

# Religion & Transitional Justice

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*Transitional justice refers to the process of dealing with human rights abuses committed during the course of ongoing conflict or repression, where such processes are established as a society aims to move toward a better state, and where a constitutive element of that better state includes democracy. A philosophical theory of transitional justice articulates what the moral criteria or standards are that processes of transitional justice must satisfy to qualify as just responses to past wrongdoing. This essay focuses on the roles of religion in transitional justice. I first consider the multiple and conflicting roles of religion during periods of conflict and repression. I then argue against conceptualizing transitional justice in a theologically grounded manner that emphasizes the importance of forgiveness. Finally, I discuss the prominent role that religious actors often play in processes of transitional justice. I close with the theoretical questions about authority and standing in transitional contexts that warrant further examination, questions that the roles of religious actors highlight. Thinking through the relationship between religion and democracy from the perspective of transitional justice is theoretically fruitful because it sheds more light on additional dimensions to the issue of authority than those scholars of liberal democracy have traditionally taken up.*

**T**his essay considers the relationship between religion and democracy through the lens of transitional justice, drawing on the case of South Africa. Transitional justice broadly refers to the formal and informal processes of dealing with past wrongs committed during the course of ongoing conflict and repression. Such processes are established in the context of an attempted transition away from protracted periods of conflict and/or repression and toward democracy.<sup>1</sup> There are many forms such transitional justice processes take, from criminal trials, truth commissions, amnesty, and memorials, to reparations and programs of lustration whereby individuals are barred from serving in specific public roles. Transitional justice processes are defended as important for their own sake and, in particular, insofar as they satisfy the rights of victims and moral demands on perpetrators. They are also valued for instrumental reasons, especially their contributions to democratization.

There is no neat or simple relationship that exists between religion and transitional justice, as the mixed roles of religion in conflict and repression in South

Africa make clear. But how should we understand the “justice” of transitional justice? That is, on the basis of what moral criteria or standards should processes of transitional justice be evaluated? As my discussion makes clear, one of the central tasks of transitional justice processes is to help establish the authority of the state, when state institutions are discredited. The prominent participation of religious actors in processes of transitional justice generate novel questions about authority and point toward questions that warrant further theoretical investigation.

**T**ransitional justice processes have been established in dozens of societies around the world over the past few decades. A few of the many contexts in which processes of transitional justice have occurred include South Africa during its transition away from apartheid to democracy, the countries that made up the former Yugoslavia following the wars that accompanied its breakup, and Colombia today as it continues to implement the terms of a peace agreement aiming to end more than fifty years of conflict between the Colombian government and the Revolutionary Armed Forces of Colombia (commonly referred to by its acronym FARC). The South African Truth and Reconciliation Commission (TRC) established in 1994; the International Criminal Tribunal for the former Yugoslavia (ICTY), which operated from 1993–2017; and the currently functioning Special Jurisdiction for Peace (JEP) in Colombia are some of the more prominent examples of such processes.

Societies that call for transitional justice vary in many ways. However, at a certain level of abstraction, we can identify common features.<sup>2</sup> I focus on three such features and illustrate them using the case of apartheid South Africa. The first is the existence of what I call *pervasive structural inequality*. Structural refers to the general terms of interaction among citizens and between citizens and officials, as laid out in institutionally defined rules and norms. For example, legal rules specify who is eligible to hold political office and the process through which political office-holders are selected. Criminal law delimits conduct that is legally impermissible, setting minimal baselines for interaction among citizens. The institutions that help to define the terms of interaction among citizens and between citizens and officials are many, including legal, political, cultural, and economic institutions. Such institutions define terms for interaction by specifying who is permitted to, required to, or prohibited from acting in certain ways, and what the formal and informal penalties for violating such terms are.

When institutionally defined terms for interaction are *unequal*, there exists differential restrictions on opportunities for certain groups of citizens, constraining what they can effectively do and become of value (such as being educated, being employed, participating in government) and constraining their ability to shape the institutional rules for interaction themselves. *Pervasive structural inequality* is such that it calls into question the legitimacy of the institutional order; citizens

have a right to rebel. Apartheid South Africa was a paradigmatic case of pervasive structural inequality, where institutional rules and norms differentially and systematically constrained the opportunities of black South Africans and excluded black South Africans from any effective role in defining the institutional order.<sup>3</sup> Under apartheid, black South Africans were stripped of the right to vote, were forcibly relocated according to government-designated racial categorizations, and faced employment restrictions and discrimination. Structural inequality can exist in a less explicitly intentional and centralized manner. Differential investment or allocation of resources in certain regional areas, access to economic opportunities structured on the basis of clientelist networks, and patterns of informal discrimination not effectively prohibited by law and sanctioned according to social norms are some of the many forms structural inequality can take.

