



Centro  
di Ricerca e  
Documentazione  
Luigi Einaudi

Beatrice Magni

# TRANSITIONAL (IN)JUSTICE: NORMATIVE REQUIREMENTS, POLITICAL COMMITMENTS

*working paper*  
**N.6 / 2018**

## Gli Annali 2018

A cura di Matteo Jessoula, Beatrice Magni,  
Nicola Riva, Maurizio Ferrera

ISBN 978-88-94960-00-6



Laboratorio di Politica Comparata  
e Filosofia Pubblica

BEATRICE MAGNI

**TRANSITIONAL (IN)JUSTICE: NORMATIVE  
REQUIREMENTS, POLITICAL COMMITMENTS**

Centro Einaudi • Laboratorio di Politica Comparata e Filosofia Pubblica  
*With the support of Compagnia di San Paolo*

Working Paper-LPF n. 6 • 2018

ISBN 978-88-94960-00-6 • Annali 2018

© 2018 B. Magni and LPF • Centro Einaudi

**Beatrice Magni** is Assistant Professor at the Department of Social and Political Sciences, University of Milan. Her research interests are in political theory, theories of justice and injustice, political realism and compromise. Among her publications: *Hannah Arendt et la condition politique. Le réel dans la pensée philosophique du XX siècle*, Paris, L'Harmattan, 2018; “New Wine in Old Bottles: The Kind of Political Philosophy We Need”, *Phenomenology and Mind*, 12, 2017, *Machiavelli. Sette saggi di teoria politica*, Mimesis, Milano, 2017, Magni B. (a cura di), *Solidarietà. Storia di un'idea*, Milano, Giuffrè (2012), *Conflitto e libertà. Saggio su Machiavelli*, Pisa, ETS (2012).

e-mail: [beatrice.magni@unimi.it](mailto:beatrice.magni@unimi.it)

The **Comparative Politics and Public Philosophy Lab (LPF)** at Centro Einaudi is directed by Maurizio Ferrera and funded by Compagnia di San Paolo. It includes the **Welfare Laboratory (WeL)** and the **Bioethics Lab (La.B)**. LPF analyses the transformation of the political sphere in contemporary democracies with a focus on the relationships between policy choices and the value frameworks within which such choices are, or ought to be, carried out. The reference here is to the “reasonable pluralism” singled out by John Rawls as an essential feature of political liberalism.

The underlying idea is that implementing forms of “civilized” politics is desirable as well as feasible. And, as far as the Italian political system is concerned, it is also urgently needed, since the system appears to be poorly prepared to deal with the challenges emerging in many policy areas: from welfare state reform to the governance of immigration, from the selection criteria in education and in public administration to the regulation of ethically sensitive issues.

In order to achieve this end, LPF adopts both a descriptive-explanatory approach and a normative one, aiming at a fruitful and meaningful combination of the two perspectives. Wishing to foster an informed public debate, it promotes theoretical research, empirical case studies, policy analyses and policy proposals.

LPF • Centro Einaudi  
Via Ponza 4 • 10121 Torino  
phone +39 011 5591611  
[segreteria@centroeinaudi.it](mailto:segreteria@centroeinaudi.it) • <http://www.centroeinaudi.it>

## TABLE OF CONTENTS

TRANSITIONAL (IN)JUSTICE. NORMATIVE REQUIREMENTS, POLITICAL COMMITMENTS	4
1. Introduction	5
2. A Sense of Injustice	7
3. Injustice and Disrespect	8
4. Transitional Justice and Its Improvements	11
5. <i>Ad hoc</i> Justice?	14
6. Towards a Theory of Injustice	15
7. “How Far Back”? Democracy, Responsibility, and Injustice	17
8. Liberalism of Injustice. A Normative Proposal	20
References	22

## KEYWORDS

justice; injustice; truth; disrespect; responsibility; decency.

## ABSTRACT

**TRANSITIONAL (IN)JUSTICE  
NORMATIVE REQUIREMENTS, POLITICAL COMMITMENTS**

In the difficult balance between justice and truth and in order to the ends of trans-national justice, the aim of the paper is to formulate a model of transitional justice that gives account of possible tensions and equilibriums between truth and justice, between retribution and restoration, memory and oblivion, past and present. It needs to be clarified what happens to truth when it is publicly recognised, when it is included in the cognitive public scene, and how this recognition affects politics. The comparison between a retributive paradigm of justice, that prescribes to punish those who are responsible for the violation, and a restorative one, focused on therapeutic and reparative dynamics aimed at reconciliation, leaves open theoretical and normative questions involving the meaning of retributive justice and its possible, or desirable, negotiability. From a more practical perspective too, attempts at balancing normative requirements and political commitments are unavoidable and dilemmatic.

## TRANSITIONAL (IN)JUSTICE. NORMATIVE REQUIREMENTS, POLITICAL COMMITMENTS

BEATRICE MAGNI

### 1. INTRODUCTION

To consider the relation between democracy and justice requires to move on different levels of enquiry and to assume different perspectives of research. The basic question the paper aims at answering is the following: is it possible to consider democracy as a fruitful notion in political theories and political practices? Such a question will be addressed both in normative terms and by referring to practices appealing to democracy and to justice out of political or juridical intents.

One of the most important issues of political philosophy turn on the controversial question of what justice requires. The Gallie's concept/conception distinction is extremely useful as a tool for clarifying the nature of disagreements about what the justice *is* and what it *should be* (Gallie 1956)<sup>1</sup>: perhaps the most famous use of the concept/conception distinction is found in Rawls's theory of justice, where Rawls appeals to the distinction between the abstract, ideal concept of justice and particular conceptions of justice, namely the particular instantiations, realizations or different and potentially conflicting articulations of the concept. His theory, *justice as fairness*, is defended as the best conception of justice, where «a theory, however elegant and economical, must be rejected or revised if it is untrue; likewise, laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust» (Rawls 1971, p. 3).

Here, and to try to proceed accordingly with the aims of my essay, it seems to be plausible to sustain that concern for justice and some concept of *injustice* are powerfully and inseparably linked.

