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## Ends and means of transitional justice

Thaddeus Metz 

Department of Philosophy, University of Johannesburg, Johannesburg, South Africa

### ABSTRACT

With her new book, *The Conceptual Foundations of Transitional Justice*, Colleen Murphy has advanced novel, comprehensive and sophisticated philosophical accounts of both what severely conflict-ridden societies should be aiming for and how they should pursue it. Ultimately grounded on a prizing of rational agency, Murphy maintains that these societies, roughly, ought to strive for a stable and legitimate democratic polity committed to not repeating gross historical injustice and should do so in ways that do right by victims. In this article, I argue, *contra* Murphy, that achieving democratic rights to political participation should not be considered an essential aim of transitional justice, and that, in contrast, doing right by victims should be considered an essential aim of it, not merely an appropriate means to achieving other aims. In addition, I highlight an issue downplayed in Murphy's book, namely, the need to make trade-offs amongst the aims of transitional justice, which becomes particularly pressing upon accepting that doing right by victims is one of them.

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## Introduction

There has been some debate about whether transitional justice is truly a form of justice distinct from others, and Colleen Murphy might have settled it in the affirmative. In her new book, *The Conceptual Foundations of Transitional Justice*, Murphy (2017) powerfully argues that the circumstances of severely conflict-ridden societies call for a response different in kind from the usual suspects of distributive, retributive and corrective justice.<sup>1</sup> These forms of justice, she contends, presume a background of a stable and legitimate democratic polity committed to not repeating gross historical injustice, but that is roughly what needs to be established.

Although this argument is clever and interesting, Murphy does not take it to be amongst the two most important contributions of her book (2017, 195–196). Instead, she particularly prizes having drawn a formal distinction between the ends of transitional justice and the just means by which to pursue them, on the one hand, and having provided a substantive characterization of these ends and means, on the other. It is these claims on which I focus in this short critical notice.

According to Murphy, the proper aims of transitional justice fall under the broad heading of 'societal transformation'. Severely conflict-ridden societies need to change

so that, in catchwords, the following conditions from which they suffer are overcome: structural inequalities, normalized wrongdoing, existential uncertainty and unstable authority. Ultimately appealing to the equal, superlative value (the dignity) of rational agency, Murphy contends that one necessary way to transcend structural inequality, and a useful way to resolve the other problems, would be to establish a democratic polity.

In this article, I provide normative reasons to doubt this claim. Although democratic rights to political participation are desirable, it is too strong to maintain that they are an essential aim of transitional justice, so that it cannot have been achieved without them. One way to argue for this position would be to invoke a basic value system that is plausible and differs from Murphy's basically Kantian one, but I do not do that here<sup>2</sup>; instead, I try to bracket fundamental normative disputes in favour of appealing to intuitions, analogies and other arguments that I expect will have broad appeal.

While societal transformation is the end of transitional justice, for Murphy, doing right by victims is the means. More carefully, Murphy maintains that responding fittingly to both victims and perpetrators is not merely the effective way to pursue the end of societal transformation, but also the just way to do so. A second major argument that I make in this article is that such responses should be considered ends in themselves alongside those of societal transformation. I claim that a society that did not hold perpetrators accountable and did not support victims would not merely have failed to pursue societal transformation justly; it would have failed to achieve some of the proper final aims of transitional justice.

A third major point that I make here is the need to consider how to make trade-offs between the aims of transitional justice, an issue that becomes particularly pressing upon accepting that doing right by victims is one of them. In the book Murphy is generally sanguine about the prospect of realizing all the transitionally just ends at the same time as well as doing so in ways that fully satisfy transitionally just means. However, I note respects in which facets of transitional justice are not always compossible, requiring reflection on which ends are most important and how to advance the overall best realization of them.

### Is democracy an essential aim of transitional justice?

As noted in the introduction, one of Murphy's major accomplishments in the book, as she sees it, is the distinction she draws between the ends and means of transitional justice. She intends it to mirror the familiar distinction from just war theory between *jus ad bellum* and *jus in bello*. The former branch of theory is about when and why it is just to initiate a war, i.e. about which ends would be necessary and sufficient to justify such a horrific means. The latter branch is about how to conduct a war in a just manner, i.e. about how to pursue the relevant ends (the 'just cause') in ways that are morally sound. Analogously, Murphy believes that there are aims that severely conflict-ridden societies must achieve as a matter of justice, and that they must do so in certain, just ways. Roughly, societal transformation is the encompassing end of transitional justice, while doing right by victims is the proper means to take in order to realize it.

