

TRANSITIONAL JUSTICE AFTER 1989: IS GERMANY SO DIFFERENT?

Keynote Address for the conference "Historical Justice in International Perspective" at the German Historical Institute, March 27, 2003

A. James McAdams
University of Notre Dame

Not so long ago, I found myself in Washington, D.C., discussing the issue of transitional justice with around 40 pretenders to the leadership of a country, let us say, "embedded" into one of the founding regions of our civilization, the Tigris and Euphrates River valley. They listened with polite attention while I offered some generalizations about Germany's most recent experience with this subject. But to my surprise, when the other Americans in the room and I concluded our remarks, we were met with a storm of notably self-confident indignation. One by one, our listeners let us know that they had little to learn from other states. Their experience with dictatorship was different. Hence, their options would be shaped by their specific departure from dictatorial rule. Only those who lived through this experience—"the people," we were informed—could determine their country's appropriate path.

Perhaps I should not have been surprised by these protests. In one respect, my American colleagues in the social sciences begin with a similar argument, although they do this dispassionately and with purely analytical purposes in mind. For the experts in democratic transition, the study of justice after dictatorship (or after any sustained period of injustice) is first of all an inquiry into "difference." One begins the examination by assuming difference and then works outward to generalizations about the divergent paths that are available to a state in reckoning with its troubled past.

For example, we are told that regimes of overthrow will follow different paths than those that come to power by negotiation. Leaders of the first regime type will find it easier to address past crimes because their predecessors are no longer around to challenge their authority, let alone to return to power. Conversely, the representatives of negotiated transitions will be in a much weaker position due to their continuing vulnerability to attack and overthrow. In their ascent to power, they may have even struck sordid deals with their adversaries that could come back to haunt them.

Likewise, commentators assume that the imperative to act upon injustice will be proportionate to the severity of the offenses in question. In

the case of egregious rights violations or indisputable crimes against humanity, there will be intense public and international pressure to satisfy the demands of the victims and to mend their fractured society. In contrast, lesser offenses—the loss of a home, the destruction of a career, the betrayal of a friendship—will be harder to address. Presumably, there will be far fewer advocates of retributive action. Their cries for justice will be drowned out by other citizens' calls to get on with life and to focus on practical tasks like institution building and economic reconstruction.

Would anyone deny the importance of these distinctions? It is hardly contestable that South Africa's modest approach to criminal trials in the mid-1990s was unlike Greece's aggressive trials of the "colonels" two decades earlier, or that Chile's "truth and reconciliation" commission of 1990 had a different agenda than its Argentine predecessor in 1983. Different histories, different leaders, and different decisions make distinct responses inevitable.

Then, too, if one takes the issue of difference to an extreme that few scholars would wish to defend, it is possible to argue—as did my aforementioned discussion partners—that there are few meaningful commonalities among these cases. Every country, just like every tyrant, police informant, ideologue, and university professor, is different from every other. Of course, this discovery is about as enlightening as the recognition that every event and every experience is unique. But let's face it, uniqueness has its attractions for politicians.

There is, however, another way of thinking about our topic. Instead of beginning with unlike cases, let us pose the opposite question. What factors do all instances of transitional justice have in common? Many onlookers will find the question counterintuitive. In geographical terms, few expressions of modern dictatorship could be more different than, say, Cambodia under Pol Pot and Hungary under Janos Kadar, or Milosevic's Serbia and Jaruzelski's Poland. Hence, at first glance, the task of acting upon these circumstances would seem radically different from one case to the next. Likewise, if we focus on cases with an historical sweep, say, Europe in the wake of the Second World War and again during the postcommunist 1990s, the challenge appears equally daunting.

Nevertheless, if we could identify similarities among these cases—a necessarily more demanding task than pointing to differences—wouldn't this discovery tell us something interesting about our subject? One possibility is that we will get a provocative glimpse into the future challenges awaiting any country after its departure from dictatorship or, in a broader sense, any people who has suffered grievous harm. Another benefit is that we will better understand why scholars throughout the world show no sign of ceasing to publish books, organize symposia, and lecture on the theme of transitional justice.

