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Distributive Justice in Transitions

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Concluding Remarks

Stephen Holmes[*]

These contributions are truly fascinating. So many interesting and provocative things have been said that there is no way to adequately summarize, let alone criticize, the contents of this book. So I will instead make a few comments to stimulate thinking. Carl Schmitt, the Nazi legal philosopher, mocked Karl Marx. He said that Marx was childish because he believed that "seizing industry" was a revolutionary and historically unparalleled achievement. But this, Schmitt alleged, was naïve. Seizing industry, Schmitt argued, was trivial in comparison to seizing land. *Landnahme* has been by far the most important form of political action in human history. And next comes seizing and controlling sea lanes or major routes of global transportation. But *Landnahme* was the main act, defining the world that we still live in today. And it is true that, because of their decisive role in defining who owns what, brutal massacre and expulsion are part of the deep history of the human race, and not just a contemporary story. To take a relatively recent example, every piece of agricultural land in the United States was originally stolen. As a result, relying on the moral authority of the United States to push for giving stolen land back to the original owners is probably unrealistic given the total impossibility of applying any such principle to the United States itself.

Now one of the fundamental principles underlying systems of private property is the obligation to "give back what is stolen". But almost all privately owned land today was, at one or more points in history, seized by force from its original inhabitants. "First ownership rights" were almost universally the product of force and fraud and, at any rate, could not have been, by definition, created through a proce-

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durally correct transfer of legal title. So here lies a philosophical puzzle or contradiction. All historically known systems of private property, including ours, are normatively based on the principle that what is stolen must be returned and, simultaneously, historically based on the refusal to return what was stolen.

This paradox does not undermine functioning systems of private property, presumably, because the original sin of violent expropriation is lost in the mists of time. When land seizure is not lost in the mists of time, as in the case of post-Communist redistributions of property to privileged insiders and criminal-apparatchik networks, or in the Colombian case discussed in this book, there is a problem. When force and fraud have been used to transfer property *within living memory*, the legitimacy of the property system as a whole is called into question.

Now I am fascinated by Elisabeth Wood's chapter for reasons both theoretical and practical, analytical and historical. And, while reading it, I kept wondering whether the categories "justice" and "injustice" are explanatory variables at all. Can justice and injustice be invoked to explain why, for example, violence breaks out or not? This would be a very un-Tocquevillean thought. One of Tocqueville's principal claims is that, historically, many highly unequal societies have been perfectly stable and largely immune to revolutionary or class violence, so that it cannot be said that, in itself, inequality *causes* political violence. Moreover, economic growth, which almost inevitably produces psychological and political tensions between the relative winners and losers of development, can sometimes fuel or trigger violence. This raises the question of the *causal* role of inequality and injustice in stoking political violence.

One possible example, about which I am not entirely confident but which is suggested by the El Salvador example detailed by Elisabeth Wood, is that El Salvador had a better chance of integrating its insurgents into the peaceful political process because insurgents were not implicated in terrible atrocities, nor were they associated with narco-traffickers. I am not sure if this is correct. But it suffices to illustrate the importance of the question of the role of justice and injustice as causal factors in the explanation of political violence. This question

has loomed over the entire book, which shifts back and forth between philosophical-analytical approaches and historical-explanatory approaches. If you believe that "ought implies can", then you must agree that any moral assertions about what we are obliged to do and advocate doing must take into account what is historically possible. So what makes land reform possible in Colombia, and what factors make it difficult?

There is one thing that I do not quite understand: will the restitution of property to the peasants who lost it in acts of violent land seizure bring the conflict to an end or not? I have read both things. Some of the authors of this book suggest that such restitution would bring the conflict to an end, and others deny it. So I would like to see this important topic addressed in a more focused manner. This, too, is a causal or explanatory question about the nature and anticipated consequences of the land reform being proposed.

Whenever a political scientist hears philosophers talking about justice and economists talking about efficiency, not surprisingly, he is bound to ask: where is the politics? So the main thing I want to address now is the politics of land reform – the ways in which the asymmetries of political power in society influence the shape and feasibility of land reform proposals. But first I will say a few words about the inadequacy of focusing exclusively on justice or efficiency.

First of all, and this is my attempt to extend an argument made in Jon Elster's chapter, *all attention to injustice is selective*. This is necessarily true because there are too many injustices in any given society to take them all into account, or to give them all adequate attention. And the principle by which our selective attention to injustice is distributed is neither impartial nor random. It is instead rigged. The selectivity of our attention to injustice is governed by asymmetries of political power. We ignore one injustice and focus on another depending on who has more political power or a more audible political voice. In the scramble to expropriate "orphaned" state assets after the collapse of Communism, for instance, the individuals and groups who managed to get hold of the most valuable pieces of property were those who had more political clout, those with greater bargaining leverage, those who had something to offer or who were capable of making credible

threats. So it is not as if asymmetries of political power are irrelevant to the topic of this book. And asymmetries of power are also important because they have a decisive impact on the selectivity of our attention to injustice.

