

TRANSITIONAL JUSTICE IN SOUTHEAST ASIA: THEORY AND PRACTICE

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The issue of transitional justice has largely evaded theoretical discussion on democratization in the Southeast Asian context despite the importance of coming to terms with the history of abuse and violence of the past authoritarian regimes. This article fills out this lacuna by incorporating regional analysis of the transitional justice process in several Southeast Asian countries to the larger and mainstream theories of transitional justice that are developed from other contexts. Using the case of transitional justice in Cambodia, East Timor, the Philippines, and Indonesia, this article finds that the two most predominant accounts in the literature – the “balance of power” and the “justice cascade” theories – are inadequate to explain the conditions of emergence of transitional justice and the kind of justice measures that the state would adopt. In turn, study of empirical cases in these four Southeast Asian countries sheds light on three plausible factors previously overlooked in the literatures: a) the distinctive, locally based, notion of justice; b) the frame and narrative of legitimacy of past violence; and c) the degree of complicity and entrenchment of current ruling elites in the past conflict.

Keywords: transitional justice, democratization, political transition, balance of power, justice cascade, Southeast Asia.

I. Introduction

In the past few decades, the landscape of Southeast Asian politics has been marked by many important transitions following regime change, especially a democratization process and the end of insurgency conflicts. One of the most pressing issues that arises with such changes is the question of how states and societies ought to deal with past violence and abuses committed by the previous authoritarian regime – which is conceptualized as transitional justice. While the issue is an important concern for policymakers and human rights activists, transitional justice has largely escaped the analytical lens of the literatures of political transition and democratization in Southeast Asian contexts. On the other hand, both policy practices and the substantive literatures of transitional justice have reached a global stage, with most focus on cases in Latin America, Africa, and Eastern Europe. This is because states in these regions have pioneered efforts to hold accountable their *ancien régime* for past human rights violations. Although Southeast Asian countries have recently embarked on the

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transitional justice process, analyses of the region have been less incorporated in the theoretical debates of transitional justice.

I aim to rectify this gap by bridging the theoretical insights of the substantive literatures of transitional justice and the empirical practices in Southeast Asian contexts. The relatively late adoption and modification, or adjustment, of certain transitional justice models in Southeast Asia provide a fertile analytical ground, not only to fill the sorely lacking regional analyses but to “test” whether theoretical expectations developed from the other parts of the world travel well. In turn, a more fine-grained look at the region, I argue, yields two theoretical benefits. First, it gives us insight about the scope of existing explanations: under what conditions the presupposed determinants of transitional justice yield the expected outcomes, and why they “work” in some cases but not others. Second, it helps us to identify measures of justice that have been adopted and/or the alternative pathways – which are overlooked by the preexisting explanations – that lead or impede states to proceed with past injustice.

I pursue this goal in the following steps. First, I provide a brief overview of two prevailing accounts of transitional justice: the “balance of power” thesis and the “justice cascade” thesis. The former emphasizes the mode of transition and the power relation between outgoing and incoming rulers as the main factors that determine whether states would punish or forgive past dictators. The latter account stresses the importance of global diffusion of human rights norms and the role of civil society activism as the norms entrepreneurs to explain the wide adoption and the states’ commitment to confront the transitional justice issues.

Second, I review some studies of transitional justice in Cambodia, East Timor, the Philippines, and Indonesia, to grasp the extent to which the predominant explanations hold. These four countries offer considerable and representative cases of transitional justice in the Southeast Asian region. The justice pursuit processes following notable political transitions in these countries are among the most studied cases and best-known in the literature.² Yet, even in these most typical cases, I found that the “balance of power” thesis is at worst wrong and at best insufficient to explain the outcome of transitional justice implemented in each country under scrutiny. The “justice cascade” thesis, on the other hand, explains the emergence of pressure to the state to adopt some measures of justice. But, the demand-side account is not sufficient to explain under what conditions states decide to proceed with justice and which kind of measures they would adopt.

Third, reflecting on the preexisting studies that discuss empirical cases in Southeast Asia, I found that the pattern of transitional justice outcomes in the region

² Renée Jeffery and Hun Joon Kim, eds., *Transitional Justice in the Asia-Pacific* (New York: Cambridge University Press, 2014); Lia Kent, Joanne Wallis, and Claire Cronin, *Civil Society and Transitional Justice in Asia and the Pacific* (Canberra, Australia: ANU Press, 2019).

may plausibly depend on three alternative factors: a) the distinctive, locally-based, notion of justice; b) the frame and narrative of legitimacy of past violence; and c) the degree of complicity and entrenchment of current ruling elites in the past conflict. Exploring these three alternatives, I argue that the elite's complicity and the legitimacy of past violence may be two underlying factors that shape political elites' decisions, by way of providing incentives structures for elites to strategically construct the distinctive notion of justice that they pursue. The last section concludes the paper.

II. Determinants of Transitional Justice: Two Main Approaches

While the process of transitional justice dates at least back to the Nuremberg and Tokyo trials in the aftermath of World War II, the scholarship of transitional justice has been more developed following the "Third Wave" of democratization.³ Huntington (1991: 211) says that the new rulers face the dilemma of facing "the torturer problem" and they have options either to "prosecute and punish, or forgive and forget."⁴ Yet, the records show that not only does transitional justice emerge and spread – albeit unevenly – but also the justice options exist beyond just the dichotomous option of prosecution and amnesty, including a third way of truth commission and revision of domestic law.

