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Re-Ordering Justice: Towards A New Methodological Approach to Studying Transitional Justice*

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Scholars and policymakers have turned increasing attention to questions of transitional justice, those legal responses to a former regime's repressive acts following a change in political systems. Although there is a rich, interdisciplinary literature that addresses the value of various transitional justice measures, theoretical arguments for how and under what conditions we should expect to see these measures implemented tend to gravitate to intuitively appealing relative power considerations. But attempts at parsimony have tended to leave the dependent variable either overly restrictive or poorly defined, yielding theories that are difficult to test. In this article, the author proposes a 'transitional justice spectrum' based on a hierarchical series of possible accountability mechanisms and designed to allow researchers to conduct more rigorous, cross-national tests of justice arguments. The objective here is not to posit a broad theory of transitional justice, but to open the debate into a methodological weakness in the transitional justice literature. The article includes seven accountability mechanisms: cessation and codification of human rights violations; condemnation of the old system; rehabilitation and compensation for victims; creation of a truth commission; purging human rights abusers from public function; criminal prosecution of 'executors' (those lower on the chain-of-command); criminal prosecution of commanders (those higher on the chain-of-command).

Introduction

Over the past 15 years, scholars and policymakers have turned increasing attention to questions of transitional justice, those legal responses to a former regime's repressive acts following a change in the political system. Although a rich, interdisciplinary literature addresses the value of various transitional justice measures, theoretical arguments concerning how and under what conditions we should expect to see these measures implemented

are limited. The current literature, born as oppressive regimes from Latin America to Eastern Europe began to fall in the 1970s and 1980s, evolves around intuitively appealing relative power considerations. But attempts at parsimony have frequently left the dependent variable either overly restrictive or poorly defined, yielding theories that are difficult to test. In this article, I propose a 'transitional justice spectrum' based on a hierarchical series of possible accountability mechanisms and designed to allow researchers to conduct more rigorous, cross-national tests of transitional justice arguments.

This article is not intended to posit – or directly refute – a broad theory of transitional justice, a task that even the most renowned

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scholars have declared extraordinarily diffi-
cult (Elster, 2004). Rather, it is meant to
open a debate into a methodological issue:
how best to test existing and future theories.
The transitional justice spectrum is intended
to serve as a yardstick to assess causality in
transitional justice decisionmaking, an ana-
lytical tool that will impose greater clarity
on what, and subsequently how, transitional
justice researchers are measuring.

I begin by explaining the accountability
dilemma (why new elites should support or
eschew accountability policies) and reviewing
arguments concerning determinants of tran-
sitional justice. I focus on the central argu-
ment in the literature, which contends that
the relative strength of new and old elites is
the primary determinant of accountability
policy. I then elaborate on a mechanism
that can be used to test this and other transi-
tional justice causal theories. Finally, I briefly
discuss ways this spectrum can be used.

Transitional Justice: Determinants of Action

Transitional justice scholars frequently
approach their subject equipped with legal
and normative arguments for why new elites
might pursue various forms of accountability
(Vinjamuri & Snyder, 2004). One under-
lying theme is the need for the new state
to acknowledge the former regime's role in
human rights abuses. A lack of exposure may
preclude society from reaching a consensus
on the historical wrongs and therefore dam-
age attempts to form a new societal bond
(O'Donnell & Schmitter, 1986: 30). Hayner
(2001: 27) highlights the important role per-
ceptions of 'truth' play in a stratified, post-
transition society, suggesting that disparate
versions of a country's repressive history
fuel political tensions that may turn violent.
Indeed, this fear has proven legitimate in
countries such as Rwanda and Yugoslavia,
where recent cases of massive rights violations

were at least partly rooted in historic abuses.
By individualizing blame, accountability
policies can end the 'dangerous culture of
collective guilt' that contributes to long-term
instability (Kritz, 1996: 128).

With respect to democratic consolida-
tion, transitional justice proponents argue
that accountability signals the start of insti-
tutional reforms, demonstrates that all citi-
zens are liable under the same law, and can
encourage public support for previously
absent democratic values, such as equality
and participation (Crocker, 1999: 47–54;
Graybill, 1999: 5; Huntington, 1991: 213;
Jaspers, 1995: 198–199). Justice can help
forge a common historical understanding,
demonstrate new elites' institutional disap-
proval of rights violations and even enable a
new government to enhance its own legitim-
acy by constructing a wall between itself and
the former regime (Jaspers, 1995). Criminal
prosecutions may satisfy victim demands
and clear the way for otherwise unattainable
victim compensation (Landsman, 1996: 82)
and might deter future leaders tempted by
injustice (D'Amato, 1994: 503). Even a
relatively moderate accounting, however,
may lead to political instability (O'Donnell
& Schmitter, 1986). Though legal scholars
question the legitimacy of potentially
unpopular blanket amnesties (Burke-White,
2001: 13; Hayner, 1996b), risks, ranging
from military coups to social divisiveness and
civil war, may prompt new elites to abandon
private preferences for harsh accountability
(Zalaquett, 1992: 1431).

