

## THE SHIFTING SIGNIFIER OF “COMMUNITY” IN TRANSITIONAL JUSTICE: A FEMINIST ANALYSIS

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### INTRODUCTION

The term “transitional justice” refers to the legal and quasi-legal mechanisms used by societies emerging from conflict and repression in order to address the human rights violations committed during the period of violence.<sup>1</sup> Transitional justice scholarship typically examines the particular role of law and legal reform in assisting (or not) the move away from violent conflict.<sup>2</sup> The field’s origins lie in the Nuremburg Trials post-World War II and achieved renewed prominence with the use of amnesties and truth commissions in transitions to democracy in Latin America and Eastern Europe.<sup>3</sup> With the institutionalization of the International Criminal Court in the Hague<sup>4</sup> and the proliferation of truth commissions in recent decades,<sup>5</sup> the field of transitional justice appears to have reached a period of “expansion and normalization.”<sup>6</sup>

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1. Transitional Justice and Rule of Law Interest Group, American Society of International Law, Statement of Purpose, <http://www.asil.org/interest-groups-view.cfm?groupid=32> (last visited Oct. 2, 2008) [hereinafter ASIL]. See generally RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 6 (2000); PRISCILLA HAYNER, *UNSPEAKABLE TRUTHS* 11 (2001); *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 4-5 (Naomi Roht-Arriaza ed., 1995).

2. See Christine Bell, Colm Campbell & Fionnuala Ní Aoláin, *Justice Discourses in Transition*, 13 *SOC. & LEGAL STUD.* 305 (2004).

3. Ruti Teitel, *Transitional Justice Genealogy*, 16 *HARV. HUM. RTS. J.* 69, 70-71 (2003).

4. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

5. See Geoff Dancy & Steven Poe, What Comes Before Truth? The Political Determinants of Truth Commission Initiation, Presentation at the International Studies Association Annual Meeting (Mar. 22, 2006), [http://www.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/0/9/9/3/2/p99320\\_index.html](http://www.allacademic.com/meta/p_mla_apa_research_citation/0/9/9/3/2/p99320_index.html) (providing an account of the proliferation of truth commissions in the last two decades).

6. Teitel, *supra* note 3, at 89.

Transitional justice processes and mechanisms are now standard features of transitions from violence and repression.<sup>7</sup>

The proliferation of truth commissions and domestic, international, and hybrid criminal tribunals to address transitional contexts, however, has prompted increasing dissent in analysis of transitional justice.<sup>8</sup> The mechanisms and processes of transitional justice stand accused on a number of grounds. Transitional justice mechanisms mooted in Iraq and Afghanistan are regarded as complicit in neo-imperialist goals.<sup>9</sup> Assertions that these mechanisms hasten the process of reconciliation in deep-divided societies face increasing cynicism.<sup>10</sup> Many judicial and non-judicial mechanisms are regarded by observers as bureaucratic, expensive, slow, and, ultimately, not “fit-for-purpose.”<sup>11</sup>

An increasingly salient criticism of transitional justice mechanisms in this period of “expansion and normalization”<sup>12</sup> has been the perceived gap between transitional justice institutions and their personnel from the communities directly affected by violence and repression.<sup>13</sup> This gap, it is argued, undermines any potentially reconciliatory capacity of transitional justice mechanisms and further fuels perceptions of these mechanisms as features of unhelpful, often exploitative, international agendas.<sup>14</sup> Further, the prevailing conception of transitional justice is said to focus unduly on the state and reasserting the state’s authority at exactly the point in which the state’s capacity and legitimacy is severely limited.<sup>15</sup> This “legalistic” understanding of transition posits the re-establishment of state institutions and the rule of law as the principal objective of transition to the neglect of tangible processes of grassroots transition from violence.<sup>16</sup>

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7. See The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, 1, delivered to the Security Council, UN Doc. S/2004/616 (Aug. 23, 2004) [hereinafter *UNSG Report*] (exemplifying the scope and breadth of the field).

8. See Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice*, 34 J.L. & SOC’Y 411, 413 (2007); Bronwyn Anne Leebaw, *The Irreconcilable Goals of Transitional Justice*, 30 HUM. RTS. Q. 95, 95 (2008); Patricia Lundy & Mark McGovern, *Whose Justice? Rethinking Transitional Justice from the Bottom Up*, 35 J.L. & SOC’Y 265, 266 (2008).

9. See, e.g., Christine Bell, Colm Campbell & Fionnuala Ní Aoláin, *The Battle for Transitional Justice: Hegemony, Iraq and International Law*, in JUDGES, TRANSITION, AND HUMAN RIGHTS (John Morison, Kieran McEvoy & Gordon Anthony eds., 2007).

10. See Leebaw, *supra* note 8, at 102-06.

11. McEvoy, *supra* note 8, at 436.

12. Teitel, *supra* note 3.

13. McEvoy, *supra* note 8, at 413; see also *UNSG Report*, *supra* note 7, at 20 (acknowledging this recurrent limitation in UN-sponsored transitional justice mechanisms).

14. McEvoy makes this argument most forcefully. McEvoy, *supra* note 8, at 425-26; see also Leebaw, *supra* note 8, at 106.

15. McEvoy, *supra* note 8, at 424.

16. *Id.* at 422-24. See also Nicholas Waddell & Phil Clark, Royal African Society, Report of the Peace, Justice & the ICC in Africa Meeting Series 32 (Mar. 2-21, 2007), now

From this context of multi-level challenges to contemporary institutions of transitional justice, advocates of “bottom-up”<sup>17</sup> transitional justice have begun to posit the community—as opposed to the state—as the appropriate site and conduit of transitional justice.<sup>18</sup> In contrast to a “one-size-fits-all” importation of transitional justice mechanisms, a community-based approach to transitional justice is said to entrust decision-making over the design, remit, conduct, character, and outcomes of the transitional justice process to members of a given community affected by violence.<sup>19</sup> A turn to community-level transitional justice mechanisms has been most notable in Rwanda<sup>20</sup> and Northern Uganda<sup>21</sup> but also in transitional contexts such as East Timor,<sup>22</sup> Peru,<sup>23</sup> and Northern Ireland.<sup>24</sup>

*Exploring the Gender Implications of the Turn to Community in Transitional Justice*

An increasing role for the community in delivering transitional justice is potentially appealing from a gender perspective given the predominance of women in community-based political activity<sup>25</sup> and the relative exclusion of women from formal state institutions.<sup>26</sup> Further, criticisms of state-centric transitional justice mechanisms have their gender corollary borne out by empirical research of institutions such as the International Criminal Tribunal

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published as ROYAL AFRICAN SOCIETY, *COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA* (Nicholas Waddell & Phil Clark eds., 2008).

17. Lundy & McGovern, *supra* note 8, at 265.

18. McEvoy, *supra* note 8, at 428; *see also UNSG Report, supra* note 7, at 21.

19. *Cf.* Lundy & McGovern, *supra* note 8, at 271.

20. Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT'L L. & POL. 355, 356 (2002); Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 6-7 (2006).

21. Waldorf, *supra* note 20, at 5; Waddell & Clark, *supra* note 16, at 27-29.

22. Piers Pigou, *The Community Reconciliation Process of the Commission for Reception, Truth and Reconciliation*, 20, *delivered to the United Nations Development Programme in Timor-Leste* (2004), available at <http://www.cavr-timorleste.org/Analysis/Laporan%20Piers%20tentang%20CRP.pdf>.

23. Kimberly Theidon, *Justice in Transition: The Micropolitics of Reconciliation in Postwar Peru*, 50 J. CONFLICT RESOL. 433, 436 (2006).

24. *See* Brian Gormally, *Community Restorative Justice in Northern Ireland*, RESTORATIVE JUST. ONLINE, Apr. 2006, <http://www.restorativejustice.org/editions/2006/april06/gormallyarticle> (last visited Oct. 2, 2008).