The second feature that characterizes transitional societies prior to the establishment of any process of transitional justice is what I call *normalized collective and political wrongdoing*.<sup>4</sup> This feature highlights the fact that during periods of conflict and/or repression, human rights violations (the *wrongdoing*) become *normalized*: that is, a basic fact of life for (certain groups of) citizens. The normalization of human rights violations is reflected in the numbers of victims of rights abuses that exist in transitional societies, ranging from hundreds to thousands to hundreds of thousands and, in some cases, millions. Wrongdoing is *collective* in the sense that it characteristically targets groups of citizens on the basis of a particular affiliation or identity; religious identity can be one targeted identity, ethnic and national identities are others. Wrongdoing is *political* in two ways. First, it implicates state agents or actors acting with the permission of the state or informally on behalf of the state, as in the case of paramilitaries. Groups contesting the state may also be implicated in rights violations, with contexts varying in the proportion of rights abuses committed by government forces versus groups contesting the state. Second, wrongdoing is political in the sense of being bound up with the pursuit of political objectives. Maintaining a regime, acquiring effective control of land, overthrowing a regime, separating politically from a state, or eliminating a particular group via a genocidal campaign are a few of the objectives pursued. For example, in defense of apartheid, South African security forces routinely arrested and tortured anti-apartheid activists; the death of Black Consciousness leader Steven Biko in detention was one especially prominent case. The systematic torture, killing, abduction, and severe ill-treatment that occurred during the apartheid era became the subject of the mandate of the South African TRC.

Religion plays no simple or single role in pervasive structural inequality or in normalized collective and political wrongdoing. Religion has been a root cause of conflict, a marker of those targeted for repression and subject to structural inequality, and a source of justification of repression and the basis for privilege in an unequally structured institutional scheme. When religion becomes intertwined

with ethnic and national identity, as is the case in Northern Ireland, for example, then differences in national aspiration, rather than differences in theological belief, explain the root sources of conflict. In other cases, theology itself can provide resources in defense of and/or resistance to repression and oppression. The Afrikaans Reformed Church vigorously defended apartheid on religious grounds.<sup>5</sup> By contrast, the South African Council of Churches (SACC) was heavily involved in supporting the anti-apartheid movement.<sup>6</sup> The Catholic Church supported dictators in South America such as Chile's Augusto Pinochet and the military junta in Argentina, while also serving as a source of moral critique of such regimes.<sup>7</sup>

Victims of human rights abuses have been targeted because of their religious affiliation and the perpetrators of human rights abuses have included religious officials.<sup>8</sup> In Rwanda, thousands who tried to escape the genocide by finding refuge in a Catholic church were instead killed.<sup>9</sup> In contrast, in retaliation for speaking out on behalf of the poor and against human rights violations committed by the government during the civil war in El Salvador, Catholic priest Saint Óscar Romero was assassinated as he said mass.<sup>10</sup>

The first two features discussed characterize repressive regimes and contexts of ongoing conflict and repression. What distinguishes transitional societies from such ongoing situations is a third additional feature, what I call *serious existential uncertainty*. Societies become transitional when there is a credible attempt to end conflict or repression and transition toward a normatively more defensible state of affairs, such as democracy. The toppling of a dictator or the signing of a peace agreement may signal the beginning of a transition. However, normative aspirations to transition away from war and/or repression do not always materialize into concrete gains. Serious existential uncertainty captures the fact that success in any given transition is far from clear. In South Africa, the transition from apartheid to multiracial democracy occurred amidst serious uncertainty as to whether the transition would produce democracy or instead racial civil war. During periods of transition, war may, and often does, resume. Democratic changes may not go deeper than the basic holding of elections, which may not be repeated and which vary in the extent to which they are free and fairly conducted. The fact that transitions attempted are not necessarily achieved creates subjective uncertainty for citizens who do not know which conflicting narrative about unfolding events is most realistic. A peace agreement may be best thought of as a harbinger of a permanent period of peace or a temporary pause in civil conflict.

The transitional narrative – the beginning of the achievement of a multiracial democracy or the beginning of racialized civil war, for example – adopted by citizens and officials shapes their conduct. The success of transitions and the vindication of a narrative that a community is in fact headed to a normatively better place is often profoundly affected by whether there are efforts made to deal with the past wrongdoing via transitional justice processes. In the midst of this existen-

tial uncertainty, whether and how a community addresses past wrongs can play a signaling function. Processes that deal with past wrongs in a serious manner can underscore a recognition on the part of government officials that the modes of interaction in the past are unjustified and can reflect a commitment to establishing different forms of interaction in the future.

**I**n the aftermath of extended conflict and repression, societies attempting to transition from war to peace and from repression to democracy increasingly engage in efforts to reckon with past wrongdoing. Processes of transitional justice are formal and informal responses to legacies of human rights violations stemming from conflict and/or repression. Philosophical literature and literature in political theory on transitional justice focus on how to understand the moral defensibility of choices about how to treat past wrongdoing. While the processes established in the name of transitional justice continue to expand and can include private undertakings, I focus here on the objectives and the justification of processes of transitional justice in the context of formally established and government-funded responses to legacies of wrongdoing, such as criminal trials, truth commissions, and governmental reparations programs.

