

# *Retribution and Reparation in the Transition to Democracy*

Jon Elster (Ed.), Cambridge University Press, 2006, 352 pp.

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## I.

Afghanistan's struggle to emerge from nearly three decades of war and establish peace and order is one of the most watched democratic transitions in the world today. Observant onlookers may have noticed something that has the potential to jeopardise this process and undermine democracy for decades to come: the new government's apparent unwillingness to address the country's turbulent past. The National Assembly of Afghanistan is in the process of passing legislation providing blanket amnesty for the warlords, communists, and Taliban commanders who terrorised the country for almost a generation. In doing so, the new democratic government may be undermining its own legitimacy and antagonising large parts of the population. By dismissing the expressed wishes for justice and retribution of the Afghan people – who were maimed and abused, whose entire families were killed, and whose homes were destroyed – the new government has created for itself another obstacle in its transition to democracy.

Afghanistan is not the first country to face the difficult task of coming to terms with its own recent history. Nascent democratic governments often strive to distance themselves from the past; unlike Afghanistan, however, most appear to recognise the need to deal with the past in order to move forward. For countries with histories of war, authoritarianism, and human rights violations, ensuring a peaceful and democratic future requires addressing past abuses. In their transition to democracy, governments must also decide how to deal with those of the old regime who violated people's rights – including public officials, bureaucrats, administrators, and armed groups. Victims may also demand compensation, and governments must determine what compensation, if any, is appropriate. The challenge lies in choosing a path that provides justice without destabilising or undermining the transition to democracy. Swift and severe punishments may undermine democratic principles, but relying on the rule of law may be slow and allow perpetrators to go unpunished. How countries attempt to achieve this balance is the subject of Jon Elster's edited volume *Retribution and Reparation in the Transition to Democracy*.

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Elster's collection of essays seeks to understand the role of transitional justice in democratic transitions by examining how and why democratising countries, from the post-World War II era to the present, have chosen to deal with their respective pasts. The case studies include the transitional justice processes in Western Europe after the defeat of the Nazism; in Argentina and Chile after the period of military domination of politics during the 1970s and 1980s; in Eastern Europe after the collapse of communism; and in South Africa at the end of the apartheid era. Most of these case studies concentrate on retribution – seeking justice against wrongdoers – rather than reparation – compensation for property lost and rights violated. The case-study authors set out to explore the reasons why particular regimes chose particular transitional justice processes, the internal and external constraints inherent in each process, and the results of the chosen process on democratic transition.

There is a plethora of instruments and mechanisms for administering transitional justice, ranging from legal measures such as criminal trials and administrative sanctions, to extra-legal measures such as commissions and public exposure. As the case studies in this edited volume demonstrate, no two countries have undergone the same process. Different countries present different circumstances and contexts for transitional justice: some face great internal constraints such as a lack of qualified human resources, and the absence of the culture of rule of law; others face external constraints such as issues of international geopolitics or the involvement of international courts. The choice of transitional justice mechanism, given the unique set of constraints and limitations facing each new democratic government, is bound to influence a country's transition to democracy.

*Retribution and Reparation in the Transition to Democracy* shows that transitional justice is inherently a political process, one that is primarily focused on advancing the country's democratic transition and protecting the health and unity of the nation, rather than meting out punishments to perpetrators of past abuses and compensating their victims. Thus, it appears that the success of a particular transitional justice process should not be assessed based on the number of offenders executed or imprisoned but on its relative ability to enable an environment for democracy to flourish. For example, in what is widely recognised as a successful transitional justice process, post-apartheid South Africa progressed toward reconciliation and democracy without prosecuting very many offenders. Argentina, on the other hand, brought many senior military officials to justice, but the country's transition to democracy is still far from complete.

Elster's collection of articles provides a comprehensive and detailed account of the transitional justice processes in over a dozen countries over the past half-century. As an edited volume, however, it falls short: The whole is, in fact, not greater than the sum of the parts. The editor fails to draw out a set of 'lessons learned' – conclusions and recommendations based on a comparative look at the case studies – that could help guide current and future transitions to democracy. Governments and supporters of countries currently undergoing democratic transitions are left wanting for concrete guidance on how to address issues of transitional justice given their particular constraints and circumstances. By leaving it up to the reader to sort through the extensive detail in search for commonalities and guidelines, *Retribution and Reparation* is likely to exclude from its readership practitioners and those engaged in transitional justice 'on the ground,' limiting itself to a largely academic readership.

