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978-0-521-14440-7 - Overcoming Historical Injustices: Land Reconciliation in South Africa

James L. Gibson

Excerpt

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Land Reconciliation and Theories of Justice, Past and Present

One of the most compelling issues for worldwide socio-legal studies has to do with how to reconcile competing historical claims to land. Countries as diverse as the United States, Argentina, and the Philippines are confronted with extremely complex and divisive issues of rectifying land injustices from the past. These conflicts are intractable in part because they implicate exceedingly difficult issues of law, justice, and history.

Nowhere is the issue of *land reconciliation*¹ more salient than in South Africa. Because the apartheid system and its predecessors were so obsessed with efforts (largely successful) to expropriate the vast majority of the land in the country for the use of the tiny white minority, South Africa's past is now colliding with its present, as demands for land reconciliation are growing in both number and intensity. And with the ever-present specter of Zimbabwe-style land invasions,² the issue is seen by many as threatening to the very political and economic stability of the country. How South Africa deals with the injustice of historical land practices will have much to do with the success of the country's attempt at consolidating its nascent democracy.

¹ I use the term "land reconciliation" to refer to a panoply of issues related to competing claims to land. As will become clear below, a number of specific issues are involved here.

² Zimbabwe's land problems figure heavily in the salience of the land issue in South Africa, with most South African elites perceiving the controversy as having had a ruinous effect on that country.

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But land reconciliation is more than “just” an important policy issue. In addition, matters of land injustice are central to the growing interdisciplinary attention to issues of *transitional justice* (see Hayner 2001, who claims that a new field of research on “transitional justice” has recently emerged). Scholars in this field are analyzing a variety of special problems of historical injustices³ that confront regimes attempting to create a more democratic polity out of an authoritarian past. At the micro-level, the complementary development in political psychology is the emerging specialty of “justice research” (see Miller 2001, who describes how this subfield was created). Fueled partly by dissatisfaction with the dominance of the rational choice paradigm, these researchers are exploring ways in which feelings of justice and injustice shape socio-legal preferences and behavior, and ultimately political institutions and transitions. This body of research contends that satisfaction with political and legal outcomes is not solely a function of instrumental considerations but is instead conditional upon perceptions of fairness. Whether people believe that the institutions and processes of a new regime are more *fair* – not just more effective – than the old ones may be crucial to the success of political and legal transitions.

But fairness is a complicated concept, and unfortunately, competing claims to land are typically grounded in competing theories of justice. For instance, deeply cherished values such as rule of law, due process, and property rights are pitted against the injustice of apartheid, the unfairness of “legal” means of forcing Africans off their land and into so-called Bantustans, and the simple need for a place to live for millions of people.⁴ In many respects, the problem of land reconciliation is a problem of the conflict between legality and justice, and thus the land issue is classically what Sniderman and his colleagues refer to as a “clash of rights,” as their book is titled (Sniderman et al. 1996). How

³ du Bois (2008, 116) defines the concept as follows: “I use the term ‘historical injustice’ to refer to injustices committed in a setting that has become historical by virtue of some fundamental and lasting change in the socio-political structure such as the end of slavery, colonial rule, or nonrepresentative government. Because of the break in continuity all these situations raise the question of how political institutions should deal with injustices that are not of their own making.”

⁴ The law on land in South Africa is based on the “implicit recognition that some of these rights [to land] had been acquired through a morally reprehensible if not strictly speaking illegal process of apartheid-inspired dispossessions” (Visser and Roux 1996, 92).

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(and whether) such controversies get negotiated and managed is a matter of considerable importance to the future of South Africa's democratic transition.