This theoretical puzzle pushes students of democratization⁵ and students of conflicts⁶ to explain the emergence and the decision-making behind the various measures of transitional justice. The global diffusion and "normalization" of transitional justice ideas and practices⁷ attract the attention of international relations (IR) scholars as well,⁸ especially related to the rise and effect of international contexts in shaping the transitional justice process in domestic politics. Their inquiries have largely resulted in

³ Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, 1991).

⁴ Samuel P. Huntington, "How Countries Democratize," *Political Science Quarterly* 106, no. 4 (1991): 579–616.

⁵ Luc Huyse, "Justice After Transition: On the Choices Successor Make in Dealing with the Past," *Law and Social Inquiry* 20, no. 01 (1995): 51–78. Monika Nalepa, *Skeletons in the Closet: Transitional Justice in Post-Communist Europe* (New York, NY: Cambridge University Press, 2010).

⁶ Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security* 28, no. 3 (2014): 5–44.

⁷ Ruti Teitel, *Globalizing Transitional Justice: Contemporary Essays* (Oxford: Oxford University Press, 2014).

⁸ Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (New York: Cambridge University Press, 2009); Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (London: WW Norton & Company, 2011); Hun Joon Kim, "Structural Determinants of Human Rights Prosecutions After Democratic Transition," *Journal of Peace Research* 49, no. 2 (2012): 305–20.

two dominant accounts of transitional justice, which I elaborate in the following discussion.

A. The Power Balance Thesis

This thesis is pioneered by Huntington (1991), who argues that the decision whether to punish or pardon largely depends on the interests of the political elites. The underlying assumption is that the struggle of interests and the capacity between outgoing authoritarians or incoming democratizers overpower the interests and demands of citizens and organized civil society groups. In this sense, the most important cause of transitional justice for him is the balance of power between old and new elites that accompanies the political transition moment.

The theory further posits that the variety of transitional justice measures depends on the mode of transition that a state takes. Huntington identifies three modes of transition: a) transformation, where the decision to reform comes from the old regime's elites who have upper hand contra the opposition and want to keep their power by changing the political climates; b) transplacement, where old authoritarian elites have declining power in facing the challengers, but they were able to negotiate the exit terms; and c) replacement, where the old regime was completely overthrown and replaced due to the lost power. Huntington claims that "in transformations former officials of the authoritarian regime were almost never punished; in replacements they almost always were. In transplacements this was often an issue to be negotiated." (1991: 615).⁹ The theory then generates testable empirical hypotheses regarding the varieties of justice measures: trial is most likely to occur in the replacement transition, the truth commission – as a negotiated way – is expected in transplacement, and amnesty or total impunity is most probably seen in transformation.

Several empirical findings from Eastern Europe and Latin America support the theory and have largely converged in emphasizing three points.¹⁰ First, the decision to have transitional justice, and which strategy chosen, comes largely from the political calculation of new elites. Therefore, the key mechanism in producing the outcome is the elites' political incentives, determined by who are the incoming rulers and how they attain power in the new regime. Second, timing matters. Given the narrow window of democratization (or post-conflict transition), incentives to hold accountable the old regimes come in the immediate period of transition. The theory also considers that public demands for prosecutions are relatively short-lived and tend to wane in the long run. Third, the incoming elites are often hesitant to proceed with justice for fear of

⁹ Huntington, "How Countries Democratize."

¹⁰ Huyse, "Justice After Transition"; Elin Skaar, "Truth Commissions, Trials-or Nothing? Policy Options in Democratic Transitions," *Third World Quarterly* 20, no. 6 (1999): 1109–28.

instability in their rule. These propositions serve as observable implications of the theory.

B. The Justice Cascade Thesis

This theory constitutes a direct challenge to the power balance theory in its underlying assumptions and the proposed causal factors. It starts with an observation that among countries with diverse democratization manners, the national policies on transitional justice have reflected a convergence that corresponds to the spread of international normative trends toward the protection of human rights. Sikkink (2011) calls the trend “justice cascade”¹¹ and Sriram (2005) observes as “a revolution in accountability.”¹² Sikkink further conceptualizes justice cascade as “a rapid and dramatic shift in the legitimacy of the norms of individual criminal accountability for human rights violations and an increase in actions (such as trials) on behalf of those norms.”

The theory suggests that international norms diffusion is an important drive for policymakers to adopt transitional justice measures. But, Lutz & Sikkink (2001) argued that the justice cascade was not spontaneous, nor was it the result of the natural evolution of law or global culture. Rather, justice cascade entails changes in ideas and practices driven and fueled by human rights activists that spread globally in a modularity. According to them, “the justice cascade started as a result of the concerted efforts of small groups of public interest lawyers, jurists, and activists who pioneered strategies, developed legal arguments, recruited plaintiffs and witnesses, marshaled evidence, and persevered through years of legal challenges” (Sikkink and Kim 2013: 277).¹³ In Sikkink’s words, these activists are the “norm entrepreneurs” whose emergence was facilitated by two broader structural changes in the world, the third wave of democracy and the end of the Cold War. Therefore, this theory decidedly stresses the demand-side explanation, in making sense of elites’ political decisions. Empirical support for the theory comes, for instance, from Kim’s statistical test of 71 countries which shows that active advocacy for individual criminal accountability is a key factor guaranteeing persistent and frequent human rights prosecutions.¹⁴

¹¹ Sikkink, *The Justice Cascade*.

¹² Chandra Lekha Sriram, “Revolutions in Accountability: New Approaches to Past Abuses,” *American University International Law Review* 19 (2003): 301–430.

¹³ Kathryn Sikkink and Hun Joon Kim, “The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations,” *Annual Review of Law and Social Science* 9 (2013): 269–85.

