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**Democracy and Justice. Transitional Paradoxes
from a Chilean Point of View**

“Justice, as fair as possible, conciliating the virtue of justice with the virtue of prudence”. (Patricio Aylwin Azocar¹)

§1. Introduction

The term “Transition to Democracy” has been used permanently worldwide over the last three decades to refer to the processes of democratic transitions and consolidation, particularly in post-authoritarian rule societies. During those transitional processes, one of the most controversial issues is how to address the legacy of human rights violations left behind by the repressor, the so-called “Transitional Justice” debate.

The attentive scholar attention paid to the waves of transition that have been characterizing the political history worldwide since the 1980s, demonstrate that the arrival of democracy does not always imply immediate justice. In fact, even in successful cases, where institutions develop themselves in a normal way, in a process of evolution towards democratic consolidation, successor justice - when actually arrives - still takes long time to be totally accomplished.

This reality highlights important questions, such as whether or not justice is necessary for the existence of democracy; or, if it is possible to build democracy without previous justice. Ruti Teitel² argues that the big dilemma for successor’s justice is that decisions, regarding whether to punish or to forget, should be independent from transitory policies. But...how independent? What is the relationship between the way to deal with the past and the quality of the future democracy?

¹ Phrase characteristically repeated by the former Chilean President, Patricio Aylwin Azocar (1990-1994), pronounced for the first time during the first speech at the reopened of the Chilean Congress after the dictatorship on the 21st May 1990.

² TEITEL, (2000).

Taking into account that not all transitions lead to everlasting democracies, it is extremely important to establish whether or not there is any relationship between what is resolved about the past and the democratic future of a nation. Latin America, for instance, can proudly show more than two decades free from dictatorship; however, UNDP 2004 Report stated that, in spite that, 57% of Latin Americans preferred democracy than to any other kind of regime, although this preference, does not imply strong support. In fact, if they must choose, around 56% of the total (just 1% less) prefer economic development over democracy; and even worse, 54% of the total sample declared that they were willing to support an authoritarian government if it could solve their country's economic problems.³ Therefore, could the results of the report mean that an economically stable regime is more solid than a democratic one?

Analyzing this hard reality several questions arise, to begin with, we should start asking each other about the kind of democracies we have been building, if they are supported by such weak foundations. Perhaps the answer is as simple as: in avoiding the past, no everlasting rule of law can emerge. But the option in the real world is not as easy as it seems in the academic sphere. In fact, countries that are emerging from conflicts and crisis, at the beginning, they have a weak or a nonexistent rule of law.

In the following pages, I will try to explain my personal - perhaps pragmatic - approach to those dilemmas, beginning with the real task of addressing transitional challenges; continuing with the contested relationship between democracy and justice and the different possible answers to try to define the fairest way to justice.

§2. The Challenges of Transition

Transition is the period of foundation or re-foundation of rule of law and democratic system itself. It is this tense and difficult initial stage at the beginning of post-conflict, where democracy must try to draw the pathway over the rubbish and ties of the past, trying to root the bases of democracy 'in' and 'for' the wounded nation that has fought to obtain it.

Transitional Justice, thus, is an analysis of paradigms; an exploration of the diverse tools used by different transitional models in search of answers for the painful mistakes of the past. It is part of the 'empirical study of justice'⁴ made up of different processes searching out the truth. Including, but not limited to, punishments and reparations that arise in transition from repression or armed conflict to peace and democracy, which involves

³ UNDP (2004): p. 131-147.

⁴ ELSTER (2004)

diverse mechanisms used to fight against the legacy of the past including not only the legacy of violence but also institutional and legal legacies.

All of these common and unanswered questions, do not only serve to identify the enormous institutional change necessary for a successful transition, but also provide a sense of consistency in the comparison of the transitional moment, between jurisdictions.⁵ These challenges are present in almost all transitions, where others experiences become fundamental tools to improve future answers.

