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Edited by Jon Elster

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I

Introduction

Jon Elster

After the fall of Baghdad in April 2003, the issues of the “de-Baathification” of Iraq and of compensation to the victims of the previous regime were immediately raised. Historical analogies with denazification and decommunization abounded. For observers and actors who want to learn from the past, and to avoid the mistakes of the past, the contributions to the present volume should provide useful food for thought. As the Iraqi regime was hardly the last surviving dictatorship, the lessons may remain useful in the indefinite future.

In a change of political regime, incoming leaders often want to punish or neutralize agents and leaders of the previous regime. In a transition to an authoritarian or totalitarian system, these measures are usually taken by executive fiat. The purges of the German judiciary after 1933 (Müller 1991, ch. 8) or of German schoolteachers in the Soviet occupational zone after 1945 (Welsh 1991) were not constrained by democracy or the rule of law. After transitions to democracy *from* an authoritarian or totalitarian regime, however, the new leaders usually want to demarcate themselves from the practices of their predecessors. Sometimes, to be sure, they will claim that their former oppressors have no grounds for complaining if they are treated by their own lawless procedures (for an example see Woller 1996, pp. 140–41). More frequently, however, the return to democracy is accompanied by the desire to see transitional justice done in an orderly manner, to prove that “We are not like them,” as Vaclav Havel said. In practice, nevertheless, this desire may yield to the even stronger desire for punishment of the obviously guilty. This tension is so common as to be almost constitutive of transitional justice.

Retribution against wrongdoers, including dismissal of compromised officials from public service, is one aspect of transitional justice. The other main aspect is reparation to victims – restitution of property, compensation for suffering, and more symbolic measures such as the cancellation of unjust legal convictions. In the present volume, most of the contributors focus on the retributive component. Issues of reparation and compensation are the topic of the chapter by Tyler Cowen, who addresses the conceptual problems inherent in the

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idea of “undoing past wrongs,” and of Chapter 12, in which Aviezer Tucker offers an overview of measures of rectification in recent episodes of transitional justice. Wrongdoers and victims do not, however, exhaust the set of agents of transitional justice. One might also want to address the moral and legal status of those who, while not themselves wrongdoers, were *beneficiaries of wrongdoing* (Mamdani 1996). Other relevant categories are *resisters* to wrongdoing, *helpers* of victims of wrongdoing, and *neutrals* who did not engage in, benefit from, or oppose wrongdoings. By and large, the fate of these individuals after the transition has not been systematically studied, an exception being the survey of resisters in Lagrou (2000). The recent negotiations involving Swiss banks, Italian insurance companies, and German firms that benefited from Nazi wrongdoings (Authers and Wolffe 2002, Eizenstat 2003) involved institutions rather than individuals.

Retribution and reparation are knowledge-based processes, since wrongdoers and victims have to be identified on the basis of evidence. The gathering of evidence may also become an end in itself, as in some of the recent truth commissions (Hayner 2001) that have investigated human rights violations carried out under authoritarian or totalitarian regimes. (I write *under* rather than *by*, since several of these commission have also examined human rights violations carried out by opponents to the regime.) With the exception of the South African Truth and Reconciliation Commission discussed by Alex Boraine in his chapter of this book, these commissions have usually not identified any wrongdoers. In some cases, though, the names of perpetrators have been leaked to newspapers, exposing them to informal social ostracism. In some countries, notably Chile (see Chapter 12) and South Africa, the findings of the truth commissions have provided the knowledge base for the reparation process.

THE UNIVERSE OF CASES

The present volume focuses on *transitions to democracy in the twentieth century*. Although this choice makes for greater homogeneity of cases, it entails the cost of ignoring otherwise interesting episodes, such as the English and French Restorations or the two instances of transitional justice that occurred after the overthrow of the Athenian oligarchs in 411 and then in 403 B.C. For a discussion of these episodes, the reader is referred to my 2004 monograph (Elster 2004) and to some brief comments in the Conclusion to the present volume.

