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PART I

THE UNIVERSE OF TRANSITIONAL JUSTICE

Transitional justice is made up of the processes of trials, purges, and reparations that take place after the transition from one political regime to another. A fuller characterization is provided in Chapter 4. The task of the present book is, first, to describe the variety of cases of transitional justice and, second, to propose an analytical framework that can help us explain the variations among the cases. Part I is devoted to presentation of the cases. In the first two chapters I describe several historical examples in some detail. Chapter 1 describes the processes of transitional justice that occurred in the wake of the restorations of Athenian democracy in 411 and then again in 403 B.C. In Chapter 2, I discuss the measures of retribution and reparation that took place in France after the two Restorations of the Bourbon monarchy in 1814 and 1815. Chapter 3 is a more compact survey of transitional justice in other cases, mainly transitions to democracy in the twentieth century.

There are several reasons that I single out the Athenian and French episodes for a fuller discussion than what I provide for other cases. First, they will be less known to most readers than the more recent cases. Second, they show that transitional justice is not limited to modern regimes nor to democratic regimes. Third, both cases show exceptionally clearly that in transitional justice, nations can *learn from experience*. The measures taken after the second restoration of Athenian democracy were shaped by what was perceived as excessive severity in the first. Conversely, transitional justice after the Second French Restoration was shaped by the perceived failure to strike hard enough in the First. In our century, too, transitional justice can be shaped by the memory of earlier transitions, the most striking instance being the three German transitions of the twentieth

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century: after World War I, after World War II, and after reunification in 1990. On each of the last two occasions, many of those who wanted to hold the outgoing regime to account were adamant that they would not repeat the mistakes that had been made the previous time.[1] In Belgium, the desire to hold speedy trials of collaborators after World War II was shaped in part by the memory of the failure to prosecute those who had collaborated with the Germans during World War I (see Chapter 8).

[1] On the back cover of a book documenting the lack of denazification of the West German judiciary (Friedrich 1998), a high judge and a law professor both draw the lesson that the same error must not be repeated in dealing with the East German judiciary. For a criticism of this argument, see Rottleuthner (1994). For the relation between 1918 and 1945, see Chapter 7.

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I

Athens in 411 and 403 B.C.

1. INTRODUCTION

Democratic transitional justice is almost as old as democracy itself. In 411 B.C. and then again in 404–403 B.C., the Athenians saw the overthrow of democracy by an oligarchy, followed by defeat of the oligarchs and restoration of democracy.[1] In each case, the return to democracy went together with retributive measures against the oligarchs. In 403, the Athenians also took steps toward restitution of property that had been confiscated by the oligarchic regime. The next episode of transitional justice occurred more than two thousand years later, in the English Restoration.

The Athenians had *two* episodes of transitional justice that followed closely upon each other. It seems likely that after the first episode some learning took place, shaping the next occurrence. After the collapse of the first oligarchy in 411, the Athenians restored the pre-oligarchic democracy, carried out harsh retribution, and enacted new laws to deter future oligarchs from trying to take power. What they did not do was to attack the root causes of the oligarchic coup. In 403, the returning democrats reacted differently. On the one hand, they enacted constitutional changes to eliminate features that had brought democracy into disrepute. On the other hand, they pulled their punches in dealing with the oligarchs,

[1] In the following I rely heavily on Ostwald (1986). My indebtedness to Hansen (1991) will also be obvious. The most recent monograph on the transition in 403 is Loening (1987). Although many of the stark statements in the text ignore important controversies in the scholarly literature, I do not think this affects the substance of the argument, as summarized toward the end.

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preferring the forward-looking goal of social reconciliation over the backward-looking goal of retribution.