I propose to ask precisely this question about the seemingly incomparable case of postunification Germany. How often have we heard that Germany is different? But for this reason, few states are better suited for my comparative exercise. If commonalities can be found between this supposedly exceptional instance of transitional justice and other cases, they are likely to be found elsewhere as well.

To engage this thought experiment, I suggest that we begin with what happened in the Federal Republic of Germany (FRG) after the events of 1989/1990. To account for something, we must agree about what we are seeking to explain. Contrary to the common wisdom, this is not so easy; I have addressed this point in my *Judging the Past in Unified Germany*.¹ Then, I will suggest three ways—one of which is still in gestation—in which Berlin's actions were not that different from other states in transitional situations. These are: 1) the constraints of precedent; 2) the illusion of resolution; and 3) the "eternal return" of the past. In terms of justice per se, if my reading of these common challenges is correct, this is not a completely uplifting story. But at the end of this essay, I hope to provide insight into why the attempt to come to terms with injustice, however difficult, should matter to us at all.

Germany: A Special Case?

Germany has always seemed to be the "special case." In the late nineteenth century and throughout the twentieth century, German officials and intellectuals repeatedly appealed to concepts like the *Sonderweg* in seeking to bolster their conceptions of a unique national identity. Likewise, after the debacles of two world wars, their European neighbors searched for special solutions—*Sonderlösungen*, if you will—to the recurrent problem of German power. Our temptation is to think that the 1990s were no different. Germany would again be special.

In late 1989 and 1990, when the two German states were on the verge of coming together, experts informed us that East Germany's fate would be dramatically different from that of any of its Soviet-bloc neighbors. After all, the German Democratic Republic alone had a national counterpart in the West. Its weaknesses were matched by the other state's strengths. Only the GDR faced the prospect of total transformation according to the economic and political principles of a liberal capitalist order. Only its leaders faced the likelihood of being divested of meaningful political roles in the unified German state. Indeed, as this unequal relationship was played out, it was logical to assume that East Germany would be the one place—among all of the formerly communist states—where transitional justice was most fully realized.

In one respect, this has been an accurate prediction. More so than in other parts of Eastern Europe, the ex-GDR experienced virtually the

gamut of efforts to act upon past crimes and injustices. Throughout the 1990s, criminal courts were the scene of numerous prosecutions for the shooting deaths at the Berlin Wall and along the inter-German border. Hundreds of thousands of civil servants from the old regime were vetted for their "suitability" for continued employment in the new democratic order. Administrative courts reviewed competing claims for thousands of houses, dachas, parcels of land, and other forms of property lost under the old dictatorship. And, by decade's end, two parliamentary commissions had completed investigations of a host of wrongs that could not be resolved by statute.

If quantity had the same meaning as quality, the story would end here. Nonetheless, despite the fact that Germany's leaders sought to address a greater number of offenses than any of their peers, these efforts were met with widespread dissatisfaction among those who followed them about the *quality* of justice that was ultimately achieved. When we think about the many different cases that are typically considered in scholarly studies of transitional justice, this point should not be news to any of us. Disappointment, disillusionment, and disgruntlement are to be expected.

Why should this matter? The first reason I shall suggest is that transitional justice is not a policy smorgasbord, where one pauses to review a menu of options and then chooses the most attractive course. ("I'll take two truth commissions, one short trial, and no property issues.") If only the challenges of governance were this straightforward! Rather, the ability of democratic leaders to control the political agenda is always less than they hope for and, for that matter, less than outsiders think. A century and a half ago, Karl Marx made this point in *The Eighteenth Brumaire of Louis Bonaparte*: "Men do not make [history] by themselves but under circumstances directly encountered, given and transmitted from the past."²

For example, not long after the demise of the apartheid system, South African rights activists invited a slew of policymakers, practitioners, and intellectuals from fledgling democracies in Latin America and Europe to learn about the various strategies for dealing with our topic. The idea was not merely that the enthusiasts of the post-apartheid order would compare and contrast their circumstances with their counterparts' experiences. Rather, many hoped that after reviewing diverse cases, they could make well-informed decisions about the approach that best suited their needs and, if all went well, that had the greatest likelihood of being palatable to all concerned.

