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MEMORY AND TRANSITIONAL JUSTICE

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I. Introduction

Transitional justice is the legal and administrative process carried out after a political transition, for the purpose of addressing the wrongdoings of the previous regime. The new regime has to decide what counts as wrongdoings and how to sanction the wrongdoers, and also to decide what counts as suffering caused by these wrongdoings and how to compensate the victims. Although the rapidly increasing literature on transitional justice almost invariably focuses on transitions to democracy, transition to non-democratic but constitutional regimes also offer interesting examples, as we shall see. In transitions to non-constitutional regimes, especially if they are also non-democratic, we are more likely to observe spontaneous revenge or show trials. I am not saying that demands for revenge do not also animate transitional justice in the constitutional setting, only that the rule of law constrains the scope of the revenge motive. For some purposes an operational criterion to distinguish between real trials (as

in Nuremberg) and show trials (as in the International War Tribunal of the Far East) is that in the former some of the accused are actually acquitted.

The decisions made in a process of transitional justice can depend heavily on the passage of time, in two distinct ways. First, the same act committed at two distinct pre-transitional times may give rise to different punishments or compensations when assessed at the same post-transitional time. Second, the same act committed at the same pre-transitional time may give rise to different punishments or compensations when assessed at different post-transitional times. These mechanisms may be compounded, if the same pre-transitional acts committed at $T=1$ and $T=2$ yield different reactions when assessed at respectively $T=3$ and $T=4$. They may also offset each other, if the same pre-transitional acts committed at $T=1$ and $T=2$ yield the same reactions when assessed at respectively $T=4$ and $T=3$.

Typically but, as we shall see, not invariably, the severity of punishment and the generosity of compensation decline (i) with the time interval between the relevant acts and the transition and (ii) with the time interval between the transition and the decision. I shall consider three distinct mechanisms that can account for these effects. (In addition, wrongdoers who are judged a long time after their acts may be able to claim successfully that due to the passage of time they are in some real sense not “the same persons”.) First, there is the spontaneous decay of emotion. The retributive emotions of anger, indignation and contempt typically have a short half-life. Second, the documentation of wrongdoings and suffering becomes increasingly difficult with the passage of time. (Statutes of limitations are usually justified by this fact, and sometimes by the “thin” notion of personal identity discussed in the previous parenthetical remark.) Third, the memory of what happened may also decay with time.

The memory mechanism mainly produces its effects through the two others, corresponding to two distinct dimensions of memory: propositional content and vividness of imagery. Because propositional memory becomes more inaccurate with time, proceedings that rely on the testimony of witnesses about temporally distant events are less likely to yield conclusive results. The documentation effect may also occur independently of the memory effect, if written documents get lost or are destroyed. Because even accurate propositional memory becomes less vivid with time, the events recalled are less likely to generate strong emotions. The emotion effect may also occur independently of the memory effect, if the decay of emotion is due to the physiological arousal subsiding rather than to Technicolor memory turning into black and white.

I shall illustrate these mechanisms, and some exceptions to them, by considering three kinds of cases. In Section **II** I shall discuss the impact on transitional justice on the time interval between acts of wrongdoing and the transition. In Section **III** I focus on the time interval between the transition and the legal or administrative decision. In Section **IV** I consider how transitional justice may be shaped by the memory of transitional justice in the wake of a previous transition. Section **V** offers some brief conclusions.

II. Wrongdoings in the distant past

The demand for transitional justice, and notably for punishment of wrongdoers, tends to decrease with the time that has passed since the wrongdoing. In the post-Communist transitions, the demand for retribution was weaker in the countries where the worst atrocities lay in the remote past, such as Bulgaria and Hungary, and stronger in Czechoslovakia and the

former DDR where the repression continued unabated until the very end. In the two former countries, the relative weakness of the demand for retribution may be explained not only by weakness of memory, but by the absence of memory. As I shall understand memory, it differs from mere abstract knowledge of a past event, in that to remember an event one must have been present when and close to where it took place. Although all Hungarian adults in 1990 knew about the repression of the 1956 uprising, less than half of them were in a position to remember it. It seems plausible that abstract knowledge of a past event is even less motivating than a faded memory.