Injustice, on the one hand, is not an outstanding, a “residual” value: if one looks at our many injustices, as Shklar suggests (Shklar 1990), what becomes

<sup>1</sup> In his article, Gallie – in short - remember the distinction between a concept (the shared or sharable core of a notion) and its conceptions (different and potentially conflicting articulations of the concept).

clear is how ordinary and pervasive they are. They spring from a violation of some justice's rule or, to use a more rawlsian wording, of a legitimate justice's expectation (Rawls 1971, p. 311). When using the term "injustice", on the other hand, we should distinguish between plural and conflictual conceptions and experiences of injustice – regarding in this case as a fact-sensitive concept –, and a little common sense is sufficient to perceive the injustice as that feeling that accompanies the violation of a legitimate expectation of recognition or respect. So what did you feel as you witnessed the injustice? How did you go about considering whether to intervene to stop the injustice while it was happening? If you put yourself in the victim's place, how would you want the witnesses or bystander to have responded? In what follows, I shall focus and briefly reflects upon some issues about human nature and society that are to be acknowledged when one inquiries into questions of injustice<sup>2</sup>. However, despite the irreducibly political dimension of injustice, some philosophical questions need to be clarified. Political philosophy cannot simply focus on justice and assume that injustice is merely its obverse image. Rather, acts of injustice require independent and analytical study of their own. Thus I would suggest to examine injustice both in theoretical accounts of the tensions that arise between (mal)distribution and (mis)recognition, and to investigate these issues in a contemporary political argument, namely in the ideals and practices of contemporary democracies.

On the one hand, injustice is often described as misfortune, and the line between injustice and misfortune is, in fact, vague and political. Disasters such as infant mortality and famine that were once misfortunes are now injustices because the advance of technology means that where they occur political corruption must be to blame. But other disasters seem less easy to categorize: for example, an earthquake that wreaks its greatest havoc on the disadvantaged because they are forced to live in more poorly constructed housing than the rich is surely part injustice; but it is also a misfortune that the earthquake happened at all. Shklar reminds us that misfortunes are still possible and warns us that our technological advances should not either lull us into a false sense of security or lead us always to look for scapegoats when disasters occur. Still, to regard acts of injustice as simply misfortunes is far worse a mistake and our greater obligation, then, is continually to speak out against what we *feel* are the injustices committed against us whether we are ultimately supported in that feeling by our society or not.

On the other hand, injustice could be considered as a strong – and partial – moral feeling: at the level of empathical relationships, there could be dangers linked to the intensity and passionate, relatively unreflective character of injustice; at times, injustice seem to exclude a commitment to reasoned justification

<sup>2</sup> The topic of injustice will be discussed in the framework of non-ideal theory, i.e. a theory which takes the current situation and the constraints of political feasibility into account.

of conduct and thus to encourage irresponsible action. The same ambiguities seem to surround injustice when it appears in public space. Our attachments – to individuals and to groups – all too often reveal themselves to be mutually incompatible. That is why an aggrieved *sense of injustice* has an important role to play in political life: as social and political conditions change, new injustices are bound to arise, and the political order can relieve them only if we are willing to lend a sympathetic ear to those who are aggrieved. Injustice, then, should become one of the touchstones of political philosophy.

## 2. A SENSE OF INJUSTICE

A «sense of injustice» could be taken to be a propensity to feel resentment and indignation at injustices. In order to get a clearer picture of the sense of justice, therefore, it is arguable to look at what is involved in the sense of justice, and to take as a starting-point Rawls's account. Rawls distinguishes between resentment as a response to wrongs done to oneself, and indignation as a response to wrongs done to others (Rawls 1971, p. 474). His account takes the form of a moral construction in which he distinguishes between three stages in the development of an individual's sense of justice. These are:

- the morality of authority: the child comes to love and trust her parents in response to their love for her. That love and trust involves a disposition to act in accordance with the injunctions of her parents, and to feel guilt at her failures to do so (Rawls 1971, p. 462-467);
- the morality of association: as the growing individual comes to participate in various forms of association and cooperation, beginning with the family and extending outwards, and as she finds that she can depend on her fellow-participants, she develops feelings of friendship and trust towards them. As these ties are established, she tends to experience feelings of (association) guilt when she fails to do her part, and feelings of resentment and indignation when others fail to do so (Rawls 1971, p. 467-472).;
- the morality of principles: at this higher stage, the recognition that we and those we care for are the beneficiaries of an established set of just institutions engenders an attachment to the principles of justice themselves. The individual who has developed this attachment will tend to honour her duties and obligations to others even when she is not bound to them by ties of particular fellow-feeling, and will feel guilt when she fails to do so (Rawls 1971, p. 472-479).

In exploring the plurality of circumstances of resentment and indignation it seems therefore to be that individuals should acquire the competences to identify jointly one standard for moral feelings and some critical explanation of



that. Otherwise, the sense of justice calls on some interpretation of a sense of injustice. In rawlsian view therefore the desire to reduce or eliminate inequalities is properly motivated by a *sense of injustice*: resentment of inequalities is akin to the resentment of other states of affairs which are recognised quite properly to arouse a sense of injustice, and this sense of injustice can in turn be located within a wider family of recognisable and acceptable moral attitudes. To understand why the resentment is a resentment of injustice, what is vital is the context of a scheme of cooperation, involving relations of mutual trust and reliance. This violation of trust is the breaking of an agreement, a promise or a contract, and that is the proper object of resentment. Those who themselves make claims of justice are participants in this understanding, and that is why they are properly resented by others if they fail to meet the requirements of justice<sup>3</sup>.

### 3. INJUSTICE AND DISRESPECT

If a sense of injustice is connected with some experiences of denial or absence of inclusion or equal treatment, it seems possible to sustain that concerns for justice and respect for personhood are powerfully and inseparably linked.