¹⁴ Kim, “Structural Determinants of Human Rights Prosecutions After Democratic Transition.”

III. Empirical Realities in Southeast Asia: Congruency and Discrepancy with Theories

The previous literatures and the widespread practices of political accountability have established several key measures of transitional justice, ranging from trials, truth commission, lustration, remuneration for victims, and restoring the official historical narratives. In general, we can identify three constitutive dimensions of transitional justice: truth revelation (truth), offender responsibility (punishment), and victim reparation (reparation). While these constitutive dimensions have appeared in many empirical cases, not all states adopt them equally. This is especially true for the cases in Southeast Asia. Most countries usually adopt only a truth commission or even give pardon (amnesty) in addressing their past crimes, such as in the Philippines and Indonesia. Few countries pursue all three measures of transitional justice, but among them are Cambodia and East Timor – in which transitional justice is adopted to address the termination of conflict, rather than democratization.

Previous empirical studies of transitional justice in these countries mostly focus on one specific mechanism (i.e., trial or truth commission, or amnesty) and are limited by within-country analysis rather than looking at comparative perspectives. Given that, we have little sense of why and when some countries undergoing transition in Southeast Asia adopt full measures of justice, while others adopt them only partially, or even resort to amnesty or impunity.

Toward answering this question, I provide a brief discussion of the experience of transitional justice in four countries – Cambodia, East Timor, the Philippines, and Indonesia – with a comparative lens in mind. The selection of these four countries follows the strategy of “typical case” selection which, according to Seawright and Gerring (2008), focuses on “a case that exemplifies a stable, cross-case relationship.” All four countries analyzed in this paper are appropriate for “typical” or “representative” cases for they similarly display a relationship between the outcome of transitional justice and the plausible explanation proposed by the two main theories: power balance of regime transition and international pressure of justice cascade. In all four of these cases, one observes the formation of an international committee of justice as well as specific power competition following the political transition leading to some justice measures.

Yet, despite the similarity of general outcomes and the hypothesized causes, these four countries display interesting differences in types and timing of the transitional justice. In this sense, the cases of Cambodia, East Timor, the Philippines, and Indonesia are appropriate to test whether the most established theories still hold to explain the different outcomes within these seemingly similar cases. In particular, I aim to use these cases as an empirical lens to “test” the explanatory power and analytical leverage of the two main theories. Even though I do not claim to offer a causal theory, I argue that my

empirical discussion also offers grounds to identify the alternative causal pathways that have been overlooked in the existing body of literature.

A. Cambodia: Trial, Truth, Reparation

Cambodia is perhaps the landmark case of transitional justice in contemporary Southeast Asia and one of the most studied cases in the literature. The transitional justice process in Cambodia has been adopted, in particular, to address the mass killing and crimes committed by the Khmer Rouge regime from 1975-1979. Pol Pot's rule was ended by a military defeat by Vietnamese troops in 1979, after which a Vietnamese backed domestic government was established. But the Khmer Rouge leadership did not fully surrender until 1999. In 1979, the country held the People's Revolutionary Tribunal in which Pol Pot and his deputies were found guilty in absentia of genocide and sentenced to death. Yet, the tribunal result did not hold much legitimacy due to the politicized Cold War frame that saw the tribunal as a Vietnamese intervention.¹⁵

Liberation from the Khmer Rouge regime did not instantly bring Cambodia to stable rule, even despite the formation of the State of Cambodia in 1989. Instead, the country "survived a decade of foreign occupation, international isolation, and guerilla terror and harassment" (Kiernan, 2002: 483).¹⁶ In 1991, the United Nations (UN) established the United Nations Transitional Authority in Cambodia which resulted in the 1993 internationally supervised election that saw the formation of a somewhat democratic government and the withdrawal of the UN mission. The international community was actively involved in pressing the Cambodian government to implement transitional justice measures.¹⁷ In 1994, the government of the People's Republic of Kampuchea (PRK) granted amnesty to members but not leaders of the Khmer Rouge. Only in 1997 did the Co-Prime Ministers of Cambodia formally write a request to the UN to set up a special tribunal to try the Khmer Rouge leaders, which eventually took place starting in 2003.

The primary measure of transitional justice in Cambodia entailed the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC) to hold accountable those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international

¹⁵ Kirsten Ainley, "Transitional Justice in Cambodia: The Coincidence of Principle and Power," in *Transitional Justice in the Asia-Pacific*, ed. Renée Jeffery and Hun Joon Kim (Cambridge: Cambridge University Press, 2013), 125–56.

¹⁶ Ben Kiernan, "Introduction: Conflict in Cambodia, 1945-2002," *Critical Asian Studies* 34, no. 4 (2002): 483–95.

¹⁷ Laurel E. Fletcher, Harvey M. Weinstein, and Jamie Rowen, "Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective," *Human Rights Quarterly* 31 (2009): 163–220.

conventions recognized by Cambodia. The ECCC is a genuinely hybrid court – the first of its kind. In what sense it is hybrid? The courts were co-designed by international and local actors, were funded from a combination of international funds and Cambodian government budget and mandated a balance of judges appointed by international and national courts. The procedures of the courts also follow the Cambodian legal system combined with some aspects of international law.

