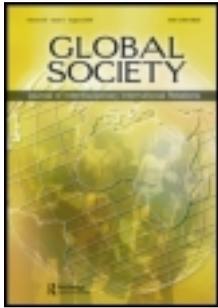


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Democratising Transitional Justice: Transitional Trade-offs and Constituting the *Demos*

EAMON ALOYO

I argue that transitional justice should be democratised and to realise this goal I propose a method by which people can be enfranchised to make such choices. By showing that transitional justice options often involve trade-offs, I lay the groundwork for my democratic account of transitional justice. This article balances three democratic principles, including collective self-determination, the all affected interests principle and the protection of individual rights that are necessary to vote, to argue that victims and potential victims should constitute the transitional justice demos. I propose a new institution that would balance international and local control of transitional justice decision making, and choose the demos. This article does not attempt to construct a theory of how to resolve tensions in transitional justice decisions. Conversely, exactly because these tensions are often present, I develop a theory of who should be empowered to make transitional justice decisions and how their powers should be constrained.

Introduction

This article criticises several leading theories and methods of transitional justice because they fail to provide meaningful choices to victims and potential victims, and then constructs a democratic, victim-centred account of how transitional justice decisions should be made. For the purposes of this article, a transition is any major political change in the type of governance of a society. Often, but not always, this will mean a non-democratic human rights-violating regime changing to a democratic regime that generally respects human rights. The justice aspect of “transitional justice” denotes a multitude of backward- or forward-looking methods to fairly address past wrongs that have deeply affected many.

My thesis is that because the goals of transitional trade-offs can be in tension,¹ because each transitional situation is unique and because some people are affected by past wrongs and potentially affected by transitional justice mechanisms in ways that are morally different than others, generally democratic principles should guide procedures for transitions. This raises the question of who should

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1. Bronwyn Anne Leebaw, “The Irreconcilable Goals of Transitional Justice”, *Human Rights Quarterly*, Vol. 30, No. 1 (2008), pp. 95–118.

be empowered to make these democratic choices. I argue that individuals who were wronged and those likely to have important human rights violated by any transitional justice mechanism that fails should be given a say in choosing the transitional justice mechanism for their society. Although there has been some progress in involving victims in broader participatory models of transitional justice, their input has remained limited.² For instance, Patricia Lundy, Mark McGovern³ and Wendy Lambourne⁴ argue that transitional justice should include local participation. In some cases, such as that of Burundi, civil society groups were supposed to be consulted.⁵ Others conducted outreach, such as the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda, among others.⁶ Similarly, some have discussed how transitional justice relates to democratisation.⁷ Yet there is an important difference between seeking input from, and empowering and enfranchising individuals regarding choosing transitional justice mechanisms. There is additionally an important difference between assessing how transitional justice mechanisms affect prospects for democracy, and democratising the transitional justice process itself. No one of whom I am aware argues for democratising transitional justice itself. Nor has anyone attempted to determine *who* should be empowered to make transitional justice decisions. These topics are the ones I address here.

Some may object that democratic procedures are inappropriate for some or all cases of transitional justice because some transitional societies are constituted by a majority that will likely corrupt a democratic procedure. Some might make this objection by suggesting that justice traditionally has been and should continue to be separate from democracy. An independent judiciary, for instance, is important so that politicians do not wield undue influence over judges. Ian Shapiro,

2. Thorsten Bonacker, Wolfgang Form and Dominik Pfeiffer, "Transitional Justice and Victim Participation in Cambodia: A World Polity Perspective", *Global Society*, Vol. 25, No. 1 (2011), pp. 113–134; Mark Findlay, "Activating a Victim Constituency in International Criminal Justice", *International Journal of Transitional Justice*, Vol. 3, No. 2 (2009), pp. 183–206; Sara L. Zeigler and Gregory Gilbert Gunderson, "The Gendered Dimensions of Conflict's Aftermath: A Victim-Centered Approach to Compensation", *Ethics & International Affairs*, Vol. 20, No. 2 (2006), pp. 171–192; Rosalind Shaw, Lars Waldorf and Pierre Hazan (eds.), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford, CA: Stanford University Press, 2010); Maria Elander, "The Victim's Address: Expressivism and the Victim at the Extraordinary Chambers in the Courts of Cambodia", *International Journal of Transitional Justice*, Vol. 7, No. 1 (2013), pp. 95–115; Nneoma V. Nwogu, "When and Why It Started: Deconstructing Victim-Centered Truth Commissions in the Context of Ethnicity-Based Conflict", *International Journal of Transitional Justice*, Vol. 4, No. 2 (2010), pp. 275–289; Patricia Lundy and Mark McGovern, "The Role of Community in Participatory Transitional Justice", in Kieran McEvoy and Lorna McGregor (eds.), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Portland, OR: Hart Publishing, 2008), pp. 99–120; Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (New York: Oxford University Press, 2002).

3. Lundy and McGovern, *op. cit.*

4. Wendy Lambourne, "Outreach, Inreach and Civil Society Participation in Transitional Justice", in Nicola Palmer, Phil Clark and Danielle Granville (eds.), *Critical Perspectives in Transitional Justice* (Cambridge, UK: Intersentia, 2012), pp. 235–262.

5. Stef Vandeginste, "Burundi's Truth and Reconciliation Commission: How to Shed Light on the Past While Standing in the Dark Shadow of Politics?", *International Journal of Transitional Justice*, Vol. 6, No. 2 (2012), pp. 355–365.

6. Lambourne, *op. cit.*, pp. 240–243, 244–247.

7. Mark Arenhövel, "Democratization and Transitional Justice", *Democratization*, Vol. 15, No. 3 (2008), pp. 570–587.

among others, has challenged the view that democracy should always be independent of justice.⁸ This article contributes to this debate by arguing that at least in transitional situations, democracy has an important role to play in transitional justice, in part because there are many types of justice.

