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Abstract
Critical scholarship on transitional justice, in Africa and globally, has drawn attention to both limits of liberalism and legalism (such as inattention to structural injustices), and to normatively more expansive – transformative, and even revolutionary – approaches to justice. Focusing particularly on South Africa, this debate piece considers the roles of liberal property relations and conceptions of the rule of law in producing and maintaining injustices related to land and property in (post-)transitional societies in Africa and beyond. Moreover, the extent to which transitional justice might contribute to revolutionary aspirations of overcoming capitalist social and economic relations (as espoused, at least rhetorically, by liberation movements throughout Africa) is considered. It is suggested that whilst this is unlikely, non-reformist reforms offer one avenue by which more expansive (transformative or revolutionary) goals might be pursued, in part, in and through transitional justice.

Keywords: property; land; transformative justice; revolution; non-reformist reforms

Introduction
This debate piece explores the relationship between property, transitional justice and non-reformist reforms (also called ‘anti-capitalist reforms’ – those which begin to shift the boundaries of the possible rather than accepting the limits of existing structures; see Gorz 1967, 7-8). With regard to land and property (particularly, but not only in South Africa), the purpose here is to think through some considerations with regard to the potential for revolutionary (i.e. social, economic and political paradigm-shifting) transitional justice (or lack thereof) and the degree to which this could or should be considered a part of transitional justice in theory or practice. It is suggested that inasmuch as the dominant approach to transitional justice remains liberal and legalistic it is necessary to move beyond it in order to fully (or at least better) address injustices relating to property (such as the highly racialised inequalities in land distribution in southern Africa which have been facilitated by both colonial and postcolonial administrations) (Moyo 2015). It is suggested that the only way in which transitional justice might realistically contribute to something revolutionary, or otherwise overcoming the limits of liberalism, is through the enactment of non-reformist reforms. However, the established nature of transitional justice suggests it is unlikely to contribute a great deal in this regard. Not everything can be done via transitional justice. Nor should transitional justice try to address everything. Nevertheless, transitional justice might set the conditions for possible (but not guaranteed) transformative change with regard to land and property by beginning non-reformist reforms in this area.

Throughout the paper there is a focus on South Africa’s experience in relation to transitional justice, land reform and property rights. From this, lessons can be drawn which are relevant to a range of other contexts in Africa (and beyond). Most obviously, consideration of South Africa can provide insights which can usefully be applied to, and can apply lessons from, neighbouring countries in southern Africa.
such as Zimbabwe and Namibia which also experienced (distinct but in some ways comparable) histories of colonisation, apartheid, liberation struggles, inequalities in land and highly racialised class inequalities into the present (Melber 2019; Mudau, Mukonza and Ntshangase 2018). There are, moreover, good reasons for considering (mainstream) transitional justice, its limits in relation to land and property, and calls for transformative change, across numerous other transitional and post-transitional contexts in Africa (i.e. those affected by and responding to conflict, authoritarianism, genocide or other atrocities), including Egypt, Tunisia, Rwanda and Kenya (Hoddy 2021; Munyao 2021).

Specifically, in relation to South Africa, the effects of the Covid-19 pandemic have drawn sharp attention to – and exacerbated – existing inequalities (Parry and Gordon 2021; Hoobler, Dowdeswell and Mahlatji 2021). Recent years have also seen electoral and wider (including internal) political contestation of the ruling African National Congress’s policy direction (including over land and property), and its perceived failings, from a range of perspectives (Ntsebeza 2018; Mabasa 2019; Satgar 2019). In this context, the paper argues that now is the time to revisit the outcomes of transitional justice measures – and the issues these measures did not address. It is, moreover, necessary to reinvigorate engagement with notions of transformative and revolutionary change which have hitherto largely been deferred or abandoned in the dominant policy paradigm (or which have been rhetorically applied in a range of sometimes vague and contradictory ways) (see, for example, Heywood 2019; Evans 2019).

In the next section background and key definitions are set out. After this, the debate piece discusses the ways critical studies of transitional justice have tended to draw attention to the limits of liberalism and legalism, and the consequent limitations these have placed on addressing injustice in (post-)transitional contexts such as South Africa (McAuliffe 2017; Moyo 2015). The potential for non-reformist reforms in transitional justice to address this is then discussed. Finally, the conclusion sets out some key themes and dilemmas for scholarship and practice.

