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## SPECIAL ISSUE ON TRANSITIONAL JUSTICE

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### Symposium on a book by

Nir Eisikovits

SYMPATHIZING WITH THE ENEMY:  
RECONCILIATION, TRANSITIONAL JUSTICE, NEGOTIATION

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## **Transitional Justice and Equality: A Response to Eisikovits**

This article responds to Nir Eisikovits' *Sympathizing with the Enemy: Reconciliation, Transitional Justice, Negotiation* (Martinus Nijhoff Publishers, 2010).

In his recent book, Nir Eisikovits argues for an approach to political reconciliation centered upon the inculcation of sympathy between adversaries. After developing this approach to political reconciliation in the first part of his book, Eisikovits applies it by evaluating common transitional institutions and negotiation styles. In my response, I focus on the relationship between sympathy and transitional justice. I argue that if Eisikovits' argument in favor of sympathy is convincing, it ought to be applied beyond the confines of transitional justice as it is traditionally understood. More specifically, the process of inculcating sympathy should be extended to address issues of substantive inequality, and ought not be limited to formal concerns.

### **Introduction**

In his recent book, Nir Eisikovits provides a rich and detailed description of the role and importance of sympathy in our understanding of international conflict.<sup>2</sup> His most important theoretical contribution consists in developing an account of political reconciliation centered upon two related processes: the resolution of formal questions and the inculcation of sympathetic attitudes between adversaries. On Eisikovits' account, former adversaries can be said to

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<sup>2</sup> All page references are to the original.

be reconciled just when they have resolved all formal disputes between them (e.g., questions regarding rights, borders, and political responsibilities), and they have — broadly though likely not uniformly — developed dispositions to sympathize with each others' actions and circumstances. I take this to be a useful and compelling way to understand political reconciliation. Eisikovits then goes on to apply this account of political reconciliation to both transitional justice and negotiation. In this response, I will focus upon Eisikovits' account of transitional justice, arguing that sympathy should be used beyond the narrow confines of political reconciliation. More specifically, I argue that the institutions and processes of transitional justice ought to mobilize sympathy in order pursue the full social and economic equality of citizens.

### **Transitional Justice**

“Transitional Justice” can be understood in a number of different ways. One dominant understanding takes it to be the sort of justice that obtains during the transition from violent conflict to civil society.<sup>3</sup> More simply, we might describe it as the sort of justice that obtains in a society that is transitioning from a state of war to a state of peace. This is not, however, the only way one might understand transitional justice. Here are some other candidate understandings: transitional justice might obtain in societies making the transition to democracy, it might describe the transition to a society where all members are given equal consideration and respect, or it might describe the kind of justice that regulates the transition of a society characterized by widespread human rights abuses or mass atrocity to a more humane one. None of these understandings, however, seem to precisely capture the import of transitional justice as it has developed in the last few decades. For example, South Africa's Truth and Reconciliation Commission (TRC) is often taken to be a paradigmatic example of transitional justice in action, but the abomination of apartheid, whatever else it might have been, does not seem to be accurately described as a state of war. It might be more apt to characterize apartheid as a state of violent conflict, but even that does not seem to capture what is essential about the situation.<sup>4</sup> Further, attempts to characterize transitional justice in

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<sup>3</sup> See, for example, the introduction to Eisikovits' entry on “Transitional Justice” in the *Stanford Encyclopedia of Philosophy*.

<sup>4</sup> For example, we could imagine a society relevantly like apartheid South Africa where the use of outright violence had been replaced by subtler forms of oppression and domination. In transitioning away from such a society, it seems plausible to think that the society would similarly be in need of institutions and processes of transitional justice.

terms of democracy or human rights seem to unduly restrict the purview of transitional institutions.<sup>5</sup>

What seems to unify all of the above cases is the fact that they all represent a transition from a state of widespread injustice to one of greater justice. If this is correct, then all of the pre-transition states listed above ought to be recognizably unjust. This seems accurate. Insofar as we take states characterized by non-democratic government, human rights abuses, mass atrocity, or war as being fundamentally unjust, then this characterization of transitional justice would seem to capture what is essential about the role and importance of the transitional justice movement: institutions of transitional justice are designed and implemented in order to help a society move beyond a past characterized by widespread injustice toward a more just future. So understood, however, I will argue that there is an important ambiguity in our understanding of transitional justice.