The end of World War II took place in very different ways in the various German-occupied countries. In Belgium, France, Hungary and Italy, there was bitter fighting to the end, and the Germans often used scorched-earth tactics. In Denmark, Holland and Norway, there was little or no fighting before the capitulation. My impression is that the demand for retribution was stronger in the first group of countries, because of the more recent and hence more vivid memory of repression. In Belgium and France we observe a related phenomenon: when deported individuals came back after the Liberation and could tell about the atrocities in the German camps, there was a second crest in the demand for retribution.

The two French Restorations of Monarchy in 1814 and 1815-1816, separated by Napoleon's Hundred Days, offer a striking example of the recency effect. After the First Restoration, Louis XVIII offered a Charter in which, resisting the demands of his fellow émigrés, he ordered a complete public amnesia (and amnesty) for opinions stated and acts committed before the Restoration, including those of the regicides who had voted for the execution of his older brother Louis XVI.. After the Second Restoration he had to yield to the demands of the émigrés and impose exile on all the

regicides who had also joined forces with Napoleon during the Hundred Days. The more recent crime took precedence over the earlier and more serious one. Similarly, the demand for indemnification of confiscated émigré properties swelled in the Second Restoration, although the financial ruin of the country delayed its realization until 1825.

A common saying about the émigrés who returned to France after the first defeat of Napoleon in 1814 is that “ils n’ont rien appris ni rien oublié” (they have learned nothing and forgotten nothing). Many of them wanted simply to restore the ancien régime, including feudal dues and the tithe. Others wanted to get their properties back, and not merely a monetary compensation. Still others wanted those who had purchased their properties at bargain-basement prices to fund the indemnification, or perhaps even be punished for their acts. At the Court the émigrés behaved with unbelievable arrogance, inducing for instance Maréchal Ney to join Napoleon during the Hundred Days because of the contempt they displayed for his wife. It seems reasonable to assume that their memory had been kept artificially alive by their artificial existence in exile, during which they had little else to do besides thinking and talking about how they had been mistreated and hoping against hope for affairs to take a better turn.

Another instance of lingering memory may be cited from the Liberation of Italy. In one of the first trials after the Law of July 27 1944 that created the framework for transitional justice, a court in Grosseto condemned 11 fascists to prison for two or three years for their public humiliation of four antifascists more than 20 years earlier. In a society that accords great importance to honor, such humiliation would be resented deeply and remembered strongly. (Strictly speaking, of course, the sentence was a legal action and not a form of personal revenge, but the evidence

indicates that in such cases the courts largely acted to preempt and prevent more drastic acts of private reckoning.) More generally, in societies with strong codes of honor emotions of revenge seem to form an exception to the rule of a short half-life. Revenge can go on for years and decades until each and every offender has been killed, because the social norm that an offended person must take revenge make it impossible for the emotion simply to fade away.

III. Delayed transitional justice

In trials in German-occupied countries after WW II, sentencing was almost invariably more severe in the initial stages than after two or three years. (The discrepancy could be alleviated by pardons, but not when the first courts had imposed the death penalty.) This is not an artifact of the more serious crimes being tried first, since the same trend is found when we limit ourselves to the same crime, such as serving in the Waffen SS. One plausible explanation may be found in the natural decay of memory and emotion, but it is not the only one. 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”. Here, the decay of the emotion is not spontaneous, but induced by the realization of the action tendency associated with it. A third explanation relies on the common observation that war situations tend to induce a general devaluation of human life, which makes the death penalty seem less extreme than it does under normal circumstances.