II. ATHENIAN DEMOCRACY

To understand the two transitions and the decisions taken in their aftermath, we have to go back to the beginning of Athenian democracy almost two hundred years earlier. In 594, Solon was given carte blanche by two opposing factions to reform the laws.[2] Three of his reforms are directly relevant for transitional justice. He enacted an amnesty law that restored civil rights to those who had been disenfranchised, except exiles condemned on charges of homicide or massacre, or for seeking to establish a tyranny.[3] This law was the model for the amnesty legislation of 405 B.C. that, in the wake of the defeat of Athens by the Spartan fleet, canceled some of the harsh sentences passed after the overthrow of the oligarchs in 411.[4] (The purpose of the amnesty was to reunite the city, but it came too late.) Also, Solon enacted a "peculiar and surprising law, which ordains that he shall be disfranchised who, in time of faction, takes neither side," the citizen being expected to "espouse promptly the better and more righteous cause, share its perils and give it his aid, instead of waiting in safety to see which cause prevails."[5] Finally, he introduced an important change in the Athenian legal system. Then and later, there was no public prosecutor. All suits had to be brought by private individuals. Solon's reform was to allow any citizen to start a prosecution, either on behalf of the injured person or simply in the public interest. One effect of the law was to create an incentive for frivolous suits by "sycophants," or professional denunciators, who would bring a suit against a wealthy man in order to blackmail him by offering to drop the case. They were widely resented by the upper classes, and vigorously prosecuted under the second oligarchy.

Other pieces of Solon's legislation are indirectly relevant, qua impetus to a process of democratization that eventually led to untrammeled popular rule triggering an oligarchic backlash. He abolished debt slavery, thereby creating an important condition for effective democracy. Before

[2] The basic sources are Plutarch's *Life of Solon* and Aristotle's *Constitution of Athens*. The latter is usefully interpreted and corrected by Moore (1975).
[3] Plutarch, *Solon* xix.3–4.
[4] Andocides, "On the Mysteries," 73–79.
[5] Plutarch, *Solon* xx.1.

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he enacted his reforms, all citizens could vote in the assembly and serve on the popular courts, but eligibility for some offices was reserved for the nobles ("wellborn"). After the reforms, all criteria of eligibility were defined in purely economic terms, so that birth no longer was decisive. Among the four property classes, members of the lowest were excluded from all state offices. For the most important offices, only members of the top class or the two top classes could be chosen. In 457, members of the third-ranked class became eligible for some of these high offices. Yet even though members of the lowest class remained ineligible, they exercised great influence as members of the Assembly, of the popular courts, and (after the reforms of Cleisthenes in 507) of the Council of the Five Hundred, which controlled the agenda of the Assembly.

The rights to vote and to hold office may be spurious if their exercise is costly. As Aristotle notes in the *Politics* (1308b–1309a), "If office bought no profit, then and only then could democracy and aristocracy be combined; for both notables and people might have their wishes gratified. All would be able to hold office, which is the aim of democracy, and the notables would be magistrates, which is the aim of aristocracy." A decisive step to a more effective democracy was taken by Pericles in the mid–fifth century, when he instituted daily pay for jurors, for members of the Council of the Five Hundred, and for magistrates.[6]

The class structure could also influence politics by its link to military functions. By and large, the navy was manned by the lowest property class (*thetes*) and the infantry (*hoplites*) by the second lowest. As Athens in the period that concerns us was more or less constantly at war, the presence or absence of these groups in the Assembly could sway the outcome:

> Radical democracy was introduced by Ephialtes' reforms in 462 which were passed by the Assembly when 4000 hoplites of the middle class were away fighting in Messina. Fifty-one years later the radical democracy was replaced by the oligarchic rule of the Four Hundred, and that constitutional change was passed by an Assembly in which the *thetes* were probably under-represented, because the meeting was held outside the walls and because the entire Athenian navy was stationed off Samos.[7]

[6] Payment for going to the Assembly was established only in the following century. By contrast, at that later time payment for magistrates seems to have been abolished, arguably "a retreat from radical-democratic principles and another sign that the Athenians from 403/2 had opted for a more 'moderate' form of democracy" (Hansen 1991, p. 241). Other aspects of this retreat from radical democracy are discussed in Section IV.

