

Edyta Pietrzak

Łódź University of Technology (Poland)

Transitional Justice in Relationship to Public Sphere and Civil Society: Theoretical Approaches

Abstract: The article presents the entitled fields in the framework of their mutual influence. The notion of the public sphere is valuable for understanding the role that civil society plays in transitional justice processes. However transitional justice often reduces the idea of civil society to NGOs and ignores the social movements and civil engagement in the public realm that can be perceived as integral to the creation of new cases for understanding justice in transition. This fact results in the lack of perception of the civil society place in transitional justice processes. Thus the presented paper is based on hermeneutics, critical discourse analysis and dialogue between various theoretical approaches.

Keywords: *public sphere; civil society; transitional justice; non-governmental organisations*

The political theory focuses on the universal and lasting issues of power, coercion, justice, and government in general and unconditional categories. However, regardless of these cosmopolitan intentions, like religion, literature, historiography, or law, it is driven by the needs of the moment and relies on particular, urgent, local and current dilemmas (Geertz, 2003 p. 270). Transitional justice is one of them.

The initial assumption to present this paper was an observation of the existing discourse on the correlation between civil society and transitional justice. However further research has proven that there are also other interesting issues like a relative lack of theories of transitional justice, the significant role, which public domain plays in the transitional justice discourse, and that the civil society in the relationship with transnational justice is often reduced only to Non-Governmental Organisations. Therefore this paper aims to present the wide spectrum of contemporary theoretical interpretations of civil society regarding the analysis of the transitional justice as well as to show the important role of global civil society in this approach.

To meet these assumptions I would like to present three main aspects of the proposed topic. First of them is the general approach of the transitional justice theories. Second, the issue of public sphere relationship to transitional justice. Moreover, the third the area of the contemporary civil society notions used in the analysis of transitional justice.

As a political scientist and anthropologist working in the field of political thought and political anthropology, I hope that my contribution brings something new to the discourse. However, the paper is only a draft of the concept.

Methodology

I would like to start from the declaration, that to raise the subject of civil society is to be on the side of the research tradition related to human thought, communication processes and interpretation of facts, and to acknowledge their meaning as the key elements of public life. How we perceive the world and how we think of it translates directly into interactions and relations in the socio-political sphere. Therefore presented work is based on methodological concepts of Hans Georg Gadamer's hermeneutics¹ (1976; 1989). As a starting point, I used the papers in which authors try to understand and explain the reality, but not the problems themselves.

Regarding the used methodology, I would like to point out in advance of possible allegations, that in this article any special and concrete geographical or historical context is not taken into consideration. In hermeneutics and theoretical² the main point of research analyses of ideas and discourses, even if it can be perceived as following the descriptive way of thinking. Therefore not facts, but ideas will drive us through the article's structure.

Transitional Justice Theories

Let me begin with an analysis of transitional justice theory by referring to the theory of justice as such. However the concept of justice is so ambiguous and evokes so different associations and emotions that it is impossible to build definitions for it, which would please everyone, we can start from a glance of philosophical and ethical proposals of justice.

¹ Philosophical thinking was for Gadamer crossing of frontiers. Gadamer's hermeneutics is the hermeneutic dialogue as the art of understanding of the theory of knowledge, philosophy of language, aesthetics and philosophy of culture. Gadamer viewed understanding as linguistically mediated, through a conversation with others in which reality is explored and an agreement is reached that represents a new understanding.

² The term 'theory' was created from the Greek word *theatai* (observers), while the term 'theoretical' meant as much as 'contemplative'. Looking at something from the outside, we take a point of view that is inaccessible to those taking part in the action or performance. Only observers have a place where they can see art in its entirety, just as philosophers can see the cosmos as an orderly whole. Withdrawal from the game is a condition for understanding the meaning of the game (Arendt 1978, p. 93).

