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Chapter 16

Trust and Commitment: How Athens Rebuilt the Rule of Law

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Indeed men too often take upon themselves in the prosecution of their revenge to set the example of doing away with those general laws to which all alike can look for salvation in adversity, instead of allowing them to subsist against the day of danger when their aid may be required.

Thucydides¹

Introduction

Much literature about democratic transitional justice focuses on the content of post-conflict law, particularly the tension between reconciliation and accountability; that is, when a democracy takes power from a dictatorship that has violated human rights, should the leaders of the previous regime be prosecuted, or should they be granted amnesty? Let us call questions like that, collectively, “the substance question.”

Once a democracy has arrived at an answer to the substance question, however, it will sooner or later be faced with a second question: should it stick to its first answer? If it has publicly and legally committed to some treatment of its previous leaders, may it change its mind?

The citizens of a transitional democracy may decide that they were originally mistaken. Perhaps their original choice caused too much political unrest, or circumstances may have changed. For example, their original choice may have been made in order to mollify some powerful interest group. But the balance of power has shifted, and that group no longer threatens the democracy; the *demos* is only now freely able to pursue its conception of justice.² Should it? Let us call this “the commitment question.”

In answering the commitment question, the *demos* must consider not only issues of abstract political morality—must a democracy keep its promises?—but also structural issues. Should the *demos* create institutions, such as courts and constitutions, to reinforce its transitional commitments? If the *demos* breaks or keeps those commitments, what effect will that choice have on the success of its democratic political institutions? Call this “the structure question.”

This chapter is a call to pay more attention to the structure and commitment questions. It will argue that transitional democracies have reasons to stick to their transitional commitments, regardless of their substance.³ And they have reasons to prospectively build structures that allow

¹ Thuc. 3.84, as translated by Strassler (1996).

² Nobles (2010: 171–5) helpfully collects the scholarship about the impact of changing circumstances on transitional justice decisions.

³ Distinguish the democracy breaking its own commitments from breaks imposed on it by law. Sometimes, domestic or international courts strike down transitional justice measures; to the extent those rulings are consistent with preexisting law, a *demos* does not undermine the rule of law by following them (and ordinarily political actors ought to be able to predict this risk when negotiating transitional measures). Consequently, this kind of commitment-breaking ought not to pose the same kind of danger to transitional democracies as (I argue below) would the *demos* ignoring its own legal commitments. (I thank Mark Osiel for raising this worry).

them to do so.⁴ In consequence, we should understand the rule of law as an element of transitional justice, *independent* of the substantive choices transitional democracies make about how to handle the past.⁵

This chapter is divided into three sections. The first is narrative: I tell the story of one of the first transitional justice problems in recorded history: the reconciliation and amnesty within the Athenian democracy after the brief but infamously brutal regime of the Thirty Tyrants (403 BCE). The second is analytic: I give an account of how the Athenians learned from their prior experience in successfully maintaining their transitional commitments and rebuilding the political community. The final section generalizes to make some theoretical claims about the relationship between public and visible mass commitment to the rule of law and the success of transitional democracies, and from there to the role of courts, civil society, and truth commissions.

Before beginning, a word of disclaimer. Necessarily, this chapter is tentative and partially speculative. It's almost certainly wrong in more ways than it's right. In the space of a single chapter, I cannot do anything even remotely approaching full justice to the political complexities of the one case I examine, let alone the greater universe of transitional justice circumstances. Nor can I give a strategic account that captures the multiple and shifting interests necessarily reduced, here, to the binary of "mass democrats" and "elite oligarchs." The object is not to declare "this is what made the Athenian amnesty successful, and this is what contemporary democracies must do," but to explore new territory with a plausible but tentative hypothesis, and, in doing so, encourage future scholars to map it more closely.

Transitional Justice in the Golden Age of Athens: A Chronology⁶

In the late fifth century BCE, two oligarchies, known to history as the Four Hundred and the Thirty Tyrants, overthrew the Athenian democracy and were overthrown in turn. Those oligarchies, the events leading up to them, and the way the restored democracy handled the fallout, are the subjects of this section.

As the end of the fourth century neared, Athens was mired in the Peloponnesian War against Sparta. By the standards of the time, Athens was a democracy: although citizenship was a hereditary status, held by around 10 or 20 percent of the residents, and women, foreigners, and slaves held inferior legal status and no direct say in politics,⁷ political rights were distributed largely without reference to socioeconomic class, and three mass institutions—the jury, the council, and the assembly—ruled the city.⁸

In 415 BCE, the assembly decided to invade Syracuse, a powerful city on Sicily. The expedition was probably hopeless on its own, but internal politics made matters worse. Just before the invasion began, the citizens discovered that a number of *hermai*—statues of the god Hermes—had been

4 Of course, even strong reasons may be overridden. Sometimes a democracy should abandon profoundly unjust commitments.

5 To be clear, I mean to say that the *prospective* rule of law is important to transitional democracies: they must run their own governments under law. This is not the same as the claim made by many scholars that the rule of law requires punishment for the *past* violations of the prior regime (for example, Mendez 1997: 6); I take no position on that.

