, focused on building theory from the bottom up, based on practices of talking, sharing, storytelling and consciousness raising.⁸⁶ Thus, a starting methodological premise is that placing women’s experiences at the centre of transitional justice interfaces is critical to building a meaningful presence for women in transitional sites. This is also a fundamentally feminist approach, which seeks to offer a better understanding of the social world by exposing aspects that have until now been ignored or misrepresented. This means, in continuous practice, consistently listening and reaching out to women, particularly the poorest, most marginalized and most excluded from the formal processes that dominate standard accountability or deal making in transitional settings. The rhetoric on listening and hearing sounds promising. In practice, it is exceptionally challenging to deliver and most processes do not even try. How might we get there?

In rooting a theory that builds on feminist practices, I suggest that one route would be to utilize George Mead’s notion of the ‘I,’ allied with Axel Honneth’s insight that only intersubjectively – by experiencing recognition from others – can we have any real sense of self.⁸⁷ Mead’s sociologically useful conception of ‘I’ is

⁸⁴ Judith N. Shklar, *The Faces of Injustice* (New Haven, CT: Yale University Press, 1990), 49.

⁸⁵ Conaghan, *supra* n 9 at 364.

⁸⁶ See, Bartlett, *supra* n 14.

⁸⁷ Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge: Polity Press, 1995), in which Honneth provides an account of the social conflicts that emphasize

fundamentally related to a notion of ‘me.’ The ‘me’ is a cognitive device and generally arises from reflection and social interaction. It is this reflective pause that has given capacity to ‘I.’ The sense of the self that comes from reflection is essential to creativity, to our awareness of ourselves and the situations around us and to our capacity to react differently to similar settings in subsequent experience. In this telling, physical harm is not the only or even the most damning injury; the harm is compounded and sometimes only fully felt when accompanied by humiliation, disrespect and social exclusion. Tied to this thinking is the fundamental philosophical insight that there is a close link between ‘self-respect and being a bearer of legal rights.’⁸⁸ These attributes are all essentially connected to the notion of recognition.

The limits of contemporary legal form and the structure of inequality, exclusion and violence in the ordinary lives of most women are part of the backdrop that forecloses the capacity of transitional justice to address the fundamentals of women’s lives. The precise selectivity of transitional justice, in terms of its timelines, its fora and its substantive subject matter concentration, invariably engages gendered exclusions. What results is the denial of self-respect and social respect to women, and these outcomes reinforce the limits of law for women in transitional contexts. This is the gendered sea in which specific injuries and violations swim. Recognition is therefore an essential component of redress. It is not merely a legal element; it compromises recognition of broader social and economic inequities as well as specific recognition and account in legal and other fora. Women-centredness – advancing recognition of the individual female ‘I’ – demands attention to particularity, openness and placement in particular and contextual settings.⁸⁹

Advancing this idea further, it is useful to draw on what Frank Haldemann describes as ‘basic intuition,’ allowing consideration of ‘the idea of a “different kind of justice.”’⁹⁰ In Haldemann’s telling, recognition is essential and essentially individual centred. Feminists can usefully draw on this theory of transition as recognition, stepping away from the ‘emphasis on the restoration of communal bonds’ and instead focusing ‘primarily on the individual’s sense of injustice and threatened self-respect.’⁹¹ Such thinking encourages us to look beyond law to a wider set of social and psychological processes in order to acknowledge the complexity of harms that comprise women’s devalued social context at the particular

the human need for mutual recognition as a precondition for realizing a distinctively human sense of self-realization. See generally, Axel Honneth, ‘Recognition and Justice: Outline of a Plural Theory of Justice,’ *Acta Sociologica* 47(4) (2004): 351–364.

⁸⁸ Frank Haldemann, ‘Another Kind of Justice: Transitional Justice as Recognition,’ *Cornell International Law Journal* 41 (2008): 675–737.

⁸⁹ See, Kathryn Abrams, ‘Hearing the Call of Stories,’ *California Law Review* 79 (1991): 971–1052. See also, Richard Delgado, ‘Storytelling for Oppositionalists: A Plea for Narrative,’ *Michigan Law Review* 87 (1989): 2411–2441.

⁹⁰ Haldemann, *supra* n 88 at 678.

⁹¹ *Ibid.*, 678.

point where they experience a specific violation that merits attention from a transitional justice perspective.