However, democracy, rule of law, peace and stability cannot be accomplished by a mere act, but through a process. Rule of law does not arise instantaneously, after the first democratic election of a nation that has lived under repression, nor does it arise immediately after a peace agreement is signed or when the groups that oppressed a society lie down arms. At that single moment, the arduous and ungrateful work begins, it will be necessary to reconstruct the nation with wounds over its body and soul; in which both, the people and institutions of the state, have been harmed. The biggest challenge for peace building processes is to give an appropriate and timely answer to past cruelties, without undermining the rising democracy or jeopardizing its possibilities of future development.⁶

Therefore, transitional challenges arise from multiple, continuous and contemporary fronts, and day after day, these challenges will imply covering or healing wounds. The task of reconstruction implies not only healing those wounded souls but also to struggle to re-establish the foundations of the society as a whole, in social, political and economic aspects and to set forth the groundwork for sustainable development. As Rama Mani has pointed out, it is necessary to have a balance between the 'positive' and the 'negative' tasks of peace building.⁷

Thus, transition takes time and has diverse phases. It is impossible to indicate in abstract the exact timing and the specific steps that transition must follow. It seems basic, however, to identify the causes of past abuses so as to take action with regard to feeble institutions, therefore, reducing possibilities that violations recur.

In general, as Mani Rama has expressed, justice is not 'uni' but 'three' dimensional.⁸ I believe that justice is, at least, three dimensional but may be multidimensional, with all the dimensions linked and all of them needing to be addressed at the same time. Actually, in my personal view, it seems possible to identify some basic target areas of justice for any

⁵ HAYNER (2002)

⁶ CROCKER (2000): p. 100.

⁷ MANI (2002a): p. 3-22.

⁸ MANI (2002b): p. 161-186.

society's reconstruction and democratization, where transitional builders must focus. Within the basic components of post-conflict transition rebuilding, we can find the dimensions of 'social', 'economical', 'democratic', 'institutional' and 'reparation' grievances that successors must deal with.

§2.1. Social and Economics Objectives

With regard to *Social* grievances, the successor must address the inequalities existing inside the society and ensure basic living conditions for all members of the nation, as well as access to clean water and food and basic conditions of health, education, labour and housing. When I speak about *Economic* objectives, I am basically talking about the necessity to break down the cycle of poverty by fomenting private investment and attracting foreign capital in order to lay the groundwork for the development of a progressively sustainable economy, which will be able to compete in the international market in conditions of equality with other democratic nations, which will be progressively less dependant on aid and subsidies; and, most importantly, handling eventual profits in a way that would benefit all members of the society.

§2.2. Democratic and Institutional Objectives

The *Democratic* objectives of transition are, mainly, to constitutionally structure the country; to adapt the legal system to a democratic regime; to re-establish civic conscience among the citizens; to institutionalize clean and free elections and hopefully to promote the existence of a civil society involved in deliberating over public matters and, at the same time; to permanently monitor and evaluate government action. The *Institutional* component of transition includes all the necessary reforms within the diverse institutions that are basic to ensure human coexistence and restore public confidence in the state authorities; the Institutional component will mainly need to have: a competent and uncorrupted police force; an independent and impartial judiciary; an adequate prison system; and capable, respected, uncorrupted and confident civil servants, able to carry on with the transitional challenges. To reach this objective, the processes of 'lustration' or 'vetting' might be needed to disqualify certain agents who remained in the institution during the transition or who have come to obtain certain positions; and of course, institutional reform will be needed.

§2.3. Reparations

Finally, as a part of the *Reparatory* task of successor's justice, it will be necessary to establish and stabilize peace and reconciliation, giving to the victims of the past regime some kind of reparation, to move beyond after past abuses. Different past experiences around the world have leave us a

variety of approaches to deal with the legacy of violence, such as in the cases where the responsible for human rights violations are brought to justice; or obtaining integral reparation for victims; reconstruction and protection of the truth and collective memory; commemoration; symbolic redress, official acknowledgment and apologies. However, all these possibilities are independent and non-excluding, therefore none of them is enough by itself; they must be achieved in a harmonic manner.

Thus, the first task of successors is to take a total 'picture' to have a general view over the real situation, not blinded by the anxiety for accountability. After determining all the necessities for transition, which each individual society must define on its own - being supported but not persuaded by external actors - including the best mechanisms to reach justice having in mind, at the same time, a long-lasting peace general objective without prejudicing said society.