Elster raised the selectivity problem when discussing the anomaly, not justified by impartial principle, that proposals to restitute lost land seem more politically popular than proposals to compensate for many other unjust deprivations, such as career chances irreversibly destroyed. In general, the groups that are well-organized or better-organized are more likely to have their claims for restitution at least discussed, if not satisfied.

Speaking about economists, one could ask: why have economists not devoted more attention to this issue before? I first encountered this peculiarity of the economics profession in conversations with an economist who was studying, or failing to study, Russia after the collapse of Communism. I asked him why entrepreneurs elsewhere did not do what "biznessmen" in Russia did, namely eliminate competitors by using plastic explosives? This is a valid question because capitalists everywhere hate competition. So why was the violent attack on competitors so much more common in post-Communist Russia than, say, in the United States or Western Europe? The economist in question answered: economics does not explain the non-use of violence! That has always seemed to me a profound confession about the limits of economics as a social scientific discipline, unable to think creatively about perhaps the most important of all social problems, namely the cabining of spirals of violence. If you are tired of hearing economists talk as if they were all-seeing and all-knowing, go to Israel, because when a large security threat dominates discussions, economists sit silently in the back of the room. And if you try to explain the distribution of land (and water rights) in Israeli-occupied territory using exclusively economic categories such as efficiency, with no reference to political power and organized violence, you will not get very far. In fact, I think that this might be a profitable line of research, to compare land redistribution in Israel and Colombia, to determine the relative roles of justice and power in the patterns of land distribution in the two cases.

Now I am happy enough with the word "restitution", but I am not that clear about what the word "transitional" is doing there. Studies of post-Communism were once called "transitology". After some time, it became clear that a more accurate term would have been traumatology, which may be a useful nomenclature for Colombia studies as well. In any case, "transition" usually means that power has changed hands. So the question is: has power in Colombia changed hands? This is an important question because it addresses the limits of feasible reform proposals. If you want to reverse a policy that has been put in place and supported by the dominant forces in society, then are you not dependent on a shift in the array of forces or at least a shift in the way the dominant forces perceive their own interests? Elster argues against the idea of restitution of land, not in a Colombian context particularly, but in general; while César Rodríguez-Garavito and Maria Paula Saffon and Rodrigo Uprimny argue in favor of it. But I am not clear about what "transition" we are discussing here. After all, although the Colombian Constitutional Court blocked Uribe's second return to power, his political coalition has retained power. So where are you going to find the political support to overturn the status quo and institute the land reforms you favor?

Elster distinguishes various reasons for allotting property to people who currently do not have it. We can give property to people who once had it or to people who need it or to people who can use it most efficiently. If I were examining these categories from an explanatory point of view, I would ask, why does a political elite, when redistributing property *selectively* to its clients, use one language of justification rather than another? The only serious explanatory question here, in my opinion, concerns the use of a style of justification for distributions, not the distributions themselves, which presumably follow a logic of power, patronage, and corruption. I would not assume, in other words, that Elster's different rationales actually motivate the distributions that occur.

Anyway, back to the Colombian case. Has power changed hands? If power has not changed hands then "restoration" would simply recreate the *status quo ante* that produced the current impasse, not a very appealing prospect. There are, needless to say, plenty of cases in history of aborted land reform, going back to ancient times. After all,

the Gracchi brothers, Tiberius and Gaius, were murdered in the second century B.C. for their attempts to redistribute patrician land to the plebeians. In their travels they observed large tracts of unused farmland and proposed giving it to those who, in Elster's terms, both needed it and could have used it most efficiently. And they were murdered because those who would have lost from the proposed land reform had the power to stop them. You cannot offer up a serious project for land reform based only on considerations of justice and ignoring brutal facts about the interests of those who wield power.

It is true that the language of restitution is popular now, including in the international human rights community. But do not forget, as I already mentioned, that every bit of land in the United States was stolen and no one in his right mind is proposing to "restore" it to its original inhabitants, or indeed to redistribute it for any rationale you can imagine. No one in the United States associates the rule of law with giving back violently seized territory to those from whom it was seized. At the very least, proponents of land reform in Colombia should not count on serious U.S. support for their proposals.

Who are the potential winners from the land restitution proposals? I did not understand where this volume's authors think that the political coalitions to support their proposals can be found. Rodríguez-Garavito speaks about political coalitions, but the only potential members of such coalitions that he named were human rights groups. But these are not serious players in effective political coalitions. Where are the well-organized and amply resourced groups who have political clout and who can credibly threaten to withdraw cooperation that Colombian elites need, and who can therefore effectively push for land reform? And I do not mean victim groups to whom the urban land reformers deliver restitution while they remain essentially passive. I mean groups that will benefit from the proposed reforms and who also have sufficient political capacity to drive the process forward on their own. Where are they? Who are they? If the groups who benefit are victim groups without political power and who are likely to remain politically passive recipients of the urban reformers' morally admirable generosity, then, over the long haul, the groups that are politically powerful, if they do not block the reform, will simply hijack it. They

will take it over and twist it to serve their own interests, not the interests of the currently dispossessed.