6 In the interest of brevity, I have refrained from giving extensive citations in the historical narrative, which is generally standard knowledge to those who study ancient Athens. The main classical sources are Thucydides, Xenophon's *Hellenika*, Andocides's *On the Mysteries*, and Aristotle's *Constitution of Athens*. The secondary sources on which I've most heavily relied are Ostwald (1986), Lanni (2010), and Hansen (1999). I have given more precise references for all of the elements of the narrative below in Gowder (2014a).

7 Accordingly, I will use the male pronoun to refer to politically active Athenian citizens.

8 An excellent summary of Athenian government is in Blackwell (2003).

mutilated. At the same time, it was alleged that some citizens had privately parodied an important religious ceremony, the Eleusian mysteries. Both were believed to associated with an oligarchic plot against the democracy.

Faced with these events, the legal system utterly broke down. Andocides (not, admittedly, a disinterested source) recounts that those making denunciations were given a financial reward; unsurprisingly, some 300 citizens ended up being denounced. At least some of those denunciations were false, and one Diocleides was ultimately executed for making false accusations. Before the hysteria died down, a number of citizens were executed or went into exile as a result of the denunciations, others were summarily thrown into prison on suspicion, and at one point the council called the whole city to arms and considered torturing citizens in order to extract more names. Alcibiades, one of the generals of the upcoming expedition, fell under suspicion. His opponents waited until he had set sail, and then accused him *in abstensia*. Upon being recalled from the invasion as a result, he turned traitor, joining up with the Spartans.

In 413 BCE, the entire Sicilian expedition was destroyed. The loss of men, money, and ships was devastating. The "allies" (client states) went into revolt. Athens seemed doomed.

Somehow, Athens survived to continue the war for a few more years. Meanwhile, Alcibiades and others conspired to overthrow the democracy. They followed a two-pronged strategy. First, they tried to persuade the Athenians that the Persians would give them a much-needed alliance if they installed an oligarchy. Second, they called on clubs of the rich and powerful within the city, the *hetaireiai* (who had widely been believed to be behind the sacrileges of the herms/mysteries), to carry out acts of violence and intimidation in order to support an oligarchic coup. Thucydides reports that the terror campaign was successful: the democrats were unable to resist the oligarchs because they were too afraid to speak against them or organize their own collective action. (I will suggest below that some of this is attributable to failures of the rule of law.)

In 411 BCE, the democracy voted itself out of existence, turning over power to the Four Hundred, the first of two Athenian oligarchies. The Four Hundred ruled relatively mildly—Thucydides reports that they killed "not many" people—but were not strategically sustainable. The lower classes controlled the bulk of (what was left of) Athenian military might, the navy at Samos. Consequently, within a few months, the oligarchy collapsed and the democrats regained control of Athens, thus facing their first problem of transitional justice. Their choice was legal accountability: they convicted a number of oligarchs for their crimes during the regime. Moreover, in order to build a more solid legal basis for deterring and punishing future oligarchs, they enacted the decree of Demophantus, which allowed anyone to kill with impunity any person who attempted to overthrow the democracy or took office in an oligarchy.⁹

The war continued. In 406 BCE, Athens won its last major victory, the naval battle of Arginusae. Unfortunately, a storm prevented them from rescuing the sailors from their disabled ships afterward. Outraged by the mischance, the people of Athens again crashed their legal system, executing the (victorious!) generals *en masse* by *diktat* of the assembly. The hysteria and disregard for law reached such a fever pitch that one citizen, who tried to put a stop to the illegal proceeding, was himself threatened with execution.¹⁰

Predictably, after killing its generals Athens lost the war. In 405 BCE, Lysander obliterated the Athenian fleet at the battle of Aegospotami, and in 404, under siege and starving, Athens capitulated. Among the terms imposed by the Spartans was the rule of another oligarchy, the Thirty Tyrants.

According to Xenophon, the Thirty began with a popular move, persecuting some alleged *syccophants*—reputedly frivolous litigants who used the Athenian courts to extort money from

9 Particularly, see Ostwald (1986: 414–22).

10 Gowder (2014a) and Gowder (2014b) go into more detail on this.

their opponents. (Classicists debate whether sycophancy actually occurred.) But the Thirty quickly expanded their violence, executing numerous citizens and expropriating an immense amount of property.