For Plato, in the subjective plan, justice is as much as a virtue, an objective feature of the legislator's activity. For St Thomas Aquinas, justice is an attitude, the strength and constant will of man to give it to everyone, that he rightly deserves to know. In the age of Enlightenment, justice has been linked to egotism and the inability to meet basic human needs (David Hume). It is conventional in nature and reconciles only the various interests at stake. According to Jean Jacques Rousseau, justice presupposes equality, because all, regardless of any differences, are to a certain extent the same, and therefore justice is only possible in a state which, by virtue of its laws, abolishes differences between people, putting them on an equal footing as citizens with the same rights (Zaorski-Sikora, 2007: 17). According to John Rawls, the most important goal should be to share the wealth in such a way that poverty is minimised. However, it does not mean, that inequalities must be linked to injustice. They may be allowed under two conditions. Firstly, we need equal opportunities. Secondly, society must be able to ensure that those who succeeded worst are as wealthy as possible (Rawls: 1971)³.

It is recognised that the concept of justice operates in three contexts - we can define them about the conduct of individuals, the functioning of the state and the activities of the judiciary. According to Maria Ossowska, Polish sociologist of morality, 1., the just is an act that gives someone what he or she deserves for. An act that infringes an entitlement recognised in a given class of rights is unjust. 2. Recognised rights and legitimate claims are based on a certain standard or a legal provision in society. We can speak of justice as a principle of goods sharing and burden sharing. Such an approach to justice can already be found in Aristotle, who has distinguished between distributive justice and retributive (commutative) justice. Distributive justice refers to the distribution of public goods, such as offices or wealth, and concerns the functioning of the state. However, retributive justice refers to human relations at the level of voluntary transactions and concerns claims, damages or compensation for unlawful acts committed by someone. Moreover, this kind of justice has a direct reference to transitional justice. 3. The principle of justice can also be considered as a principle of consistency. The principle of applying rules which do not lead to any hierarchy of values or forms of preference. Once we have decided to stick to a certain criterion, we should stick to it without making any exceptions (Ossowska: 2000, p. 131-148). How do these theories relate to transitional justice theory?

The term 'transitional justice' started to have been used by American scholars in the early 1990s. The first major study on the subject of transitional justice, released in 1995, examined 'the relationship between justice and the prospects for a democratic transition'⁴ (Schabas, 2011).

³ The source of inspiration for Rawls's doctrine is Immanuel Kant's moral philosophy, who claimed that a just society is one in which every individual, regardless of his social position, must be treated before the law as equal, have the right to a fair trial and be subject to equal interest on the part of society.

⁴ Kritz (1995). See also: McAdams, 1997; Teitel, 2000; Cherif Bassiouni, 2002; Roht-Arriaza & Ma-

In 2004, the report entitled ‘The Rule of Law and Transitional Justice in Post-Conflict Societies’ and contained the definition of transitional justice had been presented by UN Secretary-General. The notion of transitional justice comprises 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, to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof⁵. Undoubtedly, we have to admit that despite the academic debate on the topic of transitional justice, there are but a few attempts to conceptualise the issue theoretically (Buckley-Zistel et al., 2014, p. 1). There are many reasons for the shortage of theoretical questions within the field (Clark, Palmer, 2012, p. 1): Firstly, transitional justice is a relatively new research area. Secondly, the field is strongly oriented towards practice, and it almost seems that theorists are not needed (Buckley-Zistel et al., 2014, p. 2)⁶. Thirdly, the concept appears to be continually in motion (Mani, 2002; de Greiff, 2012)⁷. Fourthly, the field is heterogeneous, what may have prevented one theoretical language from emerging as well as crossing disciplinary boundaries. These calls for an expansion of the transitional justice field are another theoretical challenges.

After all those statements we could even ask, why the theory of transitional justice is needed? However, also, in this case, there are several different answers. First of all, we need it to understand better what transitional justice is and how it functions. Theories improve the ability to explain and understand, but also sometimes predict processes and developments. Scholars need it to increasing the level of abstraction and conceptualising them in the form of models or paradigms, allowing for wider generalisations beyond a particular phenomenon as well as to develop a vocabulary which allows communicating about the specific issues leading to exchange of ideas.

