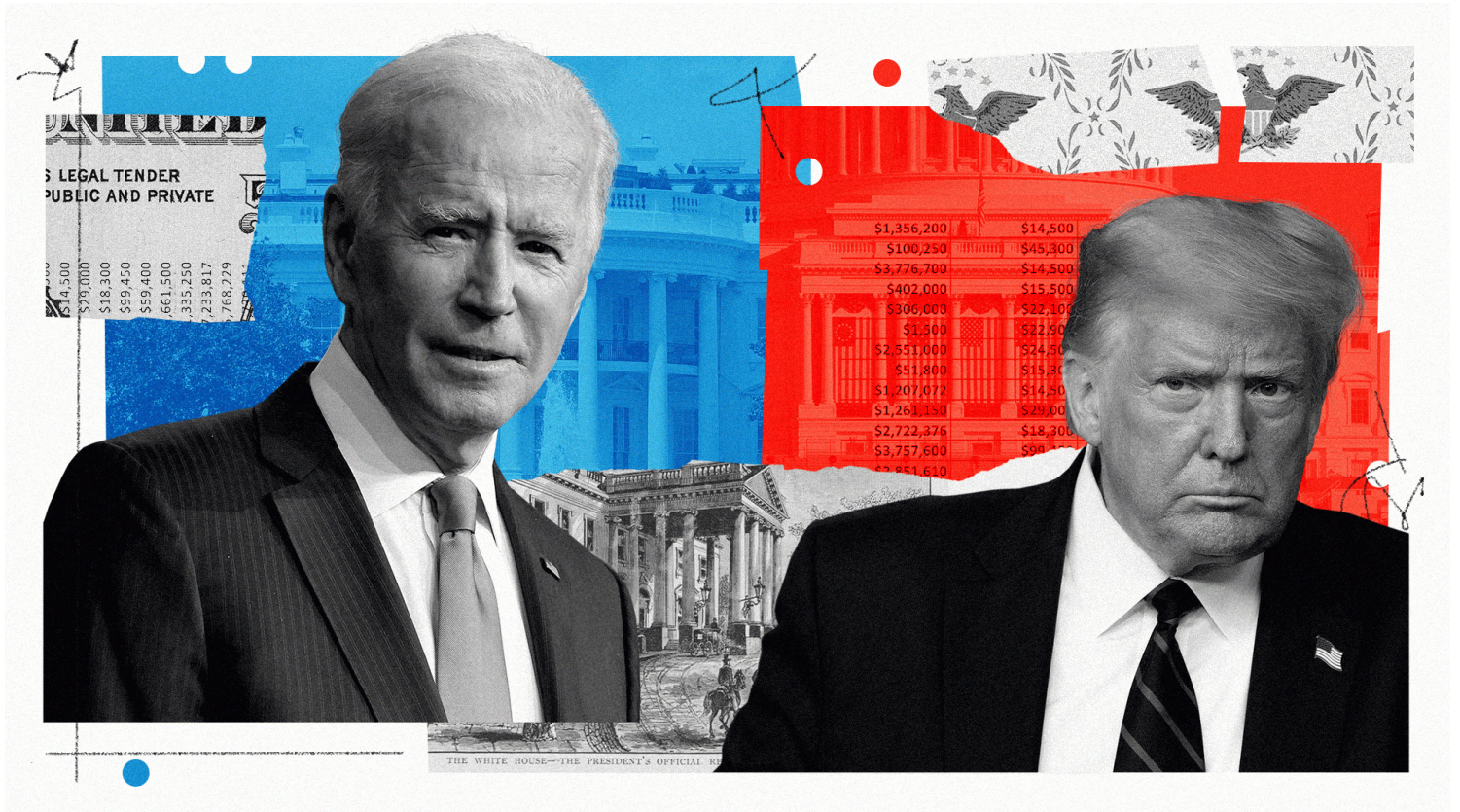


I Beg Your Pardon: Two Lessons from/for America's Worst Days



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If the US were a Netflix saga, the current season would be the most captivating: the killing of George Floyd and the following BLM protests, a pandemic which has already killed more Americans than WWII, the storming of the Capitol, the (now ex-)President of the United States banned from all social media. Finally, the season finale: the inauguration of a new President and the first female (of color) Vice-President, with its soundtrack by Lady Gaga and J.Lo.

After the storm and the [acquittal](#) of the ex-President in his second impeachment trial, [President Biden](#) pledges unity and healing, [Republicans](#) call for unity and even the [Pope](#)

urges US reconciliation. Nonetheless, how healing and reconciliation are to be achieved remains an open issue. Some of these recent episodes have raised concerns and discussions among lawyers as well. From impeachment to pardon power, there are many relevant legal issues at stake. Behind them lies a major question: can law play a role in the reconciliation process?

