

RECTIFICATORY JUSTICE: RIGHTING PAST WRONGS

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Summary

“To rectify” means to “set right.” “Rectificatory justice” identifies criteria to determine whether a society is reckoning appropriately with and righting serious past political wrongs. To fashion and evaluate any particular tool—for example, trials, truth commissions, or financial restitution—as a means to correct past evil in a particular society and to combine one tool with others requires not only knowledge of that society’s historical legacies and current capabilities but also a grasp of morally important goals and standards of assessment. What goals and norms should be used, where should they come from, and how might they be promoted? Eight goals that have emerged from worldwide moral deliberation on transitional justice serve as a useful framework when particular societies deliberate about their objectives and how to achieve them. These goals are truth, public platform for victims, accountability and punishment, rule of law, compensation to victims, institutional reform and long-term development, reconciliation, and public deliberation. The present essay employs these eight goals to identify and clarify the variety of ethical issues that emerge in reckoning with past wrongs, widespread agreements about resolving each issue, leading options for more robust solutions of each issue, and ways to choose among conflicting norms.

The aim of this essay is both to show that there are crucial moral aspects in righting past wrongs and to clarify, criticize, revise, apply, and diffuse eight moral norms. What is proposed is not a recipe or “one-size-fits-all” blueprint but rather a framework for exploration by which societies confronting past atrocities can decide—through cross-cultural and critical dialogue—what is most important to accomplish and what are the morally best ways of proceeding.

1. Introduction

Many nations and some international bodies today are deciding what, if anything, they should do about past violations of internationally recognized human rights. These abuses—which include war crimes, crimes against humanity, genocide, rape, and torture—may have been committed by a government against its own citizens (or those of other countries), by its opponents, or by combatants in a civil or international armed conflict. Some of these societies are making a transition to democracy and some are not. The challenge of “transitional justice,” a term increasingly used, is to address how an incomplete and fledgling democracy such as South Africa, Guatemala, South Korea, the Philippines, Argentina, Chile, or El Salvador should respond (or should have responded) to past evils without undermining its new democratic regime or jeopardizing its prospects for equitable and long-term development. This focus on new democracies has much to recommend it, for it is important that new democratic institutions, where they exist, be protected and consolidated and that reckoning with an evil past not imperil them.

However, nations other than new democracies also have occasion to decide what they “should do about a difficult past,” and their choices are of intrinsic moral significance as well as relevant for new democracies. These countries, none of which is (now) making a transition to democracy, can be roughly divided into three types:

- (i) Post-conflict societies, such as Bosnia, Cambodia, and Rwanda, that aspire to make a democratic transition but are at present taken up with ongoing security issues following ethnic strife and massacre
- (ii) Authoritarian and conflict-ridden societies, such as Yugoslavia, Indonesia, and Peru, in which both an end to civil conflict and the beginning of democratization may depend on negotiated agreements between the government and its opposition with respect to treatment of human rights violators
- (iii) Mature democracies, such as the United States, Germany, Japan, France, and Switzerland, that are reckoning with past evils, for example, slavery, war crimes, collaboration with the Nazi extermination efforts, or failures to prevent human rights abuses in their own or other countries

The fashionable focus on new democracies tends to limit what such societies may learn from other attempts to reckon with past rights abuses and to diminish the moral challenge facing non-democratic and mature democracies as they reckon with an unsavory past.

Even in the context of societies making a democratic transition, the term transitional justice may be misleading. This is because, like the term “accountability,” transitional

justice singles out one morally urgent feature from a complex that has many pressing goals or obligations.

“Rectificatory justice” is arguably a better term than transitional justice in describing a society’s attempt to reckon appropriately with past wrongs. In everyday usage “to rectify” means to “set right,” and our concern here—regardless of whether a society is or is not in transition—is to identify criteria by which to determine whether a society is reckoning appropriately with certain past wrongs and, if possible, correcting them.