Significantly, there is more than one theory of transitional justice. We can rather, say about approaches to conceptualise the phenomenon in general. The majority of scholars associate transitional justice with “a move towards liberal values and democracy” (Mih,

riezcurrana 2006. Two conferences held at the time used the term ‘transition’ and framed the evolving discussion: in 1991, ‘Political Justice and Transition to the Rule of Law in East Central Europe’, under the auspices of the University of Chicago and the Central European University in Prague, and in 1992, ‘Justice in Times of Transition’, in Salzburg.

⁵ UN Doc. S/2004/616.

⁶ Mainstream transitional justice discourse at times seems to ignore relevant theoretical debates taking place in other disciplines such as law, sociology or philosophy that are often based on a long history of theoretical insight.

⁷ Also, the use of the concept of transitional justice was soon expanded beyond its original realm of punitive understandings of justice.

2012, Teitel, 2003). The different disciplinary perspectives lead to the particular focus of research. For the legal and political science research, formal rules and institutional actors tend to be at the centre of interest. Anthropological, sociological and psychological research on transitional justice focuses rather on the challenges of transitional politics on the group and individual level (Buckley-Zistel et al. 2014, p. 4). Some interpretations focus stronger on the notion of justice; others are more concerned with the moment of transition. The concept of transition has been related in the literature due to the presence of two paradigmatic forms: transitions from war to peace and transitions from authoritarianism to democracy. However, in recent years, it has become increasingly common to define the transition regarding a comprehensive transformation in social and political life. It can be directly linked with 'restorative justice' theory and concurrent interest in social reconciliation and posttraumatic healing (Winter, 2013). Here emerge questions such as what a transition should lead to, what kind of society is envisaged and how the transition should or could be accomplished? On the other side, contributions with a stronger emphasis on the notion of justice are guided by the question what shape justice should take and how justice may be defined (Buckley-Zistel et al., 2014, p. 6)? This kind of discussion has moral character and is couched in the tradition of promoting peace and human rights (May 2012). Theoretical approach of transitional justice is indispensable to lead us to further conclusion. However, before we get there, we need to focus on the issues of the public sphere and civil society.

Public Sphere

Transitional justice processes do not happen in socio-political emptiness. They operate in social, historical, cultural, demographic, religious and even geographical contexts that extend far beyond the practical life (Buckley-Zistel et al. 2014, p. 32). There is a history behind every political event. We can refer here to the experience of political anthropology based on three foundations: human being, culture and context. Clifford Geertz advocated for such a semiotic concept of culture, like Max Weber he was convinced that human being is an animal suspended in the network of meanings. Culture is just that network. Its analysis is not an experimental science aimed at discovering the laws, but an interpretative science, which aims at discovering meaning, explaining and translating social expressions (Geertz, 2005, p. 19).

That is why the significance of the justice in transition seeks to understand how individuals and communities engage with needs, rights, customs, agency and mobilisation, and how they contest continuities of injustice and seek justice in their local reality. Justice in transition emerges from a particular time and place and in contrast to transitional justice cannot be prescriptively described, but it is the product of a highly contextualised approach to a justice deficit (Gready & Robins, 2017).

The term of the public sphere⁸ is useful in the general characteristic of socio-political life because it makes visible the relationship between social interactions and explains the role of citizenship. The notion of the public realm captures the role of citizens who can organise themselves according to the common good, to be defended in the public arena. That is why the communicative interactions play a special role in political participation as a model of social integration (Calhoun, 1992, p. 8).

The concept of the public sphere also has normative importance within democratic societies. Firstly, the weakness or total absence of a public sphere is normally characteristic of repressive regimes and conflictive environments. Secondly, while stressing the importance of political participation, the concept of the public sphere establishes a set of considerations for properly playing its role (Habermas, 1991, p. 1-3).

The idea of the public sphere can be also valuable for understanding the fundamental role that civil society in the state and what is even more important, the role of the general public play in countries that are engaging in transitional justice processes. The issue of the public sphere is also useful for identifying the communicative conditions that must be in place to start those discussions among citizens about transitional justice in contexts that political conflict has socially disrupted. It also can help to foster a culture of democratic debate (Ramírez-Barat, 2014, p. 34).

