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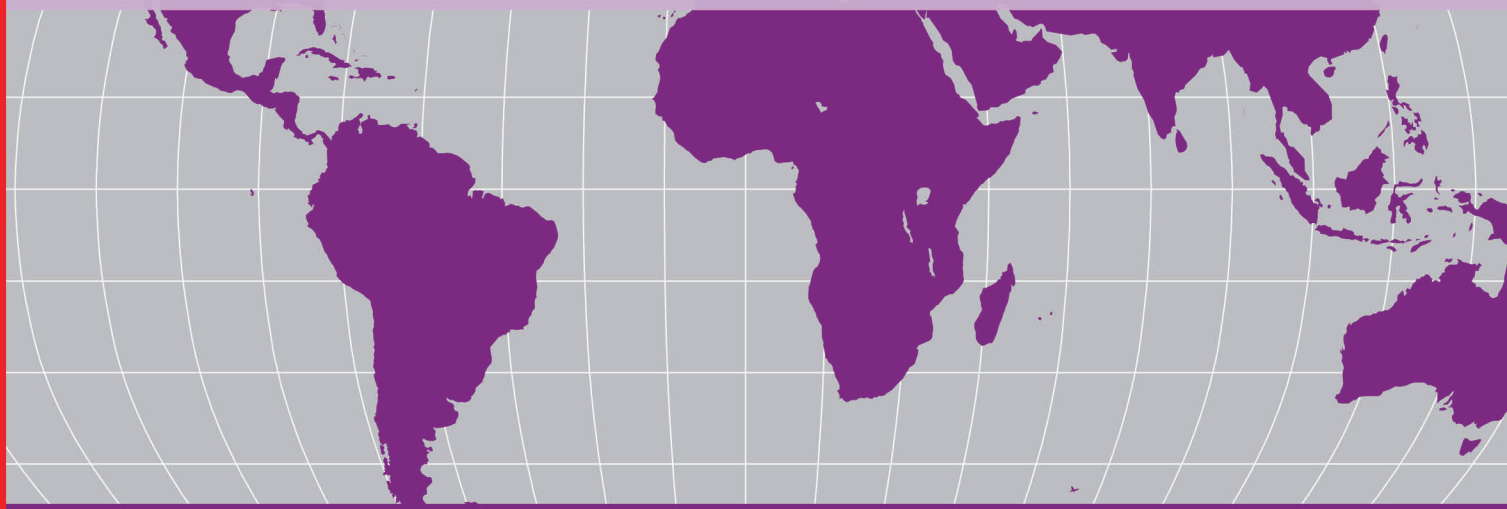
Distributive Justice in Transitions

Morten Bergsmo, César Rodríguez-Garavito, Pablo Kalmanovitz and Maria Paula Saffon (editors)



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Land, Justice and Peace

Jon Elster[*]

1.1. Introduction

In this chapter I consider land reform for the purpose of promoting justice and peace. The context is that of civil war or, more generally, political violence. Although I shall draw on a number of historical and contemporary conflicts, the Colombian situation is constantly present in the background and sometimes in the foreground of the discussion. Whether Colombia has experienced a full-scale civil war, and whether the high levels of violence have been politically rather than financially motivated, are partly semantic questions, partly factual ones. Does the FARC, for instance, remain a social movement grounded in claims for social justice, or has it degenerated into a mafia? I shall remain agnostic on that issue, since nothing I shall say turns upon it. For convenience, I shall use the term "civil war" to cover all the cases I shall discuss, including the Colombian one.

Let me begin by considering the *root causes* of civil wars. I shall limit myself to cases in which the war occurs because part of the population has a grievance against the government, because of a perceived injustice (the civil war that arose around the secession of Katanga would not, for instance, fall in this category). In many important cases the grievance is that of an *economically oppressed majority*, whether the injustice takes the form of unequal distribution of land or of huge income disparities. Colombia exemplifies this case. In another important set of cases, the grievance is that of a *politically oppressed minority*, whether the injustice takes the form of the minority being denied access to public office, the right to worship in its own religion, or the

[*] **Jon Elster** is Robert K. Merton Professor of Social Science at Columbia University and holder of the Chaire de Rationalité et Science Sociales at the Collège de France.

right to use its own language. The French wars of religion in the 16th century and the recent conflict in Sri Lanka exemplify this case. Finally, in rare cases a *minority* that believes itself to be *economically oppressed* may be at the origin of a civil war. An example is provided by the Athenian oligarchs who initiated the civil wars of 411 BC and 403 BC, two episodes that have surprising potential even today for illuminating the dynamics of civil wars.

