

Philosophical Issues in Transitional Justice Theory: A (Provisional) Balance¹

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Abstract

Transitional justice is becoming more and more an interdisciplinary field of study with interesting developments, not only in the assessment of a wide number of case-studies, but also in the evaluation of increasingly more articulated theoretical problems. Undoubtedly, a robust collection of literature has now accumulated also on the more theoretically-oriented side. The present essay, far from aiming at an exhaustive reconstruction of the existing literature, is structured around some conceptual issues that consider the convergence of philosophical, legal and political aspects of transitional phenomena.

Keywords: transitional justice; human rights; genocide; non-ideal justice; democracy (*transitional justice; diritti umani; genocidio; giustizia non-ideale; democrazia*).

Introduction. The Philosophical Appeal of Transitional Justice

Sokreaksa Himm was only fourteen in 1977 when the Khmer Rouge soldiers killed 13 members of his family in front of his eyes: “[...] I, along with my father and brothers were dragged to the edge of a mass grave and slashed with machetes and clubbed with hoes. Minutes later, I awoke in the grave in a pile of my dead and dying relatives. [...] The anger against the killers was as great as the grief for

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my family and it burned inside me like a great ball of fire. For years I cultivated elaborate fantasies in which I tortured and murdered the killers [...] I realized that I would never know true peace until I had dealt with this as well. I had to find a way of forgiving them, before the bitterness inside destroyed me”². Sokreaksa found his answers in religious teachings which led him to become a missionary and to forgive his family’s murderers. If there were no institutionalization of transitional justice, this would remain one of the few possibilities to overcome revenge. Instead, the goal of transitional justice is to provide a *political* answer to such challenges through restorative and retributive measures. The political aspect of transitional justice lies exactly at the intersection of two non-political extremes such as revenge, on the one side, and forgetting on the other³. Revenge and forgetting are instinctual feelings, denying the same significance and possibility of social ties and common political projects. As exemplified by the action of the Erinnyes in Greek mythology, revenge in its natural form, revenge aims at an annihilation of a crime. It represents a non-political strategy precisely because it seeks compensation by adopting a form of “in-kind” rebalancing. Revenge does not require any form of socio-institutional rationalization, nor any type of collective consideration for the consequences attached to crimes and punishments.

On the contrary, it seems that “blood be washed with blood” as if in a state of nature. Is forgetting a better strategy for moving ahead? This approach does not seem to be very effective either. Forgetting requires a total erasure of an event from the memory⁴. Nevertheless, deleting the memory of a factual occurrence, if possible, would never

² See this and other testimonies in *The Forgiveness Project* at <http://theforgiveness-project.com/stories/sokreaksa-himm-cambodia>.

³ For a politically overcoming of such impasse, see M. Minow, *Between Vengeance and Forgiveness*, Beacon Press, Boston 1998.

⁴ P.P. Portinaro distinguishes among different forms of memorizing/forgetting the past as for instance: a) the dialogic forgetting, where there is a collective share of the impulse to forget, the pact of silence, the collective silence; b) remembering in order to prevent forgetting, where it is indicated the passage from a culture of amnesia to a culture of memory such as in the case of the Holocaust; c) remembering in order to forget, as in the case of the model of the Truth and Reconciliation Commission in South Africa: or finally, d) the dialogic remembering, which is the model oriented to the construction of a transnational and cosmopolitan memory, in P.P. Portinaro, *I Conti con il Passato*, Feltrinelli, Milano 2011, 202 ff.

absolve the task of reforming an institutional and cultural system responsible for a certain political outcome. To come to terms with the past therefore implies that first the past is reconstructed according to some form of historical truth and accuracy⁵. The verification of the occurrence of certain facts as well as the attribution of responsibility is a social cooperative work, which cannot be pursued outside a minimally operating system of mutual coordination. This is the fundamental paradox within which transitional justice operates; that is, the pretence of reconstructing a past constantly frustrated by a non-political context of operation.

The philosophical debate over what is today referred to as “transitional justice” 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). Athena transformed a situation of apparent political impasse, and eventually managed to dissuade the Furies from taking revenge by allowing an honorable solution within the new system of law and adjudication. As the founder of a new order, she assigned the role of creating a system of rule of law to a permanent court⁶. *Mutatis mutandis* this role of a *deus ex machina* – as an external promoter of an order – is equal to how the international community has acted in several circumstances starting from the case of the Nuremberg Trials.

The external imposition of a new order, as it will be shown, is not without problems and it links transitional justice with the necessity of instituting a legitimate cosmopolitan order. These were some of the issues that N. Kritz, for instance, debated in one of the pioneering works on the subject, the three edited volumes titled *Transitional Justice*⁷. This

⁵ As Adorno reminds us, “We will not have come to terms with the past until the causes of what happened then are no longer active. Only because these causes live on does the spell of the past remain, to this very day, unbroken,” in T.W. Adorno, «What Does Coming to Terms with the Past Mean?», in G.H. Harman (ed.), *Bitburg in Moral and Political Perspective*, Indiana University Press, Bloomington, IN 1986, p. 129.

⁶ On the transitional justice interpretations of *The Oresteia*, see B. Leebaw, *Judging State-Sponsored Violence, Imagining Political Change*, Cambridge University Press, Cambridge 2011, p. 108 ff.

⁷ N.J. Kritz, *Transitional Justice. How Emerging Democracies Reckon with Former Regimes*, United State Institute of Peace Press, Washington D.C. 1995, Vol. I-III.

work was representative of a two-day conference organized in Salzburg by the New York based Foundation Charter 77 on the occasion of the 1989 post-communist regime change⁸. This initiative was part of the Transitional Justice Project which was in its turn an element of the Rule of Law Initiative promoted by the United States Institute of Peace. The Salzburg's conference was actually anticipated by the 1988 Aspen Institute Conference in Wye, Maryland and financed by the Ford Foundation with the aim of achieving an overall understanding of transitions to democracy throughout the 1980s, particularly in South America (Argentina, Uruguay and Brazil). It is interesting to note that on this occasion, R. Dworkin and T. Nagel also joined, and this was presumably due to the follow-up to their previous invitation to C. Nino's 1986 conference on human rights in Argentina. It is on this second occasion that Nagel proposed the now well-accepted distinction between "truth acknowledgement" and "truth knowledge" as a way to highlight the relevance of public accountability in transitional contexts⁹.

The expression "Transitional Justice", however, was not new. It had been adopted for the first time in a technical way during late 1980s by R. Teitel who then formulated the basic principles of this emerging discipline¹⁰. Nevertheless, the linguistic occurrence itself appeared for the first time in an almost completely unknown study on US troops' occupation of New Mexico in 1948¹¹. The term was widely discussed and criticized due to the fact that it combined 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 field of study is thus characterized by a continuous attempt of defining the field, an attempt, which as it will be shown, is far from having been completed¹². Core questions concerning the philosophy of transitional

⁸ N.J. Kritz, *Ivi*, vol. I, xix.

⁹ For a reconstruction of the development of transitional justice and its initial debates, see P. Arthur, «How Transitions Reshaped Human Rights: A Conceptual History of Transitional Justice», *Human Rights Quarterly*, n. 2 (2009), 31, p. 349 ff.

¹⁰ R. Teitel, *Transitional Justice*, Oxford University Press New York, NY 2000.

¹¹ For a widely informed reconstruction of the origin of the term, see P. Arthur, *Ivi*, p. 330; whereas for the attempts, mainly by T.G. Ash, to replace the expression "Transitional Justice" with German-based constructs (i.e. *Geschichtsaufarbeitung* or *Vergangenheitsbewältigung*), see P. Arthur, *Ivi*, p. 332.

¹² In this regard, P. De Greiff has recently affirmed that: "Finally, and most surpris-

justice, some of which will be addressed in due course, therefore fall in the overall framework that a theory must be capable of exhibiting, such as whether the backward- and forward-looking perspectives of criminal sanctions in transitional justice manifest some form of “speciality” in the field, as some scholars have claimed or, contrarily, whether this aspect is not indicative of any distinctiveness, as others would claim.

Finally, further opposition would challenge the notion of considering transitional justice as a form of compromise among contracting parties. Alternatively, it could be viewed as a truly normative field, characterized by a specific context of application of general principles of justice independently justified (hence the proper interpretation of “transitional”)¹³.

In the following sections, I will reconstruct the significance of some of the most crucial problems revolving around the problem of justice in transition. The field of transitional justice studies is in fact increasingly gaining attention, not only from lawyers and legal practitioners mainly oriented in the assessment of case studies¹⁴, but also from political philosophers and theorists who are progressively beginning to understand the far-reaching impact of the theoretical and practical implications of this new field of study. Due to the on-going debate, it is hoped that this introductory essay will ease and eventually stimulate further discussion.

“Transitional” Dilemmas in Justice Theories

Nunca mas – never again – this was the title of the 1984 report of Argentina National Commission on the disappearance of civilians

ing, 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 University Press New York-London 2012, p. 32.