This is not the place for a major reconstruction of all the legal implications of the aforementioned events. There are surely many complex lessons to be learnt. However, focusing solely on the very last days of the Trump administration, I herein propose to start with two of them.

In the first section, I will depart from the confined discussion around US presidential power of pardon, in order to affirm that clemency in general should have a structural role in our democracies and that lawyers should get involved in orienting its exercise. In the second section, I will raise some questions about a possible role of transitional justice in the US. In particular, after the major radical – and TWAIL – critiques to transitional justice, this could be the acid test: shall we dismiss transitional justice as an outdated – or even neocolonial – political project of the 1990s or can it overcome its structural limits and become a tool to fight racism and social injustices even at the very heart of the Western World?

First Lesson: Lawyers need to focus on clemency

Many lawyers have expressed their opinion in relation to Trump's temptation of pardoning himself before leaving office. Other Presidents before him took that into consideration, but no one ever dared to go through with it. Every commentator recalled the 'battle' between England's King Charles II and the Parliament in 1678 in relation to the King's intent to pardon his Lord Treasurer, Earl Danby, in order to stop the latter's impeachment proceedings. No matter how these opinions were motivated, they actually seemed to be indicating what a President *should* do, rather than what a President *can* do. In fact, the confined discussion on self-pardon leads to the major topic of the arbitrary nature of clemency in general. As [Mark Osler](#) noted, 'Mostly, people will ask "Can he do that?" My response will be, "He just did." Clemency, as structured by the Constitution, has no check or balance other than politics.' Founding Father Alexander Hamilton made clear that the Framers intended the presidential power to resemble the King of England's pardon power. That means, as the Supreme Court clearly affirmed, that, besides the express impeachment prohibition on pardons, 'the power is unlimited' (*Ex parte Garland*, 71 U.S., 373); the Court stressed that the proper recourse in addressing a possible abuse of this presidential power is not to set any limits to its exercise, but rather impeachment (*Ex parte Grossman*, 267 U.S., 121).

This is far from surprising. In Western world, no matter the many different forms in which it appears today, clemency is still to be considered as the last legacy of the Ancient Regime, the original expression of sovereign power: in Shakespeare's words, 'It is enthroned in the hearts of kings, / It is an attribute to God himself' (*The Merchant of Venice*). Beyond the differences between civil law and common law, clemency is an element which is extraneous to modern criminal law systems and the basic principles of the Enlightenment. Clemency finds itself nestled in there, limited in small spaces and contained by specific procedures that control its forms, but not its content. Not surprisingly, Jeremy Bentham considered clemency as 'the last sanctuary where arbitrary power is entrenched'. For this reason, both constitutional and criminal lawyers have never been too interested in inquiring a power which has more to do with politics than it has to do with law. Moreover, various criminal lawyers in Europe consider clemency anachronistic and incompatible with contemporary criminal law systems and wish for its disappearance (for instance in Spain [Bacigalupo](#) 1997, 73; for a comparative overview [Bourget](#) 2018). As Gustav Radbruch observed during the Weimar Republic, clemency is often regarded as 'the legislator's guilty conscience' in relation to the lack of structural and social reforms ([Radbruch](#) 1910,136). This is true for instance in [Italy](#), where the massive use of both individual and collective clemency (42,336 individual pardons since 1948 and 333 amnesty laws from 1861 to 1990) had eventually to be dramatically reduced – no amnesty law has been issued since 1990 – because of how amnesty was disregarded by criminal lawyers. Italy is probably the best example of the vicious circle surrounding clemency: on the one hand, scholars never developed any critical theory on clemency, considering that its exercise is essentially political, on the other, the legislator was then left totally free and used clemency in a very arbitrary way, which reinforced such a belief.

On the contrary, I propose to take this opportunity as a wakeup call, in order to develop a legal framework on clemency in general. What about imagining that clemency could be more than a discretionary form of grace, and instead be used as a tool to implement the basic principles of our democracies? There are actually many ways in which clemency could serve this function. First of all, on a communicative level, such in the case of the [Royal Pardon](#) for Alan Turing in 2013 and the following amnesty law (so-called [Alan Turing law](#)) of 2017, through which Britain pardoned all homosexuals convicted for the offence of 'buggery' from 1533 till 1967 (when homosexuality became legal in England and Wales, while the remaining parts of the UK followed in the early 1980s). As I noted [somewhere else](#), since the vast majority of the recipient of the amnesty were already dead in 2017, this law mainly operated on a communicative level. By distancing itself from the policies of the past and paying tribute to the victims, the British Parliament publicly affirmed the basic democratic principle of equality and non-discrimination on the basis of sexual orientation. An analogous law was issued in [Germany](#) in the same year.

