

THEORIZING TRANSITIONAL JUSTICE

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Introduction

This collection of essays aims to bring philosophical clarity to the study and practice of Transitional Justice. Theorists and practitioners of transitional justice are interested in the aftermath of conflict and large-scale human rights abuses: how do nations and political groups address past wrongs in order to create (sometimes recreate) a decent civil order? The question is very old: as we will see in one of the essays offered here, it certainly occupied the ancient Athenians after the fall of the Thirty Tyrants¹. And it is still very much with us in recent history: from the failure to account for the Armenian Genocide, through the Nuremberg Trials, denazification, lustration policies in Eastern Europe after the fall of communism, the creation of ad hoc and then a permanent International Criminal Tribunal, the South African Truth and Reconciliation Commission – all offered different answers. If the 20th century was the nightmarish, barbaric century of genocide, it was also an epoch in which the question of how to account for mass crimes has been taken most seriously. Needless to say the question is still very much with us, as we consider how best to transition to sustainable democracy after years of authoritarian rule in Egypt, Libya and Syria, to pluck but a few names from recent headlines.

The study of transitional justice in recent decades last decades has been interdisciplinary, running the gamut from philosophy through theology, sociology, anthropology, law and recently even neuroscience². The field had its contemporary birth with the creation of the Nuremberg Tribunals after the Second World War, the first successful and effective trials for large-scale war crimes. But the concern with accountability for past wrongs went into a deep freeze with the Cold War and the inability of the two great powers to agree on the nature and orientation of international norms. Interest reemerged after the collapse of the Soviet Union. In the past several decades we have seen the creation of several new ad hoc criminal tribunals (for, e.g., the former Yugoslavia, Rwanda and Cambodia) as well as the rise of Truth and Reconciliation Commissions (most famously in South Africa) and other semi-judicial bodies (for example, Rwanda's Gacaca courts).

In spite of the exponential growth of interest in this area, there have been surprisingly few attempts to provide a systematic conceptual grounding of the nature, aims and limitations of

¹ For a classic account of the history of transitional justice see Elster, J. (2004) *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge, U.K.: Cambridge University Press.

² See, e.g. a recent initiative to study the connection between neuroscience and post conflict strategies inaugurated by *Beyond Conflict*, a non profit organization based in Tufts University. A report on a recent conference organized by Beyond Conflict on this topic can be found here: http://www.beyondconflictint.org/wp-content/uploads/2012/04/Neuroscience_Bro_v2_optimized.pdf

transitional justice. Perhaps this theoretical lack is due to the vastly different contexts in which transitional policies are put into practice. One of the essays herein suggests as much. Perhaps it is due to the vastly disparate scholarly methodologies employed by academics who take up such questions. Be that as it may, the collection before you seeks to fill this lacuna by asking a wide range of established as well as upcoming writers to “theorize” transitional justice – to reflect philosophically about how the interaction between moral, political, legal and conceptual questions shapes our practices after war. What kind of justice is transitional justice? What are the contradictions between its transitionality and its justness? What are the operative assumptions that any state seriously engaging in transitional policies entertains? How do we understand the tensions between the desire to hold criminals responsible for what they have done and the need to generate political and economic stability for a new state? Are the major dilemmas of transitional justice themselves transitory, to be dispelled with the creation of a settled democracy, or do they continue to animate the political life of a state founded (as so many are) in great injustice? What is the potential of transitional justice to bring about social change? More specifically, how and when can it promote political reconciliation? How and when can it bring about significant structural and economic reform? What are the interactions between transitional justice practices and a new state’s cultural life? Are some social-scientific and philosophical methodologies more promising than others in trying to address these questions? In attempting to tackle these questions this is the first volume to take on the theory of transitional justice from a philosophical perspective³.

