



Transitional justice approaches: A study of the most popular transitional justice mechanisms and lessons to be learned by Afghanistan

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Abstract

States transitioning from civil war, dictatorship and other and other international brutalities adopt various mechanisms to address the crimes and injustices happened in the past. There is neither a single strategy, nor a universal strategy. Instead, states adopt one or more mechanisms according to their unique circumstances. The most popular strategies states have so far adopted are, inter alia, truth commissions, local and international trial, traditional methods of justices, reparation, and the vetting. It should be noted that the focus of all these mechanism is on a stable and prosperous future and peace. Afghanistan has also gone through various eras of brutalities since 1978. War crimes and crimes against humanity have been committed in Afghanistan by various partitas to the conflict of Afghanistan. This paper recommends that Afghanistan should adopt some mechanisms, according to its particular situation, to address the crimes and injustice committed since 1978 up to date.

Keywords: civil, Dictatorship, adopt various, circumstances

1. Introduction

The term of Transitional Justice (TJ) refers to judicial and non-judicial mechanisms for dealing with human rights abuses committed in a specific period of time in a specific country. States transitioning from dictatorship, civil war, and other types of authoritarian regimes to democracy and legitimacy may use transitional justice mechanisms for dealing with the past. The victims of human rights violations and their relatives are always expecting the new regime to establish some accountability mechanisms. Some people are hoping reconciliation in the post-conflict era. The post-conflict government may try to ensure accountability and reconciliation. However, accountability (and justice) are not always helping reconciliation. There are various kinds of transitional justice mechanisms such as criminal prosecutions, reparations, institutional reforms and truth commissions. Determining the best transitional justice mechanism is context-dependent. Some post-conflict states may prefer one mechanism, and some may choose another. In addition, some states may use more than one mechanism. This course discusses transitional justice in various parts. First, it introduces TJ and its historical background. Then, it discusses the goals of TJ and TJ in international law. The course then discusses various transitional justice mechanisms. After generally discussing TJ, this course finally sheds light on transitional justice in Afghanistan.

1.1. Introduction to transitional justice

Transitional justice is a response to human rights violations of a systematic and widespread nature ^[1]. It “seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice, but justice adapted by societies

transforming themselves after a period of pervasive human rights abuse ^[2].” In some cases, these transformations happen suddenly; in others, they may take place over many decades ^[3]. The 2004 Report of the UN Secretary General to the Security Council on the rule of law and transitional justice in conflict and post-conflict societies defines transitional justice as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation ^[4].” The report further states that “these may include both judicial and non-judicial mechanisms, with differing levels of international involvement (and none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof ^[5].” Similar to the UN definition, a slightly more comprehensive definition is advanced in the Max Planck Encyclopedia of Public International Law. It states that “[t]ransitional justice describes a field of international law which is concerned with the question how to confront a situation of past large-scale human rights violations and humanitarian abuses in a period of transition to peace and democracy ^[6].”

1.2. Historical background

The approach of transitional justice emerged in the late

¹ International Center for Transitional Justice, <https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> [hereinafter Center for Transitional Justice].

² *Id.*

³ International Center for Transitional Justice, <https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> [hereinafter Center for Transitional Justice].

⁴ The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, Report of the Secretary General, 23.8.2004, S/2004/616, at para. 8.

⁵ *Id.*

⁶ Seibert-Fohr, Anja: Transitional Justice in Post-Conflict Situations. In: Wolfrum, Rüdiger (Ed.): Max Planck Encyclopedia of Public International Law. Oxford 2012, at para 1.

1980s and early 1990s, mainly in response to political changes in Latin America and Eastern Europe—after demands of justice in these regions. At the time, human rights activists and others wanted to address systematic abuses by former regimes but they did not want to endanger the political transformations that were underway. As these changes were popularly called “transitions to democracy,” people started to call this new multidisciplinary field “transitional justice”^[7].

