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0521839696 - Closing the Books: Transitional Justice in Historical Perspective

Jon Elster

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Closing the Books

This book offers an analysis of transitional justice – retribution and reparation after a change of political regime – from Athens in the fifth century B.C. to the present. Part I, “The Universe of Transitional Justice,” describes more than thirty transitions, some of them in considerable detail, others more succinctly. Part II, “Analytics of Transitional Justice,” proposes a framework for explaining the variations among the cases: why after some transitions wrongdoers from the previous regime are punished severely and in other cases mildly or not at all, and why victims are sometimes compensated generously and sometimes poorly or not at all. After surveying a broad range of justifications and excuses for wrongdoings and criteria for selecting and indemnifying victims, the book concludes with a discussion of three general explanatory factors: economic and political constraints, the retributive emotions, and the play of party politics.

Professor Jon Elster is the Robert Merton Professor of Social Science at Columbia University. He received his Ph.D. from the University of Paris in 1972, and before coming to Columbia University, he taught in Paris, Oslo, and Chicago. His publications include *Ulysses and the Sirens* (1979), *Sour Grapes* (1983), *Making Sense of Marx* (1985), *The Cement of Society* (1989), *Solomonic Judgments* (1989), *Nuts and Bolts for the Social Sciences* (1989), *Local Justice* (1992), *Political Psychology* (1993), *Strong Feelings* (1999), *Alchemies of the Mind* (1999), and *Ulysses Unbound* (2000). His research interests include the theory of rational choice, the theory of distributive justice, and the history of social thought (Marx and Tocqueville).

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For Torolf and Henrik

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Preface and Acknowledgments

The topic of transitional justice has been with me, one way or another, for a long time. Let me illustrate with three episodes, beginning with the most recent.

On April 10, 2003, the day after the fall of Baghdad, I got an e-mail from a Canadian journalist who wanted to ask me some questions about “de-Baathification” in Iraq. (I told him that the main policy options were purges, trials, and exposure by truth commissions, each of these having several subvarieties.) By the beginning of the twenty-first century, one of the first questions that comes to mind when an autocratic regime falls is indeed how to hold the leadership to account and to block its influence in the future. Another, of course, is how to build a new and better regime. A third question is how to deal with the victims of the regime. The present book is mainly concerned with the two backward-looking issues: how societies respond to wrongdoings and sufferings. I also consider forward-looking issues such as economic reconstruction and constitution making, but only to the extent that they interact with the backward-looking ones. I mainly try to *describe and explain variations* in how societies close their open accounts from the past after regime transitions. Normative considerations enter indirectly, however, through the conceptions of justice and fairness that may animate the actors of transition and enter in the explanation of their behavior. Although my own normative views may sometimes shine through, they are not a main or even secondary concern of the book.

My attempts to think about these topics in a systematic way go back to June 1990, when I participated in a conference in Pécs (Hungary) on how to build new institutions and constitutions in Eastern Europe. Inevitably,

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questions of retribution and reparation also came up. In the notes that I wrote up for myself afterward I summarized the debates as follows:

Several politicians present at the conference agreed that retribution should not be carried out, except against those who had committed clear criminal acts (such as torture). The “Spanish solution” of complete amnesty was the only workable one. The injustice inherent in amnesty was the price one had to pay for democracy.

The former Minister of Justice in Hungary was especially insistent on this point. He observed that since the mid-nineteenth century 14 Hungarian prime ministers had been executed or forced into exile; it was time to break with this tradition of a highly politicized judiciary. In Hungary a commission had started looking into the sources of the wealth of high officials. About 4,500 dossiers were opened, but after a while the investigations died out. In his opinion, they were strongly anticonstitutional. Although not himself a participant in the roundtables, he did not believe that retribution was ever a topic of discussion, or that any promises of amnesty were made.

In GDR [German Democratic Republic] the old leaders tend to invoke the very principles they had violated. Although they constantly had violated the principle of legality (*nulla crimen sine lege*), they now invoke it against attempts to bring them to court.

The President of the Polish Senate observed that the Polish example had been very important for the transition in GDR, by showing that it is possible to “live quietly in the new society.” (He had heard this from the East German ambassador.) He reported that the Sejm recently had voted to transform pensions for party officials into normal pensions without special privileges. A Polish law professor argued that former party members could be demoted – e.g., from school principal to teacher.

Later, the issue of rectification – giving back property to those from whom it had been confiscated – was raised. Again, the general tendency was to argue against this form of backward-looking justice.

I do not know whether these ideas were as consensual at the time as I reported them, but – except to some extent in Hungary – they were certainly not confirmed by subsequent developments. The Spanish solution was not adopted. Some countries carried out extensive purges in the public administration. In several countries, restitution of property was carried out on a large scale. Few were put on trial, however.