25. *See generally* THE CHALLENGE OF LOCAL FEMINISMS: WOMEN'S MOVEMENTS IN GLOBAL PERSPECTIVE (Amrita Basu with the assistance of C. Elizabeth McGrory eds., 1995) (analyzing women's local activities across the globe on issues such as violence against women).

26. *See* Inter-Parliamentary Union, *Women in National Parliaments*, <http://www.ipu.org/wmn-e/world.htm> (last visited Oct. 1, 2008) (reviewing the world average of women and men in houses of parliament).

for the former Yugoslavia.<sup>27</sup> This research suggests that the institution has been experienced by female witnesses as “dehumanizing and re-traumatizing.”<sup>28</sup> Moreover, the institution is increasingly removed from the grassroots women’s activism, which led to the recognition of sexual violence against women by these institutions in the first instance.<sup>29</sup>

Feminists, however, have seldom endorsed the community as the central organizing unit of the political system.<sup>30</sup> Recognizing the potentially exclusionary and conservative politics of defining the membership and values of the “community,” a highly developed critique of communitarianism is evident in feminist theory.<sup>31</sup> While scholarship of community-based transitional justice has considered the legal treatment of sexual violence by such mechanisms,<sup>32</sup> there has been no sustained engagement with the substantial body of feminist theory of communitarianism. Consequently, arguments over the merits of community- versus state-centric transitional justice have proceeded to date with little attention to the particular gendered implications of the further privileging of community in transitional societies.<sup>33</sup> Advocates of community claim that bottom-up transitional justice has the capacity to empower those communities formerly disenfranchised by violence.<sup>34</sup> Community-based transitional justice is therefore explicitly about the redistribution of political power in transitional states beyond political elites<sup>35</sup> and ameliorating the daily injustices experienced in transitional societies.<sup>36</sup> Yet, the very dichotomy supposed in community-based transitional justice between the community as “good,” and the state as “bad,”<sup>37</sup> proceeds with little recognition of women’s relative absence from leadership positions in either fora.

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27. Julie Mertus, *Shouting from the Bottom of a Well*, 6 INT’L FEMINIST J. POL. 110 (2004) [hereinafter Mertus, *Shouting*]; Julie Mertus, *Truth in a Box: The Limits of Justice through Judicial Mechanisms*, in THE POLITICS OF MEMORY: TRUTH, HEALING AND SOCIAL JUSTICE 142 (Ifi Amadiume & Abdullahi An-Na’im eds., 2000).

28. Mertus, *Shouting*, *supra* note 27, at 112.

29. *Id.*

30. See ELIZABETH FRAZER & NICOLA LACEY, THE POLITICS OF COMMUNITY: A FEMINIST CRITIQUE OF THE LIBERAL-COMMUNITARIAN DEBATE 130-62 (1993) (providing an excellent overview of feminist critiques of communitarianism); see also IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 12 (1990).

31. FRAZER & LACEY, *supra* note 30, at 142-45.

32. See Waldorf, *supra* note 20, at 62-63; Karen Brounéus, *Truth-telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts*, 39 SECURITY DIALOGUE 55, 60 (2008).

33. See, e.g., *supra* notes 20-21 (offering no detailed consideration of the gender-implications of the turn to community in transitional justice).

34. See UNSG Report, *supra* note 7, at 7; Kieran McEvoy & Harry Mika, *Restorative Justice and the Critique of Informalism in Northern Ireland*, 42 BRIT. J. CRIMINOLOGY 534, 553 (2002); see also McEvoy, *supra* note 8, at 437; Waddell & Clark, *supra* note 16.

35. McEvoy & Mika, *supra* note 34, at 545.

36. ASIL, *supra* note 1.

37. See McEvoy, *supra* note 8, at 437 (making the contrast particularly pronounced).

*Locating Women in Community: The Northern Irish Experience*

Drawing on the Northern Irish case study, this article brings a gender lens to the recent turn to community in transitional justice. The analysis proceeds by asking an ostensibly simple question: where are women in the community that underpins bottom-up transitional justice?

The article's claims are threefold. Firstly, I contend that the turn to community in transitional justice has important gender implications that have thus far been unexplored. The article seeks to address this significant gap in analysis. Part I therefore provides the context and description of efforts to foster transitional justice in the "community" setting in Northern Ireland and the resulting tensions between community- and state-centric transitional justice paradigms. The unexpected prominence of women's organizations in the surrounding political controversy is explored.

My second claim is that the absence of gender-specific analysis of the turn to "community" in transitional justice is symptomatic of the narrow male-defined conceptions of violence and harm to be addressed by transitions from violent conflict and repression. In Part II, I use the Northern Irish case study to expose the resistance of prevailing transitional justice frameworks to a feminist-informed definition of harm to look beyond a narrow focus on so-called "public" or "political" violence. The Northern Irish case reveals the ways in which "bottom-up" transitional justice can replicate, and even exacerbate, these same gendered shortcomings. The tendency of mainstream transitional justice analysis to collapse gender interests in transitional justice into the legal treatment of sexual violence is noted.

Thirdly, in order to challenge and expand this narrow terrain for feminist engagement with transitional justice, I contend that feminist analysis would usefully focus on the highly-contested and politicized nature of efforts to define "harm" in transitional justice. Recognizing this as a site of heavy political contestation, transitional justice mechanisms or processes could then be considered for the extent to which they permit or encourage creative articulations of harm that take us beyond an exclusive focus on so-called "public" or "political" violence.<sup>38</sup> Transitional justice mechanisms that reassert the dominance of already dominant actors in struggles to define "harm," to the exclusion of a broad array of stakeholders, would be challenged on those grounds.

Part III therefore argues that feminist engagement with transitional justice might usefully draw on political science analysis of gender and transition, with its focus on the impact of transition on women's political participation, in order to broaden the scope and impact of feminist interventions into transitional justice. The article concludes by signaling the prospective benefits of a feminist

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38. See Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495 (2001) (discussing the role for law in recognizing dissent within culture, rather than reinscribing traditional and exclusionary cultural barriers).

focus on transitional justice mechanisms as sites of contestation, exclusion, and, potentially, political participation.

#### PART I. COMMUNITY-BASED TRANSITIONAL JUSTICE IN NORTHERN IRELAND

Northern Ireland's ongoing process of transition has been marked by a prominent discourse and politics of "community."<sup>39</sup> Reform to state institutions has been premised on the need to counter community alienation from the state.<sup>40</sup> Ongoing tensions surround efforts to formalize the community-state relationship in Northern Ireland's postconflict political dispensation.<sup>41</sup> The importance explicitly placed on securing community involvement in state institutions, in order to bolster the legitimacy of these institutions,<sup>42</sup> is particularly noteworthy. This section focuses on organizations working to end violence against women in Northern Ireland and examines their relationship to the process of finding a role for community within the new tapestry of state institutions.

##### A. *The Emergence of Community-Based Restorative Justice in Northern Ireland*

Northern Ireland has recently emerged from over three decades of violent conflict.<sup>43</sup> During the period of conflict, the police force in the jurisdiction performed a highly militarized role<sup>44</sup> with little accountability and was involved in several incidences of the use of lethal force against civilians.<sup>45</sup> Consequently, Northern Ireland has traditionally recorded high levels of community alienation from the police.<sup>46</sup> Given the overwhelmingly Protestant composition of the police force,<sup>47</sup> this alienation was felt most acutely in Northern Ireland's Catholic community.<sup>48</sup> The absence of community confidence in formal policing and criminal justice in Northern Ireland during the conflict<sup>49</sup> led to the adoption over time of a policing function by paramilitaries within their

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39. See *infra* text accompanying notes 65-68.