[7] Ibid., p. 126.

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Not surprisingly, the impetus for the restoration of democracy came from that very same navy at Samos. The second-highest group, the cavalry (*hippeis*), was seen as closely associated with both oligarchies.

As members of the Assembly, the Athenians could vote laws and decrees, but it remained to implement them. Perhaps the most remarkable feature of the full-fledged Athenian democracy is the degree of control the citizens exercised over those who were to carry out their decisions. Although most officeholders were chosen by lot, the important offices were elective. Whether chosen by lot or elected, all magistrates had to undergo a mandatory scrutiny before and after taking office. Whereas the ex ante scrutiny was usually a formality (but see Section V for exceptions), the ex post examination could be a serious business. Moreover, magistrates were also subject to prosecution for "crimes against the state." These control functions had originally been lodged in the Areopagus, an elite body consisting of former high officials belonging to the highest property group, but after the reforms of Ephialtes, they devolved on the Council and finally on the popular courts.

By the mid–fifth century, a succession of reforms had created the potential for abuses of unrestrained popular power.[8] As reflected in the title of Martin Ostwald's work, the Athenians had popular sovereignty but not yet the rule of law. For a while, as he also writes, "Pericles' intelligence and psychological and political insight prevented unreason from dominating policy."[9] One cannot, however, judge the robustness of institutions by looking at the outcomes they generate under good leadership: Enlightened statesmen will not always be at the helm. The next generation of leaders, of lesser stature or lesser prudence, showed the vulnerability of the

[8] We may wonder how this came about. There was certainly no democratic revolution. Although the masses may have used their voting rights to expand their power, this does not seem to have been the main mechanism. Rather, the elites found it in their interest to sponsor popular measures. Ober (1989), p. 85, notes that "by the time of Cleisthenes, the elites recognized mass ambitions as a new weapon to use against each other. As a result, politically ambitious elites actively sponsored democratizing reforms. . . . Ironically, as the elites gained victories over their enemies by sponsoring democratic reforms, there were fewer and fewer institutions that they could control directly." Similarly, Ostwald (1986), pp. 179–80, writes that "Ephialtes' reforms had the effect of establishing the sovereignty of the people in political affairs, but that does not mean this was their intent. His primary purpose may well have been to outflank those who had been most effective in supporting Cimon's now-discredited policy of 'giving a higher priority to the interests of Sparta than to the expansion of his own country.'" Ober's comment is especially interesting, in that it suggests that the elites were engaged in something like a prisoner's dilemma, in which they all lost power by trying to outdo one another in appealing to the people.

[9] Ibid., p. 200.

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institutions. Although the system contained some safeguards,[10] these were least effective in the supremely important realm of military decisions.

III. THE FIRST OLIGARCHY AND ITS DEMISE

Athens had strong expansionist and imperialist traditions. At its height around 460, the Athens-led Delian League comprised nearly two hundred member states in the Eastern Mediterranean. The idea of empire appealed both to the Athenians' desire for glory and to their desire for tribute. Yet when decisions to go to war were taken by the popular assembly, they were not always wise. In particular, the disastrous Sicilian expedition of 415 was undertaken on a wave of popular enthusiasm, against the more realistic assessment of Nicias. Summarizing Thucydides, Ostwald writes that

> Nicias himself recognizes that the sobriety and circumspection of his seasoned military expertise have little chance of stemming the irrational enthusiasm of the Assembly (6.9.3). Even before Alcibiades had opened his mouth, lust for adventure had made the commons deaf to Nicias' warnings: a Sicilian expedition would only swell the number of already existing enemies (6.10); even if the expedition succeeded, it would be difficult to control a large population from a great distance, and if it failed in any way, the Sicilians would join the Spartans, eager to recoup their lost prestige, in attacking Athens itself (6.11), and what strength had been recovered after the recent plague should not be dissipated on alien ventures (6.12).[11]

The effect of the disaster was "the rise of oligarchic opposition, putting all the blame on the leaders who had persuaded the people and on the people themselves for being cozened by them."[12] In the summer of 411, the oligarchs staged a coup and terrorized the assembly into abdicating its powers to them. Organized as the Council of the Four Hundred, they stayed in power for four months only, as the alliance with Persia on which they had counted fell through and the naval troops at Samos turned against them.