Another objection to using democratic means to decide questions of transitional justice is that democratic choices could divide and entrench former adversaries along the same pernicious lines that drove, or solidified during, conflict. If the majority perpetrated injustices, they may abuse democratic mechanisms to unjustly avoid prosecution or uncomfortable public confessions of their role in past abuses.⁹ As with domestic democracy, checks and balances are necessary to avoid morally problematic outcomes. One way of providing a check to democratising transitional justice decisions is to carefully limit who should be enfranchised in order to obviate the concern that a majority would vote to exonerate themselves and their co-conspirators in a transitional justice setting.

Improving methods of choosing transitional justice mechanisms is a pressing moral and practical issue. The Arab Spring shows just how important—and fraught with risk—transitional justice is. As of July 2013, more than 90,000 people had been killed, millions had been displaced in Syria's civil war and numerous women had been sexually abused, for instance, whereas the transition in Egypt has been comparably peaceful.¹⁰ Transitions are common. Since 1974, over 90 countries have democratised during this "third wave" of democratisation.¹¹ More than 30 countries over the past 40 years have used truth commissions.¹² Transitional justice will continue to be important because many non-democracies will likely transition to democracy over the coming decades.¹³

Transitions often happen at the level of the state and my proposal can account for state-based transitions. Yet it can also be used in situations where states fragment, such as in the former Yugoslavia, in regions where refugees cross state boundaries, such as the Syrian civil war that resulted from the Arab Spring, and to sub-state and supra-state areas where human rights violations have occurred.

The article is organised into two main sections. In the first section, I show that transitional justice trade-offs are often unavoidable. In the second section, I construct my democratic account of transitional justice based on who should constitute a transitional justice *demos*, and who should be empowered to decide who should constitute the *demos*.

8. Ian Shapiro, *Democratic Justice* (New Haven, CT: Yale University Press, 1999).

9. Amy Gutmann and Dennis Thompson, "The Moral Foundations of Truth Commissions", in Robert Rotberg and Dennis Thompson (eds.), *Truth V. Justice: The Morality of Truth Commissions* (Princeton, NJ: Princeton University Press, 2000), pp. 22–44; Chandra Lekha Sriram, "Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice", *Global Society*, Vol. 21, No. 4 (2007), pp. 579–591.

10. David Jolly, "Death Toll in Syrian Civil War Near 93,000, U.N. Says", *The New York Times*, 13 June 2013, sec. World/Middle East, available: <<http://www.nytimes.com/2013/06/14/world/middleeast/un-syria-death-toll.html>>.

11. Larry Diamond, *The Spirit of Democracy: The Struggle to Build Free Societies throughout the World* (1st edition) (New York: St. Martin's Griffin, 2008), chap. 2; Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1993).

12. Daniel Philpott, "An Ethic of Political Reconciliation", *Ethics & International Affairs*, Vol. 23, No. 4 (2009), pp. 389–407.

13. Diamond, *op. cit.*, chap. 3.

1. Potential Transitional Trade-offs

Criminal punishment, amnesty and methods aimed at reconciliation such as truth commissions are three widely used transitional justice mechanisms. These options are sometimes in tension because often different transitional justice mechanisms favour certain outcomes, such as retribution, reconciliation, restorative justice or some combination of outcomes, and all three options cannot be applied to the same person simultaneously. Prosecuting an individual and granting him amnesty are concurrently impossible, for instance. Not all transitional justice options are mutually exclusive, however. A combination of transitional justice options¹⁴ is known as complementarity.¹⁵ For example, South Africa prosecuted many individuals for abuses during apartheid, but they also offered amnesty to some in exchange for public confessions at the Truth and Reconciliation Commission. Some combinations of transitional justice options could be preferable to others. For instance, a society could use Truth and Reconciliation Commissions that would have the authority to conditionally offer amnesties to those who told the truth about their past wrongs. The problem with many existing arguments for and practices of transitional justice mechanisms is that in general they assume the interests of others. This is worryingly paternalistic. Just as democracy is a solution to such a problem at the state level, I argue that victims and likely potential victims should be empowered to express their own preferences. Consider in turn each of the three widely used transitional justice options.

The first widely used transitional justice option is individual criminal accountability. Mark Drumbl calls this the “dominant” method of dealing with past atrocities.¹⁶ Retributive sentiments push us towards preferring to arrest, try, convict and punish at least the organisers of the worst crimes of a former regime. Since World War II, individual criminal accountability has become increasingly popular through domestic, hybrid and international courts, culminating in the permanent International Criminal Court (ICC).¹⁷

It is not only liberal Western democratic states that push for criminal accountability. For instance, a public opinion poll of Darfuri refugees in Chad who were displaced by the violent and perhaps genocidal policies of Sudan’s president, Omar al-Bashir, found that 98 per cent of them wanted Bashir put on trial by the ICC.¹⁸ Following the Rwandan genocide, the local traditional method of justice, Gacaca, was combined with the International Criminal Tribunal for

14. Bert Ingelaere and Dominik Kohlhagen, “Situating Social Imaginaries in Transitional Justice: The Bushingantaha in Burundi”, *International Journal of Transitional Justice*, Vol. 6, No. 1 (2012), p. 58.

15. This should not be confused with the principle of complementarity present in the Rome Statute of the International Criminal Court (ICC) that holds that only if states are unwilling or unable to try people can the ICC exercise jurisdiction.

16. Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007), pp. 5, 35–41.

17. Kathryn Sikkink, “From State Responsibility to Individual Criminal Accountability: A New Regulatory Model for Core Human Rights Violations”, in Walter Mattli and Ngaire Woods (eds.), *The Politics of Global Regulation* (Princeton, NJ: Princeton University Press, 2009), pp. 121–150; Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (1st edition) (New York: W. W. Norton & Company, 2011).

18. Rebecca Hamilton, *Fighting for Darfur: Public Action and the Struggle to Stop Genocide* (New York: Palgrave Macmillan, 2011), p. 160.

