Published in European Journal of Sociology 39 (1998), 7-48.

NOTE:
The introduction + Sections 3 + 4 are required as marked.

COMING TO TERMS WITH THE PAST·

nework for the study of justice in the transition to democracy

by

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Abstract

ter the transition from an authoritarian to a democratic regime, e commonly observes trials of the agents of the former regime d efforts to compensate its victims. In our century, waves of nsitional justice have occurred in German-occupied countries er 1945, in South-Eastern Europe in the 1970s, in Latin- nerican countries in the 1980s, and in post-Communist countries er 1989. The article proposes a framework for the behavioral udy of these phenomena. The dependent variables are political cisions to pursue retroactive justice after the transition. dependent variables include the constraints of the actors, their otivations and beliefs, as well as the mechanisms by which dividual policy preferences are aggregated into binding collective cisions.

I.Andenæs, G.A. Cohen, H.F. Dahl, D. Gambetta, J.Lautman and A. Stepan ents on an earlier draft of this article, and the National Endowment of the s for financial support.

I. Introduction

Over the last fifty years there have been a number of
om authoritarian or totalitarian to democratic regimes. (For
nience, I shall use "authoritarian" for both pre-democratic
.) In most of them, the new regimes have had to come to
heir pre-democratic past. They have had to decide whether
ollaborators with or agents of the former regime should be
urt or otherwise penalized, and whether and how the victims
s should be rehabilitated and compensated. Large-scale trials
itions have taken place or are still unfolding in the German-
ntries after WW II, in several South European countries in
the East Bloc countries after 1989, and in a number of Latin
untries in the 1980s. As these examples indicate, transitional
occurs in regional waves, allowing earlier experiences within
influence later ones. Isolated cases also occur, as in South
1993 or South Korea in 1996.

In a basic source book Neil Kritz coined the term transitional
ese events.[1] (The term "retroactive justice" is also commonly
ontributions to these three volumes are largely normative, and
awyers who rely on international law and the human rights
e main purpose of the present article is to sketch a framework
oral analysis of transitional justice. The dependent variables
ns taken by the political forces in presence after the transition
t to prosecution, amnesty, restitution, rehabilitation, truth-
so on. The independent variables include the beliefs and
e actors, as well as the constraints under which their policy
made. Although the approach is mainly behavioral, this does
at no attention is paid to normative factors. As in my work on
e" - the allocation of scarce goods and necessary burdens - I
normative conceptions held by the actors among the
variables of the analysis.[2] Also, I shall occasionally discuss

(ed.), Transitional Justice, vols.I-III, Washington D.C.: United States
ace Press 1995.

, New York: The Russell Sage Foundation 1992 and Local Justice in
York: The Russell Sage Foundation 1995. J. Cohen, "The arc of the

and criticize the validity of these normative arguments - either the arguments themselves or their factual premises.[3]

The discussion is largely programmatic. I offer more questions than answers, hypotheses to be tested rather than actual verifications. Given the paucity of literature on the subject I have not been able to go beyond this stage, although I hope to do so in the future. The only systematic discussion of explanatory factors in transitional or "retroactive" justice is Carlos Nino's invaluable study, Radical Evil on Trial.[4] Although many of his conclusions carry over to the present analysis, they do not exhaust the topic. His dependent variables do not include economic measures of restitution and compensation. Among the independent variables he focuses heavily on the determinants of the strength of demand for retribution, whereas the discussion of other factors is less systematic. To produce a fuller set of dependent as well as independent variables, one has to look at case studies, especially the ones that are written in an analytical perspective. A model study from which I have benefited much is a book by Luc Huyse and Steven Dhondt on the Belgian case, La répression des collaborations 1942-52.

To introduce the question, Section **II** offers a case study of the earliest well-documented case of transitional justice, the return of the democrats to Athens in 403 B.C. after the rule of the Thirty Tyrants. Besides being of interest in its own right, the episode shows that many of the issues and solutions we confront today have been with democracy from its beginning. Section **III** offers a general overview of the problem. Sections **IV** is a survey of the key dependent variables and the institutional solutions that have been chosen. In Section V I survey some of the main independent variables that should be considered. Section **VI** is a brief conclusion.

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moral universe", Philosophy and Public Affairs 26 (1997), 91-134 argues more ambitiously that moral facts themselves, such as the injustice of slavery, can have explanatory force. I shall only rely on the uncontroversial idea that people's subjective conceptions of justice - like other mental states - can have causal efficacy.

[3] To pursue the analogy with local justice: when discussing the principle of seniority in layoffs from firms I have argued both that it owes much of its appeal to a conception of justice as desert (the more senior workers deserve to be retained because they have devoted the life to the firm) and that this conception is invalid (since this "devotion" does not normally entail any sacrifices, it cannot generate an entitlement).

[4] In addition to his analytical gifts, Nino could rely on his experience as a participant-observer of the Argentinean transition.

II. A case study.

Although the bulk of examples in this article are taken from questions of transitional justice are not novel. In France the acutely posed in 1814 and then again in 1815, during the first Restorations.[5] These were not, however, transitions to but passages from an authoritarian regime to an oligarchic ambiguous case of transitional justice in the sense of the le occurred in the first historical democracy, with the return of s to Athens after the fall of the regime of the Thirty Tyrants in e following account of this case does not aim at any kind of npleteness, but is intended to highlight aspects of the process more or less similar form in recent cases.[6]

In its heyday from the early fifth century to the late fourth ., Athenian democracy was interrupted only by two or "oligarchic" episodes, in 411-10 and in 404-3.[7] In the Thirty Tyrants" - who have been compared to a Latin ita[8] - took power in Athens and installed a rule of terror in al thousand Athenians were killed and many fled. Their to their being deposed, and replaced by the larger oligarchic Three Thousand. Under Spartan supervision, the Athenian d the democrats in exile at Piraeus drew up a treaty of a that would allow the democrats to return and democracy to

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thier de Savigny, La Restauration, Paris: Flammarion 1955, Chs. V and he first Restoration left most of the administration in place, the second a "white terror" that involved large-scale purges. The second pected the decision taken under the first to restitute all properties that cated from the nobility and remained in the hands of the state, but not been sold to particulars. As we shall see below, this was also the in Athens in 403 B.C.

on T. C. Loening, The Reconciliation Agreement of 403/402 B.C. in rt: Franz Steiner Verlag 1987 (=Hermes Einzelschriften, Heft 53). The Aristotle, The Constitution of Athens.

re were elements of transitional justice in the aftermath of the first (M. Popular Sovereignty to the Sovereignty of Law, Berkeley and Los rsity of California Press 1986, pp.400-404), they were more prominent

ument by J.M. Moore, Aristotle and Xenophon on Democracy and eley and Los Angeles: University of California Press 1975, p.267.

be restored, while the oligarchs who wanted to leave were granted a safe haven in Eleusis. According to Aristotle, the terms of the reconciliation were as follows:

> Those of the Athenians who had remained in the city and wished to leave should live in Eleusis, where they should retain full citizen rights, have complete self-government and enjoy their incomes. The temple was to be common to both sides. [...] Those living at Eleusis were not allowed to visit the city of Athens, nor were those living in Athens allowed to visit Eleusis, with the exception for both sides at the celebration of the Mysteries. The people at Eleusis were to contribute to a defence fund from their revenues like the other Athenians. If any of those leaving the city took over a house at Eleusis, they were to do it with the agreement of the owner; if agreement proved impossible, each was to select three assessors, and the owner was to accept the price they fixed. Any inhabitants of Eleusis acceptable to the new settles were to live with them there. Those wishing to move out to Eleusis had to register within ten days of the swearing of the reconciliation oaths if they were in the city at the time, and move out within twenty; those abroad had the same periods from the moments when they returned to Athens. Nobody living at Eleusis could hold any office in the city of Athens until he had been registered as having moved his residence back to the city. Homicide trials in cases where someone had killed or wounded a person with his own hands were to be conducted in accordance with traditional practice. There was to be a total amnesty covering everyone except the Thirty, the Ten, the Eleven and the governors of the Peiraeus; even they were to be immune from prosecution once they had rendered their accounts. The rendering of accounts for the governors of the Peiraeus was to be held before the citizens of the Peiraeus, while those who had held office in the city were to appear before citizens with taxable property. On this basis those who wished to leave could leave the city. Each side was to repay separately the money which it had borrowed for the war. (The Constitution of Athens, 39.)

Although Aristotle does not mention the fate of property confiscated by the oligarchs, other texts show that this issue was also covered by the treaty. In Thomas Loening's summary,

luals who had purchased confiscated goods will retain sion of them, and any property which had not been auctioned ill revert to the original owner. [...] This provision only es movable property. Presumably, the original owner would to establish undisputed title to these unsold goods before ing possession of them. Acceptance of the reconciliation nent meant a renunciation of all legal claims to movables cated and sold by the oligarchy. There may have been a ion whereby the exiles could repurchase their goods for the it of money paid by the buyer, provided that he were willing l. Such a clause would prevent profiteering on the part of is who had bought confiscated property cheaply and who then attempted to sell it back to the original owner at an inflated There would be no obligation to resell, unless the buyer d to do so. [...] Not all confiscated property remained in the of the purchasers. The reconciliation treaty ordains that vable property, such as land and houses, will be returned to ormer owners [...] on the condition that they paid.[9]

Given this brief sketch of the reconciliation agreement, let me e salient features of the treaty and its application.

First, the safety-valve negotiated for the oligarchs by m to emigrate to Eleusis seems to be a unique feature in cases al justice. There are many cases in which the leaders of the itic regime have fled to escape justice, but to my knowledge ch they were allowed to do so as part of a formal transitional ial agreements have probably been made on some occasions, egotiated transitions to democracy. To smoothen the path of ie democratic forces can allow a dictator to leave the country take some state funds with him.

Second, the treaty was established at the initiative of a ver. Although Sparta had initially supported the oligarchs, it artan king Pausanias who, using persuasion as well as force, vo parties reach a mutually acceptable agreement. Again, there rfect analogues in later instances of transitional justice. forces in countries under Communist rule and in Latin nilitary dictatorships have enjoyed and benefited from the support of democratic regimes elsewhere. Sparta was not a democracy, however. Pausanias acted for reasons of internal and external politics at home, not because of any sympathy with the democrats.[10]

Third, besides opening the possibility of emigrating the reconciliation treaty contains several others safeguards for the oligarchs. (i) Except for the top officials, there was a general amnesty for acts committed during the oligarchy, and probably for crimes against the state committed before the oligarchy as well.[11] (ii) Although murder was not covered by the amnesty, prosecution for murder was possible only in cases when the accused had killed "with his own hands" (autocheiria). "The means which the Thirty had employed to eliminate their opposition, however, made it difficult for potential plaintiffs to demonstrate autocheiria in its strictest sense. Few victims of the oligarchy were murdered outright; more often they were deposed by an informer on a spurious charge, arrested, convicted before the oligarchic Council (unless a trial were dispensed with altogether) and compelled to drink hemlock."[12] (iii) Even those exempt from the amnesty could get scot free by submitting their accounts (euthynai), as all Athenian officials had to do at the end of their tenure. If they passed their accounts, or were convicted and paid the appropriate fine, "they could utilize the amnesty to protect themselves from further legal entanglements arising from their tenure in office."[13]

Fourth, an amnesty did not imply that the past had to be completely erased from the public consciousness.[14] Athenian officials were subject not only to the ex post scrutiny of euthynai, but also to the ex ante scrutiny of dokimasia. Although the latter was usually a matter of form, to ensure that the candidate satisfied formal requirements of birth and

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ie Reconciliation Agreement, p.51-52. The last clause ("on the condition ") is somewhat conjectural.