Finally, transitional justice measures can also be perceived as a contribution to strengthening the democratic rule of law in transitional societies. It is done through their capacity to catalyse the (re) articulation of civil society organisations (de Greiff, 2011). The human rights organisations or victims' groups can directly support institutional processes or conduct justice-related projects on their own (Crocker, 1998, p. 492-517; Duthie, 2009). The area of the public sphere in transitional societies draws attention to the capacity of the public to monitor and criticise government's actions to redress the past or advocate for pending tasks that need to be included in the transitional agenda.

Transitional justice, closely linked to the politics of memory, plays a very important role in the public domain. By interpretation and referring to such and no other heroes of the past, we create the socio-political values responsible for educating future generations and supports the power of new elites. Past can be used to promote new social and political standards, as

⁸ Hannah Arendt in *Human Condition* claims that in Ancient Greece there were two ways of understanding what public was. Public was everything that could have been seen, heard and understood by everybody. Public was also everything that was creating the existing world. (Arendt, 1998, p. 50-59). The public sphere that was modeled through citizens' discussions and arguments was independent from the ruling governments or current policies. Greeks could not imagine their lives without the state and the public part of their lives, and saw the ones who lived outside of it as barbarians.

In the contemporary neoliberal theories public sphere is define by the political actions and applicable laws. What should be classified as public is decided by the arguments that have been used publicly and by their influence on the accepted social order and rules.

well as to popularise symbolic understandings of the democratisation. (Marszałek-Kawa & Wawrzyński, 2016, p. 19). “Focusing attention on the public sphere as the fundamental space for developing a country’s political culture of democratic citizenship in transitional justice contexts also reveals the importance of reconstructing the society’s communicative web in itself” (Ramírez-Barat, 2014, p. 35).

Civil Society

In the academic discourse, we can distinguish diverse themes relating to civil society emerging within the transitional justice. There are such issues as: the uncertainty of transition, instrumentalist readings, interrogating the use of civil society in relation to broader political and institutional agendas, weaknesses within civil society, and a tendency to collapse civil society into a treatment of formal structures, and in particular NGOs (Backer, 2003, p. 297–313). All of them are a part of the mentioned institutional approach. However, there is also another interpretation of the discussed phenomenon. The political science also offers interpretations of transitional justice, public sphere and particularly civil society done from the perspective of political theory and political thought. Moreover, this point of view is crucial for the presented paper.

Good point to start this narration is the knowledge that analysing the idea of civil society we are entering the tradition of appealing to *societas civilis* and *koinonia politike*. We deal with the continuity of the concept of free political self-organisation with certain permanent normative elements but also with many of its transformations⁹. The concept of citizenship¹⁰, *polites*, *civis*, *citizen*, *citoyen* has not been lost in the course of these changes. However, we are seeing an increase in the group of civil rights holders (Koselleck, 1994, p. 112–113; Koselleck, 2004). However, always the citizen could be the only one who is responsible and the one who rules. The role of civic responsibility is the key factor in the transitional justice theories, and we cannot forget about this factor when we analyse the relationship between transitional justice processes and civil society.

It could be claimed that the key features of civil society are present in the republican model, based on the idea of common good, and in the liberal model, based on the idea of

⁹ Civil society has had periods of popularity and periods when it was going into the shadows displaced by other political problems. The most important concepts of the political theory of the second half of the 20th century were democracy and justice. Citizenship was only a term attributable to civil rights. At the end of the 1970s it was said that civil society was out of fashion, but early in the 1990s, with democratic transformations in Central and Eastern Europe, was on the lips of everyone, regardless of their political views.

