

DILEMMAS OF TRANSITIONAL JUSTICE

CRIMINAL PROSECUTIONS OR TRUTH COMMISSIONS ?

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INTRODUCTION

This paper attempts to address some of the dilemmas of transitional justice. As a preliminary definition, “transitional justice” may be defined as the choices made when democratically accountable leaders replace authoritarian predecessors who are presumed responsible for gross violations of human rights. In the aftermath of the Cold War and the advent of the “third wave” of democratization, this has become an increasingly pressing issue for legal reformers, human rights activists, diplomats and politicians.¹ Moreover, transitional justice has become the object of a great deal of academic interest. A relatively new area of research, the transitional justice literature attempts to analyze and evaluate the various legal and societal responses to radical political change.²

1 See S. Huntington, 1991, *The Third Wave: Democratization in the Late Twentieth Century*. See also B. A. Ackerman, 1992, *The Future of Liberal Revolution*.

2 For leading works on this issue, see A. De Britto, 2001, *The Politics of Democratization: Transitional Justice in Democratizing Societies*; N. Kritz (ed), 1995, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*; A. McAdams (ed.), 1997, *Transitional Justice and the Rule of Law in New Democracies*; M. Minow, 1998, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*; R. Teitel, 2000, *Transitional Justice*.

Examples abound of countries that have, in recent years, undergone a process that may, in the most general terms, be characterized as a “transition to democracy”. No part of the world has resisted this trend: in Europe there was the collapse of the Stalinist regimes in the Soviet Union and the Warsaw Pact satellite states; in South America there was the downfall of the military juntas; and throughout Africa there was the final severing of ties with the former colonial powers. Similar change also occurred in many parts of Asia, for instance, in Taiwan, South Korea, Cambodia and Thailand. Over the course of the second half of the twentieth century, therefore, many societies rejected dictatorship, totalitarianism, or oppression, or emerged from civil war to face the task of building a more just political order. In almost all of the above-mentioned cases, one of the most pressing problems confronting the new regime was how to respond to human rights violations committed under the prior regime. The project of reconstruction (in fact, the very *possibility* of reconstruction) was entangled with the complex question of confronting the past.

Now it is clear, that among the countries struggling to come to terms with the past, different types may be distinguished: post-conflict societies (former Yugoslavia), authoritarian (former Soviet Republics) and conflict-ridden societies (South Africa), and mature democracies (German reunification). And yet, in each of these cases there is a common experience of having to respond in some way to the legacy of the past. That this is a difficult (perhaps even an impossible) task can be indicated by briefly listing some of the competing goals that demand to be addressed as part of such a process: (1) discovering and publicizing the truth about past human rights abuses; (2) making a symbolic break with the past; (3) promoting the rule of law and strengthening democratic institutions; (4) deterring future wrongdoing; (5) punishing the perpetrators of such crimes; and (6) heal-

ing victims and achieving social reconstruction and reconciliation. The challenge facing governments is that they address the past in a manner consistent with each of these goals. This principle is a noble goal, but may, in practice, be extremely difficult to achieve. Particularly when one considers the fact that key figures in the predecessor regime often continue to exert influence resistant to doing anything about past indiscretions, save covering them up.³ In addition, there are the ambiguous and often contradictory messages from the international community, which in one case may be pushing for trials and in the next case condoning state sanctioned denials of past indiscretions.

Of course, these are profound and complex questions and cannot be dealt with comprehensively here. This paper, therefore, will briefly examine a series of issues associated with two responses to transitional justice, namely criminal prosecutions and truth commissions.⁴ A central theme in

3 When a new democracy replaces an authoritarian regime, one obvious answer to the question of what to do about the legacy of the deposed government is to do nothing; that is to say, to draw a clear line between the past and the present. Since nothing can really be done about the lives that have been lost and the pain that has been suffered, then nothing is to be gained by reviving feelings of anger and retribution. Furthermore, the new democratic order that is being created might be damaged by an upsurge in popular feeling. Forgetting the past is, therefore, seen by many as the best path to democratic stability. On this issue, see S. Cohen, 2000, *The Sociology of Denial*; M. Penrose, 1999, 'Impunity — inertia, inaction, and invalidity: a literature review', *Boston University International Law Journal*, 17: 269.

4 Clearly, this is not an exhaustive list of responses to past human rights abuses. A range of other measures, most obviously amnesty, reparations, and lustration will not be discussed here. On amnesty legislation, see W. Burke-White, 2001, 'Reframing impunity: applying liberal international law theory to an analysis of amnesty legislation', *Harvard International Law Journal*, 42: 467. On reparations, see M. Minow, 1998, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, chp. 5. On lustration, see H. Schwartz, 1994, 'Lustration in Eastern Europe', *Parker School Journal of East European Law*, 1: 141.

the transitional justice literature has been the importance and legitimacy of criminal prosecution for human rights violations committed under a prior regime. Indeed, international law scholars often point to the fact that there is a clear “duty to prosecute” gross violations of human rights under prevailing international norms.⁵ Perhaps more important - at least in a domestic context - is the notion that such prosecutions will facilitate a smoother political transition and the development of the rule of law, by removing questions of justice from the arena of local power struggles and symbolically interrupting cycles of “impunity”. Part II, therefore, focuses on a series of issues raised by so-called successor trials, most significantly concerning the rule of law.

