

ARTIGOS

TRANSITIONAL JUSTICE: AN OVERVIEW OF POLICY OPTIONS AND CHALLENGES

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SUMMARY: 1. Introduction. 2. Meaning of Transitional Justice. 3. Transitional Justice and International Law. 4. Transitional Justice Policy Options. 5. Blending Policy Options. 6. Theorizing Political Transitions. 7. Justice in Times of Political Transition. 8. Economic Crimes: The Missing Link. 9. The Role of Leadership in Transitional Justice. 10. Conclusion

RESUMO: Este ensaio aborda uma variedade de discursos teóricos sobre opções políticas de justiça transicional para países que estão se afastando de longos períodos de conflito e abusos de direitos humanos. Busca-se construir uma compreensão teórica e prática do papel da justiça transicional e as premissas que permeiam a relação entre as suas várias dimensões, incluindo questões sobre se se deve processar ou não os desafios do que constitui a justiça e a reconciliação, bem como problemas inerentes aos processos de contar a verdade. O ensaio enfatiza que desenvolver uma estratégia de justiça transicional é um enorme desafio político, ético e jurídico que exige balancear uma variedade de interesses legítimos e conflituosos. Muitas vezes é esse balanço de forças que na maioria dos casos determina qual opção de política de justiça transicional que o novo governo adota. O ensaio refuta a abordagem que procura aplicar o mesmo modelo de justiça transicional a distintas situações. Em oposição, preconiza-se um exame acurado do contexto, incluindo as necessidades específicas da sociedade em questão e as opções políticas disponíveis. A maioria das ilustrações usadas no ensaio é referente ao caso da África do Sul, onde o autor tem feito numerosos estudos sobre o assunto.

PALAVRAS-CHAVE: Justiça Transitória. Direitos Humanos. Conflitos Civis.²

ABSTRACT: This paper reflects on a variety of theoretical discourses on policy options of transitional justice for countries moving away from periods of protracted conflict and abuse of human rights. It seeks to build a theoretical and practical understanding of the role of transitional justice, and the underlying assumptions and relationship between its various dimensions; including questions on whether or not to prosecute, the challenges of what constitutes justice and reconciliation, and the problems inherent to the truth telling processes. The paper emphasizes that developing a strategy of transitional justice is an enormous political, ethical and legal challenge that calls for a balancing of a variety of competing and legitimate interests. Eventually, it is this balance of forces that in most cases determine the type of transitional justice policy option adopted by the new government. The paper discourages the one-size fits it all approach and underscores the need for each context to critically examine its own needs and link

policy options in a way that is more relevant to its own context. Most of the illustrations used in this work are from the case of South Africa, where the author has carried out a number of studies on the subject.

KEYWORDS: Transitional Justice. Human Rights. Civil Conflicts.

1 Introduction

The end of the cold war has witnessed an increasing ascendancy of practices for dealing with questions of past conflict and human rights abuse. Principles of democracy, human rights, and transitional justice are part of this. In this sense it can be said that an international understanding of dealing with past conflict and human rights abuse is slowly evolving. It is contributing to pushing the idea of dealing with conflict away from the basic aim of achieving the cessation of physical hostilities, toward addressing the underlying structures and effects of that conflict in order to prevent its re-occurrence. The world has witnessed increasing interest in the question of transitional justice in societies that are moving away from conflict and human rights abuse. These societies have to decide whether or not to deal with perpetrators of past human rights abuse. This paper examines the challenges and policy options for dealing with these questions of past conflict and human rights abuse. It aims to build a theoretical and practical understanding of the role of transitional justice, and the underlying assumptions and relationship between its various dimensions, including the question on whether to prosecute or not, the challenges of what constitutes justice and reconciliation, and the problems inherent to truth telling processes. It draws most of its illustrations from the context of South Africa, where the author carried out a number of studies on related themes.

Broadly speaking, the question of transitional justice has become more critical, particularly after the end of the Cold War, with various countries attempting to utilise it as a tool for building sustainable peace, democracy and the rule of law. Many significant but unanswered questions remain, however, as to whether transitional justice mechanisms do actually influence or produce the results anticipated in their mandates. The concern over whether, and in what ways, fledging democracies should hold accountable those involved in the previous regime, and who stand accused of committing gross violations of human rights, has indeed produced intense legal, ethical, political and practical debate.³ Transitions from authoritarian to democratic rule can represent an opportunity as well as a risk to successor governments. The successor government faces both ethical principles that ought to be pursued and actual political opportunities and constraints that ought to be taken into account. Juan Méndez argues that it is a mistake for the human rights movement to “allow itself to be painted into a corner of either a “legalistic” or a “moralistic” position. He discusses the legal and ethical principles that ought to be followed, and the political challenges inherent to political transitions, and concludes that there it is necessary to take a sober and realistic view when proposing any accountability measures.⁴ The primary concern of an emerging democracy would normally involve establishing the rule of law and fostering precautionary measures to promote the respect of human rights, in order to ensure that human rights abuses do not occur again. Some scholars argue that failing to prosecute those responsible for committing gross violations of human rights could seriously undermine the legitimacy of the newly elected government. While human rights groups, in particular, believe that impunity remains one of the main contributing factors to continuing patterns of violence,⁵ developing a strategy of transitional justice is not an easy task; it combines the enormous challenges and difficulties of balancing a range of competing and legitimate interests, such as redressing the harm suffered by the victims, while at the same time, ensuring the democratic stability of the country.