It is always Rawls to provide a rich account of self-respect and respect as a feature of reciprocity. He suggests that self-respect has two aspects: first, it involves a sense that I consider myself and my life plans as worthy and having value; second, that I have confidence in my ability to achieve my plans. Social conditions that make it more likely for me to be able to enjoy and maintain my self-respect, according to Rawls, involve having ‘at least one community of shared interests’ to which I can belong that will validate my sense of my own value and my plans’ value, as well as make it more likely that I can achieve these plans, presumably through moral and other kinds of support (Rawls 1971, p. 407). Rawls famously argues that self-respect is the most important primary good. Given this premise, it is important that he explain what bearing his two principles of justice have on individuals’ self-respect. Rawls suggests

<sup>3</sup> Moreover, the resentment of injustice has a place within a larger family of recognisable and acceptable moral responses and attitudes. It is a response to being treated just as a means. We can distinguish a resentment at inequalities from resentment at the breaking of a promise or an agreement, and from resentment at being the victim of force or fraud, but we can also recognise affinities between these cases, and by doing so we can begin to make sense of the idea of being used as a thing in contrast to being respected as a person. Since kantian perspective, the more one treats another just as a means to be used, the more one’s treatment of the other is wrong and is properly resented. There is of course no mathematical formula for measuring the degrees to which people are used as means, but common sense indicates that we can make rough comparison and contrasts.

that the two principles of justice are institutional ways for citizens to express their mutual respect. The difference principle is meant to both symbolize and uphold citizens' mutual respect and self-respect. 'By arranging inequalities for reciprocal advantage and by abstaining from the exploitation of the contingencies of nature and social circumstance within a framework of equal liberties, person express their respect for one another in the very constitution of their society', he writes (Rawls 1971, p. 429). Rawls also asserts that the first principle of justice – the guarantee of equal basic rights and liberties – is a basis for self-respect: 'the effect of self-government where equal political rights have their fair value is to enhance the self-esteem and the sense of political competence of the average citizen' (Rawls 1971, p. 440). Rawls's work should be applauded for attempting to provide a theory of self-respect formation, and for his recognition that our self-respect crucially depends on others' view of us. We can legitimately demand freedom from harm and from injustice, and by the same logic we are not free to inflict harm or to treat others unjustly: respect for other people would preclude everyone from trying to treat anyone else like Pavlov's dog.

The greatest single instance of injustice is so found in the *dis-respect*. Disrespect produces feelings of injustice because it creates a sort of social and political imbalance: an act of disrespect is unjust because it deprives people of something to which they are entitled and because it subjects people to something they do not deserve (Miller 1993). Despite their diversity, all instances of disrespect (discrimination, arbitrary treatments, racism, unwarranted punishments, intolerance among religious groups and so on) may have something in common, like a failure to adequately recognize autonomous, independent, sensitive, morally significant individuals.

On this point, namely to define what does and does not count as disrespectful, Nancy Fraser's (Fraser 2001) analysis of the obstacles to political and social justice represents an advance at a theoretical level. Fraser argues that social justice movements in modern societies protest two distinct kinds of injustice: maldistribution and misrecognition. Some groups, she writes, mainly suffer the first kind, distributive injustice. Different specific remedies might be appropriate here, ranging from redistribution to increasing the consumption share of the poor to the reorganization of the division of labour. In general, the goal of the distributive paradigm of justice is a more fair distribution of resources and goods. For the second type of injustice, injustice as misrecognition, the remedy must be recognition, not redistribution. In general, the goal of the recognition paradigm of justice is a 'difference-friendly' world, where assimilation to majority or dominant cultural norms is no longer the price of equal respect' (Fraser 1996). In summary, Fraser has reframed the notion of respect through her dualist framework of justice, in which the injustices of maldistribution and misrecognition are independent, irreducible and equally primary forms of injustice. Fraser's issues have been more fully explored in her dialogue with Axel Honneth (Fraser-Honneth 2003), where Fraser continues to defend a perspectival dualism, capable of integrating the insights derived from a theory of distribu-

tion and a theory of recognition, each necessary but incapable of reduction to the other, while Honneth defend a normative theory of mutual recognition, according to which the integrity of human subjects, vulnerable as they are to injury through insult and disrespect, depends on their receiving approval and respect from others: “the essence of everything which, in moral theory, is known as ‘human dignity’ can only be ascertained indirectly by determining the forms of personal degradation and injury, and it was only such negative experiences of disrespect and insult that turned the normative goal of securing human dignity into a driving force in history” (Honneth 1992, p. 187). Put schematically, there are in Honneth’s framework three primary dimensions of intersubjective relations of recognition: love, rights, and solidarity. Recognition claims related to love or care are localized primarily in the spheres of intimacy, the family, and friendship. Recognition claims related to the sphere of rights are expressed primarily in terms of universal moral and legal principles and citizenship rights in the modern democratic state. Claims to esteem are based upon a shared community of value and social solidarity that accords social honour and dignity to the contributions of each to the welfare of all. Along each of these axes of recognition, there are corresponding forms of disrespect, such as physical and emotional abuse, exclusion and denial of basic rights, and dismissal or denigration of socially useful traits and abilities. For Honneth, these categorical distinctions provide the basic framework for the elucidation and evaluation of empirically observable struggles for recognition and social justice, past and present. These three patterns of recognition – love, rights, and solidarity – therefore set down the formal requirements for conditions of interaction within which human beings can feel assured of their ‘dignity’ or ‘integrity’.

A hallmark of Fraser’s and Honneth’s version of disrespect is to insist that the dimension of injustice is irreducibly political.

On this wake, Margalit’s decent society (Margalit 1996) offers a sustained, innovative and well-informed discussion of this issue. A decent society, in Margalit’s view, is a society whose institutions do not humiliate its members. He presents the logical, moral and cognitive reasons for choosing a sort of negative politics: it is not justice that brings us to politics but injustice – the avoidance of evil rather than the pursuit of the good. In contrast to the elusiveness of the abstract notion of human dignity, the phenomenon of humiliation is tangible and instantly recognizable; so too is the notion of evil associated with it. Heading off evils and not the attempt to realize an ideal condition of justice should be the central focus of political thought and action. If we start from dealing with evils rather than striving for an ideal good—as Margalit propose – it is clear that in a decent society many types of injustice would be corrected; it is no less clear that remedying injustice is not the same as moving toward a condition of perfect justice. But his point is not that theories of ideal justice (such as those of John Rawls, for example) should be replaced by a philosophy that focuses simply on making the world less unjust—a position set out in Sen (2009). Margalit’s argument (Margalit 2010) is different and more radical: the

struggle for a decent society requires compromise, including the willingness to accept a less just world where this is necessary in order to stave off greater and disrespectful evil. To characterize an institution as not unjust does not amount to characterizing it as just: an institution might be in an ‘interim zone’ as it were, where it will be considered not-unjust and yet it will not quite qualify as just either. There is in Margalit’s view a sort of “minimum floor” injustice’s principle that simply attempts to guarantee a decent set of opportunities that would allow individuals to function decently wherever they are. But, whilst it may be true that the minimum floor principle takes us some way in the direction of avoiding the most pervasive inequalities, it is important to be clear that it does not remove all of them. In any case, the *decent* set of opportunities is surely the primary goal rather than the *equal* set. It is a goal *via negativa*: recognition claims are first revealed primarily as experiences of misrecognition, respect claims are first revealed primarily as experiences of disrespect. But if disrespect itself connotes a moral negative, then even if all instances of disrespect have nothing else in common besides that negative valence, they will all be at least morally condemnable, and in that case disrespect can enable the normative work we want done by a supposed theory of injustice.

