



Max-Planck-Institut
für ausländisches und
internationales Strafrecht

Punishment in Political Transitions: Comparing Global Experiences

Hans-Joerg Albrecht

Max Planck Institute for Foreign and International Criminal Law
<http://www.mpicc.de>



Content



- A Short Introduction: What are criminal sanctions and sentencing about?
- Two Stories of the Aftermath of Punishment
- Models of Criminal Sanctions and Sentencing Compared
- Conclusions





- What is sentencing?
 - Determination of a penalty after a finding of guilt
 - Range of criminal sanctions
 - (Sentence bargaining)

- Transaction fines etc. (imposed by the prosecutor)

- Implementation of (prison) sentences
 - high security vs open prison, semi-liberty, halfway houses, early release, parole

- Pardon, amnesty

Sentencing at the Crossroad of Powers



- Sentencing is considered a core function of the judicial power
- A broader concept of sentencing has to accommodate the proper relationship between judicial, executive and legislative powers
- Salient questions concern
 - Decision-making on prison regimes, early release and parole
 - Sentences prescribed by the legislator
 - Restrictions on pardon, amnesty





Two Stories



Story 1



- When Biljana Plavšić finally came home after being paroled from a 11 years sentence after 6 years in a Swedish prison
 - “It was a sunny autumn afternoon, and the locals treated her to a triumphal reception as she traveled from the airport to her apartment. Plavšić wore a bright smile; she received hugs and kisses from passers-by along the way, escorted by the Bosnian Serb Prime Minister himself”
 - It had been alleged that Plavšić had masterminded a policy of racial extermination and persecution in Bosnia. She had enthusiastically endorsed ethnic cleansing of Muslims and Croats, and achieved global notoriety after a 1992 photograph showed her greeting fellow war criminal Ražnatović with a kiss over the dead body of a Muslim civilian.



Story 2



- It was a nice summer day in 2012 when the ex-wife of Marc Dutroux entered a monastery in Belgium where she intended to stay after being paroled from a 30 years prison sentence
- She had served 16 years
 - She had been convicted as an accomplice to Marc Dutroux in killing 3 girls
- The Belgian Prime Minister met with the victims' families, expressed publicly his anger about early release and vowed immediate reform of parole
- Following mass protests and death threats she was placed under protection by police



Punishment, Power, and Stigma



- Punishment carries significant stigmas
- (1) Punishment is violence/force and therefore carries
 - Risk of being interpreted as illegitimate force
 - Risk of violent retaliation
 - Risk of nurturing solidarity with the offender
- (2) Punishment carries the risk of stigmatization and exclusion
 - Permanent exclusion of criminal offenders
 - Creating and enforcing Otherness
 - Labeling and subcultures (underworld)



Something Between the Extremes



- Sustainable political power must be free from the stigma of violence (and despotism)
- Sanctions and sentencing should not fuel solidarity with the perpetrator
- Punishment must be based on norms (that are perceived to be legitimate and accepted)
- Only a normative basis of punishment provides for sustainable power (and social order)
 - Codification/Democracy
 - Acceptance/Legitimacy
- Punishment and sentencing must avoid alienation of the offender (and his/her peers) from the (international) community
 - Right to rehabilitation Art. 10, 3 ICPCR



The Basic Rationale of Sentencing



- Why punish in national courts?
 - Reenforcement of the (established) normative order (general affirmative prevention) through
 - Stabilizing confidence (in face of permanent risks of rule breaking)
 - Prevention of vigilante justice (private violence)
 - » Retribution, deterrence, rehabilitation, incapacitation, reconciliation, truth-finding: Social engineering
- Why punish in international courts?
 - End of impunity?
 - Not „end of impunity“ but establishing/creating (and not reenforcing) a global normative order through criminal punishment
 - Retribution, deterrence, rehabilitation, incapacitation, reconciliation, truth-finding: Social engineering



Codification: Where Do Sentencing Rules Come From?



- Rome Statute

- International (Treaty) Law and International Customary Law
 - Nuremberg, Tokyo Courts
 - Ad Hoc International Courts

- General legal principles derived from national justice systems
 - Comparative approach



The Rome Statute and Sentencing



- Art. 77 Applicable Penalties
 - Imprisonment with a maximum of 30 years
 - No minimum established
 - Life imprisonment
 - When justified by the extreme gravity of the offence and the individual circumstances of the offender
 - Fine
 - Forfeiture
- Art. 78
 - Gravity of the offence and individual circumstances
 - Sentencing of multiple crimes: separate sentences for each crime, from which a joint sentence is established, not less than the highest (individual) sentence and not more than 30 years or life
- Art. 80
 - National systems of penalties remain applicable
- Art. 83
 - Sentencing on appeal: „If the sentence is disproportionate to the crime“



Further rules



- Preamble of the Rome Statute
 - The most serious crimes must not go unpunished
 - Putting an end to impunity and contributing to the prevention of such crimes
- Rule 145 (rules of procedure and evidence)
 - Culpability
 - Balance all relevant factors: mitigating and aggravating
 - Consider circumstances of the person and the crime
 - Inter alia: damage, harm, nature of crime, means employed, degree of participation, degree of intent etc.
 - Furthermore:
 - Diminished capacity
 - Post crime behavior: cooperation, guilty plea and compensation