Rwanda (ICTR).¹⁹ Other countries including Cambodia, Sierra Leone and Rwanda have used criminal justice (among other methods) to deal with previous abuses. Prosecutions are generally considered a backward-looking mechanism of transitional justice because they focus on punishing individuals for past wrongs.

The second transitional justice option is offering amnesties to past perpetrators. Amnesties excuse individuals from criminal prosecution through a pre-trial decision for actions that would otherwise be punishable by law.²⁰ Amnesties correspond with forward-looking conceptions of justice that prioritise preventing future harms for the following reason. Powerful leaders may demand amnesty in exchange for stepping down from office, not carrying out future human rights abuses, or not resuming war. Some scholars suggest that amnesties are preferable to prosecution in some cases, especially when they may be necessary to prevent future human rights abuses.²¹ Promoting peace and preventing more human rights violations by offering amnesties to those still capable of committing wrongs is a compelling goal. Choosing between prosecutions and amnesties is widely known as the “peace versus justice” trade-off²² because amnesties may be more likely to bring peace and prosecutions are associated with achieving (retributive) justice.

This trade-off is more accurately viewed as a tension between peace and punishment because punishment for severe wrongs is only one type of justice. Furthermore, as Mark Drumbl argues, punishment for committing mass violations of human rights is disproportionately mild compared with typical domestic punishments.²³ Sometimes a perpetrator of a single killing domestically receives a heavier sentence than someone who masterminds a war crime that results in the murder of thousands of innocents, for instance.

A third option is reconciliation mechanisms such as truth commissions that aim to promote mutual acceptance of—although not necessarily affinity between—victims and perpetrators. There is some evidence that truth commissions can contribute to reconciliation,²⁴ but they are not the only option that can achieve this goal. Like amnesties, reconciliation methods are forward looking in that they aim to promote co-existence. But like criminal tribunals, they often use backward-looking mechanisms such as public confessions of and repentance for past wrongs.

19. William A. Schabas, “Genocide Trials and Gacaca Courts”, *Journal of International Criminal Justice*, Vol. 3, No. 4 (2005), pp. 879–895; Lorna McGregor, “International Law as ‘Tiered Process’: Transitional Justice at the Local, National, and International Level”, in McEvoy and McGregor, *op. cit.*, pp. 47–73.

20. Pardons, in contrast, are post-trial decisions to commute or excuse a conviction.

21. Kent Greenwalt, “Amnesty’s Justice”, in Rotberg and Thompson, *op. cit.*, pp. 189–210; Christopher Wellman, “Amnesties and International Law”, in Larry May (ed.), *War: Essays in Political Philosophy* (Cambridge: Cambridge University Press, 2008), pp. 249–265; Jack Snyder and Leslie Vinjamuri, “Trials and Errors: Principle and Pragmatism in Strategies of International Justice”, *International Security*, Vol. 28, No. 3 (2004), pp. 5–44; Larry May, *Crimes against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005), chap. 13.

22. Rachel Kerr and Eirin Mobekk, *Peace and Justice: Seeking Accountability after War* (Polity Press, 2007); Naomi Roht-Arriaza and Javier Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (1st edition) (Cambridge: Cambridge University Press, 2006); Rotberg and Thompson, *op. cit.*; Chandra Sriram, *Confronting Past Human Rights Violations: Justice Vs. Peace in Times of Transition* (New York: Frank Cass, 2004).

23. Drumbl, *op. cit.*

24. James Gibson, “Does Truth Lead to Reconciliation? Testing the Causal Assumptions of the South African Truth and Reconciliation Process”, *American Journal of Political Science*, Vol. 48, No. 2 (2004), pp. 201–217; James L. Gibson, “The Truth about Truth and Reconciliation in South Africa”, *International Political Science Review*, Vol. 26, No. 4 (2005), pp. 341–361.

Although punishment and peace are self-evident goods, it is not obvious that reconciliation and forgiveness should be a goal of transitional justice.²⁵ Domestically, victims are not required or encouraged to reconcile with or forgive perpetrators, so at first glance it seems strange that victims should be encouraged to reconcile with perpetrators who committed severe and widespread human rights abuses. But some degree of reconciliation or forgiveness may be important for victims and divided groups to function cohesively as a society, and above all to prevent a collapse back into violence.

Individuals advocating for retributive justice through punishment, prospective peace through amnesty, and reconciliatory or restorative justice through truth commissions generally eschew the question of who should decide what type of transitional justice options are used. Often transitional justice decisions are left to a small, elite coterie of national or international politicians or bureaucrats who rarely face the risks or bear the psychological and physical scars from past human rights abuses that victims and potential victims do. In the next section I present a democratic means of empowering those who were and could be most affected by a transition to decide among the various transitional justice options.

2. Democratising Transitional Justice

In this section, I argue that the people who have been wrongly harmed and those that might be wrongly harmed deserve to choose what transitional justice process is used because these groups of people are or could be affected in ways that are different to how others were affected by past human rights abuses and could be affected by transitional justice. This method of transitional justice can be implemented by establishing an institution composed of a two-tiered set of panels populated by experts who can decide who victims and potential victims are. To limit bias, the first panel would be composed of only international experts, excluding representatives from the affected region. The first panel would choose the second panel, the latter of which could include individuals from the society in transition. The second panel would then make the difficult decisions about who should be empowered to vote on transitional justice processes and which processes should be put to a vote.

My proposal limits majority rule—but not democracy—in two important ways. First, it limits who should have a vote in transitional justice choices. Second, it limits which decisions should be put to a vote. The international community has a powerful role in this approach to transitional justice, but at the same time the process is sensitive to local differences in culture, custom, circumstances and history.