2 Meaning of Transitional Justice

The politics associated with the post–Cold War in countries such as Chile, the former Yugoslavia, Rwanda and South Africa are indicative of a trend that has come to be broadly referred to as Transitional Justice. In all these countries, transitional responses, in the form of truth commissions

and criminal tribunals, have been established to deal with past injustices. While these measures have broadly been referred to as Transitional Justice, the question of what constitutes transitional justice remains unclear and is debated among scholars and practitioners. Alex Boraine observes that the essence of transitional Justice is to address challenges facing societies that are moving away from authoritarianism to a form of democracy, and that often, these societies are emerging from a serious conflict, with high incidences of human rights violations.⁶ As a consequence there is often a breakdown in the judicial system, stark divisions and apportioning of blame, institutional collapse, and economic downturn. Transitional justice in this case should not be seen as a contradiction of criminal justice, but rather, as a deeper, richer, and broader vision of justice which seeks to confront perpetrators, address the needs of victims, and start a process of reconciliation and transformation, moving towards a more just and fair society.⁷ According to Villa-Vicencio, the five components of transitional Justice are accountability, truth recovery, reconciliation, institutional reform and reparations.⁸

The task of addressing the past can be difficult, perhaps even impossible because of the competing goals such as discovering and publicizing the truth about past human rights abuses, making a symbolic break with the past, promoting the rule of law, and strengthening democratic institutions, deterring future wrongdoing, punishing perpetrators of such crimes, healing victims, and achieving social reconstruction. The challenge facing new governments that come to power on a platform of democracy is that they need to address the past in a manner consistent with most of these goals.⁹ While this assumption may be noble in theory, it can be extremely difficult to achieve in practice, particularly when one considers that key figures in the predecessor government may often continue to wield influence and resist attempts to expose their past wrongs. Indeed the policy adopted to deal with past impunity is most likely to be a result of the path taken toward the democratic dispensation, as was the case in South Africa, where the TRC arose out of a negotiated settlement. Dealing with past human rights violations can only take place in a context in which the stability and peace of the country are considered to be durable enough to withstand the challenges of the process.¹⁰

Societies that are making the transition from repressive regimes to more democratic ones are faced with a number of dilemmas, including the need to distinguish between the old regime and the new one. The new government must decide whether to punish the leaders and henchmen of the old regime, or grant them general or conditional amnesty. If the new government decides to punish or prosecute, it will normally be faced with the challenge of determining who in the former regime should be prosecuted. In other cases, where the nature of past human rights abuses are diverse, the new government has to decide whether to prosecute only issues of human rights violations, or whether to include other crimes such as economic mis-management. The new government has to deal with a wide range of transitional concerns such as whether or not to purge members of the old regime from the public sector. While the continued presence of the old bureaucrats could give the impression that the new government is merely following the old regime's conventional way of doing things, those individuals may sometimes be the only ones with the knowledge needed to administer crucial public sector institutions. In South Africa for instance, institutions such as the judiciary had to retain personnel from the previous regime because the new government did not have new ones to replace them. Furthermore, the new government has to decide whether to compensate victims of past human rights violations, yet the new government may lack the resources to make these compensations and may, in fact, consider the available resources to be better spent on rebuilding the state's institutions and infrastructure. Developing a transitional justice strategy is therefore not an easy task; it entails enormous challenges and difficulties. Neil Kritz, however, observes that while the process of transitional justice may be expensive in the short term, failing to deal adequately with issues of past human rights abuses can provoke new conflicts and make the situation even much more expensive in the long term.¹¹

According to Alex Boraine, transitional justice is wider than just prosecuting perpetrators, since it is impossible to deal with the true intent of justice through court procedures alone.¹² It is unfeasible to prosecute all offenders in times of political transition. This introduces the vexed problem of selective prosecutions, and according to Boraine, this selectivity undermines the ideals of individual criminal responsibility which are so fundamental to the understanding of the rule of law. Therefore legal punishment cannot be the last word. Transitional justice should be seen as an attempt to complement retributive justice with alternative forms, such as restorative justice.¹³

Broadly speaking, transitional justice entails the application of a wide range of approaches for tackling the legacy of past human rights abuses, with the aim of creating a more just and democratic society. Transitional justice measures are tasked with a wide range of responsibilities and expectations, some explicit, some implicit. Their mandates normally include establishing an authoritative record of the past in order to overcome denial of past atrocities, and facilitating public acknowledgement of those atrocities.¹⁴ They are also expected to accomplish a wide range of goals including restoring dignity to victims, providing them with psychological healing, preventing violence and future human rights abuses, creating a collective memory or common history for a new future, forging a basis for a democratic political order that respects and protects human rights, identifying the architects of past atrocities and excluding or shaming them for their offences, legitimating and promoting the stability of the new regime, promoting reconciliation across social divisions, educating the population about the past, and recommending ways to deter future violations and atrocities.

3 Transitional Justice and International Law

There is an emerging trend in International Law that provides for universal jurisdiction on issues of accountability for gross violations of human rights. This trend is supported by various international treaties, human rights instruments, customary international law, and regional systems that protect human rights and sustain the notion of a duty to investigate, prosecute and punish perpetrators of gross human rights violations. The legal framework for these standards results from the various treaties and customs that are now established norms of international law.¹⁵ Traditionally, the state where human rights violations were committed had the primary duty to investigate and prosecute those crimes. This was based on the premise of the convention of state sovereignty and practicality in accessing and availing witnesses, its usefulness for understanding the history and knowledge of the violations, and the minimizing of communication problems by the use of the local language, all of which made it much more appropriate and practical to comprehend and confront the relevant problems of past impunity. Since the Second World War, however, the fight against impunity has become a universal cause. States are expected to comply with various affirmative obligations in response to gross violations of human rights. For instance, Article 2(3) of the International Covenant on Civil and Political Rights states that parties undertake to ensure that victims of human rights violations ‘shall have remedy, notwithstanding the fact that the violation may have been committed by persons acting in an official capacity.’¹⁶ This imposes on states the obligation to permit civil actions for damages, although in case of violations as grave as crimes against humanity, no remedy short of prosecutions and imprisonment are to be considered effective.¹⁷ Article 5 of the Torture Convention is precise in requiring each state party to “establish its jurisdiction” over offences committed in its territory, either by or against its nationals, and to submit the case to its competent authorities for the purpose of prosecution.¹⁸ Each state must ensure that its appropriate authorities promptly and impartially investigate allegations such as torture, and ensure that the victims of such acts obtain redress through its legal system.

