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978-1-107-00369-9 - *Identities in Transition: Challenges for Transitional Justice in Divided Societies*

Edited by Paige Arthur

Excerpt

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Introduction: Identities in Transition

Paige Arthur

In times of transition, divided societies face difficult practical questions about how to devise new state and civil-society institutions that will diminish the potential for discrimination, conflicts over political power, and intercommunal violence.

It is unclear, however, what special approach – if any – transitional justice measures should take in these kinds of contexts. Transitional justice is a response to massive or systematic violations of human rights that aims to recognize victims and to prevent the recurrence of abuse. It is often associated with a set of measures that, taken together, work toward those two aims in ways that reinforce one another.¹ Those measures include prosecutions, especially for those most responsible for grave human rights violations; truth telling that publicly recognizes the abuse, often in the form of an official commission; massive reparations programs that provide a mix of material and symbolic benefits to victims, including official apologies; memorialization projects that educate the public and also provide a space for mourning; and reform of abusive institutions, most often security forces such as the police and military.

Transitional justice has emerged over the last two decades, building on experiences mainly in Latin America, Eastern Europe, and Africa to develop new norms at the international level, based on rights to truth, justice, reparation, and nonrepetition. Given the contexts out of which it first emerged – new democracies in the wake of dictatorships in Latin America – transitional justice has primarily been concerned with “first generation” human rights, that is, civil and political human rights violations. In particular, it has often focused on serious crimes such as massive or systematic extrajudicial killing (e.g., disappearance), arbitrary detention, rape, and torture.

* I owe thanks to Pablo de Greiff for helpful comments on this chapter.

¹ On this issue see, Pablo de Greiff, “Theorizing Transitional Justice,” in *Transitional Justice*, ed. Melissa Williams and Rosemary Nagy, *Nomos* XLX (forthcoming).

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Transitional justice currently operates in many contexts that are quite different from the classical Latin American cases that so strongly shaped the field.

In places like the Kurdistan Regional Government (KRG) in Northern Iraq, for example, where identity played a strong role in the state-led violation of human rights, and where identity politics is alive and well, we see some key differences. The relationship between the KRG and the rest of Iraq is complicated. Iraq is a federation, and the KRG has considerable independence. Kurdish is spoken there, and its own flag is flown. Many states in the region, including Turkey and Iran, are threatened by potential statehood for the Kurds. Violence between Kurds and Arabs in disputed territories in the south of Iraq – such as Kirkuk, which had been “Arabized” over a period of decades – has been escalating in recent years.

Since the fall of Saddam in 2003, space has opened up to pursue a limited range of transitional justice activities. The Kurdish Regional Government has a Minister of Martyrs and Anfal Affairs, a position created in 2006 that has been charged with providing reparations to survivors of Saddam Hussein’s genocidal Anfal campaign of 1987–1989, in which more than 100,000 people were killed and thousands of villages were destroyed in an effort to Arabize the region – a tough task, since no registry of victims currently exists. A handful of the victims did receive reparations from the central Iraqi government, since they had taken direct part in the Anfal trial conducted by the Iraqi High Tribunal (IHT). In June 2007, the IHT convicted three high-ranking Iraqi leaders, including Ali Hassan Al-Majid, known as “Chemical” Ali, of genocide. Saddam would have stood trial but had already been executed by that time. They were sentenced to death. The trial was important to the KRG, which provided evidence and sent lawyers to Baghdad, where the IHT was located.

In this case, the familiar concept of a state apologizing to victims is problematic. In the KRG, the regime’s violence is viewed as an attempt by Arabs to dominate Kurds; thus, the notion that a Kurdish president should apologize seems, to some, absurd. As another example, the issue of who should pay for reparations takes on different sorts of political stakes. Some Kurds reject the idea that Kurds themselves should be responsible for reparations, since the Kurdish people are collectively the principal victims of the abuse being repaired. Moreover, these negotiations take place within a state that is attempting to become a viable federation. The structure of the political institutions themselves and power struggles within them are affecting discussions about the shape that transitional justice can and should take.

