TRANSITIONAL JUSTICE AND THE QUEST FOR DEMOCRACY: TOWARDS A
POLITICAL THEORY OF DEMOCRATIC TRANSFORMATIONS

by

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Abstract
The overall purpose of the dissertation is to make a contribution to a political theory of democratic transformations by drawing attention to one of the less theorised dimensions of a polity’s public culture: public affect. More precisely, I deal with the role that institutions in general and courts in particular can play in the education of public moral sentiments within transitional justice processes. A cognitive constructivist approach to emotions provides the background for my attempt to show, first, the legitimacy of negative public emotions of resentment and indignation in the aftermath of violence, and second, their positive potential for the reproductive efforts of the democratic community. These affects are barometers of injustice and can act as signals of alarm for institutions to intervene correctively. As such, they bear normative weight and should be a proper object of concern for any society attempting to make the transition to democracy; however, left unfiltered and unmediated institutionally, they can either degenerate into political cynicism and apathy, or be expressed in ways that are incompatible with the democratic value of equal concern and respect for all citizens. I argue that courts dealing with transitional justice issues can recognise, engage constructively, and fructify negative moral emotions for democracy. The exemplarity of judicial reflective judgment—both in the context of constitutional review of transitional
justice bills and of criminal trials—can inspire citizens to reflect on what they want to do in the name of their violated sense of justice and encourage them to internalise democratic norms of social interaction. A series of case studies from the twentieth and twenty-first centuries are used to illustrate how the judiciary has historically chosen to engage negative emotions in the aftermath of oppression and violence.
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Chapter I

The Problem

Where there was torture, there are walking, wounded victims. Where there were killings, wholesale massacres, there are often witnesses to the carnage, and family members too terrified to fully grieve. Where there were persons disappeared, kidnapped by government forces without a trace, there are loved ones desperate for information. Where there were years of unspoken pain and enforced silence, there are often a pervasive, debilitating fear and, when the repression ends, a need to slowly learn to trust the government, the police and the armed forces, and to gain confidence in the freedom to speak and mourn properly.

(Priscilla Hayner, *Unspeakable Truths*)

Dwelling in the frozen space of inability and incapacity is unacceptable, unresponsive to the victims, unavailing to the waiting future.

(Martha Minow, *Between Vengeance and Forgiveness*)

To forget would not only be dangerous but offensive; to forget the dead would be akin to killing them a second time.

(Elie Wiesel, *Night*)

At 11:30 on November 3, 1991, six armed men, faces covered, crashed a party held at no. 840 Jirón Huanta in the Barrios Altos district of Lima, Peru. The guests, who had gathered to collect funds for the renovation of the building, were ordered to lie on the floor. The armed men then started shooting indiscriminately at them, killing fifteen on the spot and seriously injuring another four. The killers left in a hurry in two vehicles equipped with sirens.

The police and judicial investigation that followed established that the armed men were members of the “La Colina” death squadron belonging to the Peruvian army. This group was in charge of carrying out an anti-terrorist programme targeting the members of the communist movement “Sendero Luminoso”. Since 1980, the movement had been trying to take over the state and establish a Maoist regime by violent means. The guests at the party were suspected of being “terrorists” belonging to the revolutionary group.
A subsequent parliamentary inquiry into the event was quickly cancelled due to a coup organised by President Alberto Fujimori with the help of the military. The legislature was dissolved on April 5, 1992. In 1995, a judicial investigation into the Barrios Altos events was again blocked, this time by the military courts. An amnesty law covering all crimes committed between 1980 and 1995 was promptly promulgated by President Fujimori, preventing any further investigation into the massacre.\(^1\) Judicial refusal to apply the law on the grounds that it was unconstitutional was curbed by the passing of yet another bill denying courts the right to review the constitutionality of the amnesty law.\(^2\)

The only choice left to the angry relatives and their representatives in human rights groups was to appeal to the Inter-American Commission for Human Rights.\(^3\) Non-governmental organisations representing the victims and their families filed petitions with the Commission in 1996. A back and forth exchange of documents between the state and these groups was mediated by the Commission between 1996 and 2000. The Commission recommended that Peru cancel the amnesty laws and initiate proceedings against the Barrios Altos murderers. The state responded that the amnesty laws were necessary as exceptional measures in the struggle against communist terrorism. Consequently, in May 2000, the Commission submitted the case to the Inter-American Court for Human Rights. During the public hearings that followed, the court declared that the Amnesty laws were incompatible with the American Convention of Human Rights, and recommended that the state protect the right to truth and provide reparations for the relatives of the victims.\(^4\)

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\(^3\) Peru had been a party to the American Convention since 1978 and had recognised the competence of the Inter-American Court for Human Rights since 1981. *Barrios Altos v. Peru*, p. 5.

Peru eventually took international responsibility for the crimes in the Barrios Altos case. It is important to note, however, that the first step in the fight against impunity had been taken by the victims' relatives, who, under the auspices of the regional human rights forum, had leveraged the legal resources at their disposal. Yet it was only much later that the relatives’ sustained efforts to deal with the crimes succeeded. Following a big corruption scandal involving his intelligence chief, Vladimiro Montesinos, Fujimori left for Japan and gave up the presidency.\(^5\)

The new government established a Truth and Reconciliation Commission to provide information about the conflict between the Maoist groups and the Peruvian state. On August 28, 2003, the final report of the Commission was presented to the President of the Republic in a solemn atmosphere. It documented the death of almost 70,000 people and condemned both sides of the violent conflict that had lasted from 1980 to 2000 for their contribution to the chaos.\(^6\) Atrocities had been committed by the “Shining Path” and the “Tupac Amaru” communist groups, but also by the state’s institutional branches in their anti-subversive programmes.\(^7\)

Yet this was not the end of the justice saga for Peru. In 2005, former president Fujimori decided to go back and try to place a bid for power. He was, however, arrested on the territory of Chile and extradited to Peru for trial. On April 7, 2009, almost six years after the report of the Truth Commission and eighteen years after the murders in Barrios Altos, a tribunal sentenced the former president to twenty-five years in prison and the payment of compensation to twenty-nine victims of human rights violations. The trial lasted sixteen months and the court found Fujimori guilty of being the moral author of twenty-five murders (including the fifteen at the Barrios Altos party), the assault of four persons and the kidnapping of two journalists. The direct perpetrators

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of the crimes were the armed forces under his command and the victims were declared completely innocent.8 "For the first time, the memory of our relatives is dignified in a ruling that says none of the victims was linked to any terrorist group," said Gisela Ortiz, the sister of one of the victims in the Barrios Altos case.9 Francisco Soberon, the leader of a human rights group that led the campaign to bring Fujimori to trial, declared to the press, "They couldn't shut us up…Our objective is to achieve full justice, remembrance and reparations."10 Finally, after a strenuous and sustained effort to obtain equal respect and concern, the innocence of the victims and the suffering of their relatives had been publicly acknowledged.11

The Peruvian case illustrates the most common problems that societies exiting complex violence have to face. On the one hand, as the above declarations show, victims’ resentments and hatred towards their oppressors will not go away, but, on the contrary, will mobilise them to fight against impunity. Institutionally imposed silence is seldom, if ever, a lasting solution. On the other hand, responsibility is very difficult to individualise and perpetrators are often protected by self-amnesty laws. In addition, where crimes have been committed by both sides, where there are no clear perpetrators and clear victims, narratives about the past are controversial and highly divisive. Most importantly, because of the nature and scale of the atrocities, justice is bound to be tragically selective, imperfect, and inappropriate. As Martha Minow writes,

…no response can ever be adequate when your son has been killed by police ordered to shoot at a crowd of children; when you have been dragged out of your home, interrogated, and raped in a

11 However, not everyone shared this opinion. The verdict was highly controversial, pitting supporters of the leader against the victims’ families. Street demonstrations and vigils showed how divided the civil society was over the fate of a president who had brought economic security and the end of communist terrorism for some, and the loss of innocent relatives for others. While human rights groups and the relatives of the victims celebrated in the street, the beneficiaries of Fujimori’s regime felt an injustice had been committed against the former president. See “Em decisão inédita, Peru condena Fujimori a ficar preso até 2032,” Folha, April 7, 2009, http://www1.folha.uol.com.br/folha/mundo/ult94u547325.shtml (accessed April 10, 2009).
wave of “ethnic cleansing”; or when your brother who struggled against an oppressive regime has disappeared and left only a secret police file, bearing no clue to his final resting place. Closure is not possible. Even if it were, any closure would insult those whose lives are forever ruptured. Even to speak, to grope for words to describe horrific events, is to pretend to negate their unspeakable qualities and effects. Yet silence is also an unacceptable offence, a shocking implication that the perpetrators in fact succeeded, a stunning indictment that the present audience is simply the current incarnation of the silent by-standers complicit with oppressive regimes.\textsuperscript{12}

This dissertation will deal specifically with the problem of institutionally engaging public emotional responses to oppression and violence. The resentment and indignation towards perpetrators of violations are legitimate reactions to the experience of injustice and require recognition. Should institutions ignore or suppress public emotions of outrage, victimisation and the insult it implies would be reproduced in time. What is more, the usefulness of these feelings as signals of alarm about legitimacy deficits in need of correction would be wasted. Left unvindicated, moral hatreds can either threaten the stability of the young democratic order or degenerate into political apathy and cynicism. It is with these delicate problems that this dissertation engages. The kind of burdens, but also the opportunities, that the emotional climate of transitions creates for fragile democratic institutions attempting to deal with a painful past will be examined with an eye to offering a theoretical contribution to an already rich literature on “transitional justice.”

The term “transitional justice” has been coined to refer to processes of dealing with a past of state-sponsored oppression and violence, processes characteristic of the third wave of democracy in the second half of the 20\textsuperscript{th} Century.\textsuperscript{13} The term is slightly unsatisfactory for a couple of reasons. First, it implies a clear temporal delimitation of the transition from


\textsuperscript{13} Ruti Teitel coined the term in 1991 to cover processes in post-dictatorships in Latin America and Eastern Europe at the end of the 20\textsuperscript{th} Century. For an account of the third wave of democratization see Samuel P. Huntington, \textit{The Third Wave: Democratisation in the Late Twentieth Century} (Norman OK: University of Oklahoma Press, 1991).
authoritarianism or civil war to democracy. Such thresholds are difficult—if not impossible—to identify.\textsuperscript{14} Political scientists’ efforts to determine the moment when democracy has become “the only game in town” inherently rely on arbitrary measurements, misrepresenting the complex democratisation processes.\textsuperscript{15} In addition, while democracy is sought as the end result of such transformations, its prospects are more remote in some contexts than in others. In war-torn societies, the immediate concern of the domestic elites and their international aides is a stable peace. The transition to a democratic regime is an important concern, but not as urgent as the stopping of bloodshed. Those who study transitional contexts often consider “post-conflict justice” to be a more appropriate label for the processes of accountability and reconciliation chosen in the aftermath of traumatic violence.\textsuperscript{16} Due to the high currency of the term in the literature, this dissertation will continue to use “transitional justice” in order to reach its audience. However, in parallel, I will introduce terms like “post-oppression” or “post-violence” justice to refer to the mechanisms societies use in order to come to terms with a violent past during the transition to some form of democracy. These terms will hopefully avoid the problems just mentioned.

The most frequently used mechanisms for dealing with the past are criminal prosecutions, lustration, Truth (and Reconciliation) Commissions, reparations, memorials, and exhumations.\textsuperscript{17}


\textsuperscript{15} In a sense, democracies are perpetually in transition, continuously trying to redress injustices in ways that more closely approximate the norm of equal concern and respect. See David Dyzenhaus, \textit{Calling Power to Account: Law, Reparations and the Chinese Canadian Head Tax Case} (Toronto ON: University of Toronto Press, 2005); Mayo Moran, “Trouble in paradise: evil law and transitional justice in stable constitutional democracies.” Paper presented at the Centre for Ethics’ Fellows Series, University of Toronto, February, 2007; Andrew Valls, “Racial Justice as Transitional Justice,” \textit{Polity}, Vol. 36 (October 2003), pp. 53–71.


Some rather recent international and domestic developments have brought transitional justice into the academic spotlight.\textsuperscript{18} Wider media scrutiny of state-sponsored atrocities all over the world, the increased number of non-governmental organisations monitoring human right abuses, last century’s developments in international human rights law,\textsuperscript{19} the establishment of international and hybrid criminal courts,\textsuperscript{20} as well as changes in the nature of war-waging have focused scholars’ attention on the choices polities need to make in the aftermath of major suffering and oppression. In the last few decades, the literature on transitional justice has developed as an independent and specialised field of research. Political scientists, historians, sociologists, psychologists, political activists, and philosophers have been working towards a better understanding of the main problems that societies coming out of authoritarianism or civil conflict have to face.\textsuperscript{21}


\textsuperscript{19} It has become a principle of international human rights law that genocide, war crimes, crimes against humanity, and torture cannot be covered by a blanket amnesty and that there is a state duty to investigate them. The principle of universal jurisdiction has also added to the power domestic courts have to charge major human rights violators irrespective of their nationality. The main legal instruments are: the Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, which entered into force on January 12, 1951; the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, adopted August 12\textsuperscript{th}, 1949, 6 UST, 3114, 75 UNTS 31; the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, adopted August 12\textsuperscript{th}, 1949, 6 UTS 3217, 75, UNTS 85; the Geneva Convention relative to the Treatment of Prisoners of War, adopted August 12, 1949, 6 UTS 3316, 75 UNTS 135; the Geneva Convention relative to the Civilian Persons in Time of War, adopted August 12\textsuperscript{th}, 1949, 6 UTS, 3516, 75 UNTS 287; the International Covenant on Civil and Political Rights, adopted December 19\textsuperscript{th}, 1966, 999 UNTS 171; the Convention against Torture and Other Cruel, Inhuman or Degrading Punishment, G.A. Res. 39/46, 39, UN GAOR, Supp. No. 51, at 197, UN Doc. A/39/51 (1984), which entered into force June 26, 1987. Regional human rights legal instruments in Europe, the Americas and Africa have also contributed to this growing body of law.

\textsuperscript{20} I am referring here to the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia, and the Tribunal for the genocide in Rwanda headquartered in Arusha, Tanzania. For a sobering analysis of the merits and the problems associated with these tribunals, see Eric Stover and Harvey M. Weinstein (Eds.), \textit{My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity} (Cambridge: Cambridge University Press, 2004).

\textsuperscript{21} For an article that contests this position see Christine Bell, “Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field,’” \textit{The International Journal of Transitional Justice}, Vol. 3, (2009), pp. 5–27.
Transitional justice concerns are not entirely new. While some authors claim they go all the way back to ancient Athens, most analysts start by looking at the accountability mechanisms used in the aftermath of the First and Second World Wars. Ruti Teitel offers us a genealogy of such efforts comprised of three distinct stages. Her account is a useful tool for understanding both the evolution of various institutional approaches to post-conflict or post-authoritarian justice and an increasing scholarly interest in the ways that societies have dealt with a past of suffering and abuse.

The first stage of the now widespread phenomenon of transitional justice starts with the post-war accountability mechanisms and sanctions attempted by the German Supreme Court in Leipzig in 1920 and ends with the Holocaust trials. This first period left a valuable legacy in terms of legal and practical precedents, but, according to Teitel, came about under exceptional circumstances and produced *sui generis* processes unlikely ever to recur in the same way.

The second phase covers the transitions to democracy that began in the late 1970s in Latin America and culminated in the demise of communism in the Soviet block in the late 1980s and early 1990s. The variety of institutional mechanisms used for the purposes of transitional justice during this period ranged from blanket amnesties to criminal prosecutions, lustration, restitution, truth commissions, and symbolic gestures targeting collective memory. At this stage, transitional justice, democritisation and radical economic reforms were closely related. Their simultaneity raised a set of novel challenges for the democratic elites and the population at

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This phase is also characterised by the mainly domestic initiation and orchestration of transitional justice projects.

It is with the advent of the third phase that transitional justice as a paradigm was normalised and became a truly global phenomenon and concern. Trials like those of Saddam Hussein, Slobodan Milosevic, and Charles Taylor, the gacaca courts in Rwanda, and the recent annulment of the 1986 amnesty for the military oppressors in Argentina mark a wider agreement on the necessity of sooner or later engaging in some form of rectificatory justice. Legalism, a division of labour between local and international fora, as well as a shift towards a human rights-centred discourse on transitional justice are characteristic of the political transitions of the end of the twentieth century and the beginning of the twenty-first.

At all these stages, a number of normative and practical problems have troubled lawyers, human rights activists, new political elites, academics, and the public at large:

What should be done with a recent history full of victims, perpetrators, secretly buried bodies, pervasive fear, and official denial? Should this past be exhumed, preserved, acknowledged, apologised for? How can a nation of enemies be reunited, former opponents reconciled, in the context of such a violent history and often bitter, festering wounds? What should be done with hundreds or thousands of perpetrators still walking free? And how can a new government prevent such atrocities from being perpetrated in the future?

The multitude of aspects that decision-makers have to take into account can be subsumed under two programmatic questions. The first question post-authoritarian or post-conflict societies have to answer is, Should there be any transitional justice at all or should we rather forget about the

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past and move forward? This is a question that requires societies to provide reasons why the past should, or should not, be ignored. If a positive answer is provided for this first question, then the issue of distributing rectificatory justice, the second query, arises: How should we distribute transitional justice?

(H)ow much should they remember? How much should they forget? What should they teach their children? What should they do with the leaders who orchestrated the violence? The underlings who carried it out? The bystanders who did nothing to stop it? Where should they draw the boundary between enough justice to destroy impunity and punishment so harsh that it becomes revenge?27

When engaging with the issue of distributing transitional justice, scholars must first provide an account of the various institutional forms the engagement with the past can take: trials, truth commissions, reparations, restitution, memorials, exhumations, apologies, etc. Secondly, the ways in which particular mechanisms can and should dispense justice—with respect to victims, victimisers, beneficiaries, and bystanders—needs to be explored. Who gets compensation and how much; who gets to testify and how; who gets prosecuted and how; who gets punished, for how long, and in what way; whose bones are exhumed; who apologises and to whom—these are all questions related to the distribution of transitional justice.

This dissertation will attempt to address both issues in a way that embraces a complex vision of democracy and does justice to the stressful circumstances of justice in transition. By bringing together insights from a wide variety of literatures and disciplines, I seek to propose a fresh approach to the justification and distribution of corrective measures in the wake of atrocity.

The first part of the dissertation will deal with the problem of justification. I shall try to put forth a defence of the necessity to engage in transitional justice processes. My position will be constructed in response to the sceptics who place special emphasis on the divisiveness and

destabilising forces that the engagement with the past creates. Post-oppression contexts are marked by strong public outrage manifesting itself in outbursts of resentment and indignation. Therefore, corrective justice processes would only provide a venue for an encounter of hatreds, thus endangering the stability and consolidation of democracy, the sceptics claim. Democratisation cannot progress if we do not bury the past. Societies must focus their energies on the construction of institutions and laws, not on the chimera of correcting past evils.

Against this position, I shall formulate two arguments. The first argument is a normative one. The emotional reactions that sceptics fear will be conceptualised as markers of an evaluative capacity to recognise injustice. Resentment is a reaction triggered by an injustice committed against oneself, while indignation is caused by the witnessing of an injustice against another. Because of their association with displeasure and discomfort, these reactions are usually called “negative” emotions. As evaluative affects, i.e., as affects that presuppose a moral judgement, they bear normative weight and qualify as legitimate objects of concern for any democratic order. Should a polity make the transition to democracy without opening a discussion about the legacies of the past and without taking the victims’ negative affects seriously, its normative integrity would be endangered. One cannot proclaim equal concern for all citizens and at the same time silence some for the sake of stability. Transitional justice can at most be postponed for prudential considerations, but cannot be dismissed without violating core democratic values.

The second argument in favour of dealing with past oppression tries to highlight the positive prudential implications of the normative argument. I shall argue that it is important to take into consideration not only the dangers, but also the opportunities that these negative emotions create for democracy. Taking the past seriously and engaging publicly with the victims’ affective responses represents a first opportunity for the newly-established institutions to embark on a process of democratic emotional socialisation. Resentment and indignation presuppose judgment, and work as barometers of injustice. While democracies can recognise the
validity of the evaluations implicit in public outrage, how that outrage is manifested in practice needs to be the object of socialisation. It is necessary that institutions help individuals and groups learn—or remember—how to take responsibility for what they want to do in the name of their otherwise legitimate emotional reactions. Transitional justice projects offer an important first occasion for institutionally stimulating reflection on the kind of actions that legitimate outrage motivates. The engagement with the past needs to be institutionally orchestrated so as to avoid societal disruptions and further violations of justice; that is to say, procedurally rigorous processes need to be set up for the purpose of rectifying injustice without undermining either the stability or the normative integrity of the young democratic regime. While potentially disruptive because of the mobilisation characteristic of political transitions, given proper filtering through institutional strainers, these emotions can help institutions identify and correct legitimacy deficits, thus contributing to the quality of democracy. What people feel, how they feel and how they act on their feelings constitute essential problems for any democratic regime. Appropriate affective responses are part of the political culture of any society and, in a democracy, certain rules for public emotional expression must be observed.

The second part of the dissertation will deal with the second programmatic question, that of distributing corrective justice. I shall not argue for the superiority of one mechanism of transitional justice over the others. Since the end of the 1990s, there has been a growing agreement in the literature that a division of labour between different transitional justice mechanisms is more likely to produce long-lasting results.\textsuperscript{28} While trials, for example, can bring about a measure of justice, on their own they cannot cater to the needs of a traumatised population. Truth commissions and exhumations can help by unveiling the facts and enabling

representation for those who were forcefully silenced. Compensation and reparation are other measures that can help remedy the social injustices frequently underlying the violence. More often than not, domestic actors need the support of regional and international human rights organisations, whose agencies can help in the struggle against impunity. The cooperation of legal and non-legal, sub-national, national and international, accountability and truth-telling institutions is necessary in order to carry our complex programmes of “transitional justice.”

Instead, I shall focus on the ways in which courts involved in distributing post-conflict justice can promote democratically acceptable forms of emotional expression. Judicial review of transitional justice bills can regulate the distribution of justice in ways that reaffirm a society’s commitment to democracy and contribute to the development of a democratic emotional culture. Criminal trials can communicate the limits that democracy places on victims’ and their families’ moral hatred. Through exemplary reflective judgments—judgments that simultaneously recognise the verdict of citizens’ legitimate negative emotions and filter their expression through democratic values—courts can help bring about democracy-friendly dispositions. Empirical case studies of relatively recent attempts to engage with an unsavoury past will illustrate how courts have chosen to deal with public emotions with a view to pushing the polity on the path to democracy.

Thus, by using insights from moral and social psychology, the literature on reflective judgment, democratic theory, and comparative law, the dissertation hopes to answer these two guiding questions in a way that contributes yet another layer of complexity to the scholarship on transitional justice. By drawing attention to one of the less-theorised dimensions of democratic transitions, that of citizens’ politically relevant emotions, I hope to inspire novel ways of thinking about institutional engagements with a painful past of violence and oppression.

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29 Transitional justice is here understood to encompass a multiplicity of objectives, and is not limited to the sense defined by criminal and civil law.
Before outlining the structure of the chapters to come, I would like to make a few remarks on the nature of this project. This dissertation is essentially a theoretical enterprise, meant to enrich the ways in which we think about justice and its circumstances in the wake of violence. By looking at the emotional dimension of a democracy’s public culture in a way that brings together lessons from various disciplines and areas of inquiry, I hope to add new insights to a mature field of research, already mapped by a multitude of theoretical positions. Case studies will be used illustratively to lend credibility to, and reveal the relevance of, this contribution. My ambition is not inductive. More precisely, the purpose of the empirical analysis is twofold. First, real-life examples are meant to show the relevance and timeliness of the questions I engage with, to give concreteness to my arguments, and to make them clearer and more persuasive. Secondly, the exploration of historical instances of transitional justice can reveal the multiple ways in which my general theoretical argument can be, and has been, instantiated in various ways, without thereby losing significance.

Chapter II will begin by outlining a positive answer to the justificatory question, Why should a society engage with a painful past? This question has structured the transitional justice scholarship into two debates about the justificatory purposes of post-conflict justice: Truth v. Justice and Democracy v. Justice. As mentioned above, there need not be a trade-off between justice and truth; different institutional mechanisms can accomplish different tasks within the volatile circumstances of transitions. However, the second debate, that between democracy and justice, still divides the field. By drawing attention to both the normative weight and the strategic value of resentment and indignation as cognitive responses to oppression, Chapter II will try to dismiss the sceptic’s fear of their negative impact on democratisation. I argue that the tension between justice and democracy is both normatively implausible and prudentially self-defeating.

In order to substantiate the theoretical claims in Chapter II, we need to unpack the multiple dimensions of public emotional expression in the early stages of democratic
transitions—in terms of both the obstacles and opportunities it creates for the institutional entrenchment of democratic norms. It is thus necessary to formulate a precise conceptualisation of the individual's sense of justice and of its relationship with feelings of resentment and indignation. Why does democracy need to be concerned with these feelings? What kind of emotional responses are they? By virtue of what characteristic can they be socialised? What makes them potentially dangerous, and what makes them potentially beneficial for democracy? These are questions that Chapter III will seek to answer. Insights from moral and social psychology will be used in order to put forth a weak social constructionist, cognitivist view of resentment and indignation, theorised as negative feelings associated with a violated sense of justice. This foray into the morphology of the sense of justice will help us strengthen the arguments presented in Chapter II and provide a framework with which to address the second programmatic question, How should post-oppression justice be distributed with a view to reproducing democracy institutionally and culturally?

In Chapter IV, I offer a theoretical account of how the judicial review of transitional justice bills can affirm the integrity of democratic principles and, at the same time, constructively engage the moral outrage characterising post-conflict circumstances. In order to sketch a pedagogic theory of adjudication for democratic transitions, Ronald Dworkin’s famous theory of “law as integrity” will be supplemented with insights from the literature on reflective judgment and the sociology of law. The first claim this chapter will advance is that maintaining the integrity of democratic principles requires judges reviewing transitional justice legislation to recognise victims’ legitimate negative emotions. Second, decisions that reaffirm egalitarian principles might also have a beneficial pedagogical effect on their addressees’ sense of justice. To the extent that courts consistently act with equal concern and respect towards all individuals, they exemplify and communicate democracy’s demands on citizens. Decisions will be formulated differently depending on the particularity of the context; however, exemplary
judgments guided by an equal concern for all can at the same time affirm democracy and engage outrage constructively. By the end of the chapter, a more robust theoretical understanding of the role of judicial review within democratisation efforts will hopefully emerge.

Chapter V will show concretely how courts engaging with a past of violence have contextually attempted to communicate democratic normative imperatives to outraged societies. The post-communist Hungarian Constitutional Court’s judgment on legislation meant to enable the prosecution of the repressors of the 1956 revolt, the Czech Constitutional Court’s adjudication of challenges to the constitutionality of the 1993 “Law on the Illegality of the Communist Regime,” the post-apartheid South African Constitutional Court’s decision in the Biko case, and the recent Argentinean overturn of amnesty laws protecting the military junta that ruled the country between 1976 and 1983 will hopefully show how far courts have tried to live up to democratic imperatives within an atmosphere of fervent emotional mobilisation.

Chapter VI will examine the potential of criminal prosecutions to contribute to democratisation. I shall enter a critical dialogue with a variety of theoretical positions that recognise the socialising role criminal trials can play in transition. Existing accounts of the educational potential of penal law in transition focus on the construction of founding narratives, the encouragement of respect for the rule of law, and the cultivation of democratic solidarity. My aim will be to try and disclose another, more subtle, dimension of legal didactics. The potential for exemplary, principled decisions to constructively engage their addressees’ sense of justice and the emotions it presupposes will be this chapter’s contribution to the overall theoretical framework of the dissertation and to the wider literature on post-conflict justice.

Mirroring Chapter V, Chapter VII will analyse a set of three domestic trials organised in the aftermath of state-sponsored atrocities and oppression. Argentina’s proceedings against the juntas at the beginning of the 1980s, the trials that took place in reunited Germany in the 1990s, and the façade trial of the Ceaușescus in December 1989 are meant to illustrate how courts have
understood their role vis-à-vis the former oppressors, on the one hand, and the multitude of outraged victims and their relatives, on the other. The hope is to offer both exemplary and cautionary tales for future judicial engagements with the past under emotionally stressful circumstances.

The conclusion will recapitulate the major arguments, draw their wider theoretical implications, sketch further directions of research and address potential criticisms. The main contribution that this dissertation hopes to make to a political theory of democratic transitions rests with the recognition of the role that reactive emotions such as resentment and indignation can play in the normative and cultural reproduction of the democratic order. While not denying the risks associated with emotionally mobilised societies, I seek to recuperate resentment and indignation’s verdicts for democratic accountability processes in the aftermath of regime change and within wider processes of reform. Nevertheless, we must not forget that, in a sense, democracies are perpetually undergoing changes that strain their citizens’ affective register. A careful consideration of the emotional aspect of a society’s political culture can help refine our understanding of politics and institutions within diverse, consolidated democracies. The theoretical framework developed here might prove itself useful for engaging the reality of imperfectly just democratic societies, plagued by different kinds of inequality and discrimination and prone to expressions of public negative affect. Last but not least, potential criticisms that this project rationalises hatred or that it advocates using the oppressive hand of law to do another kind of violence to citizens will be addressed as part of our engagement with the question of a painful past.
Chapter II

Transitional Justice: Optional or Imperative?

*The new rulers* (of transitional democratic regimes) *also have a tendency, probably based on their feeling of moral superiority, to waste energy in what might be called ‘ressentiment politics’ against persons and institutions identified with the old order. This would consist in petty attacks on their dignity and their sentiments.*

(Juan Linz, *The Breakdown of Democratic Regimes*)

*Impunity is the torturer’s most relished tool. It is the dictator’s greatest and most potent weapon. It is the victim’s ultimate injury. And it is the international community’s most conspicuous failure. Impunity continues to be one of the most prevalent causes of human rights violations in the world.*

(Mary Margaret Penrose, *Impunity—Inertia, Inaction and Invalidity*)

*The question, then is not whether to remember, but how.*

(Martha Minow, *Memory and Hate*)

This chapter will outline an answer to the first programmatic question this dissertation seeks to answer, Should societies deal with a painful past of violence and oppression? The attempt to provide a persuasive justification for an institutional engagement with the past has led to two major debates in the scholarship: Truth v. Justice and Democracy v. Justice. While there is an increasingly broad consensus that the first of these two oppositions has been overcome through an understanding that truth and justice are not mutually exclusive, but rather complementary goals of a more capaciously understood project of transitional justice, the second is still dividing the field. Democratisation cannot progress if we do not bury the past, the transitional justice sceptics claim. We must focus our energies on the construction of democratic institutions and laws.¹ Such projects can only antagonise society by providing enraged victims with a propitious

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context for political vendettas and scapegoatism. Negative public emotions should not be indulged, but rather suppressed in order to stabilise the ground for the institutional reforms necessary to consolidate democracy.

This chapter seeks to overcome this second, enduring dilemma and give a clear positive answer to the question, Should societies engage a political past of abuse and oppression? The first two sections will provide the background for my engagement with the issue of justifying transitional justice measures. Section I.1 reviews the Truth v. Justice debate and its solution in a complementarity approach to truth-seeking and corrective justice mechanisms as parts of a broader understanding of the project of “transitional justice.” I shall then turn to the second debate, Democracy v. Justice, and engage the realist’s dismissal of corrective justice practices. Two arguments, one normative and one prudential, will be presented in support of an institutional engagement with oppression and violence (Section II.2). In order to substantiate my proposal, I shall then put forth a more complex account of the circumstances of transitional justice that includes, along with the economic and institutional dimensions, a social-emotional element. The relationship between resentment and indignation, on the one hand, and the betrayal of legitimate moral expectations, on the other, will be discussed in order to explain why such emotions are linked to the legitimacy of the regime and, implicitly, to its stability (Section II.3). Some preliminary suggestions as to how the exemplary institutional application of democratic norms might recognise moral outrage and at the same time inspire victims and witnesses to internalise democratic principles of public emotional expression will be the focus of Section II.4.

By following these steps, the chapter hopes to contribute to the arguments in favour of dealing with the past by disclosing yet another dimension of the circumstances of justice in transition: the politically relevant negative emotions and their importance for both the legitimacy

and the stability of any democratic order. Through a critical and in-depth engagement with the philosophy and sociology of emotion, Chapter III will take further the proposal sketched here and thus strengthen this positive answer to the justificatory question.

II.1 Overcoming the Truth v. Justice Dilemma

Supporters of post-violence justice defend it as a necessary step for the prevention of similar abuses in the future and for the imposition of appropriate punishment on the guilty. The institutional (re)affirmation of rule of law standards is thought to be a precondition for the further consolidation of young democracies, a way to show discontinuity with the abusive practices of the past, a means to awaken legal consciousness and to ensure some diffuse deterrence effect. Criminal proceedings are considered important in upholding the norms of the Rechtsstaat, though not without complications. By establishing individual responsibility, courts are supposed to undermine a culture of impunity, legitimise the new democratic regime, and restore the moral order of society and the dignity of victims.

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Criminal proceedings are also meant to guard against a cycle of violence and hatred. Should outraged victims be denied any measure of acknowledgement, they might decide to punish those responsible for their suffering extra-legally. Irrational outbursts of public passion would thus undermine the prospects for peace and democracy. By listening to the alternative stories of victims and perpetrators, courts are in a good position to establish the truth, give some satisfaction to the aggrieved, and contribute to collective memory building.

Numerous scholars claim that criminal proceedings are not fit to move a society towards reconciliation and social healing, however. In the aftermath of major suffering and violence, people need to learn how to live together and trust one another again. The divisiveness of the retributive practices, the strictness of rules of evidence, and the high likelihood that courts have been “tainted” under the previous regime have made critics plead against prosecutions and in favour of alternative mechanisms: Truth (and Reconciliation) Commissions. The famous example of South Africa has been celebrated, not uncontroversially, by human rights activists and international lawyers as a successful non-judicial approach to memory building, truth, deliberation and social healing. Nevertheless, not all Truth Commissions have had...

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reconciliation as one of their direct purposes and the findings of some have been used in subsequent criminal trials.\textsuperscript{11}

The Truth v. Justice dilemma dominated the literature in the 1990s; however, scholars and practitioners soon realised that this was a false impasse. Both parties—supporters of truth commissions and supporters of criminal prosecutions—understood that the relationship between these two main transitional justice mechanisms was one of complementarity and not mutual exclusiveness. If we adopt a more capacious understanding of post-oppression justice, then it can be seen as serving multiple justificatory goals. Trials cannot accomplish reconciliation, for this is not their end. Judicial proceedings do establish some measure of truth, but the courts' perspective needs to be supplemented with insights from commissioners, historians and the wider public. Taking victims seriously requires more than giving them an opportunity to testify in a tribunal. A truth commission or a \textit{gacaca} court may constitute more appropriate venues for confronting one’s oppressors. In addition, commissions can assist courts by providing them with information. By exposing torturers and acknowledging the voice of the previously silenced victims, TRCs can also dispense a measure of justice. A division of labour between judicial and non-judicial bodies is likely to produce better and longer-lasting results.\textsuperscript{12}

Thus understood, transitional justice becomes a complex project meant to encourage reflective public deliberation about what “we, the people” did, about who “we, the people” are...
and want to become in the future.13 While trials may hold the guilty accountable, truth commissions can promote social catharsis and reconciliation. While restitution and reparations can bring a measure of social justice to those suffering and the dispossessed, public memorials will fix the meaning of history for future generations. The reproduction of democracy requires that many different tasks be accomplished by different institutions.14 Various mechanisms should be seen as contributing to a holistic effort to deal with the legacies of violence and oppression in a way that aims at establishing and deepening democracy institutionally and culturally.15

While the Truth v. Justice dilemma has been overcome by a rather generalised agreement on the complementarity of efforts to seek truth and do justice, the Democracy v. Justice opposition seems to be more recalcitrant to resolution. Sceptics hold that transitional justice processes would endanger the prospects of democratisation by pitting political adversaries against one another. The argument focuses almost exclusively on the practical obstacles that impede institutional efforts to correct past state-sponsored abuses. The following section will show why this dilemma has been so resilient. By revealing that the relationship of normative

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14 The division of labour thesis is more difficult to sustain for the South African case where retributive justice had to be forgone in the name of truth and social unity. David Dyzenhaus offers a survey of the ways in which philosophers have attempted to justify the institution in its South African form. While some theorists opted to base it on a different kind of justice, namely “restorative justice,” others have attempted to find non-justice related justifications, such as democratic deliberation. The most sophisticated and more plausible attempt to reconcile truth and justice for the post-apartheid mechanism is formulated by Jonathan Allen who claims that the TRC should be conceived of as the result of a “principled compromise” between values, of a choice that had to be publicly justified and that inevitably left some people dissatisfied. Justice had not been completely compromised, however; some of its aspects—its recognition function and its ethos—found proper expression within the TRC’s proceedings. Given the structure of the TRC, some weak punitive justice, as well as a measure of compensatory justice, were achieved along with the revelation of apartheid violations. In this sense, we could say that the different committees of the South African TRC divided the labour of recognizing victims, instilling an ethos of justice and awarding compensation between themselves. See Jonathan Allen, “Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission,” University of Toronto Law Journal, Vol. 49 (1999), pp. 315–353 cited in David Dyzenhaus, “Survey Article: Justifying the Truth and Reconciliation Commission,” The Journal of Political Philosophy, Vol. 8, no. 4 (2000), pp. 470–496.

15 Martha Minow provides us with a twelve-point spectrum of goals that transitional justice hopes to achieve, ranging from ending denial, building a record for history, preventing violence, establishing democracy, to social reconciliation, psychological healing, punishment and the building of an international order where atrocities will not be possible. See Martha Minow, Between Vengeance and Forgiveness, p. 88.
Implication between democratisation and transitional justice can also be prudentially valuable, we will be in a position to bridge the gap between realists and supporters of rectificatory justice.

II.2 Democracy v. Justice: Another False Dilemma

Most arguments against rectificatory justice warn elites of the potential for instability that usually accompanies such processes. Fragile democratic institutions are not in a position to hold accountable their still powerful enemies, therefore justice is the price post-oppression societies have to pay for peace. The success of democratisation should take precedence over punishing the former elites and revenge-thirsty victims must be silenced if the polity is to move forward.\textsuperscript{16} This is especially important in contexts where power was transferred conditionally, in exchange for amnesty.

Realist voices claim that post-oppression justice is, most of the time, simply a mask for a political vendetta, an opportunity for revanchism and scapegoatism that makes the adherents of the previous regime resentful and unsupportive of the newly established democracy.\textsuperscript{17} While trials are the surest way to antagonise society, truth commissions suffer from many flaws as well: they open old wounds and allow for impostors to make false accusations, while reconciliation has rarely, if ever, been achieved. There are other priorities the state should focus on: a constitutional regime, and the reform of the economy and major institutions.\textsuperscript{18} The existence of

\textsuperscript{16} International Relations realists offer sceptical accounts of the international quest for justice, be it in the form of trials or domestically orchestrated truth commissions. Snyder and Vinjamuri claim that, unless backed by a blanket amnesty, neither trials nor truth commissions can advance the cause of peace and reform. The neglect of the distribution of power is the main problem afflicting transitional justice enthusiasts, they claim. See Snyder and Vinjamuri, “Trials and Errors.” Also, McMahon and Forsythe, “The ICTY’s Impact.”

\textsuperscript{17} Juan Linz uses the notion of \textit{ressentiment politics} to describe such risks. See Juan Linz, “Crisis, Breakdown and Re-Equilibration,” \textit{The Breakdown of Democratic Regimes}, ed. Juan Linz and Alfred Stepan (Baltimore, MD: Johns Hopkins University Press, 1978).

\textsuperscript{18} Bruce Ackermann, \textit{The Future of Liberal Revolution} (New Heaven, CT: Yale University Press, 1992). Ackerman is part of what I would call a \textit{Mirror of Democratisers} literature. The comparison is with the \textit{Mirror of Princes} genre whose main representative is Machiavelli. Other major contributions are Linz and Stepan, \textit{The Breakdown} and Huntington, \textit{The Third Wave}.
strong political constraints and limited resources—financial and institutional—are sufficient reasons why the ghosts of the past should not be awakened.19

The realist’s argument is based exclusively on a logic of consequences that prioritises the future and seeks immediate deterrence as the main goal. He opposes the “rights romanticism” of rectificatory justice fans, too sensitive to victims’ emotions.20 “Rights romanticism” put too much emphasis on laws and their educational impact on the world society, says the realist.21 The “norms cascade” phenomenon22 they hope for is an illusion under the circumstances of weak international law and tribunals, to say nothing of the major power inequalities between the actors usually involved. The concern with moral sentiments is equally naïve. One should not strive for a policy of dealing with the past that places emotional satisfaction at its core.23 The logic of consequences dictates that transitional justice is permissible only to the extent that it serves the deterrence of direct perpetrators and leads to the entrenchment of the rule of law and of democratic institutions. If trials and truth commissions are not supported by the most powerful, they will end up destabilising post-conflict equilibria. If amnesties serve the cause of democratisation better, they should be formally implemented and guaranteed. A truth commission might be established only instrumentally, for the purpose of distracting the public’s attention from the remaining injustice.24

19 Most realists focus on what they see as the naïve idealism behind the recent institutional innovations in corrective justice, such as the development of the concept of universal jurisdiction, the establishment of the International Criminal Court and the frequent demands for humanitarian intervention. See for example Jack Goldsmith and Steven D. Krasner, “The Limits of Idealism,” Daedalus (Winter 2003), pp. 47–63 and John C. Torpey in Making Whole What Has Been Smashed: On Reparation Politics (Cambridge, MA: Harvard University Press, 2006).
20 Snyder and Vinjamuri, “Trials and Errors”.
21 McMahon and Forsythe claim that the ICTY had only a minor, mediated impact on the former Yugoslavia and that “judicial shock-therapy” is highly overestimated. See, McMahon and Forsythe, “The ICTY’s Impact”. See also Goldsmith and Krasner, “The Limits of Idealism.”
The realist does not overlook the possibility of entertaining transitional justice projects later on, when waters are calmer; however, by then such projects would serve no apparent good. Once stability and democracy reign, looking back into the past would achieve nothing for the future of the polity. If the bloodshed has stopped, there is obviously no need for deterrence measures.\(^25\) Or so the realist thinks.

While I do not want to deny the prudential weight of these considerations under the demanding circumstances of post-conflict contexts, this chapter will provide two lines of argumentation that seek to disclose the realist’s limited understanding of the circumstances of transitional justice and democratic politics.

First, I shall propose a normative argument that challenges the sceptic’s narrow account of democracy and democratisation. In contrast to his exclusive attention to institutions and their stability, democracy will also be conceptualised as having normative and cultural dimensions. As a normative regime, democracy presupposes an egalitarian theory of human worth\(^26\) dictating the limits of state power, as well as the rights and duties that citizens hold. Democratic institutions are meant to approximate as closely as possible the value of equal respect and concern that moral egalitarianism presupposes. If the books of history were closed without even attempting a public discussion about the legacies of the past, the normative integrity of democracy would be violated.\(^27\) Democratic equality requires the rectificatory work of justice in order to ensure the

\(^{25}\) Snyder and Vinjamuri, “Trials and Errors,” p. 25.


\(^{27}\) Although motivated by different concerns, David Dyzenhaus clearly defends the inherent relationship between the establishment of a democratic order and the work of transitional justice mechanisms: “If one wants more than mere peace or mere stability because one wants to establish a democratic order in which human rights are respected, then considerations of justice must give structure to the transitional process.” We must not forget, however, that the shape of the relationship between justice and stability concerns is determined by the contingencies of the context. As will become clear later on, I share Dyzenhaus’s view on the contextually determined institutional form that dealing with the past takes within transitional moments. With him, I believe that forgoing justice is not permissible if the goal is the establishment of a democratic order even if transitional justice is bound to be tragically imperfect. What we can do is orient our judgment in light of democratic principles and be honest about the limits context creates for our normative prescriptions. My particular interest lies with the kind of obstacles and opportunities the emotional component of the circumstances of transition creates for the decision-makers faced with the tension between the values of unity/stability and justice. See Dyzenhaus, “Survey Article,” p. 492.
legitimacy of democratic institutions; however, this normative conclusion is relevant to the realist only to the extent that he sees a positive correlation between publicly perceived institutional legitimacy and stability.

This is why, in order to stand a better chance of persuading him, we need to disclose the positive prudential implications of a principled engagement with the past. The prudential merits of my normative argument become clear once we turn to the public emotional dimension of democracy. This dimension refers to the public’s politically relevant attitudes, dispositions and emotions. In the aftermath of violence and oppression, reforming laws and structures inspired by historically successful blueprints is an important part of democratisation, but not the only one. In addition, the creation—or revitalisation—of a public emotional culture supportive of the institutions and the values they embody is an equally important objective.

There has recently been a surge in interest in emotions within transformational moments. The affective dimensions of forgiveness, post-atrocity trauma, shame, humiliation and anger have been widely explored in the transitional justice scholarship. Nevertheless, while this literature unveils some of the important emotional aspects of the transitional context, no attempt is made to rigorously show on what grounds and how negative affects can be made to serve the cause of democracy. This is the more specific contribution this chapter and the next seek to make to a theory of democratic change.

I argue that the negative emotions that usually accompany transitions are responses to discrimination, oppression and violence and that, by virtue of their ability to signal injustice,
these emotions can be of great use for the maintenance and reproduction of democracy, as a normative and institutional order. It is true that, due to the nature and intensity of previous abuses, heightened emotional mobilisation has often led to a cycle of violence in which victims turn into victimisers. In order to fructify the evaluative force of these affective responses and avoid a lapse into further injustice, citizens’ emotions need to be socialised so that they are responsive to fundamental democratic values. A democratic pedagogy implies the cultivation of democratically acceptable forms of emotional expression. While democracy can recognise the legitimacy of resentment and indignation towards former oppressors, how people act on those emotions needs to be the object of institutional attention—and transitional justice processes offer the first opportunity for initiating such educational projects.29

In view of the above, the main claim of this chapter is that carefully orchestrated transitional justice processes can perform three important functions for a young democracy. First, by recognising the appropriateness of negative emotional reactions towards former oppressors, such projects would enact the democratic requirement to recognise every citizen’s right to be treated with equal concern and respect. Both victims and victimisers need to be given a voice within public institutions. In this way, the normative integrity of democracy would be preserved and citizens’ perception of institutional legitimacy would be strengthened. Indirectly, perceived legitimacy would contribute to the stability of institutions. Second, prudentially, creating a proper venue for emotional expression can help prevent these emotions from being expressed in

29 In his work on the South African TRC, Jonathan Allen claims that one of the main justice goals of the Commission was to give recognition to victims and engage the ideologically corrupted sense of justice in the wake of apartheid. See Allen, “Balancing Justice and Social Unity.” Following Allen, Dyzenhaus claims that by helping create a stable democratic order and by instilling citizens with an ethos of equal respect, the TRC can accomplish a measure of transformative justice. See Dyzenhaus, “Survey Article.” While I too am concerned with the sense of justice, I am more interested in the recognition and education of the negative emotions in which a violated sense of justice finds legitimate expression. In addition, I shall not limit my analysis to the South African experience, but try to provide a more detailed account of the mechanisms at play in the expression and socialisation of a democratic sense of justice within more or less radical political transformations.
abusive ways: extra-judicial killings, excessive revenge, scapegoatism, abusive purges. Thirdly, by constructively engaging the negative emotions exhibited during transitions, the development of a democratic emotional culture could be stimulated. Resentment and indignation are essential for identifying legitimacy deficits. They bear normative weight and function as important aids for any democratic regime. Nevertheless, while recognising their legitimacy, institutions also need to filter these emotions so as to avoid the instrumentalisation of victimisers for the sake of satisfying victims’ desire for vindication. Exemplary political and institutional judgment is required in order to secure the positive contribution these affects can make to the reproduction of democracy.

These arguments will structure the theoretical contribution this dissertation seeks to make. Before moving on to the next section, which outlines the transitional circumstances of justice, I would like to make some brief remarks about what I consider to be the realist’s faulty understanding of the relationship between time, justice and democracy.

The realist emphasis on a logic of consequences leads to a tragic disregard of the ways in which history informs and constructs both the present and future. This perspective limits the purposes of corrective justice to the immediate deterrence of perpetrators and “spoilers,” overlooking all the other important ends that can be served by such projects. Even if we agree that deterrence is important, we need not conceptualise it so narrowly. A broader understanding—one that looks beyond the discouragement of direct perpetrators and targets the global society of witnesses to atrocity—would make rectificatory justice programs imperative. It

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is unlikely that major perpetrators of human rights violations would be deterred by threats of prosecution once they have unleashed their forces against their perceived enemies. Nevertheless, rectificatory justice processes could warn future potential violators of the possible consequences of violations. The *Nunca mas!* inherent in such legislation is geared towards present and future generations and is meant to steer the identity of the polity away from violence and oppression—and it might take a long time for the fruit of trials or truth commissions to ripen. Experience has taught us that the effects of justice cannot be seen immediately. Therefore, we should wait for a little longer before losing patience with the most recent innovations in post-conflict justice.

Rectificatory legislation is future-oriented in yet another way. The promulgation of a democratic constitution and of related legal reforms may produce a *first order political enfranchisement*; however, citizens do not share an equal starting point. Taking the past seriously requires further enfranchising victims through the enactment of rectificatory legislation aimed at levelling the political playing field. Only thus can citizens develop a sense of allegiance to the new institutions and benefit from the empowerment that comes with the recognition of equal status. Transitional justice processes provide victims with a forum of representation wherein their previously silenced voices can be safely expressed. A consistent affirmation of the equal respect and concern owed to all citizens thus requires *a second order enfranchisement* through post-oppression justice mechanisms. In the absence of recalibration efforts, the quality of the future democracy would be affected.  