In fact, inner powers and forces of society can determine the necessity to prioritize certain objectives in certain specific situations rather than others - not necessarily based upon the importance of the objectives - but according to which, said objectives, seem to be more prudent. Transition must work for the society as a whole. Dealing with past abuses and with the legacy that the abusers leave behind is an extremely political issue, so the way and opportunity to solve the violations against human rights, is a fundamental decision that must be taken at the right time, still with full conscience, after evaluating the risks and benefits that a choice can carry out to either way.

As it always is in life, none of those objectives appear and are developed in isolation; they depend upon and are affected by the other objectives, they are in permanent conflict and cannot be resolved at the same time. In fact, imposing criminal sanctions on the perpetrators of human rights violations, immediately at the beginning of transition, if the same forces responsible for the abuses maintain political, economical and social support, it will be dangerous for a weak democracy. At the same time, conferring amnesties or passing final point laws without waiting for natural processes, could deeply jeopardize society's trust in justice.

All those tasks, in consequence, have a relative character, therefore the specific factual condition of each case should be considered to determine in particular, but just for this specific case, in which of those objectives will it be more timely to focus on some exact moment.

As I previously said, there will always be doubts about whether to punish or to forget; however, if the final aim is reconciliation and the construction of a long-lasting and sustainable society, the correct manner and opportunity to solve human rights violations committed by the previous

regime is a fundamental decision that must arise from the society – not under any circumstance being imposed by external actors –⁹ and said decision must be made with total conscience and, at the same time, evaluating the risks and benefits that will come out as a result after the election.

The only certain thing is that each society has its own history and its own load within the repression and it is not possible to determine previously a normative scheme indicating exactly *what* and *when* things “should be done” by the successor – transitional justice escapes from the regulations of normal periods. In societies that experience deep political changes, concepts of Justice, Democracy and Rule of Law undergo deep changes as well. Transition is the field where, as Jon Elster has pointed out, Reason, Emotions and Interests, play out and interact as influences that are part of each particular and personal feeling of justice.¹⁰

§3. Democracy vs. Justice

As I have been explaining, there is always the necessity to prioritize in certain occasions some transitional objectives rather than others. However, it is important as well to explore if those societies, that do not prosecute and reach accountability for the perpetrators of human right violations, can be properly considered democracies. Cases such as Chile after Pinochet,¹¹ but also Spain post Franco, Germany post Second World War and even the United Kingdom dealing with Northern Ireland Troubles,¹² makes me have strong concern about whether or not Justice is part of the essence of Democracy. On the other hand, as well, even if it exceeds from the limited scope of the present analysis, cases as Angola or Burundi raise the dilemma of whether democracy is always a basic element for the construction of long lasting peace.¹³

It is clear that the regime successor’s foundational mission implies dealing with the past, but the proper way to do it is still part of the dilemmas that remain unanswered. In fact, it has always been discussed whether if the

⁹ See UNITED NATIONS SECURITY COUNCIL (2004).

¹⁰ Id. ELSTER (2004).

¹¹ For a general overview of the historical and transitional Chilean process see: SALINAS (2006): p. 99-144.

¹² For the Northern Irish troubles see: WALSH (2000); MCCRUDDEN (2004); MCEVOY & ELLISON (2003); MCEVOY & MORISON (2003); and DARBY (1995).

¹³ NEWMAN, (2004): p. 188-207. Here it is explained how in some cases even it is possible that exist a huge tension between democracy and other objectives as peace-building, reconciliation, efficient provision of public services or even economic reconstruction.

democracies that truly endanger stability are those who punish or those who forget.¹⁴

Subsequently, options will always be defined by those kinds of social forces; clearly decisions about how to manage abuses carried out in the past are not guided exclusively by ethical and moral principles. On the contrary, as Newman identify, it is 'much more about politics and trade-offs'.¹⁵ The steps that must be taken by governments and the political choices available will always depend upon the reality of the society; if the old regime still maintains some kind of power, the real capacity and impartiality of the judiciary, the availability of personnel able to carry out the policies and the access to resources for implementation.

