Justice as Unfairness *

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My inversion of John Rawls’s famous formulation, which in its original phrasing – Justice as Fairness – might be taken as the classic philosophical statement of American political liberalism, is admittedly a bit opportunistic and even inapposite, since I am not going to talk much about the kinds of general issues of social justice that concerned Rawls. But I can’t resist the inverted paraphrase,1 because I will discuss an inverted version of the trope of justice as presented in Meša Selimović’s Death & the Dervish (Derviš i smrt), a major literary work, one that has resonance in popular culture, at least in the former Yugoslavia, but perhaps more widely as well.

I will also talk about transitional justice; or, rather, about perceptions of transitional justice by the people supposedly being primarily benefited by it, since it is supposed to promote the reconciliation of their communities, which have been in conflict. Most of my references will be to Bosnia, which is surely appropriate, since the International Criminal Tribunal for the Former Yugoslavia (ICTY) was the first international criminal court established after

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1 The classic citation is Rawls’s 1971 book, A Theory of Justice. Rawls and others continued to debate the arguments almost until Rawls died in 2002, a fascinating literature that is peripheral to the main topics of this keynote address and thus will not be discussed here.

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* Keynote address at the conference on “The Topos of Justice,” Miami University, February 27, 2014. Thanks for their comments and the usual dispensation from responsibility for the contents of this paper go to Marina Antić, Lea David, and Zoran Milutinović.

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the Nuremberg and Tokyo Tribunals and the first established by the United Nations (UN). According to the Tribunal’s website (and to a lot of more formal sources) the ICTY “aims to deter future crimes and render justice to thousands of victims and their families, thus contributing to a lasting peace in the former Yugoslavia.” The model of the international tribunal has been pursued repeatedly in the 20-plus years since the ICTY was founded, with various ad hoc tribunals and the International Criminal Court (ICC), and there is a truly Hague-iographic literature (sorry!) on all of this, with remarkably little criticism. We may ponder the fact that an organization named Amnesty International is such a huge fan of prosecutions, and also that the Chief Judge of the newly created ICTY not only chose the Prosecutor but also then “faxed his fellow judges a message using the language of papal succession: ‘Habemas papum’” (Hagan 2003, p. 61). For those who speak the former Serbo-Croatian, a different saying might come to mind: kadija te tuži, kadija ti sudi (“the kadi prosecutes you and the kadi judges you,” the kadi being a judge in a Sharia court, with presumably prejudicial judgment), and one does not expect justice, or fairness, from such a court.

In contemplating the topos of justice, it might thus be appropriate that I turn away from the usual academic and political discourses to a quite different source: a novel by Meša Selimović that has a kadi as a central figure. Selimović (1910–1982) is probably the second-best-known of Bosnian novelists after Ivo Andrić, who was both more prolific and, courtesy of the Nobel Prize for Literature in 1961, much more renowned internationally. In my estimation, Selimović’s Death & the Dervish (Derviš i smrt), first published in 1966, is one of the great novels of the twentieth century. While it is usually interpreted as a critique of the strict period of Yugoslav communism during which it was written (1962–1966), disguised as an account of intrigue in Ottoman Bosnia, the book is also a sustained discourse that inverts the standard topos of justice, and it is these inversions that interest me.

A brief plot summary: narrator/protagonist Ahmed Nuruddin (‘Light of the World’), ex-soldier and now, at age 40, sheikh of a tekke of the Mevlevi order, reflects on his ordered life and status as the “foundation and frame” of the tekke, even embodying “its fame and holiness … with me it became a bastion of faith” (p. 7). Yet this pillar of the establishment and embodiment (at least in his own eyes) of the purity of its ideology is confronted with the arrest of his brother, on charges at first unknown, but manifestly unjust. The sheikh tries to intercede with the authorities to save his brother but becomes aware that by even trying to do so, he brings suspicion upon himself, for daring to question the actions of the authorities. When his brother is executed, Sheikh Nuruddin decides to take revenge on the unjust authorities, especially the kadi who ordered his arrest.

Until this point the sheikh may be seen as pursuing justice by correcting injustice, and in fact he ponders on the meaning of justice, creating parts of the inverted topos to which I will shortly return. His first thought is to speak truth to power, if you will: as sheikh, he has an honored place in the mosque and speaks openly about the injustice

the extremes of distorted discourses of nationalist rhetoric in the former Yugoslavia.