[10] The example suggests that to the varieties of democratization listed by A. Stepan, ("Paths towards redemocratization", in O'Donnell, Schmitter and Whitehead (eds.), Transitions from Authoritarian Rule: Comparative Perspectives, pp.64-84) we should add "Redemocratization initiated by an external non-democratic regime".

[11] Loening, The Reconciliation Agreement, pp.130-46.

[12] Ibid., p.83.

[13] Ibid., p. 47.

[14] Ibid., p. 102. In light of the examples from Lysias cited in the text, his argument seems more plausible than that of N. Loraux, La cité divisée: L'oubli dans la mémoire d'Athènes, Paris: Payot 1997, for whom the core of the reconciliation treaty was a ban on referring to past strives in any way whatsoever.

there are several speeches by Lysias (16, 25, 26, 31) in which : of a candidate during the oligarchy is used as evidence of :k of fitness for the position. The speech against Philon (# 31) ' interesting, in that the candidate is argued to be unfit for : ground that he had been neutral during the civil strife.

Fifth, the decrees in the treaty were applied with considerable otle praises Archinos, a leader of the democrats, for his e behavior "when he seized one of the returned exiles who ing to disregard the amnesty, brought him before the Boule, ed them to execute him without trial" (The Constitution of 2). An editor of Aristotle's text comments that Archinos' tacking someone for violating the amnesty was indeed right, way of reestablishing the state after such a traumatic period Athenians to turn their backs on the past, but it is legitimate to an illegal execution was the best way of reestablishing the [15] The Athenians also instituted the law of paragraphe, which fendant to prevent the admission of a suit on the grounds that : treaty.

Sixth, the protection of the oligarchs provided by the equirement could nevertheless be challenged by interpreting nore widely. In his speech against Eratosthenes (one of the sing him of the murder of his brother Polemarchos, Lysias to apprehend a man who is known to be accused unjustly and rtainty will be condemned to death, when it is possible for an avert such a miscarriage of justice, is tantamount to direct lthough the wording of the treaty was intended to exclude ind of charge, the fact that Lysias' case was tenable enough inary hearing to be deemed admissible (the outcome of the ıot known) shows that the Athenians were at least willing to ker reading of the text.

Seventh, the principles guiding the restitution of property struck a balance between plain backward-looking justice and ial forward-looking considerations. From the point of view of abstract justice, an individual's claim to his confiscated property might seem unaffected by the fact that it had passed into the private property of another individual. From the point of view of social reconstruction however, it was important to "minimize ill-feeling and interminable legal disputes which might threaten reconciliation".[17] The democrats could get their movable property back if it had not been sold, and their immovable property if they could pay for it, with one obvious exception: "Although those members of the Three Thousand who had chosen not to emigrate and who were in possession of immovables confiscated by the oligarchy were to be compensated by the exiles for the return of this property, the émigrés were not. Since they were outside Athenian jurisdiction, they could not take advantage of such an arrangement."[18]

Conclusion. A striking feature of the Athenian reconciliation treaty is that so many of the general themes of justice in the transition to democracy are already found in the very first well-documented instance. The Athenians were acutely concerned with balancing backward-looking and forward-looking considerations - with prosecution and limits to prosecution, with restitution of property and limits to restitution. It is also striking how well the treaty worked. Although those who had sided with the oligarchs or failed to oppose them might find it difficult to be approved for political office, the dramatic example set by Archinos seems to have been an efficient deterrent against violations of the amnesty. Also, the Spartans may tacitly have served as guarantors for the treaty. A final striking feature is the extent of choice left to the oligarchs. They could decide to emigrate, and thus avoid prosecution altogether. If they decided to remain, they could present themselves for euthynai, to be able to live in security thereafter. In either choice, each option might involve risks or losses as well as benefits.

III. The nature of the problem

I begin by distinguishing transitional justice from two related phenomena, civil war trials and trials imposed by the winners in a war among nations. Although many of the legal and moral issues are similar, there are also important differences. In cases of transitional justice, the

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totle and Xenophon on Democracy and Oligarchy, p.272. For the ' of this execution, see also Loening, The Reconciliation Agreement,

Reconciliation Agreement, p.71. The argument is in Lysias 12. 25 ff.

[17] Loening, The Reconciliation Agreement, p.52.

[18] Ibid., p.66.

ın regime had all legal and political powers. Any opposition would have been underground or exiled. In a civil war, by ere is overt conflict between two or more contenders for)nce the conflict has been resolved, in favor of one of the ıough some compromise solution, trials may well take place. ıaracteristic feature of transitional justice will typically be that the actions that are potential targets of legal prosecution vere themselves carried out within a stable legal regime. For I exclude the trials arising out of the civil war in the former from the scope of the analysis.

In cases of transitional justice, the society is in a real sense lf. In war trials imposed by the winners, this is not the case. nce has important consequences. In transitional justice, many :s will themselves have been implicated in the regime they are war trials, judges can be taken from outside the country. Also, :es of transitional justice the pre-democratic regime continues portant political presence (most obviously in cases of military s) that may necessitate compromises that a victorious or ıower need not worry about. Even when external powers have ısible for bringing about the transition itself, once it has been :d the new democratic regimes are often on their own. They vere, rebuild the boat in the open sea. For this reason I exclude erg trials from the scope of transitional justice, but include the ok place in German-occupied countries.

Many events that take place after a regime transition can be ıughly as "retroactive justice". Here, I limit myself to a subset ents that seem sufficiently homogeneous to find place in a ıework. These are political decisions made in the immediate the transition and directed towards individuals on the basis of id or what was done to them under the earlier regime.[19] Let me at is excluded by this definition.

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may seem pedantic, let me state that I limit myself to negative measures t taken on the basis of what people did and positive measures of taken on the basis of what people had done to them. One might define etroactive justice so as also to include positive measures or rewards to the basis of what they did, but I shall not do so. Except for decorations, were not allocated by any formal process.

First, I exclude delayed cases of transitional justice, i.e. cases that do not form part of an uninterrupted chain of retroactive justice beginning at the time of the transition. In France, for instance, the "memory of Vichy" was largely suppressed from 1954 to 1971.[20] In their psychological and political dynamics, the processes of Touvier, Barbie, Bousquet , Papon and others that have taken place over the last decades differ so much from what happened in the immediate aftermath that it is probably not useful to treat them under the same heading. In countries where the issue of restitution of property confiscated from the Jews during WW II has come up again in the 1990s, it has also taken entirely new forms. The demand for return of gold stored in Swiss banks comes from the international community and not from within the country. The public commission appointed to reassess the value of what was taken from the Norwegian Jews is heavily influenced in its reasoning by perceptions of the Holocaust that had no role in the restitution and compensation that took place in the immediate aftermath of the war.[21]

Second, I exclude cases in which (non-state) organizations appear as either the agent or the target of transitional justice. By considering only choices made by legal and political authorities I exclude decisions by professional associations (e.g. of writers or entrepreneurs) to sanction members who had collaborated with the previous regime. A borderline case arose in Belgium, where a decree-law of September 19 1945 allowed the government to link private and public repression, by depriving individuals excluded from professional organizations of certain rights for the rest of their life.[22] Since most exclusions took place well before the enactment of the decree-law, the state-amplified punishment became much more severe than foreseen. By considering only individual wrongdoers and victims I exclude, for instance, measures to confiscate Party property and to restore former Church property in the former Communist countries. Once again, these limitations are not simply

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[20] H. Rousso, Le syndrome de Vichy de 1944 à nos jours, Paris: Le Seuil 1990, Ch.2.

[21] Inndragning av Jødisk Eiendom i Norge under den 2. Verdenskrig, Oslo: Norges Offentlige Utredninger 1997: 22. A similar French commission had at the time of writing not yet published any findings ("La commission Mattéoli s'apprête à rendre son rapport d'étape sur la spoliation des biens juifs", Le Monde January 8 1998).

[22] L. Huyse and S. Dhondt, La répression des collaborations, Bruxelles: CRISP 1993, pp.55, 120.

y a desire to make the subject more manageable, although that ays a part. More importantly, the responses evoked in which the state confronts a single wrongdoer or victim - the rsus the individual - differ from those that arise in more c circumstances.

Third, I exclude cases, then, in which one individual nother. In many countries, wrongdoers - whether otherwise r not - have been the victims of ostracism and violence. Even n Argentinean officers do not walk safely in the streets. After as common practice in many European countries to shave the men who had consorted with the enemy. In France, these d also be punished by loss of their civil rights.[23] In Norway, nterned to protect them from molestations.[24] More generally, idual could answer the question "What did you do under the regime?" could be decisive for his personal and professional dently of any formal sanctions imposed by the state or by to which he belonged. Although informal ostracism may cut formal punishment, it is not subject to the same explanatory

Fourth, a more complicated question arises in defining the decisions that shall form the dependent variable. I limit itical decisions establishing the laws, decrees and procedures transitional justice, thus excluding the legal decisions that - hose laws, decrees and procedures - bring about the final ne distinction might seem tenuous. Nino's work, for instance, that the Argentinean courts were heavily shaped by political considerations. Similarly, Raymond Aron wrote that the of the High Court that tried Pétain, Laval and others "were ly be political processes".[26] Quite generally, justice is more ansitional situations than under normal circumstances. Yet are not infinitely malleable and open to interpretation, there

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L'épuration, Paris: Fayard 1986, p.290 ff.

Det Vanskelige Oppgjøret, Oslo: Tanum-Norli 1980, p.205.

r, that some political decisions, such as decisions of grace and of early on, affect outcomes directly.

ttman, L'épuration, p.313.

are limits to how political the judges can be. Also, the sense in which the laws are shaped by politics differs from the sense in which their interpretation is shaped by politics. In the former case, we are dealing with a public, adversarial process; in the latter with an informal, subterranean and perhaps unconscious mechanism. Because I want to understand retroactive justice as a social and political process, I mainly treat the juridical system as a parameter rather than as an agent in its own right. Thus the geographical or temporal inequalities in sentencing that was found in many countries after WW II are not part of my subject matter, but the political attempts to anticipate or rectify them are.

Finally, I exclude an aspect of transitional justice that one may think of as "justice within justice" - measures directed towards perpetrators or victims of unjust acts that were themselves part of retroactive justice. In several countries that had been occupied by the Germans during WW II, many of the first dealings with collaborators after or during the transition took place in atmosphere of violence and illegality. Later, some of the perpetrators of these acts were punished, and some of the victims compensated.[27] In Norway, some guards in internment camps were prosecuted for their behavior towards the interned.[28] In France, in one notorious case, three officers of the Forces Françaises de l'Intérieur were sentenced to prison for premature execution of collaborators.[29] In Denmark, several hundred people received compensation for unjustified internment.[30] These acts should not be confused with apparently similar ones committed during the authoritarian regime. When the post-transition authorities prosecute persons who committed acts of terrorism or executions under the authoritarian regime, they target behavior that arose

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[27] Some perpetrators also received immunity. Thus in 1947 the Belgian government suspended, for the period between May 10 1940 and July 10 1945, the application of a law from 1795 that would have enabled collaborators to obtain compensation for violence against themselves or their property (Huyse and Dhondt, La répression des collaborations, p.50-51). The late cut-off date is explained by the "second wave" of pillages that took place in May-June 1945, after the return of prisoners of war from Germany.

