

TRANSITIONAL JUSTICE:
A PATHWAY TO A PROGRESSIVE SOCIETY AND DEMOCRACY
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Transitional justice emerged in the 1970s and in the 1990s in Eastern Europe and Latin America, respectively, when victims of war and autocracy demanded accountability, justice, and redress after political shifts in their countries. Ever since, transitional justice became part of the political process for democracy and social justice in many other transitional countries, especially in African countries like South Africa, Sierra Leone, Liberia, the Democratic Republic of Congo and recently in The Gambia. Transitional justice means shifting from a state of injustice and corruption to a state of socio-economic justice and good governance.

Transitional justice has become a systematic political process where new governments establish independent commissions to investigate past human rights violations and corruption, establish mechanisms for accountability to provide redress for victims, and most importantly, reform and strengthen democratic institutions. Transitional justice is more than just wiping the tears of victims and holding perpetrators accountable, the process should be looked at holistically. This involves building a strong judiciary, public service sector and legislature, and reforming the security sector to prevent authoritarians from capturing states and the reoccurrence of such inhuman treatments of citizens. Politicians aspiring for power following autocratic regimes have included transitional justice as part of their political manifestos and campaign agendas.

Often, when transitional justice is discussed, the focus is on documenting and redressing human rights violations without paying much attention to economic justice. As important as it is to establish truth commissions and judicial investigations on past human rights violations, establishing a financial commission of inquiry is equally important. During the transition to democracy, investigating those who plundered state resources, enriched themselves, and helped cripple the economy of their countries is just as important. These actions subjected citizens to abject poverty, depriving them access to basic healthcare, education and other fundamental rights.

Many dictators and rulers in power are notorious for coopting state resources, which is possible under a government with excessive executive autonomy or military power. For example, the former President of The Gambia, Yaya Jammeh, could give verbal directives or just send a bodyguard to withdraw millions of Dalasis from the Central Bank of The Gambia for personal use without being questioned. He also had access to the country's social security fund which he could use as he deemed fit. The use of unlimited state resources lowered the quality of life for Gambians.

Transitional justice could take different approaches depending on the country context. Some countries may adopt reconciliation and social justice measures, while others may take conventional approaches, such as signed treaties between conflicting parties. Regardless of the process, the end result should include a path to justice that is not seen as political revenge against a specific group of perpetrators. Thus, it is important for the truth to be told in public in order to repair the society and move to a new chapter of a progressive nation. The case

studies below provide a glimpse into some prominent examples of transitional justice approaches in the world. They allow practitioners and peacemakers to understand how different transitional justice processes have worked elsewhere.

South Africa

Undoubtedly, one of the best models of the truth-seeking process during transitional justice is that of South Africa. In 1994, South Africa transitioned to democracy and ended the apartheid which lasted for almost five decades. The country swiftly moved towards establishing the “Truth and Reconciliation Commission (TRC)” in 1995. Using both “Retrospective and Prospective Justice” mechanisms¹, the commission’s mandate was to look at not only apartheid, but political crimes and mass human rights violations committed between 1960 – 1994 on behalf of the then apartheid government. The TRC’s proceedings were transparent and accessible to South Africans from their homes through live TV and radio broadcasting.

South Africa was not only able to establish the truth by collecting public records from 21,000 witnesses on 38,000 human rights violations between 1960 – 1994, but there was some level of justice established. The country was able to end apartheid and develop one of the best democracies in Africa, which was in part possible through its transitional justice process.

Balkan Region

The experience in the Balkans greatly differs from the transitional justice process that occurred in South Africa. Following almost a decade long conflict from 1991 to 1999, some criminals that committed war crimes in the former Republic of Yugoslavia have still not been held accountable due to a lack of effective transitional justice in the region. The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by the UN Security Council in 1993 to address war crimes in the Balkans and lead the region towards peace, justice and reconciliation. While many have yet to face charges, more than 100 suspected war criminals have faced justice (some serving jail time) through the guilty verdicts of the commission. However, the implementation of the ICTY policy to arrest and extradite war criminals has been dubbed a “policy of conditionality” as some ICTY party (or participating) states fail to comply with it.