40. *Id.*

41. See *infra* text accompanying notes 85-88.

42. *Id.*

43. The Northern Ireland conflict dates approximately from 1968. See JOHN MCGARRY & BRENDAN O'LEARY, EXPLAINING NORTHERN IRELAND: BROKEN IMAGES 1 (1995) (elaborating generally on the conflict).

44. INDEPENDENT COMMISSION ON POLICING FOR NORTHERN IRELAND, A NEW BEGINNING: POLICING IN NORTHERN IRELAND 1.3, 2 (1999), available at <http://www.cain.ulster.ac.uk/issues/police/patten/patten99.pdf> [hereinafter PATTEN REPORT].

45. FIONNUALA NÍ AOLÁIN, THE POLITICS OF FORCE: CONFLICT MANAGEMENT AND STATE VIOLENCE IN NORTHERN IRELAND *passim* (2000).

46. PATTEN REPORT, *supra* note 44, at 1.3.

47. *Id.* at 14.1.

48. *Id.*

49. See Mary O'Rawe, *Transitional Policing Arrangements in Northern Ireland: The Can't and the Won't of the Change Dialectic*, 26 FORDHAM INT'L L.J. 1015 (2003) (providing an excellent account of these dynamics).

respective communities.<sup>50</sup> This largely took the role of violent “disciplining” of local youths engaged in anti-social behavior.<sup>51</sup> With the major ceasefires of 1994, paramilitaries ceased their military activities but retained their “policing” functions.<sup>52</sup>

The changed political context did however prompt efforts to find a non-violent alternative to punishment beatings, even while community alienation from the police continued. The outcome was community-based restorative justice (CBRJ) schemes. The schemes were “designed to allow such paramilitaries to (in their terms) ‘disengage responsibly’” from such acts, handing dispute resolution back to the local communities from which the conflicts emanate.”<sup>53</sup> Individuals formerly imprisoned for paramilitary offenses play a leadership role in the schemes.<sup>54</sup> While they vary by community, CBRJ schemes describe their work thus: the minimalist model is to work intensively with young people accused of anti-social crime, including in the process of victim-offender mediation and reparation to the community.<sup>55</sup>

In some schemes, volunteers engage with a broader range of problems or disputes brought to them by members of the public or by other agencies.<sup>56</sup> Schemes also engage in mediating neighborhood disputes. Where relevant, they organize mediation sessions where alleged perpetrators, direct victims, and community representatives “try to work out solutions.”<sup>57</sup> Given their paramilitary origins, and their operation as a parallel justice system in the jurisdiction, the appropriate role of these schemes within Northern Ireland’s reformed postconflict criminal justice system has become a key site of political controversy.<sup>58</sup>

#### B. *Enter the Law: Efforts to Formalize the Community-State Relationship*

On April 10, 1998, the major peace agreement addressing the Northern Irish conflict, the Belfast Agreement,<sup>59</sup> was reached by all but one of the major political parties in the jurisdiction and the British and Irish governments. The Agreement sets out the political and legal dispensation for postconflict

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50. CRIMINAL JUSTICE INSPECTION NORTHERN IRELAND, NORTHERN IRELAND ALTERNATIVES: REPORT OF AN INSPECTION WITH A VIEW TO ACCREDITATION UNDER THE GOVERNMENT’S PROTOCOL FOR COMMUNITY-BASED RESTORATIVE JUSTICE § 1.2, 3 (2007), available at <http://www.cjini.org/documents/ProtocolReport2.pdf>. See also McEvoy & Mika, *supra* note 34; Interview with Jim Auld, Director, Community Restorative Justice Ireland, in Belfast, N. Ir. (Aug. 3, 2007); Gormally, *supra* note 24.

51. CRIMINAL JUSTICE INSPECTION, *supra* note 50.

52. McEvoy & Mika, *supra* note 34, at 535.

53. *Id.*

54. Gormally, *supra* note 24.

55. *Id.*

56. *Id.*

57. *Id.*

58. See discussion *infra* text accompanying notes 75-85.

59. Agreement Reached in the Multi-Party Negotiations, Ir.-U.K., Apr. 10, 1998, available at <http://www.nio.gov.uk/agreement.pdf> [hereinafter Belfast Agreement].

Northern Ireland.<sup>60</sup> The Agreement established sophisticated mechanisms for consociational government by both major ethnic groups in the jurisdiction.<sup>61</sup> Comprehensive provisions were made for new human rights protections and institutions<sup>62</sup> and substantial reform to Northern Ireland's policing<sup>63</sup> and criminal justice<sup>64</sup> institutions.

The language of "community" is recurrent throughout the text of the Belfast Agreement.<sup>65</sup> The new political and legal institutions established by the Belfast Agreement have been designed with the avowed objective of securing the participation and confidence of all sections of all communities.<sup>66</sup> The understanding of community penetrating the Agreement is explicitly concerned with issues of ethnic identity (as tellingly captured by repeated reference to "both communities" and "the two communities").<sup>67</sup> Thus, the discourse and politics of "community" have been prominent in the implementation stage of the Belfast Agreement.<sup>68</sup>

The comprehensive review of criminal justice mandated by the Belfast Agreement<sup>69</sup> considered the potential relationship of CBRJ schemes to the reformed criminal justice system. The Review identified the need for a "partnership"<sup>70</sup> between these schemes and the formal criminal justice system.<sup>71</sup> Meanwhile, proponents of community-level justice argued that whether and when state agencies are brought on board, these schemes had to be "determined by the community."<sup>72</sup> The Review noted: "This argument hinged on the perceived lack of legitimacy of the RUC and other criminal justice agencies in the areas that most needed the development of a restorative approach . . . where

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60. See Colm Campbell, Colin Harvey & Fionnuala Ní Aoláin, *The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland*, 66 MOD. L. REV. 317 (2003) for further analysis.

61. Belfast Agreement, *supra* note 59, § 3.

62. *Id.* § 6; see also CHRISTINE BELL, PEACE AGREEMENTS AND HUMAN RIGHTS (2000).

63. Belfast Agreement, *supra* note 59, § 9, Annex A.

64. *Id.* § 9, Annex B.

65. Belfast Agreement, *supra* note 59. The word appears on forty-four separate occasions in the thirty-five page document, with "communities" appearing a further eight times.

66. *Id.* § 9.

67. *Id. passim.*

68. See discussion *infra* notes 69-85.

69. CRIMINAL JUSTICE REVIEW GROUP, REVIEW OF THE CRIMINAL JUSTICE SYSTEM IN NORTHERN IRELAND (2000), available at <http://cain.ulst.ac.uk/issues/law/cjr/report30300.htm>

70. *Id.* § 9.86, at 212.

71. The Criminal Justice Review Group directed the Northern Ireland Office (NIO), the headquarters for the administration of criminal justice in the jurisdiction, to draft a protocol to govern the relationship between CBRJ schemes and the formal criminal justice system. *Id.* § 9.18, at 193-94. Further, the terms of the proposed "partnership" were explicitly linked to questions over the legitimacy of policing and criminal justice. See *id.* § 9.25, at 195-96.

72. *Id.* § 9.25, at 195-96.

the criminal justice agencies and the criminal justice process were distrusted most.<sup>73</sup>

The unfolding of the accreditation and funding of CBRJ schemes was complex and surrounded by political intrigue. While the input of women’s organizations to the Criminal Justice Review was not specifically noted in the chapter of the Review dealing with CBRJ and sexual crimes and domestic violence were only mentioned once,<sup>74</sup> this was ultimately exactly the terrain on which questions of the appropriate place of CBRJ schemes within the criminal justice system would take place. On December 5, 2005, the NIO Criminal Justice Policy Branch published its “Consultation on Draft Guidelines for Community-based Restorative Justice Schemes.”<sup>75</sup> The key questions in the consultation concerned whether and how individuals with criminal convictions should be permitted to work in the schemes. The baseline on this issue as set out by the guidelines was that “it would clearly be unacceptable for anyone involved in paramilitary activity or criminality to work in the schemes.”<sup>76</sup> The draft guidelines explicitly precluded sexual offenses and domestic violence from the mandate of the schemes.<sup>77</sup>

The guidelines also addressed the vexed issue of the relationship of these schemes to the police. Whether and in what way the schemes would be required to report cases to the police was an area of intense negotiation.<sup>78</sup> Being accredited under the scheme would be the key step for such schemes to receive government funding.<sup>79</sup>

The substance of this draft represented a considerable shift from the recommendations set down by the Criminal Justice Review, which required that such schemes could only continue as an integral part of the criminal justice

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73. *Id.*

74. *Id.* at 189-217.

