

Transitional Justice: Fundamental Goals and Unavoidable Complications

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I. INTRODUCTION

A VIGOROUS DEBATE HAS EMERGED in recent years in international human rights law literature regarding what is often referred to as the issue of “transitional” or “retroactive” justice. This refers principally to the question of whether and how fledgling democratic governments ought to call to account those accused of having committed gross violations of human rights in the period preceding the democratic transition. Many argue that new democracies should always take an aggressive approach to accountability by adopting policies and programs that emphasize punishment and condemnation of perpetrators. Others insist on a lenient approach to accountability, generally recommending policies and programs which emphasize forgiveness and reconciliation. Finally, some recommend a moderate approach regarding accountability, generally favouring policies and programs which seek to balance a broad combination of goals including, *inter alia*, punishment, reconciliation, and the establishment of an accurate historical record.

The position asserted in this essay is that it is dangerous to recommend any one of these approaches in the abstract. While there are certain fundamental transitional justice goals that ought to be considered in any new democracy, determining which goals can or should be implemented involves many difficult and contradictory considerations. For example, in many cases, transitional governments are effectively forced to choose between justice and the continuation of peace, or justice and the continuation of democracy. In addition, transitional justice policy making often involves a variety of agonizing trade-offs and oppor-

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tunity costs, each of which carries its own set of moral, legal and political hazards. This essay will explore these and other transitional justice considerations with a view to deepening conventional understandings of the myriad of constraints and dilemmas that confront transitional governments.

The essay itself will be divided into two main sections. First, there will be an examination of the six main goals that ought to inform the policies of any government that is committed to achieving some measure of transitional justice. Second, there will be an assessment of the six main constraints and dilemmas that make it difficult for new democracies to achieve any or all of these goals. While reference will be made to various real world examples of transitional justice, this essay is primarily intended as a theoretical examination of the principal goals of transitional justice and the principal complications related to their implementation.

II. THE FUNDAMENTAL GOALS OF TRANSITIONAL JUSTICE

THIS SECTION WILL PROVIDE a brief review of the six fundamental transitional justice goals that—for a variety of moral, legal and political reasons—ought to be central considerations in any new democracy that has recently emerged from a period of civil war or violent authoritarianism, *viz.*, accountability, truth, social reconciliation, victim recognition, compensation for victims, and institutional reform.

New democracies should consider the adoption of policies aimed at *accountability* for individuals who committed gross violations of human rights during the pre-transition period. In some cases, accountability should take the form of criminal sanctions; in others, non-criminal forms of sanction may be appropriate.¹ The objectives in either case will be the same. First, as a matter of morality, a new democracy must attempt to hold perpetrators accountable for their actions in order to provide an appropriate measure of public justice on behalf of the victims of the prior regime. Second, as a matter of law, accountability measures are necessary to re-establish the authority of the law, to prevent private vengeance by victims, and to ensure that perpetrators and others do not commit new crimes out of a sense of impunity. Third, as a matter of politics, a new democracy should consider the adoption of accountability measures in order to clearly distinguish itself from the prior regime, and to bolster support for democracy and its institutions.

New democracies should consider the adoption of policies aimed at establishing an *accurate record of the past*. Often, the past is clouded by fictitious or

¹ Non-criminal sanctions may take the form of lustrations, removal from office, forced apologies, civil liability, community service, economic penalties, or public disclosure of wrongdoing. The acceptability of such sanctions will vary depending on the gravity of the violations in question.

exaggerated accounts of events under the prior regime. Correcting these accounts is critical for three reasons. First, as a matter of morality, the truths of the past have to be made known so that the victims of the prior regime do not continue to be victimized by the falsehoods that were spread about them, and can take their rightful place as welcome members in the new society. Second, as a matter of law, it is critical to identify the human rights abusers (either individually or collectively) and their various levels of culpability, and to seek to determine the fate of any victims who were forcibly disappeared or otherwise cannot be accounted for. Third, as a matter of politics, it is important to make known to the public what really took place under the prior regime in order to reveal the true costs of the past, and to provide a clear understanding of the dangers to democracy that may still persist.