#### 4. TRANSITIONAL JUSTICE AND ITS IMPROVEMENTS

But now it is right to take small steps, and begin to consider that transitional justice appears a concept squeezed between two contrary forces. The first is the necessity to ensure a smooth transition from the “old” autocratic regime to new democratic actors – it thus follows a renunciation to start penal action against those guilty of crimes in the “old” order. Secondly, there is the opposite necessity, on the one hand, to fulfil the expectation of victims seeking retribution, while on the other, to pursue the de-legitimization of the “old” oppressor through recourse to law<sup>4</sup>.

Taking this into account, legalistic conceptions of the retributive justice paradigm – contemplating mandatory prosecution and punishment of those found guilty of whatsoever violation – are put into question by a competing paradigm – a new model - (restorative justice), which is centred on therapeutic as well as restorative dynamics, and consequently having the power to encourage reconciliation. This new model of justice – restorative justice, of which thin as well as thick versions are available (depending on circumstantial factors such as time and place), has four main aspects:

- a) it condemns but refrains from sanctioning;

<sup>4</sup> Post-apartheid South-Africa is a case in point – there, the relationship between justice and the building of a new constitutional and democratic order has been articulated in a most innovative (and controversial) manner.

- b) generates provisional claims aimed at establishing the truth (but I will come back to this later);
- c) is nurtured by the precariousness typical of slipping democracies;
- d) focuses on victims.

Comparing retributive and restorative paradigms raises crucial theoretical and normative questions, that pertain to the meaning of retributive justice itself, and its possible, or desirable, negotiability; further, it leads us to consider the case that the method favoured by restorative justice, i.e. TRC could give shape to a really alternative model of justice.

Thus, we can reasonably agree that, to the question on whether considering TRC not just as palliative for locales where the application of law is lacking (a *faute de mieux* solution), but as an alternative way of dispensing justice in its own right, we can give a nearly positive answer. Comparisons between retributive and restorative paradigms articulate the alternative between judgment and – for instance – forgiving, as effective strategies competing with revenge as legitimate (and possible) methods to manage transitions to democracy. These two paradigms reflect diverging visions of the relationship between justice and public good.

A close look at restorative justice “toolbox” reveals at first sight elements that witness its viability as alternative model for justice:

- 1) crime understood as violation of a (human) being by another (and not as violation of rules);
- 2) push toward having offenders acknowledge their guilt, in order to make up and to avoid further violations;
- 3) ways to solve and prevent should be agreed on by the parties involved through deliberation within an informal and consensual process (i.e. victim-offender mediation, reconciliation program, conferencing, family group conference, circle sentencing);
- 4) victim and offender should find a common ground, and the latter must be reintegrated into the system.

However, a first question here arises: is the restorative paradigm a viable option, even preferable to others, for transition to democracy? In other words, is it possible to ensure a transition - without losses in retributive terms – from a divided past to a present of sharing? If transitional justice is justice for crisis times, I wonder if it could be fruitful to add some new layers to the above-mentioned toolbox. As the lack of an explicit delimitation between winners

and losers, and the consequent need to consider the “old” leadership not only as threat and problem, but also as legitimate actor and possibly reference point for the transition to the “new” order, I wonder if Smith’s idea of sympathy might be included in the toolbox, and if so, to what effect; for Smith we enter into another person’s situation rather than into their feelings: impartial spectator is expected to become as well informed as possible about the circumstances at hand, and to remain as fair as possible in spite of his natural biases. As Griswold puts it, impartial spectatorship ‘does not require a Rawlsian veil of Ignorance. The impartial spectator does not forget his own conception of the good life but understands when a virtue (especially justice) calls for restraining his demand that others act in accordance with his conception’. This results in a suspension of moral judgment of actions until after an imaginary exchange with the actor has been attempted. Crucially, Sympathy depends on exposure to details, on familiarity with specifics. I need to know as much as possible about those circumstances. But the imagination needs something to work with. It needs data. On the other hand, if I begin to sympathize with another, and make an effort to place myself in her circumstances, this can serve as an independent motivation and encouragement for endowing her with the same rights I have.

In other words, an insistence on absolute justice might lead to absolute injustice. Sympathy, with its focus on particulars, can be a very useful buffer against the temptations of absolute justice. To the uncompromising cry: ‘I am right!’ sympathy replies with a more feasible question: ‘how do I make life bearable? Again, exposure to context does not eradicate the possibility of moral criticism. Even if it raises extenuating considerations, there remains a difference between extenuation and exculpation. Context gives us pause; it makes us think twice about our reactions. This does not render us incapable of deciding or acting; it just makes it more likely that we will decide and act carefully. This might not be conducive of forgiveness, but it does, to use Michael Ignatieff’s term, “narrow the range of permissible lies”. If sympathy is conducive of political reconciliation, the TRC’s work was, at the very least, conducive of sympathy.

Secondly, reflecting on the statement that restorative justice represents, so to speak, a “lesser evil” useful to escape the dilemma truth-justice, I wonder if it might be possible to think of a more “homeopathic” therapy – I have in mind two possible solutions. The first suggested by Rousseau – (a search for the remedy into evil) his *remède dans le mal* prefigures, under certain conditions (i.e. in case of dirty “hands” ), the possibility that remedies to evil actions are to be found in evil actions themselves (*Tirer du mal même le remède qui doit le guérir: telle est l’intuition fondamentale de la philosophie politique de Rousseau*); the second possible solution integrates the first, and takes into account a point of view on the concept of *stasis* as suggested by Nicole Loraux in *The Divided City* (Loraux 1992) – that is, common grounds originate precisely from division and conflict, and reconciliation is possible only in the light of rupture.