75. NORTHERN IRELAND OFFICE, CONSULTATION ON DRAFT GUIDELINES FOR COMMUNITY-BASED RESTORATIVE JUSTICE SCHEMES (2005), available at [http://nio.gov.uk/community\\_based\\_restorative\\_justice\\_schemes\\_draft\\_guidelines\\_public\\_consultation\\_and\\_summary\\_of\\_responses.pdf](http://nio.gov.uk/community_based_restorative_justice_schemes_draft_guidelines_public_consultation_and_summary_of_responses.pdf).

76. *Id.* § 18, GUIDELINES.

77. *Id.* § 2, GUIDELINES.

78. The community-based scheme would “communicate promptly” to either the police, the Probation Board, or the Youth Justice Agency the details of any offense. *Id.* § 10, GUIDELINES. Should either of the two latter agencies first receive the report, they would then communicate this to the police. *Id.* The guidelines also proposed an alternative to this measure, whereby an advisory panel would be formed which included representatives of the police, the Probation Board, the Youth Justice Agency, and the community-based scheme. *Id.* § 11, GUIDELINES. Community-based schemes would bring individual cases directly to this panel in order to consider the suitability of each case for disposal by CBRJ schemes. *Id.* The Police Service of Northern Ireland (PSNI) would then consider whether or not a police investigation would be required, and the Public Prosecution Service (PPS) would decide whether or not to refer the case to a CBRJ scheme. *Id.* § 12, GUIDELINES. Further, schemes would be required to establish their own system for handling complaints, subject to inspection by the Criminal Justice Inspectorate, and access to an external mechanism which is also subject to inspection. *Id.* § 24, GUIDELINES.

79. *Id.* at THE WAY FORWARD, SUMMARY.

system, receiving referrals from the police rather than directly from the community.<sup>80</sup> The ensuing controversy surrounding the protocol focused on the permissibility of those with past criminal convictions to occupy positions in a CBRJ scheme, the ability of the schemes to distance themselves from direct engagement with the police, that complaints against the schemes were at first to be handled internally by each scheme, and concerns that the proposed inspection mechanism would not be sufficiently robust.<sup>81</sup>

Allegations surfaced of back-room deals between the British government and Sinn Fein, the political party most closely allied to the CBRJ schemes, whereby schemes based in nationalist areas would consent to the minimal form of communication with the police in return for government funding.<sup>82</sup> In the context of Sinn Fein's continued refusal to take their seats on the Policing Board, established further to the Policing Review mandated by the Belfast Agreement,<sup>83</sup> even this limited role of the police in the schemes might make a significant addition to the republican perceptions of police legitimacy.<sup>84</sup> In particular, the Social Democratic and Labour Party (SDLP), Sinn Fein's main rival for votes from the Catholic/nationalist community, came out very strongly against the draft guidelines.<sup>85</sup>

### C. *Enter the Women: Exposing the Boundaries of "Community"*

The reactions of both the Belfast Rape Crisis Centre and Foyle Women's Aid to this controversy received unprecedented prominence. Both organizations voiced significant opposition to accreditation and funding of CBRJ schemes. They cited examples of the schemes dealing with incidences of sexual and domestic violence, chiefly in order to protect perpetrators with paramilitary

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80. CRIMINAL JUSTICE REVIEW GROUP, *supra* note 69, at 189-217.

81. NORTHERN IRELAND OFFICE, *supra* note 75, at THE WAY FORWARD, SUMMARY. Particularly damaging to attempts to bring CBRJ projects within the criminal justice system was a report by the Independent Monitoring Commission that it had been told of "a number of instances of restorative justice being invoked as a means of continuing to exert paramilitary control within communities, and of what seems to at least some people living and working in those communities as paramilitarism operating under the guise of restorative justice." INDEPENDENT MONITORING COMMISSION, EIGHTH REPORT OF THE INDEPENDENT MONITORING COMMISSION, § 2.13, at 11 (2006) available at <http://www.independentmonitoringcommission.org> (select "Eighth Report" along right hand column, select "click here to continue" hyperlink). The Independent Monitoring Commission was established in 2004 to oversee implementation of the Belfast Agreement. Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Northern Ireland Establishing the Independent Monitoring Commission, Ir.-U.K., Nov. 25, 2003, available at <http://www.independentmonitoringcommission.org/documents/uploads/AGREEMENT1.doc>.

82. Garret FitzGerald, Op-Ed., *North's Justice Scheme Threatens Democracy*, IRISH TIMES, Feb. 4, 2006, at 16.

83. Belfast Agreement, *supra* note 59, § 9.

84. *Id.*

85. See FitzGerald, *supra* note 82.

connections.<sup>86</sup> The Director of Foyle Women’s Aid stated that the organization had been approached by the local CBRJ scheme, agreeing to refer cases to Women’s Aid if it agreed not to involve the police.<sup>87</sup> The concerns of these organizations received a great deal of coverage by media outlets.<sup>88</sup> Further, both the SDLP and former Irish Prime Minister (*Taoiseach*), Garret Fitzgerald, cited concerns expressed by the violence against women sector as central to their objections to government accreditation of CBRJ schemes.<sup>89</sup> The Protocol finally devised by the Northern Ireland Office made substantial revisions to the 2005 draft, requiring direct police involvement in accredited schemes, a completely independent complaints mechanism, and more rigorous inspection by the Criminal Justice Inspectorate.<sup>90</sup>

The issue then moved to one of funding accredited schemes. Amid much controversy, the British government declined to fund the schemes on the basis of their failure to satisfy the requirements of the Protocol.<sup>91</sup> CBRJ projects in Republican areas have never formalized their relationship with the police;<sup>92</sup> however, projects in Loyalist communities appear to have a good relationship with the police, and some include police officers on their board.<sup>93</sup> According to Jim Auld of the main Republican CBRJ scheme, Community Restorative Justice Ireland, the government’s decision not to fund either Republican or Loyalist schemes demonstrated the government’s only real interest in CBRJ: “[T]o legitimate the police.”<sup>94</sup> Without community-based schemes from the Republican community coming within the criminal justice system, there is little incentive for the government to have a role in Loyalist community-based schemes, as the police do not suffer the same degree of perceived illegitimacy in those communities.<sup>95</sup>

When pressed about concerns expressed by the violence against women sector as to government accreditation and funding of CRBJ schemes, Auld’s response was two-fold. Firstly, he directed me back to the Rape Crisis Centre, and indeed, the Rape Crisis Centre does seem to have revised its opinion of the

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86. *Revised CRJ Protocol is Still Unacceptable*, Op-Ed., IRISH TIMES, July 29, 2006, at 14 (quoting Eileen Calder).

87. *Id.*

88. See, e.g., *id.*; FitzGerald, *supra* note 82; Suzanne Breen, *Known IRA Men Cleared Up Gangrape Scene, Claims Rape Crisis Chief*, SUNDAY TRIBUNE (Ireland), Nov. 13, 2005, at N10.

89. FitzGerald, *supra* note 82.

90. NORTHERN IRELAND OFFICE, PROTOCOL FOR COMMUNITY-BASED RESTORATIVE JUSTICE SCHEMES, July 25, 2006, available at <http://cain.ulst.ac.uk/issues/law/rj/index.html>.

