

Some Thoughts on Transitional Justice



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In May 2012, I took up the function as UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. The mandate of the Special Rapporteur was created by the Human Rights Council in 2011 by a consensus resolution 18/7. The mandate evolved out of a cross-regional initiative by Switzerland, Argentina and Morocco; so a country in the MENA region (whose truth commission I had advised many years ago) was one of many that played an important role in the process leading up to the adoption of the resolution establishing the mandate. The Middle East and North Africa (MENA) region is the locus of important transitions and therefore the mandate is following developments in the area closely. In the conviction that there are important differences in the way that the various regions implement the measures under the mandate, I started the exercise of the mandate with the organisation of regional consultations. The first of these meetings, involving both representatives of states and civil society organizations, was precisely for the countries in the MENA region.¹ Further, my first official visit as Special Rapporteur was to Tunisia, by the invitation of the Government, in November 2012.

¹ The meeting took place in Cairo, Egypt, in November 2012. The second regional consultation organised by the mandate, for the Latin America and Caribbean region, took place in Buenos Aires, Argentina, in December 2012. A regional consultation for the Africa region is planned for November 2012, and a consultation for the European region for spring 2013. A consultation for the Asia region will follow shortly thereafter.

In this brief piece, I want to present some thoughts on the state of the field of transitional justice, achievements and challenges included, and a few reflections that might be of particular relevance in the MENA region.

In a fairly short period of time of about 30 years, transitional justice can claim to have achieved some important successes. I would like to start by highlighting these.

First, transitional justice has managed during the last twenty to thirty years to consolidate itself as a specific autonomous field. There is a great deal of academic activity around transitional justice, in addition to a growing network of experts, as well as official government positions and even entities in charge of transitional justice. For instance, Tunisia established recently the first ever Ministry for Human Rights and Transitional Justice. Furthermore, international cooperation devotes significant resources to the field. There is a dense network of civil society organisations both at the national and international level that has specialized on issues of human rights and transitional justice. In other words, there is no question that transitional justice is a distinct field consisting of academic reflection, activism, as well as of policy making. Taking into consideration how hard it is to mobilise resources to create networks, the fact that transitional justice has managed to do so in such a short period of time, is certainly worth highlighting.

Second, and much more important than the consolidation of the field, but related to it, is that transitional justice has become a normal part of the sets of policies that countries in the process of political transition are expected to implement. The normalization of transitional justice in this sense is a second achievement that the field can claim for itself, both at the national and international level. There is a range of instruments and mechanisms, today, at the international, regional and national levels that refer to the right to truth, justice, reparation and to guarantees of non-recurrence.

Third, in the process of implementing transitional justice measures one of the inevitable consequences has been to make victims visible and to give civil society organisations a voice and a space in the



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public sphere that they did not have before. This articulating effect of transitional justice measures is a fundamentally important contribution, and something that those of us who work in the field have reasons to celebrate.

I do not want to turn this article into a celebration only because we all know that the field of transitional justice also faces very significant challenges - some of these have been with the field from the beginning while others are new. Let me mention some of these challenges that I think are significant.

The first challenge that transitional justice faces is characteristic of fields that promote not just one but a variety of measures. Following the definition provided by the UN Secretary General, transitional justice is understood in terms of the implementation of the four measures that are part of the title of the mandate: truth, justice, reparation and guarantees of non-recurrence. A series of questions arise: Each one of these includes a number of sub-categories reflecting various rights. How to keep these four measures together? How to design and implement programs that are truly comprehensive and that help to withstand the constant temptation, particularly by governments, to trade off one measure against the other? How to avoid, for example, the temptation of saying we will be generous in terms of reparation and truth in order to avoid pursuing, or pursue less aggressively justice or institutional reforms? In other words, the field still faces a challenge, both in theory and in practice, in relation to the design and the implementation of truly comprehensive measures that help satisfy the existing rights of victims and of society more generally. Progress is unlikely to be simultaneous and even less instantaneous, but nevertheless the challenge is how to think about transitional justice in a way that includes the implementation and realisation of the four sets of measures in a *coordinated* fashion over time. I think that some progress has been achieved in this area. But each wave of transition brings up a new set of challenges of how to achieve a truly comprehensive transitional justice policy. I will dedicate significant work in the implementation of the mandate on making a contribution to address this challenge.

The other challenge that I think the field faces is at least in part a result of its own success. To illustrate what I mean by that, let me point to the historic roots of transitional justice. The measures of truth-seeking, justice initiatives, reparation, and guarantees of non-recurrence emerged first as practices and experiences in post-authoritarian

settings, such as the Latin American countries of the Southern Cone and, to a lesser extent, those in Central and Eastern Europe and South Africa. Despite all their differences, these settings shared the following main characteristics. First, the countries concerned had achieved relatively high degrees of both horizontal and vertical institutionalization, that is, their institutions could cover all their national territories and, their legal systems already contained provisions for the regulation of the relationship between citizens and State institutions regarding at least the most fundamental topics. Second, the measures that emerged were adopted as a response to a particular kind of violation, namely, those associated with the abusive exercise of State power through precisely those institutions.

