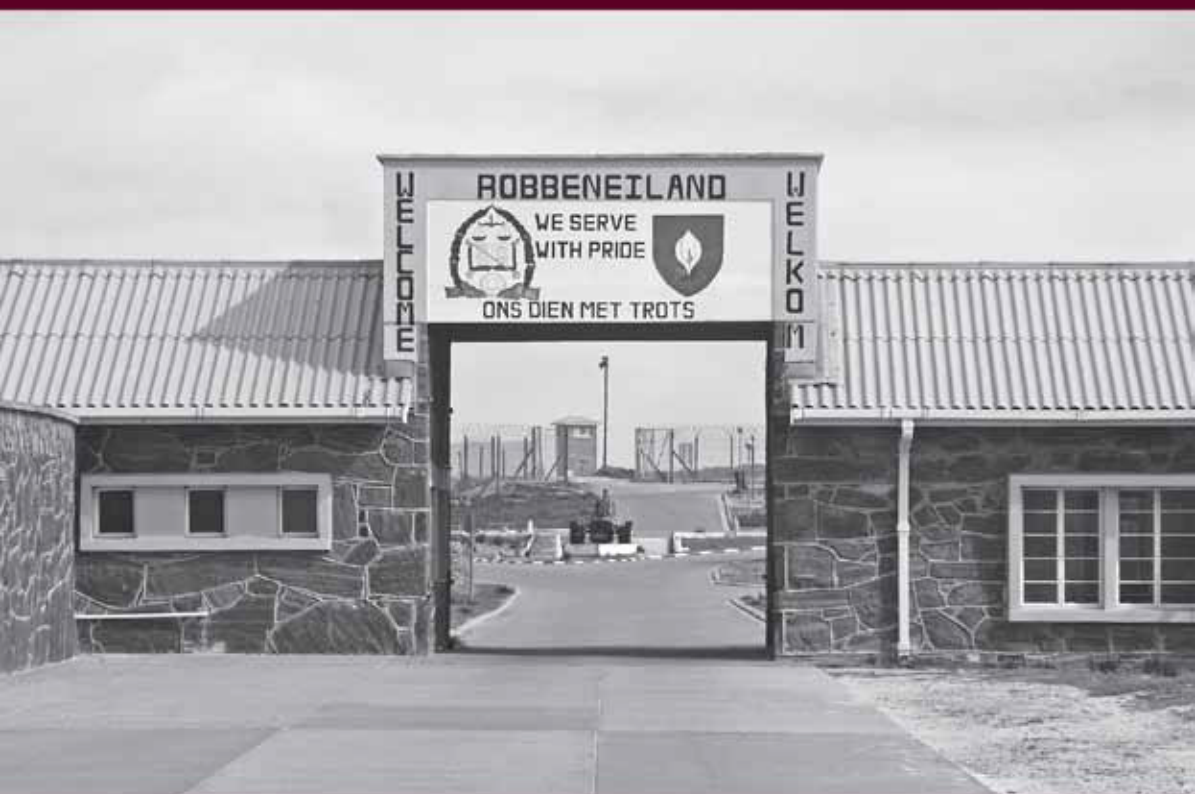


# Theorizing Transitional Justice



Edited by  
**Claudio Corradetti,**  
**Nir Eisikovits and**  
**Jack Volpe Rotondi**

# THEORIZING TRANSITIONAL JUSTICE

*Offers an exceptionally diverse array of normative theory and research relating to the evolving field of Transitional Justice.*

Ruti Teitel, New York Law School, USA

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# Theorizing Transitional Justice

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# Contents

<i>List of Figures</i>	<i>ix</i>
<i>Notes on Contributors</i>	<i>xi</i>
Introduction <i>Claudio Corradetti, Nir Eisikovits, and Jack Volpe Rotondi</i>	1
<b>PART I IS IT ALWAYS NECESSARY TO ACCOUNT FOR PAST WRONGS?</b>	
1 Forgetting after War: A Qualified Defense <i>Jack Volpe Rotondi and Nir Eisikovits</i>	13
2 Peace without the Past? Truth, Transition and the Northern Ireland Case <i>Cheryl Lawther</i>	29
<b>PART II PUNISHING AFTER WAR</b>	
3 The Force of Forgetting or Forced Forgetting? Schmittian Amnesties and Transitional Justice <i>Juan Espindola</i>	45
4 Transitional Justice, Retributive Justice and Accountability for Wrongdoing <i>Colleen Murphy</i>	59
<b>PART III TRANSITIONAL JUSTICE AS A VEHICLE OF STRUCTURAL AND INSTITUTIONAL CHANGE</b>	
5 Transitional Justice as Structural Justice <i>Krista K. Thomason</i>	71
6 Justice-Seeking in Settler States: A Model for Thinking about ‘Justice’ in Transitional Societies <i>Michael Phillips</i>	81
7 Structural Causes of Conflict and the Superficiality of Transition <i>Pádraig McAuliffe</i>	93

**PART IV TRANSITIONAL JUSTICE AND POLITICAL RECONCILIATION**

- 8 Reconcilable Resentments? Jean Amery's Critique of Forgiveness in the Aftermath of Atrocity  
*Grace Hunt* 109
- 9 A Theory of National Reconciliation: Some Insights from Africa  
*Thaddeus Metz* 119
- 10 Restoring Human Capability: Reconciliation and Liberal Multiculturalism  
*Monica Mookherjee* 137

**PART V TRANSITIONAL JUSTICE AND THE ARTS**

- 11 Transitional Justice and the Arts: Reflections on the Field  
*Sanja Bahun* 153
- 12 Democratic 'Sacred Spaces': Public Architecture and Transitional Justice  
*Mihaela Mihai* 167

**PART VI DEFINING THE PARAMETERS OF TRANSITIONAL JUSTICE**

- 13 Transitional Times, Reflective Judgement and the 'Hōs mē' Condition  
*Claudio Corradetti* 185
- 14 Further Explorations of the Social Death Hypothesis  
*Claudia Card* 199
- 15 Making Reparations Possible: Theorizing Reparative Justice  
*Margaret Urban Walker* 211

**PART VII CASE STUDIES**

- 16 Trust and Commitment: How Athens Rebuilt the Rule of Law  
*Paul Gowder* 225
- 17 Transitional Justice in Post-Genocide Rwanda: An Integrative Approach  
*Lynne Tirrell* 237

- Index* 253

# List of Figures

12.1	The exterior of the Voortrekker Monument	172
12.2	The Cenotaph	173
12.3	The Victory of Socialism Boulevard	176
12.4	Exterior of the People's House	176



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Press (2013), pp. 136–50; “Philosophical issues in transitional justice theory: A (provisional) balance,” *Politica e Società*, Il Mulino, Bologna (2013): 185–220.

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# Introduction

The philosophical debate over transitional justice as a concept can be traced back to ancient Greece. Some of its most central problems were already addressed in Aeschylus's trilogy of *The Oresteia* where Athena played the transitional role of casting the decisive vote for pardoning Orestes and saving him from the Furies (the Erinnyes).<sup>1</sup> Yet, the linguistic expression “transitional justice” has been adopted for the first time in its technical sense by R. Teitel during late 1980s who then formulated the basic principles of this emerging discipline in her path-breaking work on the subject.<sup>2</sup>

Since its appearance, the term was immediately discussed and criticized due to its combination of two apparently irreconcilable elements: the idea of justice and the idea of change through time—transition. The skepticism accompanying the birth of transitional justice as a study area was thus characterized since the beginning by a continuous attempt of defining the field, an attempt which is even now far from having been completed.<sup>3</sup> Some views have challenged the notion of transitional justice as a form of compromise among contracting parties whereas others have instead considered it as a specific context of application of general normative principles independently justified (hence the proper interpretation of “transitional”).<sup>4</sup>