New democracies should consider adopting policies aimed at *social reconciliation*. As a matter of morality, social reconciliation is an important value to foster as a substitute for the rivalries and hatreds that often persist from the pre-transition period. Also, as a matter of politics, social reconciliation is a precondition to peaceful relations within civil society, and without peaceful relations the democratic transition itself will be in danger of failure. In addition, reconciliation policies are necessary as a means to deter violent responses from accused perpetrators and their associated institutions, and to encourage the “less culpable” members of the old order to join as partners in the new society.²

New democracies should consider the adoption of policies that provide an *opportunity for victims to be heard and acknowledged*. As a matter of morality, such policies are needed to allow victims the opportunity to relate their traumatic experiences to the public, and to help them regain their dignity. Such policies can also assist some victims in the process of psychological and emotional recovery and healing. Also, as a matter of politics, such policies can help educate the public about the full extent of past crimes (which are often grossly underestimated) and build support for further victim-centred transitional justice initiatives. In addition, providing a forum for victims to be heard can help to catalyse and inform broader public deliberation on the moral, political and legal issues of transitional justice. As such, it can also provide an important test of the readiness of society for taking up the critical democratic practice of debating ideas without resort to violence.

New democracies should consider adopting *symbolic and financial compensation programs for victims* of the prior regime. Defined broadly, “victims” could include those who suffered directly or indirectly under the prior regime, includ-

² A transitional government, in order to carry out even the most uncomplicated functions, will often require the services of the many bureaucrats, officials and underlings of the prior regime. Consequently, as a practical matter, their “culpability” in past violations (which is in most cases more in the nature of moral, rather than legal or criminal culpability) may need to be forgiven in order for the new government to move forward.

ing those who may have been severely marginalised, socially and economically, without being physically harmed. Defined narrowly, "victims" could include only those who suffered the worst forms of physical depredations at the hands of the prior regime. Either way, as a matter of both morality and politics, victim compensation is an important form of acknowledgement of the harm suffered by victims, and a straightforward way to socially and economically integrate victims into the new society. Also, as a matter of law, compensation programs (particularly in the form of income or services) represent a tangible remedy that can to some extent help restore the victim's personal financial circumstances to what they were prior to the violation of their rights.

New democracies should attempt to adopt *constitutional, legal and policy reforms* which will enable the country to achieve the long-term social, economic and political objectives that are essential to preventing civic and/or democratic collapse in the future. Such reforms may include the establishment of civilian oversight of the military, new appointment and tenure rules for the judiciary, redesign of the electoral and political system, land reform, and human rights training programs for police and soldiers. In all cases, such reforms should have as their aim the elimination of the conditions that led to the existence of the prior non-democratic regime or civil war, as the case may be.

III. COMPLICATIONS IN APPLYING THE GOALS OF TRANSITIONAL JUSTICE

HAVING OUTLINED THE FUNDAMENTAL goals of transitional justice, this section of the essay will now examine the six principal constraints and complications related to the implementation of those goals, *viz.*, capacity complications, program costs, program trade-offs, complications of interdependence, complications of timing, and dilemmas of legality and fairness.

A. Capacity Complications

Whether emerging from civil war or authoritarian rule, transitional governments typically have to find their way forward under the threat of a return of widespread violence. For example, in Chile, even after having ceded power to a democratic government, General Pinochet issued multiple public warnings to the new government about the dire consequences that it would face if it attempted to prosecute any soldiers for human rights violations.³ Similar warnings were issued by the Argentine military when the Alfonsín government attempted

³ M. Popkin & N. Bhuta, "Latin American Amnesties in Comparative Perspective: Can the Past Be Buried" (1999) *Ethics and International Affairs* 111-114. In the end, the Chilean government of the time made the decision to investigate certain crimes and compensate certain victims, rather than attempt prosecutions.

to take an aggressive approach to retroactive justice, warnings which ultimately culminated in several attempted coups.⁴ And of course in both countries, it was an *ex ante* condition of transition that existing blanket amnesty laws in respect of crimes committed during the pre-transition period would have to continue to be respected.

Should we condemn governments that fail to be more aggressive in pursuing the goals of transitional justice in these contexts? Not always, in my view. From a transitional justice perspective, the most important tasks in these contexts are to ensure the continuation of the transition and to support the deepening of democracy. Indeed, only in the most exceptional of circumstances would it be reasonable to argue that it would be better to have no transition than some transition. Granted, the moral and political price that is demanded for transition (in most cases, in the form of a blanket amnesty) is often very high. However, that price must always be weighed against (a) the human cost of continued civil war or continued tyranny, and (b) the fact that in the absence of a transition it is generally impossible to achieve any substantial measure of transitional justice.

B. Program Costs

A retroactive justice program, like any other program, must be paid for. International funding and special reparations taxes can of course be of assistance in this regard. However, the lion's share of program funding for transitional justice programs will invariably have to come from the regular budget of government.⁵ The problem is that many transitional justice programs are very expensive. For example, consider the cost of prosecutions in a country like Rwanda, where at one time there were over 90,000 people being held in detention awaiting trials for genocide-related crimes only.⁶ The cost of actually prosecuting this many people is in the billions of dollars, and as such would be a difficult burden for even the wealthiest and most sophisticated of countries in the world today. In addition, if such prosecutions are to be done in accordance with even the most basic due process standards (including the right to counsel and the right to an appeal) then the strain on financial and human resources goes up even further.