The restoration of democracy, including transitional justice, took place in two steps. The first (or "intermediate") successor regime, which lasted

[10] These safeguards included notably the use of *delegation* of decision making to smaller bodies and *delays* (Ostwald 1986, pp. 78–79; Hansen 1991, p. 307). See, however, Ruzé (1997, Chap. 22) for important reservations to the idea that the role of the Council in preparing proposals for the Assembly served as a delaying device.

[11] Ostwald (1986), p. 318.

[12] Hansen (1991), p. 40.

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for about eight months, was a truncated democracy, limiting franchise to the Five Thousand, "of which body all who furnished a suit of armor were to be members."[13] The regime immediately engaged in what Ostwald calls "a relentless prosecution of extremist oligarchs."[14] Three of them were tried and two executed for treason, because they went on an embassy to Sparta after news of the revolt of the troops at Samos had reached Athens. Some avoided trial by going into exile, only to return in 403 to become members of the Thirty Tyrants. After the restoration of the full democracy, "vindictive measures against those who had been associated with the Four Hundred widened in scope."[15] Soldiers who had stayed in the city during the regime of the Four Hundred suffered partial loss of their political rights.[16] Three democrats are cited as having exploited the retributive apparatus for private gain.[17] An oligarch who had already been tried and convicted under the intermediary regime was retried under a more serious charge.

Yet three indicators show that the measures were not simply victors' justice. First, as Ostwald adds, "it was a prosecution not a persecution: we hear of no lynchings or terrorism but only of orderly legal proceedings initiated soon after the new regime had been established." Second, many who served on the Council of the Four Hundred to the very end were tried *and acquitted*. Third, the restored democracy resisted the temptation of retroactive legislation. Because there was no law against attempts to overthrow the democracy, the three oligarchs had to be prosecuted for treason; others presumably were not prosecuted at all. Although the new regime enacted a law against such attempts, the legislation was prospective, not retroactive. It was intended to deter "oligarchic recidivism," not to punish members of the oligarchy that had just been overthrown.[18]

[13] Thucydides, *The Peloponnesian War,* 8.97.1. This measure, and the abolition of pay for public office, were voted by the people as a whole.
[14] Ostwald (1986), p. 401.
[15] Ibid., p. 420.
[16] Andocides, "On the Mysteries," 75–76.
[17] Lysias, "Defence against a charge of subverting the democracy," 26.
[18] Ostwald (1986), p. 418. In his account of why the "intermediary regime" tried three oligarchs for treason but not for their "revolutionary activities," Ostwald (1986), p. 402, cites the fact that "their accusers had themselves been active in establishing the Four Hundred and had been members of the Council but had turned against the extremists and were now leaders of the new regime." After the restoration of the full democracy, this self-serving reason was presumably less important in the explanation of democratic self-restraint.

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IV. THE SECOND OLIGARCHY AND ITS DEMISE

The next oligarchic regime owes its origin to an event that both discredited the democracy internally and made it vulnerable to external threats. After a great victory in a sea battle against the Spartan fleet off the Arginusae Islands in 406, the Athenians tried eight of their generals for failure to rescue the surviving sailors (or perhaps for a failure to recover the bodies of the dead). The proceedings, which may have involved breaches of legality,[19] led to the condemnation of all the generals and the immediate execution of the six who were present in Athens. The charged emotional atmosphere that made this outcome possible is captured in Xenophon's description of what happened when a member of the Council, Callixenus, proposed to vote over the guilt of the generals without a proper trial:

