

Religion & Transitional Justice

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This essay considers the relationship between religion and democracy through the lens of transitional justice, drawing on the case of South Africa. Transitional justice broadly refers to the formal and informal processes of dealing with past wrongs committed during the course of ongoing conflict and repression. Such processes are established in the context of an attempted transition away from protracted periods of conflict and/or repression and toward democracy.¹ There are many forms such transitional justice processes take, from criminal trials, truth commissions, amnesty, and memorials, to reparations and programs of lustration whereby individuals are barred from serving in specific public roles. Transitional justice processes are defended as important for their own sake and, in particular, insofar as they satisfy the rights of victims and moral demands on perpetrators. They are also valued for instrumental reasons, especially their con-

Africa make clear. But how should we understand the “justice” of transitional justice? That is, on the basis of what moral criteria or standards should processes of transitional justice be evaluated? As my discussion makes clear, one of the central tasks of transitional justice processes is to help establish the authority of the state, when state institutions are discredited. The prominent participation of religious actors in processes of transitional justice generate novel questions about authority and point toward questions that warrant further theoretical investigation.

Transitional justice processes have been established in dozens of societies around the world over the past few decades. A few of the many contexts in which processes of transitional justice have occurred include South Africa during its transition away from apartheid to democracy, the countries that made up the former Yugoslavia following the wars that accompanied its breakup, and Colombia today as it continues to implement the terms of a peace agreement aiming to end more than fifty years of conflict between the Colombian government and the Revolutionary Armed Forces of Colombia (commonly referred to by its acronym FARC). The South African Truth and Reconciliation Commission (TRC) established in 1994; the International Criminal Tribunal for the former Yugoslavia (ICTY), which operated from 1993–2017; and the currently functioning Special Jurisdiction for Peace (JEP) in Colombia are some of the more prominent examples of such processes.

Societies that call for transitional justice vary in many ways. However, at a certain level of abstraction, we can identify common features.² I focus on three such features and illustrate them using the case of apartheid South Africa. The first is the existence of what I call *structural inequality*. Structural refers to the general terms of interaction among citizens and between citizens and officials, as laid out in institutionally defined rules and norms. For example, legal rules specify who is eligible to hold political office and the process through which political office-holders are selected. Criminal law delimits conduct that is legally impermissible, setting minimal baselines for interaction among citizens. The institutions that help to define the terms of interaction among citizens and between citizens and officials are many, including legal, political, cultural, and economic institutions. Such institutions define terms for interaction by specifying who is permitted to, required to, or prohibited from acting in certain ways, and what the formal and informal penalties for violating such terms are.

When institutionally defined terms for interaction are *structurally unequal*, there exists differential restrictions on opportunities for certain groups of citizens, constraining what they can effectively do and become of value (such as being educated, being employed, participating in government) and constraining their ability to shape the institutional rules for interaction themselves. *Structural inequality* is such that it calls into question the legitimacy of the institutional order; citizens

have a right to rebel. Apartheid South Africa was a paradigmatic case of pervasive structural inequality, where institutional rules and norms differentially and systematically constrained the opportunities of black South Africans and excluded black South Africans from any effective role in defining the institutional order.³ Under apartheid, black South Africans were stripped of the right to vote, were forcibly relocated according to government-designated racial categorizations, and faced employment restrictions and discrimination. Structural inequality can exist in a less explicitly intentional and centralized manner. Differential investment or allocation of resources in certain regional areas, access to economic opportunities structured on the basis of clientelist networks, and patterns of informal discrimination not effectively prohibited by law and sanctioned according to social norms are some of the many forms structural inequality can take.

The second feature that characterizes transitional societies prior to the establishment of any process of transitional justice is what I call *normalized collective and political wrongdoing*.⁴ This feature highlights the fact that during periods of conflict and/or repression, human rights violations (the *collective and political wrongdoing*) become *normalized*: that is, a basic fact of life for (certain groups of) citizens. The normalization of human rights violations is reflected in the numbers of victims of rights abuses that exist in transitional societies, ranging from hundreds to thousands to hundreds of thousands and, in some cases, millions. Wrongdoing is *collective and political* in the sense that it characteristically targets groups of citizens on the basis of a particular affiliation or identity; religious identity can be one targeted identity, ethnic and national identities are others. Wrongdoing is *normalized* in two ways. First, it implicates state agents or actors acting with the permission of the state or informally on behalf of the state, as in the case of paramilitaries. Groups contesting the state may also be implicated in rights violations, with contexts varying in the proportion of rights abuses committed by government forces versus groups contesting the state. Second, wrongdoing is political in the sense of being bound up with the pursuit of political objectives. Maintaining a regime, acquiring effective control of land, overthrowing a regime, separating politically from a state, or eliminating a particular group via a genocidal campaign are a few of the objectives pursued. For example, in defense of apartheid, South African security forces routinely arrested and tortured anti-apartheid activists; the death of Black Consciousness leader Steven Biko in detention was one especially prominent case. The systematic torture, killing, abduction, and severe ill-treatment that occurred during the apartheid era became the subject of the mandate of the South African TRC.

