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Paradoxes of Retribution What Central European Experiences tell about Transitional Justice in Arab Countries

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What Central European Experiences tell about Transitional Justice in Arab Countries

Klaus Bachmann¹

After 1989, when leading members of the military and communist leadership and prominent figures from Solidarity negotiated a transitional power sharing compromise, the famous Round Table, where the talks were held, became the most famous political export product of democratic Poland. Politicians and diplomats recommended „round table talks” to their counterparts in Ukraine, promoted the famous furniture to conflict parties in the former Yugoslavia and sometimes even to their partners in the European Union. Today, demand for a device, which could support peaceful transition to democracy, is higher than ever since 1989. Several Arab countries are currently undergoing transition, with Tunisia and Egypt on top of the agenda (Arieff 2011). And once again, Poland is eager to offer its competence and experience about transition. Self confident NGO activists and Human Rights campaigners argue, that Tunisians should listen to Poles, rather than to former colonial powers or US advisers. Central European can contribute a lot to democratization in Arab countries. There are lessons, Tunisians, Egyptians and maybe even Libyans and Syrians could learn from earlier transitions in Poland, former CSSR, Hungary and the Baltic countries, commentators and politicians in Warsaw claim.

Lech Walesa, Poland’s famous Noble Price winner, just came back from Tunisia, where he advised his partners, to be careful with vetting and screening, and to „analyze each case individually” – a comment based on personal rather than national experience. The

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Polish Ministry of Foreign Affairs recently announced, it would turn Tunisia into a major destination of Polish transition support in the near future.

But there is one problem.

What exactly are Arab think tankers, government advisors and former dissidents supposed to regard as the Central and Eastern European authoritative lesson from transition? What are the conclusions from Polish transition, they could possibly embrace? CEE societies, experts and politicians along with Polish media and political parties are far from being unanimous in their opinions about transition. From a West European and US perspective, transition in Central and Eastern Europe is a success-story. But this assessment mostly stems from a comparative approach, which rarely anyone in post- transition Europe would accept for himself. Transition in Europe was less violent and invoked less social and economic cost than in Latin America. The states, which emerged from the breakdown of the Soviet empire, are more stable and less prone to violent bilateral and internal conflicts, than post- colonial Africa and democratizing countries like South Africa, Argentine or Chile. The dissolution of Czechoslovakia and the Soviet Union went smoothly, compared with turmoil in Croatia, Serbia and Bosnia throughout the nineties. Even relatively few cases of failed or suspended transitions, like in Belarus and Ukraine, do not change this general positive image.

Today, it is CEE itself, that challenges this rosy view on the last 20 years. Poland and Hungary have recently seen parties rising in polls and elections, which radically call into question, whether democratization was a national achievement. They do not challenge democracy itself, but instead emphasize the social cost of transition and the allegedly remaining power of the „ancien régime”'s secret networks and stakeholders, the lack of retribution for communist perpetrators, the reluctance of the post transition political establishment to get rid of the remnants of communism and the way, resources were redistributed once communist governments had gone. What once was a success story about building a market economy out of the ruins of central planning, now is retold as a story about Poles, Czechs, Slovaks and Hungarians being pressed into neoliberal capitalism. Observers often have the impression, that former dissidents can more easily

agree on a common positive transition narrative with their former communist adversaries than with politicians, who started their careers already in democracy. When a Tunisian minister of justice asks his Polish partners, what kind of transitional justice he should apply, a chorus of diverging opinions may answer him, ranging from rejection *pur et simple* of any kind of retribution (in the name of national reconciliation) to appeals, to put “them all” behind bars (on behalf of their victims). Moral claims will merge with political considerations, legal constraints with ethic rigorism. And finally, the dissonant choir from CEE will leave it to our fictive Tunisian minister, to do, what he deems appropriate, which will be, beyond any morality and legalism, what he actually can afford to do.

Remains the question: Is there a lesson from Central and Easter European transitions? Is it distinct from democratization in Africa, Latin America and Asia? The answer is „yes, but.” And it is worth while, to consider the „but” first.