In this paper I utilize the superb translation by Bogdan Rakić and Stephen Dickey: Selimović (1996).

6 The tekke is the lodge of a Sufi religious order, comparable in many ways to a Christian monastery, and some in the Balkans were actually built on the site of former monasteries; see Lifchez (1992). The Melevi Order was founded by followers of Mevlana Celaleddin-i Rumi, better known as Rumi; the center of the order was Konya in Anatolia until the banning of such orders by Ataturk in 1924. The turbe is now a museum; see Harmanşah, Tanyeri-Erdemir & Hayden (2014). The Mevlevi are a Sufi order, known for the so-called ‘Whirling Dervishes’.
of his brother’s death, invoking the Koran, and thus using the official ideology of the authorities to criticize their actions (p. 202–03). But the next day he is first attacked by the regime’s men, then arrested; after many days in a dungeon he is suddenly released. Neither his arrest nor his release is explained to him, but he is still sheik, still a figure embodying the establishment – he has been warned.

Sheikh Nuruddin then hatches a complicated plot to trap the officials who killed his brother. This involves multiple false accusations that provoke the arrest of a guiltless man who is beloved in the community, which leads to a popular uprising against the officials, some of whom flee the town, while the kadi is killed in his office. The operation has been messy: the sheik had endangered one innocent man, and another innocent was killed. But Nuruddin is proud: “God had passed his verdict, and the people had carried it out ... I had no doubts. I was cheerful, like every true believer” (p. 394). Better yet, he himself is offered the position of kadi by ‘prominent townspeople’ and accepts it.

Were Selimović to have ended his story here, we’d have a parable of revolution, and the ultimate triumph of justice, especially since the new kadi resolves “to consult only my conscience in everything.” But of course the story does not end there. The sheik, now kadi, gets increasingly caught up in political intrigues, and plagued by rumors that he caused the previous kadi’s death (which, of course, he did). His intrigues lead to the execution of one of the former officials who had fled, and then other officials compel the new kadi to betray his only friend, who is arrested, in order to save himself. Yet further betrayal of the kadi saves his friend by making the sheik seem guilty of freeing him, and thus Sheikh Nurruddin himself is condemned, through deceit, but – perhaps justly? The novel ends with the dervish awaiting execution at dawn, as the first roosters crow.

This is actually also where the novel began, with the same scene. The timelessness of the tale, or better, of the processes it depicts, is found in this circularity: the novel begins with the sheik writing his account on the night before his execution, and though months seem to pass, it ends with him facing dawn on this same, last night. And the tale of political intrigue follows well-worn paths, from Euripides through Shakespeare through House of Cards. But it is the discourse on justice, its inversion, which is striking. The very embodiment of the faith fights injustice by using deceit because speaking truth has only gotten him attacked and arrested himself. The deceit succeeds, supposedly fulfilling God’s will but at the cost of innocent life. Since the sheik then becomes kadi, bound to follow only his own conscience, justice is apparently assured, except that the judge finds it necessary to exercise increasing deceit, increasingly undermining justice, until he himself is condemned through deceit, which is, perhaps, just.

My summary does not do, well, justice to this complex and beautifully written novel. The book has been seen as in part autobiographical, since Selimović’s brother was executed by the newly empowered communist authorities in Bosnia at the end of World War II, and though he was a Communist of some rank himself, Selimović was not able to save him. Another noteworthy feature of the book, which was written just before the liberalizations that opened communist Yugoslavia’s borders in 1966, was the explicit invocation of the Koran, though what seem to be Koranic verses are generally out of order, jumbled together and at times apparently misquoted.

The dervish’s travails, however, provide us with an alternative framework through which we can look at justice, and especially institutions of transitional justice. The perspective is unusual because it expresses an inversion of the standard
trope of justice. My use of ‘inversion’ is related to the use of that term in contrapuntal music, or in Levi-Straussian analysis of myth (see Lévi-Strauss 1975, p. 15–30); an even better example would be Indian raga theory. In each case, a theme may be expressed not only in its original form but in an inverted manner. Thus in contrapuntal music the inversion of a theme inverts the intervals of the theme itself, so that a second ascending tone becomes a second descending tone, and so forth. The performance of Indian ragas makes extensive use of such inversions.