During the IV century BC in Athens, Loraux claims, the lack of superior authority made the recourse to politics unavoidable. With no constitutional tool

to make a minority accept the deliberations of a majority, *stasis* became a legitimate outcome. Likewise, in slipping democracies the lack of a system of constitutional coercion makes *stasis* an inescapable *conditio sine qua non* – while, at the same time, transitional justice becomes a semi-constitutional tool for implementing reforms and promoting change. “Stasis” means “movement”, “commotion”. But it also means “position”, “immobility”: *stasis*, then, is a blocked (frozen) movement, a sort of barrier that doesn’t yield under stress and imposes on the city a paradoxical unity typical of synchronized uprisings of the two halves comprising a whole. *Stasis*, therefore, is a paradoxical political paradigm: it is what makes conflict possible – conflict made perpetual, stable. Lack of commotion, Loraux claims, brings division. Further, without conflict, there will be division. Thus, a certain degree of conflict could ensure unity.

What I would like to suggest in this essay, then, is rethinking transitional justice through the lens of *stasis*. In other words, if reconciliation (of values, opinions, and worldviews) is produced by way of rupture, made explicit in our case, what bonds individuals with different backgrounds together could be a sort of (pre-disposition) competence, expertise, towards conflict, the awareness that bonds originate in the discontinuity of a division that is shared.

What transitional justice allows us to see, then, is the *right (measure of)* dissent – something that unites and divides at the same time, the ability to tame conflicts.

## 5. *Ad Hoc* JUSTICE?

In summary, restorative justice is an *ad hoc* justice: in my opinion, this is not to be considered a weakness. On the contrary, it is a point of strength that – as Haldemann and Lefranc clearly states (Haldemann 2008, Lefranc 2011) – if channelled within an academic or professional context, will deceive its original spirit of a bottom up justice returned to the community, with all the features mentioned above, - its power grounded in its being exceptional, an exception shared and accepted by both parties, helping to address imbalances, re-establish relationships, reconcile. “Not only good men make good societies, also bad men make good societies”: this is its added value. Due to the peculiar truth-building practice that it offers, restorative justice contradicts the need to find a justice paradigm which will be valid in every time and everywhere. Between forgiveness and revenge, restorative justice offers a plural truth in the form of a continuous search for a balanced narration. It is a balanced truth, constructed by juxtapositioning one truth to the other (side by side), resulting in a final outcome produced by the constant tension between universalism and individualism. It is not factual truth, it is a truth about facts – a truth that attempts to preserve opinions, not destroying them – otherwise, it would also destroy the political legitimacy of the individual.

The whole set of different opinions would be destroyed, with none of them likely to their place. But what do we talk about when we talk about truth in politics? In transitional justice, truth doesn't have a constitutive role within politics (nor factual truth can have it, given the discrepancy between factual truth and truth about facts): instead, it draws its borders, and becomes the starting point in times of crisis, - starting point understood as element of stability. Therefore, to avoid the despotic trappings of consensus, and perhaps to avoid the relativistic trappings of forgiveness, the last tool I am suggesting comes from Hannah Arendt, whose remedy for an action doesn't come from superior authority, but by a potential hidden in the action itself and, in particular, from the ability to forgive and from the ability to make, and keep, promises.

Restorative justice is the most evident example of justice that is neither substance nor foundation that we can employ indiscriminately, that we have once and for all. Concerning the meaning of justice as it emerges from your research, and the justice/truth trade-off, truth is besieged because we seem not to want to face it, recognize it, accept it, or believe it. But truth is threatened as well because we cannot believe it. Truth is far too outrageous to be believable. How therefore can we put such atrocities and criminality behind us? The remedy suggested is to forget the past, blank out the past and cover it up with images that shield us from its terrors. Even when "successful", then, this strategy of systematic forgetfulness, amnesia or oblivion carries calamitous costs.

But how might it be normatively acceptable to look for a balance between retribution and restoration? What do we mean when we talk about re-establishing a violated order? If, in a restorative context, reconciliation is a priority and to make peace remains the main objective, and if, in a retributive context, the priority is to do justice, in spite of possible political impacts and whatever conditioning factor, the priority for transitional justice is to seek stability or find truths to turn into foundation for pursuing social and moral aims? Is the search for stability a good enough reason to sacrifice justice? Is there well-grounded reason to sacrifice justice?

## 6. TOWARDS A THEORY OF INJUSTICE

If it seems plausible Shklar's reflections (Shklar 1989) about what she calls "the subjective sense of injustice and the sentiments that make us cry out for revenge", and if – as it is said - injustice anywhere is a threat to justice everywhere, according to the argument hitherto developed, a theory of injustice, compared to a theory of justice, ought to be defined, and on different ground as opposed to theories of justice.

The general categories of a theory of injustice must be primarily articulated with historically contingent and variable experiences of disrespect. A theory of injustice calls first for the ascription of a right to rectification once an injustice has been perpetrated. An important component of Nozick's theory of justice is



indeed the principle of rectification (Nozick 1974). To sum up, the principle of rectification maintains that victims of injustice are sufficiently compensated if they are no worse off (having received compensation) than they would have been had the injustice not taken place. According to Nozick, there are three sets of rules of justice, defining:

- how things not previously possessed by anyone may be *acquired*;
- how possession may be *transferred* from one person to another;
- what must be done to *rectify* injustices arising from violations of the first two rules.

A distribution that doesn't arise in accordance with these three sets of rules is a distribution unjust (Nozick 1974, p. 151): any distribution, irrespective of any pattern it may or may not have, is just provided it has the appropriate history, provided it did in fact come about in accordance with the rules of acquisition, transfer and rectification. Nozick sustain that it is an important task in each society to work out what operable policy best approximates the results of a detailed application of rules of rectification. It is possible that some tax-financed welfare program, or even Rawls's rule of favouring the worst off group, may be justified as a means of rectification, if it can be assumed that the better off are beneficiaries of past injustices, and the worse off victims. He warns that his entitlement theory cannot be used to condemn any particular welfare scheme unless it is clear that it cannot be justified as a means of rectifying past injustices. But finally for Nozick the historical dimension is essential to any justification, for it is only by reference to origins, and not final structures, that justice can be defined (Brown 1986).