¹³ This latter thesis is defended by P. De Greiff, «Theorizing Transitional Justice», cit., p. 58 ff.

¹⁴ On the change of study-paradigm in this sense, it is worth considering the higher number of theoretical articles published only from the last two years on by the major specialized journal in the subject: *International Journal of Transitional Justice*, Oxford University Press.

that occurred throughout the dictatorship of the military juntas from 1976-83. These tragic disappearances, as well as several others that have accompanied the rise and fall of authoritarian regimes during the twentieth century, are at the core of the growing interest in transitional processes of democratization and the rule of law. Transitional justice phenomena, in fact, are not simply aimed at supporting institutional transformations; rather, they aim at constructing normative and institutional barriers in the hopes of making the process hopefully irreversible. While apparently utopian, the ever-growing cosmopolitan order is progressively supplementing the fragility of individual state processes of democratization. Evermore interconnected institutional nests contribute to a certain extent not only to constructing a more legitimate international scenario but, more importantly, to bringing to justice international criminals and supporters of war crimes.

With the creation of the *ad hoc* Tribunals for the Former Yugoslavia and Rwanda in the 1990s, as well as with the entry into force of the permanent International Criminal Court (ICC) in 2002, the politics of human rights has broadened the number and scope of effective mechanisms of international criminal justice¹⁵. This is only one side of what is today called “transitional justice”, since not only punishment is a crucial step for a state to come to terms with its violent past, but mechanisms of reconstruction of a social texture and narrative are also important for reformulating a shared political project.

This latter point calls into play the philosophical impact of judgment in the reconstruction of common narratives along transitional scenarios. This is crucial if one thinks to the limits of actual processes of retributive justice based on the reconstruction of facts for the prosecution of *individual* criminals. Such *ad hoc* reconstructions of past atrocities cannot provide reliable ground for establishing a process of collective awareness of responsibilities¹⁶. In order to address this lacu-

¹⁵ Within the Italian debate, these same issues have been recently addressed by M. Calloni (ed.), *Violenza senza legge. Genocidi e crimini di guerra nell'età globale*, UTET, Torino, 2006.

¹⁶ It is worth mentioning that both H. Arendt and K. Jaspers opened an important and still ongoing debate on the notion of the “German Guilt”. At this regard see, H. Arendt, «Organised Guilt and Collective Responsibility [1945]» in R.H. Feldman (ed.), *The Jew as Pariah: Jewish Identity and Politics in the Modern Age*, New York, NY, Grove Press 1978; K. Jaspers, *The Question of German Guilt*, Capricorn

na in transitional phases, it is thus relevant to construct a normatively valid notion of political judgment¹⁷. The discussion of the notion of judgment has been recently revitalized. Beginning with H. Arendt's lectures on I. Kant's aesthetics¹⁸, judgment has received wide political interpretation¹⁹ and recently a transitional reading²⁰. According to an extensive interpretation²¹, I. Kant's judgment is best characterized by its individual occurrences which make validity independent from compliance with ideal conditions of justice. Exemplarity of judgment allows for the possibility of a case-by-case adjudication *versus* what would be a mechanical application of a norm. Reflective judgment is context-sensitive and it favors confrontation among particular points of observation without renouncing to some form of positional impartiality. Due to the intersubjective nature of judgmental activity, as well as its contextual sensitivity, reflectivity of judgment seems particularly suitable to underpin discourse practice and the sharing of a common narrative. The narrative-constructive role of judgment is, in turn, strictly connected to the emotional and imaginative patterns at the heart of memory (re)constructions²².

Books, New York, NY [1947] 1961. For a contemporary discussion concerning post-war reconciliation between Germany and Poland see, J. Habermas and A. Michnik, «Overcoming the Past», *New Left Review*, I/203 (1994), pp. 3-16. For an engaged discussion of this issue see A. Schaap, «Guilty Subjects and Political Responsibility: Arendt, Jaspers and the Resonance of the 'German Question' in Politics of Reconciliation», *Political Studies*, n. 4 (2001), 49, pp. 749-766.

¹⁷ For a discussion of this point see also the contribution of B. Leebaw here published.
¹⁸ H. Arendt, *Lectures on Kant's Political Philosophy*, The University of Chicago Press, Chicago 1982.

¹⁹ See the political application of reflective judgment by A. Ferrara as in *The Force of the Example. Explorations in the Paradigm of Judgment*, Columbia University Press, New York 2008.

²⁰ There is a growing literature and discussion on the significance of judgment in transitional justice, as for instance in the already quoted text B. Leebaw, *Judging State-sponsored Violence, Imagining Political Change*, Cambridge University Press, Cambridge 2011; M. Mihai, *Judicial Review and Transitional Justice: Reflective Judgment in Three Contexts*, CEIC papers#60, Sept.2010, on-line at <http://www.identidadcolectiva.es/pdf/60.pdf>; C. Corradetti, "Transitional Justice and the Truth-Constraints of the Public Sphere", *Philosophy and Social Criticism*, 38 (2012) 7.

²¹ C. Corradetti, *Relativism and Human Rights. A Theory of Pluralistic Universalism*, Springer, Dordrecht, 2009, pp. 99 ff.

²² C. Corradetti, unpublished manuscript.

If one then turns to the institutional response of the challenge for the construction of a common narrative, what should be examined is the role displayed by the more than twenty Truth and Reconciliation Commissions around the world for the promotion of historical truths and responsibilities. The functions such institutions perform in helping social reconciliation has supplemented the retributive function played by criminal courts. By focusing on public accountings, Truth Commissions emphasize the role of victims as active subjects, and not merely as beneficiaries of political transitions. The South African Truth and Reconciliation Commission, for example, privileged a strategy of pardon in exchange for truth and confessions in those cases where the crimes committed were not the most serious.

This certainly helped the process of democratic advancement rather than turning the page with blanked amnesties or worse, with random executions²³. It is certainly true that even in the case of such specific mechanisms of intervention, satisfactory results are difficult to obtain either because of the lack of external funding or because of the difficulty in involving those who held actual responsibilities. This is the case of East Timor's Commission for Reception, Truth, and Reconciliation, for instance, where among the thousands of testimonies, until 2004 none were proved to be perpetrators²⁴. Yet, such difficulties should not discourage us from considering these institutional and political instruments as virtually adequate and certainly necessary for the promotion of a regime of justice.

Transitional justice, exactly like justice in the traditional sense, opens up to a wide number of philosophical dilemmas which can only be cursorily mentioned here. Some of the most discussed ones, even if not at all exhaustive of the philosophical potentiality of this new field of study, have been addressed in the 1990s in accordance to the classical dichotomy of "truth *vs* justice"²⁵, or from the beginning of the new

²³ One of the most authoritative books revitalizing a philosophical discussion on the subject is edited by R.I. Rotberg and D. Thompson (eds.), *Truth v. Justice*, Princeton University Press, Princeton and Oxford 2000, where are analyzed the moral determinants of truth commissions and the apparent dichotomy between truth and justice.

²⁴ C.T. Call, «Is Transitional Justice Really Just?», *Brown Journal of World Affairs*, n. 11 (2004), 1, p. 104.

²⁵ R.I. Rotberg and D. Thompson (eds.), *Truth v. Justice*, cit.

millennium of “democracy *vs* justice”²⁶. On which grounds are value exchanges possible or perhaps only conceivable? In which cases and within which limits should these be allowed? Finally, are these real or false dilemmas? If, on one hand, the dichotomy between truth *vs* justice regarded a (partial and predefined) dispensation of retributive justice for those perpetrators willing to narrate the truth of a violent past, the opposition between democracy *vs* justice, on the other hand, focused on the (falsely) required exchange of historical truth with the promise of a yet to be realized democratic order. The task of a systemic conception of transitional justice in such cases would be that of developing a variety of robust transitional institutions capable of filtering historical resentments and transforming them into democratic pretenses. This cannot occur without the institutionalization of retributive mechanisms as forms of retrospective justice *within* a democracy construction.

Other instances of philosophically relevant concerns raised by transitional justice paradigms regard non-ideal *vs* (traditionally) ideal approaches. How should non-ideal theory be defined? Can one be content with the role and conceptualization that non-ideal theory has received in literature since J. Rawls’s *The Law of Peoples*?²⁷ Also, what is the overall methodological and disciplinary impact of non-ideal theory to the theory of justice as a whole? Can a fully-fledged development of transitional justice as a paradigm of non-ideal justice truly be an alternative to standard normative theory? These are some of the most crucial questions to which a complete theory of transitional justice is called to respond. Indeed, if one is ready to endorse the view of non-ideal theory as a critical/normative standard embedded within factual elements, then a truly interesting alternative to justice is paved. Such a possibility touches exactly upon the crucial aspect of the so-called paradox of ideal *vs* non-ideal justice according to which sound theories of justice cannot be both action-guiding and ideal²⁸.

²⁶ “Realist skeptics hold that transitional justice processes would endanger the prospects of democratization by pitting political adversaries against one another [...] Democratization cannot progress if we do not bury the past” M. Mihai, «Transitional Justice and the Quest for Democracy: A Contribution to a Political Theory of Democratic Transformations», *Ratio Juris*, n. 2 (2010), 23, p. 186ff.