These risks have for centuries forced polit-
ical elites to wrestle with whether to punish
or forgive members of oppressive regimes
(Elster, 2004). Contemporary debate can be
traced back to the immediate post-World
War II period, when the victorious Allied
forces applied still-evolving international
judicial norms to vanquished powers accused
of heinous war crimes (Teitel, 2003). The
Nuremberg and Tokyo trials were a leap in

international human rights, but they took place under 'exceptional political conditions' (Teitel, 2003: 70) that quickly disappeared. During the Cold War, bipolar power struggles eclipsed the nascent transitional justice movement (Evans, 1996). As harsh authoritarian regimes in Latin America, Africa, and Southern and Eastern Europe fell in the 1970s and 1980s, incoming elites sought to balance the norms of justice that emerged in the post-war era with political constraints present in the absence of all-out military victory. Retributive measures, such as mass criminal trials, were frequently replaced with more lenient policies, including blanket amnesties and truth commissions.

Perhaps as a result of these systemic observations, various theoretical arguments designed to identify key determinants of, or impediments to, pursuing justice in post-repressive states are bound by a common thread: a focus on the relative power of incoming and outgoing elites (Aguilar, 2001: 99; Barahona De Brito, Gonzales-Enriquez & Aguilar, 2001: 11; Benomar, 1995: 41; Huyse, 1995: 63; Roehrig, 2002: 199; Sieder, 2001: 162; Sutter, 1995: 121; Zalaquett, 1992: 1432). While these arguments include a range of independent variables, relative power tends to operate as a trump card where the greater the relative strength of the old elites compared to the new, the less likely we should see new elites pursue 'harsh' forms of justice (Huyse, 1995: 78).

Strands of this relative power hypothesis are differentiated by definitions of power and underlying processes. Huntington's widely cited political elite level typology explains transitional justice as a function of top-level political power as mediated by the transition process from authoritarian rule to democracy (Huntington, 1991: 230–231). Elites rising to power through revolution are most likely to implement harsh forms of retributive justice, since the former regime's power base (and ability to meddle in the new state)

is presumably destroyed. By contrast, new regimes empowered following a negotiated transition or old elite-led transformation (where authoritarian leaders control the speed and character of change to democracy) often give explicit or implicit amnesties to members of the still-powerful old regime and should therefore show restraint in the accountability sphere.

Other scholars adhering to the relative power logic define power more broadly, taking into account state structures. O'Donnell & Schmitter (1986: 28), for example, emphasize the continued presence in key power ministries of those actors complicit in prior abuses. In the South American context, the military is particularly relevant; in Eastern Europe, the police and secret services might receive more attention (Rosenberg, 1995). Loyalties to the old regime and potential feelings of complicity among members of the state apparatus could impair a new elite's capacity to rule, much less engage in transitional justice.

Finally, others apply an even broader definition of power, based on public support. Zalaquett (1995), for example, introduces the role of non-elites, arguing that a state's social (e.g. ethnic, religious) structure may preclude certain types of justice that could antagonize intrasocietal relations. Some also consider the role of memory and temporal as well as qualitative aspects of past rights abuses (Aguilar, 2001: 97; Elster, 2006: 11; Huyse, 1995: 71–73; O'Donnell & Schmitter, 1986: 30; Pion-Berlin, 1994). Dangers of transitional justice are more than elite-based, with potential immediate consequences outside of the official realm. Even Huntington, despite his succinct typology, acknowledges this, referring frequently to referenda and quoting one Romanian government official as saying, 'If we publish the [secret police] files as some people have suggested, there could literally be something worse than a civil war with friend turning against friend

once they find out what is contained in them' (Huntington, 1991: 230).

While these arguments all look at justice as a function of power, they differ with respect to *who* determines the relative power of old and new, as well as with regard to the implicit or explicit mechanisms that make relative power a serious constraint. Supporters of Huntington's political elite argument seem to stress normative aspects of the bargaining process but also, like state structure proponents, imply the risk of a coup or failed state (marked by the inability of new elites to implement policies) where relatively weak new elites pursue retributive justice upsetting to the old guard. By contrast, those focused on societal conditions warn that aggressive justice could prompt civic unrest and even civil war depending on attitudes, and perhaps level of complicity, of broader society. Ultimately, however, each argument focuses on new elite's fears that powerful elements implicated in yesterday's rights violations can destabilize the political sphere if they perceive justice policies as threatening.

These various relative power arguments all point astutely to potential risks of transitional justice, but each comes with a set of potential weaknesses. Challengers to elite-level arguments might ask why post-oppositionists should respect deals made through arm-twisting by illegitimate outgoing elites, particularly in cases where new elites quickly and democratically accrue more political power than predicted by transition type. While state structure explanations address this, they leave unaddressed important questions about the cohesiveness of subpolitical actors, most of whom were probably not directly complicit in past violations. Structuralists also side-step the issue of mass participation in the initial regime change, a factor that may embolden post-oppositionists. The most obvious weakness of public attitude explanations is, as with the preceding strains of relative power, a lack of elasticity. Are

public attitudes non-malleable, structurally determined by experiences and perceptions of past injustices? Or are they more dynamic, influenced by perceptions of present governmental successes and failures (Holmes, 1994: 34; Walicki, 1997), or even subject to elite persuasion (Jacobs et al., 1998; Koch, 1998; Powlick, 1991)?