The twentieth century offered some thirty-odd cases of transitional justice, in five geographical and chronological clusters: Western Europe and Japan after 1945, Southern Europe around 1975, Latin America in the 1980s, Eastern Europe after 1989, and Africa from 1979 to 1994. The chapters in Part II of the present volume discuss transitional justice after 1945 in Austria, Belgium, Denmark, France, Germany, Hungary, the Netherlands, and Norway. While broad, the coverage is not complete. For the purges and trials in Italy, the reader is referred to the outstanding study by Woller (1996). For the Japanese war trials and purges, Taylor (1981), Harries and Harries (1987), Dower (1999), Cohen

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(1999), and Minear (2001) provide comprehensive analysis and criticism. For other cases not discussed in the present volume – and for several of those that are covered herein – Kritz (1995) is an invaluable sourcebook.

The next cluster of transitions to democracy occurred in the mid-1970s, with the fall of the dictatorships in Portugal, Greece, and Spain. Whereas the 1945 transitions all stemmed from the same cause, the end of World War II, the temporal coincidence of these South European transitions seems to have been an accident. From a comparative point of view, the Spanish transition (Aguilar 2001) is the most interesting. Spain offers in fact the only example in the universe of cases of a consensual decision to *abstain* from any form of transitional justice. Although often held up as a model, notably in the Polish and Hungarian transitions after 1989, the Spanish example did not find any imitators. Other countries have refrained from purges and trials through self-amnesties granted by a dictatorial regime before the transition, as in Brazil and Chile, as part of a negotiated package with the incoming democratic leaders, as in Uruguay, or as a condition imposed by a third party, as in Rhodesia.

A third wave of transitional justice, owing to a domino effect beginning in Poland and ending in Bulgaria, occurred in a number of ex-Communist countries after 1989. In Chapter 9, Aviezer Tucker offers a survey of trials and purges in East and Central Europe. He does not deal with the former German Democratic Republic (GDR), which is the topic of the contribution by Claus Offe and Ulrike Poppe. Except for the Baltic states, there has been no transitional justice in the former USSR – not because of any consensual, negotiated, or imposed decision to abstain, but because of the lack of an organized demand for justice. The closest analogue to decommunization in the USSR may have been the earlier process of de-Stalinization (Smith 1995, Adler 2001). It is noteworthy that among the countries subject to decommunization in the 1990s, several had already been subject to denazification after 1945. As Offe and Poppe note, after 1990 some Germans argued that “this time we are going to do it right,” as if a rigorous reckoning with communism could redeem the laxist practices after 1945. In Poland, the newly created Institute for National Remembrance is authorized to investigate crimes committed under Nazi as well as under Communist rule.

In Latin America, the 1980s saw transitions to democracy in Argentina, Bolivia, Brazil, Chile, and Uruguay. Members of the military dictatorship were put on trial in Argentina (Chapter 10) and Bolivia (Mayorga 1997). Reparations were initiated in Argentina, Brazil, Chile, and Uruguay. In the last three countries, therefore, it might appear as if compensations were paid to victims of perpetratorless crimes. In Argentina, too, the number of convicted officers was a small fraction of the actual wrongdoers, most of whom benefited from the “Due Obedience” law that the military extracted from President Alfonsín in 1987. In both Chile and Argentina, however, there are recent signs that the amnesties and self-amnesties might be canceled, whence the appropriateness of the title of Acuña’s chapter, “Transitional Justice in Argentina and Chile: A Never-Ending Story?”

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On the African continent, the most important cases of transitional justice are those of Ethiopia (Haile 2000) and South Africa (Chapter 13). The former is an extreme case of “protracted transitional justice.” The previous (Dergue) regime fell in 1991; trials began in 1994 and were still continuing in 2005. In 2001, the special prosecutor announced that they would end in 2004. In South Africa, the Truth and Reconciliation Commission created incentives for wrongdoers to come forward if they could show that their acts had been motivated by political goals rather than by malice or desire for gain (Chapter 13). A similar procedure was adopted in Poland (Chapter 9), where candidates for high elective or appointive office have to declare whether they were “conscious collaborators” between 1945 and 1990. If they admit it, no further action is taken, except that the record is made public. Voters or hierarchical superiors then decide how to respond to the information. Candidates who falsely deny that they collaborated are banned from public office for ten years. An early precedent of this “incentive-based mechanism” (Nalepa 2003) was a proposal (not implemented) made in August 1944 by Mauro Scoccimarro, the Communist responsible for purges in the Italian administration. He proposed that all officials above a certain level should be retired with generous pensions, with the possibility of appeal. If they won the appeal, they would be reinstated; if they lost, they would lose not only their job but their pension (Woller 1996, pp. 191–92).