> Euryptolemus . . . and some others served a summons upon Callixenus, alleging that he had made an unconstitutional proposal. And some of the people applauded this act, but the greater number cried out that *it was monstrous if the people were to be prevented from doing whatever they wished*. Indeed, when Lyciscus thereupon moved that these men should also be judged by the very same vote as the generals, unless they withdrew the summons, the mob broke out again with shouts of approval, and they were compelled to withdraw the summonses. Furthermore, when some of the Prytanes [the executive committee of the Council] refused to put the question to the vote in violation of the law, Callixenus again mounted the platform and urged the same charge against them; and the crowd cried out to summon to court those who refused. Then the Prytanes, stricken with fear, agreed to put the question – all of them, except Socrates, [who] said that in no case would he act except in accordance with the law.[20]

The phrase that I have italicized is commonly taken as the most extreme expression of unconstrained popular sovereignty in Athens. There is a special irony in that one of the executed generals, Thrasyllus, had been a key actor in restoring the democracy in 411. Although later "the Athenians regretted their action and voted that charges be brought against those who had deceived the people, Callixenus among them,"[21] this could not undo the twofold harm that had been done. First, the episode rekindled divisions among the citizens and strengthened those who distrusted the democrats. Second, in choosing new generals to replace those who had been executed, the Athenians favored loyalty to the democracy over military competence. In itself, this would not have mattered had the

[19] For opposing views on this important point, see Ostwald (1986), pp. 439–41, and MacDowell (1978), pp. 178–79.
[20] Xenophon, *Hellenica*, I.vii.
[21] Ibid.

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Athenians accepted a peace offer from Sparta after the defeat at Arginusae. According to Aristotle, the Assembly rejected the offer because it was deceived by Cleophon, whom he depicts as a notorious demagogue.[22] Whether the Assembly acted emotionally or took a calculated gamble based on distrust of Sparta,[23] the outcome was disastrous. Led by less-than-outstanding generals, the Athenians suffered a devastating defeat in the battle of Aegospotami in 405, which marked the end of the Athenian empire. In the wake of the defeat, a second oligarchy was installed in 404 under Spartan auspices. The reasons why the Spartans preferred to install a relatively autonomous oligarchic "Vichy" regime, rather than a puppet "Quisling" government, remain conjectural.[24]

The peace treaty included provisions for the return of the oligarchs who had gone into exile after the collapse of the previous oligarchy, and a vague clause allowing Athens to retain its "ancestral constitution," a phrase susceptible of several interpretations. In practice, the regime installed by the Thirty Tyrants, as the new oligarchic leaders came to be called, was one of terror. Among other things, they required each of their members to prove his mettle by killing one metic (alien resident). Also, more than fifteen hundred citizens were killed. One motive for the atrocities may have been revenge: The leading oligarch Critias "showed himself eager to put many to death because . . . he had been banished by the democracy"[25] after the demise of the previous oligarchy. For some oligarchs, the ultimate goal may have been to remake Athens on the austere model of Sparta.[26] Economic gain may also have been a motive. To consolidate their rule, the Thirty created a privileged body of Three Thousand, as they came to be called, and expelled the rest of the citizens from the city.

The expelled took up residence in Piraeus, the main port of Athens. Ultimately, with the assistance of an exile democratic army, they routed the oligarchs in battle and killed two of their main leaders. The Spartan leaders once more pulled their punches and supervised a treaty of reconciliation between "the men in the city" and "the men in Piraeus." According to Aristotle, the terms of the reconciliation were as follows:

> Those of the Athenians who had remained in the city and wished to leave should live in Eleusis, where they should retain full citizen rights, have complete

[22] *The Constitution of Athens* xxxv.1; see also xxviii.3.
[23] For the latter view, see Kagan (1987), pp. 378–79.
[24] Ibid., pp. 405–10.
[25] Xenophon, *Hellenica,* II.iii.
[26] Ostwald (1986), pp. 485–87.

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