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Capturing Transitional Justice: Exploring Colleen Murphy's The Conceptual Foundations of Transitional Justice

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Abstract

Colleen Murphy's book, *The Conceptual Foundations of Transitional Justice*, is a formidable accomplishment. Its detailed grasp and fluid synthesis of a daunting body of theoretical and empirical work on transitional justice, and Murphy's command of philosophical tools -- from political philosophy, philosophy of law, and ethics -- is masterful. It stands alone as a philosophical work that sets out to demonstrate how transitional justice -- a body of theory, practice, and advocacy -- is about justice and unfolds what can only be called a grand unified theory of a single, novel, distinct kind of justice that is transitional justice (compare Teitel, Winter, Philpott, Verdeja).

Keywords

Transitional justice, transformation, accountability, justice, victims, perpetrators

Murphy's interest is "the moral evaluation of the choices that transitional communities make in dealing with wrongdoing" (2). She argues that transitional justice does not reduce to retributive, corrective, or distributive justice, nor the somewhat new-fangled idea of restorative justice (83). Transitional justice is instead a distinct kind of justice that is defined by the peculiar circumstances in which it becomes salient and by a specific problem that those circumstances pose. The circumstances are: pervasive structural inequality; normalized collective and political wrongdoing; serious existential uncertainty; and fundamental uncertainty about authority (33). These circumstances are distinct, Murphy holds (not uncontroversially), from circumstances of "stable democratic contexts," in which structural inequality is limited, wrongdoing is individual and deviant, existential uncertainty is minor, and uncertainty about authority is narrow (34). These particular conditions define a "central moral challenge" for transitional justice: What constitutes a just societal transformation? (33-34).

Murphy's position is that the "overarching aim for the sake of which processes of transitional justice are adopted" is "societal transformation" in a very demanding sense. Societal transformation requires "overhauling the terms of interaction structuring political relationships among citizens and between citizens and officials" to establish relationships of "mutual respect for agency and reciprocity" (160). The job of transitional justice, however, is to pursue this robust relational transformation "by dealing with past wrongs" through "intrinsically fitting or appropriate responses to victims and perpetrators of wrongdoing" (195). In her conclusion, she recaps:

"Transitional justice responses can fail to be just in two senses: by failing to contribute to societal transformation or by failing to be appropriate and fitting responses to victims and/or perpetrators. There is reason to believe that processes can satisfy both sets of criteria if pursued with both sets in mind and if transitional justice processes are designed and implemented in a coordinated manner" (195).

If you want to know why the circumstances to which transitional justice responds trouble familiar understandings of retributive or corrective justice or want a quick but exquisite tutorial in why certain responses to victims and perpetrators in the aftermath of systemic violence matter, read this book. I will focus on three big questions. First, how do we know that transitional justice is fundamentally a single special kind of justice that permits a grand unified theory? Second, is it plausible to hold, as Murphy claims, that societal transformation is the overarching aim of transitional justice? Third, is transitional justice convincingly explained as pursuing societal transformation "through" (112) or "via" (194) or "by" (195) dealing with past wrongdoing?

How Do We Know What Transitional Justice 'Is'?

A recent overview of article literature in the field finds that transitional justice is "still struggling for a consistent definition that reflects a worldwide consensus" (Fletcher and Weinstein 2015, 192-193). An undertheorized area of practice and discourse in need of a deeply informed theoretical structure to unify and guide it – this looks like great news for Murphy's contribution; or is it?

Murphy's book begins with a series of ground-clearing arguments that other ways of explaining the justice in transitional justice fail. Transitional justice is not justice compromised with expediency; nor is it justice compromised by competing moral demands, such as peace or reconciliation; nor is it restorative justice. What she does not discuss is a prior question about whether there is reason to think that transitional justice admits of a non-trivial, unified construal, or whether the unifying feature of transitional justice, if there is one, is indeed justice. Yet this is a live question in the field, fought over both directly and often implicitly across its disciplinary tributaries.

