

THE TOPIC OF THE ISSUE

The role of Parliamentarians in the TJ Processes

Nenad Dimitrijevic

Ok, on this particular topic I should try hard not to sound as a preacher. Or I should not sound as a football coach who is saying to basketball players how to play basketball. It is questionable whether and how I – a non-parliamentarian – can say anything useful to you – parliamentarians – about the role of parliament and its members in the process of transitional justice. What I can meaningfully offer is perhaps a couple of remarks that could serve as incentives for discussion.

In our focus is a particular sub-type of transitional societies. Besides being in transition from a non-democratic to a democratic regime, those societies face an additional exceptional burden: namely, mass crimes committed in the recent past. I will start by summarizing the role of parliament in transition in general, and in the second part of my talk I'll offer my view on the role of parliament in TJ.

Let me start by claiming the obvious: parliaments play the central role in transition to democracy.

This institution, we all know, is, at least according to our constitutions, the highest, most important, most powerful political body. This we can say on the basis of two criteria: first, parliaments are elected by the people: you, as parliamentarians, rule in the name of the people. Second, we know that parliament is the highest body through its functions: when you read constitutions of any of our countries, you see that the most important powers are assigned to the parliament. And we also know that central among those functions is law-making.

Now, both of these features of parliaments – embodiment of popular sovereignty and carrier of the most important powers – get a special meaning in times of transition. Put simply, transitional societies have to make a series of fundamental choices, and most of them are to be made by parliaments. New regime has to design a new institutional set-up, to establish the rule of law, to effectively guarantee basic rights. Political pluralism has to be introduced, the whole state apparatus has to be re-shaped to meet new tasks, far-reaching economic and social reforms have to be initiated. And you also know how difficult and sometimes controversial these demands are. For instance, you have to go through the process of privatization, but privatization is not a safe road to well-being: economic reforms lead to the collapse of many old enterprises, to mass unemployment, and so on. In other words, transition to free economy produces social injustice, which is a painful paradox. Similarly, political pluralism, multi-party system is a necessary feature of democracy, but in the transitional context it often leads to political destabilization. On top of that, all these changes more often than not have to be done in societies in which democracy was either destroyed or non-existent – the problem of political culture, political agents, population at large).

The ground for managing all those issues has to be laid down by parliamentary laws. It is difficult to make decisions, partly because it looks as if every time you manage one question, you create two new problems.

Let me add something of which you are also too well aware: while all of these transitional problems are given, there is no objective answer to them. You as members of parliament will interpret these problems in different ways, depending on your ideological or interest preferences – these preferences are set down by parties you belong to. Parliaments are not simply composed of you as individual representatives of the people – parliaments rather consist of you as political elites, and you hold different, often competing views on problems of transition. Diverse paths can be taken, and you in your parliaments will rarely agree on which path is the right one. Fair enough – this we call political pluralism. Disagreeing over issues is a feature of democratic freedom. In the communist past we had to agree to everything that the ruling party proclaimed – and it was not good.

Still, in democracy we may disagree on many things, but we must not disagree on everything. For instance, we are all – and you as political elites in particular – expected to accept democracy as the political order. And this basic agreement has actually been reached in most – if not all – of the countries in our region. Neither old communists nor extreme nationalists would say that they prefer say a dictatorship. Democracy is the beloved watchword all over the place. But we need more: we need a basic consensus on the meaning and the content of democracy. You – independent of your ideological differences, independent of different programs your parties favor – need to make two commitments: first, that you will always, regardless of whether you are in majority or in minority, respect democratic procedures: you will accept every decision made in a procedurally correct way, even if it makes you losers; second, you all will defend certain values that are in the core of democracy: liberty, equality – or

equal freedom for all -, human dignity of each and every member of society, and protection of constitutional rights of all, especially of minorities of all types. Just a small aside: many politicians in our region think that once they are democratically elected, they can do whatever they please. This of course is profoundly wrong: the ultimate criterion of democracy is not the rule of majority, but the effective protection of minority. Even if you're in minority, you must not be excluded, you must never be deprived of any right. This is the test of any working democracy.

If you look at those problems, they all have to do with the recent past: when post-communist parliaments make their first decisions after the regime change, they find themselves in a kind of peculiar position. [it looks as if – after the change – you have a huge power in your hands; you are about to design a completely new system; still, you soon come to realize that there are serious constraints you have to take into account. Whatever you intend to do – to pass new laws, to create democratic institutions, to start economic reforms, to establish system of rights – this all is conditioned by the character of the past and its legacies. As soon as we say 'we want a better future', or 'we want democracy' we realize that this 'better' future requires that we take a stance towards the recent past. And, mind you, the talk is not about the past that has become irrelevant with the regime change. What is at stake is called legacies: legacies are those elements of the past that have survived the regime change, and that are in different ways still present today. Whether transition will succeed or not depends to an important extent on how we deal with the past.