The book also fails to provide clear insight into the longer-term effects of different transitional justice processes on democratic transitions. Most of the case-study chapters focus on the specifics of the process itself, forgetting that the edited volume intends to combine the twin issues of transitional justice and democratic transition.

### II.

*Retribution and Reparation in the Transition to Democracy* comprises over a dozen case studies. The first group of chapters examines the transitional justice process in Germany and German-occupied countries after 1945. These essays consider the challenges faced by Germany, France, Austria, Hungary, Denmark, Norway, Belgium and the Netherlands in designing and implementing transitional justice processes.

In 'Transitional Justice in Divided Germany after 1945,' David Cohen provides a comprehensive overview of the transitional justice processes that took place in East and West Germany after the end of World War II. He offers a chronological account of the different mechanisms employed – Allied trials, de-Nazification efforts, German trials – as well as the processes undertaken by each of the occupying powers (the U.S., France, Russia and Britain). He concludes that the Allied transitional justice process was successful, although not necessarily in the way it was intended: de-Nazification in the late 1940s was largely a failure, as the 1950s witnessed the return to politics of many former Nazi officials. Nevertheless, Cohen points out, the process helped the Allies achieve their political objectives, which

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were at the core of their transitional justice processes: stigmatising the Nazi regime, reinforcing the rule of law, and uncovering the truths about the abuses that took place during the war. The Russians too were driven by political objectives, wanting retribution for the betrayal and severe losses at the hands of the Nazis and seeking to consolidate communist rule in East Germany. With the onset of the Cold War, both the Allies and the Soviet Union were successful in using transitional justice as means to achieve their own political objectives.

Henry Rousso's *'The Purge in France: An Incomplete Story'* offers great insight into the costs and benefits of purging Nazi collaborators from public life in France after WWII, its overemphasis on statistics notwithstanding. According to Rousso, the purge first sought to provide security in France by eliminating collaborators of the occupation; the purge was also designed to serve as an outlet for those calling for a violent response to the occupation, and to legitimise the new regime. When selecting a mechanism for transitional justice, the new government faced a common dilemma: the need to carry out a process strong enough to appease those seeking harsh retribution, but balanced so as not to deprive the country of the economic and administrative human resources necessary for reconstruction. Ultimately, the government prioritised the reconstruction effort, purging collaborators from the political sphere but largely avoiding the economic and administrative sectors, and offering amnesty only five years after the liberation.

In 'Political Justice in Austria and Hungary after WWII,' Istvan Deak outlines the limited success of transitional justice in each country. In both countries, international actors guided the process, and prosecution and punishment of war criminals and collaborators gradually lost political and moral significance. Austria's acceptance of democracy, along with a shortage of professionals, drove the Allies to begin rehabilitation of former fascist officials as early as 1948. In Hungary, the transitional justice process was influenced by Russia, and prioritised eliminating democrats and other enemies of the new communist regime over the purge of former fascists.

In 'Dealing with the Past in Scandinavia: Legal Purges and Popular Memories of Nazism and WWII in Norway and Denmark after 1945,' Hans Fredrik Dahl describes how in Denmark and Norway legal transitional justice measures relate to the public memory of the war. According to Dahl, both countries sought immediate and thorough retribution as a means of developing a national narrative of the war; this narrative, particularly in the case of Norway, would 'nourish popular

memories of the war without interference from rival versions of those out of line with the majority opinion.’ The author explains why the two governments chose such severe transitional justice mechanisms – for example, the reinstatement of the death penalty – but is less explicit in linking these mechanisms to either country’s transition back to democracy.

‘Belgian and Dutch Purges after World War II Compared,’ by Luc Huyse, provides a thorough and insightful comparison of the post-war purges and subsequent reintegration processes in Belgium and Holland. The two countries adopted similar approaches to the elimination of Nazi collaborators, with comparable accomplishments, but they differed significantly in the success of their reintegration policies. Both governments recognised the importance of reintegrating former collaborators, and initiated reintegration through the removal of sanctions and the reinstatement of civil rights. Holland was eventually more successful in its resocialisation efforts, relying on a tradition of non-political administrative agencies, than was Belgium, where the issue was politicised and played into historic political divides.

