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Transitional Justice: Its Relevance for African Development

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Abstract:

The development of any nation depends on how justice and its relations to equality and peace are handled. Justice centres on giving each person or group of people his or her due. The three concepts-justice, equality and peace are necessary for the building of a nation. It is believed that unaddressed past legacies actually ginger conflicts and the idea of transitional justice is both backward and forward looking. Transitional justice is a notion which paves ways for social transformation and rests on the ground that societies need to confront the past and move on thereby promoting the possibilities of peace, equality, reconciliation and democracy. There is a need for the African countries to confront their past of mass violence for proper transformation. The paper examines the idea of transitional justice as a condition for development in Africa and to argue in conclusion that it promotes deliberative democracy.

1. Introduction

The idea that justice and its relations to equality and peace are paramount for national development with particular reference to Africa is not an understatement. Justice remains the bedrock and the hallmark for the development of any nation. Obviously justice and its relations to equality and peace are the problems facing African nations. How have the ethnic conflicts, political conflicts, territorial conflicts, religions conflicts and most importantly, economic conflicts being resolved in African countries? Through proper scrutiny of the causes of those conflicts, one would believe that something is wrong with the African leaders, followers and the democratic system in Africa. When justice and its relations to equality and peace are harnessed and well managed, the socio-political backwardness in the continent would be a thing of the past.

Most importantly the state is founded based on the ideals of justice, equality and peace. The stability of any state depends on how the above concepts are handled. The different African countries have encountered one form of conflict or the other. This calls for the idea of transitional justice, which is both backward and forward looking. It will deal with the divisive past of mass violence for better transformation. Transitional justice has thus become an impulse instrument within the wider peace building package which involves confronting the past to faster a culture of human rights, to reform a state institutions and re-build civil society after the occurrence of mass violence. The system of governance in Africa lacks the pragmatic approach to justice, equality and peace. A society that is just is stable in nature characterized by equality and peace. The state controls the economy properly to secure the maximum happiness being translated through equality, justice and peace. This in turn paves ways for the development of the state.

Transitional justice centres on transformation after a period of permissive human rights abuse precisely after a period by which the societies might have lacked the ideas of peace, justice and equality. Justice is a cardinal pillar for the meaningful development of any nation. It would be necessary to consider the concept of justice and transitional justice.

2. The Concept of Justice/Transitional Justice

Many people have reference to it particularly the great thinkers – political philosophers, reformers, politicians and ideologists etc. It has been a household concept on the lips of great people throughout the ages. The lofty ideals of justice have ginged many people in different countries to fight for their right and freedom.

Justice can be considered to be the equality of being impartial characterized by equality and fairness in awarding what is right and due for a person or a group of people. For this reason Socrates sees justice as an internal disposition to do the right thing. Sequence to that Aquinas considers justice on the constant and perpetual will to give everyone what is due to him or her. The main target of the principle of justice is centred on giving people whether weak or strong the required due and to demand the contribution of each on the ground of equal consideration. The determining factors are natural and conventional laws. Justice precisely is a moral virtue which has constant will to render to people their due in considering the circumstances, time and place.

There are some classical schools of thought on justice. First the social contract concept advocated by Rawls and Hobbes. This school believes that a society is just if its members mutually and freely consent to the rules or codes of the society which in turn is for the objective interest. Second the utilitarian concept advocated by Bentham and Mill. The school believes that the society is just if it guarantees the greatest happiness to the greatest number of people. Aristotle was of the view that the good is that which everything aims and the ultimate good should be self-sufficing and most advocated or desirable thing. In line with the happiness such is taking to

be the best since it is desired for its own sake and not as a means to an end. The respect concept is associated with Immanuel Kant who was of the view that in just society people must be considered and treated as ends in themselves never as a means. In a just society people are well respected no matter the level. The idea of how to deal with the past of mass violence has been an old issue. Really it centres on how best to build the nation for better development through peace. This has been adopted for conflict resolution because it is believed that unaddressed past legacies could fuel conflicts. According to Mendez, transitional justice centres on the theories and research programs that explain, justify, compare and contest specific practices of moral and social repair and the political and social movements dealing with the past, including practices such as truth commissions, trials, administrative reorganization, nation building, commemoration and reparationⁱ. The work of transitional justice is to exercise justice and provide some measure of repair in the wake of horrifying violenceⁱⁱ. In furtherance to that transitional justice is an authentic instrument that leads to social transformation and rests on the belief that societies are in need to confront past abuses in order to come to terms with the past and move on.