²⁷ J. Rawls, *The Law of Peoples*, Harvard University Press, Cambridge 1999, p. 90ff.

²⁸ On the possibility of solving the paradox see L. Valentini, «On the Apparent Paradox of Ideal Theory», *The Journal of Political Philosophy*, n. 3 (2009) 17, pp. 332-355.

Ideal and non-ideal justice problems are paralleled by ideal *vs* non-ideal theory²⁹. The latter is a form of presupposition for the contexts in which theories are to be applied. Indeed, the paradox itself can be formulated only if it is assumed first that theories of justice shall exhibit fact-sensitivity in order to be action-guiding. Yet, even among different forms of idealization, it is still a task to be accomplished – that of defining how it is possible to separate correct from incorrect processes of abstraction. This seems to be a crucial point, not just for theories of transitional justice, but for theories of justice as such³⁰.

Several scholars have recently framed the discussion of non-ideal theory on the basis of an interpretation of J. Rawls' duty of assistance as a truly transitional principle³¹. In *The Law of Peoples*, J. Rawls claims that well-ordered societies should cooperate not only among themselves, but also with non well-ordered (and burdened societies) in view of the condition improvements of the latter. These, J. Rawls observes, are “questions of transition”³². The principle of transition would require, under specific conditions, that not-well organized societies must be supported by liberal or decent peoples to become members of the “Society of Peoples”.

It is with no doubt that such a viewpoint certainly looks like a promising and fascinating interpretation of J. Rawls's non-ideal theory. Nevertheless, J. Rawls does not explain what kind of justice is involved in transition, nor whether special international institutions are involved – rather than the action of individual states. This instead contributes by revealing the limited internationalist perspective of *The Law of Peoples*. It also rehabilitates the political-institutional

²⁹ Concerning the philosophical opposition to non-ideal models of justice and specifically to transitional justice as a non-ideal model of justice, see L. Meyer: “Eine solche Theorie wäre eine nicht-ideale Theorie oder schliesse jedenfalls eine nicht-ideale Theorie ein. Philosophen beuge zu der Auffassung, dass es eine generelle nicht-ideale Theorie nicht geben könne [...]”, L. Meyer (Hrsg.), *Justice in Time*, Nomos, Baden-Baden 2004, note 52, p. 47. For a recent attempt to propose a non-ideal paradigm of justice see A. Sen, *The Idea of Justice*, Harvard University Press, Boston Mass. 2009.

³⁰ L. Valentini, «On the Apparent Paradox of Ideal Theory», cit., p. 354.

³¹ See, for instance, A.J. Simmons, «Ideal and Nonideal Theory», *Philosophy & Public Affairs* 38 (2010) 1, pp. 5-36; G. Sreenivasan, «What is Non-Ideal Theory?», in M.S. Williams, R. Nagy, and J. Elster (eds.), *Transitional Justice: NOMOS LI*, New York University Press, New York, NY 2012.

³² J. Rawls, *The Law of Peoples*, cit., pp. 89-90.

side of the criticism advanced by T. Pogge for the economic aspect, that is, the causal relation of impoverishment between well-ordered and burdened societies. The fundamental problem of J. Rawls' duty to assist as a principle of transition remains that of justifying more convincingly the underlying picture of international justice in order to provide legitimacy; not only to a scheme of global redistribution of economic goods, but also to one of global redistribution of goods more strictly oriented to political and criminal justice. This final point opens the question as to whether we need a more elaborated theory of transitional justice, developed along normative lines and with the aim of ordering the required institutional steps for the implementation of a plan of action³³.

Reconciliation, Restoration and Historical Memory

In the previous section, I referred to reconciliation as a socio-political dimension aimed at integrating retributive strategies in transitional justice. Overall, forms of reconciliation may be quite complex and differentiated due to their justificatory patterns embedded either in political or theological discourses. As for the latter, the emerging role of religious discourses is part of a wider phenomenon defined as the rise of "public religion in the modern world"³⁴. In the case of transitional justice, the role of charismatic figures in securing processes of peace and reconciliation has been extremely significant. To mention some of the most important ones, Archbishop D. Tutu has solicited victims to forgive perpetrators, whereas in Guatemala, Archbishop J. Gerardi has contributed to forming and leading the Recovery of Historical Memory Project, a particular type of Truth Commission which supplied psycho-

³³ The choice between normative and non-normative approaches to transitional justice is one of the most crucial alternatives to be decided upon in view of the generalizability of "best practices" that can be pursued. For a non-normative approach to transitional justice in the Italian debate, see P.P. Portinaro, *I conti con il passato: vendetta, amnistia, giustizia*, Feltrinelli, Milano 2011.

³⁴ J. Casanova, *Public Religions in the Modern World*, University of Chicago Press, Chicago, IL 1994, quoted in, D. Philpott, *Religion, Reconciliation, and Transitional Justice: The State of the Field*, SSRC Working Papers 2007 available at <http://www.ssrc.org>.

logical help to the victims. Other examples include Bishop C. Belo in East Timor, Iraqi Ayatollah al-Sistani and even organizations such as the Community of Sant'Egidio, which have been crucial in bringing peace to Mozambique in the 1990s. Such developments have even led some scholars to divide transitional justice scholars into those falling in the “liberal human rights tradition” and those in the “religious traditions, particularly the Abrahamic traditions, Judaism, Christianity, and Islam, the ones that have said the most about transitional justice”³⁵.

The religious way to reconciliation, though, has been severely criticized by secular liberals for advancing a comprehensive and eventually illiberal view³⁶. The objection raised is grounded on the classical liberal point for which individuals in society deserve mutual respect, and this in turn requires that a multiplicity of religious and non-religious views are advanced by public institutions. According to this understanding, a religiously-based process of mutual forgiveness would frustrate the promotion and protection of pluralism in the public realm.

Alternative attempts have been made to find a way capable of connecting reconciliatory paths with reparatory aims³⁷. J. Thompson, for example, defends an intergenerational “duty to respect” which is only capable of grounding “the moral relationship between the generations [...] Rather than supposing that the point of reparative justice is to return victims to the situation they were in before the injustice was done, those who take a reconciliatory approach to reparation aim at re-establishing just and respectful relations with those they have wronged by coming to terms with the past [...]”. This step becomes crucial in view of the recognition of claims of retribution for past injustices since it leads to justifying the moral obligation for current generations to compensate for previous injustices³⁸. Yet, intergenerational

³⁵ D. Philpott, *Religion, Reconciliation, and Transitional Justice: The State of the Field*, op.cit., p.4.

³⁶ See this debated as reported by J. Van Antwerpen, «Reconciliation Reconceived», in W. Kymlicka and B. Bashir (eds.) *The Politics of Reconciliation in Multicultural Societies*, Oxford University Press, Oxford 2008.

³⁷ Among the several strategies for political reconciliation, C. Murpheen provides a “transitional” reading of the capability approach. See, C. Murpheen, *A Moral Theory of Political Reconciliation*, Cambridge University Press, Cambridge 2010.

³⁸ J. Thompson, «Collective Responsibility for Historical Injustices», in L. Meyer (Hrsg.), *Justice in Time*, cit., note 52, p. 113. For one of the most controversial positions

processes of recognition require – *per se* – that a philosophically robust notion be elaborated not simply in terms of an acknowledgement of the suffering of victims, but as their recognition as right-bearers³⁹. Further contributors have analyzed the conceptual purchase of reparative justice along the axis of the symbolic *vs* the material, and the individual *vs* the collective⁴⁰. These polarizations of the concept open to a wide variety of compensatory possibilities not limited to material restitutions. Indeed, symbolic reparations such as official apologies, financing of public memorial monuments or festivities play a significant role in fostering public acknowledgement of the victims. According to E. Verdeja, the primary function of a more articulated notion of reparatory mechanisms does not rely on either individual or collective forms of compensation, but rather on the social *intersubjective* function that it plays in the restitution of “moral worth and dignity” to victims. While important also for critical interpretations of the past, reparations are only an element of what should be a more comprehensive approach to social reconciliation aimed at prosecuting impunity and at promoting the rule of law⁴¹.

All in all, proposals such as the ones advanced by E. Verdeja endorse either implicitly or explicitly one of the most fundamental statements characterizing restorative justice as a general paradigm for transitional justice, that is to say: “Crime is not primarily lawbreaking but a conflict among individuals, it is harmful to an individual, but affects the community and the perpetrator too; Criminal justice should aim more at reconciling the parties and repairing the wrong rather than simply punishing the perpetrator”⁴². Yet, even within restorative justice paradigms, it is possible to distinguish between process-focused

against a intergenerational duty of reparation due to the impossibility of re-establishing a *status quo ante* see, J. Waldron, «Superseding Historic Injustice», *Ethics*, 103 (1992), pp. 4-28.

³⁹ See P. De Greiff, «Theorizing Transitional Justice», cit., p. 43.