CLASSIFYING THE CASES

In classifying these episodes we can pay attention to the nature and duration of the autocratic regime, and to the nature and duration of the process of transitional justice itself. The regime as well as the process may be endogenous or exogenous. They may also be of short or of long duration. The place of a given episode of transitional justice on these dimensions can affect the political and emotional dynamics in a number of ways.

The autocratic regime that preceded the transition to democracy may either have originated within the nation itself or been imposed by a foreign power. The process of transitional justice may either be initiated by the new regime or carried out under the supervision of a foreign power. Combining the two dichotomies, we may classify the episodes as follows:

Some cases are ambiguous or may require some comments:

- Italy and Austria might have a place in all four cells of Table 1.1. In Italy, the Germans imposed the harsh and detested Salò regime after the fall of Mussolini. Although the Anschluss of Austria was technically an invasion, the ensuing regime had strong national support. In both countries, purges and trials were carried out by the allied military government as well as by the national one (see Deák’s chapter).
- Over time, transitional justice in Germany after 1945 became increasingly endogenous and, as a result, increasingly lenient.

TABLE 1.1

	Endogenous Transitional Justice	Exogenous Transitional Justice
Endogenous autocratic regime	Latin America South Africa Bulgaria Romania Ethiopia Ethiopia Hungary 1945 Greece Italy Spain	Germany 1945 Japan Austria Rhodesia
Endogenous autocratic regime	Poland Hungary 1989 Czechoslovakia Countries occupied by Germany during World War II	Former GDR

- Bulgaria was unlike other East European countries in that the Soviets were not seen as an occupying force, because of the positive image of Russia as having liberated the country from “the Turkish yoke” in 1878.
- Romania, too, was special. Once a faithful member of the Communist bloc, the country later gained full independence.
- Transitional justice for the former East Germany is the most complex case. The transition itself was endogenous: the regime collapsed from within. The reunification treaty, too, was a voluntary agreement between two sovereign states. The former East Germany, although not coextensive with the regime that was to judge it, was at least included in it. Yet in practice, the former East Germans were judged by former West Germans and within the legal and constitutional framework that unified Germany inherited from West Germany. In one sense, nevertheless, the trials were endogenous, since the Unification treaty laid down that any acts to be tried had to be defined as crimes according to the penal codes of both countries.

Pretransition regimes as well as the process of transitional justice under the new regime may be of variable duration. Consider first the pre-transitional regime (or regimes). At one extreme, the USSR endured for almost 75 years. At the other extreme, the puppet Nazi governments in World War II lasted for 5 years. Intermediate cases are Mexico (70 years), GDR (57 years), the apartheid regime in South Africa (45 years), Portugal (44 years), Eastern Europe (ca. 40 years), Spain (40 years), Chile (26 years), France before the First Restoration (25 years), Italy (23 years), Brazil (20 years), Bolivia (18 years), Ethiopia (17 years)

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Uruguay (12 years), West Germany (12 years), England before the Restoration (11 years), Argentina (7 years), and Greece (7 years).

Consider next the temporal dimension of transitional justice itself. In *immediate transitional justice*, proceedings begin shortly after the transition and come to an end within, say, five years. There are three contrasting cases: (i) In *protracted transitional justice* the process starts up immediately but then goes on for a long time until the issues are resolved. This pattern is found in Bolivia, Ethiopia, Germany after 1945, and most post-Communist countries. (ii) In *second-wave transitional justice* we can distinguish three stages. After the processes are initiated and completed in the immediate aftermath of the transition, there is a latency period during which no action is taken, until, decades later, new proceedings are undertaken (Rousso 1990). The Papon and Bouvier trials in France, as well as the recent process of compensating Jewish bank account holders and slave workers, fall in this category. The reopening of cases against Argentinean officers also provides an example. It is not fanciful to imagine that South Africa may eventually offer another. (iii) In *postponed transitional justice*, the *first* actions are undertaken (say) ten years or more after the transition. The prosecution of Pinochet is a paradigmatic example.