In myth, as Levi-Strauss has shown, the basic elements of a story may be expressed in inverted ways. An example used by him (albeit for slightly different purposes) would be that of Oedipus: the horror induced by the knowledge that he has killed his father and married his mother reflects the fact that his actions have inverted the normal relationships of a son to both his parents, and the horror arises only because of this inversion. To carry the analysis further, the power of the fate of Antigone, the daughter of Oedipus and both daughter and granddaughter of Jocasta, lies in her (great-)Uncle Creon’s forcing her to choose between family duty and that to the state. Creon’s action in prohibiting the burial of one (grand-)nephew while ordering the live burial of Antigone manifests a dramatic inversion of the duty of family elders to their children. In all of these cases, musical and mythical, not only is meaning conveyed through these processes of inversion, but the full meaning of the relationships is conveyed by considering not only the theme itself, but also its inversion. (Actually, logically, once this is recognized there is little reason to view either as original or as inversion, since both renditions are inversions of each other.)

Sheikh Nuruddin’s account, moreover, manifests another form of inversion: that of people subjected to the actions of those engaged in administering ‘justice’, and also the observations of such administrations of ‘justice’ by people who are neither engaged in nor, at least for the moment, subjected to its administration. Since the administration of justice, and especially that of an international tribunal, is supposed to convey meaning, it follows that, as in myth and some forms of music, the full meaning of a judicial action can be seen only by expressing its meaning by those receiving and observing it, thus inverting the perspective.

These academic theorizings actually have quite important practical implications. While the scholarly and policy literatures are overwhelmingly Hague-iographic, empirical data consistently indicate that the ICTY does not enjoy a favorable reputation among most people in the region, and opinions are not randomly distributed (these data are discussed in Hayden 2011). Quite the contrary, the journalist Mirko Klarin has also noted that throughout the former Yugoslavia, television broadcasts are almost exclusively those of the trials of accused in the broadcaster’s own state (Serb accused in Serbia, Croat accused in Croatia, etc.) and not of trials in which members of that nation were victims (Klarin 2009). This is logical, because all or nearly all studies show that the popularity of the Tribunal is inversely related to the number of members of the respondents’ nation tried by it. Politicians throughout the region have capitalized on the unpopularity of the ICTY through the simple expedient of televising its trials of members of their respective nations. In so far as the Hague-iographies anticipate that the Tribunal will publicize the crimes that were committed and thus teach people about them, this expectation is misplaced.

That misperception would not be shared by Selimović’s Sheikh Nuruddin, however, who states, in arguing with the mufti on behalf of his brother, that “all injustices are equal, but one always thinks that the injustice committed against him is the greatest of all” (p. 172). This saying seems almost worthy of a zen kōan (or at least, the popularized western understanding of a zen kōan), seemingly paradoxical, but actually expressing concisely both the direct, official tenet of justice and its inversion. Indeed, the premise of the direct tenet is that justice overcomes the phenomenon.

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7 Svaka nepravda je jednaka, a čovjeku se čini da je najveća koja njemu učinjena.
stated by Sheikh Nuruddin – which actually makes the officialized tenet itself an inversion of common sentiment.

Empirical studies of perceptions of the ICTY, however, indicate that the inverse perspective stated succinctly by Sheik Nuruddin is actually dominant from the perspective of those on whose behalf the institution is supposedly working: victims. This understanding makes not only understandable, but quite predictable the findings by Sanja Kutnjak Ivković and John Hagan that as the ICTY delivered convictions of Serbs for crimes committed during the siege of Sarajevo, the popularity of the Tribunal in the city actually declined (Ivković and Hagan 2006). The problem for the Tribunal was that 70 percent of the population claimed to have been victims of war crimes, and for them, the Tribunal’s decisions were too lenient, with nearly one third of respondents wanting the death penalty to be given, which was not available. But considering that the total casualty count in Sarajevo was about 14,000,8 of whom 60 percent were military, it would be impossible for any court to say that 70 percent of the citizens had been victims of war crimes, much less meet their demands for “the injustice committed against them, the greatest of all.”