Everyone agrees that transitional justice describes a set of practices and allied thinking that began to emerge in the 1990s in response to transitions from repressive military regimes in Latin America and communist dictatorships in Eastern Europe. Transitional justice is about “dealing with the past,” where the past involves large-scale or systematically patterned grave human rights or humanitarian abuses from which a society has emerged or is trying to emerge (Bell 2009, 7). The practical repertory of transitional measures (often – and sometimes derisively – called the “tool kit”) has also remained strikingly constant (although not without dissension, to which I return below). Criminal trials, truth recovery projects, reparations, and reforms of relevant institutions, constitute the enduring standard menu. Beyond this point there are fateful divergences.

An influential definition of transitional justice, enshrined by then-UN Secretary General Kofi Annan in 2004, is “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to assure accountability, serve justice and achieve reconciliation” (UN Security Council 2004). This definition already folds in a broader concern with reconciliation, although the relationship of accountability to reconciliation is arguable (Seils 2017, 2-4). Similarly, for the way Fletcher and Weinstein gloss transitional justice as “a menu of interventions to promote justice, political stability, and human rights (variously defined)” (Fletcher and Weinstein 2017, 193). The International Center for Transitional Justice continues to foreground “accountability and redress for victims” on its website (<https://www.ictj.org/about/transitional-justice>). Roger Duthie, introducing a recent collection published by ICTJ, says that “The protection and vindication of victims’ rights is the most direct objective of transitional justice processes and should not be subsumed under other policy objectives” (Duthie, 2017, 10). There is a contest here between transitional justice as (just) justice, as justice “plus” other desired goals, and as justice “in order to” get to something else.

There are other contests as well. In perhaps the most attended quantitative study of whether and how transitional justice “works,” Olsen, Payne, and Reiter’s *Transitional Justice in Balance*, the authors define transitional justice as “the array of processes designed to address past human rights violations following periods of political turmoil, state repression, or armed conflict” (11). They include amnesty in their empirical study of the efficacy of transitional justice measures (Olsen et. al. 2010, 1). But amnesty is not a justice measure; amnesties are justified instrumentally in the best case for their contribution to peace, stability, or reconciliation. But amnesty (usually blanket amnesty) is the most widely used device in the aftermath of conflict or repression. Olsen et. al., in looking for “what works,” effectively promote a kind of transitional justice nominalism. Transitional justice on this view is what international lawyer Christine Bell characterizes as “a label to describe a range of particularistic bargains aimed at increasing democratization and reducing violence” (Bell 13).

Now, I am sure Murphy is aware of this backdrop; some of the works I’ve referred to are cited and quoted by Murphy in her book. She does not discuss the question of whether transitional justice is “merely an ad hoc practical concatenation” of measures (Winter 2015, 215), but goes straight to the justice question in pursuit of an inclusive and distinct theory. I think there is a reason, however, for Murphy to address the contest surrounding the very nature of the field. In a book on the “conceptual foundations” of transitional justice, it’s fair to ask whether we think it has conceptual foundations, where we should look for them, and what counts in showing we have uncovered them. This in turn raises an important question about how Murphy sees her project and about how we are intended to evaluate it. Is it a rational reconstruction of an area of practice whose supporting rationales are mixed or unclear? Is it instead a radically revisionary critical account of what we should consider to be the unique demands of justice in transition, perhaps at variance with significant parts of existing literature and common practice? Or is it a constructivist theoretical experiment that is unconcerned with its good or ill fit with the confusing (and perhaps conceptually unsound or infirm) “field” of transitional justice?

In the Introduction, Murphy says she will “generate” a set of normative principles to apply in a kind of circumstance by identifying what facts give rise to the problem, as if *de novo* (Murphy 37). This sounds like an

experiment in free-standing theoretical construction. But Murphy clearly means to fully engage the existing conversation, with her careful attention to extant theory and practice, her reference to the “practical need” for normative theory (20), and her address not only to theorists but also “policy makers and citizens” (6). In the Conclusion of the book, Murphy explains that she did not discuss particular transitional measures in detail, lest she reinforce the idea that the “standard menu” of measures constitutes “the complete range of options from which transitional societies should choose,” while the range of responses is “potentially much broader” (200). This seems to imply a rational reconstruction approach that claims both to make good sense of existing practice and thinking and to extend the power and reach of the approach. Because Murphy doesn’t challenge the existing repertory, but speaks of its extension, it does not appear that her aim is radically revisionary critique. Her view that transitional justice is for the sake of societal transformation, however, is radically revisionary. Her view sorts with a growing segment of transitional justice literature that argues for “transformative transitional justice.”