[28] Andenæs, Det Vanskelige Oppgjøret, p.62-63.

[29] Lottman, L'épuration, p.144.

[30] D. Tamm, Retsopgøret efter Besættelsen, Copenhagen: Jurist- og Økonomforbundets Forlag 1984, pp.209-19.

egime was still in force rather than behavior arising in the ealing with it after it was abolished.

IV. Dependent variables

A new democracy that emerges from an authoritarian regime e a number of interrelated choices. (i) It has to make the ıether to engage in transitional justice at all. If it does, it then the following issues. (ii) It has to identify the wrongdoers, ıe decision to treat certain acts committed under the former cts of wrongdoing. (iii) It has to decide how to deal with the . (iv) It has to identify victims of these acts and, more f the regime itself. (v) It has to decide how to deal with the) It has to make a number of procedural decisions with respect cal implementation of (ii)-(v). I shall discuss these in turn.

The basic decision. The issue on which all others turn is /hether to engage in transitional justice at all. In a few cases, ı has been made to abstain from such measures. The Spanish f 1976-1978 is the most prominent example. "In keeping with ıfrontational approach to the legacy of the former regime, from the long Franco era have not been used to purge those n the abuses of the regime; these files have remained sealed to day. In 1976, Juan Carlos issued a royal amnesty for many of political crimes, excluding those sentences for acts of n 1977, the newly elected parliament approved an amnesty ered all political crimes previously committed by both t forces and the opposition."[31] In the core states of the former e has also by and large renounced on transitional justice. ussia has passed laws on the rehabilitation of political victims ompensation for their suffering[32], there has been no restitution or financial compensation for loss of property. Although a n screening the former nomenklatura was debated[33], it came to ılike the case of Spain, however, there was never a consensual

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litor's Introduction", in Kritz. (ed.), Transitional Justice, vol.II, p.298-99.

et al., "Compensating former political prisoners", in Kritz. (ed.), Justice, vol.II, pp.751-54.

nn, "Legislation on screening and state and security in Russia", in Kritz. ional Justice, vol.II, pp. 754-61.

decision to let bygones be bygones for the sake of reconstruction and reconciliation. Instead, the abstention from pursuing retroactive justice happened more or less by default.

Identifying wrongdoers. Once the basic decision has been made, it must be decided whether acts of wrongdoing shall include only acts committed by agents of or collaborators with the former regime, or whether acts committed by the opposition to the regime should also be covered. In the "Promotion of National Unity and Reconciliation Bill" that regulates the work of the South African Truth Commission, members of the liberation movement and of the State security forces are treated in an entirely symmetrical manner. Later, Bishop Tutu "threatened to resign from the commission unless the African National Congress formally acknowledged that it, too, was responsible for human-rights abuses".[34] The recent hearings about Winnie Mandela made it clear that the commission did more than pay lip service to this principle. In Argentina, President Alfonsín included among his guiding principles for prosecution that "Both state and subversive terrorism should be punished".[35] Likewise, the Commission of Truth and Reconciliation in Chile was charged with investigating not only state terrorism but also subversive terrorism. In German-occupied countries, unjustified killings by the resistance were not included in the formal war trials, although some victims were later solemnly exculpated.[36]

It must be decided, moreover, whether prosecution should cover indirect as well as direct responsibility for wrongdoings. The Greek reconciliation treaty of 403 B.C. required hands-on responsibility if an act were to be prosecuted. It is not simply a matter of those who gave orders versus those who executed them. One may also have to decide whether to prosecute those who transmitted or facilitated execution of the orders - those who (say) neither themselves were involved in any killings nor gave orders to kill, but constituted a necessary (if fungible) link in the causal chain that led to the killing. As an instance one may cite German railway officials who were involved in the transportation of Jews to the gas chambers. Also, there is the issue whether to prosecute acts of omission

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[34] T. Rosenberg, "Recovering from Apartheid", The New Yorker Nov.18 1996, p.92.

[35] Nino, Radical Evil on Trial, p.67.

[36] For Denmark, see Tamm, Retsopgøret efter Besættelsen, Ch.11.

s of commission, e.g. whether to prosecute officials in the ccupied countries for failing to warn Jews about an impending More generally, one might ask whether failure to join the should be seen as a wrongful omission. In France, for instance, olland - "the father of judicial resistance" - decided that higher ıould be replaced unless they could prove that they had been ıe resistance.[37]

There are also issues of mens rea. Concerning informers, for he Belgian legislation made their punishment an increasing f the actual consequences of the action.[38] In Denmark, by nformers ran the risk of the death penalty for actions whose n if unforeseen and unforeseeable[39]) or intended consequence ose severe bodily harm or loss of life.[40] Conversely, the Danish ng economic collaboration renounced on mens rea for criminal ity, by stipulating the guilt of those "who knew or should have at their activities would further German interests.[41] Hence the gislators accepted neither failure to bring about the intended ces nor ignorance with regard to the likely consequences as g circumstances. In the Belgian case, another distinction was ıereas the prewar legislation required proof that the accused had h the intention of harming" Belgian interests, the Belgian exile ıt substituted the weaker requirement that the accused had to be ıave "acted with the knowledge" that his actions might harm the benefit the enemy.[42]

It must also be decided whether acts committed by agents of can be considered acts of wrongdoing even when they were by order of the legal authorities or were legal at the time. Well- d controversial cases include membership in the Nazi Party German occupation, an issue that was resolved differently in

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L'épuration, pp.51, 335.

l Dhondt, La répression des collaborations, p. 220.

tsopgøret efter Besættelsen, p.368.

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1; italics added.

l Dhondt, La répression des collaborations, p.64.

Norway and Denmark[43]; East German border guards who shot escapees to the West[44] and informers to the security police throughout the East Bloc; and the "due obedience law" enacted in Argentina in 1987.[45] In occupied countries, the treatment of economic collaboration with the enemy will also have to be considered. In Denmark, the prosecution of economic collaborators has been characterized as a "fiasco", partly because many of the cases came up so late than courts were reluctant to convict[46]; in France and Belgium, it was largely but not completely decrimininalized[47]; in Norway, it was relatively important.[48]

Decisions may also have to be made as to the cut-off date for wrongdoings. In some cases, this will be a function of when the appropriate laws or decrees were enacted. In Norway and Belgium, some acts of collaboration were punishable only according to legislation passed by the exile governments at various times during the war. As the war trials respected the ban on retroactive legislation, the same acts committed before those dates could not be prosecuted. In Denmark, there was an intensive debate whether to extend retroactive legislation to the cessation of hostilities in 1940, or only to acts after August 1943 when the Germans formally took control of the country. Broadly speaking, the former solution was chosen.[49] In the recent East European transitions, demands have been made to extend the scope of restitution and compensation to 1945 (to include property confiscated from the 3 million Sudetengermans in

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[43] In Denmark, party membership was not deemed ground for prosecution (Tamm, Retsopgøret efter Besættelsen, p.386). In Norway, the Supreme Court decided on various grounds that it was (Om Landssvikoppgjøret, Oslo: Justis- og Politidepartementet 1962, pp.95-99). The difference can be explained by the much more important role of the Norwegian party in enforcing German rule.

[44] K. Adams, "What is just? The rule of law and natural law in the trial of former East German border guards", Stanford Law Review 29 (1993), 271-314.

[45] Nino, Radical Evil on Trial, p.100-101.

[46] Tamm, Retsopgøret efter Besættelsen, p.492-93.

[47] L'épuration, pp.365-78; Huyse and Dhondt, La répression des collaborations, pp.237-48. In France, prosecution for economic collaboration was to some extent preempted by the extensive nationalizations that took place after the war.

[48] Om Landssvikoppgjøret, p.239.

[49] Tamm, Retsopgøret efter Besættelsen, p.93.

/akia or from the 240, 000 ethnic Germans in Hungary) or to clude property confiscated from Jews).[50]

Deciding how to deal with the wrongdoers. Once the s have been identified, it must be decided how to treat them. peaking, the responses lie on a continuum where one extreme is osecution followed by execution, prison or fines for those found the other is investigation followed by publication of the names ongdoers without any further legal consequences (although ith consequences in the form of private ostracism).The former s chosen in the German-occupied countries after WW II and tively in the Communist Bloc and Latin America. The latter ainly a conceptual possibility. Most of the truth commissions been at work since 1974 focus on victims rather than s. Only in El Salvador did the commission name some forty responsible for human rights abuses.[51] The South African n is a special case (see below).

Between the two extremes there is a large variety of including pardons, amnesties, dismissal or suspension from ce, loss of civil or political rights, confiscation of profits or of ard labor (in Belgium, one day working the coal mines counted ys in prison[52]) redemption[53], and liability for civil damages.[54] oslovak lustration law lays down that people who held specific r engaged in specific activities under the Communist regime are ineligible for specific public offices.[55] The South African Truth Commission relies on self-reporting. An individual can choose between applying for amnesty, with a risk of being prosecuted if the actions to which he admits do not fall under the amnesty law, or remaining silent, with a risk of being prosecuted if independent evidence to convict him comes to light.

Identifying the victims. Victims of these wrongdoings include several different groups. First, there are those who suffered personally and directly at the hands of one or a few individual wrongdoers. These include victims of torture, escapees or demonstrators who were shot, individuals who were made to "disappear", citizens who lost their jobs or went to jail because someone informed on them, and victims of unjustified killings by resistance groups. In these cases, one wrongdoer imposed great harm on one victimized individual. In the polar opposite case, each of many wrongdoers imposed a small harm on each of many individual victims. Thus any individual's membership in the Nazi or Communist party or (in most cases) economic collaboration with the enemy could only have a small impact on the welfare of any given other person. Yet if for any given wrongdoer we add up the damage done to all the victims or for any given victim the damage done by all the wrongdoers, the amounts could be considerable.[56]

Third, individuals can be victims of political decisions that do not target them personally. Under Communism, this category includes those who had their property confiscated or nationalized as well as those who were prevented from selling their labor power or hiring others for a wage. Indirectly, many also suffered from the preferential treatment given to members of the Communist Party and their children. Some individuals were also penalized because of their class background, to the point where the phrase "class genocide" has been used.[57] The treatment of Jews in German-occupied countries and of blacks in South Africa also falls in this category. In many of these cases, individuals are victimized not because of anything they have done, but because of what they are or what they have.

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irvey, see S. Avineri's contribution to the "Roundtable on property East European Constitutional Review Vol.2 No.3 (1993), pp.30-40.

rvey, see P. B. Hayner, "Fifteen truth commissions 1974 to 1994 - a survey", in Kritz (ed.), Transitional Justice, vol.I, pp.225-61.

l Dhondt, La répression des collaborations, p.143.

· the liberation of France, young men who had enrolled in the militia and s could redeem themselves by enlisting in the French expeditionary force (De Gaulle, Mémoires de Guerre, Paris: Plon 1989, p.704).

s only a theoretical possibility. Following the fall of Communism in 1989 lars argued that victims from the Communist era should be allowed to sue itors for civil damages, as an alternative to criminal prosecution, but the ne to nothing.

[55] A survey of lustration laws in post-Communist societies is H. Schwartz, "Lustration in Eastern Europe", in Kritz. (ed.), Transitional Justice, vol.I, pp.461-83.