As the field kept growing, measures of transitional justice have been progressively transferred from their "place of origin" in post-authoritarian settings, to post-conflict contexts and even to settings in which conflict is ongoing or to those in which there has been no transition to speak of. New challenges arrived with this expansion, generating the expectation that it will be equally effective in these contexts that are so different from post-authoritarian situations. There is the tendency to say there is no "one size fits all" recipe for transitional justice and that each country has to find its own way. And at the same time states signed up to universal obligation that require all countries to satisfy the rights to justice, to truth, to reparation, to guarantee of non-recurrence. The implementation of programs to satisfy these obligations in situations with different institutional capacities, political traditions, and needs, is challenging. Countries also differ from one another in their ability to generate resources and in the availability of local capacities. To understand the implementation of transitional justice measures in such variety of cases, I think, is one of the biggest challenges that the field still faces.

Let me now, finally, turn to some reflections on how the new mandate on truth, justice, reparation and guarantees of non-recurrence can assist in addressing some of these challenges.

There are three thematic areas where I think the mandate can make a contribution to strengthening the field; these are also reflected in my first report to the Human Rights Council.² The first area concerns the link between truth, justice, reparation and guarantees of non-recurrence, an issue to which I will dedicate significant time and work, as I have

² A/HRC/21/46.

mentioned before. The resolution that established the mandate insists on the importance of taking a comprehensive approach in the implementation of these measures. There is practice suggesting that when measures are implemented in an integrated fashion they are much more effective than when implemented in isolation. Morocco, for example, provides an interesting example about the difference that it makes to establish a reparation program as a standalone initiative or taking an integrated approach with a truth telling exercise that also involved some initiatives concerning institutional reform. The latter approach has proved to gain far more acceptance and legitimacy among victims and the society at large. The draft law on Transitional Justice being debated in Tunisia also calls for the implementation of a comprehensive approach.

The second area refers to context-sensitivity, i.e. making the measures more sensitive to the characteristics of the different contexts they are applied in today. This relates both to the different degrees of institutional strength, and also to the various needs generated by the differences in sources and types of violations.

And finally, the third area where I consider that more work needs to be done concerns increasing the effectiveness of the measures in post-conflict situations. It is already difficult for the measures that are part of transitional justice to achieve their own goals, namely, providing recognition to victims - as victims but fundamentally, as bearers of rights - fostering trust between citizens and the state, as well as strengthening the rule of law. It would be a tremendous error to think that transitional justice can burden the agenda of a political, social, and economic transformation - the process is certainly much more comprehensive. Transitional justice, indeed, is part of this process, making sure that justice for serious human rights violations is not forgotten. At the same time, the challenge of the field is to articulate the relationship with other areas of policy interventions, such as development and security.

In my view these are not impossible challenges to meet. There are encouraging instances of practice that cannot be ignored: different countries have undertaken significant initiatives for their people in the aftermath of serious violations, with and without international cooperation, and there is an ever growing commitment of civil society to achieve justice. Each new case demonstrates that serious rights violations cannot be swept under the

rug; that problems do not disappear and people do not forget.

Consistent with the idea that it is important to be mindful of contextual features, I will finish with a few reflections that might be of particular relevance to the MENA region (although most of them would have applied to transitional processes in different areas at different times):

- All revolutions face the challenge of making sure that they do not become instances of mere 'turn-taking' in which not so much oppression, but only the subjects of oppression change. Real transformation, of course, requires that the equal rights of all are effectively guaranteed. Transitional justice measures, both in their design and in their implementation must reflect this ideal.
- There is nothing that threatens more directly the real function of transitional justice measures than turning them into instruments which benefit supporters and punish detractors; transitional justice measures are rights-based and can be rights-enhancing precisely because whatever they distribute - benefits as well as sanctions - they distribute on the basis of rights, not affiliation with any particular cause. Transitional justice measures should not be conceived of as a way of rewarding martyrs but as a way of redressing human rights violations, whatever the identity of the perpetrator or the victim.
- In addition to claims for justice and political participation, the 'Arab Spring' brought to the fore, in ways that transitions in other countries had not, strong demands for economic opportunities, the end of corruption and other forms of economic crimes. This presents both an opportunity and a challenge: the opportunity for transitional justice is to articulate more clearly its links with development, the challenge is to find ways of addressing corruption and other economic crimes in ways that do not overburden measures that were not originally conceived with such ends.
- A comprehensive approach to the four areas of transitional justice, as mentioned before, does not come easily. Countries in the area, however, have thus far exhibited a tendency to over rely on some measures at the expense of others. One may hope, for the sake of the sustainability and the effectiveness of the initiatives as rights enhancing instruments, that this is only a temporary tendency.

- Finally, as in most contexts where the topic is new, it is important to keep in mind that transitional justice is not a special kind of justice, a 'soft' form of justice. Much rather, it is a strategy for the achievement of a familiar conception of justice to which countries in the area have adhered as manifested by their ratification of international instruments that ground and express rights to truth, justice, reparation, and guarantees of non-recurrence. Similarly, and as a consequence, it must be kept in mind that reconciliation is not an alternative to justice, but that it requires, precisely, the implementation of measures that include the four elements under the mandate.