Religion plays no simple or single role in pervasive structural inequality or in normalized collective and political wrongdoing. Religion has been a root cause of conflict, a marker of those targeted for repression and subject to structural inequality, and a source of justification of repression and the basis for privilege in an unequally structured institutional scheme. When religion becomes intertwined

with ethnic and national identity, as is the case in Northern Ireland, for example, then differences in national aspiration, rather than differences in theological belief, explain the root sources of conflict. In other cases, theology itself can provide resources in defense of and/or resistance to repression and oppression. The Afrikaans Reformed Church vigorously defended apartheid on religious grounds.⁵ By contrast, the South African Council of Churches (SACC) was heavily involved in supporting the anti-apartheid movement.⁶ The Catholic Church supported dictators in South America such as Chile's Augusto Pinochet and the military junta in Argentina, while also serving as a source of moral critique of such regimes.⁷

Victims of human rights abuses have been targeted because of their religious affiliation and the perpetrators of human rights abuses have included religious officials.⁸ In Rwanda, thousands who tried to escape the genocide by finding refuge in a Catholic church were instead killed.⁹ In contrast, in retaliation for speaking out on behalf of the poor and against human rights violations committed by the

tial uncertainty, whether and how a community addresses past wrongs can play a signaling function. Processes that deal with past wrongs in a serious manner can underscore a recognition on the part of government officials that the modes of interaction in the past are unjustified and can reflect a commitment to establishing different forms of interaction in the future.

In the aftermath of extended conflict and repression, societies attempting to transition from war to peace and from repression to democracy increasingly engage in efforts to reckon with past wrongdoing. Processes of transitional justice are formal and informal responses to legacies of human rights violations stemming from conflict and/or repression. Philosophical literature and literature in political theory on transitional justice focus on how to understand the moral defensibility of choices about how to treat past wrongdoing. While the processes established in the name of transitional justice continue to expand and can include

is taken to demand deprivations that typically cause suffering, characteristically in the form of punishment, of perpetrators of wrongdoing. Insofar as responses to wrongdoing fail to punish perpetrators, such responses require justification, and one kind of justification could be a choice to engage in an act of mercy. The em-

be faithful to our obligations to God and to humanity. When relating to human beings, the covenant suggests that we are to love one's enemies and friends unconditionally and to forgive unconditionally. Such forgiveness is not contingent upon conditions and can inspire the repentance in others that our recognition of God's unconditional forgiveness inspires in us.¹⁷ Guided by this conception, forgiveness and repentance can be achieved among citizens in transitional communities.

In contrast, in my own work, I have argued for a distinctive conception of transitional justice, not reducible to either retributive or restorative justice. Drawing on David Hume's notion of the circumstances of justice, I argue that in the circumstances of justice, the problem of justice that is salient is distinctive from the problem addressed by familiar forms of justice such as retributive or corrective justice. The circumstances of transitional justice include the three features highlighted above: namely, pervasive structural inequality, normalized collective and political wrongdoing, and serious existential uncertainty. Rather than turning to theology, I defend the claim of the distinctiveness of transitional justice by developing a philosophical account of justice that takes context seriously.¹⁸ My argument examines the circumstances of what I call "stable democratic societies," circumstances implicitly assumed to be present in the societies for which philosophers articulate conceptions of what retributive or distributive justice require. Such features include limited structural inequality (so that the institutional order remains legitimate even as reform is always possible) and individual and personal wrongdoing (so that ordinary criminality not implicating the state is presumed to be the subject of a retributive response). Shifting circumstances to transitional contexts, however, the core arguments for why retribution, for example, is necessary become much less plausible. For one thing, responding to perpetrators is only part of the problem salient in transitions. The standing of the state to respond to past wrongs is something to be established and cannot be assumed (for reasons I discuss below). And the efficacy of the punishment of one perpetrator to restore the equality of the victim, who was subjected to a form of normalized wrongdoing implicating the state and committed against a background of pervasive inequality, is doubtful.

The core normative aim of transitional justice, I claim, is transforming political relationships in a just manner.¹⁹ The overarching goal is to alter the basic terms structuring interaction among citizens and between citizens and officials so that recent histories of apartheid, genocide, systemic impoverishment, and corruption will not define or be repeated in the future. This process of transforming relationships links transitional justice with political reconciliation, the process of repairing damaged political relationships. In fleshing out what such transformation requires, I draw on core concepts in the liberal tradition that include relational concerns. For example, consider the ideal of the rule of law, which specifies how legal institutions should structure political relationships. If you adopt a perspec-

The explicit appeal by some scholars to theological justifications for forgiveness in the context of the justification of public policy choices for dealing with past human rights abuses is controversial. Indeed, appealing to the importance of justifying policies on the basis of public reasons, scholars such as Amy Gutmann and Dennis Thompson have explicitly argued that justifications of processes of transitional justice must be based on reasons that are accessible to all citizens and therefore cannot include an appeal to specifically religious considerations of the kind articulated above. In response to the justification of the South African Truth and Reconciliation Commission offered by many of its proponents, includ-

concept of political reconciliation or the challenges of transitional contexts. Secular liberal accounts of transitional justice, such as my own, can and do articulate it as a substantial value that is rich in content and that speaks to actual challenges in transitions.