The purpose of raising these weaknesses is not to directly challenge these theories but to suggest the need for more vigorous scrutiny. The shortcomings described demonstrate the types of holes and inconsistencies prone to fester in theories not tested using clear measures of validity. Indeed, perhaps because of the natural appeal of relative power explanations, scholars frequently defend them by largely anecdotal evidence. Huntington, for example, evaluates his popular argument by referring to a range of cases, from the Philippines to Romania, that appear to support his thesis. To pick one example, I look at the case of Uruguay, which Huntington claims had, under military rule, the highest proportion of political prisoners in the world (Huntington, 1991: 211). According to Huntington, the transitional justice policies of Uruguay's new leaders, who came to power through negotiations, were severely constrained by the prevailing power of military leaders who first promised to obstruct criminal prosecutions and then made threats in order to (successfully, Huntington says) influence a public referendum on the subject (Huntington, 1991: 226–229). Similarly, the new regime's relative weakness left it unable to pursue a truth commission which, according to one general, would have compromised the amnesty military leaders assured themselves by handing over power.

Instructive as this study is, Huntington is guilty of over-simplification, resting his theory that across cases 'justice was a function of political power' (Huntington, 1991: 228) on the observation of only two aspects of justice, criminal prosecutions and truth commissions.

Even arguments intended to look beyond relative power frequently revert to this binary indicator. Huyse (1995: 76), for example, concludes that 'the need to avoid confrontation' prompts new elites to exchange criminal prosecutions for truth commissions as 'the least unsatisfactory solution' (Huyse, 1995: 78). Sieff & Wright (1999: 759), who argue that relative power sets 'the parameters for the application of the norms of justice', similarly conclude that if new elites believe peace and justice are reconcilable they will prosecute, but otherwise they will opt for truth commissions (Sieff & Wright, 1999: 769). This focus on the 'usual suspects' of transitional justice (criminal trials, amnesties or truth commissions) is problematic. First, these terms may marginalize other justice measures that have been used (perhaps successfully) by political elites around the world. Indeed, scholars have explored the pros and cons of a gamut of intermediate policies, including public apologies, victim compensation, and banning perpetrators from public office (Crocker, 1999; Gibney & Roxstrom, 2001; Kritz, 1996; Minow, 1998: 23; Reilly, 2002).

More importantly, underspecification of the dependent variable makes it difficult to produce hypotheses and empirical observations that succinctly correlate power to justice type. How can one correlate transitional justice and power when there is no clear understanding of how the many transitional justice measures relate to one another? How do these policies compare to one another qualitatively, and under what conditions will a new leadership decide to implement which steps? While relative power might correlate nicely with the likelihood of criminal prosecutions, this does not provide strong evidence that justice is a function of power – only that one type of justice appears to be affected by this particular independent variable. If transitional justice policies are a function of relative power, it seems both the primary independent variable (old–new elite power) and dependent variable (justice type) should be defined incrementally. If, for example, we begin doing this and concede that prosecutions and administrative purges are 'harsher' than truth commissions, then relative power proponents might expect a weak new elite leadership to launch truth commissions rather than prosecutions or purges. But what if, for example, the new leadership instead conducts purges but finds itself unable to launch an independent truth commission (as was the case, for example, in some post-communist states)? This may be suggestive that something other than (and perhaps exclusive of) relative power is at work. By specifying the dependent variable, we establish clear expectations that can be evaluated systematically and objectively.

Scholars addressing the broad range of transitional justice options to date tend to refrain from outlining a clear policy hierarchy (Minow, 1998: 23; Reilly, 2002). Rankings tend to be restricted to the obvious, when discussion touches on only two or three policy options (especially blanket amnesties, truth commissions, and criminal prosecutions) and general policy guidelines remain limited to the 'how to', rather than 'when to' or 'when not to', of one specific accountability policy (Hayner, 1996b; Landsman, 1996). Authors are clearly cognizant of the different risk levels involved in the policy options, but there has been no attempt to systematically address this. Yet, without explicitly defining the dependent variable in ways that allow one to measure risk, it is difficult to have confidence in the widespread consensus that relative power is the key determinant of justice.

Vagueness of the dependent variable therefore renders relative power arguments obtuse, perhaps prompting skeptical authors to challenge them by positing new arguments rather than explicitly identifying evidence to reject the prevailing ones. Moran, for example, found little support for relative power

arguments in Central Europe, arguing instead that justice is influenced by psychological determinants based on the degree to which opponents in the former system could voice their opposition or emigrate (Moran, 1994). In an analysis of three Latin American states, Pion-Berlin (1994) found that while the nature of rights violations and relative power issues set the boundaries for political action, elite preferences and strategic calculation shaped concrete policy outcomes within these confines. The fact that these arguments seem to have had little resonance in the transitional justice literature may result from the growing belief that there is no single determinant (Elster, 2006), but it may also follow from the difficulty in explicitly taking on the prevailing argument without adequate instruments.

Transitional Justice Spectrum

The goal of this section is not to challenge the relative power argument per se, but to suggest ways of testing it and other theoretical arguments concerning transitional justice. The first step towards this objective involves specifying the dependent variable, accountability mechanisms available to a new regime. There exists a range of possible actions that leaders can undertake to pursue accountability for human rights violations. Through a review of the democratization and transitional justice literatures, I have identified seven frequently used policies and placed them in a 'transitional justice spectrum'. These mechanisms are ranked by the degree to which they personalize responsibility, as well as by the severity of each policy's repercussions for the perpetrators. These measures co-vary early in the spectrum, but after stage four, when concrete individuals are already targeted, severity increases independently.