[56] See also D. Parfit, Reasons and Persons, Oxford University Press 1984, pp.67-86.

[57] S. Courtois et al., Le livre noir du communisme, Paris: Laffont 1997, p.19.

Finally, family members and relatives of victims in any of ries may themselves be viewed as victims, on one of two the one hand, spouses, siblings, parents or children of persons :ported, made to disappear or otherwise treated cruelly may iave suffered cruelly. On the other hand, descendants of vho had their property taken away from them may have ıse of the reduced opportunities that were left open to them. have" because the confiscated goods might also have been nd left no opportunities for descendants to exploit.)

Deciding how to deal with the victims. There is a large range to the wrongs done to victims, ranging from undoing of the nly symbolic measures. Consider first responses to economic [58] Undoing may occur in the form of physical restitution of nd or housing, either in all cases (as in Norway after WW II) the property has not been resold to particulars (as in Greece). It can also take the form of material or financial , e.g. the allocation of a comparable piece of property or its lue in money, vouchers or shares. Victims can also be for other economic losses, as when a person is compensated arnings of a dead spouse or when years lost because of re taken into account when calculating the seniority of Finally, victims may be given preferential treatment in the carce goods, thus creating a link between transitional justice ice. Thus in Russia, political victims take priority in the ousing, medical treatment, and phone installations.[59]

he undoing may be incomplete, e.g. if (as in Bulgaria after s an upper limit on the size of landholdings that can be ıe original owners or (as in much of Eastern Europe) for loss of property is awarded in the form of vouchers that buy shares in newly privatized companies. In Norway after ıensation for property that had been confiscated and sold was limited to 68% of the value, the discrepancy being due ıinistering the funds during the war (28%) and after the war (4 %).[60] Strictly speaking, of course, undoings will almost always be incomplete (or indeterminate), since one can rarely know exactly how an individual would have fared in the present had certain rights abuses not taken place in the past.[61]

Responses to physical wrongdoings (death, imprisonment, torture) also include financial compensation for "moral damages". More frequent responses, perhaps, are measures of rehabilitation and truth-finding. Thus the main aim of most truth commissions has been to alleviate the pain of victims and their relatives rather than to expose wrongdoers. As mentioned, reports from these commissions usually do not cite any names of wrongdoers, but only list the victims. More generally, any measures undertaken to punish wrongdoers will ipso facto be capable of serving the needs of the victims.[62]

Procedural issues. Times of transition are, almost by definition, exceptional. The procedures used in dealing with the past also tend to be exceptional. Second-best arguments come to the forefront, together with considerations of practicality and expediency. Compared to normal legal procedures, the following exceptional measures have been observed:

> Illegal internments. In France and especially in Belgium, many suspected collaborators were interned after the liberation without much respect for legal formalities. In Belgium, "some mayors were under strong pressure from members of the resistance and found themselves forced to give out internment orders with the name to be filled in".[63] To some extent, though, this illegal behavior may have been a lesser evil, as the internment camps also protected the suspects from popular violence.[64]

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of economic compensation in Eastern Europe, see C. Offe, Varieties mbridge: Polity Press 1997, Ch.6.

ımpensating former political prisoners", p.753-54.

[60] Inndragning av Jødisk Eiendom i Norge under den 2. Verdenskrig, pp.41-45.

[61] J. Waldron, "Superseding historic injustice", Ethics 103 (1992), 4-28, esp. pp.7-14.

[62] There is obviously a risk that these measures might be taken in order to serve those needs rather than to determine the just treatment of the wrongdoers, i.e., that the goals of vengeance or catharsis might come to replace that of retribution. See also V below.

[63] Huyse and Dhondt, La répression des collaborations, pp.102.

[64] Lottman, L'épuration, pp.135, 182, 328.

ctive guilt. In France, de Gaulle wanted to try the Pétain e collectively, for having signed the armistice. When his ıter of Justice threatened to resign, de Gaulle gave way.[65] In ay, all members of the Nationalist Socialist party were initially collectively and fully responsible for economic damages d by the organization. Under this rule, they would all have had clare bankruptcy. Later, the responsibility was adjusted to take ınt of the guilt and the economic situation of individual ers.[66] In 1992, three human rights organization submitted a randum to the Constitutional Court of the Czech and Slovak blic, claiming that the lustration law amounted to "an sition of collective guilt".[67] The Court upheld the law.

ımption of guilt rather than of innocence, and inverse burden of . As mentioned, higher French officials lost their jobs unless could prove that they had been active in the resistance. In um, it was necessary to show a "certificate of civic behavior" large number of occasions, e.g. to be inscribed in a university business registers. The system soon got out of hand, to the where a former Minister of Justice wrote that "The way things going, we can foresee the day when one has to show a icate of civic behavior to obtain a certificate of civic behavior. ust as under the occupation one had to prove that one was not sh, now there are all sorts of occasions on which one has to that one was not incivic."[68]

d selection of jurors and judges. In France after WW II, there considerable pressure to select members of the resistance to the ial bodies that were to judge the collaborators. In some cases, nay have led to jurors being charged with judging the very iduals who had been responsible for their suffering.[69] In um, too, members of the resistance claimed a central place in judging the collaborators, but with less success.[70] In Denmark, the resistance movement was allowed to nominate 5% of the lay judges as a gesture towards the Communists, who were not inscribed on the electoral lists from which these judges were selected.[71] The Danish resistance had full veto powers over the professional judges.[72]

Lack of adversarial proceedings. Among the objections raised to the Czechoslovak lustration law, was that "the Act does not require that the subject of a Commission hearing is entitled to the aid of counsel, to present his or her own evidence, or to refute the evidence against him".[73] In France after WW II, the Comité National des Ecrivains published a "black list" of 158 collaboratist writers, without prior contradictory proceedings.

Lack of appeal mechanisms. In some cases, normal appeal mechanisms are suspended or not created. Thus in Belgium, the denial of a certificate of civic behavior could initially not be appealed, a practice that persisted until two years after the liberation.[74] In Denmark, the law regulating war trials stated that only sentences to death or to more than ten years of prison could be appealed, except when a special commission found that the circumstances justified an appeal.[75]

Special courts. In some countries, the political authorities had the choice between trying cases before civilian courts and using (preexisting) military courts. This was the case, for instance, in Belgium[76] and in Argentina.[77] Both countries initially chose the military option, but in Argentina jurisdiction was transferred to

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Det Vanskelige Oppgjøret, pp.125-34.

ıdum on the applicability of international agreements to the screening (ed.), Transitional Justice, vol.III, pp.335-45, at p.342.

Dhondt, La répression des collaborations, p.42.

épuration, p.225.

[70] Huyse and Dhondt, La répression des collaborations, pp.72, 90-93.

[71] Tamm, Retsopgøret efter Besættelsen, p.135-35.

[72] Ibid., p.133.

[73] "Memorandum on the applicability of international agreements to the screening law", p.344.

[74] Huyse and Dhondt, La répression des collaborations, p.42.

[75] Tamm, Retsopgøret efter Besættelsen, p.758-59.

[76] Huyse and Dhondt, La répression des collaborations, p.72-73.

[77] Nino, Radical Evil on Trial, pp.67 ff.

courts because of the unwillingness of the Supreme Council Armed Forces to judge their own. In other countries, the n was whether to create special tribunals to deal with rators. In Denmark, the Council of the Resistance tsrådet") wanted to try the accused before special courts, because of skepticism towards the regular judiciary and o expedite the trials.[78] Under pressure from civil servants the r of Justice renounced on this idea after the liberation.[79] In by contrast, martial courts and military tribunals were used in the first months after the liberation.[80]

rgaining. In Belgium, a decree of November 10 1945 opened possibility of plea bargaining - otherwise unknown in an legal systems - when the maximum penalty for the crime ion was less than five years.[81]

tive legislation. In many countries, transitional justice has confront (or finesse) the principle of nulla poena sine lege. ues come up: whether to punish people for actions that were minal when committed, and whether actions that were l when committed can be punished more severely (e.g. by th penalty) than laid down in the earlier law. In Norway, ivity for acts was excluded, but retroactivity for punishment facto admitted.[82] In Denmark, both forms of retroactivity plicitly admitted.[83] In Belgium, retroactivity was technically , although the decision to interpret the phrase "bearing arms Belgium" to cover any action that benefited the enemy[84] was o a form of retroactive legislation. Similarly, because

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pgøret efter Besættelsen, p.83. In Norway the resistance movements d special courts, on the grounds that they were identified with the actices of the occupying power (Om Landssvikoppgjøret, p.51-52).

uration, pp.43, 107 ff.

ondt, La répression des collaborations, p.134.

Det Vanskelige Oppgjøret, p.119 ff., who demonstrates the flaws in offered by the Ministry of Justice for the non-retroactivity of the

gøret efter Besættelsen, pp.71-72, 75, 121.

ondt, La répression des collaborations, p.64-65.

measures that without basis in previous legislation impose the loss of civil liberties or the right to hold office are not criminal statutes, they are not technically retroactive. With regard to the Czech lustration laws it has nevertheless been argued that "the justifications for the nulla poenae principle apply"[85] to this case as well. If accepted, this argument also undermines a claim made in a secret report from 1943 about the future trials of collaborators in France: "For political acts of collaboration not covered by the criminal law, the report suggested national indignity - a 'political offense' being sanctioned by a 'political punishment', such as banishment or national degradation; in this way, the question of retroactivity would not even arise."[86]

Extending statutes of limitation. When an authoritarian regime fails to pursue crimes committed by its agents, it may seem perverse that they shall later benefit from a statute of limitation. Thus in 1993 the Czech Republic passed an "Act on the illegality of the Communist regime and resistance to it", which stipulated that "The period of time from 25 February 1948 until 29 December 1989 shall not be counted as part of the limitation period for criminal acts if, due to political reasons incompatible with the basic principles of the legal order of a democratic State, [a person] was not finally and validly convicted or the charges [against him] were dismissed." The law was later upheld by the Constitutional Court.[87] When the Hungarian parliament passed a similar law in 1991, it was struck down by the Constitutional Court.[88]

Shortening statutes of limitation. Conversely, the new regime may decide to put an end to prosecution before the normal statute of limitation has expired. Thus in Argentina, President Alfonsín decided in 1983 that "The trials should be limited to a finite period during which public enthusiasm for such a program remained

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[85] "Memorandum on the applicability of international agreements to the screening law", p.343.

[86] Lottman, L'épuration, p.52. On the similar procedure in Belgium, see Huyse and Dhondt, La répression des collaborations, p.28-29.

[87] "Act on the illegality of the Communist regime and resistance to it", in Kritz (ed.), Transitional Justice, vol.III, pp.366-68; "Constitutional court decision on the illegality of the Communist regime", ibid., pp.620-27.

[88] J. Pataki, Dealing with Hungarian Communists' crimes", ibid., vol.II, pp.647-52; "Constitutional court decision on the statute of limitations", ibid., vol.III, pp.629-40.