For another, to reject liberal democracy is to reject a constitutive element of the aspiration of transitional societies. This aspiration should, I believe, influence our understanding of reconciliation and of concepts including transitional justice itself. Transitional justice concentrates on a subset of the transitions of which we might speak. Instead of talking about a transition to liberal constitutional democracy, we could talk of a transition to authoritarian rule or an Islamic republic. But those objectives do not normatively respond to the moral complaints of citizens during conflict and repression in the manner that liberal democracy does. It is with demands for respecting human rights and for democratic inclusion that protest movements lead to the fall of repressive regimes. Moreover, respect for rights and democracy are needed for citizens to be equals within the community, for only with opportunities for democratic participation can citizens have turns to both rule and be ruled. The normative aim of a liberal democratic political community should influence our understanding of the kinds of relationships we want to promote, and the basis on which official policies and processes designed to deal with past wrongdoings should shape our understanding of the goals to which such policies should strive.

A different rejoinder to my argument would not reject the priority of liberalism but would suggest that it is possible to have religious conceptions of justice that justify forgiveness in liberal democratic contexts. As noted earlier, and echoing philosopher John Rawls's notion of justification as the product of an overlapping consensus, Philpott, in his later work, defends his notion of transitional justice, which draws on restorative justice and thus prioritizes forgiveness in part by showing how it could be the subject of an overlapping consensus among Muslims, Christians, and Jews.³⁰ I note here or d 0 -1.227 Td [(tiectives d)1 (o no8an.227 T386v23verla -0.0quotio27 Td

al contexts are frequently from already marginalized backgrounds, and the experience of victims has been one of denial of their experience on the part of governments and isolation or ostracism within their communities in the aftermath of certain rights violations. Victims often bear the consequences of their wrongdoing alone and those consequences, not just in terms of immediate harm but also in terms of social effects, are ongoing. Thus, paying attention to the context in which forgiveness is being urged is critical. Requiring for policy success that victims overcome their anger risks failing a second time to take seriously the wrongs to which they were subjected and the right of victims to be angry in response. Second, overcoming anger on the part of victims does not resolve the broader background structural inequality and normalization of wrongdoing that rendered victims vulnerable and contributes to the ongoing effects they suffer from their victimization. Moreover, it is precisely this structural inequality and the conditions that enabled the normalization of wrongdoing that must be addressed to prevent a recurrence of conflict, repression, and their characteristic wrongdoing.

Rejecting the suitability of forgiveness as an aim toward which public policies and processes of transitional justice should strive does not imply any evaluation of the permissibility or justifiability of forgiveness as an individual choice of particular victims. Nor is it to set limits to what private organizations, including religious organizations, may advocate. It is rather to criticize framing policy success or failure as a function of overcoming the anger and resentment constitutive of forgiveness.

One further area regarding religion has received less attention in the literature than one might expect. This is in part because it is bound up with questions of authority that have garnered less interest than they should. As Philpott has correctly noted, religious figures frequently play a critical role in the promotion of transitional justice and political reconciliation, and indeed take up official roles in transitional justice processes. In Philpott's words,

In South Africa, Christian churches and theologically minded leaders, as well as Muslim leaders, urged a truth and reconciliation commission. . . . Religious communities in Brazil courageously conducted an underground inquiry into the truth. Similarly, Chile's Catholic Church was instrumental in investigating abuses under the rule of General Pinochet. . . . East Timor's Nobel Prize-winning Bishop Carlos Belo was instrumental in calling for reconciliation. . . . In Guatemala, Bishop Juan Gerardi . . . even formed and conducted an entire separate commission.³¹

The fourth and final circumstance of transitional justice, what I call *the* *circumstance of uncertainty*, provides resources for explaining why religious figures play such prominent roles. There are two dimensions of uncertainty with respect to authority present in transitional contexts. The first narrowly concerns

uncertainty with respect to the standing of the state to deal with past wrongs. Philosophical explanations of the authority of the state to deal with wrongdoing through criminal trial and punishment characteristically assume that the government of concern is legitimate and that it is not directly implicated in the wrongdoing under consideration. As such, the standing of the state to respond to wrongdoing stems from its ability to be an impartial party and its status as a representative of a community's defensible values, which criminal wrongdoing flouted.³² That explanation of why retributive justice is appropriately meted out by the state will

past wrongs. When consolidated, the explanation for why any official has the authority to issue rules governing the conduct of citizens or investigate past wrongs in an official capacity will not appeal to his or her moral stature. Rather, it will appeal to the process through which he or she came to assume the position he or she now holds. A final question warranting further explanation is how to understand the relationship between the (ideally temporary) reliance on moral exemplars for the authority of transitional justice processes and the goal of legitimizing state in-