DEPENDENT VARIABLES

The contributors to the present volume are mostly social scientists and historians rather than lawyers, hence their approach tends to be explanatory rather than normative. We may try, therefore, to identify the main dependent variables or explananda of transitional justice, as well as the main independent or explanatory variables considered later.

The dependent variables may be conceptualized as a series of *decisions*. The most fundamental is the decision whether to address the wrongdoings of the past at all, or rather draw a “thick line” through the past. If the former option is chosen, the new regime may weigh the options of *justice* or *truth*. The latter alternative includes not only establishing truth commissions, but also giving individuals access to their security files, so that they can learn what they were suspected of and even who informed against them. Prospective employers, too, may have the right to inspect the file of an individual before he or she is hired. Hence, as Offe and Poppe argue in their chapter, the German Gauck agency “can best be described as a hybrid of a public archive (distributing information) and an investigative agency triggering punishment.” The extreme solution is to put the information in the public domain. Thus on March 20, 2003, a list identifying seventy-five thousand spies and informers who had denounced friends and neighbors to the Communist regime was posted on the Web site of the Czech Ministry of the Interior and was also made available in print. In February 2005, a Polish journalist obtained a list of 240,000 alleged collaborators that was subsequently leaked onto the Internet. In Argentina, Brazil, and Chile, the lack or low level of prosecution was to some extent offset by the publication of

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the names of wrongdoers. In Brazil, for instance, the Archdiocese of Sao Paulo published a list of 444 torturers in 1985.

Once a regime decides to move toward retributive or reparative justice, it has to decide which individuals to target and how to deal with them. The task of retribution has two aspects: criminal trials (including plea bargaining) and administrative sanctions. There is great variation in the ways new democracies address these questions. In Latin America and South Africa, a handful at most of those who ordered, facilitated, or carried out human rights violations have been brought to trial. There have essentially not been any purges in the administrations. At the other extreme, countries that had been occupied by Germany during World War II imposed some kind of legal punishment on large number of individuals, up to 2 percent of the population (Norway). Extensive purges of the administration were also carried out. In France, for instance, about 10 percent of the judges were sanctioned in one way or another, half of them by discharge from the service (Bancaud 2003, p. 191).

Germany after 1945 and the ex-Communist countries fall somewhere in the middle. Although the number of executed death penalties (per million of population) in Germany after 1945 exceeded that of any German-occupied country, the percentage of the citizens who were tried and convicted was quite small (see Cohen's chapter). In West Germany, the purging of the administration was an utter failure; the Nazi judiciary, for instance, was preserved intact (Müller 1991). In East Germany, trials and purges were more extensive but also more ambiguous, as they tended to target anti-Communists as well as Nazis. In the former Communist countries, there have been very few convictions of major political or military figures, and only a sprinkling of convictions of lower-level officials. The statistic cited by Offe and Poppe in their chapter on transitional justice in the former GDR is stunning: "As of March 31, 1999, 22,765 investigations were opened, leading to the opening of just 565 criminal court cases. Verdicts were reached in 211 cases, of which just 20 cases resulted in actual prison sentences." Here, at least, purges were more effective. By 1992, for instance, fully 50 percent of the former GDR judges and prosecutors had lost their jobs (Offe 1997, p. 95). Other countries in the region, however, saw minimal de facto changes in the administration, in spite of seemingly harsh legislation (see Tucker's Chapter 9).