⁴⁰ See E. Verdeja, «A Critical Theory of Reparative Justice», *Constellations*, n.2 (2008), 15, pp. 208-222.

⁴¹ E. Verdeja, «A Critical theory of Reparative Justice», cit., p. 209 and p. 219.

⁴² K. Andrieu, *Transitional Justice: A New Discipline in Human Rights*, *Online Encyclopedia of Mass Violence*, [online], published on 18 January 2010, accessed 20 March 2013, URL: <http://www.massviolence.org/Transitional-Justice-A-New-Discipline-in-Human-Rights>, ISSN 1961-9898, pp. 9-10.

and outcome-focused approaches⁴³. Normally within the first category, cooperative problem-solving processes based on face-to-face interactions between victims and offenders are included, whereas within the second category, the goal of doing justice to victims through reparation of the committed crime is maximized. Differently from pure retributive justice measures, goal-oriented restorative justice aims at deploying criminal sanctions in view of reforming the same judicial system. As from the case for instance of retributive *vs* restorative accounts of transitional justice, one can see here how also from within one single paradigm, further dichotomies arise. Process-focused and goal-focused approaches, in fact, compete under several respects and primarily for the different prominence that each assigns to the empowerment of stakeholders: necessary and unavoidable in the first case and secondary and ancillary to the enforcement of criminal sanctions in the second. Also, whereas in the case of process-focused models a simple encounter and confrontation between victims and perpetrators does not suffice normatively to advance restoration, in the case of goal-focused models, there seems to be a clash or alternatively, a lack of result in the adoption of coercive measures based on the existing criminal justice system and aimed at the general objective of restorative reformation. Restorative advancement, thus, appears more likely if promoted on the basis of dedicated institutions constructed for the advancement of transitional justice objectives.

In view of this general consideration, a primary role is then to be assigned to the previously-mentioned Truth Commissions as well as to official public forms of pardon and memorialization. *Ad hoc* measures and institutions, while extremely helpful, do not suffice to achieve a general social process of reconciliation. To this purpose what is required is the re-gaining of a sense of affiliation to a collective body of political citizenry. Such more far-reaching ambition brings back transitional justice to some of the classical problems of justice *tout court*. Yet, what remains specific to restorative paradigms is the defense of a general goal of social reconstruction through the “healing of victims” from past violations. This raises a host of philosophically complex

⁴³ M. Zernova and M. Wright, «Alternative visions of restorative justice», in G. Johnstone and D.W. Van Ness, (eds), *Handbook of Restorative Justice*, Routledge, London and New York 2011, p. 91.

problems. Before attempting to cite such difficulties, a preliminary point regards the same possibility of defining and consequently identifying victims and perpetrators. This is not at all an easy task due to the presence of a third under-theorized dimension – the so-called “grey zone”⁴⁴ – resulting from the macabre involvement of the same victims in the perpetuation of crimes against their comrades. Furthermore, the same ambiguity attached to the concept of the “past” as captured by the two German expressions “Vergangenheit” and “Gewesen” indicate respectively, that “the past” is both “something that is not anymore” and “something that has been”⁴⁵. Such fundamental duplicity also consequently affects the epistemic categories for understanding the past as well as the same activity of remembrance and of forgetfulness. Even more importantly, following P. Ricoeur⁴⁶, it affects the way in which the past is recollected: as a form of testimony and narration aiming at being credible rather than as a faithful reflection – a mirroring – of a fact. Here again is raised the question of how the same notion of historical truth mentioned before can be defined alternatively as a form of testimony to be believed rather than as something “picturing” the world, as the early L. Wittgenstein of the *Tractatus* would put it. Additionally, the same activity of recollecting the past seems necessarily bound to go beyond the yet unavoidable individual dimension of maintaining coherency in memories. Memories are inherently intersubjective. Since they proceed along the backlash of narration and testimony, memories are *a fortiori*, the result of interacting and dialoging selves. It is within this intersubjective process of interaction among narrating selves that a philosophically deeper understanding of the same notion of forgiveness may be highlighted. To forgive someone in this respect is not to erase facts. This latter form amounts rather to forget that something has occurred. On the contrary, to forgive seems dependent on the same possibility of sharing a memory for which it is assumed a historical responsibility. It

⁴⁴ See this quotation from Primo Levi in B. Leebaw, *Judging State-Sponsored Violence, Imagining Political Change*, Cambridge University Press, Cambridge 2011, p. 3.

⁴⁵ On this distinction and on very illuminating considerations for the relation between the past, memory and forgiveness, see P. Ricoeur, *Das Rätsel der Vergangenheit. Erinnern – Vergessen – Verzeihen*, Wallstein Verlag, Göttingen 1998.

⁴⁶ P. Ricoeur, *Id.*

is on the basis of such intersubjective recognition that the “healing” process can begin.

There is, though, a widespread skepticism characterizing the same possibility of restorative reconciliation in the case of deeply divided societies. As is argued by A. Schaap with reference to H. Arendt’s theory of action, there seems to be a structural paradox preventing the same possibility of conceiving a viable solution to social restoration so that “any ultimate reconciliation in the future is itself a political impossibility”⁴⁷. What can instead be achieved is the formulation of a collective “we” as a counterfactual check to present politics. This move would redirect action to its critical-transformative function and reconnect it with a constitutional founding moment⁴⁸. If this is so, then the point is rather how to transform normative moral constraints into political standards of “civic friendship”⁴⁹; yet this implies in turn a transformation of politics as “antagonism between enemies” into “agonistic politics between adversaries”. This “transition” from morality to politics certainly seems required in order to progress towards an at least functioning political community. Nevertheless, difficulties arise when the author suggests that agonistic politics do not require rational deliberation⁵⁰. The institutionalization of processes of civic reconciliation, especially in the case of deeply conflicted societies, cannot subtract themselves from the use of political rationality as a normative resource for conflict resolution. This is what deliberative consensus transforming non-generalizable interests into normatively defensible standards is aimed to achieve. As I have shown on a different occasion⁵¹, deliberative rationality, as a reformulated speech act-theory, while actively rationalizing subjective preferences, contributes

⁴⁷ A. Schaap, *Political reconciliation*, Routledge, New York, NY 2006 p. 6.; “The promise of action lies in its power to generate new relationships with others and thus the potential that a ‘we’ will emerge from public interaction. Its risk derives from the fact that our freedom to act is given under the condition of non-sovereignty. Because every act falls into an already existing web of conflicting wills and intentions, each actor lacks mastery over the consequences of his or her actions”, A. Schaap, Id.

⁴⁸ A. Schaap, Ivi, p. 7.

⁴⁹ A. Schaap, Ivi, p.10.

⁵⁰ A. Schaap, Ivi, p. 22; A. Schaap, Id.

⁵¹ C. Corradetti, *Relativism and Human Rights. A Theory of Pluralistic Universalism*, Springer, Dordrecht 2009, p. 106 ff.

forging “a yet to come” political community along the axis of exemplarity. The implication is therefore that neither the constitutional making of a community seems to be feasible outside a proper process of deliberation, nor the construction of a political community as such can subtract itself from the fulfillment of criteria of exemplarity for the validity of discourses.

This final observation leads us to the discussion of two further interrelated points which become crucial to the construction of a normative theory of transitional justice: namely, 1) the discussion regarding to which political settings transitional justice transformations should lead, and 2) the assessment of what types of historical phenomena transitional justice processes should include. In the next two sections, I will assess each in turn.

The Multiplicity of Transitional Justice Phenomena (I): a Transition to What?

Scholarly informed debate over transitional justice has thus far proceeded to a large extent in the absence of a comprehensive agreement over the pre-definition of the content and the scope of its object of study. Jurists, political scientists and historians, only to mention a few, when addressing transitional justice problems not only refer most often to a wide spectrum of diversified problems, but also adopt a multiplicity of definitions that are either too inclusive or too exclusive in terms of the phenomena considered. In some cases, indeed, it is even possible to speak of approaches lacking a normative drive. An initial assessment of the problems involved may start with the discussion of two prominent historical-institutional perspectives that have influenced the recent debate over transitional justice: J. Elster’s analysis of transitional justice processes in a historical perspective⁵² and R. Teitel’s view on the historical genealogy of transitional justice⁵³.

⁵² J. Elster, *Closing the Books. Transitional Justice in Historical Perspective*, Cambridge University Press, Cambridge 2004.

⁵³ R. Teitel, «Transitional Justice Genealogy», *Harvard Human Rights Law Journal* 16 (2003), pp. 69–94.

I define the conceptual implications raised by such two historical analyses as the paradox of the “moving objects” in transitional justice. The paradox consists of formulating a definition which either allows a too-wide spectrum of objects as falling *within*, so that the specificity of the domain of investigation is lost; or, alternatively, in establishing a too-demanding standard that *excludes* some important conceptual and phenomenological aspects. In either case, the result is that the definition catches either too much or too little so that the instability that follows produces unintended results.