Is Societal Transformation the Goal of Transitional Justice?

Murphy’s book from start to finish is in service of her central theoretical claim: “Transitional justice is ultimately concerned with the just pursuit of societal transformation...” (7). I am surprised, then, not to find much in the way of an argument for that claim.

Some passages, however briefly, hint at a “root causes” argument that is common in the wider transformational literature. Murphy says that societal transformation and responding to wrongs “get linked” in the special circumstances of transition (112). Pervasive structural inequality “enabled” (27) normalized wrongdoing, just as such wrongdoing shores up pervasive inequality, Murphy says (113). This looks like the argument that transitional justice is not really or effectively “dealing with the past” if it leaves in place systemic patterns of social and political disempowerment and vulnerability to violence (such as those based on gender, poverty, ethnicity, indigeneity, or religious marginalization). Transitional justice must not rest content with addressing the aftermath but must also attend to the disposing or enabling conditions of violence and repression.

Although I suspect this is part of what she intends, in this same passage Murphy stresses instead of a different “link”: in conditions of existential uncertainty that characterize transitional settings, dealing or failing to deal with structural issues has “enormous implications” that can influence the society’s trajectory and the success of its transition; failing to address the linked phenomena of structural inequality and normalized violence also has implications for political authority in the characteristic transitional condition of uncertainty about state authority (113). This argument seems to be that in the face of the circumstances of structural inequality and normalized violence, transitional justice must either attempt societal transformation or it will fail to address the other two conditions of existential uncertainty and uncertain authority (see also 194). These claims, notice, are empirical claims about what phenomena are predictably linked causally in transitions. These connections do not go without saying and cannot be established solely by argument. So, I don’t see a clear argument, or even a nod to the empirical basis and complexity of causal claims that are made, in support of societal transformation as the guiding aim of transitional justice.

If societal transformation as the aim of transitional justice were a common or received view, the absence of dedicated argument would be unremarkable. But it is not, putting the burden of argument on Murphy’s central claim. The actual inception of transitional justice thinking and practice saw accountability for past abuses as the ‘justice’ in transitional justice (Arthur 2009; Bell 2009; Fletcher and Weinstein 2015). The driving question was whether impunity for gross abuses could be allowed to stand as the page of political transition turned. The answer that took shape in theory and practice was that societies emerging from eras of abuse were required, legally or morally, to attempt some justice with respect to the past even under fragile transitional conditions. The main outlines of the transitional justice menu of measures consolidated rapidly – trials, truth commissions,

reparations, institutional reform – and has not dramatically altered in practice (Arthur 2009, 355; Fletcher and Weinstein 2015, 178, 192). Yet this field-defining conception has come under pressure with demands for more expansive and ambitious aims.

The “transformative turn” in the literature is a wave of critique accompanied by aggressive demands and arguments for the extension and expansion of transitional justice goals to economic redistribution as well as structural transformation of social hierarchies (McAuliffe 2017, xiii). Critics contend that transitional justice is shaped by neo-liberal international agendas that sideline economic justice concerns (Mani 2002; Arbour 2007; Miller 2008; LaPlante 2008; Sharp 2015) and the role of oppression along lines of gender, ethnicity, indigeneity, and other systemic vectors in human rights abuses (Couillard 2007, Saris and Lofts 2009, Lambourne 2009, Gready & Robins 2014). The transformative wing of the literature sharply rebukes and rejects the predominant conception and practice of transitional justice (going well beyond the view that specific social, economic, and cultural rights violations need to be recognized as wrongs and dealt with by transitional measures (Schmid and Nolan 2014), and argues for its replacement or radical revision.

I draw attention to this conspicuous feature of recent transitional justice discourse to highlight the fact that embedding the aim of societal transformation (economic and social-structural) in transitional justice is understood by others advocating for it as a transformation of transitional justice itself in theory and practice. To assert that societal transformation just is the overarching aim of transitional justice is to join a contest in which one has to fight one’s corner. I wonder why Murphy, who cites some of this “transformative transitional justice” literature, spends so little time developing or grounding this crucial point, and never places her own theory in contact or contrast with these approaches.