In every situation the basic task is that the successor must be distinguished as a really new entity, different from the previous repressor. However, it is precisely the strong political pressure for justice against those that served the repressive regime and the necessity to demonstrate a difference between the old and the new government that can become strong incentives for immediate and severe sanctions against a great number of individuals. Nevertheless, if such actions are handled in an incorrect manner, they can intensify - rather than repair - the divisions within the nation.

Traditionally, justice has been associated with punishment, and during transition, the main justification to insist on punishment has been to avoid impunity. It has also been indicated that judgments allow the public to express its condemnation for the past violence and to legitimize the rule of law that is necessary for the consolidation of the future democracy; this is the so-called 'democratic justification of punishment'.¹⁶

So, in this context, it is previously necessary to clarify the meaning of the Democracy we are trying to consolidate. First of all, even up until recent decades, democracy has been promoted internationally as the real 'panacea' that is able to resolve almost all the difficulties of any society. The reality is that even a unique concept or description of democracy does not exist, mainly because traditional scholars and peace builders have been focusing on notions of procedure rather than values, so they qualify and implement democracy principally based upon electoral process.

Therefore, the attempt to search for a precise definition is permanently abandoned for the impossibility to reach consensus on all the elements of democracy, avoiding the risk, as O'Donnell has pointed out, to

¹⁴ TAPPATÁ (2003).

¹⁵ NEWMAN (2002): p. 31-50.

¹⁶ Id. TEITEL (2000): p. 28-29.

qualify as democratic ‘everything that one likes’;¹⁷ or to include, as Beehman has said, just ‘beautiful and shining’ things.¹⁸

Thus, there exist multiple and diverse meanings for democracy, some coincide in certain aspects and others are diametrically opposed, some confuse their definition with questions about whether it is democracy or not, or how well a democracy is functioning in a given regime.

Above all for Beehman, there are certain Basic Principles that should be at the centre of the notion of democracy; and those principles would serve to explain and to resolve many of the disputes about the definition of democracy. The starting point would be the democratic sphere, the sphere of collective binding decisions. If, at this level, the system of making collective decisions is subjected to the control of all of the pertinent members of the association, or all of those under their authority, considered as equals, it would be democratic. As such, then, the central principles of democracy – always and in all places – would be: Popular Control over the decision making and Political Equality.

The same author assures us that democracy is not a question of everything or nothing, but better described as a question of the grade in which Basic Principles are carried out, a judgment that is more comparative than absolutist. With different types and grades of democracy between diverse countries, always and everywhere an ongoing process, it is not a rigid event, but a process undergoing constant evolution and improvement.¹⁹ We cannot impose upon transition the additional burden of fatal time limitations and absolute formulas to obtain the objectives.

But given this uncertainty, when can we speak of democratic consolidation if it does, in theory, begin at the conclusion of the transition? For Beehman, democracy is consolidated, when we have a good reason to believe that it is capable enough of resisting pressures or commotions without abandoning the electoral process or political liberties, including those of dissidents and opponents.²⁰

As we can see, it appears that we return with this qualifying democracy only as it is related to the electoral process making neither mention of justice nor other kind of values. In effect, if a democracy is capable of resisting the aforementioned pressures, but the feeling of an important part of the population is that justice has not been done with regard to crimes of the past, could it still be consolidated? What happens in such cases as in Chile where Pinochet finally died, however, even at the time of

¹⁷ O’DONELL (2004).

¹⁸ BEEHAM (2000a).

¹⁹ Id. BEEHAM (2000a): p. 5.

²⁰ BEEHAM (2000b).

his death, nothing was done about the impunity that Pinochet gave to himself?,²¹ considering as well that the country was seen throughout the world as one of the most solid democracies in Latin America.²²

It seems as if the answer comes from the way we have been constructing, at least in Latin America, our democracies. They are just different political regime, simply diverse of authoritarianism or dictatorship because it implies some special political freedom but they do 'not resolve itself other problems of the society'.²³ Particularly in Latin America, we have been "seriously" distinguished between 'democracy' and 'rule of law', and in almost all of the cases of the Southern Cone of South America: Chile, Argentina, Uruguay, and recently – but in a different way - also Venezuela, Bolivia, Ecuador, Peru, and so on. We commonly accept that a healthy democracy does not necessarily imply other superior values such as accountability, freedom of press, freedom of thought, separation of powers, and so forth. Perhaps here is the answer as well to explain the lack of strong support for democracy by the Latin Americans that the UNDP highlights.