Governments of the above-mentioned regions adopted strategies that later became the basic approaches to transitional justice. These strategies included the following

- **Criminal prosecutions:** As obvious from its name, criminal prosecution is the formal proceeding of a criminal case by prosecutor and prosecution authorities, which will lead the case to a trial. These are judicial investigations and prosecution of human rights’ violators. Prosecutors frequently emphasize investigations of the “big fish”: suspects considered most responsible for **massive** or systematic crimes^[8].
- **Truth commissions:** Truth Commissions are trying to find the “truth” regarding human rights violations and their root causes^[9]. These commissions of inquiry have the primary purposes of investigating and reporting on key periods of recent abuse. They are often official state bodies that make recommendations to remedy such abuse and to prevent its recurrence.
- **Reparations programs:** These are state-sponsored initiatives aimed at repairing the material and moral damages of past abuse^[10]. They usually compensate through distributing a mix of material and symbolic benefits to victims. Monetary compensation and official apologies are some forms of these reparations^[11].
- **Gender justice:** Gender justice efforts aim to challenge impunity for sexual and gender-based violence and ensure women’s equal access to redress of human rights violations^[12].
- **Institutional Reforms:** Institutional reforms is key to the transformation processes. These efforts seek to transform the army, police, judiciary and related state institutions from instruments of repression and corruption into instruments of public service and integrity. Without have an effective institutional reforms mechanism, a transitioning national will be unable to succeed^[13].
- **Memorialization:** These include museums and memorials. The main purpose of memorialization is the preservation of public memory of victims. It also raises moral consciousness about past abuse, in order “to build a bulwark against its recurrence”^[14].

The above-mentioned mechanisms do not represent an exclusive list. However, these initiatives are widely understood to form a basis for transitional justice efforts. Many transitioning societies have developed other creative approaches to past abuse; it is because of this reason the

field has gained both strength and diversity over the years. A state may use more of these methods, other may include new initiatives according to its own unique situation.

1.3. Goal of transitional justice

Transitional justice has many goals, but the “basic challenge of a transitional justice strategy is to effectively respond to past abuses in ways that (a) reveal the truth about what happened and why, (b) acknowledge victims’ suffering; (c) hold perpetrators accountable; (d) compensate for past wrongs; (e) prevent future abuses; and (f) promote social healing; and others”^[15].

Many countries around the globe have overthrown authoritarian regimes and military dictatorships to instate a new democratic order; most of these changes happened during the last decades of the twentieth century. In Latin America, Eastern Europe, East Timor and South Africa, “the transition has proven to be a complex process during which the successor regime, as part of the post-conflict reconstruction agenda and in order to establish a sustainable peace, has to deal with the legacy of the past where atrocities and mass human rights violations have deeply divided the members of society”^[16]. The transition and transitional justice in Afghanistan are also complex. The alleged perpetrators of human rights violations are still in power, and they are challenging state’s rule of law efforts.

There are two important points about the reconciliation. First, it is a primary goal for every post-conflict society^[17]. Secondly, it is a long, painful, process that cannot be externally imposed or internally legislated^[18]. It has been described as “the route that leads from a dividing past to a promising future through the restoration of shattered relations and as ‘creative space where mercy and truth meet justice and peace’^[19].” However, dealing with the past can be “a double-edged sword for the newborn democracy”^[20]. On the one hand, it is a precondition for the flourishing of reconciliation^[21]. On the other hand, re-opening past wounds could lead to a new round of violence.

Given the facts, “justice should not be understood solely as a blind strategy seeking to implement universal norms and to hold accountable all those responsible for past crimes, but rather as a sum of complementary mechanisms and processes” (judicial and non-judicial) aiming to: (a) rebuild the destroyed or dysfunctional judicial infrastructure through the re- establishment of the rule of law, (b) deal with the crimes committed by the agents of the former regime by trials or truth commissions, and (c) address “the structural and systemic injustices that led to conflict”

¹⁵ Transitional Justice: Information Handbook, United States Institute of Peace (USIP), 1-2 (2008). *available at* https://www.usip.org/sites/default/files/ROL/Transitional_justice_final.pdf [hereinafter TJ Handbook].

