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Book Review

**\*363** TRANSITIONAL JUSTICE.

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Transitional justice has been characterized as “the choices made and the quality of justice rendered when new leaders replace authoritarian predecessors presumed responsible for criminal acts.” [FN1] In the aftermath of the Cold War and the advent of the “third wave” of democratization, this has been an increasingly visible and pressing issue for jurists, legal reformers, human rights activists and diplomats. A central focus of transitional justice literature, largely dominated by legal scholars, has been on the conditions and legitimacy of prosecution versus amnesty for human rights violations committed under a prior regime. Diane Orentlicher argues that international law must be read to entail a “duty to prosecute” gross violations of human rights, albeit selectively, adding that such a duty will also facilitate a smoother political transition and the adherence to rule of law, by removing questions of justice from the arena of local power struggles and symbolically interrupting cycles of “impunity.” [FN2] Proponents of this basic set of arguments have mobilized support for the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda, as well as the statute for an International Criminal Court, which was signed on New Year's Eve by President Clinton, though it may never be ratified by the United States.

Debates on transitional justice have also dealt with the emergence of truth commissions as an alternative way to reckon with past crimes and the broad problem of remedy through administrative purges, compensation, reparations, or apologies. “Truth Commission” is a generic term for official bodies set up to investigate and report on a pattern of past human rights abuses. Since 1974, approximately 21 official truth commissions have been established worldwide and truth commissions are currently under consideration for Indonesia, East Timor, Sierra Leone and Cambodia. [FN3] Scholarly debate on transitional justice choices centers on tensions between legal norms and political compromises thought necessary to advance the transitional process, such as negotiations with suspected war criminals to end a conflict, or the bargains made by a new elite to safeguard against threats from the military of an outgoing regime. These tensions are often characterized as two competing values and approaches to transition: **\*364** peace versus justice, truth versus justice, or idealism versus realism.

Ruti Teitel's **Transitional Justice** offers a fascinating and pathbreaking approach to **transitional justice** scholarship. She begins by rejecting the premise that transitional justice implies a universal norm. She proposes that the role of justice in the context of political transition is extraordinary and constructivist: “Law is caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective, between the individual and the collective.” In order to understand transitional justice, she argues, it is necessary to appreciate the nature of a period of interregnum and turn away from standards derived from stable or even foundational political conditions. Teitel explores the role of law in periods of political change by looking empirically at the various forms of law in the transitional context. *Transitional Justice* is structured thematically into chapters that each deal with a specific form of transitional justice, including criminal justice, reparations, truth commissions, lustration,

and transitional constitutionalism. Teitel concludes by outlining a new paradigm for transitional jurisprudence, one that acknowledges conceptions of justice as partial, contextual and multiple, and based on the premise that conceptions of justice emerge in a language that is responsive to prior injustice. In lieu of a single ideal standard for assessing **transitional justice** efforts, **Teitel** proposes a continuum along which transitional options might be arrayed, ranging from those that are most critical of the prior regime, to those that aim at preserving the pre-existing legal order.

Teitel's major contribution is to treat the transitional period as a distinct arena for study, investigating precisely what it is that defines the relationship between law and politics in a period characterized by both institutional and ideological flux. Theories of transitional justice have tended to share a common weakness in that they often presuppose foundations that are unavailable in the context of political transition. For example, advocacy for transitional prosecutions often relies on premises that are drawn from the manner in which prosecution functions in a stable regime. Similarly, critics of prosecution who champion "reconciliation," imply with this term, a pre-existing community, which requires "healing" in order to progress toward the rule of law. In essence, such theories import sociological premises associated with established communities or regimes into the transitional context in order to provide support for normative claims associated with policy choices. The uniqueness of the transitional context is often summarized in writings on transitional justice with references to instability. By rejecting norms and premises developed in relation to established regimes, Transitional Justice points the way to scholarship that will transcend the dichotomous positioning of justice versus peace, and begin to develop premises appropriate to the unique nature of a period of political transition.