Before entering more specifically into the problems just mentioned, I wish to discuss a preliminary objection. Some, indeed, could claim that rather than representing a paradox, the mutability of the defined phenomena depends simply on the historical progress of politics towards which transitional justice, as a discipline is committed. According to this view, there would be nothing odd in redefining transitional justice in accordance with certain factual changes. If this were really the case, there would not be a problem in peacefully accepting the progressive redefinition of the discipline according to a mutually-intersecting pragmatics of facts and principles. As it will be shown at the end of this section, there are good reasons to be in favor of such a view and to consider transitional justice as a discipline defined along these lines. The problem here seems rather of a different nature since it appears to be connected to the multidimensional and multidisciplinary expansion of the subject matter itself, that is, to its conceptual disciplinary status rather than simply to its conceptual evolution.

This issue is not of little relevance, especially in light of the fact that it considers transitional justice as a discipline which defines its own objects in relation to specific normative presuppositions and objectives. Let me approach this in a more comprehensive way. J. Elster, in his pioneering study, discusses a wide variety of transitional justice cases ranging from Athens in the V century through the English (1660) and French restorations of monarchies (1814-15), up until the political transitions of the second half of the twentieth century⁵⁴. What J. Elster observes is that since the ideal beginning of transitional justice is a political phenomenon, it is possible to detect a number of mechanisms recurring also at a later stage. For instance, by consider-

⁵⁴ J. Elster, *Closing the Books*, cit., 2004.

ing two transitions from oligarchic regimes that took place in Athens in 411 BC and in 403 BC, and which were followed by a restoration of democracy in both cases, it is possible to recognize not only two different transitional strategies oriented to retribution and restoration respectively, but also specific procedures and mechanisms that have later become a constant in transitional justice phases (for example the supervision of an external state as in the case of Sparta in the 403 BC transition, the use of amnesties or sanctions on perpetrators, or even the compensations to victims as well as the legislative disincentives for oligarchic coups attempts, etc.). Such phenomena in the way they are reported bear important similarities with some contemporary transitions as in the case of post-Nazi/fascist regimes after 1945 or even the most recent transitions following the collapse of the Soviet bloc in 1989. At the institutional level, there is certainly a significant variance, but all in all, there seems to be general congruence in the described phenomena.

Problems arise, though, when J. Elster considers as part of the wider phenomenon of transitional justice also those already mentioned cases of non-democratic transitions, that is, restorations of monarchies, or more generally of oligarchic governments. The case of the French restorations of 1814-5 that J. Elster discusses as a case of transitional justice is a significant as well as puzzling example. It is said that the characteristics of such two post-Napoleonic transitions for the restoration of the Bourbon crown are phenomenologically characterized by an external negotiation of the Allied powers as well as by some classical measures of indemnification or compensation for revolutionary confiscated goods. What is not discussed, though, are the conceptual bases on which such political transitions are considered as falling into, that is, the normative significance assigned by J. Elster to the notion of justice. Political transitions, *qua* transitions, are not on par with transitional justice transformations. In the latter, in fact, the emphasis on “justice” requires an evaluative justification on what counts as “just” in political transformations.

This evaluative dimension for the definition of the phenomena falling within the interest of transitional justice studies, paves the way to philosophical research. J. Elster’s view on justice is normatively limited and based essentially on three elements: reason, emotion and interest. Only reason fulfills the criterion of impartiality and universality

that the author claims to be the fundamental feature of justice⁵⁵; yet in the case of non-democratic transitions (as in the just-discussed case of the French restorations), the criterion is waived and only the two remaining constraints are fulfilled⁵⁶.

One might then argue as to why J. Elster also considers these as significant instances of transitional justice processes. One major difficulty seems to lie in the following aspects. When J. Elster distinguishes between the legal, administrative and political dimensions of justice, he expresses a reductivist and derogatory view. This is made explicit when he asserts: “What I shall call ‘pure political justice’ occurs when the executive branch of the new government (or an occupying power) unilaterally and without the possibility of appeal designates the wrongdoers and decides what shall be done with them”⁵⁷, or again when he states: “Pure political justice may also take the form of *show trials*, where the appearance of legality is a mere fiction because the outcome is a foregone conclusion. In the negotiations among the Allied powers over the Nuremberg process, the Soviets essentially wanted a show trial where the only role of the tribunal would be to decide the *degree* of guilt of the major war criminals”⁵⁸. In a quite surprising fashion and confirming the derogatory view of political justice, J. Elster concludes that: “When many violations accumulate or where core criteria are violated, there comes a point, however, when legal justice is replaced by political justice (sic!)”⁵⁹. Such lack of a normative standard in the definition of transitional justice is therefore at the base of a wide and hyperinclusivist approach to the contemplated transitional phenomena.

This unconstrained inclusivism is also problematically reflected in the goals that transitional justice assume as a field of investigation so that the overall picture of transitional justice emerging from J. Elster’s analysis results are widely inclusive in the considered phenomena and strikingly narrow in the definition of the transitional goals. This point appears when J. Elster clarifies his views for the expected

⁵⁵ J. Elster, *Closing the Books*, cit., p. 80.

⁵⁶ J. Elster, *Closing the Books*, cit., p. 82.

⁵⁷ J. Elster, *Closing the Books*, cit., p. 84.

⁵⁸ J. Elster, *Closing the Books*, cit., p. 85.

⁵⁹ J. Elster, *Closing the Books*, cit., p. 88.

results of fair political transitions: “The outcome of transitional justice is a series of legislative, administrative, and legal decisions”⁶⁰. In many respects, both normative and empirical, it seems that transitional justice aims at a much wider institutional and social impact than the one considered by J. Elster himself. This narrow view on the scope of transitional justice clashes with the multiple levels of interaction and target-actors that the author considers relevant for the same realization of transitional justice.

In fact, there is not only a specific reference to supranational institutions (international tribunals), nation-states, corporate actors (associations, political parties) and individuals (extralegal measures of justice as with individuals against other individuals, etc.), but also to the targets of transitional justice, that is, states and state-citizens as victims of wrongdoing. The short-sighted description of the assigned goals are even more striking if confronted with the wide number of institutional and non-institutional transitional justice agents that are included, such as: wrongdoers, victims, beneficiaries, helpers, resisters, neutrals and promoters⁶¹. Indeed, the author considers interesting cases of individuals acting first as beneficiaries of wrongdoings and then turning into resisters. These people have an ambiguous status in transitional justice phases and specific measures must be formulated in view of the complexity of the interconnecting social texture. It is quite clear that J. Elster’s formulation of transitional justice goals is too limited when confronted with the multiplicity of layers of analysis and social interaction.

From the initial analysis of J. Elster’s characterization of transitional justice, it seems in fact that what can be formulated as a future task of research consists rather in elaborating a normatively thick notion of justice in transitional phases so that a more adequate account of the interconnections among different social actors and levels of transition may be provided. If this is so, then how should the “just” of transitional justice be defined? This is not only a speculative problem, but rather an operational agenda for future action.

The specific task for a normatively constrained programme of justice in transition is the focus of some of the most influential litera-

⁶⁰ J. Elster, *Closing the Books*, cit., p. 116.

⁶¹ J. Elster, *Closing the Books*, cit., p. 99.

ture in the field. As recently observed by R. Teitel (2003), for instance, twentieth-century institutional and legal developments of transitional justice have revolved around three major historical events/phases: I) the post-Second World War 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 justice⁶².

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 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 Yugoslavia⁶³. 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.

The above-mentioned historical accounts concerning transitional justice have been criticized also on (partially) different grounds. For instance, P. Arthur claims that J. Elster is a defender of a quite

⁶² R. Teitel, «Transitional Justice Genealogy», cit.

⁶³ R. Teitel, «Transitional Justice Genealogy», cit.

problematic form of historical “anachronism” since he “treats transitional justice [...] as a timeless construct”⁶⁴. R. Teitel’s historical genealogy does not seem to be in a safer position. Indeed, as P. Arthur notes, actors at the Nuremberg Trials were not aware of advancing transitional justice measures. Anachronism and historical genealogy, even if due to different reasons, both seem at a loss in understanding the normative/evaluative role of historical-political categories⁶⁵. The suggestion arising from such criticisms therefore amounts to taking transitional justice measures as connoted by specific and historically non-generalizable responses. For instance, it is only recently that transitional justice has been adopted to favour democratic arrangements, despite previous Marxist approaches to socialist transitions. So, while transitional justice as a technical domain is strictly connected to the progression of democracy, transitions in general have been seen as connected to different political goals. The lack of account of such historical change is seen by P. Arthur as one of the major flaws in several approaches to transitional justice due to the fact that transitions to democracy is not justified without a preliminary explanation of why the socialist paradigm has become unattractive⁶⁶. As will be discussed in the concluding section, the debate is wide open and it includes many more options than the classical binary opposition between democratic *vs* socialist transitions.

⁶⁴ P. Arthur, «How Transitions Reshaped Human Rights: A Conceptual History of Transitional Justice», cit., p. 328.