In such circumstances, a government committed to a prosecution strategy faces a stark choice: either prosecute everybody according to inferior fairness

⁴ J. Linz & A. Stepan, *Problems of Democratic Transition and Consolidation* (Baltimore: Johns Hopkins University Press, 1996) at 194.

⁵ For this reason, Bruce Ackerman suggests that one of the most crucial tasks in a transition is the inauguration or re-establishment of a progressive taxation system. See B. Ackerman, *The Future of Liberal Revolution* (New Haven: Yale University Press, 1992) at 95.

⁶ M. H. Morris, "The Trials of Concurrent Jurisdiction: The Case of Rwanda" (1997) 7 *Duke J. of Comparative and International Law* 349 at 357.

standards; or prosecute only a tiny subset according to superior fairness standards.⁷ In either case, the cost remains comparable and extremely high. Accordingly, in many transitional contexts, it may make most sense to expend a limited amount of public funds on prosecutions and to devote more funds to non-prosecutorial mechanisms that may more effectively achieve the various goals of a comprehensive transitional justice program.⁸

C. Program Trade-offs

Related to the problem of program cost is the difficult issue of establishing priorities among transitional programs. Although it is not a strictly accurate statement, generally speaking a dollar spent on one program is a dollar lost to another program. This means that new democracies committed to adopting transitional justice measures must decide, as between the various transitional justice goals, which are the most important at any given time. To complicate things further, they must also constantly balance the relative priority of transitional justice goals versus other political, social and economic goals. Consider the example of South Africa. There a decision was made by the transitional government to adopt an innovative and controversial approach to transitional justice which involved a series of "compromise" measures, including the establishment of a Truth and Reconciliation Commission which provided public hearings in which victims could tell their stories and in which perpetrators of certain crimes were eligible for amnesty in exchange for truthful disclosure of their participation in such crimes. The Commission was also mandated to recommend a reparations program for victims. However, when the Commission finally issued its recommendation regarding reparations, the government only agreed to fund a limited amount of urgent interim reparations and to pay out further amounts only "to the extent that resources permitted."⁹ Although it had initially promised to provide full compensation to victims on the basis of the Commission's recommendations, the government was not prepared to take more money away

⁷ In many ways, neither choice is effective. If only the leaders are prosecuted (and thousands of accused are let free) there will always be protests that more should have been done; and yet if everybody is prosecuted there will be accusations of "victor's justice" and the very legitimacy of the transition will be called into question.

⁸ For excellent analyses of the costs of prosecution and the limits of prosecution as a tool of transitional justice, see J. Mendez, "In Defense of Transitional Justice" in J. McAdams ed., *Transitional Justice and the Rule of Law in New Democracies* (London: University of Notre Dame Press, 1997); and P. van Zyl, "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission" (1999) 52 *J. of International Affairs* 647.

⁹ ANC Daily News Briefing (28 October 1998). Since then, the government has attempted to mobilize resources for reparations through partnerships with the private sector and civil society.

from the housing and education programs that it felt were needed to overcome the structural inequalities that were part of the legacy of apartheid.

From a transitional justice perspective, it would be unreasonable to reflexively condemn such a decision. Indeed, the South African government went much further in seeking a meaningful measure of transitional justice than had other countries facing much less dramatic social, political, and economic constraints in their transitional periods.¹⁰ The government also achieved a remarkable balance during the transition between the goals of accountability, truth, reconciliation, public deliberation and institutional reform. Should the government also have provided full victim compensation? In an ideal world, yes. However, in the real world, such compensation has to be justified as a trade-off against other urgent policy goals and human needs. In appreciating this harsh fact, surely the decision of the South African government becomes, if not justifiable, at least more understandable.

D. Complications of Interdependence

The goals of transitional justice are interconnected in sometimes complementary and other times contradictory ways. For example, programs aimed at accountability and institutional reform, tend, on balance, to complement and support each other. On the other hand, such programs will often function at cross-purposes with the transitional goal of reconciliation. For example, at the time during which the Truth Commission of El Salvador was being established, there was a fierce debate as to whether the Commission should be composed of nationals or foreigners. El Salvador had just emerged from a decade-long civil war in which tens of thousands of civilians were killed, and the social divisions within the nation remained deep and rigid notwithstanding the signing of the Peace Accords between the government and the rebels. Ultimately, it was agreed that the prospect of nationals sitting on the Commission risked undermining the important goal of reconciliation, and that the truth of past events could in any event be discovered whether or not the Commission members were nationals.¹¹ As a result of this and many other similar compromises, El Salvador has managed to avoid both the renewal of civil war (though not, regrettably, the

¹⁰ Here one cannot help but draw a contrast with the approach of Spain, where transitional justice issues were never really given serious attention despite far superior social, political and economic circumstances. This can, perhaps, partially be explained by the fact that in Spain, unlike in South Africa, most of the worst human rights violations had taken place decades earlier.