¹⁶ George Kasapas, an Introduction to the concept of transitional justice: western balkans and eu conditionality, unisci Discussion Papers, (2008), *available at* <https://www.ucm.es/data/cont/media/www/pag-72511/UNISCI%20DP%2018%20-%20KASAPAS.pdf> [hereinafter: Concept of TJ].

¹⁷ Rigby, Andrew (2001): Justice and Reconciliation After the Conflict, Colorado, Lynne Rienner Publications, pp.139-141.

¹⁸ Id.

¹⁹ Lederach, John P. (1999): The path towards Reconciliation, Scottsdale, Herald Press, p. 65.

²⁰ Concept of TJ, *supra* note 15, at 60.

²¹ Id.

⁷ Center for Transitional Justice, *supra* note 1.

⁸ Id.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ Id.

through reparation and compensation ^[22]. A holistic, multidimensional approach is more suited to deal with the complex reality of post-conflict societies, promote reconciliation and ensure the successful passage to the state of positive peace.

1.4. Transitional justice mechanisms

Transitional justice mechanisms are created to deal with crimes that were committed during a period of conflict, at a stage where that society is at the cusp of transition from a society of conflict to one of democracy and peace. There are wide-ranging options available, to the transitional governments and the international community assisting them, to tackle these crimes – not only a dichotomy of punish or forgive, and local ownership of these processes is paramount ^[23].

Transitional justice mechanisms may take a number of forms. Most prominently these include the international criminal court, international tribunals, special courts, truth commissions, local courts and traditional methods of justice. This paper will address the latter three; truth commissions, local courts and traditional methods of justice. The international criminal court, international tribunals and special courts for past crimes will not be addressed, because these tend to be further removed from local ownership and this paper will focus on what can be termed local forms of transitional justice ^[24].

Before discussing transitional justice mechanisms, it is important to understand factors that should be considered for determining the appropriate mechanism of transitional justice.

▪ The Transitional Justice Mechanisms

The following are the well-known transitional justice mechanisms:

a. Reconciliation

Discussing transitional justice is impossible without reference to certain key concepts, which are all interrelated – one of these concepts is reconciliation ^[25]. In all post-conflict societies and post-conflict reconstruction processes, reconciliation is the ultimate objective ^[26]. Despite this reality, “reconciliation is often very vaguely defined, if at all ^[27].” It has been referred to as “acknowledgement and repentance from the perpetrators and forgiveness from the victims, as non-lethal co-existence, as democratic decision-making and reintegration, and as encompassing four concepts namely truth, mercy, peace and justice, concepts which in themselves are difficult to define ^[28].”

Reconciliation (in the context of transitional justice) is of two types: national and individual reconciliation ^[29]. National reconciliation and individual reconciliation differ from each other. National reconciliation is achieved when societal and political processes function and develop without reverting to previous patterns or the framework of the conflict. Individual reconciliation is the ability of each human being to conduct their lives in a *similar* manner as

prior to the conflict without fear or hate. This distinction is crucial because it is impossible to achieve national reconciliation without achieving individual reconciliation. National reconciliation may come at the expense of reconciliation at the individual level, although political processes may proceed, and progress individuals may find greater difficulties in dealing with their experienced traumas. However, reconciliation at the individual level is also independent of reconciliation at the collective level. Moreover, some transitional justice mechanisms can promote one type of reconciliation more than others ^[30].

b. Truth Commissions

Truth commissions try to find the truth about the abusive past in a given society. Establishing a truth commission in a post-conflict society has become increasingly popular, in the last few decades. There is a growing demand for truth and truth telling, and the international community has sought to strengthen the emphasis on truth commissions. Since 1974, around 25 such commissions have been established around the globe, and often the first thing that newly elected politicians in a transitional democracy cry out for is the establishment of a truth commission. Truth commissions, as are currently perceived, stem from the numerous Latin American commissions held in the 1980s, however, they have changed somewhat, particularly in the context of a post-conflict society, which has experienced international intervention ^[31].