The need to provide criteria for assessing the moral defensibility of choices concerning transitional justice processes is driven not only by theoretical interest in the general question, but also by the practical fact that there is deep disagreement about the defensibility of choices made in transitional contexts. There is no consensus among citizens, politicians, or scholars about the moral justifiability of granting amnesty to perpetrators of egregious wrongs, of linking amnesty with the operation of a truth commission, and/or of pursuing reparations that necessarily fall short of what corrective justice would demand. Notably, there is also no agreement on criteria or terms that would need to be satisfied for justifiability to be (or fail to be) demonstrated.<sup>11</sup> Disagreement over criteria has many sources. One source of disagreement is prompted by recent social scientific studies that examine the impact of transitional justice processes in particular contexts, showing that their efficacy is much more limited than advocates of transitional justice often implicitly assume.<sup>12</sup> A second, but related, source of disagreement is competing understandings of what the pursuit of justice means when you are dealing with large-scale wrongdoing that implicates the state and that no single process of transitional justice has the capacity to fully and completely address.

One way of conceptualizing the disagreement about justice would be in terms of the appropriate balance to strike between justice and mercy, or the relationship between justice and forgiveness. The most frequent form of transitional justice response in practice is amnesty, whereby individuals or groups are granted immunity from civil and criminal liability. One might frame amnesty as a choice of mercy, to refrain from what one has a right to do: punish perpetrators. Retributive justice

is taken to demand deprivations that typically cause suffering, characteristically in the form of punishment, of perpetrators of wrongdoing. Insofar as responses to wrongdoing fail to punish perpetrators, such responses require justification, and one kind of justification could be a choice to engage in an act of mercy. The emphasis of many on forgiveness as a necessary condition for the possibility of transition, given the widespread and deep anger felt by many victims as conflict and/or repression ends, and on processes such as truth commissions, which might under certain conditions cultivate forgiveness, could similarly be viewed as a choice of forgiveness over justice.

But there exists a prior disagreement about the very meaning of justice in transitional contexts, which needs to be resolved before discussion of the relationship between justice and mercy can occur.<sup>13</sup> To see this, consider another kind of justice frequently appealed to in transitional contexts: restorative justice. Core tenets of restorative justice include conceptualizing crime or wrongdoing as a problem in part because of its impacts on relationships, both between perpetrators and victims; and among victims, perpetrators, and their broader community. Practices that can repair the relationships ruptured by wrongdoing are emphasized, including, in particular, ones that provide an opportunity for perpetrators to make amends to their victims and for victims to forgive their perpetrators. Through amends and forgiveness, the claim is, reconciliation can be achieved.<sup>14</sup> Thus, for restorative justice advocates, forgiveness is an essential part of justice, not a value distinct from and potentially in tension with justice. Moreover, retributive and restorative justice are seen as fundamentally in tension, and in the face of this tension, restorative justice advocates believe that it should be prioritized over retribution.<sup>15</sup> Restorative justice proponents do disagree about whether punishment is compatible with its demands. For those who view punishment as outside the parameters of what restorative justice permits, a choice to refrain from punishment is not necessarily a choice of mercy but rather a choice of justice.

While restorative justice can be and is defined in secular terms, the core ideas of restorative justice are also defined in religious terms in the literature on transitional justice. Political scientist Daniel Philpott, for example, has developed a conception of reconciliation that incorporates the core components of the idea of restorative justice articulated above and shows how it can be the subject of overlapping consensus among members of the Abrahamic faiths.<sup>16</sup> Religion and religious understandings, theologian Alan Torrance has argued, can provide additional resources in defense of forgiveness, resources that in fact made possible remarkable transitions like that of South Africa. Consider, he writes, the Judeo-Christian conception of God's covenant of grace with humanity, unilaterally established by God, whereby God freely committed to be faithful to Israel *unconditionally*, regardless of considerations of human worthiness. Once we realize that God's love and forgiveness are unconditional, Torrance argues, this inspires repentance and commitments to

be faithful to our obligations to God and to humanity. When relating to human beings, the covenant suggests that we are to love one's enemies and friends unconditionally and to forgive unconditionally. Such forgiveness is not contingent upon conditions and can inspire the repentance in others that our recognition of God's unconditional forgiveness inspires in us.<sup>17</sup> Guided by this conception, forgiveness and repentance can be achieved among citizens in transitional communities.