Thus, many of the countries in which transitional justice practitioners work are not only societies coming to terms with past human rights violations – they are also societies coming to terms with ethnic, religious, or linguistic divisions that may have been at the root of the violations themselves. South Africa after apartheid, Burundi and Guatemala after genocide, and Iraq after dictatorship are all cases in which political redress in the forms of new constitutional arrangements, electoral systems, guarantees of minority rights, or preferential policies has been sought in addition to redress for mass atrocity, with varying degrees of success. However, although identity

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conflicts and identity-based grievances form a significant part of postconflict and postauthoritarian contexts, there is no body of knowledge that analyzes what the relationship between these measures and more familiar transitional justice initiatives – including truth telling, prosecutions, reparations programs, memorialization, and a range of institutional reforms – might be.

This gap is a crucial one both for transitional justice practitioners and for those advising on political reforms in divided societies. Although research on the causes and consequences of identity-based conflicts, as well as political remedies for them, has been accumulating for the past decade, transitional justice efforts in Bosnia and Herzegovina, Iraq, and other postconflict countries have been overwhelmed, sometimes to the point of paralysis, by identity-based divisions.

This book is a first step toward trying to close this gap. The good news is that there is already a well-established literature on identity for those in the transitional justice field to draw on. Moreover, there are a number of key cases – Germany, South Africa, the Balkans – where enough time has passed that we can start to evaluate the myriad ways that identity may have affected transitional justice measures and their outcomes. The literature is so large, however, and the issues so deep and varied – from constitutional and electoral design to cultural heritage and education – that any research agenda is likely to be piecemeal and, on its own, unsatisfying.

Given these constraints, the aim of this book is to clarify some of the ways that identity presents new challenges for transitional justice efforts, and offer preliminary suggestions for how these efforts might be adapted to meet those challenges. It includes six chapters on transitional justice measures, most of which are comparative in scope, written by transitional justice experts from around the world. These studies look at identity as a factor in truth-telling efforts, massive reparations programs, security system reform, memory projects, and domestic and international prosecutions. They are intentionally rich in empirical detail, following a set of guidelines that were standardized as far as possible across the studies.

The authors were asked, however, and indeed they all insisted, that they articulate and apply their own analytical frame, which should be reflective of the identities they found most salient in the cases under examination – whether ethnoreligious, political, gendered, and so forth, or a combination of these. Since the chapters were intended to be exploratory, we wanted to treat a range of different cases: identity in conflicts that break along ethnoreligious lines (Northern Ireland, Guatemala, the former Yugoslavia, Rwanda); identity in conflicts that break along ideological lines (Peru); identities in postauthoritarian contexts (Argentina, Germany); and, finally, a hybrid case – South Africa – which possesses both postconflict and postauthoritarian characteristics. What we discovered, as I will discuss later, is that although there are differences, there are also dynamics that cut across types of cases.

Further, the book includes chapters written by experts on identity, many of whom work outside of the transitional justice field. Narrowing the range of topics for these experts to explore was challenging, and priority was given to issues that were

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identified as particularly pressing for those working in the transitional justice field: constitutions, ethnic conflict, education, indigenous peoples, and minority rights. More normative than empirical in focus, these chapters argue for ways to improve transitional justice through learning from other fields of expertise, which have been building knowledge about identity for a decade or more. They explore the two levels of justice that need to be addressed where the special political claims and durable patterns of intercommunal violence characteristic of identity conflicts are strong: justice for past mass human rights abuse, and justice for systematic institutional marginalization on the basis of one's identity.