When the majority is not politically oppressed, that is, not excluded from the suffrage, why would it remain economically oppressed? Why does it not use its electoral power to produce economic redistribution instead of using extra-legal means? We must assume that some of the channels of representation are distorted or blocked. To mention only one of the many ways this can happen, the Colombian secret ballot is sometimes undermined by the practice of voters using their cell phones to take and send a photograph of their act of voting, so that they can make a credible promise to vote for this or that candidate. Thus even if the ultimate goal of insurgents is economic redistribution, their proximate goal may be to remove blocks to political influence.

In the aftermath of civil war, there is usually a need to alleviate or rectify both the *injustices that caused the war* and the *injustices caused by the war*. At the end of each of the eight French wars of religion, for instance, an edict was issued that tried to address both questions. Yet because the measures proposed to address the root causes were mostly insufficient, the wars started up again after a few months or years. They came to an end only when the edict of Nantes definitely established the right of the Calvinists to live in their own fortified towns. In the following, I focus on civil wars where the root cause was economic injustice. To ensure a stable peace, the injustice that caused the war will have to be alleviated by measures of *distributive justice*, especially redistribution of land or income. At the same time, one may want to address injustice caused by the war through measures of *transitional justice.* The relation between these two is the main topic of this

chapter.[1] Although I emphasize land reform as a measure that can serve both ends, I shall also discuss other initiatives.

1.2. Transitional Justice

Consider first measures of transitional justice, notably retribution, reparation, purges and truth commissions. These are intertwined in complex ways. Some forms of reparation can also serve as punishment, and vice versa. In the land reform in the former Czechoslovakia after 1989, the government preferred restitution to former owners over financial compensation or voucher schemes. The latter solutions would probably have led to a more efficient use of the land, but were rejected because it was feared that the land would have ended up as the property of former Communists. Indirectly, therefore, the compensation scheme served to punish the latter. When Colombia adopted the Law of Justice and Peace, confiscation of the property of paramilitary leaders was intended to serve the purposes both of punishment and of creating reparation funds for victims. Truth commissions have often contributed to the process of reparation by identifying victims, and to some extent also to the process of retribution by identifying wrongdoers. Their most important effect, however, has been to stabilize the new regime by making it impossible to deny the extent of wrongdoing under the previous one.

Punishment of wrongdoers and reparations to victims are easily justified on intrinsic grounds. The former deserve punishment, the latter deserve reparation. Instrumental arguments for punishment and compensation are more difficult to assess. One argument that is widely used in the human rights community is that severe punishment of present wrongdoers is needed to deter future wrongdoers ("sending a signal to the future"). As I don't believe in that claim, and because in any case I want to limit myself to the here and now, I shall disregard it.

A different instrumental argument is that both retribution and reparation are needed to stabilize the post-transitional society. If wrongdoers are not punished and victims not compensated, the gov-

[1] From a perspective different from (albeit compatible with) the one adopted here, this issue is also raised in the chapter by Pablo Kalmanovitz.

ernment will lose legitimacy and extremist movements may flourish. It is hard to evaluate the empirical validity of this argument. Historically, I do not know of any post-transition regimes that have failed because of insufficient retribution or reparation. Yet perhaps it is too early to tell – South Africa might prove to be a case. The bulk of the black community in that country got neither justice nor land, only (some) truth. The very high level of individual violence in South Africa could one day crystallize into collective violence, although the likelihood of that happening is steadily decreasing.

Even if valid, the instrumental argument for retribution might be limited by an instrumental counterargument. *The transition itself* could be in danger if wrongdoers know they will be harshly punished when they step down. The question then is whether punishments can be fine-tuned to as to be sufficiently severe to satisfy the demands of the population for retribution, but sufficiently lenient to persuade the wrongdoers to step down. This was of course the intention behind the Law of Justice and Peace in Colombia.

On a more uncontroversial note, purges in the bureaucracy and in the military may be needed to ensure the loyalty and efficiency of the new administration. The failure of the first French restoration in 1814 was in large part due to the insufficient purge of officials and officers who remained loyal to Napoleon. It offers, therefore, a uniquely clear case in which insufficient transitional justice caused the collapse of the post-transitional regime. Fear of sabotage or blackmail by members of the former elite was a major reason behind the lustration process in Eastern Europe, which Monika Nalepa discusses in chapter 4 of this volume.

