

# Review essay

## Transitional justice

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The following books are reviewed:

Alexandra Barahona De Brito, Carmen Gonzalez-Enriquez, and Paloma Aguilar, eds., *The Politics of Memory: Transitional Justice in Democratizing Societies* (Oxford: Oxford University Press, 2001) xxv, 413 pp. [Barahona De Brito *et al.*]

Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crime Tribunals* (Princeton: Princeton University Press, 2000) 402 pp. [Bass]

Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (Oxford: Oxford University Press, 2000) xv, 466 pp. [Boraine]

Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001) xii, 340 pp. [Hayner]

Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton: Princeton University Press, 2001) xvi, 364 pp. [Mamdani]

A. James McAdams, *Judging the Past in Unified Germany* (Cambridge: Cambridge University Press, 2001) xix, 244 pp. [McAdams]

Juan E. Mendez, Guillermo O'Donnell, and Paulo Sergio Pinheiro, eds., *The (Un)Rule of Law & the Underprivileged in Latin America* (Notre Dame, Indiana: Notre Dame University Press, 1999) ix, 357 pp. [Mendez *et al.*]

Margaret Popkin, *Peace Without Justice: Obstacles to Building the Rule of Law in El Salvador* (Pennsylvania: Penn State Press, 2000) xvi, 287 pp. [Popkin]

Robert I. Rotberg & Dennis Thompson, eds., *Truth v. Justice: The Morality of Truth Commissions* (Princeton: Princeton University Press, 2000) vii, 309 pp. [Rotberg & Thompson]

Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000) ix, 292 pp. [Teitel]

Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001) xxi, 271 pp. [Wilson]

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While the label “transitional justice” is very recent, the topic is not. Societies that have wanted to make a break with the injustice and authoritarianism of the past have adopted various models to mark that break and to bring in a better future. These models fall roughly into two groups. There are the criminal accountability models, either international criminal tribunals, most famously the Nuremberg Tribunal, or domestic tribunals, or some combination of the two used to bring perpetrators of injustice to book. Alternatively, there are the models that mark the break by a formal declaration not of accountability but of amnesia—the society wishes to put the past behind it, most notably through an amnesty for the perpetrators of injustice.

As Ruti Teitel shows in the most comprehensive analysis to date, one of the most vexed topics in the debate about transitional justice—the question of amnesty—was addressed in the Athenian Constitution that followed Athens’ defeat in the Peloponnesian War.<sup>1</sup> And her frequent illuminating references to the stories of the Old Testament illustrate that the problems and complexities of reconciling a deeply divided society might figure just as dramatically in the founding myths of a society as do its famous military victories and defeats.

Moreover, there are treatments of the topic in the classics of political theory. The most striking example might well be Thomas Hobbes’s *Leviathan*.<sup>2</sup> Although Hobbes starts his account of the process by which civil society is achieved in the state of nature, as a matter of fact his audience was the people who would have the task of reconstructing a society torn apart—though not totally destroyed—by civil war. *Leviathan* contains both significant instruction about how to achieve reconciliation or civic harmony in the face of deep ideological division and an account of the construction of political and legal institutions in order to maintain that harmony.

So, one might ask, why is a big deal made about transitional justice? And there is no doubt that there is a big deal. The superb bibliographical survey in Barahona De Brito *et al.* takes up pages 315–51 of the book, but contains only a fraction of the material that was produced in 2000. One answer to this question is simply that a number of societies around the world managed to bring to a formal end a protracted period of severe repression of either a minority or a majority of their inhabitants and so were confronted with the problem of how, or indeed whether, to deal with the details of repression as they set about constructing the future. At the same time, other societies were plunged into civil or other war by the breakup of the political alliances of the Cold War, as in the Balkans, or found themselves in some other abyss of violence, most notably in Rwanda.

But one also has to take into account that the criminal accountability and amnesiac models no longer dominate the debate. As we will see, other models have emerged, in particular the Truth Commission model, which tries to combine both accountability and amnesty in order to avoid amnesia while achieving a transition to a just society.

The idea that these transitional events should be grouped under the rubric of “transitional justice” has its origins in an international trend that makes the countries of Central and Eastern Europe central to the topic—the trend of liberalization. I take my understanding of liberalization from Teitel’s account, where liberalization amounts to more than being caught up in a process of globalization since it involves a deliberate

<sup>1</sup> Teitel, at 52.

<sup>2</sup> THOMAS HOBBS, *LEVIATHAN* (C.B. McPherson, ed., Penguin Books 1968) (1660).

attempt to put in place liberal democratic institutions in order to mark the end of the transition. Significant here is that many within the transitional justice debate take it almost for granted that judicial review on the basis of a liberal democratic constitution is an indispensable and important marker of a successful transition.