Broadly speaking, there is in international law concerning the duty of the states to punish crimes against humanity, although in the actual international practice, there has been an apparent failure to implement this law in various circumstances. Examples include the failure of the international community to bring to justice some of the perpetrators of gross human rights violations in the territory of the former Yugoslavia¹⁹ and even more so in the Darfur region in Sudan. One of the significant developments in the area of international law has been the obliteration of laws that provide for amnesties, and the annulling of restrictions, including official immunities designed to block prosecutions of serious crimes against humanity. States are expected to govern their actions according to these emerging principles, which can also constitute a reliable legal source to be used by judges in courts anywhere in the world, when dealing with issues of impunity and human rights abuse. In practice however, this has sometimes created tension between international legal expectations and domestic constraints. For instance, international legal standards would have expected the new regime in South Africa in 1994 to prosecute the perpetrators of severe human rights abuses during the apartheid era, when in reality, some of the alleged perpetrators still wielded considerable military and political power and could create chaos and instability if they were to be prosecuted. It is because of this that South Africa opted, instead, to take a path that attempted to balance the legal principles of prosecutions and the actual political and ethical opportunities and constraints.

Nonetheless, human rights norms are increasingly becoming acceptable around the world. There is a growing connection between the obligations of international law on human rights and the practices of the domestic courts on the issue of impunity. Impunity laws and the state practice of impunity are widely deemed to be contrary to the ideals of democratic organization and international law. Although human rights norms have become indisputable, there is no guarantee that contraventions will not occur.²⁰ Indeed, although violations of human rights have declined in various parts of the world, they still persist in other places. The very political changes that have contributed to the strengthening of the human rights cause, such as the end of the Cold War and the subsequent 'wave of democratisation', have also brought about fresh political challenges and ethical dilemmas when dealing with the ills of impunity. Today, most human rights abuses, particularly in Africa, are caused by insurgencies and armed groups in the name of liberation struggles, or by governments under the pretext of countering upheaval. This is the problem of solutions posing new challenges. Successor regimes have to struggle to nurture democratic institutions, while attempting to maintain peace and foster social reconstruction. Sometimes it is difficult to consider measures for promoting transitional justice in such contexts, because most of the political actors, government and opposition groups have been complicit and ought to be brought to account.

While international law requires the punishment of violators of its various international human rights treaties, it is, by its very nature, a set of binding norms that lacks a unitary and efficient enforcement mechanism, thereby leaving the various legal instruments to be selectively implemented by national governments. It was for this reason that the successor regime in South Africa opted, in 1994 to exercise its discretion on the question of bringing to account perpetrators of past human rights abuses.

4 Transitional Justice Policy Options

Varying transitional justice approaches have been presented as a means of dealing with past conflict and human rights violations. These approaches range from taking an aggressive stance by adopting policies which emphasize punishment and condemnation of perpetrators, to taking more lenient measures that emphasize forgiveness and conciliation. However, there are procedures that accommodate a middle ground approach, favouring policies aimed at balancing numerous goals including punishment, conciliation and the establishment of an accurate historical record, as in the case of the South African TRC. Flexibility in the formulation of a transitional justice process is, in most cases, attributed to the fragility of transitional contexts that vary from context to context. Transitional justice measures therefore need to reflect the needs of a particular context.

States in transition from violent conflict or repressive rule towards democracy and the rule of law need to carry out profound internal reorganization, in order to bring about new political and constitutional provisions that inhibit the reoccurrence of past impunity. Such arrangements may include restructuring the legal and political structures that promoted the past impunity, in order to encourage a process that emphasizes political accommodation and compromise. In South Africa, a TRC was the preferred mechanism for dealing with the country's past. One significant challenge for transitional justice arrangements is that societies in transition often experience paradoxical demands. For instance, while in some cases victims feel entitled to legal justice, truth and reparations, perpetrators, with varying degrees of power, may insist on amnesty or exemption from punishment. In South Africa, one of the most contested issues in the negotiation process was whether or not the past government was to be granted amnesty for crimes committed during the apartheid era. The National Party insisted that there should be a general amnesty, while the ANC pushed for accountability for all past crimes. Ultimately, it was agreed that the country pursue an accountability process that would provide for conditional amnesty to perpetrators only after they had fully disclosed their crimes, and proved that they were, indeed, politically motivated. Those who did not do so would be subject to prosecution.

Broadly speaking, in attempting to establish mechanisms for transitional justice, the new government would normally face an array of challenges, including the need to meet the basic needs of the society, and this can in some cases limit the capacity or willingness of that government to devote resources to accountability or reparative mechanisms for past human rights abuses. Societies

in transition demand different things of the justice structures than those demanded of the formal courts in established democracies²¹. These societies, for instance, may value stability of the country and conciliation over processes of retribution. They need to come up with policy options that relate to the specific goals desired by that society. The essential aspects for constructing policy frameworks for dealing with past conflict and impunity include the following:

a) Amnesty

In the aftermath of a conflict or repressive rule, the new government may decide to grant general amnesty for crimes and human rights abuses committed by members of the previous regime. Issuing amnesties and granting presidential pardons was common, especially in the various transitions from military rule and dictatorships in Central and South America²². These actions do not necessarily mean the respective governments did not care, but rather, they reflect the precarious position in which many new governments find themselves. The new government may not have sufficient power to control disgruntled members of the former regime. New leaders fear that subjecting the perpetrators of human rights violations to prosecution, or their activities to public scrutiny, could initiate an aggressive response that could undermine the stability of the nascent democracy. In many of cases, the former violators are not totally defeated or eliminated during the transition. They may still retain considerable power and influence. In other words, they still pose a threat to the stability of the successor government. In Chile for example, the democratically elected president had to share power with a former military dictator²³. The same occurred in the Democratic Republic of Congo, where the President Joseph Kabila had to share power before the first democratic elections November 2006, with four Vice Presidents, even though some of these had been leading insurgents in committing serious human rights atrocities in the eastern part of the country. Attempting to prosecute such individuals can seriously undermine the peace and stability of the country, and it is easy to understand why under such circumstances, some successor governments opt to issue general amnesties or pardons.