Whether any constraint on majority rule can itself be democratic is a question at the heart of democratic theory. The direct democrat, Rousseau, for example thought that one would have to give up *all* of one's rights when living in civil society so that by definition one could not have one's rights violated if the

25. Gutmann and Thompson, *op. cit.*, pp. 32–33; Daniel Philpott (ed.), “Beyond Politics as Usual: Is Reconciliation Compatible with Liberalism?”, in *The Politics of Past Evil: Religion, Reconciliation, and the Dilemmas of Transitional Justice* (1st edition) (Notre Dame, IN: University of Notre Dame Press, 2006), pp. 11–44.

demos decided to harm or kill someone or some group of people.²⁶ However, killing or otherwise disenfranchising innocent citizens is anti-democratic, and not only unjust, because democracy requires enfranchising each adult (except for rare conflicts of interest) and obviously killing people prohibits them from voting (and violates other rights).²⁷ Indeed, democracies often constrain domestic law making in two related ways: through a bill of rights or constitution, and through judicial review, both of which aim at protecting individuals' rights and democracy itself. All democratic states today exclude the vast majority of individuals in the world from participating in their domestic affairs. Democracies generally restrict voting rights to citizens. For these reasons, the decision-making model of transitional justice I present here is democratic even though it is not simply majority rule.

My proposal regarding how transitional justice decisions should be made relies on direct input from voters for the following reasons. Electing representatives is useful when there are too many issues and choices for individuals to realistically have the time and resources to devote to each, but this concern does not arise in transitional justice. Only one or a few questions will be put to voters in the case of transitional justice once per transition, allowing the voters sufficient time to deliberate, discuss and decide. Whereas representatives often make decisions on issues that are trivial to the average voter in ordinary democratic polities, because transitional justice decisions are deeply important to victims and potential victims they deserve a direct say in the decision. Another objection to direct democracy is that it may allow a tyranny of the majority, but again the objection does not arise in transitional justice for two reasons. First, the panel will not enfranchise likely perpetrators in order to avoid them undermining the democratic process. Second, the perpetrators' rights will be protected because the second panel will only be allowed to authorise mechanisms consistent with fair procedures and human rights. There will be constraints on what the *demos* can decide. I now turn to how the *demos* should be constituted.

Constituting the Transitional Justice Demos

In this section I critique two accounts of constituting a *demos*, the all affected interests principle and the coercion principle. I then suggest that modifying the all affected interests principle is apposite for transitional justice because past wrongs affect some people in ways that are different in kind from how past wrongs affect others, and some people have the potential to be harmed in ways that differ in kind from how others could be affected. I argue that those who were severely wronged in the past and those at risk of being severely wronged in the future should be enfranchised to make transitional justice decisions. I then consider how the electorate's votes should be weighed and a number of objections.

The boundary problem within democratic theory or, as Goodin calls it, the problem of "how to constitute the *demos*", is "who should be included in the

26. Jean-Jacques Rousseau, "The Social Contract", in *The Social Contract and the Discourses* (New York: Everyman's Library, 1762), pp. 180–307.

27. Robert Goodin, "Enfranchising All Affected Interests, and Its Alternatives", *Philosophy & Public Affairs*, Vol. 35, No. 1 (2007), p. 47.

demos or constituency” for democratic choices or votes.²⁸ This is an important issue for transitional justice because reasons of justice matter in choosing who should be enfranchised. For instance, criminal justice systems do not give a convicted murderer a say in his or her sentences. In some ways the boundary problem is easier to address in the specific circumstances of transitional justice than it is in general, yet in other ways it remains subject to the same problems. It is easier because the vote is only done once for each transition and the issue area is tightly constrained. It is subject to some of the same problems, however, because some of the same objections apply to how to constitute a transitional justice *demos* as apply to constituting the *demos* in general.

A foundational democratic ideal, roughly stated, is that the people who are affected by a decision should have a say in that decision.²⁹ This was the underlying principle of American revolutionaries who claimed it was unfair to tax colonialists without giving them a voice in how their taxes were spent. Robert Goodin takes this principle to its logical conclusion by arguing that it requires enfranchising every adult and perhaps all adults of future generations in public policy decisions (or their representatives) because the opportunity cost of every public decision could affect anyone.³⁰ For example, Goodin would argue that instead of the more than \$260 million that was allocated to the International Criminal Tribunal for Rwanda (ICTR) in 2006–2007,³¹ the billions of adults alive at that time, and perhaps representatives of future people, should have voted on how to allocate those funds. I shall argue that this ecumenical framing of the all affected interests principle is overly broad for transitional justice because of conflicts of interest and because some individuals are affected and could be affected in ways that are morally relevantly different.

A different way of constituting the *demos*, favoured by David Miller, is a qualified coercion principle.³² Miller carefully differentiates coercion from prevention. If prevention prohibits an individual from one or a few courses of action, coercion requires one course of action, with severe penalties if that single option is not followed. Miller takes states as the assumed unit of analysis. Instead of including anyone who is affected by a democratic decision, or those who are prevented from making certain decisions, Miller argues that the *demos* should only include those who are coerced. I put aside the objection that who is coerced by a decision may depend on who is empowered in the first place to make that decision and thus cannot provide a solution to the boundary problem.³³ Applying Miller’s theory to transitional justice, however, underscores another weakness in his proposal since in transitional justice, suspects of past human rights abuses can be

28. *Ibid.*, p. 40 and passim; David Miller, “Democracy’s Domain”, *Philosophy & Public Affairs*, Vol. 37, No. 3 (2009), p. 201.

29. Goodin, *op. cit.*; Miller, *op. cit.*; Sofia Näsström, “The Challenge of the All-Affected Principle”, *Political Studies*, Vol. 59, No. 1 (2011), pp. 116–134; Robert Dahl, *After the Revolution? Authority in a Good Society* (revised edition) (New Haven, CT: Yale University Press, 1970), p. 67; Shapiro, *op. cit.*, p. 37; Frederick Whelan, “Democratic Theory and the Boundary Problem”, in James Pennock and John Chapman (eds.), *Liberal Democracy: Nomos XXV* (New York: New York University Press, 1983), pp. 13–47; Johan Karlsson Schaffer, “The Boundaries of Transnational Democracy: Alternatives to the All-Affected Principle”, *Review of International Studies*, Vol. 38, No. 2 (2012), pp. 321–342.