Background and definitions
Transitional justice tends to be defined as a society’s attempts to recover from periods of armed conflict or authoritarian rule, through state and non-state actions, typically with stated aims of promoting reconciliation, peace and justice (de Greiff 2010, 2; International Center for Transitional Justice n.d.; Annan 2004). A mainstream toolkit of mechanisms has become established, reinforcing the notion of transitional justice as inherently short-term and legalistic (Waldorf 2012; Miller 2020). This toolkit typically includes criminal trials and amnesties, truth commissions, and (at least recommended) reparations and institutional reforms (Annan 2004; International Center for Transitional Justice n.d.; Andrieu 2010; Sandoval Villalba 2011; Gready and Robins 2014). These have most often (as in South Africa) been applied to a relatively narrow range of gross violations of civil and political rights, particularly those related to violations of bodily integrity (Gready 2011; Gready and Robins 2014; Waldorf 2012; Miller 2020).
Whilst advocates posit that ‘[t]ransitional justice is essential for the peace and stability of any country’ (Munyao 2021, 123), recent critical scholarship has highlighted limitations of established mainstream approaches to transitional justice, including in relation to land and property (Moyo 2015; Evans 2018). Critical studies have frequently explored normatively more expansive – transformative, and even revolutionary – approaches to justice in transitional settings (Evans 2018; Sharp 2019; McAuliffe 2017; Gready and Robins 2014; Franzki and Olarte 2014). Transformative justice has been defined in terms which emphasise addressing structural violence and socioeconomic rights violations (rather than focusing primarily on direct interpersonal violence and civil and political rights), and which emphasise grassroots, bottom-up, longer-term and less legalistic responses to injustice than transitional justice (Lambourne 2014; Gready and Robins 2014; Evans 2016, 2018).

Dustin Sharp (2019, 578-579), further, contrasts the ‘minimalism and neoliberalism’ of established mainstream transitional justice on one side, and ‘the heroic ambition’ of transformative formulations on the other, with a third approach (which he advocates): “social democratic” transitional justice’. Whilst ‘less ambitious’ than transformative transitional justice, this would nevertheless expand transitional justice beyond the neoliberal formulation, to include “economic violence,” including violations of economic and social rights and crimes of corruption’, but not ‘structural and every-day violence’ (Sharp 2019, 578-579). Revolutionary transitional justice, meanwhile, has been defined as going further than both social democratic and transformative formulations, and potentially including ‘large-scale redistribution of wealth, the democratic control of the economy, and people’s courts that pursue both direct perpetrators and indirect beneficiaries of the previous regime, including bystanders’ (Sharp 2019, 579, citing Franzki and Olarte 2014). This debate piece focuses on these more expansive formulations of justice in an attempt to think through what is possible in terms of addressing injustices present in (post-)transitional contexts even after – or, in part, resulting from – implementation of mainstream (minimal or neoliberal) transitional justice processes.

Here, the notion of non-reformist reforms is applied in order to explore the extent to which transformative, or revolutionary, goals might be pursued in (post-)transitional contexts (especially, but not only, South Africa). As defined by André Gorz (1967, 7-8), ‘[a] reformist reform is one which subordinates its objectives to the criteria of rationality and practicability of a given system and policy’, whereas non-reformist reforms are ‘conceived not in terms of what is possible within the framework of a given system and administration, but in view of what should be made possible in terms of human needs and demands’. In Gorz’s (1967, 7-8) words: a struggle for non-reformist reforms—for anti-capitalist reforms—is one which does not base its validity and its right to exist on capitalist needs, criteria, and rationales. A non-reformist reform is determined not in terms of what can be, but what should be… it bases the possibility of attaining its objective on the implementation of fundamental political and economic
changes. The changes can be sudden, just as they can be gradual. But in any case they assume a modification of the relations of power... They assume structural reforms.

This is to say that non-reformist reforms are those which push the boundaries of the possible, contributing towards changing the systems and structures within which they take place rather than shoring up the established order of things. As elaborated in the sections that follow, the reforms pursued through mainstream – liberal-legalist – transitional justice are not typically focused on such structural change.

Limits of liberal legalism

Lars Waldorf has written of the limitations of transitional justice, and the – arguably (over)ambitious – responses to these, such as transformative justice, in terms of seeking out ‘good enough’ transitional justice (Waldorf 2019a, 161; also Waldorf 2012, 2019b). It seems unlikely that transitional justice is good enough at addressing questions of housing, land and property. This is not least because of the definitional and theoretical questions raised not only by asking what justice is (and ought to be), but also what property is (and ought to be) (Atuahene 2010b). To some degree Sharp’s (2019) position reflects that of Waldorf (2012), in arguing that there may be significant limits to what transitional justice can achieve and suggesting that the ambitions of those who posit that transitional justice ought to address an ever larger array of socioeconomic injustice might be tempered by engagement with empirical reality (Sharp 2019). For similar reasons, it is argued here that transformative justice ought to be considered as a mode of practice for securing justice which is separate to transitional justice (see also Evans 2016, 2018).

