Normative and Strategic Aspects of Transitional Justice

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Keywords: *transitional justice; conflict; tribunality; reconciliation policies; democracy; authoritarianism*

After atrocities, disappearances, and other human rights violations, the dictatorship in Authoritania falls, and a new democratic regime takes power, changing the country's name to Freedonia. How should Freedonia deal with Authoritania's rulers and their agents? Do they have options between forgiveness and full-scale retribution? Should agents of the past regime be allowed political rights? Should victims be compensated, and should confiscated property be restored? What role does the international community have?

These kinds of dilemmas constitute the field of transitional justice. Transitional justice refers to formal and informal procedures implemented by a group or institution of accepted legitimacy around the time of a transition out of an oppressive or violent social order, for rendering justice to perpetrators and their collaborators, as well as to their victims. Following Elster (2004), we divide transitional justice into endogenous and exogenous. In the endogenous case, the procedures are administered by the society itself, without external intervention. Exogenous transitional justice is administered from the outside, typically by agents who were not engaged in the conflict, and often

GUEST EDITORS' NOTE: The articles in this volume were presented at the conference "Transitional Justice," held at the University of California, Irvine, October 29-31, 2004. Financial support from the Center for the Study of Democracy and the Center for Global Peace and Conflict Studies at the University of California, Irvine, is gratefully acknowledged.

JOURNAL OF CONFLICT RESOLUTION, Vol. 50 No. 3, June 2006 295-302
DOI: 10.1177/0022002706286949

under the auspices of an ongoing institution. Cases where retribution is administered externally without regard to the wishes of the citizens of the state in transition (e.g., some war crimes trials) are "victor's justice," falling outside the definition because they lack accepted legitimacy. Summary executions or individual acts of revenge without institutional legitimacy also fall outside transitional justice for want of legitimacy. The study of transitional justice includes normative issues involving the evaluation of transitional institutions, as well as positive issues of determining who are the main decision makers, what situations have led to the adoption of various measures, what were the goals of measures, and when have they succeeded.

Even before they take power, the Freedonian leaders face a moral and practical dilemma. The Authoritanians may hope to cut a deal, to allow a peaceful transition in exchange for freedom from retribution. But unless they expect to be strong enough in the new order to ensure that the promise is kept, they will not take it as a credible one. What can be done in general to make promises to dictators credible? (In an analogue to medieval exchanges of hostages, Nalepa [2005] investigates the idea of providing the outgoing leaders with information that would be compromising to the Freedonians.) Sometimes, apparently noncredible promises of restraint have in fact been kept, so how can this be explained?

International actors have played a role in some transitions. At the end of the American Revolution, England pushed for compensation for loyalists whose property had been seized or destroyed, and over the years, many dictators have found refuge with friendly neighbors. Since the cold war ended, support has grown for "tribunality," the principle that the international community should hold leaders legally accountable for aggression, war crimes, or crimes against humanity. The difficulty is that the Authoritanian leaders would be more willing to abdicate peacefully if they were sure that the international community would not take its own retribution. Supporters of tribunality argue for international bodies despite this worry. National governments recovering from civil wars, they point out, lack human and material resources, and international bodies are the only ones that can try heads of state for official crimes. They have access to independent judges and professional expertise, and they can draw on precedents and sources in international law with greater legitimacy. (The Constitutional Court in postcommunist Hungary noted that international law precluded the national statute of limitations for war crimes and accordingly lifted it for crimes committed during the 1956 uprising. This was not a clear case of a national court citing international law, however, because the principle had already been incorporated into Hungarian law [Solyom and Brunner 2000].) International tribunals offer better prospects of due process and impartiality, which give their decisions more legitimacy. Since international tribunals are typically situated outside the state in conflict, they can better protect judges and prosecutors from ongoing violence or intimidation by the former regime's supporters. Finally, tribunalists argue, a court accountable to the interests of the international community will not negotiate with war criminals still in office.