One might then surmise, cynically but not altogether unrealistically, that the transitional justice debate is about how societies might get as close as possible to being clones of the United States of America, which would then make that debate look uncomfortably like the debates of the 1970s about third world development. That is, however good the intentions of those who participate in the debate, its practical effect will be to fit its subjects into the role of obedient bit players in the economic plans of the most powerful interests within the most powerful nations.

There is, in my opinion, a real concern about letting the idea of liberalization both frame and answer the question of transitional justice even if it is the case that without that idea the question would not be posed. But as we will see, even the critics of liberalism in the transitional justice debate (Mamdani and Wilson) seem to accept a liberal framework. Indeed, there is a remarkable attraction in the literature to the idea that there are universal human rights, so that even the critics of transitional justice share the goal of its proponents—establishing institutions that serve the cause of human rights. All they differ about, it seems, are the means, and it is not even clear that the differences are so great in this respect. Further, there is something close to agreement that the question of what means are appropriate is largely dependent on context.

Mamdani's account of the genocide in Rwanda shows how the standard account of the genocide there presupposes that what "went wrong" was that colonialism united in one nation state two distinct cultural groups—the majority Hutu and the relatively more economically privileged Tutsi—with the tragic result that the majority Hutu decided to solve the problem by killing every Tutsi individual.

Mamdani argues that these cultural identities have to be contextualized if one is to make sense of how several hundred thousand people could participate in the mass murder of up to a million of their neighbors and, further, make sense of it in a way that will allow for reconciliation. One has to understand how these identities were constructed and reconstructed in the course of the colonial project, how they were influenced by regional development, and how, once the colonial power had retreated, the Hutu and the Tutsi became locked in a series of political battles of which the genocide is the most recent and perhaps by no means the last.

Mamdani, however, does not wish to substitute for the story of clash of cultural groups a Marxist narrative where culture and politics itself reflect the real struggle, which is about the economic power relations bequeathed by colonialism. Politics cannot be reduced either to culture or to class, but has to be seen as having a creative role. Indeed, it is in the creative potential of politics that Mamdani sees the hope for reconstruction as well as a significant cause of past destruction. Moreover, the hope is for a politics orientated towards justice.

He rejects the idea that justice should be reduced to victor's justice—the "Tutsification" of state institutions, since the price of victor's justice is either a divorce or a continued civil war.<sup>3</sup> Drawing on Mamdani's analogy between the situation in Rwanda and apartheid South Africa, one might say that victor's justice in Rwanda

<sup>3</sup> Mamdani, at 270–72.

would be akin to restoring whites to political power in post-apartheid South Africa after a period in which the black majority rebelled against white privilege by engaging in a Rwanda-style massacre. Instead he proposes what he calls “survivor’s justice”—a “form of reconciliation . . . that is not at the same time an absence of justice, and thus an embrace of evil . . .”<sup>4</sup>

The term survivor deliberately embraces both victims and perpetrators and is meant to steer a course different from the liberal one involved in de-Nazification—blaming the perpetrators while identifying the victims—and de-Sovietization—which blames the system by identifying victims but not perpetrators. Survivor’s justice makes sense only in a context where, as in Rwanda, the beneficiaries were few and the perpetrators many, by contrast, say, with South Africa, where the perpetrators were few but the beneficiaries many. Because of the structure of apartheid, the focus in South Africa—Mamdani suggests—should be on social justice—the only basis for a “durable reconciliation.” In other contexts, criminal justice will be the correct focus. But in Rwanda the focus should be political justice—“reform of the institutions of rule.”<sup>5</sup>

The problem, as Mamdani portrays it, is that while the Tutsi minority want justice, the Hutu majority see justice as a way of fortifying minority power and thus they want democracy. To achieve reconciliation one has to look for a reconciliation between democracy and justice, an approach to how one governs rather than to who governs, an approach that will foreclose the “possibility of a *democratic despotism*” (his emphasis). And so, he concludes, one has to find a way of founding political identity not in any cultural construct—here, the liberal idea of the nation—but rather in the purely political idea of common citizenship based on the contingent fact of shared residence.<sup>6</sup>

Now I have used the term “liberal” to describe one of Mamdani’s theoretical foes without his authorization, since that term is not one he uses in the book. Indeed, the culture-based explanations he rejects can just as well be fascist as liberal. But it is clear that to the extent that he criticizes contemporary non-Marxist based explanations of the Rwandan genocide, the objects of his criticism fall within a broadly conceived liberal camp, as does the thought he rejects that reconciliation will be brought about through Western-style criminal justice that seeks out the perpetrators of atrocities.