Historically the notion of transitional justice as a field of research and action first appeared during the “third wave” of democratization in Latin America and in Eastern Europeⁱⁱⁱ. It refers to the transition from a dictatorial or authoritarian regime towards a liberal market democracy. It was in 1992 that the body called charter 77 foundation was in Salzburg with leaders from South America, Africa, Eastern and central Europe to discuss the required way or the objective opinion of organizing the transition from a dictatorial to a democratic regime.^{iv} The collapse of such movement led to proliferation of political democratization and liberalization. Consequently, transition was a central word in both human rights and international relations. For Ruty Teitel in one of the books on the subject describes transitional justice as “a concept of justice intervening in a period of political change characterized by a juridical answer to the wrongs of past repressive regimes”^v. According to the International Centre for Transitional Justice a NewYork-based research group which works with transitional regimes, transitional justice is:

A response to systematic or widespread violations of human rights. It seeks recognition for the victims and to promote possibilities for peace, reconciliation and democracy. Transitional justice is not a special kind of justice, but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. In some case, these transformations happen suddenly; in other they may take place over decades^{vi}

Transitional justice mainly is both backward and forward looking. It centres on the notion that the successive government must build institutions that will bring justice to the past while showing their commitment to good governance in the future. For Minow justice leads to replacing violence with words and terror with fairness and finding a path between too much memory and too much forgetting^{vii}.

Transitional justice has evolved a great deal in the last two decades. On the angle of democratization and human rights, it has tended to become an important component of any liberal peace-building operation. In post conflict transitions according to Lederach efforts to confront the past are now a permanent feature^{viii}. So within the peace building package transitional justice has become a tool which centred on confronting the past to foster a culture of human rights, to reform a state’s institution and to rebuild civil society after the occurrence of mass violence. It is very interesting to note that some transitional justice efforts have been absolutely local and the transitional justice initiatives are carried out by some NGOs, regional organizations and international institutions such as the United Nations Development Program, the International Criminal Court and the World Bank. The report released by United Nation in 2004 stated that transitional justice is combined with post conflict reconstruction and the rule of law. It stated thus:

The full range of processes and mechanisms associated with a society’s attempts to come to term with a legacy of large scale past abuses in order to ensure accountability, serve justice and achieve reconciliation^{ix}.

During the post cold war, peace operations there were two main challenges; to have peace agreement that will create new political and economic institutions through proper mediation and new social norms that will transform the society and prevent the recurrence of conflict. Secondly legitimate this new transitioning political order on the ground by empowering the people and increasing local ownership over the peace process. The paramount nature of transitional justice is based on its usefulness for both these goals; by re-establishing the rule of law, it helps rebuilding the political institutions at the state level and by healing victims, promoting reconciliation and unearthing the truth about the past and helps in creating a healthy civil society.

The goals of transitional justice are based on transformation or the regeneration of a whole society. It involves political, economic, cultural, sociological and psychological transformation. Actions are on. Truth and Reconciliation Commissions, prosecutions, lustration, public access to police and government records, public apology, public memorials, reburial of victims, compensations, reparations, literary and historical writings and blanket or individual amnesty.

In a holistic approach, transitional justice combines a number of these tools and acknowledging the fact that none of the above measures will ever provide or sense of closure and adequately repair the injuries of the past. According to Jasper transitional justice remains on an optimistic answer to mass violence.^x It goes against the defeatist argument that would make genocides and mass atrocities forever unforgivable and imprescriptibly. Nothing is commensurate with the horrors of mass violence neither the judicial sentence nor an apology. For Hannah Arendt “we are unable to forgive what we cannot punish and we are unable to punish what has turned out to be unforgivable”^{xi}. For Lawrence Langer “the logic of law will never make sense of the illogic of genocide”^{xii}.