Amnesty can therefore be meaningful where it serves to minimize the threat of perilous societal reprisals and help forge a constructive relationship between the successor government and powerful members of the former authoritarian regime. In cases like South Africa, where an authoritarian regime had committed human rights violations against its citizens, its members, particularly the security apparatus, were reluctant to embrace the new government. While their responsibility in perpetrating past crimes may be well-known, the need to secure their support and cooperation may be crucial to the efforts of the new government to limit the likelihood of violent reactions. Indeed few governments emerging from authoritarian regimes can function effectively without the support of the civil service and security machinery of the former regime. Granting amnesty can therefore be a useful way of securing their cooperation, since any gesture of prosecution or punishment increases the chances of escalating hostility. In its effort to punish past human rights violations, the new government can, in fact, end up appearing to be malicious and harboring the intention to engage in witch hunting of officials of the former regime. A case in point is Kenya, where some of the officials of the former regime politically repackaged themselves after the 2002 general elections as “defenders of the oppressed”, and any attempt to prosecute them was interpreted by their followers - who in most cases came from the same ethnic communities as the leaders in question - as an affront to the whole community. The corollary of this is that these ethnic interpretations are in most cases translated into national discourses, deciding fundamental national issues in parliament, and even voting during national elections. This is not to suggest that prosecutions cannot or should not be undertaken in such circumstances, but rather, to point out some of the political challenges and costs inherent to transitional justice policy measures that are retributive in nature.

The above arguments in support of amnesty notwithstanding, general amnesty also has negative implications. It is a measure that falls short in addressing the concerns of victims, and casts doubt on the obligation of successor regime to deal with impunity. When a government grants amnesty to human rights violators, this may be interpreted by some of the victims as a failure to acknowledge their past anguish. Just as in the repressive regime, the successor government subordinates the victims’ rights and concerns to the needs of the state. The successor regime exchanges justice and victim recognition for greater political stability. If the violators are not identified or prosecuted,

large numbers of victims may remain politically alienated and unhappy with the successor regime. Without the support of the victims, the nascent government can be even less stable, suffering from a lack of trust and influence over its citizens. Under these circumstances, some of the victims may be inclined to avenge for themselves, or pursue what they consider to be their own form of justice, rather than relying on the government or legal authorities. Both of these concerns are likely to diminish the contribution that amnesty makes to the stability and social reconstruction process of the country. Therefore, while the general amnesty policy option may meet the demands of the powerful and influential members of the former regime, it may undermine the victim's concerns and hinder legal proceedings against violators of human rights abuse. In essence, amnesty laws officially absolve human rights violators of their crimes. Without criminal responsibility, it is impossible to successfully prosecute a criminal or civil case against former officials²⁴. Despite these drawbacks, new governments often feel constrained in pursuing alternative policy options, and end up granting amnesties and presidential pardons.

b) Truth Telling

Unlike amnesty, the policy option of putting in place a truth telling process akin to what happened in South Africa after 1994 may illustrate the degree of confidence and security in the new government, in undertaking measures to address the human rights violations committed by the previous regime by identifying those responsible and acknowledging the victims²⁵. The goal of a truth telling process, especially one carried out publicly, is to put in the public domain an account of the policies and practices of the previous regime that is as accurate as possible. In most cases, truth telling processes end with the writing of a report of the accounts, and sometimes making suggestions about institutional reforms.

Compared with prosecutions, the public truth telling policy may be considered rather passive, but the disclosure of the past human rights abuse can make a meaningful contribution to recognizing the suffering of victims and limiting the culture of denial in the society. There are arguments that the desire to merely forget the past provides a weak basis upon which to build the democratic institutions of the new government²⁶. In South Africa, the truth telling process is seen to have facilitated an understanding of the country's divided past, while also recognizing the untold suffering and injustice perpetrated against the victims. Paavani Reddy states that coming to terms with the past through truth telling was fundamental to the promotion of national reconciliation, and for building the new South Africa²⁷. Nonetheless, it is far from certain that truth telling can actually guarantee reconciliation. It is possible that some individuals would be hurt by new revelations about past brutal acts committed against their relatives. Justice Albie Sachs argues that truth, by its very nature, is not neat, it is not compact, it is not finished.²⁸ Nonetheless, truth telling processes have been largely combined with other procedures such as amnesty and reparations in constituting truth and reconciliation commissions.

c) Reparations

In contrast to amnesty provisions and truth telling, both of which focus largely on the perpetrators, reparation focuses primarily on the victims. In most cases, reparation is linked to processes of truth telling and sometimes amnesty. In many cases, it involves financial compensation or payouts to assist survivors. Reparation stresses the recognition of the damages caused by injustice to victims, and the need to address some of their needs. It helps victims or their relatives to cope with the material aspects of their losses by helping to meet their basic survival needs. Brandon Hamber observes that reparations contribute to the process of publicly acknowledging wrongdoing, restoring survivors' dignity and raising public awareness about the harm victims have suffered.²⁹

In many cases, seeking financial compensation for damages may be the victim's most crucial remedy.³⁰ While it is feasible to bring to account individuals from a former regime, who were involved in past crimes and human rights abuse, it is not possible to bring to justice the institution of state or the government that was responsible for those violations once the individuals constituting that institution have left power.³¹ What the new government can do, however, is to use

its own resources to compensate victims of past crimes and human rights abuse. Often succeeding governments pay monetary damages (in South Africa, this was part of the recommendations of the TRC process) and sometimes arrange for counseling programs for victims. Other options might include providing low-cost housing and educational subsidies. Regardless of their form, reparations are an attempt by the successor government to compensate the victims' for the anguish suffered, and restore their dignity.

