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Justice in Times of Transition: A Reflection on Transitional Justice

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Transitional Justice as a motif, a discourse and a practice continues to entice analysis from scholars, practitioners and policy makers. It is a field that has rapidly expanded, and that has both the fortune and disadvantage of being termed an "industry." The growth of transitional justice is both an opportunity and a warning, as the challenges raised by massive human rights violations and transitions from violence to peace or from repressive regimes to more liberal ones continue to preoccupy scholars and practitioners. Each new country specific context facilitates revisiting old trade-offs and concepts revealing new elements to transitional dilemmas.

In a collection edited by Melissa Williams, Rosemary Nagy and John Elster entitled *Transitional Justice*, a substantial attempt is made by a number of contributors to engage with theoretical and conceptual understandings of transitional justice, as well as to reflect comprehensively on the conceptual dimensions of selected transitional justice measures. The book is the product of the annual meeting of the American Society for Legal and Political Philosophy, in conjunction with the American Political Science Association, in 2005, but only

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brought to publication in 2011. With a self-confessed theoretical bent, vividly captured in the contribution by David Dyzenhaus entitled "Leviathan as a Theory of Transitional Justice," the essay collection contributes to the on-going theorization of the transitional justice field and there are some significant nuggets to be pulled out of its pages. However there is also some patchiness in the collection, with some variance in the strength and depth of contributions and thus their overall conceptual cohesiveness.

The opening essay, "Theorizing Transitional Justice," is by Pablo de Greiff, the recently appointed United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition and practitioner of transitional justice, as well as Director of Research for the New York based International Centre for Transitional Justice. The essay is derived from de Greiff"s reflections on the under-conceptualized state of the field, his assessment of the limitations of other theory-oriented contributions, as well as his own theoretical contribution, seeking to cohere theoretical approaches to the analysis of transitional justice. De Greiff relays an emerging "common sense" around transitional justice practice, which one can take to mean greater convergence between all those engaged in writing and practice on the contours, imperatives and dimensions of the field. His preoccupations are driven in part by an identifiable frustration with piecemeal or "pick and choose" transition, whereby states and international institutions think that different parts of the transitional justice "package" can be traded off against one another. Instead he argues for a normative conception of transitional justice, the contents of which are advanced in this essay. In particular, he makes strong claims for relationships between the constituent elements of transitional justice, yielding in his terminology a "holistic" vision. De Greiff does so because he argues that normative theoretical work can guide action, and operate to make practical choices clearer or give their problematic elements greater exposure. Essential to his task is the identification of "two mediate goals, namely recognition and civic trust and two final goals, reconciliation and democracy . . ." (pp. 33-34). He frames his overall argument by the claim that these four goals in tandem "[g]ive concrete expression through law-based systems to the necessarily more abstract notion of justice" (p. 34). De Greiff also attempts to mediate a middle ground through the contradictory views of transitional justice as comprising either "extraordinary" justice on the one hand, or

merely constituting an untidy set of political compromises on the other.[5] De Greiff"s analysis devises some new and thoughtful ground and there is both appealing turn of phrase and fresh insight into well-trodden problems of addressing grievous human rights violations in fraught political circumstances. He is pragmatic on the limited reach of many transitional justice mechanisms, operating as they do "in a very imperfect world." His claim to the value of understanding a variety of transitional justice mechanisms (truth telling, accountability, reparations, and memory) as inter-connected resonates with the challenges that other observers make as to the restrictions that follow from a singular approach to transitional work. This echoes the selection of the negative relations identified by Elster in Chapter 2, as he pinpoints the challenges of undertaking one kind of transitional measure (truth) with the balancing of another (failure to identify wrongdoers or offer reparations) (p. 94).