Now, this complex task of building a new democratic system acquires yet another dimension in societies whose immediate past has been marked not only by the authoritarian nature of the previous regime, but also by mass regime-sponsored crimes. Their gravest typical element is the mass murder, or the attempted annihilation of the whole groups. The victimized groups are identified, and their members are chosen to be killed, on some ideological basis - racism, nationalism, or class belonging are the most typical pre-texts. So, targeted victims are the people who are ideologically proclaimed as enemies or as less worthy human beings. Mass murder is complemented by other forms of violence. Those who are not killed, or those who are not killed yet, are denied the status of citizens, and they are forced to live in the condition of constant humiliation and fear, deprived of any security. Legal, political, social protection and provisions state normally guarantees to all of its citizens, cease to apply to targeted people. Police does not protect them, judicial system does not recognize them as equals. Their property, together with everything that comprises normalcy of their lives, is considered free to be taken or destroyed. They are often denied freedom of movement, they lose their jobs, they are denied schooling, proper social and health protection, and you name it. Those people become outcasts, living or dying at the mercy of those who named them enemies.

The claim is that transition from such an evil past may require a special response of the new regime. This is where the category of TJ is introduced. Transitional justice is a set of legal, political and social institutions and processes created and implemented during the transition to democracy. These measures can be of different kinds: legal, political, moral. Their aim is to remove the instruments, actors and consequences of massive violence from public and social life, and to contribute to the creation of a just and democratic community.

But before TJ is introduced, parliamentarians have to address one basic question: does the evil past matter? Should we cope with the past, or should we simply look forward? Should we know and act on the basis of that knowledge, should we forget, or should we move the recent past to museums and history textbooks? This is the first choice parliamentarians have to make.

If you come up with an affirmative answer to this query, then you'll have to go on, and answer additional questions. Why, for which reasons exactly, should the past be dealt with? What would be the task and aims of such a process? Does this process require separate institutions? Which strategies would be applied?

It is relatively easy to demonstrate that past injustices trouble everyone: both those who are ready to face them in their full terror, and those who deny them; they trouble both victims and members of their group, on the one hand, and perpetrators and members of their group, on the other hand; both 'ordinary people' who supported the old regime, and those morally virtuous persons who fought against it. They trouble new and old elites alike. They trouble, we know, international community as well.

Each of these actors is confronted with different challenges. As soon as we try to identify these challenges, it becomes clear that the meaning of the past is different for different agents. Victims and their descendants will typically try to preserve the memory of the evil inflicted upon them. On the other hand, many from the perpetrators' group will prefer forgetting.

I address these issues from the perspective of a state that is successor to the criminal regime. Two basic strategies can be identified: the policy of oblivion and the policy of an open and multidimensional confrontation with the past.

What are the arguments against dealing with mass crimes? Its advocates will say that democracy after a non-democratic past requires looking forward, not looking back. The demand to deal systematically – legally, morally, politically – with disturbing legacies of the past would only divert attention from really important issues. Transition would suffer. At the same time, it would open painful questions to which there are no conclusive answers: who was right, who was wrong, who's guilty, who's responsible, and so on. It is impossible to reach an agreement on this – in result, already existing difficult social, political, and ideological divisions will be only made sharper.

Besides, it can be argued that immediately after the change the people are simply not ready to face the past, and their own possible role in what happened. People are longing for normalcy, they want to bury the past, and to live their lives as peacefully as possible. Indeed, this is one of the most powerful human inclinations. If, after traumatic events of the recent past, we were now required to live with its legacies, and to take an active stance of reflection and responsibility, would it not lead to danger that individuals and the whole society simply crash if exposed to pressure of painful and disturbing memories?

An additional argument would go like this: dealing with the past would necessarily imply that some, or even large, portions of population used to act in a morally unacceptable way. Even if this suggestion were true, ex-post facto establishment of such a truth can have only devastating effects for our identities, because it would practically promote the category of collective blame, hence accusing both the collectivity of co-nationals as a whole, and each individual belonging to the collectivity. In consequence, the same people who are expected to interiorize, as democratic citizens, new moral, cultural and political values, are locked in the past, burdened with the mark of guilty subjects. Simply put, people are made hostages of detrimental past, and they are forced to carry the weight of uncontrollably spread guilt.

Hence, it may be that closing the book on the past, letting the by-gones be by-gones, is the only rational way for healing the inflicted wounds, and for creating a future in which the normal – peaceful, civilized, democratic – life would again be possible.