I recall a senior Chilean participant in this exercise telling me proudly at the time that the South Africans had selected his country as their model because it represented the least confrontational path. Looking back, I am

not persuaded that his assessment held true. Still, it is more important to recognize that well before the “retrospective justice shuttles” had touched down in Johannesburg and Cape Town, the leaders of the African National Congress and the National Party had already formalized their decisions in the interim constitution of 1993. Here and there, interested parties could debate the meaning of ambiguous terms in the document—for example, the loaded concept of “amnesty”—but the framework for all subsequent discussions had been set.

At this point, some of my social science colleagues would undoubtedly tell me that this particular outcome was the predictable result of a negotiated transition. Accordingly, they would argue, one could expect a different outcome from a regime of overthrow. In fact, this is what critics confidently predicted about unified Germany’s intentions. For many, the country’s predominately western leadership was bent upon imposing “victor’s justice” upon its vanquished counterparts, regardless of the damage it did to the credibility of German legal traditions and the rule of law. Precisely because West Germany’s policies had been validated in the court of history, it could and, they were certain, would impose its will as it wished. In the favored expression of the GDR’s long-time party secretary, Erich Honecker, one would have had to be “blind as kittens” not to recognize this fact. However, if we look closely at two of the Federal Republic’s most prominent efforts to achieve retrospective justice in the 1990s—the opening of the once secret files of East Germany’s security police (the *Stasi*) and the return of expropriated property to its original owners—we can see that these assumptions were not quite correct.

Consider the controversy that broke out in 1990 over the millions of *Stasi* files that suddenly became available after the Wall’s fall.³ Despite observers’ first impressions, the fact that authorities had access to these documents was hardly an opportunity for self-satisfaction and gloating. Contrary to expectations and against the demands of many East German dissidents, West German officials initially balked at the prospect of giving the *Stasi*’s victims access to the tainted remnants of dictatorship. At a time of turbulence and uncertainty in the East, they feared that the opening of these records would have explosive consequences. Interior Minister Wolfgang Schäuble underscored his belief that there were more important things to be done than stirring up ugly memories. Chancellor Helmut Kohl noted that it would be best to destroy the files outright.

Yet despite their apprehensions, Germany’s leaders soon discovered that they could do little to prevent these records from entering the public sphere. In many respects, their predicament was a natural outgrowth of decisions reached months before unification. Thousands upon thousands of personal dossiers and surveillance reports had been captured in January 1990 when outraged citizens stormed the *Stasi*’s Berlin-Normannen-

strasse headquarters, and shortly thereafter, journalists, well-meaning activists, and a variety of opportunists had already begun to circulate large portions of the records. As a result, by summer 1990, the GDR parliament, the *Volkskammer*, was rushing to pass legislation on what its representatives considered to be the appropriate uses of the files. Hence, even before West German officials arrived on the scene and regardless of their wishes, the opening of the *Stasi's* records was well underway.

In much the same way, Kohl and his colleagues found their hands similarly tied on the issue of property restitution.⁴ The suddenness of the GDR's collapse precipitated a landslide of disputes over the disposition of tens of thousands of properties lost, stolen, or expropriated since WWII. In an ideal world, federal officials would have preferred to pick and choose when they would get involved in the adjudication of these matters. But here, too, their options were shaped by circumstances "encountered, given, and transmitted from the past"; indeed, a somewhat more remote past.

Months before the signing of the Unification Treaty, the point at which West Germany's legal system was officially transferred to the territory of the GDR, the *Volkskammer* had taken another step toward redressing the old regime's offenses by returning scores of nationalized firms to their original owners. For the FRG, this *fait accompli*, too, raised uncomfortable matters of precedent: if these companies could be returned, then why not other forms of property as well? Further complicating matters, this was not the only precedent for addressing open property disputes. West Germany itself had set the stage decades earlier under Konrad Adenauer. In the 1950s, the new democracy committed itself to compensating the Jewish victims of Nazism for their property losses during Hitler's "aryanization" campaigns. Of course, as long as Germany was divided, this policy could not be applied to the GDR. Unification raised the issue anew.

By itself, each measure made good sense. Nonetheless, the unwieldy conditions of the times made it impossible—in both this and other cases—to compartmentalize policymaking. Once West German authorities moved ahead on one controversy, it seemed, they were immediately confronted with other disputes. Among these were the fantastically complex issue of the Soviet Union's postwar expropriation of nearly one-third of the landed property of the area that would eventually become the GDR; the destruction of scores of houses and apartment buildings in order to clear the way for the Berlin Wall's construction; and, in the GDR's waning days, the purchase by hopeful citizens of state-controlled houses and other properties that many had occupied for their entire lives.