Thus, the specific objective of this book is to develop and test a theory of justice values and apply it to South African preferences and judgments on issues of land reconciliation. I then test hypotheses derived from this theory using data from a nationally representative survey of ordinary people. In the broadest terms, my objectives include answering the following questions:

1. How are the issues of land reconciliation understood by South Africans? How much does history – including historical injustices – shape contemporary understandings of land politics? Which aspects of justice (distributive, procedural, retributive, or restorative) are most salient? How do the various issues and justice concerns get dimensionalized in the minds of people?
2. How much support exists for various aspects of land reconciliation in South Africa? Is support based solely on material self-interests, or do larger symbolic concerns predominate? What is the relative influence of contemporary and historical factors?
3. How can competing views of land be reconciled? Are land positions so deeply rooted in conflicting value systems that reconciliation is impossible, or can people be persuaded to alter and moderate their views?
4. Is land reconciliation an example of the more general phenomenon of people caring about the justice of socio-legal disputes, even when their immediate self-interests are not directly implicated?
5. How does support for land reconciliation vary across the various subcultures in South Africa? Are subcultural differences connected to such basic values as the sanctity of private property and preferences for European-style individualism or African-style communalism?
6. To what degree do land issues engage group identities, rendering the issue more volatile and intransigent?

Consequently, three overriding themes structure this research: To what degree are the politics of the present shaped by feelings of injustice from the past? To what degree are feelings of justice and injustice

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bound up within group identities and attachments? And to what degree are land issues further complicated by a clash of cultures within South Africa's multicultural context? South Africa thus offers an extremely fecund laboratory for testing psychological theories of transitional justice, since land reconciliation is at the forefront of the list of injustices wrought by apartheid.⁵

Thus, this is a book about how ordinary people apply principles of justice to complex policy issues within the domain of land reconciliation. It may not be immediately obvious that a study of the beliefs, attitudes, and preferences of ordinary people are of much relevance to issues of land reconciliation. More relevant might be a study of land litigants (plaintiffs and defendants), land activists, land policy makers, or even land claimants. What can a study of the justice thinking of a representative sample of South Africans tell us about the land issue and/or theories of justice?

COMMONSENSE JUSTICE

Justice research is a field of inquiry in the making (Miller 2001), and applications of justice theory to actual issues of law and politics are becoming increasingly common (e.g., Hamilton and Sanders 1992; Gibson and Gouws 1999; Gibson 2002). Indeed, the publication of an encyclopedic review of justice research – the *Handbook of Justice Research in Law*, by Sanders and Hamilton – will most likely contribute enormously to the institutionalization of the field. It is now well established that the justice judgments of ordinary citizens (“commonsense justice” – see, for examples, Finkel 1995, 2001) are of considerable importance to both psychologists and political scientists.⁶

The basic insight of this research is that, when it comes to law and politics, *justice matters*. Generally speaking, justice research examines

⁵ For many, land is a central element of transitional justice politics and reconciliation in South Africa. For instance, Roux (2006) treats land restitution as a form of reconciliation. On reconciliation more generally, see Gibson 2004a.

⁶ Investigations of justice theories can be found in far-flung places, including normative treatises on social justice (e.g., Barry 2005), experimental treatments inspired by distributive justice theories (e.g., Michelbach et al. 2003), both experimental and survey studies of procedural justice (e.g., Tyler et al. 1997; see also Tyler and Lind 2001), qualitative studies of how ordinary citizens think about fairness (e.g., Hochschild 1981), and large cross-national quantitative research on cultural differences in understandings of fairness (e.g., Kluegel, Mason, and Wegener 1995).