The specific task for a normatively framed programme of justice in transition is the focus of some of the most influential literature in the field as, for instance, in R. Teitel (2003), where the author considers how twentieth-century institutional and legal developments of transitional justice revolved around three major historical events/phases: I) the post-Second World phase of the Nuremberg Trials prosecuting Nazis' generals, II) the post-Cold War phase which has modified the bipolar equilibrium and opened democratization processes, and finally, III) the steady-state phase of transitional justice.<sup>5</sup>

Whereas the first phase of the Nuremberg trials was characterized by a very limited scope dominated by criminal law, the post-Cold War phase moved beyond a mere retributive strategy and looked for social and interparty restoration. What emerged was a dichotomy between truth and justice, where truth commissions as *ad hoc* institutions favoring reconciliation were created. In addition to the trade of justice for truth, this second phase was characterized by the trade of justice for peace. A large amount of literature developed in relation to concepts of “forgiveness” or “reconciliation.” Finally, phase II reinterpreted the universalist view on the rule of law typical of phase I and considered it as dependent on state-particularist perspective. Universality was therefore seen as embedded in contingent political contexts. Even if characterized by institutional innovation, the second phase was nevertheless limited by circumstances linked to nation-state transitions. Such constraints are now inadequate for the understanding of the global dimension, which is instead

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1 On the transitional justice interpretations of *The Oresteia*, see B. Leebaw, *Judging State-Sponsored Violence, Imagining Political Change*, Cambridge: Cambridge University Press 2011, 108 ff.

2 R. Teitel, *Transitional Justice*, New York, NY: Oxford University Press 2000.

3 In this regard, P. De Greiff has recently affirmed that: “Finally, and most surprising, there is no fully worked-out conception of transitional justice even in the most influential works in the field”, P. De Greiff, “Theorizing Transitional Justice”, in M.S. Williams, R. Nagy and J. Elster (eds), *Transitional Justice*, New York-London: New York University Press 2012: 32.

4 This latter thesis is defended by P. De Greiff, “Theorizing Transitional Justice,” cit., p. 58 ff.

5 R. Teitel, “Transitional Justice Genealogy,” cit.



typical of the third phase. This latter, indeed, due to the permanent action of investigation and prosecution assigned to the International Criminal Court has *normalized* the exceptionality of the special tribunals of Rwanda and Yugoslavia.<sup>6</sup> This process of normalization is also connected to the expected change of role of transitional justice into the politics of prevention and self-defense from terrorist attacks. The latter events have placed the scope of transitional justice strategies more directly into the field of economic and political transformations of the global world and raised the question of the opportunity of global rule of law.<sup>7</sup>

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

The study of transitional justice in recent decades has been interdisciplinary, running the gamut from philosophy through theology, sociology, anthropology, law and recently even neuroscience.<sup>8</sup> The field had its contemporary birth with the creation of the Nuremberg Tribunals after the Second World War, the first successful and effective trials for large-scale war crimes. But the concern with accountability for past wrongs went into a deep freeze with the Cold War and the inability of the two great powers to agree on the nature and orientation of international norms. Interest reemerged after the collapse of the Soviet Union. In the past several decades we have seen the creation of new ad hoc criminal tribunals (e.g., the former Yugoslavia, Rwanda and Cambodia) as well as the rise of Truth and Reconciliation Commissions (most famously in South Africa) and other semi-judicial bodies (e.g., Rwanda's Gacaca courts).<sup>9</sup>

In spite of the exponential growth of interest in this area, there have been surprisingly few attempts to provide a systematic conceptual grounding of the nature, aims and limitations of transitional justice. Perhaps this theoretical lack is due to the different contexts in which transitional policies are put into practice. One of the chapters herein suggests as much. Perhaps it is due to the vastly disparate scholarly methodologies employed by academics who take up such questions. Be that as it may, the collection before you seeks to fill this lacuna by asking a wide range of established, as well as up and coming writers, to “theorize” transitional justice—to reflect on how the interaction between moral, political, legal and conceptual questions shapes our practices after war. What kind of justice is transitional justice? What are the contradictions between its transitionality and

6 R. Teitel, “Transitional Justice Genealogy,” cit.

7 These opening paragraphs are a revised extrapolation from Corradetti, C. 2013. “Philosophical Issues in Transitional Justice Theory: A (Provisional) Balance.” *Politica e Società* 2/2013: 185–220.

8 See, e.g., a recent initiative to study the connection between neuroscience and post-conflict strategies inaugurated by *Beyond Conflict*, a non-profit organization based in Tufts University. A report on a recent conference organized by Beyond Conflict on this topic can be found here: Beyond Conflict. 2012. “Neuroscience and Social Conflict: Identifying New Approaches for the 21st Century.” Accessed July 9, 2014. [http://www.beyondconflictint.org/wp-content/uploads/2014/01/Neuroscience\\_Bro\\_v2\\_optimized.pdf](http://www.beyondconflictint.org/wp-content/uploads/2014/01/Neuroscience_Bro_v2_optimized.pdf).

9 For a discussion of different cases and strategies of reparation see Brooks, R.L. 1999. *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice*. New York: New York University Press.

its justness? What are the operative assumptions that any state seriously engaging in transitional policies entertains? How do we understand the tensions between the desire to hold criminals responsible for what they have done and the need to generate political and economic stability for a new state? Are the major dilemmas of transitional justice themselves transitory, to be dispelled with the creation of a settled democracy, or do they continue to animate the political life of a state founded (as so many are) in great injustice? What is the potential of transitional justice to bring about social change? More specifically, how and when can it promote political reconciliation? How and when can it bring about significant structural and economic reform? What are the interactions between transitional justice practices and a new state's cultural life? Are some social-scientific and philosophical methodologies more promising than others in trying to address these questions? In regard to these questions the volume represents one of the few systematic attempts to take on the theory of transitional justice from a philosophical perspective given that as De Greiff has recently affirmed: at present "... there is no fully worked-out conception of transitional justice even in the most influential works in the field."<sup>10</sup>

Absence in systematic philosophical literature in this field does not amount to a complete lack of engagement in some of the core themes by individual philosophers which sporadically, but significantly, contributed to the setting up of the discussion. This is for instance, the case of Adorno's contribution on what it means to "come to terms with the past" which expanded on Arendt's and Jaspers' opening of the debate about "the German Guilt," revived then once again by Habermas' and Minchik's discussion of post-war reconciliation between Germany and Poland.<sup>11</sup>

More generally, some of the philosophical problems raised by transitional justice concern the reframing of the opposition between ideal versus non-ideal justice. This seems suggested by John Rawls' reference to improvements of the conditions for non-well-ordered and burdened societies as "questions of transition"—as he refers to them—but with no indication on the specific steps and institutions to adopt.<sup>12</sup> Another central area of philosophical debate to emerge recently has focused on the question of whether it is possible to define transitional justice as a form of special justice or if, instead, it has to be regarded as a form of normal justice.<sup>13</sup> This question is of central importance because if transitional justice is *sui generis*, it is far from clear that our best theories of justice apply to transitional settings. If, on the other hand, the question of justice in times of momentous political change is at bottom a question about ordinary justice, then many of the normative questions of transitional justice have already been addressed in previous theorizing. Other areas of interest include the opposition between forgiveness and forgetting as ways for transitional societies to confront the past; the understanding of the nature of evil; as well as the normativity of historical

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10 De Greiff, P. 2014. "Theorizing Transitional Justice." In *Transitional Justice*, edited by M.S. Williams, R. Nagy and J. Elster. New York and London: New York University Press. An excellent collection of essays published in 2014: Buckley-Zistel, S., Beck, T., Braun, C., Mieth, F. (eds). 2014. *Transitional Justice Theories*. New York: Routledge. Provides outstanding methodological coverage but does not put equal emphasis on philosophical inquiry.

11 Adorno, T.W. 1986. "What Does Coming to Terms with the Past Mean?" In *Bitburg in Moral and Political Perspective*, edited by G.H. Harman. Bloomington, IN: Indiana University Press.