One might find the analogy *prima facie* weak in some ways. When it comes to war, a key point of specifying aims is to show what plausibly overcomes the moral presumption against the badness of full-scale military conflict, whereas there seems no obviously parallel bad to justify in the case of transitional justice (except perhaps the costs of setting up

a truth and reconciliation commission). However, I do not pursue this line, instead granting Murphy the usefulness of a broad distinction between ends and means and disagreeing with her about their substantive content.

In the following section I argue that doing right by victims is not reducible to the just way to pursue other, separate aims, contending that Murphy's view objectionably excludes it as a relevant final aim of transitional justice. In this section, in contrast, I argue that her view includes one aim too many, namely, that of establishing a democratic polity.

As noted, Murphy characterizes the overarching aim of transitional justice as 'societal transformation', with this, in turn, being specified in terms of establishing various kinds of institutional and social relationships. These include the rule of law, the presence of trust at the political level, and the ability to avoid poverty. They also, for Murphy, essentially include a democratic relationship between a state and its citizens, on which I focus here.

Murphy says that 'democracy is a necessary feature of transitional justice in my view' (2017, 35; for similar statements, see 31, 132, 156–158). By 'democracy' Murphy means at the core that all (adult, competent) persons in a territory have formal equal voting power, and that they have equal opportunities to run for political office and to establish and support political parties (2017, 157). While African political philosophers would plausibly object to the idea that a democratic state requires political parties as standardly conceived,<sup>3</sup> I instead advance reasons for thinking that a conception of transitional justice that requires democracy of any sort is 'too thick'. I myself favour democracy when it comes to distributive justice,<sup>4</sup> and I believe democracy would be a desirable constituent of transitional justice (Metz 2015a, esp. 125–126), but I do not think that it is required for transitional justice.

To begin to make the case, consider that we Western political philosophers, so often trained in the Millian and Kantian liberal tradition, tend to take democracy for granted and treat it as a bedrock norm on which to build other views. That is a reasonable strategy, when restricting ourselves to Euro-American-Australasian contexts, but it can be less so upon taking a more global perspective, one that includes *prima facie* plausible value systems that are different. For example, consider the frequent view that a (if not the) central aim of higher education should be to facilitate democratic citizenship (e.g. Anderson 1999, 2007; Nussbaum 2010). Such a perspective entails that there is much less of a point to sustaining higher education in countries where there is neither democratic citizenship nor the prospect of its realization. However, my intuition is that there would be clear and compelling reasons for a non-democratic state to fund and otherwise support higher education; an appeal to democracy does not capture the global scope of the reasons for pursuing higher education.<sup>5</sup> By analogy, there would be clear and compelling reasons for a non-democratic state to advance something that would be fairly called 'transitional justice' consequent to severe and widespread human rights violations, or what Murphy calls 'normalized wrongdoing', having been undertaken in its territory.

To make this claim more plausible, I invite the reader to imagine two kinds of states that lack democracy but have enacted all the other conditions that Murphy prescribes for periods of structural socio-economic inequality and normalized wrongdoing. Then, we consider whether transitional justice would be possible in them.

For a first example, familiar to Western political philosophers, consider Rawls's (1999) thought experiment of decent hierarchical peoples. Roughly, these are states that

uphold a core minimum of human rights, orient the state toward promoting a conception of the good (perhaps of virtue or piety) that citizens do not find oppressive, and do not seek to impose this conception of the good on other societies. Although decent hierarchical peoples might have a 'consultation hierarchy', in which decision-makers routinely take citizens' preferences into account, citizens do not have the final authority to determine state policy.