Observers generally see transitional justice in Cambodia as a relatively successful process. Ainley (2013), for instance, notes that while the Courts could not legally punish Pol Pot before his natural death in 1998, the trials in the ECCC have sentenced most responsible people of significant rank. It showed that the court functions beyond just a formality. Ainley also observes that the trial has led to public interest in justice and wide support for the ECCC.¹⁸ Theiring (2017: 186) notes that the Courts have also made headway that drives “a variety of facets reconciling individual victims in Cambodia. Through victim support, production of a legal culture rooted in international law, and establishment of a common history, the ECCC has given people a means to begin to recognize and transition from the days of the Khmer Rouge.”¹⁹ It is too early to know if it has or will deter future violence, but it has, it seems, enabled the violence of the past to be discussed more openly: the KR period is now (for the first time) a compulsory aspect of school curriculums.

What lessons does the Cambodian experience provide to assess the theoretical explanation of transitional justice? Cambodia seems to defy the expectations of power balance theory, especially regarding the timing and the expected outcome of justice measures. While the downfall of the Khmer Rouge regime largely followed the replacement path, as the regime was completely overturned and replaced by the Vietnamese backed government in 1979, the Khmer Rouge was not punished, as the theory would expect, and other measures of transitional justice were absent until 1997. Therefore, contrary to the theoretical postulation that demand and incentives to proceed with justice are short-lived and most likely in the transition process, the Cambodian case shows that the process was instead delayed. The outcomes of the justice process in Cambodia were largely produced by the pressures from activism from international institutions. In this sense, the “justice cascade” thesis is correct in identifying the significance of norm diffusion and the role of international factors, but the theory gets the primary actor wrong because the role of civil society is minimal, and the popular demand/support came only after the Courts took place.

¹⁸ Ainley, “Transitional Justice in Cambodia.”

¹⁹ Robert Theiring, “The Policy of Truth: A Comparative Study of Transitional Justice Between the Rwandan Gacaca Court and the Extraordinary Chambers in the Courts of Cambodia,” *California Western International Law Journal* 48 (2017): 159–88.

Another insight is that the Cambodian case does not seem to confirm the expectation that “prosecutions may deter human rights violations by increasing the perception of the possibility of costs of repression for individual state officials”²⁰ and that “transitional justice overall has a positive effect on the change in human rights and democracy measures”²¹ (Olsen et al. 2010). Instead, Kheang Un (2011: 547) finds that “since 2003, Cambodia has evolved into hegemonic party authoritarianism wherein the minimum criteria for democracy – freedom of expression, freedom of assembly – have been seriously curtailed while periodic elections have been maintained.”²² In addition, Ainley (2013) finds that “with respect to human rights measures, based on PHYSINT data which uses a range of zero to indicate no government respect for physical integrity and eight to indicate full respect, Cambodia shows a significant decline from a score of five in 2002 to two in 2007.”²³

B. East Timor: More Reconciliation and Reparation, Less Prosecution

The process of transitional justice in East Timor must be placed in a context similar to the post-colonial states against their former colonizers. This is because the massive human rights abuse in East Timor occurred under unlawful occupation from 1976 to 1999 by the Indonesian government – under Suharto’s dictatorship. After decades of guerilla resistance, combined with intensive international diplomacy by East Timorese national leaders, the external, imposed rule ended in 1999 in a national referendum in which more than 80 percent of East Timorese chose to separate from Indonesia. In the years leading to the eventual collapse of Suharto’s rule in 1998, the Indonesian state had faced strong pressure from the international community regarding the illegitimate rule that Indonesia imposed on the nation – in particular after the 1991 Santa Cruz massacre.

The transition to independence in East Timor, from 1999-2002, was coordinated by a multinational intervention, the UN Transitional Administration in East Timor (UNTAET). The international transitional administration established a Serious Crimes Unit and – similar to the UN’s approach in Cambodia—a ‘hybrid,’ or internationalized, tribunal, known as the Special Panels for Serious Crimes.²⁴ The tribunals were mandated

²⁰ Sikkink, *The Justice Cascade*.

²¹ Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, “The Justice Balance: When Transitional Justice Improves Human Rights and Democracy,” *Human Rights Quarterly* 32 (2010): 980–1007.

²² Kheang Un, “Cambodia: Moving Away from Democracy?,” *International Political Science Review* 32, no. 5 (2011): 546–62.

²³ Ainley, “Transitional Justice in Cambodia,” p. 154.

²⁴ Ida Maria Solaas, “Transitional Justice in East Timor: A Case Study of Justice Versus Reconciliation and Its Consequences” (Unpublished Master’s Thesis, Oslo, University of Oslo, 2009); Lia Kent, “Local Memory Practices in East Timor: Disrupting Transitional Justice Narratives,” *International Journal of*

to investigate and prosecute cases of war crimes, crimes against humanity, genocide, murder, torture and sexual offences. On the other hand, the Indonesian government eventually created its own mechanism, an ad hoc human rights court in Jakarta, to meet the pressure from the international community—and also as part of the process of Indonesia’s own democratic transition—to try within its jurisdiction the human right abusers who played a leading role in the post-referendum violence. Studies of transitional justice in East Timor have noted the shortcomings of these judicial attempts.²⁵ They generally observe that the established judicial measures have failed to hold the serious crimes perpetrators accountable. After a decade, not one Indonesian official, let alone any of the high-ranked generals, has been successfully prosecuted for any 1999-related crime.

While the judicial measure is largely a failure, studies have found that the process of transitional justice has, both domestically in East Timor and bilaterally between East Timor and Indonesia, been characterized by an emphasis on reconciliation.²⁶ The UN-initiated Commission for Reception, Truth and Reconciliation (CAVR) undertook a nationwide truth-seeking process and organized community reconciliation hearings to reintegrate perpetrators of less serious crimes, including looting and arson, into their communities. After East Timor gained independence, its government, together with the Indonesian government, established yet another mechanism, the Commission of Truth and Friendship (CTF). This Commission was mandated to seek the “conclusive truth” about the 1999 violence with a view to fostering friendship and reconciliation between the two nations. While the CAVR was a mix of reconciliation founded on research-based truth and on political negotiation, the CTF involved reconciliation based more on political negotiation and a politically negotiated truth.