A rebellion arose and began to win battlefield victories against the Thirty. Sparta sent troops to reinforce the Thirty, but the commander of the relief troops grew tired of the conflict and imposed a peace on the warring factions. The Thirty were forced to step down, but the Athenian people were forced to grant an amnesty to their collaborators, forbidding the restored democracy (for the most part) from prosecuting them for any crimes except murder, and forbidding individuals from taking revenge outside the legal system. The solution to Athenian democracy's second problem of transitional justice within a decade was imposed on it from the outside.

Shortly thereafter, Athens comprehensively revised its legal system. A new court procedure, *paragraphe*, was created, allowing a citizen to immediately challenge a lawsuit alleged to violate the amnesty. Athens also prohibited laws targeted against individuals as well as the enforcement by magistrates of unwritten laws. Finally, a distinction was created between laws, which were to be difficult to amend, and decrees of the assembly, making it clear that the former were to supersede the latter—in effect constitutionalizing the existing legal system, and, with the help of the long-standing procedure of *graphe paranomon*, creating a system of judicial review to challenge unconstitutional decrees. The overall effect of these changes was to entrench the existing laws and shift power from the assembly to the juries.

The amnesty held. Those who collaborated with the oligarchs were not legally punished for their crimes, and the council summarily executed the only citizen whom history records as attempting extra-legal revenge. Having successfully reintegrated the oligarchic opposition into the community and reformed its legal system, Athens swiftly rebuilt, and, within a few years, transformed from a crippled and conquered city into a major power once again.

What Changed in Athens?

After the Four Hundred fell, the democrats prosecuted the oligarchs for their misdeeds. After the much more brutal regime of the Thirty, the democrats observed an amnesty, even though that amnesty, while imposed by Spartan military might, wasn't propped up by it.¹¹

The obvious explanatory hypothesis is that Athens learned. Their behavior after the Four Hundred led to continued class conflict, impeded the war effort, and brought on a second oligarchy eight years after the first. Their behavior after the Thirty, by contrast, contributed (along with other changed circumstances) to a speedy return to military significance after a devastating defeat, and to no further oligarchies.

But that believable hypothesis is also ambiguous. Did Athens learn only to refrain from punishment and revenge, or also about the importance of keeping their legal commitments?

Suppose the Athenians learned that in an unstable external political environment, it's better to give an amnesty to one's former rulers than to prosecute them?¹² This seems like a good lesson for them to have learned, since Athenian class conflict, carried out in part through legal prosecutions, probably contributed to their military defeat: the affair of the *hermai*/mysteries helped turn the Sicilian expedition into a disaster, and then the trial of the generals decapitated the army just

¹¹ As proof of the latter, note that less than a decade after the overthrow of the Thirty, Athens joined another war against Sparta—hardly what we would expect if the democrats kept the amnesty out of fear of Spartan punishment.

¹² This is the hypothesis given by Elster (2004) and Loening (1987: 149).

in time to lose the war altogether.¹³ Moreover, there is reason to believe that the upper classes wanted to topple the democracy in part because they were unhappy about the way they were treated by the legal system: consider that the Thirty started off by eliminating alleged frivolous litigants who targeted the rich, and that a letter attributed to Plato claims that their rule was a result of general dissatisfaction with the laws.¹⁴ Consequently, the democrats after the Thirty had good reason to pursue an amnesty strategy rather than a retribution strategy, in order to reintegrate their socioeconomic elites into the community, gaining the benefits of their resources and talents against external competitors as well as giving them less reason to plot against the *polis*. There is strong evidence on the side of those who have argued that

Athens learned that it could not go on without reconciling the rich and powerful to the democracy.¹⁵

However, that version of the hypothesis is incomplete. An unreliable amnesty would not have achieved the democrats' ends. If the elites had reason to fear that the restored democracy would disregard its promises and punish them for their crimes, they still would have had reason to plot for a future oligarchy. If the democracy did, in fact, continue to eat its own elites, it would have again deprived itself of their services in international conflict. Consequently, in order to have learned the right answer to the substance question, it also must have learned the right answer to the structure and commitment questions. In the jargon of political science, the Athenians must have learned to *credibly commit* to the amnesty: to enforce it in support of their long-run interests even in the face of a short-run desire by aggrieved democrats to the contrary.¹⁶