It has been assumed that truth commissions are a path to reconciliation and peace for all post-conflict societies, and that they are to be preferred to other transitional justice mechanisms. However, as with all transitional justice mechanisms, the aim and mandate of a truth commission and what such a commission can achieve depend on the unique context of each society ^[32].

More than 30 countries across the globe have created truth commissions, including Peru, Guatemala, Argentina, Brazil, Canada, Timor-Leste, Thailand, Sierra Leone, South Africa, Liberia, Kenya, Côte d’Ivoire, Morocco, and the Solomon Islands ^[33]. Afghanistan adopted a transitional justice action plan in 2005, which had five goals, one of which was establishing a truth commission. The entire plan expired in 2009 without any important achievements. While truth commissions share some common features, each is unique, reflecting important contextual differences ^[34].

Truth commissions are official investigative bodies comprised of independent experts that are responsible for investigating and reporting on patterns of human rights abuses over a certain period of time in a particular country or in relation to a particular conflict. Truth commissions allow victims, their relatives and perpetrators to give evidence of human rights abuses, providing an official forum for their accounts ^[35].

The truth commissions have few main objectives. They are: officially acknowledging past human rights abuses, recognizing the suffering of victims, identifying patterns of violence and more specific acts of wrongdoing, and making

²² *Id.*

²³ Eirin Mobekk, *Transitional Justice in Post-Conflict Societies – Approaches to Reconciliation*, 261, [hereinafter Eirin Mobekk].

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Eirin Mobekk, *supra* note 20, 262.

²⁹ *Id.*

³⁰ *Id.* at 263.

³¹ *Id.* at 264.

³² *Id.*

³³ *Id.*

³⁴ Truth Commissions, *Transitional Justice Initiatives*, United States Department of State, *available at*

<https://www.state.gov/documents/organization/257772.pdf>

³⁵ TJ Handbook, *supra* note 8, at 6.

recommendations to prevent a recurrence of violence in the future. Truth commissions may also identify the perpetrators of violent acts, and even recommend cases for criminal prosecution. However, truth commissions cannot be expected to find the ultimate truth for all individual cases. Truth commissions are therefore usually only one of many mechanisms of transitional justice and should be part of a larger strategy to build sustainable peace and a political order respecting the human rights of all. Trials, reparations and reforms may also be part of a complete program of justice and reconciliation ^[36].

c. Trials

Trial is the official criminal proceeding. An accused of human rights violation could be tried in a local, hybrid or international court. Holding local trials in post-conflict societies is another transitional justice mechanism to deal with past crimes and human rights abuses ^[37]. These types of trials can be conducted with or without the direct assistance of the international community. They can include the participation of international judges, for example, judging panels where two out of three judges are local, and one is international, or they can consist entirely of local judges and prosecutors ^[38]. They can apply local law only or they can apply a transitional form of law, which may include international human rights law or UN laws and treaties. In a transitional period, if local trials are chosen as a vehicle for justice for past abuses, a multitude of combinations may be employed during this period in a court of law. There are numerous positive and negative outcomes and effects of applying local trials to deal with the past in a transitional period. However, the key issue which need to be addressed prior to even contemplating the potential of local trials to deal with human rights abuses is the state of the judiciary and the judicial system in post-conflict societies ^[39].

d. Traditional Methods of Justice

Traditional methods of justice can take many different forms, and vary extensively from community to community ^[40]. They are generally considered restorative justice, but they can also have punitive functions ^[41]. However, on a broad and general level they are mechanisms for solving disputes, conflicts and crime at the community level. It is where a village or tribal council, community meeting or council of elders is held to deal with crimes perpetrated towards the community or individuals, or it can focus on resolving conflicts such as marital disputes and domestic violence. The council, elders or group then decide on the punishment for the perpetrator. The punishment can vary extensively depending upon not only the seriousness of the crime or transgression, but also on the culture of the country and community. It can include public humiliation of the perpetrator, paying fines, community labor, physical punishment or what the community or council determines to be the best solution for the transgression. It is often focused on the fact that the perpetrator is part of the community and although he/she can be punished for the crimes committed, it is not in the sense of incarceration. The perpetrator may serve the community and repay for his/her crimes. This

serves the greater good of the community rather than separating the perpetrator from the community ^[42].