Nonetheless, the role of clemency is not to be limited to communication. Clemency could be aimed at correcting an injustice, maybe alongside an apology or a police reform (think of those minor criminals who at the same time have been victims of racial mistreatment by the police). Clemency could generally represent a form of justice, in such cases where a strict application of criminal law, though formally correct, would appear substantially unjust. Clemency could also be applied to crimes committed amid major social protests in delicate political moments. In modern democracies, criminal law does not reflect an absolute idea of justice. Rather, it constitutes a form of social control and in some cases – because of the personal or social context – the ultimate goal of the criminal law system can be better reached through clemency rather than through punishment. As Martha Nussbaum suggests, 'If we can see the offender as someone who is capable of good in future, we can adjust our sentencing in light of that thought, while 'we redouble our dedication to creating more propitious conditions for all' (Nussbaum, 2016, 208). Why not imagine that clemency could become an institutionalized form of intervention alongside punishment? In the US, the [Obama Administration Clemency Initiative](#) – which operated from 2014 to January 2017 – was an important initial step in that direction. It created a permanent mechanism of application for the commutation and reduction of sentences and it established criteria in order to be eligible, mostly focused on good conduct and signs of will of social rehabilitation. Although [chronic understaffing left the initiative struggling to keep up with demand](#), during his eight years in office President Obama granted more than 1,700 commutation requests. Such a system of commutation could maybe work automatically, turning categorical clemency into a corrective tool, while waiting for more significant criminal-justice reforms. This structural role of clemency shall not be limited to the exceptional situation of the US, but it could have an important meaning in Europe as well. In a moment in which the pandemic, migrations and the economic crisis reinforce social injustice, punishment and clemency should work together as instruments of a socially-oriented criminal policy, which sees punishment as the last resort.

Legal scholars ought to do their job as well and get involved in finding basic principles which should orient and limit the exercise of the power of clemency. Regarding the orientation, good starting points can be found in rehabilitation, reconciliation and the last resort principle. Regarding the limits, some contribution can be found in both comparative criminal law and transitional justice. In these, for instance, we could also find an answer to our starting point: The discussion on self-pardon. Departing from the 'bad examples' of the self-amnesties adopted by Pinochet (law decree n. 2191/1978) and Fujimori (law 2647/1995) and before them by Mussolini, right after the coup which brought him to power (Royal Decree 1641/1922), the vast majority of scholars rejects the admissibility of self-clemency (among them [Marxen](#) 1984, 38; [Cassel](#) 1996, 219; [Slye](#), 2002, 240; [Ambos](#) 2009, 51; [Maiello](#) 2007, 419; [Mañalich](#) 2010, 24; with a

distinction between conditional and blanket self-amnesties, [Sarkin 2017](#)).

Second lesson: We still need transitional justice

This brings me to the second lesson. As some scholars already affirmed ([McGovern 2020](#); [Murphy 2021](#); [Lollini 2021](#)), the polarized American society might benefit from the establishment of transitional justice mechanisms. Twenty-one years after Ruti Teitel's renowned book *Transitional Justice* (see the recent [Symposium](#)), transitional justice is no longer considered an alternative to criminal prosecution for societies undergoing a postconflict or postdictatorial political transition. Therefore, its vast arsenal of mechanisms could be appropriate for the need of the US for both backward- and forward-looking approaches, combining justice with reconciliation, stability with social change. Of course, the exact scope of 'political crimes' to be included ought to be better discussed: structural racism in particular within the police forces, vandalism and violence during the BLM protests, the storming of the Capitol, right-wing attacks, incitement to social hatred on social media. Even the choice of the proper mechanism(s) and their structure should be evaluated: a truth and reconciliation commission (TRC) alongside clemency measures, public apologies, reparations (see [Neiman 2021](#)), school textbook reform, police and court reform, creation of memorials.