The book has seven sections. The first centers on the most basic assumption in the field – that political reconstruction requires a reckoning with past wrongs. Rotondi and Eisikovits question this “memory assumption”, almost axiomatic in writings about transitional justice, which dictates that a violent past *must* be addressed in any process of transition. The received view underlying much of the literature is that impunity, burial of the past, unaccountability, not only impede transition but also exacerbate the divide between victims and oppressors. But is this always and unconditionally true? The authors argue that under specific circumstances, a (qualified) argument for not remembering can be formulated. They consider three cases in which the memory assumption is problematic: 1. Post conflict societies that evidence a widespread cultural ambivalence about policies of accountability for past wrongs 2. Conflicts where there is an immensely complicated division of guilt between the parties and 3. Political situations where an insistence on immediate commemoration and thorough accountability risks reigniting the conflict.

³ An excellent collection of essays published in 2014: Buckley-Zistel, Beck, Braun, *Transitional Justice Theories* (Routledge) provides excellent methodological coverage but was not philosophically oriented.

Like Rotondi and Eisikovits, Lawther is also interested in the possibility of a transition without addressing past wrongs. Based on over 40 semi-structured interviews conducted with groups and individuals involved in the decades long conflict in Northern Ireland, Lawther wonders if it is possible to achieve peace without excavating the past. More importantly, can silencing the past be beneficial rather than detrimental to stability? The question is taken up in the Northern Irish context, where transitional justice mechanisms have been implemented in the absence of a clear truth process. Commenting insightfully about the role of trust in any policy of post war truth telling, the author provides both a set of interpretations for why truth telling was neglected in the Northern Irish transition and of the possibilities that picking it up could generate.

The second part of the book takes up the subject of punishment (and refraining from punishment) in a process of transition. Espindola articulates a two-pronged attack on Carl Schmitt's famous argument for amnesties in the aftermath of World War II: Schmitt's defense fails to take into account the moral importance of retributive sentiments and the possibility of channeling them into productive responses by means of transitional policies. More devastatingly, Schmitt's support of amnesties is inconsistent with much else in his writing- primarily the insistence that political communities have the exclusive ability to identify who their own enemies are and treat them accordingly. As Espindola puts it: "Schmittian amnesties violate Schmitt's own principle of epistemic privilege of political communities with respect to the paradigmatic political decision about how the enemy should be dealt with."

Murphy's paper provides us with a sophisticated and important comparison between the aims and scope of retributive and transitional justice. She argues that the retributive justification for punishment, quite coherent in settled contexts, does not hold up in circumstances of political transition. If, as part of our transitional policy, we are to punish those associated with a deposed authoritarian regime (and Murphy accepts that such punishments can be appropriate) the justification for punishment cannot be purely retributive. Murphy sets several tasks for any theory of punishment in transitional settings. Chief among these are determining how a perpetrator becomes liable for punishment (though the wrongs she is accused of may well have been legal at the time of commission), why the new state should try to punish under transitional circumstances and whether/how it can do so effectively.

Part three examines the potential (or lack thereof) of transitional policies to bring about lasting structural change and to truly mold a new polity's economic and constitutional institutions. Taking her bearings from Young's understanding of responsibility as based in structural injustices

(we are responsible not only for our specific acts but also for participating in, benefiting from and upholding structural distortions in our political system), Thomason sketches a theory of transitional justice as structural justice. Her account focuses on the background conditions that led to strife in the first place rather than on particular acts of violence. As she puts it, “Structural injustice occurs when institutions and systems work in such a way to disadvantage large groups of people while allowing others to benefit. Structural justice, then, would require that institutions and systems work to ensure that large groups of people are not disadvantaged.” The main task of transitional justice policies according to such a model is to end or prevent wide scale disenfranchisement of certain groups. This involves identifying (and abolishing) the institutions and practices that contributed to the disenfranchisement in the past, and constructing the kind of institutions that would be less likely to engage in it again.

Phillips argues, convincingly, that settler states, often created at terrible human and material cost to indigenous populations, must concentrate their transitional justice efforts on the political empowerment of the groups they have dispossessed. Transitional measures must “allow indigenous populations the right to participate, as an equal, in the resolution of justice claims.” Such a commitment calls for looking beyond the relatively narrow focus of truth commissions, war crime trials, or compensation programs to claims about “political” or “constitutional” justice arising from the original wrongdoing and dispossession. Phillips considers two case studies and argues that Australia has failed to address such questions of political and constitutional justice when it comes to the status of the aboriginal population, while New Zealand’s approach to the plight of the Maori shows far greater promise. The paper is significant not only for its insistence on the centrality of political and constitutional justice but also for the implied argument expanding the scope of transitional justice to states (like Australia and New Zealand) no longer in the acute throws of a transition.

