

A Critical Analysis of Transitional Justice and Rule of Law in Post-Authoritarian Democracies

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ABSTRACT

This legal theoretical article based on secondary sources aims to critique the concept of “Transitional Justice” as against criminal trials and punishment, for the establishment of Rule of Law in post-authoritarian democracies, especially in the context of prosecution for Human Rights Violations during the authoritarian regime.

Keywords: *Rule of Law, Transitional Justice, Criminal Prosecution, Human Rights*

1. INTRODUCTION

The development of International Human Rights Law is one of the most significant legal developments after the end of the Second World War and the horrors of the holocaust. The parallel enshrinement of democracy as a preferred method of governance is substantially pivoted on the assumption that democracies are more effective in legally preventing and addressing Human Rights violations. However, the twentieth and twenty-first century are replete with instances of gross violations of Human Rights usually by intervallic authoritarian interruptions of democracy. This has engendered a certain conflictual contradiction between prosecution of Human Rights violators and political consolidation of the neonatal democracy in the post-authoritarian State. This paradoxical situation has its origin in the growing dominance of a contemporary strand of legal thought which prioritises political Transitional Justice over legal Criminal Justice. This article is a critical analysis of the concept of Transitional Justice as preferable ‘Restorative’ Justice superior to Positivist Criminal Prosecution and Trials for ‘Retributive’ Justice.

2. THE FOUNDATIONS OF TRANSITIONAL JUSTICE

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Transitional Justice had its genesis at the Aspen Institute Conference on State Crimes in 1988 and was founded on legal and human rights theory to deal with the issue of transition to democracy from authoritarian regimes at the end of the Cold War (Arthur 2009:321). Criminal Trials supplemented by other Transitional Justice strategies were

expected to initiate human right-based norm socialisation in weak post-authoritarian transitional democracies (Orentlicher 2007:12). It was initially envisaged as "a depoliticised legalist language of right and wrongs, duties and obligations, [that] is supplanting the dominant political language based on State interests, deliberation and consensus" (Teitel 2002). Subsequently the field of Transitional Justice has become increasingly multidisciplinary with other disciplines crowding out the legal aspect to the periphery of contemporary Transitional Justice discourse (Lambourne 2009:28-35). The broadening of the ambit of Transitional Justice from a 'thin' legalistic human rights centric mechanism into a 'thick' rendezvous discipline that is "beyond legalism" (McEvoy 2007:411-433) has metamorphosed it into an incoherent and often conflictual and contradictory theoretical idiosyncrasies from diverse fields such as political science, sociology, anthropology, psychology, economics, developmental studies, medicine, gender and feminist studies, cultural studies, linguistics, theology, ethical philosophy and aesthetics. The result is the proliferation of a vast body of soft law has developed in the last thirty years to address issues like impunity and reconciliation as a part of the "restorative" Transitional Justice discourse which has increasingly been claiming parity with, if not outright superiority to, the Statist-Legalist paradigm which originally informed Transitional Justice. The "restorative justice" discourse presently infecting Transitional Justice Theory a result of retrospective attempt at explanatory theorisation based on cherry-picked trans-disciplinary concepts lacking coherence, and an ex post facto attempt at construction of normative foundations as a compensation for the trade-offs of realpolitik (Gray 2006: 2621-2688, Roht-Arriaza 2006:3).

3. IS TRANSITIONAL JUSTICE REALLY JUSTICE?

Transitional Justice Measures were originally intended to be used as temporary tools to help consolidate peace in the interregal period for consolidating domestic Rule of law in the post-transition State, but there is a propensity to conflate the two and treat the short term tool -Transitional Justice- as a surrogate for the intended long term outcome- Rule of Law (Kennedy 2004:116). Transitional Justice measures have always focussed on mediating the immediate transition to democracy (Teitel 2001:3) rather than the establishment of normative precursors for the consolidation of Rule of Law in the long term. This "finite and contained" mandate of Transitional Justice (Aolain and Campbell 2005) that conceives of transformative transition to be the short term outcome of a politically negotiated deal for ending repression, reforming institutions of governance, reconciling the past through blanket, conditional or de facto amnesties or hollow measures of confessions and reparations for past human rights abuse, are incompatible with the long-term aspirations for creation of institutional and structural changes where accountability, respect for rule of law and the judiciary are the norms. The relevance of transitional justice for the achievement of realistic future objectives like long term initiatives for rule of law and capacity building in post-conflict societies is doubtful on account of its focus on dealing with past abuses (Kerr and Mobekk 2007:177).