Moreover, in order to successfully fight off *future* oligarchic threats, the democrats of Athens must have learned to trust one another. The elite, like all elites, were more powerful than members of the mass on a one-to-one basis; they had the capacity to do things like bribe or intimidate assemblies and juries. They also had greater capacity to coordinate their own actions to magnify their individual power, due to their smaller population, and preexisting organizational capacity in the form of the *hetaireiai*.¹⁷

In order to counteract these advantages, the masses would have had to make full use of the only advantage they had: numbers. They would have to have been able to trust one another for support to punish future elite coups, even though elites would have had the power to do them harm on a one-on-one basis. This need for support is reciprocal and extends across the political community. A depends on B's support, but B, in order to be able to support A, depends on A's reciprocal support, and both also depend on the support of citizens C, D: each individual democratic, non-elite, citizen, in order to be willing to stand up to a member of the oligarchic elite, must be able to rely on the support of each other individual democratic citizen.

¹³ Many classicists think the trial of the generals was motivated by class animosities. See Asmonti (2006).

¹⁴ The Seventh Letter, 324.c in the standard Stephanus numbering. Lysias's 25th speech tells a similar story.

¹⁵ Moreover, a year after the trial of the generals, and before the Thirty took over, the Athenians tried to end the cycle of retaliation by enacting a belated amnesty which covered some of the prior political conflict (Boeghold 1990). Although this amnesty of 405 was too late to prevent the Thirty, it does indicate that the Athenians had come to see the importance of reconciliation. See also Lys. 18.17–18, in which a litigant argues the importance of a return to civic harmony after the Thirty. However, several times, the democrats carried out acts of retaliation against former oligarchs—acts which were consistent with the law, and hence could be conducted without undermining what I argue is the lesson of the Athenian amnesty, namely the importance of the rule of law. For example, when called upon to send troops off to a foreign war where they would be likely killed, Athens deliberately sent cavalrymen who had been associated with the oligarchs. It also cut the pay of the cavalry and quadrupled the pay of the lower-class archers. And, incidentally, it reconquered an oligarchic enclave at Eleusis (though that last one might have been illegal—the circumstances are lost to history). On all of this, see Wolpert (2001: 46) and Loening (1987: 117–19).

¹⁶ On the idea of credible commitment, see North (1993).

¹⁷ On the advantage of small groups see Olson (1971).

Otherwise, doing so is too dangerous. Thucydides tells us that they were unable to so trust one another when the Four Hundred took over, suggesting that they must have had to build this trust out of nothing after the Thirty.

In the jargon of game theory, the democracy has a coordination problem: each non-elite citizen wants to be doing what each other non-elite citizen does. He wants to punish future elite transgressions if and only if each other citizen will do so—then he gets his most-preferred outcome, a functioning democracy. However, he wants to refrain from attempting to punish elite transgressions if other citizens won't do so, because so refraining allows him to avoid his least-preferred outcome, being crushed by an overwhelmingly powerful member of the elite, although it forces him to accept his second-least-preferred outcome, living under an oligarchy.¹⁸ This is a class of problem that has been extensively studied in political science and economics.¹⁹ One thing we've learned in those disciplines is that law, understood as a common-knowledge mapping of conduct to evaluations ("legal" or "illegal"), with some mechanism for producing authoritative decisions about those mappings, is instrumental to the success of coordinated sanctioning systems (Law 2009, Hadfield and Weingast 2012, Hadfield and Weingast 2014). In order to achieve coordinated punishment against some transgressor, the democratic masses must have some settled way of determining when a transgression has occurred. And they must be able to trust one another to apply it faithfully. The upshot is that the Athenian democracy after the Thirty Tyrants critically depended on each citizen's ability to predict each other citizen's behavior; the law was the instrument for this prediction just to the extent that citizens knew one another could be depended on to uphold it.

Enter the jury. The chief institution of Athenian litigation, the jury was composed of several hundred citizens who were selected at random. Any citizen could bring an indictment against any other, without regard to class or wealth, and the jury too was selected without regard to class. Its decisions were final. The jury provided the necessary authoritative resolution of disagreements about whether a given course of conduct was sanctionable under law or not, and thus made it possible for the democracy to coordinate itself by law in the first place.

It is this jury that would have heard charges against oligarchs, both amnesty-violating charges for crimes committed under the Thirty Tyrants, as well as charges for new oligarchic crimes committed after the Thirty; it is also the jury that would have heard charges against self-help amnesty violators, had any (other than the one we know of) happened. And—this is the key point—this gave the jurors reason to support the amnesty, because by doing so they could signal their willingness to one another to stand up for the law, and hence solve their coordination problem, and protect their democracy.