To a large extent the limits of transitional justice – with regard to property and more broadly – are the limits of liberal legalism. The priorities and aims of transitional justice might well include stability (of a sort) and the (re)establishment of liberal markets – and property relations – underpinned by a liberal notion of the rule of law (Greedy 2011, 212-213; Greedy and Robins 2014; Lai 2016; Franzki and Olarte 2014). Private property is often seen as the basis of the liberal order (Waldron 2020; also Atuahene 2010b). Inasmuch as this provides the basis for capitalist exploitation and wealth extraction (and the subjugation of nature), transformative, revolutionary (and perhaps even social democratic) aims do not fit easily within this order.\(^2\) Indeed, with regard to revolutionary aspirations, the core of communist demands (as set out by Marx and Engels) is the abolition of bourgeois private property (Marx and Engels 2008, 72).

In part the liberal order reinforces and is reinforced by a transitional justice industry, elements of which thrive in an environment in which liberal assumptions form the (frequently) unchallenged bounds within which transitional justice takes place, often as technocratic, depoliticised and NGOised interventions from elite experts (Lundy and McGovern 2008; Andrieu 2010; Malingozi 2010; Franzki and Olarte 2014). In part responding to this, the potential for socioeconomic rights issues, and economic violence, including that relating to property, land and housing, to be addressed in transitional justice has increasingly been highlighted in recent years (Sharp 2012;
Atuahene 2010a; Schmid and Nolan 2014; see also Muvingi 2009; Pasipanodya 2008). However, further and underlying injustices are nevertheless maintained by the property relations present in the ordinary (i.e. non-conflict, liberal-democratic) circumstances transitional justice typically seeks to (re-)establish (Franzki and Olarte 2014). This is reflected in the relative inattention to distribution of and access to land and property, and related structural injustices, in the settlement established by South Africa’s transitional justice mechanisms.

**Land, property and non-reformist reforms**

The moments in which transitional justice processes intervene are opportunities for change. Reforms can be made, and there is perhaps the possibility of these being non-reformist in that they contribute towards the transformation of structures and the shifting of the boundaries of the possible (see Gorz 1967, 7-8). In relation to property, it has been suggested that the airing of grievances over access to, ownership and distribution of land, and land reform, could be more integrated with established transitional justice mechanisms (such as truth commissions and reparations programmes) and that these could be addressed in and through the post-transition order that transitional justice processes seek to establish (see, for example, Huggins 2009). As a reviewer of an earlier draft of this paper suggested, if South Africa’s Truth and Reconciliation Commission (TRC) had held extensive victims’ hearings on forced removals and required the perpetrators to apply for amnesty, it might have provided greater ideological and political support for land reform than emerged in the absence of such hearings. Whilst this may have been desirable, it did not occur. The purpose here is not to lament missed opportunities of the past, but to explore the possibility of moving in the direction of alternative paths in the future.

The degree to which transitions are malleable is limited (McAuliffe 2017). Enduring elites, and the competing material interests of (former) conflict parties contribute to this limitation (McAuliffe 2017, 2019). This is perhaps most obvious in instances where a negotiated settlement is pursued between conflict parties whose interests and constituencies of support divide (at least partly) along class lines – if the conflict itself was over property relations. A negotiated settlement between those who (at least claim to) seek revolutionary change to property relations and those who defend the existing order in this regard (as was the case in liberation struggles across Africa, including in South Africa) will not result in revolutionary change. A compromise position between such parties necessarily results in the abandonment – or at least, the deferral – of the former party’s revolutionary ambitions (see, for example, Bowman 2019; on class compromise more broadly, see Wright 2000). Arguably, such compromises are inherent to the practice of transitional justice and may also be necessary to achieve aims such as cessation of armed conflict or transfer to democratic rule. Such compromise outcomes are, however, likely to leave at least some injustices – especially those stemming from property relations – in place (see, for example, Moyo 2015, 81). This is the case in South Africa.
This invites the question of whether other outcomes are possible, and what, if anything, transitional justice might contribute to these. It is argued here that it might at times be possible for transitional justice to expose, widen and deepen the ‘cracks’ (Holloway 2012) that exist in liberal legalism and the order this upholds. This can be seen when non-reformist reforms are pursued – when the boundaries of compromise settlements and established orders are revisited and permeated. For example, whilst South Africa’s transitional justice mechanisms did not in themselves address land (and relatedly, housing), the post-apartheid constitution does allow for (potentially radical) land reform (including expropriation and redistribution of land without market-level compensation) (Evans 2018; Ntsebeza 2018). This could be seen as a non-reformist reform – or, at least, opening the possibility for such reforms – as the potential for more radical change (beyond legal enactments) is contained within the constitutional order established by processes which took place within the bounds of liberal legalism.

Frequently, however, transitional justice – especially as practised in its established and mainstream forms – reinforces the liberal order. This suggests that the pursuit of transformative, and especially revolutionary, change with regard to property relations is unlikely to be successful through transitional justice, especially not through transitional justice alone (Moyo 2015; Miller 2020). Both the lack of direct attention to land and property relations in South Africa’s transitional justice processes and the actual, limited, practice of land reform post-apartheid (regardless of the potential for more reform within the new constitutional order) reflect the abovementioned limitations (Evans 2018, 2019; Atuahene 2010b; Kepe and Hall 2018; Akinola 2018).