If transitional justice obtains in the transition from a state of widespread injustice to a state of justice, then we are still left with the question of what sorts of justice and injustice are at issue here. For example, are the pre-transitional states all characterized by *criminal* injustice? And further, what sort of justice characterizes the post-transitional states? It seems to me that the first question is relatively unimportant. In cases where calls are made for transitional institutions, the depth and severity of injustice seems sufficient to obviate the need for any subtle or sophisticated conceptual understanding of the kinds of injustice involved. But the question regarding the kind of justice that characterizes post-transitional states seems to me to be of fundamental importance. It is, I take it, the question of when the transition is complete. Until we know what sort of justice transitional justice is a transition toward, we will not know when the utility of transitional institutions has been exhausted. In what follows, I will argue that Eisikovits, in assuming that political reconciliation and transitional justice are coextensive, improperly limits the proper scope of transitional justice.

### **The Limits of Political Reconciliation**

In developing his account of political reconciliation, Eisikovits argues that we should be limited in our aims. He rejects the view that political reconciliation should be geared toward the healing of old wounds, or the promotion of

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<sup>5</sup> For example, it would seem possible for transitional justice to play a role in a society transitioning to a more just, but still non-democratic state. Similarly, transitional institutions could play a role in transitioning a society away from a state of war that did not involve gross human rights violations (this assumes that such a war is possible).

solidarity between enemies. He claims that any such maximal theories of reconciliation are “unquestionably noble and unquestionably over-ambitious” (p.49). Similarly, Eisikovits recognizes that while economic prosperity can be both fostered by sympathy and can itself help to inculcate sympathetic attitudes, it should not be the goal of political reconciliation (pp.43-44). Thus, Eisikovits seems to take a narrow view of the scope of political reconciliation: it does not require that adversaries cease to be adversaries, but only that they cease to be enemies. In the case of political reconciliation, this seems fully apt. After all, enemies that are reconciled need not be friends, and the reconciliation aimed at here is explicitly political, rather than economic or social.

With regard to negotiation and conflict resolution, Eisikovits argues for a similarly limited approach: the resolution of specific problems does not depend upon establishing fraternal ties between former enemies, nor does it require eliminating all injustice. Rather, he argues that political reconciliation ought to be an important goal of negotiators (p.135), and that its achievement can carry a great deal of symbolic weight for parties to the negotiations (p.139). Negotiation can be successful, however, even when it falls short of these aims. As a result, the scope of negotiation is, morally speaking, even narrower than that of political reconciliation. While the settling of formal questions and the inculcation of sympathetic dispositions are necessary conditions for political reconciliation, they are not strictly speaking required for successful negotiation.

In the case of transitional justice, Eisikovits takes a similarly limited approach, arguing that the justification of transitional institutions is tied to their ability to promote political reconciliation (p.131). He rejects broader justifications of transitional institutions (especially TRCs) based in deliberative democracy, social unity, and restorative justice, arguing instead that:

...a South African-style truth commission can be justified because it creates the preconditions for sympathy, which in turn, is constitutive of political reconciliation. More specifically, I shall argue that such bodies are morally defensible because they can generate the detailed information and the kind of political generosity required for the development of sympathetic attitudes. (p.126)

For the purposes of this article, I will concede Eisikovits' claim that the justification of transitional institutions is tied to their ability to promote sympathy, but I dispute his assertion that the point of such sympathy must be limited to the goals of political reconciliation. I do not see why political reconciliation and transitional justice must have the same moral scope. Political reconciliation is necessarily political, whereas transitional justice need not be. Indeed, it seems odd to restrict the scope of transitional institutions to the same goals as political reconciliation. As Eisikovits notes, the moral ambitions of the South African TRC greatly outstrip the purview of political reconciliation

(p.131), and seem to be geared toward the promotion of political and social equality (p.10). It seems plausible to me that political reconciliation and transitional justice are quite different in scope: reconciliation extends only to the realm of politics, whereas transitional justice ought to be much broader, encompassing political, social, and even economic equality.

Stated another way, I take it that the appropriate end points of political reconciliation, negotiation, and transitional justice are quite different from one another. As Eisikovits maintains, two enemies are reconciled when they have settled all formal questions between them, and have developed the proper sort of sympathetic dispositions toward one another. Negotiation, on the other hand, is complete when it provides a solid foundation for a lasting peace. But I take it that institutions and processes of transitional justice ought to aim higher, and ought to continue working beyond the end points of either negotiation or political reconciliation. I will argue in the next section that institutions of transitional justice ought to aim for not only the establishment of a lasting peace, and for the resolution of formal questions and the inculcation of sympathy, but should also attempt to bring about social and economic equality.

Perhaps an example will be helpful here. I think it is reasonable to suppose that Israelis and Palestinians could be politically reconciled without achieving substantive equality. Imagine the case of two future children: a young Israeli boy from Tel Aviv and a young Palestinian girl from Gaza. I claim that they could be politically reconciled even though they might still have substantially different life prospects (e.g., their ability to go to the best universities, their opportunity to open a business, and the likelihood that they will become prime minister). Political reconciliation does not seem to require that sort of equality, but I take it that transitional justice should aim precisely at such lofty goals.