Whatever difficulties it would be in applying the principle of rectification, a theory of injustice could be taken into account moral feelings and historical contingencies, and to balance them – in the negativistic way sustained by Honneth and Margalit – with some principles of injustice, like disrespect and misrecognition. If moral feelings – as a sense of injustice – are *facts*, in a theory of injustice speaking, the work of political philosophy will be properly to be engaged in the best geometry of such moral feelings. The presence of mutual respect is the first requirement for this theory of injustice, respect in the deeper meaning who involves the recognition of the actual difference and otherness of potential opponents. This thick notion of respect does have a cognitive requirement in that individuals have to be more familiar with, if not understand, always other's viewpoints.

A theory of injustice will so not have a specific origin. It will not result from a particular culture or tradition. Freedom from injustice is a desirable end that is shared globally. All people refuse fear of fear and injustice, and actively seek to reject the conditions of such a feeling, regardless of the times they live in, or their geographical locations. The question is with feasibility of the injustice's claim. Describing how that theory may work in practice require a detailed (and highly controversial) analysis, which is beyond the scope of this article. The

point here was not to suggest a specific public policy about injustice, but only to give an idea of the theoretical and practical implications of embracing a normative theory of injustice, which is morally attractive and also followable, namely desirable and feasible: a theory of injustice equally interested in independent variables – namely, the range of variables that affect the perception of injustice – and in identifying dependent measures, that is the ways in which feelings of injustice manifest themselves. A theory that could discover bases for reasoned agreement – or respectful disagreements (Fish 1999) – in a society where sharp divisions threaten to lead to conflict. This theory of injustice need standards to be employed – in ordinary and extraordinary times – both as a regulative criteria for evaluating actual social and political practices and as a basis for constructing ideal models.

Finding ways to motivate people to act less unjustly is arguably the most pressing challenge facing egalitarian justice today, to make new spaces for citizenship.

## 7. “HOW FAR BACK? DEMOCRACY, RESPONSIBILITY, AND INJUSTICE

Of the factors that affect how disrespectful a harmful act is perceived to be, one of the most important is responsibility. To understand better how disrespectful treatment produces feelings of injustice, it is useful to examine the phenomenology of injustice. Because context matter. The details of the particular histories matter. What is at stake, in the case of injustice, is the attribution of responsibility, and attribution of guilt is only one of the possible outcomes. But if we value living in a society in which freedom is taken seriously, then we should takes responsibility seriously (Sheffler, 1992; Ripstein, 1994). And so we should take injustice – historical and not – seriously. In the second paragraph we’ve seen that moral agents who have a sense of justice and a commitment to the importance of respecting others as ends in themselves will necessarily feel indignation when others are treated unjustly and resentment when they themselves are treated unjustly. Here and now, but also – and more controversially – in the past. Understanding and dealing with the moral consequences of the past is therefore one of the most important political issues of our time, and yet also one of the most intractable.

Historical injustice is ever-present in human history. The origins of just about every institution relevant to human political life rise from several forms of injustice. Slavery, genocide, mass expropriation of property, mass internment, indiscriminate killings of civilians and massive political repression are all depressingly familiar features of human history, both in the distant and more recent past. Should any of them be redressed? Can historical injustice be redressed? Dealing with historical injustice has also become a major task for countries struggling to found new institutions and forms of collective life after years of oppression or civil conflict – for example, in Central and Eastern Eu-

rope after the fall of Soviet Communism, as well as in post-colonial Africa, South America and Asia.

As a general issue, the challenge of dealing with historical injustice touches on a range of deeply contested yet essential concepts in contemporary political philosophy, such as the nature of rights and responsibility. And yet there are practical urgencies as well. Any plausible defence of the idea of making reparations for past injustices must deal with some questions: how much normative weight should we give to the past? Which historical injustices matter and why? To whom are reparations owed? Who should pay them? What form of reparation? What kind of prudential and political considerations need to be taken into account when defending (or criticizing) reparations?

By «historical» injustice we mean those harms or wrongs committed by individuals, groups or institutions against other individuals and groups who are now dead, but whose descendants live today. Historical injustice (Nozick 1974) is usually thought of in close relation to demands for reparations. And reparations are usually thought of as involving payments to claimants on the basis of past wrongs, but where the transfer between identified wrongdoer and victim is complicated by the passage of time and where an ordinary legal remedy is unavailable. There are, at least, three different modes of reparation of an injustice:

- restitution: it correspond to a restoration, or handing back of the thing that was originally taken (if our land is stolen, we get it back);
- compensation: it corresponds to make amends for, or offset the consequences of, a harm, accepting that literally restoring what was taken is impossible. We tend to talk about compensation when the consequences of the wrong are such so as to render literal compensation impossible (no amount of money can compensate for being tortured, or for the legacy of colonialism);
- recognition: it corresponds to a reparation that force the recognition of the basic humanity and subjectivity of the victims denied in the perpetration of harm against them. Recognition is, of course, built into the act of restoring to or compensating someone for a harm they have suffered. But recognition of responsibility takes on other meanings too, especially when embodied in a public apology and forms of collective remembrance. In fact, public recognition of past injustices is a uniquely political act.

In general, reparations are intended to help re-construct or re-found a political community that has been broken by civil conflict, or scarred by historical injus-