A number of the chapters in this book take a highly pragmatic approach to assessing the success or failure of transitional justice as an entity or its constituent parts. In this vein, Adrian Vermeule's analysis of "Reparations as Rough Justice," which opens by rehearsing the philosophical and policy objects to reparations, yet sympathetically suggests and explains why "there is a widely shared intuition or complex set of intuitions underpinning the persistent demand for compensatory reparations programs" (p. 151). These intuitions are captured by the deft insight that while rough justice may be broadly indefensible, it is attractive only when compared to no justice. Vermeule's instincts here pair him closely with Elster in a very pragmatic alignment that is readily identifiable to those operating at the cold face of transition—namely that the perfect transition is rarely available and that "[p]reference satisfaction is not the yardstick by which ordinary people judge [in this case a monetary award]" (p. 154). Vermeule's analysis, though concentrating on reparations, speaks to a broader range of transitional justice trade-offs, where many of the mechanisms available to victims would not really be defensible according to "any first-best normative criterion," but that the "status quo is even less

5. Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761 (2004). Notably, David Dyzenhaus' contribution to this collection is also framed by a skepticism that there is a "distinct field of inquiry" in transitional justice, and that one should think of "transitional regimes as exceptions to our ordinary theory of justice," leading in his view to a third and doubtful premise "that the societies in which most theorists of transitional justice live are the societies that transitional regimes should aim to emulate in most respects" (p. 182).

morally defensible, assuming that one can coherently speak of comparisons and matters of degree in such things" (p. 154).

The preoccupation with reparations and compensation is picked up in Debra Satz's contribution, "Countering the Wrongs of the Past: The Role of Compensation." This essay has a pithy and uncontroversial start, articulating the instinctive view that individual demands for repair can vary, and "responses that might be appropriate in one situation might not be appropriate in another" (p. 129). The essay is mostly concerned with the ethical and philosophical concerns that follow from the giving (or receipt) of monetary compensation, and well as problems of identification where the harm in question has been experienced historically and is not a recent occurrence for those claiming the harm. While Satz is certainty right in saying that the standard welfare economist's view of compensation is the one most appealed to in many conversations about repairing historical wrong, this reader was not convinced that in practice this is where the gravest tensions lie as regards contemporary transitions grappling with reparations. Indeed, a robust literature and practice of group, communal, symbolic and development-integrated reparations is to be found in multiple sites underscoring much greater innovation in legal and political practice than the essay captures.[6] Doubtlessly, in the context of U.S. positioning relating to Native American or African American slavery reparations the debate remains largely stifled and concentrated on the sterile pros and cons of lump sum financial compensation. Acknowledging that should not limit us to viewing the theoretical space of monetary compensation through the prims of these specific cases alone, or to frame other cases out from them. Arguably, a slice of the innovative practices and pragmatic choices being made in fragile and economically limited post-conflict sites may have the capacity to circle back to the cases that seem to underpin Satz's analysis.

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6. *See, e.g.*, THE REDRESS TRUST, IMPLEMENTING VICTIMS' RIGHTS: A HANDBOOK ON THE BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION (1996), http://www.redress.org/downloads/publications/Reparation%20Principles. pdf; Ruth Rubio- Marín & Pablo de Greiff, *Women and Reparations*, 1 INT'L J. TRANSITIONAL JUST. 318 (2007); Colleen Duggan et al., *Reparations for Sexual and Reproductive Violence: Prospects for Achieving Gender Justice in Guatemala and Peru*, 2 INT'L J. TRANSITIONAL JUST. 192 (2008); Brandon Hamber & Ingrid Palmary, *Gender, Memorialization and Symbolic Reparations*, *in* THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS 324 (Ruth Rubio-Marín ed., 2009).

Satz's essay undertakes some graceful analytical work in addressing why the assumptions that individual satisfaction can be aggregated into a single scale are misplaced. Here the assumptions are misdirected not least because victims may view their harms as incommensurable to other goods, that the obligation to compensate disconnects in unacceptable ways the wrong done from the wrongdoer, or that the relational nature of the harm is not fully revealed by the compensation offered. There is, whether in this work or other, some significant space left to explore why and by what pathway symbolic and communal reparations allow for satisfaction to victims in ways that financial compensation does not. It is generally agreed that victims need both practical reparations for and symbolic acknowledgement of their experiences. Both are necessary to achieve a cohesive, unitary and structurally engaged response to harm. Symbolic reparations can undo stigma, remake citizenship and social status, and provide a formal lasting testament to deeply felt harm. But we should we wary of seeing symbolic reparations as a full substitute for individualized monetary and social benefits to victims. Tangible benefits without societal and state acknowledgment marginalize the victim politically and socially.