At this point, some might say second order enfranchisement makes no sense when atrocities have been committed by both parties to a conflict, when victims are at the same time perpetrators, when it is difficult, if not impossible to distinguish between the two. Rajeev Bhargava has labelled this scenario “symmetric barbarism.” He claims that, under such circumstances, a truth commission would be enough to restore a minimally decent order. Nevertheless, attempting to close the books without any form of acknowledgement, remembrance, and collective acts of assuming responsibility would only benefit the guiltiest and would allow the past to haunt the future. See Rajeev Bhargava, “Restoring Decency to Barbaric Societies,” in Rotberg and Thompson, *Truth v. Justice*, pp. 45–67. While I want to acknowledge the realist’s point about the practical difficulty of distinguishing between perpetrators and victims, I do not want to conclude that engaging with the past should be forgone. I agree with Bhargava that some form of reckoning with history is necessary in order to seal the commitment to minimal norms of human decency. Both parties need to take responsibility for the state in which society finds itself in the aftermath of conflict. In this sense, in the case of symmetric barbarism, the second order enfranchisement I mentioned above shifts emphasis from

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There is a second reason why I find the realist understanding of the relationship between time, justice and democracy, problematic. His emphasis on the future-oriented establishment of the rule of law—as opposed to the backward-looking character of corrective legislation—does not seem to be fully accurate.\(^{32}\) It is true that a democratic constitution has a forward-looking role in setting the parameters of collective identity in the language of rights, but it also looks back at the past, defining itself in opposition to the arbitrariness and abuses of the previous regime. This fact can be seen in the differences between the changes in institutional arrangements that appear from one constitution to the other, be they in the redefinition of the boundaries of institutional competences, of the demos, or of the relationship between domestic and supra-domestic constitutional fora. Many new constitutions contain emphatic declarations of principles that denounce a past of discrimination and injustice in order to draw a line between the arbitrary practices of the past and a hopefully peaceful democratic future.\(^{33}\) The past inevitably infiltrates the setup of democratic institutions.

Having made this brief detour into the realist’s temporal framework, it is time to take the next step in the exploration of our alternative conception of rectificatory justice and its role in democratisation. An account of the circumstances of transitions to democracy will provide the background for my two arguments in favour of post-violence justice projects.

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\(^{32}\) See Ackerman, *The Future* and Snyder and Vinjamuri, “Trials and Errors”.

II.3 Democratic Shifts and the Emotional Circumstances of Justice

Democratic shifts are generally seen to cover changes exemplified, at one end of the spectrum, by such phenomena as the Rights Revolution in the United States and, at the other, by the more profound transformations of societies coming out of major conflict and oppression. If we look at democracy as a normative regime, such transformations may involve refining standards of evaluation, discovering new principles, or rediscovering old ones. All of these are part of a continuous and gradual—but also sometimes abrupt—movement towards a closer approximation of the requirements that democratic reciprocity places on both institutions and citizens. If we look at democracy from the institutional point of view, these normative changes get manifested in (re)writing constitutions, reviewing old statutes, doing away with “evil laws,” and creating new rights or more extensively applying the existing ones.

Be they more or less profound, such transformations lend themselves to multiple layers of theorising and usually lead to practical dilemmas. Some of the most pertinent questions one could ask are: Who initiates the normative shift—institutions or groups within the civil society? How can the citizens of a community be motivated to accept and to consistently act on the recently (re)discovered principles? What happens when these principles are in strong tension with the individuals’ dispositions, desires and reactive emotions?

These questions bring us to the socio-affective dimension of a democratic political culture. Democratic shifts need the backing of a supportive political and emotional culture. However, motivating citizens to adapt to change behaviourally and attitudinally is a very difficult task in the aftermath of radical democratic shifts. Such contexts face an important predicament: on the one hand, the development of democratic attitudes is of paramount importance for the

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functioning of institutions; on the other hand, we cannot expect such attitudes to spontaneously flourish overnight.

The consolidation of democracy is thought to have three dimensions:

*Behaviorally,* a democratic regime in a territory is consolidated when no significant national, social, economic, political or institutional actors spend significant resources attempting to achieve their objectives by creating a non-democratic regime or turning to violence or foreign intervention to secede from the state.

*Attitudinally,* a democratic regime is consolidated when a strong majority of public opinion holds the belief that democratic procedures and institutions are the most appropriate way to govern collective life in a society such as theirs and when the support for anti-system alternatives is quite small or more or less isolated from the pro-democratic forces.

*Constitutionally,* a democratic regime is consolidated when governmental and nongovernmental forces alike, through the territory of the state, become subjected to, and habituated to, the resolution of conflict within the specific laws, procedures and institutions sanctioned by the new democratic process.\(^{35}\)

Although I find the split between these three dimensions a bit artificial, Linz and Stepan do capture the importance of the entrenchment of democratic dispositions within the citizenry at large. Loyalty to the values expressed in democratic constitutions needs to be owned and acted on by individuals. However, it is generally believed that, in the aftermath of oppression, a long time must pass before hopes of a democratic political culture and of a lively and independent civil society can be entertained. Democratic predispositions are not always present to sustain the complex processes of legal, political, economic, and social reform that enable the consolidation of the new political order. Mutual respect, the willingness to listen, to exchange arguments and to include the points of view of all affected, tolerance, and social trust are frequently absent in war-torn or state-victimised societies. On the contrary, moral hatred, lack of trust, resentment, and indignation dominate the emotional repertoire.

Resentment has rarely been listed among the “good” emotions by philosophers and political scientists. The central place *resentiment* occupied in Nietzsche’s account of the genealogy of morals has stigmatised this emotion for political theory. Moreover, within liberal thought, the relationship between resentment and the desire for revenge has played a central role in the theoretical justification of modern legality. Through processes of legal justice, the irrationality of a resentful drive to retaliate is translated into cool, rational, and proportional retribution at the hands of the state. Its hypothesised resilience and obsession with the past have led political scientists and historians to share the philosophers’ sentence and relegate resentment to a category of emotions in need of management and silencing.

Indignation has not been free of suspicion either. The potential for hypocritical, delayed outrage and for the unwarranted self-righteousness of bystanders has made scholars wary of this emotion’s claim to legitimacy. Its capacity to mask vendettas and scapegoatism has not escaped criticism.

This account of the emotions marking the circumstances of justice in transition can easily support the realist’s prescriptions for democratisers. Given the emotional mobilisation that accompanies major transformations, the worst thing one could do is provide an institutional

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37 The differences between revenge and retribution are systematically explored by Robert Nozick in his *Philosophical Explanations*. First, retribution is done for a wrong while revenge may be for injury, harm, or slight and need not be for a wrong. Secondly, retribution sets an internal limit to the amount of punishment required according to the seriousness of the wrong, whereas revenge, on its own, sets no limit to what may be inflicted. Revenge is personal, whereas the agent of retribution need have no personal or special tie to the victim of the wrong for whom he or she extracts retribution. Fourthly, revenge implies some emotional tone, pleasure in the suffering of the other, while retribution requires no such emotional element, though it may involve another, pleasure at justice being done. Lastly, there need be no generality in revenge. In contrast, the imposer of retribution, inflicting deserved punishment for a wrong, is committed to the existence of some general *prima facie* principles mandating punishment in similar cases. See, Robert Nozick, *Philosophical Explanations* (Oxford: Claredon Press, 1984), pp. 366–368. For the ideological role that the dichotomy between revenge and retribution plays, see Roberto Unger, *Knowledge and Politics* (New York NY: Free Press, 1976). For an argument as to why revenge and punishment are not that different after all, see Leo Zaibert, “Punishment and Revenge,” *Law and Philosophy*, Vol. 25 (2006), pp. 81–118.

38 For an account of the typical story of resentment-driven revenge see Austin Sarat, “When Memory Speaks: Remembrance and Revenge in *Unforgiven,*” in Rosenblum, *Breaking the Cycles of Hatred*, pp. 236–259. For discussion of the risks associated with resentment and revenge within a variety of historical contexts see all essays in this edited volume.

39 For a historical example of the abuses of indignation see Virgili, *Shorn Women*. 
arena for a showdown of hatreds. This need not be the conclusion, however. Not everyone has given up on these emotions. Potential avenues for recuperating and putting them to use in the reproduction of a particular moral order are revealed through the disclosure of the cognitive, evaluative dimension they presuppose. Some recent work in the transitional justice literature has embraced the cognitivist stance and has attempted to defend the legitimacy of negative reactions in post-conflict situations. The essence of these scholarly pieces is a critique of the exaggerated values of forgiveness and magnanimity that truth and reconciliation commissions are thought to treasure. Drawing on the work of Holocaust survivor Jean Améry, Panu Minkkinen conceives of resentment as an “inalienable right” that should not be violated by pushing victims into officially organized venues of forgiveness. Thomas Brudholm looks at the South African Truth and Reconciliation Commission’s celebration of forgiveness through the lens of Améry’s account of ressentiment and finds it wanting. Their blindness towards the moral affirmation inherent in resentment makes reconciliation commissions problematic, claims Brudholm. While acknowledging these authors’ efforts to draw attention to the relevance and legitimacy of resentment within democratising contexts, this chapter seeks to go beyond their specific interest in the limitations of truth commissions with regard to such negative emotions.

Thus, I argue that we must dismiss a crude understanding of emotions as mere irrational responses to stimuli and recognise their evaluative dimension. Victims’ resentments and indignation cannot be regarded merely as dangerous threats. As markers of a sense of justice, they bear normative weight and should be recognised as legitimate objects of concern by decision-makers. Such emotions may act as valuable signals of alarm that injustices need correction. Therefore, suppressing them is not in the interest of the agents of democratisation. In

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41 Minkkinen, “Resented and Unforgiven”.
42 Brudholm, “Revisiting Resentments” and Resentment’s Virtue.
addition, ignoring the past by silencing the victims can have two practical negative consequences. On the one hand, widespread apathy and cynicism may slowly permeate civil society. Institutional failure to live up to proclaimed standards leaves citizens feeling disempowered and abandoned. These attitudes have often permitted the hijacking of democratisation processes by partisan interests. Alternatively, resentment can be reproduced from one generation to another, always latent and ready to erupt in abusive ways. The stability of the newly established regime will thus perpetually remain precarious. Needless to say, in both scenarios the quality of democracy would be diminished as a result of missing a great opportunity to affirm democratic equality and initiate socialisation into the democratic rules of emotional expression. Given political will and inspiring reflective judgment, such dangerous outcomes can be avoided.

By now it should be clear that this chapter sees democratic legitimacy as a necessary ingredient for the stability of institutions. Because of their inherent connection with the satisfaction or frustration of citizens’ moral and political expectations, negative emotions are crucial for legitimacy considerations. In an article entitled “Multiculturalism and Resentment” Duncan Ivison captures the relationship between negative emotions, stability, and legitimacy.

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within a multicultural society and he warns of the instability dangers associated with the failure to address the legitimate expectations underlying public expressions of resentment and indignation:

Left unaddressed, the alienation or frustration out of which resentment can grow, corrodes the structures of trust between citizens. Left to fester, it can erupt in socially and politically damaging ways, and is most likely to do so when enough of the same citizens or groups are always the ones who seem to be losing … democrats need to be concerned with not only the positive effects (and affects) of collective political action, but also with the distribution of negative ones. We need forms of practical reason that can address these common features of political life, not side-step them.\textsuperscript{46}

Do resentment and indignation need to be taken into account only for prudential reasons, i.e. for the disruptive and harmful directions they can take if allowed to linger? Ivison’s account goes beyond prudential considerations; he writes:

Societal learning is rarely comprehensive or linear and not always resilient. The potential for any positive residue to emerge or be sustained might be overwhelmed by the persistence of historical and contemporary injustice … We should aim to take these reactions seriously, not only because they can be manipulated in harmful ways, but also because they remind us of the fact that the process of political legitimation is always ongoing, as it is imperfect.\textsuperscript{47}

While Ivison’s immediate interest is in resentment and the corrosion of social solidarity within multicultural societies, he links the expression of such emotions to the greater issue of democratic legitimacy. By living up to democratic citizens’ expectations in a principled manner, institutions become legitimate, the level of social mobilisation decreases, and with it, the potential for instability.

Following Ivison and adapting his views to the context of interest for this dissertation, I argue that in the aftermath of dramatic normative and political shifts, transitional justice processes can clearly and directly contribute to the institutional satisfaction of citizens’

\textsuperscript{46} Ivison, “Multiculturalism and Resentment,” pp. 2–3.
\textsuperscript{47} Ivison, “Multiculturalism and Resentment,” p. 23.
expectations of recognition and vindication. The expectation of being treated with respect by the institutions and by one's fellow citizens is emotionally charged in the aftermath of violence.\textsuperscript{48}

Within post-oppression contexts, victims demand that political equality—and sometimes implicitly also moral—equality be (re)established. Resentment and indignation can be related, first, to the experience of first-hand victimisation by the former regime and, second, to the failure of the successor elites to address legitimate claims to justice. In other words, before the democratic shift, violence, arbitrariness, and oppression usually lead to resentment by specifically targeted groups and indignation within the population at large. The intensity of the negative feelings depends on the heinousness and duration of the human rights violations. There is a difference of degree between resentment at being denied reasonable opportunities to express oneself politically by an authoritarian regime and resentment at being made a prisoner of an extermination camp. Third parties’ indignation also varies with the seriousness of the harm inflicted on the victims. Sometimes these reactions mobilise the body politic in a way that brings about change from the bottom up. In other contexts, they remain latent and only get publicly expressed with the advent of safer times. It is important to note that democratic change is most of the time imagined as the establishment of normality in the sense of the creation of, or a return to conditions of equality before the law and governmental predictability. These expectations, stifled for reasons of fear and lack of social trust, naturally come to the fore and demand satisfaction. Should they be denied voice once again, the injury and insult towards victims would be compounded and the integrity of the democratic normative regime would be imperilled.\textsuperscript{49} In addition, political apathy and disillusionment might prevent the performance of accountability

\textsuperscript{48} In this sense my account follows Jay Wallace’s appropriation and criticism of Strawson’s account of reactive attitudes. See, Jay Wallace, \textit{Responsibility and the Moral Sentiments} (Cambridge, Mass.: Harvard University Press, 1994).

functions by civil society, while the stability of the political regime would be perpetually threatened by unvindicated negative feelings, potentially reproducing themselves across generations.

The onus is therefore on the young democratic institutions to prove that they can stay true to the commitments expressed in the post-conflict constitutional documents. This, I argue, inherently implies a response to the demands of transitional justice. Normative consistency, understood as acting according to our newly declared standards of equal respect and concern for all, requires that we deal with betrayed, yet legitimate, expectations in a way that acknowledges the appropriateness of reactive feelings, provides them with a safety valve, and justly corrects the injustices of the past. It is only in this way that victims and victimisers will not be instrumentalised for the sake of stability. In addition, the exemplarity of institutional consistency in the affirmation of democratic values can act as a catalyst for the development of a democratic emotional political culture within the citizenry. By responding to public emotional mobilisation in a way that (re)affirms the equal concern and respect democracy posits for all citizens, institutions can live up to previously frustrated expectations, gain legitimacy, stimulate social support for necessary political and economic reforms, and in these ways ensure their own stability.

The next section will try to provide a theoretical account of democratic normative consistency and the burdens and duties it creates for both the citizens and institutions of the new democratic regime. The broad suggestions made in this last section will be further elaborated in the second part of the dissertation when we turn to the issue of the distribution of transitional justice. For now, suffice it to outline what it means to show equal concern and respect for all.
II. 4 The Exemplarity of Institutional Normative Consistency

So, what does it mean to consistently act democratically in the wake of democratic shifts? At the individual level, consistency requires a readiness to bear the burden that the norm of equal respect places on us. Accepting the strains of commitment to the value of equal liberty implies reflectively endorsing the protections this value provides not only for the victims, but also for the victimizers. Citizens need to understand that, if they are to stay true to their newly proclaimed standards, they need to extend respect to everyone; that is to say, democracy places limits on the kind of acts that can be performed in the name of violated moral expectations. But, as we saw so many times in history, controlling one’s otherwise legitimate hatreds does not come easily.

How can institutions catalyse the endorsement of democratic respect across persons? This dissertation claims that an exemplary enactment of the value of equal respect and concern in institutional practices can inspire citizens to moderate their resentments and indignation. Consistency in the commitment to democratic values first and foremost demands that the polity decide on some form of transitional justice. Former victims need to see that their suffering is recognised and that the insult they experienced does not get perpetuated historically. Equal concern for all citizens demands that *general enfranchisement* through constitutional lawmaking be supplemented by a *second order, redress enfranchisement* through the promulgation and application of rectificatory legislation. Responses to wrongdoing in the form of transitional justice legislation can provide the crucial vindication victimized societies long for. If this double process of enfranchisement does not occur, the risks of sliding back into injustice and violence may run high.

Once the decision to engage in some form of rectificatory project has been made, it is imperative that institutions observe democratic norms consistently in legislation, adjudication and policy-making. In legislating, it forbids passing laws that would allow the instrumentalisation of former victimisers for the sake of satisfying victims’ desires for revenge.
In reviewing legislation, it commands striking down as unconstitutional any corrective justice bill that would undermine the foundational norm of equal respect for all citizens. In trying victimisers, it requires contextualisation, careful attribution of responsibility and attentive interpretation of law, both domestic and international, in a way that minimises the dangers of scapegoatism and political revanchism. In establishing truth commissions, forgiveness should not be pushed on victims as a test of good character. In compensating, political judgement must balance carefully the competing claims of justice and expediency.

The audience for all these institutional efforts is composed of the victims, victimisers, society at large, and the international community. The individuals’ ways of interacting with the other citizens, but also with the state’s institutions, need to change. A period of accommodation and adjustment to the new realities is inevitably felt as strenuous. Social trust needs time to develop. The pedagogy of transitional justice must engage individuals’ moral emotions and the judgements underlying them. In time, the hope is that democracy will generate its own support and that citizens will gradually understand how loyalty to political and moral egalitarianism requires respect for all members of the community, victims and victimisers, bystanders, and beneficiaries of injustice. Discontinuity with the abusive practices of the past cannot be achieved if indignation and resentment are vented through revanchist measures outside the procedural protections of the law. The entrenchment of reciprocity standards within the wider political and emotional culture is a success to the extent that individuals respond to the exemplary actions of the institutions by learning to take responsibility for the public expression of outrage.

Sometimes the climate of the immediate post-authoritarian moment might not be propitious to rectificatory processes. This dissertation argues that democrats can concede the necessity to postpone, but cannot forgo the duty to listen to formerly disenfranchised voices.\textsuperscript{50} Of

\textsuperscript{50} The sustained expressions of public negative feelings and the delayed transitional justice measures they pushed for in Argentina are an illustration of the corrective function resentment and indignation can play within
course, corrective efforts are bound to be imperfect. Nevertheless, public debate about the legacies of violence cannot be stifled. Left to fester, moral hatred can reproduce itself in time and erupt unexpectedly in destabilising ways. Alternatively, political cynicism could become pervasive and affect the functioning of civil society. If the past is ignored, if public emotions are not engaged pedagogically, a great occasion to initiate socialisation for a democratic future will have been missed. The positive potential that such emotions have as barometers of legitimacy would be wasted.

By now I hope to have shown the limits of the sceptic’s position. Forgetting cannot be imposed, yet how a society remembers makes proper object of an institutionally orchestrated pedagogy. The institutions’ living up to democratic commitments can have an important, even if slow, educational effect on the society at large. Different arrangements are suitable for different contexts, yet we should not overlook common problems and a shared purpose, the establishment of a well-functioning democracy, which depends in this first instance—both for its normative integrity and the stability of its institutions—on the successful production and application of rectificatory legislation.

But what type of emotions does democracy need from its citizens in order to reproduce itself as a regime? What kind of affective culture does an egalitarian theory of human worth prescribe? What makes resentment and indignation compatible with such an affective culture? These questions will frame the discussion of the following chapter. I shall try to provide an account of resentment and indignation as negative expressions of a violated sense of justice and of the emotional and evaluative mechanisms at play in public expressions of moral outrage. Insights from various bodies of literature will be brought to bear on a complex understanding of the morphology and functioning of politically relevant affects. A weak constructionist view of a
democratizing contexts. Judge Baltasar Garzón’s failed efforts to bring justice to Spain last year are just an illustration that the past finds its agents of justice in the present.
community’s emotional culture will substantiate the claims made so far and will mark an important step towards answering the second of the two questions guiding our inquiry, that of distributing transitional justice.
Chapter III

Indignation, Resentment and the Legitimacy of Punitive Expectations

Self-confessed man of resentments that I am, I supposedly live in the bloody illusion that I can be compensated for my suffering through the freedom granted me by society to inflict injury in return. The horsewhip lacerated me; for that reason, even if I do not dare demand that the now defenceless thug be surrendered to my own whip-swinging hand, I want at least the vile satisfaction of knowing that my enemy is behind bars. Thereupon I would fancy that the contradiction of my madly twisted time-sense were resolved.

(Jean Améry, At the Mind’s Limits)

We are forced to live together...Because of that we are all pretending to be nice and to love each other. But it is known that I hate them and they hate me. It will be like that forever.

(Mostar resident, 2001)

I don’t understand this word “reconciliation.” I can’t reconcile with people, even if they are in prison...If a person comes to ask my forgiveness, I will pardon him after he has resuscitated the members of my family that he killed!

(Genocide survivor, Rwanda, 2002)

“Do you see this boy? He is my grandson. And I will teach him to remember and to hate. I will teach him to kill!”

(Bosnian woman, Srebrenica, 1998)

Abusive regimes imprison, kidnap, spy, torture, and kill, thus denying their victims many aspects of a purposeful life. Government-sponsored crimes can be placed on a continuum ranging from the milder forms of coercion—for example, restrictions on freedom of movement and speech, expropriation, and denial of public services—all the way to genocide. Such actions are most of the time met with resentment, hatred, and indignation. As we have seen, resentment corresponds to the individual’s experience of injustice towards herself, whereas indignation is the feeling that arises in the individual from witnessing an injustice done to another. Sometimes, these negative emotions mobilise groups to push for change. Once the regime of violence has fallen, victimisers frequently become the target of the emotionally charged desire for justice. Other times, the
rulers’ subordination of society is so strong that atomisation and apathy ensue, while negative emotions surface only after the violence has ceased, if at all.

Irrespective of whether the transitional moment is characterised by violent manifestations of outrage or apathy, these reactions are symptomatic of something deeper with which young democratic institutions need to concern themselves. Recognising the legitimacy of public emotions and, at the same time, initiating a process of democratic emotional socialisation are two imperatives of transitional moments.

Dealing with high levels of resentment and indignation seems to be a more immediate task from the point of view of stability, yet engaging societal apathy is just as important. Apathy, as much as resentment and indignation, can endanger the proper functioning of democratic institutions, for it is often a marker of disillusionment with politics, distrust in public institutions, or perceived powerlessness. These are all detrimental to the prospects of establishing democratic institutions and mechanisms of political accountability.¹

While acknowledging apathy as one of the two possible extreme affective attitudes that can characterise transitional moments, my project will be focusing on the outburst of negative moral feelings that can accompany the change from oppression and violence to equal concern and respect for all. In this chapter, I shall try to provide an account of the moral and social psychology of democratic transitional moments. Being a democrat implies, among other things, expressing one’s emotional reactions in a way that does not violate principles of equal respect for all. As we saw in the previous chapter, the emotional culture of a polity is part of its political culture and, as such, an important object of concern for institutions. While democracy can recognise the validity of the evaluative verdict inherent in resentment and indignation, how these emotions are expressed in practice and the kind of actions they motivate must endanger neither

¹ There is a vast literature in Democratisation Studies that bears testimony to the particularly negative impact that political apathy can have on societies making the transition from authoritarianism to democracy. I dealt with such phenomena in the context of Eastern European transitions to democracy in my Licenta Thesis, Political Apathy: A Problem of Socialisation?, submitted to the University of Bucharest, Political Science Department, July 2003.
the normative integrity of the democratic theory of human worth, nor the stability of the institutional order. More specifically, the individual’s sense of justice needs to be engaged in such a way as to recuperate its correct evaluation and channel its forms of expression such that it serves the causes of democratisation.

In order to unpack the multiple dimensions of public emotional expression in the early stages of democratic transitions—in terms of both the obstacles and opportunities it creates for the institutional entrenchment of democratic norms—we need to work on a precise conceptualisation of the individual’s sense of justice and of its relationship to feelings of resentment and indignation. What is it that gives these feelings appropriate normative weight? What kind of emotional responses are they? In what sense are they both potentially dangerous and potentially beneficial for democracy, and why?

The sense of justice or, alternatively, the sense of injustice, has been the object of theorising in moral psychology,\(^2\) political theory,\(^3\) legal theory\(^4\), theology,\(^5\) and anthropology.\(^6\) I shall start by engaging two of the most influential accounts of the sense of justice in liberal political theory, those offered by John Rawls and Judith Shklar (Sections III.1.1 and III.1.2). There are two important theoretical elements that make these accounts appropriate as a starting point for analysing what it means to be morally resentful or indignant within transitional moments. The first element I will focus on is the weak constructivist position on emotions that

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these two authors endorse. A weak constructivist views the principles guiding the sense of justice as given by a socially endorsed conception of justice. The biological is also given some weight, as the expression of moral emotions is linked to what makes us human. By contrast, a strong constructivist position would deny any role to the biological and would claim emotional responses are thoroughly the product of social construction. At the other extreme, a non-cognitivist position would reduce emotions to mere physiological reactions devoid of any judgment. Secondly, the sense of justice is theorised as a durable disposition expressible in negative moral feelings. For both Rawls and Shklar, the experience of injustice is usually met with public expressions of outrage: resentment by those who directly experience it and indignation by witnesses. Sections III.2 and III.3 will supplement these two important conclusions with a complex analysis of the morphology and socialisation of emotions in general, and of the sense of justice in particular. Through an engagement with the recent literature in social and moral psychology, Section III.2 discusses the mechanisms through which socialisation partially constructs our affective register and instils in us publicly appropriate forms of emotional expression. As we shall see, the internalisation of emotional rules, no less than of any other rules, constitutes us as members of a political and cultural community. I shall then narrow the inquiry and examine what a weak constructivist might have to say about the sense of justice (Section III.3). This moral disposition will be conceptualised formally, divorced from the favourable conditions of a consolidated liberal democracy.

This analysis prepares the ground for answering important questions for this project, questions that, because they connected the development of the sense of justice with the principles of constitutional democracy, Rawls and Shklar did not answer. Where does the content of an

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8 The most famous representative of such a position is William James, “What is an Emotion?” *Mind*, Vol. 9 (1884), pp. 188–205.
9 As will become obvious, the account of socialization I shall introduce is framed by the categories worked through by Talcott Parsons in *The Social System* (The Free Press of Glencoe, 1964). See especially Chapters I, II, VI, VII.
individual's sense of justice have its origin when he or she has not been socialised under or benefited from a democratic regime? Is there any way democracy can recognise the legitimacy of negative reactions to the crimes of previous regimes when these reactions are not expressed in democratic language? The view I hope to defend is that, while emotional claims by transitional justice victims are constitutively compatible with democratic principles of justice, the endorsement of regulative emotional rules needs to be institutionally stimulated, for reasons both of prudence and of democratic normative integrity. In other words, while democracy recognises the appropriateness of such affective responses to violence and oppression, the manner in which they are manifested publicly needs to become the object of institutional filtering so as to avoid the undermining of democratic values.

The last section of this chapter, Section III.4, will provide an account of the constraints that a democratic, egalitarian theory of human worth would place on the public expression of negative moral feelings as responses to injustice. My purpose is to sketch the principles of emotional appropriateness that democracy needs to instil in its citizens, whether victims, witnesses, or victimisers. Voice cannot be given unconditionally; the normative, institutional, and cultural reproduction of democracy requires the establishment of checks on the target, type, manner, and duration of public expressions of negative affect.

Let us now take a closer look at political theory’s recent views of the sense of justice, its object, development, and legitimate forms of expression. Rawls’s conception of the moral power to act on publicly embraced principles of justice and Shklar’s deploring of the dormant state of this power within consolidated democracies will get us on our way towards a political theory of democratisation that takes stock of the affective dimension of the social order.
III.1 Liberal Democratic Accounts of the Sense of Justice and Their Limits

III.1.1 Moral Powers and the Stability of Principles

John Rawls has authored one of the most famous theoretical articulations of the concept of the sense of justice as an enduring moral sentiment which finds expression in feelings of guilt, resentment and indignation. Although his account is tailored for the well-ordered society and deals only marginally with non-ideal conditions, I shall briefly examine his contribution in an attempt to see whether it can help us make sense of emotional reactions within the circumstances of a transition to democracy. I shall first delineate his ideas as they appear in his 1963 article, “The Sense of Justice” and his two famous books, *A Theory of Justice* and *Political Liberalism*. In view of my interest in the evaluative emotional eruptions usually accompanying major democratic shifts, I shall try to see what theoretical resources we can derive from the Rawlsian contribution.

*A Theory of Justice* sets out to provide a normative account of the derivation of the principles of justice, but also a descriptive moral psychology that would ensure the stability of this conception. I shall not go into the extensive debate over the role of moral sentiments in the derivation of principles in the Original Position.\(^{10}\) The sources of motivation of the parties are different under the Veil of Ignorance and in the post-derivation phase. What interests me for the purposes of this dissertation is the aforementioned descriptive moral psychology that is meant to ground the stability of the two principles outside of the Original Position, in both full- and partial-compliance situations.

Rawls’s conception of the person is an essential ingredient of his theory of social justice. Individuals are conceived of as endowed with two moral powers: the capacity for a conception of

the good and the capacity for a sense of justice. Similarity in the possession of these capacities is what normatively grounds equality for Rawls. This assumption is compatible with his allowing for differences of degree between individuals when it comes to the exercise of the sense of justice. These differences do not exclude anyone from the realm of justice, although they do entitle those with a more developed capacity to a special claim with regards to certain offices.  

But what exactly is the sense of justice?

Rawls conceptualises the sense of justice as a sentiment, a permanent governing disposition to act on the two principles of justice as they would have been agreed upon in the Original Position: “We develop a desire to apply and to act on the principles of justice once we realise how social arrangements answering to them have promoted our good and that of those with whom we are affiliated. In due course we come to appreciate the ideal of just human cooperation.”

The development of this desire and the sustained motivational force of the two principles are conditioned by the experience of having repeatedly benefited from living within a fair scheme of cooperation. The stable disposition to act on recognised principles of justice is part of a thin theory of the good for the members of a well-ordered society: it is rational for individuals in the original position to want the members of their cooperative scheme to share in the possession of a sense of justice. Thus theorised, the sense of justice ensures the stability of the conception of justice. Within partial compliance theory, the manifestation of the sense of justice in negative feelings of resentment and indignation signals correctable injustices and can contribute to the greater approximation of the two principles in practice. Once acquired, this capacity moves citizens to support the institutional arrangements from which they have drawn

11 Rawls suggests that a greater skill and facility in applying the principles of justice and in constructing arguments in particular contexts is an asset for a judiciary office. Rawls, *A Theory of Justice*, p. 505–506. See also Rawls, *Political Liberalism*, p. 80.
advantages. In addition, it motivates them to set up just institutions or reform the existing ones, if justice demands it.

By consistently acting on the sense of justice, we fulfil what Rawls identifies as the natural duty to support and further just institutions. Natural duties are duties which do not depend on one’s consent and which would be acknowledged in the Original Position, while positive duties include duties to uphold justice, to mutual aid and mutual respect. The most relevant negative imperatives are those demanding that moral agents abstain from injuring or harming the innocent, and these duties are owed to individuals as persons, not as members of a political community. The natural duty to uphold justice gets fulfilled once individuals develop a sense of justice and contribute their part to the maintenance of just institutional arrangements.14

Because of the need to provide the conception of justice as fairness with a stable basis within individuals’ psychology, Rawls engages in a reconstruction of the emergence of the sense of justice, a reconstruction he claims owes its inspiration to both empiricist and rationalist accounts of moral development.15 The basic idea is that of a gradual maturing process stimulated by positive interpersonal experiences. It is the manifest intention of others to act for our good—starting within the family and culminating in the political community of just principles—that enables the development of a sense of reciprocal justice as an acquired new motive. Rawls states that people’s tendency to answer in kind is a “deep psychological fact” making human sociability possible.16 It is our primitive natural affects that ground our disposition to act on the two principles of justice. Rawls goes so far as to state:

One may say, then, that a person who lacks a sense of justice and who would never act as justice requires except as self-interest and expediency prompt, not only is without ties of friendship, affection or mutual trust, but is incapable of resentment and indignation. Thus a person who lacks a sense of justice is also without certain natural attitudes and certain moral feelings of a

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particularly elementary kind. Put another way, one who lacks a sense of justice lacks certain fundamental attitudes and capacities included under the notion of humanity.\textsuperscript{17}

Though partially determined by a set of natural affects that make us human, the sense of justice receives its content from the conception of justice that is publicly recognised, and it becomes efficient once just institutions have been firmly established and recognised as such:

Since a well-ordered society endures over time, its conception of justice is presumably stable: that is, when institutions are just, (as defined by this conception), those taking part in these arrangements acquire the corresponding sense of justice and desire to do their part in maintaining them. One conception of justice is more stable than another if the sense of justice that it tends to generate is stronger and more likely to override disruptive inclinations and if the institutions it allows foster weaker impulses and temptations to act unjustly. The stability of a conception depends upon a stability of motives: the sense of justice that it cultivates and the aims that it encourages must normally win out against propensities towards injustice.\textsuperscript{18}

Thus, the hypothetical presentation of the development of this moral power can be seen as belonging to a weak constructionist perspective: both general, natural maturing processes and the force of socialisation are given their due within an account of the way in which moral development might happen in a well-ordered society governed by the contract doctrine.\textsuperscript{19}

Rawls acknowledges the need to further elaborate on the motivational force of the two rationally derived principles in relation to the sense of justice as a moral sentiment. Within his conception of justice, this force has several sources. First, the principles are chosen by rational persons for their contributions to advancing human interests. Second, they are continuous with the love of mankind. Third, on a Kantian reading, acting on the principles of justice manifests individuals’ nature as free and equal beings. Lastly—and most importantly for my project—given the content of the principles of justice, feelings of guilt and resentment are aroused by

\textsuperscript{17} Rawls, “The Sense of Justice,” p. 299.
\textsuperscript{18} Rawls, \textit{A Theory of Justice}, p. 454.
\textsuperscript{19} Rawls, \textit{A Theory of Justice}, p. 495.
injustices that offend one’s sense of justice. In this sense, we can see that Rawls might have envisaged a regulative function for these emotional responses within partial compliance theory.\textsuperscript{20}

The main characteristics of the sense of justice remain relatively unchanged with the transition to Political Liberalism. Here, Rawls shifts the locus of the two moral powers—the sense of justice and the capacity for a reasonable conception of the good—from the person to the citizen socialised within a political conception of justice suited for a democratic society. Rationality and reasonableness will be experienced as good by individuals as citizens and not as persons—this distinction being crucial for Rawls’s attempt to shed the comprehensive philosophical elements of A Theory of Justice.

The basis of moral motivation in the citizen relies on a power to form a conception of the good and the capacity to acquire a conception of justice. Citizens will have a desire to act on the principles of justice when they believe the institutions they found are just and that others will do their part in upholding them. From within their comprehensive doctrines, they will find the motivational sources to support the principles of the public conception of justice. This enables the development of social trust between the integrated members of the cooperative scheme. Trust stabilises with the enduring success of their joint efforts.\textsuperscript{21} For this purpose, the satisfaction of the publicity condition is equally essential as it places the conception of justice in the public culture of the polity, thus enabling its educational role: “In this way citizens are made aware of and educated to this conception. They are presented with a way of regarding themselves that otherwise they would most likely never be able to entertain.”\textsuperscript{22}

This last observation on the educational role of the conception of justice leads us back to the weak constructionist reading I alluded to before. It highlights once again the fact that the sense of justice depends for its orientation on the content of a conception of justice. The publicly

\textsuperscript{20} Rawls, A Theory of Justice, p. 476. His claim that encountering someone’s resentment and indignation is correlated with the experience of guilt in the agent comes to strengthen this hypothesis.
\textsuperscript{21} Rawls, Political Liberalism, p. 86.
\textsuperscript{22} Rawls, Political Liberalism, p. 71.
recognised conception of justice is political, transmitted through socialisation, and backed by the coercive apparatus of the state. By reference to the two principles chosen in the Original Position, the sense of justice defines its object and delimits its scope.\(^{23}\) (This idea was first articulated in Rawls's 1963 article and then reiterated in *A Theory of Justice*.\(^*) The disposition to act justly is a moral psychological capacity that matures with age and depends on some basic affects that are part of our human sociability. At the same time, it is also highly determined by the socialisation one is subjected to as part of the reproductive efforts of the political community or other relevant groups. This is the first theoretical element that I shall retain from the Rawlsian account of moral sentiments. It will later become clear how weak constructionism can be useful for finding the sources of the individual sense of justice outside a liberal democratic culture.

The second relevant aspect is that negative feelings are expressions of the sense of justice. In experiencing wrongs—directed at oneself or at another—the individual’s moral power gets expressed in more or less transient feelings of resentment and indignation. When one is the author of injustice, the experience of guilt is accompanied by the expectation of others’ resentment or indignation. These are moral feelings by virtue of the fact that, in explaining their experience of them, an individual has to appeal to a moral concept of justice and its associated principles, no matter what conception they identify with.\(^{24}\) Although Rawls does not elaborate too much on this, it seems correct to assume that the principles of justice will guide the experience of negative moral feelings and of the actions they might motivate the individual to perform.

The question that emerges from this exposition is, What do these two theoretical conclusions in ideal theory mean for the exercise of the sense of justice under partial compliance

\(^{23}\) To clarify, I am here only referring to the constructivist nature of our emotional responses and not to constructivism as an approach to the formulation of moral principles (usually opposed to moral realism). According to a weak constructivist position, emotional responses are partly determined by nature and partly by socialisation processes.

conditions? How far can ideal theory go in accounting for and guiding political action in imperfectly just societies?

In an attempt to set the limits of tolerance towards injustices within partially just societies, Rawls’s treatment of the sense of justice in non-ideal theoretical terms focuses on the issues of civil disobedience, militant action, and conscientious refusal. Partial compliance theory covers those constitutional regimes based on a publicly recognised conception of justice, but which are imperfectly just.²⁵ The situations that entitle citizens to engage in any of the above mechanisms of political resistance are violations of the two principles that he imports from ideal theory as standards of evaluation: “Viewing the theory of justice as a whole, the ideal part presents a conception of a just society that we are to achieve if we can. Existing institutions are to be judged in the light of this conception and held to be unjust to the extent that they depart from it without sufficient reason.”²⁶ And, further,

We must ascertain how the ideal conception of justice applies, if indeed it applies at all, to cases where rather than having to make adjustments to natural limitations, we are confronted with injustice. The discussion of these problems belongs to the partial compliance part of non-ideal theory. It includes, among other things, the theory of punishment and compensatory justice, just war and conscientious objection, civil disobedience and militant resistance.²⁷

Now, what exactly does Rawls have to say about facing injustice? When engaging in forms of political resistance such as civil disobedience or conscientious refusal, citizens appeal to the publicly recognised conception of justice and to the sense of justice of the community in order to attract attention to an imbalance in the sharing of burdens within their scheme of cooperation. A just constitution publicly articulates the standards against which both the government’s policies and the citizens’ plans have to be measured. In practice, however, policies do depart from the publicly recognised conception of justice, resulting in massively skewed distributions of primary

²⁶ Rawls, A Theory of Justice, p. 246.
goods within society. The civil disobedient’s sense of justice manifests itself in legitimate feelings of resentment and indignation towards the normative inconsistency of governmental actions. This scenario fits well with what some have called transitional justice within consolidated democracies. In order to live up to democratic standards, civil disobedience remains within the boundaries of fidelity to law:

It should also be noted that civil disobedience is a political act not only in the sense that it is addressed to the majority that holds political power, but also because it is an act guided and justified by political principles, that is, by principles of justice which regulate the constitution and social institutions generally...one invokes the commonly shared conception of justice that underlies the political order. It is assumed that in a reasonably just democratic regime there is a public conception of justice by reference to which citizens regulate their political affairs and interpret the constitution.

Within imperfectly just societies, the principles generally guide social interaction, though correctable deviations do occur. Rawls does consider the possibility of a more radical form of political resistance as well: militant action by individuals or groups who think the basic structure itself is unjust or blatantly departs from the principles of justice. I suspect the reason Rawls only briefly introduces militant action is that it falls outside the scope of partial compliance theory. The main aim of militant action is to make the public aware of the need for a change when the basic structure is guided by the wrong principles. Appeal to the citizens’ sense of justice, under these circumstances, is not an option as their sense of justice is erroneous or ineffective. Rawls claims that some situations justify the recourse to militant action but he does not provide an analysis of this form of political resistance. Nevertheless, on the basis of his views of the forms of political resistance limited by fidelity to law, I shall try to infer what he would have to say about this rather extreme case of political resistance. Here, two scenarios can be distinguished.

28 See Dyzenhaus, *Calling Power to Account*; Moran, “Trouble in Paradise.”
In the first scenario, there was once a publicly endorsed conception of justice, but it was discarded by partisan interests. Militant action is, in this case, a radical form of conscientious political resistance. Militants do not appeal to the community’s sense of justice because it is considered too weak and without effect—otherwise it would have prevented this movement away from the principles of justice from occurring. The choice of this more disruptive form of resistance depends on the severity of the injustice, the possibilities for social trust, and mobilisation, but also on the ideology moving the militant group. The once publicly endorsed conception of justice provides the militant with a vocabulary with which he can formulate his claims and by reference to which he can design political alternatives. This scenario corresponds to the case of polities that have experienced constitutional democracy at some point in their histories, slid temporarily into authoritarianism, violence or civil war, and have since tried to make a democratic comeback.\footnote{Eastern Europe after the fall of the Berlin Wall is considered to be full of such examples. However, sometimes the democratic experience is so far away in the distant past that its normative sources have dried and the members of this polity are as much at a loss for a political vocabulary of resistance as the members of the polities with no previous democratic experiments.}

This is not the case in the second scenario, a scenario about which Rawls is most vague. One can easily identify in history societies in which the publicly endorsed conception of justice is not inclusive, i.e., it places some categories of individuals outside the scope of the community’s sense of justice. It is not that the citizens’ sense of justice is without effect, but, the militant would say, it is plainly erroneous. The principles of justice and their adjacent duties do not apply to certain groups who are excluded from political membership. In some historical cases, there is exclusion from humanity, which then justifies the perpetration of atrocities against the members of these categories. This, of course, is an extreme case, yet not a fictitious one.\footnote{The history of Black slavery in the United States, the apartheid regime in South Africa or the subordination of women qualify as examples of long term oppression and discrimination with major consequences for the well-being of the subordinated groups. Among more recent and shorter episodes of exclusion from humanity, consider the genocide in Rwanda or the ethnic cleansing that occurred in the former Yugoslavia.} In this second scenario, there is no formerly endorsed just constitution to which one could appeal in
order to publicly defend demands for reform. This is the case in which the militant—should he be given the opportunity for political expression by the ruling forces—tries to prepare the way for radical change. Should these marginalised groups resist and challenge the inegalitarian principles at the basis of their society, principles they themselves have been coerced to abide by, what account can we give of their moral psychology? Given that they contest the very principles governing the basic structure, they cannot be thought to have successfully internalised the norms justifying their exclusion. Where does their sense of justice derive its content from when it manifests itself in violent resentment and indignation? What principles do the subordinated make reference to when they protest, or, once the change of regime has taken place, when they demand reparation? As we shall see by the end of this chapter, there is a multitude of normative sources that Rawls’s militant could make recourse to, ranging from imported political conceptions of justice to comprehensive visions of the good available within the lifeworld of their societies. The question that still remains is whether, to what extent, and how these alternative normative sources and the emotionally charged actions they motivate are or can be made compatible with the theory of moral worth that democracy endorses.  

The two scenarios on militant action I have tried to derive from Rawls’s minimal elaborations on non-ideal theory come closest to the type of extraordinary constitutional moments this dissertation deals with, that is, the transition from oppression, civil war, or violence to democracy. This is a radical case of a democratic normative shift, a case Rawls did not engage with much. In order to answer the questions we set for ourselves at the beginning of this chapter, we need to go beyond the scope of his conceptualisation of the sense of justice. For now, let us keep in mind two essential theoretical elements that, as I will try to show later on, might help us

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33 Jiwei Ci presents us with attempt to provide a formal account of the sense of justice, or as he calls it, the disposition to be just, which is neutral among reasonable substantive views of justice. By limiting his account of moral motivation to reasonable conceptions of justice, he can only deal with the first of the two scenarios I introduced above, one in which injustice can be framed as a break of reciprocity against the background of a culture that at some point endorsed reasonable just rules. See Jiwei Ci, *Two Faces of Justice* (Cambridge Mass.: Harvard University Press, 2006).
fruitfully move beyond his account: the weak constructionism of the sense of justice and its negative manifestation in feelings of resentment and indignation. Before I turn to an examination of how these elements can help us explain the workings of the sense of justice in transition, let us first examine another influential account of this moral power, Judith Shklar’s vehement affirmation of the duty to act against injustice.

III.1.2. Civic Duties and Passive Injustice

One tends to become aware of one’s sense of justice most dramatically when one experiences an injustice, be it against oneself or another human being. This is why the negative expression of this moral sentiment through feelings of resentment and indignation has received more attention than its positive manifestation, i.e., the desire to act on principles of justice and the feelings of respect towards oneself and others associated with it. Of all their characteristics, it is the importance of the regulative function that negative moral emotions can perform publicly that constitutes the focus of Shklar’s account. Since she considers proper indignation to be a marker of good citizenship, she is alarmed by citizens’ failure to act against injustice within a constitutional democracy.

There are a few reasons why her treatment of the sense of justice is relevant for this project. Firstly, Shklar successfully defends the importance of indignation and resentment for the reproduction of democratic values. These reactive attitudes need not be feared as dangerous for democracy. On the contrary, under certain conditions, they act as a major corrective force, pushing for a greater approximation of democratic values in practice. Unlike feelings of indifference and apathy, indignation and resentment can remind us of the perpetually imperfect nature of the process of democratic legitimation. Secondly, in spite of the fact that her account of

35 Shklar, *The Faces of Injustice*. 
the sense of justice is limited to the political culture of constitutional democracy, there are some formal theoretical elements that can enable us to make sense of other political contexts. As I shall show in this section, she shares with Rawls a weak constructivist perspective of moral emotions and the view that there is a strong relationship between the sense of justice and the emotional experiences of resentment and indignation. Lastly, in light of her sombre—and sober—view of the functioning of the sense of justice within consolidated democracies, we may be in a better position to foresee the problems of political socialisation within transitional contexts and to better imagine the role that institutions might play in stimulating the proper, balanced exercise of this politically essential disposition.

Shklar defines injustice as the individual’s failure to perform on her capacity to recognise injustices committed towards others. The central distinction for Shklar is that between injustice and misfortune. She criticises people’s propensity to label injustices as misfortunes so that they can escape pangs of conscience when they do not feel compelled to act: “the difference between misfortune and injustice frequently involves our willingness and our capacity to act or not to act on behalf of the victims. To blame or to absolve, to help, mitigate and compensate or just to turn away.”36

The main claim is that citizens ignore what their sense of injustice dictates whenever they refuse to

…prevent acts of wrongdoing when they could and should do so ... by passive injustice I (Shklar) do not mean our habitual indifference to the misery of others, but a far more limited and specifically civic failure to stop public and private acts of injustice ... As citizens we are passively unjust when we do not report crimes, when we look the other way when we do see cheating and minor thefts, when we tolerate political corruption, and when we silently accept laws that we regard as unjust, unwise or cruel.37

37 Shklar, The Faces of Injustice, p. 5.
Shklar limits her conception of passive injustice to people in their political role as citizens of a constitutional democracy. The cognitive capacity to identify injustice linked to major institutional abuses needs to be supplemented by a desire to act on one’s assessments and ask for public accountability. This is not a matter of moral virtue, but of the positive duty of citizens to take victims seriously as a requirement of justice. She argues against falling into the temptation to neglect or ignore rather than to protect. This type of attitude, she says, is typical of the citizens of constitutional democracies who enjoy its benefits but do nothing to contribute to its preservation. Not acting on the sense of injustice represents a violation of what a minimal democratic ethos requires of the members of the political community. In contrast with the citizens of oppressive regimes, citizens of democracies always enjoy more opportunities to act on their sense of injustice without fear of repercussions. She writes: “The possibility of such preventive civic activity is by far greater in a free society than in fear ridden and authoritarian ones, so I shall treat it as an aspect of the obligation of citizens of constitutional democracies only.”

Shklar’s attention is directed exclusively towards citizens’ duties, as individuals, to act on their capacity to recognise the violation of other people’s rights. She demands that they become indignant at the injustices that befall other members of the community and, although she does not elaborate on this, she intimates that it is only through collective pressure that institutional redress can be achieved.