From an earlier transition, I can recount an experience that illustrates the often extraordinary climate in these times. On May 9, 1945, the day after the German capitulation, my father returned from Stockholm where he had spent the last years of the war. When he dropped by his prewar haunt in central Oslo, Theatercaféen, the maître d’hôtel called him aside to say, “Mr. Elster, there is a dead German officer in the men’s toilet. Could you please help me.” My father somehow got rid of the officer. Being five years old at the time, I was unaware of this particular event. As I grew up

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after the war, however, I could not fail to notice how individuals in public and sometimes in private life were assessed, chosen, or rejected according to what they had done or failed to do, and at what times, during the German occupation. Someone who panicked in April 1940 would never again be seen as totally reliable, whatever his behavior at later stages in the war. The memory of the many shades of defeatism or opportunism was not allowed to fade away. Children of collaborators, too, suffered in numerous ways. In one case known to me, a mother told her two daughters that it was unpatriotic to play with the children of a convicted Nazi collaborator. In one sense, the legal and administrative proceedings that form the core of this book are only the most visible part of a larger complex.

These early memories may have been important in shaping the approach I take in the book. Although I consider a fairly large set of cases, from Classical Antiquity to the present, the episodes of transitional justice that occurred in the wake of World War II receive more than their proportionate share of attention. There is also another and less personal reason for this bias, if that is what it is. By far the most prominent historical instance of regime wrongdoings assessed in courts of justice is provided by the fate of perpetrators and victims of the Holocaust. The wrongdoings of the Stalinist regime may have been of a comparable magnitude, but there the only way in which wrongdoers were made to pay was by becoming victims themselves. Those who were merely victims, without having first been part of the circle of wrongdoers, received little reparation. By contrast, the prosecution of the Nazi regimes and the compensation of their victims occurred on a scale that, although inadequate in numerous ways, was utterly unprecedented and remains unequalled. It does not seem unreasonable, therefore, to dwell, as I do especially in Chapters 5 and 6, more extensively on these processes than on others.

The lack of an Introduction to the book is matched by the absence of a Conclusion. If I had had a theory of transitional justice, I might have begun the book by stating it and finished by evaluating it. Since I do not have one, this conventional parsing seemed pointless. My hope is that readers with the patience to sift through the material I present will find discussions that match their interests. Moral philosophers may find some hard dilemmas that had escaped their attention, and ponder the relevance of counterfactuals for ethics. Legal theorists may discover new difficulties in the idea of letting the punishment fit the crime. Political scientists may find that transitional justice is a fertile area for the study of the role of emotions in politics. Historians may be surprised to discover

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that the problem of “dual ownership” of property after a transition was resolved in the same way in Athens in 403 B.C., in the Second French Restoration, and in Germany after reunification. I write, then, for those whose intellectual excitement is triggered by the fine grain of societies, rather than for those seeking the large picture. Implicitly, I suppose, I do not think there is a large picture to be found, since if I had thought there was one, I would have been searching for it, too.

My first education in these matters came about through my participation in the Center for the Study of Constitutionalism in Eastern Europe, which was established in 1990 at the University of Chicago Law School, under the guidance of Gerhard Casper (who also attended the Pécs conference). Later, Geoffrey Stone provided unfailing support for the activities of the Center. My codirectors there, Stephen Holmes, Wiktor Osiatynski, and Cass Sunstein, helped me understand what I was observing during my subsequent travels in Eastern Europe. Later, the insights of Vojtech Cepl, Romyana Kolarova, Claus Offe, and Andras Sajó into the East European transitions were invaluable. I thank them all.

This experience led me to think about transitional justice more generally. In 1998–99, with the generous funding of the Mellon Foundation, I organized a yearlong seminar series at Columbia University on “Retrospective justice.” (The now-standard term “transitional justice” had not yet taken hold.) The papers presented at the seminar will be published, together with some additional contributions, as a companion volume to the present book, under the title *Retribution and Reparation in the Transition to Democracy*. Around the same time, Hans Fredrik Dahl, Stein Ugelvik Larsen, Øystein Sørensen, and I initiated a project, funded by the Research Council of Norway, on Norwegian transitional justice in 1945. I thank my codirectors of this project for discussions and comments. Other valuable support has been provided by the Wissenschaftskolleg zu Berlin and the Norwegian Academy of Science. I am very grateful to Monika Nalepa for invaluable research assistance and for many useful discussions, to Avi Tucker for comments on an earlier draft of the manuscript, and to two anonymous reviewers for valuable comments.

Unless otherwise indicated, translations from Danish, French, German, and Norwegian are mine.