30. Goodin, *op. cit.*

31. Drumbl, *op. cit.*, p. 131.

32. Miller, *op. cit.*, pp. 218–225.

33. Goodin, *op. cit.*, p. 52.

coerced and not simply prevented. Suspects are routinely arrested and put on trial, i.e. coerced. Thus by his principle alone perpetrators should be able to vote on transitional justice decisions. Yet because of perpetrators' conflict of interest, we need a different way to narrow the scope of the *demos* in the case of transitional justice.

I argue that some conflicts of interest are sufficiently problematic to exclude those individuals from the transitional justice *demos*. Only those wrongly harmed and those most likely to be wrongly harmed if transitional justice fails should be included.³⁴ While victims and potential victims are or could be affected (Goodin's principle) and coerced (Miller's principle) by transitional justice decisions, they furthermore are or could be wrongly harmed, by definition. Precisely because most severe harms are morally worse than being affected or coerced in ways that do not also wrong, victims and potential victims assume a special place in my account of who should make transitional justice decisions and how they should be made. Victims and potential victims are owed something special because of their roles, namely a vote in the transitional justice process.

Not all coercion is wrong. For instance, someone could be coerced to pay taxes, but this tax is not a wrong or a harm. Being coercively taxed would qualify someone to be included in the *demos* on Miller's and Goodin's accounts, but they would be excluded on my account. Being shot, raped or tortured is far worse morally than merely being affected or justifiably coerced. Since transitional justice deals specifically with trade-offs of how to account for past wrongs and possible future wrongs, victims and potential victims have a unique claim to a say in this process. To put it in Walzerian terms, transitional justice is a sphere that is distinct from other areas of justice.³⁵ Victims and potential victims are owed special consideration because of their special situation and because of the unusual circumstances of transitional justice. As with domestic criminal justice systems, we think it is only right that resources be spent on lawyers, judges, jurors, jails and rehabilitation centres, even if the money might result in more good (all things considered) if it were spent differently.

Objections and Weighing Votes

John Locke might have objected to my argument because he argues that it is problematic if victims have a say in the fate of their perpetrators because they are problematically biased against the alleged perpetrators. Locke writes that in the state of nature, "passion and revenge will carry them [the victims] too far in punishing others".³⁶ However, this objection confuses permitting victims to judge in their own cases *how severe* punishment should be with *whether* victims should have a say if perpetrators should be tried at all—especially in cases where the alleged perpetrators, if threatened with punishment, might be able to inflict additional harms. Whereas Locke is objecting to the former, my argument refers to the latter. My argument actually supports the Lockean notion that victims should not be

34. Findlay, *op. cit.*

35. Michael Walzer, *The Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983).

36. John Locke, "Second Treatise of Government", in *Two Treatises of Government* (3rd edition) (Cambridge: Cambridge University Press, 1689), para. 13.

judges in their own cases because all criminal options should be required to follow legal standards that are widely accepted.³⁷

Some might object that coerced perpetrators who are also victims should be enfranchised as well as innocent victims and potential victims because coercion excuses wrongdoing and therefore actually makes perpetrators victims. For example, should the moderate Rwandan Hutus that were coerced to kill in Rwanda's genocide have a vote in post-genocide justice? Or take Ishmael Beah, a child soldier in Sierra Leone who was abducted by rebels and first experienced war when he was just 12 years old.³⁸ Victims who are also perpetrators may sometimes be permitted to partake in the vote when they are coerced, suffer duress, have epistemic limitations (such as being a child or insane) or due to other factors that excuse their wrongs.³⁹ Because perpetrators who are fully excused bear no moral responsibility for their wrongs, they are primarily victims rather than villains. Because Beah was coerced and was not an adult at the time of his crimes, he and those like him should be given a vote in transitional justice decisions. How excused a perpetrator is will vary in morally significant ways. Therefore, the second panel of the new international institution will decide which perpetrators are sufficiently excused and can therefore participate in the transitional justice process.

Another objection is that in some places there are multiple cycles of violence, so victims are also perpetrators, and vice versa, depending on the historical time frame in question. Thus some might argue that my proposal is impractical because it cannot account for such cases. Take Burundi as an example where people from different ethnic groups perpetuated wrongs over many cycles of violence over decades. Ann Nee and Peter Uvin found in a recent survey that a majority of Burundians do not favour prosecution for past abuses because they believe that too many people would be prosecutable.⁴⁰ Because many were both victims and perpetrators in Burundi, those enfranchised by the second panel may have chosen amnesties for most perpetrators so that Burundi society could peacefully move forward. Rather than not being able to account for such difficult situations as repeated cycles of violence, my proposal provides a way to deal with such difficult cases, even if the second panel would have more work than in less complex societies.

Another group that deserves consideration in transitional justice is the deceased. The dead are victims too and therefore on my account of who should constitute the transitional justice *demos*, their interests should be included.⁴¹ This poses an obvious dilemma because the deceased cannot vote. Some might think that, as in domestic murder trials, the dead should have no say in the type of mechanism or the severity of punishment for the defendant if convicted. In the case of transitional justice, however, the murdered could plausibly want

37. Larry May, *Global Justice and Due Process* (1st edition) (Cambridge: Cambridge University Press, 2011).

38. Ishmael Beah, *A Long Way Gone: Memoirs of a Boy Soldier* (1st edition) (New York: Farrar, Straus and Giroux, 2007), p. 6 and passim.

39. Jeff McMahan, *Killing in War* (1st ed.) (Oxford: Oxford University Press, 2009), chap. 3.

40. Ann Nee and Peter Uvin, "Silence and Dialogue: Burundians' Alternatives to Transitional Justice", in Rosalind Shaw, Lars Waldorf and Pierre Hazan (eds.), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford, CA: Stanford University Press, 2010), pp. 156–182.