Given her focus on the political culture of a constitutional democracy and the individual citizen as the main unit of interest, Shklar’s account of the sense of injustice is only partially useful for our attempt to analyse dramatic democratic shifts. As in Rawls’s case, however, Shklar has the resources to account for instances of transitional justice within consolidated democracies:

Most injustices occur continuously within the framework of an established polity with an operative system of law, in normal times. Often it is the people who are supposed to prevent injustice who, in their official capacity, commit the gravest acts of injustice, without much protest from the citizenry … it is not sufficient to look only at the causes of affliction; the self-understanding of victims must also be taken into account by a full theory of injustice. Moreover such a theory should concern itself with both formal and informal victims, both those who are legally or conventionally recognised as such and those who do not show up in even the best of social inventories of injustices. For there are many victims of injustice who fall entirely outside the reach of public rules. This is the case even though democratisation has now greatly expanded legal concern for the victims of crime.\footnote{Shklar, \textit{The Faces of Injustice}, pp.15, 36.}

Where the rights repertoire and relevant institutional channels are already in place, instances such as those Shklar describes require the active pressure of citizens in order to realise an expansion of the scope or content of rights. Only thus can the normative consistency requirements of democracy be fulfilled. Citizens of mature democracies have been socialised within a public conception of justice that demands equal respect for all the members of the political community; but they sometimes fail to act on these principles, in spite of the existence of institutional avenues for action. Should citizens act on their sense of injustice, the existence of these avenues and the broader liberal political culture would provide the supporting background for successful rectification.

The situation is different in transitional contexts given that the victims’ sense of injustice seldom takes its content from constitutionally sanctioned democratic principles of justice.\footnote{Consider the two scenarios I introduced at the end of the section on Rawls.} In addition, the severity of political oppression, the moral effervescence of transitional moments, and the lack of favourable conditions for a careful attribution of responsibility have often tempted victims of oppressive regimes to instrumentalise victimisers for the satisfaction of their moral outrage. This is the first step towards engaging in acts that would pass as unjust under the newly embraced constitutional regime. While democracy can recognise the correctness of the
emotional evaluation of the victimisers as guilty in view of the crimes they have committed, emotionally motivated actions need to be filtered through democratic norms; that is to say, within contexts of dramatic political shifts, the challenge is often not to stimulate, but to temper and orient the volitional element of the sense of justice, while nonetheless acknowledging the legitimacy of its evaluative verdict.\(^{41}\) This is a normative requirement in the sense that democratic equality demands both that victims be heard and that victimisers get treated fairly. What is more, if the new elites do not make sure institutional filters are in place to channel legitimate feelings of moral outrage, a great opportunity to initiate socialisation for democracy would be missed.

It should be clear by now that Rawls and Shklar can provide us with some valuable theoretical insights into the structure, role and optimal intensity of moral emotions within democracies and polities that have had, at some point in their history, an experience with democracy that has left a strong imprint on public memory. In order to make sense of dramatic democratic shifts, however, we need to move beyond their accounts. Building on our excursus on the merits and limits of liberal views of the sense of justice, I shall now move on to a more in-depth exploration of the two theoretical lessons we have derived so far. In the next two sections, I shall try to clarify what it means to say that emotions in general—and the sense of justice in particular—are partially constructed by the norms that govern one’s social and political context. We shall then be in a position to infer the type of emotional responses a democratic egalitarian theory of moral worth would seek to sustain and promote within the citizenry.

\(^{41}\) In cases where civil society is apathetic, the challenge is to stimulate citizens to react and put forward claims through the available channels of political participation.
III.2 A Weak Constructionist View of Emotional Socialisation

The concern with the importance of emotions for social life is as old as philosophy itself. The debate has traditionally opposed cognitivists to those who emphasise the physiological dimension of emotional expression. In spite of ongoing debate among cognitivists as to the exact relationship between judgement and feeling, belief and affect, they dominate the more recent literature.\(^{42}\) What cognitivists do share is a general consensus on the function of emotions as evaluative dispositions conferring meaning to human experiences:

> What is an emotion? An emotion is a judgement (or a set of judgements), something we do. An emotion is a (set of) judgement(s) which constitute our world, our surreality, and its “intentional objects.” An emotion is a basic judgement about our Selves and our place in the world, the projection of the values and ideals, structures and mythologies, according to which we live and through which we experience our lives.\(^{43}\)

Cognitivists strongly disagree with those who portray emotions as purely irrational passions contaminating the higher parts of one’s soul. On the contrary, they claim, emotions serve as a guide to human interaction and can thus motivate moral behaviour: “precisely the role of emotion is to provide the creature—or as we might now get used to saying, the person—with an orientation, or an attitude to the world. If belief maps the world, and desire targets it, emotion tints or colours it: it enlivens it or darkens it as the case may be.”\(^{44}\) However, “(T)he aim of a cognitive theory of emotions is not to reduce the drama of emotion to cool, calm belief but to break down the insidious distinctions that render emotions stupid and degrading and eviscerate cognition.”\(^{45}\)

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\(^{45}\) Solomon, “On Emotions as Judgements,” p. 175. One of the best defences of cognitivism comes from Richard Wolheim who looks at the place of thought in emotion by making a distinction between the role it plays in rational inquiry and in serving emotion:
Given the participation of belief in the morphology of emotion, the cognitivist position is sensitive to the role that socialisation can play in the history of an affective disposition. Among contemporary theorists of emotion, Ronald de Sousa’s conception of the genesis and maturation of emotions within what he calls “paradigm scenarios” has injected some precision into the mix of biological, psychological, and cultural elements that enter the life of an affective disposition and inherently factor into the process of its socialisation:

A child is genetically programmed to respond in specific ways to the situational components of some paradigm scenarios. But what situational components can be identified depends on the child’s stage of development. An essential part of education consists in identifying these responses, giving the child a name for them in the context of the scenario, and thus teaching it that it is experiencing a certain emotion. That is, in part, what is involved in learning to feel the right emotions, which, as Aristotle knew, is a central part of moral education (Nichomachean Ethics, II 2).

Building on De Sousa’s contribution, the important role of socialisation—in terms of both its constitutive and regulative dimensions—has become the focus of the most recent developments in the social constructivist theory of emotions. This theory allows for weak and strong versions, depending on the weight the biological is seen as bearing on the development of emotions. In what follows I shall briefly present the constructivist thesis in its weaker form. As mentioned before, strong constructivism denies any importance to the natural, while weak constructivists

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46 When thought is denied a place in emotion, this is for the reason that to allow it in would be to intellectualise emotion in an unacceptable fashion. But this argument erroneously assumes that, inside emotion, thought will operate in the same way as it does inside, say, inquiry, and it overlooks the fact, considered in the first lecture, that thought is a merely instrumental disposition. Thought takes on an end from the outside. So, when thinking is made to serve inquiry, it serves the end that inquiry pursues: it aids in the construction, or purification, of some truth-oriented picture of the world. Equally, when thinking is recruited into the service of emotion, it helps to strengthen, or elaborate upon, some attitude that we have towards some attitude that we have towards something in, or held to be in, the world. It follows that, if thinking intellectualises belief, there is no reason to conclude that it will intellectualise emotion. Wollheim, On the Emotions, p. 117.

portray human emotion as partially determined biologically, but also very malleable to socialisation.\textsuperscript{47}

The constructionist perspective on emotion is part of a larger theory of the social construction of human experience, the most famous representative of which is George Herbert Mead.\textsuperscript{48} The weak variant admits, however, that while a lot of human emotional attitudes depend on training in accordance with a social norm, other attitudes are natural:

A social constructivist view of emotion does not envision a completely plastic organism, the proverbial blank slate on which experience can write unhindered. Homo sapiens is a biological species and millions of years of hominid evolution make some patterns of response easy to acquire and others difficult or almost impossible. But this being granted, it must also be recognised that the biological constraints on human behaviour are rather loose.\textsuperscript{49}

The naturalist thesis according to which social emotions are merely regulated biological responses is rejected as unnecessarily impoverishing our account of human experience.\textsuperscript{50} Emotions are based on beliefs, judgements, and desires, which are partially the product of a social environment. The object of an emotion is made up of instigation, a target and an objective; for example, in the case of resentment, the instigation is the experience of a wrong towards oneself, the target is the person who inflicted the wrong, and the objective is the punishment, or the correction, of the wrong.\textsuperscript{51} The individual’s experience of a certain emotion is dependent on his having internalised the rules that are constitutive, regulative, and heuristic


\textsuperscript{50} Armon, “The Thesis of Constructionism,” pp. 186–188.

\textsuperscript{51} Averill presents these three possible components of the object of an emotion but says that not all are present in all emotions. He exemplifies these components and the way in which the rules of emotion apply in his book length treatment of anger and its relationship with aggression. See Averill, Anger and Aggression.
These rules reflect the social norms guiding interaction within a particular community. In the case of moral emotions, rules reflect the theory of moral worth that a society or a sub-group within that society embraces. Successful emotional socialisation will result in the formation of context-appropriate emotions and their expression in culturally sensitive responses. With time, the individual learns to take responsibility for his emotional reactions in particular contexts and can be held accountable for his affective performance. This is how he comes to assume a certain “transitory social role.” By internalising the rules that define the role, he lives up to social expectations: “In order to perform a role adequately, an actor must not only know his own part, and the parts of others, but he must also understand how the various roles relate to the plot (and subplots) of the play … In the case of social roles, the plot is the cultural system.”

This conclusion is warranted by the cognitivist premise that the capacity for moral judgement predates moral emotions and grounds them. An understanding of the publicly endorsed moral rules is a precondition for the development of moral sentiments. It is thus possible to subject emotional responses to rational critical appraisal based on how accurately the individual evaluated the situation eliciting the emotional response and how appropriately he manifested this evaluation in his behaviour. Thus, objectively,

If emotions are cognition based, then this allows that they can be subjected to rational persuasion and criticism. For example, agents can be reasoned out of their anger just because the emotion is based on attitudes which can themselves be critically appraised in respect of whether they form an accurate or reasonable construal of the situation. If the agent misinterprets the situation as an insult, then we expect and consider him able to relinquish his anger. This point is relevant to constructionism because it allows that emotions can be endorsed or condemned with respect to the social appropriateness of the attitudes by which the emotion is generated, and that

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52 Averill, “The Acquisition of Emotions,” p. 106.
54 Averill, “A Constructivist View of Emotion,” p. 314–315. The foundational work for role socialization in general can be found in Parsons, The Social System. Here, the emphasis is, however, on a specific class of norms, those of emotional appropriateness.
agents can be held responsible for the possession or absence of those emotion attitudes which are socially required for a situation. 

and subjectively,

(I)t is important to stress continually the difference between the emotion itself as a judgement and our reflective judgements about our emotions (judgements about our judgements). My being angry is my making a judgement; my recognition that I am angry is a reflective judgement about my anger (as is my judgement that my anger is justified, that, on reflection, the other person deserves [or doesn’t deserve] my wrath, etc.).

Given the malleability of emotion in relation to reflective judgement, it is clear that emotions can and are meant to fulfil important functions for the reproduction of the collectivity, in terms of both limiting undesirable behaviour and encouraging the wider endorsement of societal values: “… every emotion establishes a framework within which we commit ourselves—or refuse to commit ourselves—to our world and to other people. Every emotion lays down a set of standards, to which the world, other people, and most importantly, our Selves are expected to comply.”

To the extent that educating the understanding and activity that are part of emotion is possible, educating emotion by providing individuals with a sense of emotional appropriateness is also possible. But how does socialisation proceed? How does an individual grow to inhabit the appropriate temporary roles that emotions are? How are affective rules internalised in order to allow for proper functioning of the individual within his group?

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56 Robert C Solomon, “A Subjective Theory of the Passions,” in Leighton, Philosophy and the Emotions, p. 71. While constructivists allow for some degree of passivity of the emotion, when it comes to clear cases of non-natural attitudes, the claim is that we interpret our reactions as passive rather than active and this reproduces the common image of passions: “an emotion is a transitory social role (a socially constituted syndrome) that includes an individual’s appraisal of the situation and that is interpreted as a passion rather than as an action.” Averill, “The Acquisition of Emotions,” p. 312.
57 Armon, “The Social Functions of Emotion.”
The core process at the basis of socialisation is the internalisation of external—social, cultural, political—norms.\(^{59}\) Social psychologists divide the sources of motivation into two categories, intrinsic and extrinsic. Intrinsic motivation has its source in the individual and is thought to guide the most autonomous activities, those undertaken purely for the sake of interest and not because of the consequences that ensue from them. By contrast, extrinsic motivation has its sources in external norms of behaviour; the individual acts only for the sake of sanctions, be they rewards or penalties.

When successful, internalisation of external norms ensures psychological integrity and social cohesion:

...internalisation is an active, natural process in which individuals attempt to transform socially sanctioned mores or requests into personally endorsed values and self regulations...When the internalisation process functions optimally, people will identify with the importance of social regulation, assimilate them into their integrated sense of the self, and thus fully accept them as their own. In this way they will become integrated intrapsychically but also socially.\(^ {60}\)

The extent of an individual's internalisation of social norms can be visualised on a continuum, beginning with external regulation (at the low end), followed by introjection, then identification, and finally integration.\(^ {61}\) As mentioned before, external regulation ensures compliance with social norms by means of external rewards and threats. Once these are removed, the individual has no other source of motivation to act on these norms. This is the most unstable and the most controlled regulatory process. Introjection goes a bit deeper than external regulation, but it only amounts to a superficial endorsement of the rules by the individual; threats and rewards are administered by the individual but are not stable. The introjected rules have not become part of


the self. As the resulting behaviour is not self-determined, there is a high degree of instability and unpredictability. *Identification* moves us towards a self-determined regulatory mode. The individual identifies with the rule, she recognises the value underlying it and accepts it as her own. This is not yet the most perfect form of internalisation as the behaviour is cultivated instrumentally. It is only with *integration* that the external norm is in harmony with all other aspects of the self which thus enters a condition of coherence. This is the form of internalisation which most fully expresses the individual’s self-determination in the appropriation of the external source of motivation.

The degree to which social norms are internalised within the individual’s sense of the self depends on the relationship between the content of the norm to be internalised and its effect on the satisfaction of the individual’s interests and needs. External motivation through sanction will keep her motivated, but this is an unstable basis for compliance as it might be resisted or, in very severe cases, push the individual towards psychological pathology. Defence mechanisms are needed to deal with feeling torn between two commands: one issued from the outside and one coming from one’s own rebellious expectations, needs, and interests, as determined by an alternative normative source that one considers authoritative or, ultimately, by biology. Depending on the seriousness of the deprivation, the individual may respond with the “inappropriate emotion” of resentment, which may be contained internally or expressed externally—in the latter case he would risk social sanction—or else he may introject, compartmentalise, engage in rigid patterns of behaviour, or substitute his needs, all at great psychological costs.

We can therefore conclude that social norms are demands or expectations that the individual encounters immediately, through sanctions or rewards—meant to encourage compliance—and mediatedly, through a long process of norm internalisation at the end of which
she experiences the norm as her own; this is what is often referred to as the “second nature.” Building on Aristotle, but allowing for variance within and among groups, constructivists believe that the individual learns “to feel the right emotion, on the right occasion, toward the right object and in the right degree.” For the successfully socialised individual, personal and social norms coincide; there is no room for conflictual emotions.

We now need to be a bit more precise about the types of rules that successfully socialised persons need to appropriate. The rules are classified by the constructivist as constitutive, regulative and heuristic. Constitutive rules cover the appropriateness of the emotion’s object; e.g., one cannot be angry about the moon. Regulative rules determine how emotions should be experienced and expressed internally and, if the conditions are favourable, externally, i.e., behaviourally. Regulative rules cover the type and intensity of behavioural responses that express the emotion as well as the time span and progression of emotional events. Last but not least, heuristic rules belong to the art of finely tuning one’s emotional manifestations and constitute the object of adult emotional development. Problems with the education of emotions can be explained by reference to violations of these rules, however, having rules does not mean that they provide precise formulae for emotional experience. Judgment is involved in the evaluation of the situation provoking the emotional reaction, the identification of the agent of injustice, and the selection of the particular response.

In what follows, I shall use the analytical tools provided by the social constructivist in order to give an account of one’s sense of justice and its negative expression in feelings of moral resentment and indignation. The hope is that, by the end of next section, we will have

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65 The distinction between the internal and the external experience of emotion has been excellently presented in Wollheim, On the Emotions, pp. 115, 128.
66 Imperfect internalisation of constitutive rules is labelled neurotic, violation of regulative rules results in delinquency (broadly defined), and incomplete appropriation of heuristic rules makes one socially inept. Averill, “The Acquisition of Emotions,” p. 109.
understood what it means to feel resentful inside and outside one’s political community in a way that sheds light on instances of democratic transition. My general claim shall be that while democracy can recognise the validity of authentic transitional reactive emotions, further work needs to be done to stimulate the endorsement of democratic rules of emotional expression. In order for the social and political benefits of resentment to become apparent, a balance between violent outbursts of moral hatred and apathy needs to be found.

III.3 Constituting and Regulating Resentment and Indignation

In moral psychology, the generally agreed upon starting point for a discussion of negative moral emotions is Strawson’s essay, *Freedom and Resentment*. In this piece, he lists resentment among the reactive attitudes one is liable to experience simply by virtue of interacting with others. He does not, however, think resentment can have a moral character; he restricts the class of moral responses to indignation and disapprobation.

Dissatisfied with Strawson’s conflation of all emotions with reactive attitudes and with his restrictions on the class of moral sentiments, Jay Wallace embarks on a book-length criticism of Strawson’s account of what it means to hold someone accountable. For Wallace, guilt, resentment, and indignation are moral reactive attitudes when connected with moral obligations as a special case of expectations:

I propose that reactive emotions be classified as moral when they are connected with moral obligations ... More precisely, we should count reactive emotions as moral when they are linked with obligations for which the agent is herself able to provide moral justifications; these justifications identify reasons that explain the agent’s own efforts to comply with the obligations in question, and they provide moral terms that the agent is prepared to use to justify such compliance on the part of others, whom the agent holds to the obligations. When they are linked to obligations of this kind, it is natural to treat reactive emotions as moral sentiments, since their explanation essentially requires moral beliefs, namely beliefs about the violation of what the

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agent herself correctly regards as moral obligations. The explanatory role of such moral beliefs gives these emotional states a distinctively moral content. And in fact we commonly do regard resentment, indignation and guilt to be moral emotions when they are incited by beliefs about the violation of moral obligations.\(^{69}\)

The stance of holding someone morally accountable features blame and moral sanction as responses. The expression of the moral emotions of resentment, indignation, and guilt, Wallace thinks, performs an important function within the moral community:

In expressing these emotions then we are not just venting feelings of anger and hatred, in the service of an antecedent desire to inflict harm for its own sake; we are demonstrating our commitment to certain moral standards, as regulative of social life. Once this point is grasped, blame and moral sanction can be seen to have a positive, perhaps irreplaceable contribution to make to the constitution and maintenance of moral communities; by giving voice to the reactive emotions, these responses help to articulate, and thereby to affirm and deepen, our commitment to a set of common moral obligations.\(^{70}\)

By basing the moral reactive attitudes on moral belief and acknowledging the social function that these reactive emotions accomplish, Wallace opens his account to the weak constructionist thesis. He claims that moral reactive attitudes make sense whenever the moral notions of obligation, right, and wrong are in place. Given that these notions are specific to a certain cultural and historical context, he thinks other moral emotions, such as shame and anger, provide the regulatory framework outside of these contexts. This conclusion could be reinterpreted if we articulated the relationship between reactive attitudes and the local moral order. Reactive emotions in response to violations of one’s moral expectations differ depending on how these expectations have been shaped by the local theory of moral worth and by how far the individual has internalised the norms of this theory. Once we understand this, we can easily explain variability not necessarily in terms of the absence of some emotions in some cultures,

\(^{69}\) Wallace, *Responsibility and the Moral Sentiments*, p. 36.

but in terms of the types of circumstances that render resentment, indignation, guilt, anger, and shame appropriate in different cultural and political contexts.

In view of this observation, I shall conceptualise the sense of justice as a complex moral disposition to act on the principles of justice defining the conception of human worth that sets the general parameters for a community’s socialisation projects. It is an enduring sentiment, characterised by relative stability. By contrast, feelings are temporary mental states that sometimes express a long-term disposition. Resentment and indignation are the negative feelings in which the sense of justice as a durable disposition finds expression. As a moral sentiment, the sense of justice presupposes the centrality of the self and its relationship to the world, and it has two components: a cognitive/evaluative component and a motivational/action-orienting one. This moral disposition provides the individual with the capacity to recognise breaches of her moral expectations, as defined by the theory of moral worth according to which she has been socialised, and gets expressed in feelings of resentment and indignation. The volitional dimension is linked to the development of a desire to act on these evaluative feelings, in the form of moral sanctioning and punishment.

Resentment and indignation are the negative emotional responses triggered by the offence of the sense of justice. As such, they belong to that class of emotions identified by theorists like Scruton as characterised by a universal object: particular injustices which give rise to resentful responses are thought to be instances of injustice as a universal category for a particular community:

Such emotions seem to abstract not only from the particularity of their object but also from that of their subject: it is only accidentally I who am feeling this indignation—the call to indignation might have been addressed to and taken up by another. The emotion is, as it were, impersonal. Learning its proper exercise involves acquiring conceptions of justice, appropriateness, and right

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71 The distinction between sentiments and feelings is widely shared in the moral psychology literature referred to in this chapter. For a clear account of this difference see Rawls, *A Theory of Justice*, p. 479.
72 This is a point of agreement for cognitivist accounts of emotions.
73 On the relationship between the intentionality of emotion and desire, see Wollheim, *On the Emotions*, p. 15.
which propose themselves as universally valid, and which remove the object of emotion from the sphere of any merely personal resentment of dislike. One might say, therefore, that the education of these universalised emotions is an essential part of moral development.\(^{74}\)

If we continue to work along constructionist lines, wrongful acts are deviations from the rules that hold together the fabric of the individual’s relevant community. Through the socialisation of moral emotions, such wrongs are meant to be identified and met with disapproval, given they are based on correct evaluations of the facts. Resentment and indignation in response to a wrong, like all universal emotions, are highly educable through the power of experience and exemplarity:

It is not difficult to see how one might educate such “universalised” feelings. Having shown a man what is contemptible in one instance of cowardice, and having brought him to feel contempt towards it, one will necessarily have brought him to feel contempt on like occasions. In educating such emotions one is educating a man’s values, and providing him with a sense of what is appropriate not just here and now but universally.\(^{75}\)

The sense of justice is of extreme political importance. Not all instances that arouse the sense of justice are politically relevant; however, the frustration of those moral expectations related to one’s status as a member of the political community—or lack thereof—are, most of the time, the object of negative affective reactions. Public institutions such as the education system and criminal law socialise citizens towards the development of a basic set of attitudes that ensures the maintenance and reproduction of the normative, institutional, and cultural community. It is essential for the proper functioning of institutions that the majority of individuals affected by them have internalised the constitutive, regulative, and heuristic rules limiting behavioural expressions of emotions. The training of both the cognitive and volitional aspects of a politically

\(^{74}\) Scruton, “Emotion, Practical Knowledge and Common Culture,” p. 525.

\(^{75}\) Scruton, “Emotion, Practical Knowledge and Common Culture,” p. 526. To these universal emotions, Scruton opposes particular emotions such as love and grief, whose objects are concrete and unique, not merely instantiations of a general category.
relevant moral emotion enables the individual to function as a full member of the political community and to identify those policy areas where correction of injustices is required.

What counts as injustice will vary from one collectivity to another. Observing constitutive rules of resentment or indignation would mean reacting resentfully or indignantly only to those circumstances that are seen as unjust according to the moral code of the relevant community. Regulative rules would prescribe what can be done in the name of these attitudes, for how long, and with what intensity. Heuristic norms, for their part, would point to the refined ways in which one could express the emotion while at the same time staying true to its underlying social norm.

In order to get a better idea of the theoretical conclusions that have so far emerged, let me introduce a schematic representation of the dimensions along which we have been theorising the sense of justice, whatever its principled content. To recapitulate, the relevant group’s theory of moral worth gives the sense of justice its guiding principles. It stipulates who the subjects of justice are, i.e., who is owed duties of justice and who is outside the scope of justice. Depending on the position the individual objectively occupies on the scale of human worth, the group entitles her to feel different moral emotions. For example, it would be appropriate for any woman living in twenty-first-century Canada to be morally outraged were she to be denied the right to property. In contrast, most slave owners in nineteenth-century United States would have been angered by a slave’s resentful answer to white maltreatment. An individual’s system of expectations and emotional responses is defined by her place in the social ranking. Socialisation stabilises her expectations over time. Experiences within one’s social environment reinforce one’s sense of the self and one's position in relation to others.

Let us now turn to my schematic representation of the multiple dimensions of the sense of justice, in terms of the individual's relationship to himself and to others, and its possible expression in positive and negative moral emotions.
### A. Self to Self

Attachment to the principles of justice one considers authoritative translates into a sense of the self and correlative expectations of predictable treatment by others. One develops a sense of entitlement/desert as a subject of justice, whatever justice requires. This usually gets expressed in a sense of self-respect. Other positive feelings associated with this dimension of the sense of justice can include pride, group loyalty, patriotism, etc.

### B. Self to Others

Attachment to the principles of justice one considers authoritative translates into a sense of others as subjects of justice and of correlative duties. Who counts as belonging to the realm of the subjects of justice and the variety of duties owed to them is defined by the recognised theory of moral worth. This usually gets expressed in attitudes of respect and can be expressed through feelings of solidarity, community, trust, civic friendship, etc.

### 1. Positively (The Sense of Justice)

A capacity to recognise injustice to the self in the form of the frustration of moral expectations that is legitimated by the principles of justice one considers authoritative. This usually gets manifested in feelings of resentment/moral hatred.

### Negatively (The Sense of Injustice)

A capacity to recognise injustice to others as the violation of their expectations that is legitimated by the principles of justice one considers authoritative. This capacity usually gets manifested in feelings of indignation/moral hatred.

I shall go over the four positions in the table and try to clarify what a formal account of the sense of justice can contribute to our understanding of social, political, and emotional phenomena. The table represents the perspectives of the individual on herself and others as recipients of justice in relation to both positive and negative experiences. Once I have elaborated on the four cells, I shall examine the potential normative sources individuals can appeal to in formulating rectificatory claims within transitional justice contexts.

Cell A1 corresponds to the individual’s sense of the self in relation to the position she has been ascribed by the theory of human worth she has successfully internalised. Depending on the position the individual sees herself as occupying in terms of her value, she develops a set of expectations as to how she will be treated by others. Provided her expectations are stable and generally fulfilled, her sense of self-respect will remain stable over time. In the case of a non-egalitarian theory of human worth, even the individuals at the bottom of the hierarchy can
develop such a sense of self-respect—and even pride—given that what might otherwise be considered oppressive treatment is predictable and does not push the biological limits of socialisation. Unequal treatment could be accepted as just deserts by a person socialised to believe that justice requires that she be treated unequally. Societies based on inequality have their own conception of justice which shapes the individual’s patterns of expectations. A person may learn to believe she deserves the type of attitudes others have towards her. The development of pride and self-respect is not necessarily precluded by unequal treatment. As long as there is agreement between the rules one has internalised and the behaviour of others—be they social actors or institutions—the stability of one's sense of the self and of the related social and political institutions is ensured.

Cell B1 covers the type of attitudes an individual forms towards others according to the theory of moral worth that colours the world for her. She develops dispositions to respect others and a desire to consistently act on the principles of justice and the duties they prescribe; however, different attitudes are deemed appropriate depending on others’ relative position in the scale of moral value. I do not exclude the possibility that some might fall outside the category covered by the sense of justice and hence are owed no duty at all. The scope of the sense of justice along this dimension is limited by one’s conception of human worth and the boundaries of the relevant group of which one is a member. Any collectivity that relegates human beings to the sub-human realm by virtue of particular physical or cultural features denies these individuals coverage under their sense of justice.

Cell A2 refers to cases in which the individual experiences threats to her sense of the self through violation or frustration of her legitimate expectations regarding the self as a subject of justice. If the individual has successfully internalised the norms of a particular theory of human worth, she will feel resentment whenever her moral expectations regarding how she is to be

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treated are frustrated at the hands of other individuals or state institutions. Resentment arises in response to attacks on one’s sense of the self, as perceived in the context of the particular theory of human value to which one subscribes. Based on the assessment of a situation as unjust, the individual forms desires to morally sanction the perpetrator and correct the wrong. The injustice the individual experienced threatened her sense of self; through punishment, she seeks to reaffirm its value.

Cell B2 corresponds to the feelings an individual forms as a third party when she witnesses a moral wrong committed against another human being. Should the victim be treated in a way that does not correspond to her moral rank, a third party might experience feelings of moral outrage when witnessing a transgression. This is the feeling Shklar would have liked to have a stronger motivational force for democrats, and which, in transitional moments, can erupt in scape-goatism. A via media aurea needs to be found in the expression of both resentment and indignation for these feelings to perform a positive rectificatory function within a democracy.

This formal account of the sense of justice helps us make sense of the relationship between the experience of injustice and feelings of resentment and indignation. No matter what the content of the conception of justice that guides the individual happens to be, his sense of justice will take one of the four positions outlined in the table above. Whether the individual’s world is coloured by an egalitarian or inegalitarian conception of human worth, she is still liable to experience the feelings described in the above table. The formation of the related attitudes will depend on the evaluation of discrete situations in view of the principles that guide the individual’s judgment. We have thus managed to provide an account of the sense of justice, its morphology, and socialisation that does not link it to the favourable conditions of a stable constitutional democracy. Next, I shall examine potential alternative normative sources that victims and witnesses of injustice can embrace during and after the fall of a repressive regime.
Emotional expressions that usually demand a solution in transitional moments can easily be interpreted as results of a tension between the individual’s expectations—as defined by the recognised or practiced conception of justice, by his comprehensive doctrine, or by an alternative, borrowed political conception that he finds authoritative—and the abusive practices of the oppressors. Let us examine some alternative scenarios.

Should the publicly recognised conception of justice see the individual as a subject of rights and a citizen of the political community while treatment by state officials or rival groups deny her this status, one is likely to experience injustice emotionally. For example, many authoritarian regimes have had public, written constitutions, but in practice these were empty documents. The tension between what is publicly declared to be the case and the actual treatment of citizens by state agents generates tension within the individual, who under such circumstances can only be motivated to abide extrinsically, through rewards or punishments. Valid, yet unobserved, constitutions can serve as normative sources for the individual’s expression of his evaluative emotions.

Exposure to an alternative political conception that resonates with citizens’ needs and interests can also act as a catalyst for resistance and change. Sometimes this borrowed conception is only partially understood and gets distorted while being used for reformist purposes. A variant of this scenario sees a state's recent experience with democratic institutions act as an important referent for the individual’s sense of justice.

The comprehensive visions of the good that citizens endorse can also provide them with appropriate normative language with which to communicate reactive attitudes. Religious or philosophical moral codes are obvious examples. In this case, the most relevant example is the civil rights movement in the United States, an instance of transitional justice whose agents relied on a widely endorsed set of religious beliefs to achieve its goals.
Lastly, there are contexts in which no alternative normative language is readily available or such a language is not widely shared by the oppressed. In such cases, the victims tend to formulate their claims in negative terms. If one looks at public protests during or in the immediate aftermath of transition in Latin America or Eastern Europe, demands were often made non-constructively: “No more Communism,” “Down with the Dictator,” “Keep the military away.”

To conclude, the language of protest varies from one polity to another, from one group to another. The sense of justice finds its content in different contextual sources that individuals see as authoritative and have successfully internalised, even if only temporarily: religion, moral codes, a failed experience with democracy preceding the unjust regime, a reactively imagined future, or, quite often, a borrowed democratic language with no, or only feeble, roots within the polity. We must be aware, however, that the plurality of normative sources one has access to and the potential for incoherence between these alternative sources can lead to tensions and emotional conflicts within individuals. A monolithic understanding of socialisation would not do justice to the complexity of the forces at work within socialisation processes. As mentioned above, some such tensions are solved in political action, others degenerate into psychological pathology. In either case, democratic institutions need to be concerned with the emotional climate of the polity.

In the case of a transition to democracy, public claims to justice, no matter what language they are expressed in, refer to harms that can easily be traced back to violations democracies would want to prevent or correct. In the aftermath of violence, fear diminishes and citizens can affirm their need to form stable expectations towards one another and towards the governing institutions. Some of these expectations take the form of legitimate demands for rectificatory measures by the state's institutions; but, given the affective vehemence of these demands, there is always the potential for violence to erupt against victimisers, real or imagined. The first
difficulty the young democracy has to face is dealing with the powerful moral feelings of victims and resisters in a way that does not instrumentalise anyone for the sake of satisfying moral anger. It is a normative imperative that democracy recognise the constitutive appropriateness of the victims’ emotional claims while at the same time preventing victimisers from slipping outside of the democratic sense of justice.

This problem of a democracy without democrats is even more stringent where the change of regime came about through elite negotiations or outside intervention. Citizens may have had difficulty resisting due to the pervasive oppression, which disabled the formation of a minimal level of social trust. Only trust enables resistance. This does not mean that resentment was not felt during the reign of oppression. It might have been aroused internally, but due to the climate of fear maintained by the regime, it was never expressed outwardly. Alternatively, long years of political and social subordination might end in political apathy and disillusionment that replace the expression of negative moral feelings.

Another possible explanation for why in some contexts resentment or indignation do not get expressed—either before or after the transitional moment—has to do with the virtues hailed by the comprehensive doctrines the oppressed subscribe to, whatever their sources. Should these views praise detachment from potential sources of suffering, strength of character, and emotional restraint, then, given sufficient commitment to these rules, one might be able to control resentment. Should one’s worldview maintain that the sense of dignity is not diminishable, one might believe that resentment would be irrational. In some of the most extreme cases of oppression, where the individual is brought to the verge of annihilation, the capacity for resentment can be lost. In cases of historical injustice, where oppressors excluded large

77 For the difference between internal and external experience of emotions see Wollheim, On the Emotions, pp. 114–115.
78 Social psychology provides us with a vast literature on basic human needs and the ways in which their frustration can lead to cognitive emotions such as resentment or indignation. Should frustration be extreme, the individual may end up in psychological pathology. The seminal texts on the socialisation of emotions and its relationship with basic
categories of people from full human status for centuries, victims may have internalised the oppressive rules. In such cases, they may consider others’ attitudes towards them as deserved and not as a reason for resentful feelings. This is often the case for women’s subordination, and racial or ethnic historical oppression, such as that of African Americans in the United States and of the indigenous peoples of the Americas and Oceania.79

These are some potential explanations as to why resentment is sometimes absent from transitional moments. The indignation of third parties as witnesses to injustice is also more likely to surface once violence has ended, whether because of safer circumstances or a newly discovered moral righteousness.80 With the return of conditions of safety, most individuals’ reactive feelings come to the fore and demand recognition.

The last issue this chapter will engage with concerns the compatibility between the principles giving content to moral outrage and democratic values of equal respect for all under the law. What type of situations appropriately constitutes resentment and indignation according to the egalitarian theory of moral worth of a democracy? How must one act on these emotions in


80 The responsibility of bystanders regarding injustices is one of the major themes in transitional justice literature. For some insightful analysis see Norman Geras, The Contract of Mutual Indifference: Political Philosophy after the Holocaust (London: Verso, 1998); Virgili, Shorn Women; Staub, The Psychology of Good and Evil.
keeping with the polity's newly proclaimed commitment to democratic values? An account of the limits democracy places on public expressions of emotion is the object of the last section of this chapter.

### III.4 Taking Responsibility for Moral Outrage: Constitutional Democracy and its Affective Rules

The authors who can help us start setting up realistic goals for emotional socialisation for democracy are Jean Hampton and Jeffrie Murphy. In their book on the moral and psychological dimensions of forgiveness and mercy, the two theorists enter into a dialogue over cognitive moral emotions and their legitimacy. Both recognise the role of the social environment in the constitution of emotions and the functions emotions perform in the preservation of social norms. A community’s theory of moral worth is supposed to provide the background for the expression of moral emotions. It settles debates over what it means for a human being to have worth, establishes how worth is to be determined, and decides how human beings should be ranked on a scale of human value. The theory must also provide the means with which to adjudicate whether and how one can lose one’s position in this ranking.

A democracy’s endorsement of an egalitarian theory of human worth dictates that resentment and indignation serve as forms of defence for specifically personal values of the self:

> I (Murphy) am in short suggesting that the primary value defended by the passion of resentment is self-respect, that proper self-respect is essentially tied to the passion of resentment, and that a person who does not resent moral injuries done to him is almost necessarily a person lacking in self-respect ... If I count morally as much as anyone else (as surely I do), a failure to resent moral injuries done to me is a failure to care about the moral value incarnate in my own person (that I am, in Kantian language, an end in myself) and thus a failure to care about the very rules of morality.

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82 Jeffrie Murphy, “The Retributive Emotions,” in *Forgiveness and Mercy*, p. 16–18. In a similar vein, Nancy Rosenblum writes: “Every injustice arouses anger, or should. A capacity to understand and feel injustice is the mark
Murphy’s emphasis on the need to defend the value of self-respect publicly against the attacks of the wrongdoer reveals an interesting reading of the Kantian view of dignity, one which allows for an intense subjective feeling of attack against one’s equal status as a moral person through moral injuries. Hampton’s account is not much different. She claims resentment is felt by the victim of an injury and that punishment is seen as reasserting the victim and victimiser’s equal moral worth. This is what makes for an appropriate expression of resentment or indignation within the bounds of an egalitarian theory of moral value: resentment should be based on a correct assessment of the denial of moral equality and its expression should be regulated to prevent self-righteous, over-moralising, and over-dramatising responses that would deny the victimiser equal moral personhood. Malicious and spiteful hatred, self-righteously claiming a superior rank for the victim over the victimiser should be avoided at all costs:

A retributivist’s commitment to punishment is not merely a commitment to taking hubristic wrongdoers down a peg or two; it is also a commitment to asserting moral truth in the face of its denial. If I have equal value to that of my assailant, then that must be made manifest after I have been victimised. By victimising me, the wrongdoer has declared himself elevated with respect to me, acting as a superior who is permitted to use me for his purposes. A false moral claim has been made. Morality has been denied.

However,

This aim means that the punisher must not do anything that could be interpreted as an attempt not merely to deny wrongdoers’ claim to superiority but also to degrade them, that is, cause them in of moral maturity; a taste for oppression is the mark of moral deformation.” See Nancy Rosenblum, “Memory, Law and Repair,” p. 1.

83 For an illuminating account of the complementarity of two views of human dignity—one deontological and one that allows for the role of recognition—see Leah Soroko, “Adjudicating Human Dignity: Towards a Critical Framework,” paper presented at the Law and Society Association Annual Conference, Humboldt University, Berlin (July 2007).

84 I will rely again on Améry for a personal account of the need to reassert moral truth: “My resentments are here in order that the crime become a moral reality for the criminal, in order that he be swept into the truth of his atrocity.” Jean Améry, At the Mind’s Limits: Contemplations by a Survivor of Auschwitz and its Realities (Bloomington IN: Indiana University Press, 1980), p. 70.

85 A similar point is made by Dillon, “Self-Respect: Moral, Emotional, Political,” p. 230, 234.

some way to lose value. Sometimes a crime is ghastly in the way in which it portrays the victim as vastly lower than the criminal or in the way it seems to reduce him almost to a bestial level, for example, mutilation, torture, enslavement … One cannot see the punishment as reasserting the moral facts if it involves doing something to the wrongdoer that either makes him or represents him to be degraded below the level of human beings generally.87

The instigation for resentment is moral injury; the target is the victimiser; the objective is punishment. Within a society regulated by a theory of equal moral worth, any act that denies equal status to an individual entitles her to resentment and third parties, to indignation. Her expectations of equal respect have been betrayed and she desires a reaffirmation of her moral worth. This reaffirmation is, however, subject to limitations by regulative rules; punishment cannot take forms that would demean the victimiser. Private, extra-legal justice would be the most blatant form that a violation of equal respect could take.

The task of ensuring compliance with both constitutive and regulative rules within societies that embrace moral egalitarianism belongs to public institutions, among which public education and a criminal law system entrenching the principles of the rule of law are the most visible. The task is to recognise the legitimacy of the victims’ evaluative emotions while at the same time channelling, filtering, and educating them in conformity with the demands of equal concern for persons. This is what democracies do.

But what does this all mean for the relationship between the moral resentment and indignation that accompany transitional justice claims, on the one hand, and the moral egalitarianism of democracy, on the other? At this point it seems safe to conclude that the moral injuries oppressors inflict on their victims would count as legitimate objects of resentment and indignation from a democratic point of view, no matter what language rectificatory claims are expressed in. Crimes ranging from expropriation to starvation, kidnapping, imprisonment, forced labour, torture, mass killings, and ultimately genocide, can all be reformulated in the

language of denying equal respect that democracies recognise. Constitutive rules of emotion are observed when people exhibit moral hatred towards their true victimisers. All the crimes listed above constitute proper instigation for resentment and indignation; however, due to contextual factors, the targets of moral disapproval, i.e. the perpetrators, are sometimes difficult to identify and responsibility is hard to establish. Attribution of guilt should be carried out with caution in order to avoid scapegoatism.  

In addition, once the target has been correctly identified, the regulative rules of morally egalitarian societies must ensure no abuses are committed when those who are experiencing resentment and indignation try to achieve their objective, namely punishing those responsible for the injuries. Victims are proper objects of concern for democracy; nevertheless, in order to live up to democratic commitments, victims should not give victimisers proper grounds for resentment by placing themselves higher on the scale of moral worth. This prescription is valid not only for the institution of punishment, but for all transitional justice mechanisms with which a society might choose to engage its painful past. Equal respect for the victimisers should be affirmed whether in the context of a TRC, a gacaca circle, a hybrid or international court, or in the delivery of compensation or restitution.

Having thus substantiated the grounds for believing in the normative weight and the educability of affect presented in Chapter II, it is time now to turn to the second question the new elites have to answer, How exactly can we give legitimate feelings of resentment and indignation their due without at the same time undermining the normative basis of democracy? How can we stimulate the development of a disposition to consistently act on the principles of justice that constitutional democracy is based on?

In what follows, I shall look into the ways in which the judiciary can dispense transitional justice while at the same time furthering democracy. Chapter IV will supplement the existing

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88 Human needs theorists have identified scapegoatism as a possible consequence of destructive mechanisms employed to satisfy basic human needs. See Staub, *The Psychology of Good and Evil*, p. 55.
literature by providing an additional argument about how judges can contribute to democratisation in their capacity to review legislation. Insights from legal theory and the literature on reflective judgment will illuminate the ways in which courts could decide in support of the cause of democracy. In Chapter V, I will show concretely how magistrates within transformational contexts have exercised this faculty in their engagement with victims and in response to society’s outraged cry for justice.

This dissertation will also examine criminal trials’ influence over the course of democratisation. Chapters VI and VII will be dedicated to an exploration of penal proceedings and of the affective impact they can have on the parties directly involved in this process and on society at large. Case studies of trials of former victimisers will be used to exemplify how such processes could engage public feelings of resentment and indignation in a way that makes them compatible with a democratic political culture.
Chapter IV

Enabling Emotional Responsibility I: Judicial Review of Transitional Justice Legislation

... the point of law is to make the passions more coherent, more consistent, more articulate, more perspicacious, more reasonable, more subject to scrutiny, more scrutinised.

(Robert Solomon, Justice v. Vengeance)

The previous two chapters have dealt with the issue of justifying transitional justice projects for polities moving from oppression to democracy. We have seen that, from the point of view of a democratic theory of moral worth, there are solid prudential implications attached to the normative reasons for supporting a serious engagement with the past. An account portraying the socialisation of the sense of justice as crucial for the reproduction of any normative order has paved the way for the next step in our attempt to develop a political theory of transition. The time has come to turn to the second programmatic question of this dissertation, that of distributing corrective measures. Who should distribute transitional justice? And how should transitional justice be distributed in order to promote the development of a democratic emotional culture, supportive of democratic institutions?

The following four chapters will examine ways in which the judiciary could dispense transitional justice so as to further democracy as a normative, institutional, and cultural order. I shall not provide an argument as to why “the least dangerous branch”\(^1\) of government is in a better position to engage with an oppressive past. As we saw in Chapter II, there is a growing convergence in the field of transitional justice on the idea of a division of labour between

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\(^1\) The phrase has been coined by Hamilton and refers to the Supreme Court’s having neither the power of the sword, nor that of the purse. See Alexander Hamilton, “The Judiciary Department,” The Federalist, 78 (June 1788), http://www.constitution.org/fed/federa78.htm (accessed September 12, 2008). For an account that links the court’s weakness to its self-restraint, see Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (New Haven: Yale University Press, 1986).
different institutional mechanisms. Judges are not the only actors who can engage the legacies of oppression, but they play quite an important part in this process. Any account of democratisation that does not acknowledge contributions by unelective institutions is incomplete and unrealistic.

Chapter IV will supplement the existing literature by providing an additional argument about how judges can contribute to democratisation through their capacity to review legislation. Given that the focus of this dissertation is on the public’s negative emotions towards victimisers and oppressors, I shall concentrate on the revision of transitional justice bills. The chapter does not seek to offer a defence of the institution of judicial review, but only to show how it can make an important contribution to a concerted effort to democratise.

There are two claims I shall advance here. First, maintaining the integrity of democratic principles requires that judges reviewing transitional justice legislation recognise victims’ legitimate negative emotions. This means that courts should decide in ways that will facilitate the opening of institutional spaces for engaging the past. In this way, judicial review would affirm equal concern for citizens, thus contributing to the reproduction of democracy. Supporting bills meant to induce silence and amnesia or bills that would unleash abusive administrative purges and trials cannot be justified. Second, review decisions that reaffirm egalitarian principles will also communicate the limits that democracy places on emotional expression. The goal is to avoid the instrumentalisation of victimisers for the sake of satisfying victims’ and society’s thirst for redress. To the extent that courts consistently act with equal concern and respect towards all individuals, they exemplify what democracy demands of its citizens. A principled engagement with the past along these lines might have a beneficial educative effect; however, since democratic socialisation can only result from a multilateral effort, it would be difficult to isolate and measure the pedagogic impact that judicial review of transitional justice bills might have on its own. What courts can strive for are clear, elaborate decisions that provide victims and victimisers, as well as the wider publics, with a justification and explanation of the institutional
form that transitional justice can take within the context of their particular democratisation efforts.

The question that naturally emerges at this point is the following: how, then, are courts to adjudicate? How can they reach the kind of decisions that display a commitment to the principle of equal respect and concern for all and that communicate democratic rules of public sentimental expression? This chapter will propose a fresh way of thinking about the mechanisms at play when judges reach and communicate decisions that maintain the integrity of democratic principles. In addition, the perspective of the addressees of the decision is dealt with from a theoretical point of view. Building on one of the most famous accounts of judicial interpretation—the one offered by Ronald Dworkin—and adding insights from the literature on reflective judgment, this chapter will illuminate the ways in which judges can decide in support of democracy. Chapter V will show concretely how courts within transformational contexts have chosen to deal with emotions in a principled manner and how they have contextually decided to communicate normative imperatives in their decisions.

I shall begin by reviewing the arguments that have been put forth with regard to the role judicial review can play for polities making the transition to democracy (Section IV.1). By drawing attention to the emotional aspect of democratic culture, I will add one more dimension to the already complex set of expectations linked to this institution. This theoretical move opens up the space for a more complex theory of adjudication for democratic transitions. In order to formulate such a theory, I shall use as a starting point Ronald Dworkin’s theory of “law as integrity” and his outcome-oriented conception of constitutional democracy (Section IV.2). The reason for choosing Dworkin lies with his dynamic and temporally sensitive understanding of legal interpretation. While Dworkin’s analysis does justice to the way in which judges work within a legal tradition and at the same time transform it, there are two shortcomings from which the Dworkinean perspective suffers. The first limitation is a lack of attention to the socio-
political circumstances of judgment in general, and to the emotional dimension in particular. Dworkin’s account is insulated from the circumstances of adjudication. Because of his concern with the integrity of the legal system in isolation, he misses important contextual elements that define the role of the judiciary. Attention to context is a prerequisite for accounting for adjudication not only within transitional moments, but at all moments within the life of a democratic community. By bringing context back in, I shall try to add complexity to Dworkin’s model by examining what the integrity of principles requires from judges. The second shortcoming in Dworkin’s analysis is related to his neglect of the relationship between the makers and the receivers of decisions. I argue that decisions need to legitimise the desire for vindication that victims and their families bring with them to court, but, at the same time, they must communicate the constraints that society’s very commitment to democracy places on the satisfaction of that desire. An account of how those to whom a decision is addressed might react and sometimes transform their position in response to the judges’ opinions is necessary for theorising the judiciary’s contribution to political socialisation. Alessandro Ferrara’s notion of exemplary oriented reflective judgment will be used to supplement Dworkin’s account with a more robust treatment of judgment by disclosing the mechanisms at play both in judges’ decision-making, and in the reception of those decisions by the court’s sometimes resentful and indignant addressees. Thus, by adding a socio-emotional dimension to the circumstances of justice and a theoretically richer account of how judgment is both made and received, Dworkin’s conception of “law as integrity” will be better equipped to make sense of the more subtle ways in which the review of bills helps create and recreate a normative regime. (Section IV. 3).