A second major contribution of Transitional Justice is that it systematically pulls together a vast amount of empirical material on **\*365** transitional legal approaches with an impressive range of academic theory, from international relations, comparative political science, comparative law, and political theory. Teitel examines "third wave" transitions in Eastern Europe, Latin America and Africa, historical antecedents in the Post-World War II era, as well as the American Reconstruction period. The book, which synthesizes hundreds of documents, including truth commission reports, legal opinions, constitutions and legislative acts, is thus a remarkable accomplishment and invaluable resource for scholars of transitional justice, as well as guide for those less familiar with the territory.

Finally, Teitel provides an unusually rich and creative approach to drawing out the pressing questions raised by efforts to do justice in the context of political transition after mass, systematic violence. For example, in a passage entitled, "Of River Crossings and Sea Changes, of Exile and Return," Teitel discusses the themes of truth and reconciliation with reference to the Biblical story of Jacob and Esau, as well as Shakespeare's *The Tempest*. In her discussion of lustration and epuration, Teitel's analysis is enriched with a discussion of the destruction of Sodom and Gomorrah. Throughout the book, Teitel transforms familiar territory with original and often surprising insights.

Teitel provides substantial evidence for her assertion that legal forms are contingent on prior injustice and ongoing political and institutional constraints. She goes further with her suggestion that "what is fair and just" is determined from the transitional position as well. This raises an interesting question for further study. Do these transitional legal forms actually correspond to a sense of justice? Does this sense of justice vary between successor elites and other segments of the population? Does the conception of justice really change, or is it rather a matter of prioritizing from among different types of justice (retributive, distributive, reparative, etc.)? How can we distinguish between conceptions of what is fair and just and appeals to conceptions of justice constructed to legitimate political compromises made to establish a successor regime?

Teitel asserts that there is "no single correct response" to the crimes of a prior regime, because a state's response is contingent upon a number of factors, including the legacy of injustice, legal culture, the dynamics of the transition and political circumstance. This presents an important problem that deserves further attention. Teitel demonstrates that it makes little sense to suppose a single approach, such as the "duty to prosecute" could be an effective, or even

a just response to diverse legacies of injustice. Yet this should not mean that we abandon the search for critical analytic and normative standards for assessing transitional justice policies. Thus, further research will be necessary to develop critical tools with which to assess transitional justice options. Researchers are already beginning to look more closely at the influence of different legal cultures and legacies. It will also be necessary to study different outcomes in the years and decades following the transitional period. A first step in doing so will be to clarify relevant transitional goals. For example, some scholars<sup>366</sup> evaluate transitional justice in relation to democratization, whereas others focus specifically on “rule of law.” Teitel uses the term, “liberalizing” to refer to the direction of **transitional justice**. Critical analysis of transitional justice policies will require that the broad terms of reference be re-assessed and disaggregated. A second major step in developing critical standards of assessment will be to look at how much really changes in a country when its laws change.

Finally, Teitel's attention to the nuances of legal culture and legacy should generate pertinent and timely questions about the dynamic between international norms and institutions and national efforts to deal with past crimes. What do Teitel's conclusions imply for the concerted effort among many international actors to develop a uniform approach to **transitional justice**? What is the role of transitional constitutionalism if, as with the Dayton Accords of 1995, international actors craft a constitution that contains principles that are foreign to local legal officials? A recent study of Bosnian judges highlights their lack of familiarity with the common law system. [FN4] What does this imply for the role of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in contributing to the rule of law? By moving beyond established theories on the duty to prosecute and the assumptions of realpolitik, Teitel provides an excellent foundation for these and other avenues of research. Transitional Justice belongs in every good law and research library. It is a sophisticated, nuanced, and somewhat difficult book that will be more readily accessible to professors and graduate students than practitioners. It should, however, be considered essential reading for all scholars as well as activists working in the field of transitional justice.

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[FN2]. Siegel, “Transitional Justice: a Decade of Debate and Experience,” 20 *Human Rights Quarterly* 2 (1998), at 433.

[FN3]. “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,” 100 *Yale L. J.* 2539 (1991).

[FN4]. Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* 14, 239 (2001).

[FN5]. The Human Rights Center, The International Human Rights Law Clinic, and the Centre for Human Rights, University of Sarajevo, “An [Interview Study of Bosnian Judges and Prosecutors](#),” 18 *Berkeley J. Int'l L.* 102 (2000).

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