."[89] In 1986, under pressure from the military, he had ament enact a "full-stop law" that established a sixty-day limit rosecution.[90]

iesties, pardons and early release. Although these measures are exceptional in themselves, their use on a large scale for serious es is. In Latin America, general amnesties have been quite mon. In Argentina, Brazil and Chile, the military enacted "self- esty" laws before leaving power. These were respected in the r two countries, but not in Argentina. In Uruguay, the post- itional parliament voted a general amnesty, which was owly upheld in a referendum. After WW II, many countries that been occupied by Germany issued pardons and early releases to t injustices created by the increasing leniency of the courts.[91]

Below I discuss why the new regimes might decide to adopt e of these non-standard procedures. Here, I shall only point to t tension that was already mentioned in connection with bove. On the one hand, practical considerations and emotional suggest short-circuiting the normal procedures of justice. On and, the new democracies may need to assert the rule of law very beginning and to distinguish themselves unambiguously predecessors. In Havel's memorable phrase, "We are not like

V. Independent variables

To explain the variables discussed in the previous Section, dentify (i) the political actors, (ii) the constraints on their (iii) their motivations, (iv) their beliefs, and (v) the mechanisms conflicting individual preferences are aggregated into a binding collective decision. Below, I consider these independent variables in that order.

Some preliminary remarks may be useful. First, often what matters are not the actual constraints of the actors, but the constraints they believe they are facing. If their beliefs turn out to be wrong, they may have to modify their course. Second, I shall distinguish between cases in which the motivations of the actors directly determine policy preferences, and those in which they must be supplemented with causal beliefs about ends-means relationships. Third, our explanations will not be fully satisfying unless we go beyond these independent variables, and look for "the causes of the causes". In particular, we often want to know why the various actors have the motivations - and strength of motivation - they have. For reasons of space, I shall not discuss this issue here, but instead refer the reader to Nino's excellent analyses.[93]

The actors. It might seem axiomatic that justice in the transition to democracy is shaped by the new democratic authorities - elected assemblies and executives that either stem from the latter or are themselves chosen by popular election. In this perspective, the main actors would be the political parties and, in presidential regimes, elected executives. Yet as the cases show, the structure of decision-making can be more complicated. Although the simple model just sketched applies well to the East European transitions, it is not adequate for the West European transitions in 1944-45 nor for the Latin American ones in the 1980s.

In some cases, decisions are taken or prepared before the transition by exile governments or resistance movements. During WW II, the Belgian, Norwegian and French governments in exile enacted a number of laws and decrees with the dual function of regulating the fate of collaborators after the war and - by the harshness of the sentences - deterring people from collaborating during the war. (In Denmark the laws were adopted after the liberation and hence could not have a deterrent effect.) Whereas the Norwegian and Belgian governments had impeccable democratic pedigrees, de Gaulle's legitimacy came from Churchill rather than from the French people.[94] In most of these countries, the resistance movements took an active part in preparing the legislation. Whereas the Norwegian ordinances of 1941 and 1942 were the work of the exile

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ical Evil on Trial, p.67.

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ınd Dhondt, La répression des collaborations, pp.161-80; Tamm, efter Besættelsen, pp.256-62; Andenæs, Det Vanskelige Oppgjøret,

comments about the need to respect legality in the trials after World War ıæs, Det Vanskelige Oppgjøret, p. 62; Lottman, L'épuration, pp.50, 109, ınd Dhondt, La répression des collaborations, p.100.

[93] Nino, Radical Evil on Trial, pp.118-26.

[94] J. Lacouture, De Gaulle, vol.1, Paris: Seuil 1984, p.386.

those of 1944 and 1945 were largely imposed by the ɔvement, although modified on some procedural points.[95] The an ordinance of December 17 1942 - which imposed much ures than what the exile government originally had in mind - ed in part by communications from the resistance.[96] In ıe law adopted by parliament on May 31 1945 was a between two proposals prepared before the liberation, one e Council of the Resistance and the other by a committee of ts. Sometimes, the resistance movements continued to course of transitional justice after the liberation, not only qua dges or jurors (see above), but also as pressure groups side the normal political parties.[97]

In the cases just discussed, the anti-authoritarian forces began oactive justice before the transition. In Latin America, one erse phenomenon: the authoritarian forces retain some power sition and use it to influence or even dictate the procedures of ıstice. Here, too, the former opposition groups remain as a e outside the party system. Writing about Argentina, Carlos erizes their role as follows:

ition to the military and the political parties, human rights zations played a key role in the transition and might be seen third collective agent influencing the course of retroactive . They emerged from the military dictatorship with enormous, ırned prestige for their courageous opposition to repression. ave them considerable influence, which they used through onnections with members of the various parties. But perhaps reatest source of their power was their international ancy, because the government's own prestige depended on ín's positive international image as a human rights crusader ; somebody who would once and for all overcome the ınal Argentine penchant toward authoritarianism.[98]

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t Vanskelige Oppgjøret, pp.53, 72.

hondt, La répression des collaborations, p.68-69.

l Evil on Trial, p.111-12.

In the cases that I have discussed so far, the actors involved are collective groupings - political parties, the military, and pressure groups of various kinds. Individual citizens can also, however, act directly. In the Danish debates, the proposal was made - but not implemented - to decide by referendum whether to impose the death penalty for the worst crimes. [99] In Uruguay, as mentioned, the final amnesty decision was made by referendum. There do not seem to be other examples.[100]

Constraints. Periods of transitions are usually characterized by scarcity of resources and other constraints on action. Some proposals, such as establishing forms of retroactive justice that are "efficace, rapide et équitable", are not feasible.[101] Other proposals, while feasible, have unacceptable side effects. They absorb too much of valuable resources, and may even undermine the very values they are intended to promote. When these constraints are understood from the beginning, the actors can make coherent choices. When they only reveal themselves after a while, they may necessitate drastic revisions.

Hard constraints on transitional justice include the scarcity of time, attention, funds, personnel and information. Concerning time, the harshness of sentences tends to decrease after a while. Aristotle observed that "men become calm when they have spent their anger on someone else. This happened in the case of Ergophilus: though the people were more irritated against him than against Callisthenes, they acquitted him because they had condemned Callisthenes to death the day before" (Rhetoric 1380b 11-13). This effect is very frequently observed in transitional justice. After WW II, sentencing became more and more lenient as time passed.[102] When the effect is anticipated, it can motivate a

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[99] Tamm, Retsopgøret efter Besættelsen, p.100.

[100] None are listed in D. Butler and A. Ramney (eds.), Referendums around the World, Washington, D.C.: American Enterprise Institute 1994.

[101] This was the stated goal of the first □Belgian government in 1944 (Huyse and Dhondt, La répression des collaborations, p.113). In practice, the Catholic party opted for trials that were "rapid and equitable", while the other parties wanted them to "rapid and effective" (ibid., p.124-25).

[102] Huyse and Dhondt, La répression des collaborations, p.231, who consider and reject the hypothesis that the trend is an artifact of the most serious crimes having been tried first; Tamm, Retsopgøret efter Besættelsen, Ch.7; Andenæs, Det Vanskelige Oppgjøret, p.229.

peedy trials. As noted earlier, Alfonsín wanted the trials to take "public enthusiasm remained high". In Belgium, one reason ing quickly was that on the basis of the experience from WW I, lieved that after a while, the popular willingness to impose ences on the collaborators would give place to indifference".[103]

Concerning attention, one has to remember that in times of etroactive justice is often only one task among many. Dealing ust has to compete with more forward-looking tasks, such as he economy or recreating constitutional democracy. Huyse and ue, for instance, that in Belgium the question of how to deal ollaborators was one of second- or third-order importance.[104] ent does not imply that retroactive justice was neglected or that er forms than it would otherwise have done, only that decisions in a more haphazard and irregular way than if they had been at the political agenda. In Argentina after 1983, by contrast, justice was the highest-priority issue and not constrained by ation.

Considering funds and personnel, these are also resources nany alternative uses in transition and reconstruction. At the they tend to be even scarcer in supply than under normal es. In Norway, for instance, it was calculated that 14% of the eal capital was destroyed during WW II. Hard economic made it impossible to replace the capital and at the same time mpensation for loss of property. In post-1989 Czechoslovakia, guments against indemnifying émigrés "were based on the view e lacked the resources to satisfy property claims of as many as aimants from abroad, and that to try to do so would hopelessly the court system and paralyze the privatization process in Thus financial constraints as well as constraints created by the the legal system serve to explain the decision to exclude processes of restitution, the cost of justice may absorb much of

d Dhondt, La répression des collaborations, p.115, who also cite three for desiring quick trials. Note that the reasoning goes against the usual tponing action until one's anger has spent itself.

l Dhondt, La répression des collaborations, p.77.

, "Settling accounts: Postcommunist Czechoslovakia", in Kritz, (ed.), ustice, vol.II, pp.575-78, at p.577.

what is to be restituted. Thus in one Norwegian case concerning restitution of Jewish property after 1945, the cost of settling an estate worth 1.8 million Crowns (about 3 million dollars in today's money) was 1.5 million Crowns, which was deducted from the estate before restitution.[106]

In many authoritarian regimes, police officers, prosecutors and judges are part and parcel of the system of repression.[107] After the transition, it may be difficult to find a sufficient number of competent officials that are not themselves under suspicion. In Argentina, "the new judges appointed by the Alfonsín administration were young and inexperienced; those originally appointed by the military regime and reappointed in 1983 were suspected of not having democratic convictions".[108] Under Communism, lawyers were essentially party hacks, with no training in independent legal thinking. (In East Germany this fact was not a problem, as cases arising here were brought before West German judges.) In several German-occupied countries, the judiciary was widely seen as collaborationist and untrustworthy, whence proposals to use special courts or rely on summary executions. In Belgium, many experienced judges and lawyers were reluctant to make the sacrifice of their personal interest that the task would involve.[109]

Scarcity of competent personnel can also affect decisions to prosecute in a very different way. In many cases, most competent administrators and business leaders in the new democracy have been deeply involved with the authoritarian regime. To have them prosecuted and jailed or disqualified would deprive the country of badly needed expertise. It is difficult to have a complex modern society run by people who have spent much of their life underground, in prison or in exile. The relatively lenient treatment of public officials and economic collaborators in France and Belgium after WW II, and of Communist bureaucrats in Eastern Europe after 1989, may owe a great deal to sheer scarcity of

[106] Inndragning av Jødisk Eiendom i Norge under den 2. Verdenskrig, p.110.

[107] For a more nuanced statement, arguing that judges are better able to retain some autonomy under authoritarian regimes than in totalitarian systems, see M. Osiel, "Dialogue with dictators: Judicial resistance in Argentina and Brazil", Law and Social Inquiry 20 (1995), 481-560.

[108] J. Malamud-Goti, Game Without End, Norman and London: University of Oklahoma Press 1996, p.185.

[109] Huyse and Dhondt, La répression des collaborations, pp.110 ff.

ial and administrative talent. Value judgments about tradeoffs backward-looking task of justice and forward-looking task of n are also, of course, part of the explanation.

Considering information, transitional justice is hampered by a also arises in other legal cases, viz. that the guilty have an destroy evidence of their guilt. When they are in a position of er, they also have the opportunity to do so. In Argentina, [The National Commission on Disappeared Persons] iat military president Bignone had ordered the destruction of ; program of repression".[110] Even earlier, one reason behind arance" strategy in Argentina may have been to "stall into the facts".[111] For such reasons, "evidentiary constraints imited the number of human rights trials even without laws cope of prosecution".[112] In Eastern Europe after 1989, some y files were destroyed, but this does not seem to have been ous obstacle to transitional justice. Rather, the problem was lently of any destruction the files were both underinclusive nts would often not be listed[113]) and overinclusive (some s were invented by the security police to fill their quotas).