ON IDENTITY

In the Balkans, a 2002 poll showed that the International Criminal Tribunal for the former Yugoslavia was trusted by 83 percent of the population in Kosovo versus only 8 percent of the population in Serbia.² In Peru, the dearth of indigenous representation among the staff of the Truth and Reconciliation Commission meant that before the first public hearing, no one had thought about the fact that indigenous women always wear hard hats, which would prevent them from using the headphones they needed to hear translations into their native Quechua. In Iraq, the executions of Saddam Hussein and his collaborators for crimes against humanity provided fuel for sectarian conflict. In Afghanistan, ethnic fragmentation and political competition have been significant impediments to security-sector reform and the implementation of other transitional justice measures. In short, identity-based grievances and conflicts among identity groups have important and varied effects in contexts where mass human rights abuses are in need of redress: on the level of perception and culture, on the microlevel of everyday interaction, and on the institutional level of politics and the rule of law.

The Salience of Identity

"Identity" in this book refers to peoples' membership in social groups – whether that membership is chosen by them or ascribed to them by others. Identity groups are probably infinite. They include ethnic, religious, and gender groups, but also subgroups within those groups: women, disabled women, minority women, minority disabled women, and so on. They are social categories that, as James Fearon and David Laitin note, rely on rules of membership that determine who is included, as well as sets of characteristics, which include beliefs, desires, moral commitments, and physical attributes.³

² International Institute for Democracy and Electoral Assistance, South East Europe Public Agenda Survey – Summary 2002; available at http://archive.idea.int/balkans/survey_summary_intl_inst.htm.

³ James D. Fearon and David D. Laitin, "Review: Social Construction of Ethnic Identity," *International Organization* 54, no. 4 (Autumn 2000): 848.

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As almost every work on identity explains, there are basically three views on how identity should be understood. The first is the primordialist view, in which identities are stable markers given through practically immutable practices of cultural reproduction. Very close to positing unchanging essences to groups, the primordialist take on identity is thoroughly discredited among social scientists. Nonetheless, it remains a popular understanding of ethnic identity, in particular among politicians and mass publics alike. The second is the rational choice, instrumentalist view, in which social identities are chosen by individuals through a process of strategic calculation, with the aim of advancing their interests. According to this view, there are incentives or disincentives for individual agents to identify as a member of any particular group, which they choose in a way that maximizes their preferences.

The third is the constructivist view, in which identities are not freely chosen by individuals, but neither are they timeless and unchanging. Instead, our identities are given through the social relationships, the everyday practices of perceiving and treating others, and the institutions in which we are embedded. As those factors change over time, so will our identities. In the construction of identities, some observers may stress the function of narrative, or stories that groups and individuals tell about themselves. Seyla Benhabib, for example, sees narratives as forms of self-representation that are also evaluative stances individuals take on their own actions.⁴ Other commentators may highlight instead the ways that practices of discrimination reproduce themselves, often on the level of daily interactions. Pierre Bourdieu has argued that these practices enforce, at the symbolic level, the valuing of some groups more than others, through a system of “vision and di-vision” of groups that happens on the nonconscious level of our practical, everyday lives.⁵ It should be noted, however, that many researchers meld together instrumentalist and constructivist accounts, arguing that social relations are not completely determinative, and that individuals’ strategic decision making is a factor in identity formation.

Identities are important because they are basic elements of our social life and its reproduction. Part of social life also, however, is conflict and domination. All of the characteristics that Fearon and Laitin mention as aspects of identity – beliefs, commitments, physical attributes, and so forth – can be a source of conflict or of domination, whether physical or symbolic. Domination may be effected through overt state efforts, in the case of racial separation institutionalized in the apartheid system. Or it may work through more subtle social and symbolic means, in the case of long-term marginalization of indigenous people in Peru. Resistance to domination may lead to conflict in which identities become politicized and their boundaries

⁴ See, for example, Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, NJ: Princeton University Press, 2002).

⁵ See, for example, Pierre Bourdieu, “Social Space and Symbolic Power,” in Pierre Bourdieu, *In Other Words: Essays toward a Reflexive Sociology*, trans. Mathew Adamson (Stanford, CA: Stanford University Press, 1990).