1. Transitional Justice and what it means in CEE

The quickly expanding Transitional Justice literature has somehow obfuscated, what Transitional Justice is about. Today, we have huge monographs and hundreds of journal contributions about dealing with the past, elucidating past atrocities and attempts to reconcile divided and conflicted societies. But Transitional Justice, as the name demonstrates, is primarily about transition. And transition is about transition of power, the fall of regimes, their replacement and the trials, vetting, administrative screening and punishment, that often (though not always) follow. Transitional Justice can be retributive, restorative and redistributive. Retributive justice comes as war crimes tribunals, international and internationalized criminal courts, national chambers judging perpetrators of the fallen regime and their followers and screening comitees, lustration laws and administrative (and sometimes popular) purges and lynching. Restorative justice focuses on victims, often involves amnesties as results from power sharing agreements and negotiated transitions. Redistributive justice often follows the latter, when land or money is given to victims of perpetrators and groups, which were formerly

discriminated by the „ancien régime”. The protagonists of retributive justice are war crimes tribunals. Truth and Reconciliation Commissions represent (mostly) the opposite approach. Like the South African Truth and Reconciliation Commission, they often trade truth finding and truth telling for punishment and offer perpetrators amnesty, if they reveal all their sins and apologize (Hayner 2011).

The striking paradox of CEE transitions lies in the lack of both: retribution and truth commissions. Transition in CEE was mostly negotiated (in different settings, though), but then, neither retributive, nor restorative measures were applied. Even the screening of public employees, security sector reform and the opening of secret police files to the public lasted for years, were half- hearted, tamed by sceptical courts and stopped by parties linked to the „ancien régime” (Stan 2009).

For these reasons, there are hardly any lessons to draw from retribution in CEE. In East Germany, where the judiciary and the security sector were immediately taken over by the Federal Republic of Germany, some high ranking leaders of the communist party were prosecuted, but trials against former soldiers, accused of shooting to unarmed refugees at the Berlin Wall, ended with minor verdicts. In Poland, only perpetrators from the stalinist period (during the fifties) were put on trial and sentenced. Whenever prosecutors indicted suspects from more recent periods, they clashed with a wall of silence, lack of evidence and positivist judges. Neither General Jaruzelski, nor his closest aide, General Czesław Kiszczak, ever spent a night in jail.

Paradoxically, Central and Eastern Europe neither has any experience with truth commissions. In Germany, a parliamentary committee under the auspices of former dissidents collected evidence about atrocities, torture and secret police informers, but its proceeding were too academic and its final report too voluminous (amounting to several thousands of pages) for the media and the public (Enquetekommission 1990). In Poland, a much smaller committee (called the „Rokita Commission”) investigated nearly a hundred disappearances of opposition members and delivered its findings to the public prosecutor, but then it dissolved and the findings fell into oblivion. Both bodies could be regarded as small – scale truth commissions, but neither their mandate, nor

their conduct put them on an equal foot with El Salvador's, Chile's or South Africa's commissions. Most monographs on truth commissions do not even mention them.

If there are lessons from CEE, which can be drawn by Human Rights activists, transitional governments, lawyers and the judiciary of Arab transition countries, they are not about trials, punishment and reconciliation, but about security sector reform, vetting, screening of public employees, economic transition and the opening of secret police files. These conclusions, which are largely ignored by the wider public in these countries and are seldom subject to public debate, can be divided into four sections: democratisation and institution building, security sector reform and public safety, economic transition and development and social attitudes and institutional trust. All four are somehow interconnected and it is often impossible to separate them clearly. But they provide deep insights into the risks and challenges of transition, the unintended consequences of democratization and the cost of Transitional Justice and reform. And many of them run contrary to common sense and popular assumptions.