However, the fear of democratic despotism has been a mark of liberal political thought for much more than a century. And the rejection of culture as the glue of a civil society—indeed the thought that culture is more of an incendiary than a glue, so that what one has to get right is the value basis of a common citizenship—is the mark of much recent liberal democratic political thought, as can be seen in the writings of Ronald Dworkin, Jürgen Habermas, and John Rawls.

Mamdani’s avoidance of any direct discussion of liberalism is curious. The only respect in which he might be thought, on the basis of this book, to be a critic of liberalism is that he rejects in one particular context an idea commonly associated with liberalism—that the only way to produce a liberal society out of an illiberal one is to bring the leaders of the illiberal society to book by using the criminal law to make them accountable. In addition, that avoidance means that he does not offer even a glimpse of the content or kind of institutions he has in mind. As I will now show, a rejection of the idea of

<sup>4</sup> *Id.* at 272–73.

<sup>5</sup> *Id.* at 273.

<sup>6</sup> *Id.* at 274–82, at 281.

criminal justice as a necessary tool of a successful transition is both widely shared by most of the participants in the transitional justice debate and the association of that idea with the liberal tradition is, as we will soon see, of quite recent provenance.

In regard to the first point, the experience of South Africa's Truth and Reconciliation Commission (TRC) has given substance to one of the three main assumptions of the transitional justice debate—that the kind of justice appropriate for transitions is different from our common understandings of justice. Both the TRC's Final Report and many of its supporters have argued that the success of the TRC came about because the justice it achieved was "restorative" in nature—a kind that is superior, at least in the transitional context, to retributive or criminal justice.

It is well known that perpetrators of gross human rights violations who testified before the TRC received both criminal and civil amnesty if the amnesty panels of the TRC were satisfied that the perpetrator had fully disclosed his role and that the violation was committed in pursuit of a political purpose.<sup>7</sup> Thus the elites who negotiated South Africa's transition decided not to rely on criminal trials as the main mechanism for dealing with the past.

One can view this decision as born of necessity: the old regime retained enough muscle to sabotage the transition and the new regime lacked the resources to mount successful prosecutions. In these circumstances, justice was unlikely to be achieved, so it was traded for the truth that emerged from the hearings at which victims of violations, or their relatives, testified, as well as the hearings at which perpetrators sought amnesty.

Alternatively, there is the claim made by the TRC itself and by its many supporters that truth was not traded for justice. Rather, the way the TRC went about finding out the truth achieved a kind of justice different from the criminal or retributive justice with which those who see a trade-off mistake justice itself. The kind of justice that the TRC achieved is restorative justice, which has something of the virtue of retributive justice in that it holds perpetrators accountable for their actions.

Moreover, it is claimed that at least in a transitional context, restorative justice has many advantages over retributive justice. It promotes a process of truth finding in which a fuller picture of the truth emerges than would emerge in a series of trials. For in the truth finding process the testimony of victims has a role that goes well beyond serving as an instrument to achieve conviction and amnesty seekers have an interest in making full disclosure, which in turn implicates others who therefore will come forward to seek amnesty. And in taking this role, victims might find not only that they can come to terms with the abuses but also that they are "restored" to a relationship of equality with the perpetrators, so that they develop a sense of agency appropriate for participation in a democratic society. Even more generally, the supporters of the old regime are forced through the confessions of the perpetrators to acknowledge its nature, while those who suffered under that regime, though without suffering gross human rights violations, can—through the experience of the victims—also come to terms with the past and find their agency in a way appropriate for a democratic future.

There are strong and weak versions of restorative justice, with the weaker—and more convincing ones—arguing that something important is lost when one foregoes

<sup>7</sup> The statute also required that the violation be shown to be proportional to the purpose, but amnesty decisions did not apply this requirement.

retributive justice but that in particular contexts the moral sacrifice involved is outweighed by the moral gains for a society in transition. Of the books under review, Boraine's offers a weak version, situated within an intriguing and self-critical account of the TRC's genesis, process, and aftermath, by someone who was one of its chief intellectual architects, its deputy chairperson, and who now devotes his experience to trying to draw out the implications of the TRC for other contexts. In addition, several of the essays in the excellent collection edited by Rotberg & Thompson, including one by Boraine,<sup>8</sup> are in a similar vein, with that by Elizabeth Kiss offering far and away the best philosophical justification of the idea of restorative justice that I have encountered.<sup>9</sup>

However, one of the other books under review suggests that the actual experience of the TRC should provide a highly cautionary note. On the basis of interviews, Richard Wilson shows that many victims did not get to testify and those who did often found themselves in a micro-managed process in which their testimony was reduced to the empirical data the TRC required.<sup>10</sup> Moreover, the TRC sought in its reports of victims' testimony to procure or construct a redemptive theological narrative of reconciliation and forgiveness rather than give voice to the desire for vengeance.