Because it was a *mass* institution, filled with hundreds of randomly selected citizens, the jury could serve as an excellent informational proxy for the extent to which the citizen body was willing to enforce the laws. Trials were conducted under a glare of publicity; citizens would know what happened there (Lanni 2012). A jury that ruled for a clearly legally correct outcome, especially when that outcome was contrary to the short-run self-interest or preferences of many of its members, and where that jury was drawn from a large and fairly representative sample of the population, demonstrated a widespread commitment to enforcing the laws, and, consequently, the extent to which the laws were likely to be enforced in the future. Finally, because individual votes were secret, each individual citizen was not in danger of retaliation from voting to enforce the law, even if the vote was against the interest of powerful members of society. In short, the jury could build a record of lawful behavior without presupposing it: by safely allowing citizens to demonstrate their

¹⁸ This is a simplification: it may require the cooperation of fewer than all democrats to effectively resist threats. Nothing turns on this.

¹⁹ Classic on the subject is Weingast (1997).

willingness to sacrifice individual preferences to support one another and the law with their votes in the jury room, it allowed them to trust one another enough to be willing to take the risk to do so elsewhere, and hence allowed them to credibly threaten to resist future oligarchic coups in the streets as well as in the courts. The mass jury served the dual role of resolving legal disputes and demonstrating that the populace was committed to following the law.

This explains (at least in part) why the amnesty succeeded, and why the democracy itself succeeded. The people of Athens learned that it was important to rule according to the law, rather than according to their short-run political preferences, even if that means letting some oligarch go scot-free for crimes committed during the time of the Thirty Tyrants; by voting in accordance in the jury, they signaled to one another that they were willing to swallow their personal interests to enforce the law, and this, in turn, allowed them to trust one another to enforce other laws and to stand together in solidarity against future oligarchic coups.²⁰

This commitment-signaling function was critical to the success of the restored democracy. The jury established a record of consistent conduct upon which each citizen could rely in predicting the behavior of his fellow citizens; this, in turn, made it less risky for each democrat to use the legal system to resist any oligarchic threats that might arise. And this, in turn, suppressed those threats: in the jargon of game theory, attempting future oligarchic coups was off the equilibrium path, because the democrats could credibly threaten to collectively respond with overwhelming force against any such attempts.²¹

The commitment to law was useful not only to the masses, but also to the elites. Even those with oligarchic sympathies, many of whom had committed crimes under the Thirty, would have reason to uphold the law—even to the extent of prosecuting their political allies for future oligarchic crimes—because if the law collapsed, the amnesty would cease to hold, and there would be nothing protecting them from mass vengeance. This is quite a trick: the law could reconcile the elites to the legal system by protecting them from punishment for their past misconduct, and at the very same time, to the extent the masses actually extended that legal protection to elites, it strengthened their own power to prevent future elite misconduct.

With this strategic analysis in hand, it becomes clearer that the best explanation for the success of the amnesty is that the democrats obeyed it because maintaining the law—even a law they didn't want in the first place, that had been imposed on them by Spartan sword—was more important to the strength of their democracy than getting rid of a few oligarchs. Aristotle confirms this hypothesis. In the *Constitution of Athens*, he recounts the argument given for summarily executing the one citizen who tried to disregard the amnesty: "[h]e argued that [the council's] actions would show whether they intended to preserve the democracy and stand by their oaths; if they let the man go, they would encourage others, while if they executed him, they would establish an example for all."²² Evident in this passage is first the idea that keeping their legal oaths (the amnesty) was necessary to preserve the democracy, and second that if the council (representing the *demos*) didn't act (and thus didn't signal their commitment to enforcing the law), the law would break down.

I submit that they had learned this in part thanks to their experience in the fifth century. It is quite natural to suppose that the failure of trust before the Four Hundred, that Thucydides reported, included a failure of trust in the laws, thereby preventing the democrats from prosecuting those

²⁰ In Gowder (2014a) I give evidence that the Athenians recognized, at least by the fourth century, the importance of a functioning legal system to the strength of the democracy.

²¹ Nor would we need any trials of amnesty-violating charges to get this happy result; it is enough that everyone believed the jury would make the right decision, and hence never brought such charges. (The real danger would be if someone brought an amnesty-violating charge and succeeded.)

²² *Constitution of Athens* XL.2, translated by Everson (1996).

who would subvert the democracy. After all, the coup followed shortly after the terrible affair of the herms/mysteries. Then, shortly before they again lost control, the legal system yet again revealed its deficiencies in the trial of the generals; widespread dissatisfaction with the performance of the legal system was evidenced both by the popularity of the Thirty's initial persecution of alleged *sycophants* and by Plato's ability to claim that the coup had come about because of legal dissatisfaction rather than Spartan force.

