

No Justice, No Peace: The United States of America Needs Transitional Justice

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In the last 10 days, anger and unrest have spread across the United States. Institutions have buckled, streets are burning, citizens attacked. The President takes cues from authoritarian playbooks and stages photo opportunities to garner support from his white, Christian, conservative base. The rule of law in the US has long been under attack from both external and internal forces (which is ironic given the US' penchant for meddling in other State's political processes). We are now witnessing in the US what happens when human rights are undermined and trust in institutions, such as the police and justice system, is eroded because of systemic racist and discriminatory practices. As slogans of 'No Justice, No Peace' spread across the country, there is hope that real change can occur. Change that transforms political, economic and social structures that enabled and perpetuated gross inequality and racism. To do this, America needs a transitional justice plan. The purpose of this blog post is to start a conversation about how the US can start to engage with its past and present, however uncomfortable it may be. Like the protests, transitional justice processes can serve as catalysts for the much-needed change.

In the last week, many people have said: ‘No one ever imagined it would get this bad’. But is that true? Isn’t this why so many of us mourned for weeks after Trump was elected? We were not just overly emotional. We knew it could get this bad. We understood that democracies and governments built on the rule of law are fragile and require constant protection. Trump’s presidential campaign was run on an ‘anti-trade, anti-immigrant, anti-elitist and often racist and xenophobic’ platform. His actions now should not come as a surprise. Following the 2016 election, there was an increase in membership in hate groups and a surge of hate crimes across the US. Almost immediately, and for the next three and-a-half years, his administration undermined human rights at home and abroad. Internationally, he signaled his disdain for human rights by withdrawing from international arms treaties, UNESCO, the Human Rights Council, and most recently threatened to withdraw from the WHO. He has also issued discriminatory travel bans and threatened international prosecutors. Internally, he has verbally attacked the judiciary and the press; separated and imprisoned families seeking a better life in the US; and most recently condoned the tear gassing of peaceful protesters outside of the White House and allowed unidentified and unaccountable law enforcement to patrol cities. He has a long history of racism, which he openly expresses to divide the American public. The list of questionable and even illegal actions is long, and it highlights the detrimental impact on democratic, rule of law, and justice institutions across the country as well as abroad, leaving little to no checks, oversight, or accountability.

It is important, however, to remember that these detrimental erosions of fundamental human rights and the rule of law hurt some more than others. They are particularly harmful to those who were already marginalized or made vulnerable and fighting for their rights. The Black community in the US has long protested their treatment at the hands of police. They have long been campaigning for prison reform and greater social justice. In stark contrast to his response to White armed-protesters demonstrating against COVID-19 safety measures or his response to the racist, anti-Semitic protests in Charlottesville where he stated there were ‘some very fine people on both sides’, protests led by Black Americans have been framed by the President and his staff as dangerous and ‘anti-American’. The disparities are sickening. The divisions increasing.

These types of situations make clear that the US has never fully engaged with its exploitative, violent, and traumatic past. Born and raised just outside of Atlanta, Georgia, I can attest to the pervasiveness of racism in American society. I was socialized in it. I am part of it. Looking at my country now, having studied states in conflict and their recovery for over two decades, I can see it calling out for repair. My hope for the US, as well as cities and communities across the country, is for it to embark upon an exercise in thinking about how ‘peace’ and ‘justice’ could be achieved for its system of governance and its population. These questions are at the heart of what is often called ‘transitional justice’; a concept closely intertwined with the rule of law and one that the US regularly and actively supports in other countries emerging from conflict and serious human rights abuses. Now is the time for the US to embark on its own self-reflection.

Transitional justice, as a concept, arose in the 1980s and 1990s following the fall of authoritarian regimes in South America. It has since been taken up by the UN, States, and civil society organizations around the world. The UN defines transitional justice 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’. The processes and mechanisms include, for example, domestic and international(ized) trials, truth commissions, reparations, vetting and lustration, and guarantees of non-repetition (such as legal, educational, and security sector reforms, as well as other efforts to promote reconciliation and memorialization). These processes fall within the four pillars of transitional justice: accountability; truth-telling; reparations; and guarantees of non-repetition.

Although the concept is a familiar one to those studying post-authoritarian regimes or in the field of post-conflict peacebuilding, it may be less familiar to those working on domestic justice issues in the US. Nevertheless, there are numerous examples of transitional justice processes being successfully implemented in ‘so-called’ stable, democratic states. America’s Northern neighbor is just one example. Whether in times of armed conflict or civil unrest or peace, States are responsible for responding to human rights violations and transitional justice is fundamentally about how a society deals with past injustices. As a field of study, transitional justice scholarship emphasizes the importance of context, rights-based approaches, and participation. Moreover, transitional justice is a valuable lens through which to view the connections between the varied responses, rather than just seeing them as isolated processes. What could a transitional justice process, based on the four pillars, look like in the US?

