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Abstract

Book review of American transitional justice: writing cold war history in human rights litigation: by Natalie R. Davidson, Cambridge, Cambridge University Press, 2020, 218 pp., AUD\$156.95 (hardback), ISBN 9781108477703, USD\$80.00 (e-book), ISBN 9781108774529, ISBN 9781108702553 (paperback)

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[American transitional justice: writing cold war history in human rights litigation](#), by Natalie R. Davidson, Cambridge, Cambridge University Press, 2020, 218 pp., AUD \$156.95 (hardback), ISBN 9781108477703, USD\$80.00 (e-book), ISBN 9781108774529, ISBN 9781108702553 (paperback)

Written by Israeli scholar Natalie Davidson, *American Transitional Justice: Writing Cold War History in Human Rights Litigation* presents a refreshingly incisive critique of human rights litigation in the United States (US) pursued under the famous Alien Tort Statute (ATS). On the face of it, this transnational litigation, which permits US courts to exercise universal jurisdiction, is a form of salvation for people who have suffered torture and abuse under repressive regimes outside the US but who have limited mechanisms for redress other than a US courtroom. Yet, in sifting through the layers of meaning of two landmark cases from the 1980s and 1990s, Davidson reveals the problematic implications of using a US legal paradigm that is limited to individual parties and individual rights to decide significant foreign issues of public interest—in particular, its whitewashing of the greater context of economic injustice and of America's complicity in foreign atrocities.

The cases in question are *Filártiga v Peña-Irala* (1980) (*Filártiga*) and *In re Estate of Ferdinand E. Marcos Human Rights Litigation* (1995) (*Marcos*). *Filártiga* was brought in relation to the torture to death of 17-year-old Joelito Filártiga in Paraguay. On trial was Americo Peña, an Inspector General of Police operating under dictator General Alfredo Stroessner who led Paraguay from 1954 to 1989. For the first time in the largely dormant life of the ATS, the

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plaintiff successfully sued the defendant for human rights contraventions, although was unsuccessful in collecting the damages of over US\$10 million. *Marcos* similarly concerned torture, disappearance and extrajudicial execution in the Philippines under Ferdinand Marcos, who ruled over the archipelago from 1965 to 1986, mostly under martial law. The case constituted the first ATS class action, having been brought on behalf of 10,000 victims, and the first use of the ATS to find a former head of state liable, though the plaintiffs were unable to recover the award of nearly US\$2 billion.

On one level, Davidson argues, the litigation has had positive outcomes. It has empowered victims by providing them with a forum in which to communicate their experience of injustice and has affirmed their accounts by finding in their favour. Moreover, she observes that in the victims' home countries, the litigation has prompted a national discussion in the media on those past events and, in the Philippines, it has encouraged the enactment of reparation law, which has provided compensation, some redistribution of Marcos's reclaimed wealth, and mechanisms for truth-telling and historical education.

The basis of Davidson's thesis, however, is that the historical narrative constructed by the cases is troublingly inaccurate. This narrative largely reduced the relevant conduct to the malevolence of individuals, much like in international criminal law, even though the abuse was systemic. At the same time, she argues, it not only exonerated the US but depicted it as a saviour and a champion of human rights. Davidson points out that this representation is particularly ironic given that the US in fact sponsored the suppression of dissent among the people of Paraguay and the Philippines, as it did in relation to numerous countries of the world in a concerted effort to contain radical movements and the struggles of workers and peasants towards socialism. She suggests that in effectively obscuring this American foreign policy of the Cold War period, the litigation, at best, has a complex legacy.

Davidson explains that particular 'legal constraints'—such as doctrines that limit the affairs of one state from being judged by the courts of another state—necessitated the substance of the arguments being 'individualized, simplified, and depoliticized' by the plaintiffs and the courts (184–185). Circumventing the history of the US backing of the regimes, she states, was also 'necessary in order to win the case' (128). In addition, to demonstrate legitimacy, the litigation supposedly demanded a picture of US opposition to torture in Paraguay and the Philippines, which contrasted sharply with the reality in which the American government provided military training on torture techniques.