Often it is the successor government that compensates for the injuries of victims rather than the actual government or individuals guilty of the violations. The tendency of successor governments to link truth commissions with reparations has in the recent past become very common. This has been duty-bound by the mandates of truth commissions, most of which seek to delineate cases of past human rights abuse and in the process, identify not only the perpetrators, but also their victims. Once the victims are officially identified, it would appear irresponsible for the successor government, especially one promising democratic virtues, to ignore the victims' need for assistance.

d) Prosecutions

Subjecting past violations of human rights to domestic law is another option for transitional justice, although it comes with its own challenges. Under repressive governments, it is mostly the powerful and influential individuals who devise and support the perpetuation of human rights abuses. Asserting judicial authority over these groups poses significant challenges because they are most likely to resist such measures as much as they can, and sometimes even violently. Nascent democracies therefore shrink back from aggressive prosecutions for fear of subjecting their fragile democracies to more turbulence.³² Assertions by those said to be perpetrators linking attempts at prosecutions with political vengeance and witch-hunts can make matters worse, much more so if such individuals have a political constituency in which they have political clout. If these perpetrators are brought before domestic courts, which are under the jurisdiction of the successor regime, they are likely to whip up public emotions on the pretext that it is their communities that are being targeted.

It is also true that the courts can be misused by the successor government as an instrument to silence the opposition. In Zambia, former president Fredrick Chiluba attempted unsuccessfully to use courts to declare his predecessor, Kenneth Kaunda, a non-citizen in order to have him banished from politics. Overzealous prosecution can indeed weaken the sense of fair play of the trials and incite new political problems for the new government. There is also a general assumption with the prosecution approach that the process of subjecting the alleged perpetrators to court processes is in line with the wishes and interests of the victims. It is possible that while there would be victims who would want to see those who violated them or their relatives prosecuted or punished, it is also plausible that there are victims who would not necessarily want to pursue that road. There could be victims who only want their story brought to the public, or who only want to be financially compensated.

Despite these possible weaknesses, several nations have attempted criminal prosecutions with domestic courts, such as Argentina, Brazil, Chile and even South Africa.³³ Although prosecutions can signal the need to end impunity and promote human rights, countries that have attempted them have shown a lack of resolve to pursue them on a full scale. In countries where prosecutions have taken place, such as Argentina, Chile and South Africa, only a very small number of the perpetrators have been prosecuted. In South Africa the recommendations of the TRC for prosecutions have largely been ignored, partly due to President Mbeki's lack of commitment to the TRC's recommendations³⁴ and also because of the apprehension that successful prosecutions would require large amounts of resources to carry out detailed investigations, hire lawyers and generally follow them to their conclusion.³⁵

In various cases where the accused are convicted, they often receive light sentences.³⁶ Besides, the individuals who are prosecuted are often low-level officials and junior security officers (Argentina being the notable exception).³⁷ While some of the low level positions in the former regime may be prosecuted, those who designed and implemented the human rights violation policies usually evade prosecution. In South Africa Pieter Botha, a former President under apartheid rule, refused to testify before the South African TRC and has remained largely untouched by the post apartheid governments.

5 Blending Policy Options

Responding to concerns of past human rights abuse in an emotionally charged and politically sensitive environment can be very problematic. The bottom-line becomes whether to prosecute, or to forgive and forget? In criminal systems, the question of justice is central to the legal process. The argument is that there can be no justice if those who violate fundamental rights are freed from the action of the courts. Thus, justice is seen to exist only if there is full respect and protection for human rights, as well as an independent and impartial judiciary able to investigate and bring to trial those who have broken the law and violated human rights. Additionally, under international obligations, states have a duty to get rid of impunity by bringing those responsible for human rights abuses to justice. The conceptual underpinning for taking legal action against perpetrators of human rights abuses is based on various premises, including the argument that justice requires such measures. In this case, the successor government has the moral duty to punish cruel crimes against humanity. Prosecution in this case is seen as a moral obligation owed to victims and their families. There is also the contention that democracy is based on law, and a stand must be taken to affirm that neither high officials nor anyone else is above the law. Prosecution can also be seen as important in deterring future violations of human rights. Prosecutions, therefore, are perceived as a necessity for asserting the supremacy of democratic values and norms and encouraging the public to believe in them. In other words, unless major crimes are investigated and punished, there can be no real growth of trust, no implementation of democratic norms in society at large, and no genuine consolidation of democracy.³⁸ The prosecution of perpetrators of past crimes is seen to represent the substantive recognition of human rights and commitment to the rule of law. Close to this school of thought is the view that where authoritarian crimes are not prosecuted, it is necessary, at the very least, to bring into the open the extent of the crimes, the identities of those responsible, and a full and unchallengeable public record. Aryer Neier states that the principle of accountability is essential to democracy, and accountability requires exposing the truth and insisting that people should not be sacrificed for the greater good; that their suffering should be disclosed, and that the responsibility of the state and its agents for causing suffering be made clear³⁹.