2. Transitional Justice and Democratisation

Under conditions of transition to democracy, transitional governments always face demand for punishment of members of the „ancien régime” and its supporters. Whereas the strength of these demands may depend – as some authors argue – on the scope and intensity of repression before transition (Moran 1994), the way, the old regime was ousted (overthrown or slowly replaced, see: Huntington 1991)), the way, these demands are met by the new rulers very much depends on the stability of his rule and the power, which remnants of the fallen regime still retain (Kitschelt et al. 1999, Kieran at al. 2011). In Poland, retribution against communist perpetrators was hardly possible, since the leading communist generals remained in key positions (as ministers of defense and of the interior, and with General Jaruzelski as interim president) and the communist party held a blocking minority in the Lower House. In East Germany, the communist party was quickly ousted and its government replaced, which made large scale screening of public

employees and radical security sector reform possible. In Czechoslovakia, screening and betting started much earlier than in Poland, due to the sudden fall of the communist regime and a very short transition period.

When the power of remnants of the „ancien régime” is too strong, transitional governments may have no choice and will have to turn down public demands for retribution. When they are strong, stable and determined, they still may contemplate about the cost of large scale retribution against former rulers and their partisans. Throughout Europe, there is a strong believe, that retribution for former autocrats and punishment for their followers is a precondition of democratization. This believe is often reasoned by arguments of appropriateness, pragmatism and moral considerations at the same time. Punishing the „ancien régime” allows for a fresh start, demonstrates to the public, who was right and who was wrong, stabilizes transition by delegitimizing the old rulers and is an important element of democratic education.

All this may be true to a certain extent. But it all comes with a price. It may be true, that democratization requires (retributive) Transitional Justice, but it also works the other way round. Transitional Justice affects democratization. When supporters of the „ancien régime” are too numerous, large scale retribution may cause unintended consequences. During democratic transition, retribution is easily tamed by the rule of law. Punished perpetrators refer to the courts and the process of “purification”, “the fresh start” and “democratic education” will become besmirched by endless legal disputes, compromises and failed trials.

But when the adoption of extraordinary measures allows large scale punishment, the results may be far from the expected outcome. Perpetrators do not disappear, but they do not have common interests and objectives, as long as the state does not force them to overcome their collective action dilemmas. Large scale retribution creates strong incentives for the establishment of pressure groups and “old boys’ networks” which strive for rehabilitation, amnesty, revision of sanctions and even for revenge. After the end of Nazi occupation in the Netherlands, 200 000 suspects were arrested by the military government. They were swiftly released, amnestied and reintegrated and no “pressure group” of former collaborationists emerged (Lagrou 2000). In Belgium, were

punishment was harsher and repressions against collaborationists continued until the early fifties, the issue of “collaboration” versus “resistance” began to shape the party system, cut a deep cleavage between left, Walloon and resistant on the one hand and right wing, Flemish and collaborationist on the other hand (Huyse 1991). In post-Franco Spain, silence about the atrocities of the civil war prevailed and until now, no one was ever convicted for atrocities. The Moncloa Pact secured a slow and peaceful transition, and former elites were smoothly integrated into the new order. Neo-francoist parties remained marginal. In postwar Poland, Stalinist repression stigmatized non-communist partisans from World War II as alleged collaborationists, of whom thousands disappeared in the cellars of the secret police, were tortured and murdered. At the beginning of the sixties, a strong bottom-up movement within the communist party forced the government to rehabilitate them and the official communist veterans’ organization opened their ranks to former anticommunist underground fighters. They strengthened the nationalist wing of the party and continued to pressure the party leadership until the late eighties (Bachmann 2010).

The way, Transitional Justice is carried out, leaves a strong imprint on the emerging political system. Paradoxically, by applying large scale retribution, countries with merely any totalitarian movements before the war, provided strong incentives for the creation of post-totalitarian, undemocratic and revisionist movements after 1945. Belgium is just one example, Italy, France and the former Yugoslavia are others. By refraining from punishment, countries like the Netherlands, Spain and South Africa managed to integrate former supporters of their fallen regimes into the new order, avoided destabilizing conflicts and deep and lasting political cleavages. Their start may not be seen as fresh and untainted, but lack of retribution often comes with a reward. In Poland – opposite to the Czech Republic and East Germany – no strong and radical left wing party challenged the new political order. Until today, radical populist, anti-western and anti-capitalist opposition comes solely from the right side of the political spectrum. The post-communist party quickly “reconciled” with Human Rights, the rule of law, liberal democracy and private ownership, because these institutions guaranteed impunity much better than any radical left wing sectarian movement. Market reform,

privatization and integration into the European Union were put into question by Czech communists and the East German PDS (Party of Democratic Socialists), but never by Poland's post-communist "Alliance of the Democratic Left".