In the 1980s and especially the 1990s, there have been numerous counterexamples to the proposition that the intensity of demands for retribution and compensation decreases steadily with the distance from transition. In France, Maurice Papon was condemned for his role in the deportation of French Jews. Swiss banks, German industrial enterprises and Italian insurance companies have paid out large sums to compensate (mostly) Jewish victims of Nazi persecution and their heirs. Why this fifty-year delay?

It is not accurate, as is sometimes claimed, that the persecution of the Jews was ignored in the processes of transitional justice immediately after World War II. Anti-Jewish action was an apparent factor in the conviction of about half the defendants at the main Nuremberg trial. When the French Mattéoli commission recently reviewed the confiscation and subsequent restitution of Jewish property in France during and after the war, they found, to general surprise, that the bulk of the aryanized property was restituted shortly after Liberation. The findings of a similar Norwegian commission were not very different. We may still ask, however, why those accused of wrongdoing (or of benefiting from wrongdoing) in the 1990s were not held to account much earlier.

Unlike emotion, interest does not decay with time. The motivation to demand compensation is presumably constant over time, only the opportunities evolve. In the case of financial compensation to persecuted Jews, the availability of class actions in American courts together with the willingness of American officials to bring pressure on foreign firms and governments made a decisive difference. To some extent, American public funds have even been used to fill a gap in a compensation package. But these factors cannot provide the whole explanation. It is tempting to

appeal to ideas such as “the construction of collective memory”, but it is a temptation I believe we should resist. Once we leave the terra firma of conscious individual memory, the scope for arbitrary and artificial constructions is endless. This does not prevent us, however, from observing that the emerging perception of the Holocaust as a focal event of the 20th century has weakened the resistance to claims for compensation and punishment. The memory-dependent demand for justice may have decreased, for all we know, and yet the memory-independent supply of justice may have increased sufficiently to explain the recent settlements.

IV. Memories of transitional justice

It may happen that a country undergoes episodes of transitional justice several times within living memory. In such cases, memory of the success or failure of an earlier episode may shape the modalities of later episodes. I shall give five examples.

In 412-11 and then again in 403 B.C. the Athenians suffered two brief oligarchic episodes, followed by the restoration of democracy. As part of the returns to democracy, the Athenians took measures of retribution against the oligarchs and (in 403) restitution to their victims. Here I shall only discuss retribution. The modalities of punishment differed widely in the two transitions. After 411, the measures were harsh and clearly aimed at deterring future oligarchic coups. They did not address, however, the root problem of the democratic regime, viz. the tendency for the all-powerful assembly to take impulsive and ill-considered measures such as the decision to embark on the Sicilian expedition. After the second coup, therefore, the democrats took a different approach. They enacted lenient measures of retribution, struck down proposals that would have altered the balance in the

city in favor of the poor, and engaged in constitutional reforms that placed popular sovereignty within the constraints of the rule of law. I believe that the failure of retribution in 411 to prevent a second oligarchic coup may have taught the Athenians a lesson: rather than trying to deter the oligarchs they should try to remove the causes of their dissatisfaction.

As noted earlier, in 1825 the French national assembly voted the “*milliard des émigrés*”, a billion francs to compensate for properties confiscated during the Revolution and sold to particulars. The first of two subsequent revolutions partially undid and the second tried to wholly undo that indemnity. The July Revolution of 1830 retained the annuities that had been established to implement the indemnity, but suppressed the “*common fund*” that was supposed to correct manifest injustices of implementation. This suppression was largely an act of vengeance on the part of the new king, Louis Philippe, although as the Duc d’Orléans he had benefited heavily from the 1825 legislation. After the February Revolution of 1848, some deputies proposed that the *émigrés* should render the billion they had obtained in 1825 to compensate them for the losses they suffered in 1792-93. The idea went no further, but shows the lasting resentment created by the counterrevolution.