One may note that it is unsurprising that the legal constraints would work to protect rather than expose the contributory role of US foreign policy. It is hard to imagine any legal system, including that of a democracy, tolerating self-criticism. The ATS was enacted to judge the citizens of other countries by America's standards on international law and not Americans by other countries' standards on international law. Dating back to the French Revolution, the

statute was arguably a sign of an emerging world power looking to assert itself not only economically in the world but legally. With the US having increasingly positioned itself as a superior arbiter of justice on the global stage through the twentieth century, this unique legislation became ever more fitting, with its jurisdiction only contracting in 2013 when it started to compromise commercial interests (*Kiobel v Royal Dutch Petroleum* 2013).

Importantly, Davidson implores human rights thinkers to consider the ATS in a historical context. She states: 'The book can thus be read as a call for an unabashedly interdisciplinary legal-historical methodology for human rights scholars and practitioners' (190). Her historical backdrop is the Cold War and its decline, which coincided with the period of transition in Paraguay and the Philippines from military dictatorship to liberal democracy. Interestingly, although the arrested spread of socialism in the world at the time meant that America perceived less need to side with dictators and that it could start to judge them publicly

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through ATS litigation, it also spelled the strengthening of conservative ideology. Indeed, Paraguay and the Philippines are currently governed by politicians with firm connections to the old guard, in line with a resurgence of far-right governments across the globe.

This state of affairs is supported in principle by the US, which continues to exert pressure on countries with pervasive working-class and liberationist ideologies and to oppose the popular will where it eschews private interests. While, in the context of a discussion of transitional justice, we can plainly see that there was a transition out of dictatorship, it should be said that the underlying objectives of the US that led to its support for this society remain the same and transition-less. One might therefore suggest that the irony of the two cases being brought before the US legal system may extend to the use of US legal mechanisms more generally to lay down the law to foreign state actors as well as the United Nations itself (e.g. Anthony 2018). The irony pervades cases where the defendants are America's allies in crime and, most markedly, where they are its political foes that have been subjected by the US to contentious wars and economic sanctions (e.g. *Warmbier v Democratic People's Republic of Korea* 2018). Hence, we may wish to take a leaf out of Davidson's book in being heedful of the greater implications of transnational human rights claims pursued from the seat of a world power.

Davidson's book can also encourage us to be alert to the private elements of public interest litigation in the US. Certainly, the US is a user-pays economy where the pursuit of justice is often an expensive activity and where there appears to be much money to be made by the legal profession in ATS litigation, which occupies private law. Davidson explains that the lead lawyer in *Marcos*, Robert Swift, actively initiated the case, was poised to take a large contingency fee from the unprecedented award, and then ultimately stifled the plaintiffs' access to compensation in refusing to provide their names to the Philippine government's reparations board without payment of a fee (which the board declined). In reality, he was simply playing a part in a legal system that celebrates justice but also permits personal profit from it. It is a system that, in not expecting comprehensive governmental reparation processes, even glorifies lawyers like Swift.

In conclusion, Davidson's monograph is essentially a reflection on compromised principles. The compromise is made particularly through a US legal system that preferences sanitised accounts of history that are 'flattering' to the US (2, 7, 13, 109) and welcomes the privatisation of justice. The book is therefore useful in providing a practical warning to public interest lawyers about the ethics of working in such situations, even when employed by a nongovernmental body acting ostensibly with the victims' best interests at heart. It is a compelling read for human rights advocates faced with the real limitations of applying individualised human rights concepts in cases that concern broader social issues. Lastly, the book is a valuable reference for international lawyers interested in the point at which law meets politics, as the author highlights the Pandora's box of political issues that were unleashed when a lawyer finally blew the dust off the ATS in the case of *Filártiga*.

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