Why has the process of transitional justice become more reconciliatory than judicially focused? Kent (2013) notes that members of East Timor’s political elite have used transitional justice discourse selectively to support their own specific agendas. Conscious of the new nation’s geopolitical constraints, East Timorese leaders have promoted an agenda of reconciliation as “forgiveness and forgetting.” This narrative can be seen in the establishment of the bilateral CTF, which embodied the leadership’s outright rejection of a prosecutorial approach and the promotion of a nation-building

Transitional Justice 5, no. 3 (2011): 434–55; Lia Kent, “Interrogating the ‘Gap’ Between Law and Justice: East Timor’s Serious Crimes Process,” *Human Rights Quarterly* 34, no. 4 (2012): 1021–44.

²⁵ Joseph Nevins, *A Not-So-Distant Horror: Mass Violence in East Timor* (Cornell University Press, 2005); David J. Cohen and Paul Seils, *Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta* (International Center for Transitional Justice, 2003); Suzanne Katzenstein, “Hybrid Tribunals: Searching for Justice in East Timor,” *Harvard Human Rights Journal* 16 (2003): 245–78; Paulo Gorjão, “The Legacy and Lessons of the United Nations Transitional Administration in East Timor,” *Contemporary Southeast Asia* 24, no. 2 (2002): 313–36.

²⁶ Lia Kent, *The Dynamics of Transitional Justice: International Models and Local Realities in East Timor* (London: Routledge, 2018).

agenda that stressed moving on from the past and building diplomatic relations with Indonesia.²⁷ At the society level, Kent (2012) also identifies the discrepancy between the universalized, official, conception of “justice” adopted and imposed by the international model and the locally-based understanding of the justice that informs the preference of the population regarding what kind of strategies they use.²⁸ This is in line with studies in Sierra Leone (Kelsall 2009), for instance, that have shown that local communities may understand ‘justice’ very differently from the way in which it is defined by official institutions.²⁹ Other studies examine the everyday localized acts of survival through which individuals and communities seek to reconstruct their lives and rebuild relationships in the wake of protracted conflict.³⁰

Overall, we see that while the transition processes in both Cambodia and East Timor have in principle taken the form of replacement, the transitional justice yielded diverging outcomes. In East Timor, although the tribunals were in place, they did not function. Instead, the justice measures were largely reconciliatory. In terms of timing, the power balance theory provides accurate insight in the East Timorese case that the incentives for the justice process emerge mainly in the immediate aftermath of the transition. But this is because of the strong international pressure and transnational activism that invoked the violation of normative international principles of state sovereignty, which set in motion mounting pressure on the Indonesian government – which also faced its own democratization phase. In this sense, the “justice cascade” thesis has been more helpful in making sense of the emergence of popular demand for justice in East Timor.

C. Philippines: Performative Process and Elusive Promises of Justice

There are at least two transitional justice processes in the country: the one concerning Philippine society post-Marcos dictatorship, and the other involving the insurgency conflict within the Bangsa Moro in the Southern Philippines. The former is incomplete, and the latter is yet to be proven as an ongoing commitment. But, in general the government’s commitment with the latter process seems stronger than with the former.

²⁷ Lia Kent, “Beyond ‘Pragmatism’ versus ‘Principle’: Ongoing Justice Debates in East Timor,” in *Transitional Justice in the Asia-Pacific*, ed. Renée Jeffery and Hun Joon Kim (Cambridge: Cambridge University Press, 2013), 157–94.

²⁸ Kent, “Interrogating the” Gap” Between Law and Justice.”

²⁹ Tim Kelsall, *Culture Under Cross-Examination: International Justice and the Special Court for Sierra Leone* (New York: Cambridge University Press, 2009).

³⁰ Rosalind Shaw, Lars Waldorf, and Pierre Hazan, *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (Stanford, CA: Stanford University Press, 2010); Kris Brown, “‘What It Was Like to Live Through a Day’: Transitional Justice and The Memory of the Everyday in a Divided Society,” *International Journal of Transitional Justice* 6, no. 3 (2012): 444–66.

Maglana (2016), for instance, argues that “the signs are encouraging that the new administration will act on the recommendations of the Transitional Justice and Reconciliation Commission (TJRC) report.”³¹ The committee was created under the Normalization Annex of the Framework Agreement on the Bangsamoro (FAB).

In regard to Marcos’ human rights abuses, however, justice is largely a stalled process. After the 1986 EDSA People Power demonstration that helped seal the fate of Marcos’ dictatorship and forced him to seek exile in Hawaii, the Philippines was ruled under the elected president Cory Aquino, who took some transitional measures to reinstate democracy in the country. While some consider her government as a redeemer, a number of scholars and political analysts also see the transitional government as “restorationist” of “*cacique* democracy”³² where the old oligarchs and patrimonial elites were brought back to power, and those who embezzled the country’s wealth and committed human rights violations were never prosecuted.