See also, Arendt, H. 1978. "Organised Guilt and Collective Responsibility [1945]." In *The Jew as Pariah: Jewish Identity and Politics in the Modern Age*, edited by R.H. Feldman. New York: Grove Press; Jaspers, K. 1961. *The Question of German Guilt*. New York: Capricorn Books; Habermas, J. and Minchik, A. 1994. "Overcoming the Past." *New Left Review* 1/203: 3–16.

12 Rawls, J. 1999. *The Law of Peoples*. Cambridge, MA: Harvard University Press. For a comprehensive overview of some of the crucial philosophical themes in transitional justice theory, see Corradetti, 2013: 185–220.

13 Posner, E.A. and Vermeule, A. 2003. "Transitional Justice as Ordinary Justice." In *Public Law and Legal Theory, Working Paper n. 40*. Chicago, IL: University of Chicago Press. [http://www.law.uchicago.edu/files/files/40.eap-av.transitional.both\\_.pdf](http://www.law.uchicago.edu/files/files/40.eap-av.transitional.both_.pdf) Nir Eisikovits also takes up this question in his entry on Transitional Justice in the *Stanford Encyclopedia of Philosophy* (<http://plato.stanford.edu/entries/justice-transitional>) as well as in the recent essay Eisikovits, N. 2013. "Peace versus Justice in Transitional Settings." *Politica e Società* 2/2013: 221–36.

memory within time, etc. An especially important chapter by Jeremy Waldron merits noting in this context as it has raised the possibility that the force of claims for historical justice can fade over time. This discussion not only suggests an interesting and controversial relationship between the abstract claims of justice and the force of changed circumstances, it also constitutes a prime example of non-ideal philosophizing about transitional justice. It raises the possibility that non-ideal theory is perhaps especially well-suited for taking up the philosophical questions involved.<sup>14</sup> Other important work in the non-ideal theory of transitional justice has taken up the question of how international norms of transitional justice emerge. Thus, Kathryn Sikkink, in her major recent book, *The Justice Cascade*<sup>15</sup> has investigated how international prosecutions are becoming an international norm and expectation influencing both the prospects of transition and creating a potential for deterrence. In a similar vein, Michal Ben Josef's Hirsch's recent scholarship traces the growth and increasing acceptance of truth commissions as instruments of Transitional Justice.<sup>16</sup>

The unfinished project of transitional justice does not include simply the already mentioned abstract conceptualizations at the normative and metaethical level but it is reflected also in the classificatory criteria for the typological varieties of transitional justice processes. The phenomenology of transitional justice events has itself become more inclusive and moved far beyond the initial stage of post-conflict transitions. Now, one can speak also of transitional justice processes *within* democratic settings as well as of transitions in *non-transitional* contexts.<sup>17</sup> Today, there is even a further area of application, as it is the case for the so-called "transitional jurisprudence" of the European Court of Human Rights (ECtHR) in regard to the former Soviet states that are now members of the Council of Europe (CoE) and subject to the European Convention of Human Rights (ECHR).<sup>18</sup> In all these cases the ECtHR adopted the principle of "self-defending" or "militant democracy" as guidance for delimiting, on temporally constrained bases and mainly on issues concerning electoral participation of extremist parties, in order to favor the achievement of democratic stability.<sup>19</sup>

All considered and to a large extent, the more or less inclusiveness of transitional justice phenomena as part of a single coherent framework depends very much on whether a merely descriptive approach is confronted with a normative one; that is, one in which transformations are seen as oriented towards democratic advancement. If the first approach characterizes J. Elster's path-breaking work on transitions, the latter approach is significantly endorsed and developed by R. Teitel, the founder of the contemporary scholarship on transitional justice, as well as one of the most important scholars today on transitional justice.<sup>20</sup>

The book has seven sections. The first centers on the most basic assumption in the field—that political reconstruction requires a reckoning with past wrongs. Rotondi and Eisikovits question this "memory assumption," almost axiomatic in writings about transitional justice, which dictates that a violent past *must* be addressed in any process of transition. The received view underlying much of

14 Waldron, J. 2001. "Superseding Historical Injustice." *Ethics* 1/103: 4–28.

15 Sikkink, K. 2011. *The Justice Cascade*. New York: Norton.

16 See, for example, Ben-Josef Hirsch, M. 2012. "Ideational Change and the Emergence of the International Norm of Truth and Reconciliation Commissions." *European Journal of International Relations*. Accessed August 15, 2014. <http://ejt.sagepub.com/content/early/2013/07/09/1354066113484344.full.pdf+html>.

17 Hansen, T.O. 2011. "Transitional Justice: Toward a Differentiated Theory." *Oregon Review of International Law* 1: 10–13.

18 For a legal analysis of some of the most important cases in this respect see: Sweeney, J. 2012. *The European Court of Human Rights in the post-Cold War Era: Universality in Transition*. London: Routledge.

19 The historical antecedent of the self-defending democracy principle was the "*wehrhafte Demokratie*" principle adopted in the post-Nazi Germany transition.

20 See respectively: Elster, J. 2004. *Closing the Books: Transitional Justice in Historical Perspective*. Cambridge: Cambridge University Press; Teitel, R. 2000. *Transitional Justice*. Oxford: Oxford University Press.

the literature is that impunity, burial of the past, unaccountability, not only impede transition but also exacerbate the divide between victims and oppressors. But is this always and unconditionally true? The authors argue that under specific circumstances, a (qualified) argument for not remembering can be formulated. They consider three cases in which the memory assumption is problematic:

1. post-conflict societies that evidence a widespread cultural ambivalence about policies of accountability for past wrongs;
2. conflicts where there is an immensely complicated division of guilt between the parties; and
3. political situations where an insistence on immediate commemoration and thorough accountability risks reigniting the conflict.

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

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

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

Part III examines the potential (or lack thereof) of transitional policies to bring about lasting structural change and to truly mold a new polity's economic and constitutional institutions. Taking her bearings from Young's understanding of responsibility as based in structural injustices (i.e. we are responsible not only for our specific acts but also for participating in, benefiting from and upholding structural distortions in our political system), Thomason sketches a theory of transitional justice as structural justice. Her account focuses on the background conditions that led to strife in the first place rather than on particular acts of violence. As she puts it, “Structural injustice occurs

when institutions and systems work in such a way to disadvantage large groups of people while allowing others to benefit. Structural justice, then, would require that institutions and systems work to ensure that large groups of people are not disadvantaged.” The main task of transitional justice policies according to such a model is to end or prevent wide-scale disenfranchisement of certain groups. This involves identifying (and abolishing) the institutions and practices that contributed to the disenfranchisement in the past and constructing the kind of institutions that would be less likely to engage in it again.

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

McAuliffe’s chapter, an exemplary exercise in non-ideal theory, gives us an account of why transitional justice often falls short of its ambitions to effect structural change in new democracies. The belief that transitional justice can transform the pathological economic structures of countries undergoing transition depends on the flawed assumption that transitional policies can be lifted wholesale “from standard blueprints.” And this, in spite of much scholarly work that supposes otherwise, cannot be done. McAuliffe’s chapter seeks to explain why it is that transitional justice does not carry the kind of limitless potential for redistributing resources and ushering in an era of greater socioeconomic fairness. The explanation is solidly grounded in the political economy of transitions and among the chief reasons he identifies is the reluctance of old power elites to relinquish economic advantage (a reluctance bolstered by their lingering strength and leverage) and the difficulty, (see the case of Afghanistan) at least in some contexts, to extend central power beyond the capital city.

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

Metz offers a novel and important theory of national reconciliation based in African ideas about community. His version of communitarianism illuminates the relationship between different elements of political reconstruction, including truth-telling, apology, forgiveness, compensation and amnesty. For Metz the understanding of community (and, consequently, how to rebuild a community) turns on two relationships: “identity” and “solidarity.” The former asks us to “share a way of life” with others; the latter requires that we be willing to act for the benefit of our compatriots.

Metz argues that the requirements of reconciliation are behavioral rather than attitudinal. Genuine community does not require us to *feel* like we forgive or love others. It just asks us to behave as if we are beginning to belong to the same group as they do.