Wilson also argues that the fact that criminal violence has post-apartheid South Africa in a frightening grip cannot be divorced from the sense among South Africa's majority of economically disadvantaged black population that the beneficiaries of apartheid continue to enjoy its benefits, and that the perpetrators of gross human rights abuses have gone unpunished. The conflation of amnesty and reconciliation with human rights embodied in the TRC was, in his view, part of an attempt to legitimize a post-apartheid state, a state that was destined to move beyond apartheid in mainly formal ways. Here his account chimes explicitly with Mamdani's claim that in South Africa social justice is key to reconciliation.<sup>11</sup>

Again like Mamdani, Wilson is far from claiming that human rights are unimportant. Indeed, he regards the formation of a human rights culture as an essential ingredient in a successful transition but finds the TRC a pragmatic compromise that moved too far away from principle. Thus he suggests that punishment of perpetrators is the best instrument for avoiding the creation of a culture of impunity, and for bringing about respect for human rights. Human rights talk has been enlisted in a project of nation-building in place of transforming an authoritarian legal order into one that delivers accountability for violations of human rights.

In my opinion, Wilson rather underestimates the potential of the military old guard in South Africa to have brought the transition to a crashing halt without the promise,

<sup>8</sup> Alex Boraine, *Truth and Reconciliation in South Africa: The Third Way*, in Rotberg & Thompson, at 141.

<sup>9</sup> Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, in Rotberg & Thompson, at 68.

<sup>10</sup> In addition, it seemed that perpetrators for the most part stuck to a script, probably coordinated by the few lawyers who appeared time and again with this group, which disclosed as little as possible and attempted to confine implicating others to implicating security force actors who had died. And in relation to the issue of catharsis, perpetrators stuck for the most part to rote apologies if they apologized at all and victims often found the experience of testifying deeply traumatic. Finally, the South African government was committed to providing meaningful compensation to victims in accordance with the TRC's recommendations, but it has reneged on this commitment.

<sup>11</sup> Wilson, at 35.

made in the Interim Constitution, of amnesty. At the same time, he overestimates the capability of the transitional state to deliver effective prosecutions of perpetrators. The individualized amnesty provisions of the TRC effectively undercut the promise of a general amnesty, delivered some form of accountability, and opened up the potential for prosecutions that might—as a result of disclosures made in the amnesty hearings—follow failed attempts to get amnesty or failure to apply at all.<sup>12</sup>

But perhaps most troubling about his critique of the TRC is that he too quickly assimilates the retributive justice of the criminal trial to revenge.<sup>13</sup> His reasoning seems to be that because popular culture demands revenge and because the criminal trial is the closest a civilized society comes to dishing out revenge, one should opt for the criminal trial above other mechanisms of accountability. In this respect he is quite close to some of the proponents of a strong version of restorative justice, most notably Desmond Tutu—the chairperson of the TRC—although they equate trial and revenge in order to reject retributivism.

Wilson's equation of a criminal trial with revenge—and thus in his view to be recommended because it is more in line with popular desires—is of a piece with a general theme of the book that the TRC was an elite-driven rather than a democratic process. But, as Boraine and many of the authors in Rotberg & Thompson emphasize, one of the features of the TRC that distinguishes it from previous truth commissions is that it was designed within South Africa's first democratic parliament amidst extensive public debate, its commissioners were appointed in such a way as to ensure a high degree of representation and popular legitimacy, and its proceedings were not only for the most part open but very effectively broadcast by the media.

Moreover, as I have mentioned, the idea that criminal justice should be one of the principal tools of a transition is of recent provenance. Bass deftly deals with fascinating material, including the decision about what to do with Napoleon, the Leipzig trials for World War I crimes, the Constantinople trials for perpetrators of Armenian genocide, Nuremberg, and The Hague. He also shows that liberal political leaders often thought that the best way to transform a society is to deal with the principal agents of atrocities by revenge—usually summary executions without any pretence of Western-style criminal justice.