(1) Cessation and codification of human rights violations;
(2) Condemnation of the old system;

(3) Rehabilitation and compensation for victims;
(4) Creation of a truth commission;
(5) Purging human rights abusers from public function;
(6) Criminal prosecution of 'executors' (those lower on the chain-of-command);
(7) Criminal prosecution of commanders (those higher on the chain-of-command).

The logic of the spectrum is twofold. Most broadly, it organizes justice mechanisms along a continuum that gradually proceeds from restorative (alleviating victims' pain) to retributive (punishing perpetrators). At the same time, and not coincidentally, this spectrum incorporates a relative power logic, since each incremental step up the accountability ladder involves implementation of a more provocative, or threatening, policy, with respect to members of the old regime. This spectrum operationalizes risk in ways that should explicitly allow justice scholars to observe strengths and weaknesses of relative power arguments, which should dictate the highest level of accountability feasible for a new leadership. In the straightforward case of Huntington, for example, we should find weak regimes (e.g. those handed power by old elites) to go no further than stage 1; moderately strong regimes might pursue up to stage 4; and only the strongest regimes (e.g. those arising out of revolution) should pursue stages 5 through 7. In cases where these expectations are not met, use of this spectrum might suggest other determinants. In my own research (described below), I used elite interviews, in which I questioned how and why each of these measures was or was not applied, to generate and test alternative theories.

In the remainder of this section, I describe each step on the proposed spectrum, including a brief discussion of the measure's pros and cons, a theoretical rationale for its risk

assessment rating and a series of examples illustrating how this measure has been carried out in practice, as well as the threats associated with it. It is important to emphasize that while readers may disagree with the specific ordering of these measures (e.g. preferring to switch stages 2 and 3 or 6 and 7), this should not detract from the use of this spectrum as a general tool. Moreover, such disagreements – and especially empirical evidence to back them – should generate further discussion that might strengthen future versions of this instrument.

I. Cessation and Codification of Human Rights Violations

In a democratizing state, one basic task for the new regime is to halt rights violations. New leaders can codify the most brutal rights violations orchestrated by previous political elites by signing, ratifying, and integrating into domestic law major international human rights conventions. On the international stage, external states often base future cooperation on their potential partner's reputation information (how they upheld past international commitments, including those in the human rights sphere) (Donnelly, 1986: 608; Fearon, 1998; Gelpi, 1997; Putnam, 1988). The heavy investment (e.g. long process) involved in treaty negotiation and ratification is also suggestive that participating parties intend to remain true to their promises (Chayes & Chayes, 1993). Indirectly, international treaties can alter a signing state's political institutions as subunits of different governments come together in treaty monitoring bodies, where conflicting loyalties to the home state and treaty mission become fluid, even resulting in new coalitions that influence a state's home capital rather than the reverse (Burley & Mattli, 1993; Keohane & Nye, 1974). Ratification of international rights agreements can also alter internal political opportunity structures, emboldening

opposition groups and expanding their collective action 'repertoire' in ways that make them more formidable opponents to potential rights violators (Pharr, 1990; Tarrow, 1991, 1994).

Because cessation and codification of violations involves exclusively positive steps, without indirectly or directly confronting old power holders or rights abusers who linger in the state apparatus, this measure is essentially risk-free. The cessation of rights violations and adoption of international rights norms mark a new course in a country's politics but do not personally threaten the old power holders. New political elites do not confront (either directly or indirectly) those complicit in past abuses, yet they ensure pro-accountability forces in society that their most essential judicial needs are met.

A review of signatories to the International Covenant on Civil and Political Rights (ICCPR), the ICCPR's first protocol allowing the Human Rights Committee to accept private citizen complaints, and the Convention against Torture suggests that incoming regimes do use international human rights agreements to signal a new era of liberty (UNHCR, 2004). During a major period of liberalization in Algeria (1989), for example, the country's new leaders passed all of these agreements in a three-month span. A similar pattern is clear in such diverse states as Angola (1992, as the country embarked on multi-party elections), Sudan (1986, just after the fall of President Numeiry), Argentina (1986, following the country's 'dirty war'), and Benin (1992, following democratic elections that ended decades of military rule). Soon after the fall of communism, most former Soviet and East Bloc states signed on to at least one human rights convention protecting political rights formerly denied. That so many associated with previous rights abuses pushed for the codification of these guarantees is evidence of the low risk of this stage.

II. Condemnation of the Old System

The exclusively positive nature of stage 1 is supplanted by a broad and impersonal attack in the form of a general declaration of condemnation of the old system. This can take a variety of shapes, from parliamentary laws and resolutions to public speeches by high-level government officials. The goal, according to Jaspers (1995: 198), is to make 'a clear distinction between the transitional government and the previous regime'. Formal condemnation of, or apology for, past abuses is typically seen as restorative, a first step towards societal reconciliation (McGregor, 2001). But condemnation also serves a mild retributive function, the gateway to culpability in which groups are implicated in past misdeeds.