One of the many virtues of the novel is that Selimović depicts some of the stages by which the sheikh, that self-proclaimed bastion of the faith who is even named the Light of the World, comes to understand subaltern views of justice. A friend offers to help save his brother by getting him out of the prison and spiriting him away. The sheikh protests, “But he’d still be guilty.” The response: “He’d still be alive! Saving him is all that matters.” The sheikh: “But I’m saving more: justice.” And the prophetic response: “All of you will suffer: you, your brother, and justice.” (p. 130). The discourse continues but the dervish still doesn’t get it. He tries to engage with the kadi, both using the words of the Koran,9 thus the formal rules of justice, but fails, realizing suddenly that he has actually damaged his brother’s case and his own standing, “because even the Koran is dangerous if you use God’s words about sinners to refer to those who decide who the sinners are” (p. 147). (I’d add that this is also true of the words of human rights scriptures when one tries to apply them to those who decide who is violating human rights.)

What may be the ultimate subaltern lesson is taught, by another prisoner, to Sheikh Nuruddin when he is arrested. They discuss the sources of authority, until the dervish is told: To direct someone’s affairs is to rule; ruling is power; power is injustice for the sake of justice (p. 234).

But how is justice to be defined, anyway? On this issue, Selimović is indirect. The same passage that notes that everyone thinks that the injustice done to him is greatest prefaces that assertion with what we might call an inverted definition: Justice is like health, you think about it only when you don’t have it. And it’s truly indefinite; maybe more than anything it is the desire to wipe out injustice. Something which is, on the other hand, very definite (p. 172).

But let’s leave the dervish to his musings and his (un?)just fate, and turn to the present-day world. A 2004 Report by the Secretary-General of the UN on “the rule of law and transitional justice in conflict and post-conflict societies” attempts to answer the question (UN 2004) of what is justice, at least for the UN. ‘Justice’ is defined in this report as “an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large” (emphasis added). The UN also refers to ‘transitional justice’, meaning “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice


9 In fact, the verses Selimović identifies as Koranic actually are not accurately stated – this was, after all, communist Yugoslavia.
and achieve reconciliation” (emphasis added). These mechanisms “include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof” (emphasis added) (UN 2004).

This is an interesting rhetorical construction. Transitional justice focuses on societies that have experienced ‘large-scale abuses’, which have produced ‘victims’ on the one hand, and ‘accused’ perpetrators, on the other, both set off from ‘society at large’. But the victims must be in some way linked as members of some kind of group. Were it otherwise, were we concerned only with cases of individual victims, we would not have a new category of justice, nor of institutions to achieve it. There is, after all, quite a conceptual difference between being accused of, say, 25 individual murders (think serial killer) and of a crime against a collectivity (e.g., a national, ethnic, racial or religious group, as such) that in its execution involves the murders of 25 individuals. The first case would not be the subject of transitional justice even if it occurred during an armed conflict, but only of regular courts. The victimizers must also be seen as joined together, as co-perpetrators of group-based ‘abuses’. It is this link that makes the abuses qualify as widespread.

‘Reconciliation’ between victimized groups and their group-based victimizers might be possible if the abuses have only operated in one direction, but in a post-conflict situation in which both groups have lost members, members of each will feel that while all injustices are equal, the ones they have suffered are the greatest. Further, members of each group will feel compelled to demonstrate the extent of their own victimization by the other group. This is critical, because, as my fellow anthropologist Lea David has reminded me,10 ‘transitional justice’ does not mean justice for all, but only for those who deserve it.

In essence, transitional justice is an inversion of Abraham Lincoln’s famous promise in his Second Inaugural Address, at the end of the American Civil War, “to bind up the nation’s wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations” through actions premised on being “with malice toward none, with charity for all.”

Transitional justice, to the contrary, is very much premised on bearing malice towards some, and charity for others. Selimović seems to have captured this inversion as well, with a stark description of someone who is “just and sincere. Only he goes to extremes. That’s become his passion, as he puts it. And his vice. He not only defends justice, but he attacks with it; for him, it’s become a weapon, not a goal. ... Maybe he occasionally brings some freshness, like the wind, but I don’t believe he does a great service either to sincerity or justice. With him they seem perverse. They resemble vengeance and cruel satisfaction, but never a virtuous need that people should aspire to have. ... Cruelty in the name of kindness is terrible; it would bind our feet and hands; it would kill us with hypocrisy. Cruelty based on power is better – that we can at least hate” (p. 290–91).