91. The NIO subsequently announced its intention to fund Northern Ireland Alternatives. See “600k Investment for community based restorative justice,” Media Center, Northern Ireland Office (July 30, 2008), available at <http://www.nio.gov.uk/600k-investment-for-community-based-restorativejustice/media-detail.htm?newsID=15346>.

92. Interview with Jim Auld, Director, Community Restorative Justice Ireland, in Belfast, N. Ir. (Aug. 3, 2007).

93. CRIMINAL JUSTICE INSPECTION, *supra* note 50.

94. *Id.*

95. *Id.*

schemes, stating that they felt that their concerns had been “used as a political football [and] manipulated by political parties for their own ends.”<sup>96</sup> In terms of concerns expressed by Foyle Women’s Aid, Auld’s response was that the Director of Foyle Women’s Aid was a member of her local District Policing Partnership.<sup>97</sup> The implication appeared to be that her concerns could therefore only be motivated by a desire to legitimate the police.

## PART II. THE GENDERED BOUNDARIES OF TRANSITIONAL JUSTICE

### A. *The Recognition of “Harms” in Community-Based Transitional Justice*

In a feminist reading of the above events, I would contend that the Northern Irish case exposes the resistance of community-based transitional justice frameworks to a feminist-informed definition of harm. The controversy signals the capacity of “bottom-up” transitional justice to replicate or even exacerbate the same gendered shortcomings of a state-based transitional justice framework. Women’s organizations working to end violence against women in Northern Ireland sought to challenge the prevailing definition of harm and to redefine the violence to be addressed by transitional processes in a more gender-sensitive and feminist-informed manner. They sought to dislodge the exclusive focus on paramilitary violence in order to consider violence committed against women predominantly within the home and community.<sup>98</sup> However, proponents of community-based transitional justice resisted these efforts, dismissing the concerns as pro-state,<sup>99</sup> while the concerns of women’s organizations were employed in a selective and highly questionable manner by local political parties.<sup>100</sup>

Further, this resistance to a broader feminist-informed definition of harm in transitional justice is underpinned at a deeper conceptual level, as demonstrated in scholarly defense of community-based transitional justice.<sup>101</sup> For example, McEvoy and Mika contend that the political controversy surrounding the legitimacy of the CBRJ schemes within Northern Ireland’s reformed criminal justice system ignores the “moral imperatives” of ending past violence, and reflects a pro-state agenda to encourage the reassertion of state agencies in criminal justice at the expense of working-class communities.<sup>102</sup>

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96. Interview with Eileen Calder, Director, Rape Crisis and Sexual Abuse Centre, in Belfast, N. Ir. (June 29, 2007).

97. Interview with Jim Auld, Director, Community Restorative Justice Ireland, in Belfast, N. Ir. (Aug. 3, 2007).

98. See discussion *supra* text accompanying notes 86-87.

99. See discussion *supra* text accompanying note 97.

100. See discussion *supra* text at notes 89, 96.

101. McEvoy & Mika, *supra* note 34, at 553.

102. *Id.*

This representation of the controversy portrays a very narrow understanding of the “violence of the past” and a real failure to conceptualize the manifold ways in which the conflict exacerbated women’s experience of gender-based violence within the home. Throughout the conflict, community alienation from the police exacerbated the inaccessibility of police for victims of domestic violence; in addition, responding to paramilitary violence was prioritized by the police over responding to other forms of violence. Further, the greater availability of weapons in the jurisdiction due to the conflict meant that women were often the victims of threatened and actual gun violence from their male partners.<sup>103</sup> Nevertheless, this violence drops from sight in advocacy for community-based transitional justice.

According to McEvoy and Mika, criticisms of CBRJ schemes have focused on so-called “technical” issues of crime reduction. Critics have therefore failed to adopt an overtly “political” assessment of the schemes, which would recognize the role of the schemes in assisting the transition away from violent conflict:

Former seasoned paramilitary activists who have genuinely and indisputably embraced restorative values and practices, communities which have until recently demanded ever more violent punishments against anti-social offenders now making use of restorative projects and accepting back into the community those who were previously banished or severely punished . . . . For us, such a context offers a clear bias towards evaluation as *political* versus *technical* practice, as a catalyst for transforming relationships of power through advocacy, group and community development and organization, and empowerment.<sup>104</sup> (italics in the original)

Contrary, however, to the authors assertions about seeking a schema of “what works” in peacemaking criminology, I would suggest that the “*technical*” versus “*political*” dichotomy presented here restates the public/private divide in transitional justice,<sup>105</sup> re-prioritizes so-called political violence overtly related to the conflict, and reinforces understandings of transition as a public sphere phenomenon.

#### B. *Interrogating the “Goals” of Transitional Justice*

It is important to locate this particular Northern Irish case study within the context of broader gendered limitations of transitional justice. Although increasingly subject to challenge, the “goals” of transitional justice are conventionally understood as the movement from violent conflict to a

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103. See also MONICA MCWILLIAMS & JOAN MCKEIRNAN, BRINGING IT OUT IN THE OPEN: DOMESTIC VIOLENCE IN NORTHERN IRELAND (1993).

104. McEvoy & Mika, *supra* note 34, at 553.

105. See generally FEMINISM, THE PUBLIC AND THE PRIVATE (Joan B. Landes ed., 1998) (exploring the public/private divide from a feminist perspective).

nonviolent (liberal) democratic regime.<sup>106</sup> Transitional justice, as a field in which lawyers have traditionally been dominant, examines these periods of political transition as legally-underpinned phenomenon.<sup>107</sup> Analysis focuses on legal and quasi-legal mechanisms for dealing with the human rights violations of the predecessor regime.<sup>108</sup> Further, transitional justice increasingly looks to the establishment of rule of law in postconflict institutions as part-and-parcel of transitions from violence and repression.<sup>109</sup> Hence, reform to the institutions of policing, courts, criminal justice, are now features of the transitional justice landscape.<sup>110</sup> Transition is underpinned by simultaneously forward- and backward-looking legal measures, to facilitate the transition away from violence and repression, toward a new normative order.<sup>111</sup> To the extent that reform is backward-looking, the reform rests on a particular understanding of the wrongs or harms of the past that must be ameliorated.<sup>112</sup> Acknowledgements around what went wrong in the past therefore structure priorities for what is to be addressed in the (re)formation of state institutions.<sup>113</sup>

In transitional societies, however, there seldom exists an agreed narrative of the past or a shared understanding of the deficiencies of the former regime. The transition in Northern Ireland, for example, has been marked by repeated debates about the nature of institutional reform, in particular as to whether this reform is to simply accommodate an end to the violence of non-state actors or to address systematic human rights violations committed by state actors during the conflict.<sup>114</sup> There persists a “meta-conflict,” or a “conflict about what the conflict is about.”<sup>115</sup> Within this meta-conflict, several narratives of the past compete for dominance in order to guide the reform to state institutions.<sup>116</sup> These battles over the interpretation of past events, in order to guide institutional reform, are not without implications for women. In particular, the definition of violence to be ended and harms to be addressed by transition carry important implications for the extent to which reform to transitional state

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106. Bell, Campbell & Ní Aoláin, *supra* note 2.

107. See TEITEL, *supra* note 1 (providing pathbreaking analysis of the role of law in political transitions).

108. See *supra* notes 1-2.

109. See ASIL, *supra* note 1; UNSG Report, *supra* note 7.

110. See ASIL, *supra* note 1.

111. See TEITEL, *supra* note 1.

112. See UNSG Report, *supra* note 7, ¶¶ 19-22 (demonstrating this understanding that wrongs of the past must be ameliorated by transitional justice).

113. *Id.* ¶¶ 14-16.

114. See Christine Bell, *Dealing with the Past in Northern Ireland*, 26 FORDHAM INT'L L.J. 1095 (2003), for a comprehensive account of these dynamics.