Despite sharing some retributive characteristics, new elites at this early stage of censure avoid threatening their predecessors by condemning the system rather than specific actors, The unpleasantness of political humiliation is in some ways diminished by pre-existing societal awareness of abuses (Kritz, 1996). Perhaps more importantly, members of the old elite remain generally protected by ambiguity and their own capacity to explain away their personal roles (Payne, 2001). Gray masses from repressive bureaucracies can offset responsibility by claiming to be cogs in the machine, personally unaware of what was ultimately being churned out.

The increased weight of condemnation (relative to the mere codification of rights violations) is demonstrated by the fierce resistance states put up to impersonal rebukes of their countries on the international stage (Cain, 1999; Donnelly, 1988). At the United Nations, for example, Security Council resolutions with no legal enforcement power are protested in tense debates, walkouts, and even official vetoes (IPNSA, 2004). On the domestic stage, condemnation may be met with tolerance or repentance on the side of the condemned, but it can also draw negative reactions (Gilligan,

2003; Lindner, 2001). Only after six years of debate did Spanish right-wing parties finally agree in 2002 to an embarrassing resolution condemning the rule of dictator Francisco Franco, who had died more than 20 years earlier (Aguilar & Humblebaek, 2002: 132). Argentinean ex-general and former ruler Jorge Videla, sentenced to life imprisonment in 1985 for his role in murders, abduction, and torture, was indignant when pardoned five years later, calling for 'the army's vindication and the reparation of military honors' (*Toronto Star*, 1991). In each case, affiliates of the former regime denied wrongdoing and resisted public rebuke.

III. Rehabilitation and Compensation for Victims

Rehabilitation, including the annulment of sentences issued in the context of political repression, and compensation are two restorative measures aimed at improving the lives of former victims (Posner & Vermeule, 2004). Like condemnation, they can also mark a break with the past. Rehabilitation involves returning full civil rights to those unrightfully persecuted, whether practically (for those still alive) or symbolically. Because compensation requires potentially heavy state financial allocations, it may be more costly and controversial. Scholars argue that fiscal measures can help 'right' past wrongs materially as well as symbolically (Crocker, 1999: 51), and some go so far as to argue that victims' 'well-being should not be sacrificed in the interest of national reconciliation' (Landsman, 1996: 86). Intergovernmental organizations have claimed post-repressive states are obliged to provide legal and financial redress to former victims (CE, 1996; UN, 1993, 1996).

In contrast to vague condemnations, rehabilitation and compensation may be seen by affiliates of the former regime as a step towards personal accountability. If this family suffered, who inflicted the pain? Perhaps for

this reason, the commander-in-chief of the Chilean navy rejected a presidential promise to provide reparations as a 'foolish and offensive way of dealing with established concepts and rules such as security, intelligence, due obedience and others' (BBC, 1991a). Similarly, when the Spanish right-wing Popular Party finally agreed to legislation condemning Franco-era totalitarianism, it continued to oppose clauses mandating rehabilitation and reparations for Franco's political prisoners (Aguilar & Humblebaek, 2002: 132). Political liability inherent in public expenditures (Simpson & van Zyl, 1995) has prompted politicians from Sri Lanka (Rees, 1990) to Czechoslovakia (Green, 1990) to water down compensation measures or create legal obstacles designed to reduce the number of beneficiaries. The Argentinean government in 1992, for example, promised to compensate former convicts of military courts but not judicial courts and other categories of victims (Chaudhary, 1992). This may serve a dual function, since associates of the old regime sometimes balk at the notion that the rules they helped create or enforce were somehow wrong (Kalisz, 2003; Paprzycki, 2003).

IV. Creation of a Truth Commission

Truth Commissions, or officially sanctioned, temporary bodies established to clarify past abuses, are frequently cited as a 'third way' between criminal prosecutions and blanket amnesties (Hayner, 1996a, 2001; Sieff & Wright, 1999). Truth commissions perform several functions, from providing an environment in which victims and/or perpetrators can tell their stories to supplying an official forum for 'a meaningful acknowledgment of past abuses' (Kritz, 1996: 138). Commissions can be public or private, aggressive or passive, empowered with legal rights of forgiveness (amnesty) or deprived of legal authority. They can be functional (establishing official records of death necessary for

relatives to attain benefits) or metaphysical (generating open discussions intended to ease tensions; Hayner, 2001). Hearings are often victim-oriented, providing what Crocker calls a 'public platform for victims' where they 'receive sympathy for their suffering' (Crocker, 1999: 48; Graybill, 1999; Hayner, 2001). But they can also be understood as society-oriented, to the degree that they aim to promote reconciliation, or policy-oriented, when they document abuse patterns useful in reforming the system or organs in question. Though usually branded restorative mechanisms, truth commissions mark the transition from earlier accountability measures that only indirectly assigned responsibility to later measures that explicitly personalize blame. Retributive aspects may be subtle (rights violators are not formally deprived of their freedom or livelihoods), but profound effects of public humiliation (Cohen, 2003: 1075; Riezler, 1943; Shweder, 2003), ranging from social ostracism to political defeat, have led some to label this 'concealed retribution' (McGregor, 2001: 38; Hayner, 2001: 24; Osiel, 2000; Zalaquett, 1995). While alleged perpetrators may be dismissive (Payne, 2001; Shapiro, 2003), identification of former rights violators, particularly in public truth commissions, is one step up the ladder towards personal accountability and directly threatening those aligned with the former system.