In contrast, in my own work, I have argued for a distinctive conception of transitional justice, not reducible to either retributive or restorative justice. Drawing on David Hume's notion of the circumstances of justice, I argue that in the circumstances of *transitional* justice, the problem of justice that is salient is distinctive from the problem addressed by familiar forms of justice such as retributive or corrective justice. The circumstances of transitional justice include the three features highlighted above: namely, pervasive structural inequality, normalized collective and political wrongdoing, and serious existential uncertainty. Rather than turning to theology, I defend the claim of the distinctiveness of transitional justice by developing a philosophical account of justice that takes context seriously.<sup>18</sup> My argument examines the circumstances of what I call "stable democratic societies," circumstances implicitly assumed to be present in the societies for which philosophers articulate conceptions of what retributive or distributive justice require. Such features include limited structural inequality (so that the institutional order remains legitimate even as reform is always possible) and individual and personal wrongdoing (so that ordinary criminality not implicating the state is presumed to be the subject of a retributive response). Shifting circumstances to transitional contexts, however, the core arguments for why retribution, for example, is necessary become much less plausible. For one thing, responding to perpetrators is only part of the problem salient in transitions. The standing of the state to respond to past wrongs is something to be established and cannot be assumed (for reasons I discuss below). And the efficacy of the punishment of one perpetrator to restore the equality of the victim, who was subjected to a form of normalized wrongdoing implicating the state and committed against a background of pervasive inequality, is doubtful.

The core normative aim of transitional justice, I claim, is transforming political relationships in a just manner.<sup>19</sup> The overarching goal is to alter the basic terms structuring interaction among citizens and between citizens and officials so that recent histories of apartheid, genocide, systemic impoverishment, and corruption will not define or be repeated in the future. This process of transforming relationships links transitional justice with political reconciliation, the process of repairing damaged political relationships. In fleshing out what such transformation requires, I draw on core concepts in the liberal tradition that include relational concerns. For example, consider the ideal of the rule of law, which specifies how legal institutions should structure political relationships. If you adopt a perspec-

tive on the rule of law like that of legal scholar Lon Fuller, then a number of social and moral conditions must be in place for law to govern conduct in a manner that is reciprocal and respectful of agency.<sup>20</sup> Such conditions include faith in law on the part of citizens and basic decency on the part of officials.<sup>21</sup> Mutual trust among citizens and between citizens and officials is part of what the rule of law can create; departures from the rule of law in turn generate, in Fuller's view, resentment and distrust. Distrust, the erosion of the rule of law, and lack of faith in law or decency on the part of officials are all actual, acute problems characteristically found in transitional contexts. As illustrations of the problems that transitional justice processes must help societies address, the South African TRC report highlighted the multiple and systematic ways in which South African security officials operated outside of what declared rules permitted. The TRC was highly critical of the legal profession for the failure of lawyers and judges to adhere to the rule of law in more than a superficial sense.<sup>22</sup> Pursuing transformation in a *just manner* requires satisfying the moral claims of victims and the moral demands on perpetrators to a threshold level.<sup>23</sup> Such demands include, for example, the right of victims to repair harm suffered and the demand on perpetrators that they acknowledge responsibility for wrongs in which they are implicated.

When faced with competing understandings of what justice requires in transitional circumstances, which understanding should be adopted? One criterion for selection is which conception provides theoretical resources communities need to navigate away from conflict and repression as they deal with past wrongs. In the view of many scholars, the conception of justice most suited to transitional contexts is restorative justice. According to such views, successful transitions in fact depend on forgiveness. Forgiveness in turn is best justified in theological terms. Consider Philpott's anthology, *The Politics of Past Evil*, which focuses on the moral dilemmas and challenges facing transitional societies and in particular on the role that theology should play in "the theory and practice of reconciliation."<sup>24</sup> Contributors such as Torrance, philosopher Nicholas Wolterstorff, and theologian David Burrell all defend a conception of restorative justice and argue that forgiveness plays an essential role in creating a just society. In Burrell's view, people will often view the same act differently, especially in divided contexts. Some will view the infliction of suffering characteristic of punishment as an act of justice; others will see it as an unwarranted act of injustice or revenge. These conflicting perspectives on the same act help us understand why punishment contributes to a spiral of violence. Those who see the suffering constitutive of punishment as revenge or unjustifiable will engage in a counterattack. Thus, as Burrell has noted, there is "mounting evidence that nothing short of the quality of forgiveness at once demanded and facilitated by the Abrahamic revelations will be able to empower people to make a fresh start after the devastation endorsed by the shadow sides of those same religious faiths."<sup>25</sup>