Transitional justice argues that the recognition of this fundamental disproportion should not become an excuse for fatal attitudes. Arendt again was of the view that these crimes do transcend the domain of humane affairs^{xiii} but humans can confront them. In transitional justice, the language of transitions thus optimistic and teleological and seductive. Theidon in line with that was of the view it formed a before and after narrative of change, it implies that “after” it will lead to something better^{xiv}.

Transitional justice is a discipline itself on the angle of a retribution centred approach, it has of recent moved towards a more restorative one, having less focus on the perpetrators and concentrated on relationships at the level of society with the main goal of

healing the victims. Many scholars have great interest on transitional justice, especially in the area of broadening the scope so as to include social justice development and economic distribution.^{xv} Much research trend in the transitional justice is moving towards evaluating the impact of transitional justice and developing more complementarily between global and local approaches to justices. It would be necessary to consider the various dimensions of transitional justice; Retributive, Restorative and Social dimension.

3. Retributive Dimension of Transitional Justice

The origin and foundation of transitional justice could be traced to Nuremberg a trial which is characterized by accountability, focusing on individual responsibility that took place in Germany after World War II. It was known that between 1945 and 1949 the Allies held thirteen trials, involving surviving senior Nazi officers such as Herman Goring, Joachim Von Ribbentrop, Julius streicher and Roudolf Hess. The minor actors in the Nazi Regime, like doctors, lawyers and industrialists, stood trial. The tribunal was the moment of a conceptual break that instigated the idea of transitional justice that were to be rediscovered in the 1990s. The judges that participated in the Nuremberg trials clearly defined themselves as the high moral authority and used the trials to tell a story about the past. According to Robert Kempner they are “the biggest history seminar that was ever held”^{xvi}. It was a laudable scenerio, a cinema screen was introduced into the courtroom for the first time and the prosecutor Rober Jackson used those images to confront the perpetrators with their deeds, while survivors and victims testified face to face in restoration of the lost moral order.

The holistic goal was on prevention and not vengeance. In 1945, during the opening of one of the trials Robber Jackson stated:

That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of law, is one of the most significant tributes that power has ever paid to Reason.^{xvii}

The tribunals gingered the notion of international justice with the focus on “crime against humanity” and absolute rejection of the “I was following orders” excuse the weakening of retroactivity as a defense and also the criminal responsibility of Heads of states. Despite the success, the idea developed by Nuremberg disappeared during the cold war from international practice. The achievement of the Nuremberg gave ground for the United Nations decision for the creation of an international criminal tribunal for both ex-Yugoslavia in 1993 (ICTY), Rwanda in 1995 (ICTR) and the establishment of international criminal court in 2002. In totality, those respectable institutions depend on the retributive model of transition that has its foundation from Nuremberg and guided by the following principles; ending impunity, moralizing international affairs, creating a link between peace and justice. In Nuremberg, the trials focused on larger and more ambitious purposes:

Issuing a detailed narrative of past atrocities, documenting the history for future generations, acting as a deterrent for the future, giving victims a voice strengthening the rule of law and promoting reconciliation on the ground.^{xviii}

Notwithstanding the criticisms leveled against the tribunals, one of the main legacies of the tribunals has been the development and creation of a permanent International Criminal Court. Presently the International Criminal Court (ICC) is focused with cases of ongoing conflict in Northern Uganda, the Democratic Republic of Congo, the Central African Republic and Sudan. The ICC role is to gather evidence and lead investigations in war zones. The victims have a major role, as stated by article 68(3) of the Rome Treaty:

Where the personal interests of the victims are affected, the court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the court in a manner which is not prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial.

Based on the views above, the International Criminal Court could be taken as a paramount tool of transitional justice, giving victims a voice and in a most special way helping and being aid to recover. For the UN report on transitional justice, International Criminal Justice focuses on:

Ending human rights violations and preventing their recurrence in the future, guaranteeing victims rights and their dignity, establishing the truth about the past, promoting national reconciliation, re-establishing the rule of law and building the building of a sustainable peace.^{xix}