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people's conceptions of the justness of law and politics under the presumption that people care about whether legal and political outcomes are fair. "What qualifies such research as justice research is the assumption that outcome satisfaction is mediated by perceptions of outcome fairness" (Miller 2001, 528). Thus, justice research moves beyond a concern with narrow calculations of individual self-interest (costs and benefits), arguing that in addition to interests, people judge legal and political outcomes by whether they comport with their standards of fairness. Indeed, a long line of research has demonstrated that "what's fair" is a terribly important criterion – perhaps even the most important criterion – in the calculus of opinion formation (e.g., Hochschild 1981). In addition, institutions that rely on principles of justice not widely shared by the citizenry are likely to have a rocky existence, since unjust institutions are unlikely to be accorded legitimacy, and without legitimacy, compliance becomes problematical (i.e., it becomes more closely related to calculations of costs and benefits).⁷ Of course, some social scientists have long argued that material instrumentalism rarely provides a full account of legal and political issues (e.g., the "symbolic politics" literature – e.g., Tarman and Sears 2005; see also Funk 2000), but there now seems to be an acknowledgment across many areas of the social sciences that fairness – even fairness for *others* rather than for oneself – is one of the most sought after "commodities" in law and politics. Citizens are often lay philosophers, applying principles of justice to complex issues of public policy (e.g., Chong and Marshall 1999). And justice matters in part because one does not have to be a party to a dispute to care about the fairness of its outcome – people care about injustices done to others.⁸

Justice considerations, however, are rarely unidimensional; rather, people typically apply multiple aspects of justice when evaluating political conflicts. Scholars have addressed several different types of justice, such as distributive, procedural, retributive, and restorative

⁷ The large body of research conducted under the general rubric of "political culture" is grounded in the hypothesis that democratic institutions require certain cultural and value commitments on the part of citizens to be effective. See, e.g., Gibson, Duch, and Tedin 1992. For a study of the degree of congruence between justice principles in law and in lay intuitions of justice, see Robinson and Darley 1998. See also Caldeira and Gibson 1995 on democratic values and support for judicial institutions, and Duch and Palmer 2004 on the cultural requisites of a market economy.

⁸ This notion of "disinterested justice" has emerged from the literature on retribution and revenge (for an excellent review, see Vidmar 2001).

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justice. Within each domain, various criteria of justice exist.⁹ For instance, the major criteria on which distributive justice judgments are made include desert, need, and equality (e.g., Miller 1999).¹⁰ Procedural justice judgments often rely on criteria such as neutrality in decision making and status recognition by the decision maker (e.g., Tyler and Lind 1992). Justice values, like justice itself, are pluralistic.

Justice assessments are especially complicated when criteria within domains conflict with one another, since there is no clear metric on which citizens can trade units of need for units of desert, for example. The problem of justice conflict is exacerbated when tension across justice domains also exists. How does one, for instance, exchange a quantity of procedural justice voice for a portion of distributive justice desert or retributive justice proportionality? Social justice theories recognize that views of justice are pluralistic (Miller 1999, 63), and that “very often people decide what a fair distribution consists in by balancing claims of one kind against claims of another” (Miller 1999, 63; see also Scott et al. 2001, 751).¹¹ But little progress has been made either theoretically or empirically on identifying a stable hierarchy of justice principles or criteria that enables predictions of how ordinary people adjudicate justice conflict in real political controversies.¹²

For example, granting amnesty to gross human rights violators may be judged in terms of distributive, procedural, retributive, and restorative justice considerations (Gibson 2002). The analysis in that work shows that these different dimensions of justice can be fungible. Although awarding amnesty to gross human rights violators does indeed create a retributive justice shortfall, other forms of justice (distributive, procedural, and restorative) can compensate for the inability to extract retribution. In judging political and social controversies and policies,

⁹ I use the term “domains” to refer to the major types of justice, and “criteria” to refer to the principles by which justice is allocated within a domain. So, for instance, within the domain of distributive justice, desert is regarded as an important criterion, or principle of allocation. In the justice literature, no standard terminology has yet been produced and accepted.

¹⁰ For a useful review of the distributive justice literature, see Hegtvædt and Cook 2001.

¹¹ Or as Scott et al. (2001, 751) note: “individuals use several allocation principles in distributive justice judgments.”