tice. That is, reparations are seen as contributing to an ideal of democratic inclusion, to what it means to treat each other equally, and thus to preserving and maintaining a democratic way of life. Restorative justice have its critics and opponents who argue that restorative justice is not real justice at all: that forgiveness sounds noble but that restoration in the form of amnesty or forgiveness betrays victims of injustice. In particular, one could argue that retribution or revenge is the only possible just response to a genocide in which there is no legal recourse and no genuine restoration is possible. What is therefore the possibility for restorative justice in such situations? The Post-Totalitarianism Trials offered a new basis for rethinking standards of responsibility – Nazi criminality raised huge issues of responsibility that posed a radical challenge to traditional standards of politics, ethics and law. When it is justified to hold someone, or a group, responsible for their actions and when it is not? Responsibility is central to considerations of corrective injustice, of course, but it is also central to distributive justice. Corrective justice involves the rectification of the wrongful invasions of legitimate entitlements that people hold, for example, to moveable or fixed property, or to bodily integrity and well-being. Thus it is often associated with what a person is due as punishment. Distributive justice, on the other hand, refers to what we're legitimately entitled to in the first place, both negatively and positively, and thus the appropriate distribution of benefits and burdens within a political order. Therefore, corrective justice can't be completely independent of considerations of distributive justice. In fact, our intuitions about distributive justice play a crucial role in providing a normative baseline against which we judge whether or not the violation of an entitlement merits a 'correction' of some kind. Thus, both corrective and distributive justice presupposes that people can be held responsible in various ways, in the sense that they can be held blameworthy. But in order to figure out which benefits she should have (or burdens she should bear) in the first place, we need a sense of what the overall distribution of them should be. Thus the purpose in assigning responsibility here is normative. In other words, we take responsibility claims seriously because of the importance of the underlying social and political relationships to which these claims refer and help protect. Now, can something like this idea of responsibility be attributed not only to individuals, but to groups? Can groups be held collectively responsible for their actions? The citizens of Saddam Hussein's Iraq had little opportunity to shape or contest the decisions he took, and thus bear less collective responsibility – if any – for his genocidal treatment of the Kurds (and others). Having said that, it doesn't follow that if a nation or state is deeply undemocratic or autocratic its members never bear any responsibility for its actions. So, it is important to note that responsibility can't be made sense of exclusively in terms of consent: just by participating in interconnected and interdependent social, economic and political processes that produce such unjust conditions – that form the background to many individual actions - I have some responsibility for alleviating them.

If it's hard enough to establish how both individuals and groups can be held responsible for their actions in the present, how can we hope to ascribe responsibility to them for things that happened in the past? Can we – as members of political communities, for example – inherit responsibilities or obligations? So, how to distinguish (non-arbitrarily) between those subjects that deserve reparations and those that don't? It's very hard to resolve these matters, not only because our knowledge is imperfect, but because there is no fact of the matter to discover in the first place and no natural stopping point for our calculations (Waldron 1992). A second major problem is the elapse of time. The longer the time and the greater the number of generations between the present and the past injustice, the more complicated and difficult is to reason about this issue.

Turning back to Shklar's argument, for her everyone could be a victim, and the feeling of injustice is a feeling that has to be studied and dealt with. Liberalism has to integrate this feeling and defend the victim and can be considered "universal" only if it incorporates the concepts of injustice and political surveillance to prevent cruelty. Human security is ultimately a response to the injustice in the world. This is why Shklar thinks it so important for a theory of justice to be supplemented by reflections on our sense of injustice. These adjustments will no doubt give rise to other injustices: «to redress one injustice is to create another» (Shklar 1990, p. 121). But in a fair political system, injustices will be distributed among all: «The best way to bridge the gap between settled expectations and demands for public change may be a system of effective and continuous citizen participation in which no one wins or loses all the time» (Shklar 1990, p. 121).

So, to reply to famous Nozick's question: «How far back must one go in wiping clean the historical side of injustices?» (Nozick 1974, p. 231), and in order to determine which complaints and which commitments are legitimate and which are not, we must resort a theory of injustice that should not be reduced to historical injustice, but neither can escape the legacy of the historical injustices that precede it: «If injustices are to be fixed, they must be fixed by voluntary means, in respect of all the innocent parties who had nothing to do with the original injustice» (Narveson 2009, p. 7, 14).

## 8. LIBERALISM OF INJUSTICE. A NORMATIVE PROPOSAL

It might be argued that rectifying a situation of injustice requires not just the mechanisms of procedural justice, but constraints on the kinds of factors that cause some groups to have easier access to these mechanisms than others. It is still Shklar who emphasizes that any limits on the power and wealth of citizens will be felt as injustices by them and that if those advocating constraints, say, on the inheritance of wealth, must win some of the time, so must those who are opposed to them. The great contribution of what it could be called Shklar's *liberalism of (fear and) injustice* is to have shifted the focus from justice to injustice

and to have placed the responsibility for a democracy's well-being on its citizens' commitment to expressing their rage at the injustices they feel have been done to themselves and others.

Conceptions of injustice are therefore important because they are central to defining the way in which people think of themselves. Perhaps responsibility will be the first principle between principles of injustice applicable in this theory, that is not separate from outside the society that it interrogates and challenges, but is, rather, *connected* to it (Walzer 1987), engaged in its central concerns and involved in the struggles of the common people. And an ideal of human plurality is central to the comprehension of injustice's issue. On this point, that is on addressing injustice, we can elaborate a framework which sets out some types of remedy, and in which the compensation paradigm is only one, and often, the least attractive one. The ultimate aim of liberalism of injustice should not be so much to compensate for injustice, but to create circumstances in which there is no injustice that calls for compensation. We can infer from Shklar's criticism of relativism a philosophical foundation for human security; we can infer from Michael Walzer that the struggle against the fear of terror and injustice implies something else in the bargain, in the sense that "We are defending more than our lives, we are defending our way of life" (Walzer 1996, p. 18). A theory of injustice will bear out that our dignity as persons includes an irreducibly second-personal authority (Darwall 2006) to demand respect for this very authority and for the requirements with which it gives us our public and political standing.

Theory of injustice as a project of an interrelation between disrespect and human integrity outlined in negative terms seems finally to represent a minimalist thought of universality. But the architecture that goes beyond the presently international order and disorder must be defined in positive terms and not only in negative ones. The causes of injustices are served not by a generalized skepticism, but by a variety of forms of critical inquiry; by factual studies that put the lie to myth and prejudice and that reveal large-scale patterns of social injustice; by ethical examinations that subject proposed norms to generalizing test of consistency and impartiality; by reflexive attention to the possible ideological influences on common understandings of causation and political categorization. Finally, we have to deal with injustice not just as a philosophical notion but also as a normative toolbox for addressing disadvantage. Because first, injustice is essentially plural; second, and relatedly, remedies for addressing injustice are themselves plural. Third, a remedy may actually produce other forms of injustice or unfairness.

A theory of injustice can expect practical support within reality to come not from such sources of positive motivation as altruism or respect but rather from the experience of disrespect: «The feelings of moral indignation with which human beings react to insult and disrespect contain the potential for an idealizing anticipation of conditions of successful, undistorted recognition» (Honneth 1992, p. 199). To reflect on injustice, finally, simply makes justice less uncertain.