⁶⁵ “In a liberal-democratic context, for example, invoking terms such as ‘democracy’, dictatorship, ‘rational’, ‘tolerant’ implies an evaluation, a particular normative judgment”, P. Arthur, «How Transitions Reshaped Human Rights: A Conceptual History of Transitional Justice», cit., p. 328.

⁶⁶ “In sum, the attractiveness of a transitions to democracy paradigm ought to be understood against the backdrop of four conditions: in most of the countries undergoing political change, democracy was a desirable for many people; the delegitimation of modernization theory; the transformation of the transitions concept from a tool of socioeconomic transformation to one of legal-institutional reform; and the global decline of the radical Left [...] the Left abandoned the language of human rights”, P. Arthur, «How Transitions Reshaped Human Rights: A Conceptual History of Transitional Justice», cit., p. 340.

The Multiplicity of Transitional Justice Phenomena (II): Classifying Types of Transition

When one moves to the assessment of the types of transitions that may be described as a phenomenological substrate of a democratic ideal, the first question concerns the normative context within which these transitions can be placed. As already discussed in the previous paragraph, philosophically robust conceptions of transitions are standardly conceived in view of democratic arrangements. The description of such teleological orientation is not at all exhaustive of the empirical occurrences of transitional justice phenomena: as said, it reflects a philosophical understanding of what is “just” in transitional justice. In the following section, I will first introduce the most straightforward cases of transitional justice processes and subsequently discuss some of the possible complications for the reconstructed picture.

From within the picture of a democratic arrangement, the most standard cases characterizing transitional justice are those falling into the following four categories: a) transitions led by the *elites* of the old regime, b) transitions forced on the *elite* by the opposition, c) transitions bargained between the *elite* and the opposition, and d) transitions imposed by a foreign nation. If one considers those transitions characterizing the post-Second World War period, for instance, then it is easy to show how such phenomena all belong to the fourth type of the above-mentioned typologies, that of a political and institutional change mediated by a foreign-power intervention. This event is certainly contingent upon the specific historical configuration of the two political blocks confronting during the conflict: the Allies *vs* the Axis. Nevertheless, as in the case of other categories of transition, problems persist with regard to the “justice” element of the process itself. For instance, in the case of post-Second World War phase, criticisms have been advanced concerning the Nuremberg trials as a form of victor’s justice or, more generally, as forms of transitional criminal justice as illegitimate strategies of retroactive justice biased also by arbitrariness in selection of relevant cases⁶⁷.

⁶⁷ H. Arendt discusses at length the objections against Eichmann trial and replies to them. It is worth considering such objections as general arguments against transitional justice (criminal) prosecutions *before* recent developments of international law

To all such difficulties indistinctively pervading the four traditional forms of transitions to democracy, the specialized institutions of transitional justice accompanied with an overall organic strategy (often called “holistic”⁶⁸) of restoration are crucial components for a coherent picture of justice in transition. The situation just described becomes complicated with the consideration of whether it is correct to make use of one single common normative framework, presupposing the opportunity of a liberal democracy as an end-result. It is considered, indeed, that in some cases, law restricts democratization rather than favoring it, and that it seems normatively more promising to try to understand whose interests are served by transitional justice measures for each specific context⁶⁹.

If this is the case, then the transitional justice continuum, considering as its two poles authoritarian *vs* liberal regimes, is supplemented by intra-authoritarian transitions that might be normatively significant under different respects. The most revealing case in this respect is that of transitional justice in non-liberal transitions where transitional justice processes are kept separated from processes of democratization. In all such cases, transitions are intended to facilitate restrictions on freedoms and to consolidate a non-democratic and repressive rule advancing more urgent needs such as security and peace. This means that transitional justice, even under a purely normative perspective, may be seen as serving a *multiplicity* of goals, which might be eventually ordered according to a hierarchy, but cannot be reduced to one. Also, if this is the case, transitional justice processes must be under-

and tribunals: “Eichmann was tried under retroactive law and appeared in the court of the victors. Second, there were those objections that applied only to Jerusalem court, in that they questioned either its competence as such or its failure to take into account the act of kidnapping. And, finally, and most important, there were objections to the charge itself, that Eichmann had committed crimes “against the Jewish people,” instead of “against humanity,” and hence to the law under which he was tried; and this objection led to the logical conclusion that the only proper court to try these crimes was an international tribunal”, H. Arendt, *Eichmann in Jerusalem*, Penguin, London 1994, p. 254.

⁶⁸ As defined, for instance, in the UN Secretary General Report “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies” 2011, accessible at <http://www.unrol.org/doc.aspx?d=3096>.

⁶⁹ T.O. Hansen, «Transitional Justice: Toward a Differentiated Theory», *Oregon Review of International Law*, 1 (2011) 13.

stood in accordance to specific contexts of occurrence as, for instance, in accordance with what might be considered as urgent to deal with in order to avoid a return to civil war. The same consideration on the urgency of the measures to adopt also applies to the specific contexts of poverty within which legitimate interests differ in priority with respect to wealthy states. According to certain views, such emergencies can be more efficiently absolved by a strong government prioritizing security over democratic values than by increasing democratic liberties in the absence of civil securities⁷⁰.

An intriguing case is that of transitional justice processes in non-transitions. These take place in the absence of a fundamental political transition which does not exclude the progressive pacification of a scenario from large-scale violent conflicts. Contrary to transitions of the 1980s and the 1990s, contemporary transitional instruments of truth commissions, criminal trials and so on are established within a number of fragile and deeply conflicted societies where there is no structural form of political-institutional transition. In such contexts, transitional justice measures may be advanced also, despite state political will⁷¹. Examples of transitional justice processes within non-transitional contexts may be referred to as Kenya's post 2007-8 election violence, which fostered the process of the so-called Kenyan National Dialogue and Reconciliation aimed at settling the conflict following election. In this instance, both major parties (the Party of National Unity and the Orange Democratic Movement) agreed on a transitional justice solution based on a Grand Coalition Government and aimed at ending conflict and promoting peace and human rights. With the support of both parties, a Truth and Reconciliation Commission was instituted, investigating not only post-electoral violence but also constitutional review, institutional reform and unfair land distribution. Additionally, the so-called Waki Commission was instituted, which investigated decades of impunity deemed to be some of the major causes for the triggering of post-election violence. Recommendations by the commission also included the establishment of Special Tribunals composed of local and international staff in order to investigate into post-electoral violence.

⁷⁰ T.O. Hansen, «Transitional Justice: Toward a Differentiated Theory», cit., p. 8.

⁷¹ T.O. Hansen, «Transitional Justice: Toward a Differentiated Theory», cit., p. 22 ff.

As interestingly concluded by T.O. Hansen: “As with transitional justice in transitions, however, it is unrealistic to expect that cases of non-transition can be approached from the same point of departure. At least, it seems required to make an overall distinction between transitional justice in cases of fragile and conflicted societies and in cases of consolidated and relatively peaceful democracies [...] this does not imply a dichotomy, but should rather be seen as a continuum where societies can be more or less internally peaceful and democratic”⁷². Such *continuum*, thus, or at least one of its possible configurations, would have to be constructed with reference to the degree of social stability and security of citizens rather than on the basis of institutional differentiation. Or better, the differentiation between democratic and non-democratic arrangements should cut across a scale of a *continuum* moving from unstable undemocratic societies to stabilized undemocratic arrangements and finally up to stable and democratic configurations as liberal western democracies. As from this sketched picture, transitional justice processes would serve as a primary purpose – that of a stabilization and security purpose rather than of democratization.

The fact that democracies themselves are also called to deal with processes of stabilization when not of political transition is what reveals contemporary cases of transitional justice in consolidated democracies⁷³. These phenomena refer, for instance, to Australian Aborigines’ family removal of children during the 1970s, as investigated by Australian Human Rights Commission in 1997. A similar case is that of the Canadian Truth and Reconciliation Commission of 2008, which has instead investigated into the injustices perpetrated when indigenous children were placed in Christian schools for “cultural assimilation”. Already in 2006, the government provided a compensation of 2 billion Canadian dollars to 80,000 victims. In 2008, Canadian Prime Minister S. Harper offered a public apology to victims that formally sanctioned the recognition by the state of the committed injustice and the will to come to terms with the past⁷⁴. Furthermore, this last category of non-traditional processes highlights a multiplicity of

⁷² T.O. Hansen, «Transitional Justice: Toward a Differentiated Theory», cit., p. 22 ff.

⁷³ T.O. Hansen, «Transitional Justice: Toward a Differentiated Theory», cit., p. 38 ff.

⁷⁴ On this point, see also the contribution of A. Follesdal published in this issue.

purposes served by transitional justice phenomena that can hardly be ordered on the basis of only one single institutional finality. Whereas democratic advancement represents the overall objective of transitional justice, it still remains to be defined what would be a normatively desirable form of democracy, namely whether “contestatory”, “agonistic”, “deliberative”, or “multicultural”, just to mention a few⁷⁵.

Is Transitional Justice “Normal” or “Special” Justice?