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

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

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

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

Building on her previous work, Card asks us to think through the conceptual implications of understanding genocide as "social death" or the loss of social vitality. By social vitality is meant "the meanings, shapes, and contents given the lives of individuals by social relationships,

personal and institutional, contemporary and inter-generational, that unite them into a people ...” Her account poses a series of fascinating puzzles: does the elimination of an evil group like, for example the KKK, count as genocide (since its evil practices do impart meaning to the lives of its members)? Does the prosecution of groups constituted on specific attributes of the members (such as sexual orientation or gender) count as genocide (as these groupings also account for social vitality)? What does the social death thesis tell us about the relationship between the quantity of people killed and the quality of ties destroyed?

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

The book’s seventh and last section takes up two case studies, one ancient, and the other contemporary, which provide a unique inductive perspective on how transitions should be shaped. Taking his bearings from the democratic reconstruction of Athens after the abortive rule of the Thirty Tyrants (403 BCE), Gowder argues that new democracies should stick to their original decisions about how to handle past crimes and must create the political institutions to help them do so. Such steadfastness cements public commitment to the rule of law and provides an outlet for lawful participation in political life. More precisely, for Gowder, the commitment to our post-war policies and the design of institutions necessary for carrying them out, are what it means to create the rule of law in a new democracy. And without signaling that the rule of law is to be taken seriously, the new state cannot protect itself against the resurgence of the old power elites that have just been ousted.

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

All in all, these sections suggest key areas for further theoretical investigation where it is likely that a convergence of scholarly interest will occur in the near future. As mentioned, we are witness to a multiplicity of state and legal transformations which are not only affecting interstate relations, but also questioning the mission and the scope of competences for international organizations such as the UN and the EU policies, the Council of Europe’s functions and internal power balancing or even the more prominent role that some regional organizations are assuming as a result of the proactive role of the International Criminal Court. The multiplicity of factors involved in state and regional transformations require a new understanding of justice in times of transition.<sup>21</sup> This

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21 One of the pioneering books in this respect was Kritz, N.J. (ed.) 1995. *Transitional Justice. How Emerging Democracies Reckon with Former Regimes*. Washington D.C.: United States Institute of Peace Press.

is not only due to the numerous failures characterizing political responses to past atrocities but also the more complex dynamics now developing among different civil and institutional actors which contribute to formulate more adequate responses to the transformation of society and the rehabilitation of its basic conditions of fairness. Also, the methodological rethinking of justice in transitional times raises the question of what type of explanatory framework it aims to promote and also the question of “what do we expect” from a theory of transitional justice. Answers can vary but what cannot be ignored is that the international community is called to play an ever more decisive role in ending impunity and injustice. The fragility of transitions, the reversibility and tentativeness of any perceived “successes,” as well as the growing complexity of interactions between local, international, modern and traditional institutions involved, requires that we achieve as much conceptual clarity as possible about transitions. We hope this volume answers some questions about how to understand transitional times and what can be expected, morally, practically and legally from post-war processes. As many of the chapters in this book argue, remaking a state is a thankless and all too often tragic task. To offer any assistance, however small, to those engaged in this Herculean task is a great reward indeed.

Boston-Oslo, July 2014

Claudio Corradetti, Nir Eisikovits, and Jack Volpe Rotondi



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# PART I

## Is it Always Necessary to Account For Past Wrongs?

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## Chapter 10

# Restoring Human Capability: Reconciliation and Liberal Multiculturalism<sup>1</sup>

Monica Mookherjee

### Introduction

Given the persistence of bitter ethnic conflicts today, a question arises as to whether liberal multiculturalists ought to pursue reconciliation. While this goal has gained prominence in countries ranging from Australia to South Africa, the matter remains highly controversial. Since the 1980s, liberal multiculturalists have emphasized diversity and disagreement as permanent features of the human condition, and might accordingly hesitate to compel the deep engagement between citizens that seems necessary for true reconciliation. While much depends on the meaning of this concept, liberals might instead adopt a value pluralist view that confronts irreducible divergence of perspectives and irreconcilable goods in human life (Berlin 1959). On the other hand, however, to assume that reconciliation has no place in liberalism seems unworkable. Intractable problems of diversity today, from the plight of Australian Aboriginals to the legacy of violence in the former Yugoslavia, seem to call urgently for reconciliatory settlements. As the magnitude of the inequalities resulting from historical conflicts suggests strategies like minority rights will not suffice, a liberal multicultural concept of reconciliation, emphasizing the commemoration of past injustice, thus appears timely, if controversial, indeed.

This chapter defends such a concept by considering the French government's construction in 2001 of a plaque at Paris' Pont St Michel to remember the killing of Algerians in the so-called 'Paris Massacre' of 1961 (Bernard and Gawn 2001). While I postpone the details of the case to my substantive discussion, it bears noting at this early point that the French state's apparent desire to achieve reconciliation with its Algerian communities in this manner prompts a debate about the meaning of the term. One possibility lies in the reconciliatory narrative of the South African Truth Commission, a narrative that focuses on forgiveness and which aims to 'heal' individuals and 'redeem' societies (Tutu 2000; Gobodo-Madikizela 2002). The notion of Reconciliation-as-Forgiveness (RF) may be contrasted with a less demanding conception which merely seeks to institutionalize impartiality and respect. Reconciliation-as-Civic-Trust (RCT) does not require citizens to 'let go' privately, but invites them to build limited public trust through democratic reason. Locating difficulties with both approaches, this chapter defends an alternative informed by Amartya Sen's capability approach (1992, 1999) and which develops from Colleen Murphy's (2010) insight into the role of capabilities in political reconciliation. Drawing on Sen's emphasis on constructive

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<sup>1</sup> I am grateful to the audiences to which drafts of this chapter were presented, notably at the Centre for Equality and Multiculturalism (CESEM) in Copenhagen, at the UK Peace and Conflict Research Society Annual Conference at Coventry and at the University of Leeds Political Theory Seminar. I am particularly indebted to Kerri Woods for her careful attention to this research and for her encouraging feedback, and to the editors for their kind support and for accepting this chapter for inclusion in the volume.

action in the world with others as the fundamental objective of human development in conditions of cultural pluralism, this conception is labelled Reconciliation-as-Agency (RA).

My discussion proceeds as follows. After outlining problems in defining reconciliation (in the next section), the following two sections unfold the two conceptions above. Finding both inadequate with regard to the French memorial, the chapter then presents RA as the moral heart of political reconciliation under culturally diverse conditions. Plausibly supported by the St Michel commemoration, RA draws on Sen's theory to defend a higher quality, sustainable peace which restores victims' and perpetrators' 'agency-freedom'. Defined as an ability to assess and act in pursuit of one's needs whilst cognizant of others', the concept of agency-freedom locates middle-ground between the ambition of reconciliation based on forgiveness and the weakness of the approach grounded in trust. In questioning liberalism's border between public and non-public reason, moreover, it promises humane responses to historical injustices, in conditions of cultural diversity, not fully achieved by systems of minority rights.

### Reconciliation versus Multiculturalism? Dilemmas in Contemporary France

A preliminary difficulty with integrating reconciliation within liberalism is that the former ideal is usually considered most appropriate to the field of 'transitional' justice.<sup>2</sup> In contrast with stable liberal democracies, transitional states seek to move towards the rule of law after atrocity and thus lack an established culture of minority rights. Yet recent political events reveal problems with an absolute distinction between established democracies and transitional states. Kymlicka and Bashir (2008: iv–v) accordingly observe that, while the post-war commitment in developed nations to democratic constitutionalism supports minority rights, exclusions and inequalities persist. However, even if one positively welcomes a liberal concept of reconciliation, a further difficulty is that its meaning is notoriously unclear. While it has been regarded as the '*sine qua non* for democracy' (Ratner 1999: 734), and although some (e.g., Kriesberg 1998; Rigby 2001) define it through various combinations of peace, mercy and compromise, its moral core remains elusive. As Quinn (2009: 182) complains: 'I have never understood just what "reconciliation" is supposed to be. Is it the sum total of what Christians believe about God's saving work? ... Or [does it involve] bringing ... incompatible descriptions of events into narrative equilibrium?'

