

Models of Transitional Justice

Summary

1. During a period of radical political change, a newly established democracy has to face twofold dilemmas related to its uncertain future and society's painful past. Firstly, the new government must decide how to confront the legacy of human rights abuses perpetrated during the course of an armed conflict or by the previous autocratic regime. Criminal trials, truth commissions, vetting, reparations and amnesties are all tools that can be used in the process. Secondly, the administration must assess how to balance the understandable urge for justice against other crucial public needs, against a possible risk of permanent social division or even against the danger of an antidemocratic upheaval or a breach of fragile peace. The profound problems faced by new democracies during this period are discussed under the umbrella term of transitional justice.

As an interdisciplinary field of scholarship, transitional justice is still at the pre-theoretical stage, focusing mainly on case and comparative studies, supported with general considerations concerning justice in the time of transition. In order to entrench the field as a distinct area of studies, a theory of transitional justice must be formulated. The book aims to be a small step in this process. In order to provide the field with a theoretical basis, this publication offers different models of transitional justice, created with the use of the tools of the analytical legal theory.

2. Transitional justice is a complex phenomenon that can be analyzed in at least three aspects (on at least three levels): (1) the aspect of legal and non-legal mechanisms used by countries in the transitional period to confront the past, (2) the aspect of the axiological justifications of such mechanisms, including the values and the principles of justice, and (3) the aspect of the decisions to implement various transitional justice instruments, based on the values and other, non-axiological factors. These three levels of transitional justice are closely connected. However, if one is to classify transitional justice ontologically, then it can be defined as a type of justice that consists of principles of justice which refer to the treatment of the victims and the perpetrators of past human rights abuses conducted before the period of radical political change and which take into account the liberalizing character of the political transition.

3. Based on the mechanisms employed towards human rights violators, three models of transitional justice can be described: (1) the retribution model, (2) the historical clarification model and (3) the 'thick line' model.

In the retribution model, individuals whose involvement in the previous regime is condemned in the democratic reality are subject to sanctions. These sanctions can be enforced through domestic, international or hybrid criminal trials or with the use of administrative measures, such as vetting or the reduction of state pensions. The value most closely connected with this model is a just punishment for previous wrongs. Examples of this model include the criminal trials in Eastern Germany and Argentina, the Czech decommunization policies and, to some extent, the instruments implemented in Poland.

The historical clarification model uses mechanisms that are intended to establish the truth about the past. The people involved in past human rights abuses face no legal sanctions. As an exception, individuals may be punished if they refuse to take part in the clarification process or publicly distort the truth about past events. The means of collective clarification, such as truth commissions and national remembrance institutes, are introduced in order to create a general overview of the character of the past political system. On the other hand, the instruments of individual clarification, such as some types of vetting policies or the declassification of secret police files, are established as a way of determining the role of an individual in the system of autocratic oppression. The use of collective clarification mechanisms is more probable where there is a lack of data on past human rights abuses, whereas the means of individual clarification are used when the autocratic regime documented its actions. The main values connected with the historical clarification model are the truth and its official acknowledgement. The examples include truth commissions in Guatemala, Chile and South Africa and the Polish lustration procedure.

Finally, in the model in which a 'thick line' is drawn to mark off the past, neither punishment nor historical clarification is implemented. Instead, the government uses *de jure* or *de facto* amnesties. Social inclusion, mercy and forgiveness are the values that underpin this model. Among the examples, one can single out Spain (until 2007), Uruguay (until 2000) and post-communist Russia.

4. There are three main viewpoints on the nature of transitional justice. Some scholars believe it to be a distinct type of justice that functions in the extraordinary circumstances of transition. Others assume that the transitional setting cannot be seen as categorically different from ordinary times and thus refuse to treat transitional justice as anything other than ordinary justice. According to the third stance, transitional justice is ordinary justice that acts in extraordinary circumstances.