No surprise, then, that with the amnesty the democrats also reformed the legal system, building institutional structures to help ensure that it would be stable and enforced, and, in doing so, deterring future violent attempts at political power. They'd learned their lesson.

We have a term for the control of state power by law: "the rule of law."²³ The rule of law was the keystone in the success of the final restoration of the democracy in classical Athens, and the real difference—the answer to the structure and commitment questions, not the substantive question between amnesty and punishment—between the failed restoration after the Four Hundred and the successful restoration after the Thirty.²⁴

The Structure and Commitment Questions in Contemporary Transitional Justice

The lessons of Athens can apply to contemporary political communities. The structure and commitment questions are independent of the substance question. Whether a nascent democracy wishes to punish those who collaborated with the prior regime, or whether it wishes to forgive and forget and reintegrate the perpetrators into society, it must be able to commit to the solution that it has decided upon, and it must build constitutional institutions to support that commitment. It must, in short, create the rule of law. These are two separate claims, one about the commitment question, and the other about the structure question. I will take them in turn.

First, the commitment question. Contemporary transitional democracies are likely similar to Athens in that, whether they choose reconciliation or punishment, they will have to be able to credibly threaten to mobilize mass collective action to prevent future attempts to regain power by the interest groups who previously ruled the state. After all, such groups often will have had some unusual, and perhaps persistent, advantage (wealth, troops, international support, etc.) in order to have been able to seize power in the first place. All democracies rely on the collective power of the individually weak masses; all oligarchies and autocracies rely on the individual power of discrete and unusual individuals or small groups; therefore, all democracies need to figure out how to coordinate to resist the powerful. And this means that the citizens of all democracies need to be able to rely on their fellows' demonstrated commitment to uphold the law. Whether they choose forgiveness or justice, they must all establish the rule of law.

This leads to the structure question. What can transitional democracies do to bring about the rule of law, and demonstrate their collective commitment to it? Today's large-scale states don't have the natural advantages of Athens: they can't so easily run mass juries in which a significant proportion of the population participates, and which are visible to the community as a whole. Thus, contemporary democracies typically rely on something like a constitutional court to enforce their

²³ In Gowder (2013) and Gowder (2014c) I give an account of what the rule of law is.

²⁴ This chapter operates at right angles to the usual discussion in the transitional justice literature on the rule of law, which often focuses on whether different substantive choices are consistent with or required by the rule of law, e.g., the controversy over the extent to which punishing the previous regime is necessary to establish a norm of legal justice, or forbidden by legal norms against retroactivity. All of this is orthogonal to my question of whether a democracy should stick to whichever choice it makes.

transitional choices. This serves the first function of the Athenian jury, the authoritative resolution of disputes, but does not necessarily serve the second—a small, elite, court does not have a built-in way for ordinary citizens to signal their commitment to enforcing the law. In fact, the power of constitutional courts depends on, rather than establishes, widespread knowledge of a popular commitment to the law.²⁵

Observe the continuity between this account of the structure and commitment questions and the existing literature on the substance question. Some scholars have suggested that an aim of the substance of transitional justice arrangements should be to publicly and collectively reaffirm the values of the society in question (e.g., to display and demonstrate disapproval of the crimes of the previous regime), in order, *inter alia*, to rebuild "civic trust" that those norms will be enforced in the future.²⁶ I have suggested that the structure and commitment questions are intrinsically connected to such civic trust: the rule of law requires maintaining transitional commitments, and the rule of law is necessary for civic trust, insofar as it constitutes a pattern of collective support for law, giving citizens some warrant to believe that they will reliably defend one another. At the same time, civic trust is necessary for the rule of law, since citizens will only be willing to risk their individual interests to enforce the law on behalf of the rights of others to the extent they trust other citizens to join them in collective enforcement. The solution is the Athenian one: create structures to give citizens some forum in which they can costlessly demonstrate their collective commitment to law.

Even though contemporary transitional democracies don't have mass juries, they do seem to often have active civil society organizations. Moreover, those organizations do seem to play a prominent role in demanding yet another outlet for demonstrating collective commitment: the many iterations of the truth and reconciliation commission.²⁷

Perhaps these commissions can mimic the function of the Athenian jury. Rather than simply demonstrating the substantive commitments of the people—we condemn these crimes of the previous regime, we say that they are not how we operate—they may also demonstrate a commitment to the rule of law in the same way as in Athens. They may give citizens who wish to pursue accountability for the crimes of the previous regime a riskless way to do so, and to do so within the law. A citizen who chooses to take her grievances to the truth commission rather than to pursue private justice has signaled her commitment to lawful means of dispute resolution; the citizens who operate the truth commissions and campaign for their use send a similar signal. At the same time, civil society organizations that represent citizens, by advocating for and participating in these processes, may also help signal a broad-based commitment to using lawful means to resolve disputes with the previous regime.²⁸

Athens, too, had its truth and reconciliation commissions. The Thirty Tyrants themselves, though not their collaborators (with a handful of exceptions), were required to subject themselves to formal *euthunai*—judicial examination of former officeholders, which posed the prospect of punishment for their conduct—in order to return to Athenian citizenship. And if collaborators

²⁵ Law (2009); Gowder (2014b).