The law may also act as a constraint on transitional justice. is always possible to violate, bend or interpret the law, a heated political climate, the need of new democracies to rule of law and make a clean break with their predecessors h behavior very costly. (i) The pre-authoritarian legal system n the procedures that are adopted when the authoritarian d to account. If the Danish was trials relied heavily on gislation, it was partly because the Danish constitution lacks a ban on such procedures.[114] The Norwegian trials by contrast, by and large respected the constitutional ban on retroactive legislation, except in a few cases involving the death penalty for war criminals of foreign nationality.[115] (ii) The authoritarian legal system may also serve as a constraint. According to Nino, "when the new democratic regime is legally continuous with the old authoritarian one and the human rights violation to be tried were legally protected at the time of their commission or afterwards (say, by an amnesty law), the principles against ex post facto reversal of that legal protection create formidable obstacles to retroactive justice. This occurred in Eastern Europe, Spain, and Chile."[116] (iii) The post-authoritarian legal system may also constrain political measures of retroactive justice. The Hungarian constitutional court, for instance, has been a very effective constraint on the desire of parliamentarians to restore property to the original owners and to enlarge the scope of prosecution by suspending the statute of limitations.

The democratic forces may also be constrained by their own past acts. As noted earlier, wartime legislation on collaboration served not only to lay the groundwork for future trials but also to dissuade in the present. What is a threat for the collaborators will also, however, be seen as a promise of harsh punishment by the population at large. In his 1979 book on the Norwegian war trials, Johs. Andenæs cites from an article he wrote in 1945, where he asserted that one could have been content to "Hang the leaders and let the others go", yet added that "in the given situation, this was hardly practical politics. [...] The government and resistance propaganda, which was intended to deter the collaborators and fortify the wavering, had greatly inflated expectations about the war trials."[117]

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l Evil on Trial, p.80.

- Report of the Argentine Commission on the disappeared" (extracts), ansitional Justice, vol.III, pp.3-47, at p.13.

er, "Settling accounts: The duty to prosecute human rights violations e", in Kritz (ed.), Transitional Justice, vol.I, pp.375-416, at p.403 note

one estimate, in Slovakia at least 16,000 top-level agents were not ster ("Memorandum on the applicability of international agreements to v", p.341, note 11).

[114] Tamm, Retsopgøret efter Besættelsen, pp. 737-44. The minister of justice at the time defended retroactive legislation by forward-looking arguments: "if the country were again to fall in the hands of an enemy, should it remain defenseless against treason and murder because legislation is paralyzed and nobody in peacetime had envisaged crimes of this gravity?" (ibid. p.738).

[115] Om Landssvikoppgjøret, pp.83-94, 513-17; Andenæs, Det Vanskelige Oppgjøret, pp.207-19. Also, as noted above, the Ministry's denial of retroactive punishment was less than convincing.

[116] Nino, Radical Evil on Trial, p.120.

[117] Andenæs, Det Vanskelige Oppgjøret, p.268-69.

Although Andenæs does not say why a more limited purge e been "impractical", he may have had in mind the risk of cing matters into their own hands to obtain the justice denied e courts. In other cases, the risk of popular justice has certainly ı heavy constraint on what the authorities could do. If the ıthorities had adopted regular (and therefore slow) procedures, smaller number of individuals and abstained from harsh (notably the death penalty), they might have triggered even carriages of justice - lynchings, pillages, summary executions - they were trying to prevent. This constraint is a constant theme ıture on transitional justice in the German-occupied countries.[118] e measures - arbitrary internments and introduction of the death ıat the authorities sought to justify in this way had other causes ıe desire for vengeance and the need to secure society against dangerous individuals also played a role.[119]

Motivations. Following La Bruyère[120], I have found it useful human motivations in three main categories: reason, interest, n. (In a cross-cutting perspective, discussed below, they can be into consequentialist and non-consequentialist.) By reason, I ınd any impartial consideration of the common good or of ights. By interest, I have in mind any consideration of individual dvantage, be it in terms of life, liberty, money, power, fame or valued good. By passion I have in mind the traditional set of lescribed, for instance, in Aristotle's Rhetoric. In processes of l justice, all of these motivations come prominently into play. go on to illustrate them with examples, I shall make two on the relations among them.

First, to profess a certain motivation (to oneself or to others) f that one's behavior is guided by it. It is a commonplace that en present themselves to others as being swayed by other and nobler motivations than those which actually shape their behavior. An emotional desire for vengeance, for instance, is often presented as an impartial desire for retribution. People can also deceive themselves about their true motivations. When civil servants argue that those among themselves who obeyed the orders of the authoritarian regime should be let off lightly, they may sincerely believe themselves to be motivated by impartial concerns for justice, yet corporate interest may provide the ultimate explanation.

Second, the relation between ultimate motivations and policy preferences is many-one rather than one-one, whence the possibility for alliance formation.[121] I return to this issue below. Here I shall only illustrate the idea with Nino's account of how in Argentina,

> the military and human rights organizations [...] converged on many tactical courses of action. For instance, both believed that every act performed during the repression could be deemed atrocious or abhorrent; the human right groups believed that justified widespread prosecution, while the military saw it as a basis for an amnesty. [...] A similar convergence occurred when the human rights groups criticized the government and helped formulate national and international opinion that tarnished the government's social and international standing. The military welcomed this since it ultimately undermined the government's credibility. Military intelligence therefore helped human rights groups spread rumors that Alfonsín had negotiated with Rico [a Lt.Col. heading a military rebellion in April 1987] on Easter Sunday.[122]

Consider first reason as a motivation. Within this category, we may first draw a distinction between backward-looking and forward-looking considerations, and then several further distinctions within the latter category. Pure backward-looking considerations can be rooted either in the rights of victims or in the duty of the state to prosecute. In the process of property restitution in Eastern Europe, Czechoslovakia has been most active in advocating restitution in kind on the basis of the inviolable rights of the original owners. Truth commissions around the

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nd Dhondt, La répression des collaborations, pp. 98, 105-6; Tamm, efter Besættelsen, pp.75, 80, 105, 120; Lottman, L'épuration, pp. 110, 1.

ıd Dhondt, La répression des collaborations, p. 98; Tamm, Retsopgøret elsen, pp.80, 105.

ıctères IV.77. For a fuller discussion, see my Alchemies of the Mind, from Cambridge University Press, Ch.V and passim.

[121] As I explain in Local Justice, pp.172-74, alliance-formation on the basis of different ultimate motivations is also common in the allocation of scarce goods.

[122] Nino, Radical Evil on Trial, p.116.

ased on the "right to truth" of the victims.[123] With regard to osecution, human rights organizations often adopt a pure philosophy. In Argentina, Nino writes, "the human rights ıce toward retroactive justice was intransigently retributive. : to punish each and every person responsible for the abuses, f their degree of involvement. They held a Kantian view of even if society were at the verge of dissolution, it had the sh the last offender."[124]

Often, these backward-looking considerations are conflated luentialist arguments. The right of victims is sometimes h the needs of victims. It is argued, that is, that victims of past will benefit psychologically from punishment of the or at least from knowing who they are, and that these benefits fic policy measures. This argument seems to be shaky on l as on factual grounds. Morally, it is not clear that the needs s can justify a particular treatment of the wrongdoers.[125] Many repugnant the implication that wrongdoers whose victims have died should, other things being equal, be let off more ctually, it is not clear that truthfinding not followed by vill produce catharsis. In some cases, it may rather produce a ıd hardening of the anger. According to one writer, "no truth to date has caused a situation to become worse."[126] A more ement can be taken from a comment on the opening of the files:

> Germans are not so concerned with the legal and moral :cations. They simply want to know the truth, no matter what st. As Rainer Eppelmann, a minister in the last government of DR and currently a deputy to the Bundestag, said, 'After reading your file, you are wiser but also poorer'. It's true - those who read their files lose many friends, their idealistic memories of resisting totalitarianism, their faith in the loyalty and honesty of bosses, neighbors, even family members. Those who support opening up the Stasi archives believe that people need to know the truth - the whole truth, no matter how painful it is. Doing so, in their opinion, will not only touch off a wave of lawsuits and perhaps even acts of revenge. More importantly, once the initial disillusionment and bitterness pass, a feeling of relief and catharsis will follow. Perhaps they are right. But will it happen during the lifetime of this generation?[127]

The unconditional respect of the property rights of former owners also, in some cases, turns out to be grounded in instrumental considerations rather than in natural law. Thus in Czechoslovakia, "comprehensive restitution is seen as essential by government because it demonstrates that Czechoslovakia is serious about upholding property ownership rights".[128] Here, one impartial consideration (economic reconstruction) is disguised as another one (restitution). In addition, restitution to the original owners was seen as an indirect form of punishment - by withholding benefits - of the former nomenklatura. "There were fears that state property offered for sale rather than distributed on the basis of 'natural' restitution would fall into the hands of a new class of private owners largely recruited from former 'apparatchiks' who, unlike the average citizen, had sufficient money to buy business offered for privatization in that way".[129] Here, one backward-looking motivation (vengeance) is disguised as another one (restitution).

Forward-looking arguments can be utilitarian or non-utilitarian. In the former category one can make a further distinction between reconstruction and deterrence as the goals that transitional justice is supposed to serve. As just mentioned, some apparently backward-looking measures are, on closer inspection, intended to serve the goal of

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teen truth commissions", p.230.

al Evil on Trial, p.112; see also the debate between Nino and Diane ritz (ed.), Transitional Justice, vol.I, pp.375-438.

l argument, criticizing procedures that are chosen to meet the needs of ral and not only those of the victims, see M. Osiel, "Ever again: legal f administrative massacre", University of Pennsylvania Law Review l-704.

teen truth commissions", p.230.

[127] H. Hartwig, "The shock of the past", in Kritz. (ed.), Transitional Justice, vol.II, pp.612-14, at p.614.

[128] Michael Neff, "Eastern Europe's policy of restitution and property in the 1990's", in Kritz. (ed.), Transitional Justice, vol.II, pp.579-81, at p.581.

[129] V. Cepl, "A note on the restitution of property in post-Communist Czechoslovakia", in Kritz. (ed.), Transitional Justice, vol.II, pp.581-85, at p.583.

tion. Other measures are explicitly designed to serve that end. WW II in Norway, compensation for economic losses (other stitution of confiscated property discussed earlier) was guided rinciple of reconstruction rather than by backward-looking of entitlement. The loss of luxury goods was not compensated sated only at a lower rate, and the overall economic position of ual was also taken into account.[130]

The forward-looking goal of deterrence is often used to orous prosecution of the agents of and collaborators with the an regime. "The fulcrum of the case for criminal punishment is he most effective insurance against future repression."[131] This although extremely widespread, is somewhat shaky. First, even is are harshly punished now, how can future would-be violators they, if overthrown, will be treated in the same way? Incentive suppose stable institutions, which almost by assumption do not ond, if the threat of harsh punishment is in fact credible, it may ays. Although it will make it less likely (but not impossible) that l occur in the future, it will also make coup-makers more o step down. The net effect of retribution on future abuses could e or negative. This mechanism may even be at work across orders: it has been argued that if South Korea had imposed harsh its on the generals that presided over the transition to ', it would have increased the reluctance of leaders elsewhere in to step down.[132] Third, if the military remain a strong force in society, harsh retribution may provoke them to take power again, as almost happened in Argentina.[133]

In addition to utilitarian arguments, arguments from rights-consequentialism are not uncommon in transitional justice.[134] Rather than the respect for rights and the duty to prosecute rights-violations being absolute side constraints on action as they are on the rigorous retributive conception, they can enter into the goal of action. Specifically, one might design transitional justice to minimize the sum of rights-violations. On any given occasion, that is, one may proceed more leniently or more harshly than full respect for individual rights would dictate, if deviation from the ideal on that occasion serves the goal of minimizing deviations overall. For an example of how less-than-optimal prosecution of rights violations may serve the goal of minimizing total rights-violations, consider the case of Argentina. Defending Alfonsín's moderate policy, Nino writes that "if he threatened democracy through trials and weighty sentences to discourage human rights violations, he might in fact be risking future violations".[135] For examples of how more-than-optimal prosecution of rights violations may serve the goal of minimizing total rights-violations, consider what happened in German-occupied countries after the liberation. The use of martial courts, harsh sentencing and arbitrary internment may have involved less rights-violation than what would have happened spontaneously in their absence. I am not taking a stand on the validity of these claims, only noting that they have on occasion played a causal role in shaping transitional justice.