The explicit appeal by some scholars to theological justifications for forgiveness in the context of the justification of public policy choices for dealing with past human rights abuses is controversial. Indeed, appealing to the importance of justifying policies on the basis of public reasons, scholars such as Amy Gutmann and Dennis Thompson have explicitly argued that justifications of processes of transitional justice must be based on reasons that are accessible to all citizens and therefore cannot include an appeal to specifically religious considerations of the kind articulated above. In response to the justification of the South African Truth and Reconciliation Commission offered by many of its proponents, including Archbishop Desmond Tutu, which framed the work of the TRC in terms of the cultivation of restorative justice through forgiveness, Gutmann and Thompson worry that that justification failed to be *moral in perspective*. They argue that the reasons in defense of having any particular transitional process must be, as far as possible, broadly accessible and inclusive of those who seek a moral justification. This requires an appeal to public reasons that are not specifically religious reasons that will appeal only to fellow adherents. In the context of the TRC, forgiveness, they argued, depended upon a particularly Christian understanding of reconciliation that would fail to be sufficiently publicly accessible.<sup>26</sup>

Some scholars take the critique of Gutmann and Thompson to point to a potential tension between the commitments of liberalism and of transitional justice. And some scholars have argued that we should choose theologically grounded notions of reconciliation and its prescriptions for transitional justice over liberalism. There are two main reasons advanced in defense of this choice: First, they claim, liberalism lacks the conceptual resources for sufficiently spelling out core transitional concepts, like reconciliation and transitional justice itself. Second, liberalism lacks the conceptual resources for creatively and accurately offering prescriptions for transitional contexts.<sup>27</sup> In other words, liberals lack the theoretical resources for analyzing the character of communal, political relationships and the process of their restoration. Nor can liberals thus make a successful case for the claim that reconciliation is a significant goal. Philpott writes that “theology will be required to account not only for reconciliation’s intelligibility but also for its warrant: that is, the reasons why we should endorse it. It may turn out that only theological commitments can explain why restoration, not justice as desert or rights or entitlement, ought to be the conceptual lodestar of justice.”<sup>28</sup>

In response, I first want to note that there are many versions of public reason and liberalism that permit the articulation of religious justifications of policy choices.<sup>29</sup> Thus, it seems overstated to suggest there may be a fundamental tension between liberalism and religion as such in transitional contexts. However, insofar as there is tension that requires a choice, the choice should, in my view, be in favor of liberalism. For one thing, both of the criticisms of liberalism are overstated. Liberalism does not lack the conceptual resources for dealing with the

concept of political reconciliation or the challenges of transitional contexts. Secular liberal accounts of transitional justice, such as my own, can and do articulate it as a substantial value that is rich in content and that speaks to actual challenges in transitions.

For another, to reject liberal democracy is to reject a constitutive element of the aspiration of transitional societies. This aspiration should, I believe, influence our understanding of reconciliation and of concepts including transitional justice itself. Transitional justice concentrates on a subset of the transitions of which we might speak. Instead of talking about a transition to liberal constitutional democracy, we could talk of a transition to authoritarian rule or an Islamic republic. But those objectives do not normatively respond to the moral complaints of citizens during conflict and repression in the manner that liberal democracy does. It is with demands for respecting human rights and for democratic inclusion that protest movements lead to the fall of repressive regimes. Moreover, respect for rights and democracy are needed for citizens to be equals within the community, for only with opportunities for democratic participation can citizens have turns to both rule and be ruled. The normative aim of a liberal democratic political community should influence our understanding of the kinds of relationships we want to promote, and the basis on which official policies and processes designed to deal with past wrongdoings should shape our understanding of the goals to which such policies should strive.

A different rejoinder to my argument would not reject the priority of liberalism but would suggest that it is possible to have religious conceptions of justice that justify forgiveness in liberal democratic contexts. As noted earlier, and echoing philosopher John Rawls's notion of justification as the product of an overlapping consensus, Philpott, in his later work, defends his notion of transitional justice, which draws on restorative justice and thus prioritizes forgiveness in part by showing how it could be the subject of an overlapping consensus among Muslims, Christians, and Jews.<sup>30</sup> I note here first that an extension of this strategy would be needed to be applicable to the many political contexts in which transitional justice occurs, which extend far beyond societies in which members of the Abrahamic faiths reside.

But even if forgiveness can be defended from the perspective of an overlapping consensus as a valuable and important dimension of individual responses to wrongdoing, it is still a mistake to include this as a necessary component of transitional justice. Transitional justice processes of interest in this essay are those established by governments. In evaluating whether a given process "worked," the answer will be shaped by what the policy was intended to do. Policies intended to foster forgiveness, because forgiveness is what transitional justice demands, will be deeply problematic especially in transitional contexts for a number of reasons. First, they place the burden of relational repair on victims. Policies predicated on forgiveness will be successful only insofar as victims overcome their anger or resentment at having been wronged. However, the majority of victims in transition-

al contexts are frequently from already marginalized backgrounds, and the experience of victims has been one of denial of their experience on the part of governments and isolation or ostracism within their communities in the aftermath of certain rights violations. Victims often bear the consequences of their wrongdoing alone and those consequences, not just in terms of immediate harm but also in terms of social effects, are ongoing. Thus, paying attention to the context in which forgiveness is being urged is critical. Requiring for policy success that victims overcome their anger risks failing a second time to take seriously the wrongs to which they were subjected and the right of victims to be angry in response. Second, overcoming anger on the part of victims does not resolve the broader background structural inequality and normalization of wrongdoing that rendered victims vulnerable and contributes to the ongoing effects they suffer from their victimization. Moreover, it is precisely this structural inequality and the conditions that enabled the normalization of wrongdoing that must be addressed to prevent a recurrence of conflict, repression, and their characteristic wrongdoing.