In the latest years, scholars have been quite busy in accusing transitional justice – from TWAIL, postcolonial, Marxist, feminist, and other angles – of failing to tackle the socio-economic roots of conflicts, in particular those related to globalization and affected by Western capitalism. It is quite accepted that, being a product of the end of the Cold War and of the 'euphoria of the presumed triumph of free market ideologies and political liberation around the globe' ([Mutua 2015](#), 1), transitional justice 'is grounded in the construction of liberalism as simultaneously neutral (unmarked by culture) and thus universalizable, and 'good,' which is a (non-neutral) statement of value' ([Park 2020](#), 266). The DNA of transitional justice is based on a 'vision of the march of history [which] is now being contested' ([Hazan 2017](#), 2). Nonetheless, transitional justice 'has by now had some time to confront its own legacies of prejudice and tributaries of insidious racism' ([van der Merwe and Lykes](#), 2020). Scholars and practitioners have not just developed critiques, but also proposed alternative approaches that seek to combine transitional justice with theories of change, transitional with transformative justice (among them [Gready and Robins \(eds\) 2019](#), [Evans \(ed\) 2019](#), [McAuliffe 2017](#)). Now the main challenge is ahead: is transitional justice a series of mechanisms provided for by Western technocratic institutions to Third World countries, or could it play a role even at the very heart of Western capitalism and in its longest-lasting democracy? Is transitional justice a mere 'conscience of transitional globalisation without troubling its essential characteristic' ([Gready 2010](#), 8) or is it a broader emancipatory framework, which aims at 'promoting a just social order' ([De Greiff 2012](#), 44)?

In fact, grassroots transitional justice initiatives have already been playing a significant role in the US since BLM and #MeToo. I am referring in particular to the so-called memory activism. As we all know, transitional justice 'is deeply involved with the ethics of memory' (Margalit, 12) and the most recent definitions of transitional justice are so nuanced and holistic (for instance Roht-Arriaza 2006, 2; Fletcher and Weinstein 2002) as to include memory activism initiatives, such as those referring to the contextualization or removal of statues and monuments (see for instance the example of J. Marion Sims' statue in New York). Although in some cases local administrations are involved, most of the times these bottom-up initiatives are spontaneous and not coordinated. On one hand, many times these initiatives have contributed to raise important issues in the public debate (see for instance the Butler Banner Project at Columbia University). On the other hand, the lack of coordination presents a risk of fragmentation of memories and of struggles between memory lobbies asking for amendments of the past, in the vortex of the so-called *cancel culture* and *woke culture*, which reject contextualization. Most importantly, those cultures risk to lead to the opposite effect of increasing social polarization by denying the fact that 'The world is messy. There are ambiguities. People who do really good stuff have flaws. People who you are fighting may love their kids and share certain thing with you' (Obama, 2019). What is needed, perhaps, is a top-down mechanism, which combines retributive and restorative tools and makes one side listen to the other. Being conscious that transitional justice 'models' do not exist as such, and that solutions are not exportable from one context to another, would it be possible to imagine the relatives of George Floyd telling their truth to white policemen on national tv, such as black and white South Africans did after years of apartheid? Could we see Rep. AOC and right-wing activists talking/listening to each other in front of a TRC? An answer to that requires facing two difficult questions, which I will leave open:

1. Where could such a mechanism gain its legitimation? Western experts and institutions, such as the UN, often brought external legitimation to transitional justice mechanisms, but when it comes to the US a legitimation from outside is to be excluded. Then, does President Biden have the political strength and credibility to provide that legitimation?

2. Transitional justice, just like justice in general, is a theatrical and religious liturgy, which requires an agreement on its rituals and a shared faith in them. The main aim of a TRC is to produce a shared truth. However, its precondition is

that both parties accept the public space of the TRC as the proper setting where truth can be searched, reconstructed and publicly affirmed. But does it all still make sense in the age of post-truth, conspiracy theories, information bubbles and (most importantly) social media? Does it make any sense in a world where one social part qualifies the other part's statements – no matter if facts or opinions – as a lie or (worse) as a conspiracy? Transitional justice implies the construction of a collective and public space, a self-dwelling place in and for the public, 'a mode of (self) representation that takes shape in the will to disclosure' (Doxtader 2003, 127). It also departs from the premises of both complexity and that each person has the 'ability to change', that 'within every hopeless situation and every seemingly hopeless person lies the possibility of transformation' (Tutu, 2014). It is in this spirit, that (ex)President Obama sang *Amazing Grace* after the Charleston massacre, a song written by John Newton – a former captain of a slave ship and an investor in slave-trading ventures, who then became the major abolitionist in England – whose life is a reminder that people can change, that 'there's hope for us, with our foibles and inconsistencies and frailties' (Sapolsky 2017, 620). Therefore, the most difficult question: Can we still imagine a role for transitional justice, without a prior legal discipline of the use of public speech on social media? Before the next season of this Netflix saga, let's at least engage in a broader discussion.



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