Moreover, any reflection on symbolic and group benefits must also engage in a meaningful way with the intersectionalities of victim status. There is a danger that by a failure to disaggregate certain kinds of harms, we ignore the re-inscribing of victim stigma in unexpected ways. These challenges are most obviously in view as we assess gender harms and the reparations that may follow to women as a result. Here there is an odd circularity in that if the harm to be remedied is a sexual harm or violation, it is premised in part on the presumed values of virtue and purity for the female body and person in a given social setting. There is self-evidently an autonomy and dignitary harm to sexual violation but in some measure the stigma that is remedied through symbolic recognition or compensation is rooted in a measure of acceptance of social role and stratification (all the more so in societies where marriage, childbearing and social status are premised on religiously mandated purity and mediated access to the female body). In the rush to ensure remedy and reparation, we should also pay attention to the side-costs, namely the affirmation of the very set of values which, in part contribute to the causalities of harm, for

example, to female bodies in highly divided or conflicted polities.

Satz further explores the work of Janna Thompson and her views of reparations as a form of redeeming intergenerational ties and obligation (pp. 141-45). The time is well spent—and affirms that the theory is one that deserves greater scrutiny by transitional justice scholars broadly defined. Despite some quibbles with some aspects of Thompson's claims, Satz generally finds attractive the notion that claims by later generations to remedy, premised on the suffering and harms of earlier generations, have currency, because these claims are understood as "means to reestablish relationships of mutual respect among persons and groups whose relationships have been severely damaged by past denials of that respect" (p. 144).

The preliminary exploration here opens up as many questions and it seeks to unwind. In particular, it begs important process inquiries in how the determination of harms to be passed on and harms that are left behind and forgotten within victim communities come about.[7] There are self-evidently internal equities and inequalities in operation, as process of memory preservation and absent memory are deployed to select out from any particular traumatic moment(s) what is remembered and held and what is not.[8] These questions of selectivity are importantly connected with the dynamics of "outsider-insiders" in victims communities: what harms do groups and communities extend collective ownership over and which may be excluded precisely because the targeted victim is a marginal or demonized figure (for example the violated woman, the GLBT victim, the politically marginal)? Here the construction of historical memory and its connection to reparations offers an opportunity to simultaneously acknowledge the present memory and reclaim the absent memory of the marginalized victims. Any such process is likely a fraught one given the prerogatives of communal ownership of historical and intergenerational memory. A further challenge that emerges from the foray to discuss intergenerational memory, is related to the relationship that emerges between external political and "guardian" communities to the successor communities that may lay claim to

7. Marianne Hirsch, *The Generation of Postmemory*, 29 POETICS TODAY 103 (2008).

8. *See* Kris Brown, '*What It Was Like to Live Through a Day*': *Transitional Justice and the Memory of the Everyday in a Divided Society*, 6 INT'L J. TRANSITIONAL JUST. 444 (2012).

the status of contemporary victimhood. A stellar example of this kind of layered analysis is Allan"s exploration of the complexity embodied in Palestinian memory for present-day refugees living in Lebanon, identifying the ways in which there are perceptible divisions between older and living embodiment victims of land displacement (those who actually remember or experienced) and subsequent generations whose identity is connected to present political and geographical space, and who uncomfortably inherit the ownership of the intergenerational harm.[9] Framed within an analysis of the instrumentalization of memory in the Shatila refugee camp, the reflection explores the tensions between "[c]ommemorative events [that] ... consolidated nationalist claims by the refugees..." but simultaneously occlude "from view are the everyday forms of suffering experienced by refugees and emergent subjectivities not conforming to the communitarian ideals of nationalism."[10] The essay thus opens up a wide and deep space for transitional justice scholars to tease apart the intergenerational inheritance and to probe its complexity and contours, both empirically and theoretically.