²⁶ "Civic trust" comes from De Greiff (2012: 44–8). Similarly, Dyzenhaus (2012) has, drawing from Hobbes, suggested that a function of transitional justice is to provide a civic education in the rule of law. I agree, but submit that what is being taught is not the importance of the rule of law in the abstract, but that citizens may rely on one another to support it: the education is collective and interdependent rather than individual.

²⁷ Examples are given in Popkin and Bhuta (1999). Hayner (2011: 223ff.) details numerous roles of civil society in truth commissions, including offering political support and expertise, advocacy for improvement in commission operation, providing access to victims, and providing access to files and information.

²⁸ Allan (1999) argues that one function of the truth and reconciliation commission is to provide a forum for public recognition of the values of the rule of law, but he seems to limit this recognition to an expression by the state; this chapter argues that the most important kind of expression is that of the people participating in such institutions.

wanted to take office under the restored democracy, they, like all candidates for office, were subject to *dokimasia*, formal examination of a prospective official's character, at which their crimes could be considered.²⁹ Lanni (2010: 584) argues that those institutions operated as a "safety valve for local resentments," allowing some measure of revenge to be exacted. The analysis in this chapter suggests that her account is correct but incomplete: these measures also gave citizens an opportunity to choose the lawful method rather than some other method to seek accountability for past crimes, and hence to affirmatively and publicly show their commitment to the accountability mechanisms provided by law.³⁰

These are the lessons that the Athenian experience with transitional justice suggests.³¹ Transitional democracies should establish the rule of law, and build institutions to enable the masses to signal their willingness to uphold the law, even against their own short-run political preferences. Doing so can support their continuation as a democracy, which is a precondition for the implementation of those substantive choices. Additionally, the literature on transitional justice should pay less attention to the perennial tension between reconciliation and punishment, and more to the institutions that allow democracies to effectuate their newfound rule.³²

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²⁹ Both were pre-coup institutions.

³⁰ In one respect, Lanni is mistaken. She suggests that the Athenians lacked the rule of law, and that this lack was helpful in their reconciliation efforts. Elsewhere (Gowder 2014a) I have argued that Athens did have the rule of law; here I have argued that it was instrumental in their successful reconciliation.

³¹ Several prior scholars (McAdams 1997, Halmai and Scheppele 1997) have highlighted that other states have learned the lesson that the prior regime must be prosecuted (if at all) in accordance with the rule of law. However, these accounts have not focused attention, as I do, on the importance of a visible mass, not elite, commitment to the rule of law in transitional democracies.

³² Recently, there has been empirical research attempting to discern the relationship between a state's substantive transitional justice choices and its success in developing the rule of law (Weiffen 2012). (Nobles 2010 highlights a few others.) This chapter suggests that there may be a missing variable in Weiffen's analysis: the extent to which a state stuck to its transitional choices, whatever they may have been.

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Chapter 17

Transitional Justice in Post-Genocide Rwanda: An Integrative Approach

Lynne Tirrell

Whether dead or alive, the victims must be recognized as victims and must know that we consider them as victims. Whether dead or alive, the guilty must be declared guilty and recognize themselves as guilty. Whether dead or alive, the innocent must also be declared innocent. Justice does not have several faces; it has only one, and it must be the same for everybody.

Andre Sibomana 1996¹

Delivering justice would mean killing the killers ... Justice finds no place after genocide, because it surpasses human intelligence. Priority must be given to the fields, the harvests, the country, and so to the killers as well and to their families, who are many and strong. What would become of a nation lying fallow, without schools or sturdy houses, eyed greedily by neighbouring countries? This is not a human justice, it's a politics of justice. We can only regret that they never show either sincerity or sorrow.