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harden. This was the case in the Balkans, where ethnoreligious identities increased in salience as a result of the war there in the 1990s. In extreme cases, as William Zartman argues, identity conflicts can develop into zero-sum games in which both parties believe there can only be one winner and one loser – there is no middle ground, and thus no room for negotiation or compromise.⁶

Each of the three views of identity already described implies a different set of policy prescriptions to the problems of conflict and domination. If one believes that identities are primordial, then policies should be designed either to keep the groups apart or to find ways to work around their differences. If, however, one is persuaded by the rational choice explanation for identity affiliations, then the problems might be addressed through shifting the available incentives and disincentives for people to hold certain identity preferences. This might be done by reshaping important state institutions and perhaps allowing a more liberal “market” for identity choices to emerge. Finally, if one believes that identities are constructed through a complex interplay of cultural reproduction (schools, media, families, and the narratives that circulate within them), everyday reinforcement (ways of perceiving and treating one’s own and other groups), as well as institutional arrangements such as constitutions, then a different set of policy prescriptions arises that will cut across political and social domains.

The constructivist view is the dominant one across methodological boundaries today – including the authors in this book. It should thus come as no surprise that the authors in *Identities in Transition* emphasize multidimensional approaches to dealing with conflict and domination. There is an emphasis across the chapters on the need to find ways to empower marginalized groups as actors with social and political standing, as a step toward broader social transformation. Transitional justice can contribute to this outcome, but so can educational reforms, minority rights guarantees, new constitutional arrangements, and so on. In some cases, the authors suggest that empowerment emerges through the valuing of previously devalued identities – for example, Mayan identity in Guatemala. In others, crosscutting and civic identities are suggested as the best routes to empowerment, as has been the case in South Africa.

These varied methods for treating identity respect the fact that there are many ways for marginalized groups to take on subject positions vis-à-vis the state in order to be recognized as legitimate claimants – that is, as citizens. Their possibilities largely depend on the strategic opportunities open to them at any given time. In some cases, taking on certain identities may be empowering, in others, perhaps not. Thus, the book does not offer a consensus view on whether specific types of identities, for example ethnic identities, should always be valorized and promoted.

⁶ Elizabeth A. Cole and Karen Murphy discuss this issue in Chapter 11 of this volume, “History Education Reform, Transitional Justice, and the Transformation of Identities.”

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It follows Donald Horowitz's assumption that "ethnicity is one of those forces that is community-building in moderation, community-destroying in excess."⁷

Which Identities?

The book focuses on identity-based abuse in which ethnoreligious communities have been targeted. In some cases, the abuse bears a direct relation to the main fault lines of conflict. This was the case in Guatemala, where the chapter on truth telling by Madeleine Fullard and Nicky Rousseau discusses the Commission for Historical Clarification's determination that state-led violence constituted genocidal acts against the indigenous population. In others cases, ethnoreligious identity was peripheral – and thus perhaps more likely to be overlooked. Elizabeth Jelin's chapter on memory projects thus discusses how the Jewish community in Argentina dealt with the special harms that Jews had suffered under the military dictatorship. Interestingly, Ruth Rubio-Marín, Julie Guillerot, and Claudia Paz y Paz Bailey's chapter on reparations straddles the divide: they focus on the cases of Guatemala, where the ethnic dimension to the conflict was palpable, and Peru, where the conflict was mainly ideological but had severe consequences for indigenous Andean and Amazonian peoples there.

The focus on ethnoreligious identities is not, however, an exclusive one. The chapters on truth telling, security system reform, reparations, and international prosecutions deal with identity in South Africa, Guatemala, Peru, Northern Ireland, Rwanda, and the former Yugoslavia. In spite of the obvious ethnic or ethnoreligious cleavages in all of these places, none of the studies omits discussion of other identities, such as gender, class, and political affiliation. Jelin's chapter on memory projects consciously treats all of these identities together. Christiane Wilke looks mainly at political identity in her chapter on domestic prosecutions in Germany and Argentina – a reflection of the ongoing debate in the literature about whether the fact that identities are "ethnoreligious" makes them operate any differently than other identities in the public sphere.