The book supports the latter position. The dilemmas of transitional justice can be suitably presented with the use of traditional ethical concepts, such as the division between distributive and rectificatory justice or material and formal justice. What is more, the concept of transitional justice can be analyzed in terms of Chaim Perelman's abstract justice and formulas of concrete justice. Finally, the distinct features attributed to transitional justice – the selectiveness of its principles, the link between past injustice and their content, their retroactive character and the fact that their acceptance enables to express a normative shift – can be also noticed, albeit less frequently, in case of the formulas of justice that exist in ordinary times. What is different are the distinct circumstances of

transition. Transitional justice is a response to the legacy of vast, systematic violence conducted by the state. This abuse was accompanied by the rupture of social bonds and the erosion of social trust. The goal of the new democratic government is to restore the trust between the people and the state and between the citizens themselves; however, the conditions in which this task is performed are highly unfavorable.

Although not a generic difference, the important feature of the principles of transitional justice – understood as Perelman’s formulas of concrete justice – is their retroactiveness. The principles of transitional justice govern the treatment of the victims and the perpetrators of past human rights abuses; these are categories which, by their nature, cannot change over time. Nevertheless, the acceptance of retroactive formulas of justice does not necessarily lead to the enactment of retroactive legislation.

5. The moral choice of a specific transitional justice measure or a transitional justice model can be described as a rational decision, based on the values intrinsic for each of the models – and the values connected with the existence of democratic procedures, the rule of law and the obedience to the norms of international human rights law. Taking those values into account, two models of transitional moral choice can be presented. The use of Jerzy Kmita’s concept of humanistic interpretation enables a thorough analysis of the influence of each of the values on transitional moral judgment. The dynamic process of balancing the values can be described with the procedures proposed in Robert Alexy’s theory of principles.

To sum up the conclusions from the model based on the humanistic interpretation, one can state that the lawmaker, equipped with the features described in the model, will choose the retribution model, if (1) he or she prefers, when selecting from among the values which will enable the stability of the democratic system, the value of a just punishment, consistent with the values of the rule of law and of the obedience to the international law or (2) the deeds in question were, at the time they were perpetrated, crimes under international law and their punishment cannot endanger the existence of the democratic system. On the other hand, the lawmaker will decide on the historical clarification model if, when choosing from among the values which will enable the stability of the democratic system, he or she favors the values of truth and its acknowledgement, consistent with the values of the rule of law and of the obedience to the international law. Finally, the ‘thick line’ model will be chosen if the lawmaker prefers the values of social inclusion, mercy and forgiveness. Both the historical clarification model and the ‘thick line’ model can be chosen if the conduct was not, at the time, a crime under international law, or if it did indeed constitute such a crime, but prosecuting the perpetrators could jeopardize the stability of the democracy.

One must add that the form of the response to a painful past is also shaped by the understanding of the principle of the rule of law in the verdicts of constitutional courts. Where the rule of law was understood formally, as in Hungary, the lawmaker had less freedom as to their choice of transitional justice measures. Where this principle was interpreted in a material way, as in the Czech Republic, especially taking into account its connections with the notion of justice, the lawmaker could choose a response to past wrongs with little restrictions.

6. The description of the three levels of transitional justice makes it possible to formulate normative conclusions regarding the appropriate approach to dealing with the past. The most important requirement seems to be the obligation of the lawmaker to introduce the transitional justice measures in strict compliance with the rule of law. Two arguments can be given in support of this requirement. Firstly, it is impossible to articulate the dedication of the new government to democratic values and to create the impression of a normative shift, if the rule of law is violated during the transition, especially in the case of previous human right violators. Secondly, when the lawmaker rejects the values typical of the autocratic regime, an axiological vacuum appears that has to be filled by the lawmaker or by the constitutional court. The values that take this place during the transition can resonate in the future on other matters, even those with no connection to transitional justice. Therefore, if the abovementioned values are inconsistent with the rule of law, this can impede the implementation of this rule in the foreseeable future.

This obligation restricts the freedom of choice in regard to the instruments of dealing with the past. However, it is necessary to accept such limits if transitional justice is to promote democracy based on the rule of law, instead of being a mere byproduct of the post-transitional balance of power and a tool in the political struggle.