The need for a clear definition, in conditions of cultural pluralism particularly, becomes apparent on considering the predicament of immigrants in states such as France today. While the republican government has historically opposed Anglophone multiculturalism, the nation confronts the need to accommodate its minority citizens with respect (Silverstein 2004). After colonial independence in the 1960s, the state practised a form of political amnesia, seldom teaching imperial history in schools; and today it not unrelatedly denies the existence of minorities (Norman and Vidal 2004). Yet institutional silence surrounding colonialism and the legal invisibility of minorities have been questioned on account of conflicts including the urban riots involving many immigrants in 2005. Moreover, as a measure to quell populist security fears regarding Algerian migrants, in 2001 Bertrand Delanoë, Mayor of Paris and himself of Tunisian origin, unveiled a plaque in memory of the 'Paris Massacre' of 1961, during which 40 – some historians say 200 – peacefully protesting Algerians were killed, and their bodies dumped in the River Seine. The action was commanded by Maurice Papon, erstwhile Chief of Police, in an event which was long shrouded in silence (House and McMaster 2006).

<sup>2</sup> The literature on transitional justice is eclectic and vast. Multidisciplinary collections include Kritz (1995), Roht-Arriaza (1995) and McAdams (1997).

A comprehensive history of this event is beyond the scope of this chapter. I draw on its legacy and the memorial specifically as lenses through which to consider the meaning of a pluralist approach to reconciliation. And although this chapter cannot address the significant literature on 'the politics of memory' in France (e.g., Lebow, Kansteiner and Fogin 2006), it concentrates on remembrance as a component of multicultural reconciliation. The case itself has proved controversial, as the plaque failed to declare responsibility. The journal *l'Humanité* notably complained that it referred to a bloody repression rather than to a crime against humanity (Ducoin 2011). Delanoë nonetheless insisted that 'there are parts of Paris's history that are painful, but which have to be talked about and which have to be accompanied by acts'. Such commemoration was therefore necessary, he argued, for France to move forward 'with unity'.<sup>3</sup>

A key question is whether this call for inter-ethnic unity amounted to a plea for reconciliation. Even if this is assumed, it seems obvious that a plaque alone cannot resolve all inequalities experienced by the country's minorities today, such as dire housing in shanty-towns, which may be considered in part their colonial legacy (Laachir 2007). As the *héritiers involontaires de la guerre d'Algérie* (involuntary heirs of the Algerian war), France's postcolonial minorities have been deemed outsiders of the grand ideal of republican unity, which traditionally demands integration over dedicated protection for minority identities (Bouamama 2008).

The case thus raises a problem concerning the relationship between reconciliation and egalitarian multiculturalism, and, indirectly, that concerning liberal multiculturalism and French republicanism. While the second issue warrants deeper discussion than space enables here, it bears remarking that some recent French writers articulate a progressive republicanism open to recognizing ethno-cultural differences (Laborde 2008; cf. Wiewiorka 1996). While republicanism undoubtedly differs from liberalism with regard to its conceptualization of both self and society (Chabal 2010), some newer voices in the tradition take seriously the way in which social exclusion can motivate or exacerbate the politicization of ethnic differences (Laborde 2008: 11). Indeed, at times these progressive republican writers seem better positioned to defend liberal goals of equality and freedom than some writing within the Anglophone tradition.

While my point in this regard is not ambitiously to re-frame French republicanism, it is to emphasize the plausibility of exploring liberal-multicultural ideals in the French context. More precisely, it is to maintain that Delanoë's call for unity need not imply the suppression of difference that liberals might fear. This point might be considered, whilst proceeding to examine the meaning of multicultural reconciliation and whether state commemorations may support it.

### **Reconciliation-as-Forgiveness: A 'Deeply Illiberal Idea' (Ash 1999: 38)?**

In view of the grave violence of the Paris Massacre, it seems apt to consider whether the state's commemoration contributes to a form of reconciliation often associated with the attractive goal of forgiveness. This idea informed the South African Truth and Reconciliation Commission of the 1990s, a ground-breaking response to an arguably more acute history of inter-ethnic violence, namely that which took place during the Apartheid regime. While there are many ways of understanding forgiveness, in essence it appears to involve the resolution of debt by letting go of resentment (Murphy and Hampton 1998). In this sense, it seems to account for the fundamental change of heart that true reconciliation might require after bitter conflicts in deeply divided, ethnically plural societies.

<sup>3</sup> Cited in a BBC News Report: 'Paris Marks Algerian Protest Massacre', <http://news.bbc.co.uk/2/hi/world/monitoringmedia>. Accessed 4 December 2012.

Although South Africa's Commission's Final Report defends reconciliation without referring to forgiveness (see Kiss 2000: 75), the two concepts were linked during the country's transition. For instance, the Chairperson of the Commission, Archbishop Desmond Tutu, alluded to the spiritual dimension of reconciliation in chapter 5 of the report by invoking an image of South African people as the 'Rainbow People of God'. In *No Future without Forgiveness* (1999: 34, 56–7), he further allied the Commission's work with the Catholic 'sacrament of reconciliation', which involves the sinner seeking forgiveness from another, notably the priest, and ultimately seeking absolution from and communion with God.<sup>4</sup> In apparent accord with the liberation theology underpinning the US Civil Rights movement, Tutu wished to establish the Christian notion that humanity, not only the sinner, has distorted its personality such that each of us requires restoration with God, whose goodness is ontologically prior to violence. The co-dependence of forgiveness and in this context reconciliation was reinforced by Krog's moving narrative in *Country of My Skull*, which affirmed that 'the one begins, or opens a process of becoming ... the other ... The Xhosa word for reconciliation in the concept of Truth and Reconciliation is forgiveness (*uxolelwano*). The TRC literally means in Xhosa: the Truth and Forgiveness Commission' (Krog 2010: 37). Tutu and Krog thus sought the political application of an approach to reconciliation usually belonging to private, spiritual sphere (Philpott 2006: 79–80); and it seems, therefore, that Reconciliation-as-Forgiveness (RF)<sup>5</sup> unofficially underpinned the magnanimity that the Commission extended to some of the protagonists of the Apartheid regime.

Yet, quite apart from the profound dissatisfaction of many South Africans in relation to this ideal, states like France with a strong public–private divide might strongly resist the idea of invoking any, and particularly a religious, notion of forgiveness in politics. This is because any version seems part of a comprehensive vision of the good life or world-view, the political endorsement of which might deny the culturally diverse values that inform responses to wrongdoing. Although Arendt (1958: 236–43) defended the indispensability of forgiveness in politics, she recognized that the version based on Christian love could threaten human 'plurality'. Tutu notably also grounded forgiveness in the African notion of *Ubuntu* or humaneness, which holds that 'a person is diminished when others are humiliated and diminished' (Tutu 1999: 35), without, however, seemingly recognizing that different world-views might specify different conditions for forgiveness; and that if parties to a conflict hold divergent tenets regarding forgiveness, its specific grounding may hinder the reconciliatory process (Auberach 2005: 469). Yet in presuming that a damaged society cannot move forward without deep inward change to break the cycle of revenge, Tutu was not alone in aiming to synthesize forgiveness and reconciliation (Philpott 2006; Gruchy 2004).

However, while the TRC ideal thereafter proliferated (Van Antwerpen 2008), the synthesis proved controversial amongst South African, European and American critics alike. Crocker contends that the moral consensus on which forgiveness is based is an objectionable goal in modern politics (2000: 69). Bhargava (2000) further argues that, while forgiveness is sometimes an appropriate response to historical injury, it is a personal choice beyond the state's responsibility. It is not always clear if these objections relate to a secular as well as a religious notion of forgiveness. The two may differ (Kohen 2009), in that the spiritual version may be unilateral, involving a pure 'act of grace', whereas the secular notion seems to require the perpetrator's atonement or

4 In the report, Tutu paradoxically warned of a 'potentially dangerous confusion' between personal and political reconciliation (Tutu, *Final Report*, cited in Kiss 2000: 87).