115. MCGARRY & O'LEARY, *supra* note 43, at 1.

116. See also Bell, *supra* note 114.

institutions will deliver material improvements to the lives of women postconflict or postauthoritarianism.<sup>117</sup>

However, as the Northern Irish case study demonstrates, a public/private divide structures definitions of harms and violence of the past to be addressed by transitional justice. This divide prioritizes so-called “political” violence directly related to conflict and political repression in the “public” sphere, rendering all other forms of violence either invisible or “apolitical.”<sup>118</sup> Within this highly-gendered framework, the understanding of transition as a public sphere phenomenon works to de-prioritize women’s experiences of violence and harm within the home and community.

Further, while periods of conflict and repression can foster greater fluidity in the public/private divide—as women assert more public roles due to the involvement of men in military activity<sup>119</sup> and women’s political activity is regarded as less threatening to oppressive states<sup>120</sup>—postconflict and postauthoritarian societies tend to be marked by the return to traditional gender roles and a retrenchment of the public/private divide.<sup>121</sup> The very process of transition, with its focus on reconstructing public institutions and reasserting the private sphere through the entrenchment of human rights protections, is dedicated to the reconstruction of the public/private divide.<sup>122</sup>

Feminist interventions into transitional justice have focused to a large extent on revealing the gender blindness of the understandings of both violence and harm that structures transitional justice processes and mechanisms. The earliest feminist interventions into the field emphasized the need for prosecutions of war criminals to recognize the systematic use of rape as a tool of war.<sup>123</sup> Subsequent interventions have built on revelations about the role of sexual violence in war in order to expand the mandates of transitional justice

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117. See also THE AFTERMATH: WOMEN IN POST-CONFLICT TRANSFORMATION (Sheila Meintjes, Anu Pillay & Meredith Turshen eds., 2001) (discussing the complex relationship between the cessation of violent conflict and women’s experiences of violence).

118. See also Landes, *supra* note 105 (discussing the public/private divide); Fionnuala Ní Aoláin, *Political Violence and Gender During Times of Transition*, 15 COLUM. J. GENDER & L. 829 (2006) (discussing gendered definitions of “political” violence); Fionnuala Ní Aoláin & Catherine Turner, *Gender, Truth & Transition*, 16 UCLA WOMEN’S L.J. 229, 231 (2007).

119. See Julie Mertus, *Improving the Status of Women in the Wake of War: Overcoming Structural Obstacles*, 41 COLUM. J. TRANSNAT’L L. 541, 543 (2003).

120. This observation is often made with respect to the visibility of women in human rights movements in the Latin American Southern Cone. See, e.g., Jennifer Schirmer, “Those Who Die for Life Cannot be Called Dead:” *Women and Human Rights Protest in Latin America*, 1 HARV. HUM. RTS. Y.B. 41, 42 (1988).

121. Fionnuala Ní Aoláin, *Conflict and Transitional Justice: Feminist Approaches Workshop at Emory University in Atlanta: A Feminist Theory of Harm* (Sept. 19-20, 2008).

122. See also Fionnuala Ní Aoláin & Colm Campbell, *The Paradox of Transition in Conflicted Democracies*, 27 HUM. RTS. Q. 172 (2005).

123. See Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN’S L.J. 243 (1994).

mechanisms.<sup>124</sup> However, to some extent, the relative success of feminist interventions into transitional justice in securing recognition of sexual violence as a “grave breach” of the Geneva Conventions,<sup>125</sup> constitutive of crimes against humanity<sup>126</sup> and genocide,<sup>127</sup> also reveals the continued resistance of mainstream transitional justice to a more comprehensive notion of gender-based harms. Sexual violence committed in times of war against female civilians by male combatants is arguably the form of gender-based violence that fits most neatly into the perceived definitions of harm in transitional justice.<sup>128</sup> As I have observed elsewhere:

The difficulty, however, is that prompting transitional justice mechanisms to recognize the most grievous violent crimes committed against women in conflict—crimes that were for so long simply invisible to transnational criminal law—was supposed to mark the beginning of a conversation about how gender is a determining factor in one’s experience of violent conflict and its aftermath. The recognition of rape as a tool of war was supposed to challenge narrow understandings of peace as simply the absence of “public” “political” violence. Instead, however, recognition by transitional justice mechanisms of rape in wartime has marked the end of the conversation about gender and conflict: “We recognize crimes of sexual violence. We therefore have a gender-friendly truth commission/local/domestic/international/hybrid (delete as appropriate) transitional justice mechanism.” Or so the reasoning

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124. See generally Vasuki Nesiah, International Center for Transnational Justice, Gender and Truth Commission Mandates (2006), <http://www/ictj.org/static/Gender/0602.GenderTRC.eng.pdf> (providing an overview of gender and the evolution of truth commission mandates).

125. See generally Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment (May 7, 1997); Barbara Bedont & Katherine Hall-Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 BROWN J. WORLD AFF. 65 (1999) (discussing the evolving legal treatment of rape as a tool of war).

126. See generally Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 5(g), U.N. Doc. S/RES/827 (May 25, 1993), available at <http://un.org/icty> (follow “Basic Legal Documents” hyperlink; then follow “Statute of the Tribunal” hyperlink; then follow “Updated Statute of the Tribunal” hyperlink); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 3(g), U.N. Doc. S/RES/955 (Nov. 8, 1994), available at <http://www2.ohchr.org/English/law/itr.htm> (last visited Oct. 25, 2008); Rome Statute, *supra* note 4, at art. 7(g); Statute of the Special Court for Sierra Leone, annex to Agreement on the Establishment of the Special Court for Sierra Leone, U.N.-Sierra Leone, Jan. 16, 2002, art. 2(g), <http://www.scs-l.org/documents/scsl-statute.html> (last visited Oct. 25, 2008).

127. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

128. Ní Aoláin & Turner, *supra* note 118, *passim*.

appears to go. How did so much get lost in translation between feminist advocacy and implementation?<sup>129</sup>

The problem, I would suggest, is the persistence of the public/private divide in definitions of harm to be addressed and the violence to be ended by transition, the extent to which a process which is supposed to be about societal transformation in fact operates within such narrow gendered boundaries.

### PART III. EXPLORING NEW PARADIGMS: WOMEN AS STAKEHOLDERS IN TRANSITIONAL SOCIETIES

#### A. *Thickening*<sup>130</sup> *Feminist Analysis of Transitional Justice*

The foregoing section sought to explore why feminist interventions into transitional justice have traditionally occurred within narrow and gendered boundaries, and how a turn to community-based transitional justice can be widely endorsed without meaningful consideration of the gender implications of the re-privileging of community in transitional societies. In feminist political science analysis, in contrast to transitional justice scholarship, transition has been characterized much more broadly, as offering “opportunity spaces”<sup>131</sup> for women to secure “the optimal structure, content, and form of institutional instances designed to represent women and their claims.”<sup>132</sup> Late-twentieth-century transitions to democracy in Eastern Europe and Latin America prompted a wealth of feminist analysis within political science.<sup>133</sup> In particular, feminist analysis has focused on women’s political and social mobilization during periods of transition, examining, for example, the role of women’s movements in initiating and consolidating processes of transition.<sup>134</sup> The relationship of organized women’s movements to the national women’s machineries established by transitional states is studied, and the effectiveness of these institutions in advancing a feminist agenda within the transitional state

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129. Catherine O’Rourke, *Feminism v. Feminism: What is a Feminist Approach to Transnational Criminal Law?* 102 AM. SOC’Y INT’L L. PROC. (forthcoming 2008).

130. See also Michael Coppedge, *Thickening Thin Concepts and Theories: Combining Large N and Small in Comparative Politics*, 31 COMP. POL. 465 (1999), on “thickening” scholarly analysis.