¹² An analogous literature exists on the role of value conflict in opinion formation. For recent examples of research on this problem, see Alvarez and Brehm (2002), Grant and Rudolph (2003), and Jacoby (2005).

citizens typically do not apply unidimensional justice thinking; instead, pluralism prevails. Unfortunately, however, although the relative influence of different justice considerations can be estimated empirically, little theory exists to help understand how (and under what conditions) one justice value trumps another.¹³

Moreover, to complicate the issue further, context matters. As Miller (1999, 63) asserts, “the social context in which the distribution has to be made – or more precisely how that context is perceived by those making the judgment – will determine which principle stands out as the relevant principle to follow.” What’s fair depends on a variety of factors idiosyncratic to contexts – for example, whether those seeking justice are part of an ingroup or are representatives of an outgroup, as in relational models of procedural justice (Tyler and Lind 1992).

We have also established that justice judgments may be formed in reference to individual or group interests, or in egocentric or sociotropic terms. Undoubtedly some people draw conclusions about justice in terms of what they think is fair to them, but many base their views on what is fair to their group, or even what is fair to groups of which they are not even members.¹⁴ Mutz and Mondak (1997) introduce the concept of “sociotropic justice” to refer to how people judge not fairness to themselves, but rather fairness to the group of which they are members. Since it is well established that people typically assess political disputes by far more than simply what they think is beneficial to their immediate self-interests (see, e.g., Funk 2000), any attempt to understand justice judgments must pay attention to justice for groups, even groups of which the judgment maker is not a member.

¹³ Another nice example of justice pluralism can be found in the work of Chong and Marshall (1999), who illustrate the crucial role that multidimensional judgments of justice played in the decision of the residents of Williamson County in Texas not to grant tax relief to Apple computer company owing to its policy on benefits for homosexual and unmarried heterosexual couples. Chong and Marshall describe the conflict that arose in the minds of people between moral and economic values; how individuals derived their positions on the Apple controversy depended on the way in which moral and economic senses of justice were prioritized. Again, however, we have little theory regarding these processes of prioritization of justice values.

¹⁴ The concern many expressed about the treatment of Afghan women is a primary example of this phenomenon. At least some white men in the United States care deeply about whether Afghan girls are treated fairly when it comes to political equality, access to education, etc.

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Thus, justice matters in part because one does not necessarily have to be a party to a dispute to care about the fairness of its outcome – people care about injustices done to others. Being forcefully removed from one's living quarters by the apartheid regime is obviously an example of both group and individual victimization. Consequently, the desire for retributive justice is stimulated. The important insight of this literature, however, is that people respond strongly to harms done to people and groups with whom no personal or immediate relationship exists. The important unanswered question is, why?

Strong feelings of injustice may be aroused by sympathy with the person or group who is victimized, based on sharing an identity with the victim. But they may also be a more general reaction to the socio-legal system, with some viewing victimization as a violation of the “social contract” between the individual and the state (and hence Tyler et al. 1997 refer to this as the “relational model”). Central to this contract is a set of normative assumptions about how citizens ought to be treated, which is of course the basic building block of a polity based on the rule of law (Vidmar 2001, 42). The offense against an individual is sometimes generalized to an offense against a group or a community, a violation of the contract. To the extent that this occurs, the systemic relevance of individual injustices is vastly multiplied.

Thinking about justice for groups raises obvious connections with social identity theory (e.g., Tajfel 1981; for a useful review, see Huddy 2001). Although most approaches to understanding justice judgments adopt an individualistic perspective, relying on attributes of the individual to predict conclusions about justice, of late, scholars have become concerned with the role of group identities in shaping thoughts about justice and injustice (e.g., Tyler et al. 1997).¹⁵ As Vidmar (2001, 43) notes, “‘disinterested’ retributive justice is not disinterested at all: The response of the individual is based on identification with her or his group and the threat to values held by the group.” People seem to feel the need to vindicate their value in society by ensuring that some form of retributive or restorative justice takes place. This is particularly important for those who draw much of their identity from their group

¹⁵ Some cross-national differences in justice thinking may have to do with how people conceptualize relations among groups, as in, for example, individualistic or collectivistic terms (e.g., Hamilton and Sanders 1992).