¹⁰ Aristotelian concept of citizenship, presents human being created to become a citizen, because that is his nature. The citizen was perceived through the community. Therefore republican tradition is the tradition of civic virtue, which focuses on the public. The citizens function in the political sphere, and the political shapes their actions.

individual freedom. Let us take a look at the classification of contemporary civil society theories¹¹ based on two models: double and triple- the so-called third sector. The key issue here is the question of the location of civil society within or outside the state. The social and democratic standpoint focuses on the thesis that civil society cannot exist without the help of state, which has to regulate the conflicts, prevent marginalisation and act in favour of political freedom and pluralism. The liberal standpoint is based on autonomy and freedom of individuals and on protecting them from the power of government officials. The dual model based on the Wilhelm Georg Friedrich Hegel and Karl Marx traditions and the liberal concept embraces civil society as distinct from the state but encompasses the sphere of economics as its nucleus. The triple model is based on the traditions of Alexis de Tocqueville, and Antonio Gramsci lies between the political and private spheres. (Dahrendorf, 1994, p. 7; Taylor, 1994, p. 59; Walzer, 1997, p. 7).

In the era of postmodernity, the metaphor of the third sector was slowly blurring. Civil society has ceased to be a mediator between capital and sovereignty. The state absorbed it, but also through intimate structures like family, sexuality or gender, which resulted in some elements previously associated with power in private life (Dybel & Wróbel, 2008, p. 177). As modern democracy has become increasingly cosmopolitan, citizenship can no longer be built by national perspectives. Thus global and transnational concepts of citizenship have arisen.

So much has been written about international networks and transnational organisations that the papers themselves have directly or indirectly inspired the idea of global civil society¹² (Seters, 2008, p. 32). In global interpretation civil society fills-in the public sphere, all the structures and actions, which are situated where the state, the private and the economic spheres cross. The orientation towards common good has been applied not only to the perspective of the *polis*, the local, like in traditional republican theories, but it has broadened its scope onto *kosmos*, the global (Pietrzak, 2014 p. 254). Global civil society fills-in the gap, which emerged after the crisis of vertically oriented organisations of the industrial society. The permanent structures have been replaced by loose coalitions and spontaneous, informal movements. As the counter-power, they have the power of the “global client”. Their mobilisation is based on distributing information through social organisations via non-mainstream media channels and evoking indignation. Global civil society is therefore moral in its character, it is a multidimensional, interconnected space, which exists in social relations

¹¹ According to Ralph Dahrendorf, it is characterized by the existence of unregulated by the state or another center of organizations and institutions as organs of the will of the people. But as Charles Taylor observes, there is also a place where free associations are under the authority of the state. And as Michael Walzer writes, even more, because also as a space of unforced human association, a network of relationships established in the name of family, faith, business and ideology space to fill.

¹² This is well documented in the yearly *Global Civil Society* issued by London School of Economics, edited by Mary Kaldor, Helmuta Anheiera and Marlies Glasius.

and dynamics. It is characterised by peaceful towards freedom, equality and solidarity, as well as willingness to take responsibility for the world inhabited.

Given the critique¹³ as well as political events such as the 2008 financial crisis or the migration crisis¹⁴, we are forced to postpone coherent visions of global society. However theoreticians did not completely depart from the concept of citizenship and their influence on real political life, they adapted them to the prevailing conditions. Thus, in the first decade of the 21st century, proposals for the vision of civil society in transnational optic emerged¹⁵ (Hanerz, 2006, p. 19).

Due to the changes that have led to globalisation, there is no longer the possibility of separating ourselves from the world in national states. It is necessary to cooperate. Moreover, this is the specific lesson for transitional justice movements. Transnational actors are non-state, non-governmental, and non-territorial actors whose activities consciously cross boundaries and affect interstate and international relations (Dumała, 1995, p. 96). Various types of citizens' organisations going beyond borders, oriented on common goals, interests or projects, are part of the transnational civic activity (Baylis Smit. 2008, p. 24). *Transnational networks* are informal such as migration chains, religious organisations and criminal activities. The flourishing of transnational networks as a kind of activity in civil society corresponds to a model of deliberative democracy that implies autonomy and communication as a basis for developing actions in the public sphere.

The transnational notion of civil society does not refer to the idea of a community built above divisions like in case of global civil society, but rather is based on multiplicity and diversity, and on the idea of the nation-state and the national identity of the subjects. The term 'transnational' is used in the context of social movements, organisations or institutions, and networks in the public sphere and to the political and legal practice.