41. Tim Mulgan, "The Place of the Dead in Liberal Political Philosophy", *Journal of Political Philosophy*, Vol. 7, No. 1 (1999), pp. 52–70.

any of the transitional justice mechanisms. Perhaps the murdered would argue that perpetrators committed such heinous crimes that they deserve the harshest punishment allowable. Or she might argue that exactly because she now understands how harmful being murdered is, she prefers forward-looking justice that she believes promotes peace and reconciliation more than other options.

There are a number of ways that the wishes of the dead could be included in the transitional justice process. When the deceased clearly express their wishes prior to death, their desires can and should be taken into account. Another option would be to empower surviving family members to represent the dead. Each deceased person could have one vote, represented by her closest surviving family member. Assuming the interests of another, including someone deceased, is problematic for many reasons, including that there is no way to know if a surrogate is simply voting based on her own desires and claiming it as another's wishes. Conversely, not giving the dead any say or representation does not entirely exclude their interests from decisions. Survivors will have their murdered loved one at the front of their minds and emotions when considering what sort of transitional justice is preferable. But it does exclude their wishes in an important way because disenfranchising them forces family members, when they may have a different view than their deceased loved one, to make a hard choice and in the end only one victim's views can be counted.

This discussion of who should constitute the *demos* leaves open how votes should be allocated within this group. Should each person receive one vote or should some receive half a vote or some other percentage because people are harmed and wronged in vastly different ways and degrees? Assuming that everyone in the *demos* deserves one vote may be unfair because of these differences. Perhaps those who were severely harmed deserve a greater say than those who were trivially harmed. Or perhaps those whose lives are most at risk of future severe harms should have more influence than those either at little probable risk or whose risk may be high but who are likely to be harmed only trivially. Or perhaps those who have both been previously wronged and may be subject to further future abuse deserve a double vote or at least more influence than those only belonging to a single group.

One problem with denying one person one vote is that it opens a potential division *ad infinitum*. The influence any one person can have could be divided any number of ways and into infinitely different modicums of power. Perhaps some fine grained, if not infinitely divisible, division of power would be most appropriate. Because of practical constraints, however, some rougher allocation of power that approximates why different individuals should have different levels of influence is required.

Harry Brighouse and Marc Fleurbaey argue that votes should be allocated proportionately to one's stake or interest in a decision.⁴² Rather than deciding on a universally applicable precise allocation of power here, because circumstances differ from society to society, I will instead make an argument that the second panel can choose to empower individuals in a range of ways. Although harms differ in severity—rape is not equivalent to having one's car destroyed, for example—because everyone in the *demos* by definition was or may be harmed, all deserve at least one vote. The victims who are also potential victims perhaps

42. Harry Brighouse and Marc Fleurbaey, "Democracy and Proportionality", *Journal of Political Philosophy*, Vol. 18, No. 2 (2010), pp. 137–155.

should be given twice the voting power of an individual belonging only to the past or prospective victim group because they may be affected in two different ways that are morally relevant. Because each transitional case will differ, such as in the probability of future harms, how severe past wrongs generally were, etc., the second panel should have some latitude in setting vote weights. Without such limits, too much power would be allocated to the panels that make transitional justice decisions, in effect allowing them to manipulate the democratic process. But are any of these groups really able to make coherent decisions at such difficult times?

A classic objection to democracy, especially acute in transitional and post-conflict periods, is that the common voter lacks sufficient information and expertise to make a wise decision.⁴³ Empirical knowledge about whether democratic or other systems of decision making will most likely function well, and what sort of goods each transitional justice option favours, is debated by highly specialised academics and practitioners for whom such research and implementation is their life's work.⁴⁴ Not only would a voter have to weigh the sorts of goods that she prefers, and the probabilities of her choices achieving the outcomes she wants, but she ought to consider what causes newly democratising countries to go to war, and what assists democratic consolidation.⁴⁵ That this knowledge could be summarised, disseminated and quickly processed in a society in transition seems unlikely.

One response to these criticisms would be to withdraw democracy from the legitimate possible tools of transitions. Victims and potential victims, however, possess a different sort of knowledge than many elites do, having lived through and been deeply affected by politics of their region. Allowing only anti-democratic governance, transitional justice mechanisms can be rebutted procedurally and substantively. First, it is procedurally problematic because generally leaving transitional justice decisions to elites unfairly excludes people who have a special stake in the transitional justice process. Second, because democratic governance generally results in superior outcomes to non-democratic governance across a wide range of indicators domestically,⁴⁶ it would likely have a similar result for transitional justice.

43. Plato, *The Republic*, trans. G.M.A. Grube and C.D.C. Reeve (2nd edition) (Indianapolis, IN: Hackett Pub Co, 380AD), bk. VIII.

44. Hugo van der Merwe, Victoria Baxter and Audrey R. Chapman (eds.), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (Washington, DC: United States Institute of Peace Press, 2009); Snyder and Vinjamuri, *op. cit.*

45. Paul Collier, *Wars, Guns, and Votes: Democracy in Dangerous Places* (1st edition) (New York: Harper, 2009); Edward Mansfield and Jack Snyder, "Democratization and the Danger of War", *International Security*, Vol. 20, No. 1 (1995), pp. 5–38; Edward Mansfield and Jack Snyder, *Electing to Fight: Why Emerging Democracies Go to War* (Cambridge, MA: The MIT Press, 2005); Edward Mansfield and Jack Snyder, "Pathways to War in Democratic Transitions", *International Organization*, Vol. 63, No. 2 (2009), pp. 381–390; Edward Mansfield and Jack Snyder, "The Sequencing 'Fallacy'", *Journal of Democracy*, Vol. 18, No. 3 (2007), pp. 5–9; Roland Paris, *At War's End: Building Peace after Civil Conflict* (Cambridge: Cambridge University Press, 2004).