The trend toward tribunality culminated with the Rome Statutes of 2002, which created the International Criminal Court. Signatories could be seen as tying their own

hands, ensuring that there could be no amnesty-for-abdication deals with dictators (Gilligan 2006). The international community was sending a credible signal to those contemplating crimes against humanity that they would not be able to negotiate their way out of punishment.

This argument for tribunality, that it deters future atrocities, is highly contested, and three recent cases illustrate the downside of international involvement. In 2003, Nigeria offered President Charles Taylor of Liberia safe haven in exchange for his abdication, but the Special Court for Sierra Leone indicted him. His indictment became public while Taylor was attending a peace conference in Ghana, and his supporters in Liberia immediately resumed fighting. Tribunality also collided with the 1980 negotiated transition in Chile, and the story illustrates the complexities of promising immunity when there is international involvement. Augusto Pinochet gave up dictatorial power in exchange for immunity for himself and his fellow regime members. In 1998, he traveled to London for medical treatment, and a Spanish judge, Baltasar Garzón, issued an international arrest warrant, charging him with violating the human rights of certain Chileans who had later become Spanish citizens. The British government arrested Pinochet pursuant to the Torture Convention, which had been incorporated into its laws, and a British court took up the issue of his extradition to Spain. A year later, he was released and returned to Chile on grounds of infirmity, but there he was stripped of his immunity and placed under house arrest. In July 2002, to the dismay of supporters of tribunality as well as Pinochet's opponents, the Chilean Supreme Court upheld a lower court's suspension of proceedings against him on grounds of poor health and mental incapacitation. In 2005, new sets of charges were brought that dealt with the disappearances of 1974-1975 and the general's secret foreign bank accounts. In December 2005, he was again under house arrest, and his mental fitness for a possible trial was reexamined (Pinochet's unhappy birthday 2005). The episode illustrates that a promise of leniency can dissolve over time, especially with international encouragement. The dilemma is common: one wonders whether the 1989 roundtable talks in Poland would have worked if the two main negotiators for the communist regime had had reason to worry that once they stepped down, they would be held accountable for human rights violations committed during martial law.

Another reason for questioning the international tribunal/deterrence link is that these tribunals, which do not impose the death penalty, sometimes offer prospective abusers milder punishment than if they were tried by their own courts and faced their own victims. One must also consider the lower relative likelihood that an international court can obtain custody of someone it has indicted.

Setting aside the issue of the deterrence of future crimes, questions also arise from the victims' viewpoint involving their right to justice and the affirmation of their human dignity. Should the old leaders stand trial as other criminals would, or should they be pardoned so that their supporters have less incentive to undo the new democratic order? How will the victims react to lenient treatment? What are the psychological consequences for victims who watch their past oppressors going about their business in the neighborhood, free and unpunished? To what extent can other measures substitute for punishment, from the viewpoint of the victims? Alternatives

might be the government determining and disseminating the facts of the past era or inducing apologies from the perpetrators. What should be done in the not-so-rare situation that the line between victims and perpetrators is blurred? If the victims of past repression are compensated and their property is restored, will those who had been given their property get compensation?

This wealth of policy-relevant questions has generated a wealth of research, but there have been important gaps. According to Geddes (1999), from 1974 to 1999, sixty-seven authoritarian regimes changed into democracies. They faced many of the questions presented above, but most of them paid little attention to the experiences of other countries that had implemented transitional justice procedures. Perhaps they judged that their country was so unique that it needed its own customized solution, but another likely cause was a lack of systematic research. Scholars, like policy makers, have often treated each case as special and not drawn on cross-national data or a common methodological framework. Some important recent works have taken a cross-cultural approach—Martha Minow's (1998) *Between Vengeance and Forgiveness*, Priscilla Hayner's (2002) *Unspeakable Truths*, and Jon Elster's (2004) *Closing the Books*. In line with the founding concept of the *Journal of Conflict Resolution*, the collection of articles in the present volume takes this stance. What unites these articles is their diversity, in their chosen context, discipline, and method. Some involve ethical or formal argumentation, and others use extensive data, either ethnographic, survey, or historical. Since they use different methods and come from different disciplines, they would normally appear in different journals with little common readership, but they are brought together here, on the grounds that diverse approaches to one subject are mutually invigorating.

