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978-1-107-00301-9 - Transitional Jurisprudence and the European Convention on Human rights: Justice, Politics and Rights

Edited by Antoine Buyse and Michael Hamilton

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## TRANSITIONAL JURISPRUDENCE AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The European Convention on Human Rights has been a standard-setting text for transitions to peace and democracy in states throughout Europe. This book analyses the content, role and effects of the jurisprudence of the European Court relating to societies in transition. It features a wide range of transitional challenges, from killings by security forces in Northern Ireland to property restitution in Central and Eastern Europe, and from political upheaval in the Balkans to the position of religious minorities and Roma. Has the European Court developed a specific transitional jurisprudence? How do politics affect the ways in which the Court's judgments are implemented? Does the Court's case-law itself become woven into narratives of struggle in transitional societies? This book seeks to answer these questions by highlighting the unique role of Europe's main guardian of human rights, the Court in Strasbourg. It includes a comparison with the Inter-American and African human rights systems.

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Justice, Politics and Rights

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ANTOINE BUYSE

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## FOREWORD

RUTI TEITEL

We are in a ‘global’ phase of transitional justice, marked by the proliferation of accountability mechanisms and processes at and across different levels – international, regional and domestic.<sup>1</sup> What all of this means theoretically and practically is the central theme of this probing book. This is a work that questions prevailing assumptions, in particular regarding the European Court of Human Rights, through cross-cutting comparative research.

The point of departure is the current state of the field of transitional justice. The global phase has three dimensions: the globalization of the context; the concern for actors and interests beyond the state, both public and private; and the expansion, entrenchment and normalization of accountability as a response to conflict, wherever it occurs and whatever its forms. Moreover, this is a time in which courts are increasingly the institutions called upon to respond to conflict. The purposes of and hopes for transitional justice are extended beyond state building to advance the promotion and maintenance of human security.

Through a comparative lens, the book aims to engage with the jurisprudence of regional tribunals. It interrogates the parameters of transitional justice and it looks to the law that has emerged to assess its form – the relevant modality. What distinguishes this jurisprudence? What might we learn about the rule of law in transitional times and, given the permanency of these judicial structures and their principles of jurisdiction, what relation might these precedents bear to ordinary times?

More specifically – what techniques are employed and what means of supervision exist in the European region? Here, the book explores the central principles which recur in judicial review such as the margin of

Ruti Teitel is Ernst C. Stiefel Professor of Comparative Law, New York Law School; author, *Transitional Justice* (New York: Oxford University Press, 2000).

<sup>1</sup> See R. Teitel, ‘Transitional Justice Globalized’, *International Journal of Transitional Justice* (2009).

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appreciation – a principle of judicial deference; proportionality – implicating a closer look at means–ends analysis; and yet another engagement with ‘militant democracy’, i.e. of closer scrutiny in instances where certain democracy related rights are under threat but where the end somehow justifies the means of limited rights restriction – all in the name of preserving other orders.<sup>2</sup> In this regard, the volume’s contributors emphasize the role of the oldest such regional court – the European Court of Human Rights which enforces the European Convention – but also include perspectives from the Americas and Africa.

The canon of human rights jurisprudence has itself been shaped by the confrontation with transition and related problems. What exactly might this mean? To what extent are transitional responses becoming entrenched? Here, one can see that the term transition does a lot of work, in some instances concerning adjudication relating to states undergoing political change in the here and now, such as *Sejdić and Finci v. Bosnia and Herzegovina* where the European Court of Human Rights sets limits on discriminatory transitional arrangements. In other instances, the term involves issues of regional transformation, i.e. supervision of states in processes of European accession.<sup>3</sup> Here one might consider recent case law involving Turkey. A third such understanding might be where questions of regional transformation are linked to the performance of unaddressed duties regarding transitional justice, e.g. concerning Serbia or Hungary.<sup>4</sup> A fourth such role is one involving the normative entrenchment of rights guarantees, deriving from challenges in times of emergency, as in the European Court of Human Rights’ role regarding derogations in the United Kingdom.<sup>5</sup> Sometimes the phenomena seem to present a combination of these, such as the Greek derogation regime, claimed shortly after its authoritarian reversion.

Of course, there is a risk in the use of the concept of transition regarding all of these moments of judicial review. For example, considering the Court’s role in rubberstamping findings of the Turkish state as to whether it is in justifiable derogation of the human rights regime. What connection

<sup>2</sup> R. Teitel, ‘Militating Democracy’, *Michigan Journal of International Law* 29 (2007).

<sup>3</sup> ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, 22 December 2009 (Appl. nos. 27996/06 and 34836/06).

<sup>4</sup> See ECtHR, *Korbely v. Hungary*, 19 September 2008 (Appl. no. 9174/02).

<sup>5</sup> *McCann and others v. United Kingdom*, 27 September 1995 (Appl. no. 18984/91); see Chapter 2, this volume. See also O. Gross, ‘The Normless and Exceptionless Exception: Carl Schmitt’s Theory of Emergency Powers and the “Norm-Exception” Dichotomy’, *Cardozo Law Review* 21 (2000) 1825.

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might findings in such transitional times of emergency play regarding judicial deference in ordinary times, e.g. in the Welfare Party case?<sup>6</sup>

The book further shows how the judgments of these regional courts may well catalyse reform at the national level, influence the strategies employed by domestic actors and help settle contested histories. But conclusions as to evaluation seem a daunting proposition given the diversity of regions and judicial players and varying interests and purposes at issue.