McAuliffe’s paper, an exemplary exercise in non-ideal theory, gives us an account of why transitional justice often falls short of its ambitions to effect structural change in new democracies. The belief that transitional justice can transform the pathological economic structures of countries undergoing transition depends on the flawed assumption that transitional policies can be lifted wholesale “from standard blueprints”. And this, in spite of much scholarly work that supposes otherwise, cannot be done. McAuliffe’s paper seeks to explain why it is that transitional justice does not carry the kind of limitless potential for redistributing resources and ushering in an era of greater socio-economic fairness. The explanation is solidly grounded in the political economy of transitions and among the chief reasons he identifies is the reluctance of old power elites to

relinquish economic advantage (a reluctance bolstered by their lingering strength and leverage) and the difficulty, (see the case of Afghanistan) at least in some contexts, to extend central power beyond the capital city.

The next section explores the nature and limits of political reconciliation, which many consider as the telos or aim of transitional policies. Taking her bearings from the writings of Auschwitz survivor Jean Améry, Hunt provides a defense of resentment as a response to wrongdoing. She suggests that resentment can be interpreted as a source for victims' empowerment whenever the sentiment is acknowledged by a community of survivors. The author explores the paradoxical possibility of *reconcilable resentment* – a form of resentment that can be productive for political reconciliation. One possible avenue of understanding resentment along these lines is viewing it as one legitimate, non-exclusive option available in transition (alongside, e.g., forgiveness). Here the author is in dialogue with Brudholm's important work on the subject. The upshot of such a legitimization of resentment is that even in the case of an agreed policy of forgiveness, a "right to resent" must be recognized as a means of criticizing policies of normalization.

Metz offers a novel and important theory of national reconciliation based in African ideas about community. His version of communitarianism illuminates the relationship between different elements of political reconstruction, including truth telling, apology, forgiveness, compensation and amnesty. For Metz the understanding of community (and, consequently, how to rebuild a community) turns on two relationships: "identity" and "solidarity". The former asks us to "share a way of life" with others; the latter requires that we be willing to act for the benefit of our compatriots. Metz argues that the requirements of reconciliation are behavioral rather than attitudinal. Genuine community does not require us to *feel* like we forgive or love others. It just asks us to behave as if we are beginning to belong to the same group as they do.

Mookherjee puts forward an account of political reconciliation based on Sen's Capabilities Approach. Steering clear of the debate between a thick idea of political reconciliation, (unpalatable to most liberal theorists as it aggressively promotes a single idea of the good) and thin conceptions (based on the creation of civic trust where the goal is simply the institutionalization of impartiality), she offers a third possibility: Reconciliation-as-Agency. The approach adopted here aims at the re-imagination of all relevant actors as human beings who can pursue a plurality of goals beyond simple subsistence.

The fifth section of the book explores the relationship between transitional justice and artistic expressions and practices. Bahun's essay provides us with a magisterial survey of how art interacts with transitional mechanisms. She argues that the arts can enhance the scope and impact of transitional justice efforts; she also insists that under some circumstances they can undermine these efforts. Beginning with the premise that art practices, formative of a nation's culture, can be both implicated in past abuses and crucial for future transformation, Bahun gives us a taxonomy of how different art forms interact with different types of transitional policies. The argument provides powerful evidence for the understudied force of the arts and how they represent past wrongs, highlight the weaknesses and absurdities in a process of transition, and also contribute to the amelioration and perhaps even eventual repair of fraught social ties. Towards the end of her essay, Bahun gives us useful methodological guidance for studying the role of the arts in transitions, stressing the importance of a comparative approach.