Aristotle used the term rectificatory justice in a broader way than is used here. In Book V of *Nicomachean Ethics*, Aristotle distinguished rectificatory justice from distributive justice. Justice in distribution concerns the “distribution of honors or wealth or anything else that can be divided among members of a community who share a political system.” “Rectification in transactions” refers to the setting right of two sorts of transactions among people. First, is the kind of correction related to the unjust results of *mutually voluntary* transactions, for instance, selling and buying. This meaning of rectification has no relevance to “reckoning with past political wrongs,” for in atrocities victims do not consent to have their rights violated.

Second, Aristotle proposed—in a way with profound relevance for serious past political wrongs—that rectification had to do with two kinds of “involuntary” transactions, ones in which the victim does not consent to the “transaction.” Among these wrongs, argues Aristotle, are those in which wrongdoers wrong their victims in “secret” or without the victims’ knowledge (“theft, adultery, poisoning, pimping, slave-deception, murder by treachery, false witness”) and those in which wrongdoers forcibly or coercively wrong the victims (“assault, imprisonment, murder, plunder, mutilation, slander, insult”).

Although Aristotle does not use the language of human rights, many items on Aristotle’s list of involuntary transactions requiring rectificatory justice apply to crimes against humanity and gross human rights violations. The sorts of wrongdoing that societies today reckon with are those in which perpetrators either secretly or coercively violate fundamental human rights by murdering, “disappearing,” torturing, raping, or mutilating persons or, as in Kosovo and elsewhere, expelling them from their homes. Aristotle’s rectificatory justice is also a relevant topic because he insists that rectification restores an antecedent condition: the perpetrator (who unfairly gains) must lose something, for instance, liberty, wealth, or social repute. The victim (who unfairly loses) must gain something, for example, the truth, financial restitution, or proper burial. Hence, in reckoning appropriately with past wrongs a society rectifies both perpetrators and victims. Yet, even the term rectificatory justice does not capture the plurality of morally urgent goals that should guide a society that deals with a dreadful past. For one thing, Aristotle’s concept does not include the possibility that a government might be the wrongdoer and that its citizens might be the victims.

2. Means and Ends

Societies and international bodies have employed many means in reckoning with human rights abuses that a previous regime or its opponents have committed. Many discussions assume that there are only two possible responses: trials and punishment or forgetting the past. For example, upon coming out of hiding and surrendering to the Cambodian

government in late December 1998, Khieu Samphan, a former top leader of the Khmer Rouge, urged Cambodians to “let bygones be bygones.” During its control of Cambodia from 1975 to 1979, the Khmer Rouge killed an estimated 1.5 to 1.7 million people, including most of the educated class, and to have destroyed much of Cambodian culture. Although he was to retract his statements several days later, Cambodian Prime Minister Hun Sen initially agreed with Khieu Samphan and remarked that Khieu Samphan and another high-placed defector, Nuon Chea, should be welcomed back “with bouquets of flowers, not with prisons and handcuffs” and that “we should dig a hole and bury the past and look ahead to the twenty-first century with a clean slate.”

When trials are judged impractical and forgetting undesirable, some have advocated truth commissions (and some 20 countries have employed them) as a third way. However, in addition to these three tools, there exist a variety of other measures, such as international (*ad hoc* or permanent) criminal tribunals; social shaming and banning of perpetrators from public office (“lustration”); public access to police records; public apology or memorials to victims; reburial of victims; compensation to victims or their families; literary and historical writing; and blanket or individualized amnesty (legal immunity from prosecution).

To decide among the diverse tools, as well as to fashion, combine, and sequence them, a society, sometimes in cooperation with international institutions, ideally should (1) consider what lessons it might learn from other societies, (2) examine its own capabilities and limitations, and (3) set clear objectives for its efforts. The first task is best accomplished by those who will be key actors in their nation’s attempts to reckon with an evil past. The second responsibility most obviously falls on historians, social scientists, and legal scholars who are adept at identifying a society’s distinctive historical legacies, institutional strengths and weaknesses, and political constraints. The last task, that of identifying goals and standards of evaluation, must be taken up by philosophers and applied ethicists, but not by these alone. Citizens, political leaders, policy analysts, and social scientists also have a responsibility to make moral judgments, engage in ethical analysis, and set forth ethically based recommendations.