Individual states have not independently established truth commissions to investigate the war crimes nor developed a transitional justice process. Some have attempted to create commissions yet have failed in the realization of them. Additionally, some member states of the ICTY have refused to comply with requirements to extradite suspected war criminals. It is expected that “The Regional Commission for Establishing Facts about War Crimes and Other Gross Violations of Human Rights Committed on the Territory of the Former Yugoslavia

¹ A “Retrospective Justice” as defined by Jeremy Webber is a form of transitional justice in which the process is “backward-looking” which seeks to correct the wrong actions of the wrongdoers and repair the loss of the victims. Webber continued to consider “Prospective Justice” as a type of transitional justice process in which the idea is not only focused on establishing truth in the past and punishing perpetrators, but the spirit to repair the society, establishing reconciliation and building the foundation for a progressive society that will prevent the occurrence of past human rights violation.

(RECOM)" will be established and operational by 2022². RECOM is an effort pushed by a coalition of non-governmental organization seeking the commitment of the six states in the Balkans to find facts about the war and missing persons two decades after.

Additionally, it should be mentioned that in 2001, Serbian Prime Minister Zoran Djindjic was expected to establish a justice and accountability processes for war criminals in Serbia. However, he was assassinated two years after becoming Prime Minister by war criminals ending his opportunity to promote transitional justice in Serbia and the region.

Lack of effective transitional justice in the region has left the families of victims traumatized as they continue to search for the truth regarding the disappearances of their family members and the ones responsible. It was clear that war criminals, some of whom served in government during the war, would do everything possible to avoid humiliation and accountability if there is an effort to establish the truth.

The Gambia

The Gambia is one of the most recent countries going through transitional justice after enduring the dictatorial rule of Yaya Jammeh for more than two decades. During Jammeh's rule, he committed gross human rights violations, issued executive orders to assassinate his political opponents, forcefully disappeared dissidents, illegally detained individuals, and tortured and killed political prisoners. All these practices were notorious under his leadership and were highlighted during the proceedings of the "Truth, Reconciliation and Reparation Commission (TRRC)."

After Jammeh's 2016 election defeat and exile to Equatorial Guinea in 2017, the transitional government led by Adama Barrow established the TRRC through an act of parliament in 2017 to investigate "impartial historical records" of the nature and extent of human rights violations between July 1994 and January 2017. The TRRC, like the TRC in South Africa, broadcasts its proceedings live on TV and radio. With the advent of sophisticated technology, victims and alleged perpetrators outside the country can testify through live video interviews.

Though the TRRC has yet to produce a report, the commission continues to investigate the 22 years of Yaya Jammeh's autocracy. These proceedings have created an opportunity for Gambians and the world to learn the truth regarding the killing, torture, and disappearance of victims and help identify those responsible for these crimes. The TRRC also gives perpetrators the opportunity to formally apologize to victims if they wish to do so. Hundreds of witnesses (including women, victims, field experts, and alleged perpetrators) have already appeared before the TRRC giving accounts of horrendous human rights violations under Yaya Jammeh³. One prominent example is the military group called "Junglers", who appeared before the TRRC to explain the disappearance and killings of individuals, a fact that was kept away from the families of the victims during the Jammeh administration.

² Jeffrey, Alex, and Michaelina Jakala. "Beyond trial justice in the former Yugoslavia." *The Geographical Journal* 178, no. 4 (2012): 290-295.

³ The TRRC has investigated the torture and killings of journalists, political prisoners, a former Minister of Finance, the assassination of more than 50 Ghanaian immigrants, and more. Perpetrators give full accounts (save some who conceal the truth) of the nature of the killings, arrest, detention etc. of victims.

Like that of the South African TRC, the Gambian TRRC performs both “retrospective and prospective justice.” Although the TRRC mandate is still active, there has been a level of reconciliation achieved by victims forgiving their torturers on live TV. The question still lingering the minds of Gambians is: Will the Barrow government impartially execute the TRRC recommendations and will victims get the necessary redress? Given the economic status of The Gambia, the country will need to set up a “reparation fund” supported by itself and its bilateral and multilateral partners for victims.