A further issue concerns the public measures taken to reintegrate and resocialize convicted wrongdoers once they had served their sentence. In his chapter, Huyse makes a pioneering contribution to this often-neglected question. His discussion concerns Belgium and the Netherlands, where collaborators were in a minority and had to confront the hostility of the population at large. In Germany, by contrast, convicted war criminals did not suffer from much opprobrium. In fact, "The fewer the number of war criminals sitting in Allied prisons, the more uncompromising the solidarity being expressed for them" (Frei 2002, p. 207). To my knowledge, there has been no systematic comparative study of the long-term consequences of transitional justice, be it on the wrongdoers themselves or on their children. Anecdotal evidence suggests that the informal

social ostracism to which they were exposed could be deeply hurtful. As Dahl asserts at the end of his chapter, the bitterness felt by the children of Nazi collaborators has led them to demand compensation for the way in which, for no good reasons, they were treated by “good Norwegians” after the war. I suspect that as in many similar cases, those most active in persecuting them had themselves been passive at best during the occupation.

The patterns of reparation do not correspond in any direct way to patterns of retribution. In Latin America, victims of the dictatorships have received substantial compensations even when the agents of the regime have gone free. West Germany, too, has a better, although flawed (Pross 1998), record with regard to reparation than to retribution. It is tempting to see reparations in these cases as “blood money,” analogous to the ancient institution of *Wergeld*. Whether or not these reparations can actually be *explained* as substitutes for retribution, some recipients have viewed them as such and rejected them for that reason. In German-occupied countries, “Aryanized” Jewish properties were returned, or compensation paid when the assets had been liquidated. In South Africa, the mandate of the Truth and Reconciliation Commission had a narrow definition of victimhood, excluding heirs of those who lost their land in the Land Act of 1913 or those who were subject to forcible resettlements during the apartheid era. The only form of suffering that counted as grounds for compensation was that caused by direct physical mistreatment. On April 17, 2003, President Thabo Mbeki announced that the government will pay approximately \$85 million in reparations to more than nineteen thousand apartheid victims who testified before the Truth and Reconciliation Commission. In the former Communist countries, restitution of or compensation for confiscated property has taken place at a vast scale (Pogany 1997, Quint 1997). Reparation has also been offered for physical suffering; thus by 1996 Poland had paid out about \$125 million to former political prisoners and their heirs.

Procedural choices also enter among the dependent variables. Virtually without exception, trials and purges after the transition to democracy have deviated from normal legal and administrative procedures. Deviations include the use of special courts, political screening of judges and jurors, collective guilt, presumption of guilt (inversion of the burden of proof), lack of adversarial procedures and appeal mechanisms, extension of statutes of limitation, and, especially, retroactive legislation. Often, the retroactive laws have been disguised in various ways. They were frankly acknowledged in Austria, Denmark, and Holland after 1945 but denied, by various implausible subterfuges, in Belgium, France, Italy, and Norway after 1945 and in Czechoslovakia and the former GDR after 1989.

INDEPENDENT VARIABLES

To explain the variation in these patterns of retribution and reparation, we may first appeal to the mode of transition. Broadly speaking, we may distinguish among three main types of transition to democracy: by *negotiation* between an

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outgoing and an incoming elite, by the military *defeat* of the autocratic regime, and by its implosion or *collapse*. In addition, there is the unique Chilean case of uncoerced *abdication* from power.

Among the cases discussed in the present volume, the clearest cases of negotiated transitions to democracy are Argentina, Poland, and South Africa. In Argentina, the outgoing military leaders used their control over the armed forces as bargaining leverage to ensure that retribution would be limited in scope (see Acuña's chapter). In Poland, the negotiated agreement did not include the creation of a fully democratic regime. As the Communist leaders (mistakenly) thought the party would gain enough seats in the first partially free elections to stay in power, they did not seek guarantees against prosecution. Observers and participants alike, however, seem to agree that there was a tacit agreement that the Communist elite would be spared (see, for instance, Osiatynski 1991, p. 841). Although the first post-transition government respected this implicit promise, its successors did not. Unlike the Argentinean military, the Communist leaders could not enforce it by a threat of violence. Decommunization in Poland is still proceeding today. In South Africa, the reasons why the amnesty negotiated by the outgoing white elites has so far been respected are their control over the economic resources of the country and the fear that extensive trials and land reform might trigger a "Zimbabwe" scenario.