In all of these cases, there is much to admire about the Solomonic care with which German administrative courts sought to reach fair and con-

sistent rulings about the disposition of such properties. Unfortunately, it is also true that few of the parties to these disputes found much satisfaction in their decisions. To the contrary, the losers in the restitution battles could not help but conclude that justice had been denied to them. Ironically, having enjoyed a taste of justice, the beneficiaries felt they should have received even more.

This dilemma brings me to a second feature of transitional justice, the illusion of resolution. We often hear from activists and intellectuals that the most sensible goal in the face of such disappointment is to search for that fine line between doing too much and doing too little. On the one hand, they tell us, one must provide the victims with the assurance that wrongdoing will be addressed. But on the other, one must also look to the future by reconciling aggrieved parties to a life together. Can it be any wonder, then, that those who take responsibility for this synthesis are frequently depicted as healers, attacking the “ills,” “wounds,” “festered sores,” “traumas,” “tumors,” and “cancers” of historical injustice while simultaneously preparing a divided society for the return to good health. But if this is healing, tell that to the family of the murdered activist Steve Biko who sought in vain to have South Africa’s amnesty law overturned.⁵ Or tell that to the families of Orlando Letelier and Ronnie Moffitt whose car was blown up by the Chilean intelligence service while they were in our nation’s capital.

The problem with justice, qualitatively speaking, is that it is so hard to recognize, and one never knows when one has received enough of it. Hannah Arendt tells us that some crimes—genocide, mass murder, and torture—are so horrific that it is impossible to know how to deal with them in a fully satisfactory manner, let alone to understand them.⁶ Yet even smaller offenses, like those that I mentioned earlier, are not so banal that they can be easily forgiven or passed over. In fact, injustice reaches everyone around it. Not only do the victims despair for lack of a resolution, but even the perpetrators can find themselves confined to a legal and moral limbo that can be lifted only through withdrawal and death.

If we consider the outcome of the much-publicized trials of the GDR’s former communist elite, it is clear that Germany has been no exception to the rule. This was not the first time in the latter half of the twentieth century that democratic leaders sought to achieve justice through criminal prosecutions; Greece, Bolivia, and Argentina did the same. However, Germany’s trials were arguably the most thorough. Beginning in 1990—once again, as a result of decisions reached before unification—an array of politburo figures, military officers, and lowly border guards were indicted on charges of ordering or facilitating the shooting deaths of hundreds of East Germans who had sought to flee their country. In painstaking fashion, local and appellate courts reviewed mountains of

evidence and agonized over the appropriate legal principles for assessing culpability. Although fewer than thirty defendants were convicted and only a handful spent time in jail, I personally believe that most of these decisions were rendered fairly and conscientiously.

Still, the disturbing result of the entire endeavor is what did not happen. Instead of provoking introspection and debate, the trials were largely received with disinterest and boredom by the majority of German citizens. At the same time, there was precious little evidence of reconciliation—or even dialogue—between the activists who had defended these measures as a vital part of Germany's healing process and the wrongdoers who stood to lose the most from convictions. Before the last judgment was rendered, both sides had been thoroughly marginalized. The heroes of 1989 were reduced to pleading their cause to each other while their counterparts were revealed to be little more than lonely old men wasting away in desolate living rooms. To paraphrase another passage from the *Eighteenth Brumaire*, what began as tragedy during four decades of communist rule seemed predestined to return as farce in a new political order.⁷

If this were where the similarities among states' diverse experiences with transitional justice came to an end, my story would be interesting but of limited long-term significance. Why then does this topic continue to intrigue us today? A major reason, and the last of my three points, is that the unaddressed or under-addressed issues of the past need not go away. They have the potential to return again and again. In fact, one of the most striking features about many scholarly treatments of transitional justice is how many of them deal with events that took place before their authors were born. If this is transitional justice, this has been quite a long transition!