On the other hand, those who claim the necessity of confronting the sinister past will typically argue that without this process the preferred democratic future remains beyond reach. The argument is that with the regime change the past has not ceased to be relevant. Holocaust, Srebrenica. The consequences of the past deny the possibility of choice between forgetting and remembering: the character of their presence is such that a decision to promote a policy of forgetting would only mean promoting refusal to confront reality. Moreover, what happened is of such a nature that it must not be forgotten. The very fact that certain acts were committed and that certain kind of harm was done – that it was possible for such things to happen – requires that we deal with the past. We have to reflect upon past atrocities, and we have to condemn them. While it may be sadly true that most of those injustices cannot be amended, we who share group and communal identities with the perpetrators, have to realize that our return to civilized normalcy depends upon our readiness and capacity to recognize and acknowledge unpleasant truths and to make them guidelines of our actions.

I accept this second position: different processes of mastering the recent criminal past are necessary for democracy. Mastering the past is a process that contributes to 1) moral, political and legal disassociation from the crimes of the previous regime, 2) establishment and stabilization of a new democratic legitimacy, 3) creation of the basis for civil normality and justice after the period of barbarianism.

Between these two approaches – denial and full, non-instrumental dealing with the past – we find compromise strategies. The typical claim is that we indeed have to deal with the bad past, but that parliaments have to make a choice among different versions of justice – you should opt for justice that is suited to the specific transitional context. On this view, the pivotal question is what can be done without damaging the prospects of the stabilization of democracy: we need to ask whether a particular strategy aimed at overcoming bad legacies contributes to the desired future: dealing with the past should be limited to actions that are feasible and that support democratic cause; and – second – it should be as fast as possible, so that books on the past can be closed as soon on as possible. Why? Because standard requirements of democratic transition cannot wait: South Africa, Spain, Argentina, Rwanda, Germany or Serbia succeed or fail depending on whether they make a headway to a viable democracy or not. Thus TJ should be limited both in reach and in time. Fast trials, fast lustration, fast reparations, and then close the book on the past, and look forward.

As a possible response to such a claim, let me say the following: it is true that stabilizing democracy should be our priority; but I'm not sure that it is a right strategy to close the book on the past by claiming democratic imperatives; imagine the Serbian government saying: well, we are fully devoted to democratization of our society; we judge that keeping the issue of Srebrenica massacre on the public agenda only disrupts our transition-related efforts, and thus we leave it aside. /in truth the Serbian official strategy is even worse/ but even such a response would be deeply wrong, for it would send out the message that past injustices don't matter. And this is something nobody, under no conditions, has the right to claim.

This is not to say that we can avoid compromises. But here you can make good compromises and bad compromises. Take the Serbian case as an example of a bad compromise: war criminals, even if sent to the Hague, were sent there as heroes, hailed by both the Prime minister and the Church. The argument was that the Serbian people is sensitive, and that if we treat those accused in the Hague as criminals public unrest would occur, or whatever. I disagree: in such situations protecting war criminals helps nobody and nothing: neither democracy, nor the present government, nor the Serbian people. True, in such situations, government sometimes points to opinion polls, which could for instance say that only 15% of population supports the Hague tribunal, or that 52% sees Ratko Mladic as a war hero. But in such situations a proper response of a responsible, truth-, justice- and peace-loving political elite should not protect those accused of war crimes. It should rather demonstrate that the old regime did not protect Serbian national interests, but that it was actually engaged in a serious, massive and systematic violation of human rights. The task of democratic political elites is to unmask the old regime's ideology of 'care for the nation' was an ordinary lie; in Serbian case, it would mean to clearly demonstrate the facts about crime: Milosevic and Mladic and who not, were claiming defense of Serbian national interests; but look around, what they did; they led killing of tens of thousands of innocent people, they led destruction, and in leading such evils they pushed the whole Serbian nation into the abyss.

Shortly, I disagree with the claim that it would be counterproductive to 'open old wounds', because it this would allegedly only lead to further political destabilization. The society is already deeply divided and destabilized in the direct result of the war, of its perception, and of the political abuse of its effects. The line between the truth and lies about the past is unclear, and lies are thus easily translated into a manipulative political discourse. Instead of recognizing the true victims of the crimes, we have preserved the old narrative about the Serbian nation being the victim. This ideology of self-victimization continues to serve as repository of right-wing political options.