e. Vetting (Lustration): Reforming government institutions' personnel

Vetting is an important mechanism for establishing trustable public institution in a transforming society. Vetting refers to "the reform of an institution's personnel by removing or excluding abusive, corrupt or unqualified employees ^[43]." Vetting programs "focus particularly on reforming the police, prison services, the army and the judiciary because they are often responsible for past human rights abuses and are otherwise institutions that the public must rely on to prevent future abuse ^[44]." In some states, excluding and screening people based on evidence of their involvement in past violations has also included candidates for various public positions, such as parliament membership, other offices whose members are elected by people, school teachers, financial officers, and others ^[45].

▪ Key Characteristics of Vetting

Vetting is based on the assumption that "fair and efficient public institutions are crucially important to prevent future human rights abuses ^[46]." Vetting processes are therefore undertaken to "(re) establish public trust in institutions, increase their legitimacy and efficiency in delivering services to all citizens; and to signal the break with the abusive past ^[47]."

Generally, vetting is "less expensive and less complex than large-scale criminal prosecutions, but still provides a form of individual accountability for those who were responsible for violations, or who should have prevented them but did not, and where undertaken, generally addresses a far larger number of cases than will be the subject of any criminal proceedings ^[48]."

Vetting aims at excluding from certain positions of public office those who

- Are responsible for past human rights violations; or
- Hold anti-constitutional views or are involved in terrorist groups or organized crime ^[49].

At the end of a vetting process, individuals may be

- Excluded from a certain type of position;
- Banned from promotion or benefits; or
- Banned from all types of public employment for a certain period of time ^[50].

In some extreme circumstances, an individual may be banned forever from all types of public employment.

f. Reparations

Reparation is a method of compensation for the material and mental losses of individuals. Reparation programs include payments or services given to victims of past abuse as compensation for the harm(s) they or their loved ones have suffered during a period of human rights violation and conflict ^[51]. It has been recognized by international law that

³⁶ *Id.* at 7.

³⁷ Eirin Mobekk, *supra* note 20, 273.

³⁸ *Id.*

³⁹ *Id.* at 274.

⁴⁰ *Id.* at 282.

⁴¹ *Id.*

⁴² *Id.*

⁴³ TJ Handbook, *supra* note 8, at 12.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 13.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 16.

“victims of systematic human rights abuses are entitled to prompt, adequate and effective reparation and states have a duty to provide comprehensive reparations ^[52].” The intention behind a reparation programs is to recognize and repair harm, restore the dignity of victims and “rebuild trust and solidarity among communities that have been torn apart by violence ^[53].”

In a post-conflict context, it is important to recognize that “no payments can ever fully compensate for torture or killing, and the reality that many governments cannot afford large cash payments to thousands of victims.” Reparations range from purely symbolic acts to mostly material benefits. Among the different types or reparations are:

- **Restitution:** May include return of property or other measures to re-establish the situation before the violation was committed.
- **Compensation:** May include the payment of economically assessable damages, pensions, or smaller symbolic payments as an acknowledgment of one’s victimization.
- **Rehabilitation:** May include medical and psychological care, establishment of rehabilitation centers, administrative rehabilitation (such as the dismissal of false charges or the restoration to a job from which one was dismissed for political reasons), legal and social services, and educational benefits.
- **Symbolic Measures:** May include State apologies, construction of memorials, re-naming of streets, establishment of commemoration days, dignified re-burials, and waivers for job training and educational fees ^[54].