Debates on transitional justice have also dealt extensively with the emergence of so-called truth commissions as an alternative way to respond to past crimes. “Truth commission” is a generic term for official bodies set up to investigate and report on a pattern of past human rights abuses.⁶ Since 1974, over 20 official truth commissions have been established worldwide and truth commissions have been considered for Indonesia, East Timor, Sierra Leone and Cambodia.⁷ Part III focuses on some of the issues associated with truth commissions, notably the concept of justice that such commissions aspire to. In both Parts II and III, it will be suggested that much contemporary discussion of transitional justice fail to recognize the distinctively *transitional* form of societal responses to terror. Too often,

5 See G. Robertson, 2000, *Crimes Against Humanity: The Struggle for Global Justice*, chp. 4.

6 For an excellent general overview, see P. Hayner, 2001, *Unspeakable Truths: Confronting State Terror and Atrocity*, discussing the truth commissions in several countries, including Guatemala, El Salvador and South Africa.

7 See, for example, M. Draper, 2002, ‘Justice as a building block of democracy in transitional societies: the case of Indonesia’, *Columbia Journal of Transnational Law*, 40: 391.

measures are evaluated according to universal standards unproblematically adopted either from “ordinary” (i.e. stable, Western) democracies or abstract political and legal thought. As such, the distinctive features of the rule of law and justice in extra-ordinary periods are either ignored or judged negatively. By emphasizing the importance of focusing on the meaning of justice and the rule of law *in transition*, the paper hopes to contribute to the development of a “transitional jurisprudence”.⁸

CRIMINAL PROSECUTIONS AND THE RULE OF LAW

Transitional justice is normally associated, at least in the public imagination, with criminal prosecutions, with so-called “successor trials”.⁹ The lasting symbols of the English and French transition from absolutism to forms of parliamentary rule are the trials of Charles I and Louis XVI. Over fifty years on, one of the most important legacies of the Nazis’ defeat in World War II remains the Nuremberg Trials.¹⁰ Greece’s trials of former military rulers signifies the triumph of democracy over military rule in Southern Europe.¹¹ Argentina’s junta trials came to mark the end of decades of repressive rule throughout South America.¹² And in an Asian

8 R. Teitel, 1997, ‘Transitional jurisprudence: the role of law in political transformation’, *Yale Law Journal*, 106: 2009.

9 The following will discuss criminal trials without distinguishing as to whether they are conducted in national courts or international tribunals. Obviously this means that discussion of some of the important differences between the two fora will be neglected.

10 See A. Tusa, 1983, *The Nuremberg Trial*.

11 See Amnesty International, 1977, *Torture in Greece: The First Torturers’ Trial 1975*; P. N. Diamandouros, 1997, ‘Regime change and the prospects for democracy in Greece: 1974-1983’, in *Transitional Justice and the Rule of Law in New Democracies*, (McAdams ed.).

12 See M. J. Osiel, 1995, ‘Dialogue with dictators: judicial resistance in Argentina and Brazil’, *Law & Social Inquiry*, 13: 481; C. S. Nino, 1991, ‘The duty to punish past abuses of human rights put into context: the case of Argentina’, *Yale Law Journal*, 100: 2619.

context, the prosecution of two former presidents of the Republic of Korea, for the violent suppression of the democratic protest in Kwangju attempted to secure a semblance of justice for the victims of a terrible wrong.¹³ Examples abound.¹⁴

Criminal trials thus dominate our ideas of justice in transitional periods. What then accounts for the widespread assumption that the most appropriate way to deal with perpetrators of serious human rights violations is to prosecute them?¹⁵ Scholars ascribe a number of justifications for such trials. Douglas Cassel, for example, argues that prosecutions either in a domestic context or in supranational institutions like the International Criminal Court contribute to justice through the “identification, exposure, condemnation and proportionate punishment of individuals who violated fundamental norms recognized internationally as crimes, and . . . reparations to their victims, by means of fair investigations and fair trials by an authorized judicial body”.¹⁶ Stephan Landsman suggests that prosecution “makes possible the sort of retribution seen by most societies as an appropriate communal response to criminal conduct”.¹⁷ Moreover, he argues,