3. Transitional Justice and security sector reform

Transitional governments are often fragile. When a power sharing agreement brings them to power, they often find themselves in a coalition with representatives of the „ancien régime”. Then, they are forced to rely on civil servants, generals and police officers, whose loyalty may give reason for concern. Under such conditions, screening of public employees, large scale exchange of high ranking militaries and police generals will be very risky. But even when a transition government is powerful and uncontested, screening of its administration and deep going security sector reform may not always be an option. On the one hand purges of high ranking officers and large scale screening of rank-and-file personnel may increase credibility and public confidence in the security services, when they were deeply involved in human rights abuses and atrocities. On the other hand, security sector reform also destabilizes law enforcement agencies. This may be counterproductive for a transitional government struggling with economic reform, financial problems and new kinds of crime, which often emerge during transition. Under legalist conditions, large scale screening of policemen and military officers can lead to a legal nightmare, when screening verdicts and dismissals are challenged in court and overturned by judges, whose loyalty to the new order may also be doubtful.

Screening and security sector reform are often efficient measures for securing the continuous support of a government's followers. But they cause also high costs. Among these costs, we find a kind of vicious circle, which often emerges from the turmoil and chaos of transition. Transition, no matter if economic, political or both, often causes deep changes in citizens' every day life, thus increasing feelings of threat and insecurity. This is why awareness of crime, fear and moral panic often arise during transition, even when crime rates are relatively low and stable. Subjective insecurity undermines institutional (and sometimes interpersonal) trust and strengthens punitive, repressive

tendencies. During the years following 1989, Poland saw stable (and, compared to Western Europe, relatively low) crime rates, but the percentage of respondents, regarding their country as „dangerous”, treatment of criminals as „too lenient” and demanded the reintroduction of capital punishment, increased dramatically between 1988 and 1992. It is questionable, whether a high level of police presence in the street in general contributes to more subjective security, but it is absolutely sure, that during and after political transition, people want to see more, rather than less policemen, when they leave their appartments. Therefore a transitional government may be ill advised, to fire a large number of police officers for lack of loyalty, when there are no others available to replace them. Large scale exchanges of personel undermine efficiency, institutional memory, deprive an institution of routine and experience.

In such a situation, it may be a rational approach, just to replace some publicly known, high ranking dignitaries, who were strongly linked with the old regime. Symbolic purges may increase legitimacy, leaving efficiency untouched. Even in cases, where no „fear-repression circle” emerges, screening and large scale security sector reforms may turn out problematic. Dismissed officers never dissappear. Their specific skills and contacts will remain. Experience from Poland, GDR, Rumania and the Czech Republic show, that these skills will be quickly at the service of clandestine organisations, the secret services of other countries, private security companies and organized crime. As a result of verification measures of policemen and purges in the secret services in Poland and East Germany, the ranks of private sheriffs quickly outnumbered those of the official police. And many of these private companies offered their services not only to enterprises and the small, but rapidly increasing number of *nouveaux riches*, but also to the expanding sector of organized crime. These are the unintended consequences of large scale security sector reform under transitional conditions: flooding the mob with experts in torture, invigilation, money laundering, extortion and a deep knowledge about police procedures and secret informers may not be the appropriate way of addressing incremental threat perceptions, fear and panic of the population. Finally, sweeping with a broom through the police, secret services and the military, may cause the same effects as large scale retribution does. It increases incentives for the creation of specific pressure groups,

lobbies and sometimes even political parties, which will strive to protect the interests of their members and fight for their rehabilitation. When such lobbies occupy pivotal or veto player positions in the political system, they may even manage to undo purges, causing deep and lasting cleavages in society and politics. Evicting too many remnants of an „ancien régime” may petrify undemocratic tendencies as much, as not tackling Huntington’s *torturer problem* (Huntington 1991) at all.