The move to holding trials was held back, first, by the fact that generally speaking this issue arose as one of how to deal with a defeated enemy and it was thought inappropriate to judge the enemy by one's own standards. Indeed, even in the lead up to Nuremberg, the idea was put forward that Nazi atrocities against German Jews could not be addressed in the same way as atrocities in the occupied countries, since decisions about how to deal with its own subjects fell within Germany's prerogative. In order to pursue this sort of idea, the values against which behavior should be measured had to be thought of as universal, not only in the sense that everyone should abide by these values, but also in the sense that the values have universal jurisdiction—they should be applied to everyone. The extension of what Bass calls "legalism" from the domestic to the international arena required a confidence about the values of legalism that was harder won than is commonly supposed.

<sup>12</sup> Wilson does place some hope in this potential in a separate essay. See Richard A. Wilson, *Justice and Legitimacy in the South African Transition*, in Barahona de Brito et al.

<sup>13</sup> Wilson, at 156–85.

In addition, holding a trial had to be thought worthwhile in order to overcome certain practical obstacles. A full-blown trial is often protracted, permits ideological grandstanding, and has an uncertain outcome. Also, there are difficult questions about who should conduct the trial. An international body might look too much like victor's justice or revenge but the experience of letting the defeated country try its own is not a happy one. Finally, there are difficulties about which procedures are appropriate—for example, British-style criminal justice requires the presence of the accused while French style does not.

Unfortunately, Bass does not explore in any detail the idea of legalism, but instead relies (mostly implicitly) on Judith Shklar's rather skeptical treatment of this topic.<sup>14</sup> Moreover, he does not advert sufficiently to a factor that is surely important in understanding why human rights might be thought to have universal jurisdiction—that at least many of the people who have suffered under state oppression now seem to understand their suffering as an affront to their human rights, and thus want to see a transitional process that both addresses that affront and puts in place institutions that will help ensure such affronts do not happen again. One has, in short, to respect the rights of perpetrators by “staying the hand of vengeance” if one wants rights and the rule of law to be generally respected. The issue then is not so much whether a criminal trial model, domestic or international, or a TRC model is best, but rather what best serves the rule of law in a particular context.

To go back to Wilson and the TRC, if the majority of South Africans wanted to transform their political culture into one protective of human rights, and if criminal trials of perpetrators were not a realistic option, and if the TRC's amnesty process did provide a kind of public education in which respect for human rights was inculcated, then the force of his objections to that process is in question. Further, support for that process need not go the whole length of turning into even a weak version of restorative justice. As Jonathan Allen has argued, the kind of justice achieved by the TRC might better be understood in terms of what he calls “justice as recognition” and “justice as ethos.”<sup>15</sup>

In regard to “recognition,” the work of the Committee that heard from victims—the Committee on Human Rights Violations—supports the restoration of the rule of law by drawing attention to the “evil consequences resulting from apartheid and the officially sanctioned transgressions of the rule of law.” The hearings thus “demonstrate the consequences of a lack of public commitment to justice and the rule of law and thus show the importance of such a commitment. In this sense the TRC supports legal recognition in a context where law's equal recognition of all responsible agents has been grossly distorted.”<sup>16</sup>

In regard to the “justice as ethos,” this involves the demonstration of how under apartheid people's sense of justice was corrupted. Justice became equated with the ideology of the group one happened to belong to, rather than serving as a base line from which any particular ideology might be criticized. This equation in turn led to an impoverished view of public discourse—politics is either a dirty business or a noble calling in which the end justifies the means. But neither of these views permits any

<sup>14</sup> JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* (Harvard Univ. Press 1986).

<sup>15</sup> Jonathan Allen, *Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 315, 328–32, 335–38 (1999).

<sup>16</sup> *Id.* at 330–31.



operation for a sense of injustice, and that sense is required if the transitional government is to preserve legitimacy and a commitment to the constraints of the rule of law, constraints that make it possible for citizens to call government to account for injustice.<sup>17</sup>

As I understand them, Allen's ideas of justice as recognition and justice as ethos are not meant to be discoveries of new kinds of justice. Rather, they are labels for processes that serve the transformation of an unjust society into a just one. But the justice they serve is little more than the justice of the rule of law, the kind of justice that has to be in place before order becomes something worth having and that also makes it possible for a society to decide other kinds of political issues in a civil fashion. And if that is right, then most of the debate about transitional justice should be boiled down to one about how to achieve the rule of law.<sup>18</sup>

This boiling down, even deflation, might cause disappointment not only to those who see in transitional justice and the work of truth commissions something altogether new and exciting, but also to the political activists who risked much to bring about the transition. As one such activist, Bärbel Bohley, from the former German Democratic Republic famously complained of the transition that followed German reunification, "We expected justice, but we got the *Rechtsstaat* instead."<sup>19</sup>

McAdams's exploration of this and other issues within the German transition achieves the rare feat of exploring fraught moral issues without moralizing. In one respect, the German transition is a fruitful testing ground for ideas of restorative justice, since the great resources available to the Federal Republic made it possible to pursue several different kinds of transitional process: criminal trials for the killings by border guards of those caught attempting to flee to the West; a parliamentary "expert" inquiry that produced a report about systemic injustice; the Gauck Authority, which managed the process of access to Stasi files that revealed the details of collaboration; and an elaborate system of returning private property to its former owners.