Murphy’s approach does work that is largely missing from much of the transformative transitional justice literature. She provides a detailed account of the specifically relational transformation she envisions. There is, however, a shared deficit in transformative views: the absence of a theory of change that makes remotely plausible how the ideal aims of such approaches could be achieved, precisely in the transitional context in which they are advocated. The demandingness of claims about what transitional justice should do is in inverse relation to what transitional processes have been found to be able to do in fact. Legal scholar Pádraig McAuliffe, in a relentless and powerful analysis in his book *Transformative Transitional Justice and the Malleability of Post-Conflict States*, examines in detail the conditions familiar to peacebuilding and development studies make post-conflict societies resistant even to modest social change, lessons some of which apply more widely in transitional contexts: these include weak state capacity, underdevelopment and/or patronage systems, elite control, and specific legacies of war and the peace agreements that terminate it (McAuliffe 2017, 64, 88). While Murphy’s methodology is to begin from the circumstances of transitional justice, her account comes short of a full picture of “those political and economic factors that make states or communities therein more or less malleable or amenable to change” (McAuliffe 2017, xi). The pursuit of accountability for past wrongs has itself proved daunting for these reasons, but the difficulties pale in comparison with the pursuit of societal transformation, which for Murphy includes changes in debilitating social norms and stereotypes as well as legal and political (and economic?) institutional reform (Murphy 132-133).

What of the Role of Transitional Justice Measures?

There are two respects in which Murphy’s analysis is vastly superior to most of what is found in the transformative transitional justice literature. First, the underlying conception of justice is theorized in detail. Second, Murphy’s chapter 4 on “The Just Pursuit of Transformation” is a beautifully argued and condensed investigation of what it means to respond in “an intrinsically fitting and appropriate manner to victims and perpetrators” (162). She is acutely aware that responding to wrongs is non-instrumentally important and not merely a dispensable means of promoting relational transformation (114). Murphy unfolds, rather than

slighting, the moral logic of transitional measures as they apply to victims, perpetrators, or both, something seldom done at all by proponents of transformation.

Murphy's aim is to unpack the "just pursuit" part of her claim that transitional justice is "the just pursuit of societal transformation." To be just, relational transformation of society must be pursued "via" responding appropriately to the wrongs done and suffered by particular individuals (112). She acknowledges that responding to past wrongs is "not typically linked with broader structural or relational change," nor is the pursuit of societal reform typically linked with responding to past wrongs (112). But her distinctive view, reiterated throughout the book, is that societal transformation is to be pursued "by" or "through" or "via" the application of the kinds of measures in the transitional repertory, along with perhaps other transitional measures that redress wrongs (200). The requirement of redressing wrong, then, is not a side constraint on the independent pursuit of transformation but is rather the substance of transitional justice as an activity of dealing with the wrongs of the past in order to transform society.

If it is reasonable to question societal transformation as the goal of transitional justice, it is even harder to comprehend how transitional justice is to seek societal transformation through mechanisms that redress the past. These devices make sense as accountability measures of diverse types (as Murphy makes wonderfully clear in her discussion of responses to wrongs), but they are highly improbable as ways to approach, much less accomplish, deep societal change; that is precisely the transformationalist indictment in the larger literature. Alongside their direct impact on acknowledging and redressing individuals and groups, they carry important expressive content and may create demonstration effects, but even in doing so they primarily aim to deal with the past in the present, and not by themselves to restructure the future.

Murphy could give up the "in order to" link between these measures and societal transformation, and hold that transitional justice must aim at societal transformation in whatever ways are effective and just, so long as this includes, and is not at expense to, the process of responding to past wrongs (a "side constraint" view which would, it seems to me, better fit her analogy with just war theory). But this solution is unhappy both theoretically and practically. Practically, past-looking responses that address victims and perpetrators are sure to lose out to measures that promise wider social benefits; attention to victims and perpetrators is even more likely to be ignored than instrumentalized. Theoretically, the project of building a just society becomes just that – simply forward-looking reform aimed at a just society. Once the transitional scene becomes merely a supposed window of opportunity, then it's just about justice, and not about transitional justice, anymore.

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