5 See also Colleen Murphy's (2010) conceptual distinctions of reconciliation in terms of forgiveness and trust. This chapter aims to outline cultural pluralist reasons, in particular for resisting the forgiveness-based concept. Also, whereas Murphy accepts trust as an element of reconciliation, I contend in contrast that recent approaches based on reciprocity and trust are problematic under culturally plural conditions. The versions considered in this chapter seem to expect of diverse citizens confidence in 'the other' that may be too thin or pragmatic to sustain lasting peace after group-based ethno-cultural conflicts.

reparation. In any event, the problem lies in the 'thickness' of forgiveness and its dependence on a moral scheme which liberals might rightly hesitate to impose on all in a pluralist society.

The concern might also be expressed that the backward-looking focus of this approach neglects future political transformation (Kymlicka and Bashir 2008: 14; Murphy 2010: 11). However, as attention to a more peaceable future does not seem logically precluded, and indeed might seem the very point of forgiveness, the liberal multicultural worries arising about this approach may be distilled into the three following concerns. The first may be called *the Objection from Justice*, which emphasizes that RF sacrifices the liberal duty to prosecute, the need for which may be felt particularly acutely in cases of offences by members of one ethnic or cultural group against another. And although amnesty<sup>6</sup> is not necessarily an act of forgiveness (see Bennett 2003), the concern is that RF renounces proportionality between an individual's or community's resentment and punishment for moral wrong, thereby violating retributive justice (Minow 1998: 12). Yet, this objection does not seem decisive: absolving the wrongdoer from suffering may be a humane and liberal aim sometimes, in part because of the historical contestability which diverse liberal societies should acknowledge. Yet, even then, the core worry persists that RF, at least when promoted through truth commissions or memorials, imposes on citizens a requirement to react uniformly to trauma in such a way that might conflict with their private sentiments (Murphy 2010: 11).

What we might call the *Objection from Privacy* thus holds that, if remembrance of past violence is not necessarily healing (Hamber 2007), and if these measures reopen old wounds, the required change of heart may fail to transpire. Furthermore, even if these measures could prove cathartic for some by establishing an official account of past events (Gobodo-Madikizela 2002: 8–10), reasonable people evidently can hold conflicting accounts of the past without anyone being misled. This point suggests a lack of agreement on the appropriate circumstances of the forgiveness-reconciliation synthesis. More specifically, commemoration may counter-productively seek institutional closure on a troubled past without addressing issues of responsibility, reparation or the possibility of multiple histories, which perhaps must be the real grounds of forgiveness. Moreover, and in a different vein, one might doubt whether Algerians today, who wish for equality and respect, have any real interest in forgiving the state or other French citizens. In this sense too, RF might violate their private beliefs.

A final concern regarding this approach addresses the claim that, even if forgiveness is liable not to transpire in practice, reconciliation may be legitimate so long as the aspiration to forgive is its agreed rationale. However, liberals may object that even to justify reconciliation on this basis grounds policy on a comprehensive, 'sectarian' ideal which some may reasonably reject under conditions of diversity. If a justification may be rationally rejected then a given policy will not be stable under liberalism (D'Agostino 1991). Thus, the *Objection from Comprehensiveness* draws attention to the need for common justifications to establish mutual commitment to life according to fair terms of cooperation. These objections suggest that RF would clash in our central case with French republican neutrality (*laïcité*). Even if one grounds reconciliation on a potentially viable notion of political forgiveness, aligned perhaps with judicial clemency or mercy, it seems that the relation between personal and political forgiveness is too controversial to ground a political commitment to reconciliation under conditions of diversity (cf. Digeser 2000). Consequently, in relation to the French state's desire for unity, the risk is that RF would exacerbate an already fraught and unequal situation.

<sup>6</sup> The Amnesty Provision of the Truth and Reconciliation Commission Charter had the power to extinguish civil and criminal liability. The provision was upheld by the constitutional court in rejecting a lawsuit filed by the families of murdered anti-apartheid activists Steve Biko and Griffith Mxenge. The family members contended that the provision violated their constitutional rights to seek judicial redress (see Kiss 2000, for further elaboration of this point).



### **Reconciliation-as-Civic-Trust: The Weakness of Democratic Public Reason?**

Given France's historic commitments to impartiality and free conscience, it is worth considering an alternative approach which may be called Reconciliation-as-Civic-Trust (RCT). As pluralist societies cannot expect between all citizens agreement on a comprehensive theory of the good, it seems justifiable to turn to a non-sectarian concept based on peaceful coexistence and human rights. This account focuses on trust, which is timely in our case given traditional republican reliance upon this idea (Pettit 1998).<sup>7</sup>

Before unfolding this account, it bears emphasizing that even a thin, democratic approach to reconciliation should address the issue of psychological change, if it is to transcend the moral bankruptcy of a realist compromise, and inaugurate sustainable peace at a higher level. For even if forgiveness proves too demanding, a non-sectarian version of reconciliation should still account for citizens' capacities to attain mental openness to the possibility of a better future after conflict (Hutchinson and Bleiker 2008). As this point will structure the remainder of my discussion, I now contend that RCT is liable perhaps surprisingly to be ethically weak on account of not requiring sufficient psychological change, and in fact may be further debilitated by one-off acts of commemoration of rights-violations against particular ethnic groups in conditions of cultural diversity.

To be sure, however, the approach seems attractive at first. Liberal writers Gutmann and Thompson offer a version of this approach to reconciliation by relying on the related notion of civic reciprocity – 'the capacity to seek fair terms of social cooperation for their own sake' (1996: 229). Gutmann and Thompson appreciate the fact that hostilities after generations of ethnic or cultural conflict are often difficult to overcome entirely. That is, they conceive policies of reconciliation as the output of engagement between civic participants, who offer one another lucid arguments in democratic debate, if only for the sake of their common future (2000: 37). Citizens need not forgive or love one another, but commit at a minimum to a respectful, transparent dialogue. While trust and reciprocity are not synonymous, they seem co-dependent and inter-related in a pluralist society focused on moving beyond past injustices. This is because trust should not be one-sided. It implies the equality involved in reciprocity (Margalit 2002); and, conversely, treating others as equals involves a readiness to view them as contributors to shared political space, which entails at least some reliance or trust. Of course, trust and reciprocity are not easily achieved. Defined as optimism about the prospective good will of others, or as the normative expectation of favourable relations, for Govier trust depends on 'acknowledgement', the content of which is contextually variable (Govier 2009: 49) and could itself be a matter of democratic debate. As the trust-based approach to reconciliation does not seem to require a very ambitious change of heart (cf. Murphy 2010), RCT thus seems reasonable and realistic, conceiving reconciliation as an everyday political concept, rather than as transcendent or morally transformational.

Moreover, RCT does not ignore retribution or reparation but encourages citizens to 'economize' on disagreement about the past and build consensus on justice (Gutmann and Thompson 2000: 40–41). Embedding the development of trust within democratic processes, perhaps relying on memorials to catalyze debate about history, promises to promote participation which is itself an important aspect of liberal justice, because debates about history should not be univocal but must make room for legitimate disagreement (2000 37).<sup>8</sup> These are modest aims based on values that

<sup>7</sup> The International Centre for Transitional Justice also explicitly defines reconciliation in terms of civic trust. See ICTJ at [www.ictj.org/cn.en/tj.784.html](http://www.ictj.org/cn.en/tj.784.html). Accessed 4 January 2013.

<sup>8</sup> The work of the organization 'Au Nom de la Mémoire' is influential here, a campaign which from the 1980s reactivated interest in the 'Paris Massacre'. However, arguably further measures would be needed to assist reconciliation.

a diversity of citizens can defend according to public reason, thereby suggesting, at least at first sight, a plausible interpretation of Delanoë's hope that the St Michel plaque might foster inter-ethnic unity.