In his study on truth commissions, Christie (2000) revealed that the Philippines was one of the few countries that did not successfully complete the report, despite the government’s initiative to transition to a democratic regime.³³ The Commission on Human Rights (CHR) was created in 1988 to investigate the past violations but its power was limited to making recommendations for prosecution and not to prosecute any party.³⁴ Another agency, the Presidential Commission on Good Government (PCGG), was established to investigate and recover the ill-gotten wealth of the Marcos family and its cronies. Until 2016, the PCGG had not fully completed its task, and as of 2015 there were still civil cases filed against 19 parties to recover illegal assets worth 32 billion pesos.³⁵ There have been efforts to provide reparations to victims of Martial Law under the 2013 Human Rights Victims Reparation and Recognition Act, and there are also plans to set up a memorial museum on the Martial Law era that would include artifacts, memorabilia and other items. But the recent near victory of Ferdinand Marcos, Jr. in his running for the vice-presidency, and the strong resolve of President Duterte to bury Marcos Sr. at the cemetery of national heroes indicate a lack of shared apprehension of the Marcos years.³⁶

³¹ Mags Z. Maglana, “Marcos Burial, Transitional Justice, and Peace Process,” *SunStar Philippines*, August 19, 2016, <https://www.sunstar.com.ph/article/93110>.

³² Benedict Anderson, “Cacique Democracy in the Philippines,” *New Left Review*, no. 169 (1998): 3–33.

³³ Kenneth Christie, *The South African Truth Commission* (Basingtoke: Macmillan, 2000).

³⁴ Wahyudi Akmaliah, “Remembering the Legacies of the Marcos Dictatorship: The Formation of Historical Memory and the Struggle for Justice in the Post-Marcos Period,” in *The Work of the 2011/2012 API Fellows* (Bangkok, Thailand: API Regional Coordinating Institute, Institute of Asian Studies Chulalongkon University, 2014), 1–8.

³⁵ Philip M. Lustre, “Search for Marcos’ Wealth: Compromising with Cronies,” *Rappler*, February 25, 2016, <https://www.rappler.com/newsbreak/in-depth/123667-marcos-cronies-compromise/>.

³⁶ Maglana, “Marcos Burial, Transitional Justice, and Peace Process.”

Plantilla (1997) argues that the process of post-Marcos transitional justice has been full of “elusive promises” and “performative promises.”³⁷ Soon after taking office, Aquino initiated the Presidential Commission on Good Government (PCGG) to recover properties illegally acquired by Marcos and his associates, as well as open up a legal case against the murder of Benigno Aquino, which resulted in the conviction of 16 out of 36 rank-and-files soldiers implicated in the assassination. However, the trial failed to reach a conclusive answer of who was the mastermind of the killing and who made the order. Nor was the government able to bring back and confiscate Marcos’ wealth to pay back the stolen and plundered state’s resources and pay the victims compensation.

While zealously promoting human rights and pursuing the ill-gotten wealth of Marcos, as Plantilla (1997) observes, the Aquino administration failed to confront four primary institutional obstacles to justice: the army, the police, the judiciary, and the civilian bureaucracy. Much of the extra-judicial killings—known as “salvaging” in the Philippines—are attributed to the police, who believed that death was a better form of justice than allowing a suspect, who may or may not be politically involved, to remain free. Salvaging and other abuses were never curbed by the Marcos administration, and such logic remains intact even until today under Duterte’s administration. This “subculture of tyranny and oppression” in the security apparatus was the main cause of hundreds of cases of torture, disappearances, and other human rights violations that remain unaccounted for.

In his article, Huntington (1991) characterized the Philippines’ democratic transition as a case of replacement, but even if we grant this interpretation, the transitional justice outcome that evolved was in a stark contrast to what Huntington would expect.³⁸ Instead of being prosecuted, Marcos and his cronies not only managed to live freely but also remained wielding much influence in the country’s politics. The Philippine case also demonstrates the limits of the justice cascade argument. Civil society activism was vibrant in pushing for accountability toward transitional justice. Yet, even then, the demand did not necessarily translate into the adoption of reconciliatory, let. alone judicial, measures.

D. Indonesia: Selective and Localized Justice, Impunity at Large

Democratization in Indonesia followed a similar pattern to that which took place in the Philippines. The strong dictator seemed to be brought down by massive and intense popular resistance. But a deeper look at the transition in Indonesia actually reveals that the decisive force that set in motion Suharto’s collapse started with the crack inside his

³⁷ Jefferson Plantilla, “Elusive Promise: Transitional Justice in the Philippines,” *Human Rights Dialogue*, Transitional Justice in East Asia and its Impact on Human Rights, 1, no. 8 (March 5, 1997).

³⁸ Huntington, “How Countries Democratize.”

own oligarchic circle and that, even at the last moment, Suharto managed to secure a deal with the powerful armed forces leader to let him leave the scene calmly and to guarantee that he and his family would be out of reach of any legal measures.³⁹ So in this sense, Indonesia's transition perhaps fits better with the transplacement path.