One frequently cited reason for the staying power of these issues has to do with the interests of the victims themselves. As long as these persons are still alive or particularly vocal descendants can be located, demands for justice and rectification will prosper. In fact, when one aggrieved group steps forward to levy its demands, it is not uncommon for another to follow in its stead. In 1988, the advocates of Japanese-Americans who were deported to internment camps during World War II forced the Reagan administration into making compensation payments by arguing that few of their clients would be around much longer to benefit from an admission of guilt. In quick succession, the Jewish survivors of Nazi slave labor camps drew upon their own longevity concerns to intensify demands for compensation from German corporations that had profited from their misery; a final settlement was reached only a year ago. Continuing this cascade, African-American descendants of American slaves began demanding reparations for the injustices inflicted upon

their forefathers. Not very long ago, Ina McGee, the 69-year-old great granddaughter of a former slave provided the following rationale for her family's decision (which included support from her 99-year-old mother) to initiate a class-action suit against three Texas corporations: "The Germans got theirs. The Indians got theirs and may get more. Everyone has received reparations except for African-Americans. It's our turn now."⁸

Such interest-based explanations undoubtedly account for the resurgence of many demands for compensatory justice. Nonetheless, I doubt they are reliable predictors of the salience and vitality of these issues over time. Furthermore, I do not believe they are true to the spirit with which these claims are raised. More than a century after the wrongs took place, Ina McGee can define a *part* of her identity in terms of her descent from persons she never knew because there is much about her demands that transcends biology. Of course, slavery is no longer a tangible reality in this country. What is tangible, however, is the continuing existence of social and economic conditions—inequality, structural unemployment, endemic poverty—that one can trace back to the institution of slavery.

In this light, it is no accident that African-American demands for reparations have intensified recently as public support for the most visible means of redressing historical injustice in the U.S.—affirmative action—has waned. As preferential hiring and university admissions policies are challenged in the courts, those who have the most to lose from a change in policy will understandably seek new vehicles for expressing their discontent. In this not exactly literal but symbolically significant way, the grievances of a new era can be planted in the fissures and faults of another age.

It is too early to tell how or whether comparable parallels will be drawn in Germany, say, ten or twenty years from now. However, if coming generations so desire, I believe they will have no problem finding reasons for relating their government's actions in the first decade of unification to contested issues in their own age.

The groundwork has already been laid. While the debates over the merits of transitional justice in the 1990s were clearly heartfelt, they were also part of a more comprehensive dispute over how Germany was to be unified. Thus, one side's nervousness about the applicability of western legal norms and mores to the ex-GDR as well as the shadow of "victor's justice" reflected deeper concerns about how quickly the FRG should dismantle the old socialist system. Conversely, the other side's eagerness to push for justice and accountability spoke to a conviction that one could not act quickly enough.

We now know that the Kohl administration's aggressive implementation of the latter course led to severe economic dislocations in the East, the collapse of the region's social security net, and a feeling among east-

ern Germans that they had been relegated to a second-class status in their new country. But let us imagine that this mood were somehow to be sustained over the coming decade. It is true that economic conditions have improved dramatically in recent years and that most of the GDR's former citizens now enjoy the benefits of the German *Sozialstaat*. Nonetheless, some twelve years after the fact, many also feel that they remain less than equal partners in the unification project. There are still few prominent easterners in high governmental positions, and many westerners continue to regard their compatriots with a hint of condescension. If these latent tensions were to be exacerbated, isn't it possible that a disgruntled Dresdener or an alienated Berliner might be tempted to reach for his or her former identity and proclaim in Kennedyesque fashion: "Ich bin ein Ostdeutscher!"

Should this happen, or to the extent that it is already happening, I have identified some rich opportunities for rekindling old debates about Berlin's reckoning with the GDR's crimes. For example, one hotly contested aspect of the debate over the *Stasi* files was their use in vetting East German officials for ties to the secret police. Although we will never have the exact figures, approximately 40,000 administrators were fired outright or forced into early retirement as a result of these findings. How might one capitalize upon this issue to serve future controversies? Conceivably, someone who wanted the German government to pay greater attention to selecting easterners for high governmental posts could argue that these dismissals confirmed that Berlin had never been fully committed to treating all Germans equally. Or conversely, those who disputed the idea of affirmative action could just as easily contend that federal authorities had disqualified far fewer officials than they could have. It would not be hard to come up with similar arguments about other nagging issues in the post-Wall period.