Unlike in the Balkan region, The Gambia established a Constitutional Review Commission (CRC) in 2018 as part of its transitional justice process. The CRC was to write a new constitution replacing draconian and undemocratic laws legislated under Yaya Jammeh. Taking a people-centric approach, the CRC consulted citizens and non-citizens, both online and in-person, in creating the new constitution. The draft constitution was presented to the people for review and feedback before it was presented to Parliament. Before the CRC drafted the constitution, they consulted all three branches of government to identify ways and means to draft new laws that will strengthen the public service and democratic institutions.

In September 2020, the National Assembly of The Gambia entirely rejected the draft CRC constitution on political, personal, and religious basis killing the hopes of its citizens for legal and institutional reform. Gambian citizens felt rejected by their elected parliamentarians. The decision to reject the constitution was personally and politically motivated and not necessarily in the national interest, even though the draft constitution is more progressive and aimed to protect more freedoms compared to the 1997 constitution. The country still has an opportunity to “resurrect” the draft constitution by making sure parliamentarians put their political differences aside, reach consensus on the contentious provisions in the draft constitution, and work with the executive branch to take back the constitution to the Parliament. Its failure will undermine the future of democracy in The Gambia.

The experience of transitional justice in The Gambia has only been around for 5 years. As the country continues to develop its own transitional justice path, it is important to learn from the experiences of other countries around the world.

Chile

Chile’s constitutional reform is undoubtedly one of the most uniquely citizen-centric constitution-building processes the world has ever seen. In 2019, Chileans rose up to protest for socio-economic change. The protests led to a historic process to write a new constitution to replace the one created during the military rule of General Augusto Pinochet. Even though Chile established two commissions to investigate human rights violations and disappearances under Pinochet, it did not address the necessary constitutional reforms to replace or reform draconian laws created under him.

In October 2020, 78% of Chileans voted to change its 1980 constitution. This led to the establishment of the “Constitutional Convention” which is comprised of 155 seats. Out of the 155 seats, 138 will be elected by the people and 17 seats will be reserved for the indigenous people. Unlike the CRC in The Gambia, members of the Constitutional Convention in Chile are not appointed by the president or the parliament, but by the people. The constitution would

not be subjected to parliamentary approval before it goes to referendum, unlike that of The Gambia.

In short, the Chileans voted that they needed a new constitution and voted for people they wanted to write the constitution. The people will review the draft constitution and provide feedback before the referendum to vote for or against the new constitution.

This transition to a new constitution after three decades of restrictive government in Chile could improve democracy in the country, but most importantly improve the lives and livelihood of Chileans.

This demonstrates that while it is important to establish justice and accountability during transitional justice, constitutional reform is fundamental in building strong and independent democratic institutions during a transition to democracy.

Why is Transitional Justice Significant?

For there to be a progressive and peaceful society following severe unrest and conflict, reconciliation must take place. This can be supported through efforts to establish truth and justice. Criminals of war and societal instability cannot be left unaccounted for as this could attract mob justice which could trigger national unrest. There must be an impartial process to intervene and judge between two parties, victims and perpetrators, in order to rebuild society to maintain peace, unity, equality and to promote development. Transitional justice helps in correcting the wrongful actions of the past, creating strong democratic institutions that will deter the reoccurrence of gross human right violations and establishing economic justice for its citizens.

Transitional justice is more than just establishing accountability and justice for victims. It also helps a country identify its institutional, legal, and societal weaknesses that made horrendous human rights violations possible and develop a national blueprint to strengthen institutions, lead the country to constitutional reform and reconstruct the society. This is necessary so it can reconcile grievances and move on to a new progressive chapter.

Through transitional justice, sites that were used to torture and kill, such as secret prisons and mass graves, should be discovered during the truth-seeking process. These sites must be preserved as memorials and for educational purposes. Memorials could be significant in recalling the past, remembering the struggle that individual victims and the country at large went through in the hands of perpetrators which could be studied and used for advocacy. National commemoration of major events is also significant in sustaining the memories that could pass from one generation to another.

The significance of transitional justice cannot be over emphasized. Countries that successfully went through it have progressed in democratic norms while the ones that fail to go through it continue to suffer conflicts or poor governance with weak democratic institutions.