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- 13 J. West, 1997, ‘Martial lawlessness: the legal aftermath of Kwangju’, *Pacific Rim Law & Policy Journal*, 6: 85.
 - 14 See, for example, on Portugal, K. Maxwell, 1986, ‘Regime overthrow and the prospects for democratic transition in Portugal’, in *Transitions from Authoritarian Rule: Southern Europe*, G. O’Donnell (eds).
 - 15 See, in general, D. Orentlicher, 1991, ‘Settling accounts: the duty to prosecute human rights violations of a prior regime’, *Yale Law Journal*, 100: 2537; M. Penrose, 1999, ‘Lest we fail: the importance of enforcement in international criminal law’, *American International Law Review* 15: 321; J. Mendez, 1997, ‘In defense of transitional justice’, in *Transitional Justice and the Rule of Law in New Democracies*, (McAdams ed.).
 - 16 D. Cassel, 1999, ‘Why we need the International Criminal Court’, *The Christian Century*, 116: 532.
 - 17 S. Landsman, 1996, ‘Alternative responses to serious human rights abuses: of prosecution and truth commissions’, *Law and Contemporary Social Problems*, 59: 81.

prosecution can educate and deter, provide a predicate for compensating victims, enhance the rule of law, and help to heal a society's wounds. Similarly, David Crocker argues that an "ethically defensible treatment of past wrongs requires that those individuals and groups responsible for past crimes be held accountable and receive appropriate sanctions or punishment".¹⁸

Deterrence, retribution, justice (for the victims and their relatives), and social reconciliation are all held up as the distinctive virtues of such trials. And yet, the argument that will be discussed here is the suggestion that such trials can play a crucial role in establishing the rule of law. Criminal justice is thought to play a foundational role in political transition by contributing to the creation of new sense of legal order. Harvard University law professor, Martha Minow, in her influential work *Between Vengeance and Forgiveness*, provides a concise summary of this idea:

To respond to mass atrocity with criminal prosecutions is to embrace the rule of law. This common phrase combines several elements. First, there is a commitment to redress harms with the application of general, pre-existing norms. Second, the rule of law calls for the administration by a formal system itself committed to fairness and opportunities for individuals to be heard both in accusation and defense. Further, a government proceeding under the rule of law aims to treat each individual person in light of particular demonstrated evidence. In the Western liberal legal tradition, the rule of law also entails the presumption of innocence, litigation under the adversary system, and the ideal of a government by laws, rather than by persons.

18 D. Crocker, 1999, 'Reckoning with past wrongs: a normative framework', *Ethics and International Affairs*, 13: 43.

No one is above or outside the law, and no one should be legally condemned or sanctioned outside legal procedures. The rule of law creates a community in which each member is both fenced in and protected by the law and its institutions.¹⁹

It is often suggested that criminal prosecutions can serve as the basis or foundation of a society governed by the rule of law. Contemporary theorizing justifies successor trials by relating criminal law enforcement to societal prospects for consolidating democracy. Successor trials are thought to advance this process of transformation by drawing a clear line between regimes, through legal mechanisms that simultaneously de-legitimize the predecessor and legitimate the successor regime. Criminal trials employ a judicial framework to hold individuals accountable for their acts of terror and violence. Undoubtedly, there is a certain irony in the application of liberal principles of criminal law to war criminals and gross human rights abusers. Prosecutors must prove the charges against the accused, and the defendant is afforded due process rights. And yet, the very fact that the new system relies on *law* in dealing with individuals who very often denied such an opportunity to others can, it is suggested, provide the foundation for a new legal order. The state's resort to a legal process to punish perpetrators is a literal as well as symbolic substitution of violence by law.

Of course, this is a controversial argument and has been subject to extensive commentary. Critics of such trials suggest that they are problematic, in that they invariably fail to meet this high standard: how can criminal prosecutions provide the foundation for the rule of law when such trials

19 M. Minow, 1998, *Between Vengeance and Forgiveness*, p. 24. See also M. J. Radin, 1989, 'Reconsidering the rule of law', *Boston University Law Review*, 69: 781.

often seem to conflict with some the most basic tenets of the rule of law ? Isn't the claim that such trials can be the basis of the rule of law at best disingenuous, and at worst grossly hypocritical ? Three aspects to this argument are worth highlighting: Firstly, there is the *problem of retroactivity*, i.e. the fact defendants are charged under legal norms that, in many cases, did not exist at the time of the alleged offence. This clearly violates the commitment to only apply pre-existing norms that is normally regarded as a distinctive feature of the rule of law. This is one legacy of the Nuremberg Trials, which is at best ambiguous and at worst a dangerous precedent. The norms guiding the prosecution of the German wartime leaders were not explicitly or specifically in place at the time of the offences. Moreover, many of the acts for which they were prosecuted were legal under domestic German law.²⁰ Other more recent examples could also be highlighted to illustrate this problem. To facilitate the criminal prosecution of former Presidents Chun Doo-Hwan and Roh Tae-Woo in Korea, for example, the period of limitations had to be retroactively extended so as to allow prosecution to take place.²¹ A similar case would be the enactment of a law in Hungary in 1991 permitting the initiation of criminal proceeding for crimes committed during the violent repression of the 1956 uprising. Despite the passage of time, the law lifted the statute of limitations for various serious crimes.²² In each of the above cases, therefore, defendants are judged according to norms and by procedures that

20 See R. E. Conot, 1983, *Justice at Nuremberg*. One of the Chief US prosecutors, Telford Taylor is said to have commented that "Nuremberg's cry for human rights would have carried further if the tribunal had not stepped on so many legal principles itself".