In my opinion, the ideas of a global and transnational civil society are particularly interesting for researchers interested in transitional justice processes. These ideas refer to the concept of responsibility and care, which can be understood not only in a narrow, local or particular context, but also in the concept of globalisation, where they go beyond and

¹³ According to John Keane, the image created by the opponents is exaggerated and the truth is that, global civil society is a set of non-state institutions (Kean, 2003, p. 9-10) functioning as a platform of monitoring. Thanks to this, the locally significant matters gain a global recognition.

¹⁴ Migration is one of the massive character processes in the twentieth century. In 1910 approximately thirty-three million people lived outside their native countries with immigrant status, in 2000 the figure was seventy-five million (Zlotnik, 2001, p. 227). The end of 2017, 65,6 million people were displaced worldwide. The UN Refugee Agency Data Base <http://www.unhcr.org/figures-at-a-glance.html>.

¹⁵ The idea of transnationality, as we know it now, appeared in the social sciences in the early 1970s as a response to the growing complexity of socio-cultural reality, the hybridity and the multiplicity of individuals. In its broadest sense, it refers to a community of cultures, communication links and social regulations crossing national borders, in the economic, political, legal, social and cultural dimensions of a plurilocal process at different geographic, local, microregional, national, macro-regional and global.

refer to the question of consequences, which in today's world affect not only the place of their events. Globalisation makes it clear that something that has happened 'here' can also echo 'elsewhere'. It is worth bearing in mind that public awareness of global or transnational responsibility for events taking place "here" may influence the course of transitional justice processes, especially if we understand justice in the retributive sense.

Conclusion

According to mentioned above Clifford Geertz, the political theory should be similar to Aristotelian vision, the school of judging, the way we get to know the horror and chaos we live in, the way we can help it survive and silence it, and sometimes stop it. To do so, it would have to devote much more attention to the details of reality and the actual course of affairs. Only then it would be able to participate in 'construction of a practical cultural policy of reconciliation', especially needed when the world regroups into 'increasingly heterogeneous structures of difference' where public decisions are not made in parliaments and presidencies but as a 'collective conscience' (Geertz 2003 p. 320).

This paper aimed to present the wide spectrum of contemporary theoretical interpretations of civil society regarding the analysis of the transitional justice as well as to show the important role of global civil society in this approach. If we conceive civil society-transitional justice interactions only through the prism of institutional mechanisms rather than seeing transitional justice as a set of discourses and form of politics, civil society plays little role in understandings of justice, or in creating spaces in which alternatives can be modelled.

In recent transitions, traditional civil society actors have not played a central role in leadership or developing 'new civic practices'. Movements that promote and shape transitions are increasingly moving away from "traditional, representative, recognised forms of citizen organisation to citizen-led, anti-hierarchical, horizontal networks" (Pantazidou, 2013, p.55-70). Central to the reimagined democracy is the creation of physical and online spaces, which embody a greater emphasis on inclusive process, direct action and the modelling of alternatives to mainstream politics and economics. Embracing alternative visions is also key to new thinking on justice and rights. Justice, for example, is not just about law, established rules and the state, but is primarily social (Gready, Robins, 2017, p. 14). That is why we need to turn toward the theory of civil society to support the transitional justice processes and to understand them on deeper level.

The links between new civil society and transitional justice emerge from the cohesion of transitional justice with continuities of injustice. The broad understandings of civil society proposed in this paper show that civil society theories could be widely used in the transitional justice analysis. Especially the global and transnational civil society theories are interesting as a kind of social education for societies in transition. Local dimension of civil society may exclude people who do not belong to the community. Yes, the citizenship also can be excluding everyone who is not a citizen (Nawratek, 2008, p. 20). Moreover, this is often the main core of the transitional justice processes. The idea of global civil society is

encompassing, based on the universal human rights and works for common good without any exception. Emphasis on inclusive process, direct action and the modelling of alternatives to mainstream politics and visions is key to new thinking on justice and rights.

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Author

Dr Hab. Edyta Pietrzak

Łódź University of Technology, Institute of Social Sciences and Management of Technologies.
Contact details. Wólczajska 215 90-924 Lodz, Poland; e-mail: edyta.pietrzak@p.lodz.pl