1.5. Transitional justice in Afghanistan

Afghanistan has experienced more than four decades of war, but so far, no accountability mechanisms have been created in order to address the past human rights violation. Peace is the demand of all citizens of Afghanistan; many peace processes have been initiated, but all have failed so far. The “fragile peace that prevailed between the various phases of the conflicts in Afghanistan has never led to accountability for past crimes ^[55].” The Bonn Agreement (that was signed by leaders of various Afghan sects after the collapse of Taliban in Bonn, Germany, which shaped the post-2001 Afghanistan system of government) of 2001 was not a peace agreement; instead, it was an agreement between selected Afghan leaders, including the Northern Alliance commanders who had supported the United States-led military intervention in Afghanistan ^[56]. As a result, “many known human rights abusers were brought into the political fold.” Despite this, the collapse of the Taliban regime and the establishment of a transitional government in late 2001 made it possible to “start discussion of Afghanistan’s brutal history of conflict and human rights abuse ^[57].” The Bonn Agreement left this possibility open by avoiding an amnesty provision and creating a national human rights body, the AIHRC.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Afghanistan: Addressing the Past, International Center for Transitional Justice, ICTJ Briefing Note, 3(2005), available at <https://www.ictj.org/sites/default/files/ICTJ-Afghanistan-Addressing-Past-2005-English.pdf>

⁵⁶ *Id.* at 4.

⁵⁷ *Id.*

A mechanism for transitional justice in Afghanistan was not established as part of the Bonn Agreement. Instead, nascent attempts to develop a transitional justice process in Afghanistan have included “(1) national consultations by the AIHRC and limited documentation of human rights violations and war crimes committed during the phases of the Afghan conflict; (2) the development of the National Action Plan for Peace, Reconciliation, and Justice (the Transitional Justice Action Plan); and (3) limited mobilization of civil society. In addition, (4) some of the vetting processes have included criteria relating to past crimes, and a few trials have been conducted under the banner of transitional justice ^[58].”

1.6. What happened to the Transitional Justice Action Plan of Afghanistan?

In response to the demands of people of Afghanistan, AIHRC, and international human rights organizations to investigate and prosecute the war crimes, the parliament of Afghanistan passed General Amnesty and National Stability law (The Amnesty law) ^[59]. The law provides blanket amnesty to all political and hostile parties who were parts of the conflict from 1978 to 2001 ^[60]. The high council of religious scholars of Afghanistan criticized this law by stating that Islamic law has given the right to the victims, not to the government to forgive the perpetrators of crimes, ^[61] while under the constitution of Afghanistan, no law in Afghanistan shall contradict Islamic law ^[62].

The president did not sign the law, but according the constitution of Afghanistan, if the president doesn't make a decision to approve or reject a law within fifteen days after the submission of law to him by parliament, the law will be considered approved by president ^[63]; by that method, the law was considered approved and was published in official gazette in 2008 ^[64]. Unfortunately, the timeline for the achievement of the outlined activities of the Plan expired in March 2009, without a considerable achievement in its implementation, and despite the demands of AIHRC and civil society to extend it, the president refused to do so ^[65].

2. Recommendations

As a post-conflict society, Afghanistan needs to do the following for addressing the past human rights violations:

1. Afghanistan should revoke or amend its General Amnesty law and should exclude war crimes and crimes against humanity from its amnesty law.
2. Afghanistan should adopt some mechanisms for addressing the past.
3. The truth commission is a best strategy for addressing the past in Afghanistan, but it should be an independent commission.
4. The government should mobilize the victims and witnesses to tell the truth to the truth commission, but should also protect them from revictimization.
5. A reparation schemes should act according to the recommendations of the truth commission.

⁵⁸ *Id.*

⁵⁹ Winter botham, supra note 149, 8.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Art. 3, CONS. AFGH. 2004.

⁶³ *Id.* art. 94.

⁶⁴ Winter botham, supra note 149, at 9.

⁶⁵ *Id.*

6. All steps must be taken in order to ensure sustainable peace in the country.

3. Conclusion

There are many transitional justice mechanisms, but adopting the most appropriate mechanism(s) is a context dependent issue. There are many mechanisms available for Afghanistan to adopt, but currently the most appropriate seems to be truth commission and reparation. Before adopting any mechanisms, Afghanistan needs to abolish its general amnesty law. All these steps must be taken in order to ensure a sustainable peace in the country.

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32. Id. at 263.
33. Id. at 264.
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