Those opposed to prosecution make the countering argument that democracy must be based on a reconciliation in which key players in society endeavour to patch up their past divisions. In this case, the process of democratisation involves the explicit or implicit understanding among groups that there will be no retribution for past outrages. In many situations of conflict, members on both sides of the divide play a role in perpetuating human rights abuses. A general amnesty in such circumstances may be deemed as a fair and stronger base for democracy than efforts to prosecute one side or the other or both. In some cases, the crimes of the authoritarian officials were justified at the time by the overriding need to suppress what may have been perceived as rebellion in order to "restore law and order." These actions may even have been supported by part of the public at the time, and this creates a complex situation concerning the question of responsibility. This was the case in South Africa, where each side of the conflict had people who supported its course of action, even though they may not have been actively involved in the struggle. Many people and groups in society may have shared in the guilt of the crimes committed by the apartheid regime. In such cases, amnesty may be necessary because of the challenges of bringing all those culpable to book. In any case, legal and moral arguments for prosecution may be countered by the moral imperative of crafting a stable democracy. In such a case, the consolidation of democracy takes precedence over the punishment of individuals.

The arguments for and against prosecution and amnesty may sound noble, but in practice, the decision of whether to prosecute or not, is less affected by moral or legal considerations. In South Africa, it was almost exclusively shaped by politics, by the nature of the democratisation process, which was through a negotiated settlement, and the distribution of political power during and after the transition. The bottom line is that nascent democracies are striving to make a break with the previous regime and demonstrate the commitment to the protection of human rights through the implementation of new policies. It is clear that there is a whole range of needs arising out of repressive regimes and conflict situations that cannot be satisfied by the action of the courts, even if the courts function well and there are no limits placed on prosecuting the wrongdoers, which is uncommon. Many alternative and complementary approaches to accountability have

thus slowly taken shape. The concrete needs of victims and communities that were damaged by violence may not be addressed through prosecutions, except in providing some solace if some perpetrators are successfully prosecuted. The institutional or societal conditions that allowed massive abuses to take place; the structures of the security apparatus, and the judiciary or the laws that should constrain the actions of officials, for example, remain unchanged, even as a more democratic and less abusive government comes into place. Many questions may remain open about what exactly took place during the years of repression, and the tensions between communities may continue to fester or deepen, if these are left unaddressed. It is with these many and multifaceted problems in mind that the subject of Transitional Justice emerges as a field which attempts to address the issue of past crimes.

The circumstances of the society in transition and its historical context should be the factors that dictate the appropriate combination of policy options to be adopted. A fine balance of options calls for a clear understanding of the implications of each policy. While the classic response to human rights violations has been the criminal prosecution approach, the circumstances that lead to the wide range of modern contexts of human rights abuse have necessitated recourse to alternative approaches that combine a range of policy options.

6 Theorizing Political Transitions

A country's decision to deal with its past is significantly influenced by the type of transition it has gone through. In South Africa, the incentive for negotiations resulted from a combination of internal and external factors. The apparent problems of governing through apartheid, compounded by inherent economic difficulties, international economic sanctions, and the end of the Cold War, put pressure on the South African government to reform. The negotiated processes that guided the South African transition were rooted in the mass political organization that had emerged during the apartheid conflict.⁴⁰ It was during the negotiation process that political compromises were made.

Samuel Huntington outlines three types of transition, which he refers to as Transformations, Replacements and Transplacements.⁴¹ In transformations, he argues, those in power in the authoritarian regime take the lead and play a decisive role in ending that regime and changing it into a democratic system. In this case the elites in power take the lead in producing democratisation. In transplacements, democratisation is produced by the combined actions of the government and the opposition. Within the government, the balance between what he refers to as 'standpatters'⁴² and reformers is such that the government is willing to negotiate a change of regime but is unwilling to initiate that change. It has to be pushed to and/or pulled into formal or informal negotiations with the opposition. This situation reflects the South African negotiated settlement, where the apartheid regime entered into formal negotiations with opposition movements, and this eventually resulted in a political settlement and the first democratic election in 1994. Huntington states that for transplacements the moderates in the opposition are powerful enough to overthrow the government, hence they see virtue in negotiations.⁴³

Replacements, on the hand, involve a very different process from transformations. Reformers within the regime are weak or non-existent. The dominant elements in government are standpatters, who are staunchly opposed to regime change. Democratisation consequently results from the opposition gaining strength until the government collapses or is overthrown. Unlike the situation of transplacement where there is a balance between standpatters and reformers, in a replacement, the standpatters gain strength and become dominant, thereby leading to replacement. In short, replacement involves three distinct phases; the struggle to produce the fall, the fall itself, and the struggle after the fall. Huntington notes that in replacements, the former opposition groups come to power and the conflict enters a new phase, as the groups in the new government struggle among themselves over which regime they should institute. According to Huntington, sometimes the line between transformations and transplacements is fuzzy and some cases might be legitimately classified in either category.

The nature of the transition and the make-up of the new government greatly affect the type of mechanism to be adopted in dealing with the impunity of the predecessor. For transformations where the elite in government take charge in producing the democratisation process and for transplacements

like the case in South Africa, where the democratisation process was realized through negotiations, the typical situation is that there is resistance to punishment, as agents of the former regime will usually insist on guarantees for immunity. The nature of the transition is central to the transitional policy option to be adopted and theoretically, it is easier to pursue prosecutions in a replacement situation where internal opposition elements have gained strength and unseated or replaced the former government. Efforts to secure transitional justice cannot be considered entirely on the basis of the politics of the time. They are informed by the historical context of a given country and the nature of the transition that is occurring.

7 Justice in Times of Political Transition

One dilemma in the establishment of a transitional justice policy is the question of whether political transitions, by their very nature, require a unique form of justice; one which in most cases emphasizes reconciliation as opposed to a strict retributive system, or whether transitional justice results from a mere political compromise in which justice becomes the casualty of a political calculation.⁴⁴ There are divergent views over whether the unique socio-political and economic circumstances of transitional periods legitimately call for responses to past human rights abuses, favoring compromise and reconciliation over retribution. There remains considerable debate in South Africa, for instance, over whether the granting of conditional amnesty to those who confessed to past crimes before the South African TRC was a political expediency that compromised criminal justice, or an appropriate policy given South Africa's past and the many challenges during its transition to democratic rule.