But on the other hand one has to take into account, as Jan Werner Müller puts it in his admirably compact account of the same issues in Barahona De Brito *et al.*, "whereas in other Central and Eastern European countries dictatorships disappeared, in East Germany the country disappeared along with the dictatorship."<sup>20</sup> In addition, the very fact of the resources available makes it difficult to draw lessons from the German experience. But then the general issue of resources can lead to dispiriting conclusions about the potential for transitional justice.

As Barahona De Brito *et al.* put it in the conclusion to their high-quality collection of case studies (the role of international actors, Portugal, Spain, the Southern Cone, Central America, South Africa, Central and Eastern Europe, Germany, and the Soviet Union), one has to take into account the "paradox of the probable and the unnecessary": "The impact of truth and justice policies on a new democracy depends on starting conditions or the initial balance of power; in other words, the more likely the

<sup>17</sup> *Id.* at 336–38.

<sup>18</sup> For more argument, see David Dyzenhaus, *Justifying the Truth and Reconciliation Commission*, 8 J. POL. PHIL. 470 (2000).

<sup>19</sup> McAdams, at 7.

<sup>20</sup> Jan-Werner Müller, *East Germany: Incorporation, Tainted Truth, and the Double Division*, in Barahona *et al.*, at 248.

implementation of such policies is because of a favorable balance of forces, the less necessary they are to ensure a process of democratization."<sup>21</sup> But, as they also point out, whatever the effect of such policies on democratization, they are "crucially important moral and political demands which are, even if imperceptibly, part of a changing climate that places respect for human rights at the forefront within and between national communities."<sup>22</sup>

I want to draw attention to two features of the German experience of transitional justice that seem to have implications for other transitions. The first undercuts the claim made by Wilson and also by the historian Charles S. Maier in Rotberg & Thompson that one should not overload a commission charged with dealing with the past with too many tasks, indeed that the most effective commission is a truth commission with a purely historical mandate.<sup>23</sup> For both McAdams and Müller suggest that the historical inquiry undertaken by the German parliament turned out to lack impact precisely because it seemed that nothing was at stake in contrast to the vividness of the amnesty-driven inquiry undertaken by the TRC.

Second, there is the issue that comes out of the complaint quoted above that East Germans found that they had unwittingly traded justice for the rule of law. This issue is particularly well presented by the German experience in part because the Federal Republic had been through an earlier transition—the process of de-Nazification. In that transition, Gustav Radbruch, one of Weimar's most eminent lawyers, had suggested a "formula" that said that positive law ceases to be law when it reaches a certain pitch of injustice.<sup>24</sup>

The "Radbruch formula" gave post-war German courts a device for stripping Nazi enactments of the character of law in order to facilitate judges' deciding legal issues that had their origin in those enactments in a fashion that respected the liberal norms of West German society. For example, in 1968 the Federal Constitutional Court decided that the Reich's Citizenship Law that had stripped a Jewish lawyer of his nationality was void. Thus, the Court was able to decide a matter concerning an inheritance on the basis that the lawyer had never lost his nationality.<sup>25</sup>

In some of the post-reunification border guard cases, judges invoked the formula in order to void the provision of the statute that set out the grounds for justification of such killings. In addition, the Federal Constitutional Court invoked the formula to dismiss an appeal against the constitutionality of the Honecker trial—in which senior politicians and officials were charged with "indirect complicity" in the killings. The Court argued that the expectation that one would be held accountable only to the legal standards in effect at the time of one's action is based on the assumption that

<sup>21</sup> Barahona *et al.*, at 314.

<sup>22</sup> *Id.*

<sup>23</sup> Charles S. Maier, *Doing History, Doing Justice: The Narrative of the Historian and of the Truth Commission*, in Rotberg & Thompson, at 261.

<sup>24</sup> See Robert Alexy, *A Defence of Radbruch's Formula*, in RECRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER 15 (David Dyzenhaus ed., Hart Publishing 1997); Julian Rivers, *The Interpretation and Invalidity of Unjust Laws* in RECRAFTING THE RULE OF LAW, *supra*, at 40; Stanley L. Paulson, *Radbruch on Unjust Laws: Competing Earlier and Later Views*, 15 OXFORD J. OF LEGAL STUDIES 489 (1995).