### **Sympathy and Equality**

One of the great strengths of Eisikovits' account of political reconciliation is his recognition of the role and importance of political generosity in reconciling former adversaries. He argues very convincingly that there can be no reconciliation unless individuals are willing to forgo the moral book-keeping of past transgressions, and set aside their vindictive or vengeful motivations. In order for political reconciliation to be successful, individuals must cultivate a set of moral dispositions: they must be willing to put an end to the cycle of violent reprisals, they must shift their focus away from their own pain and the wrongs they have suffered, and they must be ready to offer an enemy more than they can minimally expect (p.75). An essential part of sympathy, according to Eisikovits, is comprised of actions that serve to develop these dispositions. Political generosity requires effort. It requires that individuals work on their own motivations, actively

shaping them to be more generous. The process of becoming sympathetic, according to Eisikovits, is thus tied up with the collection and acceptance of information describing the conditions and experiences of others.

It should be recalled that according to Eisikovits, political reconciliation is not possible through the inculcation of sympathetic dispositions alone. Instead, it also requires the resolution of formal questions between adversaries (p.10). Political reconciliation requires that rights and responsibilities be fairly allotted amongst former enemies. As a result, we need to be wary of mischaracterizing Eisikovits' position as blind to issues of inequality.<sup>6</sup> But the sorts of inequalities that seem to be central to political reconciliation on Eisikovits' account concern formal questions regarding the distribution of political rights. As Eisikovits understands it (p.1), political reconciliation requires answers to questions like: who has a right to what? Answers to such questions thus specify the formal terms of political reconciliation.

It ought to be obvious, however, that persistent injustice can endure even where individuals enjoy formally equal political rights. Informal barriers to employment, public office, and various sorts of opportunity can endure even if, as a matter of political rights, everyone has the same set of permissions and entitlements. The experiences of minority groups in the U.S., Europe, and elsewhere should suffice to demonstrate that formal equality is all too compatible with social inequality and injustice. If we take this to be the case, then why should transitional justice focus exclusively on formal questions? Even if we concede, as I think we should, that political reconciliation is so limited, we might want to extend the scope of transitional justice and its institutions beyond merely formal considerations to substantive issues governing, for example, distributive justice.

As Eisikovits rightly emphasizes, rights and sympathy are mutually supporting, and it is this very synergy that seems to animate much of the literature on transitional justice. As Eisikovits says when discussing political reconciliation:

If sympathy is understood as the ability to identify imaginatively with another, and if this other is endowed with the same rights that I possess, the identification becomes easier. In other words, if having a set of rights constitutes part of my self-understanding, it is easier to identify with someone who possesses the same set of rights, since by the fact of possessing them she becomes more like me. On the other hand, if I begin to sympathize with another, and make an effort to place myself in

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<sup>6</sup> For Eisikovits' discussion of structural inequalities, see his response to what he calls the Marxist critique (p.70), and his discussion of distributive justice (p.114).

her circumstances, this can serve as an independent motivation and encouragement for endowing her with the same rights I have. (p.14)

The above comments are all the more convincing when we move beyond formal political questions, and begin to consider the role of transitional institutions in promoting substantive (rather than merely political) equality. I take it that the intellectual energy and excitement that has developed around the transitional justice literature in the last few decades is due to the potential of transitional institutions to serve as new tools in the service of social justice. Whether or not such institutions can live up to this promise remains to be seen, but their potential to promote justice beyond mere formal rights should not be ignored.

### Conclusion

Much of the promise of transitional institutions stems from the fact that they require communities to balance considerations of justice that pull in disparate directions. In order to succeed, such institutions must make trade-offs between, for example, retribution for past wrongs, and social stability. Transitional justice requires that societies work toward a more just future by making difficult sacrifices (e.g., allowing murderers to go free, so that the community can move on). Despite, and because of the injustices of the past, a way must be found toward a more just future. In this way, transitional institutions like South Africa's TRC require the development of a kind of political generosity that is elsewhere unheard of. When one finds oneself in the midst of such political generosity, when one confronts a society that is willing to focus its attention on the common project of promoting justice, and when one finds a community willing to make such sacrifices in order to promote sympathy, it seems a great and unconscionable waste to lower one's goals from full equality. Once the moral urgency of such situations has dissipated, and the regular political book-keeping settles in, opportunities for concerted political action predictably recede. As a result, we ought to emphasize the moral difference between political reconciliation and transitional justice. Although they both may rely upon the mechanism of sympathy, it seems that the latter has appropriate to it egalitarian aspirations wholly absent from the former.

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