In a chapter that deals with the nitty gritty of transitional justice at the cold face, "When More May be Less: Transitional Justice in East Timor," David Cohen & Leigh-Ashley Lipscomb, assesses the success of transitional justice measures in East Timor. The essay nicely frames its arguments in terms of the two competing visions of transitional justice articulated in the volume. On the one hand, Jon Elster's contention that one should not necessarily view each core objective of transitional justice as "synchronous and complementary," set up against Pablo de Grieff's theory of transitional justice that proposes an holistic application of transitional justice measures, where deep coordination and overlap is actively sought and valued through the transitional phase. In situating their analysis in East Timor, a post-conflict locale in which multiple transitional justice systems came into play simultaneously, the chapter undertakes the difficult task of applying the theory to practice. They make the strong empirical claim that because of the peculiar circumstances of the transition in East Timor, where sovereignty had largely been ceded to the United Nations, it may be one of the best situations to make meaningful assessments of an holistic approach to the multi-pronged implementation of transitional

9. Diana Allan, *Commemorative Economies and the Politics of Solidarity in Shatila Camp*, 4 HUMANITY 133, 136 (2013).

10. *Id.*

justice measures. East Timor was a place in which there was an intensity of investment in transitional justice measures. Their core claim, borne out by a painstaking review of criminal process, truth recovery process and other complimentary measures, is that "more may actually mean less if scare resources are dispersed rather than concentrated" (p. 257). In their view, the addition of multiple transitional justice institutions, one layered on the other, may not have led to better justice outcomes (or perceptions) for victims, but produced unsatisfactory results for many of the central stakeholders.

In the context of criminal trials, their pithy review of the pitfalls of East Timor's domestic prosecutions (the Jakarta ad hoc human rights courts) show the undisputable challenges of the lack of competence by local courts and legal actors managing the application of international crimes (e.g., crimes against humanity), but more tellingly illustrate how difficult it is for justice institutions to let go of the institutional values inculcated by the previous regime. This seepage effect profoundly limits the capacity of successor regimes (or more directly their legal institutions) to do justice for the crimes of the former. These insights, while not entirely new, are revealed in fresh ways through the working through of ideas in a specific site which shows the precise effect on old institutions operating "new" practices, the blockages by entrenched institutional elites little affected by accountability for past violations, and the limited reach of civil society and international organizations to fundamentally affect outcomes. The message is sobering for any undue optimism on the reach of transitional justice.

Cold face exploration is also in play in the sole empirical contribution to the collection—the essay by Monika Nalepa, "Reconciliation, Refugee Returns, and the Impact of International Criminal Justice: The Case of Bosnia and Herzegovina." The essay is placed with a stated lacunae of the limits of political science to clearly establish "whether and how criminal prosecutions can contribute to what is arguably the highest goal of transitional justice institutions: reconciliation" (p. 317).[11] To answer that question the chapter employs the methods

11. Whether this lacunae is as deep as the author identified, with the recent publications of large-scale comparative study of the relationship between criminal accountability and rule of law, is an open question. *See* KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (2011); TRICIA D. OLSEN ET AL., TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY (2010).