Rejecting the suitability of forgiveness as an aim toward which public policies and processes of transitional justice should strive does not imply any evaluation of the permissibility or justifiability of forgiveness as an individual choice of particular victims. Nor is it to set limits to what private organizations, including religious organizations, may advocate. It is rather to criticize framing policy success or failure as a function of overcoming the anger and resentment constitutive of forgiveness.

One further area regarding religion has received less attention in the literature than one might expect. This is in part because it is bound up with questions of authority that have garnered less interest than they should. As Philpott has correctly noted, religious figures frequently play a critical role in the promotion of transitional justice and political reconciliation, and indeed take up official roles in transitional justice processes. In Philpott's words,

In South Africa, Christian churches and theologically minded leaders, as well as Muslim leaders, urged a truth and reconciliation commission. . . . Religious communities in Brazil courageously conducted an underground inquiry into the truth. Similarly, Chile's Catholic Church was instrumental in investigating abuses under the rule of General Pinochet. . . . East Timor's Nobel Prize-winning Bishop Carlos Belo was instrumental in calling for reconciliation. . . . In Guatemala, Bishop Juan Gerardi . . . even formed and conducted an entire separate commission.<sup>31</sup>

The fourth and final circumstance of transitional justice, what I call *fundamental uncertainty about authority*, provides resources for explaining why religious figures play such prominent roles. There are two dimensions of uncertainty with respect to authority present in transitional contexts. The first narrowly concerns

uncertainty with respect to the standing of the state to deal with past wrongs. Philosophical explanations of the authority of the state to deal with wrongdoing through criminal trial and punishment characteristically assume that the government of concern is legitimate and that it is not directly implicated in the wrongdoing under consideration. As such, the standing of the state to respond to wrongdoing stems from its ability to be an impartial party and its status as a representative of a community's defensible values, which criminal wrongdoing flouted.<sup>32</sup> That explanation of why retributive justice is appropriately meted out by the state will not always work in transitional contexts. As mentioned above, the state is characteristically implicated in the wrongs that may now become the subject of criminal prosecution, such as when security contractors hired by and representing the state commit torture or massacre a group of civilians. Thus, there arises a fundamental question of establishing the basis upon which the government has standing to deal with such wrongs. Against a background of questions about the authority of the state, it is unsurprising that in practice, in transitional contexts, nonstate groups or individuals representing such groups deal with past wrongs in ways that do not generate questions about their standing to do so. Questions of standing that would otherwise be raised in a stable democratic context – were the Catholic Church to undertake an official inquiry into police brutality or ethical violations by government officials, for instance – do not come up in transitional contexts.

The second source of uncertainty about authority is a function of the fact that the authority of the new government to rule during a transition is not completely established. In transitional contexts, it is practically impossible to completely overhaul existing institutions, practices, and personnel in the immediate term. Thus, as foreign policy scholar Thomas Carothers has pointed out, transitional societies characteristically

have some attributes of democratic political life, including at least limited political space for opposition parties and independent civil society, as well as regular elections and democratic constitutions. Yet they suffer from serious democratic deficits, often including . . . frequent abuse of the law by government officials, elections of uncertain legitimacy, very low levels of public confidence in state institutions.<sup>33</sup>

A transition is necessary because of the pervasive inequality in the structure of political relationships among citizens and between citizens and officials during conflict and repression. Yet during the transitional period itself, democratic structures of authority are being constructed and established but have not yet been consolidated. Indeed, part of the function of transitional justice processes becomes trying to bootstrap into existence the authority of the new government where it has been absent.

Thus, in transitional periods, there exists this background challenge of building the legitimacy of government institutions both to deal with wrongdoing and,

more broadly, to rule. In this context, the authority of any official involved with transitional justice processes is often not taken to be a function of the process by which he or she was appointed, as it is in stable democratic contexts. Intense scrutiny of the particular choices made for commissioners of truth commissions or judges for courts also occurs against a background of weak domestic institutions; the pervasive influence of international nongovernmental organizations, especially in transitional societies in the Global South; the monitoring of the International Criminal Court; and the historical exclusion of certain groups from positions of decision-making within particular transitional societies. As a result, the justification of the authority of officials running truth commissions or deciding which transitional justice process will be adopted becomes much more individualized.