4. Restorative Dimension of Transitional Justice

Restorative justice has the following foundational assumptions (1). The process of justice should have the participation of the victims, the offenders and their different communities (2) Crime is not primarily lawbreaking, but a conflict among individuals; it is harmful to an individual but affects the community and the perpetrator too. (3) Criminal justice should aim more at reconciling the parties and repairing the wrong rather than simply punishing the perpetrator. The goal of restorative justice is to democratize the social control of punishment by making its methods characterized by consensus and participation^{xx}. The restorative justice has been applied to small scale crimes of juvenile offenders^{xxi}. The application of it to mass atrocities in post-conflict situations, particularly via Truth and Reconciliation Commission (TRC) is of most recent. The founding moment of restorative justice is the development of the South African Truth and Reconciliation Commission, which has been the subject of a wealth of literature. Truth and Reconciliation Commissions are tools which are of transformative in nature and rest on the basic assumption that collective remembrance of the past could prevent the recurrence of violence in the future. The aims of Truth and Reconciliation Commissions are numerous:

To unearth, clarify and acknowledge past violations, to respond to victims’ needs, to create a culture of accountability and respect for the rule of law, to outline institutional responsibility and possible reforms to advance the prospects of reconciliation and reduce historical conceit over the past.^{xxii}

Two kinds of Truth and Reconciliation Commissions can be differentiated. For the South African one rests on a participatory standard, propelling reconciliation by public dialogue and collective acknowledgement. Other ones are on educational fact finding with the goal of encouraging historical interpretation and disseminating a new collective memory. According to Nagy the Truth and Reconciliation Commission in EL Salvador, East Germany and Guatemala are of the latter kind.^{xxiii}

Hayner enumerated the characteristics of those bodies; they deal with the past, they operate for up to two years and then submit reports on their findings, they investigate continued patterns of abuses and they are official bodies sanctioned by the state.^{xxiv} Truth and Reconciliation Commissions can make recommendations for broad reform of state institutions based on their findings and give genuine suggestion for reparation for the victims. Furthermore, it is a vehicle for truth telling, providing a public platform for voicing victims stories and creating a historical record of past abuses through official acknowledgement of the facts. They combine investigative, judicial, political, educational, therapeutic and even spiritual functions. According to Asmoil, they focus on healing and reparation rather than on punishment.^{xxv} Then again Allen was of the view that restorative justice is an embodiment of Truth and Reconciliations Commissions which regards the universe as an organic whole and infuses jurisprudence with concrete principles.

In South Africa, African Philosophy of Ubuntu reflected about it and emphasizes the group over the individual.^{xxvi} Mainly Truth and Reconciliation Commissions by the defenders affirm that the telling of people's stories is a necessary step to the building of their identity both as individual and as people; "Private accounts become woven together into a larger narrative about the period as a whole"^{xxvii} thereby permitting individuals to heal.^{xxviii} For Anojie Krog through TRC, the marginalized voice speaks to the public ear, the unspeakable is spoken and translated the personal story brought from the innermost of the individual to bind us a new to the collective.^{xxix}

Truth paves way for healing and Truth and Reconciliation Commissions are characterized by the therapeutic type of language. They provide a platform for victims to come together and share their memories which is taken to be very important for healing. In TRCs through testimonies, they help to establish an accurate record of a country's past and other benefits.

5. Social Dimension of Transitional Justice

The longer term aims of transitional justice like the democratization of institutions and the rebuilding of the rule of law will only have impact on the victims lives indirectly and concern their children and grand children more than themselves. What is needed of urgent is the promotion of social trust and integration as an avenue to victims healing. Due to that is often taken that materials reparations can have a direct tangible impact or effect on victims and such should be given a special position within transitional justice. It is believed that reparations are part of a broader challenge to the state's sovereignty a symbol of its accountability for past abuses. According to Verdeja, they can be defined as:

Those policies and initiatives that attempt to restore to victims their sense of dignity and moral worth and eliminate the social disparagement and economic marginalization that accompanied their targeting, with the goal of returning their status of citizens.^{xxx}

Reparations represent the dawning of a new phase in the relationship between states and the groups they have historically victimize. The so called "Van Boven Principle" set in the UN document on "The Right to Reparation for victims of Gross Violations of Human Rights and Humanitarian law"^{xxxi} distinguishes four categories of reparation, restitution, compensation, rehabilitation (medical, psychological, social and legal), satisfaction and the guarantees of non-repetition.