46. Amartya Sen, *Development as Freedom* (New York: Knopf, 1999); Thomas Christiano, "An Instrumental Argument for a Human Right to Democracy", *Philosophy & Public Affairs*, Vol. 39, No. 2 (2011), pp. 142–176; S.C. Poe, C.N. Tate and L.C. Keith, "Repression of the Human Right to Personal Integrity Revisited: A Global Cross-National Study Covering the Years 1976–1993", *International Studies Quarterly*, Vol. 43, No. 2 (2002), pp. 291–313; S.C. Poe and C.N. Tate, "Repression of Human Rights to Personal Integrity in the 1980 s: A Global Analysis", *American Political Science Review*, Vol. 88, No. 4 (1994), pp. 853–872; C.W. Henderson, "Conditions Affecting the Use of Political Repression", *Journal of Conflict Resolution*, Vol. 35, No. 1 (1991), pp. 120–142; Christian Davenport, *State Repression and the Domestic Democratic Peace* (1st edition) (Cambridge: Cambridge University Press, 2007); Christian Davenport

Another objection is that deciding on who perpetrators are *before* trials or other forums to assess guilt have been conducted violates the presumption of innocence. This objection misses the point. Exclusion from transitional justice decision making need not and should not be equated with guilt. What is important is minimising conflict of interest, and even innocent defendants have a conflict of interest since they would likely prefer to not be jailed until a trial and put through an onerous legal process. Mistakenly excluding some who should have a say is inevitable, but consider the alternative of not excluding those with a conflict of interest. Enfranchising those who are perpetrators is more unfair than mistakenly excluding a few who should be included.

Yet the issue is even more complicated because alleged perpetrators can belong to different groups. The first category includes those accused of crimes who are unlikely to become victims in the future and who were not victimised. These people can be excluded from democratic transitional justice decision making because they are not victims or potential victims, and they potentially have a strong conflict of interest. The second category, individuals accused of crimes who may become victims in the future, is more complicated. This group can include those who were coerced into perpetrating crimes. On the one hand, individuals like the moderate but coerced Hutus in Rwanda have a double claim to having a vote since they are victims and may become victims again. On the other hand, because they perpetrated harms that are not fully excused, they perhaps should be disenfranchised. Although this group of defendants does have some claim under a victim-centred account, their powerful conflict of interest should likely exclude them from transitional democratic decision making. Whether anyone from this group should have a vote can be left to the second panel.

A similar objection holds that dividing a society into groups of victims and potential victims, and everyone else, would entrench inveterate animosities instead of moving beyond them. This potential problem should be taken seriously. One response to this objection is that this criticism privileges reconciliatory types of transitional justice over other sorts, such as retributive justice. Making this choice for the individuals harmed and potentially harmed by the past regime is exactly the sort of paternalism my proposal attempts to avoid. Avoiding mass human rights violations is undeniably important. Yet while reconciliation may contribute to avoiding mass atrocities, there is no empirical research showing that it is a necessary condition for avoiding mass atrocities. And although more deterrence-based research is necessary, at least some scholars find that prosecuting human rights violations likely deters others.⁴⁷

Another objection is that my account of transitional justice is not democratic enough because it limits the options the *demos* can choose in two ways. First, it disallows options that would violate the human rights of the accused. It prohibits torture, for instance, because torture is prohibited by international law. Second, it restricts the procedures that one can legitimately employ to widely accepted international standards in order to avoid show trials and ensure that defendants receive a fair hearing. There are two responses to this objection. First, the burden of proof for anyone who would want to allow violations of human rights—through, say,

and David Armstrong II, "Democracy and the Violation of Human Rights: A Statistical Analysis from 1976 to 1996", *American Journal of Political Science*, Vol. 48, No. 3 (2004), pp. 538–554.

47. Hunjoon Kim and Kathryn Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries", *International Studies Quarterly*, Vol. 54, No. 4 (2010), pp. 939–963.

allowing torture as a punishment for mass atrocities—is on this proponent. The second response is similar. To ensure that defendants receive a fair hearing, internationally recognised standards should be required for any situation where individuals deserve a defence (including criminal trials and truth commissions).⁴⁸ Third, recall that democracy is not equivalent to majoritarian decision making. Placing no restrictions on what could be chosen is anti-democratic, as well as morally problematic. In what follows I discuss how the panels should be constituted.

Who Should Decide Who Should Be Enfranchised and Which Decisions Should Be Decided Democratically?

This section argues for a new global transitional justice institution that could actualise the theoretical arguments made in this article and that would be sensitive to local differences. The institution would consist of two panels. The first panel would be elected by representatives of states and would be composed of globally recognised experts in transitional justice, international law, democratisation and other relevant fields. Any individual from the transitional justice society would be prohibited from serving on the first panel to avoid any conflict of interest, or appearance thereof. The first panel would choose the second panel. The second panel would consist of individuals specialised in the transitional justice society as well as those with more general expertise. The second panel could include individuals from the society in transition so long as the first panel concluded that they did not have a conflict of interest. Individuals on the second panel would decide who should constitute the *demos*, and how their votes should be weighed.

This two-tiered approach aims to limit illegitimate bias. Especially in the years immediately following conflict and sometimes decades on, local actors on any side of a conflict may be deeply, problematically biased against individuals from other groups. Because members of the international community that are not affected by the conflict are most likely to judge fairly whether others are fit to decide who can impartially choose the *demos*, they should choose who will sit on the second panel, in a process similar to that of vetting potential jury members. Citizens of a transitional justice state, such as Nelson Mandela or Desmond Tutu in South Africa, should be eligible to serve as panelists in this second round of decision making. In choosing the second panel, the first panel would have to balance local involvement and its attendant legitimisation, capacity building and so on, with the possibility of bias.