Although philosophers and other ethicists have not entirely ignored the topic of reckoning with past wrongs, legal scholars, social scientists, policy analysts, and activists have made the most helpful contributions. Understandably, much of the work on transitional justice has been of an empirical and strategic nature. Fledgling democracies need effective institutions and strategies for addressing previous human rights violations; establishing such arrangements and policies requires a grasp of what works and why. Legal and human rights scholars such as M. Minow, A. Neier, C. Nino, S.R. Ratner, J.S. Abrams, G. Robertson, and R. Teitel have focused on what national and international law permits and requires with respect to prosecuting gross human rights violations. These scholars have also reported and assessed the progress of the Bosnian and Rwandan international criminal tribunals, crafted the terms of an agreement on a permanent international criminal tribunal, and argued for the implementation of that agreement. Investigative reporters have described the successes and failures of particular countries and the international community in reckoning with past human rights abuses. Principal actors and advisers such as D. Tutu and C. Villa-Vicencio have written about their experiences and assessed their achievements.

Historians and social scientists, for instance P. Hayner, have scrutinized the particular approaches of numerous countries, and the results of their choices.

However, pressing ethical questions remain. How should “success” with respect to reckoning with past wrongs be conceived? Are the ends that societies seek to achieve and the means they adopt to achieve them consistent and morally justified? Questions such as these should not be overlooked or overshadowed by legal or strategic considerations.

To be sure, moral concerns are often implicit in the existing work on transitional justice, and moral norms of various kinds underlie the institutions and policies that societies already have established to reckon with an evil past. Indeed, one task of ethical analysis must be to understand what precisely constitute human rights abuses. Michael Walzer’s attempt to fashion a new moral theory (with historical illustrations) of just and unjust wars between nations can be adapted to forge a normative framework to assess what responses are ethically permissible and obligatory as a society reckons with human rights violations.

When political actors or scholars pose ethical questions with respect to addressing past wrongs, they usually do so in relation to only one goal, such as penal justice, truth, or reconciliation, or one tool, such as trials, truth commissions, or amnesties. However, the full range of conceptual and moral issues underlying the many ends and means of transitional justice has not received the sustained analysis it deserves (see *Consequentialism*).

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Biographical Sketch

David A. Crocker is senior research scholar at the Institute for Philosophy and Public Policy and the Maryland School of Public Affairs (MSPA) at the University of Maryland. He has a Master of Divinity, an M.A., and a Ph.D. from Yale University. Dr. Crocker specializes in applied ethics and sociopolitical philosophy, international development ethics, transitional justice, and ethics of consumption. His courses at MSPA include moral dimensions of public policy; development and foreign aid; ethics and U.S. foreign policy; and ethics and politics of human rights. While professor of philosophy at Colorado State University from 1966 until 1993, Crocker wrote *Praxis and Democratic Socialism: The Critical Social Theory of Markovic and Stojanovic* (1983). He has been a visiting professor at the University of Munich and twice a Fulbright scholar at the University of Costa Rica. Since coming to the University of Maryland in 1993, Dr Crocker has co-edited (with Toby Linden) *Ethics of Consumption: The Good Life, Justice, and Global Stewardship*, (1998). His most recent book, *Human Flourishing and International Development: The New Ethic of Human Capabilities* (1998), analyzes and evaluates Amartya Sen’s capabilities approach to development. Dr. Crocker has completed a manuscript, *Well-being, Capability, and Development: Essays in International Development Ethics*. Recently, he has published several articles on transitional justice and is currently working on a book that defends and applies a normative framework for reckoning with past political wrongs to Argentina, Cambodia, Guatemala, South Africa, and Yugoslavia. Dr. Crocker is also doing research for a volume that assesses deliberative democracy and its relevance for international development and transitional justice. He is a founder and current president of the International Development Ethics Association.