Lest this seem extreme, we should recall that the European Union and the United States used economic sanctions on impoverished, war-

10 Personal communication, February 19, 2014.
shattered Bosnia in order to compel leaders there to accept what these outsiders saw as justice. Such pressure could hardly be expected to increase acceptance of either the ICTY or of those outside powers that were threatening further damage to these already injured societies. Justice as weapon, not goal, cruelty in the name of kindliness — power as ‘injustice for the sake of justice’, indeed.

But that last Bosnianized zen kōan also reflects the need to consider not only the standard or direct trope of justice, but also its inversion, because perhaps justice can only be found in their paradoxical unity. Selimović implies as much at the beginning of Death & the Dervish, at the moment when Sheik Nuruddin, the Light of the World, first contemplates the meaning of justice, when he observes a fugitive hiding from the law: he did not think of or care who was right and who was wrong in the matter, because: When people settle their accounts, guilt is easy to find, and justice is the right to do whatever we think must be done, and therefore justice can be anything (p. 46). Note that he says this before he begins to doubt the comforting familiarity of the law, and of his own superior position.

When the perspective we take on efforts to create transitional justice, at least through courts, is that of the people supposed to be directly benefited from them, the inverted trope of justice is probably more believable than the direct one. For each group, the injustices done to them are the greatest, and any action contrary to that presumption is a demonstration of the power to mandate injustice in the name of justice.

But let me finish with the one happy ending in what is otherwise a remarkably dark tale. Nuruddin is shown a married servant couple, but the wife is having an affair with another servant in the house; the husband doesn’t know. What is to be done? “The Koran tells us: an adulteress is to be stoned. But you must admit, that’s rather old-fashioned.” If the husband finds out, he’ll kill them both; if the other man is sent away, she’ll follow him. Her husband actually has it the easiest, since he neither knows nor suspects, though supposedly he is the one who is wronged. The employer, telling the tale, fears to do anything, because “I’d break the delicate threads that hold them together, I’d hasten the tragedy hanging over them.” He says to the sheikh: “Find whatever rule you like, solve this for me, set up your order! But without destroying them, because then you’ve done nothing” (p. 122–23).

The sheikh is no help in this case (no surprise to you at this point), giving a stock answer about the fault lying in sin rather than the law, which the employer rejects as not helpful in this concrete case. We simply expect tragedy to eventually occur. Yet a hundred pages later, the employer finds a solution, bribing the young man to never see her again, which the youth accepts and tells the woman he is leaving; she mopes for two weeks and gets over the affair; and her husband, still unaware that the affair took place, actually misses the company of the youth (p. 314–15).

Do we have justice? Not according to the Koran, and not according to the popular sentiment that a cuckold has been wronged. Further, to adopt modern terms, not only have wrongdoers been given impunity, one has even been paid off. But conditions have changed, time has passed, and the tragedy that seemed inevitable has been avoided. Justice in inversion, perhaps?

But it is probably easier to accept the failure of formal justice in a case in which tragedy has been averted. It is harder to do so when a society has been dramatically disrupted, with tens of thousands killed and millions displaced. Yet even in such situations, the inverse perspective on justice, from those being subjected to it, must be considered, especially when there have been losses on both (or all) sides. The inversions of the trope of justice presented in Death & the Dervish explain well the overwhelmingly negative reactions to the ICTY throughout the region, and also indicate that local perceptions will not be better in other such cases.

If reconciliation is truly a goal, perhaps the most effective form of transitional justice would be to employ the principle that Lincoln proposed, but was killed before he could implement it. That task is to actually work to rebuild the society rather...
than to magnify its social divisions and their recent violent interaction. This is a job probably better undertaken with malice towards none, and charity to all, than with insistence on a retributive justice that can only further divide peoples who believe, as all people do, that the injustices done to them are the greatest, and who know that for rulers, justice is indeed the right to do whatever they think must be done and thus may be anything – but will not be fair.

References