Investigation of the much-heralded South African Truth and Reconciliation Commission (TRC) highlights the risks inherent in this process. Former South African President F. W. de Klerk used continued white power to press for amnesty for his constituents (de Klerk, 1999: 288). ANC leaders, contending with anti-amnesty constituents, accepted a truth commission characterized by conditional amnesties as a compromise (Eades, 1999; Jackson, 1998; Newham, 1995; Waldmeir, 1997: 213; Wilson, 2001: 7). Even then, many whites saw the truth commission as a

threat rather than a bargain, 'a witch-hunt' in the words of the TRC chair (TRC, 1995). As a result, many in the potentially danger-ous security services chose to remain in the shadows rather than risk speaking up and then being denied amnesty (Davenport, 1998). Security services in other states have been more vocal, with members of El Salvador's military opposing a UN-sponsored Truth Commission on the grounds that 'because of a few bad (members), an entire institu-tion is being judged' (Wilkinson & Miller, 1992; Alder, 1993). Some new leaders may purposely limit the scope or powers of the commission to avoid upsetting the new bal-ance (Dicklitch & Lwanga, 2003).

V. Purging Human Rights Abusers from Public Positions

While stages 1 through 4 of this transitional justice spectrum spare former rights abusers formal sanction, employment bans for the first time impinge on their civil liberties. According to some scholars, such bans can increase societal trust in critical public insti-tutions and enhance rule-of-law concepts (Kritz, 1996) and can also act as a (restora-tive) form of affirmative action by creating positions for people previously denied jobs on account of their political views (Esquith, 1999). On the other hand, such purges bring about a range of practical and ethical con-cerns about whom to target and what sorts of limitations to apply (Baehr, 2000; CE, 1996; Rigby, 2001). Purges can be destabilizing, whether because they weaken state capacity (by expunging the only trained specialists) or create strong incentives for collective action on the part of banned actors (Kritz, 1996).

As provocative as this measure may seem to some elites, there are ways to lessen the risk of destabilizing collective action by those being purged. Older functionaries, for exam-ple, may be able to transition into (early) retirement, while the younger ones may either have less experience with the former

regime (and therefore be allowed to stay in their positions) or be able to relatively eas-ily find a new source of income (Kozlowski, 2004; Moran, 1994). By adopting a new profession or accepting a lesser role in pub-lic life, members of the former regime may continue to enjoy freedom and avoid crim-inal liability in the new order. At the same time, human rights offenders are punished for their actions and separated from the new government.

The tension between an urge to purge and a fear of potential destabilization may suf-fice to delay or even reverse policy. Immedi-ately after taking power from the military in Greece, for example, Karamanlis dismissed senior level ministry personnel and launched a vetting of the old bureaucracy that resulted in 108,000 disciplinary actions, mostly involv-ing termination (Kritz, 1996; Nanda, 1998: 391). Yet, the government waited for the retirement of a brigadier loyal to the former regime before feeling secure enough to purge the higher military ranks, retiring more than 200 army officers (*Economist*, 1975a: 12). In El Salvador, an official report calling for purges of officers accused of rights viola-tions and corruption sent rumors of a mili-tary coup through the country (Wilkinson & Miller, 1992). Even purges that followed a military victory, such as that after World War II, frequently resulted in rollbacks, per-haps as a result of these pressures. In Japan, for example, less than 9,000 of an initially purged 202,000 remained punished once the Allies left; similarly, Italians reinstated under a 1948 amnesty most of the 2,000 government employees purged there (Nanda, 1998: 391).

VI. Criminal Prosecution of 'Executors'

Since the Nuremberg Trials of Nazi lead-ers following World War II, and through subsequent international treaties such as the Convention on the Prevention and Punish-ment of the Crime of Genocide (1948) and

the Convention Against Torture (1984), international law has promoted the prosecution of human rights criminals (Ratner & Abrams, 2001). Over the years, intergovernmental organizations and local courts have increasingly justified and encouraged criminal prosecutions based on international human rights law (CE, 1996; Fletcher & Weinstein, 2002; Roht-Arriaza, 1996). Scholars have argued prosecutions of individuals can create a historical record, satisfy victims' desires for justice, and further democratic values of equality and accountability (Huntington, 1991; Jaspers, 1995; McGregor, 2001) while reducing the risk of collective guilt (Kritz, 1996) and vigilante justice (*Economist*, 1976: 47; McGregor, 2001).

Criminal prosecutions raise the severity of consequences for rights violations to a new level (deprivation of freedom), but come with a myriad of practical difficulties. A lack of qualified lawyers or judges, especially those not tainted by activities under the previous regime they are to try, has been blamed for multi-year pre-trial detentions in countries such as Ethiopia and Rwanda and overly lenient sentences in other states (AFP, 1997; Kritz, 1996: 133; Naszkowska, 1992; von Kellenbach, 2003). There are also ethical and legal questions concerning 'retrospective justice' (Nino, 1996: 166–179). Finally, there are concerns that the severity of the repercussions could lead to resistance by those accused or even whole institutions whose personnel fear extended witch hunts.