21 J. West, 1997, 'Martial lawlessness: the legal aftermath of Kwangju', *Pacific Rim Law & Policy Journal*, 6: 85.

22 Interestingly in this case, the Hungarian Constitutional Court ruled this law unconstitutional. See E. Klingsberg, 1992, 'Judicial review and Hungary's transition from communism to democracy', *Buffalo University Law Review*, 41: 62; T. Rosenberg, 1995, *Haunted Land: Facing Europe's Ghosts after Communism*.

were not in force at the time the offense was commissioned.

A second problem with successor trials is that they are often highly *political*. Rather than standing as independent institutions removed from political pressures and calculations, such tribunals are *enacted politics*, something that undermines the ideals of impartiality and universal norms associated with the rule of law. Clearly the rule of law is subverted when a trial tribunal is patently or profoundly dependent on political actors. Such an accusation is frequently made against the Nuremberg trials, not least by the defendants themselves. And a similar criticism could be made of the Yugoslavia tribunal, at least in its early stages. The response to Bosnia - namely the establishment of a tribunal for the prosecution of crime in Yugoslavia - occurred while those charged with crimes were still in power (most obviously, then President Milosovic). These actions can easily be interpreted as a belated effort on the part of the international community undertaken after it became clear that no nation was willing to risk its own soldiers to prevent further massacre. As such, the creation of the tribunal seemed a political move rather than an embracing of the rule of law. Similar accusations of political justice have been made elsewhere, in fact in almost every trial of this kind. Clearly, if the connection between law and politics is too explicit then the legitimacy of the whole enterprise of successor trials is called into question.

A final problem with successor trials is the problem of *selectivity*. It tends to be the case that only a small number of those who could or should be charged are subjected to criminal prosecution. The concern of critics is that this process of selection is likely to reflect factors far removed from considered judgments about who deserves to be punished (political power and influence, for instance). The criminal prosecution in 1991 of a small

number of former East German border guards for shooting civilians who tried to escape during the last days of the Berlin Wall illustrates these difficulties.²³ What struck many commentators as unjust was the fact that the guards and not their superior officers or the authors of the policy under which the guards acted were not prosecuted, and, in some cases, even gave evidence against the guards. The case of Argentina is also instructive on this point.²⁴ After his election victory in 1983, President Alfonsín initiated prosecutions against those responsible for the so-called “Dirty War” that resulted in many citizens being “disappeared” (i.e. kidnapped and murdered by the military). After an initial round of trials, political pressure meant that Alfonsín stopped the prosecutions. A new law was passed exempting from prosecution those who acted out of due obedience to authorities. This made the existing prosecutions so obviously selective and partial as to challenge the fairness of the whole process.

The above is a very brief summary of the two dominant positions on successor trials. On the one hand, are those scholars who argue that such trials can serve as a *foundation* for the establishment of the rule of law. On the other hand, are those who are more skeptical and argue that such trials invariably serve to undermine the rule of law. As such, the value of such trials - if indeed they have any value - must be sought elsewhere. Very

23 See Judgment of Jan. 20, 1992, Landgericht [LG] (Berlin), 13 *Juristen Zeitung* 691, (1992) (F.R.G.); see also Judgment of Oct. 24, 1996, *Bundesverfassungsgericht* [BVerfGE] (F.R.G.). For commentary, see M. Gabriel, 1999, ‘Coming to terms with the East German Border Guards Cases’, *Columbia Journal of Transnational Law*, 38: 375.

23 J. West, 1997, ‘Martial lawlessness: the legal aftermath of Kwangju’, *Pacific Rim Law & Policy Journal*, 6: 85; D. P. Kommers, 1997, ‘Transitional justice in Eastern Germany’, *Law & Social Inquiry* 22: 829; T. Rosenberg, 1995, *Haunted Land: Facing Europe’s Ghosts after Communism*.