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IV.1 Judicial Review and the Shaping of a Democratic Emotional Culture

Most of the political science and legal studies materials written on the relationship between democracy and judicial review have been motivated by a fascination with the spectacular American constitutional experience. The United States Supreme Court is arguably a paragon of judicial power, with an immense media presence. The mirage of foreign blueprints as well as a disenchantment with the vagaries and unpredictability of politics, have made societies exiting authoritarianism and civil violence quite fond of the judiciary in general, and of courts with constitutional jurisdiction in particular. Numerous countries that made the transition to democracy in the 20th century opted for institutional setups that included a strong court of constitutional review; some following the American, others the Kelsenian, model. The fear of political processes—which, historically, had led to the creation of permanently losing parties and enabled the hijacking of all state power by a minority—often made people more trustful of courts. A clearly romanticised image of the judiciary as an impartial forum of reason often dominated public perceptions of the institution, while the enormous body of work—both

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4 The alternative to a court with constitutional jurisdiction would be the Westminster model of legislative supremacy. In Europe, Spain, Germany, Italy, Portugal and the post-communist states all embraced a court of constitutional review once they exited authoritarianism. However, there are important institutional differences. The US legal system is based on an idea of diffuse, concrete, a posteriori control of constitutionality, while European countries have adopted courts of special jurisdiction on the Kelsenian model; these engage both in abstract and concrete, a priori and a posteriori review. (One might speculate they would not want control of bills to be left to the incidence of cases. While this might have a safeguarding effect, it might also lead to a politicization of the judiciary). Eastern European countries have followed the Austrian blueprint as well. For a review of the performance of such courts in post-communism see Herman Schwartz, “Eastern Europe’s Constitutional Courts,” Journal of Democracy, Vol. 9, no. 4 (1998), pp. 100–114. The famous post-apartheid South African Constitutional court has mixed review powers. Prempeh engages the tension between the existence of constitutional courts in the absence of constitutionalism in Africa. See H. Kwasi Prempeh, “Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa,” Tulane Law Review, Vol. 80, no. 4 (2006), pp. 1239–1324). Latin American democracies represent a patchwork of abstract and concrete, centralized and diffuse, a priori and a posteriori review. The US model is more influential there than in Europe. For a detailed account of judicial review in Latin America, see Patricio Navia, “The Constitutional Adjudication Mosaic of Latin America,” Comparative Political Studies, Vol. 38, no. 2 (2005), pp. 189–217.
academic and fictional—on the US Supreme Court did nothing but fuel the fascination with court-administered limits on capricious legislative politics.\(^5\)

In spite of divisive debate over many aspects of the new institutional design to be adopted, new democracies generally agree about one thing: never again will citizens put up with state-sponsored harm. Never again will they want to go through the nightmare of living in fear. Never again will they be at the mercy of politics—negatively conceived as a realm of arbitrariness and whimsical power. Insulation from the potentially abusive reach of the state—and of the group controlling it—is thought to be guaranteed by an impartial judiciary who can make sure laws will never serve the cause of disenfranchisers. Freedom as non-domination\(^6\) makes the minimal object of an agreement that can ground the Constitution. The most astute critic of the institution, Jeremy Waldron, explains the fascination with judicial review along similar lines:

...a large part of the authority, the legitimacy—if you like, the simple *appeal*—of a legal system is that we may regard ourselves as subject to government by laws, not by men. And the danger of focusing on legislation is that, as a source of law, it is all too human, all too associated with explicit, datable decisions by identifiable men and women that we are subject to these rules rather than those...The processes by which courts reach their decisions are supposed to be special and distinctive, not directly political, but expressive of some underlying spirit of legality...Everyone knows that argument in Congress or in Parliament is explicitly and unabashedly political.\(^7\)

\(^5\) This has naturally provoked vehement reactions from those who deplore the losses associated with shifting the locus of decision-making from parliaments to unelected tribunals. The most vehement critic of the institution of judicial review is Jeremy Waldron, who claims that such an institution would diminish democracy and would insult the citizens’ capacity for self-government. See *Law and Disagreement* (Oxford: Claredon Press, 1999). Parts of the argument presented in Chapters X through XIII have been published in “A Rights-Based Critique of Constitutional Rights,” *Oxford Journal of Legal Studies*, Vol. 13, no. 1 (Spring, 1993), pp. 18–51; Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999). Waldron does, however, acknowledge the fact that within societies that do not enjoy the benefits of a rights-supportive political culture, judicial review could be a compromise solution to protect unpopular minorities; yet, he warns us not to forget that this would be a violation of democratic norms. It is interesting that he does not see how judicial review could contribute to an institutional effort to bring about the necessary dispositions that underlie a rights-supportive culture. Jeremy Waldron, “The Core Case against Judicial Review,” *Yale Law Journal*, Vol. 115, no. 6 (April 2006), pp. 1346–1407.


Most societies coming out of regimes that denied meaningful exercise of rights are enamoured with the idea of having legally protected claims against the state and other members of the political community. Rights-talk may have the potential to impoverish the public discourse and weaken the sense of the community if it leads to the creation of a litigation-centred culture; but recently enfranchised populations celebrate rights and think a relapse into the past could only be prevented through the entrenchment of a constitution. Rights have a powerful expressive function that provides the right-bearers with a sense of self-respect, a sense that can balance the individual’s negative feelings.9

When discussing the relationship between democratisation and judicial review, constitutional engineers have identified a variety of functions a court of constitutional jurisdiction could perform within transitional contexts. An independent panel of judges controlling the constitutionality of bills and acts by the political branches may prevent a slide back into unaccountability and oppression.10 Judicial review enthusiasts have linked the establishment of a court of constitutional jurisdiction to the protection of human rights and, indirectly, economic prosperity.11 Such a court could take the side of the least powerful and, under propitious conditions, push majorities to comply with its rulings.12 Moral consciousness might be awakened13 through an institutional shaping of memory and remembrance processes.14

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In addition, focusing public attention on salient issues could encourage the development of a sense of civic responsibility and help crystallise the party system.\textsuperscript{15} Deliberation and meaning creation could also be stimulated provided courts embrace the idea of transparency.\textsuperscript{16} What is more, a constitution and the judiciary interpreting it could contribute to an identity-building project. Bills of rights have been understood as legal expressions of the requirements implicit in the democratic theory of human worth. Their publicity and highly generalised form can mobilise citizens and institutions in a common effort to move against and beyond a violent past. Through all these different functions, some observers claim, judges would serve the substantive ideal of democracy even better than elected parliaments.\textsuperscript{17}

This chapter will reveal an additional dimension of what it is that judicial review can contribute to democratization. My claim is that by handing down the right decisions in transitional justice-related cases—and other kinds of cases as well—courts can reproduce democracy both normatively and culturally. Let me explain.

My aim is to draw attention to the emotional dimension of the circumstances of politics and adjudication. Democrats are not socialised overnight and in a vacuum; institutions are important actors in the inculcation of democratic norms of political and social interaction. Political socialisation—which encompasses the socialisation of politically relevant emotions—takes place over time and depends on sustained institutional orchestration. Within emotionally charged transformational moments—whether in mature or young democracies—participation is associated with multiple discriminatory risks. A liberty-supportive culture either is not yet present, does not include all members of the political community, or has been stifled by public outrage.

\textsuperscript{14} Teitel, \textit{Transitional Justice}.
\textsuperscript{15} Cindy Skach “Rethinking Judicial Review: Shaping the Toleration of Difference?” in McAdams, \textit{Rethinking the Rule of Law after Communism}, pp. 61–74.
\textsuperscript{17} Scheppele, “Democracy by Judiciary.”
Only certain kinds of emotional expression are compatible with democracy. When it comes to young democracies, one might say that the Millian spirit of liberty has only shown its revolutionary, negative, anti-oppression face—righteous, legitimate resentment and indignation have contributed to a push for political change or have emerged virulently in the aftermath of violence. The “watchfulness over rights” disposition needs to be excavated from underneath layers upon layers of moral hatred directed towards former oppressors. Under such circumstances, a polity cannot risk relying on the shaky barriers of moral conviction. Long years of fear and violence may lead revenge-thirsty majorities to carry out actions in tension with the moral egalitarianism to which they declare their commitment. People agree that the past should never be repeated, but they also agree that their suffering entitles them to satisfaction. As we have seen in the previous two chapters, democracy recognises the need to give resentment the institutional attention it deserves. However, not all results of political participation, not everything the majority votes into law is legitimate from a democratic point of view. Laws of transitional justice that treat victimisers as less than members of the community are not tolerable in a democracy. The spirit of equal concern needs to be stretched to cover the rights of the former victimisers as well. At the same time, laws that impose silence about the past fail to recognise victims’ suffering and relegate them to second-order citizenship. Between these extremes, there is ample room for judgments that contextually affirm a concern for all involved.

The question that naturally emerges at this point is, How exactly can the judiciary stay true to its normative commitments to democracy while also engaging the emotional component of a democratic political culture? What kind of adjudication do we need in order to make sense of the parallel processes of normative affirmation and emotional socialisation? What kind of decision is the right decision from the point of view of democracy? How can courts reach this kind of decision? The next two sections will focus on answering these questions. Ronald Dworkin’s conception of constitutional democracy and “law as integrity” will provide the
background for examining the way in which courts can contribute to the normative, institutional, and cultural reproduction of the democratic order. Lessons from the philosophy on reflective judgement will then strengthen Dworkin’s account of judicial decision-making and thus take us closer to understanding how a principled decision can also play important communicative and pedagogical roles.

**IV.2 The Limits of Law as Integrity**

Ronald Dworkin’s defence of judicial review relies for its justification on a “value conception of democracy,” an ambitious project based on the idea that democracy itself presupposes substantive, and not only procedural, rights that act as limits on majoritarian decisions. I will first introduce his view of democracy, a view that does justice to both the normative and institutional components of a regime, and which partially maps onto the conception of democracy I presented in Chapter II. His theory of adjudication will then show us what kind of decision counts as a “right” decision from the point of view of democracy. Nevertheless, while Ronald Dworkin’s conception provides useful insights into the function that courts can play in the normative and institutional reproduction of a regime, his account will prove to be incomplete. I will engage with two shortcomings from which I think his theory of adjudication suffers. First, this section will disclose how a limited focus on the integrity of the legal system detracts from the broader circumstances of justice in general, and from the socio-emotional environment within which the judiciary functions in particular. As a consequence, Dworkin cannot account for the more subtle contribution of these contextual factors to the development of a democratic socio-emotional climate. Second, in the following section, I shall supplement his account with a more robust treatment of reflective judicial judgment. While Dworkin acknowledges the role of reflective judgment within his theory of adjudication, it remains undertheorised. Moreover, he only pays attention to judges as decision-makers and does adequately consider the perspective of the
addressees of judicial judgments and how they may react to decisions that both further and transform the legal tradition.

Dworkin’s conception of democracy is meant to support his justification of the institution of judicial review in a way that resolves the tension between popular will and individual rights. While a justification of the institution of judicial review is not my purpose here, I will briefly review his thoughts on the nature of democracy. As we shall see in this chapter, it is because of a limited understanding of democracy that his theory of adjudication suffers from an incomplete view of the circumstances of justice and of the contribution the judiciary can make.

On Dworkin’s “moral reading,” a certain set of conditions must be met in order for a democratic political community to count as legitimate. These conditions go beyond those expressed in procedural defences of judicial review. Equal concern for the interest of all members of the political community is a defining feature of constitutional democracy and majoritarian decision-making can ensure it, though not exclusively. The principle of “equal concern” that underlies democracy is an internal, not external, limit on democratic politics. When majoritarian procedures fail, courts must step in to make sure the legitimacy conditions are met.

Dworkin writes:

If we reject the majoritarian premise, we need a different, better account of the value and point of democracy. Later I will defend an account—which I call the constitutional conception of democracy—that does reject the majoritarian premise. It denies that it is a defining goal of democracy that collective decisions always or normally be those that a majority or plurality of citizens would favour if fully informed and rational. It takes the defining aim of democracy to be a different one: that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal respect.

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Majoritarianism cannot be the essence of democracy for Dworkin, for majoritarianism is an incomplete procedure, one that cannot test if the conditions for democratic rule are met. These conditions are structural and relational. Structurally, a community is characterised by a history, culture, language, etc. Relationally, every member’s interests must be treated with equal respect and she must be allowed a part in all decision-making affecting her—this is the requirement of reciprocity and of membership in the moral community.

No democratic community that fails to meet the relational conditions counts as legitimate for Dworkin. Their satisfaction requires the institutionalisation of majoritarian decision-making, but outcomes cannot be left entirely at the mercy of volatile legislatures. Controls must be established; however, they need not take the form of a court of rights review:

I do not mean that there is no democracy unless judges have the power to set aside what a majority thinks is right and just. Many institutional arrangements are compatible with the moral reading, including some that do not give judges the power they have in the American structure. But none of these varied arrangements is in principle more democratic than others. Democracy does not insist on judges having the last word, but it does not insist that they must not have it. Dworkin’s contention is that democracy is compatible with judicial review by an unelected body, and that “liberty,” “equality,” and “community” are not compromised by such an institution. “Liberty” has no meaning unless one is recognised as a member of the relevant political


Dworkin, Freedom’s Law, p. 7.
community or, as I have claimed in Chapter III, one is under the protection of the citizens’ sense of justice. Judicial review can make sure the unpopular do not get excluded. “Equality” of power—defined either as impact or influence—is a chimera in a world defined by highly complex politics and major economic inequalities. The only equality democracy can aspire to is equality of status and this is something that the constitutional version of democracy is equipped to guarantee. Last but not least, the sense of “community” is not weakened by judicial review. On the contrary, a republican debate of a superior quality might take place around decisions by a constitutional court rather than around legislative or even referendum voting.21

Dworkin’s position obviously embraces a result-oriented perspective, one that gives priority to those institutional arrangements meant to ensure the conditions of legitimacy: “I see no alternative but to use a result driven rather than a procedure driven standard for deciding them (constitutional questions). The best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions actually are, and to secure stable compliance with those conditions.”22 Furthermore, he thinks that because of their susceptibility to illegitimate political influence, majorities are not the safest bet for ensuring equal concern for all citizens. Of course courts can be wrong, but so can majorities; there is a symmetry of fallibility. But as long as courts observe the limits that text (the Constitution) and integrity (the task of making the law “the best as it can be”) place on adjudication, democratic legitimacy will endure. An egalitarian community would have to embrace a conception of democracy that makes room for non-elective institutions in order to ensure equal concern is shown to all, irrespective of vote-counting. While judicial review is not the only solution to the problem, if instituted, it can make a positive contribution.

22 Dworkin, Freedom’s Law, pp. 34.
This should not lead to the conclusion that as long as the right results are ensured by the judiciary, participation does not count. On the contrary, an egalitarian community requires that the feelings of empowerment and moral capacity that come with participation in politics, as well as the loyalty-building functions of participation, be recognised and cherished. The difference between judicial review sceptics (such as Waldron) and Dworkin does not lie in the role they ascribe to participation, but in the attention they pay to the consequences thereof. Dworkin writes:

This alternate account of the aim of democracy, it is true, demands much the same structure of government as the majoritarian premise does. It requires that day to day political decisions be made by officials who have been chosen in popular elections. But the constitutional conception requires these majoritarian procedures out of a concern for the equal status of citizens, not out of any commitment to the goals of majority rule. So it offers no reason why some non-majoritarian procedure should not be employed on special occasions when this would better protect or enhance the equal status that it declares to be the essence of democracy, and it does not accept that these exceptions are a cause of moral regret.\(^\text{23}\)

It should be clear by now that Dworkin goes beyond a mere institutional understanding of democracy and pays attention to its normative reproduction. The principles of equal status for persons as persons and equal respect for that status underlie democracy as a normative regime. The protection of this status for all citizens, in practice, sometimes requires that majoritarian institutions be supplemented with safeguards, judicial or non-judicial. Non-elective institutions can thus contribute to democracy and societies must sometimes reconcile themselves to the fact that democracy does not always come about from the bottom up.

The relationship between democracy and judicial review, as Dworkin theorises it, determines his theory of adjudication. Dworkin presupposes the existence of a personified community whose ethical integrity requires institutions to act in a certain way with regards to the

basic principles of its ethos. Integrity is a specific virtue that stands alongside fairness, justice, and due process:

Integrity becomes a political ideal when we make the same demand of the state or community taken to be a moral agent, when we insist that the state act on a single, coherent set of principles, even when its citizens are divided about what the right principles of justice and fairness really are… If we accept integrity as a distinct political virtue beside justice and fairness, then we have a general, non-strategic argument for recognising such (legal) rights. The integrity of a community’s conception of *fairness* requires that the political principles necessary to justify the legislature’s assumed authority be given full effect in deciding what a statute it has enacted means. The integrity of a community’s conception of *justice* demands that the moral principles necessary to justify the substance of its legislature’s decisions be recognised in the rest of law. The integrity of its conception of *procedural due process* insists that trial procedures that are counted as striking the right balance between accuracy and efficiency in enforcing some part of the law be recognised throughout, taking into account differences in the kind and degree of moral harm an inaccurate verdict imposes. These several claims justify a commitment to consistency in principle valued for its own sake.\(^\text{24}\)

With regard to the burdens this virtue places on institutions, a distinction between two areas of integrity is required: “The first is the principle of integrity in legislation, which asks those who create law by legislation to keep that law coherent in principle. The second is the principle of integrity in adjudication: it asks those responsible for deciding what the law is to see and enforce it as coherent in that way.”\(^\text{25}\)

When it comes to institutional integrity, Dworkin is not concerned with integrity across historical epochs. On the contrary, promoting this cherished virtue might require ruptures with the past. The perspective that is required is horizontal, “across the range of legal standards the community now enforces.”\(^\text{26}\)

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Given the interest of this section, I shall now focus more closely on what integrity requires from judges.\textsuperscript{27} Against the background of Dworkin’s strong personification of the community, judges must identify rights and duties on the presumption that they have all been created by the collective acting as a single author.\textsuperscript{28} An analogy between law and a chain novel is meant to explain how adjudication should work. Each of the judges/writers contributing to the legal tradition/chain novel tries hard to make the law/novel the best it can be, in the sense of making it look more like the work of a single author (the community) rather than that of a series of discrete contributors: “Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person’s situation is fair and just according to the same standards. That style of adjudication respects the ambition integrity assumes, the ambition to be a community of principle.”\textsuperscript{29}

These rather general guidelines for adjudication are valid for common law, statute, and constitutional review, with the exception that, in constitutional interpretation processes, judges get closest to the guiding light of principles. Fidelity to the basic standards underlying the legal system requires that the judiciary try to constructively interpret specific laws in a way that best instantiates the tradition. Only thus can the integrity of the order be maintained.

The main merit of Dworkin’s conception of constitutional democracy is that it offers a plausible account of how judges can simultaneously maintain and correct a legal tradition by perpetually attempting to instantiate its guiding principles in practice. The historical novel of a polity is made up of various contributions and can be steered in different directions by decision-

\textsuperscript{27} Dworkin claims integrity is not only a matter of concern for public officials, but a virtue in the vicinity of \textit{fraternity or community}. What is more, the aspiration is that citizens themselves treat one another in a principled way. Equal concern for all members of a community is the mark of a fraternal association in a thin sense. However, he rejects any demanding understanding of fraternity as \textit{love} and limits this attitude to equal concern for the other members of the community.

\textsuperscript{28} Dworkin, \textit{Law’s Empire}, p. 225.

\textsuperscript{29} Dworkin, \textit{Law’s Empire}, p. 243.
makers. Dworkin’s theory of law-making through adjudication, accommodating for both continuities and discontinuities, represents any democracy’s historical narrative, comprising both moments of equilibrium and more or less dramatic shifts.

However, his theory of adjudication would gain in complexity by considering—alongside the normative and institutional components of a legal system’s environment—the affective circumstances of justice. More precisely, given the interest of this dissertation, I want to draw the reader’s attention to the kind of obstacles and opportunities public emotions create for adjudication. Before engaging Dworkin on this point, I will first take a short technical detour.

I find the distinction between justice, fairness, and due process a bit blurry, for these all seem to denote aspects of justice rather than discrete virtues. More importantly, integrity does not make much sense as an independent virtue. Dworkin himself explains that integrity is horizontal consistency of principle and, by means of illustration, opposes it to consistency of policy. Acting consistently with equal concern and respect for each and every citizen is what grounds democratic legitimacy. Equal concern is a part of democratic justice and it should be pursued at all times across all persons. Consistency is a parasitic value and it is obviously not always desirable. For example, the consistency of discriminatory practices cannot count as a virtue. Only consistency in the service of democratic equality can constitute political legitimacy and ground political obligation, and it is the task of judges to exemplify how equal respect can be contextually, yet also consistently, observed in adjudication. Whether the chain novel of democracy is already lengthy or has only just had its first page written, whether it contains all its chapters or is missing some (as is the case with democracies that have lapsed into oppression for a while), a constant pursuit of democratic principles should guide institutions and citizens alike.

The first substantive issue I would like to raise against Dworkin is that of the socio-emotional context of adjudication. While the arguments Dworkin provides for counting the institution of judicial review as a mechanism, among others, for ensuring equal concern with all members of the polity, his account is blind to its more subtle implications regarding what courts can contribute to the socialisation of democratic attitudes. The explanation lies with his adopting a perspective limited to the legal system and its relationship with the legislature. In order to understand the larger implications of the functions the judicial branch can perform, we need to enlarge our understanding of the circumstances of adjudication and pay attention to the socio-emotional atmosphere within which judges work. Critics have accused Dworkin of ignoring an important variable in his analysis of the law’s empire: he does not account for the socio-political realities of the judges’ professional environment. My point here is different, although I too want to disclose a problem in Dworkin’s portrayal of the circumstances of adjudication. Because of a lack of interest in the environment within which the legal system exists, Dworkin does not see the full complexity of what it is that judges can accomplish within and for a democratic tradition. Given that we seek to understand the ways in which the judiciary can contribute to the maintenance and furthering of democracy, attention must be paid to all its dimensions: not only to the institutional and normative order, but to its cultural-emotional component as well. Only thus can we acquire a more complex understanding of what judges can achieve when they adjudicate in support of democracy. More precisely, keeping in mind the goals of this dissertation, Dworkin failed to see the socialisation function that this institution can have with respect to a society’s public attitudes and politically relevant emotions.

I shall argue that, if taken to its logical conclusion, Dworkin’s conception of “law as integrity” requires that judges reviewing transitional justice bills passed by outraged parliaments

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should not strive to suppress these negative emotional reactions. The argument I would like to
defend is that a decision displaying integrity of principle has the potential to pedagogically
engage the public’s negative feelings. While the courts’ recognition of resentment and
indignation is an imperative of the value of equal respect and concern for all, integrity also
requires that courts state clearly what is permissible and what is not permissible in the name of a
violated sense of justice. The principles whose integrity we are concerned with must extend their
protective scope to include victims and victimizers, beneficiaries and bystanders. Integrity need
not be subordinated or sacrificed for educational purposes. On the contrary, it is an education in
normative integrity that this chapter is concerned with. A decision can potentially have the right
kind of impact on people’s emotions only if it is oriented by the principles of equal respect and
concern constitutive of a democratic order; that is to say, a principled decision recognizes the
legitimacy of moral hatred, while proclaiming the limits that integrity of principles places on its
public expression. As we shall see in the last section of this chapter, how, precisely, these two
tasks are accomplished depends on the magistrate’s contextualized judgment.

At this point, one might correctly ask, what is the relationship between taking stock of
emotions and the content of judicial decisions? To the extent that courts depart from integrity of
equal respect by giving disproportionate attention to one side, they are not displaying “good”
sensitivity; or rather, in such cases, judgment has strayed from the orienting light of equal
concern for all. Both victimizers’ and victims’ interests need to be given proper consideration in
the arguments judges give for their decisions. Symmetry of consideration of both victims’ and
victimisers’ affective reactions is a must of democratic integrity. More concretely, treating
everyone with equal concern implies striking down bills aiming at stifling the possibility of
public discussion about the past, or annulling responsibility for massive violations and closing
victims’ avenues for redress. It also requires striking down bills that violate procedural
protections for victimisers, thereby instrumentalising some individuals for the sake of victims’
thirst for satisfaction. Bills excluding former oppressors from the scope of the democratic sense of justice and treating them as less than equal cannot be upheld by reviewing courts.\textsuperscript{32} Arguments for why not all forms of emotional expression pass the test of equal concern need to be clearly provided and justified in the decisions.

These are just a few ways in which negative evaluative emotions are given their due while at the same time being shown the limits of democratic appropriateness. How courts engage public affect ultimately depends on the kinds of cases that come before them and on the constellation of political variables that determines how much freedom they have to carry out their potentially beneficial work. For example, the timing of the review processes plays an important role. The normalisation and internalisation of the transitional justice paradigm in the 21\textsuperscript{st} century meant that states had less and less room to manoeuvre around the issue of taking the past seriously.\textsuperscript{33} These recent developments have made mere lip-service recognition less likely today. The strengthening of international law, the creation of international courts that can step in when domestic courts cannot or will not take the initiative, and the increased number of human rights organisations monitoring such processes in the world have changed the kind of calculations decision-makers can make in the wake of violence.\textsuperscript{34} This has not always been the case and the illustrative studies in the next chapter will show the importance of the temporal variable for the courts’ performance in reviewing post-oppression violence.

No matter the context of the review, however, justification and ample treatment of the principles underlying democratic institutions must be communicated by the deciding court. Clearly giving voice to the normative substance of democracy can engage the affective reactions of both victims and victimisers, as well as of the wider audience. In this way, judges explain to wider publics what kinds of acts provide appropriate grounds for resentment and indignation

\footnotesize{\textsuperscript{32} These requirements are concrete expressions of the broad guidelines I sketched following Murphy and Hampton in the last section of Chapter III.}
\footnotesize{\textsuperscript{33} See Teitel, “The Law and Politics.”}
\footnotesize{\textsuperscript{34} See Teitel “The Law and Politics.”}
from the point of view of democracy. Moreover, their principled engagement with the past can help calibrate the intensity and duration of negative affective responses. Hopefully, through repeated exemplary judgements, the public will become responsive and the courts’ interventions will become rarer and rarer as time goes by. Needless to say, this extra—pedagogical—function that judicial review can perform provides the institution with yet another layer of legitimacy.35

Democratic principles do not, however, offer precise formulae for decision-making by the courts. They can guide judges who must use their reflective judgment when writing their decisions. The kind of decisions I am looking at are not the result of determinant judgment, but of oriented, reflective judgment. In order to understand the mechanisms behind judicial decisions and the ways in which they can provoke reflection by their audiences, I will now turn to one of the most recent and sophisticated accounts in the philosophy of judgment. The hope is that this theoretical move will bring us closer to a more complex theory of adjudication for democracy, one that unveils the mechanisms at play in judicial decision-making and at the same time investigates their impact from the perspective of the recipient of decisions.

IV.3 Judicial Review and the Exemplarity of Oriented Reflective Judgment

Sparked by Hannah Arendt’s pioneering extension of reflective judgment from Kant’s aesthetics to politics, in the last few decades, a massive literature on this topic has developed.36 The proponents of this move claim that politics is not a science; it covers complex situations where no precise, easily applicable guidelines are available. While Kantian determinant judgment denotes the faculty that enables one to apply pre-given rules, formulae, and principles to a

35 Whether judges’ motivation in contributing to democratisation is a noble one, is another issue. As we shall see later on, in transitional moments—but not only in such moments—they might adjudicate in a way that is supportive of democracy for purely strategic reasons.
concrete situation, reflective judgement works within the complexity of the situation itself and attempts to derive the general from the particular. This makes the latter particularly relevant for the domain of political interaction. Taking some distance, enlarging one’s perspective so as to include as many views as possible, weighing different potential outcomes, and then making a decision intended to have persuasive force for others, are the interrelated and inseparable moves involved in reflective judgement.

While it seems easier to be persuaded about the pivotal importance of reflective judgment for politics, doubts might be raised about whether this kind of faculty is required for law in general and for judicial review in particular. Isn’t law the realm of determinant judgment in which judges faithfully apply the law to cases in front of them? This criticism seems to hold even more force when directed at civil law systems, where the role of judges has been historically (and, I would add, falsely) envisaged as that of official automata speaking the voice of the law.37 I argue that there is room for reflective judgment even for adjudication in civil law systems. The selection of the relevant facts, the identification of the relevant norms, their interpretation, and the pronouncement of the final decision are all operations of reflective judgement. The absence of precise formulae for legal adjudication is most obvious in judicial review cases where, unless one is a radical textualist, the political nature of decisions cannot be denied.

The notion of “oriented reflective judgement” Alessandro Ferrara has been developing over the last few years will be used to supplement the more contextually sensitive version of “law as integrity” that we developed in the previous section. By de-isolating the legal system from the emotional circumstances of justice in transition38 and by exploring the mechanisms at

38 While this dissertation is particularly concerned with the emotional dimension of the transitional context, it is worth keeping in mind that socially divisive issues within consolidated democracies also create emotional pressures, as well as opportunities, for the judiciary. One need only mention the issues of abortion, euthanasia and the death
play in the interaction between the author and the recipient of judgments, I hope to illuminate how it is that judges participate in wider democratisation projects.

In using reflective judgment as an unexplored source of normativity for the age of pluralism, Ferrara’s ambition is to provide an alternative to the neo-naturalism that has flourished since the Linguistic Turn in contemporary political theory. While I do not want to examine the plausibility of his overall project, I find his notion of “oriented exemplary judgment” particularly useful for making sense of how courts can—and sometimes do—influence the emotional dispositions of citizens and the political positions of the other institutions they address. In this sense, Ferrara’s account provides the second piece missing from Dworkin’s theory of adjudication.

Following in Arendt’s footsteps, but departing in considerable ways from her attempt to recuperate judgment for politics, Ferrara defines an "example" as a union of the “is” with the “should be” that puts into motion our moral powers and provides us with a sense of the possibilities for transformation.39 Examples can be familiar in the sense that one knows what an example is an example of. On the other hand, innovative examples cannot be understood by making reference to precedents. It is only post facto that we can understand their normative weight. Innovative judgment is most clearly present in political revolutions, the founding of new religions, or groundbreaking works of art.

In politics, the force of examples is of utmost importance due to the fact of pluralism and the perpetual contestation of principles. By setting the imagination and other moral powers into motion, exemplary judgments act as engines of historical change when no readily available principles, from experience or elsewhere, come to our aid.40 The “inspiringness” of the example lies entirely within itself, says Ferrara; however, this does not mean that reflective judgment is

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purely reflective or idiosyncratic. On the contrary, it is “oriented” by the fulfilment of identities: exemplary judgment operates within, though it is not restricted to, a context of shared truths. In the case of “us the moderns,” it is guided by the ideal of equal respect. The only valid understanding of reflective judgment that fits with the modern identity and its realities is reasonable judgment.

Competing reasonable judgments within a society can be ranked depending on which of them best fits a shared idea of what “we” could be at our best. The idea of a community of judgment makes judgment possible both theoretically and concretely. When “we” evaluate “new and as yet unexplored alternatives,” “we” are guided by the ideal of equal respect that lies at the basis of our understanding of ourselves as heirs of modernity: “If we wish to talk of general principles such as the principle of equal worth or the right to demand justification or the discourse principle, or other such principle, as normative elements whose reach spans beyond our own particular identity, we can certainly do so. The point is, however, that the role played by them is always best understood as that of orienting our reflective judgment in the sense of what best proceeds from our shared truths.”

The reference to the Rawlsian concept of reasonableness is explained by Ferrara’s idea that the validity of exemplary judgment for a community of moderns depends on inclusiveness, i.e., on taking into consideration the positions of as many individuals as possible. It is these

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41 Ferrara makes this point when he analyses Ackerman’s work on the extraordinary constitutional moments that punctuate American history. See “Judgment as a Paradigm,” in The Force of the Example, p. 37.
43 It becomes clear, now, why Ferrara thought he found in Dworkin’s theory of adjudication and its emphasis on integrity a recognition of the importance of exemplary reflective judgment.
44 In comparing the Kantian idea of reflective judgment with the Aristotelian conception of phronesis, Ronald Beiner explains the inescapable need for both formal and substantive conditions for the exercise of the faculty of judgment. The addressed community can vary, yet it is only against such a background that reflective judgment gains meaning. See Ronald Beiner, Political Judgment. For the distinction between the formal and the substantive dimensions of political judgment see also Valentina Gueorguieva, “Les deux faces du sense commun,” The Canadian Review of Sociology and Anthropology, Vol. 40, No. 3 (2003), pp. 249–265.
individuals’ consent that we are trying to woo when we communicate our judgment.\textsuperscript{46} By engaging their moral powers, and more precisely their imaginations, exemplary judgment can help its addressees enlarge their perspective: “Examples orient us in our appraisal of the meaning of the action not as schemata, but as well-formed works of art do: namely, as outstanding instances of congruency capable of educating our discernment by way of exposing us to selective instances of the feeling of the furtherance of our life.”\textsuperscript{47}

This does not mean that exemplary judgment provides a checklist for its recipients to follow, but it surely encourages them to develop what Ferrara calls “second-order reflective judgments” about the validity of the first-order reflective judgments underlying exemplary or reasonable deeds, decisions, policies, practices, etc.\textsuperscript{48} A good second-order judgment is one that recognises the originality of a first-order judgment and accepts the provocation that its exemplarity directs towards one’s own moral powers. A political institution, decision, or action is exemplary, and has fulfilled its purpose of generating good second-order reflective judgments, to the extent that it has stimulated citizens’ political imagination in such a way as to provide them with an enhanced view of the possibilities offered by their political life. Charisma—the personal power to inspire others famously theorised by Max Weber—and the ability to mobilise are two essential ingredients for the pursuit of this aim:

What truly mobilizes us, instead, is something not only that meets our interests but also stirs our imagination and carries with it the promise of a “promotion, affirmation or furtherance” of our political life as well as the idea of a communicability of this experience. We do not think of something that mobilizes our political enthusiasm as something that merely meets our preferences: we think that the “vision” enshrined in that proposal, slogan, objective can potentially promote, affirm, or further everybody’s life. The ability to mobilize politically rests on the force of the exemplary to inspire conduct.\textsuperscript{49}

\textsuperscript{46} Ferrara, “Making Sense of Exemplarity,” p. 46.
\textsuperscript{47} Ferrara, “Making Sense of Exemplarity,” p. 61.
\textsuperscript{49} Ferrara, “Political Republicanism and the Force of the Example,” in The Force of the Example, p. 119. Aristotle adds the goodness of the speaker’s character, the strength of his arguments, and his skills in engaging the audience’s
I shall not go into Ferrara’s interesting attempt to stretch the force of exemplary reflective judgment beyond the boundaries of the community where it originated into universality. For the limited purposes of this dissertation, it will suffice to look at how reflective exemplary judgment can contribute to the flourishing of a particular kind of identity, that of a democratic community.

This account of oriented reflective judgment and the power of its example to inspire good secondary reflective judgement provides the dimension missing from Dworkin’s account of adjudication: an explanation of how adjudication works and how it can influence those on the receiving end of decisions, i.e., both the citizens directly involved in the decision, and the wider public. Dworkin himself acknowledges the fact that the principles underlying a community’s theory of moral worth do not provide citizens and institutions with precise formulas for action; interpretation is always needed.50 "Fidelity to principle" can mean only that judges ought to let themselves be guided by principles, recognizing, however, that these principles do not offer clear cut answers for particular cases. Clearly, principles orient institutional and social decisions, but cannot be mechanically applied.51 Dworkin is not unaware of the crucial role judgment plays in legal interpretation, yet he fails to pay attention to the impact it has on the addressees’ evaluation of a decision.

The kind of adjudication we are concerned with in this dissertation is always politically informed, both in terms of its contribution to the building of a democratic identity and in terms of the moral, political, and material constraints, domestic and international, under which judges

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51 Ferrara himself claims that Dworkin’s theory of adjudication in Law’s Empire can be subsumed under a turn to judgment in contemporary political theory. See Ferrara, Justice and Judgment.
work. In the case of courts reviewing discriminatory rectificatory justice bills or hearing criminal prosecutions of victimisers, judges do not have readily available precise rules that would apply perfectly within the transitional context of their polity. The principles underlying precedents from other times and places—historical decisions issued within the same polity, decisions by international or other domestic tribunals, international legal documents—can guide adjudication without offering precise formulae. In this sense, principles are not univocal, but require careful interpretation and a contextualized weighing of their multiple voices. There are no clearly operationalised norms to be relied upon within the confused and demanding conditions of political transformations. This is why exemplary reflective judgment is necessary to make context-appropriate decisions, but also to transform dimensions of the polity’s political life in a way that encourages and equips its citizens to become “the best they can be” from the point of view of a democratic identity. Good reflective judgment in weighing relevant factors and making the best decision enables courts to exemplify what a commitment to democracy might imply.

Like Dworkin, Ferrara does not address the emotional dimension of the circumstances of politics, but we can easily integrate negative reactive emotions as a politically relevant force within transformational periods and as such, part of the variables that enter judgment. During the emotionally charged moments of transitions, the evaluative dimension of these emotional responses needs to be steered. As we saw in Chapter III, the often-feared emotions of resentment and indignation have a cognitive dimension, a judgment component that makes them part of the individual’s sense of justice and, as such, crucial for the normative reproduction of the community. Institutions need to engage this component of the emotion and woo individuals to enlarge their perspective. The aim is to provoke the public’s imagination in a way that distracts

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52 Beiner writes: “Men never judge in a vacuum; to overlook the objective constraints upon their judgments is to fail to do full justice to the situation that elicits political judgment in the first place.” Political Judgement, p. 148.
53 Teitel makes a good point when she represents transitional law as the blurry space between the old and the new. See Teitel, Transitional Justice.
them from their immediate desire for the satisfaction of their moral anger. By dialoguing with the
addressees’ moral powers, courts can contribute to a process of democratic emotional
socialisation. The individual’s sense of justice must be enlarged to take into account the voices of
victims and victimisers, of losers and beneficiaries of violence. The provocation described above
takes the form of exemplary first-order judgments from institutions. Citizens must be inspired to
ground their affective reactions in good second-order reflective judgments and recognise as
many points of view as possible. Anyone can author good reflective judgment, but in the
affective effervescence surrounding transformational periods, exemplary first-order judgments
by judges—capable of taking enough distance to achieve impartiality and of acting prudently
within the existing historical constraints—can lead the way so that no one has solid grounds for
feeling resentful. The judge is both a spectator of history—evaluating the political
circumstances with which he or she is presented—and an agent thereof—selecting the type of
arguments and decisions that are most likely to persuade citizens to accept the provocation to
reflection addressed to them. It is in response to inspiring, historical judgments that individuals
might learn to take responsibility for what they feel and what they want to do in the name of their
violated sense of justice. Different solutions will apply to different contexts; however, that
negative public emotions need recognition and engagement is a general requirement of
transitional justice, and this realisation is itself the object of reflective judgment.

At this point, we need to address two questions sceptics might ask. First, where can we
find judges motivated to perform such exemplary deeds in the aftermath of oppression and
violence? The account presented above may seem to some to bear a strong flavour of naïve

54 Ricoeur emphasises this aspect of the success of judgment in law: “I think that the act of judging reaches its goal
when someone who has, as we say, won his case still feels able to say: my adversary, the one who lost, remains like
me a subject of right, his cause should have been heard, he made plausible arguments and these were heard.
However, such recognition will not be complete unless the same thing can also be said by the loser, the one who did
wrong, who has been condemned. He should be able to declare that the sentence that condemns him was not an act
55 “Without examples or exemplars to reflect on we could not even begin to imagine what it would be to exercise
such a faculty. We ourselves are schooled in the exercise of this faculty by observing the exemplary performances of
others. We learn by example.” Beiner, Political Judgment, p. 163.
idealism and romanticism about the judiciary. In the aftermath of state-sponsored oppression, the judiciary is either weak or tainted by collaboration with the ancient regime. Judges have rarely taken the side of the resistance under oppressive regimes, and then not always successfully. If they have any experience, it is usually the wrong kind of experience from the point of view of democracy. In most cases, it would be unreasonable to expect extraordinary, exemplary first-order judgments to come from the courts. History has, however, given us a few examples in which judges have lived up to what might otherwise be seen as idealistic expectations. The cases explored in the following chapter offer such fortunate illustrations. Where such exemplars of reflective judgment are not available, we can only hope that strategic reasons might move judges to make decisions that they would not otherwise make. International attention and pressure, the desire to entrench their own institutional power within the new democratic order, and sometimes even concern for the safety of their positions might motivate “the least dangerous branch” to contribute to democratic civic education efforts.

The second question one might ask at this point in the development of our democratising adjudication is the following: why should we see judicial review as an attempt to engage the moral powers of citizens and not as overpowering majorities? One cannot deny that judicial review of legislation in most young democracies has a binding force on their parliaments. Overruling a review would require extraordinary parliamentary majorities, most of the time impossible to achieve. The coercive aspect of review thus cannot be denied; yet, while most of the time external motivation has been the effect of decisions, our constructivist conception of emotional socialisation recommends that intrinsic motivation should always be the objective of judicial decision-making. Going beyond mere external coercion as the driving force of motivation requires that judges elaborate on the principles underlying their decision, present

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56 See, for example, the fate of the Russian Constitutional Court under the Eltsin administration, or the unanswered demands of the Argentinean Supreme Court to the military junta leading the country between 1976 and 1983.
57 See the account of emotional socialisation presented in Chapter III.
them in a communicable way, and aim at respectfully engaging the cognitive dimension of outrage. If resentment and indignation are symptoms of a violated sense of justice and not merely physiological, irrational reactions, then courts must treat these emotions with due respect, while at the same time provoking their audience to reflect and integrate democratic rules of emotional expression as guides for judgment.

To conclude, this chapter has tried to make the argument that in the aftermath of conflict, violence, and oppression, judicial review can contribute to the development of a democratic culture by virtue of its maintaining the normative integrity of equal respect and concern for all. Ronald Dwokin’s “law as integrity” has been used as a starting point for formulating a democratic theory of adjudication. Its insufficient perspective on the complexity of the circumstances of democratic politics, as well as its undertheorised account of judicial judgment has created an opening for this chapter’s contribution. Attention to the socio-emotional circumstances under which institutions function requires that we address the issue of how a court of constitutional jurisdiction can, under certain circumstances, acknowledge the legitimacy of moral hatreds and, at the same time, serve as a filter for outrage-driven actions. The need for such a filter is necessary at all moments within the life of a democracy, but it needs to work exceptionally well within the formational moments of tormented transitions. Courts can make sure that the majority’s sense of justice is stretched enough to cover all those affected by the majority’s decisions. By reviewing transitional justice bills in ways that affirm and communicate respect for all, courts can help shape the judgments appropriate to a democrat’s sense of justice. Basing political participation and emotional expression on good judgments might take a long time, but small, yet memorable, steps in this direction can and should be taken. Getting individuals “to have the right attitude, on the right occasion, toward the right object and in the
right degree”58 is something that the judiciary can help with, even in the absence of accurate “recipes” for success.

In the next chapter I shall explore some decisions by constitutional courts reviewing the constitutionality of transitional justice-related legislation. Four case studies will illustrate how courts have, to a greater or lesser extent, affirmed the principles of democracy in their judgments. In Chapter II we saw that the normative consistency of democracy requires an institutional response to the past; however, not all bills put forth by outraged majorities can stand the test of equal concern for all members of the polity. The post-communist Hungarian Constitutional Court’s decisions regarding the legislation meant to enable the prosecution of the repressors of the 1956 revolt, the Czech Constitutional Court’s adjudication of challenges to the constitutionality of the 1993 “Law on the Illegality of the Communist Regime,” the post-apartheid South African Constitutional Court’s decision in the not-so-frequently talked about Biko case, and the recent Argentinean overturn of amnesty laws protecting the military junta who governed the country between 1976 and 1983 will hopefully show how courts have chosen to communicate democratic imperatives under circumstances of high emotional mobilisation.

Chapter V

Judicial Review and Transitional Justice: Reflective Judgement in Context

Chapter IV has provided a theoretical framework for a more complex account of the role that judicial review can play within transformational periods. Attention to the socio-emotional realities of transitions and to the mechanisms at play in both giving and receiving judgments has hopefully furthered our contribution to a political theory of transition. Chapter V will present a series of case studies that illustrate the ways in which courts have responded to citizens’ affective reactions to injustice through the institution of judicial review. By analysing real life cases, I try, first, to show the relevance and the timeliness of the issues with which this dissertation engages, and second, to calibrate the expectations about the function and potential of the judiciary in the transitional setting that the previous chapter has engendered. In addition, I aim to reveal how the arguments this dissertation has put forth so far can be instantiated in a variety of forms, depending on the context, without thereby losing their normative relevance.

Different arguments and strategies have been used by magistrates within different polities, but with a shared goal: a thriving, stable democracy. In the cases under scrutiny here, several factors frame the context within which judgment has been exercised and help explain the variation in the kind of strategies courts have adopted in reviewing transitional justice bills: the way in which judges conceive of their role as institutional and historical actors, the level of legal and emotional mobilisation, the legal tradition of the country, the agents who initiate the transitional justice bills, the agents who demand the review of those bills, and, last but not least, the timing of the cases in relation to the different stages of the historical development of transitional justice as an international concern. In addition, we must not forget that there are also
important practical limits to transferring institutional frameworks from consolidated democracies to young, inexperienced ones. These frameworks have been built and rebuilt on the basis of a long experience with judicial review in the context of enduring traditions of democratic governance. Institutions within polities undergoing profound political transformations are faced with different, urgent problems. Some of the courts are young, under-resourced, less experienced, understaffed, or staffed with “tainted” personnel. They need to establish their authority in relation to the other branches of government and to repeatedly satisfy unreasonable public expectations. Their striving for international recognition places an extra limit on the strategies available to them.\footnote{For a theoretical account of the strategic locking-in of international standards in the face of volatile political conditions see Andrew Moravcsik, “The Origins of Human Rights Regimes: Democratic Delegation in Post-war Europe,” \textit{International Organisation}, Vol. 54, no. 2 (Spring 2000), pp. 217–252.} Moreover, in transitional periods—though not only in such periods—they cannot act as unconstrained actors.\footnote{Some of the constraints met by courts as actors in democratization processes are examined in Lee Epstein, Jack Knight and Olga Shvetsova, “The Role of Constitutional Courts in the establishment and Maintenance of democratic Systems of Government,” \textit{Law and Society Review}, Vol. 35, no.1, 2001, pp. 117–163.} Most of the time, judges cannot freely decide themselves to review legislation, but must take on this responsibility at the request of other institutional actors, who prefer to refrain from dealing with such delicate tasks themselves.\footnote{See Ran Hirschl, “Juristocracy—Political, not Juridical,” \textit{The Good Society}, Vol. 13, no. 3, 2004, p. 6. Hirschl draws our attention to the timing of the delegation by executives and legislatives, as it is likely to reveal the interests of these institutional actors.} All these factors make judges’ work difficult, but, at the same time, open up opportunities for them to contribute to the cause of democracy in ways that require careful reflective judgement.

The cases discussed in this chapter have been chosen to illustrate a variety of political contexts and span two decades. The chapter argues that some of these courts have chosen better strategies to recognise and pedagogically channel resentments and indignation than others. Since courts are not the only institutions to address and engage outraged populations, it would be difficult to measure precisely the educational impact their decisions have had. Such an impact is contingent on the courts writing decisions in a way that preserves the integrity of principle and communicates the constraints of equal respect; on the collaboration of other institutions, the
transparency of their decision-making, publicity, and exposure in the media; and, finally, on the responsiveness of victims, itself a function of the type of atrocities endured and the length of the oppression, among other things. To the extent that this chapter claims that some courts have been more “successful” than others, “success” is measured in terms of the quality of the message or lesson communicated to victims, victimisers, and society at large, and not in terms of their effectiveness in changing people’s emotions. No straightforward causal link is claimed between the courts’ judgments and civil society’s responses. The chapter simply seeks to illustrate how courts have reflectively decided these cases in view of recognising negative emotions as a requirement of democracy, both normative and prudential.

V.1 Hungary

On the Anniversary of the Hungarian Revolution thirty years ago, on 23 October 1956, workers, students, and soldiers stormed the building of the radio in Budapest because they were fed up with the official lies and wished to hear the truth and to voice their demands. They destroyed Stalin's statue and the credibility of the regime, which called itself the dictatorship of the proletariat and the republic of the people. The struggle made it clear that what the Hungarian people really wanted was independence, democracy, and neutrality. They wanted to live in peace, in a free and decent society.

(East European Dissidents' Appeal on Hungarian Revolution Anniversary, October 1986)

Hungary belongs to the majority of East European countries that benefited from a rather smooth transition from an authoritarian regime to democracy in 1989. The fall of communism in Hungary was the result of a round of negotiations between the Hungarian Socialist Worker’s party and the democratic opposition. In the 1990 free elections, the former communist party experienced a bitter defeat. The newly elected parliament was dominated by a rather fragile coalition of right-wing parties: the Hungarian Democratic Forum, the Christian Democrats, and

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4 Minow carefully explores the importance of the media for the visibility of proceedings, but also as facilitating the creation of a shared experience for a divided nation. See Minow, *Between Vengeance and Forgiveness*.
the Smallholders Party. Some of the newly elected MPs were anti-communist dissidents who had faced harsh repression during the long years of one party rule. This explains why the Hungarian parliament spent a lot of time and effort trying to have former communist officials prosecuted through the passing of subsequent laws lifting the statute of limitations for crimes related to the stifling of dissidence. The 1956 anti-soviet revolt, which resulted in thousands of victims and the imposition of stricter control by the USSR, naturally figured as one of the most important instances of state oppression in need of correction.

In November 1991, the Hungarian parliament passed a law suspending the statute of limitations for all crimes of murder, treason, and aggravated assault leading to the victim’s death that had not been prosecuted for political reasons during the forty-five years of communist rule. Most of these crimes had been committed by individuals involved in the suppression of the above-mentioned anti-communist revolt. The law was introduced by two MPs from one of the governing parties, the Hungarian Democratic Forum, Peter Takács and Zsolt Zetenyi. The passing of the law by the legislature was marked by a fervent, emotionally charged public debate about its possible witch-hunting elements and collective guilt implications. The fact that the law would have enabled the state to prosecute some of the participants in the negotiations ending communism was an important issue of contention. Legal concerns also came to the fore. The Criminal Code set the statute of limitations for murder at 20 years, for high treason at 15 years, and for aggravated assault at 8 years. Lifting the statute of limitations implied a violation of one of the most important principles of the rule of law, nullum crimen sine lege. In response, the proponents of the law suggested that the violations of human rights by the previous regime had not been prosecuted for political reasons and, hence, the statute of limitations had only started...
running after the fall of communism in 1989.10 Other concerns were expressed about the definition of the offences. Some terms, such as “treason,” lent themselves to multiple interpretations and could have been used for political revanchism. Prudential concerns about the destabilising effect of such a law were also put forward in the public debate, pointing to the importance of such a document for the Hungarian democratisation project.