For another example, consider what I have in other work called an 'open' society, a state that is illiberal, undemocratic or otherwise *prima facie* suspect from the perspective of a Kantian conception of dignity, but that goes out of its way to provide citizens robust exit options (Metz 2001, 2004). Suppose that, in the present case, a state said to its citizens, 'You will not have the equal right to determine state policy if you live here, but it is your choice of whether to live here or not. If you dissent and choose not to, we will help you relocate'. The exit option that initially comes to mind is emigration, joining a different, extant state (though in principle another exit option could be secession, creating a new state). Imagine that the state provided dissenters the educational, financial and other resources they would need to move to another country. The state might have, for instance, made foreign language instruction part of the public school curriculum, sustained cultural centres in which citizens could learn about other ways of life, provided substantial, medium-term unemployment benefits to those who have changed territories, forged agreements with other countries to ensure that dissenters have attractive (democratic) places to emigrate and so on.

Now, suppose that one of these non-democratic political structures emerged after a time of severe social conflict between a majority and minority ethnic population. Consider an autocratic state that established the rule of law, were firmly committed to preventing systematic wrongdoing against the minority population in the future, strove to compensate and otherwise respond appropriately to victims, worked with other key institutions to integrate the minority into the everyday socio-economic workings of the society, acted in ways that made trust reasonable and forthcoming, enjoyed broad legitimacy amongst the majority and minority populations, and any other condition that might seem relevant to overcoming severe social conflict – apart from equal rights to vote, to hold office and to participate in political parties that would contest power. My intuition is that something fairly called 'transitional justice' would have been achieved in this thought experiment, and hence I conclude that it is not true that 'democracy is a necessary component of transitional justice' (Murphy 2017, 157).

For further consideration in favour of this conclusion, imagine that the precise reason the autocracy had been established was to address the 'circumstances of transitional justice' as Murphy conceives of them. That is, imagine that towards the end of the conflict period some key players read Murphy's book, and came to accept the urgent need to overcome the four serious problems facing their society, *viz.*, of structural inequality, normalized wrongdoing, existential uncertainty and unstable authority. Suppose they further decided that the most likely way to overcome a large majority of these problems would be to concentrate political power in the hands of an educated minority dedicated to pursuing more or less Murphy's conception of transitional justice.

Of course, an elite with the final authority to make political decisions could not correct for political inequality of the sort that Murphy finds characteristic of societies needing

transitional justice. However, it could be best positioned to resolve the other problems that she highlights. Consider them now in more detail than I have so far.

First off, such an elite might particularly be able to overcome existential uncertainty, the ‘deeply unclear empirical trajectory of a political society’ (2017, 66). It could indicate to the public that it is in charge and provide a clear plan for the future, one that would not be vulnerable to the vicissitudes of voters and Parliamentarians as it would be in a democratic polity.

Such an elite might be best able to address the concern that in societies needing transitional justice there are ‘characteristically de facto multiple competing norms of authority present’ (2017, 72). The elite group would become the sole political authority. In addition, its authority would not be arbitrary, but rather would be grounded on its being best qualified to advance a variety of facets of transitional justice in the short to medium term (and perhaps a conception of the good in the long term).

Such an elite would be particularly capable of ending normalized collective and political wrongdoing, if its membership were distinct from those who had been responsible for the wrongdoing in the past (and were not inclined to seek retaliation). Indeed, if it were a minority that had been systematically persecuted, then a democratic order, one with majority rule, might in fact continue to risk it harm by comparison.

Finally, such an elite would seem no worse able to address socio-economic inequalities than an elected legislature. For Murphy these include unequal opportunities to obtain education or a job, unequal access to public facilities such as beaches and restrooms, and grossly unequal allocations of wealth, at least to the point where the worst-off group cannot meet its needs. Again, if it was a minority that had been discriminated against, then, particularly (but not only) in this case, avoiding majority rule might be the most reliable mechanism by which to advance socio-economic egalitarianism.

In reply, Murphy would likely say, as she does in her book, that ‘pervasive structural inequality and normalized collective and political wrongdoing are empirically correlated and mutually reinforcing conditions’ (2017, 61; see also 62–66). More specifically, political inequality might be expected to facilitate systematic human rights violations.

However, while that might be often be true, it is not necessarily true, and there are realistic counterexamples. One is where it has been a majority persecuting a minority; in such a case, majority rule would make human rights violations more likely than would rule by an elite devoted to Murphy’s non-democratic dimensions of transitional justice.