Transitional Justice emphasises on reaffirming human rights norms and is "tilted towards international approbation and influence rather than on the ground domestic impact in the concerned states" (Bayliss 2009:2). The differing emphasis on time scales for addressing, and the paradigm difference in the concept of "Justice" between 'thick' Transitional Justice Measures and Rule of Law Institutionalisation through Legal-Judicial consolidation, renders the two incompatible. While Transitional Justice seeks reconciliation between the perpetrator and victim through politicisation of a legally determinable crime, Rule of Law through institutionalisation of judicialization and inductive absorption of legal norms seeks to address not only the victims and perpetrators but also the vast majority of people who fall outside this narrow dichotomy, based on procedural due process, fairness and law.

4. POLITICIZATION OR NORMATIVE JUSTICE

Studies have shown that there is no increase in the likelihood of trials for human rights violations in post-conflict States adopting Transitional Justice Measures (Olsen et. Al 2010:99-104). Amnesties continue to be the most popular mechanism for addressing reconciliation in post-conflict societies opting for Transitional Justice (Mallinder 2008:26-27). The influence of the Civil Society

remains weak and ineffectual to challenge the immunity from accountability granted to perpetrators of authoritarianism once Transitional Justice is initiated due to political pacts to facilitate the transition (Wilson 2001: 190-198). The persistent and ominous influence of the military on politics continues to determine the contours of the accountability secured through Transitional Justice Measures in many post-conflict States opting for it (Olsen et. al. 2010:54-55, 117). The use of Truth Commissions once a favoured Transitional Justice Mechanism is declining in relative terms (Olsen et. al. 2010: 102). Transitional Justice operates under the presumption that its goals and methods are not only necessary and laudable but also "are by definition a good thing" (Lutz 2006: 339). The legitimisation of the measures based on moral subjective self-appraisal and the appropriation of "Justice" by the Transitional Justice discourse requires further scrutiny (Kennedy 2004:116-119).

Transitional Justice theories are replete with incongruencies and contradiction perhaps because of the 'thickening' of the field. Where it can attract most attention and resources, Transitional Justice claims to be synonymous with Rule of Law (Chesterman 2008:343). The core elements of rule of law such as representative government, adoption of legislation through public procedure of legislation and safeguards and protection of the rights of the accused and access to justice for the victim in criminal cases (Kritz 2006:590), rules, accountability, fair trials and punishments are subordinated by the Transitional Justice Measures to political bargaining in the interest of the transition. Thus, the political Transition takes primacy over formal legal Justice in Transitional Justice Theory with its emphasis on expanding its scope beyond its legalistic origins towards a diffused and open-ended aspiration of "confronting and dealing with past violations of human rights and humanitarian law" (Roht-Arriaza 2006: 2). Transitional Justice has consistently moved away from law and the Statist legalist judicial foundations ostensibly to address human rights violations in a more holistic manner. The focus of the Transitional Justice Theories on the political transition through amnesties, social reconciliation and reparations and its agenda of reconstructing and shielding the post-transition polity has at times exposed its veiled antagonism towards Rule of Law and institutionalisation of the judicial process. The dismissive attitude of Transitional Justice towards Rule of Law has become more pronounced. As has been observed,

"...since the rule of law is just one of the virtues the law should possess, it is to be expected that it possesses no more than prima facie force. It always has to be balanced against competing claims and other values...A lesser degree of conformity is often to be preferred precisely because it helps realisation of other goals" (Raz 1977:210).

Another aspect of the Transitional Justice Process is the process of determination of the identity of the alleged perpetrators, and the protection of their human rights to presumption of innocence and fair trial by courts of competent jurisdiction before they are declared guilty of

any offence. This assumes significance since a subsequent criminal trial against the person declared to be guilty by a truth commission shall then stand tainted with bias due to the declaration given against the person by the non-judicial Transitional Justice process.