The main purposes of material reparations are to put an end to an unjust situation via the allocation of a monetary equivalent that is supposed to compensate for it. One benefit of reparation policies is that they are said to be morally neutral: the actualization of economic dimension is an avenue to free the relations from an overwhelming effective and moral weight. For Goerg Simmel economic exchange shifts things away from their affective signification, transforming the victim perpetrator relation into a more neutral relation of dept.^{xxxii} It helps in empowering the victims, giving a public sign of their activism and thus putting an end to the cycle of "victimness". Reparations are clear authentic proof of a state's willingness to make amends after mass violence and then to promote civic trust. In clear elaboration, reparations do achieve one of the main goals of transitional justice; inclusiveness in the sense that all citizens become part of a common political project.

The importance of reparations is organized in a more holistic manner as part of a wider transitional justice program that would also include prosecutions, truth telling and institutional reforms. Reparations embody the cost of wrong doing. In line with that Walker was of the view that they should always include a symbolic element, where the giving of compensation itself acknowledges the responsibility and sends a message about the seriousness of the wrong or the sincerity of the responsible party to make things right.^{xxxiii} Apart from monetary payments to individuals, other types of compensation include; the restitution of lost property, the building of memorials the naming of streets after victims or the revision of history books. Furthermore, the truth itself is sometimes taken to be a form of reparation: when families know where the bodies of their loved ones are buried for instance the injury may begin to repair. Official apologies are also included in the reparative paradigm, unlike material or political reparations, the goal is to promote reconciliation through words only, public acts of contrition and true repentance.

6. Transitional Justice: A Concretization of Justice, Equality and Peace for National Development

A nation that treats equals equally and unequal unequally is mainly in line with the path of peace. A just society is very necessary and important for peace. When issues are handled devoid of element of favoritism peaceful coexistence and development emerge. The combination of justice and equality give rise to peace. The ideas of lasting peace is due to the clear presence of justice and equality. The central mission of transitional justice is to ginger the realization of justice, equality and peace. Through this we can talk and consider the idea of development on the real sense of the term. A nation that is interested and clamoring for development should pay great attention on maintaining the balance between justice and equality to enhance peace. This can be properly achieved through the idea of transitional justice.

For Rodney development is the process of gradually becoming better and stronger.^{xxxiv} Likewise development according to Akinpelu may be understood as a process of changing the personality equipping it with the necessary skills, knowledge and attitudes to

conceive, design and carryout his or her self-development using the tools and facilities at his or her disposal^{xxxv}. The out come of the result of this will lead to national development and this can be guaranteed through transitional justice.

7. Conclusion

Transitional justice helps in pursuit of reconciliation and acknowledging the fact that all responses are inadequate after mass violence and we cannot expect in totality the sense of closure or completion. According to Martha Minow “closure is not possible, any closure should insult those whose lives are forever ruptured”^{xxxvi}. Many countries like Mozambique and Spain have chosen to forget for progressive move and considered as successful transitions.^{xxxvii} Transitional justice is paramount for defining what it is that must be forgotten in order for the country to move on and look forward. Having the knowledge of the past is very necessary.

Transitional justice provides the basis or the foundation for proper communication about the past and contributes to ensuring that it will not be instrumentalized by future leaders. The abandonment or the refusal to acknowledge or know the past widens the gap between victims and perpetrators. Such may ginger or reinforce the image of “otherness” which is taken as the source of violent conflicts. Precisely, unidentified and unacknowledged past injustices might only poison societies and create a new circle of violence.

The work of transitional justice involves redefining relationships, promoting public deliberation, paving ways for or healthy civil society, facilitating the healing process as well as making institution both trustworthy and effectively trusted. Reconciliation in transitional justice according to Huysse involves:

A means of finding away to live alongside former enemies – not necessarily to love them, or forgive them, or forget the past in anyway, but to coexist with them to develop the degree of cooperation necessary to share our society with them so that we all have better lives together than we have had separately.^{xxxviii}

Transitional justice would be the building of the discursive solidarity in the aftermath of mass atrocity. This idea of deliberative politics is philosophically rooted in Habermas’s rejection of the subjective paradigm which he advocated that should be replaced by an intersubjective, communicative paradigm mediated by language. So transitional justice is a part of the peace building project that would become more society building for the development of any nation and it would be of great importance for the development of African countries.

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