The second group of case studies focuses on more recent transitions. In ‘Paranoids May Be Persecuted: Post Totalitarian Transitional Justice,’ Aviezer Tucker examines transitional justice processes in post-totalitarian transitions to democracy, drawing on examples from East and Central Europe after the fall of the Soviet Union. Tucker discusses the many variables at play in such transitions: constraints on political decision-makers (human resources, time, and information); stakeholder interests (inherent desires of the *nomenklatura*, dissidents and members of the new regime); targets for sanctions (residents, collaborators, confidants, contacts); and the types of sanctions to employ (individual and collective criminal sanctions, administrative sanctions). Transitional justice processes in post-totalitarian contexts are further complicated, Tucker argues, by a weak or absent civil society, a lack of alternative elites, and a compromised judiciary. He concludes that the success of the democratic transitions in East and Central Europe during the early 1990s was less a function of transitional justice legislation than it was a result of the balance of power between the old (post-communist) and new (non-communist) political elites. In countries, such as Czechoslovakia, where that balance weighed on the side of the new democratic regime, the transitions were more successful.

Carlos H. Acuna’s essay, ‘Transitional Justice in Argentina and Chile: A Never-Ending Story,’ clearly demonstrates the impact that transitional justice processes

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can have on the transition to democracy. In Argentina, the new government was lenient toward the human rights violators of the former military regime, but the existence of an independent judiciary and active political parties and civil society ensured a fairly severe transitional justice process. In Chile, the armed forces resisted attempts to bring human rights violators to justice by institutionalising amnesty for themselves. As a result, the democratic transitions of Argentina and Chile differ significantly. For example, in Argentina, the military budget is controlled by parliament, the Ministry of Defense is led by civilians, and the legal mandate of the armed forces is to prevent foreign aggression; while in Chile, the armed forces has its own budget and the constitution reserves the right for the military to 'guarantee law and order,' opening the door for continued military interference in political affairs. Acuna is one of few authors in this edited volume who clearly illustrate the linkages between transitional justice and the prospects for consolidating democracy.

In 'Transitional Justice in the German Democratic Republic and in Unified Germany,' Claus Offe and Ulrike Poppe offer an intriguing example of the influence of external forces on transitional justice and the road to democracy. Initial legal sanctions in the form of criminal prosecutions against communist collaborators met with little success; this spurred the emergence of alternative transitional justice instruments, such as the German Bundestag's Commission of Inquiry and the Gauck Agency, charged with overseeing the publication of records kept by East Germany's Ministry for State Security. The transition to democracy in East Germany, the authors highlight, was entirely driven by West Germany in an attempt to ensure a smooth unification process. As a result, East Germany avoided many of the challenges to transitional justice common in other countries: there was no dearth of qualified professionals in the economic or administrative arenas, the country was not facing a major reconstruction effort, and the judiciary and administration did not obstruct the process.

In his essay, 'Truth and Reconciliation Commission in South Africa: Amnesty, The Price of Peace,' Alex Boraine provides an excellent account of the transitional justice process in post-apartheid South Africa. According to Boraine, the new government made a strategic decision to focus the transitional justice process on reconciliation, aiming to lay the foundation for a peaceful, democratic South Africa. Thus, the Truth and Reconciliation Commission was not created as a venue for the country to dwell on the past, but rather as a tool for coming to terms with the present and the future. The Commission provided 'the possibility of truth relating to victims and perpetrators, the restoration of dignity for victims and survivors, a limited amnesty,

and a search for healing and reconciliation’ – thereby creating an environment of coexistence, where past abuses could not be denied and violations of human rights would no longer be tolerated. Boraine argues that the success of this transitional justice mechanism helped propel the country’s transition to democracy.