If one is ready to endorse the just-mentioned development and functional change in the role of justice in transitional times, it also follows that the debate concerning either the exceptionality or the normality of transitional justice processes must be updated. Such discussion, indeed, was oriented to the assessment of whether transitional justice measures must be seen as a significant but still limited exception from the exercise of normal justice or whether they are to be considered as measures on par with the institutions characterizing normal justice.

As a matter of example, E.A. Posner and A. Vermeule⁷⁶ believe that transitional justice is not a special kind of justice, and there are several reasons for this non-speciality. Some of the most important reasons are in the fact that theories of transitional justice err in treating regime transitions as self-contained domains and err in denying the relevance of comparisons between transitional phases in regime transitions and the wide variety of transitions in consolidated democracies⁷⁷. On the contrary, transitional justice theories are to be placed in a continuum leading to accomplished regime transitions. One problematic element of this initial characterization is defining a clear starting point in which transitional justice processes are placed not

⁷⁵ For the discussion of this point and the general “migration” of the politics of reconciliation into “consolidated” democracies, see W. Kymlicka and B. Bashir (eds.) *The Politics of Reconciliation in Multicultural Societies*, cit., p. 4 ff.

⁷⁶ E.A. Posner and A. Vermeule «Transitional Justice as Ordinary Justice», in *Public Law and Legal Theory Working Paper n. 40*, The University of Chicago, Chicago, Ill. 2003.

⁷⁷ E.A. Posner and A. Vermeule “Transitional Justice as Ordinary Justice”, cit., p. 2.

simply as empirical occurrences but, more importantly, as typological phenomena. Are transitional justice phenomena to be placed in post-conflict phases of transitions, or are they to be placed *within* conflict phases? If the latter, it seems difficult to formulate the hypothesis of a continuum in transitional justice, since it would not even be possible to speak of a minimal degree of social cooperation in transition. If the former, then one would mistakenly invert the relation between field and sub-field in transitional justice. As observed by C. Bell in an overall assessment on the state of the art of transitional justice:

Transitional justice would seem to be a subset of the study of transitions from conflict; the justice component of a transition that will also present economic, political, social and psychological questions. An understanding of justice issues as merely one of a number of transition's dilemmas would sublimate them to a subfield of a non legal inquiry into processes of political transition.... Little to no attempt has been made to define a concept of transition that would place limitations on when transitional justice can legitimately be applied [...] Paradoxically, the call for interdisciplinarity constructs transitional justice as the dominant field because a common project of transition can only be found in the acceptance of innovative forms of justice. Again, this inverts the relationship between subfield and field: transition is constituted as a subfield of transitional justice rather than vice versa. (C. Bell, "Transitional Justice, Interdisciplinarity and the state of the 'Field' or 'non-Field'", *The International Journal of Transitional Justice*, vol. 3, 2009, p. 24)

This means that also in case one were to reconsider more appropriately different forms of transitions as subsectors of a general paradigm of transitional justice, such as those discussed in the previous paragraph, it would nevertheless be left open to discussion whether and how transitional justice is a form of normal justice not arguable nor justifiable from contractarian premises.

This is a philosophically profound issue which here can be only mentioned in passing. Contrarily, there subsist further arguments in support of the idea of transitional justice as a normal form of justice, which even if not philosophically demanding, have the merit of establishing legal and institutional parallels. Let us consider them in turn. E.A. Posner and A. Vermeule further claim that every electoral cycle in normal democracies creates problems of transition, even if to a small degree: "New presidents want to reward supporters with governmental posts, punish enemies with the loss of office, and ex-

ert control over a sluggish and potentially recalcitrant bureaucracy [...]”⁷⁸. In such respect, therefore, there would be no difference – if not in degree – between transitional and normal justice. The parallel here is clearly between the spoiling system typical of the US and the lustration/purge actions mainly directed to administrative personnel as elements of transitional justice strategies widely adopted, especially during post-cold war/de-sovietization phase.

The analogy, while intriguing, is misleading. The reason is that in transitional justice phases, the necessity of personnel removal invests virtually *all sectors* of public administration and certainly *in primis* the judicial sector. On the contrary, in spoiling system actions, the replacement is not only quantitatively limited, as the two authors recognize, but also significantly more limited inasmuch as *key sectors* of public replacements are concerned. This is certainly no surprise if, in contexts of radical change, what is at stake is an entire political regime together with its ideals, values, etc. and not simply an *equipe* of administrators showing a commitment and political faithfulness to one of the political parties sharing – after all – the same democratic values as those of the others. A final line of argumentation defended by the two authors concerns the analogy of retroactive justice, both in cases of transitional justice contexts and in cases of normal justice. The formulation of the argument proceeds in the following way: as in transitional justice contexts, appealing to higher preexisting law (either preexisting constitutional law, or international law or natural law as “trumping” positive law of past regime) is necessary in order to countervail positive law of the old regime which licensed abuses and injustice, so it seems to be similar the case of courts in contexts of normal justice which allow retroactivity unless deemed “unreasonable”⁷⁹.

From a legal perspective, there seems to be an incommensurable difference between the two scenarios since in the former case what is called to perform the function of legal “trump” is higher order law (either natural law, international law, etc.), while in the latter case, this is performed by ordinary law. As a result, this diversity of status of law conveys signaling two radically different juridical functions in each

⁷⁸ E.A. Posner and A. Vermeule, «Transitional Justice as Ordinary Justice», cit., p. 15.

⁷⁹ E.A. Posner and A. Vermeule, «Transitional Justice as Ordinary Justice», cit., p. 14 ff.

of the cases; that of superordinate hierarchy of legal sources in case of transitional justice scenarios, and that of legal replacement within ordinary justice system in all other non-transitional cases.

Clearly such a difference is not only significant with regard to the specific function played by law, but more importantly, with respect to the institutional contexts required in order to realize juridical efficiency between different/similar systems of law. Whereas in the case of “trumping” systems of law, an adjudicating apparatus positioned externally to an object of adjudication is required, in the latter this is not the case. Also, what is worth observing is that whereas in transitional cases, legal apparatuses are replaced *en bloc* due to their either illegitimate or immoral source of production, in the case of retroactive law production in contexts of normal justice, replacement is punctual and limited in scope. All these differences play against an assimilation of transitional justice and normal justice on the basis of legal retroactivity.

If E.A. Posner and A. Vermeule have not convincingly shown how it is possible to assimilate transitional justice to normal justice, then one might wonder whether there are any arguments in favor of transitional justice as a special form of justice. This is the thesis defended, among others, by J.D. Ohlin who warns us preliminarily on the possible error in emphasizing too excessively the side of “transition” or of “justice” in times of hardship and thus of alternatively placing transitional justice either in the field of social sciences or in the field of moral philosophy⁸⁰. J.D. Ohlin claims that transitional justice, as a special form of justice, must demonstrate the following properties: a) it must avoid the formulation of political ideals in the way of Platonic Forms waiting to become real, and it must, on the contrary, propose normative values subject to revision when circumstances so require; b) it must maximize victim-oriented retributions/compensations, that is, it must “serve the victims” as a *terminus ad quem* for the justification of its same pretenses; c) also, it must remain focused on “collective action”, both of victims and perpetrators, due to the same mass atrocities/genocide perspective involved in the fight of one group against the other. The objective of transitional justice as special justice, according to J.D. Ohlin, is precisely the resolu-

⁸⁰ J.D. Ohlin, «On the Very Idea of Transitional Justice», *The Witbehead Journal of Diplomacy and International Relations*, Winter/Spring 2007.

tion of such intergroup conflicts, even if the instruments that may be adopted in such respect are those of classical law based on individual responsibility and therefore result in some cases being inadequate to deal in group-related contexts of action; finally, d) the death penalty is seen as an example of “special justice”, which would be justified in view of the UN role in securing peace under Chapter VII: its justification as a transitional justice measure lies, according to Ohlin, both in a legal and moral argument.

As far as the legal argument is concerned, the author claims that “international tribunals that fail to recognize the death penalty for crimes of genocide might frustrate the very goals they were originally constituted to achieve, i.e. collective security”, whereas according to the latter argument, what is denied is that “there is such a thing as an absolute right to life in all circumstances which cannot be violated” or better, that genocidiaries have forfeited the right to life by virtue of the same actions. This allows the use of the death penalty of genocidiaries, which would not amount in this case to deny the universality of the right to life itself⁸¹.

Are these arguments sound? Do they provide any convincing reason for the idea of transitional justice as a special form of justice? Even at first glance, it seems difficult to see how these formulations can provide either a reliable grounding for transitional justice as a “special” form of justice (a-c), or as transitional justice as a form of “justice” tout court (d).

On the contrary, the points raised thus far contribute to reinforcing the idea of transitional justice as a normal paradigm of justice that is called to incorporate special emergencies in view of political and institutional breakdowns. From the discussion presented above, there is no final conclusion that can be derived as to where transitional justice is to be placed. This is still a point open to debate, which also must consider, among other things, the apparently conflicting goals that any transitional justice strategy implies, such as possible conflicts between purges (removal of past administrators) and political/economic development (due to the removal of experienced personnel), or the more general coordination of backward/retributive justice measures with forward-looking/restorative perspectives⁸². What still remains to be

⁸¹ J.D. Ohlin, «On the Very Idea of Transitional Justice», cit., p. 57.