## REFERENCES

- Allen J. (1999), «Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission», *University of Toronto Law Journal*, Vol. 49, n. 3, Summer.
- Arendt H. (1968), «Truth and Politics», in *Between Past and Future. Eight Exercises in Political Thought*, The Viking Press, New York.
- Arendt H. (1969), *Crisis of the Republic – Lying in Politics, Civil Disobedience, On violence, Thoughts on Politics and Revolution*, Harvest/HBJ Book, New York.
- Arendt H. (1972), *Lying in Politics. Reflections on the Pentagon Papers*, Harcourt Brace Jovanovich, New York.
- Aukerman M. J. (2002), «Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice», *Harvard Human Rights Journal*, vol. 15, Spring.
- Barrington Moore jr. (1978), *Injustice. The Social Bases of Obedience and Revolt*, New York, Pantheon Books.
- Brown, Alan (1986), *Modern Political Philosophy*, New York, Penguin Books.
- Darwall, Stephen (2006), *The Second-Person Standpoint*, Cambridge, Harvard University Press.
- Dyzenhaus D. (1998), *Judging the Judges, Judging Ourselves. Truth, Reconciliation and The Apartheid Legal Order*, Hart Publishing, Oxford.
- Dyzenhaus D. (2000), «Survey Article: Justifying the Truth and Reconciliation Commission», *The Journal of Political Philosophy*, vol. 8, n. 4.
- Elster J. (1998), «Coming to terms with the past. A framework for the study of Justice in the transition to democracy», *Arch. European Sociology*, vol. 39.
- Elster J. (2004), *Closing the Books: Transitional Justice in Historical Perspective*, New York, Cambridge University Press.
- Elster J. (2006), ed., *Retribution and Reparation in the Transition to Democracy*, New York, Columbia University Press.
- Fish, Stanley (1999), «Mutual Respect as a Device of Exclusion», in Macedo S. (ed.) *Deliberative Politics: Essays on Democracy and Disagreement*, New York, Oxford University Press.
- Fraser, Nancy (2001), «Recognition Without Ethics?», *Theory, Culture and Society*, 18, 2.
- Fraser, Nancy, Honneth, Axel (2003), *Redistribution or Recognition? A Political-Philosophical Exchange*, London, Verso Book.
- Gallie, Walter Bryce (1956), «Essentially Contested Concepts», *Proceedings of the Aristotelian Society*, 56.
- Gill G. (2004), *The Dynamics of Democratization: Elites, Civil Society, and the Transition Process*, New York, Cambridge University Press.
- Haldemann, Frank (2008), «A Different Kind of Justice: Transitional Justice as Recognition», *Cornell International Law Journal*, 41, 2.
- Hayner P. (2001), *Unspeakable Truth: Confronting State Terror and Atrocity*, New York, Routledge.
- Honneth, Axel (1992), «Integrity and Disrespect. Principles of a Conception of Morality Based on the Theory of Recognition», *Political Theory*, vol. 20, n. 2, May.

- Honneth, Axel (2007), *Disrespect. The Normative Foundations of Critical Theory*, Cambridge, Polity Press.
- Lefranc, Sandrine (2011), "Transitional Justice, Bottom-up Peacebuilding: Peace via the Individual", in B. Charbonneau et G. Parent (eds), *Peacebuilding and Subjectivities of Peace: History, Memory, Politics*, Routledge.
- Loraux, Nicole (1997), *La cité divisée. L'oubli dans la mémoire d'Athènes*, Paris, Payot.
- Margalit, Avishai (1996), *The Decent Society*, Cambridge MA, Harvard University Press.
- Margalit, Avishai (2010), *On Compromise and Rotten Compromise*, Princeton, Princeton University Press.
- Miller, W. (1993), *Humiliation and Other Essays on Honor, Social Discomfort, and Violence*, Ithaca, NY, Cornell University Press.
- Minow M. (1998), *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Boston, Beacon Press.
- Narveson, Jan (2009), «Present Payments, Past Wrongs: Correcting Loose Talk About Nozick and Rectification», *Libertarian Papers*, vol. 1, n. 1.
- Nozick, Robert (1974), *Anarchy, State, and Utopia*, London, Blackwell.
- O'Donnell G. (1996), "Illusions about Consolidation," *Journal of Democracy*, vol. 7, no. 2.
- O'Donnell, G., Schmitter, Ph. C., Whitehead, L., *Transitions from Authoritarian Rule*, Baltimore.
- Rawls, John (1963), «The Sense of Justice», *Philosophical Review*, vol. 72, n.3, July, p. 298-299.
- Rawls, John (1971), *A Theory of Justice*, Cambridge, MA, Harvard University Press.
- Rawls, John (1989), "The Domain of the Political and Overlapping Consensus", *New York University Law Review*, 64, 2, p. 233-255.
- Rawls, John (1996), *Political Liberalism*, New York, Columbia University Press.
- Ripstein, Arthur (1994), «Equality, Luck, and Responsibility», *Philosophy and Public Affairs*, 23, 1, p. 3-23.
- Rotberg R. I. & Thompson D. (eds) (2003), *Truth v. Justice: The Morality of Truth Commissions*, Princeton University Press.
- Sheffler, Samuel (1992), «Responsibility, Reactive Attitudes and Liberalism in Philosophy and Politics», *Philosophy and Public Affairs*, 21, 4, p. 299-323.
- Shklar, Judith (1989), "The Liberalism of Fear", in Rosenblum N. (ed.), *Liberalism and the Moral Life*, Harvard, Harvard University Press.
- Shklar, Judith (1990), *The Faces of Injustice*, New Haven, Yale University Press.
- Shriver D. W. (2000), *An Ethic For Enemies: Forgiveness in Politics*, Oxford University Press, 1995 York, St. Martin's Press.
- Tully, James (2000), "Struggles over Recognition and Distribution", *Constellations*, 7, n. 4.
- Waldron, Jeremy (1992), «Superseding Historic Injustice», *Ethics*, 103, 1 (p. 4-28).
- Walzer, Michael (1987), *Interpretation and Social Criticism*, Harvard, Harvard University Press.
- Walzer, Michael (1996), "On Negative Politics", in Yack B. (ed.), *Liberalism Without Illusions. Essays on Liberal Theory and the Political Vision of Judith Shklar*, Chicago & London, University of Chicago Press.



Young, Iris Marion (2000), *Inclusion and Democracy*, Oxford, Oxford University Press.

Zerilli L. (2006), “Truth and Politics”, *Theory & Event*, vol. 9, n. 4.