Consider next the role of interest. Most obviously, agents of the authoritarian regime have an interest in avoiding prosecution or, failing that, in mild sentences. Conversely, those who fought against the authoritarian regime have an interest in avoiding prosecution for any

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ing av Jødisk Eiendom i Norge under den 2. Verdenskrig, pp.45-50. In e Directorate for Compensation took account of whether a claimant could have expected to receive the full amount to which he would have been er normal rules of inheritance. Thus since Jews whose families had died in nation camps could not have expected to inherit all their relatives, the ' received was correspondingly curtailed (ibid., pp.98-102). The reasoning nsistent with the general forward-looking principles adopted by the

ier, "Settling accounts", p.377.

obably true that neither the generals who run Myanmar , nor President ndonesia, nor the Communist Party in China, will be encouraged to move nocracy by the fate of Messrs Chun and Roh. After all, Mr Roh ceded acefully as any military man can. Now he has fallen victim to the process of tion that he helped to foster. The moral drawn by Asia's nervous dictators may well be that, when democrats are at the door, lock them up rather than usher them in" ("The quality of Korean mercy", The Economist August 31 1996).

[133] For partly similar arguments against the deterrence effect argument, see also Nino, Radical Evil on Trial, p.144-45.

[134] For this idea, see R.Nozick , Anarchy, State and Utopia, Oxford: Blackwell 1974, p.28.

[135] Nino, Radical Evil on Trial, p.110.

illings they may have committed.[136] Also, those who lost their otherwise suffered economic losses have an interest in on or restitution. Thus in Hungary, "the Independent s Party raised the issue of reprivatization [..] during the mpaign of 1990. After the election the Smallholders became gest part in Hungary; they not only participated in the coalition but succeeded in forcing it to draft a bill on the on of agricultural land."[137]

The role of party interest in the shaping of transitional justice important. This is obviously true when, as in Eastern Europe, regime retains a presence in the competition for votes in free et party politics among the winners can also be crucial. ny transitions take place in an atmosphere of national unity, it not take long before party interests come to the forefront. In ope, a nasty case arose in May 1992, when, as part of his uggle with President Walesa, Prime Minister Olszewski flimsy list of high public officials suspected of collaborating ret police.[138] With regard to Argentina, Nino summarizes the ics as follows:

overnment feared that if it was seen as too lenient with the y, that would impair its social ascendancy and ultimately its ral chances. Indeed, that is what happened in 1987. ition parties, on the other hand, feared that if the government oo successful in its quest for retroactive justice, the Radical would be unbeatable. The parties were united, however, in the at if they gave too many concessions to the military, it would possible to consolidate democracy, finding themselves in ons similar to those of Frondizi and Illia [former Argentine s], where the government was subjected to [...] permanent ds from the military.[139]

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licit contemporary reference to this interest, see Tamm, Retsopgøret en, p.669.

y, "Judicial review of compensation law in Hungary", In Kritz (ed.), stice, vol.II, pp.667-85, at p.671-72.

"Olszewki's ouster: Poland's political tribulations", RFE/RL Research e 1992.

al Evil on Trial, p.110.

The Argentinean parties operated within a spectrum, where too few concessions to the military were as dangerous as too many concessions. Within these constraints, Alfonsín wanted to be as severe as possible, whereas the Peronists wanted to constrain Alfonsín's policies to be as lenient as possible - not to protect the military but to prevent Alfonsín from taking the credit for punishing them.

In German-occupied countries after WW II, party politics played an important role in shaping transitional justice. In Belgium and Denmark, the socialist parties maintained relatively strict policies so as not to be outflanked on their left by the intransigent Communist demands.[140] In Belgium, members of the opposition suffered loss of civil liberties just before strategic elections, to deprive them either of their right to vote or their right to stand for office.[141] The political landscape was complicated by the division between the Flemish and Wallon communities, and the role of Flemish nationalism. While the socialist wanted to use severe retroactive measures to eliminate Flemish nationalists from the voter register, the Catholic party promoted clemency to prevent the formation of a Flemish nationalist party that might drain votes from the Catholics.[142]

Consider finally the role of passion. This motivation can either play a direct role in animating the actors that are responsible for shaping transitional justice, or an indirect role as a motivation of other actors who enter among the parameters of the decision-makers. Earlier I have discussed the (presumably dispassionate) attempts by political actors to preempt or contain popular passion. Below, I indicate how legal actors may be subject to emotional mechanisms that require political responses. In addition to this indirect role of passion in shaping transitional justice, it can obviously exist in the main actors themselves, be they agents of the authoritarian regime, resistance leaders, human right activists or democratic politicians.

At the individual level, fear of punishment can certainly have motivated many agents of the authoritarian regime, but at the political

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[140] Huyse and Dhondt, La répression des collaborations, p.153; Tamm, Retsopgøret efter Besættelsen, p.259.

[141] Huyse and Dhondt, La répression des collaborations, pp.31, 151-52.

[142] Ibid., pp. 288, 181-82.

ıcides with the simple interest in not being punished.[143] Much rtant in shaping transitional justice are the emotions of anger towards these agents. The difference between the two emotions tated by Aristotle: "Now whereas anger arises from offences :self, enmity may arise even without that; we may hate people ause of what we take to be their character. [...] Much may make the angry man pity those who offend him, but the hater rcumstances wishes to pity a man whom he once hated; for the have the offenders suffer for what they have done; the other : them cease to exist" (Rhetoric 1382ª 2-16).

Anger is triggered by the actions of the offending person, not ıracter. It treats the target individual as responsible for his ıd as capable of guilt feelings. Hatred, by contrast, is triggered ef that the offending person is intrinsically bad and devoid of ngs. Perpetrators of genocide and torture embody what Nino :al evil". In his opinion, "the proper response to the worst s is to suspend reactive attitudes, similar to what we do with ple".[144] In this normative perspective, incarceration for life he appropriate way of treating radical evil. In a behavioral , hatred and a desire for the death penalty - so that the offender se to exist" - seem more likely reactions. By contrast, actions / trigger anger may also generate pity, as Aristotle noted, and a lemency.

Earlier, also citing Aristotle, I referred to the tendency for spend itself" as an explanation for the decreasing severity of in the WW II war trials. A contributing factor is the general ı of human life in wartime that makes the death penalty seem ne than under normal circumstances.[145] In many German- ountries, the inequality of sentencing that became evident after a few years led to various forms of rectification. In Denmark (through decree) and in Norway (through legislation), prisoners who had served half of their sentence were pardoned.[146] In Belgium, a law from 1946 established early release, which could be granted after one half and sometimes one third of the sentence had been served.[147] These measures did not always help small criminals who might already have served their full sentence[148], nor big ones who might already have been executed for crimes that a few years later would at most have gotten them twenty years of prison.[149]

There seem to be two related mechanisms at work in these cases. On the one hand, judges were initially much more subject to strong retributive emotions than they became later. In Belgium, according to Huyse and Dhondt, "in the first months following the liberation magistrates and judges were acting 'under the sway of passion'. [...] Sometimes the passion arose in the judges themselves, but most of the time it found its way into the courts through the channels of the written press, political pressures or sheer expressions of blackmail. The gods were thirsty, and it took months to still their thirst."[150] On the other hand, the political authorities underwent a similar change of heart that made them more willing to revise the legislation in the direction of greater clemency. In doing so, they were also motivated by the inconsistencies and inequalities created by the pattern of legal decisions. In other words, I am suggesting that in revising the legal framework the political actors were motivated by concerns both of absolute justice (as their emotions abated) and of relative justice (as the abatement of the emotions of judges and jurors created inconsistencies that had to rectified).

Beliefs. Two kinds of beliefs enter into the establishment of a system of transitional justice. On the one hand, there is a need to make

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istinction between the emotion of fear and fear as a mere complex of eliefs (as when we say we're afraid it's going to rain) see R. Gordon, The the Emotions, Cambridge University Press 1987, p.77 and passim.

lical Evil on Trial, p.141.

:endency, see Huyse and Dhondt, La répression des collaborations and et Vanskelige Oppgjøret, p.182. The mechanism may be related to the money to suffer a temporary devaluation in the context of large purchases and D. Kahneman, "The framing of decisions and the psychology of nce 211 (1981),553-58).

[146] Tamm, Retsopgøret efter Besættelsen, p.452-53.

[147] Huyse and Dhondt, La répression des collaborations, p.169.

[148] Huyse and Dhondt, La répression des collaborations, p.170; Tamm, Retsopgøret efter Besættelsen, p.446. In Denmark, some of those who (i) received short sentences and (ii) were tried early actually served longer than those who had been sentenced to longer sentences (ibid., p.449).

[149] Huyse and Dhondt, La répression des collaborations, p.125.

[150] Ibid., p.267, citing a statement in parliament from 1948.

iates of the number of cases that may qualify for prosecution, n or restitution, the capacity of the legal system, the financial : the new regime, the availability of evidence, and related the other hand, there may be a need to form causal beliefs ely effects of various policies. Without denying the practical of the former, I shall mainly focus on the latter set of beliefs.

The various motivations discussed above may be reclassified First, there are consequentialist motivations that include (i) (ii) the consequentialist subset of impartial motivations, such ism and rights-consequentialism. Second, there are non-list motivations that include (iii) passion and (iv) the non-list subset of impartial motivations, such as pure retributivism ement theories. To implement (iii) and (iv), there is no need al beliefs. Given the principle that "Ought implies can", it e be necessary to form various factual estimates. Even if one verybody who suffered under the authoritarian regime is l compensation, the coffers of the state may not allow for this here is enough money to compensate the victims, the further policy are irrelevant.

Consequentialist motivations depend, for their imple- ucially upon nomothetic beliefs about ends-means relation- opinion, the social sciences are very far from always being e such law-like beliefs.[151] In many cases, they can only offer frequently occurring and easily recognizable causal patterns ggered under generally unknown conditions or with consequences. Let me illustrate the two subvarieties of mplicit in this definition by examples from the previous dis-

f we ask how the victims of oppression will be affected by dentity of their oppressors, there are two possible answers. e may bring catharsis and peace of mind, or it may harden ieir anger. Each reaction embodies a specific mechanism, gered under "generally unknown conditions". If we ask e punishment of human rights violation today will deter ators so as to reduce the amount of violations in the future,

we must take account of two different effects. On the one hand, and assuming that the deterrence works, the expectation of severe punishment if the dictatorship eventually falls makes it less likely that it will be established in the first place. On the other hand, and assuming that the deterrence is not so strong as to make the probability of a dictatorship fall to zero, the same expectation will make future dictators less willing to step down and more willing to use violence to maintain their regime. Since I do not think we can show that in some indefinite future the net effect will go one way or the other, severe sentencing has "indeterminate consequences".