However, while reconciliation undoubtedly involves trust, questions arise about its robustness under this conception. It seems reasonable that acknowledgement of a fractured history need not connote consensus or self-disclosure, which are problematic in circumstances in which agreement is usually possible only in relation to some aspects of the past. However, even if acknowledgement requires only accepting fellow citizens as equal partners in dialogue and a commitment to locate agreement on what further should be acknowledged and how, this is a strenuous achievement in divided societies (Bhargava 2000: 47). The disaffection of many immigrants in France demonstrates the estrangement that can persist in spite of democratic processes (Geisser 2003; Laachir 2007). Thus, the borderline between the voluntary pragmatic trust involved in committing to procedural democracy and forced compliance borne out of powerlessness is often fine, with continual threats of the former collapsing into the latter (Kelman 2004: 116). More fundamentally, the liberal pluralist deliberative approach seemingly fails to recognize structural power inequalities in assuming that all citizens are equally interested in reconciling through democracy. Furthermore, perhaps only acknowledgements that take responsibility explicitly would facilitate trust. This is in spite of the difficulties with questions of responsibility when perpetrators and victims are dead or when the significance of past events is contested (Bashir 2008: 48; Butt 2006).

These difficulties suggest that in a procedural democracy the limited empathy, at least in the form of recognition of mutual humanity, needed even for pragmatic and 'self-interested' trust may fail to emerge after profound conflict. Citizens, experiencing excessive dissonance between the terms of formal political engagement and their private beliefs, would probably struggle to honour the settlement. Controversies surrounding reconciliation in Australia (Motha 2007) emphasize that after a violent history sometimes refusing to trust in liberal democracy is reasonable, and even that limited democratic cooperation might be possible without trust (Cook, Hardin and Levi 2007). On balance, therefore, Bashir opposes this approach. For one thing, if trust is required for dialogue, deliberation presupposes what reconciliation is supposed to achieve. Therefore, the concept is circular. Moreover, the requirement to offer 'neutral' reasons, whilst broader than in standard liberal theories, may still be too narrow in a polity which has historically dismissed minority claims (Bashir 2008: 66).

One might respond here by openly accepting the development of trust as a central challenge of reconciliation. The deepest conflicts today, including those of Israel-Palestine and Northern Ireland, are marked by widespread disengagement. However, this problem does not necessarily nullify the attempt to build a society of equals through dialogue. The problem is to ensure an equitable basis for facilitating it, as the history of violation makes all persons' views mistrustful, biased and polarised, with all sides claiming victimhood. The intractability of these cases often arises from the fact that 'everyone has done something to somebody else' (Yael Tamir, cited in Minow 1998: 80). However, while the fact that nobody in a damaged society escapes the effects of the past surely makes formally egalitarian democratic structures important (Murphy 2010: 15), the problem remains. For even if RCT addresses the earlier objections from *Justice, Privacy and Comprehensiveness*, it remains true that if reconciliation hinges on procedural fairness only, there may be little to distinguish the idea from realist compromise which lacks moral foundations and fails to secure stability. Indeed, RCT may then be indistinguishable even from a settlement which indirectly institutionalizes, by passively tolerating, entrenched social disrespect.

In brief, I contend that the approach based on civic trust, perhaps paradoxically, lacks an essential account of citizens' attitudinal change towards a stable and integrated preference to

view others as political equals. This key psychological shift would enable wounded individuals to engage in a sustained and committed way with those they may privately continue to resent. Put differently, a plausible account of mutual engagement through multicultural democracy must account for the intra-psychic change according to which citizens develop a durable mental openness to the possibility of a more cohesive future after conflict, an openness which is internalized and integrated into their own world-view. The concern is that, without such integrated change, democratic institutions can be compatible with gross injustices (Murphy 2010: 17); and that after serious violations, generations of families and communities can remain traumatized, unable to make sense of, let alone articulate views about, the past (Minow 1998: 37). This is true for many Algerians after the Liberation War, who long remained mute regarding the violence (Sebbar 1999). In such circumstances, the danger is that a one-off act of commemoration, in randomly publicizing one aspect of a wider, more complex history, might further debilitate a fragile political situation by exacerbating unexpressed private grievances which are seriously dissonant from the equal relations in law to which democratic citizens subscribe.

In summary: while the deep purpose of RCT may in fact be to encourage positive attitudinal change, the version of it discussed here does not guarantee this shift and may also hinder it; and the moral heart and deep objective of political reconciliation should thus be found elsewhere. The point of reconciliation, I next suggest, resides in internalized change in each party's identity, notably the removal of 'self-negation' and 'negation of the other' as central components of one's self-concept (Kelman 2004: 120). As a movement from victimhood to agency, such change is necessary if the contested idea of reconciliation is to transcend problems with the status quo which initially provoked the conflict, and, ultimately, to contribute to culturally pluralist unity.

### **Beyond Politics as Usual: Reconciliation-as-Agency and Non-Shareability**

The French state's desire for unity indicates the need for reconciliation that is sufficiently universalistic to prescribe attitudinal change but still consistent with liberal diversity. This conception challenges liberal multiculturalists who might hesitate to prescribe private psychological transformation. For Philpott (2006) warns of an enduring tension between liberalism and reconciliation: the former, with its guarded private sphere, cannot yield a warrant to interfere with the personal sentiments of the wounded in a diverse, pluralist society. With this problem in mind, I propose Reconciliation-as-Agency (RA), which responds to the concern that, while reconciliation should neither assert sectarian ideals nor violate privacy, the trust-based approach drawing on democratic procedures alone often fail to deliver high-quality, durable peace.

My proposed alternative prioritizes human choice and action in post-conflict recovery. It focuses on learning about the social roots of inequality and needs-denial which gave rise to conflict, in an approach which has proved indispensable in post-genocide Rwanda (Staub 2006: 868). In focusing on individual psychology, RA strains the normal boundaries of liberal thought. However, it remains receptive to pluralism. It does not impose on citizens a single view of the past or a teleological goal like forgiveness. It conceives reconciliation as a work-in-progress, the moral core of which lies in an evolved understanding of the frequent origin of conflict in frustrated needs for security, effectiveness, control and comprehension of a changing world (Staub 2006: 877), or else in perceived threats to identity, community and justice (Kelman 2004: 112). While developing from her insights, in contrast with Murphy's (2010) contention that the rule of law, trust and human capacities equally underpin reconciliation, I claim that restoring a particular capacity constitutes the heart of the concept, without which forgiveness might connote despair, trust may fail and

democratic institutions would be weak. I also argue that the contribution of commemoration to such reconciliation is plausible, but highly dependent on its presentation.

RA draws from Sen's (1985, 1992, 1999) human capabilities approach in order to conceive reconciliation in terms of re-imagining both self and others as complex human beings choosing amidst the structural constraints of a rapidly transforming, confusing world (Staub 2006: 878). This recognition is difficult after atrocity but all-important, because understanding the motives and concerns of others without de-humanizing them is essential to making progress individually and collectively (Haidt 2006). While Sen does not apply his theory directly to the issue of reconciliation, although he writes of identity and violence elsewhere (1998; 2006), he defends an ideal of constructive social action in the world, cognizant and critical of structures of power (1999: 5).<sup>9</sup> If political reconciliation has a moral core, it seems to lie here.

Before considering his account, it bears noting that others also recognize that reconciliation involves extending the 'psychological repertoires' of victims and perpetrators (e.g., Lederach 2011). A memorial such as the St Michel plaque might foster reconciliation in this way because its moral restraint, or its refusal to dramatize, vilify or condemn, might assist to 'unfreeze' perspectives on the past, to help individuals and groups to re-frame traumatic experiences, enabling them to re-categorize others as, at least, not existential threats. This is not to forsake the establishment of responsibility after wrongdoing but to emphasize that the gradual and difficult process of viewing ethnic conflict as the outcome of understandable human processes often requires normatively neutral overtures (Staub 2006: 878). Sometimes victims do require an admission of guilt in order to progress psychologically (Gobodo-Madikizela 2002); but, equally, extreme recrimination in fragile situations can stifle hope of reasonable and constructive understanding of either self or other.