of empirical political science, analysing the distinct patterns of refugee returns in two municipalities that were the site of egregious human rights violations during the disintegration of the Former Yugoslavia (specially Prijedor and Srebenica). These two sites are chosen specifically because close analysis by the author of the prosecution strategies of the International Criminal Tribunal for the Former Yugoslavia (ICTY) demonstrated different prosecutorial strategies in dealing with suspected war criminals in both municipalities. The analysis is well couched in the caveats that make sense—namely that there may be other factors in play in both sites that inject or depress the capacity to "do" reconciliation. There is useful and important data findings in the study that deserve the attention of international criminal lawyers and those interested in theorizing from a legal perspective on supra-national legal justice. Her conclusion that "the price of plea-bargaining in order to reconstruct the chain of command and reach order-giving perpetrators depresses reconciliation" though having an instinctive (as well as empirical) quality is a valuable one (p. 317). That noted, the presumptions concerning reconciliation as a valued or presumed goal of transition itself remain somewhat under-tested in the analysis. Nalepa makes a nod to this challenge in affirming the empirical difficulties in deciding how to conceptualize reconciliation as a measurable empirical phenomenon. Her view that the modest position of focusing on the return of refugees itself as a measure of "reconciliation," thereby viewing return itself as fulfilling some measure of social trust and cooperation across ethnic lines may be more ambitious that the author acknowledges. Specifically, it presumes a set of real choices for refugees, and that the absence of violence and fear sufficient to return to a home (which may be a better choice than a tent, or an inadequate crowded and shared social housing provided as the mainstay of refugee resettlement) is tantamount to some measure of social trust. As the rich exploration of Kimberly Theidon, tackling the complexity of return and community existence in the aftermath of Shining Path and Peruvian state sponsored violence, reveals,[12] living together in the aftermath of deadly communal violence may be many things—but it is generally not reconciliation.

12. KIMBERLY THEIDON, INTIMATE ENEMIES: VIOLENCE AND RECONCILIATION IN PERU (2013).

CONCLUSION

The essay collection carries a cacophony of new and old voices to the transitional justice conversation. Its value lies in the nuance and reflectiveness of a number of the contributions, the capacity to tease out word and concept in a painstaking and thorough way. There are inter-disciplinary strengths and communications of substance across disciplinary lines, though in a sense that may prevent some of the best of the analysis being fully heard within the terrains of the disciplines that would most benefit from a diverse set of voices on the new and old challenges of transitional justice.

For a diverse collection of ideas, one missing piece was the absence of critical and non-mainstream voices from any of the disciplinary contributions in the collection. There is much greater expression of critical left, situated, post-colonial, site specific and feminist voices to be garnered across many of the disciplinary engagements with transitional justice than are revealed in this collection. The majority of the voices represented here are those of the western / non-transitional "here" speaking to the experiences and choices of the non-western, "othered" there. The challenge is not only theoretical, but compounded by the fact that an uncritical and narrowly liberal conception of the transition directs our gaze away from the cultural, material and geo-political sites in which transitional justice practices have emerged. In simple terms, the sites transitional justice most often engage are the exotic other of locales, subjects, conflicts and repressions elsewhere (never in the western "here"). The export of rule of law and transitional justice discourse can reflexively deploy an uncritical, liberal, and hierarchical positioning with little capacity to recognize its own hegemony and privilege.[13] Transitional justice discourse, in all its standard forms and straightjackets, demands critical interrogation. Specifically, seeing transitional justice as a form of discursive colonization whereby its language and "tool box" appropriate and codify knowledge in ways that exclude and produce hierarchies of value through the course of political transition should be recognized.[14] A fully articulated postcolonial

13. On rule of law exports and the challenges for women in particular, see Fionnuala Ní Aoláin & Michael Hamilton, *Gender and the Rule of Law in Transitional Societies*, 18 MINN. J. INT'L L. 380 (2009).

14. *See* Christine Bell, Colm Campbell & Fionnuala Ní Aoláin, *The Battle for Transitional Justice: Hegemony, Iraq, and International Law*, *in* JUDGES, TRANSITION, AND HUMAN RIGHTS 147 (Morison, et al. eds., 2007).

challenge to the hegemonic reach of legal liberalism as represented by mainstream transitional justice has yet to emerge,[15] but any fulsome theoretical analysis should be cognizant of this critique's relevance. It is the absence of any such alternative articulations to the subjective experience and conceptualization of transitional justice that leave a distinct gap in an otherwise generally erudite and thoughtful set of contributions.

15. For an early articulation of what such an approach would encompass see Khanya
sela Moyo, *Feminism, Postcolonial Legal Theory and Transitional Justice: A Critique of Current Trends*, 1 INT'L HUM. RTS. L. REV. 237 (2012).