There are many interesting questions raised here: what distinguishes the institutions of regional tribunals as opposed to national and/or international judiciaries? To what extent are there continuities or affinities across regions? Here, one might observe common practices across the regional tribunals. Another question goes to law's relation to politics and political development. What the Inter-American Court does may well differ from others such as the older European Court doing supervision now of human rights issues in states acceding to membership of the Council of Europe and, indeed, the European Union. Indeed, there may be some tension between the transitional priorities of states and the transitional goals of supra-national actors.

These are difficult issues as they go to the question of how effectively targeted courts can really be in insuring such normative change. To what extent is this really a transitional jurisprudence? And insofar as this term is used here beyond the transition, is there a risk in the entrenchment of such precedents? More particularly, how successful have strategies such as the margin of appreciation been? We have seen more and less progressive interpretations of this principle raising serious questions about the role of courts in protecting minority rights. But if one assumes dynamic rather than static understandings, then how exactly does the deference to the state work? To what extent do such principles imply deference to static or dynamic understandings of democratic majorities?<sup>7</sup>

What is the relation of regional compared to global transitional justice? Might different courts be more transitional at different times? More or less supervisory? Here, the compendium raises the potential role of the passage of time, as one factor of concern to the courts. But, of course, we know from the development of the field that rarely are societal responses speedy; and we might even detect tensions and contradictions regarding

<sup>6</sup> See *Refah Partisi (Welfare Party) v. Turkey*, 13 February 2003 (Appl. nos. 41340/98, 41342/98, 41343/98 and 41344/98) paras. 267, 269.

<sup>7</sup> R. Teitel, 'Militating Democracy', *Michigan Journal of International Law* 29 (2007).



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the passage of time where state crimes are at issue and where the role of time may well be paradoxical.<sup>8</sup>

In evaluating between the regions, there may be less awareness of the European Court as fulfilling a transformative role than the role of the Inter-American Court whose adjudication docket was launched at the time of the major transitions out of military grip in Latin America, and moreover whose jurisprudence has ended up defining policy regarding the transition. This happened most famously in its first landmark case ruling in which the Inter-American Court held that there must be a minimum level of investigation and reparation (the *Velasquez Rodriguez* decision).<sup>9</sup>

On this question, the book contributes to an existing debate, i.e. one between this author and Martin Krieger, Wojciech Sadurski and other observers of the East European transitions who explore the relationship of transitional justice to law as it is in ordinary times, and from their critical perspective, offer the view that there is always normative decision-making and some degree of transformation and not always in a liberal direction. There can be, for example, derogation even in ordinary times. But we know that this is always a question of degree; and moreover that the continuum is informed by culture, legal tradition (common law versus civil law) and ultimately by the degree of commitment to transformation.

This book moves deftly between laying out the case law and the basic principles of human rights law and of transitional justice to further probe the nature of this jurisprudence. Bringing this case law together is itself an important accomplishment. Beyond this, the book also entertains two related profound questions about what distinguishes this jurisprudence and what it is actually advancing.

<sup>8</sup> R. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000) 138–145, 182–185.

<sup>9</sup> See IACtHR, *Velasquez-Rodriguez v. Honduras*, 29 July 1988 (Series C no. 4); see also IACtHR, *Case of Barrios Altos v. Peru*, 14 March 2001 (Series C no. 75) (concurring opinion of Judge Trindade) para. 26.

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Transitions are long-term processes, in which the road ahead is often full of trials and tribulations. Societies emerging from armed conflict or authoritarian rule face the difficult challenge of re-inventing themselves in a constant process of adaptation. The experience of editing this book has left us with an unmistakable feeling that edited collections have many features in common with transitions: they take time, involve many actors and require continual re-adjustment. Nonetheless, we did not have to face directly the horrors of war or the terror of dictators. Rather benignly, we were haunted only by deadlines and competing academic responsibilities. And in the process, we enjoyed and benefited greatly from the expertise, collaboration and friendship of many. The transition from tentative idea to tangible result is marked with the publication of the present volume.

The possibility of this project was first floated at an away-day at the Rural College and Derrynoid Centre in Draperstown – a secluded oasis halfway between the University of Ulster’s Magee and Jordanstown campuses. It evolved and developed under the flag of the Transitional Justice Institute (TJI) at the University of Ulster. Not only are several of the book’s contributors researchers or visiting scholars at TJI, the Institute provided the perfect intellectual space, and the collegial and financial support, for us to discuss and develop the themes at the core of this book. In March 2010, at something of a mid-point, we organised a roundtable seminar for the book’s authors. This event was funded by TJI and proved indispensable to the further crystallisation of ideas and cross-cutting themes. For all of this, we remain truly indebted to Professors Christine Bell, Colm Campbell and Fionnuala Ní Aoláin – and also to David Kretzmer during his time in residence at TJI – for their mentoring, encouragement and support along the way. Also at TJI, we want to thank Lisa Gormley, Elaine McCoubrey and Emer Carlin for their immeasurable help throughout the book’s gestation. And at Utrecht University, we are sincerely grateful to the encouragement and support of the director of the Netherlands Institute of Human Rights SIM, Professor Jenny Goldschmidt.

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*Michael Hamilton and Antoine Buyse*