Three themes emerged from this initial research. First, identities are complex constructs, meaning that conflict and modes of domination rarely operate solely through one type of identity. Even in conflicts where there is an explicit ethnoreligious cleavage, other identities, such as gender, come into play. Both men and women noncombatants may be targeted for abuse or murder because of their gender. Cécile Aptel's chapter on international prosecutions in Rwanda and the former Yugoslavia gives special attention to these issues. Women may be killed in a regime of genocide or ethnic cleansing in order to prevent them from bearing children that will reproduce their community – as happened in Rwanda. Or they may be

⁷ Donald L. Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 1985), 13.

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systematically raped in order to induce individual and communal shame, as was the case in Bosnia and Herzegovina – a particularly effective tactic in societies where perceptions of women’s sexual “purity” are highly important. Moreover, noncombatant men may be targeted for murder simply because, as men, they are perceived as potential fighters for their ethnoreligious group. The slaughter of men and boys at Srebrenica is just one example of this phenomenon.

In addition to gender, class and political affiliations can also intersect in complicated ways with ethnoreligious cleavages. Mary O’Rawe, in her chapter on security-system reform, describes how political and ethnoreligious identities are deeply interrelated in Northern Ireland. This point is illustrated through the usage of hybrid terms like “Catholic/Republican” and “Protestant/Loyalist” to describe people’s affiliations. Jelin’s chapter on memory projects weaves together class and ethnicity in its discussion of how the repression of workers in the north of Argentina is remembered. And, as mentioned, Wilke’s chapter on domestic prosecutions foregrounds political identity in the Argentine and German cases, but also weaves in ethnonational, religious, and generational identities.

Second, the research demonstrates the key role of *crosscutting* identities – in effect, bridges across communities. In South Africa, as Fullard and Rousseau’s chapter on truth telling relates, political identity allowed people to join forces across the state-enforced racial divide; many whites joined black South Africans in the struggle against apartheid and a commitment to a postracial future. They saw race as a construct used to divide them, and united instead through their political and moral commitments. In Northern Ireland, as O’Rawe’s chapter argues, police reform perhaps misguidedly focused its attention on ethnoreligious identities, thus heightening tensions and creating difficulties to seeing the reform process through. Reform may have been better served if it had made gender the focal point for its new “equality framework” – since the need for greater gender sensitivity in policing was something that all sides of the conflict agreed on.

A final, related theme concerns victim identity – an issue that all of the chapters touch on in some way or other. Ethnoreligious identities in particular are often built on experiences of suffering and grievance at the hands of other groups. Collective victimization and collective guilt are common outcomes of conflict and systematic domination, making recognition of victimhood on the other “side” difficult, if not impossible. In both South Africa and Northern Ireland, some strides have been made toward affirming common suffering across ethnoreligious divides – that is, a victim identity that is not exclusively organized along ethnoreligious lines. Victim identities are thorny things, especially when they become entrenched across generations. At the same time, if they help humanize the suffering of those in another group, they can be valuable. No one illustrates this better than O’Rawe. She notes that reform of the largely Protestant police force was made more palatable to working-class Protestants once they saw parallels between the experience of Catholic/Republican

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communities and their own experience of the police – they, like the others, had often been on the “rough end” of policing during the Troubles.

IDENTITY AND JUSTICE

Coming into the project, most of the authors, including myself, had deep questions about whether taking identity into consideration raises the stakes of the debate for transitional justice. Do these identities force us to reconsider the basic aims of transitional justice to recognize victims and prevent the recurrence of human rights violations? Beginning to answer this question entails an examination of the fact that transitional justice measures typically focus their efforts on the redress of a narrow band of individual human rights violations, for example, state-led murder, torture, disappearance, or rape.