⁸² See also the contribution of N. Eisikovits in this issue.

considered is how a possible solution of the speciality *vs* the normality dilemma can contribute to an overall acceptable reformulation of the apparently irreconcilable goals of transitional justice⁸³. A holistic approach to transitional justice therefore seems to be required.

Conclusions

As discussed throughout this essay, a philosophical understanding of transitional justice cannot avoid the formulation of a thesis on global justice and its governing principles. The latter should today be elaborated in view of some fundamental evolving notions in the field of international relations as those redefining the threshold of legitimacy for the notion of government, legitimate military intervention and more in general “the responsibility to protect”.

These conceptual reformulations have received political support, not only by the Canadian government, which contributed to establish *The Independent Commission on Intervention and State Sovereignty* [ICISS] in September 2000⁸⁴, but also more recently by the UN General Assembly, which has incorporated the results for the Commission as a framework of action (2009)⁸⁵. In particular, the first of the two documents elaborated by the Commission redefine the issue of state sovereignty, intervention and institution building. Sovereignty implies responsibility, and this translates into protection of citizens. When protection cannot be granted, states become illegitimate and citizens’ protection is demanded of the international community.

Overall, the strategy related to the responsibility to protect can be divided into three main sectors: the responsibility to prevent, the

⁸³ For a sophisticated analysis of this problem with a specific concern on: a) individualization of the guilt *vs*. countering denial of complicity, b) favoring dialogue *vs*. punish past criminal behaviors, c) individual/collective healing of vengeful feelings *vs*. due process guarantee, see B.A. Leebaw, «The Irreconcilable Goals of Transitional Justice», *Human Rights Quarterly*, 1 (2008), 30, p. 107 ff.

⁸⁴ See *The Responsibility to Protect* (2000), at: www.responsibilitytoprotect.org/

⁸⁵ At this regard see *Report on the General Assembly Plenary Debate on the Responsibility to Protect* (2009), at: http://www.responsibilitytoprotect.org/ICRtoP%20ReportGeneral_Assembly_Debate_on_the_Responsibility_to_Protect%20FINAL%209_22_09.pdf.

responsibility to react, and finally the responsibility to rebuild⁸⁶. The latter particularly fits into the classical paradigm of transitional justice, since it is concerned with reconstruction and reconciliation processes after military interventions as well as with causes of harm that intervention is supposed to halt.

The explicatory potentialities of the transitional justice paradigm in the light of the “responsibility to protect” paradigm are so vast and far-reaching that the limitation to post-war phases diminishes the force of its conceptual perspicuity. Let us take for instance the case of the “responsibility to prevent”. Here attempts to prevent can be hopefully achieved only if a specific strategy of “anticipatory governance”⁸⁷ is first developed. Indeed, to limit transitional justice to reconstruction is simply to deliberately limit the long-term effects that post-war processes are intended to achieve. This point is worth further analysis. Indeed, there are at least two senses in which transitional justice strategies extend beyond the post-war phase. One is the already-mentioned non-standard case of transitions within democratic settings or, more generally, the categorization of new transitional processes not limited to post-war phases. Yet, another important sense is that attached to the establishment of conceptual interconnections between post-war reconstructive and reconciliatory phases with a (qualified) limitation of the principles regulating the *jus ad bellum*. One interesting proposal in this direction is L. May’s revitalization of F. Suarez’s *addendum* of the principle of “proper method” to the Thomistic approach to the *jus ad bellum*. This additional constraint subordinates in part the right to wage a war (*jus ad bellum*) to the effective measures adopted for the achievement

⁸⁶ There is growing literature analyzing the theoretical and practical law and policy implications of the Responsibility to Protect strategy (RtoP). Some of the most interesting contributions are: G. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Washington, D.C.: Brookings Institution Press, 2008; A. Bellamy, *Responsibility to Protect. The Global Effort to End Mass Atrocities*, Polity Press, 2009; J. Hoffman & A. Nollkaemper (eds.), *Responsibility to Protect: from Principle to Practice*, Pallas Publications-Amsterdam University Press, Amsterdam, 2012; G. Zyberi (ed.), *An Institutional Approach to the Responsibility to Protect*, Cambridge University Press, Cambridge, 2013.

⁸⁷ See on this point the pioneering study by K. Chi “Four Strategies to transform State Governance”, IBM Center for the Business of Government, 2008, on-line document available at www.csg.org/.../docs/.../ChiReport.pdf.

of a legitimate victory (*jus in bello*)⁸⁸. Such co-dependence overcomes the strictly classical trichotomisation between the *jus ad bellum*, *in bello* and *post bellum*. One could proceed further and claim that there are even further ways in which connections may be drawn among the different phases of Just War theory. As an example, a suggestion consists in detecting a possible co-dependence of the principles regulating the *jus ad bellum* on the capacity of the (waging war) state to *guarantee reconstruction* of the targeted state after war is over. As already mentioned, the multiplicity of such co-variables is relevant for making sense of long-term stability goals in post-war phases. Since the stability of the same international order is affected by pacification processes in local transitional contexts, the correlation between post-war transitions, the responsibility to protect, and international justice becomes stricter and stricter. In particular, under the lenses of a reformulated approach to Just War theory, the *jus ad bellum* is reconsidered in light of a responsibility to prevent, where preventing cannot be on par with the legitimacy of waging war, but must be reconsidered under a broader and more complex strategy of “anticipatory governance”.

To adopt an anticipatory strategy requires that a complex number of informational sources and layers are properly elaborated and interpreted so that a range of possibilities is preliminary evaluated. To reach this point though, it is necessary to supplement normative theory with statistical analysis and to construct macro-hypothesis on socio-political (transitional) phenomena. This is the case for instance of the recently elaborated Transitional Justice Database⁸⁹, which adopts three basic criteria: a) the examination of multiple mechanisms (trials, truth commissions, amnesties, lustration policies etc.); b) four decades of analysis which allows for long-term trends prediction; c) the avoidance of case-study preselection biases through the inclusion of nearly all countries (a total of 161).

The overall objective of the database is to test a number of formulated hypotheses, starting from current literature and allowing prediction. Overall, the database includes 848 different mechanisms

⁸⁸ L. May, *After War Ends*, Cambridge University Press, Cambridge, 2012, p. 164ff.

⁸⁹ See T.D.Olsen, L.A.Payne, A.G.Reiter, *Transitional Justice in Balance. Comparing Processes, Weighting Efficacy*, United States Institute of Peace Press, Washington, D.C 2010; also see the on-line data at <http://www.tjdbproject.com>.

TABLE 2.2. *Transitional Justice Mechanisms, by Region*⁹⁰

Mechanism	Africa		Asia		Europe		Americas	
	N.	%	N.	%	N.	%	N.	%
Trials	110	41	45	17	74	28	38	14
Truth Comm.	19	28	8	12	18	26	23	34
Amnesties	181	43	136	32	38	9	69	16
Lustr. Pol.	15	28	6	11	20	37	13	24
Reparat.	5	14	4	11	17	49	9	26

implemented in 129 countries since 1970. Out of 161 countries, only 32 have experienced no transitional justice mechanisms to date. Furthermore, there are important differences in distribution of trials and other transitional mechanisms according to regional diversity.

While extremely useful, mere lists of data distribution do not allow *per se* the understanding of complex political and institutional phenomena. In the case, for instance, of the worldwide distribution of number/percentage of transitional justice mechanisms, the lack of consideration of regime transition could lead rather to serious misinterpretations. For example, if the data on lustration policies are examined, these are higher in cases of complex power-structured regimes, such as the former Communist Bloc, than in cases of systems relying mostly on one single dictator. Data are thus to be read in view of well-defined political and institutional hypotheses and only a progression towards such direction can allow scientific reliability to change prediction. It is hoped, therefore, that the next steps will proceed in the direction of an expansion of the paradigm of transitional justice both at the sub-state⁹¹, state and global levels, so that an incorporation of new sectors of political action will provide new data for further elaboration of an overall framework of statistically significant transitional justice research.

⁹⁰ T.D. Olsen, L.A. Payne, A.G. Reiter, *Transitional Justice in Balance*, cit., p. 40.

⁹¹ For an extension of the transitional justice paradigm to sub-state autonomy areas see C. Corradetti, "Transitional Justice and the Idea of 'Autonomy Patriotism' in South Tyrol: towards a Third Autonomy Statute (?)", proceedings of the *Konferenz Südtirolerinnen II*, in G. Grote, H. Obermair, G. Rautz (eds.), *Un mondo senza stati è un mondo senza guerre. Politisch motivierte Gewalt im regionalen Kontext*, European Academy, Bolzano", book 60, European Academy publisher Bolzano/Bozen, 2013, pp. 17-32.