Berthe Mwanankabandi, survivor of '94²

An imperfect "politics of justice" is inevitable in the aftermath of genocide. An even-handed justice, Andre Sibomana emphasizes, requires recognizing victims as victims, the guilty as guilty. In Rwanda, an even-handed justice has proven elusive, given the scale of the atrocities, the breadth of participation, and the need to build a justice system from scratch while establishing security and restoring the rule of law. Like many Rwandans, Berthe Mwanankabandi's resignation to less than perfect justice is matched with determination to live again. Rebuilding individually and collectively in the aftermath of the apocalyptic events of April–July, 1994, Rwandans know that a non-ideal "politics of justice" will be incomplete justice, that despite efforts to build a new criminal justice system, major *génocidaires* have escaped punishment and small fry have served only short terms. They also know that distributive justice will be hard to achieve. And all along they have been hearing their government and churches stressing the importance of reconciliation without anyone really knowing how to bring it about, despite heroic efforts.

There can be no perfect justice for atrocity. The very concept of transitional justice carries with it diminished expectations and a sense of compromise, and unfortunately suggests that justice has "several faces" (Sibomana). This is, in part, because transitional justice cannot presuppose a stable society, and must have a variety of goals. Gerald Gahima defines transitional justice as comprising the "policies, practices and mechanisms with which societies seek to confront and deal with legacies of past violations of human rights and humanitarian law in the context of political

1 Sibomana, Andre, Hervé Deguine, and Laure Guilbert. 1999. *Hope for Rwanda: Conversations with Laure Guilbert and Hervé Deguine*. Translated by Carina Tersakian. London: Pluto Press, 105.

2 Hatzfeld, Jean. 2009. *The Antelope's Strategy: Living in Rwanda after the Genocide*. Translated by Linda Coverdale. New York: Farrar Strauss, & Giroux. Quote, 130–31.

Theorizing Transitional Justice

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Contents

<i>List of Figures</i>	vii
<i>Notes on Contributors</i>	ix
 Introduction <i>Claudio Corradetti, Nir Eisikovits, and Jack Volpe Rotondi</i>	 1
 PART I IS IT ALWAYS NECESSARY TO ACCOUNT FOR PAST WRONGS?	
1 Forgetting after War: A Qualified Defense <i>Jack Volpe Rotondi and Nir Eisikovits</i>	13
2 Peace without the Past? Truth, Transition and the Northern Ireland Case <i>Cheryl Lawther</i>	29
 PART II PUNISHING AFTER WAR	
3 The Force of Forgetting or Forced Forgetting? Schmittian Amnesties and Transitional Justice <i>Juan Espindola</i>	45
4 Transitional Justice, Retributive Justice and Accountability for Wrongdoing <i>Colleen Murphy</i>	59
 PART III TRANSITIONAL JUSTICE AS A VEHICLE OF STRUCTURAL AND INSTITUTIONAL CHANGE	
5 Transitional Justice as Structural Justice <i>Krista K. Thomason</i>	71
6 Justice-Seeking in Settler States: A Model for Thinking about 'Justice' in Transitional Societies <i>Michael Phillips</i>	81
7 Structural Causes of Conflict and the Superficiality of Transition <i>Pádraig McAuliffe</i>	93

PART IV TRANSITIONAL JUSTICE AND POLITICAL RECONCILIATION

8	Reconcilable Resentments? Jean Amery’s Critique of Forgiveness in the Aftermath of Atrocity <i>Grace Hunt</i>	109
9	A Theory of National Reconciliation: Some Insights from Africa <i>Thaddeus Metz</i>	119
10	Restoring Human Capability: Reconciliation and Liberal Multiculturalism <i>Monica Mookherjee</i>	137

PART V TRANSITIONAL JUSTICE AND THE ARTS

11	Transitional Justice and the Arts: Reflections on the Field <i>Sanja Bahun</i>	153
12	Democratic ‘Sacred Spaces’: Public Architecture and Transitional Justice <i>Mihaela Mihai</i>	167

PART VI DEFINING THE PARAMETERS OF TRANSITIONAL JUSTICE

13	Transitional Times, Reflective Judgement and the ‘Hōs mē’ Condition <i>Claudio Corradetti</i>	185
14	Further Explorations of the Social Death Hypothesis <i>Claudia Card</i>	199
15	Making Reparations Possible: Theorizing Reparative Justice <i>Margaret Urban Walker</i>	211

PART VII CASE STUDIES

16	Trust and Commitment: How Athens Rebuilt the Rule of Law Paul Gowder	225
17	Transitional Justice in Post-Genocide Rwanda: An Integrative Approach <i>Lynne Tirrell</i>	237
	<i>Index</i>	253

List of Figures

12.1	The exterior of the Voortrekker Monument	172
12.2	The Cenotaph	173
12.3	The Victory of Socialism Boulevard	176
12.4	Exterior of the People’s House	176