¹¹ See N. Kritz, "Coming to Terms with Atrocities: A Review of Accountability Mechanism for Mass Violations of Human Rights" (1996) 59 *Law and Contemporary Problems* 127 at 149. A similar and probably better compromise was reached a few years later in Guatemala, where it was agreed that the Historical Clarification Commission would be composed of nationals representing different Guatemalan perspectives, but be chaired by a foreigner.

continuation of political violence), and the unending mutual recriminations that would otherwise have obtained if reconciliation had been either excessively or inadequately valued as a transitional goal. Thus, transitional governments must recognize that certain transitional justice goals are inversely related, and that as a result there will be times when certain goals may have to give way to others in order to preserve peace and stability.

E. Complications of Timing

Transitional governments are often pressured by the international community and by victims to provide as much transitional justice as possible, as soon as possible. This can provoke transitional governments to take a very aggressive approach to transitional justice right from the start of the transition, without a full appreciation of the associated dangers and/or destabilising effects. Consider for example the Philippines, where Corazon Aquino purged the armed forces and began investigations and prosecutions shortly after having been sworn in as the first democratically elected president. Aquino's actions immediately fostered fierce resentment and outrage among Marcos loyalists and the military hierarchy. As a result, over the course of her first term in office there were seven attempted coups, one of which might even have succeeded but for the explicit show of U.S. military force in support of Aquino.¹²

Although a quick and intense fix of transitional justice can often be effective and even necessary in the initial stages of a transition, governments should appreciate that not *everything* needs to be done at once. Indeed, events such as the trials of Maurice Papon in France and Augusto Pinochet in the U.K. suggest that transitional justice also has not only an inter-temporal but also an international quality to it, such that "justice delayed" does not necessarily have to mean "justice denied." Thus, while a more lenient approach to transitional justice will understandably anger and frustrate most victims, surely there might be some consolation in the prospect of justice at some point in the future, whether it be in a national, foreign or international forum. In the meantime, the victims can at least enjoy a measure of peace and democracy.

F. Dilemmas of Legality and Fairness

The question of how to deal with past violations of human rights in transitional justice contexts raises complex questions of legal theory and practice. These include, *inter alia*, questions such as: whether certain laws can be applied retroactively; whether pre-transition statutory limitations can preclude post-transition prosecutions; whether state immunities should serve to shield perpetrators from certain crimes; whether amnesty laws enacted in the pre-transition period should be respected; and whether customary international legal norms

¹² C. Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1996) at 29–30.

can apply in the face of contradictory national norms. While there will always be a temptation to arbitrarily apply whatever rules best serve the goals of transitional justice, new democracies ought to be very careful not to give public credibility to the worst practices of the prior regime. By way of example, consider the issue faced by the Hungarian Constitutional Court in 1992, when President Goncz asked the Court to decide on the constitutionality of a proposed law that attempted to restart the statute of limitations for selected crimes committed between 1944 and 1990. In a decision that surprised many, the Court held that the law was unconstitutional on the basis that it placed political convenience ahead of basic legal standards of fairness.¹³ From a transitional justice perspective, this appears to be the right decision because if transitional justice measures are to be useful in consolidating democracy, it seems self-evident that such measures must at a minimum both be fair and be perceived by the public as fair. The critical point is that, when in conflict, expediency must in most if not all cases give way to legitimacy. To do otherwise would risk degrading the very essence and purpose of a democratic transition.

IV. CONCLUSION

THE PURPOSE OF THIS ESSAY was to provide a brief examination of the main goals of transitional justice, and an assessment of the various constraints and dilemmas which make it difficult for transitional governments to achieve any or all of those goals at different points in time.

Ultimately, the best and perhaps only prescription that can be given to transitional governments is to *pursue as much transitional justice as possible and yet only as much as is prudent*. Although this will often involve deferring or sacrificing individual rights in favour of collective goals such as social peace, economic development and democratic consolidation, the paramount concern of transitional governments must be to avoid a return to the past. For there is no way to get around the fact that without peace, most of the fundamental goals of transitional justice cannot even begin to be attained.

¹³ The Court subsequently upheld a revised version of the law which classified the 1956 crimes as “war crimes” and “crimes against humanity,” neither of which was subject to a statute of limitations. See generally M. Ellis, “Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc” (1996) 59 *Law and Contemporary Problems* 181 at 183–185.