Though the title of the volume is *Retribution and Reparation in the Transition to Democracy*, most chapters focus almost exclusively on retribution. Only two authors, Tyler Cowen and Aviezer Tucker, discuss in detail the issue of reparation as a component of transitional justice. They both highlight the difficulties, and to some extent undesirability, of providing compensation to victims of war crimes and rights abuses. Tucker outlines the constraints that governments face in addressing rectification: shortage of human resources; the inherent weakness of new democratic governments; and constraints on time, money and information. An additional burden is the choice that governments face in terms of what losses should be compensated – liberty, job and career, educational opportunities, property, civil rights – and the procedure for rectification – judicial procedures through courts or extrajudicial through special commissions. Cowen goes a step further and makes a case for limited reparation, arguing that the value of compensation is too difficult to determine. He also suggests that restitution is often pursued as means for victims to ‘become whole again,’ something that material compensation cannot achieve regardless of its value.

### III.

As a whole, *Retribution and Reparation in the Transition to Democracy* only implicitly explores the relationship between transitional justice and the resulting democratic transition. All case-studies detail the context, mechanisms and outcomes of transitional justice in their respective countries of focus; few, however, explore the *impact* that the given transitional justice process had on the country’s transition to democracy. The reason for this may be, at least in part, that in many of the countries studied the transitional justice process had little to do with the emergence of democracy. Post-WWII Western Europe was merely re-establishing democratic governance, not transitioning to democracy. Transitional justice does not appear to be a pivotal factor in that context. For example, whether the death penalty in Norway was reinstated to eliminate Nazi collaborators, or how extensively it was used for that purpose, had limited impact on the country’s path back to democracy. While the case studies from Western Europe provide interesting examples of approaches to transitional justice, their inclusion in a volume on transitional justice

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in the transition to democracy is questionable given how qualitatively different their experiences were from those countries transitioning from authoritarian or totalitarian regimes. Some of these pages would have been of better use if allocated to discuss transitional justice as it happened in Cambodia, Rwanda or the former Yugoslavia.

Further, most of the authors place great emphasis on chronicling the number of individuals sanctioned, imprisoned, or otherwise held to account through transitional justice processes. More time is spent detailing the specifics of each process than examining their role in the transition to democracy – which is, after all, the stated goal of the book. Thus, the forest is somewhat lost for the trees. The volume as a whole would have benefited greatly from a concluding chapter, drawing out the lessons learned and formulating some guidelines for current and future transitional justice processes. What mechanisms have proved most successful overall? Which approaches work best in countries where the rule of law is weak? Which measures, if any, should be avoided in all contexts based on historical experience?

For those trying to make sense of Afghanistan's democratic transition, for example, a few clear pointers would have been useful. The Afghan context presents a wide variety of challenges for democracy and the administration of transitional justice: deep ethnic cleavages continue to influence every aspect of political life; three decades of war and brain drain has created a lack of qualified professionals; the court system is nonfunctional, there is no rule of law, and the culture of impunity is dominant. Although the government announced the establishment of the 'Action Plan of the Islamic Republic of Afghanistan for Peace, Justice and Reconciliation' in 2005, recent developments in parliament threaten to undermine, or make irrelevant, these plans. Nevertheless, people want justice – they want their suffering to be recognised, they want to see the perpetrators punished. In a country with such a complicated and violent past as Afghanistan, how should the government redress past abuses while maintaining stability and peacefully reintegrating both the victims and the perpetrators of abuse?

For Afghanistan, and other transitioning democracies, a few general principles of transitional justice can be drawn from *Retribution and Reparation in the Transition to Democracy*. First, new governments should not underestimate the importance of establishing a *process* for transitional justice – even if ultimately few perpetrators are legally sanctioned. Providing a process for people to learn about the past, for truth



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to be discovered and for acknowledging the suffering of the victims, is crucial for society to begin to leave the tragedies of history behind. Such a process also serves to establish the new government as a standard bearer of democracy and the rule of law. Ignoring the need for transitional justice may undercut the legitimacy of the new government and weaken popular support for democracy. Second, a successful transitional justice process does not necessarily require individuals to be imprisoned or eliminated from public life; more important is that it enables an environment for national reconciliation. In Afghanistan, where many known human rights abusers now occupy important government offices, a wholesale 'purge' would neither be feasible nor desirable. A justice mechanism along the lines of South Africa's Truth and Reconciliation Commission would be more appropriate for creating the conditions for healing to begin.

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