However, in countries that emerge from conflicts and crisis at the beginning of democratic reconstruction have a large probability of having a weak or nonexistent rule of law. Therefore, as in most of the cases there is no real possibility to reach serious accountability, each individual society has been searching the mechanisms to, at least achieve lasting peace.

In effect, many have declared that the most important ethical objective of transition is to forge a just, viable and sustainable political order. Said objective must commit governments, and its political actors, for a reform but also it requires a compromise from the whole society. Being the reconstruction the central purpose, it is not only important the past that continues resting upon the present - and can even put the future in danger - but also to consider the present political situation, to gradually, strive towards the future as the main aim.²⁴

From this last ethical – to forge a just, viable and sustainable political order - objective two other precise objectives arise: to prevent future harm and to repair the wounds left by past crimes. It is necessary that those crimes do not recur, but also, that the wounds left by said crimes are treated. Supported by these reasons, some societies have acted under the strict conviction that, to achieve the objectives of prevention and repair

²¹ CORREA (2004)

²² Id. O'DONELL (2004): p. 47.

²³ See GARRETÓN (2001).

²⁴ ZALAUQUETT (2003a).

under specific conditions, revealing the truth is sufficient condition of justice.²⁵

The prevention of future violations is always the main objective of transition. In transitional scenarios, what has been resolved in the past has special importance for the future. Transition sets forth a powerful message to the whole society; if human rights violations are really allowed in certain situations or not; this meaning will remain, for the rest of history, present in the collective memory of the nation. The reconstruction and reparation of national memory, in and of itself, is a tool for the integration of those who have been excluded, recognizing them as equals. However, the truth must, at least: a) be convincing; b) result in social repudiation; c) reinforce the value of human rights and rescue the human dignity and good reputation of victims; d) and, should not accumulate irresistible tensions for democratic stability.²⁶

Punishment can always be assumed to be the most effective tool to achieve the final objective of a viable and sustainable political order. Nevertheless, we cannot forget that the models of criminal justice have been designed to apply an existing order, not to reconstruct an order after a period of break up. In certain cases, the truth appears to be the only suitable mean to truly achieve the objectives of prevention and reparation. More importantly, truth is fundamental when there are facts of great ethical implications and those facts have been denied, and the denial of those facts was believed by a large part of the population. In Chile, for instance, the real existence of political disappearances was denied for many years. It was said that those 'despaired people' actually never existed and that were tales of badly-intentioned people who wanted to "*enlodar el honor de la patria*" (to muddy the honour of the country); worse still, during the dictatorship and beyond, the denial was believed by almost half of the population.^{27 28}

²⁵ ROHT-ARRIAZA (1999); and ZALAQUETT (2003b).

²⁶ Id. CORREA (2004).

²⁷ On Octubre 10, 1975 Sergio Diez representing the chilean government before the UN General Assembly denied expressly the existence of 153 missed chilean people. See *Informe de Derechos Humanos* ARZOBISPADO DE SANTIAGO FUNDACIÓN DOCUMENTACIÓN Y ARCHIVO VICARÍA DE LA SOLIDARIDAD (2004) and Interview RADIO COOPERATIVA 30 de marzo de 2004, available at: http://www.cooperativa.cl/p4_noticias/antialone.html?page=http://www.cooperativa.cl/p4_noticias/site/artic/20040330/pags/20040330115255.html

²⁸ On March 1st. 1975 the chilean President of the Suprem Court declared: "Chile, que no es una tierra de bárbaros como se ha dado a entender en el exterior, ya por los malos chilenos o por individuos extranjeros que obedecen a una política interesada, se ha esmerado en dar estricto cumplimiento a estos derechos. En cuanto a torturas y otras atrocidades, puedo afirmar que aquí no existen pardones y cortinas de hierro y, cualquier afirmación en contrario se debe a una