24 See D. Pion-Berlin, 1994, ‘To prosecute or to pardon? Human rights decisions in the Latin American Southern Cone’, *Human Rights Quarterly*, 16: 105.

briefly, this paper questions both sides in this debate. It seems clear that to suggest that such trials can serve as the *foundation* or basis of the rule of law in a society is a problematic claim. There are aspects of these trials that cannot be defended from the point of view of the traditional conception of the rule of law, namely their retroactive, political and selective character. As such, successor trials serve as a potentially dangerous precedent. However, to characterize these trials as the *failure* of the rule of law seems to be a rather simplistic stance. It presupposes a conception of the rule of law that is transplanted from stable, Western liberal democracies and is applied unproblematically to a situation that is inherently volatile, namely a society in the midst of political and social transition. One could also question whether stable Western liberal societies even adhere to the rule of law as it is characterized above. Certainly the recent experience of criminal justice in the United States, for example, can be criticized for its failures in this regard.²⁵ Successor trials are often condemned from the perspective of an *idealized* concept of the rule of law derived from political and legal theory, rather than one based on the reality of the rule of law in concrete situations.

The suggestion made here is that such trials in many cases do have value and that this value can be thought of in terms of the rule of law. However, in making this claim one needs to invoke a different *transitional* concept of the rule of law. It is important to begin by noting the important, but often overlooked point, that issues of transitional justice arise within a distinctive historical context, namely a shift in the political order. By definition, the “transitional” period begins after a change in regimes. Because transitional justice is justice within a highly unstable and politicized situation it is inevitably going to be limited and partial. Successor trials are

25 See, in particular, on this point, M. Mauer and T. Huling, 1995, *Young Black Americans and the Criminal Justice System*.

located in a time of transition, that is to say, between the backward-looking task of dealing with the past, and the forward-looking task of constructing a new and more just political and legal order. This task is inherently paradoxical. In established democracies during ordinary times, law provides order and stability, and the rule of law implies the operation of principles that constrain how the law can be utilized. But in periods of rapid political change, law is unsettled, fluid and cannot function as an abstract source of stable norms. Legal norms are necessarily multiple and the idea of justice is always going to be something of a compromise. To expect otherwise - that is, to expect trials to function as an exemplary instance of the rule of law that can serve as the foundation of the new order - is to ignore the political and social reality of the transitional process. If ordinarily the rule of law means adherence to settled law, to what extent are periods of transformation compatible with a commitment to the rule of law? For a society in transition what can the rule of law possibly mean?

In the context of transition, the rule of law is best thought of as a legal framework that is designed to respond - in a partial and incomplete way - to past political violence. The function of successor trials is not, therefore, *foundational* but rather *transitional*.²⁶ Trials provide an important means of mediating political transformation and expressing public condemnation of aspects of the past, as well as contributing to the legitimacy of the new political order. Moreover, trials make it possible to isolate and censure individual (albeit institutionally sanctioned) acts of wrongdoing. When societies move away from repressive rule, one of the key normative shifts concerns the status of the individual and the centrality of individual responsibility. Hence it seems most appropriate that the construction of

26 On these issues see R. Teitel, 2000, *Transitional Justice*.

collective understandings of individual action occurs through the processes of criminal justice. Through the individuation of responsibility, trials offer a powerful mechanism for both remembering and condemning past wrongdoing, while at the same time confirming the new legal and political institutions. Situated as they are between two different regimes whose normative basis is clearly very different - e.g., authoritarianism and democracy, such trials inevitably contain a wide range of principles. At best, they are designed not only to create stability in transition, but also to move the community in question from one regime (whose norms are problematic) to another regime (whose norms are presumed to be more desirable), and so to correct past injustices. As such, they are both associated with a set of positive goals - e.g., establishing democracy - and structured by the nature of the particular wrongs that they must address. Moreover, unlike “ordinary” cases of criminal justice, cases of transitional justice do not aspire or pretend to be apolitical. Instead, they are designed to realize a particular set of political goals and to lay the foundations of political transformation by constructing a new legal and political order, as well as a new sense of national identity. Finally, in attempting to do this, cases of transitional justice often find it appropriate - perhaps even necessary - to politicize the legal process and legal judgment.

The form that such trials take will vary from society to society, based on the contingent experience of oppression and transformation. The norms and procedures upon which particular trials are based will inevitably reflect a historically unique experience of past injustices. To evaluate trials from the perspective of an abstract conception of the rule of law fails to appreciate the unique experience of transition for each society. This is not to say that such trials are without problems, but rather to suggest that the standard by which they are evaluated is shifted from an idealized concep-

tion of legality to a contingent standard based on a distinctive historical experience. The terms of the argument can then shift away from the seemingly inevitable failure of successor trials as an exemplary instance of the rule of law to an analysis of the role that they play in mediating social change in a contingent and highly unstable process of political transformation.