Because of all the variables that factored into the public debate surrounding the law, the President of the Hungarian Republic, Árpád Göncz, referred the law to the Constitutional Court for the control of its constitutionality. Aware of the implications of such legislation for Hungary, but also for the entire region, the Head of State decided to defer to the country’s constitutional forum for sanction. A realist would see this decision as a strategic, prudential gesture on the part of the executive, meant to avoid the heavy political responsibility that would have come with approving such a law, especially taking into account the fact that communists still permeated the Hungarian institutional landscape. However, keeping in mind that Göncz himself had been a dissident, we might interpret his decision differently, as the result of an exemplary political judgement by a man who had managed to take some distance from his own political biography and wanted to ensure that the integrity of democracy did not get undermined by a hasty law that violated its guiding principles.

Before analysing the decision, it is important to examine the status of the Constitutional Court in the young Hungarian democracy and the level of legitimacy it enjoyed at the time. The Constitutional Court emanated from the decisions of the roundtable itself; it was the product of the politically negotiated transition. The law that mapped out the functioning of the court had been agreed upon in the course of the debates at the national roundtable and had been passed by the last communist parliament. The judges assigned to the Court represented the new democratic force in the new legislature. They had been selected partly at the roundtable leading to the end of

years of communist oppression, and partly in a vote by the newly elected parliament. The Court began to function in the beginning of 1990 and by the time the Takács–Zetenyi law was submitted for review in 1991, it had already established a record of strong independence and counter-majoritarianism. Thus, we can safely infer that the president's move to delegate the decision on the law to a young, but strong, court, which had been actively working as a check on the first inexperienced democratic parliament, was a deliberate one, based on his recognition of the law's broad implications and its legally problematic assumptions. The representativeness and legitimacy enjoyed by the court naturally weighed in favour of deferring to its opinion.  

The president’s petition was based on the main principles of legality: the principle of non-retroactivity and the requirement of predictability and certainty of law. Another concern was that the terms of the law were vague and could be used arbitrarily for political purposes. The Constitutional Court shared most of Göncz’s concerns and, in a unanimous decision, struck down the first attempt to prosecute communist abuses as unconstitutional. In decision 11/1992 (III.5) AB h., the Court used arguments against the vagueness and indeterminacy of the statutory language that violated the norm of security of the law. The Court emphatically proclaimed that the 1991 law went against the basic principles of the amended 1989 Constitution, whose first article stated that Hungary was “an independent, democratic state under the rule of law, which conferred on the state, its law and the political system a new quality, fundamentally different from that of the previous era.” The Court decided to focus on the requirements of the concept of the Rechtsstaat. This was reflected in their attitude towards the claims of moral and political discontinuity between the previous regime and the young

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Hungarian democracy. The judges argued that the change of system should not be interpreted as separable from the requirements of a state under the rule of law, “as crystallised by the histories of constitutional democracies and also posited by the 1989 Hungarian constitutional revision.”16 They wrote:

The politically revolutionary changes ushered in by the new Constitution and the pivotal laws following on its heels were all effected in a procedurally impeccable manner, fully in accordance with the old legal system’s regulations of the power to legislate, thereby gaining their binding force. The old law retained it validity. With respect to its validity, there is no distinction between “pre-Constitution” and “post-Constitution” law. The legitimacy of the different political systems during the past half century is a matter of indifference from this perspective, that is, from the viewpoint of constitutionality of laws … Irrespective of its date of enactment, each and every valid law must comport with the new constitution.17

The Court avoided making historically symbolic statements about the nature of the communist regime. The judges claimed that the moral and political legitimacy of the previous regime was of no relevance from the point of view of legality; this argument emerged out of prudential concerns about the destabilising effects of such a bill, but also because, being at the beginning of their mandate, they were in need of national and, most importantly, international recognition. The didactic message towards the outraged parliamentarians was that discontinuity should be affirmed though a break with the old habit of violating the main principles of the rule of law—predictability, generality, and publicity—and not by selective substantive justice measures: “A state under the rule of law becomes a reality when the Constitution is truly and unconditionally given effect … Not only the regulations and the operation of the state organs must comport strictly with the Constitution, but the Constitution’s values and its “conceptual

“culture” must imbue the whole society. This is the rule of law and this is how the Constitution becomes a reality.”

By adopting such a stance, the court was giving Parliament a lesson in equal respect for all. The court stressed the primacy of the security of the law and dismissed the idea that justice required a sacrifice of legality. This position was contested by the dissidents, and yet it seemed the best approach under the volatile political circumstances of the transition. The Court wrote: “… the basic guarantees of the state under the rule of law cannot be brushed aside by reference to historical situations and the state under the rule of law’s demand for justice. A state under the rule of law cannot be created by undermining the rule of law. The security of the law based on formal and objective principles is more important than the necessarily partial and subjective justice. In its precedents the Constitutional Court has already given effect to this principle.”

The Court did not want to engage with history; it was more concerned with future consistency in the affirmation of equal concern for all. Should the new polity pass discriminatory laws, it would violate its own commitment to democracy. Thus, the Court saw its historical role as that of a watchdog for a limited conception of legitimacy equated with legality. They judged that the cause of democracy could be served best in this way: “… in the process of achieving the rule of law, beginning with the Constitution and manifesting itself in the peaceful change of systems, the Constitutional Court within its competence must unconditionally guarantee the comportment of the legislative power with the Constitution … Simply put, historical situations, justice, etc. are of no consideration in this matter … moral argument may, of course, motivate penal sanction but legal foundation must be constitutional … Though criminal law protects values, as a warranty of freedom it cannot become an instrument for moral purges in the process of protecting moral values.”

Sincere adherence to the new institutional and normative order meant that one could

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not punish outside its legal provisions. Moral purges, therefore, could not withstand the standards of legality. “The criminal system of a liberal, democratic State construes the principles of *nullum crimen, nulla poena sine lege*—pillars of classical criminal law—as a constitutional duty imposed on the state.”

In addition to this main line of argumentation, the Court also stated that there was no way to determine which crimes had not been prosecuted for political reasons. Moreover, the definition of the offences listed in the law was not in concordance with the definitions in the existing criminal law of the country. The Court’s concern with legality was voiced once again: “… an offender cannot be burdened by the criminal justice system’s inability, brought about by the State’s failure to prosecute, to achieve its designated purpose of delivering a just sentence. From the perspective of this constitutionally allocated burden, it makes no difference whether the state exercised its prosecutorial powers improperly or whether it failed to exercise them altogether.”

Thus, the first decision of the Hungarian Constitutional Court relied heavily on the principles of the rule of law. The Court established legal continuity with the previous legal system, but discontinuity with the system's practices of abusing the law. A cautious concern for the rights of potential defendants meant that, at that moment, Hungary had yet to come up with a legitimate way of engaging with its past.

While their judgement was much applauded internationally for its role in preventing scapegoatism, the decision could not bring the Court the anticipated domestic legitimacy capital. The next couple of years saw repeated attempts by Parliament to suspend the statute of limitations. The judges’ decision to use continuity arguments in order to preserve the integrity of

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democratic equality came across as a post-communist “original sin,”\textsuperscript{23} one of neutralising the past and failing to morally repudiate it. From the point of view of post-conflict societies, courts tend to move to legitimise themselves and capitalise public support—both for themselves and for the entire political and administrative system—by drawing a thick line between the present and the past.\textsuperscript{24} On this account, the line the Hungarian Constitutional court drew was not thick enough.

As a consequence, at the beginning of 1993, the same parliamentarians who wanted to see justice done in 1991 made use of another legal strategy to get around the Constitutional Court’s decision: they voted for a so-called “authoritative resolution”—an act which provided interpretive guidelines for an existing law—meant to exempt the years between 1944 and 1989 from the validity of the statute of limitations.\textsuperscript{25} This time, the review was requested by a number of opposition MPs, and again, the Court struck this legal initiative down on the basis of principles of non-retroactivity. In addition, it challenged the parliament’s choice of means, claiming that they needed to enact a statute and were not to use problematic legal artifices when what was at stake was a measure that would affect the basic rights of numerous Hungarian citizens. The Court communicated to the members of Parliament that constitutional democracy, as well as their institutional position as representatives of the Hungarian people, demanded that they choose appropriate means of reaching their aims, namely, in legislation. The dissidents’ thirst for satisfaction did not entitle them to bypass the publicity requirement. Again, the pedagogical message was clear: no matter how entitled they were to their resentment, not just any measures for obtaining their goals were appropriate from the point of view of democratic equality.

\textsuperscript{24} This point has been made forcefully by Teitel in \textit{Transitional Justice}.
\textsuperscript{25} Halmai and Scheppele, “The Hungarian Approach to the Past,” p. 164.
The third attempt to get justice done was a statute meant to amend the Criminal Procedure Act in order to make it compulsory for prosecutors to charge some criminals, even if the statute of limitations had expired. As expected, president Goncz again refused to sign this into law and deferred to the Constitutional Court. The judges were consistent in striking it down as unconstitutional, providing the same reasoning they did for the previous attempts: the commitment to democracy cannot be violated in legislation or prosecution.

The dissidents did make some progress by adopting the trump language of internationally recognised legal standards. They also avoided vagueness by referring specifically to the 1956 events. In order to enable the prosecution of those responsible for the suppression of the 1956 revolt, the law “Concerning the Procedure in the Matter of Certain Criminal Offences During the 1956 October Revolution and Freedom Struggle” made use of the language of “crimes against humanity” and “genocide” as formulated in international documents—such as the Geneva Conventions Relative to the Treatment of Civilians in the Time of War and Relative to the Treatment of the Prisoners of War of 1949 and the New York Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968, of which Hungary was a signatory. In support of their bill, the MPs made reference to Chapter 7 of the Hungarian Constitution, which read, “The legal system of Hungary shall respect the universally accepted rules of international law, and shall ensure furthermore, the accord between the obligations assumed under international and domestic law.” We could see this move as a strategic rephrasing of the law by a governing democratic coalition that was not doing very well in pre-election opinion polls and hoped to better its position before the time ran out.

Strategically-speaking, this was an important, though ultimately unsuccessful, move, as the Communists returned to power following the elections of May 1994.

For reasons already discussed, the president chose to send the law to the Constitutional Court for abstract review. This time, since correct use was made of the language of international law, the judges struck down only some parts of the law. In decision 53/1993 (X. 13) AB h, the judges addressed Parliament and explained that they had to distinguish between crimes that were rightly deemed crimes against humanity and those that were not. In upholding those parts of the law that dealt with crimes committed during the 1956 revolt, the Court provided a detailed explanation as to why such international standards had been created and why they were relevant for Hungary. From the text, we can see that at this point the Court clearly assumed the role of guardian of law, engaging the young parliament in an analysis of the requirements that needed to be met in view of the country's alignment with the community of democratic nations: “Giving effect to international law concerning these crimes is the condition for the participation in the community of nations, which the Constitution expressly recognises, mandates its application and harmonisation with domestic law and the domestic law’s divergent interpretation of those obligations in a divergent manner does not alter the state's international obligations. It is isolation from, or rejection of international law, which is what would be contrary to article 7 of the Constitution.”

In order to synchronise with the international regimes of human rights, however, Parliament had first to distinguish clearly between crimes against humanity and ordinary domestic crimes. In its guidelines for the Hungarian parliament, the Court defined “crimes against humanity” as homicide committed on a massive scale and as part of a large, regular attack. Not all the crimes that the parliamentarians wanted to include under the umbrella of the

30 For the content of the decision see Halmai and Scheppele, “The Hungarian Approach to the Past,” p. 167.
1993 law qualified as such. Insisting on precision, the Court instructed the MPs in the limits that equal respect placed on the actions of the state against all potential defendants. It advised the proponents of the law to go back to the deliberative forum and revise it in view of these corrections. Once again, the message of the court was that the dissidents’ institutional choices for dealing with the past violated democratic standards.

In this effort, the Constitutional Court was joined by the Supreme Court judges who dealt with the first appeals in concrete cases where the revised version of the 1993 law had been used by the prosecution. Unfortunately, Parliament had not fully integrated the recommendations of the Constitutional Court and had not carefully formulated the procedural aspects of the law. This led to conditions of legal uncertainty. Consequently, the Supreme Court judges did not want to take the responsibility for deciding these cases and asked for an abstract review of the modified version of the 1993 law.\(^32\) The Constitutional Court agreed with the reasoning of the Supreme Court and decided that the law was unconstitutional on the basis of its procedural incompleteness.\(^33\) Parliament was again asked to make a set of revisions so that concrete cases could be tried without violating the principle of equal respect and concern for all.

From the judgements of the Supreme and Constitutional Courts we can deduce an even stronger concern with procedural fairness once prosecutions had been made legally possible. Dealing with such serious offences needed all the caution and correctitude possible in order to avoid abuses and miscarriages of justice. Given the precarious position of young institutions, international attention on the transition processes at the time, and a general lack of experience with such processes, the high courts chose prudence and made use of all possible legal safeguards in order to set Hungary on what they thought was the right path. A concerted effort by the judges of the different courts was meant to steer the polity away from abusive moral purges

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\(^32\) For the chronological case details see Halmai and Schepple, “The Hungarian Approach to the Past,” p. 169.

and to exemplify a concern with the rights of all interested parties. They attempted to lock in procedural norms of fairness by appealing to internationally recognised liberal democratic instruments in the face of turbulent transitional times and emotionally charged parliamentary majorities. A series of subsequent exemplary judgements by the Hungarian judges explicitly provoked the enraged dissidents to reflect on what they wanted to do in the name of their otherwise correct evaluation of the past injustices and invited them to respect the commitments that they themselves had made to democracy. The resilience of moral hatred did not distract judges from their formative task. The decisions feature clear explanations as to why not all forms of engaging the past were compatible with affirming equal respect and concern for all. The subordination of law to abusive purges was thus avoided. Legality was not sacrificed for the sake of a potentially abusive search for satisfaction. Needles to say, the decisions brought the court acclamation from constitutional lawyers in established democracies.

34 I want to clarify here that I do not want to equate the desire for trials with the desire for vengeance. I believe the desire for criminal justice is legitimate and not the result of an irrational desire for satisfaction. My claim is that equal concern for all should guide the courts’ judgment and that resentment and indignation should be seen as legitimate object of concern, provided they are relevant for the particular case under review. To the extent that the court recognises the evaluative dimension of these emotions, while also addressing the judgment underlying them constructively, the hearing is not an instrumentalisation. To the extent that equal concern is shown for the interests of both potential defendants and victims, the proceedings are properly run. Scapegoating through trials is the problem. The problem with Hungarian case was that the language of the proposals was vague and indeterminate enough to allow for abusive prosecutions. The first attempts to initiate prosecutions were procedurally dubious and violated democratic principles of equal concern for all citizens. Political revanchism and scapegoatism could have disturbed the course of the young democracy. For fear of the unjust and destabilising effects such a law could have if put into practice, the court struck it down. They judged that the use of arguments from legality would be the best way of demonstrating discontinuity with the abusive practices of the prior regime. They tried to disclose the link between legality and constitutional democracy. In this way, they counterbalanced the exclusive concern with victims shown by the parliamentarians. Their problem was not with prosecuting victimisers as such, but with the ways in which parliament tried to enable those prosecutions and the discriminatory forms the latter might have taken under those conditions.
V.2 The Czech Republic

It is not true that Czechoslovakia is free of warfare and murder. The war and the killing assume a different form: they have been shifted from the daylight of observable public events, to the twilight of unobservable inner destruction. It would seem that the absolute, "classical" death of which one reads in stories (and which for all the terrors it holds is still mysteriously able to impart meaning to human life) has been replaced here by another kind of death: the slow, secretive, bloodless, never quite-absolute, yet horrifyingly ever-present death of non-action, non-story, non-life, and non-time; the collectively deadening, or more precisely, anesthetizing, process of social and historical nihilization. This nihilization annuls death as such, and thus annuls life as such: the life of an individual becomes the dull and uniform functioning of a component in a large machine, and his death is merely something that puts him out of commission. All the evidence suggests that this state of things is the intrinsic expression of an advanced and stabilized totalitarian system, growing directly out of its essence.

(Václav Havel, "Stories and Totalitarianism," April 1987)

The wave of democratic openings across Eastern Europe in the late 1980s also included Czechoslovakia, where anti-regime groups soon started to press for reform. Their mobilisation led to student demonstrations in November 1989. These marches triggered a violent intervention by the police. In response, a nine-day peaceful protest was organised in Prague’s Wenceslas Square, followed by widespread strikes. By the end of December 1989, the communist regime had fallen and Václav Havel, the best-known dissident of the country, had become the president of the republic.35

In contrast with other former communist countries, the new government moved quickly to deal with past injustices. The most important measures were the Lustration Law of 1991, Havel’s amnesty of 20,000 political prisoners, and the 1993 “Law on the Illegality of the Communist Regime,” suspending the statutes of limitations for crimes committed from 1948 to 1989 that had not been prosecuted for political reasons.36 In order to gain some insight into the role of judicial review within transitional justice efforts, this section will focus on the challenge brought to the constitutionality of the 1993 law by the communist successor parties and the response given by the Czech Constitutional Court.

On July 9, 1993, the Czech parliament adopted the “Law on the Illegitimacy of and Resistance to the Communist Regime.” The democratic forces in the parliament wanted to see the most heinous crimes of the communist regime punished. More importantly, legal continuity with the previous regime prevented the rehabilitation of those victims of communist oppression who had been legally prosecuted and tried before 1989.37 All the deputies from the Communist Party of Bohemia and Moravia voted against the law, but it passed with a majority of 129 out of 200 expressed votes.38

The law began with a very strong statement of denunciation of the previous communist regime, from which the young democratic regime wanted to distinguish itself. The legislature wrote a symbolic, foundational declaration of principles delineating the political identity of the Czech people and meant to guide historical judgement. The communist regime had denied the main values of European civilisation. As a consequence, there was a strong need to negate its political and moral legitimacy: “[T]he CPCS, its leadership and its members are responsible for the … systematic destruction of European civilisation; for the intentional violation of human rights and freedoms: for the moral and economic decay that was accompanied by judicial crimes and terror against those who held views differing from those of the state; for the replacement of a functioning market economy by a command economy and for the destruction of traditional principles of ownership; for the abuse of education, science and culture for political and ideological goals; and for the destruction of the environment.”39 Following this general condemnation of the regime in the preamble, the law stated that due to its use of torture and murder, and its appeal to a foreign power for the purpose of persecuting the Czechoslovak

38 Obrman, “Czech Parliament.”
people, the Communist Party and all its satellite organisations were to be deemed “criminal, illegitimate and abhorrent.”

The more significant provisions of the law were the suspension of the statute of limitations for crimes committed between February 1948 and December 1989 (Art.5), the rehabilitation of dissidents who had not been rehabilitated by previous laws (Art.6), and a rather vague appeal to the Czech government to redress the suffering of the victims of the communist regime (Arts. 4 and 8):

Art 4: All those who were unfairly harmed or persecuted by the Communist regime and did not take part in the activities specified in Art.1 paragraph 1 of this act deserve compassion and moral satisfaction.

Art.8: The government is authorised to rectify by decree some wrongs done to the adversaries of the Communist regime and to persons affected by persecution in the social, health and financial spheres.

Public opinion was divided on the content of the law. The democratic forces in Parliament rejected the argument from the non-retroactivity principle of the rule of law raised by the successor forces of the Communist party on grounds that, had it not been permissible to lift the statute of limitations, “an absurd situation would arise, in which tyrants and dictators could ensure that they would evade retribution forever.” Public opinion generally supported the law and so did President Havel who believed that it did not contradict the Czech Charter of Fundamental Rights and Liberties. He claimed that “through this law, the freely elected parliament is telling the victims of communism that society values them and that they deserve respect.” This implied that in order for the dignity of the victims of the communist regime to be restored, the truth had to be revealed and the perpetrators, punished. Setting the historical record

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40 “Law on the Illegitimacy of the Communist and Resistance to the Communist Regime,” art. 2.
straight implied allocating responsibility for the most heinous crimes—or so the democratic majority thought.

The constitutionality of the law was challenged by a number of deputies from the Communist Party of Bohemia and Moravia on the grounds that it violated the principles of the rule of law. In contrast to the Hungarian case, in which the president, himself a former dissident, submitted the bill to review, in the Czech case, the opposition parties, as direct targets of the rectificatory bill, took the initiative in a gesture of self-defence. In analysing the court’s judgment, this should be factored in as an important variable.

First, the communists accused Parliament of violating the principle of legal generality in trying to prosecute a certain group of persons as jointly responsible for the abuses of the previous regime. The court rejected this claim, pointing to the moral-political—rather than legal—character of the first four articles of the law that they attacked: “The Constitutional foundation of a democratic state does not deny the parliament the right to express its will as well as its moral and political viewpoint by means which it considers suitable and reasonable within the confines of general legal principles—and passably in the form of a statute, if it considers it suitable and expedient to stress its significance in the society.”

Through this statement the Court showed its support for Parliament’s denunciation of the communist regime and emphasised the importance of such a symbolic gesture of recognition for the emotional climate within the young polity. The Court also showed that it was the fifth article that explicitly used the technical language of penal law about the suspension of the statute of limitations, and not the first four articles.

With regard to Art. 5, the parliamentarians claimed that it violated the principle of non-retroactivity. In response, the court asserted the need to examine whether “… the institution of

the limitations of actions should be viewed as real or fictional for a period when the infringement of legality in the entire sphere of legal life became a component of the politically, as well as the governmentally protected regime of illegality.”

The Court explained to the challengers that in order for a statute of limitations to be considered valid, two conditions need to be met: the state should try to punish the offender and the offender should be in ongoing danger of being punished. This position stands in stark contrast to the approach of the Hungarian courts, who were concerned with affirming legal continuity. According to the Czech Court, the communist state, as a regime of structural impunity, failed on both counts. Hence, one could not consider the statute of limitations to have run for crimes committed between 1948 and 1989 that were not prosecuted for political reasons.

The second, more severe challenge targeted the articles proclaiming the illegitimacy of the Communist regime on the grounds that legal continuity was implicit in the functioning of the post-communist regime. The opposition MPs claimed that all laws that were in effect before 1989 retained their validity after the velvet revolution took place: “If the statutory statement concerning the illegitimacy of the governmental political systems during the period 1948 to 1989 were correct and remained in effect, then the other legal acts adopted during the stated period would no longer have been valid as of August 1st 1993; naturally this did not occur, for legal certainty is one of the basic characteristics of a state based upon law, and that certainty depends upon the constancy of legally expressed principles in particular areas of law, on constancy of legal relations…”

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46 “Constitutional Court Decision,” p. 622.
48 “Constitutional Court Decision,” p. 625.
Given the importance of such a law and of such a challenge to the historical account of the Communist period, the Court devoted considerable energy to refuting the Communists’ claims. The judges, first and foremost, rejected the definition of legitimacy as legality, making explicit reference to post-WWII Germany and its approach to the abuses of the Nazi regime: “Consciousness of the fact that injustice is still injustice, even if it is wrapped in the cloak of law, was reflected in the post-war German Constitution, and, at the present time, in the Czech Constitution.” In this sense, the Czech court rejected the legal continuity argument and judged that democratic equality required the suspension of statutory limitations: “Our new Constitution is not founded on neutrality with regard to values, it is not simply a mere demarcation of institutions and processes, rather it incorporates into its text also certain governing ideas expressing the fundamental, inviolable principles of a democratic society … this means that even if there is a continuity of “old laws,” there is a discontinuity in values from the “old regime” … (L)egality mutatis mutandis undoubtedly embodies a part of the legitimacy of the regime, however, these concepts are not quite interchangeable.”

This reasoning placed judges in the role of lay historians. Through this statement, the Court reinforced the will of the legislature and inscribed the denunciation of the former regime in the history books of the Czech polity. The judges confirmed the views of the newly elected parliament and president, thus legitimising the latter’s position. They may have understood the necessity of backing up the political and moral legitimacy of the new parliament in times of political hardship and volatility, characteristics of transitional periods.

Legality was presented as instrumental to the reproduction of a democratic society, provided laws were just; however, on its own, maintaining the integrity of laws was not enough to justify 40 years of oppression. By responding to popular claims to truth and justice, the Court

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50 “Constitutional Court Decision,” p. 373.
51 “Constitutional Court Decision,” p. 373.
acknowledged the legitimacy of the public's outraged sense of justice. In contrast with the Hungarian court’s attention to the rights of the potential defendants, however, the Czech court asymmetrically catered to the recognition needs of the victims.

To the extent that the court attempted to perform any educational role, it was directed more towards the minority of nostalgic supporters of communism, rather than the population at large. The challengers to the law came from the Communist Parties of Bavaria and Moravia, successor parties to the communists. In comparison with its Hungarian homologue, the judgment tilted in the opposite direction. The Czech Court seemed to be exclusively concerned with the needs of the victims and did not pay much attention to the status of the rights of victimisers, equally important in the context of a democratic regime. The victimisers’ status as persons and objects of equal concern and respect was not clearly affirmed by the judges. While the court sanctioned the normative weight of a desire for rectification, it did not communicate the limits that the very same principles invoked in support of the law placed on the kind of measures a democracy could take against its victimisers. By declaring the illegality of the Communist Party, one party to the debate over memory was silenced and instrumentalised for the sake of satisfying otherwise legitimate negative emotions.

The practical implications of the decision remained unrealised, as the courts of ordinary jurisdiction refused to apply the law in cases where criminal charges were brought against top figures of the previous government. While the Czech Constitutional Court was powerful in its collective identity-forging function, it had no power to review decisions by the lower courts.53 Its weak institutional position enabled the lower courts to balance concern for the victims with the rights of the victimisers. The lower courts acted in a counter-majoritarian way and refused to judge retroactively, thus correcting the Constitutional Court’s symbolic statement based on

principles of extra-legal justice and supplementing it with a concern for the procedural protections of all citizens, irrespective of their pre-transitional life histories. While the Constitutional Court drove home the lesson about the moral impermissibility of state oppression, the lower courts protected the integrity of democratic principles by safeguarding the procedural protections of defendants. It was these lower courts who, through their actions, affirmed that moral satisfaction could not be obtained at the price of democratic equality; however, their lesser visibility and prestige within the legal system, as well as inconsistency between the two levels of the judiciary, diminished the educational potential of these decisions.

V.3 South Africa

Whilst the settlement offered many opportunities, flowing from it were many undesired consequences. One of it shortcomings was the moral equivalence it extended to both sides of the conflict. With this approach came ambiguity of the true cost of our freedom. No description so undermines our national sacrifice than the term “miracle.” The abolishment of slavery, the end of the Jewish Holocaust, and the end of the Rwandan Genocide are simply that—an end to the most unfortunate periods in the history of humanity. Miracles do not come at such cost. The cost having being suffered, it is no miracle when humanity finds that which it should never have lost in the first place—its sanity.

(Nkosinathi Biko, Steve Biko’s son, May 7, 2006)

Without the amnesties associated with the political negotiations that led to the end of the apartheid era, “we would have been overwhelmed by the bloodbath that virtually everyone predicted as the inevitable ending for South Africa.”\(^{54}\) One of the most important legal landmarks of the negotiated transition to democracy was the “Promotion of National Unity and Reconciliation Act” instituting the Truth and Reconciliation Commission (TRC), which was signed by the president of the republic on the 19\(^{th}\) of July 1995.\(^{55}\) The purpose of the commission

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“was the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights”\textsuperscript{56} committed during the apartheid regime. Both the motives of perpetrators and the perspectives of the victims were to be taken into account in constructing as broad and precise a picture of oppression as possible. Most controversially, the document provided for “the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective.”\textsuperscript{57}

In order to carry out this difficult work, three committees were created: a “Committee on Human Rights,” dealing with gross violations and empowered to gather and receive information; a “Committee on Reparation and Rehabilitation,” tasked with gathering information and making recommendations for reparations to the president; and a “Committee on Amnesty,” holding the power to grant amnesties for violations of human rights that were politically motivated on condition of full disclosure of the truth by the applicants.\textsuperscript{58}

The establishment of the TRC generated fervent debate, which focused on the morality, prudence, and legal status of such an institutional response to a past of \textit{symmetrical barbarism}.\textsuperscript{59} A lot of victims saw the establishment of the TRC as robbing them of justice. Empirical research in South Africa reveals the dissatisfaction that many felt regarding the subordination of retributive justice to reconciliation.\textsuperscript{60} I shall not engage here in an analysis of the arguments made in favour or against one of the most famous mechanisms of transitional justice. This section is concerned with an event in South Africa’s transitional saga that has received somewhat less attention in academic circles, namely the challenge to the constitutionality of the TRC

\textsuperscript{56} \textit{Promotion of National Unity and Reconciliation Act.}

\textsuperscript{57} \textit{Promotion of National Unity and Reconciliation Act.}

\textsuperscript{58} \textit{Promotion of National Unity and Reconciliation Act, Sections 3 (a) (b) and (c).}

\textsuperscript{59} See Barghava, “Restoring decency to barbaric societies.”

initiated by the families of some prominent resisters to the apartheid regime. While the first two
case studies discussed in this chapter exclusively involved official agents, the South African case
brings to the fore the perspective and influence of those closest to the victims, their immediate
relatives. Given our interest in the ways in which the judiciary can engage citizens’ negative
emotions within transformational moments, I shall focus on the South African Constitutional
Court’s arguments in the “Azanian Peoples Organization (AZAPO) and others v President of the
Republic of South Africa and others,” case CCT 17/96, decided on July 25, 1996.

The plaintiffs in this case were the families of black resistance legend Steven Biko, killed
while in police custody in 1976, lawyer Griffiths Mxenge, killed by security policemen in 1981,
and African National Congress activist Fabian Ribeiro, murdered in 1986. The members of
these families could not reconcile themselves to the idea of civil and criminal indemnity for the
brutal murders of their beloved. Their legal representatives claimed that the amnesty provision of
the Act that established the TRC obliterated the right to justice, be it in the form of criminal
prosecutions or civil compensation. The target of their challenge was the constitutionality of
section 20(7) of the “Promotion of National Unity and Reconciliation Act,” which provided that
no person, organization, or state should be criminally or civilly liable for any act or omission that
amounted to human rights violations committed for “political reasons.” The plaintiffs claimed
that section 20(7) was in conflict with Section 22 of the Constitution, which stipulated that
“[e]very person shall have the right to have justiciable disputes settled by a court of law or,
where appropriate, another independent or impartial forum.” The constitutional status of the
Epilogue to the Constitution—the text enabling Parliament to pass amnesty provisions in the
TRC statute—was challenged. The plaintiffs argued that the Epilogue was not part of the text of

61 Juliette Saunders, “Biko family lose battle over S. Africa truth body,” Reuters, July 26, 1996,
62 Section 22 of the Constitution cited in Azanian Peoples Organization (AZAPO) and others v President of the
Republic of South Africa and others, case CCT 17/96, July 25, 1996, p. 11.
the Constitution and, therefore, was not covered by section 33(2), which outlined the rights-overriding clauses:

The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation-

(a) shall be permissible only to the extent that it is-
   (i) reasonable; and
   (ii) justifiable in an open and democratic society based on freedom and equality; and

(b) shall not negate the essential content of the right in question,

and provided further that any limitation to-

(aa) a right entrenched in section 10, 11, 12, 14(1), 21, 25 or 30(1)(d) or (e) or (2); or

(bb) a right entrenched in section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity,

shall, in addition to being reasonable as required in paragraph (a)(i), also be necessary.\textsuperscript{63}

Desmond Tutu and the African National Congress did not receive the news of this challenge well and labelled the legal action as a self-righteous attempt to undermine their reconciliation efforts for South Africa.\textsuperscript{64} These families were negatively portrayed as unwilling to forgo their right to justice for the sake of the greater good of peace and unity. In contrast, the judgement of the Constitutional Court showed a better and more sensitive understanding of the kind of emotional costs victims had to pay in exchange for truth and reconciliation. The Court carefully legitimized the moral outrage of the victims’ relatives by recognizing their validity as responses to suffering and uncertainty over the fate of their beloved. As we shall see, throughout the text of the decision, the author (Judge Mahomed) expressed deep concern for the emotional strain felt by the South African population, both before and after the negotiated transition. Nevertheless, the court ruled in support of Parliament’s decision to institute a TRC with amnesty powers.

\textsuperscript{63} Art 33(1) of the South African Constitution, cited in CCT 17/96 at p. 13.

Although the judges claimed that their only concern was to see whether Section 20(7) of the TRC statute was constitutional or not, they constructed a multilayered argument as to why the TRC was the optimal choice for the political circumstances of post-apartheid South Africa. In retrospect, we can say that the judges' elaborate defence of the legislature's stance on the past was grounded in an understanding of the emotional hardship that the very existence of the TRC created for victims and their families, and an awareness of the novelty of such a mechanism for dealing with a past of symmetrical barbarism. The kind of representation and voice that the political elites envisaged for the victims was going to take a new, non-retributive form. The task the court had set itself was to persuade the victimised of the validity of this alternative form of recognition, which was just as valuable as that enabled by criminal justice and civil compensation. The judgement also reflected the court’s trust in the TRC’s ability to distinguish between political and non-political reasons for human rights violations, which left the path to retributive justice at least partially open. A more detailed analysis of the arguments will reveal how the young Constitutional Court perceived of its own historical role in this important case.

The introduction to the decision retells the story of the unsavory past and its legacies for the present. The oppressiveness of the regime is juxtaposed with the increasing anger of the subordinated black population. The difficulty of building a democracy on the ruins of the apartheid state is acknowledged: “It was wisely appreciated by those involved in the preceding negotiations that the task of building such a new democratic order was a very difficult task because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could not be achieved without a firm and generous commitment to reconciliation and national unity. It was realised that much of the unjust consequences of the past could not ever be fully reversed. It might be necessary in crucial areas to close the book on that
The “deep emotions,” the “indefensible inequities,” and the impossibility of reversing the past required that society turn its back on desires for retribution. The Epilogue of the Constitution is taken as a testimony of the will of the people—through their representatives—to look forward to peace, unity, reconciliation, and reconstruction. It is on the basis of this declaration of intention in the Epilogue that the Parliament legislated the statute creating the TRC. In this sense, the court emphasises, the TRC was the product of a democratic will and, hence, legitimate.

Judge Mahomed then moved on to a step-by-step examination of the challenge to the constitutionality of the TRC statute. With great care and drawing references to section 232(4) of the Constitution, the court explained how the Epilogue, under which the TRC statute had been legislated, was as much a part of the constitution as any other section. As such, it correctly entitled Parliament to exercise amnesty powers:

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed. With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.

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65 CCT 17/96, p. 3.
66 CCT 17/96, p. 3–4.
This text, said the court, legitimised the decision to provide amnesty for both civil and criminal offences as a means to move beyond hatred and towards a future of unity and mutual understanding. Next, the court engaged in a long discourse about the tragic dimension of the South African transition and a defence of the parliament’s choice of institutional means to deal with the past. The author's apparent intention was to appeal to the plaintiffs’ judgement and persuade them that, under the circumstances, there could not have been any other way of dealing with the past. The discourse showed respect for the plaintiffs’ claims and anger, and sought to acknowledge the legitimacy of such emotions, while at the same time explaining why the court had to stand by Parliament’s decision. Criminal and civil liability for individual wrongdoers—as well as civil liability for organisations and the state—were subordinated to the greater social good of reconciliation, through the vehicle of truth-telling. A different kind of recognition was to ensue from the proceedings of the TRC: recognition of the victims’ right to know the truth and to forgive. Let us now reconstruct the arguments that the court prepared for the outraged relatives of apartheid resisters.

Judge Mahomed dealt, first, with the issue of immunity from criminal prosecutions. He began by acknowledging the emotional frustration of a victim’s family when amnesty was granted to their relative’s killers: “Every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack, but the circumstances in support of this course require carefully to be appreciated.”

Given that the abuses had taken place a long time ago and that the previous regime had been based on lies and secrecy, there was no reliable data to ensure an accurate establishment of responsibility. As a consequence, amnesty was a safer bet from the point of view of justice: “All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive

68 CCT 17/96, p. 11.
suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law.  

A democratic concern with the risk of abusive trials thus lent support to the Commission. In addition, a TRC where survivors could meet and share stories was more likely to give voice to all sides, which would hopefully contribute to reconciliation. Without the incentive of freedom from criminal prosecutions, victims' relatives could not hope to learn the truth about those they had lost, and the victimisers would have to carry the guilt and anxiety associated with culpability:

Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the positions of the applicants so desperately desire. With that incentive, what might unfold are objectives fundamental to the ethos of a new constitutional order. The families of those unlawfully tortured, maimed or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the “reconciliation and reconstruction” which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue.

Disregarding some problematic psychological assumptions about the relationship between truth, healing, and the anxiety that human rights violators experience, the court expressed here a clear concern with the emotional responses to human rights violations. More importantly, a very acute understanding of the importance of a stable emotional environment for the furthering of political and social reform is revealed in the text. Had amnesty not been proclaimed, prosecutions would have been selective, information about the injustices that had occurred would not have been

69 CCT 17/96, p. 18.
70 CCT 17/96, p. 18–19.
readily available, and truth would not have surfaced. Negative emotions would have remained alive and would have prevented the crossing of the historical bridge towards a brighter future:

The alternative to the grant of immunity from criminal prosecution of offenders is to keep intact the abstract right to such a prosecution for particular persons without the evidence to sustain the prosecution successfully, to continue to keep the dependants of such victims in many cases substantially ignorant about what precisely happened to their loved ones, to leave their yearning for the truth effectively unassuaged, to perpetuate their legitimate sense of resentment and grief and correspondingly to allow the culprits of such deeds to remain perhaps physically free but inhibited in their capacity to become active, full and creative members of the new order by a menacing combination of confused fear, guilt, uncertainty and sometimes even trepidation.71

If amnesty had not been granted, the negotiations that led to the end of the apartheid regime would never have succeeded. If prosecutions had been organised, there would have been a high likelihood of miscarriages of justice. If the prospects of retaliation and revenge had been kept alive, no transformation would have been possible. All these conditionals were brought to bear on the argument that there was no other way forward but to opt for a TRC in the form it eventually took within the South African context.

The court reminded its audience not to forget that amnesty was not unconditional, however. It was only upon full disclosure of the truth and only for politically motivated crimes that immunity from prosecutions was granted. The Committee for Amnesty was to closely follow the criteria for identifying politically motivated actions in order to make sure that amnesty was only awarded on proper grounds. In addition, the court emphasised the fair nature of the amnesty: unlike many cases in Latin America, this was not a self-proclaimed, abusive amnesty by a military junta losing power, but a democratically chosen transitional measure.

At this point in the text of the decision, the tragic dimension of the decision-makers’ judgement received its due attention. The court acknowledged the difficulty of balancing claims

71 CCT 17/96, p. 19.
to justice and stability, “between a correction in the old and the creation of the new.”\textsuperscript{72} The judges considered that Parliament’s institution of a forum for talking and listening, instead of one for punishing, was a good step towards a better future for all the citizens of the republic.

Once the domestic, constitutional obligation to prosecute had been dismissed, the court proceeded to engage the claim that international law required that gross human rights abuses, such as those experienced in South Africa, be prosecuted. The court responded by showing how international legal instruments could not become valid law for South Africa until made so through legislative enactment. Since that had not yet happened, there was no international duty to prosecute. In addition, the type of conflict that had plagued South African society could not be equated with the kind of contexts the Geneva Conventions dealt with.\textsuperscript{73}

The next step was the justification of the annulment of civil liability for individual wrongdoers. By way of a semantic analysis of the term “amnesty,” the court explained why the concept could not be limited to criminal liabilities. In addition, the search for truth—the justificatory goal of amnesty for criminal offences—would best be served by cancelling civil liabilities. It would have been counterintuitive and counterproductive to proclaim amnesty for one kind of offence only;\textsuperscript{74} horizontal consistency required a broader approach.

The issue of the civil liability of the state raised the bar of justification even higher. In the end, the court circumvented this problem by pointing to the scarcity of resources and the need to channel them into alternative paths of reconstruction, such as national social policies: “The resources of the state have to be deployed imaginatively, wisely, efficiently and equitably, to facilitate the reconstruction process in a manner which best brings relief and hope to the widest sections of the community, developing for the benefit of the entire nation the latent human

\textsuperscript{72} CCT 17/96, p. 22.
\textsuperscript{73} CCT 17/96, p. 26–31.
\textsuperscript{74} CCT 17/96, p. 37.
potential and resources of every person who has directly or indirectly been burdened with the heritage of the shame and the pain of our racist past.”

Lastly, the immunity from civil liability held by organisations to which the victimisers belonged was redeemed by pointing to the fact that it was due to the efforts of these organisations—in negotiation with the alternative elites—that democracy came about. Their contribution to the cause of democracy required that they be released from their civil obligations.

In his concluding remarks, the author of the decision expresses his conviction that “the Constitution authorised and contemplated an ‘amnesty’ in its most comprehensive and generous meaning so as to enhance and optimise the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future.” The court thus fully embraced the judgment of the lawmakers and, in its turn, decided to uphold the constitutionality of the TRC statute.

Given the interest of this dissertation, it is important to stress the court’s attention to a certain dimension of legal claims: the affects. The opinion of the two judges suggests a realisation of the importance of a stable emotional climate in the context of transition, as well as a sober awareness of the material and political constraints that limited the prospects of redress in the South African case. The deep fractures in South African society and their emotional expression in hatred and resentment were a constant theme in the arguments of the court. The judges acknowledged that such emotions were legitimate, but tried to persuade the public that recognition did not necessarily have to take the form of retribution. To the contrary, finding the truth and being given a voice within the TRC constituted an alternative, yet just as valid, form of institutional recognition. The TRC provided a compensatory venue for these feelings to be

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75 CCT 17/97, p. 40.
76 CCT 17/97, p. 46.
expressed in public. A rather strong, and some might say unfounded, belief that social catharsis would ensue from encounters between victims and victimisers was also expressed. Under the circumstances, it is not surprising that the judges reflectively endorsed the decision of Parliament. In the course of their arguments, they tried to engage the judgments underlying the victims and relatives’ negative feelings in a way that they thought was most conducive to strengthening South African democracy, asking them to accept the political experiment in truth and reconciliation that the Commission embodied.

Given the exclusion of retribution from the institutional arrangements under scrutiny by the court and the heightened level of emotional frustration experienced by the complainants, the latter were disappointed with the decision. The Azanian People’s Organisation said of the decision that “[I]t takes away a fundamental right of the people to apply to the courts for adjudication. We think this has important consequences for democracy in this country.” In spite of the court’s justificatory endeavour and commendable attempt to talk to the plaintiffs’ emotions, their effort to appease resentment and indignation by pointing to the healing potential of truth-telling rather than retribution, and their argument as to the inevitably selective and abusive form that criminal justice would take under the circumstances, they did not meet the South Africans’ expectations. The inevitable institutional and normative limitations of the TRC, its problematic relationship with the Prosecutorial Office, the lack of an evaluation of the apartheid regime as a whole, and a limited attendance to the victims’ needs left the immediate families of the victims, as well as large segments of the population, dissatisfied and angry.

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77 If we follow Allen’s account of the principled compromise that the TRC embodied, we can see that the court was trying to highlight the aspects of justice that had not been forgone for the sake of reconciliation: weak punitive justice, recognition, and compensation. Nonetheless, as the author forecast, not everybody can be persuaded of the merits of the contextually determined compromise. See Allen, “Balancing Justice and Social Unity.”


In the Biko case, this dissatisfaction was later fuelled by the fact that, in spite of the TRC’s rejection of amnesty applications by Biko’s killers, trials were never held. The official reason was the lack of sufficient evidence. A long time after this denial of criminal justice, Biko’s son was still writing of the bitter taste that negotiated settlements had left in the mouths of victims and their families: “White South Africans must reckon with history for what it is and not for what they wish it to have been. We can then choose to roll up our sleeves, and occupy our place as citizens of significance who get on with the business of rebuilding South Africa or we can, once more, palm this responsibility off to our children. If we choose the latter, then I am afraid my children will be making these very points many years from now. Only then it may not be through the power of the pen but ‘by any means necessary’.”

As we see from the statement above, there is a chance that left unvindicated, the feelings of frustration and disappointment, and a lack of trust in institutions will reproduce themselves across generations. This is not only true in the case of Biko’s son. Empirical studies have shown that post-apartheid failures of justice have contributed to the widespread culture of impunity and violence in today’s South Africa. The promise of the Constitutional Court was left empty by the judiciary’s failure to prosecute individuals whose amnesty requests had been denied by the TRC.

To sum up, while the court did its best to acknowledge the victims’ demands and to persuade them of the merits of a truth and reconciliation forum, the novelty of this institutional experiment, the principled compromise it proposed, and the subsequent failures of the justice system left many dissatisfied. The demand that they be content with knowing the truth and work for national reconciliation did not provide all victims with the kind of recognition they would

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82 Gibson, “Truth, Justice and Reconciliation.”
have found persuasive and that would have made them support the young democratic regime. It was inevitable that not everybody would accept justice as recognition as an alternative to retributive justice. When even the modicum of retributive justice allowed by the transitional arrangement fell through as the courts failed to follow up on the recommendations of the TRC, public feelings of resentment and indignation remained unappeased. The culture of impunity that emerged from the failure to deliver the kind of justice the public appreciated left hatreds alive and led to an increased use of violence for solving conflicts within South African society. Had the truth revealed at the TRC been accompanied by a measure of retributive justice for the cases that could not be amnestied, the emotional climate of the young democracy might have been different.

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85 A quick clarification here: I have tried to link resentment and indignation to the frustration of legitimate expectations. To the extent that prosecutions were recommended by the TRC and never materialised because of incompetence or corruption, legitimate expectations were betrayed, and that represents a failure to show equal concern and respect for all. To the extent that prosecutions were not organised in order to avoid miscarriages of justice (the lack of evidence in the Biko case is one example), forgoing prosecution is a requirement of democracy itself.
V.4 Argentina

And I ask myself why? What gives him the right to bring terror back into my life; what right has he got to enter my house, to enter everybody's house; what gives him the right to frighten, through a screen, those who did not get to know him personally... with what right? With all the right given him by the impunity we are experiencing; with the right of the law that leaves him free and today to speak of his crimes; with the right given him by people unable to shout ENOUGH, a right given by a government that allows him to live in freedom among us, his victims, in this society, among a people who declared NEVER AGAIN, a NEVER AGAIN that remains unspoken, and which does not exist.

(Delia Barrera, desaparecida, August 1995)

Between 1976 and 1983, Argentina was under violent and arbitrary rule by the military. The end of the regime only came with the defeat of the Argentinean forces in the Falkland Islands war at the beginning of the 1980s. During the period of military rule, the Supreme Court of the land had repeatedly petitioned the leaders to clarify the status of thousands of missing individuals, but was regularly snubbed by a junta who claimed not to have any knowledge of what was happening.  

Just before losing power, the military passed a self-amnesty law, the 22924 National Pacification Law, supposedly meant to set the ground for reconciliation. This law stipulated a blanket amnesty for all subversive and counter-subversive acts that had taken place between May 25, 1973 and June 17, 1982.  

In this way, the officers left power ensuring that human rights

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abuses—the most notorious of which were the “disappearances” of a large number of Argentinean citizens suspected of leftist, counter-regime activities—would not be prosecuted.

The Argentinean Truth Commission (CONADEP), established in December 1983 by the newly elected president Alfonsín reported 8,960 victims of "disappearance." Immediately upon taking power, the president argued against the constitutionality of the National Pacification Law, which eventually got nullified. As a consequence, the prosecution of the top military and left-wing guerrilla fighters who had committed massive human rights abuses since 1976 began.

In order to appease the military, the highest military court was charged with the task of prosecution; but, when it refused to hear cases, the proceedings were transferred to civil courts. In addition, the president asked that the “due obedience” defence be considered valid. This meant that lower ranks could defend themselves on the grounds that they had been merely observing orders from their superiors. Due to the fragile balance of power after the change of regime, Alfonsin and his team of legal experts opted for prudence and restraint in the quest for justice. His intention was to have an exemplary trial of the top leadership of the army in order to appease the social demand for justice, while avoiding the appearance of a targeted attack on the military. His judgement was proven wrong by what followed. Argentinean society, together with the (at the time, responsive) judiciary, were not ready to accept this kind of tokenism.

The 1985 trial of the junta leaders was met with great public excitement. Generals Videla and Massera received a sentence of life in prison; Agosti, four and a half years; Viola, General Viola replaced Videla for a few months in 1981 as head of the junta.