Emphasis has been placed on the diversity of actors exercising domestic and effective decision-making power, so that individuals representing different communities within a society are present.<sup>34</sup> In addition, the authority of such representative decision-makers and commissions has been made not by pointing to the process by which someone was selected as an official, as is typical in government processes in stable democratic contexts. Rather, the extent to which an individual was a moral exemplar during the period of conflict and repression often influences his or her authority to chair a truth commission. It is in the context of these discussions that we can situate the prominent role of religious figures in many transitional justice processes. Here, their fittingness to assume the role of commissioner in a transitional justice process is a function of individual biography and the moral authority that biography generates.

**I**n this essay, I have provided a broad overview of the role of religious figures and the debates about religious justifications for public policy choices that are prominent in the literature on transitional justice. By way of conclusion, I want to highlight some of the further questions raised by the *de facto* reliance on the individual moral standing of commissioners to establish their authority to choose or run transitional justice processes.

One question is whether this appeal to individual moral standing is justified. I provided reasons to explain why this appeal has come about, given the absence of a stable framework of the authority of a government to rule and more specifically to deal with past wrongs. However, those reasons do not themselves provide a defense of this practice.

Second, insofar as more individually based standards for authority are defensible, there are questions about the constraints that should appropriately be placed on an individually based analysis of authority or standing.

A fundamental goal of transitional communities is to consolidate the authority of a new government and/or institution established by a government to deal with

past wrongs. When consolidated, the explanation for why any official has the authority to issue rules governing the conduct of citizens or investigate past wrongs in an official capacity will not appeal to his or her moral stature. Rather, it will appeal to the process through which he or she came to assume the position he or she now holds. A final question warranting further explanation is how to understand the relationship between the (ideally temporary) reliance on moral exemplars for the authority of transitional justice processes and the goal of legitimizing state institutions. Whether and when moral exemplars contribute to the bootstrapping into existence of the credible authority of a state needs to be articulated.

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#### AUTHOR'S NOTE

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#### ENDNOTES

- <sup>1</sup> That transitional justice processes are established as a society aims to move toward a better state and that a constitutive element of that better state includes democracy have been the subject of critique, where the possibility of transitional justice processes in societies not in transition and in the context of a nondemocratic transition have been raised.
- <sup>2</sup> I argue at length for these conditions in Colleen Murphy, *The Conceptual Foundations of Transitional Justice* (New York: Cambridge University Press, 2017). See, in particular, chap. 1.

- <sup>3</sup> I use “black South African” to refer to South Africans categorized as Indian, Coloured, or African during the apartheid regime.
- <sup>4</sup> Murphy, *The Conceptual Foundations of Transitional Justice*, chap. 1.
- <sup>5</sup> See Truth and Reconciliation Commission of South Africa, *Final Report, Volume 4* (Cape Town: Truth and Reconciliation Commission, 1998), 91, <http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf>.
- <sup>6</sup> Rita M. Byrnes, ed., *South Africa: A Country Study* (Washington, D.C.: Government Publishing Office for the Library of Congress, 1996), <http://countrystudies.us/south-africa/53.htm>.
- <sup>7</sup> Katharine Davis, “Katharine Davis on the Role of the Catholic Church in Politics in Chile,” Georgetown University Berkley Center for Religion, Peace and World Affairs, March 1, 2007, <https://berkleycenter.georgetown.edu/posts/katharine-davis-on-the-role-of-the-catholic-church-in-politics-in-chile>; and Julia G. Young, “The Catholic Church & Argentina’s Dirty War: Victims, Perpetrators, or Witnesses,” *Commonweal* 142 (16) (2015), <https://www.commonwealmagazine.org/catholic-church-argentinas-dirty-war>.
- <sup>8</sup> For a comprehensive discussion of the role of religion, see R. Scott Appleby, *The Ambivalence of the Sacred: Religion, Violence, and Reconciliation* (New York: Rowman & Littlefield, 2000).
- <sup>9</sup> Harriet Sherwood, “Pope Francis Asks for Forgiveness for Church’s Role in Rwanda Genocide,” *The Guardian*, March 20, 2017, <https://www.theguardian.com/world/2017/mar/20/pope-francis-asks-for-forgiveness-for-churchs-role-in-rwanda-genocide>.
- <sup>10</sup> “St. Óscar Romero,” Encyclopaedia Britannica, <https://www.britannica.com/biography/Oscar-Arnulfo-Romero>.
- <sup>11</sup> On these disagreements, see Murphy, *The Conceptual Foundations of Transitional Justice*, introduction; Antjie Krog, *Country of My Skull: Guilt, Sorrow, and the Limits of Forgiveness in the New South Africa* (New York: Broadway Books, 2007); and Colleen Murphy, “Judging the Justice of the Colombian Peace Agreement,” unpublished draft.
- <sup>12</sup> See, for example, Pdraig McAuliffe, *Transformative Transitional Justice and the Malleability of Post-Conflict States* (Cheltenham, United Kingdom: Edward Elgar Publishing, 2017).
- <sup>13</sup> Eric Posner and Adrian Vermeule, “Transitional Justice as Ordinary Justice,” *Harvard Law Review* 117 (3) (2004): 761–825; Jonathan Allen, “Balancing Justice and Social Utility: Political Theory and the Idea of a Truth and Reconciliation Commission,” *University of Toronto Law Journal* 49 (3) (1999): 315–353; and Lucy Allais, “Restorative Justice, Retributive Justice, and the South African Truth and Reconciliation Commission,” *Philosophy and Public Affairs* 39 (4) (2012): 331–363.
- <sup>14</sup> Daniel Philpott, *Just and Unjust Peace: An Ethic of Political Reconciliation* (New York: Oxford University Press, 2012).
- <sup>15</sup> Jennifer Llewellyn and Robert Howse, “Institutions for Restorative Justice: The South African Truth and Reconciliation Commission,” *University of Toronto Law Journal* 49 (3) (1999): 355–388.
- <sup>16</sup> Philpott, *Just and Unjust Peace*.
- <sup>17</sup> Daniel Philpott, *The Politics of Past Evil: Religion, Reconciliation, and the Dilemmas of Transitional Justice* (Notre Dame, Ind.: University of Notre Dame Press, 2006), 55.