Mihaela Mihai's paper 'Democratic "Sacred Spaces": Public Architecture and Transitional Justice' considers how newly established democracies should deal with architecture created by a deposed authoritarian regime. Following Levinson's notion of "sacred space" as a structuring of the social order, the author takes up the problem of structures that were erected to aggrandize a troubling ideology or to communicate a sense of collective humiliation. Two cases are analyzed: South Africa's Voortrekker monument – a racist edifice celebrating the 'civilization' of the Zulus by the white Trekkers - and the Romanian Civic Centre, an architectural complex declaring the supremacy of Ceaușescu. The respective transitional polities are judged to have mishandled these old monuments, each failing to neutralize or sufficiently address the weight of humiliation that the structures carry.

Part six offers philosophical accounts of key operative concepts pertaining to transitions: time, genocide, and political repair. Claudio Corradetti's "Transitional Times, Reflective Judgment and the 'Hōs mē' Condition" brings together Agamben's notion of temporality and Kant's idea of reflective judgment to demonstrate the essential interdependence of restorative and retributive justice in transitional societies. The synthesis of past and present implicit in Agamben's understanding of eschatological time suggests a more subtle conception of justice than a traditional chronological approach can provide. According to Corradetti, temporality as interpreted by Agamben offers a crucial, although mostly overlooked, framework for theories of transitional justice. Corradetti argues that Kant's notion of reflective judgment is particularly relevant in this temporal perspective because it is capable of addressing past wrongdoing while at the same time focusing on the future construction of identity. The larger aim of Corradetti's argument is to show

that it is possible to maintain the normative aspect of justice, while at the same time focusing on the complex circumstances that characterize political transitions.

Building on her previous work, Claudia Card asks us to think through the conceptual implications of understanding genocide as “social death” or the loss of social vitality. By social vitality is meant “the meanings, shapes, and contents given the lives of individuals by social relationships, personal and institutional, contemporary and inter-generational, that unite them into a people....” Her account poses a series of fascinating puzzles: does the elimination of an evil group like, for example, the KKK, count as genocide (since its evil practices do impart meaning to the lives of its members)? Does the prosecution of groups constituted on specific attributes of the members (such as sexual orientation or gender) count as genocide (as these groupings also account for social vitality)? What does the social death thesis tell us about the relationship between the quantity of people killed and the quality of ties destroyed?

Walker’s paper provides an important philosophical account of the undertheorized and underutilized transitional instrument of reparations. The contemporary discussion of reparative justice lacks a clear terminology and seems to assume that repair for past wrongs is impossible. In practice, reparations are the least popular instrument of transitional justice, and when they are used very little attention is paid to the actual needs of victims. Walker offers a novel and compelling relational view of reparations. These must be “about demonstrating (rather than establishing) relations of accountability and reciprocity ...” Any meaningful attempt at reparations should address the material needs of victims (and it is important that victims participate in defining these), acknowledge wrongs perpetrated, and signal a willingness to base future relationships on mutual accountability and responsibility.

The book’s seventh and last section takes up two case studies, one ancient, and the other contemporary, which provide a unique inductive perspective on how transitions should be shaped. Taking his bearings from the democratic reconstruction of Athens after the abortive rule of the Thirty Tyrants (403 B.C.E.), Gowder argues that new democracies should stick to their original decisions about how to handle past crimes and must create the political institutions to help them do so. Such steadfastness cements public commitment to the rule of law and provides an outlet for lawful participation in political life. More precisely, for Gowder, the commitment to our postwar policies and the design of institutions necessary for carrying them out, are what it means to create the rule of law in a new democracy. And without signaling that the rule of law is to be taken

seriously, the new state cannot protect itself against the resurgence of the old power elites that have just been ousted.

Building on her research into Rwanda's post genocide transition, Lynne Tirrell argues, compellingly, that a coherent and successful transition policy must focus on retributive justice, public truth telling, focused reparations and economic development. Ultimately, it is the combination of these factors that can restore the dignity of victims and begin to mend what she has called, elsewhere, "recognition harm." Since these areas of focus are mutually enhancing, it is only their interdependence that has the potential to generate lasting and stable peace. As Tirrell puts it: "Punishment of offenders and material repair are each individually insufficient for this task, but when combined with economic development and enhanced protection of human rights, there are better odds of creating a social and political system in which all have a voice, one which offers a shared narrative that fosters mutual recognition."