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88 This refers to the kidnapping, illegal imprisonment, torture, and killing of persons suspected of left-wing subversion.
90 Human Rights Watch Reports, “Argentina.”
91 Nino, Radical Evil.
92 Legal theorists Carlos Santiago Nino and Jaime Malamud-Goti were the most prominent.
93 Nino, Radical Evil.
94 Videla, Massera and Agosti were the members of the first military junta that took power after deposing President Isabel Perón in 1976.
95 General Viola replaced Videla for a few months in 1981 as head of the junta.
seventeen years; and Lambruschini,\textsuperscript{96} eight years. Graffigna\textsuperscript{97} and all three members of the third military junta were acquitted.\textsuperscript{98} The trial’s main shortcoming was its not-so-clear stance on “due obedience.” This ambiguity cleared the way for further prosecutions of lower-rank officers. Naturally, the military saw this move by the courts as a threat and an insult. They drew ranks and started threatening to disrupt the already fragile peace.\textsuperscript{99} In response, the president and his aides prudently prepared two laws intended to limit the impact of prosecutions. The first was the “Full Stop Law” (23492 Punto Final, 1986), which gave courts and prosecutors 60 days in which to press charges. Unexpectedly, the courts proved very diligent in prosecuting a great number of cases before the term expired, even working during their vacation period. As a consequence, the military organised a serious rebellion, which resulted in the passing of the “Due Obedience Law” (23521 Obediencia Debida, 1987), limiting responsibility to the highest ranks of the military. The law halted proceedings for all the trials against middle-rank officers and was soon challenged by human rights groups, but the Supreme Court of the country upheld its constitutionality.\textsuperscript{100} In this way, the march to justice came to a standstill. The final blow for victims and their families came shortly after in the form of President Menem’s pardon of all officers already convicted for crimes committed during the “dirty war.”\textsuperscript{101}

From a socio-emotional point of view, these events pushed Argentinean society in two directions. On the one hand, widespread apathy, a general feeling of disempowerment, and heightened official tolerance towards former oppressors who continued to live next door to their victims reflected the apparent dysfunction of the Argentinean transition.\textsuperscript{102} Needless to say, 

\textsuperscript{96} Admiral Lambruschini took over from Massera as the chief of the navy.
\textsuperscript{97} Commander of the air force after Agosti.
\textsuperscript{98} Human Rights Watch Report, “Argentina.”
\textsuperscript{100} Decree 2741–43/12.30.90, Human Rights Watch Report, “Argentina.”
\textsuperscript{101} Di Paloantonio, “Tracking the Transitional Demand,” p. 357.
\textsuperscript{102} Di Paloantonio, “Tracking the Transitional Demand,” p. 362. For an anthropological study of the emotional reactions of the youngest Argentineans to structural impunity see Suzana Kaiser, \textit{Eschraches: Demonstration,}
public perceptions and attitudes such as these diminished the quality of democracy and were symptomatic of a widespread lack of trust in political institutions’ capacity to deliver justice. On the other hand, strongly mobilised civil society groups, especially those associated with the relatives of the murdered and “disappeared,” began to put increased pressure on subsequent administrations. Political mourning became a new form of democratic participation and so were marches against impunity. Street demonstrations, litigation, and various public rituals marked public resistance and abhorrence towards the unjust laws. While some groups were eventually satisfied with compensation and subsequently demobilised, others continued to press for criminal justice, claiming they could not be bought either with money or with bones.

Testimonies of atrocities under the shelter of immunity by major military figures through the 1990s did nothing but make the relatives of victims even more vocal in the demands they were raising against the state, whether through litigation or public communication. Their offended sense of justice could not be reconciled with the fact that murderers and torturers were walking free. The presence of the victimisers became more and more offensive as they managed to monopolise the attention of an uncritical media seeking sensationalism everywhere. Sometimes groups of activists took justice into their own hands, engaging in public rituals of disclosure, humiliation, and stigmatisation of torturers and victimisers. The so-called eschraches brought together the children of the disappeared. The rituals were meant to shake the conscience of the apathetic Argentinean public and rally citizens in an effort to unmask and ostracise the hundreds of assassins living freely under the shelter of the amnesty laws and Menem’s pardons.


103 Humphrey and Valverde offer an insightful analysis of the complex social and emotional forces moved into action by the state’s failure to address injustices, both before and after the dictatorship. See Michael Humphrey and Estela Valverde, “Human Rights, Victimhood, and Impunity: An Anthropology of Democracy in Argentina,” *Social Analysis*, Vol. 51, Issue 1 (Spring 2007), pp. 179–97.

104 Humphrey and Valverde, “Human Rights.” The reference to the “bones” makes allusion to the return of bodily remains to families.


106 Kaiser, “Eschraches.”
The demonstrators would gather in front of the torturer’s house, name him as a torturer, warn his neighbours about his presence there, distribute pamphlets, play music, present improvised theatre scenes, make lots of noise, write denunciations on the sidewalks and walls of the victimiser's house, and symbolically throw red paint on the doorstep. Sometimes the neighbours would join the demonstrators in their denunciation. Police repression of these manifestations of public indignation was frequent, making the demonstrators even more virulent in their behaviour. Failure by the state to address the resentment and indignation at the impunity of human rights violators pushed citizens into engaging in symbolic stigmatising acts of punishment, shaming, and public humiliation, all in the hope of drawing both the state’s and the apathetic citizens’ attention to an unrectified past that would not go away easily. The passing of time did not diminish the strength of their call for justice. It was anchored in the emotions of the victims’ relatives, which would not allow resignation to settle in. In this way, human rights groups sent a signal of alarm about the legitimacy deficits from which the Argentinean democracy suffered.

The judiciary eventually took up the issues that the victims’ associations had provoked. In view of the public’s increasingly vociferous reactions to the persistence of impunity, a few federal judges decided it was high time something was done about a past that continued to blemish the Argentinean democracy. The legal loophole that allowed for the first breakthrough in the fight against impunity was the fact that neither the amnesty laws, nor Menem’s pardon covered crimes against babies. After some failed attempts to find the truth about the disappeared in the late 1990s, progress came with the prosecution of cases dealing with the theft of babies.

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107 These rituals were the trademark of one of the most visible human rights group, HIJOS (Daughters and Sons for Identity and Justice against Forgetting and Silence). For a detailed analysis, see Kaiser, “Eschraches.”

108 Humphrey and Valdeverde emphasise this point when they write: “…the demands for justice persist because they are anchored in the emotional lives of the survivors and the families of the victims.” Humphrey and Valdeverde, “Human Rights,” p. 180.

109 In the aftermath of a decision by the Inter-American Human Rights Organisation on the existence of victims' right to truth, the so-called “truth trials” pushed on the courts by the Centre for Legal and Social Studies (one of the most powerful Argentinean NGOs) took the form of hearings meant to satisfy the victims’ relatives’ right to truth. Due to a lack of cooperation by the military, their findings, though significant, were limited. See Human Rights
from victims of torture. The military had systematically taken prisoners' children away from them, changed the children's identities, and had them adopted by childless families among their ranks. Once the widespread and systematic practice of stealing babies was uncovered, prosecutions of officers that had been formerly pardoned by president Menem began. Between 1998 and 1999, a number of high profile officers were indicted. The Federal Court of Appeals upheld the indictments on appeal. Pressure from the relatives of the disappeared, among whom the grandmothers of the stolen babies were most prominent, increased by the day. Of all the cases examined in this chapter, Argentina displays the highest level of social legal mobilisation by the victims and their families.

It was during the investigation of a case of a kidnapped couple and their baby that one of the most important court decisions for the fate of justice in Argentina was handed down. On March 6, 2001, Federal Judge Gabriel Cavallo of the Buenos Aires Federal Court of Appeal ruled that the “Full Stop” and “Due Obedience” laws were unconstitutional. An *amicus curiae* brief had been submitted by The Centre for Legal and Social Studies on behalf of the Grandmothers of the Disappeared. The two amnesty laws were found to be in conflict with Articles 29 and 118 of the Constitution, as well as with international and regional human rights documents. Article 29 of the Constitution prohibited Parliament from granting the executive powers that put the “life, honour, and fortunes of Argentines at the mercy of whatever government or person.” With respect to Chapter 118, Judge Cavallo explained how the crimes committed by the junta were serious enough to be considered “crimes against humanity” and, as such, subject to universal jurisdiction, and shielded from any statute of limitations. According to

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111 Human Rights Watch Report, “Argentina.”

112 These are two of the most active human rights groups in Argentina.

an amendment to the Argentinean Constitution dating from 1994, international law took direct precedence over domestic law, without having been incorporated into domestic law through legislation. As such, it was international law that enabled prosecution of the hideous crimes committed during the military rule.\textsuperscript{114} A precedent of Argentina’s extradition of a Nazi criminal to Germany for trial was also cited in order to strengthen the argument from within the country’s own jurisprudence.

The “Due Obedience” law was analysed and found problematic from the point of view of a constitutional democracy. The law’s premise that orders could not have been resisted raised initial doubts. Its protections, moreover, did not cover crimes such as theft of property and concealment of babies. This led to the paradoxical result that theft could potentially be prosecuted, while torture and mass killings could not, since the latter were covered by the amnesty. For all these reasons, and against the background of an increasing social demand for criminal justice, Judge Cavallo decided to restart the struggle against impunity in Argentina. He was soon joined by other federal judges who reached similar conclusions in the cases they heard.

In 2003, in response to this judicial initiative and public mobilisation, the parliament passed a law invalidating the amnesty protections.\textsuperscript{115} Two subsequent National Prosecutors also affirmed the unconstitutionality of the laws. In order for the repudiation of the law to become valid, however, the sanction of the Supreme Court was needed. (In Argentina, it is the Supreme Court that has final jurisdiction over constitutional matters.)\textsuperscript{116}

The Supreme’s Court’s invalidation of the law was delayed until 2005. In its ruling,\textsuperscript{117} the court made reference to international and regional human rights documents that had priority over

\textsuperscript{116} CELS report, “Pedido.”
\textsuperscript{117} Case “Simon, Julio Hector y otros s/privación ilegítima de la libertad, etc.” S1767 (XXXVIII), http://www.unhcr.org/refworld/country,,,CASELAW_ARG,4562d94e2,4721f74c2,0.html (accessed November 20, 2008).
domestic legislation, and to the precedent set by the *Barrios Altos* case decided by the Inter-American Court of Human Rights. In the latter case, the Peruvian state had been held responsible for the passing of amnesty laws covering massive human rights violations by its agents.\textsuperscript{118} The Supreme Court noted that the Argentinean impunity laws were similarly *ad hoc* and violated the state’s internationally sanctioned duty to prosecute.\textsuperscript{119} The actions of the military had violated the human being in her humanity and had been carried out by state agents in the exercise of their functions. As such, they qualified for the status of “crimes against humanity,” crimes recognised by international law at the time when the Argentinean atrocities were committed. Consequently, wrote the court, there was no violation of the retroactivity requirement of *nulla poena sine lege*.\textsuperscript{120}

Next, the court examined whether the 2003 law passed by the Argentinean legislature violated the principle of the “separation of powers.” The judges affirmed that Parliament was entitled to issue declarations of principles with symbolic political content. The passing of the law did not constitute an infringement on judicial power. Furthermore, the legislature needed to take institutional responsibility for facilitating the fight for justice and truth, especially when the culprit was the Argentinean state itself. The law in question was instrumental in this respect.\textsuperscript{121}

The repealing of the amnesty laws marked the beginning of prosecutions. Soon the courts were busy trying officers for various violations of human rights. In this way, the longing for justice that victims had long been manifesting in a variety of forms in the public sphere finally received the attention from the state to which it was entitled.

There are a few elements that make the Argentinean case interesting for this project. First, it is important to see how, given the fragile equilibrium of forces in the immediate

\textsuperscript{120} CELS, “Las Leyes,” pp. 5–9.
\textsuperscript{121} CELS, “Las Leyes,” p. 11.
aftermath of the transition, democratic forces had to settle, initially, for limited justice measures and were eventually forced to postpone the quest for rectification. The commitment to democratic norms had not been betrayed by the Argentinean institutions or the public, it just needed to wait for propitious conditions. As we shall see in Chapter VII, the initial prosecutions of the military leaders in 1985 can be read as having had an important motivational impact for the victims’ ensuing legal struggle against impunity. Second, the emotional mobilisation of the victim’s families and of other civil society forces points to a healthy understanding of the relationship between citizens and the state which, even though not universally shared, served as a corrective force in the decades that followed the transition. The political use of emotions—grief, anger, indignation, resentment—was successful in bringing home the lesson that the past is an important part of a country's national narrative and cannot be ignored. Had the institutions responded sooner to the public demands for justice, however, the problematic aspects of some forms of protest might have been avoided.122

Once the conditions had changed, the state in general and the judiciary in particular were in a better position to recognise the legitimacy of the societal cry for justice and acted in order to correct past wrongs. Looking back and realising the importance of addressing wrongs committed by the state’s agents, Judge Cavallo reflectively judged that it was time to end structural impunity and begin treating the victims’ families with the respect and concern that were due to them. It was time for the victimisers to be removed from the safe heaven that the amnesty laws had provided; it was high time for the victims and their families’ moral expectations to be given proper recognition by the state. The judge's decision signalled that a polity’s violation of the principle of equal concern and respect made it a lesser democracy. Following his example, the other federal courts and Parliament demonstrated that they too understood the significance of corrective justice for the quality of democracy in Argentina. Ultimately, the highest court of the

122 I am referring here to the public shaming and humiliation that were the trademark of the escraches.
country upheld the judgement of the lower courts in a gesture showing that a democratic regime can at worst postpone, but not deny justice. The normalisation and internalisation of transitional justice concerns clearly contributed their part in this process by making documents and precedents available to the courts. A number of prosecutions of high-rank military officers have been successfully initiated and completed since 2005.

In this way, the public emotional barometers of injustice proved their usefulness in the correction of democratic deficits. Moreover, building on the work of groups that coagulated in response to the injustices of the past, organisations concerned with the injustices of the present formed and began to put sustained pressure on the government, thus further contributing to the health of the Argentinean democracy.\textsuperscript{123}

\textbf{V.5 Lessons to be Learnt}

The cases examined above illustrate the ways in which the emotional atmosphere of adjudication can mark the task of the judges reviewing legislation intended to enable engagement with the past. We can see that the judges’ scrutiny of decisions brought before the high courts was heavily dependent on the political and historical context, the courts’ level of legitimacy, the nature of the former regime, the level of mobilisation of civil society, the nature of the actors who passed transitional justice bills, and those who initiated the review process. Key to my analysis, however, is the fact that all four courts had to take stock of the negative emotions that proponents or objectors to these bills brought to their attention and find ways to deal with them without undermining the integrity and stability of the new democratic order.

The first of the courts examined here decided to emphatically communicate how they believed democracies must deal with an unsavoury past. The fear of political revanchism pushed the Hungarian court to engage in a sustained pedagogical effort with the enraged parliament. In

\textsuperscript{123} See Humphrey and Valverde, “Human Rights.”
doing so, it tried to act as a guardian of democratic equal concern for all citizens, be they dissidents or oppressors. The judgment was framed by the features of the political and historical context of the country's attempt to deal with its past: the 1956 revolt was difficult to document as evidence was often almost impossible to obtain, the first post-communist governing coalition was very fragile, civil society was split on the issue of what to do about the past violations of human rights, and pre-election polls showed communists coming strongly from behind. The communist regime itself had not been so oppressive compared to the infiltration of the German and Czech societies by secret police informers. Under these circumstances, the judges decided to act strategically and only allow for the prosecution of the most abhorrent crimes against humanity, as identified by international human rights regimes. The Hungarian Court, headed by Judge Solyom, thus managed to prevent the abuses that would have emerged from the application of the bills proposed by the outraged former dissidents.

This is not the case with the second court we examined, a court that made a point of writing a critical history of the previous regime and its repression. The Czech Constitutional Court responded to constitutionality challenges raised by the successors of the communist party. The MPs from the Communist Party of Moravia and Bavaria, who raised the challenge, invoked the principles of legality to question the law allowing the suspension of the statute of limitations for crimes committed by former state officials. This was a historical irony, which the court felt was in need of correction. Again, context played a major part in framing the judgement. The Court could not have struck down a law meant to rectify historical injustices in a country in which lustration screenings had revealed the extent of state intrusion into the lives of citizens. The judges avoided the transitional sin and condemned the communist regime for the suffering of the Czech population. They got carried away, however, by concerns for the victims, to the detriment of the victimisers. Lower courts re-established the balance by refusing to apply retroactive laws. Integrity of equal respect was thus preserved through a division of labour.
between lower and higher courts, the former caring for the victimisers and the latter acknowledging the legitimacy of victims and their families’ moral hatred; yet, the pedagogical message was partially lost precisely because of this lack of institutional coherence. The work of justice was left for the lustration commissions and other non-judicial mechanisms the country adopted.

Among the courts examined in this chapter, the South African Constitutional Court showed the greatest concern with the emotional dimension of transition. The arguments the judges formulated in upholding the constitutionality of the TRC display both an acute sensitivity to the emotional atmosphere of the transition and a sense of realism as to how difficult it would be to satisfy the public’s outrage at the parliament’s chosen mechanism of transitional justice. Although they did everything they could to bring the challengers to the side of the TRC, their arguments failed to persuade their immediate audience, whose emotional assessment of the situation remained at odds with the court's judgment. In spite of the court’s laudable, exemplary judgment, the lack of precedent for the institutional experiment with the TRC, the principled compromises the Commission embodied, and the subsequent failure of criminal courts to follow up on the its recommendations resulted in some being placed above the law and led to the rejection of otherwise legitimate claims for vindication. Negative emotions reproduced themselves in time and, according to empirical studies, contributed to the development of civil society pathologies.

In our final case, federal judges in Argentina acted as a transformative force for a fledgling democracy that had been severely stained by a culture of impunity. Displaying political and moral leadership, judges ended institutional complacency towards the morally problematic settlement of 1983. Benefitting from the support of well-organised human rights and victims groups, the courts provoked the elective institutions and the society at large to reflect on the internal contradictions of their incomplete democracy. In response to the courts’ challenge, the
legislature and the highest court of the land nullified the abhorrent laws that had protected violators for many long, painful years. In this way, the Argentinean democracy came one step closer to a social reality that corresponded to the guiding principles of equal concern and respect for all citizens. The corrective force of victims and their family’s resentment and indignation made its contribution to the cause of democracy and continues to do so today in response to injustices that emerged long after the transition.

To conclude, the courts reviewing transitional justice bills examined here sought to communicate the demands of the normative integrity of democratic principles, while they themselves engaged in a learning process, as they advanced from one case to another, from one law to the next. This learning process took the form of a continuous dialogue with the proponents of the bills, their detractors, the other branches of government, the international legal community, and the wider society. As the case studies show, some have had a better, more complex understanding of the elements that entered their judgment and formulated clearer messages as to what democracy allows its citizens to do in the name of their violated sense of justice.

The analysis of these cases strengthens the idea that successfully delivering the right decision from a democratic point of view implies affirming democratic principles and challenging individuals to reflect on the kind of actions through which they ought to seek vindication. Different courts will do this differently, depending on the variables constraining and enabling their judgment. Their common purpose, however, remains the preservation and reproduction of democracy as a normative, institutional, and emotional-cultural order. Due to the myriad of variables that may affect the level of effectiveness of the court’s message, the impact it can actually have on the public is almost impossible to measure; however, the quality of the message can still be evaluated in terms of its exemplarity, its simultaneous affirmation and communication of the constraints that equal concern for all creates for victims and victimisers,
bystanders and beneficiaries of violence and abuse. This chapter has showcased both more and less inspiring attempts by the judiciary to engage with the complex emotional environment of their work in transition.
Chapter VI: 
Enabling Emotional Responsibility II: 
Criminal Trials in Democratic Transitions

It is comforting to watch the trials afterwards. After the bombs and the machetes. After the war of brother against brother and neighbour against neighbour. After the torn bodies and the burnt out villages. After the faces of grief and the faces of those who are so beyond grief they cannot speak and they cannot cry. After the children blown up or hacked to death. After the rubble and the fires. After all of this and too much more, so much more than anybody should be expected to witness, let alone live, yes, it is comforting to hear about, see from time to time, the trial of the man, some of the men, held responsible for any one of these outrages against humanity.

Comforting to watch the accusations, the evidence, the witnesses. Justice is being done, punishment will be meted out, a balance has been redressed to a universe gone mad.

I am one of those who has been consoled and moved by those exemplarity rituals of the law during which violators of human rights are forced to accept and obey the rules, the very civilised behaviour, they have so pitilessly flouted. I have been among those who proclaim how urgent and necessary such proceedings are for the well-being of our wounded humanity. Important for the victims, instructive for the victimisers, healthy for the community that was damaged, and deeply satisfying for those who watched from far away and could do nothing to stop the horror.

(Ariel Dorfman, My Neighbor, My Enemy)

The previous two chapters have marked the first step in my attempt to deal with the second programmatic question of this dissertation, that of distributing transitional justice. They offered some insight into what it means to say that courts can contribute to the cause of democratisation by reviewing bills meant to regulate the distribution of corrective measures. It is now time to turn to the other venue through which the non-elective judicial branch can further the cause of democratisation while distributing transitional justice: criminal trials of perpetrators. This chapter and the next will provide a theoretical framework for analysing penal law’s potential to contribute to affective socialisation. A series of illustrative cases that can be situated on a spectrum ranging from democratically appropriate to catastrophic engagements with emotions will testify to the institutional need to seriously engage moral hatreds.
There is a large body of research on criminal trials of abusers within the transitional justice literature. Arguments for and against the use of trials as a distributive alternative to a TRC have been broadly circulated in the Truth v. Justice debate.\(^1\) In the 1990s, the divisiveness of trials was opposed to the reconciliation potential of pseudo-legal fora such as truth commissions. Once the dilemma between truth-telling and justice mechanisms had been overcome with the formulation of the “division of labour” thesis, scholars refined their analysis of what it is that criminal trials can contribute to democracy, in spite of their limitations.\(^2\) The traditional purposes of criminal law, deterrence and retribution, were supplemented with—and sometimes even replaced by—other goals: raising legal awareness by institutionalising and moderating the desire for revenge,\(^3\) protecting democratic values,\(^4\) transforming the collective consciousness of a people,\(^5\) sending the message that impunity had to give way to accountability,\(^6\) giving victims a sense of security and satisfaction,\(^7\) re-establishing the credibility of the judiciary at home and abroad,\(^8\) and shaping memory and processes of remembering.\(^9\) The didactic dimension of trials also received special attention. Whether contributing to the construction of a founding narrative,\(^10\) encouraging respect for the rule of law\(^11\) or cultivating of democratic solidarity,\(^12\) trials have been proposed as important opportunities for legal educators.

It is within this more particular body of literature that I would like to locate my contribution. This chapter will try to refine the understanding of these trials’ pedagogy by identifying an additional dimension: the potential for exemplary decisions to constructively

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1. See the discussion in Chapter II of this dissertation.
2. For a sober analysis of the limits of trials of oppressors see Minow, *Between Vengeance and Forgiveness*.
3. See Bass, *Stay the Hand of Vengeance*.
4. See Nino, *Radical Evil*.
engage addressees’ sense of justice. In order to position my arguments, I shall analyse, in turn, the pedagogical functions that Judith Shklar, Lawrence Douglas, and Mark Osiel ascribe to criminal trials in the aftermath of atrocity and try to supplement their accounts with yet another layer of complexity. I have chosen their contributions as a starting point for my analysis because they all recognise, to some extent, the educational merits of such proceedings. Although I build on their work, I argue that there are two limits from which their accounts suffer, which I examine in turn. First, I shall critically engage with the way they conceptualise the relationship between pedagogy and legality in order to propose a theoretical solution to the assumed tension between these two ideas. I argue that legality need not be sacrificed for the sake of pedagogy, that criminal trials oriented by the ideal of equal respect for both victims and perpetrators will aim to publicly affirm and reproduce the normative integrity of democracy. Only principled responses to oppression can have pedagogical effects beneficial for democracy. Second, this literature does not elaborate on who or what it is that trials are supposed to educate, thus failing to do justice to the entire range of possible targets of legal pedagogy. My account will distinguish between direct and indirect audiences and explain how exemplary judgments can contribute to the political and emotional socialisation of democratic citizens. By virtue of a concern with principled consistency, fair decisions can inspire the development of an inclusive sense of justice directly for the victims and victimisers, and indirectly within the wider citizenry. Conducting trials and delivering legal decisions in a way that respects procedural norms and shows equal concern to all parties has the potential to contribute to the development of a democratic emotional culture. While the precise educational impact of such decisions is difficult to measure accurately due to the complexity of variables defining each context, courts can still strive to make their own contribution to the building of a public culture supportive of democratic institutions. Through their decisions, magistrates can try to provoke outraged publics to reflect on the judgments underlying their negative affective reactions.
I shall present three pedagogical perspectives on transitional criminal trials that I situate on a continuum whose extremes are occupied, at one end, by positions conceiving of the relationship between legality and pedagogy as a zero-sum game and, at the other, by authors who claim that it is inadmissible to make any trade-offs between legality and legal pedagogy. When talking about legality, I am referring specifically to the procedural rights of defendants as the legal expression of equal concern. It is these procedural rights that are usually in danger of being sacrificed for the sake of teaching lessons through the law. Preserving these safeguards implicitly also preserves the normative integrity of democracy. Section VI.1 will engage Lawrence Douglas’s "narrative jurisprudence" approach to criminal trials in order to see what his narrative account of law in transition has to offer for our project. Next, I shall address Judith Shklar’s critique of legalism’s limited, instrumental value in the wake of violence (Section VI.2). Last but not least, I will discuss Mark Osiel’s theory of the relationship between criminal trials of victimisers and the development of “discursive solidarity” within the polity (Section VI.3). This critical engagement with these three authors will lead the way for my own contribution to theorising the relationship between criminal law and democratic transitions (Section VI.4). My overall purpose in this chapter is to enrich the existing literature on the educational function of penal law by proposing a further dimension, that of emotional socialisation, which will clear the way for new ways of thinking about criminal trials in the wake of violence and oppression.

VI.1 Legal Didactics: Doing Justice to the Representation of Atrocity

Lawrence Douglas’s book *The Memory of Judgment: Making Law and History in the Trial of the Holocaust* looks at the didactical function of the Holocaust trials. Douglas’s main concern is with the didactic function of representing the event of the Holocaust in legal form. The questions around which his book is built are: “Did the trials do justice to the unprecedented crimes of the Holocaust? Did they present a responsible portrait of a horrific subject? To answer this question,
one must examine how a specialised legal instrument, the criminal trial, was used as a tool of collective pedagogy and as a salve to traumatic history.”

Douglas’s interest lies in the pedagogy of truth, of revealing sobering historical facts through the medium of penal law. From the point of view of narrative jurisprudence—the view of jurisprudence he embraces—a complex understanding of law is necessary in order to grasp how criminal trials function as rituals that both produce and suppress various stories in the aftermath of unprecedented atrocities. In order to support this theoretical point, the author examines the didactic use of evidence at Nuremberg and victim testimony in the Eichmann trial. His main goal is to explain how these trials struggled to “show the world the facts of astonishing crimes and to demonstrate the power of law to reintroduce order in a space evacuated of legal and moral sense.”

Douglas’s analysis of Nuremberg focuses on the use of film, documentary, and material evidence for the purposes of writing the history of an unprecedented atrocity. Due to a strong concern with the legitimacy of the proceedings, the court’s actors opted for rigorous proceduralism. Framing charges in line with existing international documents, avoiding victims’ testimonies, and replacing them with documentaries were strategies meant to fend off potential accusations of victors’ justice. Because of these choices, the trial became a tedious spectacle, marked only by sporadic dramatic episodes. Douglas claims that the pedagogical effect Nuremberg could have had was thus sacrificed for the sake of procedural rigour. He writes, “Yet in spite of the prosecution’s redoubtable efforts to document the Nazis’ campaign to exterminate the Jews of Europe, these pedagogic efforts were importantly compromised by the legal grid in

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14 He also dedicates an ample analysis to the failures of law to police the memory of the Holocaust in the Demjanjuk and Zundel trials. Demjanjuk was the first criminal (camp guard) to be judged in Israel after the Eichmann trial. His death sentence was overturned in 1993 by the Israeli Supreme Court on procedural grounds. Currently, he is appealing an order of extradition from the US to Germany, where he can be tried. Zundel was a Holocaust denier tried in Canada in 1985 and then again in 1988. The law under which Zundel was tried was later struck down as unconstitutional and he was a free man. For the purpose of this dissertation, I shall focus on the author's analysis of the Nuremberg and Eichmann proceedings.
which unprecedented atrocities were framed, contributing to the serious shortcomings in the historical understanding of the Holocaust that emerged from Nuremberg.”

Eichmann’s trial, on the other hand, did better in terms of representing the event of the Holocaust. The prosecution’s efforts to tell the tale of heroic Jewish resistance to the young Israeli generation took the form of rather unconstrained testimonies by numerous victims. A lot of attention was paid to survivors and their feelings in an attempt to balance the disproportionate procedural protections for the defendant. Historical instruction and the normative reconstruction of the nation were prosecutor Hausner’s main objectives. As these objectives were pursued through the medium of the penal trial, Douglas claims that the proceedings successfully stretched the law in order to understand and commemorate traumatic history. In a very short treatment of the conception of law he embraces, Douglas writes, “…for rule-based formalism, questions of narrative are extralegal, while narrative jurisprudence, by insisting that rules fail to exhaust the universe of what counts as law, insists on a more capacious understanding of the legal.”

According to Douglas, making sense of the didactic contribution of the Eichmann trial requires that we incorporate what would otherwise be considered extralegal variables into a more flexible perspective on the law’s functions. From the point of view of narrative jurisprudence, Eichmann’s trial managed to present an accurate and disturbing story only by virtue of transforming the role that law can play in the wake of violence: “… the Eichmann trial furnished a complete and exceptionally moving digest of the Nazis’ campaign to exterminate European Jewry. Like Nuremberg, the trial uncovered documents and material that have been the source of important scholarly study. Yet in contrast to Nuremberg—and largely as a result of the prosecution’s tenacious rebellion against the court’s formalism—the trial was able to ‘reach the hearts of men’.”

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Legality was not entirely forsaken, however, as the prosecution’s efforts were tempered by vigilant judges. The court shared Nuremberg’s concerns with the legitimacy of proceedings. Given that the trial was being held on Israeli territory on the basis of a law passed only in 1950 and that the defendant had been seized through a move that violated the territorial principle of jurisdiction, the Court struggled to preserve legality by providing a counterweight to the accusers’ strategies. Thus, they made a sustained effort to filter testimonies through the strainer of relevance:

The court’s and the prosecution’s notion of legitimacy, however, differed importantly, and nowhere was this disparity more visible than in the clash that erupted over the relevance and meaning of the testimony of survivors of the Holocaust. The court, as we have seen, sought to shield itself from the challenge of traumatic history by rigorously defending legal form. The prosecution, by contrast, saw the trial not simply as a means for adjudging the man in the glass booth, but as a complex drama meant to demonstrate the law’s power to support a project of normative reconstruction. By comprehending the act of survival as legally relevant and by hearing the words of the survivors as personal petitions for legal justice, the trial was treated as the fulfilment of a teleology of bearing witness.19

Given the prosecution’s nation-building project, Hausner did not select testimonies solely with a view to demonstrating culpability. Consequently, he put the judges in the uncomfortable position of having to police the survivors’ testimony. In Douglas’s words, “(I)t was, for the court, a double bind, as legal integrity came at the cost of insulting the memory of the dead and the experience of survivors, while fully accommodating the narrative impulse would have distorted the conventional legal form upon which the court believed its legitimacy rested.”20

Douglas sees the court’s intervening to limit witnesses’ testimonies to what was relevant for Eichmann’s particular case as a necessary measure for securing procedural legitimacy for the proceedings. By way of supplementing Douglas’s account, I would like to argue that while Hausner did his best to teach history and redeem the victims in front of a new generation of

Israeli citizens, the court was busy affirming the limits that equal respect places on the narrative uses of the law. More specifically, while the prosecution focused on doing justice to the event of the Holocaust, the judges could be seen as trying to do justice to individuals by including under the scope of the sense of justice not only the survivors, but also a defendant whose culpability had otherwise never been in doubt. Moral outrage in the wake of the Holocaust could not be denied voice, yet it had to target a particular victimiser responsible for individuals’ suffering. Selecting testimonies that had nothing to do with Eichmann’s contribution to the Holocaust violated the principle of equal concern for all persons. Not all stories and not all feelings, no matter how legitimate they may be, could have had standing in front of the court. The criterion of relevance places a limit on what can be admitted in a particular criminal trial. A message about the value of equal respect for everyone, irrespective of their life trajectories, had to be communicated to the Israeli nation and to the world community. This message certainly helped with the legitimacy of the proceedings. It also served another kind of pedagogy, a pedagogy Douglas did not take into consideration precisely because of the way in which he opposed legality to historical narrative building. The judges’ disqualifying unrelated stories was a way of teaching a lesson about how democracies deal with victimisers. It could also help explain the court’s filtering of testimonies and “policing” of the prosecution's narrative efforts.

Therefore, even if we agreed with Douglas that rules do not exhaust the realm of law, we need not agree that historical lessons exhaust the realm of legal pedagogy. From his analysis of the Nuremberg and Eichmann proceedings, it is clear that he does not see legality as serving the cause of pedagogy. For him, pedagogy is concerned solely with historical truth and national redemption narratives. By adopting this position, Douglas remains blind to the lessons of procedural justice and their potential impact on the culture of respect for all.

This brings us to this chapter’s second dimension of analysis, the subjects of legal didactics. While Douglas clearly appreciates the prosecutor’s efforts to offer young Israelis a
substantive narrative and some nation-building myths, he does not see the ways in which procedural rigour could have educated the political dispositions of Israeli citizens, victims, and witnesses, old and young. There is no room in his account for the judges’ pedagogy targeting the development of democratic attitudes of equal respect and concern for all in the wider society. When he writes that the testimonies in Jerusalem “moved the hearts of man,” he does not refer to an education of the attitudes and sentiments of the public, but to the spectators’ affective reactions at learning about the extent and nature of atrocity. One could say that Douglas was also concerned with the education of attitudes and sentiments, those of attachment to a certain kind of national identity that Hausner tried to construct.21 One could also claim, however, that the court’s effort to ensure that the defendant would not be easily instrumentalised was another way of talking to “the hearts of men”: legality was meant to show the limits of what can and should be done in the name of otherwise legitimate moral outrage against the defendant. Given the immensity of the harm in question, the moral debates surrounding the procedures, and the prosecution’s inflammatory orations, it would be difficult to believe that the judges actually had an important pedagogical influence over “the hearts of men,” but we cannot overlook the fact that in exercising historical reflective judgement, the court opted for a defence of legality as the strategy best suited for publicly and pedagogically communicating the limits democracy places on public emotional expressions.

Towards the end of his analysis of the Eichmann trial Douglas writes, “This is not to suggest that the court’s defence of formalism was misplaced; on the contrary, it was only because of the struggle between the court and the prosecution that the trial could succeed both as law formally conceived and as a didactic event.”22 These concluding statements clearly indicate that there is no room for pedagogical legality for Douglas; legality and pedagogy must be traded-

21 I thank Simone Chambers for this extremely insightful observation.
off against one another. The Nuremberg trial’s and Eichmann court’s reflective historical judgment that procedural rigour had to be preserved did not constitute a didactical move, but only a legitimising strategy, on his account. I argue, however, that the didactical function of law gains in complexity by exploring not only the substantive, historical messages that constitute foundational myths for the trial’s audiences, but also the kind of political and emotional socialisation that legality can contribute to. As we shall see exemplified in the next chapter, it is this subtler, yet crucial contribution that legal pedagogy can bring to the development of democratic attitudes.

VI.2 Legalism’s Instrumental Role

Having examined Douglas’s account of the relationship between legality and didactics, it is time now to take one more step towards the centre of the spectrum I laid out earlier. Judith Shklar’s classic book *Legalism: Law, Morals, and Political Trials* acknowledges legality’s pedagogical merits, but only to a certain extent. Her main aim is to use political trials, both domestic and international, in order to reveal the severe shortcomings of legalistic ideologies.

Legalism is at the same time an ethical attitude, a code of conduct, a social ethos, and a political ideology, according to Shklar. Its main presuppositions are, first, that moral conduct is a matter of rule following and, second, that moral relationships consist of duties and rights determined by rules. Two dichotomies are cherished by legalism’s proponents—between law and morals and between law and politics.23 These two dichotomies, Shklar thinks make legalism inappropriate for an age of diversity.

With regards to the first dichotomy—between law and morals—legalism, in both its positivist and Natural Law versions, cannot account for the role of law within pluralistic social environments. On the one hand, positivism artificially separates law from morals and treats each

as an isolated block. Shklar’s main point is that this stark opposition between the two is misleading. A more accurate picture of the relationship between law and morals emerges when we recognise that some societies endorse legalistic values to a greater extent than others.\textsuperscript{24} Natural Law legalism, on the other hand, presupposes a strong normative agreement, unattainable under the current conditions of diversity. Its emphasis on an ahistorical moral certainty can allow for repression of dissenters, something unacceptable within a pluralistic democratic society.

Nowhere are legalism’s limits more obvious than in the handling of political criminal trials.\textsuperscript{25} Legalism’s second dogmatic separation, that between law and politics, makes it incapable of recognising law’s great creative force and the kind of social functions it could perform at all times, but especially during radical transformative moments. Ignorance of, or disinterest in, law’s social consequences obscures this position. Shklar writes: “There is no situation in which these ideological habits of legalism are more openly confronted by competing policies than in the course of political trials. Both in accepting and in rejecting political trials legalism strives valiantly to distinguish itself from “mere” politics, even such politics as might well serve the future development of legal institutions and values.

Instead of emphasising the insulation of law from “dirty” politics, it would be better to ask, What sort of politics can law maintain and reflect? Trials can serve all sorts of politics, liberal and illiberal, legalistic or non-legalistic: “The answer again must be that there is politics and politics. It is the politics of persecution which political trials serve that is the real horror, not the fact that the courts are used to give it effect. There are occasions when political trials may actually serve liberal ends, where they promote legalistic values in such a way as to contribute to

\textsuperscript{24} Shklar, \textit{Legalism}, p. 62.
\textsuperscript{25} Shklar, \textit{Legalism}, p. 112.
constitutional politics and to a decent legal system… It is the quality of the politics pursued in them that distinguishes one political trial from another.”  

Once we acknowledge that trials in the aftermath of large scale violence cannot escape politics, we can also understand the need to consider the future social goals that law can achieve. Neither Natural Law theory nor positivism can help in this sense. Shklar uses the Tokyo and the Nuremberg trials as examples to show how both variations of legalism have failed to achieve the social goods they could have achieved for the Japanese and German nations.

The Natural Law arguments introduced in the Tokyo trials did nothing but outrage Asians with their “narrowness, ethical dogmatism and historical emptiness of the ideology of agreement.” Such arguments did not make any sense outside the Western liberal environment in which they had historically developed. As for positivism, had the prosecutors at Nuremberg understood the educational impact that the trial could have had on the immediate future of Germany, they would not have based their case on the legal fiction of an existing international system of law and would not have gone to such lengths to use domestic categories, clearly misrepresenting the situation at hand. Such rigid strategies undermined the positive contribution that legalism could have made to political change in Germany, if only its constraints had been relaxed. Temporally-speaking, the trial’s actors were more concerned with a vaguely defined “grand” future of the “Law,” rather than the German people’s immediate future. The law’s potential social role was thus severely diminished by legalism’s insistence on a clear separation between law and politics.

To the extent that Nuremberg’s obsession with formalism had any impact on the democratic socialisation of the German people, it was on Germany’s professional and

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27 Shklar also analyses domestic political trials in the US. Given the focus of this dissertation, I shall mainly look into her treatment of the trials that followed the Second World War.
29 She is referring to their use of the crime of “aggressive war” instead of the category of “crimes against humanity.”
bureaucratic classes, already educated within a legalist tradition: “Certainly total re-education of millions was not feasible. The Trial, addressing itself to the political and legal elite, gave that elite a demonstration of the meaning and value of legalistic politics, not only by offering a decent model of a trial, a great legalistic drama, but by presenting evidence in a way that the political elite could not shrug off. It could and did illustrate what happens when Nazi Ideology replaces legalism.”

The impact on the wider sectors of the German population, if any, was very limited, according to Shklar. Prior education into legalistic virtues conditioned receptivity to the lessons of Nuremberg. Had legalistic concerns with precedent been relaxed, had “crimes against humanity” been used as a prosecutorial category, the truth of the novelty of Nazi crimes would have resonated with the broader German population, claims Shklar. The legalist’s safe use of “crimes of aggressive war” did not transmit any didactic message and, what is more, opened the way for tu quoque arguments to be raised against the allies.

Shklar’s understanding of the didactic function of trials can thus be summarised as follows: to the extent that a political trial respects the rigours of legalism, it can teach legalist virtues, but only to those who have already been socialised to respect such virtues, i.e., the legal and political classes. In order to socialise the wider public for a future of decency, procedural constraints must be loosened. Since the only justificatory goal of the great trials was a broader pedagogical reach, strict legality should have been sacrificed.

This brings me to my first objection to Shklar’s conceptualisation of the relationship between legality and pedagogy. She seems to believe that success in teaching historical lessons depends on the audience’s familiarity with the ways in which the lessons are taught. Like Douglas, she purges mere legality of any pedagogical function, but, unlike him, she sees

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30 Shklar, Legalism, p. 169.
31 Shklar, Legalism, p. 156.
instrumental value in its capacity to communicate historical truths to certain sections of the public. The political and legal classes of Germany learnt the lessons about the horror of the Holocaust because the stories were told in a language they could understand. This seems to be the only merit a concern with strict rules of evidence and legal determination can have in terms of contributing to the political socialisation of a trial’s audience, in her view.

In response to Shklar, I argue that it was liberal democratic politics that lay behind Nuremberg’s preoccupation with precedent and reliance on existing legal documents in the international arena. The court’s concern with its own legitimacy, with the credibility of criminal proceedings, and with communicating that even the worst perpetrators of atrocity must be given voice and representation, was meant to send a didactic message to the world community. Liberal democratic politics requires that only those judicial decisions that display equal respect for all, including both victimisers and victims, are permissible. Only by respecting principled constraints can they also aspire to have an educational influence on the attitudes of their addressees. The very fact that procedurally appropriate proceedings were initiated instead of summary executions was meant to affirm that democracies deal differently with the defeated. In this sense, the world community was the target of a pedagogical effort to show the limits that democratic justice places even on the victors in war.  

As for legalists’ ignorance of social and political implications, to claim that the prosecution and judges at Nuremberg were blind to the practical ramifications of their choices is to misrepresent their self-understanding as actors within an unprecedented set of legal

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32 Bass makes a similar point when he writes that is it liberal nations that are particularly concerned with the organization of trials in the wake of violence and abuse. Bass, *Stay the Hand of Justice*. 

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proceedings.\textsuperscript{33} Aware of the impact of such proceedings on world history, the actors at Nuremberg reflectively judged that the reproduction and affirmation of liberal democratic equality required excessive attention to procedural rigour.

Shklar sometimes hints that there is something commendable about legalism’s value for a polity. She seems to believe that there is a relationship between legalism and the level of “decency” of a society\textsuperscript{34} and between legalism and personal freedom.\textsuperscript{35} She also writes, though in vague terms, that legalism is compatible with the worst oppressive politics, though not “in its most extreme form.”\textsuperscript{36} These statements are left under-theorised, however. What is missing is an articulation of the fact that legalism’s “obsession” with procedural protection for both the defendant and the victims is the reflection of a guiding principle of legal and political judgment within liberal democracies: the principle of equal concern and respect for all. And though excesses of proceduralism sometimes lead to absurd results, courts dealing with massive violence and oppression prefer to err on the side of being too rigid for fear of failing to show discontinuity between liberal democratic politics and the abusive practices of the defendants standing trial.

The second point I want to raise in response to Shklar’s account refers to her understanding of the kind of impact trials can have on broader audiences. When talking about society at large as addressees of the court, Shklar sees the trial’s influence simply in terms of preventing a generalised bloodbath. The proceedings against the Nazi war criminals removed justice from private forces and placed it in the hands of the law:

The Trial fulfilled an immediate function which is both the most ancient and the most compelling purpose of all criminal justice. It replaced private, uncontrolled vengeance with a measured

\textsuperscript{33} For evidence of the political concerns behind the framing of the International Tribunal’s Charter see, for example, Douglas, \textit{The Memory of Judgment}, esp. Chapter II.
\textsuperscript{34} Shklar, \textit{Legalism}, p. 145.
\textsuperscript{35} Shklar, \textit{Legalism}, p. 220.
\textsuperscript{36} Shklar, \textit{Legalism}, p. 209. Does Shklar want to say, with Fuller, that there is an inner morality of the law? The claim remains unsubstantiated.
process of fixing guilt in each case, and taking the power to punish out of the hands of those directly injured… The only consequence of officially doing nothing would have been to invite a perfect bloodbath, with all its dynamic possibilities for anarchy and conflict on an already disoriented continent… The political function of criminal law is here shown to be clearly not just a matter of protecting society against its deviant members, but of protecting all the members of society against themselves, against the corrosive effects of their own passion for vengeance.\textsuperscript{37}

The terms in which Shklar describes this accomplishment of the Nuremberg prosecution reveals that she does not see the prudential avoidance of unleashed vengeance as part of the pedagogical function of the trials. She sees the trial as a “containment” of vengeance, a suppression of “passions.” There is nothing to be recuperated from these “passions”; they had to be done away with in order to prevent bloodshed. While Shklar’s claim that trials prevent further violence is correct, her conception of vindictive passions misrepresents the circumstances of justice in the wake of atrocity and oppression and leads to a reductionist understanding of the trial’s resonance.

In view of the theoretical contribution I introduced in the previous chapters, I would argue that the trial sought to prevent further violence by sending a message about what can be justifiably done in the name of resentment and indignation. Shklar’s treatment of the passions betrays a non-cognitivist stance\textsuperscript{38} that does not do justice to the kind of affective responses that emerge in the aftermath of atrocity. What the court tried to communicate to European societies and their decision-makers was that the lynching and extra-legal executions of Nazi leaders\textsuperscript{39} and suspected collaborators and the shearing of women after the liberation\textsuperscript{40} were not appropriate responses from the point of view of liberal-democratic justice. While negative emotional reactions to the suffering and frustrations associated with large scale violence were more than

\textsuperscript{37} Shklar, \textit{Legalism}, p. 158.
\textsuperscript{38} As we saw in Chapter III, non-cognitivists reduce emotional expression to physiological changes and do not recognize any evaluative element in the morphology of affect.
\textsuperscript{39} Churchill and Stalin famously supported swift executions—and not trials—for the Nazi leadership.
\textsuperscript{40} Virgili, \textit{Shorn Women}. 
legitimate, when left unfiltered institutionally, they had led to misdirected revenge. Shklar’s conceptualisation of the role of criminal law in the containment and suppression of vindictive passions prevents her from seeing the more subtle pedagogical implications of Nuremberg’s strict procedural constraints.

To conclude, in contrast to Douglas, Shklar admits that there is a beneficial role that legalism could play in the socialisation of some categories of citizens; however, she understands this role merely as instrumental to the transmission of substantive lessons about history. Against this perspective, I argued that we need not reduce the role of procedural rigour to an instrumental one. Secondly, against her limited understanding of the trial’s impact on wider publics, I explained why the scope of legal pedagogy needs to be expanded in order to provide a more complex image of the circumstances of justice in the wake of massive violence.

Having engaged Shklar’s conception of post-conflict pedagogical justice, I shall now move further along the spectrum and turn to Mark Osiel’s account of the relationship between legal didactics and social solidarity in the wake of atrocity and oppression.

VI.3 Criminal Trials and the Pedagogy of Procedure: Towards Democratic Solidarity

Mark Osiel dedicates his book *Mass Atrocity, Collective Memory and the Law* to offering an alternative to the Durkheimian account of the relationship between criminal law and social solidarity in the aftermath of “administrative atrocity.” The term “administrative atrocity” refers to “… large scale violation of basic human rights to life and liberty by the central state in a systematic and organised fashion, often against its own citizens, generally in a climate of war—civil or international, real or imagined.”41 State-sponsored atrocity poses specific problems for the new elites, working without the support of a democratic political culture. It is Osiel’s contention that criminal trials of perpetrators can contribute to the beneficial development of a

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modicum of social trust and solidarity within deeply divided societies. In contrast to Durkheim’s account of legal proceedings conceived as drawing on a societal normative consensus and solidarity, 42 Osiel proposes a thin understanding of solidarity, one reduced to an endorsement of equal respect for different points of view. The great number of competing versions of the past that usually characterise post-oppression polities make Durkheim’s account implausible for such contexts. Osiel argues that by stimulating public discussion about the meaning of violence, however, criminal trials can promote liberal democratic virtues: toleration, mutual respect, and habits of reflection. 43 Civility in the management of conflict can be encouraged by means of the rules of criminal procedure and responsibility in the legal profession. These rules impose on participants a minimal agreement on how to disagree. The actual experience of being part of adversarial proceedings would also contribute to the development of “discursive solidarity,” as would a certain level of self-conscious dramaturgy by prosecutors and judges: “Legal proceedings produce a different kind of solidarity, founded on a different basis. The proceedings are founded on civil dissensus. They produce the kind of solidarity embodied in the increasingly respectful way that citizens can come to acknowledge the differing views of their fellows.” 44

Unlike Douglas and Shklar, Osiel argues that legality need not be sacrificed for the sake of pedagogy. It is only by conducting trials in a way that both provides a public spectacle and preserves legality that courts can help shape the political culture of a young democracy. The shattering of a widely shared assumption in the literature of a tension between legality and pedagogy is one of Osiel’s main objectives. This assumed tension is the first of six potential theoretical and practical obstacles he seeks to overcome in his book. A fuller image of his prescriptions emerges from this critical engagement with the sceptics’ counter-arguments. This

43 Osiel, Mass Atrocity, p. 9.
44 Osiel, Mass Atrocity, pp. 22–23.
section will follow Osiel in his constructive presentation and then evaluate his account through the lens of the theoretical framework this dissertation strives to offer.