- <sup>18</sup> Chapter 2 of Murphy, *The Conceptual Foundations of Transitional Justice*, focuses on this argument in particular.
- <sup>19</sup> See chapters 2 and 3 in *ibid.*
- <sup>20</sup> Lon Fuller, *The Morality of Law*, rev. ed. (New Haven, Conn. : Yale University Press, 1969).
- <sup>21</sup> Colleen Murphy, *A Moral Theory of Political Reconciliation* (New York : Cambridge University Press, 2010).
- <sup>22</sup> “Part of the reason for the longevity of apartheid was the superficial adherence to ‘rule by law’ by the National Party (NP), whose leaders craved the aura of legitimacy that ‘the law’ bestowed on their harsh injustice. Significantly, this state of affairs was not achieved in the early stages of NP rule. It began after the coloured vote crisis in the mid-1950s, when the restructuring of judicial personnel and the Appellate Division took effect, and the white electorate lent its support to the constitutional fraud resorted to by the government to circumvent the entrenched clauses of the South Africa Act. It was manifestly abandoned when emergency executive decree became the chosen medium of government towards the end of formal apartheid—from the mid-1980s—when a climate of ‘state lawlessness’ prevailed and the pretence of adherence to the rule of law was abandoned by the Botha regime.” Truth and Reconciliation Commission of South Africa, *Final Report*, para. 32.
- <sup>23</sup> I lay out these claims and demands in chapter 4 of Murphy, *The Conceptual Foundations of Transitional Justice*.
- <sup>24</sup> Philpott, *The Politics of Past Evil*.
- <sup>25</sup> *Ibid.*, 124–125.
- <sup>26</sup> Amy Gutmann and Dennis Thompson, “The Moral Foundations of Truth Commissions,” in *Truth v. Justice: The Morality of Truth Commissions*, ed. Robert I. Rotberg and Dennis Thompson (Princeton, N.J. : Princeton University Press, 2000), 22–44; and David Dyzenhaus, “Survey Article: Justifying the Truth and Reconciliation Commission,” *Journal of Political Philosophy* 8 (4) (2000): 470–496.
- <sup>27</sup> Philpott, *The Politics of Past Evil*, 13.
- <sup>28</sup> *Ibid.*, 34.
- <sup>29</sup> On this point, see Jonathan Quong, “Public Reason,” *The Stanford Encyclopedia of Philosophy*, Spring 2018 ed., Edward N. Zalta, ed., <https://plato.stanford.edu/archives/spr2018/entries/public-reason/>.
- <sup>30</sup> Philpott, *Just and Unjust Peace*.
- <sup>31</sup> Philpott, *The Politics of Past Evil*, 5. He notes that this has not uniformly been the case. There are societies with strong religious communities (such as Northern Ireland) that have not provided an impetus for a truth commission and societies where the religious communities did not contribute, given their implication in previous abuses, like Rwanda.
- <sup>32</sup> See, for example, Jean Hampton, “Correcting Harms versus Righting Wrongs: The Goal of Retribution,” *UCLA Law Review* 39 (6) (1992): 1659–1702.
- <sup>33</sup> Thomas Carothers, “The End of the Transition Paradigm,” *Journal of Democracy* 13 (1) (2002): 9–10.
- <sup>34</sup> On the place diversity considerations figure, see Colleen Murphy, “The Ethics of Diversity in Transitional Justice,” *Georgetown Journal of Law and Public Policy* 16 (2018): 821–836.