Pure democracy calls for pure political equality, but this principle clashes with the new state's need for stability, and it may be decided to limit the autocrats' access to office. What should the restrictions be, who should decide what constitutes collaboration with the old regime, and how will the facts of an individual's past be established? Marek Kaminski and Monika Nalepa (2006 [this issue]) analyze "lustration," the screening or vetting of those persons seeking political office in the new regime. Once a democracy is established, Freedonia's institutions must process the files of Authoritania's secret police to determine whether potential candidates for political office collaborated with the dictatorship. The information may be incomplete or inaccurate: some documents may have been lost, intentionally destroyed, or falsified, or they may be simply wrong, based on gossip and rumor. Imperfect data will produce false positives and false negatives, in that some noncollaborators will be accused and some guilty parties will be held innocent. Kaminski and Nalepa describe lustration laws that use participants' own declarations in a way that give them incentives to be truthful. The laws can be adjusted to a given context to minimize the rate of misses for a given rate of false alarms. Others have proposed procedural criteria for designing lustration laws, such as ensuring their conformity with due process standards of established legal systems, but the authors argue that an efficiency-based criterion is better.

Transitional justice is often accused of constituting "retroactive justice," of punishing deeds that were legal at the time they were performed. Kaminski and Nalepa

(2006) point out, however, that communist laws had been questionable in many ways and that the transitional justice procedures used in their transitions were compatible with other systems such as the Helsinki Accords or their countries' pre–World War II laws, which their wartime governments-in-exile had continued to observe. The important goal, they argue, is not to avoid retroactivity per se but to choose a legal referent that has legitimacy.

Some Authoritanian bureaucrats may claim that they secretly helped the democratic underground, but does this redeem them for their official offenses? Jon Elster's (2006 [this issue]) article describes the dilemmas for post–World War II France, where courts admitted support for resistance as an exonerating factor that weighed against collaboration. The courts faced a problem of inferring motives since occupation government officials sometimes supported the resistance with an eye on their postwar treatment. They used a variety of methods to rationalize and systematize this very subjective idea of redemption. A surprising finding is the richness of avenues to redemption (e.g., some courts considered as exonerating circumstances even actions taken by a defendant's family members).

Nenad Dimitrijević (2006 [this issue]) also treats the question of individual responsibility but looks at the consequences for reconciliation. In the case of Serbia and Montenegro, he argues, a hypothetical truth commission should help Serbs acknowledge that their leaders' representatives perpetrated war crimes on their behalf. A commission that tells the story in a comprehensive way, investigating the motives and producing a broad account of what happened, will help heal ethnic divisions better than one focused on assigning responsibility to particular individuals for particular acts. He also argues that in societies recovering from civil war, truth commissions that distribute blame in ways contrary to expectations will undermine reconciliation. Transitional justice in Serbia may have harmed reconciliation by increasing the resentment of supporters. The slogan "They are killing Serbs in the Hague" appeared frequently on the walls of Belgrade's housing complexes (Rangelov 2004).

Anne Sa'adah (2006 [this issue]) compares the severe procedures in Germany after World War I with the milder ones after World War II, asking whether they undermined or promoted the postwar democracy. Scholars generally agree that the 1918 measures created resentment and helped the Nazi cause, but what has been less discussed is how the earlier experience induced West German leaders after the Second World War to restrain their treatment of former Nazis. She argues that, surprisingly, integrating former Nazis into the new democracy benefited reconciliation in the long run, compared to taking victim-oriented acts of retribution.