First and foremost is the need for criminal accountability for the deaths of George Floyd, Breonna Taylor, and Ahmaud Arbery, as well the many others who have been killed or been injured by police violence due to their skin color. In the US, prosecuting police officers is difficult. For federal charges to be brought under Title 18, US Code, Section 242 (Deprivation of Rights Under Color of Law), prosecutors would need to show beyond a reasonable doubt that a police officer acted willfully to deprive an individual of a federally protected right. If the right at stake is the right to be free from unreasonable seizure under the Fourth Amendment of the Constitution, the prosecutor must also show that the force used was objectively unreasonable. This is a very high standard to meet, resulting in very few criminal cases being pursued. There have been various attempts to pass reform legislation to address excessive police violence and provide accountability, but few have been successful. This needs to change. Those ordering, condoning and carrying out excessive police violence need to be held criminally accountable.

In addition to accountability, the creation of a truth commission could facilitate truth-telling and address social justice concerns. Established in more than 40 countries around the world to deal with apartheid, dictatorships or indigenous demise (see for instance the final reports in South Africa, Peru, and Canada), truth commissions are officially sanctioned, temporary, non-judicial investigative bodies designed to produce a final report describing the patterns of violence and abuse, its causes and its consequences (Hayner 2011). They take, collect and analyze statements, hold public hearings, and

research and investigate allegations of wrongdoing. Truth commissions have the potential to disclose widespread violations by police, create an historical record by showing the connections between slavery, Jim Crow laws, separate but equal policies, and modern-day racism in the justice system. Truth commissions can also promote national healing by bringing affected communities and police together and provide individual catharsis and redress for those impacted by the unjust practices. Beyond police violence, issues such as social, cultural or racial discrimination or exclusion; the erosion of livelihoods through corrupt practices (housing policies for example); the denial of voting rights; and interference with access to justice, education and healthcare can all be included in a truth commission's mandate. The US has limited experience with truth commissions, but one localized example, established in 2004 in Greensboro, North Carolina to address police and Klan violence, is certainly one to learn from. However, the problems so prominently raised by the current protests show that, in addition to local initiatives, a national response is needed because issues of racial discrimination are so pervasive.

Like accountability and truth-telling, providing reparation and redress to victims and victim communities should be paramount in any transitional justice response. Reparations acknowledge the particular victims, and their family members, affected by the violence and unjust practices. In some situations, individuals have received compensation but these almost always came after long and tedious civil cases were filed. More often than not, the application of 'qualified immunity', which protects government officials from lawsuits alleging rights violations, has resulted in victims not being able to get justice. A more comprehensive reparations response should look beyond individual reparation awards in discrimination or police misconduct cases. Through a process of negotiations, states should provide collective reparations to those communities most affected by the violence and discriminatory practices (both historical and ongoing), prioritizing based on needs and vulnerability. When designing a collective reparations scheme, discussions with community leaders and individual citizens should take place about how the reparations (combined with other state actions) could become transformative for the communities. Transformative reparations seek to change existing legal, economic, and social structures facilitating inequality and discrimination. Examples could include changes to access to quality housing, access to quality education or job programs, or investments in infrastructures. The dialogues between the state and community representatives must shape the reparations, instead of consisting of simple information sharing or consultation sessions.

On their own, however, reparations will never be enough. They must be part of an integrated and holistic transitional justice approach at all levels. Transformative reparations must be connected with a larger context of reform, framed as guarantees of non-repetition. These can prevent governments from relapsing into violent, repressive or authoritarian situations. Within the peacebuilding field, scholarship recognizes guarantees of non-repetition as offering the highest potential for impact on successful transitions to rule-of-law-based societies (Mayer-Rieckh 2017). Measures falling within the category of guarantees of non-repetition include, for example, security, education, and justice reforms. Of these, security sector reform (including police reform) is often the most prioritized as it aims to improve safety through more effective and accountable

security institutions by ensuring accordance with human rights and rule of law principles. Measures related to police reform could include improving oversight and accountability structures, stopping the militarization of the police, improving trainings and reducing unnecessary arrests, and promoting the monitoring of social relationships with community partners to prevent crime and conflict. In the context of police reform, linking a state's due diligence obligations with guarantees of non-repetition will be important. The state is the duty bearer and the onus falls on the government to show the steps they took to address misconduct. Requiring that authorities, together with community partners, analyze and understand the patterns of violence, including the root causes, may also help address more structural factors contributing to the harm. Like security reforms, educational reforms should be top priority. Too few Americans know or understand the full ramifications of slavery and racism on modern life for Black Americans and people of color. This erasure of racism from history lessons has greatly contributed to this ignorance. Curriculum at all levels must be reformed. Books such as *Stamped: Racism, Antiracism, and You* by Jason Reynolds and Ibram X. Kendi should become required reading in high schools across the US.

When carried out properly, these processes have the potential to signal a clear break from past abusive practices so that trust between different groups in society and the state can be (re)established. They are not a remedy for all of a society's problems. Rather, they are small steps, part of a larger whole, in addressing past abuses and injustices. But make no mistake, these processes are all highly politicized and implementation fraught with challenges. Yet, despite these challenges, the conversation for a holistic transitional justice response needs to start. From critically looking at memorialization to unpacking local reconciliation efforts, transitional justice in all its forms will start when there is a demand for it. Of one thing I am certain, a failure to confront the anger and fear displayed across the US will only generate and perpetrate mistrust and inequality between social groups and the government, leading, very likely, to a recurrence of violence. Without justice there is no peace.