TRUTH COMMISSIONS AND JUSTICE

A truth commission may be provisionally defined as a state sponsored inquiry into atrocities of the past.²⁷ Such commissions are increasingly seen as the main alternative or, at least, precursor to criminal trials. Although the United Nations began to experiment with truth commissions in 1992, commissions of inquiry have existed for more than eighty years. The Carnegie Endowment for International Peace established the first modern truth commission to investigate alleged killings of civilians and prisoners of war during the 1912 and 1913 Balkan Wars. After World War I, the Allies investigated the atrocities by German and Turkish forces in the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. Under the auspices of the United Nations, other commissions investigated German and Japanese war crimes after World War II. For more than two decades thereafter, no state introduced a truth commission. Political upheaval in several South American countries, however, prompted the revival of the truth commission as a tool to address atrocities of preceding regimes. From 1974 to 1991, the president or parliament in nine South American countries initiated truth commissions.²⁸

27 See P. Hayner, 2001, *Unspeakable Truths: Confronting State Terror and Atrocity* for an excellent overview. The following historical overview derives from Hayner's account.

28 See *Nunca Mas: The Report of the Argentine National Commission on the Disappeared*, 1986; *Report of the Chilean National Commission of Truth and Reconciliation*, 1993; *From Madness to Hope: Report of the Commission on the Truth for El Salvador*; *Guatemala: Memoria del Silencio: Informe de la Comision para Esclarecimiento Historico*, 1999.

The popularity of truth commissions rose dramatically beginning in 1992. This was partly due to the wide attention given to the El Salvador truth commission. Perhaps more importantly, several cases of, including Guatemala, Somalia, the former Yugoslavia, and Rwanda, contributed to a desire in the international community to investigate instances of systematic, state-sponsored human rights abuses. The latest wave of commissions is interesting, not least because they are experimenting with the form of traditional truth commissions. Of particular note, in this regard, is the South African Truth and Reconciliation Commission (hereinafter TRC).²⁹ Set up after the collapse of the apartheid regime in 1995, the TRC was unusual in that it offered complete immunity from prosecution only to political criminals prepared to earn it by testifying as to their role in previous wrong-doing, and, if necessary testifying as prosecution witnesses in subsequent trials.

Proponents of truth commissions cite a number of purposes served by such an approach.³⁰ First, truth commissions generate an officially sanctioned record of past wrongs. The conventional model of a truth commission involves a democratic government following dictatorial or military rule. In such cases, establishing the truth about what happened in an officially sanctioned manner is considered essential to the fragile democratic foundation, both to strengthen the rule of law and to affirm human rights practices.³¹ It also offers a clear demarcation between the past and pre-

29 See *Truth and Reconciliation Commission of South Africa*, 1998. See also D. Tutu, 1999, *No Future Without Forgiveness*; A. Boraine, 2001, *A Country Unmasked: The Story of the South African Truth and Reconciliation Commission*; A. Krog, 1999, *Country of my Skull*; M. Meredith, 1999, *Coming to Terms: South Africa's Search for Truth*.

30 Hayner *op cit*, chp. 3.

31 Moreover, the quality of the truth to be told is clearly different in Eastern Europe - where it was a story of friends and relatives betraying people to secret police - and South Africa - where it entailed the violent and systematic repression of one race by another.

sent regimes. This is particularly important when so many repressive regimes make denial of the truth about human rights abuses an official state policy.³²

A second purpose of truth commissions is to provide a more pragmatic alternative to a process of criminal prosecution. For instance, because commissions do not involve prosecution, they do not demand an independent judiciary. Moreover, in many cases of transitional government, the police and courts are incapable of addressing the magnitude of past human rights violations. Indeed, some argue that if the judiciary and police had fulfilled their duties as charged, an *ad hoc* truth commission would not be necessary. The question of judicial complicity also raises concerns about public faith in formal prosecutions. Many people view truth commissions as more vigorous and autonomous than the courts of a country.

A third purpose of truth commissions is that they provide the basis for later criminal prosecutions. Supporters of truth commission defend them as a means of collecting evidence to be used later in the formal prosecutions of human rights violators. Under the mandate of Chile's truth commission, for instance, commission members were directed to submit evidence of crimes to the prosecutor's office. By collecting evidence in advance of formal prosecution, truth commissions deal with some timing problems associated with criminal trials. The evidence is gathered shortly after the transition to the new government, when memories are most vivid. However, this is also the time when the judiciary is likely to be weak and ineffectual, so prosecutions may not be a practical option until the judiciary is reformed and strengthened. Hence, the information gathered during

32 On this issue, see S. Cohen, 2000, *The Sociology of Denial*.

truth commission proceedings can provide the basis for later criminal trials.

A fourth feature of truth commissions is the promotion of institutional changes designed to prevent future human rights violations. To accomplish this goal, truth commissions generally publish recommendations along with a report of findings. Institutional changes involve strengthening democratic institutions, such as an independent judiciary, improving safeguards against police and military abuse, or even recommending that certain individuals be removed from official posts. Although recommendations for institutional changes are often critical to the rebuilding of a country in the wake of gross human rights violations, the success of widespread reforms hinges on the political and economic constraints of the country. International pressure to accomplish the reforms may also increase the chance of success.