Land reform in transitional justice often comes up against the problem of *dual ownership*. Sometimes property is confiscated by the state in the pre-transitional regime and then distributed or sold to new owners. This took place in Athens in 403 BC, in England in 1648, and in France in 1793. This was also the case for Jewish property in France during World War II and for Communist Europe after 1945, except for Poland, where farmers were allowed to retain their individual plots. In other cases, original owners have been forcibly dispossessed of their property or possession by war or civil war, and others have taken their

place. This also includes the very important and common case of forcible sale of property at artificially low prices. After the transition, the property may then be returned to the original owner without compensation to the new one (France 1945), returned with compensation (as sometimes happened in England after 1660), retained by the new owners with compensation for the original ones (France 1815), or retained without compensation (German properties confiscated by the Soviet Union between 1945 and 1949). The choice among these solutions seem to depend, first, on the time between the dispossession of the original owners and the regime transition, and second, on the good or bad faith in which the subsequent owners acquired the property.

Sometimes, property has been returned to the original owners only if it remained the property of the state after confiscation (France after 1815, Bulgaria in 1990). In these cases, there were no new owners who could assert their legitimate expectations to retain it. Owners of confiscated property may not receive the identical plot of land, but land of comparable size and location; also, as noted earlier, there may be an upper limit on the size of the plots they receive. One may allocate land to demobilized soldiers, either as payment for services or to prevent them from taking up arms again. Finally, one may allocate vouchers to the original owners, which they can use to bid for land purchase (Hungary after 1990).

1.3. Distributive Justice

Let me now turn to measures of distributive justice in transitions, and more specifically to the redistribution of land. In some cases, this process can go hand in hand with transitional justice. As a dual-purpose measure, the new regime can impose an upper limit on the size of restituted plots. This policy was followed in Hungary in 1945 and in Romania in 1991. In Colombia, property confiscated from the paramilitaries might have been used to enact a general redistribution of land, and not only to compensate victims. In general, however, the two processes are unconnected. When they compete over the same scarce resource, land, the political system has to decide how much to allocate to the one and how much to the other.

For my purposes it will be useful to understand the idea of distributive justice in a broad sense, which also takes into account the *efficiency* of the measures taken. The reason for this is that an increase in the size of the "pie" makes it easier to share it more fairly, whatever principle of distributive justice one subscribes to (as observed in the Czechoslovak land reform, transitional justice may occur at the expense of efficiency). Thus measures of land reform may be defended on grounds of equity, on grounds of efficiency, or both. Let me briefly canvas some policies that have been used or proposed.

On grounds of efficiency, one can impose a property tax on uncultivated land so that the need to pay the tax will induce the owners to cultivate it or to sell it. On grounds of equity, the state might subsidize the purchase price. One might also expropriate large estates with "full" or "adequate" compensation paid by the new owners or by the state, to break them up into smaller units. In some cases, smaller units are more efficient as well as desirable on grounds of equity. In other cases, one might consolidate many small plots into large estates to be used for highly mechanized production. Although inequitable, this policy is also sometimes recommended on grounds of efficiency.[2] Often, equity may require the transformation of *de facto* possession into formal ownership. To encourage small land-holdings, the state may subsidize the cultivation of new land at the agricultural frontier or subsidize peasants who negotiate land purchases with owners.

1.4. Conclusion

Land reform in the aftermath of civil war or political violence poses several general questions to which there are no easy answers. I have already discussed one of them, the problem of *dual ownership* of land. I now consider three others that strike me as particularly important and difficult.