One fundamental question is the conditions under which a society should turn to trials, or truth commissions, or both. Miriam Aukerman sees a preference for prosecution at work in the international legal community,⁴⁵ and is supported by Diane Orentlicher who adds, however, that there are conditions under which prosecuting those in the past regime, who stand accused of human rights violations, is unwise.⁴⁶ The prosecution approach emphasizes the observance of the rule of law. It holds that human rights norms can not be established in a society in which an impotent judicial system allows prominent criminals to enjoy impunity. There are others, however, who see retribution as just one of the many goals of transitional justice. The bipolar nature of trials, in which prosecutions seek to make a clear distinction between the innocent and the guilty, is in some cases inappropriate for redressing the systemic exploitation and violence that many societies in transition have experienced.⁴⁷ Ruti Teitel stresses the limited character of transitional justice and takes note of the compromises to formal justice that it entails. She argues against the prevalent view that favors punishment, and contends that while the law plays a profound role in periods of transition, often societies ravaged by brutal human rights legacies find themselves subverted by the challenges and compromises inherent to the transition itself.⁴⁸ She is supported by Brian Walsh, who observes that prosecutions of human rights violators can jeopardize the stability and reconciliation process of a country.⁴⁹ Elin Skaar concludes that whether a new government chooses truth commissions, trials or nothing, depends on the relative strength of demands from the public and the outgoing regime, the choice tending towards trials as the outgoing regime becomes weaker, and towards nothing as the outgoing regime becomes stronger, with truth commissions being the most likely outcome when the relative strength of the demands is roughly equal.⁵⁰ It is true that there will always exist incompleteness and inescapable inadequacy of each possible response to collective atrocities. It is for this reason that structures of retributive and restorative justice have come to coexist during periods of political transition. It is also possible for truth commissions to augment the work of prosecutions in the process of establishing accountability for widespread human rights abuses, as was the case in Sierra Leone.⁵¹

Societies in transition face an array of challenges, and are sometimes forced to impose demands on justice structures that are not made of the formal courts in established democracies.⁵² Understanding the problem of justice in times of transition is best considered when located in the actual historical context and socio-economic and political realities of the time. Transitional contexts are affected by the features of the former regime, and by the socio-economic and political constraints of the time. Where the dispensation of criminal justice poses acute rule-of-law problems, it is only appropriate to balance accountability with mechanisms that would help steer the nascent democracy and rule of law.

The overall aim in that case should be to ensure the stability of the country, in order to encourage and enable the social-economic and political reconstruction of the society. Regarding the problem of whether or not to prosecute, Alex Boraine states that the answer is surely not an either/or situation: "Once it is agreed that there must be balancing of imperatives then it is surely both."⁵³

Transitional justice has become an integral part of the reconstruction process in societies that are moving away from conflict and human rights abuse toward the rule of law. Nonetheless few criteria remain against which to blend a viable transitional justice policy option. If a new regime decides to pursue a transitional justice policy, it needs to relevantly tailor it to suit its own specific context.

8 Economic Crimes: The Missing Link

Most transitional mechanisms have previously focused their investigations on serious human rights abuses (torture, disappearances, extrajudicial killings, crimes against humanity, genocide, etcetera.), as well as on violations of international humanitarian law and war crimes. But there have been increasing efforts to include economic crimes in the transitional justice agenda.⁵⁴ The rationale is that economic crimes are intrinsically linked to other systemic human rights violations, which are often committed to perpetrate economic crimes. In some countries, such as Nigeria and Kenya, economic crimes by former regimes have been as pronounced and destructive as the civil and political rights violations. While there are calls to include economic crimes within the mandates of the truth commission, there are a number of challenges that are likely to confront any effort to include economic crimes in a truth commission's mandate. For instance, the methodology and timing required to investigate corruption and economic crimes are quite different from those required to investigate individual or systematic practices of torture or killings. Moreover, a broad focus on economic violations might suggest the need to look into many other related concerns, like poverty, which could risk expanding the mandate of the commission so broadly that it could become effectively impossible to complete its task. This debate on transitional justice and economic crimes is important because it underscores the need to link transitional justice policies to specific contexts, in a way that is relevant. While for instance the South African TRC has been widely held as the standard practice, it is likely to face serious challenges when extrapolated into a context where economic crimes are the central concern.

9 The Role of Leadership in Transitional Justice

In South Africa, the transitional justice infrastructure strongly harnessed the ethical leadership of Nelson Mandela. Mandela was an example of an individual who held fast in giving leadership to the South African truth and reconciliation process. Having been inaugurated as President, Mandela faced up to the political restrictions in dealing South Africa's past. He remained the leading moral voice in the establishment of the TRC, and played a critical role, through his non-retributive approach, to increasing the chances of fulfilling the moral mandate of "reconciliation" at the heart of the TRC, and which was, in fact, a policy theoretically bound by the ethical purpose of dealing with the legacy of apartheid and seeking to build a democratic South Africa.