Such fears prompted the Argentinian defense minister in 1986 to order expedited trials of the 300 officers awaiting justice so as to avoid 'an image of collective judgment' which could provoke military unrest (Graham, 1986). A series of army mutinies eventually forced the government to end prosecutions (Barham, 1992), and upon taking power, President Carlos Menem quickly pardoned the 39 senior officers

convicted.[1] Thinly veiled threats from military leaders in Ecuador (LARP, 1980) and Chile (BBC, 1991a,b) were successful in at least temporarily thwarting trials there, as well. Opposition to a 2002 UN call for criminal prosecutions in Sierra Leone (AN, 2002a) prompted one local newspaper to warn that attempts at criminal justice may cause great harm where weapons remain in the hands of those complicit (AN, 2002b).

VII. Criminal Prosecution of Commanders

Limited capabilities or fears that wide-scale trials could disrupt state operations may prompt new elites to launch a more limited set of trials that still demonstrate a commitment to justice (Crocker, 1999; Kritz, 1996; McGregor, 2001). Pursuing leaders, or the most culpable (Kritz, 1996: 6), may alleviate the danger that lower-level functionaries feel they are scapegoats (Kamali, 2001: 107; Osiel, 2000: 126; Rigby, 2001: 104–105), but can be potentially more risky for several reasons. First, lower ranking officials may regardless see senior-level prosecutions as the first phase of a witch hunt (Roehrig, 2002: 199). Second, senior-level leaders may command respect and organizational loyalty useful in orchestrating a reaction at lower levels. Finally, this ripple effect may reach far deeper, creating perhaps unexpected societal reactions in a world where even the most brutal dictators seem capable of evoking immense emotional solidarity. Fifty years after Stalin's funeral, which drew tens of thousands, one attendee recalled, 'It was as if we lost the father of the family, the person who took care of us. We felt like orphans' (Rosenberg, 2003).

These pressures are visible in a range of cases. Weeks before new elites moved to

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[1] Interestingly, President Kirchner in 2003 felt secure enough to sponsor a law annulling immunity for approximately 2,000 former military men allegedly tied to pre-1983 abuses (Hennigan, 2003).

arrest and extradite to the Hague deposed
Yugoslav dictator Slobodan Milosevic, opin-
ion polls suggested only 11% of Yugoslavs
supported his extradition (Holley, 2001)
and approximately 1,000 people created a
'people's guard' to defend his home (Mitic,
2001). Post-oppositionist Prime Minister
Zoran Djindjic, an advocate of criminal jus-
tice, warned that high-profile extraditions
might lead to civil war (RFE/RL, 2002).
An apartheid-era South African president
warned the new government in 1995 that
prosecutions of apartheid-era leaders would
'awaken the tiger in the Afrikaner' (DPA,
1995). The durability of this emotional
bond was evidenced following the arrest by
British authorities of Augusto Pinochet in
1998, eight years after he left power, which
brought 3,000 pro-Pinochet demonstrators
to the streets of Santiago (DPA, 1998).

Associates of the old regime lingering in
the state apparatus frequently lead the defense
of their leaders. Less than a year after losing
power, Greek officers launched a failed coup
to secure an amnesty for imprisoned leaders
of the former junta, convincing the new gov-
ernment to reduce those leaders' sentences
(*Economist*, 1975a: 12, 1975b: 15, 1975c: 12).
Similarly, a series of army mutinies in Argentina
contributed to government decisions to at
first expedite trials and later issue amnesties
for those senior officials convicted of human
rights crimes (Barham, 1992; Graham, 1986).
A continent away and a decade later, Malawi's
army intercepted a brewing military coup on
the eve of the trial of former Malawian ruler
Hastings Kamuzu Banda, accused of involve-
ment in several political murders (AFP,
1995a,b; Mponda, 1995).

Discussion

By identifying and theoretically rank-ordering
a range of accountability policies, this 'tran-
sitional justice spectrum' qualifies vague
labels of lenient and harsh prevalent in the

theoretical transitional justice literature, and it
allows researchers to empirically test causal
theories of transitional justice across cases.
In the preceding section, I provided evidence
that each incremental step up the spectrum
involves more personalized responsibility and
more severe repercussions to the old elite.
Some of this evidence was closely linked to
old elite reactions, symptoms of discomfort
associated with a given measure. As men-
tioned above, this spectrum can be used to
indicate the success of the relative power
arguments, since – according to that logic –
states with the strongest old elites should
eschew the harshest retributive measures.
And the simple nature of the spectrum is
designed to make it durable across contexts.
For example, while the passage of time or
the nature of abuses might affect the type
of justice pursued, each incremental step up
the spectrum should at any point in time be
more provocative than the previous stage. In
other words, truth commissions will always
be less provocative (or risky) than purges,
which will always be less confrontational
than prosecutions.