131. SONIA ALVAREZ, *ENGENDERING TRANSITION IN BRAZIL: WOMEN’S MOVEMENTS IN TRANSITION POLITICS* 36 (1990).

132. *Id.* at 269.

133. See e.g., *id. passim*; THE WOMEN’S MOVEMENT IN LATIN AMERICA: FEMINISM AND THE TRANSITION TO DEMOCRACY (Jane S. Jaquette ed., 1989); GEORGINA WAYLEN, *ENGENDERING TRANSITIONS: WOMEN’S MOBILIZATION, INSTITUTIONS, AND GENDER OUTCOMES* (2007); MALA HTUN, *SEX AND THE STATE: ABORTION, DIVORCE AND THE FAMILY UNDER LATIN AMERICAN DICTATORSHIPS AND DEMOCRACIES* (2003).

134. See WAYLEN, *supra* note 133.

is explored.<sup>135</sup> Further, many studies address the absence of women in the democratic institutions of postauthoritarian states.<sup>136</sup>

Importantly, feminist political science analysis is not only confined to formal institutions of political participation but also examines how women's movements have fared post-transition.<sup>137</sup> The question of the "feminist imprint" of women's mobilization, or the implications of women's mobilization on the basis of their maternal role in periods of transition, is particularly well-developed in analysis of women's mobilization in Latin American transitions.<sup>138</sup> Critically, this literature maps how the changing institutional terrain of the state, an ostensibly "public" concern, implicates nominally "private sphere" questions of body and family.<sup>139</sup>

Overwhelmingly, studies of gender and transition take as their central focus the implications of transition for women as political actors (broadly defined).<sup>140</sup> What is the relationship between these processes of "democratization" on the recognition of women as stakeholders in transitional societies? This focus on women as stakeholders in transitional societies, it is submitted, might usefully inform feminist analysis of transitional justice.

The resounding impression from the Northern Irish case is the acutely *political* terrain of defining "harm" in transitional justice. The process is heavily-contested, involving divergent views among several stakeholders. Drawing on political science scholarship of gender and transition, feminist analysis of specific transitional justice mechanisms might usefully focus attention on the actors that are present and those that are excluded from the process of defining harm. In considering the impact of transition on women's political participation, a particular transitional justice mechanism might be examined for the extent to which it facilitates open and inclusive contestation in defining the harm and violence to be addressed by transition—the extent to which a particular transitional justice mechanism or process creates a space for dissenting voices and otherwise marginalized actors.

"As the existence of women on all sides of the (meta) conflict attests,"<sup>141</sup> the definition of "harm" is often contested among women. Further, feminist articulations of "harm" will change from context to context and over time within a particular context as transition unfolds.<sup>142</sup> This points to a complex and

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135. See, e.g., PATRICIA RICHARDS, *POBLADORES, INDÍGENAS, AND THE STATE: CONFLICTS OVER WOMEN'S RIGHTS IN CHILE* (2004).

136. See, e.g., Georgina Waylen, *Gender and Democratic Politics: A Comparative Analysis of Consolidation in Argentina and Chile*, 32 J. LATIN AM. STUD. 765 (2000).

137. See WAYLEN, *supra* note 133.

138. See Maxine Molyneux, *Mobilization without Emancipation? Women's Interests, State, and Revolution in Nicaragua*, 11 FEMINIST STUD. 227 (1985).

139. See HTUN, *supra* note 133.

140. See sources cited *supra* notes 131-39.

141. Christine Bell & Catherine O'Rourke, *Does Feminism Need a Theory of Transitional Justice? An Introductory Essay*, 1 INT'L J. TRANSITIONAL JUST. 23, 34 (2007).

142. This has been the finding of the author's fieldwork in Chile where initial interventions by women into transitional justice emphasized the need to acknowledge the

evolving definition of harm over the course of transition. A focus on the actors involved and excluded from the process of defining the harms to be ended by transition, might at least go some way to ensuring that transitional justice mechanisms are not doing a further harm by reinforcing the marginalization of women in transitional societies.

*B. Thickening Gender Analysis of the Turn to "Community" in Transitional Justice*

With respect to the turn to community in transitional justice, "thicker" gender analysis would both include and go beyond questions concerning the place of sexual violence in the mandates of community-based transitional justice devices, interrogating more deeply the notion of "community" underpinning the transitional justice process. The re-privileging of community in transitional societies would be considered for its implications for the recognition of women as stakeholders in transitional societies.

Feminist analysis of communitarianism already indicates that there are grounds for concern in the privileging of community as the central locus of political power for three principal reasons.<sup>143</sup> Firstly, there is a disturbing privileging of homogeneity in community that works to exclude or oppress those who are different.<sup>144</sup> Further, the idealization of community tends to lead to the suppression of internal dissent, "an inevitable side effect of a thoroughgoing social constructionist approach to moral and political value."<sup>145</sup> Finally, in theories of communitarianism, there is an inattention to the dynamics of power involved in defining both the terms of membership and the communal values to be privileged in "community."<sup>146</sup> There is little awareness of the domination and inequality within "community" that systematically gives the voices of certain groups such as women lower status in the articulation of

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women "disappeared" by the regime. See COMITÉ DE DEFENSA DE LOS DERECHOS DEL PUEBLO, *TODAS ÍBAMOS A SER REINAS: ESTUDIO SOBRE NUEVE MUJERES EMBARAZADAS QUE FUERON DETENIDAS Y DESAPARECIDAS EN CHILE* [WE WERE ALL GOING TO BE QUEENS: STUDY OF NINE PREGNANT WOMEN WHO WERE DETAINED AND DISAPPEARED IN CHILE] (1990), <http://www.derechos.org/nizkor/chile/libros/reinas>. With the process of designing the subsequent reparations programme, socio-economic harms suffered by women under the dictatorship were emphasized. See PROGRAMA DE MUJERES, COMISIÓN CHILENA DE DERECHOS HUMANOS, *MUJERES, MEMORIAS, Y DERECHOS HUMANOS* [WOMEN, MEMORIES AND HUMAN RIGHTS] 36 (1995). Finally, with the Comisión Nacional sobre Prisión Política y Tortura of 2003, feminist articulation of harm focused on the sexual violence suffered by women detained by the military regime, and linked this to ongoing questions of gender-based torture. See LA MORADA ET AL., *SHADOW REPORT RESPECTING THE THIRD PERIODIC REPORT OF THE GOVERNMENT OF CHILE § 23-25* (2003), submitted to the U.N. Committee Against Torture, Geneva, Switzerland, 32nd Session, May 10-11, 2004, [http://www.humanas.cl/documentos/torture\\_english.pdf](http://www.humanas.cl/documentos/torture_english.pdf).

143. See FRAZER & LACEY, *supra* note 30 (providing an excellent discussion of feminist analysis of communitarianism).

144. YOUNG, *supra* note 30.

145. FRAZER & LACEY, *supra* note 30, at 137.

146. *Id.* at 142-45.

communal values.<sup>147</sup> Communitarianism is therefore marked by inattention to the question: “Who has the power, not only to speak, but to be heard?”<sup>148</sup>

To return to the Northern Irish case study in light of these potential concerns, examining the political controversy surrounding CBRJ in the jurisdiction from the perspective of its implications for women’s political participation brings us to a very different set of conclusions than an exclusive focus on the place of sexual violence in the mandates of the schemes (especially given that sexual violence was formally excluded).<sup>149</sup> The Northern Irish experience resonates with broader feminist critiques of communitarianism, in particular with concerns of power and voice in “community.” I contend that the political controversy surrounding the appropriate role of the CBRJ schemes in the criminal justice system unfolded in a manner which ultimately worked to deny women recognition as stakeholders in transitional Northern Ireland in several key respects.