Leadership needs to make people believe that it carries the goodwill to address the legacy of past human rights violations and build a just and fair democratic system, and it needs to take care of a possible diversion from that guideline because of new political constraints. José Zalaquett argues that when faced with the formidable challenge of deciding whether or not to deal with the past, leaders should not make their choice on such a momentous matter "as though picking something from a menu, but rather, must work hard to create the conditions for any given choice to be politically feasible."⁵⁵ He observes that leaders should find inspiration in the concept of the ethics of responsibility coined by Max Weber, which demands that politicians act in "the tangled world of politics in a manner that effectively increases the chances of fulfilling the moral mandates that guide them."⁵⁶ In Max Weber's concept of the ethics of responsibility originating from his 1919 Conference on *Politics as a Vocation*⁵⁷, he states that in difficult situations where the stakes involve the whole society, leaders need to be guided by the ethical maxim of responsibility as opposed to the ethics of conviction (ethics of ultimate ends). In his view, responsible politicians do not shy

away from pursuing the fulfilment of basic ethical principles, even in dangerous circumstances, but rather, they carefully assess the circumstances, so as to be able to attain the desired results to the fullest extent possible.⁵⁸ He cautions against leaders invoking the need for prudence as an excuse for inaction and cowardice. Weber clarifies that an ethic of conviction does not imply lack of responsibility, just as an ethic of responsibility does not imply lack of conviction. Rather, he stresses the fundamental difference between acting according to an ethical precept regardless of the outcome, and acting while taking into account the predictable consequences of one's actions. In Weber's view, politicians must always be guided by an ethic of responsibility instead of an ethic of conviction, in which one pursues what he believes to be a rightful goal without heeding the foreseeable consequences of his course of action. In the ethic of responsibility, a leader has to take responsibility for bad consequences and not blame destiny or people for failing to follow his lead. The ethics of responsibility may actually call for determined, bold measures. Mandela can be said to have been inspired by the ethics of responsibility faced with diverse political restrictions, and the need to be accountable to the whole nation.

It is amidst such complex and sometimes transitory circumstances that political leaders must try, as far as possible, to act responsibly. Since there is no blueprint to direct their actions, they must rely on good judgment. Responsibility also requires taking into account the accomplishments and failures of other countries that have faced similar challenges.

10 Conclusion

The recent wave of transitions toward democracy has fashioned a paradigm shift in the way new leaders respond to past violations of human rights. There is a growing interest at both domestic and international levels, in bringing "justice" and healing to people who have experienced gross violations of human rights. Transitional justice is increasingly seen as a key component of social reconstruction and the promotion of just and fair institutions in societies that have suffered conflict and human rights abuse. The subject of transitional justice is slowly evolving into a discipline, as a result of the increase in public interest and the expectation that accountability is due, after periods of mass atrocities and human rights abuse. This paper examines the challenges involved in establishing transitional justice mechanisms. It seeks to build a theoretical and practical understanding of the role of transitional justice and the underlying, often contradictory relationships between its various elements, such as the proclamation of amnesty and the need for criminal justice. The paper observes that developing a strategy for transitional justice is not an easy task; it is an enormous challenge that involves balancing a variety of competing and legitimate interests. It also evaluates some of the legal, ethical and political challenges that successor governments face when dealing with past human rights abuses, and argues that debates on transitional justice need to recognize the distinctive differences in the transitional contexts of each specific country. Too often, transitional justice measures are evaluated according to universal standards simply adopted from stable western democracies and abstract political and legal thought, without considering the different circumstances of many of the societies in transition. Most studies, particularly those which advocate prosecutions of violators of past human rights, typically understand the concept of transitional justice within the framework of state responsibilities, with an underlying assumption of western type institutionalised states that are not constrained by the dynamics of social-political and economic pressures, and whose relations are mediated by the law.⁵⁹ This paper argues that efforts to establish transitional justice need to take into account the distinctive features of the rule of law and justice in the specific contexts of political transition.

One common premise in discourses on transitional justice is the implicit assumption that political change, otherwise known as political transition, does not necessarily mean that countries are on the way to democracy and the rule of law.⁶⁰ There are cases where political transitions are said to have occurred, only for these countries to carry on without any substantive change in the business of politics. In Somalia, for instance a Transitional Federal Government was put in place in 2004, only for an Islamic militia; the Union of Islamic Courts, to seize control of much of country in 2006. It was only after the intervention of Ethiopian troops that the Union of Islamic Courts was driven out of power. There is, therefore, a need for caution against the assumption that societies that are moving away, or show signs of moving away, from conflict or repressive rule towards some form of democracy will progress sequentially in a linear way.

Broadly speaking, after a period of protracted conflict or repressive rule, a country and its people need to move on from the violence and human rights abuse. To do so, various countries often seek to look back with the purpose identifying the root causes of their past problems, in order to generate ways to prevent the future occurrence of similar cases. Transitional justice needs to be seen as an interim measure that seeks to address the crimes of the past, in order to lay a foundation for legitimate democratic reforms. Each country needs to link the transitional justice policy options to its own context, in a way that is relevant. This is because each transitional case varies in its experience of past conflict and human rights abuse.

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- ¹⁵ The United Nations is the principal forum for creating international law and principles. Apart from the elaboration of treaties, the systematic work of UN human rights bodies over the last decades has

- crystallized into declarations, resolutions, guidelines, principles and opinions, collectively named “soft” law. These norms are especially relevant in the promotion of human rights and in the prosecution of severe crimes. One such relevant human rights document is the Commission on Human Rights resolution 2003 of 1972, which requested the Secretary-General to order an independent study on best practices, that resulted in Prof. Orentlicher’s report, titled “*Best Practices to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity*” See PAVON, B., *Combating Impunity: Transitional Justice in the Aftermath of Mass Atrocities*. **United Nations Chronicle** (Online Edition). Available at: < <http://www.un.org/Pubs/chronicle/2004/issue3/0304p22.asp>>. See also JOYNER, C. C. Redressing Impunity for Human Rights Violations: The Universal Declaration and the search for Accountability. In: **Denver Journal of International and Policy**, v.26, no. 4. 1998. See ALLMAND, W. Combating Impunity: The Convention Against Torture. In: **The Changing Face of International Criminal Law**. Selected Papers, June 2001. pp 161-166.
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Recebido em: 04/2008

Avaliado em: 05/2008

Aprovado para publicação em: 05/2008