Finally, the activity of exposing the truth promotes reconciliation within a society in transition. Truth commissions place great emphasis on the restorative power of truth-telling, both for individual victims and for a society more generally. The idea is that the testimony of victims and wrongdoers, offered publicly to a truth commission affords opportunities for the nation as a whole to heal. With the aim of producing an accurate and extensive account of events, a truth commission is based on the assumption that it helps individuals to tell their stories and to have them recognized in an officially sanctioned report. There is a belief therefore that a report can create the framework for the nation to deal with its past. Rather like psychology and confession, truth commissions presume that telling and hearing the truth is healing.³³

33 On the prevalence of this idea in contemporary culture, see N. Rose, 1999, *Governing the Soul: the Shaping of the Private Self*.

However, many commentators remain unimpressed by truth commissions, and regard them as having limited utility as a device for responding to past atrocities. Firstly, critics point to the historical record of truth commissions. What such a review reveals is that truth commissions (particularly in South America) have not been terribly effective. There has often been something of a gap between the theory and practice of truth commissions. For instance, in most cases there are no trials of any kind, even where the scope of abuses and identity of perpetrators is widely known. And in many cases, the truth that is exposed is very distorted. In Bolivia, for example, a National Inquiry into Disappearances was set up soon after the restoration of democracy in 1982.³⁴ It produced no report and resulted in no prosecutions. In Uruguay in 1985, after twelve years of brutal military rule, the new government deliberately excluded from any inquiry the systematic use of torture by the military. In Chile after the restoration of democracy in 1990, a Commission for Truth and Reconciliation was established under Senator Rettig. Most significantly, it was not permitted to name individuals responsible for the crimes or to recommend sanctions.³⁵ Similar criticisms could be made of truth commissions in El Salvador, Haiti, Uganda and Zimbabwe.³⁶ Of course, these individual failures do not necessarily reflect the failure of truth commissions *per se*. Some truth commissions have left a more positive legacy. President Alfonsín established the Commission on the Disappeared, and its report, *Never Again*, was widely disseminated and made a positive contribution to the Argentinian transition to democracy.

34 See 'Bolivia: A historical ruling against impunity', *ICJ Review*, 51.

35 See M. Vasallo, 2002, 'Truth and reconciliation commissions: a critical comparison of the commissions of Chile and El Salvador', *University of Miami Inter-American Law Review*, 33: 153.

36 See G. Robertson, 2000, *Crimes Against Humanity: The Struggle for Global Justice*, chp. 7.

The comparative informality of truth commissions (at least compared with criminal trials) facilitates a weakening of due process and this is the second criticism that is often made of such commissions. In the case of El Salvador, for example, the truth commission did not sanction cross-examination of witnesses a standard due process requirement in criminal procedure. In that country, witnesses were - unsurprisingly - extremely reluctant to disclose their identities for fear of reprisal. Additionally, whereas criminal courts have the difficulty of being unable to prosecute individuals who have been granted an amnesty, a truth commission could conduct an investigation. Such a practice, although desirable, might be seen to be rather unfair. Other criticisms of the non-judicial nature of truth commissions include their lack of power to subpoena witnesses or deal effectively with perjury, and the potential manipulation of history as victor's justice. Thus, the potential advantages that come from flexible, non-prosecutorial proceedings may depend upon the facts of a particular situation. Clearly, such a neglect of due process has made some commentators uncomfortable. Jose Zalaquett underscores the importance of restraining truth commissions from attempting to prosecute when he talks of the "fine line between an ethical commission and a kangaroo court."³⁷

Finally, and perhaps most fundamentally, there is the suggestion that the emergence of truth is no basis for reconciliation, but rather serves to further deepen antagonism and the sense of injustice felt by both victims and perpetrators. Michael Ignatieff in a powerful critique of truth commissions questions the "articles of faith" within much of the literature on this topic

37 J. Zalaquett, 1998, 'Confronting human rights violations committed by former governments: principles applicable and political constraints, in state crimes', *Hamline Law Review*, 13: 623.

that the assumptions that truth and reconciliation are linked and that revealing truth is capable of healing a nation.³⁸ In privileging the search for truth, such commissions are often seen as failing to provide any justice - either punitive or compensatory - for the victims and their families. As was mentioned above, the lack of due process can be seen as a lack of procedural or formal justice for the accused. The view that punitive and compensatory justice is also sacrificed in truth commissions has an obvious plausibility. This was particularly so in the case of the South African Truth and Reconciliation Commission (TRC) where perpetrators who qualified for amnesty could not be prosecuted, and victims or family members of victims lost the right to the legal redress that would otherwise have been open to them. Moreover, Ignatieff casts doubt on the analogy that is so often made between an individual and a society with regard to the healing effects of exposing the truth. No evidence can be provided for such a claim, and, consequently, it seems to rest on rather spurious empirical foundations.