Why privilege land? Generally speaking, civil wars and autocratic regimes cause many kinds of sufferings. Material suffering in the form of confiscated or destroyed property is only one of them. In addi-

[2] The comparative efficiency of small scale and large scale land cultivation is discussed by Albert Berry in chapter 2 of this volume.

tion, personal suffering in the form of time served in prison, forced labor, or forced displacement, and intangible sufferings in the form of deprivation of opportunities for education, travel, *et cetera* can be just as important. There are no *a priori* principled reasons to give priority to material suffering. Of course, there are bureaucratic reasons for doing so, because land is easy to measure, and to evaluate. Putting a price on time spent in prison or on time spent on doing forced labor is obviously difficult. How to put a price on the lack of opportunity to get higher education? For instance, when Jews in Hungary in 1938 were forbidden to take a law degree, how should one compensate them for that loss of opportunity? Since it is hard to assess the magnitude of that loss, it is tempting to give priority to what is operationally simple to do. In doing so, however, one might impose substantive injustice to those who experienced other forms of suffering. For instance in Eastern Europe after 1989, there was almost an obsession in some countries on full restitution for loss of property. Even people who had emigrated to the United States got their property back, and Václav Havel got his family palace back. However, there was no emphasis on the fact that millions of people for generations had been prevented from selling their labor power, which for many of them was their only property, because capitalism was not allowed. The emphasis on material property seems arbitrary.

Who shall have the burden of proof? If a long time has passed since dispossession, or if war and conflict have destroyed records and archives, the dispossessed may have difficulties in establishing their claims. Traditionally, of course, claimants are required to establish legal pedigree that they have claim to the piece of land in question. That is the traditional assumption of any court. In some cases of transitional justice, however, the burden of proof on the claimants has been replaced by a presumption of possession based on various criteria. For Jews in France after 1945 and also in the more case of Swiss bank accounts, the mere membership of an ethnic group was sufficient to establish some kind of a presumption. In Colombia, the fact that the claimant lived in a region torn by conflict and dispossessions might create presumptions. Finally, of course, if the property was sold below market prices, that would also create a presumption for possession.

Past, present, or future. The final question, and probably the deepest one, is whether policies should be guided by the past, by the present, or by the future. First, one may allocate land and scarce resources more generally according to *entitlements* created by past holding or past sufferings. Second, one may allocate them according to present *needs*, whether or not caused by the armed conflict. Finally, one may allocate them to their most *efficient* use, to alleviate resource scarcity in the future.

If we focus on needs, distributive justice takes precedence over transitional justice. A focus on entitlement implies the opposite priority. A focus on efficiency is neutral, in the sense that the division of the larger pie may be guided by either transitional or distributive justice. In the choice between these two principles, a *truncated restitution of property* can be a compromise. In addition to the restitution principles adopted by Hungary and Romania (cited above), the policies adopted in Norway and France after 1945 also conform to this idea. The French law of 28 October 1946 did not indemnify the loss of 'sumptuary' elements. In a time of extreme penury in a France where after four years of occupation and generalized looting, allied bombardments and destructions due to the struggles of the Liberation, everything had to be rebuilt, the sumptuary was thus opposed to the necessary. For instance, neither jewelry nor works of art were indemnified. In Norway, too, the principle of regressive compensation for war damages was well established. The purpose of the legislation was to assist survivors for purposes of reconstruction, not to recreate pre-war fortunes. There was a general feeling that the whole country had suffered, and a certain reluctance to compare sufferings.

In Colombia today, displaced individuals who were forced by guerrillas or paramilitaries to give up their property are entitled to get it back or to receive land of equivalent value. Other displaced individuals fled their land because they feared, perhaps on the basis of false rumors, that they would be forced to give up their properties. Although their need is just as great, they do not have the same legal entitlement. In this case, it is far from clear that restitutive justice should take absolute precedence over distributive justice. From the pool of available land, some might be allocated to the immediate victims of violence and some to what we might call collateral victims. Finally,

some resources could be allocated to individuals who are neither direct nor collateral sense victims of war, but who simply need land to make a decent living.

Of course, the more we widen the circle of beneficiaries of land reform, the more land will have to be made available. Given the large landholdings of many members of parliament in Colombia, the political obstacles to land reform will be enormous. Limiting redistribution to the direct victims of violence might, therefore, be more acceptable from the political point of view. Yet while transitional justice may be more feasible in the short run, distributive justice may be needed for a stable and durable peace.

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The chapters of this book explore, from different disciplinary perspectives, the relationship between transitional justice, distributive justice, and economic efficiency in the settlement of internal armed conflicts. They specifically discuss the role of land reform as an instrument of these goals, and examine how the balance between different perspectives has been attempted (or not) in selected cases of internal armed conflicts, and how it should be attempted in principle. Although most chapters closely examine the Colombian case, some provide a comparative perspective that includes countries in Latin America, Africa, and Eastern Europe, while others examine some of the more general, theoretical issues involved.

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