In those scenarios, Truth and Reconciliation Commissions have been used for diverse social functions, such as to give responses to the relatives of victims, and at the turn, establish the basis for political change such as reparations to combat the legacy of terror or the writing of a collective history. Said functions forming the basis for democratic consolidation. The possibility of a total recovery is highly uncertain, but combining truth with the purpose of ending violence, recognition, reparations and suitable confrontation of the structural inequalities can, at least, help to prevent the cycle to be repeated.²⁹

Additionally, due to a combination of political reasons, transitions require alternative means. It is possible to recognize cases of extremely complex power relations: like those in which the previous regime maintains important power during the new government, as the military and paramilitaries in Latin America,³⁰ in those cases it seems more recommended for success to political reforms to take place with their participation, and not excluding them from the process; or certainly because no system of criminal justice can be sufficiently effective in the sudden judgment of thousands of human rights violations and due to the fact that the successor is not able to process but a small percentage of perpetrators; or in cases where it is not clear if the personal appearance of victims will only contribute to increased pain, since the mission of the defence attorney is to discredit their testimony and to deny victims' suffering. In these cases it seems more appropriate to focus on strategies based upon the victims' needs and not based solely upon the punishment of the perpetrators.³¹

Nevertheless, this is always debatable. Common sense also suggests that the trauma is prolonged for a much greater period in the permanent absence of social support for victims and by the lack of certainty of the repentance of the perpetrators. Some observers really even believe that reconciliation, like an essentially religious principle, is unnecessary for the

prensa proselitista de ideas que no pudieron ni podrán prosperar en nuestra patria".

²⁹ Id. HAYNER (2002)

³⁰ *E.g.*, In Chile, democracy started on March, 1990; however, Pinochet maintained his place as Chief Commander of the Army and later become a non-elected member of the Senate – a privilege that he renounced in July, 2002 – due to international pressure, but until now he receives the benefits and privileges of a former Chilean President; in Argentina, even though all of the military commanders had been condemned in the trial of 1985, they were absolved by Menem in the 1990's; in Colombia, disarmament of paramilitary groups has been difficult due to the strong economic power of their supporters; in post-Fujimory Peru, judges and witness have been seriously threatened after the Truth and Reconciliation Commissions' Report.

³¹ See VAN ZYL (1999): p. 649; also *see* LLEWELLYN (1999): p. 103-107.

Rule of Law.³² Others think that it has been demonstrated that Truth and Reconciliation Commissions have even been used, in certain cases, by the abusers to avoid responsibility.³³ It seems day after day much more evident that it is dangerous to resign the perpetrators of atrocities to criminal punishment and perhaps revealing truth is not really sufficient. Thus, reconciliation must be, in a certain way, complementary with some kind of punishment.³⁴

§4. Conclusion

As we have seen, transitional challenges arise from multiple, continuous and contemporary fronts, and day after day, it will imply covering or healing wounds. The reconstruction task implies not only healing those wounded souls but to struggle to re-establish the foundations of the society as a whole, in social, political and economic aspects and to project a sustainable development.

Transition takes time. It is a huge mistake to expect the first democratic government to conclude all transitional' objectives, it is a process that must be developed jointly by all those democratic successors, in spite of their different political tendencies they must work in the common project of re-establishing rule of law. Those successors who make their decisions based exclusively upon transitory politics may create a policy situation that is extremely dangerous for the stability of the country.³⁵

However, all the experiences are different. The democratic development and its prompt or slow consolidation will depend, to a great extent, upon the particular process and origins of each transition. This is the reason why it is neither possible to describe the quality of the transitional justice from the traditional perspective of criminal justice nor it is possible to qualify the transition from a theoretical and utopian generalization of democracy.

Recent facts simply demonstrate that neither permanent nor precise answers for matters associated with transition exist. It is extremely difficult to try to define the fairest way to justice and it must be defined for and within each society, taking in consideration the real social, economic and – mainly - the political situation.

³² VERBISTKY (2005).

³³ See BBC NEWS (16 December 2005), Archbishop Desmond Tutu declares that South Africa should have prosecuted the perpetrators of the apartheid-era atrocities after unknown numbers of people who were responsible for killings, torture and other atrocities never came forward to testify and, they did not receive punishment of any kind.

³⁴ See MAGARELL & FILIPPINI (2006).

³⁵ See for example the Argentinean case on ACUÑA (1998).

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