We would add that it is rare that a state has a chance to learn from its own experience. Germany was one example, as Sa'adah (2006) describes, and another arose in classical Athens. After the overthrow of the 400 Oligarchs and the restoration of democracy in 411 B.C., officials and supporters were given summary trials, denied citizenship, and banished (Elster 2004). Four years later, the democracy was overthrown, and with many former Oligarchs restored to power, the new regime outdid the first one in atrocities. Eight years later, the Spartans helped the democrats negotiate a "reconciliation treaty," which instituted more lenient measures than before—a wide

amnesty and asylum in nearby Eleusis for all supporters except those who had killed with their own hands. Candidates for public office were screened, and confiscated property was restored but with compensation for the current owners. Sa'adah regards Germany as exceptional, not a case that postcommunist states could imitate. One special feature was the unifying effect of the Soviet threat, and another, she notes, was that the country was better able to forgo victim-oriented accountability because so few victims survived in its populace.

A state with many victims but few identifiable perpetrators was the postcommunist Czech Republic. As the integration of perpetrators is Sa'adah's (2006) focus, the integration of victims into the democratic process is that of Roman David and Susanne Choi (2006 [this issue]). Subjecting transitional justice to systematic data analysis, they report their extensive survey of former political prisoners. They look for factors explaining why victims forgave perpetrators and, based on their findings, argue for victim-oriented transitional justice. They find that punishing wrongdoers, having them apologize to victims, and giving victims special political or social rights significantly contribute to forgiveness. Interestingly, the strength of victims' religious affiliation is positively related to their willingness to forgive.

Do transitional justice procedures contribute causally to reconciliation? Most scholars believe they do, citing cases where criminal trials, truth commission reports, or wide compensation payments to victims were followed by democratic stability (Minow 1998, 2000). However, the apparent causation may be spurious—perhaps the wide use of transitional justice procedures is just a signal of future success and not its cause. Recognizing that an association does not mean a cause-effect relationship, James Gibson (2006 [this issue]) puts forward the provocative hypothesis that a cultural history of the rule of law is a third cause, generating both transitional justice and reconciliation. He examines this notion for South Africa, which has long seen the rule of law (whether or not the laws involved were fair and moral). The association was there: the South African Truth and Reconciliation Commission was created promptly after the transition, and the goal of reconciliation, understood as the willingness to share democratic institutions with those who had been one's political opponents, was accepted immediately. Using a two-stage regression model, he concludes that transitional justice procedures contributed to reconciliation in a causal relationship. He also argues that the South African Commission promoted reconciliation more effectively because it wrote a report designed to please none of the parties. If one side had fully endorsed the report, its opponents would have suspected that the commission was biased in that direction.

In Peru, starting in 1980, the communist guerrilla group Shining Path waged a rebellion in which almost 70,000 died. Kimberly Theidon (2006 [this issue]) considers transitional justice at a local level, the grassroots procedures used by communities to reintegrate rebels into village life. Based on folk and religious beliefs, the methods combined repentance with physical punishment. Some of those ex-collaborators were turned over to the military, but those who were forgiven got full rights of village citizenship, land to make a living, and helping hands from the other villagers. (From a game-theoretic perspective, we note that although the criteria for successful repentance are fuzzy, interesting type-revealing mechanisms are at work. For instance, to make the

sincerity of his repentance credible, the repenter had to bring his family—performing contrition in front of this audience made it harder for him to revert later.)

Other studies have tended to look at reconciliation policies on the national level and examine the results of these policies for a sample of individuals, but Theidon's (2006) study looks at the interactions among individuals in the community, with a background of the national commission's actions. Her main lesson is that nationally imposed institutions may not only be less effective but can sometimes also indeed interfere with local norms and reconciliation procedures. Especially when the victims are ethnically different from the central government, it is better to let localities reconcile in their own ways. A similar argument for local procedures can be made for the *gacaca* courts that operated after the Rwandan genocide and for reconciliation ceremonies prevalent in Uganda. Theidon also notes that categorization is complicated by the fact that some groups were both victimized and acted as perpetrators, a situation more prevalent in civil wars than has been recognized in the literature.

The central/local question for reconciliation in Peru and the international/state-level question for courts are parallel and raise similar issues. It is this kind of synergy of ideas across disciplines, methods, and contexts that we hope will be the contribution of this volume.

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