In multiple contexts, women experience structural discrimination, persistent violence, lower social status, formal legal discrimination, lack of access to the public domain, stereotyping and official and informal exclusions. Conflict and/or authoritarian governance are merely another layer added to these ever-present realities. A persistent blind spot for transitional justice has been the entrenched habit of zoning in on specific violations to the individual. That approach has its practicalities: there are relatively clear boundaries to the violations, they map onto agreed harms in international and customary law (e.g., torture, extrajudicial execution, indefinite detention and disappearance) and there are fairly clear precedents for prosecuting or compensating for these harms. However, this narrowing, which is central to the legal domain, evacuates a range of harms and socially relevant contributors to the frequency and depths of the harms women experience. As Paul Gready rightly notes, ‘the transitional justice tool-kit does little to challenge, for example, the impacts of neo-liberal economics and/or rising levels of violent crime and punitive responses to such crime.’⁹² It specifically does little to address the structural harms of discrimination, inequality and violence that characterize many women’s lives.

In sum, if we do not take into account women’s vulnerable legal and social status and the violence they experience in most societies as a routine matter, we leave out a highly relevant part of the practices of harms as they are experienced. We then only offer a modicum of understanding and remedy to the victim. By this I mean that in many contexts, the harm that is legally captured may merely be one piece of the overall macro structure of harm, exclusion and discrimination that encapsulates women’s interface with the state, an armed group, a military force and the broader civilian context in which they live.

As the fullness of these fault lines is revealed, a framework revolving around an ‘ecology model’ of social reconstruction is emerging.⁹³ This approach suggests multiple interventions at multiple levels of society – state, community and individual – spanning a diverse variety of fields: law, economic development, politics, security and education. The interdisciplinary and hybridity element is not happening in isolation but is increasingly a feature of human rights work as it shifts into such fields as development, public health and environmental protection. The move beyond legal responses generally in transitional justice indicates a way of proceeding that has gained traction but is not without its detractors. For feminists, the challenge here is to view the shifting sands of transitional justice theory and practice and to grasp the implications of these moves for women.⁹⁴

⁹² Gready, *supra* n 77 at 8.

⁹³ See, Laurel E. Fletcher and Harvey M. Weinstein, ‘Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation,’ *Human Rights Quarterly* 24(3) (2002): 573–639.

⁹⁴ Drawing on Lydiah Bosire, Gready notes that a clear challenge to ‘bottom-up’ transitional justice is the practical need to strengthen the state and its institutions, particularly in Sub-Saharan Africa. Here, the state is not a luxury and its functionality is a condition precedent to the activation of

Conclusion

This article tells a feminist story around the development of transitional justice and draws attention to the absence of women in the many scholarly contributions that describe the development of the field. It places its narrative in the stream of genealogies that overlook the experiences of women in transitional contexts as well as women's agency in transitional justice processes.

I stress that women appear in transitional justice discourses as both subjects (primarily victims) and increasingly as autonomous agents, with some capacity to exert influence on the issues that dominate in the fraught contexts of political transition. Once women start to appear in the ethnography of transition, they do so in marginal ways. They are present but repeatedly in stylized and archetypal form. Over time, presence becomes the primary motif for articulating a transformed politics of transition. Without a feminist vision that seeks to deploy transitional justice to advance women's interests, however, presence may do little to transform the lived realities of women's lives in terms of the ongoing violence and discrimination they experience. Without attention to other ways of thinking about transitional justice – by drawing on the centrality of law to the endeavour but equally recognizing its functional and practical limitations – overall transformation will remain elusive.

In this vein, I challenge feminist scholars to think of the concept of justice as recognition, explore its capacity to address some of the shortcomings that have been identified in the institutions and practices of transitional justice and use it as one possible building block to get us to a more cohesive and positive feminist version of what justice in transition looks like. In doing so, my goal is to drill down to whether harms (the 'things' to be remedied) in transition are in their conceptualization and practice a route to addressing the needs and desires of women. In thinking through a conceptual widening of the tools of transitional justice to address women's needs, we may make practical and conceptual headway and possibly deliver transformation as well as transition for women.

other mechanisms. Gready, *supra* n 77, referencing Lydiah Kemunto Bosire, 'Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa,' *SUR International Journal on Human Rights* 3 (2006): 71–107.