<sup>25</sup> See Alexy, *supra* note 23, at 18–19.

the standards are democratically enacted in a way that takes account of basic human rights. When a nondemocratic government uses the law to justify the “worst criminal injustice”, the assumption no longer holds. The contradiction between positive law and justice is so great that the constitutional “promise of legal security had to be subordinated to the higher norms of humanity.”<sup>26</sup>

McAdams comments that it is understandable that the Court was reluctant to allow a constitutional guarantee against ex post facto law to be “misused to justify particularly crass forms of injustice” but that the argument seemed to “recommend a standard of personal responsibility that was open to abuse. Taken to an extreme, all that a particularly vengeful court would have needed to do to establish guilt was to show that a given individual had been involved in the commission of an act that, in the court’s estimation, had violated basic principles of morality.”<sup>27</sup>

The dilemma seems to arise because of the assumption that a central task of a transitional regime is to educate the public in the value of the rule of law. On the one hand, if the rule of law obstructs the pursuit of justice for past wrongs, then the rule of law will fall into disrepute. On the other, if the rule of law is quite easily sacrificed—however bad the killings were, they were not on a par with the Holocaust—then, the value of the rule of law cannot be set very high, and again the educational task fails.

But this formulation is controversial and unhelpful, for it presupposes the positivist proposition that the rule of law is exclusively about the enforcement of positively enacted clear rules. And it sets up, as we saw Bohley did, the situation as either/or: either the rule of positive law or the rule of natural law, that is, the standard of substantive justice.

As McAdams shows, there was a third way—courts sometimes reasoned on the basis that the statute expressly stipulated that when guards had to use firearms to prevent an escape, “if possible” they were to avoid killing.<sup>28</sup> And even when courts convicted on the basis of a judgment that the guard had adopted disproportional means to prevent the escape, they handed down very mild sentences. The lesson, McAdams suggests, is that there was an “attractive alternative to the assumption of collective guilt in East Germany. Some GDR citizens, the policy makers seemed to say through the medium of the trials, would have to admit to their crimes under the old order. However, this judgment did not apply to everyone for the simple reason that wrongdoing was specific and individualizable.”<sup>29</sup> And, while McAdams does not go further into the implications of this lesson for our understanding of the rule of law, he does seem committed to there being some more subtle alternative to the one that leads to the either/or formulation.

<sup>26</sup> McAdams, at 51 (footnote omitted).

<sup>27</sup> *Id.*

<sup>28</sup> Alexy rejects (wrongly in my view) this option as a “covert kind of retroactivity,” *supra* note 23, at 21. It is worth comparing to this option the cases in which West German courts dealt after reunification with the left-wing terror groups, most notably the Red Army Faction. This issue is explored in Burkhard Schaefer, *Sometimes You Must be Kind to be Cruel: Amnesty between publicae laetitiae and damnatio memoriae*, in *LETHE’S LAW: JUSTICE, LAW AND ETHICS IN RECONCILIATION* (Emilios Christodoulides and Scott Veitch, eds., Hart Publishing 2001). (My own contribution to this volume precludes me from reviewing what is otherwise an obvious choice.)

<sup>29</sup> McAdams, at 168.

It is, in my view, important to pursue the more subtle formulation. The positivist proposition that the rule of law is exclusively about the enforcement of positively enacted clear rules excludes the idea that the rule of law is also about the pursuit of justice in accordance with a set of principles of legality, what the philosopher of law Lon L. Fuller called “an inner morality of law.”<sup>30</sup> The positivist proposition thus excludes the claim that there was a set of moral standards internal to the law under the old regime that made culpable individual conduct, especially the conduct of officials, and requires that we regard the justice of the transition as something special, because it is discontinuous with both the past and the future. It is discontinuous with the past because the transition is a radical break with the past, at the end of which one has in place the institutions that mark the end of the transition and usher in the new era—hence the radical discontinuity with the future.

The assumption that transitions are radically discontinuous in this way is the second of the three main assumptions in the debate, the first (as I mentioned) being that there is something special about transitional justice. In my view, these two assumptions obscure the contribution of some of the best work in that debate. For example, Teitel addresses in separate chapters the issues of criminal justice, historical justice, reparatory justice, administrative justice, and constitutional justice. She provides in each a full account of the complexity of the issue in a transition, often using case studies and examples to good effect. Her analysis of the set of legal problems that confront transitional regimes and the tools available to them is thus indispensable. But it is also based on the unsupported assumption of discontinuity and the associated idea that the rule of law in a stable society is apolitical and accords with the positivist proposition.