One of the reasons to consider this possibility, if my amateurish knowledge of Colombia has not totally deceived me, is that the original confiscation of land was aimed at destroying the political power of the peasants. Is that not the case? Was that not why land confiscation was accompanied by the brutal killing of union leaders, aimed at reducing the capacity of the rural poor to organize for political reasons? If part of the purpose of the original confiscations was to reduce the power of the peasants, and if this strategy was successful, would-be land reformers today do not have well-organized peasant allies who can help them put land reform into effect. The reason why restitution is needed, in other words, is the same reason why restitution is so devilishly difficult. Justice requires that the Colombian peasantry be given back the power they have lost; but justice alone does not give them the power they need to reestablish their political role in the country. I do not mean to be cynical here. But it is no secret that the rights of big landowners, say, were respected long before the rights of orphans. In other words, *justice depends on power*. John Stuart Mill memorably said, however, that the dependence of justice on power is not a cynical observation. Rather it is a practical recommendation. If you want justice, you had better strategize and organize for power.

Now it is true that norms of justice have some, not entirely negligible, capacity to rally individuals into organized groups capable of pushing for reform. But these norms are weak. As David Hume said, justice is strong enough to shape our judgments about right and wrong, but too weak, on its own, to control our passions. To achieve anything even vaguely resembling justice, justice-seekers must make alliances with groups who have only partly overlapping aims and who, on many issues, embrace values that are deplorable from the standpoint of justice itself.

This leads me to a couple of concluding points. The first concerns deeds and title to land, especially lack of clarity of title. Again, as a student of Russia, I have noticed something striking, namely, that when the KGB came to power with Vladimir Putin, the chekists began systematically to strip property from the mostly Jewish "oligarchs"

who had flourished under Boris Yeltsin in the 1990s. But they did not destroy property rights. Why? They did not destroy property rights because property rights are useful, selectively, to members of certain social networks. If I am in the KGB, for example, I have a group-specific network of enforcers who can make the property title in my possession worth the paper it is printed on. I must have the deed. It is a necessary but not sufficient condition for my "owning" the property. It is my informal power, based on my KGB network, however, that makes the legal title valuable. If you are not in the KGB and not under its protection, then the legal title that places property formally in your name is worth nothing. The property can be taken from you with very little fuss. This example helps us focus again on the context of political power within which property rights, including land rights, exist. We read in Albert Berry's chapter about all the ways in which the politically powerful can manipulate land ownership. For example, if new technologies are given to big landowners instead of small landowners, the government can then "justify" large landholdings by appeal to their observable efficiency, which the government itself has created by its systematically biased policies. This is an excellent example of the way in which decisions that correspond to the interests of the politically powerful can disguise their true purpose behind seemingly neutral economic categories such as "efficiency".

Now one of the first shocks I had when I went to Colombia some years ago was the impression that, at least some of the time, "the democracy" did not refer to all inhabitants of Colombia but rather to the white people who live in the cities – that is, to a part of the society, the privileged part. Now this is certainly an oversimplification, because, as I said, I am writing from a deplorably superficial understanding of Colombian society. Nevertheless, the following considerations may be worth discussing. Any kind of genuinely democratic transformation must begin with the commitment to include previously excluded groups in a common national project, as apparently happened in El Salvador. And that, in the Colombian case, may require a deep transformation of a way of thinking, not to mention in the Colombian elite's self-image. How to bring about such a transformation is far beyond my powers of imagination, but the daunting dimensions of the task seem at least worth flagging. And once we see things this way, then the dispro-

portion between the problem Colombia is facing and the land reform solutions proposed in this book become an issue. Property restitution seems a much too minor policy change to have any serious impact on the yawning gulf between the urban haves and the rural have-nots that has tormented Colombia for so many bloody decades.

Finally, if you want to be practical (and strategizing and organizing for power is the most obvious way), one thing to think about is how to split the powers that be. You have to play chess. You have to use tactics of divide-and-conquer. One time-tested method for changing a prevailing system of power is to devise ways to split the members of the ruling coalition and set them against each other. You must figure out what incentives could be used to bring some parts of the current ruling coalition over to the land-reform side. For example, the 1901 land reform in Ireland worked in the following way. Landowners were compelled to sell their lands, but only at market prices. The trick was that the government paid 90% of the price and the peasants who took possession of the land only paid 10%. It was a win-win strategy based on political realism, or the understanding that groups in a good position to obstruct reform must be bought off, or their visceral opposition blunted in some way. You cannot say, we are going to redistribute the land and, simultaneously, punish all those who currently have power. That this would not be a practical approach is the least that might be said.

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Distributive Justice in Transitions

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

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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