

TRANSITIONAL JUSTICE IN BALANCE



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TRANSITIONAL JUSTICE IN BALANCE

COMPARING PROCESSES, WEIGHING EFFICACY

Tricia D. Olsen
Leigh A. Payne
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The idea for this book originated during a graduate seminar on transitional justice in the University of Wisconsin–Madison’s Department of Political Science. Seminar participants noted that the abundant literature on transitional justice had generated numerous still untested hypotheses. During summer 2005, a team of three researchers began building the Transitional Justice Data Base to conduct those tests. This book is the culmination of their efforts to refine that original data base and the findings generated.

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FOREWORD

This book constitutes one of the first scholarly attempts to evaluate through comparative empirical study what works in transitional justice. It comes more than half a century after the Nuremberg trials, twenty years since the communist collapse and posttotalitarian transitions, and into the third decade of the modern development of transitional justice, i.e., the self-conscious policymaking regarding justice associated with periods of radical change.¹ The data presented and analyzed in this book will be indispensable for future scholarship, as well as for policymakers. This project is the first of its kind to compare multiple mechanisms and combinations of mechanisms across a broad range of regions, countries, and time. Moreover, the volume takes up crucial questions of stocktaking critically important in this new century of transitional justice. This work—original, savvy, and timely—poses the very questions we should be thinking about today.

Transitional Justice in Balance asks three central questions: Which mechanisms “institutionalize remembrance,” and when do countries adopt them? Next, what factors facilitate or impede adopting these mechanisms deemed essential to “transiting to a minimally decent condition?” Third, do these mechanisms achieve the desired goals of avoiding the repetition, reenactment, or reliving of horror?

As the authors observe, little is known about the factors that encourage or impede either adoption of transitional justice or success in achieving its goals. In the spirit of this work, one might begin with some reflections on the road traveled. When I first started thinking about these questions, it was in the context of postauthoritarian rule in Latin America and post–Cold War transitions in Eastern Europe, where successors debated what to do in the transition. In the late 1980s and early 1990s, the context that gave rise to the modern-day understanding of transitional justice was characterized by a vital question that appeared to dominate the debate across multiple political transformations and regions: how to deal with the responsible agents of the prior regime? In my book *Transitional Justice*, I argued that the approach employed in each country should be designed to deal with the particular character of repression in that country, taking into account in each case the need to demonstrate respect for the victims and for the suffering they endured; the importance of dealing fairly with those accused of causing their suffering; and the crucial significance of acting in a manner that promotes the rule of law.² The debate about whether to punish predecessor regimes, particularly in light of the aims of democratization and state building, was framed in relatively narrow terms.

At the time, I advocated a more open-ended and plural approach to the wrenching questions at stake in the so-called punishment/impunity dilemmas, arguing

1. Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000).

2. Aryeh Neier, “Do Trials Work?” *The New York Review of Books* 42 (1995): 16. Aryeh Neier, “Putting Saddam Hussein on Trial”, *The New York Review of Books* 40 (1993): 15.

that, wherever the criminal justice approach was compromised, there might well be other ways to respond to predecessor regimes' repressive rule.³ Moreover, the pursuit of such alternatives could also develop capacities for advancing the rule of law, in addition to the (obviously related) aims of democracy and state building. As we now understand, in the context of the collapse of communism and subsequent East European transitions, the structure of the transitional response was informed and directed at least in part by the circumstances of the associated political conditions, as well as by the degree of commitment to political change. In such hyperpoliticized moments, it became clear that the law operates differently than in ordinary times, that justice seeking would hardly conform to an ideal. The relevant actors and institutions on the ground often lack the capacity to vindicate all of the traditional values associated with the rule of law, such as general applicability, procedural due process, as well as more substantive values of fairness or analogous sources of legitimacy.

In the meantime, the field has developed to embrace a wide range of institutions, actors, and purposes beyond the state. We can see a clear role for civil society, notably for victims and their representatives, in reviving these questions, often after an extended period. These developments are well accounted for in this book, where the role of sequencing is deemed to have explanatory power beyond the mere passage of time. In the new global politics, with the rise of political fragmentation and internal conflict, international institutions of judgment are operating vis-à-vis private actors, including paramilitary groups and political opposition. But there is also a relationship to domestic courts and alternative mechanisms for accountability, such as truth commissions. One also can see the emergence of universal jurisdiction with respect to the most serious offenses.

Transitional Justice in Balance addresses many of these developments, taking a comparative perspective. This data set is unique in its inclusion of diverse mechanisms over a considerable period and across regions—illustrating and articulating the “diffusion of transitional justice throughout the world.” In the authors view, analysis of the data suggests an optimal approach of “combining and sequencing” different mechanisms. In their words, “The balance is crucial ... trials are essential to accountability for human rights violations and to building democratic institutions. On the other hand, countries cannot put everyone on trial.... We accept this fact with other types of crimes.... Therefore, a balance exists between legal imperatives, public safety, and pragmatic considerations.”

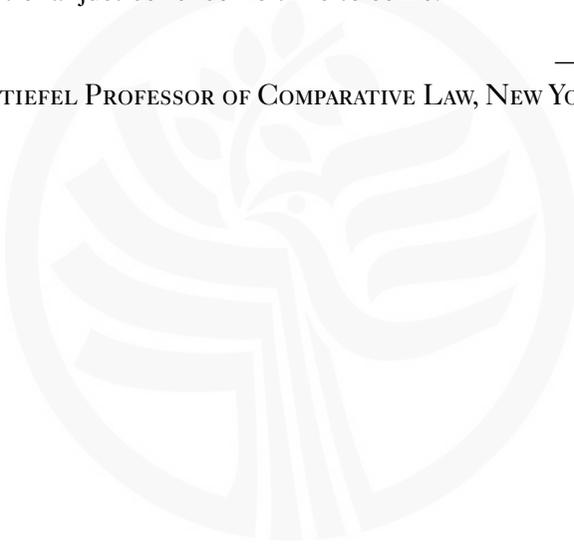
Achieving such a balance entails important legal and policy challenges. Future research arising from the data base will have to wrestle with the broader global context against which these decisions are playing out, namely, the role of international tribunals and universal jurisdiction beyond the state and their impact on local decision-making regarding prosecutions or amnesty. How does one think about domestic policymaking against a context of complementarity?

3. Teitel, *Transitional Justice*.

To what extent can the policies of states be taken up separately from other institutions, actors, norms, and values? In the proliferation of actors and institutions, there are often diverse purposes, all of which inevitably inform the evaluative and policymaking project this book sets out to address. Others may quarrel with the conclusions because they do not give adequate attention to the effects of these mechanisms in regards to other actors.⁴ But these debates only point to the significance of this book and its broader project. It is likely to spark a research agenda in transitional justice for some time to come.

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4. For other approaches see Jack Snyder and Leslie Vinjamuri, “Trials and Errors: Principle and Pragmatism in Strategies of International Justice,” *International Security* 28(3)(Winter 2003/04): 5-44.