The second panel would decide who should be enfranchised. It should additionally attempt to minimise threats to potential voters by working with other actors, including local and international armed and unarmed actors, including peacekeepers, to guarantee the safety of the individuals at risk. Because there is empirical support for the claim that leaders abuse human rights more as threats against their hold on power increase, especially when a leader is still in power who may be threatened by choices a *demos* makes, the panels should take this risk seriously.⁴⁹

48. May, *Global Justice and Due Process*, *op. cit.*

49. Davenport, *op. cit.*; Dursun Peksen and A. Cooper Drury, "Coercive or Corrosive: The Negative Impact of Economic Sanctions on Democracy", *International Interactions*, Vol. 36, No. 3 (2010), pp. 240–264; Dursun Peksen and A. Cooper Drury, "Economic Sanctions and Political Repression: Assessing the Impact of Coercive Diplomacy on Political Freedoms", *Human Rights Review*, Vol. 10, No. 3 (2009), pp. 393–411; Hans Schimtz and Kathryn Sikkink, "International Human Rights", in Walter E. (Emmanuel) Carlsnaes, Thomas Risse and Beth A Simmons (eds.), *Handbook of International Relations*

Democracy requires the protection of individuals' rights that are important in themselves and some of which are instrumentally necessary for voting.⁵⁰

Voting precludes other models of decision making, and some may object that requiring voting (instead of a more consensus-based model or another method) has a problematically liberal, Western bias. However, countries in all corners of the globe use democracy, so it is difficult to sustain the claim that voting is solely a Western practice. Second, even if it were a Western concept, fairness and justice matter more than where an idea or practice originates so the burden would be on the critic to show why voting is less fair than other models. Third, nothing in my argument precludes other models of opinion formation, such as a council of elders recommending to others how to vote or other traditional methods. The key point is that it is up to individuals to decide to accept or reject this advice, and voting ensures that each has a fair say in the process. Thus, although democracy may have originated in the West, it remains a fair mechanism to decide on transitional justice mechanisms. The next question is what issues should be put to a democratic vote, and why.

What Issues Should be Included in Democratic Decision Making?

This section suggests that only some issues should be put to a democratic vote. Because each country and situation is unique, the choices available to each society are too numerous to list and a full taxonomy of options is beyond the scope of this article. The process of deciding which choices will be put to a vote will consist of the following. First, the public will be given time to debate and submit suggestions to the second panel. There should be a period of time whereby individuals and civil society members from the society in question should be able to offer suggestions to the second panel regarding such issues. The public—including those who are disenfranchised—should be given time to deliberate, discuss and debate which options would be preferable and why. In Lambourne's terms, the panels should conduct "outreach" to inform the population of this opportunity to submit proposals, and the population can "inreach" to the second panel to convey their interests and desires.⁵¹

The second panel will then make these decisions in consultation with the first. The second panel should decide which issues should be put on the ballot because if it were left to the public there may be too many issues to vote on realistically, or the results might be incoherent. Imagine if a vote for a trial had to include everything from how evidence should be collected, to where the trial should take place, to the sentencing guidelines. The sheer number of ballot issues might render the entire process inert. Specific items to include or exclude will be left up to the second panel to decide, since, for instance, one community may have unusual sentencing traditions, and the panel may decide it is appropriate to adopt that tradition, or put it to a vote. Whatever issues that will be put to a vote will be reviewed by and could be vetoed by

(London: Sage Publications Ltd, 2002), pp. 517–537; Courtenay R. Conrad and Emily Hencken Ritter, "Treaties, Tenure, and Torture: The Conflicting Domestic Effects of International Law", *The Journal of Politics*, Vol. 75, No. 2 (2013), pp. 397–409.

50. Corey Brettschneider, *Democratic Rights: The Substance of Self-Government* (Princeton, NJ: Princeton University Press, 2010); Christiano, *op. cit.*

51. Lambourne, *op. cit.*

the first panel in order to ensure that the options are consistent with international standards.

Conclusion

Now that the components of my account of democratic transitional justice have been laid out, I discuss some implications of my argument. None of the arguments here supports abandoning a local population if powerful actors inflict further human rights abuses as a result of the choices made by victims and potential victims or for other reasons. Conversely, the international community has a limited responsibility to protect vulnerable populations, especially given recent evidence that peacekeeping significantly decreases the probability of a resumption of civil conflict.⁵²

Whether my argument is consistent with international criminal law and whether this account could ever be implemented in practice are important questions. First, my account is in harmony with the international criminal law codified in the Rome Statute of the International Criminal Court. Some might claim that the intentional rule of law generally requires prosecutions and prohibits amnesties.⁵³ But according to Article 53, 1.(c) and 2.(c), of the Rome Statute, the prosecutor has leeway to *not* “investigate” or “prosecute” crimes if refraining from prosecution would best serve the “the interests of justice” taking into account the “interests of victims”. This shows that the prosecutor can decide to defer to a range of democratic choices made by local populations, including ones that do not involve criminal prosecution.

Second, many societies are destroyed to an extent difficult to imagine. Obtaining a free and fair vote may be implausible: how are voters to be located, protected, informed of their rights, and votes collected and counted all in a safe, efficient and timely manner? Two responses are warranted in relation to whether votes could actually be held in recovering societies. First, fair votes routinely occur in troubled and dangerous places. Second, the panels have a responsibility to help guarantee the safety of at-risk populations. In short, my account of democratising transitional justice is fairer than current methods of choosing a transitional justice mechanism, consistent with prevailing international criminal law, and feasible.

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52. Alex Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Cambridge: Polity, 2009); Collier, *op. cit.*, pp. 83–87, 95–100; Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington, DC: Brookings Institution Press, 2008); ICISS, *The Responsibility to Protect: The Report of the International Commission on Intervention and State Sovereignty* (Ontario, Canada: IDRC Books, 2001).

53. D.F. Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime”, *Yale Law Journal*, Vol. 100, No. 8 (1991), pp. 2537–2615; D.F. Orentlicher, “Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency”, *International Journal of Transitional Justice*, Vol. 1, No. 1 (2007), pp. 10–22.