Those of us trained in the West tend to think of dictatorships as run by rapacious, power-hungry parties or the arbitrary, uncaring whims of a monarch. However, the political philosophies justifying autocracy, as in much of the Islamic and Confucian traditions (not to mention Plato and Hobbes), normally defend elite rule as the most reliable way to advance a social good. In this section I have argued that one such good could conceivably be transitional justice.

I reiterate that I believe a non-democratic polity would be distributively unjust; over time, political power ought to be allocated to more than simply those best qualified to advance a publicly desirable end. My point is that, while it would be ideal for democracy to be realized immediately upon the end of severe conflict in a society, it does not appear essential for such a society to manifest *transitional* justice, a form of justice that is a bridge from a society of extreme injustice to one that is better, even if still far from ideal.

## Is responding to victims an essential aim of transitional justice?

In the previous section I argued that Murphy considers one too many final ends to be constitutive of transitional justice, while here I argue that she considers one too few. Recall that she contends that the aims of transitional justice are a matter of societal transformation, roughly, the overcoming of structural inequalities, the establishment of the rule of law, the promulgation of political trust and the like. Doing right by victims is not amongst these conditions. It is not an end of transitional justice, for Murphy, but rather a morally sound means. Whereas Murphy contends that ‘the justice-based claims associated with wrongdoing itself ... must be satisfied if transformation is to be pursued in a just manner’ (2017, 161), my claim in this section is that satisfying them should be considered to be, if not part of societal transformation, then an independent aim that is to be pursued for its own sake and that might warrant trading off other aims to some degree.

Murphy does not speak of ‘doing right by victims’ in the abbreviated way that I have. Her more common phrase is rather ‘responding in an intrinsically fitting and appropriate manner to victims and perpetrators’ (e.g. 2017, 162). With regard to victims, the public should acknowledge that they were mistreated, recognize them as members of the political community entitled to press rights-claims, effect reparations for wrongful harm they suffered, and make it clear that it will protect them and others from further similar mistreatment. When it comes to perpetrators, they should be pushed to repudiate the wrongdoing they did, to make it clear that they will not engage in further wrongdoing of the sort, and to hold themselves accountable for having done it, say, by helping to make reparations. This is a bare bones sketch of Murphy’s rich, empirically informed discussions of how these various ‘backward-looking’ facets of transitional justice have figured into actual policies and how they should.

My concern with Murphy’s account of how to respond to victims and perpetrators in intrinsically fitting ways is not with its content,<sup>6</sup> but rather its status in her theory. For her, it is not an aim of transitional justice, not a good reason for a state to set up a transitional justice scheme, but rather is a means by which to achieve other aims, those of societal transformation, as explored in the previous section. To be sure, Murphy does not reduce such responses to merely causally efficacious factors; they are supposed to be that *plus* to be morally sound, such that the pursuit of transformational aims ‘is conditioned on respect for the moral claims of a being a perpetrator or victim of wrongdoing generates’ (2017, 161). Recall the analogy that Murphy wants with just war theory: responding to victims and perpetrators in the light of facts about the past is deemed analogous to engaging in particular acts of war that are expected to advance a just cause *and* are morally sound insofar as they are discriminating, necessary, proportionate and so on.

In the following section, I will argue that sometimes, perhaps often, societies have to choose between an approach that fully responds in an intrinsically fitting way to historical injustice and one that would maximally advance a transformed society, a conflict that Murphy does not thoroughly address in this book but that has been central to some ‘compromise’ approaches to transitional justice involving amnesties. At this point, I contend that backward-looking reasons for responding to victims and perpetrators in certain ways should not be considered merely a just way to pursue an independent end of societal transformation; it is itself a final end of transitional justice, one that can compete with other final ends.

Here is an argument for thinking that a society that did not do right by victims would have failed to achieve some of the aims of transitional justice. Imagine a society that fully realized societal transformation as Murphy conceives of it. So, picture a society that has addressed structural inequalities (including political ones if you prefer), established the rule of law, fostered political trust and so on, but did so *without* having dealt in an ‘intrinsically fitting or appropriate manner with victims and perpetrators’. Suppose that this particular means had been pretty much entirely bypassed, as happened in Chile and Argentina. Now consider this question: have the aims of transitional justice been fully realized? Should any truth and reconciliation commission that had been in operation now be shut down?