The reciprocal achievement of the (still undefined) ideal of agency seems important *prima facie*, then, because breaking out of endless cycles of revenge, vendetta or condemnation must involve an imaginative paradigm shift that sets in motion a rethinking of rights and coexistence which, as Sen observes in *Identity and Violence* (2006), enables individuals conceive self-realization in non-negating ways. Of course, one objection to this thought is that it 'psychologizes' the predicament of minorities in post-conflict situations without addressing structural injustices and actual suppression of material needs that often underlie the discord.<sup>10</sup> This criticism is highly relevant to the French case; and attention to Sen's capability approach assists to address it.

In an acclaimed theory of human development, Sen counsels a shift of theoretical attention away from a society's human rights record and material resources towards citizens' capacities to 'achieve valuable states of being or doing' (1985, 1992). He distinguishes 'wellbeing capability', which connotes valuable physical and psychological potentialities such as achieving adequate nutrition and appearing in public without shame, from 'agency-freedom', which involves opportunities to pursue valuable goals beyond subsistence or survival. Conceiving the latter as potentially fundamental to life as the former, agency-freedom renders the capability approach attuned to human diversity by emphasizing the multidimensionality and possible non-materiality of human need.

One important well-being capacity is the 'ability to show concern for others and understand their point of view' (Sen 2005: 152), a capacity which is often blunted during ethno-cultural conflict. While multicultural reconciliation is a matter of promoting this objective dimension of well-being,

<sup>9</sup> Space does not permit a full examination here of Sen's account of identity, reason and violence (1998, 2006). I undertake such a study in my work-in-progress, *Multiculturalism: From Political Principle to Human Capability*, where I argue that Sen's understanding of identity is continuous with his emphasis on choice in the capability approach.

<sup>10</sup> I am grateful to a member of the Leeds Political Theory seminar for indicating this problem and relating it to the debate between Honneth and Fraser (2003) concerning redistribution and recognition.

it also recognizes the diverse ways in which human beings attain it, by re-dignifying themselves and others after atrocity as complex beings confronting difficult choices. Sen emphasizes this point by observing that agency goals and material well-being may conflict interpersonally and within a single life. That is to say, different basic capabilities may 'move in different directions' (Sen 1992: 56). For instance, a person's goals may include national independence, religious enlightenment or retaining an inherited language. Their agency-freedom might involve choosing to sacrifice stability of an authoritarian order to fight for democracy, with the entailed risks to material or bodily security. Briefly, then, agency-freedom connotes the individual's assessment of how to function and their opportunities to act in accordance with this view. Far from ignoring material needs, the approach supports mutual opportunities to live well socioeconomically, but encourages personal assessment of the balance and priority of individual needs after the conflicts that often negate this capacity.

While agency-freedom in Sen's sense seems the indispensable objective human development, it also promises to disrupt an otherwise endless cycle of violence by opening a person mentally to the complexity of human experience, and, thus, towards a re-humanization of the other as a complex being choosing according to their vision of the good. While this mutual capacity is by no means easily achievable in post-conflict situations, particularly where violations have spanned centuries and generations of families are traumatized (Philpott 2006: 39–40), the approach accounts at a sustainably higher level than other approaches for the attitudinal shift required for reconciliation. Although the individual may continue privately to recriminate, they learn not to de-humanize or comprehensively alienate the other as a condition of maintaining identity, exactly because they are enabled to assess, prioritize, trade off and pursue their personal and collective agency goals. Restoring this human capacity means that limited but durable trust in the other might thus become integrated into the person's world-view. In this sense, one changes in order to remain the same (Kelman 2004: 112). Without implying amity or love, the process promises higher-quality reconciliation than that based on the pragmatic trust of the procedural approach.

Pluralist states would therefore consider that the agency-freedom of some may involve choosing to resent past injustices, thereby undermining some well-being through negative affect, in maintaining a separate ethnic identity. This does not mean that they fail to reconcile, as reinforcement of a strong world-view does not logically have to involve negating others or viewing them as existential threats (Kelman 2004: 117). Moreover, in France, agency-freedom might perhaps involve contesting official unitary citizenship and the church-state separation, insisting on maintaining religious dress in public, or institutionalizing education about colonial history, as the conditions of social inclusion. The point is that citizens may only approach the issue of how to reconcile by engaging an unfrozen reflection about the significance of historical group-relations.

A number of dilemmas arise in relation to this conception of reconciliation, not all of which are fully resolvable here. One problem is how, beyond deliberative democracy itself, the agency-freedom of diverse citizens might be cultivated. Also, Sen admits that the relation between agency-freedom and justice is far from settled (Sen 1992: 71). Governments have duties to secure citizens basic well-being and agency but not necessarily to support them in, say, erecting a statue in honour of their political hero (Sen 1992: 73). However, the fact of pluralism induces doubt surrounding the nature and content of state responsibility in this regard, a problem which is most acute where annihilation of others is perceived by some as a basic agency goal, as has been tragically the case in Bosnia-Herzegovina and Israel–Palestine (see e.g., Finkelstein 2003). Agency, thus, constitutes the moral problem and the moral heart of political reconciliation, as Sen indicates indirectly elsewhere (Sen 1998, 2006; Qizilbash 2009). Although the question of public policy to support mutual agency-freedom in a culturally plural society requires further consideration, I refer again to Sen's belief in the progressive potential of education in human development (Sen 1999: xi; 5).

A key observation, and indeed potential difficulty, is that RA challenges standard liberal distinctions between public and non-public reason. Liberals typically hold that public reasons should be intelligible and shareable and that policies and institutions are accordingly legitimized when based on 'reasons for each [which] are reasons for all' (D'Agostino 1991: 391). Yet it remains true that the development of reconciliation might necessitate rights to public expression according to a non-political spiritual ideal, which may be intelligible to others but not shareable. Yet RA's expansion of liberal thought in this regard then raises the difficulty of limiting the domain of disagreement about reconciliation and the problem of dismissing views of the past that are manifestly false or unreasonable, and which may violate the basic moral tenets of some.

As a brief though inevitably incomplete response to this issue, I suggest that, while logically dissonant views evidently cannot be reconciled, liberal multiculturalists would seek reconciliation between persons rather than beliefs. It is human beings who engage civically and who warrant ultimate concern and respect. Moreover, the controversy about liberal reasonableness is neither new nor limited to the concept of reconciliation (Fines 2010). RA suggests that the boundary around reasonableness cannot plausibly be absolute and a-historical, as to assume its metaphysical 'given-ness' would be to count mistakenly on the transparency of all human reason and experience. With this thought, it is at least reasonable to conclude that reconciliation is most sustainable and at its highest quality when, admitting the non-shareability of at least certain human reasons, it supports the agency and humanity of all.

### Conclusion

This chapter has outlined different formulations of the contested ideal of reconciliation in the context of liberalism's long-standing commitment to diversity. It has been argued that reconciliation must avoid requiring the demanding personal change involved in forgiveness, notably but not exclusively in plural societies like France. At the same time, conceived in terms of fostering mutual agency-freedom according to Sen's capability approach, reconciliation still asks that liberals unsettle their vaunted boundary between public and private reason. After an unequal or atrocious history, liberal multiculturalists might thus reconceive reconciliation as encouraging attitudinal change towards all persons' re-humanization of others and of themselves, in a mutual pursuit of agency goals that seems the most plausible interpretation of Delanoë's hope with respect to the St Michel plaque. While future elaboration is undoubtedly required, reconciliation so understood anticipates a humane balance between justice and mercy, to which citizens mutually commit on principle, rather than out of the pragmatism of despair, for the sake of a fairer and more compassionate future for all in a culturally plural liberal state.

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