5. THE POSITIVIST CRITIQUE OF TRANSITIONAL JUSTICE

The Fuller-Hart debate (1958) is widely acknowledged as "one of the great jurisprudential exchanges of our time" (Dugard 1997:285) which still has great relevance to the legal criticism of 'thick Transitional Justice and the growing legal exceptionalism in Transitional Justice theory. The debates were in the context of the Nuremberg trials of the Nazi German Officials who pleaded against retroactive application of criminal law in accordance with *Nullum Crimen, Nulla Poena Sine Lege*. The impassioned arguments of Fuller subscribing to the natural law school which while upholding compliance with ordinary rule of law, reiterate the paramountcy of the moral content, in conformity with "natural law", devoid of which the law, even if validly positively enacted, rendered the Nazis liable to be judged for their actions since unjust and lawless laws could not constitute a legally valid regime (Fuller 1958:630). Hart, a legal positivist, on the other hand, conceded that adherence to Rule of Law required that the criminal law could not be applied retrospectively to the Nazis who were obeying a law duly enacted. To punish them on moral grounds when they had not acted in conformity with a positively enacted law would threaten the edifice of legality (Hart, 1958:593). Even those scholars who realised the heinous nature of the Nazi atrocities and wished that they are punished were reluctant to outright criminalise adherence to positive law (Skhlar 1964:1-28). Ultimately the Nazi trials at Nuremberg were grounded positively and the indictments were tenuously based on the then-existing international treaties against aggression (Ohlin 2007:59). Despite this novel interpretative exercise, even the prosecutors admitted that the "creative" indictments of the Nazis were indefensible and inconsistent with the then prevailing fundamental principles of legality (Taylor 1992:635). The dilemma that assailed the Nuremberg prosecutors no longer exists. The Nuremberg principles have been codified and have become a part of the International Law. A substantial body of international treaties practises and judicial decisions protecting human rights has emerged and become an accepted part of the International Human Rights Law. This has changed the fundamental nature of the environment within which State actors operate since there is penetration" through what has been termed as the "justice cascade" which has created a synergistic relation between International Law and influenced the decisions of domestic courts creating an accountability norm (Lutz and Sikkink 2001). Moreover, domestic law and human rights/International Humanitarian Laws are functionally interdependent and can structurally be addressed within

the domestic legal framework through the judicial institutions and writs such that "in practice, the rule of law and human rights tend to overlap and the theoretical boundaries between the two become unclear" (Chesterman 2008:343).

In these circumstances, the thick interpretation of Transitional Justice and its departure from positivist statist legalist approach has adverse implications for rule of law in the long term in post-conflict States and has therefore come under increasing criticism (Kritz 2009:14). The implications of continuing with the Transitional Justice mediated undermining of Rule of Law in the post-conflict States is the weakening of the process of consolidation of judicial institutionalisation and impunity through politicisation of an issue which in the present can, and ought to be addressed legally.

As has been pointed out by legal experts that "criminal trials single out intellectual authors and actual perpetrators of atrocities while leaving to broader initiatives in rule of law, humanitarian assistance, democracy building, and economic development the task of resuscitating a sick society. Such an approach that does not integrate trials with these other capacity-building measures is insufficient to attend to social repair" (Fletcher and Weinstein 2002:580). Transitional Justice initially in its original conception consisted of novel and interpretative but mainly legal recourse against the atrocities of authoritarian ancien regimes, it now claims to have "transcended" the legal approach to achieve "justice" (Carranza 2008:323). It is asserted that "the rule of law is not an ideal source of law (Teitel 2001:7). This rejection of the "legal approach" to achieve transitional justice begs the question as to what approach would replace the legal framework based on democratically enacted parliamentary statutes, interpreted by the Judiciary and implemented by the executive as the means for Justice. While Transitional Justice theorists have postulated that "restorative justice" as obtained through the conciliatory mechanisms of Transitional Justice are equal to or even superior to legal "retributive justice" (Minow 1998:30-38) and have an added advantage of "social repair", they derogate from rule of law in practice. Apologies and seeking forgiveness due to moral guilt through a Transitional Justice mechanism, is qualitatively different, from conviction secured through fair trial in criminal court. As cogently observed by some scholars,

"Whatever salutary effects it can produce, an official truth-telling process is no substitute for enforcement of criminal law through prosecutions. Indeed to the extent that such an undertaking purports to replace criminal punishment (rather than to promote distinct goals that punishment cannot serve), it diminishes the authority of the legal process; it implicitly concedes that the machinery of Justice is powerless to punish even those crimes that any civilized society views as most pernicious" (Orentlicher 1991:25-46).

Transitional Justice in its departure from the legal approach severely erodes the rule of law. The reconciliatory leniency towards the cathartic perpetrator for political transition is an affront to the dignity of the

victims and a masked moral defeat for the Government seeking to legitimise itself.

6. CONCLUSION

Justice is an essentially contested concept (Gallie 1956: 168) with variations and disagreements in what it means to individuals or groups of individuals based on their epistemic and contextualised understanding of social cooperation and control. However, when mass criminality especially in the context of the transition from authoritarian regimes, then the need for the objective legal justice becomes even more imperative. The respect for rule of law through due process sends a message that "law's authority is superior to that of individuals" (Landsman 1996:83) and legitimising and building trust in institutions. Failure to punish the perpetrators erodes public confidence in the judicial institutions, their impartiality and authority (Orientlicher 1991:25-42). Adherence to settled criminal law and proper unbiased criminal trials and convictions serve to demonstrate the contrast with the arbitrariness of the authoritarian regime and to secure the legitimisation of the Judiciary while deflecting charges of "victor's justice" against political opponents and should replace politicised Transitional Justice.

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