As mentioned above, the first puzzle Osiel tries to solve is a hypothesised tension between the liberal concern with legality and the pedagogy of criminal trials. The author claims that the solution to this problem depends on how we conceive of the kinds of lessons that are taught by a trial. There need not be a tension between legality and pedagogy because “(L)iberal show-trials are ones self-consciously designed to show the merits of liberal morality and to do so in ways consistent with its very requirements,”45 and “…a liberal state may employ a 'show trial' for administrative massacre to display the horrific consequences of the illiberal vices and so to foster among its citizens the liberal virtues (including respect for basic human rights, deliberative capacity and toleration.)”46

It is by cultivating and rewarding the virtues of mutual respect, self-reflection, and toleration that trials can contribute to normative and social change. Cultivating a disposition to respect the moral rights of others is the main objective of institutional political socialisation—and this requires that legality not be sacrificed, as it is the very norms of criminal procedure that can inspire a respect for civility in a trial’s audience. Only by observing the rights of the defendants and victims in an exemplary fashion can such proceedings resonate with outraged, mobilised societies.

The second counter-argument with which Osiel engages states that the pedagogical use of trials is likely to distort history. Osiel acknowledges that one could conceive of such proceedings as caught between too perspectives: one that is too narrow, that of a simplifying formalism, and one that is too wide, giving in too much to historical narrative-building to the detriment of legality. These risks should not lead us to discard pedagogy as a goal of transitional trials,

45 Osiel, Mass Atrocity, p. 65. Emphasis added.
46 Osiel, Mass Atrocity, p. 67.
however—quite the contrary, according to Osiel. Law should use the stories that come before it to persuade its audience of the merits of civility and respectful attitudes. Living up to the principle of equal respect also requires that this be done without silencing alternative narratives: “On this account, courts may legitimately tailor the stories they tell in order to persuade sceptical publics of the merits of liberal morality. But they may not exclude incompatible stories from public hearing. Prosecutors and judges can strive to make the liberal story about these events more persuasive than its alternatives, yet cannot suppress them. In fact, the discursive view requires effective public presentation of counter-narratives in order to have any chance of refuting them, were they inconsistent with the liberal one.”

More concretely, Osiel envisages criminal trials in the aftermath of administrative massacre being conducted as a kind of theatre of ideas. While the prosecution will evidently choose the style of an accusatory moral drama and the defence, that of a tragedy, he thinks judges should encourage competition between alternative narratives seeking to persuade the audience. It is his optimistic view that the superiority of a morality of equal respect will become apparent when contrasted with alternative views.

The third challenge to the discursive solidarity model points to another dilemma associated with the didactic use of law: the temptation of too much indulgence in the past on the one hand, and too little engagement with the past, on the other. The discursive solidarity conception of criminal trials has an easy way out of this dilemma. First, judges and prosecutors should be honest about the limits of the law in accounting for historical violence. Second, they should make sure victims do not have an exclusive right to speak. Victims should not have a monopoly over the past. A society-wide debate over what the past means would prevent the slide into an obsessive backward looking. The courts’ role is precisely to stimulate a discussion about how prominently the past should figure in the polity’s self-understanding.

47 Osiel, Mass Atrocity, p. 141.
The fourth question Osiel’s conception has to answer is whether criminal trials can help the cause of national reconciliation. His position is that trials can accomplish a different goal than national reconciliation: by forcing unpleasant topics onto the public agenda, trials can induce moral self-scrutiny among the citizens and the emergent elite, even if they fail to do this for perpetrators and their sympathisers.48 The question the legal profession must ask itself is not “How can trials achieve reconciliation?” but “How can the criminal law be most effectively deployed, through the dramaturgical choices of prosecutors and judges to foster national self-searching of this sort—to stimulate the deliberative criticism of a society’s political culture and institutions by its members?”49

Fifth, Osiel feels he needs to account for how law can contribute deliberately to norm change: “The law’s proper role will be to stimulate a candid discussion of just what these shared norms are, or should be. Solidarity emerges both insofar as agreement is reached in this regard, and also—insofar as it is not—through the very process of discursive engagement over the question. A memorable courtroom telling of the tale of recent horrors can be an effective means to both these ends.”50 The success of the deliberate efforts to stimulate public debate that observes the norm of equal respect is contingent on a multitude of variables; however, some strategic decisions meant to increase the proceedings’ didactical value have to be taken into consideration by courts attempting to influence social attitudes.

The last potential objection Osiel takes up is the following: granted that the deliberate education of civic attitudes is possible, must the judges’ intentions be kept away from public view in order for such strategies to be successful? To this question the author gives a definite negative answer. While there is a lot of room for prosecutorial discretion in choosing didactical

48 Osiel, Mass Atrocity, p. 175.
49 Osiel, Mass Atrocity, p. 176.
elements that do not contravene legal integrity, prosecutors should strive to justify publicly every step they take.\textsuperscript{51}

So far, Osiel has not said much about how the spectacle of justice could be framed so as to provoke a lively debate within civil society. It is clear that law advances this purpose “by ventilating and addressing disagreement rather than concealing it.”\textsuperscript{52} But what exactly does that mean?

To cultivate memory in the aftermath of administrative massacre requires that courts treat easy cases as if they were hard ones. This is because legal concepts and doctrines will often have lost their normal connection to the underlying moral and political issues at stake. This means that judges must allow both prosecutors and defense counsel to paint with a broader brush (as they have demonstratively done, in any event), to widen the special and temporal frame of the courtroom storytelling in ways that allow litigants to flesh out their competing interpretations of recent history, and to argue these before an attentive public. Only in this way can the debate within the courtroom be made to resonate with the public debate beyond the courthouse walls.\textsuperscript{53}

This will sometimes mean that the prosecution’s position will be weakened; however, Osiel thinks that this will be compensated for by the increased credibility and legitimacy of the trial. While legality should not be sacrificed for the sake of pedagogy, a certain kind of rigid positivistic formalism is disqualified as an approach to criminal proceedings in the aftermath of administrative atrocity: “By simply applying ‘the rules laid down,’ without extended discussion and defence of the principles on which they rest, formalist approaches to judicial process shut off the very discussion that is most needed, when judging the conduct of those who do not share the law’s assumptions. Formalist judging assumes widespread societal agreement on fundamentals already exists, when agreement at such times is conspicuously absent, and when steps towards its

\textsuperscript{51} It seems that here Osiel conflates the role of judges with that of prosecutors. This can probably be explained if he is thinking of civil law traditions where the judges take on the role of interrogator during trials. Alternatively, he might be thinking of the kind of prosecutorial setting of cases that would persuade judges to allow proceedings to continue.
\textsuperscript{52} Osiel, \textit{Mass Atrocity}, p. 283.
\textsuperscript{53} Osiel, \textit{Mass Atrocity}, p. 296.
construction—through reasoned debate and persuasion—are so imperative."54 Because societies in the wake of violent oppression are divided over the past, because attitudes of civil respect and concern for all are not present within such contexts, and because courts can contribute to cultivating a democratic political culture, a strict formalist approach cannot be the answer. Ample space in the courtroom should be given to explaining why it is that all stories need to be heard. Only in this way can courts fulfil their didactic function: “Only non-formalist conceptions of the judicial role, by encouraging litigants to examine the law’s underlying moral principles and social policies, allow courts some legitimate latitude to stimulate this broader process of public deliberation, or to initiate it where memory remains repressed. At such times, legal analysis can be confined within narrow, formalistic terms only at the cost of sacrificing all public persuasiveness and societal resonance.”55

This does not mean that courts will need to relax procedural protections or that some agents will be instrumentalised for the sake of the common good of developing deliberative attitudes. The principle of equal respect is what judges seek to teach the citizens of a young democracy. Violating this principle during the court's proceedings will not serve Osiel’s socialisation ambitions. What is needed, though, is more room for telling alternative stories about the past, in the hope that wider public debates will take their cue from the conversations taking place in court. “Slam-dunk” sentencing, even in cases where guilt is beyond doubt, will not achieve much by way of stimulating a culture of democratic civility. This is why Osiel thinks that attention to procedural correctness needs to be supplemented by strategies for initiating a public discussion about who “we, the people” are and want to be in the future.

Of the three approaches reviewed here, Osiel’s is best equipped to see both the more and less subtle ways in which transitional trials can serve the purpose of political socialisation. More

54 Osiel, Mass Atrocity, p. 298.
55 Osiel, Mass Atrocity, p. 300.
importantly, his account does not require sacrificing defendants’ procedural rights in the course of transmitting educational messages. On the contrary, the very nature of the educational message—the encouragement of reflective, dialogical attitudes within the citizenry, as opposed to the sanctioning of one particular version of the past—requires that procedural protections be in place. As institutional dictates of the principle of equal concern for all, procedural constraints ensure that all voices get representation. It is the most persuasive story that wins the day. The court need only ensure that no story gets silenced and the liberal democratic story will emerge victorious.

Osiel’s theorised purposes of legal pedagogy converge with the purposes I have put forth for transitional justice mechanisms. His support for the role that non-elective institutions can play in democratisation efforts falls in line with the main arguments of this dissertation. I find his account wanting, however, in terms of its take on the circumstances of justice in transition. More precisely, I find there is a lack of attention to the emotional circumstances of such trials. It should not be assumed that the parties involved in these trials, and its broader audience, will be naturally receptive to the lessons the court is preparing to teach. There is one more obstacle—the seventh—that Osiel needs to overcome, that is, the emotional mobilisation by victims and society at large against the former oppressors. Before it can hope to stimulate democratic respect, the judiciary must first face resentful victims and indignant societies. The last section of this chapter will build on Osiel’s work in providing an account of what trials can do to constructively engage negative public emotions so as to serve the cause of democratic principles.

VI.4 Educating Negative Emotions: Law’s Contribution to a Democratic Public Culture

While Osiel correctly characterises the social context within which transitional justice mechanisms function as one that is divided between alternative versions of the past, he does not
see that these divisions are especially deep because of the emotional mobilisation behind them. In this section I shall add an emotional dimension to the circumstances of penal transitional justice and thus take Osiel one step further in the attempt to develop a theory of criminal legal didactics for post-oppression contexts. Like judicial review decisions, exemplary criminal trials judgments can, by following the guidance of democratic principles, also help stretch a violated sense of justice to cover all members of the political community.

Criminal law theory has not been a stranger to theorising the role of emotion in legal decision-making. Evidently, of all branches of law, penal proceedings have received the most attention with respect to the role of affect in criminal motivation, jury decision-making, judges’ supposed neutrality, victims’ desire for revenge, or the justification of criminal acts. In a review of the “law and emotions” movement in legal studies, Terry Maroney identifies six approaches scholars have taken to the study of affect, theoretically and empirically. The first, “the emotion-centred approach,” focuses on one particular emotion and analyses how it is, or should be, reflected in the law. Second, an “emotional phenomenon approach” describes the mechanism behind the formation of an emotion and explores how it gets represented in the law. Third, “the emotion theory approach” examines how a given theory of emotion guides, or should guide, legal practice. Fourth, a “theory-of-law approach” focuses on the theories of emotion already embedded within a particular legal theory. Last, the “legal actor approach” looks at how a particular “legal actor’s performance of a legal practice is, could be or should be determined by emotion.”56 The critical point of Maroney’s typology is that a successful engagement with the issue of affect in penal law needs to combine all of these approaches:

Thus, academic inquiry into the intersection of law and emotion should (1) identify which emotion(s) it takes as its focus; (2) carefully distinguish between those emotions and any implicated emotion-driven mental processes or behaviours; (3) explore relevant and competing

theories of those emotions’ origins, purpose or functioning; (4) limit itself to a particular type of legal doctrine of legal determination; (5) expose any underlying theories of law on which the analysis rests; (6) and make clear which legal actors are implicated. While the respective weight given to each approach will vary according to the nature of the project, each choice, and those choices’ unique combination, ideally should be considered, explained, and, to the extent possible, justified.57

In what follows I shall try to build my account of emotional pedagogy through transitional trials around Maroney’s criteria for good academic engagement with the role of emotions in criminal law. This dissertation is interested in the negative emotions of resentment and indignation as expressions of a sense of justice (1). Such reactions usually form an integral part of transitional contexts and, more often than not, place special burdens on young and fragile democratic institutions. As expressions of a sense of justice, resentment and indignation are responses to injustices towards oneself or others, leading the agent to advance claims of redress which, left unattended, can either erupt violently or degenerate into apathy and other socio-psychological pathologies (2). After a detailed exploration of the philosophy of emotions in Chapter III, I argued that the most appropriate lens for examining these emotions is a cognitivist one, one that presupposes an essential role for judgment in the morphology of affect (3). This is in line with criminal law theory’s having overcome the longstanding opposition between emotions and reason through the incorporation of more sophisticated findings from the social and natural sciences about the cognitive elements in emotions.58 Conceptualising negative emotions as presupposing an evaluative dimension gives them normative weight and makes them proper

58 In this sense, Dan Kahan and Martha Nussbaum claimed that a mechanistic conception of emotion—one that placed emotion outside of rational control by the agent—had to give way to an evaluative conception, one that gave judgment an important role in the morphology of emotion. Their path-breaking article is considered to be one of the main contributions to a “law and emotions” movement within legal studies. See Dan Kahan and Martha Nussbaum, “Two Conceptions of Emotions in Criminal Law,” Columbia Law Review, Vol. 96, no. 2 (1996), pp. 269–374. Another crucial piece for this movement is a book edited by Susan Bandes, The Passions of Law (New York, NY: New York University Press, 1999). More recently, a whole issue of Law and Human Behavior has been dedicated to the role emotions play in legal decision-making. See Law and Human Behavior, Vol. 30 (2006).
objects of concern for institutions. A commitment to equal respect for all requires not that they be suppressed, but that they be given voice and representation within officially sanctioned venues, including transitional criminal trials. At the same time, however, not just any form of emotion ought to receive recognition. Resentment and indignation must target the true victimisers and must not lead to acts that violate equal concern for everyone’s status as a member of the political community. This is why, while acknowledging the appropriateness of moral hatred as a marker of a capacity to recognise injustice and as having normative weight, institutions in general and courts in particular must also engage with that emotion pedagogically in order to make it compatible with the broader emotional culture of a democratic regime. As we saw in the last section of Chapter III, while emotions such as these seek to reaffirm the equality disturbed by criminal acts, they must not seek to affirm the victim’s superiority of status over the defendants. Constructive engagement with emotions as an important first step towards the cultivation of equal respect is a more subtle aspect of the legal education of attitudes, one that none of the authors discussed in this chapter explore.

The theory of legal determination that is embraced in this dissertation owes a great debt to Dworkin’s “law as integrity.” I supplemented Dworkin’s path-breaking contribution, however, with a more robust account of legal judgment, one that sees judges’ reflective decisions as oriented, yet not determined, by the political principles of a polity, and which looks into both the giving and the receiving of decisions (4 and 5). Just as the judicial review of transitional justice bills, criminal trials must affirm equal concern and respect for all members of the polity, irrespective of their pre-transition life histories. The requirement of principled integrity holds across various branches of law. Yet, as we have seen in Chapter V, principles do not offer formulae for legal actors to follow. Principles guide judgment, but do not determine it. How courts interpret the law in order to ensure the integrity of its principles—and implicitly acknowledge the legitimacy of resentment and indignation—varies from one society to the other,
from one legal tradition to the other, from one transition to the other. From a more concrete point of view, Osiel is right to plead for special attention to publicly justifying the principles on which a court runs its proceedings. The international law’s suspension of statutes of limitations for certain crimes makes this easier in the 21st century. Justifying prosecutorial decisions every step of the way is another requirement of treating everyone, including the defendant, with equal concern and respect. Keeping victims informed about their role in the proceedings, as well as the schedule and aims of the proceedings, and providing them with assistance and counseling before, during, and after the trial are guidelines that victims’ movement promote for all criminal trials and which make particular sense for contexts of atrocity. At the same time, provoking reflection through exemplary, first-order judgment is crucial as good decisions can inspire citizens to reflect upon what they should do in the name of their moral outrage. With Robert Solomon, this chapter maintains that “… the point of law is to make the passions more coherent, more consistent, more articulate, more perspicacious, more reasonable, more subject to scrutiny, more scrutinised.” Beyond these general ideas about how to foster respect for all by respectfully staging criminal proceedings, judges and prosecutors within transitional contexts will have to make decisions while taking into account a host of political, social, and institutional variables. Most likely, these variables will limit the kind of impact law might otherwise have on


the course of democratisation. In addition, a non-romantic view of the judicial branch in the wake of violence should make the theorist cautious of the kind of motivations that might lie behind judges’ judgments.

Lastly, this dissertation has focused primarily on victims’ and their families’ resentment and indignation as the immediate objects of legal pedagogy (6). The trial’s spectators can also be brought under the court’s direct influence and the proceedings against Eichmann in Jerusalem are a good example of that. Broader society, which accesses court proceedings in a mediated way, can be counted as the indirect, yet no less important, target of the court’s educational message. The efficacy of this message depends on the collaboration of other institutions, the transparency of the decision-making, the observance of the publicity requirement, exposure in the media, and public responsiveness to judicial arguments.

Although the weight awarded to the different elements of a serious academic engagement with the issue of emotions in the law varies, my account shows that a careful analysis of the emotional dimension of transitional justice influences the way in which we conceive of didactical legality. At the same time, the theoretical commitments this dissertation has made have been recapitulated. We are thus drawing closer to having answered the second programmatic question enunciated at the beginning, How should we distribute transitional justice? Chapters IV and VI have provided a conception of the role of two legal mechanisms for distributing transitional justice that takes into account the complex circumstances of democratic transitions. The aim was to show that even institutions without a democratic pedigree can make an important contribution to the furthering of the democratic cause. Chapter V has illustrated empirically how courts, through the judicial review of transitional justice bills, have chosen to fructify negative emotions for democracy. By way of symmetry, Chapter VII will consist of a series of case studies of trials of perpetrators in the wake of oppression and violence. The cases are positioned on a spectrum ranging from undemocratic engagements with moral hatred and
botched legal justice to exemplary judgments that sought to contribute to the development and reproduction of public attitudes. The legal fiasco ending in the execution of the Ceausescu couple in Romania on Christmas day in 1989, the controversial trials of the border guards and top communist leadership in reunited Germany in the early 1990s, as well as the first trial of important military leaders in Argentina after 1983 illustrate how courts’ judgments have, more or less exemplarily, dealt with the emotional legacy of a painful and unsavoury past.
Chapter VII

Fighting Impunity, Affirming Democracy: Transitional Criminal Trials

This chapter will analyse a set of three domestic trials organised in the aftermath of state-sponsored atrocities and oppression. Historically, these trials took place during the second phase of the development of transitional justice, as Teitel outlines it.¹ This means that they pre-date the internationalisation phase, when it became more common for international agencies to intervene when a state fails to hold its own accountable. While I do not want to dismiss the rich potential that international and hybrid tribunals could hold for the future, the legitimacy deficits, the still incomplete legal framework underlying them, the unbalanced prosecution of African defendants by the International Criminal Court,² as well as the distance between such courts and the societies within which violence occurred have made their use problematic until now.³ In order to ensure the local ownership of justice, the strengthening of the legal system and the beneficial socialisation effects of such trials, priority should be given to domestic institutions. Civil trust in the judiciary will not be (re)built if courts are not given a chance to make their contribution to democratisation. As we shall see in this chapter, there are good reasons to opt for domestic trials. The hope is that lessons derived from the study of such cases can be useful for improving the way in which international organisations can help, but not hijack, transitional justice efforts within societies exiting violence and oppression.

¹ I introduce her genealogy in Chapter I. See Teitel, “The Law and Politics.”
² For a list of the pending trials see the court’s web-page: http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Cases/.
As I have argued in the previous chapters, maintaining the normative integrity of the principle of equal concern and respect requires that courts fight amnesic impunity, while at the same time ensuring that victimisers do not get instrumentalised for the purpose of satisfying moral hatreds. Impunity is a complex concept. McSherry and Mejia have usefully operationalised it in terms of structural, systemic, and psychological impunity.\(^4\) While structural impunity refers to institutionalised and legal mechanisms for protecting those who abuse state power (such as a parallel system of military courts), strategic impunity covers measures taken by those in power (laws, amnesties, pardons) for the purposes of derailing accountability processes. Psychological impunity takes the form of ongoing state terror over civil society. The negative results of impunity can be, on the one hand, resentment and indignation erupting in violence or, on the other, political apathy and resignation about the pervasiveness of injustice. For democracy to thrive, it is important that these facets of impunity, all of which split the population into first and second class citizens, be addressed and ended.

The cases to be presented in this chapter are placed on a continuum, ranging from inspirational judgments that sought to contribute to the struggle for memory and equal citizenship, to hatred-driven, illegitimate proceedings that failed to affirm democratic principles. Special attention will be paid to the contextual variables providing the framework for the courts’ reflective judgment. The first two case studies—Argentina’s trial of the juntas at the beginning of the 1980s and the trials that took place in reunited Germany in the 1990s—have been selected with a view to illustrating two approaches to recognising the validity of negative emotions and to condemning all forms of impunity (Sections VII.1 and VII. 2). The last case is negatively illustrative, i.e., it shows what the judiciary, as much as it is possible, should avoid doing in the aftermath of a repressive regime. The façade trial of the Ceauşescus in December 1989

exemplifies untamed moral hatred by the judiciary itself, aggravated by a context of manipulation and political uncertainty (Section VII.3). The chapter will end with a set of conclusions about the practical obstacles, but also the opportunities associated with domestic criminal proceedings within emotionally mobilised societies (Section VII.4).

VII.1 Argentina

The only struggle you lose is the one you abandon.

The Mothers of the Plaza de Mayo

In Chapter V we analysed the processes that Argentina had to undergo before securing a clear and coherent engagement with the past after 2005. Transitional justice had a sinuous trajectory and was delayed until the military became weak enough to be held responsible for the abusive way in which they handled the left-wing guerrillas terrorising Argentine society in the 1970s. In what follows, I shall analyse the 1985 trial of the members of the first three military juntas by way of illustrating an exemplary approach to maintaining the integrity of equal concern and to constructively engaging the public’s negative emotions. This first trial after the end of military rule is extremely interesting for the purposes of this dissertation. The difficult socio-political context in which it was held and the judgment the court reached make this trial an exemplary one in terms of what can be done, even under extremely stressful conditions.

On the one hand, the period preceding the trial had been marked by intense social emotional mobilisation. The self-amnesty law passed by the last military government⁵—later nullified through constitutional review—provoked an upsurge of outrage that brought people to the streets. Massive demonstrations were also organised on the day the trial of the first three military juntas began in Buenos Aires. According to Carlos Santiago Niño, one of president Alfonsín’s prominent legal advisers, fifty thousand people marched in the capital in support of

Extremely active before the change of regime, victims and relatives of victims associations pressured the young democratic institutions to take a stance on the country's unsavoury past. Among the many civil society organisations that took part in this effort, the Centre for Legal and Social Studies and the Mothers of the Plaza de Mayo featured as the two main political forces that fought for legal accountability. Emblematic is also the fact that CONADEP—the Argentinean Truth Commission established by president Alfonsín to gather information about the disappeared in 1983—benefited from great voluntary participation and numerous testimonies from both victims and families of the disappeared. The final report by the Commission documented the almost 9,000 desaparecidos and the existence of 365 secret detention centres. Its findings about the repressive practices of the military were used as evidence during the first junta trial.

On the other hand, the threat of military rebellion was high after power was ceded to the civilian government headed by President Alfonsín. Argentina was no stranger to military coups. Continuous threats from the army made the government’s tasks immensely difficult and ultimately led to the halting of judicial action against the culpable officers until 2005. The new political elite was therefore caught between two strong forces: society’s emotionally charged claims for re-affirming equality and the risk of another military coup.

Given the heightened social mobilisation against the represores, upon taking power in 1983, the president decreed that the members of the first three military juntas, as well as some notorious heads of the leftist forces they fought, would be prosecuted. Argentina had been marked by a situation of “symmetric barbarism,” with atrocities performed by both parties to the civil conflict, the leftist guerrilla engaging in acts of terrorism before the military coup and the

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6 Niño, Radical Evil, p. 82.
7 The most common means of repression was the kidnapping of persons suspected of subversion, internment, and torture for the purpose of obtaining information followed, most of the time, by execution. Americas Watch, Truth and Partial Justice in Argentina: An Update (Human Rights Watch, 1991), pp. 13–14.
8 See Chapter IV.
9 I owe the term to Rajeev Bhargava. See Bhargava, Restoring Decency.
armed forces retaliating with extra-legal kidnappings and executions of suspected subversives. The newly elected president wanted to take an even-handed approach to atrocity and avoid demonising one party while martyrising the other. A concern with historical truth and fairness made him condemn both state-sponsored repression and anti-system political violence. Needless to say, there was also a hope that the military would be appeased by an effort to prosecute the leftist subversives and not only people from within their own ranks.

The Argentinean Military Code provided that members of the armed forces should be prosecuted by military courts, whether their crimes were committed in violation of military or penal law while on duty in a place under military jurisdiction. In respect of this law and in order to give the military an opportunity to police their own, the president decreed that the officers who had led the country between 1976 and 1982 should be brought to trial before the highest military court, the Supreme Council of the Armed Forces. In order to ensure the end of structural impunity, however, a law (23049/1984) was passed that enabled appeals of decisions by this high military court within domestic courts. In addition, in case the proceedings were not completed within six months from the first session, the Supreme Council would have to provide the relevant Federal Appellate Court with a report explaining the situation. If there were evidence of unjustifiable delay and negligence on the part of the military court, the civil court would take over the proceedings, no matter what stage they were at. By passing this legislation, the formal principle of non-retroactivity was violated for the purpose of ensuring that the trial would not substitute tokenism for justice. Given the estimated number of victims—between 10,000 and 30,000—the government did not want to allow the military to close ranks and insult the memory of the disappeared and the suffering of their relatives.

By the fall of 1984, the Supreme Council had failed to complete the proceedings, but also declared its inability and unwillingness to continue the trial against the junta members. In their report, the members of the Council found the officers’ strategies in the battle against the left to be unobjectionable and concluded that the subversive elements had no entitlement to due process protections. In addition, the Council claimed that the victims’ testimonies were not only unreliable, but part of an anti-military conspiracy.

Faced with another example of strategic impunity, the public was appalled. Their indignation was well represented in the press of the time. In response, the Federal Appellate Court of Buenos Aires took over the proceedings and the trial began on April 25th 1985. The defendants, officers Videla, Massera, Agosti, Viola, Lambruschini, Garaffigna, Anaya, and Lami Dozo were charged with 711 counts of murder, illegal detention, torture, robbery, and rape. Although their culpability was not limited to these charges, the amount of reliable evidence, as well as pragmatic considerations related to the continuous threat of military rebellion and time constraints led prosecutor Strassera to limit his accusations to these cases. The court reinforced the prosecution’s view by providing a further normative reason for limiting the charges to 711: the right to a speedy trial for the defendants.

Argentina, like many Latin American countries, has a strong civil law tradition. Criminal proceedings within civil law systems are predominantly in writing; however, due to the historical importance of this trial, the need for transparency, and, I would add, the importance of addressing resentful victims and their families, as well as mobilised, indignant civil society groups, the court allowed oral cross-examination of the defendants. The press had reserved seats and approximately 100 citizens could assist at the trial on the basis of an invitation system. In

14 To recapitulate, Videla, Massera, and Agosti made up the first junta who took control of the government in 1976. Lami Dozo, Anaya, and Galtieri were the members of the third military junta that ruled Argentina between 1981 and 1982. Viola succeeded Videla as president in 1981. Lambruschini became head of the Navy after Massera.
this way, the publicity requirement was fulfilled. When outbursts of negative emotions against
the defendants were later made by the trial’s audience, however, the judges evacuated the room
in an effort to ensure that equal respect would be shown to the victims and their victimisers.15

This was not the only way in which the judges of the Federal Appellate court tried to
ensure the normative integrity of the newly established democracy and pay equal attention to
both sides of the conflict. During the trial, approximately 800 witnesses were called, mostly by
the prosecution. Many were victims who were given a proper hearing even though the defence
perpetually tried to discredit their testimonies.16 The findings of the CONADEP played an
important role in showing the consistency of testimonies in front of the commission and in court,
thus proving the implausibility of the accusation of anti-military conspiracy. A division of labour
between truth-telling and justice mechanisms was thus successful in fulfilling the various needs
of the immediate transition.

The verdict of the court contained 2000 pages that presented in detail each of the 700
cases that were, in the end, considered by the court.17 The judges took their time in outlining the
junta’s criminal plan. The armed forces “…detained a large number of people, lodged them
clandestinely in military units or in places controlled by the armed forces, subjected them to
interrogation under torture, kept them in captivity under inhumane conditions, and, finally, either
submitted those persons to the courts or to the National Executive Power, released them or killed
them. These proceedings, which assume the secret derogation of the laws in force, were carried
out in accordance with plans approved and implemented by the military commanders.”18 A
condemnation of the junta’s means for fighting subversion, its secrecy and strategic impunity
followed: “The defendants did not hesitate in downgrading the Law in order to obtain political

15 Amnesty International, Argentina.
16 Amnesty International, Argentina.
17 Amnesty International, Argentina.
18 Argentina: National Appeals Court (Criminal Division), “Judgment on Human Rights Violations by Former
power, the use of torture, inhumane treatment, the imposition of work and the imposition of the belief that no one was able to help the captives... On the basis of evidence ... it can be concluded that the defendants deliberately concealed the facts from the courts, from the families of the victims, from national and foreign institutions and organisations, from the Church, from governments of foreign countries, and from society at large."19 Revealing the abuses of the past and giving them institutional voice was extremely important in the aftermath of massive atrocity committed under a thick veil of secrecy. Survivors’ testimonies were particularly important given the nature of the political repression in this case: kidnapping, imprisonment, and torture in clandestine detention centres, point-blank executions, and the throwing of drugged prisoners from planes flying over the Atlantic.20

Nevertheless, attention to the victims’ need for recognition was balanced by a concern with the procedural rights of the defendants. The amount of evidence produced by the CONADEP and the trial was more than enough to convict the officers; however, the court was careful to engage in a thorough dialogue with the defence. The judges’ concern with the legitimacy of the proceedings took the form of an extensive verdict, in which all the challenges raised by the defence were carefully addressed. In addition, large sections of the decision were dedicated to justifying the choice of law, the principles underlying it, and the theory of culpability to which the court subscribed. The methods and criteria for evaluating the evidence, the different justifications offered by the defendants, and the opinions of legal scholars were all given due consideration within the text of the decision. In this way, the court showed the importance of the interests and equal status of the defendants. A desire to mark discontinuity with the arbitrariness and illegality of the military regime pushed the court to take a longer path

19 Argentina, Judgment on Human Rights Violations, p. 333.
to the sentence. By outlining both sides of the story, by allowing both victims and victimisers to speak, the court invited wider publics to reflect on the competing narratives being presented and to make informed decisions about the meaning of the past. In this way, the proceedings respected Osiel’s criteria for a good trial in the wake of administrative massacre.

The concern with dissipating any accusations of scapegoatism and political revanchism became most apparent in the judges’ serious and charitable engagement with the four justifications that the defence offered for the ways in which the accused had conducted the “dirty war.” One by one, the arguments of the officers’ teams of lawyers were critically and dialogically engaged.

The first justification offered by the juntas was the “state of necessity” argument. They claimed that the armed forces had to resort to extraordinary means in order to prevent the subversives from terrorising the population and undermining the values upon which the Argentinean society was built. The court agreed with the defendants that Argentina was suffering from an increase in leftist terrorism in the 1970s: “…it has been proven that terrorist subversion became a condition without which the criminal acts under examination probably would not have taken place. Moreover, the court acknowledges that those terrorist acts amounted to an illegal act of aggression against Argentine society and the State. It is also acknowledged by this court that Argentine society was compelled to act. This reaction was necessary in order to prevent that further increase of terrorism, which would endanger the stability of institutions whose philosophical foundations are found in the Federal Constitution.”

The “state of necessity” defence was stipulated by the Argentinean Criminal Code as a situation in which the commission of a crime was necessary to prevent a greater and immediate evil for which the perpetrator was not responsible. The evils the military was trying to prevent were killings, robberies, and bombings by the subversives, as well as the destruction of the

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Argentinean state itself. This defence could not stand, however, because “(I)f the idea was to kill and kidnap in order to prevent the subversive groups from continuing to kill and kidnap, then this would not be a situation where “a lesser” evil is being resorted to in order to avoid a “greater” evil. Both evils would have produced, at best, equal damage. Therefore, the defence of necessity does not stand.”

In addition, the danger that the government would be taken over by the guerrillas was in no way imminent. The subversives had not taken control of any part of the territory; they were not supported by a foreign power and lacked the support of the population. All these variables contribute to showing that the “state of necessity” argument did not hold. The judges went on to enumerate in pedagogical fashion what legal and administrative measures the juntas could have taken in order to tackle the terrorist phenomenon without slipping down the slope of arbitrariness and atrocity. This decision is emblematic of the court’s instructive intentions, as it shows the ways in which even the most bitter conflicts can be solved within a democracy.

The second defence raised by the defendants was that their strategy of engaging the subversives was in conformity with the law in force at the time. More precisely, they referred to Decrees No. 261 of February 1965 and No. 2770 of October 1965 regulating the legal existence of “a state of war.” Based on these decrees, the officers claimed they had to take all necessary measures against an enemy in a war.

In response, the court first pointed out that these decrees had been passed before the 1976 coup, while the army was still under civilian control and at a time when the Constitution was still in force. The implication was that in issuing a decree ordering the armed forces to “eliminate the capacity of the subversive elements to act throughout the national territory,” the president could not have meant “physical elimination.” Such a decree would have been unconstitutional and in

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violation of the Argentine legal order and tradition. On the contrary, the authors expressly referred to the elimination of combat capacities. Therefore, since no law authorised the crimes committed by the military, the defence of compliance with legal duty did not stand either.

The third defence put forth by the defendants was that their methods were justified by the defence of the State and society. The judges defined self-defence as “the necessary reaction against an unjust aggression, present and unprovoked.”

According to the Criminal Code of the land, self-defence was guided by a need to stop unprovoked, illegitimate aggression. While the judges agreed that the subversive forces were unprovoked and that their means were illegitimate, they questioned whether the means taken by the junta to defend the Argentinean State and society were reasonable. Even if in some particular cases the arrest of armed persons was justified, the torture, illegal deprivation of freedom, and homicide were not permissible:

Most of the acts in question were committed with the purpose, inherently plausible, of curbing terrorism. The defendants thus conceived a course of action according to which it was necessary to resort to “unprecedented” (inéditos) methods, effective enough to face an aggression which was equally unprecedented. The claim that the new methods passed the test of rationality of means employed is both morally and legally unacceptable. In view of the repressive means available to the State to curb terrorism, we are persuaded after a close examination of these means that the rationality test was not met.

The fourth, and last, defence was the controversial claim that everything was allowed in a state of war. War leaves “no room for law, moderation, ethics, religion or humanitarian principles.”

In order to refute the juntas’ Machiavellian position on war, the judges engaged in a long excursus on the typology of conflicts, domestic and international, and measured the evidence of the case against this theoretical framework. The conclusion was that the conflict in Argentina was purely domestic. The subversives had not been recognised internationally, they did not

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dominate any part of the territory, nor had they received aid from an outside force. For all these reasons, the juntas could not claim that the state of war justified their repressive means; the Argentinean legal system provided ample provisions for dealing with subversives under both ordinary and exceptional circumstances. Moreover, international law also furnished sufficient guidelines for dealing with the situation. Despite this, the juntas had chosen to act outside of the law, thus negating the very values they had supposedly set out to defend.\textsuperscript{30}

In this way, all four justificatory grounds raised by the military were refuted with detailed explanations, meant both to ensure credibility and to communicate the limits that the Constitution placed on official action. The ample space and attention given to all four angles of defence reflected a concern with presenting all points of view, thus encouraging the court's various audiences to evaluate and make their own decisions about the case. The defendants' judgment was provoked in order to prompt them to reflect on their own justifications for their actions. By condemning impunity, the victimisers, victims, their families, and the wider society’s outrage was recognised.

The concern with public emotions also led the court to provide a powerful condemnation of the regime as atavistic and in violation of the Argentinean nation’s standards:

These criminal offences violated legal rights of vital importance. They were also acts against society inasmuch as they attacked fundamental aspects of the legal order that rules society as a whole… These proceedings have already established that the tactics deployed against terrorism did not conform to the law in force, to Argentine tradition, or to the custom of civilised nations. It was also made clear that the State had many alternative means to its disposal which were entirely suitable… Because the means used were atrocious and inhuman and because society was—and still is—shocked by such acts, these illegal acts fall outside the cultural behavioural patterns of this Nation… The Nation’s interest is not, and never has been, in the regression to a primitive state of nature.\textsuperscript{31}

\textsuperscript{29} Argentina, “Judgment on Human Rights Violations,” p. 355.
The judges then moved on to engage with the theory of culpability adopted by the prosecution. In a careful, attentive manner they explained why the defendants were considered moral, and not material, perpetrators of the offences. A substantive set of arguments in favour of the “control theory” of culpability was given for the purpose of legitimising the proceedings and affirming “never again” to state oppression. In this way, victims and society’s claims were vindicated.

The prosecution used provisions of the Military and Penal codes to accuse the defendants of being “indirect perpetrators” of the crimes committed by their subordinates. In giving orders and being in a position to determine the consequences of those orders, the defendants were indirectly guilty of the kidnappings and murders performed by their subordinates, as well as of whatever other crimes—robbery, abortions, rape—that could have been (and were) perpetrated in the performance of those orders. The defence challenged this approach by claiming that the “control theory” had been opposed by many scholars because of the difficulty of establishing criminal responsibility for all those who stood in between the indirect and direct perpetrators. This is why the Argentine penal code did not embrace this theory of culpability, but instead chose to rely upon the “formal objective” theory, according to which only the direct or principal perpetrator of the crime can be considered criminally responsible.

In response to the defence, the court went back to the originator of the theory, Hans Welzel, and explained how the doctrine was incorporated into Argentinean legal standards. According to Welzel “the perpetrator is the individual who through a conscious manipulation of the desired end, of the events leading to this end, is in command of the perpetration of the crime. He is the person who controls the course of events, that is, not the will to perform the act, but rather the will to control the performance of the act.”

While in the past many Argentinean legal scholars had embraced the “formal objective” theory of culpability, more recent scholarship had

32 Scholarly exegesis is an important source within civil law systems, hence the attention to the academic research.
shifted to “control theory,” the court argued in an extensive review of the literature. The judges also pointed out that this theory was far from an invention of the Argentinean legal system and had been used by many other legal systems.34 In a spirit of fairness and publicity, however, but also in order to provoke its addressees’ capacity for reflective judgment and decision-making, the court also presented the case against the “control theory.” By introducing arguments both for and against the court’s preferred theory of culpability, the judges hoped to display exemplary fairness and to inspire wider publics to show moderation and respect for their opponents. By not suppressing the counter-arguments, the court showed how democracies should deal with represores. A detailed account of why the “command theory” was the appropriate theory for the circumstances under review was provided against the background of overwhelming incriminatory evidence. The importance of the arguments raised in support of the “control theory” cannot be overestimated given that not only the culpability of the top military commanders, but also that of their subordinates, depended on the conclusions reached in this judgment.

The “control theory” was clearly reflected in the provisions of the Criminal Military Code whose article 514 read that “when a crime is committed through the execution of an order, the superior officer who gave the order shall be the only one responsible. The subordinate officer shall be considered an accomplice only when he had exceeded compliance to such order.”35 In support of their claim that the military law reflected the “command theory,” the judges also cited other legal provisions outlining the principles of military discipline.36 Art 11 of Law 23049 elaborating on Art 514 of the Criminal Military Code stipulated that the subordinate would be liable to the extent that “he exercised decision-making powers, knew the orders were illegal or if

36 Art. 7 of Law no. 19101, RV 110/10 and arts 667, 674 and 675 of the CJM.
the order required the commission of atrocious or abhorrent acts.” This meant, the court claimed, that not all subordinates following the orders of the defendants would be able to raise the “due obedience” defence. By interpreting the law in this way, the court opened the way for further prosecutions of the lower ranks.

The judges did not stop at showing that military law incorporated the “control theory” of culpability. By going as far back as 1886, they explained how the doctrine was transmitted from one version of the civil criminal code to the next, all the way to the present version. This historical genealogy of the legal provisions regarding indirect perpetrators was meant to legitimise the proceedings and to demonstrate that the trial was not scapegoating anybody. Whether by military or civil standards, the charges against the junta were legitimate.

Having outlined the sense in which the “control doctrine” was part of the Argentinean legal tradition, the court ruled that the evidence clearly pointed to the fact that the defendants had become the moral perpetrators of atrocities when they decided to fight the left guerrillas “unlawfully and with atrocious means”:

The unlawful acts were perpetrated through a regular chain of command, the effect of which was to overrule the applicable legislation which was in conflict with the given orders… The assurances of impunity given to the direct or to the actual perpetrators of the crime were also part of the plan approved by the defendants… The defendants were in control of those acts because the machinery of people and property that made possible the commission of the crimes was under their command. The events in question are not the result of the erratic, solitary and individual decision of those who carried them out; they were part of an overall strategy devised by the commanders-in-chief of the armed forces in order to fight subversion… Under these circumstances, who actually perpetrated the crimes is not so important. The control of those who headed the system was absolute.  

The system set in place by the military commanders was made up of interchangeable men. Such was the control of the commanders that should a subordinate refuse to obey their orders, he

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would have immediately been replaced by another. At all times, however, the defendants had the power to stop the commission of the crimes; yet, they continued to give orders and to provide their subordinates with all the equipment necessary to carry on the “dirty war” against subversion.

In view of the testimonial and documentary evidence, the defeat of these various defence strategies, and the establishment of moral culpability, the court sentenced Generals Videla and Massera to life imprisonment, Brigadier Agosti to four years and six months, General Viola to seventeen years, and Lambruschini to eight years, and acquitted General Galtieri, Brigadier Garaffigna, and Brigadier Lami Dozo.\(^{39}\) The sentence was not well received by victims’ families. Street protests were organised and calls were made for harsher punishments. The families of some *desaparecidos* addressed the Supreme Court and submitted writs demanding life imprisonment for all defendants. Such writs were enabled by the provisions of Law 23049 that stipulated that victims and their families had the right to initiate criminal proceedings and to appeal verdicts. The prosecutor appealed and required that all members of the juntas be given equal sentences. The defence appealed as well on the grounds that the sentences were arbitrary and that the culpability of the officers had not been established.\(^{40}\) The Supreme Court heard the case and reaffirmed the sentences with some minor reductions. In addition, the court reclassified the offenders as “direct participants” rather than “moral perpetrators” in the commission of crimes outside of military service. The Supreme Court declared that crimes against civilians in a time of peace were not covered by Art. 514 of the Military Code, but by the civil criminal code. The officers’ culpability was changed from “indirect perpetrators” to “participants who provided necessary assistance for the commission for the crimes.”\(^{41}\) In this way, the jurisdiction of the civil courts over the officers received an alternative justification. The Supreme Court rejected the


\(^{40}\) Amnesty International, *Argentina*.

appeals from the families of the disappeared and the defence by reaffirming the constitutionality and correctness of the proceedings. Thus, the higher court backed up the decision of the federal judges in a way that demonstrated the limits of what can be done in the name of legitimate public resentment and indignation in a constitutional democracy. "Equal concern for all" meant that law could not be bent in order to subordinate the rights of the defendants to the victims’ desire for satisfaction. While the defendants needed to understand that what they had done was illegal according to both military and civil law, the victims needed to be instructed about the constraints that a commitment to democracy places on public expressions of moral emotions.

Although the prosecution of other officers was halted by the passing of the Full Stop and Due Obedience Laws in 1986 and 1987 respectively, and although the officers convicted as a result of the first trial were later pardoned by President Menem, these proceedings showed that an engagement with a past of violence and secrecy was possible. Contextual instability initially undid the small steps taken against impunity in the first trials of the military; however, victims and their families continued to mobilise socially and legally until they managed to break the wall of silence at the beginning of the 21st century. The judgment in the 1985 trial may have contributed to this mobilisation by showing that a constitutional democracy pays attention to both victims and victimisers. The judges addressed the survivors and recognised their suffering and traumas. At the same time, they explained that discontinuity with a past of arbitrariness requires that cries for justice be heard, but within the limits of equal respect and under safe procedural protections for those whose culpability was beyond doubt. A serious engagement with the defence’s arguments was a sign of respect that democracies must pay to all their members. Only by hearing the other side and by constructively engaging with its arguments could the polity move in the right direction. The long road the court took in order to reach this conclusion and its serious attention to each and every argument put forth by the defence counsel

42 See Chapter IV.
shows a determination to inculcate both defendants and their victims with democratic values. Re-establishing the rule of law required a transparent, exemplary, comprehensive set of arguments addressed to the immediate public of the trial and society at large. The court reflectively judged that discontinuity with the abusive practices of the past required an important effort on the part of their formerly incapacitated institution.

This dissertation therefore argues against seeing this first trial and its immediate aftermath as a case where justice was sacrificed to democratic stability. On the contrary, justice was done in an exemplary fashion and even if its achievements were suspended for a while, it may have continued to inspire and encourage historical reflection within an outraged population. At the same time, the possibility of redress that it embodied opened a public discussion and continued to mobilise victims and their families in the struggle for memory and second-order enfranchisement.

**VII.2 Germany**

*We wanted justice, and we got the rule of law.*

Bärbel Bohley, East German dissident

The collapse of communism in East Germany fell within the large category of “velvet” revolutions in the region. Change was brought about without any blood shed. As a result of the Roundtable organised by Hans Mudrow with the opposition forces, on November 9, 1989, the Brandenburg gate of the Berlin wall was opened in a dramatic gesture that signified the end of the East/West division. In March 1990, free and fair elections brought to power a coalition government made up of pro-unification parties and headed by Lothar de Maizière. Germany was finally reunified on October 30, 1990.43

Reunited Germany is considered to have engaged in one of the most comprehensive transitional justice projects, comprised of trials, a parliamentary commission of inquiry similar to a truth commission, a commission to give citizens access to their secret police files,\(^{44}\) property restitution, lustration, and rehabilitation. Yet while the project was ambitious in its scope, due to the influence of strong contextual variables, it was moderate in its outcomes.

While the fall of the oppressive regime clearly belongs to the large camp of “negotiated” revolutions in Eastern Europe, the exceptionalism of the German post-authoritarian circumstances, marked by two very important contextual variables, set Germany apart in key respects. First, there was a marked power asymmetry between the Western and the Eastern parts of the united Germany. This asymmetry was one of the most contentious issues in discussions about transitional justice for the country. The West was often portrayed as engaging in victor’s justice and colonising the East. Public resentment towards the West was nourished by several sources. The courts tasked with trying the border guards and top communist leadership were exclusively led by West German judges.\(^{45}\) It was also argued that West Germany had, in fact, recognised the regime of the East and that they had collaborated on pragmatic grounds.\(^{46}\) Those raising questions of political complicity pointed to the welcome that Helmut Kohl gave Erich Honecker during his 1987 visit to West Germany. Accusations of political hypocrisy were a constant reference for the entire duration of the transitional trials, and these could be seen to influence the Courts’ remarks in defence of the proceedings.\(^{47}\)

The other variable that made the German transition special was the problematic relationship between the Reunification Treaty and Basic Law of the united Germany, on the one

\(^{44}\) The East German secret police was notorious for the levels of its infiltration into civil society. It had nearly 86,000 employees and around 109,000 informers. See Noel Calhoun, *Dilemmas of Justice in Eastern Europe’s Democratic Transitions* (New York NY: Palgrave Macmillan, 2004), p. 57.


\(^{46}\) An overview of the public debate about the prosecution of former communist agents within the context of the unification can be found in Commission on Security and Cooperation in Europe, “Human Rights and Democratisation in Unified Germany,” (September 1993), pp. 11-18.

hand, and the law of the German Democratic Republic,\footnote{Henceforth referred to as GDR.} on the other. The rule of law had a long tradition in German jurisprudence and this was emphasised in the documents promulgated following the unification in 1990. Even the most significant instance of public participation, the occupation of the Stasi headquarters by citizens trying to prevent the destruction of secret police files by its own agents, was done within the boundaries of the law and in the presence of public prosecutors. In this sense, some have claimed that the fall of communism in the GDR was a “legal revolution.” Legality concerns naturally featured prominently in the public discussion regarding the prosecution of border guards and top Communist Party officials after the fall of the Berlin Wall. According to the Unification Treaty, criminal offences committed in the GDR could only be prosecuted if they were also punishable under GDR law. The principle of \textit{nulla poena sine lege} is clearly stated in the Basic Law: “an act could be punished only if it was an offence against the law before the act was committed.”\footnote{The German Basic Law, Art. 103. 2, http://www.iuscomp.org/gla/statutes/GG.htm (accessed December 12, 2008).} Through the extension of the federal laws to the former GDR (with some exceptions listed in Annex 1\footnote{Treaty between the Federal republic of Germany and the German Democratic Republic on the Establishment of German Unity, Aug. 31, 1990, http://www.jura.uni-sb.de/Vertraege/Einheit/ein1_m0.htm (accessed December 12, 2008).}), the Reunification Treaty acknowledged partial legal continuity with the Eastern Communist regime.

Along with the commitment to the formal requirements of the rule of law, however, one can also find in the German Basic Law reference to trans-legal sources. Chapter 20 of the Basic Law says that “legislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by \textit{law and justice}.”\footnote{The German Basic Law, Art. 20. Emphasis added.} This article had been interpreted by Western German Courts as presupposing a non-positive, moral higher ground that judges were bound to in delivering their decisions.\footnote{See decision 34 BVerfGE 269/1973 of the Federal Constitutional Court in the Princess Soraya case and BVerfGE 14/1951 decision in the Southwest case, both cited in Donald K Kommers, \textit{The Constitutional Jurisprudence of the Federal republic of Germany}, 59 (1989), at 132–133.} The “natural law argument” in German jurisprudence went back
to Gustav Radbruch\textsuperscript{53} and had been conceptualised as a check on strong, unreasonable positivist positions, the excesses of which had most clearly materialised in the abuses of the Nazi regime. This type of argument was in acute tension with claims based on the principles of security and non-retroactivity of law and provided an alternative source for courts engaging in transitional trials of former communists and their subordinates.