Incidents of systematic identity-based violations might suggest grounds for reconsidering the narrowness of this focus. On the one hand, as was argued at the time of the South African Truth and Reconciliation Commission, this narrow band ignored many of the rights violations that were hallmarks of the apartheid system, such as forced displacement, expropriation, and violations engendered by the racist pass laws – indeed, violations that were likely to have been experienced by the majority of the population. It could thus be argued that transitional justice measures should be more responsive to the types of violations engendered by the inhuman systems they deal with, rather than limited by a set menu of rights violations to be addressed.

Moreover, the focus on a narrow band of human rights violations might be challenging in contexts in which these violations bear a direct relationship to complex histories of marginalization that may span centuries, which has, for example, been the plight of indigenous peoples in regions settled by Europeans. In these cases, remedying only recent individual human rights violations may not satisfy more ambitious claims for justice, in which social transformation – and a direct reckoning with the beneficiaries of injustice – may be the desired outcome. Here, some may wonder at the relevance of the standard set of transitional justice measures. They may argue that either new measures need to be added or that existing ones should be expanded. On the flip side, proponents of maintaining the focus on a narrow set of rights violations would counter that these rights are important in themselves and in relation to supporting other rights. They therefore deserve efforts dedicated to their protection. Moreover, transitional justice measures perhaps should not be burdened with outsized expectations for social transformation in the first place – and indeed might be more effective if they simply worked in coordination with other efforts to spur such transformation.

The big questions dealt with by this volume’s authors seemed to break down into two categories. The first concerned the relationship between human rights abuse and long-term, everyday discrimination. The second concerned the relevance of

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transitional justice itself to large-scale social transformation in the wake of discriminatory regimes.

Discrimination and Everyday Violence

Long-term histories of exclusion tend to be punctuated by periods of social unrest, low-level conflict, and outright war in which physical abuses intensify. Yet one of the factors in unrest and violence is the everyday violence that keeps groups in a state of subjection – whether through intentional or through neglectful policies – and that may lead to societies in which collectivities live in two (or more) different worlds. In the first, there is low infant mortality, high literacy, economic security, and more opportunities for people to live their lives in a manner of their choosing. In the second, endemic poverty may be responsible for needless deaths of children, famine, displacement, shortened life spans, and a condition in which people's freedom to make choices in their lives is severely curtailed – if it exists at all.

That is, severe discrimination can lead to everyday violence – a state of affairs in which, as Nancy Scheper-Hughes describes it in her research on Brazil and South Africa, crisis, trauma, and fear are normal rather than exceptional. “For those living in the affluent first world,” Scheper-Hughes writes, “crisis is understood as a temporary abnormality linked to a particular event.” Scheper-Hughes is concerned about the strategy of weighting justice interventions toward exceptional violence (e.g., state-led torture or disappearances), especially when the everyday violence resulting from social inequality may well remain completely unchanged in the wake of a political transition.⁸

These observations on everyday violence mirror the debate among gender scholars and practitioners about a continuum between ordinary (everyday) and extraordinary violence against women – and how transitional justice measures ought to take this continuum into account. Indeed, the gender field has well-developed arguments that are highly relevant to the question of how identity-based discrimination and inequality may matter for transitional justice.⁹ Gender scholars and practitioners have pushed the transitional justice field to consider the ways in which transitional justice measures might take even modest steps in transforming social structures that undergird the violence done to women both in “ordinary” and “extraordinary” times. This involves, at a minimum, ensuring women's participation in debates and processes that hitherto might not have been available to them. It also involves asking a new set of questions of violence that tries to tie “extraordinary” violence committed

⁸ Nancy Scheper-Hughes, “Dangerous and Endangered Youth: Social Structures and Determinants of Violence,” *Annals of the New York Academy of Sciences* 1036 (Dec. 2004): 13–46.

⁹ See, for example, Ruth Rubio-Marín, “Introduction” and “Gender and Collective Reparations in the Aftermath of Conflict and Political Repression,” in Ruth Rubio-Marín, ed., *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge: Cambridge University Press, 2009).