Post-authoritarian Indonesia has faced many cases of past human rights abuses: the 1965-66 anticommunist massacres, 1984 Tanjung Priok killings, the 1998 shootings of protestors, internal armed conflict in Aceh, Papua, and the occupation of now-independent East Timor. But these various cases show different outcomes of transitional justice. In the East Timor case, as I discussed earlier, the Indonesian state adopted two comprehensive mechanisms: 1) a domestic ad-hoc human rights court system against an international court for East Timor, and 2) a truth and reconciliation commission—truth-seeking combined with amnesty—against domestic ad-hoc human rights courts. In this process, Suh (2012) argues that the most important driving force was transnational human rights activism.⁴⁰

A different outcome occurred in the transition following the Aceh conflict in 2005, which ended through a series of peace agreements. The peace agreement established four mechanisms to implement peace between the two sides: 1) amnesty for the rebel fighters of the Free Aceh Movement (GAM); 2) demobilization, disarmament, and decommissioning of GAM and the Indonesian forces; 3) a reintegration agenda for combatants, political prisoners, and civilians of the conflict, and 4) the establishment of a human rights court and a truth commission for Aceh.⁴¹ Yet, in Aceh, except for financial reparation and political integration (restorative measures), punitive justice and the reconciliation agenda proved to be an utter failure. The proposed human rights court for Aceh has never been set up despite a law calling for its establishment. A truth commission has not been officially established because it is supposed to operate under the framework of a national truth and reconciliation commission, which was ruled unconstitutional.⁴²

Kimura (2015) argues that implicated elites in Indonesia have employed various strategies to maneuver and circumvent the democratic system to hamper justice and reconciliation as well as to prevent themselves from being a target of legal

³⁹ Jeffrey A. Winters, *Oligarchy* (New York, NY: Cambridge University Press, 2011); Richard Robison and Vedi Hadiz, *Reorganising Power in Indonesia: The Politics of Oligarchy in an Age of Markets* (London: Routledge, 2004).

⁴⁰ Suh Jiwon, "The Politics of Transitional Justice in Post-Suharto Indonesia" (Ph.D. Dissertation, The Ohio State University, 2012).

⁴¹ Ehito Kimura, "The Struggle for Justice and Reconciliation in Post-Suharto Indonesia," *Southeast Asian Studies* 4, no. 1 (2015): 73–93.

⁴² Edward Aspinall and Fajran Zain, "Transitional Justice Delayed in Aceh, Indonesia," in *Transitional Justice in the Asia-Pacific*, ed. Renée Jeffery and Hun Joon Kim (New York: Cambridge University Press, 2014), 87–123.

accountability. One such way is reflected in the redefinition and rearticulation of the concepts of justice and reconciliation in a politicized arena. Many groups, international and local alike, have turned to alternative forms of justice that employ traditional, cultural, and/or religious practices. While successful in some instances, Kimura (2015: 74) argues that forms of “traditional” and, in particular, Islamic justice have also been used to avoid and even undermine forms of accountability.⁴³

In the case of the anticommunist violence in 1965-66, most disappointingly, the state has never been compelled to adopt such measures to come to terms with its past. It is civil society and activists working on human rights issues that have insisted the state settle the case and right its past wrongs by adopting measures for truth and justice. In the early years of *Reformasi*, state institutions responded to some of these calls and initiated both policies addressing the 1965 tragedy and attempts to promote national reconciliation.⁴⁴ However, most of these projects at the central-state level have failed to be completed or implemented. Since there has been stagnation at the national level in dealing with issues of truth and justice relating to the mass violence in the mid-1960s, in the last few years NGOs and victims’ groups alike have undertaken more grassroots and community-based activities at the local level.⁴⁵ Yet, at the national level, the state has still treated communism as “the latent threat.”⁴⁶

The Indonesian case shows that the analytical utility of the preexisting theories must be kept in mind with certain caveats and scope conditions. In the case of East Timor, the emergence of some justice measures seems to be better explained by strong international pressure, as presumed by the justice cascade thesis. Yet, for the case of post-Suharto transition in general, the strong demand and the significant involvement of norm entrepreneurs and the normative diffusion of the justice conception has not been easily transposed and translated into official policies in Indonesia. As Kimura (2015: 74) observes, “the attempt to build a Truth and Reconciliation Commission (TRC) emerged from activists and civil society organizations but came to be coopted into a law that would emphasize amnesty over accountability.”⁴⁷ The Indonesian case also reveals a lack of analytical attention to the reverse of transitional justice: impunity. Also, in Indonesia, the previous studies have shown the diverse forms of localized justice applied selectively for different cases, albeit under the same democratic transition. This dynamic calls for the need of disaggregating the analytical unit of transitional justice. It may be

⁴³ Kimura, “The Struggle for Justice and Reconciliation in Post-Suharto Indonesia.”

⁴⁴ Rohana Kuddus, “The Ghosts of 1965: Politics and Memory in Indonesia,” *New Left Review*, no. 104 (2017): 45–92.

⁴⁵ Sri Lestari Wahyuningroem, “Seducing for Truth and Justice: Civil Society Initiatives for the 1965 Mass Violence in Indonesia,” *Journal of Current Southeast Asian Affairs* 32, no. 3 (2013): 115–42.

⁴⁶ Kuddus, “The Ghosts of 1965: Politics and Memory in Indonesia.”

⁴⁷ Kimura, “The Struggle for Justice and Reconciliation in Post-Suharto Indonesia.”

more productive to treat a specific case of human rights abuse, instead the country-level case, as the unit of analysis.

IV. Alternative Paths of Transitional Justice

From the empirical discussion in the previous section, one common insight is that elites' political decisions are the key mechanism (proximate cause) in getting to transitional justice. This seems obvious in almost all cases. Yet, the remaining question is then to understand under what conditions elites would have incentive to pursue justice processes. The experience of Southeast Asian countries shows that the logic of power balance and modes of transition seems to apply only limitedly, while justice cascade and norms diffusion is most useful in explaining the driving force behind the demand of transitional justice, but not always helpful in making sense of the eventual outcome of the implementation process. In addition, to assess the preexisting theories, an empirical look at the Southeast Asian experiences allows us to identify other causal factors that plausibly explain various outcomes of transitional justice. From the previous discussion, this section highlights three potential alternative explanatory variables.