In an attempt to illuminate the role that the high German courts played in setting the path for a synchronisation of the norms and political cultures of the two parts of the country within one thriving democracy, this section shall examine the trials of the first two border guards and the proceedings against Erich Honecker and the top communist leadership. The hope is to derive from these cases insights into the trajectory that the German High Courts wanted to set for the future of the reunited German democracy. I argue that different German judges engaged with transitional justice issues in distinctive ways, depending on the position they adopted with regard to the weight of legality and their perception of themselves as historical actors. Their judgments reflect their conceptualisation of their own position as both spectators of the transition process and actors involved in democratisation efforts. At the same time, the two contextual variables mentioned above created considerable obstacles for their efforts to address their publics.

The first border guard trial began on September 2, 1991 and led to the conviction of two soldiers for killing 20-year-old Chris Gueffroy (the so-called “last victim of the wall”) on February 1989.\textsuperscript{54} Most of the evidence against the defendants had been prepared by the mother of the victim, Karin Gueffroy, who served as co-accuser during the proceedings.\textsuperscript{55} Once again, this illustrates the resilience and immense mobilising power of negative affect. Some

\textsuperscript{53} For an exposition of Radbruch’s theory see Emil Lask, \textit{The Legal Philosophies of Lask, Radbruch, and Dabin} (Cambridge MA: Harvard University Press, 1950).


\textsuperscript{55} For a detailed journalistic account of the German trials I analyse in this chapter see also Tina Rosemberg, \textit{The Haunted Land: Facing Europe’s Ghosts after Communism} (New York NY: Random House, 1995).
commentators have argued that the proceedings would not have been initiated at all had it not been for Karin Gueffroy's investigatory work.\textsuperscript{56}

In their defence, the accused raised the argument from legality and referred to the provisions of the East German Criminal Code: “...an unlawful frontier crossing was a criminal act which the border-guard as a member of the socialist society had a duty to prevent ... It was likewise criminal to resist government measures 'by the use of force or threat of force or any other major disadvantage' when an official was engaged 'in the dutiful carrying out of public duties entrusted to him for the safeguarding of law and order'... as a whole the GDR’s penal code sanctioned attempts to prevent illegal border crossings.”\textsuperscript{57}

In addition, the Code absolved anyone who “warded off a present illegal attack against ...the socialist state and social order in a manner commensurate with the nature of the attack.”\textsuperscript{58} Another legal instrument that supported this line of defence was the Border Law, revised in 1982, which provided that “the use of physical force was allowable when other means were not sufficient to prevent serious consequences for the security and order of the border territory” (Section 26.1) and permitted the use of firearms “to prevent the imminent commission of a crime” (Section 27.2).\textsuperscript{59}

Faced with arguments from the legality of the acts, Judge Seidel of the Berlin Regional Court had two avenues open to him. One was to accept the legality of the previous regime—thus at the same time establishing legal continuity—and to hand down a sentence on the basis of the GDR law. The other, which he eventually took, was to reject the legality and legitimacy of the previous regime on higher, natural law grounds. Heavily relying on the Radbruch principles, Seidel denied the legitimacy of the GDR and claimed that its laws were “in crass contradiction to

\textsuperscript{56} Martha Minow, \textit{Between Vengeance and Forgiveness}.


the generally recognised foundations of the rule of law. Even in the former GDR justice and humanity were understood and treated as ideals.”60 In this way, Seidel claimed that East Germany suffered from structural impunity. The soldiers should have recognised the moral unacceptability of their actions: “shooting with the intent to kill those who merely wanted to leave the territory of the former GDR was an offence against basic norms of ethics and human association.”61 Judge Seidel explicitly used the language of natural law: “(N)ot everything that is legal is right: there is a central area of justice, which no law can encroach upon. The legal maxim ‘whoever flees will be shot to death’ deserves no obedience.”62 The judge built a parallel with the Nazi regime and claimed that the same reasoning was appropriate under both sets of circumstances, as there was a difference only of degree between the atrocities committed by the Nazis and the shootings at the wall.63 Seidel could have made appeal to the Helsinki Accords and Geneva Convention as the GDR had been a signatory party at the time of the shootings.64 Instead, he chose to take the higher moral ground, thus opening a dangerous can of worms from the point of view of Germany’s positivist tradition.

In order to understand his judgment, it is necessary to better contextualise the trial. We must not forget the emblematic role that the border regime held with regard to the injustice of the former regime, as well as widespread public resentment to the 1961 construction of the wall. In view of the arguments he used, we could say that Judge Seidel played the role of a mighty legislator who took upon himself the reintegration of the whole German people within the sphere of humanity. The decision had both an expressive (“the law was unjust and the regime was illegitimate, we dissociate ourselves from it”) and a corrective function (“this will not happen

64 Radin, “East German Border Guard,” p. 1.
again, we will not allow it”), setting the path for the construction of the German democracy within the community of nations. The burden of this project of national re-creation was twice as heavy due to the historical precedent of Nazism in the early 20th century. By means of a pedagogical exposure of the historical truth and an affirmation of the normative bases of law and democracy, the court may have hoped to diminish future societal acceptance of major violations of human rights. In this sense, Seidel instrumentalised the border guards’ case in order to make a greater point about German history and identity, a point directed towards both the domestic and international communities.

There may also have been some strategic concerns in the use of the Radbruch principles. Seidel’s denunciation of the oppressive communist regime could have been an attempt at giving some form of satisfaction to the frustrated East German audiences who desired an official recognition of their suffering and the truth about the oppression. Gueffroy’s mother’s efforts in helping the prosecution of the guards required due attention in order to avoid her re-victimisation. Public dissatisfaction with the West’s trying the “small fry” rather than going after the “big fish” needed appeasement. Moreover, by acknowledging the oppression that had occurred and the reality of the victims’ pain and death, the court was capitalising on its political legitimacy in the newly incorporated Länder.

At the same time, however, Seidel’s judgment was politically problematic and untactful as it implied a clear discontinuity with the oppressive communist regime, a regime with which the West had previously engaged. By drawing a distinct line between the new state and the former communist East, the judgment could surely not have driven Germans together towards national reconciliation. The side effect of affirming discontinuity was the creation of an obstacle

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to smooth unification. In addition, the use of supra-legal principles did not sit well with the West German legal profession.

This is why, in spite of the fact that the moral culpability of the border guards was publicly recognised, Germany’s high appeal court, the Bundesgerichtshof, showed its disapproval of Seidel’s arguments, overturning the decision against one of the defendants and suspending the sentence of the other in March 1993. Most significantly, the court based its judgment explicitly upon pre-existing GDR law.\textsuperscript{66}

The same path of conformity to the GDR law was taken in the subsequent trial for murders at the Wall. In the second of the border guard trials, which began on the December 18, 1991, two soldiers were charged with the shooting death of an individual who had sought to escape over the wall into West Berlin in 1984.\textsuperscript{67} Understanding that a denunciation of the previous communist regime would facilitate neither national reconciliation, nor Germany’s coming to terms with Western complicity and Eastern collective guilt, the Court decided the case on the basis of the Criminal Code of the GDR.

In her ruling on February 5, 1992, Judge Ingeborg Tepperwein used the Border Law of 1982 to show that the defendants had not used commensurate means to prevent a crime. In addition, Tepperwein demonstrated that this law required the guards to seek to preserve human life if possible (Section 27.5). Both defendants were found guilty; however, their sentences were suspended on the grounds that they had worked under conditions that prevented fully autonomous actions.\textsuperscript{68} “Not selfishness or criminal energy” had led to their crime, but

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\textsuperscript{67} McAdams, “The Honecker Trial,” p. 63.
\textsuperscript{68} Mc Adams, “The Honecker Trial,” p. 65.
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“circumstances over which they had no influence, such as the political and military confrontation in divided Germany and the special conditions of the former GDR.”

This ruling is highly significant in terms of its contribution to setting the path for the future reintegration of Germany’s society. By basing her decision on GDR law, Tepperwein applied the norms of impartiality and generality of law to defendants she did not consider fully autonomous and to whom she provided the legal status and protections of citizenship under the new Basic Law. The court engaged in a pedagogical function meant to facilitate the creation of a community of judgment in the new, reunited state. In so doing, she connected the standard of legality to the future of the reunited constitutional democracy. The message was that in spite of the fact that their deeds were reprehensible, the defendants should be given all the protections their victims did not have. This was the only way to take further steps towards democracy, national reconciliation, and reintegration within the society of nations. Having neglected to prosecute the border guards for their excess of force, the GDR was guilty of strategic, but not structural, impunity.

The judges who tried Honecker and other top hierarchy officials went even further in the protection of the human rights of the defendants. On May 12, 1992, the Berlin Prosecutor General’s office had published a nearly 800-page indictment charging President Honecker, former Secret Police Chief Erich Mielke, Minister President Willi Stoph, Defence Minister Heinz Kessler, his Chief of Staff Fritz Steletz, and Suhl district Party Secretary Hans Albrecht with collective manslaughter at the Wall between 1961 and 1989. Not surprisingly, Honecker’s defence was an accusatory one: he saw the trial as nothing more than an example of victor’s justice over a victim of historical circumstances. The proceedings did not go very far due to the poor health and advanced age of the defendants. The prosecutors knew that a long and tiring trial

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70 Walther, “Problems in Blaming and Punishing.”
could not be held in view of the Basic Law’s explicit protection of human dignity. The court temporarily suspended the charges against Stoph and Mielke on grounds of poor health. The public did not seem to react too harshly in opposition to this decision, but they reacted with outrage when the defence asked that the same protection to be given to Honecker, who was suffering from terminal liver cancer. In spite of an upsurge in public disapproval, in January 1993, Berlin’s constitutional appeals court intervened to stop the proceedings. The judges’ decision was a significant statement about the weight that Germany gave the rule of law and the value of human dignity after its second lapse into oppression. While Judge Seidel was ready to instrumentalise the low-rank border guards for the sake of historical pedagogy, the court tasked with trying the top communist leadership saw the dropping of the charges as the ultimate triumph of the principle of the Rechtsstaat. Had they continued the proceedings, “(T)he individual would become a simple object of state measures.” As a result, the judges chose not only to postpone the trial, but also to dismiss all of the charges against Honecker on health grounds. The public, for its part, remained divided about the significance of this decision.

The trial did go on for the other three defendants—Kessler, Streletz, and Albrecht—who based their case on their lack of control of the larger international political circumstances, a defence which was partially successful. The question of how to establish culpability of the leaders for the deeds of their subordinates posed problems for the German court in the same way that it had posed problems for the Argentinean judiciary. The criminal law of the GDR stipulated that one could be convicted as an indirect perpetrator only to the extent that the direct perpetrator was not responsible. Since the border guards had been considered responsible, the

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71 The German Basic Law, Art. 1(1).
74 Walther, “Problems in Blaming and Punishing.”
75 See the section on Argentina in this chapter.
communist leaders were classified as accessories and instigators of the killings at the wall.\textsuperscript{76} Justice Boss established the causal link between their commands and the deaths at the border: “Without their decisions and commands, the succeeding chain of command would never have been set into motion and the actions of the border soldiers which led to the deaths of the victims would never have followed.”\textsuperscript{77} The defendants were condemned to imprisonment to terms ranging from four and a half to seven and a half years.

On July 26, 1994, the Bundesgerichtshof delivered its verdict upholding Judge Boss’s decision but with some modifications. While Boss had decided that Kessler, Streletz, and Albrecht had only been partially responsible for the killings at the inter-German border (as “instigators” and “accessories” respectively), the higher court wrote that they were responsible for acting within an organised structure in which their acts led to a regular course of events. They took advantage of the existence of those structures and of other agents’ readiness to execute their orders, which is why the three were culpable of manslaughter as members of the National Defence Council on whose instructions the killings at the wall had been carried out.\textsuperscript{78} In terms of the changes to the sentence, the court only increased Albrecht’s sentence by 7 months.\textsuperscript{79} The Bundesgerichtshof clearly followed Tepperwein and Boss in acknowledging the legality of the GDR. In a similar manner, the judges emphasised the fact that individual responsibility could be established and that the international and domestic political circumstances could not serve as a full excuse; however, the structural impunity of the communist system was disclosed as the background against which the crimes had been committed.

In 1996, the Constitutional Court of Germany issued a decision upholding the convictions of Kessler, Streletz, and Albrecht by, surprisingly enough, heavily relying on the Radbruch

\textsuperscript{76} Walther, “Problems in Blaming and Punishing,” p. 108.
\textsuperscript{77} Langericht Berlin, Urteil vom 16. 9. 93 – [527] 2 JS 26/90 Ks 10[92], cited in McAdams, p. 71
\textsuperscript{78} Walther, “Problems in Blaming and Punishing,” p. 108.
\textsuperscript{79} Mc Adams, “Honecker’s Trial,” p. 72.
The court argued that the principle of non-retroactivity was not absolute when dealing with cases related to a legal system lacking in democratic rule-making and the protections of universally recognised human rights. Hence, claims of substantive justice had to outweigh the protections of non-retroactivity. Nevertheless, the court did admit that even if it were to judge purely on the basis of GDR law, the defendants’ actions had gone way beyond the law's scope. The use of natural law arguments by the court of constitutional review completes the full circle of legal reasoning in the criminal trials of former East German oppressors. Sharing the Bundesgerichtshof’s view of the lenient or suspended sentences that left many disappointed, the court felt the need to strongly denounce the communist regime’s structural impunity.

From our analysis of the judgments the German courts delivered in the early transitional trials, we can see that the judges themselves were reacting to the circumstances of transition and went through a learning process. Contextual variables framed the reflective judgments that the courts made. The issue of Western complicity, the East’s resentment towards the communist repressors, its lack of control over the transitional justice processes, and the predominant positivist tradition in German jurisprudence are factors that complicated immensely the task of the judiciary. Because of the difficulties associated with these variables, the judges in the cases discussed reached different, and sometimes contradictory, decisions.

Seidel’s appeal to natural law arguments mapped onto painful memories of the beginning of the century and a popular desire to find out the truth and break away from the oppressive communist past. The use of natural law arguments for the strong condemnation of the violations of human rights at the border was meant to signify a second return to the true values of humanity. In following the Radbruch principle, Seidel could have understood his role as similar to the that of the architects of modern Federal Germany after the Second World War. What Seidel did not see, but some of the other judges involved in the transitional trials did, was the fact

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that in depicting the GDR as plagued by structural impunity, his decision ensured that it would not lead to national reconciliation and would not alleviate the feelings of resentment associated with the asymmetries of power between the East and the West. If the objective was to reappropriate the Eastern Länder and synchronise their political and legal culture with that of West Germany, discontinuity approaches were not useful for achieving this aim. In addition, the use of natural law arguments that instrumentalised the border guards for the sake of moral lessons was in tension with a commitment to democracy. If the judge's goal was the prevention of further abuses and the development of a democratic political culture, the defendants would have had to have been awarded the same rights as any citizen of the new state. A democratic state that failed to give former perpetrators the full protection of the law would contradict itself and undermine the very basis on which it was established: equal respect and concern for all.

The Tepperwein and Boss courts emphasised the future dimension of their decisions and engaged in an educational process meant to instil the newly integrated Länder with respect for the rule of law. These courts also acted in a counter-majoritarian way in considering the health of the top communist officials as grounds for suspending the charges. The judges considered this to be the ultimate proof of the triumph of legality over revenge. In addition, by shifting the weight of the accusations from structural to strategic impunity, the court was hoping to politically and socially smooth the path for national integration.

Lastly, given the lenient stance towards the top leadership, the Constitutional Court tried to show how, whether one adopted natural law or positivist arguments, the defendants were guilty of having set in place an abusive state apparatus. Anticipating the Eastern dissidents’ dissatisfaction with the results of the criminal proceedings and the lack of ownership of the processes of transitional justice, the court of constitutional review tried to deliver a strong denunciation of the regime’s main actors. Key to this was the establishment of the individual culpability of some of its agents. In this way, the East was spared the bitterness that could have
emerged from an institutionally encouraged reckoning with its own complicity with the communists.

In swinging between continuity and discontinuity arguments and in failing to provide a unified position on the normative bases of law within a democracy, the judiciary's affirmation of democratic principles of equal concern and respect for all failed in the eyes of the dissidents.  

The lack of a coherent position by the judiciary, the seemingly arbitrary choice of defendants and offences, the exclusive use of Western courts, and the high number of suspended sentences led to social frustration with the Federal policy.

This dissertation has argued that a decision in tune with the normative integrity of democracy must recognise both victims’ and victimisers’ claims and transmit rules of emotional expression and social engagement to the public. In an attempt to eschew accusations of victor’s justice, the German courts clearly showed a concern with protecting the interests of the defendants. With the exception of Seidel’s condemnation, all the other judges worked within a legality framework and handed down lenient sentences. Also, the courts’ pedagogical efforts were minimal, and this can be explained by their fear of seeming self-righteous once the Eastern regime had fallen.

In spite of the Western courts' attempts to address the East’s past, it has been argued that the choice of defendants and crimes to be prosecuted was arbitrary, incomplete, and not well-thought through. According to East German dissidents, the way the Western courts dealt with

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82 Peter Quint identifies and critically analyses seven arguments that have been used at the border guard and top communist leadership trials. Six of the arguments range from a strong Natural Law stance to rigid positivism, with the seventh claiming that no retroactivity problem ensues since the GDR was an unrechtsstaat. See Peter Quint, “The Border Guard Trials and the East German Past—Seven Arguments,” *The American Journal of Comparative Law*, Vol. 48, no. 4 (Autumn 2000), pp. 541–472.

83 On the failures of transitional justice in reunited Germany see Müller, “East Germany,” pp. 261–262.

84 Müller, “East Germany”; Anne Sa’adah, *Germany's Second Chance: Trust, Justice, and Democratization* (New Haven CT: Harvard University Press, 1998). Helga Walsh tells us that between 1989 and 1998, there were 65,000 preliminary judicial proceedings, involving around 100,000 people and resulting in approximately 800 prosecutions, 400 convictions and 200 suspended sentences. The proceedings covered crimes such as corruption, electoral fraud,
the criminal legacies of communism did not help second order enfranchisement. Given the context in which the courts were functioning, however, their contribution seems to have had an important, even if mainly symbolic, impact. While the punishment meted out did not conform to the norms of criminal law under ordinary circumstances, the proceedings were important for the kind of truths they unveiled, for the acknowledgement of suffering, for recognising victims as victims. Proper attention to circumstances required a careful and restrained approach to culpability. Equal respect and concern with the status of the accusers, as well as the political and social constellations of the time, pushed courts to opt for lenience in dispensing punishment. A “limited criminal sanction” approach was dictated by the circumstances of justice after 1989.\textsuperscript{85} Remembering that victim recognition and empowerment were achieved through the work of the Gauck commission, the parliamentary commissions of truth, and rehabilitation and reparation processes, we are in a better position to see the judgments of the courts as part of a holistic attempt to reconcile the past with democracy and national unity after 1989.

\textbf{VII.3 Romania}

\begin{quote}
\textit{We are the People, down with communism! Death to the murderer!}
\end{quote}

\begin{quote}
Anti-communist slogans, Bucharest, December 1989
\end{quote}

Between 1965 and 1989, Romania was dominated by one of the most oppressive communist regimes in Eastern Europe: Nicolae Ceauşescu’s “sultanism”\textsuperscript{86} or “personal neo-Stalinism.”\textsuperscript{87} The grip of the party-state over society was one of the strongest in Eastern Europe. The secret police, the infamous “Securitate,” were used to annihilate any dissidence or resistance to the

\textsuperscript{85} Ruti Teitel proposes a “limited criminal sanction” approach to penal justice within transitional justice. She claims that an emphasis on truth revelation, recognition, and condemnation and less attention to sentencing marks the use of criminal justice within transitional periods. See Teitel, \textit{Transitional Justice}.


dictator’s megalomaniac plans for enforced collectivisation, urbanisation, and total control of the economy.\textsuperscript{88} His project of paying Romania’s entire international debt to achieve national economic autonomy was realised in the summer of 1989, at the cost of a humiliating rationing of all consumer goods, food, utilities, and petrol for the population.\textsuperscript{89} A nationalistically motivated demographic policy made abortion illegal in the 1960s and led to a high mortality rate for women undergoing illegal and unsafe abortions.\textsuperscript{90} The extermination of between 500,000 and 2,000,000 political resisters, the destruction of the cultural patrimony, and the extraordinary cult of personality\textsuperscript{91} were dimensions of a regime that refused to reform even when the communist block around it had collapsed.

At the first signs of public unrest in December 1989, Ceauşescu ordered the armed forces and the Securitate to suppress street demonstrations by the desperate, outraged masses demanding the death of the tyrant and the end of the communism regime. A peaceful, negotiated roundtable was not an option in Romania. Between one hundred and one thousand people were killed and many more were wounded. While the Securitate forces supposedly continued to fight for the “tyrant” and shoot at the population and the army, the army leadership quietly sided with a newly formed organisation that soon took power in the vacuum left by the flight of the dictator on December 22. The “Front of National Salvation,” as it was called, was made up of former top communist apparatchiks who had had conflicts with Ceauşescu and had been consequently marginalised in the last period of the regime. They took advantage of the popular movement to

\textsuperscript{89} See Tony Judt, \textit{Post-war: A History of Europe Since 1945} (Penguin, 2005), pp. 622-626:
legitimize themselves as leaders of the revolution and take control of the country. Caught unprepared in the whirlpool of events, the authentic dissidents, mostly intellectuals and figures from the Romanian culture scene, had no chance and no organisational capacity to match the Front’s advantage.

The street fighting continued until the December 27 and destroyed many landmark buildings in the centre of the capital and in the city of Timişoara. As it became apparent later, many deaths were the result of shootings by both sides in a generalised climate of fear, rumours, and confusion. Sometime between December 22 and 25, 1989, Ceauşescu and his wife—the second most powerful official of the regime—were caught, arrested, summarily tried by a military tribunal, and executed under dubious circumstances. The video-recording of the trial and execution was broadcast on national television on December 25. The declared rationale for showing the tape was that having seen their leader dead, the secret police would stop shooting at the demonstrators. International disapproval and condemnation of the masquerade trial ensued.

While secrecy surrounded the whole affair, the execution did not initially find many critics in a society starved, frustrated, and traumatised by its years under Ceauşescu's rule. The accumulated hatred against the dictator and his family, as embodiments of state-sponsored oppression, led ordinary citizens to welcome his death with street celebrations. But the way in which Romania dealt with its past in the immediate aftermath of the political shift was to leave a great negative imprint on the political culture of the democracy that eventually emerged from the ashes of the Stalinist experiment.

This section will analyse the trial and try to show how it failed to serve the cause of democracy. What was a genuine popular revolt was quickly transformed into a quasi-revolution that brought to power former communist leaders. By blaming everything on Ceauşescu, the
latter hoped to prevent a comprehensive, lucid analysis of the oppressive system to which they themselves had belonged. A veil of secrecy continued to protect a bureaucracy permeated by non-democrats. There are good reasons to believe that because they were left unsatisfactorily addressed, public resentment and indignation were reproduced over time and contributed to the development of civil society pathologies: disillusionment, apathy, and a lack of trust in political institutions.94

Nicolae and Elena Ceaușescu were arrested and submitted to a trial by an extraordinary military tribunal on an army base in December 1989. The trial was organised by Ceaușescu’s own Defence Minister, General Victor Atanasie Stănculescu. In collaboration with the Front of National Salvation—the organism made up of former communists who at some point were alienated from Ceaușescu95—the general set up the court and ordered military magistrates to try the dictator and his wife. The trial lasted less than one hour and violated almost all procedural rules. Transcripts reveal that the prosecution, judge, and lawyers all accused the couple who repeatedly refused to recognise the legitimacy of the court and its proceedings.96

After a rather incoherent introduction in which he denounced the starvation to which the Romanian people were subjected while the privileged few were indulging in luxury, the judge allowed the prosecution to outline the charges. The four charges were based on the Romanian penal code of the time and they were: genocide committed during the public revolt, the undermining of state power and armed attack on the state’s institutions, the organisation of diversions with a view to the destruction of industrial installations, and the undermining of the

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94 For the socio-emotional status of post-Decembrist Romania see Tismaneanu, “The Quasi-revolution.” Also, Mihai, Licenta Thesis.
national economy.\textsuperscript{97} While legal continuity with the previous regime was affirmed by the court's use of the existing law, the couple were accused of shamelessly, and with impunity, using the state’s structures for their own interest.

Ceauşescu refused to acknowledge the charges. Enraged, the judge went on a tirade about the enforced penury of the Romanian people, the 64,000 people\textsuperscript{98} who had supposedly died in the repression of the street demonstrations in Bucharest and Timişoara, and the exile of the intelligentsia. The defence lawyers then made a point of explaining why the proceedings were legitimate and legal. As President of the Country, Ceauşescu could only have been held accountable by the great legislative assembly (MAN); however, since he had lost his office as a result of the “sovereign will of the people,” he was to be tried like any other ordinary citizen. In response to the lawyers’ presentation, the couple insisted they were the victims of a conspiracy and that they would only give an account of their deeds in front of the MAN. Further enraged, the judge moved on to accuse the couple of the destruction of the Romanian peasantry through enforced urbanisation plans\textsuperscript{99} and to compare, once again, the poverty of ordinary citizens with the luxurious style of the clan. The prosecution then raised questions about supposed secret bank accounts in Switzerland, where the money obtained through the exploitation of the country was supposed to have been deposited. At that point, Elena Ceauşescu demanded that evidence be presented to support these accusations. Rhetorically and sarcastically, the judge promised that evidence would be made available, while the prosecutor made unprofessional remarks about the defendants’ mental health.

\textsuperscript{97} See “Transcript of the Closed Trial.”

\textsuperscript{98} This figure had been grossly exaggerated, the number of dead people being somewhere between 100 and 1,000. It is possible that the judge might have been himself the victim of manipulation by General Stânculescu. In the grip of depression and fear about the consequences of his actions during the trial, the judge committed suicide at the beginning of 1990. See the interview with the trial’s prosecutor in “Cadavrele ceausestilor, filmate de Topescu,” \textit{Jurnalul National}, November 3, 2005, \url{http://www.hotnews.ro/stiri-arhiva-1202344-cadavrele-ceausestilor-filmate-topescu.htm} (accessed March 20, 2009).

\textsuperscript{99} Around 13,000 villages, predominantly from the regions populated by ethnic minorities, were transformed overnight into “agro-towns.” This was in tune with the dictator’s idea of “modernization as urbanization.” See Judt, \textit{Post-war}. 
The sarcastic and angry tone was preserved when the topic of Elena Ceaușescu’s fabricated scientific career was broached. Without knowing that the very man who was behind the trial, General Stănculescu, had personally ordered the carnage in Timișoara, the judge demanded obsessively to know who was responsible for the street fighting. Another recurring theme was the generalised starvation, the most direct frustration Romanians had to endure in the last years of the dictatorship. The unimaginable psychological impunity Romania had faced for more than four decades was behind the popular revolt. The magistrates at the trial vehemently voiced their disapprobation and moral hatred of the defendants and their repressive apparatus. From the declarations of his colleagues it seems that, notwithstanding his lack of professionalism, the judge's emotional expressions at the atrocities committed by the couple were sincere.¹⁰⁰

Tired of a conversation that was going nowhere, the prosecutor asked for the death penalty and the total expropriation of the couple. In response, the defence lawyers reiterated the grounds of the legality of the trial, claimed that they were doing the couple a favour by defending a tyrant who, in his full mental capacity, had committed atrocities against his own people, and declared that they thought the defendant was culpable of all charges. A long chain of accusations followed. The lawyers expressed their indignation at the lack of medicine in hospitals, the surveillance by the Securitate, the coup that brought the communists to power in 1947, and the deaths of the demonstrators in the previous days. In a symbolic gesture, however, they appealed to the judge not to allow the trial to degenerate into a vendetta.

After a short period of deliberation, the court pronounced the sentence: death penalty and total expropriation. The lawyers tried to enter into a dialogue with the two defendants with a view to appealing the decision, but Ceaușescu again refused to recognise the tribunal. As a

¹⁰⁰ “Cadavrele Ceausestilor, filmate de Topescu.”
consequence, the lawyer declared that by not recognising the court, the Ceauşescus had lost the right to appeal. The Ceauşescus were immediately executed and on Christmas night, 1989, Romanians watched the death of the dictator and his wife on their television screens. By blaming everything on the couple, the new leaders of the country had strategically ensured the impunity of the communist apparatus and its agents.

Since 1989, every Christmas season television channels rebroadcast the tape, hold round tables, show documentaries, and interview participants, all in an effort to find out what really happened. Who engaged in the street shootings? Who was behind the trial? As years went by and the truth did not come out, citizens speculated, formulated conspiracy theories, sunk into cynicism, and developed a total lack of trust in the state institutions’ capacity to come to terms with the past.\(^\text{101}\) The impunity associated with communist repression was replaced with the impunity of a post-communist, dubiously democratic regime of uncertainty and suspicion. As a result, an apathetic, bitter, and distrustful civil society failed to exercise its key function of holding the endemically corrupt government accountable.

The trial had nothing to recommend it as an exemplary event in democratic justice. It took place in an ad hoc military tribunal, but the law referred to during the proceedings was the civil criminal code. No evidence was presented, there were no testimonies, and all magistrates, including the defence and the judge, acted as prosecutors. The proceedings were marked by long and virulent condemnatory speeches, loaded with rhetoric and sometimes incoherent due to the emotionally charged atmosphere. The moral hatred of all towards the defendants, from the judge to the soldiers who executed the couple, is clearly evident in the transcript and video-recording. While legitimate given the atrocities that had been committed and ordered by the defendants, the unrestrained resentment and indignation experienced by the legal team were not appropriately

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expressed in a court of law aiming to end a regime of arbitrariness and move towards democracy and freedom. In all its features, the trial represented a judicial abuse and failed to communicate any didactical lesson to the equally enraged population. By unreflectively playing their part in the game that General Stăncaulescu and the Front had planned, the magistrates helped divert Romania from the democratic direction in which it had been going in the early days of the popular revolt. The supreme commander of the country had been eliminated and the multitude of the victims of his regime remained voiceless, while the system and its successors were still almost fully in place and continued to rule\textsuperscript{102} until 1996, when the liberal-democratic opposition finally won the parliamentary and presidential elections.

It was only in 1997, after the first peaceful power transition between the forces of the old (FSN) and the forces of the new (the Democratic Convention), that the National Prosecutor started to investigate General Stăncaulescu for his role in the 1989 events. In 2000, a court found him guilty of aggravated murder and sentenced him to 15 years’ imprisonment. Despite this, with economic disaster plaguing the liberal-democratic mandate, Romanians voted for the return of the Front’s successor party to power between 2000 and 2004. Consequently, a special appeal procedure was introduced to prolong the proceedings against the General and ensure the impunity of his acts. In 2007, one year after the elections that brought the liberal-democrats back to power, the initial sentence was reconfirmed. Currently, Stăncaulescu is fighting to get his sentence suspended on medical grounds.\textsuperscript{103}

The dominance of the Front’s successor party over the Romanian political landscape after 1989 delayed a sober engagement with the past until 2007 when a commission of experts under the President’s office formulated a 666-page report on communist and post-communist

\textsuperscript{102} Violent repression of the intellectual dissidents and student movement against the continuation of the communist regime followed in the summer of 1990 when the leader of the Front, then President of the country, summoned miners from the Jiu Valley to appease the “hooligans” contesting his power.

repression in Romania.\textsuperscript{104} The report contains scientifically documented information and a set of recommendations for a holistic transitional justice project, involving legal accountability, civic education, lustration, and memorials for the victims. However, the public debate around the document was not what Mark Osiel would have hoped for. Romanians still have to embrace deliberative habits and to observe emotional rules of expression.\textsuperscript{105} It took nineteen years and the end of the reign of the communist successor party for the country to begin its reckoning with a painful and lingering past. The hope is that by finally giving victims their due recognition and respect, the Romanian democracy will live up to its principles and shake the political apathy and public resentment that have been plaguing its public sphere for almost two decades.

\textbf{VII.4 Some More Lessons to Be Learnt}

Chapter VII has attempted to analyse courts’ various strategies when engaging with a past of state-sponsored oppression. Special attention has been paid to the precarious political circumstances under which these courts were forced to function. The threat of another military intervention in Argentina, the power asymmetries between East and West Germany, and the pervasive uncertainty induced by political manipulation during the revolutionary days of 1989 in Romania have made the judiciary’s task in each case extremely difficult. While oriented by a commitment to ending impunity and reaffirming equal respect for all citizens, the judgments of all the courts under survey have had to adjust to the situation and recognise the limits of the law in the process. As in Chapter V, the emphasis here was not on the empirically measurable impact of the decisions. I did not look into the lessons that the addressees of the decisions have learnt,

\textsuperscript{104} See \textit{Raportul Final}.

\textsuperscript{105} For an account of the vituperative attacks the commission and its president had to face from the left and the extreme right groups see Tismaneanu, “Democracy and Memory.” In 1999 a commission for the study of the Securitate files was established in an attempt to shed light on the workings of the much-hated institution; however, the commission was severely incapacitated by its own statute: the files remained under the control of the successor institution to the Securitate and the commission could be denied access on grounds of “state interest.” See Lavinia Stan and Lucian Turcescu, “The Devil’s Confessors: Priests, Spies, Communists, and Informers,” \textit{East European Politics and Society}, Vol. 19, no. 4 (November 2005), pp. 655–685.
but examined the quality of the lessons that were taught. In an attempt to further my contribution to a contextual theory of transitions, I explored these judicial decisions in order to illustrate, but also refine, the normative position I have taken in this dissertation.

Argentina’s first trial of the juntas displayed an interest in communicating concern with the suffering of victims and their families and also with the victimisers’ right to a fair trial. While realist critics have seen the defeat of Alfonsin’s efforts as clear proof that justice must give way to democratisation, this chapter has defended the first trial’s exemplary and inspirational quality within the Argentinean struggle for memory. The long, elaborate verdict constituted a lesson in democratic justice that had the potential to provoke the moral powers of its addressees.

The courts of the newly reunited Germany found themselves caught in an effort to condemn communist abuses without giving the impression of a self-righteous Western policing of the less fortunate East. The GDR citizens’ frustration with decades of communism was aggravated by a supervening national resentment towards the West’s confiscation of transitional justice. The Western judiciary, for its part, was caught unaware by the need to tackle this complex socio-emotional environment. The difficulty of this task was reflected in the choice of cases and defendants, in the less than coherent lines of argumentation offered by the various courts, and in the public’s reaction to the proceedings. For all these reasons, the quality of the message that the judiciary could have communicated was diminished. Nevertheless, as part of a comprehensive process of dealing with the past, the German judiciary contributed—even if imperfectly—to opening up a debate over what had happened.

Last but not least, by giving in to their own hatred against the oppressors and failing to oppose the new elites’ plans to blame the communist leader for the structural impunity plaguing Romania, the magistrates involved in Ceaușescu’s trial failed on several counts. Proper recognition was not given to the countless victims, the first couple was blamed for everything that went wrong in the country since 1947, and no lesson as to what democracy requires from its
citizens was communicated. On the contrary, instead of being constructively engaged in a fair dialogue about why Romania had been under communist repression since 1947, resentment and indignation were channelled exclusively towards the dictator and his wife in the most blatant act of scapegoatism. While it would be difficult to say what the court could have done under the strenuous conditions of the transition, it is equally difficult to ignore the fact that they unreflectively contributed to the hijacking of the country’s first impulse towards democracy. In this sense, the Romanian case study serves as a cautionary tale about the negative impact of a botched trial on the future development of a democratic emotional culture.

By reviewing these cases I hope to have illustrated the ways in which courts have, more or less exemplarily, chosen to deal with a past of violence and repression. While practical obstacles cannot be underestimated, the didactic opportunities associated with domestic trials must also not be wasted. All three trials presented here took place under emotionally stressful conditions. The variables defining the contexts in question played an important role in the judges’ evaluations of the alternative courses of judgment. While some made the best of the situation, helped end the reign of impunity, and filtered public moral hatred through the principle of equal respect and concern for all, others did not live up to the occasion. By looking back at their experience, I hope to have provided both exemplars of judgment and cautionary tales for societies contemplating an engagement with the past along democratic lines.
Conclusions

With the analysis of the impact that exemplary criminal trials of perpetrators could have on democratising societies, we have reached the end of our foray into the functions that transitional efforts could perform for democratising societies. By way of conclusion, I shall first recapitulate the main contributions this dissertation has sought to make, address a few potential criticisms, and delineate further trajectories of research.

The main ambition of this project has been to provide a contribution to a political theory of democratization. The main innovative element of this enterprise has been to draw attention to the affective dimension of politics during radical transformative periods within the life of a democratic order. Emotional culture has been conceptualised as part of the political culture of a society. In order to reproduce itself normatively and institutionally, democracy needs the support of an emotionally favourable environment. This is rarely the case in the aftermath of massive abuses and violence at the hands of the state. While legitimate, resentment and indignation targeting the agents of oppression can be publicly expressed in ways that endanger both the stability of institutions and the normative integrity of the democratic principles of equal respect and concern for all. Sceptics have seen this as a sufficient reason to turn their back on the past. In response, I have argued that transitional justice projects can perform important functions for democracy: they can institutionally reaffirm the commitment to democratic equality, legitimise and provide a venue for voicing negative emotions, and pedagogically engage resentment and indignation in an attempt to initiate democratic socialisation processes.

A constructivist cognitive account of emotion has given substance to this proposal. An excursus into the philosophy and sociology of emotions has shown why negative affect should
not be seen only with suspicion, but also as potentially beneficial to the reproductive efforts of any normative and institutional order. Through a critical dialogue with the main theories of moral emotions, I have conceptualised the sense of justice as an enduring disposition manifesting itself in negative expressions of resentment and indignation under circumstances of injustice, violence, and oppression. As cognitive affects, i.e., as affects that presuppose a judgment, they bear normative weight and can serve as barometers of legitimacy deficits. Consequently, constructively engaging with them in a way that takes them seriously and fructifies their beneficial functions is a normative and prudential imperative of democracy itself. The possibility that under circumstances of extreme oppression and impunity resentment and indignation might degenerate into political apathy, disillusionment, and other social and political pathologies has also been considered in order strengthen the argument in favour of an institutional concern with the politically relevant affects.

Of the multiple institutions that transitional justice projects can involve, I have chosen to look into the ways in which the judiciary can recognise and, at the same time, socialise negative expressions of resentment and indignation. A theory of adjudication for democratisation has been offered by supplementing Dworkin’s historically sensitive concept of “law as integrity” with more attention to the complexity of the context within which judicial review takes place and with insights from the philosophy of judgment. The theoretical framework thus built was then used to make sense of various instances of judicial review of transitional justice bills. Through a careful analysis of the different strategies courts have opted for in reviewing post-violence legislation, I have tried to illustrate how the least dangerous branch can issue exemplary, inspirational judgments that communicate the limits that democracy places on otherwise legitimate moral hatreds and provoke the moral powers of the public.

Criminal trials of perpetrators were also given due attention. The existing literature on the pedagogical goals that proceedings against the agents of state repression can achieve was
critically appraised. The dissertation's contribution to this literature lies in drawing attention to the emotional socialisation function legality can perform. Case studies of domestic transitional trials were then used to exemplify both democratically appropriate and democratically inappropriate judgments. The hope was to thus identify judicial strategies that would challenge citizens to reflect on what they ought to do in the name of their violated sense of justice and to prompt us to think in fresh ways about the role of magistrates in transition.

Before outlining the greater theoretical implications of this dissertation and the extended research project for which it could constitute the starting point, I shall try to respond to some potential criticisms that one might formulate against the arguments I have developed here.

The first potential criticism is that by phrasing the justificatory question in terms of a tension between democracy and justice and not between peace and justice, I misconstrued the principles that are usually conceived as being in tension within transformational contexts. The divisiveness of transitional justice—reflected in its potential for causing social disruption and for reifying cleavages through its own institutional mechanisms—needs to be carefully considered.

The first reason I decided to frame the debate in such terms is that historically, transitional justice has mainly been a concern of liberal democracies. Constitutional democracies usually organise trials and search for the truth about past abuses. In spite of the apparent universalistic and inevitabilist tones of some recent transitional justice discourses, the relatively new concern with organising trials, truth commissions, public apologies, and compensation schemes has been historically and politically confined to constitutional democracies and to societies aspiring to become constitutional democracies. When corrective mechanisms have been established for post-conflict contexts with no, or only weak, democratic traditions, this has been done mainly at the hands of international human rights institutions and agencies, themselves based on liberal-democratic principles.
At this point the critic might point out that I have not yet satisfactorily answered the question. After all, sometimes democracies have themselves decided to forgo justice for the sake of peace, post-Franco Spain being the most obvious example. While the example would have worked a few years ago, recent attempts to engage with the past and the virulent public debate surrounding the *Ley de la Memoria Histórica* support the thesis this dissertation sought to present. I argued that democracies can postpone but not renounce the project of a principled engagement with the past. A sustainable, stable, and fair set of democratic institutions needs the work of justice, whatever its institutional form. While fear of entering a cycle of violence should be one of the main concerns of decision-makers in the aftermath of violence, on its own, this does not constitute a sufficient reason to forgo corrective efforts. By arguing against the idea of stability as a good in itself and by showing the prudential merits of a principled engagement with the past, I have sought to persuade the transitional justice sceptics. We should not simply discard the possibility that the contentious debate surrounding a painful and divisive past might eventually lead to the cultivation of democratic attitudes of respectful disagreement. ¹ A divisive past and its competing interpretations can be domesticated and transformed through the conflict-resolution channels constitutional democracies make available to their citizens.

A second potential criticism might condemn the conservative, state-centred approach that this dissertation has embraced. By looking at the role that the national judiciary can play within wider processes of post-oppressive justice, the critic might accuse me of having neglected and indirectly closed the possibility of using alternative, traditional, local justice mechanisms. In

¹ See Osiel, *Mass Atrocity*. Leigh Payne claims that, rather than settling accounts, the debate that ensues around testimonies by former oppressors can help foster political participation, freedom of expression, and contestation of political ideas. Leigh Payne, *Unsettling Accounts: Neither Truth nor Reconciliation in Confessions of State Violence* (Durham NC: Duke University Press, 2008). David Dyzenhaus makes a similar point when he describes the kind of reflective reaction that the South African Legal Hearing contributed to: “Put differently, not only those who were involved directly in the Hearing, whether through participation or through being brought under its scrutiny, but all who can imagine themselves in their position, find that the process poses difficult and quite personal moral questions. South Africa’s judges were in the limelight, but we cannot judge them without at the same time subjecting ourselves to judgement.” David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1999).
response I would like to reiterate that this dissertation has not awarded the national judiciary an exclusive jurisdiction over transitional justice affairs. I chose to closely investigate courts in order to show that even non-elective public institutions can bring their contribution to the cause of democratisation. Democracy does not always emerge spontaneously, bottom up, straight from the grassroots. Sometimes state institutions can stimulate and catalyse the development of a democratic emotional culture. This does not mean that courts are best equipped to distribute corrective measures in view of democratic socialisation. I subscribe to the “division of labour” thesis and conceive of post-conflict justice as a holistic project involving various institutions, agents, and practices. I do not see any problem with a legal pluralist approach to transitional justice or with the idea that pseudo or non-legal institutions can also help advance democratisation. There is a caveat, however. Non-state, local practices of justice are desirable provided they do not contradict the principles underlying the democratic regime, i.e., to the extent that everyone—victims, victimisers, witnesses, bystanders, beneficiaries, and survivors—is treated with equal respect and concern.²

Related to the above criticism is a third potential accusation, namely, that I have adopted a narrow, Western, legalistic approach to very complex realities that cannot be properly engaged through the medium of the law. Addressing this criticism requires a few clarifications.

First, this dissertation has sought to avoid adopting a heroic, idealised view of the judiciary within transitional justice processes. The limits of legal justice have been recognised and so has the potentially non-principled, merely strategic motivation behind judges' contribution to democratisation. The normative prescriptions put forth in Chapters IV and VI were meant to provide a useful way of rethinking what "the least dangerous branch" of the government should

²² The most frequently talked about alternative to legal justice is justice by local, traditional fora such as the gacaca courts in Rwanda. While initially celebrated because of their stronger roots and greater legitimacy within the affected communities, problems soon started to emerge: génocidaire judges, proceedings based on insufficient, distorted or false evidence, abuse of witnesses and defendants, and lack of appeal venues. See Human Rights Watch, Rwanda, http://www.hrw.org/legacy/english/docs/2006/01/18/rwanda12286.htm, accessed May 5, 2009.
seek to achieve. In these chapters, I attempted to go beyond a simplistic, formalist understanding of adjudication and provide a more realistic account of what the law can and should strive for in the wake of violence. By paying attention to the complex political, social, and emotional circumstances of justice in transition, by investigating the role of judgment in both decision-making and decision-receiving processes, by valuing the programmes victimologists have outlined for us, I hope to have avoided the pitfalls of arrogant abstract trust in the power of the “Law.” The contextual theoretical approach this dissertation has adopted was meant to serve as a safeguard against abstract idealism in the sense that the normative program I set out for magistrates was informed by familiarity with real life practices. While some of the courts analysed in Chapters V and VII have engaged in an exemplary fashion with the problems they were faced with, others failed miserably. There are always lessons to be learnt, examples to be followed, and mistakes to be avoided.

Second, in view of the legitimacy and pragmatic shortcomings from which international fora often suffer, I have argued in favour of using domestic courts. While I believe that allowing international agencies to intervene and develop transitional justice programmes where there is an unsatisfied local demand is necessary, a quick look at the current docket of international and hybrid courts helps us understand the condemnable aspects of the distribution of transitional justice internationally. An acute awareness of the limits of international instruments continually reminds us of the need to tone down our trust in the power of the law.

In terms of accounting for the complexity of the emotional aspect of democratising polities, the work done in this dissertation is obviously far from sufficient. Feelings of guilt and remorse, pity and mercy could provide excellent objects for further research. An investigation into the ways in which hybrid and international criminal courts have attempted to engage their local addressees’ sense of justice would enrich our view of the judiciary’s contribution to democracy and would add intercultural insights to the analysis. An overview of other
mechanisms of transitional justice and the way in which they could deal with negative affects also needs to be undertaken. At the same time, a comparison between judicial and non/pseudo-judicial fora could also be enlightening. Last but not least, it would be interesting to see whether the insights into the risks and the opportunities associated with negative emotions within radical democratic transformations have any bearing on the realities of “consolidated” democracies, themselves undergoing significant and continuous changes in an age of plural citizenship and contested sovereignties.

This last observation holds a lot of promise in terms of building on the theoretical findings of this dissertation and developing further directions of research. The virulent public hatred targeting Roma and African immigrants in Italy in 2008–2009, the anti-government violent street protests in Athens during the last Christmas season, the emotionally charged events that led to the establishment of the Bouchard-Taylor Commission in Quebec in 2007, the recurring immigrants’ riots in suburban Paris, or the emotional effervescence around the planned building of a mosque in Cologne are just a few cases that illustrate the kind of challenges negative public emotions create for mature democracies. Does democracy owe recognition to these affective reactions? Should they be given venue for voice and representation or should they rather be suppressed as threats to stability? What mechanisms can be used to engage these emotions in a way that preserves the normative and institutional integrity of the democratic order? How can democratic attitudes be cultivated and preserved in an era of multiculturality and abrupt cultural changes?

These are questions all democratic societies have to answer in the age of pluralism. Democracies are perpetually experiencing transformations that push the limits of citizens’ democratic dispositions and of institutions’ representation capacities. Massive migration, minority recognition claims, historical injustices, economic inequalities and hardships, gendered inequities—all constitute solid grounds for negative feelings on the part of the affected groups.
Increased ethnic, religious, and sexual diversity within old democracies constitutes a source of political and affective strain. Dealing with emotionally charged claims is a challenge no democracy can ignore. Through an analysis of the ways in which these emotions have been represented (or misrepresented) in the media, civil society organisations, domestic institutions, and art works, we could learn from the past and discover innovative ways of making negative affects serve the cause of democracy. In this sense, a more extended and complex project would aim to contribute to the vast literature on democratisation by supplementing it with an account of one of democracy’s rarely explored dimensions: that of politically relevant emotions and the role they can play in times of social, cultural, and political change.

By drawing attention to the affective dimension of politics, such an extended project would seek to propose a nuanced understanding of democratic participation and representation in a globalised world, marked by unprecedented levels of pluralism. Two sets of questions could structure the inquiry: *On the one hand*, can the democratic background culture celebrated in liberal-democratic thought perform its functions when faced with increased diversity? Can the institutions of consolidated democracies give proper voice and representation to legitimately resentful minority claims? What kind of institutional innovations are needed in order to engage citizens’ outraged sense of injustice? *On the other hand*, can minorities make claims in a way that does not give majorities good grounds for negative feelings? What forms of emotional expression by marginalised groups are compatible with democratic norms of respect and concern for all? Provisionally, I can imagine that engaging emotions constructively is an important normative and prudential concern for all democratic communities, at all times, and across persons. Paying attention to politically relevant affects can help decision-makers rectify legitimacy deficits, prevent crises before they occur, and socialise emotions for a more inclusive idea of democracy. In this way, the theoretical conclusions this dissertation has reached for
contexts of radical transformations could be made useful for theorising the essential emotional aspect of so-called “consolidated,” yet permanently changing, democracies.
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