After World War I, Germany was subject to minimal retribution and to heavy monetary restitution. After World War II, many perceived the Versailles settlement as a double failure. This time, the main responsible for the German initiation and conduct of war should be severely punished. At the same time, Germany should be physically devastated or “*pastoralized*”, partly to prevent it from ever becoming a threat to peace again and partly to provide compensation in the form of machinery and equipment rather than in money. The main failure in 1919, as many saw it, was to demand monetary

compensation, which could only be forthcoming if German industry was allowed to be rebuilt and Germany thus allowed to rise again from the ashes. In the end, the emerging threat of Communism undercut these projects. A strong Germany firmly allied with the West was seen as necessary to counter Soviet expansionism in Europe.

A different kind of learning process from World War I took place in Belgium after 1944. After World War I, the trials of Belgians who had collaborated with the Germans were notoriously slow and ineffective. After the Liberation in 1944, the memory of that failure induced some Belgians to demand speedy justice, before memory and emotions would fade. Usually, people in the grip of strong emotions find it difficult to anticipate that they will come to feel less strongly after a while. People in the grip of shame, for instance, may kill themselves because they believe, wrongly, that they will always feel as devastated as they do at the moment. In that case, learning from experience is impossible, as you can only die once. The Belgians could and did remember, however, that after the last war their emotions had faded quickly, to be replaced by “politics as usual”, and so they wanted to act quickly before it could happen again.

After the reunification of Germany in 1990, the country underwent its third process of transitional justice in “the short twentieth century”. In complex and still ill-understood ways, the process was shaped by the memory of what happened, or did not happen, after 1945. Some West Germans said, “This time we are going to do it properly”. After being widely criticized for getting denazification wrong, they now wanted, at least, to get decommunization right. Other West Germans might have a more murky motive, which might be summarized as “This time we’re going to be on top”. In other words, in 1989 West Germany would be to East Germany

what the Western powers had been to West Germany in 1945. Still others said that it would be absurd to impose much more severe punishments for what were, after all, much less serious crimes. The former East Germans might draw a different connection between the two episodes. Given that they carried out a more thorough denazification than the West Germans did, they might resent the latter setting themselves up as their judges.

V. Conclusion

I have focused on memory as an explanatory factor in transitional justice. To serve as an explanans, the concept must be reasonably clear. I have used it consistently in the sense of conscious, individual-level recollections of earlier events that the individual either directly witnessed as an observer or learned about when they happened and close to where they happened. For other purposes, a broader definition, which would allow us to say that Germans born after 1945 “remember” the failure of denazification, might also be useful.

My main reason for focusing on the personal experience of the individual is the link between memory and emotion. I believe that processes of transitional justice are deeply shaped by the emotions of the individuals involved, be they wrongdoers, beneficiaries of wrongdoings, victims, resisters, accusers, or neutrals. These emotions arise in direct confrontation among the individuals concerned, and tend to fade as the memories fade. Yet we have also seen several cases in which memories of injustice prove to be remarkably durable. Life in exile and strong social norms may sustain memories or emotions that would otherwise have been subject to spontaneous decay.

A broader notion of memory makes it more difficult to link memory with emotion, or at least with “personal emotions”. I know that many Germans who are born after 1945 claim to feel shame (or perhaps guilt) personally for what their parents’ generation did, but I do not quite understand what they mean when they say it. I could understand it if they said they were impersonally indignant, in a way one can also be indignant about events taking place in a distant country, but that is not what they say. An impersonal emotion, like justice itself, is probably less vulnerable to decay. Because the dynamics of personal and impersonal emotions are so different, it may not be useful to include them in the same explanatory framework.

In rare cases, the fading of memory and of emotion can be anticipated, perhaps on the basis of a memory of earlier cases. When it is, the individual may take immediate action to prevent other priorities from taking over. In such cases, both dimensions of memory have a role: an accurate propositional memory at $T=3$ of the fading at $T=2$ of emotion-inducing memory of atrocities at $T=1$ generates action at $T=4$ to preempt memory decay at $T=5$. Such nested memories may be worthy of further study.