The first alternative path is that the actual outcomes of justice measures may depend on the localized notion of what counts as "justice." This is shown, in particular, from the case of transitional justice in Indonesia and East Timor. In the Tanjung Priok case where military officers responsible for the violence against Muslims in a Jakarta neighborhood proposed to settle matters through *islah*, an Islamic form of peace making rather than resorting to judicial channels. In Aceh, practices of *diyat* and *peusijek* have led to debates about whether to use alternative or traditional forms of reconciliation or national legal mechanisms to prosecute individuals. While proponents have argued that these cultural practices offer an alternative way to resolve conflicts, critics have derided the cooptation of Islamic and traditional principles for their own self-protection.

The second alternative explanation is that the outcome of justice depends on the legitimacy of the past violence. Legitimacy of the past violence refers to the way in which violent and repressive actions committed by the regime are framed and institutionalized in the collective memory of the society. In turn, legitimacy is indicated by how much this frame is accepted and congruent with popular narratives. Violence can be framed as legitimate when the target of violence is deemed as threatening and the regime can incite popular participation in committing violence. Different frames of legitimacy may be framed by different actors—for instance, an official state narrative versus an international normative frame—which in turn affect the extent of popular pressure and shape different political calculations of the elites. In the case of East Timor, the stronger support from international communities for the pursuit of independence and subsequent justice processes is partly due to the frame of illegitimate occupation. East Timor was not previously part of Indonesia, and therefore the invasion by Suharto in 1975 calls for

the strong normative urge to observe international norms of self-determination. In reverse, the greatest challenge to fight against impunity and the near absence of any efforts to address the 1965-66 anticommunist massacres is to deconstruct a strongly cultivated narrative which sees the abolition of anticommunism as not only legitimate, but also necessary for the existence of the Indonesian republic, as communists were constructed in the official historical texts as treacherous and dangerous.

Lastly, the outcomes—and especially the timing—of transitional justice implementation may also depend on the level of complicity of current elites in the past conflict. Complicity here refers to the degree of involvement of the present ruling or dominant elites in perpetrating violence and to what extent their power and influence are compromised by the pursuit of transitional justice. In this sense, the more dominant elites—especially those who are in the security forces—are entrenched and implicated with the past conflicts, the more obstacles are in place for the pursuit of transitional justice. In this sense, rather than coming as a function of the balance of power *vis-à-vis* outgoing regime, the incentive to pursue justice comes from elites' consideration of how much power or influence they are going to lose when the state discloses the truth or conducts trials. This factor seems to explain the culture of impunity in Indonesia and the Philippines, in which elements of power patronage from the Suharto and Marcos eras that helped the dictators commit violence still have a strong grip in political office and the security apparatus. Another analytical utility of this explanation is that it can better make sense of the reason why transitional justice policies are often adopted in gradual or delayed implementation—such as those that took place in the Cambodian case.

In adjudicating the relative significance of these three alternative factors, we need to evaluate how much they affect political elites' decisions, which is the proximate cause of the type and timing of transitional justice in all cases we observe. Looking through this optic, one can say that the interaction of two variables—legitimacy of past violence and complicity of current elites in the past conflicts—serves as two fundamental reasons that shape political elites' decisions. While the distinctive, localized, notion of justice still matters, one can assume that these notions are more malleable to the incentives and stakes that the political elites have. Therefore, legitimacy and complicity come as decisive variables that shape the structure of stakes and incentives of the political elites.

In this sense, this alternative view concurs with the power balance and the justice cascade theory in highlighting that elites' political decisions are the key mechanism (proximate cause) in getting to transitional justice. Yet, my underlying assumption about elites' political calculation differs from them. Rather than a function of balance of power *vis-à-vis* the outgoing regime, I contend that the incentive to pursue justice comes from elites' consideration of how much stake they will have in facing demands for justice. The first variable, the legitimacy of past violence, corresponds to the stake from popular pressure. The second variable, the complicity in the past conflict, corresponds to the stake from the institutional process of justice. Therefore, exploring the interaction of

these two plausible factors may benefit students of transitional justice to develop a more dynamic explanation.

V. Conclusion

Throughout this empirical analysis of transitional justice in Cambodia, East Timor, the Philippines, and Indonesia, I have demonstrated the utility and the pitfalls of two predominant theories of transitional justice. I found that the power balance theory pioneered by Huntington (1991) is either wrong or incomplete to make sense of the empirical realities of various transitional justice outcomes. The theory, while seemingly logically sound, errs in two crucial empirical respects. First, the hypothesized outcomes “punish or forget” diverged from the actual outcomes, such as in the Philippines. Moreover, the political decision to pursue transitional justice does not seem to depend purely on power relations during transition. Second, instead of emerging in the immediate aftermath of transition (as Huntington postulates), in many cases, the pursuit and implementation of transitional justice policies seem to take place more intensively as the country moves further from the transition moment to the consolidation period.

The “justice cascade” thesis, on the other hand, is at most useful in explaining the emergence of popular or international pressure on the state. But, the demand-side account is not sufficient to explain under what conditions societal and international pressures will translate into institutional adoption.

While this paper does not aim to provide an alternative theory, my empirical analysis advances three other plausible causal factors that seem to help explain the diverse outcomes of the types of transitional justice in Southeast Asia: a) the distinctive, locally based, notion of justice; b) the frame and narrative of legitimacy of past violence; and c) the degree of complicity and entrenchment of current ruling elites in past conflict. A more developed explanation of how these alternative pathways explains the type of transitional justice process certainly requires further and deeper inquiry.

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