Although the Polish transition involved genuine negotiations, the regime changes in other Communist countries increasingly approached the collapse mode. In Hungary, what began as genuine bargaining between the regime and the opposition ended with the virtually complete victory of the latter. Although no written documents prove the existence of a gentleman's agreement to spare the Communist leaders from prosecution, many concordant statements suggest that some kind of deal was struck (e.g., Halmai and Scheppele 1997) and largely respected. In East Germany and Czechoslovakia, where the transitions were even closer to the collapse end of the continuum, no deals were made. These regimes were also notable for deploying harsh repressive measures up to the very end of their existence. Moreover, unlike what happened in Hungary and Poland, the ex-Communist parties never got a majority in parliament that they could use to limit the extent of transitional justice. We might expect, therefore, more extensive retributive measures in these countries. Although this expectation is to some extent fulfilled, the level of *successful* trials and purges was nevertheless low. I return to this puzzle later.

In Germany and German-occupied countries, the former elites had no military and little political leverage that they could use to protect themselves from prosecution. In Germany itself, former Nazis did with considerable success lobby the major and especially the minor political parties to halt denazification, enact amnesty laws, and commute the sentences of war criminals (Frei 2002). In German-occupied countries, the collaborators were by and large powerless. If some of them were treated leniently, it had more to with *raison d'état* than with their bargaining or lobbying power. The diametrically opposed case is that of the Chilean dictatorship, which stepped down after having first enacted a

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self-amnesty and then created a semidemocratic constitution that was intended to block prosecution forever through an ingenious arrangement of interlocking appointment powers. As Acuña details in his chapter, this bastion is now beginning to crumble.

Another factor that may explain low levels of retribution as well as reparation is the *scarcity* of money and qualified personnel often found in periods of transition. In Western Europe after 1945 and Eastern Europe after 1989, transitional justice had to compete for resources with, respectively, economic reconstruction and economic transformation. In countries that were devastated by war or by a massively inefficient economic organization, compensation to victims was of necessity severely limited. After 1945, the prosecution of economic collaborators was also limited by the need to rebuild the economy. For the same reason, skilled administrators were often spared. In his chapter, Roussio cites a sibylline statement by the French provisional government in 1944 that in purging the administration, “it is good to show intransigence but only to the extent that it does not interfere with the functioning of the services.” Although the same argument has been used to explain the low level of prosecution against the former Communist nomenklatura (e.g., Walicki 1997, p. 195), Tucker argues in Chapter 9 that Communist officials rarely possessed expertise at any tasks beyond that of enriching themselves.

A more compelling explanation of low levels of prosecution in Eastern Europe, as well as in Germany and some German-occupied countries after 1945, is the scarcity of competent and untainted legal personnel. In Eastern Europe, as Tucker emphasizes in Chapter 9, members of the legal profession were nothing more than party hacks. In Germany, judges harnessed their undeniable competence to the task of minimizing the guilt of all members of the Nazi regime, beginning with themselves (Müller 1991). In France, all but one eccentric judge swore the oath to Pétain. After the Liberation, judges were widely suspected of sympathy with the collaborators. Ironically, de Gaulle himself contributed to this state of affairs when he deliberately selected two lawyers who were compromised by their relations with Vichy as president and prosecutor in the High Court of Justice. “Their past errors were for de Gaulle a guarantee of a certain docility” (Roussel 2002, p. 513). As is well known, de Gaulle chose for reasons of state to impose strict limits on transitional justice in France and to create the image that the collaborators were merely “a handful of misérables” (Baruch 2003). To this end, compromised judges were to be preferred to those having roots in the resistance.

In the trials of leaders and agents of the former GDR, however, the (former West German) judges were both competent and untainted. The low level of successful prosecutions remains a puzzle. As Offe and Poppe argue in their chapter, one explanation may be found in the low level of resources allocated to the investigations and to the high level of respect for the rule of law and notably for the clause in the unification treaty that individuals might be tried only for acts that were crimes under both East German and West German law at the time they were committed. It has been argued (Sa’adah 1998, p. 177) but remains