Of course, my scenarios exist only in the realm of fancy. There is no guarantee that any will take the form I have described. Yet my point is not whether one or another criticism of past policy will be used to call attention to enduring social and political disputes. Rather, I mean to suggest that demands for justice and for the admission of wrongdoing exhibit a stubborn resiliency that makes them difficult to step over lightly.

The Meaning of Transitional Justice

Now that I have identified three similarities among states' efforts to come to terms with their past, where does this recognition leave us? I can imagine that those individuals who are optimistically moving down the path of restorative justice would be disappointed after listening to me, even distressed. After all, these similarities are not about what can be

done but instead about what cannot be done: factors you can't control, issues you can't resolve, and controversies you can't escape.

Because I am an historically-minded political scientist, these seemingly less than uplifting conclusions do not bother me much. The objective is to get things right. In particular, in a scholarly climate of postmodernist fascination with dominance and power, I like being able to shine light on what states cannot do and cannot determine. At times, their leaders are given too much credit. With respect to one subgroup of my own discipline's sometimes fetishistic obsession with rational choice, I also enjoy having the opportunity to point out that justice is about something more consequential than acting out preferences and fitting them into neatly configured boxes.

But if I am right, what should we say to those hopeful individuals who still want to do something about the recurring problem of historical injustice? From my perspective, the answer to this question is actually good news. If the attempt to repair long-standing wrongs is not about using a utilitarian calculus to decide what we should or should not aspire to accomplish, then it must be about something more fundamental in life that transcends individual cases. As Hannah Arendt emphasized in her examination of Adolf Eichmann's "unthinkable" crimes, you don't need to anguish over the difficulty of achieving justice before you act upon it.⁹ You take action because it is the right thing to do. I would push Arendt's point even further. Doing the right thing should not depend upon the gravity of the crimes. It should be one's first consideration in dealing with every instance of injustice.

In this light, allow me to emphasize what I am not arguing in this essay. I am not saying that one should refrain from addressing the wrongs of a tyrannical regime just because one's room for maneuver is constrained by preceding events and decisions. Nor am I saying that one should abandon the quest for justice, truth telling, and reconciliation because these goals are difficult to attain. Indeed, I welcome the fact that democratic leaders can never be sure that they will satisfy all participants in a dispute, even including parties a generation or more down the road. I am simply arguing that we should be aware of what we are getting into and be prepared for the challenges I have described above.

At this point, I want to return to the implicit problem of beginning with the differences among cases before proceeding to what unites them. When one starts with differences, one may please the social scientist or the occasional politician. But in the same breath, one runs the risk of characterizing principled decision-makers—that is, the kind of leaders both Arendt and I would prefer—as something we hope they are not: calculators and opportunists who first test the wind's direction before deciding what to do.

This is no small matter. We are accustomed to speaking about transitional justice in terms of its retrospective purposes. But it can have prospective functions as well. The spirit and energy that democratic leaders bring to a common problem provides their citizens with important signals about what they can expect in the years to come. Should the new regime's behavior be unresponsive and erratic, it is unlikely to gain the trust of a population that has long been subjected to cynical manipulation. Yet, it has a chance of winning credibility if its representatives show their dedication to the principles of fairness and decency that were denied in the past. The recognition of universal norms happens to be an essential condition for all democracies. It transcends the idea that states are so unique that they cannot learn from each other. In fact, if I were given the opportunity to speak to Iraq's new leaders, I would begin with exactly this point.

Notes

¹ A. James McAdams, *Judging the Past in Unified Germany* (New York: Cambridge University Press, 2001).

² Karl Marx, *Selected Works* (New York: International Publishers, 1968), 97.

³ *Judging the Past*, chapter 3.

⁴ *Ibid.*, chapter 5.

⁵ For example, see John Dugard, "Retrospective Justice: International Law and the South African Model," in A. James McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press, 1997), 269–290.

⁶ Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958), 241.

⁷ *Selected Works*, 97.

⁸ *Houston Chronicle*, January 20, 2003.

⁹ Hannah Arendt, *Eichmann in Jerusalem* (Middlesex, England: Penguin Books, 1976), 277–278.