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affiliation, and especially if the group has been subject to systematic victimization in the past.

Consequently, an obvious hypothesis drawn from social identity theory (e.g., Tajfel 1981; Gibson and Gouws 2000) is that to the extent that an individual identifies with a victimized group, reactions to the victimization of an individual group member will be stronger, more salient, and of greater socio-political relevance. Land reconciliation is certainly an important issue for those directly victimized by apartheid. But through mechanisms of group identification, group comparison, and disinterested justice, the victimization takes on larger proportion and meaning for the political system. Because such feelings of injustice aroused by failure to punish wrong-doers typically generate anger and the desire to strike out at the offender, behavioral consequences of these attitudes often materialize (as perhaps in criminal behavior against the privileged minority, or in Zimbabwe-style “land grabs”). Failure to sanction offenders can lead to a more general sense of the illegitimacy of the socio-political system.¹⁶ Apparently, people feel the need to vindicate their value in society by ensuring that some form of retribution and restitution take place. This is especially important for those who draw much of their identity from their group affiliation, especially if the group has been subject to systematic victimization and lack of respect for the rule of law.¹⁷

Land repression in South Africa was obviously directed against both individuals and groups.¹⁸ Where individuals could live was determined by their group membership (race), as ascertained by law. There was no ambiguity about the value of group comparisons – whites assigned themselves the superior position and blacks the decidedly inferior position. Thus, the harm of forced removal was experienced both directly by those who were required to move their residences and by those who, while not directly affected, were subject to the law requiring forced

¹⁶ See Vidmar (2001, 56), who concludes that the question is as important as existing empirical research is sparse.

¹⁷ Huo and Tyler (2000) report the interesting finding that identification with a group does not undermine legal authority, even if failure to identify with the United States does.

¹⁸ On the importance of this issue, Leung and Morris (2001, 371) note: “very little research has examined [the dispossession of native peoples] from a justice perspective. We believe that this is a major area that should be tackled in future research.”

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removals. Consequently, land reconciliation is likely to be of great concern to all black South Africans because until such reconciliation takes place, blacks cannot have their status as equal citizens of the country affirmed.¹⁹

Identity theory may therefore provide some basis for establishing a hierarchy of justice values. Skitka (2003), for instance, has argued that although *justice principles* may not be hierarchically organized themselves, different types of *identities* are arrayed in a hierarchy – and become salient under different, contextually defined circumstances – and different types of identities give rise to different types of justice concerns. For instance, following group values and relational models of justice (Lind and Tyler 1988; Tyler and Lind 1992), she hypothesizes that “people are influenced more by socio-emotional outcomes like standing, status, and respect as the relative salience of their social identity concerns increases” (Skitka 2003, 290). In addition, “when people’s material interests are threatened, they will first look for violations of the equity norm, and when their social status or standing is threatened, they will first look for evidence of procedural impropriety (e.g., a biased judge) or violations of group norms” (Skitka 2003, 292). Thus, people define themselves socially; sociotropic concerns are at least as important as egocentric goals and are associated with assigning priority to procedural justice; and group identities, norms, and values are therefore important when people assess the fairness of outcomes.

In sum, extant research has shown that citizens typically evaluate justice claims using multidimensional frameworks. To understand the politics of such claims, one must be able to assess which justice domains are dominant, whether group identity concerns are activated, and how conflicts among justice domains are adjudicated. Since the land issue implicates a variety of justice values, it provides a useful context for an inquiry into commonsense justice.

¹⁹ This suggests the hypothesis that whether one was victimized by apartheid is unlikely to be a strong predictor of positions on land reconciliation (just as the risk of victimization has been found to have little impact on attitudes toward California’s “three strikes” sentencing laws – see Tyler et al. 1997). In fact, based on the limited data available from our 2001 survey (see Gibson 2001), this hypothesis receives little empirical support. Experiences of this sort seem to have only a very small influence on the attitudes South Africans hold toward land reconciliation.