But this spectrum is also a useful tool for
evaluating or generating other theories related
to transitional justice. Here, the spectrum
functions in two ways. First, it essentially pos-
its relative power as the null hypothesis and
gives us an ordinal tool to identify possible
inconsistencies. This might be particularly
useful in large-N studies, where comparisons
of cross-sample data could indicate general
trends. Second, the spectrum provides a useful
(if basic) checklist of important justice policies
that have been implemented around the world.
As with any broad framework, this list is not
intended to be exhaustive, and additional
measures, such as property restitution, might
also be added to suit the context. Archival or
interview data might be used to explore the
determinants of each of these policies. Taken
in the aggregate, these data could support
existing theories or identify new variables.

In my own research, I used this spectrum to explore why political elites pursued or eschewed various forms of justice in four diverse post-communist states: Uzbekistan, Serbia, Croatia, and Poland (Grodsky, forthcoming). My theoretical argument focused on economic-based motivations, but I used this spectrum as a tool to assess other (including relative power) arguments as well. My evidence was based on analyses of local and international media reports and more than 215 elite interviews conducted (in the local languages) primarily with post-oppositionists in various influential government posts and non-governmental actors involved in human rights. During the 50–90-minute meetings, interviewees were asked for their perceptions concerning why the new leadership (un)successfully launched or did not launch each mechanism on the spectrum.

The results of my fieldwork were fascinating. Across my cases (including in Uzbekistan, where any transition collapsed along with the Soviet Union), I found political elites were particularly sensitive to how various measures of justice would affect their ability to provide public goods to expecting populations (Grodsky, 2008b). Post-opposition elites tended to drive the accountability process, but the direction they took was usually limited by the degree to which they expected the public would perceive their activities as facilitating or hindering other, especially economic, policies. Relative power was deterministic only to the degree that it made measures practically impossible (e.g. post-oppositionists lacked the required votes to pass a particular law) or particularly costly (when old elites threatened to thwart other public goods-related bills as a consequence of tough accountability measures). The threat of voter backlash, rather than a coup or civil war, was ultimately the key constraint on justice.

If Huntington applied this spectrum to the case of Uruguay discussed above, he might well find that relative power was the key determinant of justice policy. But if, for example, purges of the military (an aspect of the dependent variable that Huntington does not consider here) were instigated in the absence of truth commissions, this would highlight a weakness to his theory. Using the spectrum as a checklist in a more thorough qualitative study, Huntington might find that other factors, aside from relative power, had an important effect. For example, perhaps new elites relatively supportive of lifting the amnesty did not actively push for a 'yes' vote in the referendum, believing that a campaign for this cause would be seen by constituents as too much energy spent on past problems rather than the problems of today. Or perhaps voters who upheld the military amnesty in the referendum were not swayed by comments from the military, but by perceptions that the justice system had its hands full enough already, perhaps fighting corruption. If earlier, less risky stages on the spectrum – such as legal rehabilitation or condemnation – were also left unaddressed, this might point to the perception among political elites that the public was simply uninterested in justice.

As indicated above, this spectrum may be useful in large-N studies where there are sufficient data concerning efforts at justice in a group of countries. If the relative power argument is correct, there should be a correlation between the power of new elites (e.g. measured by transition type or seats in government/legislature) and the highest degree of justice pursued. But my two years of fieldwork, trying out this spectrum, point to two areas of caution, concerning questions of reform authenticity and interaction effects. With respect to the former, users of this spectrum must be aware as they code data for each country that there may be significant differences between what I call 'genuine' and 'artificial' accountability reforms. For example, a truth commission conducted in democratic, post-apartheid South Africa obviously

differs substantially from one imposed in
authoritarian Uzbekistan or Chad (Grodsky,
2008a). In other words, *how* measures are
pursued can be just as important as *whether*
they are pursued. Context is important and, as
always, studies are only as strong as their data.

This observation leads to a second cau-
tion for using this spectrum, particularly in
large-N studies: under certain conditions
there may be interaction among various
components of the dependent variable. In
particular, in the relatively few cases where
there are international pressures for a par-
ticular form of justice, leaders pursuing
one form of justice may argue the enacted
mechanism makes alternative justice poli-
cies immaterial. Serbian cooperation with
the International Criminal Tribunal for the
former Yugoslavia (ICTY), for example, may
have precluded more aggressive bureaucratic
cleansing or local criminal trials. Conversely,
there is much evidence that Yugoslav President
Vojislav Kostunica launched a truth commis-
sion in order to reduce pressure for unpopu-
lar handovers to the ICTY. This interaction
makes it impractical to look for a correlation
between one policy and another, or measure
results cumulatively, under such circum-
stances. Still, in these unique cases it seems
that the relative power argument could be
assessed according to the highest stage of jus-
tice pursued (using the spectrum as an ordi-
nal measure). The fact that Serbian political
leaders made so many high-level handovers
to the ICTY in exchange for international
support and despite the strength of former
elites suggests a need to at least reconsider
relative power arguments.

Finally, it should be emphasized that as
much as this justice spectrum is designed
to deal with a significant weakness in the
current theoretical literature, it is also an
invitation to begin a broader debate on
this subject. In order to produce coherent
theories that explain why and how leaders
pursue accountability for past human rights

violations, we must agree on a measuring
stick. This article suggests one such instru-
ment and opens the floor for suggestions of
other mechanisms that may substitute or
complement this one. The collective goal
should be to increase our capacity to gener-
ate and test transitional justice theories in
ways that are more rigorous and therefore
more satisfying.

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