As the reader will have noted, in the last paragraphs I have stepped outside the explanatory or positive framework that I have adopted in most of this article. Returning now to that framework, I can only remark that many regimes have based their policies on beliefs about the cathartic powers of truth and about the beneficial deterrent effects of severe punishments. Also, I have noted that transitional authorities have relied on beliefs about which measures - perhaps more than optimally severe, or less than optimally severe - would minimize the overall sum of rights-violations. These cases are, perhaps, less deserving of skepticism. It does seem likely, for instance, that insisting on full pre-war legality after the liberation of the German-occupied countries would have defeated its purpose.

Aggregation mechanisms. One cannot take it for granted that all those who have some power to shape transitional justice come to the process with the same beliefs, values and policy preferences. Whenever initial policy preferences fall short of unanimity, the actors must rely on some mechanism of aggregating them to reach a decision. Aggregation mechanism include not only formal procedures of voting, but all procedures that are capable of yielding binding decisions. Among equals, the main aggregation mechanisms are arguing, bargaining, and voting, used singly or in combination with each other.[152] Although binding decisions can also be taken by the executive power (president or

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3 draws on Ch.I of Alchemies of the Mind, to which the reader is er discussion.

[152] For a more extensive discussion of these three aggregation mechanisms, see my Introduction to J. Elster (ed.), Deliberative Democracy, Cambridge University Press 1998.

:) without the involvement of other actors, the selection of the
; ultimately made by aggregating preferences.[153]

Consider first bargaining. In transitions to democracy, the the authoritarian regime often try to strike a deal that will m from prosecution and their property from confiscation. ve do not know the details, something of the sort must have 1 403 B.C. More recently, the liberation of Denmark after WW several examples of bargaining. When the Council of the proposed the use of special courts to judge the collaborators, it bly intended as a bargaining chip rather than as a serious As Frode Jacobsen, a central figure in the Danish resistance, e time, it was doubtful that "the stuff about the judges" would l by parliament, but "we cannot begin with the compromise".[154] frequently stated, by Jacobsen and others, that immunity for d killing of informers was part of a deal struck before [155]

The question that haunts all bargains of this sort is how the ıade by the democrats can be credible. Once they are in power, keep them from reneging? In fact, will there not be ing popular pressure to prosecute the authoritarian leaders? In an case, we may suspect that Sparta served as an implicit of the deal that had been struck. The Danish resistance could count on their immense moral prestige in the population. ns from military dictatorships, the armed forces often retain heir clout to enforce the bargains. In the negotiated transition to in Chile, for instance, the democratic forces had to substitute hment of a Truth Commission for a repeal of the 1978 amnesty e transitions to democracy in Eastern Europe, some of the : leaders may have hoped that the Soviet Union would serve as

bed by Huyse and Dhondt, La répression des collaborations, pp.80, 149-sting case arose in Belgium, where the first government of national unity () was authorized by parliament to regulate transitional justice by decree-elegation law remained in force under the center-left government that ın Acker II), which used it to pass important and potentially controversial debates or votes in parliament.

etsopgøret efter Besættelsen, p.446.

66 ff. Tamm believes, however, that the deal was probably implicit and ne to be represented as an explicit agreement.

a guarantor. If they did, they were proved wrong. In Hungary, for instance, reform Communists claimed that the law passed in 1991 to suspend the statute of limitations for certain crimes violated the "gentleman's agreement" that had been made during the Round Table Talks between government and opposition in 1989.[156] Although the Constitutional Court struck the law down, the alleged promise played no role in its decision. In South Africa, the white minority could rely on warnings rather than on threats.[157] They could say, credibly, that if the promises of power sharing were not respected, the white elites would leave the country.

When the policy choices are the exclusive domain of the new democratic forces, they are usually made by normal democratic procedures of deliberation and voting, constrained by judicial review. These procedures may or may not include representatives of the earlier regime. In the German-occupied countries after WW II collaborators were excluded from the political process. In most East European countries after 1989, the Communist parties or their successors were represented in the parliaments that legislated on transitional justice. In most places, however, they remained a minority during the period in which these laws were passed. To cite but one obvious example, the 1993 Czech law declaring the former Communist regime illegal was passed against the votes of the Communist deputies.

In the politics of transitional justice, two groupings may be animated by the same motivation, but differ in their causal beliefs and hence in their policy preferences. Also, as mentioned earlier, two groupings may differ in their motivation but agree in their policy preferences. One can often observe, therefore, friends who behave like enemies and enemies who behave like friends. Let me elaborate on this point.

Those who share the forward-looking values of reconciliation and reconstruction may differ in their causal beliefs about the policies that will best promote these goals. In Eastern Europe as well as in Latin America, one hears over and over again both that "To move forward, we must first come to terms with the past" and "To move forward, we must resolutely ignore the past". Those who subscribe to the first argument will

[156] J. Pataki, "Dealing with Hungarian Communists' Crimes", in Kritz. (ed.), Transitional Justice, vol.II, pp.647-52, at p.650.

[157] For this distinction, see Alchemies of the Mind, Ch.V.3.

those who subscribe to non-consequentialist ideas of justice, of those who are mainly concerned with vengeance. Those ıe to the second argument will find allies in those who have a rest in the past being ignored. A conjecture about motivations y Fig.1:

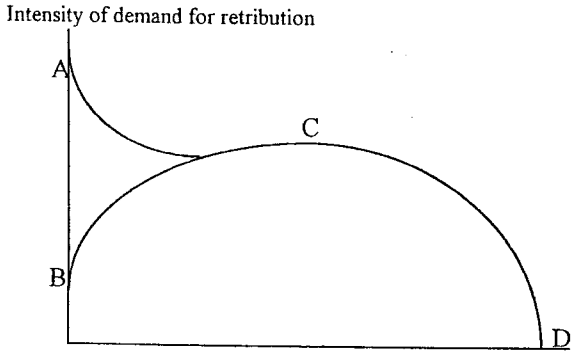

Fig.1

The rough hypotheses embodied in the diagram are the nong the members of the resistance or opposition movements thoritarian regime, we find a bifurcation of motivations. In l around A in the diagram, the past sufferings and struggles demand for retribution. In those located around B, the same ıe opposite effect (cp. the comments above on opposing triggered under "generally unknown circumstances"). In kia, for instance, Vaclav Benda and Vaclav Havel represent and B respectively. Those who are located around D will t insist on retribution.

Those in the gray area around C, however, are often very demanding punishment of those who behaved badly, those opportunistically to the regime may feel that they are joining those who behaved heroically. In Belgium, the draconian posed by Antoine Delfosse, minister of justice in the exile "may have their origin in a need to stifle doubts created by his behavior during the first months of the occupation".[158] In France, a defense lawyer explained the severity of the first sentences by "the fact that many jurors were latecomers to the resistance and were eager to demonstrate a zealousness which they had not shown earlier. Later, when the deported came back from Germany, one had much more thoughtful jurors who [...] did not feel the need to prove themselves".[159] Referring to retroactive justice generally, Nino cites disgusted reactions to the hypocrisy "when those who were silent in the past suddenly become vociferous advocates of retroactive justice".[160]

Whereas the leaders of the resistance or opposition movements often insist on abiding strictly by the rule of law in order to set the new regime on a firm footing, people in the gray zone may be so imbued with the lawlessness of the former regime that they are willing to short-circuit the regular process of the law. Alexander Zinoviev describes how the process of destalinization in the Soviet Union was itself carried out in a typically Stalinist way. For a short while after 1956 it was simply non-obligatory to mention Stalin in all contexts, but soon it became obligatory not to mention him.[161] Similarly, the process of de-communization in Eastern Europe has sometimes been carried out with something like Communist disregard for individual rights.

In many cases, the political landscape after transition is occupied by three political groupings. First, there are democrats who emphasize forward-looking measures of reconciliation and reconstruction. As argued above, these will often be found around B in Fig.1. Second, there are democrats who give priority to backward-looking measures of prosecution and restitution. This group may include some people around A and some around C in the diagram. Third, there are representatives of the pre-democratic regime, either in the form of an autonomous military or in the form of political parties. These fall obviously around D in the diagram. In German-occupied countries after WW II the third group did not exist, and the conflict between the first two was less acute than in other cases. The following comments do not, therefore, apply to these cases.

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[158] Huyse and Dhondt, La répression des collaborations, p.69.

[159] Lottman, L'épuration, p. 272.

[160] Nino, Radical Evil on Trial, p.39.

[161] J. Elster, Political Psychology, Cambridge University Press 1993, p.94.

As indicated earlier, there is a tendency for alliances to form rst and the third groups. Whether motivated by the common lf-interest, they want to forget the past and move forward. ibers of the first group are somewhat more inclined than the e in confrontation with the past, they tend nevertheless to be e. It is then tempting for members of the second group to and the third groups together as being "soft on authorita- s tendency may be especially pronounced in individuals g.1.) In Czechoslovakia, for instance, some members of the osition were affiliated with the Communist party before h they left the party and lost their jobs after the Soviet proposals to limit confrontations with the past were often spicion. In Poland, there was a ludicrous episode in 1992 retributionists accused Walesa himself of having been h the Communist regime. When President Alfonsín erate stance, because he thought that society had to move ared that a strict policy of retribution might provoke the idermine the emerging democracy, human rights activists ected him of being "soft on the military".

VI. Conclusion

e behavioral study of transitional justice lies in the two more general domains. On the one hand, it is part of to be called "transitology", the study of regime transitions. level, it can be defined as the study of the disequilibrium lie between the pre-transitional and the post-transitional ludes not only the dynamics of the transition itself, but also nomic reconstruction, constitution-making and reckoning n important task - occasionally mentioned above - is to on among these post-transitional activities. Economics, ice compete for the same scarce resources, and may also ly or negatively with each other.

the other hand, the behavioral study of transitional justice ie empirical study of justice more generally. In addition to e, this domain includes (among others) the study of "local justice" and the role of justice in wage determinations.[162] A key task in this domain is to identify and explain the different types of justice motivations that animate social actors, as well as their relation to interest and passion. Another important task is to investigate the extent to which the conceptions of justice held (or professed) by the actors serve to explain their behavior.[163]

Transitology and the empirical study of justice are subject, I believe, to the same methodological procedures. Rather than looking for general law-like explanations or "theories", we should try to identify recurring causal patterns or "mechanisms". Although apparently modest, this program is actually quite ambitious. It requires a concern for the fine grain of events that larger theories neglect. In this programmatic article, I have admittedly not been able to go far in this direction, but I hope some of the discussions suggest the kind of work that is likely to be fruitful.

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[162] See for instance M. Lerner and S. Lerner (eds.), The Justice Motive in Social Behavior, New York Plenum Press, aptly subtitled "Adapting to times of scarcity and change".

[163] I argue in Ch.V of Alchemies of the Mind that even when these conceptions of justice are rationalizations of other motivations, they can nevertheless have independent explanatory power, due to (i) the need for consistency and (ii) the need to avoid rationalizations that are too obviously a mere disguise for other motivations.