Similarly, the more exceptional transitions are made to seem and, correspondingly, the more that truth commissions are made to look like the unique tool for dealing with these exceptional situations, the greater the temptation to provide the stronger and less convincing restorative justice accounts of such commissions, and to regard the failure to adopt the truth commission model as tantamount to being doomed to an unsuccessful transition. Thus even Priscilla B. Hayner, the leading comparative scholar of truth commissions, concludes her magisterial and very clear-headed survey of their role by saying that those countries (most notably Mozambique) that have deliberately opted for what she recognizes to be good reason to “forget” their past will likely one day have to adopt a formal process of remembering.<sup>31</sup>

Far more promising, I believe, is to avoid a view that requires us to think that there is something exceptional called a “transition” whose contrast is the “static” societies in which most of those involved in the academic debate about transitional justice live. As some contributors to the debate have pointed out, for example, Ronald C. Slye and Sanford Levinson in Rotberg & Thompson, truth commissions and amnesties have their counterparts in societies that are both stable and democratic.<sup>32</sup> The insight here not only helps to legitimize the work that truth commissions or amnesties might do in

<sup>30</sup> LON L. FULLER, *THE MORALITY OF LAW* (Yale Univ. Press 1969).

<sup>31</sup> Hayner, at 249–54.

<sup>32</sup> Ronald C. Slye, *Amnesty, Truth, and Reconciliation: Reflections on the South African Amnesty Process*, in Rotberg & Thompson, at 170; Sanford Levinson, *Trials, Commissions, and Investigating Committees: The Elusive Search for Norms of Due Process*, in Rotberg & Thompson, at 211.

transitions, but allows us to draw lessons from those transitions about how our own societies might more effectively deal with the injustices of the past with which we still live.

For example, the essays collected in Mendez *et al.* about the “(un)rule of law” and the underprivileged in Latin America make sober reading. But while the specific problems they address about access to justice, racial and gender discrimination, discrimination against indigenous peoples, the role of the police, reform of the judiciary, pockets where the violence of the street rules rather than the law, are writ large in Latin America, they are—at the least—writ small in North America. Similarly, Margaret Popkin in her excellent account of the obstacles to building the rule of law in El Salvador argues effectively for the centrality to that process of a judiciary committed to human rights. But the link between the rule of law and such a judiciary is hardly uncontroversial in countries such as the United Kingdom that have recently incorporated human rights instruments into their domestic law.

In conclusion, two of the main assumptions of the transitional justice debate—that transitions are discontinuous with the past and the future and that there is something special about transitional justice—are flawed. At most, the drama of what gets called a transition brings to light problems that are to be found in societies that are hardly static, even though they are stable. However, I still regard this process of bringing to light and the work done to understand it as of the highest value, because the third assumption of that debate is sound.

This assumption is, as the title of Popkin’s book is meant to suggest, and as all the contributors to Rotberg & Thompson argue, that peace or order without justice is not worth having, not only from the standpoint of morality, but because such a peace will not work in the interests of the society. It is worth recalling how even those who try to stand outside what they think of as the liberal paradigm—Mamdani and Wilson—turn out to be rejecting the means adopted in a particular transition, rather than the end—the creation of a culture of the rule of law that is conducive to the protection of human rights. That brings us to the question not only of how to design our institutions in such a way as to maintain the rule of law, but of what the rule of law or legality is and what ends it serves. From the standpoint of legal and political theory, the transitional justice debate might have its greatest value in the way it requires us to return to those classics of political theory that present fundamental questions of institutional design. Hence, my mention earlier of Hobbes’s *Leviathan* as a kind of textbook of transitional justice.

I also suggested that once we see that the transitional justice debate is part of the trend of liberalization, we should also be wary of the attempt to construct a transition in order to fit this trend. We should be concerned lest peace is bought at the price, pointed out in Randy Newman’s song “Political Science”, of becoming “just another American town” or even worse an “all-American amusement park”.

Put differently, liberalization has to be wrested from the temptation to equate it with free-market-driven globalization. The motor of transitions should be human rights constructed around local understandings and needs with no particular model of how to do this being touted as of universal application. Rather, and I think much more modestly, one needs to establish an institutional framework of the rule of law or legality that puts into place what Fuller thought of as the main point of law—a relationship of reciprocity between ruler and subject. Only then can the more divisive issues of social justice be properly debated and projects undertaken to implement the outcomes of those debates.