4. Transitional Justice and development

A frequent claim in Transitional Justice literature stipulates a link between Transitional Justice, institution building and the development of civil society structures. According to this claim, the establishment of new institutions which promote respect for Human Rights and implement them, empower former victims, facilitate legal activism and Human Rights litigation, strengthen interpersonal and institutional trust, thus improving conditions for human and economic development (de Greiff et al. 2009). It must be admitted, that empirical evidence from social psychology studies in South Africa support these claims to a certain extend (but for primarily restorative measures, though). (Gibson 2004). A recent study about the influence of the International Criminal Tribunal for the former Yugoslavia on the development of legal activism shows some support for a link between institutions of Transitional Justice and the development of non-governmental organisations (Nettlefield 2010).

Unfortunately, other evidence indicates strongly in the opposite direction. Most European countries refrained from large scale and long lasting punishment exactly because of its detrimental effect on development. Lack of labor, the need for swift reconstruction, the requirements of reintegrating millions of displaced persons, who returned to their devastated homelands strongly contributed to the termination of prosecution, to the closure of files and the passing of amnesty laws. Where power struggles lasted for a long time (in Poland, Yugoslavia and Belgium), development suffered and the country lagged behind its neighbors. In post- communist Poland, the strength of old – boys’ networks and the strong position of the post- communist party

prevented retribution for past Human Rights abuses. Having lost political power, members of the former political, administrative and economic establishment escaped into the private sector and occupied crucial positions in private banks, foreign trade companies and consultancies. After 1945 the governments of France, Belgium and the Netherlands did not eliminate economic collaborators, because they needed their skills, contacts and knowledge for reconstruction. After 1989, members of Poland's communist nomenklatura could not be deprived of their influence, because demand for their skills and contacts were highly priced in the market economy. Actual impunity, which resulted from this unofficial and largely unintended trade-off between justice and development, resulted in social frustration, the emergence of revenge-parties, political cleavages (Grabowska 2004) and election campaigns running along a divide between parties defending "the *acquis* of 1989" and parties radically contesting this *acquis* and calling for large scale retribution of former perpetrators, "de-communisation" and the opening of secret police files to the public. However, the trade-off between justice and development secured the country a smooth economic transition, despite huge social costs.

Conclusion

Central and Eastern Europe does not offer concise lessons for Transitional Justice. There is hardly any experience with large scale retribution, and even high ranking perpetrators of the communist system were hardly ever held accountable by their successors. This is partly due to the fact, that most transitions were negotiated and accompanied by power sharing agreements, partly it stems from the strength of the „ancien régime"s' remainders. Despite the prevalence of restorative justice, no important truth commissions were installed. Large scale retribution did not take place, since it would have been detrimental for economic development.

If Arab transition countries can take lessons from CEE countries, they are about vetting, screening and security sector reform rather than punishment for perpetrators. Here, however, most cases suggest prudence to new governments. Immediate reform may

increase societal fears, trigger “fear – repression circles” and undermine the efficiency of law enforcement. They provide incentive for the creation of “old boys’ networks”, pressure groups and revenge parties and push officers of the „ancien régime” into organized crime and suspect private security companies. Discharging infamous high ranking officers and carrying out selective punishment as a kind of symbolic purification and starting signal for a “fresh and untainted start” allows society to cut off a bad past from a (potentially) bright future, but does neither harm economic development, nor undermine the stability of the political system. These are conclusions which run contrary to popular wisdom, widespread punitive tendencies and popular notions of justice. Nevertheless, in a fragile transition, pragmatism is a value in itself. A morally rigid transition can hardly be regarded as a success, when it delivers too many arguments to those, who want to reverse it.

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