My intuitive answers are ‘no’. There is still an important job to be done, especially as concerns victims. If so, then Murphy is incorrect that doing right by victims is merely a way to pursue societal transformation in a just manner. It is instead a final end of transitional justice, a just cause that would justify some expense, time and other resources from the state to pursue.

Note that such a view also makes the best sense of Murphy’s inclination to acknowledge that certain backward-looking responses to wrongful harm are ‘intrinsically fitting’ or that ‘there are noninstrumental moral reasons to respond to the victims and perpetrators of wrongdoing’ (2017, 163). If it is right in itself to some degree to acknowledge, recognize and compensate victims, as well as to hold perpetrators accountable, then it is natural to think that doing these things are proper aims of transitional justice, are ends to be pursued for their own sake, should be goals of a state that can merit forsaking pursuit of some other goals to some degree. In terms of the just war analogy, the need to make these kinds of responses should be considered a just cause, part of *jus ad bellum*.<sup>7</sup>

### To what extent are the aims of transitional justice compossible?

My impression of Murphy’s book is that she is sanguine about the possibility of various forms of transitional justice aligning neatly. She appears to believe there are no *prima facie* substantial tensions between effecting societal transformation and responding to wrongdoers/perpetrators in intrinsically fitting ways, or between the various aims of societal transformation even as Murphy conceives of them.

In contrast, I think there are often actual tensions amongst these facets of justice. Above I implicitly pointed to instances where pursuing the end of democracy could undermine a state’s ability to achieve other ends, such as reducing socio-economic inequalities, particularly as they pertain to a minority. Instead of addressing tensions within various dimensions of social transformation further, I turn to one between it as a whole and the need to respond to wrongdoers and perpetrators.

Consider, then, the two projects of effecting societal transformation and responding to wrongdoers/perpetrators in intrinsically fitting ways. Set aside, for now, the issue of whether the latter is best understood as an end or a means. So long as responding to wrongdoers/perpetrators is not merely a causally efficacious means, i.e. has some independent moral weight, conflicts will likely arise with the aim of effecting societal transformation.

Think, for example, about South Africa’s struggle to end apartheid. It appears that, in order to effect societal transformation, especially in terms of correcting structural



inequalities and normalized wrongdoing, it was necessary to temper the responses to victims and perpetrators that would have been fitting. According to one commentator citing several historical analyses of South Africa,

The vast majority of accounts of the amnesty negotiations concur that in the absence of agreement on amnesty, negotiations would have faltered, with the likely result that the violent struggle would have continued, and more lives would have been lost. (Lenta 2007, 158–159)

Recall that amnesty meant that perpetrators would be neither punished nor held liable for compensation to victims, if the former fully disclosed their political crimes in respect of the latter. Perpetrators were not required to repudiate their misdeeds, to apologize to victims, to ask for forgiveness, to state they would not seek to oppress people again, etc.

In reply to this sort of concern, Murphy claims that ‘far from balancing two separate moral imperatives, just practices of accountability for past collective and political harms are bound up with the very possibility of relational transformation, which is the overarching aim of transitional justice’ (2017, 192). There are two major reasons Murphy gives in support of this bold claim, both of which I find weak.

One is what Murphy labels the ‘conceptual’ idea that ‘responses to wrongdoing are pursued for the sake of fostering societal transformation, and this *jus ad bellum* analogue requirement will necessarily influence judgments of whether a given response was just’ (2017, 191). This phrasing suggests a logic entailing that, if it is indeed true that amnesty of the sort given in South Africa was necessary for societal transformation, then it was the perfectly just way to respond to wrongdoers and perpetrators.

If I am reading the passage correctly, this move is troubling, since it appears to conflict with Murphy’s earlier claims about certain responses to wrongdoers/perpetrators being ‘intrinsically fitting’, being backed by ‘noninstrumental reasons’, and not being reducible to instrumental efficacy (e.g. 2017, 170). It also appears philosophically implausible, for there was surely something *pro tanto* unjust with perpetrators not being held accountable for their misdeeds beyond merely reporting what they were, even if this injustice was on balance justified by the need to advance the justice of societal transformation. At this point it would probably help my case to invoke the argumentation from the previous section: responding to victims and perpetrators is best understood as a final end of transitional justice, one that has its own logic and moral weight and that can therefore in principle impinge on the pursuit of other final ends.