Questions are then invited as to how injustices relating to land, housing and property might be addressed in South Africa and analogous cases. If non-reformist reforms are to be pursued it is unlikely that these will take place within formal transitional justice processes (given their time-bound nature and tendency towards reinforcing liberal conceptions) (see, for example, Miller 2020). Indeed, as highlighted by an anonymous reviewer, a question which hangs over transitional justice interventions is that of mandate and democratic legitimacy. One might question the mandate of a transitional justice mechanism such as the TRC (rather than an elected government) to implement structural changes.

As well as being outside mainstream transitional justice processes, transformative, non-reformist reforms may well take place after such processes have been completed – for instance, if South Africa were to pursue a more radically redistributive approach to land in the present, decades after the TRC and the new constitution (Evans 2016, 2018, 2019). Importantly, transitional settlements, and the compromises these might entail, need not be permanent (Evans 2018, 2019; Collins 2010). Post-transitional mobilisations might contribute towards more transformative (perhaps even revolutionary) change addressing injustices not covered by transitional justice processes (Evans 2018, 2019; Collins 2010). Such mobilisations, are, at least potentially, more democratic and may lead to a clearer mandate (with
greater perceived legitimacy) to carry out transformative change than established transitional justice mechanisms (see, for example, Evans 2018, 2021). They may build on, add to and further non-reformist reforms, further exposing and widening ‘cracks’ in liberal legalist transitional settlements (Holloway 2012; Evans 2019).

**Conclusion**

The liberal order of private property and rule of law which transitional justice tends to work within (if not actively reinforce) produces and maintains injustices (see, for example, Marcotte 2018; Moyo 2015; Franzki and Olarte 2014; Miller 2020). Far-reaching transformative, or revolutionary, approaches to reimagining property relations are not within the remit of established transitional justice mechanisms. However, these mechanisms might under some circumstances set the conditions for the pursuit of non-reformist reforms in this area, for instance by stretching the boundaries of liberal understandings of the rule of law or of human rights in ways which allow for – but do not guarantee – transformative or revolutionary change. This might happen by enshrining more collective understandings of rights and more socioeconomic rights in constitutions, and/or by recognising structural violence and systemic injustices, and conferring legitimacy upon attempts to address these (through the state or other actors), in the outcomes of transitional justice processes such as truth commission reports, reparations programmes and memory work. This could provide space and motivation for ongoing grassroots mobilisation outside formal or state-led structures with a view to pushing reforms which contribute to altering the structures within which they take place.

Transitional justice, and the moments in which it intervenes, moreover, are not the only moments that change is possible or the only means by which any injustices can be addressed. In this regard it is helpful to consider thinking ‘against, and beyond’ (Holloway 2016) transitional justice. This might be complementary to or sit in tension with thinking within transitional justice when it comes to injustices stemming from liberal property relations and the pursuit of (social democratic, transformative, revolutionary) change addressing these (see also Miller 2020). Transformative justice, and revolutionary justice (possibly even social democratic justice) in (post-)transitional contexts could be seen as outside and beyond transitional justice. To the extent that transitional justice reinforces the existing order it is inadequate for pursuing transformative (or revolutionary) conceptions of justice. Such conceptions are thus against transitional justice. Non-reformist reforms, which work against and beyond the (perhaps inherent) limitations of transitional justice and liberal legalism (exposing, widening and deepening the cracks in these), might then in combination facilitate (greater moves towards) transformative, or revolutionary, change.

**References**


For instance, Khanyisela Moyo (2015, 82) argues that Zimbabwe might exemplify ‘the perils of a land reform process which is not rights based’, whilst also having been in some ways successful, at least ‘in terms of transferring agricultural land from a white minority to the black majority’ and in addressing some inequalities (Moyo 2015, 86). She further argues that whilst ‘the rights violations which characterized Zimbabwe’s land redistribution programme make it a difficult precedent to locate within the transitional justice field’, redistribution (including of land) should nevertheless be ‘included within the ambit’ of transitional justice (Moyo 2015, 89).

Sharp (2019, 578) refers to social democratic transitional justice as making use of ‘a concept called “liberal localism” in an attempt to strike a better balance between state-led and community-driven modalities, western and “traditional” approaches to justice, and legal and political frameworks for changemaking’. However, social democracy has been used to refer a wide range of (at times contradictory) positions in different contexts. Some of these notions are likely to be compatible with maintaining (perhaps actively reinforcing) the liberal order of property relations, whereas other uses of the term suggest something much closer to a revolutionary restructuring of society and economy (see, for example, Marx Memorial Library 2020).