So, it is wrong to argue the elimination of the current regime and the establishment of procedural democratic regulations would be enough to ensure entry into normality. I simply believe that after the wars which were waged in the name of false moral aims, transition into a state of civil peace cannot be achieved only through the replacement of the governing elite and the setting up of new legal-institutional establishments. If the war was a false response to what was a falsely fabricated moral question, peace cannot be merely a political matter. This could also be formulated in a different way, as the need for a clear, radically new moral political foundation after a moral catastrophe. We cannot allow ourselves the luxury of pretending that nothing was done in the name of 'our identity'. The long-standing logic of nationalistic hysteria cannot simply be erased by replacing the rhetoric of hatred with democratic vocabulary. If it is not clearly shown what is wrong in the ideology of Milosevic's regime, democracy will be doomed to failure. Why? Simply because the liberal democratic talk of freedom, rights and the rule of law remains abstract and removed from the people. Discussion about what was done in our name yesterday will serve to create democratic normality in the future.

There is one more reason for systematic dealing with the past: it is the relationship to victims, their descendents and their community. The crime was committed against non-Serbian population, on the basis of non-belonging of victims to the Serbian ethnic group, and in the name of the Serbian ethnic group and each its member. We know that wrong was done in our name, but we have political and moral duty to make a step from private knowledge to public acknowledgement. Victims have the right to demand this from all of us, simply because the harm was done to them in the name of each of us. And here is the task for parliaments: to make public act of remorse, of apology – this is the least we owe to victims. I hold that one of the most difficult traumas of survivors of crime is the fear of living in the world in which their suffering will be forgotten, or declared irrelevant. And this is exactly what politicians are doing when propose to simply focus on democratic future.

So, what concrete institutions and strategies can parliaments design in the process of TJ? Do standard democratic institutions suffice, or some special institutional arrangements and measures, designed specifically for confronting the crime and its consequences, are required? A general answer may be clear: TJ should be special because of the character of past injustices, and their consequences. TJ has to deal with many issues, and it is to be focused on different actors: wrongdoers, collaborators, old political elites, 'ordinary people', victims.

The choice

1. criminal justice
2. political justice
3. compensatory justice
4. justice as recognition
5. justice as self-reflection

Institutions of criminal justice are criminal law and judicial system. Its processes take place in form of trials. CJ is aimed at wrongdoers, at those who committed crime and their collaborators. What kind of

role you have here? Well, the range of application of CJ depends on how you politically evaluate past events and their actors. If you as politicians say like 'this was only a legitimate defense of the nation, and Ratko Mladic is our hero', then it is highly unlikely that anything like criminal trial will take place. But, if you say the past was bad, then you will want to express the community's refusal to tolerate the bad practice established by the crime. In this view, criminal justice is an instrument of disassociation from what was bad in the past. Perpetrators will be typically brought to criminal justice. However, even this measure is marked only as typical, and not as compulsory, because in the transitional context the subject of amnesty is sometimes brought to the agenda. In LA emphasis in many countries was on heavily reducing or even abandoning criminal justice. This was the result of bargaining, in difference to say South Africa, where an attempt was made at least to reach a broad societal consensus that amnesty is a good thing, provided truth for victims is consequently carried out. In some of LA countries the search for the truth via truth commission was tried, with a different degree of success.

Political justice is the process that takes place through the legally established institution of lustration, and it normally applies to those state officials who did not commit crimes, or whose actions cannot be directly causally linked to the crimes committed. Still, if not guilty in legal terms, they nevertheless should be held politically responsible. During the old regime, they were in position to make binding decisions, to create and impose ideology of hatred. The aim of political justice is to exclude members of the old state apparatus from participating in the public life of newly established democracy.

Compensatory justice is aimed at helping to overcome injustice done to victims. In instrumental terms, we go for material compensation, in an effort to ameliorate as much as possible the present condition of victims, their families, and their group or community. As a matter of restoring justice, the victims and their group ought to receive a material compensation from the community to which perpetrators belonged.

This leads as to the feature I called justice as recognition. By addressing the victims and by acknowledging that the crimes committed in our name are unjustifiable, we give recognition to the undeserved suffering and other evils experienced by victims and their families. It is a form of recognition that encourages victims to act in public – the idea is to pave the way for their full return to the community of equals. TCs

Finally, justice as self-reflection. This is about our attitude toward crimes committed on our behalf, irrespective of our duty towards victims. It goes for an inward-oriented process, aimed at reaching a new moral and political understanding of what has happened recently. This is important because in the past majority of population developed a kind of culture of selfish tolerance of injustice. Many people behaved as if nothing wrong was taking place at all. If this remains unaddressed, it is likely that a kind of political culture of tacit affirmation of the bad past will develop. As numerous comparative empirical surveys show, the set of values developed in the previous period cannot after the change of regimes be reduced to a mere remnant of the bad past. You cannot expect those values to gradually spontaneously disappear with a dynamic proportional to the institutional reforms. If there is anything spontaneous in the status of the authoritarian set of values after the political change, it is their transformation an active illiberal political culture in a liberal context.