Firstly, the manner in which the political debate around CBRJ unfolded, in particular the actions of certain political actors in selectively promoting the gender-based concerns about the scheme, demonstrates the continuing role of interlocutors between women’s community-based activism and mainstream public debate. In terms of CBRJ, the state proposes to appoint CBRJ schemes as mediators between community and state,<sup>150</sup> yet women are present neither as leaders or staff in these projects.<sup>151</sup> This continuing role for interlocutors (either political parties or community-elites) between women’s community-based activism, and mainstream political life demonstrates the difficulties of harnessing women’s community activism to meaningful political influence in transitional Northern Ireland. Further, the re-privileging of formerly violent actors in the community risks a continuation of the marginalization of women from political leadership positions in the jurisdiction.

Secondly, organizations active on violence against women were set apart from, and then set against, “community” by the political actors who seized on their concerns in order to attack the community-based schemes. In a context where community cohesion is privileged above all else, there can be very damaging consequences for those seeking to move against apparent community consensus. In the context of the CBRJ schemes, the political controversy placed women *quo* women outside the community but at the heart of a state of still dubious legitimacy. If, as in Northern Ireland, state legitimacy is seen as contingent on securing community involvement, but women are located outside of “community,” this effectively denies women *quo* women any stake in

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147. *Id.*

148. *Id.* at 145.

149. NORTHERN IRELAND OFFICE, *supra* note 75, § 2, GUIDELINES.

150. CRIMINAL JUSTICE INSPECTION, *supra* note 50, § 1.16 at 6 (noting that police value the schemes as a way to advance “policing with the community”).

151. *See, e.g.,* MARIE SMYTH, JENNIFER HAMILTON & KIRSTEN THOMSON, CREGGAN COMMUNITY RESTORATIVE JUSTICE: AN EVALUATION AND SUGGESTED WAY FORWARD 30 (2001), available at <http://www.conflictresearch.org.uk/documents/CRJReport.pdf>.

constituting state legitimacy. Gaining political traction for an explicitly gender-based policy agenda in Northern Ireland's transition thereby becomes all the more difficult.

Critically, the response of CBRJ schemes to concerns emerging from the violence against women sector points to very little space for internal critique within the "community" at the basis of these schemes. High levels of intracommunal solidarity in postconflict societies such as Northern Ireland, while critical to sustaining communities in the context of deep alienation from the state, have arguably also exacerbated the more oppressive and exclusionary tendencies of "community."

Foyle Women's Aid's concerns were dismissed as pro-state, because the Director had taken a seat on the new police structures.<sup>152</sup> Proponents of CBRJ schemes thereby rejected women from "community" and allied them with the still dubious state because of their dissent from the schemes. More broadly, criticisms of the schemes are dismissed as either overly "technocratic" or motivated by party political concerns.<sup>153</sup> Certainly, there appears to be little space for recognition of gender-based identity within one's political community.

Further, in Northern Ireland, access to political power is institutionally determined along ethnic lines. The Northern Ireland Assembly is a consociational mechanism involving a power-sharing executive and a series of "safeguards"<sup>154</sup> ensuring that contentious decisions have cross-community support. The exiling of dissenting female voices from the political community stands to further disempower women in Northern Ireland's unique political and legal dispensation. The recognition of women as stakeholders in Northern Irish society is thereby critically undermined.

#### IV. CONCLUSION: TOWARDS A FEMINIST POLITICS OF TRANSITIONAL JUSTICE

The turn to "community" is an emerging trend in transitional justice. However, analysis of this recent phenomenon in the field has to date failed to acknowledge any potential gender-specific implications. This failure is particularly worrying given that advocates of community-based transitional justice typically locate themselves within the "critical and contextual" scholarship in the field.<sup>155</sup> This article has not sought to suggest that bottom-up formulations of transitional justice are inevitably flawed and exclusionary from a gender-perspective, and, certainly, feminist analysis of transitional justice processes to date demonstrates that uncritical feminist endorsement of a state-

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152. This resonated with attacks on the organization during the mid-1990s, where their decision to train police in handling domestic violence placed them under the threat of IRA violence. Interview with Marie Brown, Director, Foyle Women's Aid, in Derry, N. Ir. (Mar. 15, 2007).

153. McEvoy & Mika, *supra* note 34.

154. Belfast Agreement, *supra* note 59, at 7-8.

155. See McEvoy, *supra* note 8, at 427.

centric model of transitional justice would be unwise.<sup>156</sup> Nevertheless, community-based transitional justice advocacy provides an acute reminder of the extent to which the protagonists of policy and scholarly discussions in transitional justice continue to perceive of the pertinent decision-making as a gender-neutral phenomenon. This article has sought to locate the absence of gender analysis of community-based transitional justice within the narrow terrain in which feminist interventions into transitional justice gained traction, demonstrated routinely by the tendency to collapse gender interests in transitional justice into an analysis of the place of sexual violence in the mandates of transitional justice mechanisms. Further, I have linked this narrow terrain for feminist engagement with transitional justice to the heavily-gendered definitions of harm and violence that continue to underpin transitional justice mechanisms and processes.

I have suggested that feminist interventions into transitional justice might usefully focus on the impact of transitional justice mechanisms on the recognition of women as stakeholders in transitional contexts in order to eschew the collapsing of gender interests in transitional justice to questions of sexual violence. The Northern Irish case exposes the politics of defining “harm” in transitional justice. Apparently technical or legalistic decisions around institutional reconfiguration in transitional societies are determined by a larger political “meta-conflict.”<sup>157</sup> There are a range of stakeholders in this “meta-conflict” beyond dominant ethnic identities and pro- or anti-state forces. “Transitional justice mechanisms are overt sites of meta-conflict negotiations.”<sup>158</sup> Feminist analysis of transitional justice mechanisms should therefore consider the extent to which these mechanisms facilitate open and inclusive contestation concerning the types of harm and violence to be ended by transition creating space for dissenting voices and otherwise marginalized actors.

Arguments for keeping contestation open and amenable to different perspectives may provoke concerns that this contestation will become a destabilizing force in transitional societies where establishing stability is a key objective. However, the consistent gendered patterns in those who are excluded from this contestation demonstrate the dangers of it being confined to already dominant perspectives. Further, it is critical that the search for stability in transition does not end up buttressing gender power imbalances. While gender hierarchies are a traditionally effective stabilizing force in society, they are also deeply harmful.<sup>159</sup>

Ultimately, I would suggest that an objective of transition should be greater fluidity in the bonds of community as violent opposition between communities and alienation from state structures no longer play a determinative role in defining community identities. This is an opportunity for transitional

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156. See generally Bell & O'Rourke, *supra* note 141.

157. MCGARRY & O'LEARY, *supra* note 43.

158. Bell & O'Rourke, *supra* note 141, at 31.

159. Ní Aoláin, *supra* note 121.

societies to forge greater plurality both within and across communities. Transitional justice mechanisms can assist this process when they recognize communities as “contested and heterogeneous, rather than static and homogenous.”<sup>160</sup> However, transitional justice mechanisms also have the potential to undermine greater fluidity in community identities when they fail to accommodate expressions of dissent within community and exile dissenting voices.

A focus on political participation may appear inappropriate, or simply inadequate, given the grave challenges facing transitional societies and, more specifically, facing women in transitional societies. However, in the context of dramatic social and political change, shifting identities, and ongoing contestation between women as to the objectives of transition, there is no effective substitute for broad meaningful deliberation among diverging interests. As Phillips writes: “[n]either community, nor solidarity will come to us ready-made; both have to be constructed through the active involvement of people trying to sort out their differences themselves.”<sup>161</sup> Given the key role of transitional justice mechanisms in assisting (or not) the move away from violent conflict in transitional societies, these important sites of transition also constitute sites of political contestation and therefore bear a duty to facilitate this contestation in an inclusive and meaningful way.

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160. Sunder, *supra* note 38, at 557.

161. ANNE PHILLIPS, *DEMOCRACY AND DIFFERENCE* 20 (1993).