Beyond this conceptual reason for thinking that effecting transformation and responding to wrongdoing are compatible, Murphy offers an ‘empirical’ one (2017, 191). She contends that scientific ‘research supports the claim that combinations of processes of transitional justice are needed to actually contribute to the rule of law and other aspects of societal transformation’ (2017, 191).

That might often be the case, but it would be very difficult to support the claim that it is always so. Beyond the South African counterexample, there are also those of Chile and Argentina, in which elites were given unconditional amnesties and victims were given far from their due. If, as appears likely, those in the control would not have stepped down and gross human rights violations would have continued without such non-responsiveness to perpetrators and victims, then, again, there is a real-world clash between imperatives of transitional justice.

I do not have an algorithm by which to balance the competing projects of effecting societal transformation and responding to wrongdoers/perpetrators in intrinsically fitting ways, or of advancing democracy and protecting minorities from structural inequalities.<sup>8</sup> My point is that the various facets of transitional justice can pull in different directions in theory, and in fact probably have done so in practice. The prospect of substantial conflicts internal to the project of seeking transitional justice requires acknowledgement at a philosophical level and sophisticated, empirically informed judgment at the political one.

## Conclusion

In this critical notice I have naturally had to focus on certain claims and issues in Colleen Murphy's fine book to the exclusion of others. There are several other fascinating and revealing discussions in it that I have not thoroughly addressed. One is Murphy's argument, mentioned in the introduction, that more familiar sorts of justice, such as retributive justice, are substantially inapplicable in severely conflict-ridden societies. Another is her characterization of the circumstances of transitional justice, that is, the conditions that make transitional justice apt for a society, which I have invoked without question in this article. A third is Murphy's rich account of the variety of sorts of relationships, ranging from the rule of law to political trust, that need to be established for a society to be transformationally just, where I have questioned only her claim that democracy is an essential relationship to be established. A fourth is her thorough, empirically informed characterization of what I often abbreviated as 'doing right by victims'. *The Conceptual Foundations of Transitional Justice* is a thoughtful work and will prompt reflection not merely on the part of seasoned political and legal philosophers, but also jurists, politicians, human rights activists and the like, given its accessible writing style and frequent use of real-world examples.

## Notes

1. Murphy also argues that transitional justice is distinct from restorative justice, although she construes the latter narrowly as requiring forgiveness (2017, 23–24).
2. Although I would normally go reaching for a communal-oriented ethic (on which see Metz and Gaie 2010; Metz 2012), it likewise entails the aptness of a democratic polity. In contrast, Confucianism is an ethic that merits prima facie consideration and probably does not support full-blown equal rights to political participation. See, e.g., Bell and Li (2013).
3. See, e.g., discussion of a 'non-party democratic polity' as an alternative to both one-party dictatorship and multi-party democracy in Wiredu (2000).
4. Though not for familiar Kantian reasons, on which see Metz (2009, 344–348, 2012, 2016, 16–18).
5. A point I first made in Metz (2015b, 192, 200, 204n11).
6. I wonder whether Murphy's account adequately captures the aptness of listening to victims (cf. Metz 2015a, 128–129), though perhaps that is implicit in her recognition criterion.
7. If this is correct, then it is not clear what would play the *jus in bello* analogue in Murphy's theory; the analogy might break down at this point.
8. There is probably a further tension, one internal to the need to respond appropriately to historical injustice, namely, between acquiring full disclosure about wrongdoing and holding the wrongdoers accountable for it (on which see Metz 2015a, esp. 132–133).

## Disclosure Statement

No potential conflict of interest was reported by the author.

## Notes on contributor

**Thaddeus Metz** is currently Distinguished Professor at the University of Johannesburg. Author of more than 200 books, chapters or articles. Some of his other recent work in the area of global ethics includes: 'Recent Philosophies of Social Protection: From Capability to Ubuntu' Global Social Policy; 'What Can the Capabilities Approach Learn from an Ubuntu Ethic?' World Development; 'Replacing Development: An Afro-communal Approach to Global Justice' Philosophical Papers; and 'Values in China as Compared to Africa: Two Conceptions of Harmony' Philosophy East and West.

## ORCID

Thaddeus Metz  <http://orcid.org/0000-0001-9861-2408>

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