This then is the form of the debate on truth commissions. On the one hand, are the supporters who emphasize the positive impact of exposing the truth. On the other hand, are those skeptics who doubt whether truth can serve as the basis of reconciliation, and accuse truth commissions of denying victims justice. Again, as with the discussion of trials, there is some truth in both propositions. It would seem to be the case that the rhetorical emphasis on the positive effect of uncovering truth has been overstated by advocates of truth commissions. And, equally clearly, from the point of view of “normal” legal systems, truth commissions do not offer justice to victims, either in the form of punishment or compensation. However, in what follows, it will be argued that the suggestion that there is

38 M. Ignatieff, 1996, ‘Articles of faith’, *Index on Censorship*, 25: 113.

no justice in truth commissions presupposes a conception of justice derived from the legal systems of stable, Western democracies, and that once again it seems clear that at their best truth commissions can promote a distinctive *transitional* form of justice.

There are dimensions to justice that go beyond due process, punishment and reparatory compensation. For instance, transitional justice seems to involve various forms of justice as *recognition of suffering*.³⁹ Whilst this might be only one aspect of a society's response to human rights violations, it nevertheless is an important contribution that can be made by a truth commission. Take the case of the South African TRC. We may interpret the function of the TRC as recognizing that human rights abuses were central to apartheid and that victims had no means to protect themselves, either because of the suspension of law, or because of the form of a law that legally sanctioned apartheid. By highlighting the misrepresentations of the apartheid system and the officially sanctioned violation of law, the TRC acknowledged the importance of justice and the rule of law. The TRC thus provided recognition in a context where law's equal recognition of all has been seriously undermined.

The TRC also embodied a commitment to the recognition of the equal dignity of all people, by offering a forum for victims to recount their stories in public. In this regard, the public nature of the TRC hearings is extremely important. It is important because it expresses a shared, collective commitment to respect the basic rights of all citizens and to make the suffering of citizens known rather than simply denying them. However, the activi-

39 The theoretical framework for the following discussion of justice derives in large part from N. Fraser, 1997, 'From Redistribution to recognition? Dilemmas of justice in a 'post-socialist' Age' in *Justice Interruptus*.

ties of the TRC do not only serve as a supplement to legal recognition. They also offer a form of recognition that is not possible within legal justice. Most obviously, they provide official recognition of the undeserved suffering experienced by victims of the predecessor regime. In an important sense, truth commissions are focused more on the victims than offenders. Victims are given an opportunity to be heard and to express their legitimate sense of injustice. It is clear that accounts of crimes are told by witnesses in criminal proceedings, but there the act of telling the story is merely instrumental for achieving a conviction and is not in itself accorded the kind of respect that it is accorded in a truth commission. The opportunity to tell one's story had an importance in the TRC that it would not have had in the context of criminal or civil legal proceedings. This consideration may help to identify how the form of recognition involved here differs from legal recognition, while at the same time promoting a particular concept of justice. Victims are not simply being accorded recognition as persons whose status before the law is equal to that of all other subjects of law. But giving victims an opportunity to tell their stories demonstrates that they are now admitted to the group of responsible agency from which the predecessor regime deliberately and consciously attempted to exclude them. It is a form of recognition that acknowledges the historical fact of systematic exclusion and seeks to reverse the denial of social status, by encouraging victims to act in public by recounting their stories. As such, it empowers the victims of repression in a way that legal justice might not be able to achieve.

CONCLUSION

This paper has introduced in a provisional way some of the dilemmas associated with transitional justice. In particular, it has outlined in a schematic

form the debate with regard to criminal prosecutions and truth commissions. It was suggested in both cases that the existing framework of understanding these issues often fails to think about the distinctively *transitional* quality of societal responses to mass atrocities. From the perspective of stable, Western societies where concepts of the rule of law and justice are at least fairly well grounded, the actions of the successor regimes can often seem at best inadequate and, at worst, unjust and highly politicized. But these negative evaluations are often insensitive both to the profound difficulties that a society in transition confronts, as well as the fact that the process of transition can give rise to distinctive forms of transitional justice. As such, one must question the assumption that movement towards democracy implies a universal standard or norm against which such change can be evaluated in an unproblematic way. Rather, one must be sensitive to the distinctive historical experience of each society. The conclusion that follows from this thought is that there is no single correct response to the crimes of a prior regime, because a state's response is contingent upon a number of factors, including the legacy of injustice, legal culture, the dynamics of the transition and political circumstance. This presents an important problem that deserves further attention. It makes little sense to suppose that a single approach, such as criminal trials or truth commissions can be an effective response to the complex legacies of historical injustice.