- International Covenant on Civil and Political Rights (16. 12. 1966)
 - Art. 6 Right to life. The death penalty may be imposed only for the most serious crime
 - Art. 7 Nobody may be subject to torture or cruel, inhumane or humiliating punishment
 - **May not be derogated in a state of emergency**
 - Art. 9 1. Right to liberty. Nobody may be subject to arbitrary detention or arrest
 - Art. 10 1. Prisoners and detained persons must be treated in a human way and according to human dignity
 - Art. 10 §3 Rehabilitation
- UN Konvention against torture and other cruel, inhumane or humiliating treatment and punishment

Critic of National and International Sentencing



- Sentencing in international courts
 - Disparity
 - Unpredictable
 - Too lenient
 - Not achieving the goals
 - In particular: social engineering
- Sentencing in national courts
 - Disparity
 - Unpredictable
 - Too lenient
 - Not achieving the goals
 - In particular: social engineering





Models Compared



Transition Without (Criminal) Sanctions and Sentencing



- Spain, Portugal, Greece, most Eastern European countries, China, Russia
 - Rehabilitation
 - Restitution (general) in the course of re-privatization



Southafrica: Dealing With the Injustices of Apartheid



- Transition from Apartheid to a democratic society
 - Apartheid related crimes: abductions, torture, killings
- Truth and Reconciliation Commission
- Goal: Recording truth about human rights violations
 - Established on a statutory basis to investigate human rights violations 1960 – 1994
- 3 Committees
 - Humans Rights Violations Committee
 - Investigation of human rights violations
 - Reparation and Rehabilitation Committee
 - Amnesty Committee
- Tasks: Amnesty decisions, development of rehabilitation and reparation policy, victim protection program,



The Amnesty Program



- Application
- Violation of human rights
- Political objective (affiliation with one of the parties involved, Apartheid regime or ANC)
- Fault had to be admitted
- Full disclosure of all relevant facts
- Evidence disclosed not admissible in courts
- Legal consequences of amnesty
 - Amnesty decisions were binding on domestic courts
 - All pending proceedings were terminated
 - Immediate release from prison
 - Immunity against criminal and civil liability



Results



- Testimony of ca. 21000 victims
 - Ca 2000 appeared in public hearings

- 7112 applications for amnesty, refused in 5392 cases, granted in 849 cases, the rest was withdrawn

- Reparations have been paid to ca. 21000 victims

- Few criminal trials have been carried out

- A tendency to grant individual pardon



The German Model -



- 1989/1990 responses to crimes committed by military and security staff, political leaders of the former GDR
- Full criminal investigation
 - Amnesties considered but rejected
- Of particular relevance: border killings
 - Problem: retroactive application of criminal law
 - Solution: Supreme Court
 - GDR had ratified the ICCPR
 - Perpetrators should therefore be dealt with on the basis of GDR criminal law, but interpreted on the basis of the ICCPR (which does grant freedom of movement)
- Special prosecution department for economic crimes during transition



Results of Criminal Proceedings



- Ca. 75000 criminal investigations (ca. 100.000 suspects)
- Ca. 1000 indictments (1700 suspects)
 - Indictment ratio 1,4%
- Convicted and sentenced ca. 750 offenders

- „Border shootings“ 275, perversion of justice 181, voter fraud 99, abuse of prisoners 42

- Sentences
 - Ca. 20% fines, 72% suspended prison sentences (< 2 years), 8% unsuspended prison sentences



Restitution, Compensation and Rehabilitation



- Compensation for false imprisonment
- Rehabilitation in case of wrongful convictions
- Restitution in case of expropriation
 - Programs of expropriation affected many people in the former GDR
 - Decision for complete restitution
 - Lengthy process
 - Difficulties of finding and identifying the beneficiaries



Truth and Reconciliation



- Truth finding had two pillars
 - Criminal investigations and trials
 - Documentation and evaluation of the documents compiled by the former domestic intelligence service of the GDR (Staatssicherheit)
 - Ombudsman for documents of intelligence services

- No official process of reconciliation

- Special economic programs for the former GDR



Genocide in Rwanda



- Between April 1994 and June 1994 some 800000 Tutsis and politically moderate Hutu have been killed

- Ethnic conflicts between Tutsi and Hutu have been observed throughout the 20th century
 - Caused also by particular power relationships introduced by colonial powers

- Killing came to an end when Tutsi military forces ousted Hutu militia



The Aftermath of Genocide



- In a short period after the genocide some 120000 suspects had been arrested and jailed in a prison system with a maximum capacity of 40000
- The court system was almost completely destroyed
- Huge backlog of cases/worsening prison overcrowding
- In search of a solution the government decided to make use of traditional/customary justice



Transitional Justice in Rwanda: Three Pillars



- ICTR
 - Most serious cases of genocide (leaders)

- National courts
 - Serious cases of genocide

- Gacaca (traditional) courts
 - Bulk of cases



Traditional/Customary Gacaca Justice



- Gacaca: customary (traditional) justice
 - Involvement of the whole community
- Government decides to revive Gacaca justice to adjudicate cases associated with the genocide
- Law classifying crimes committed during the genocide period into 4 categories: 1) planning/leading genocide 2) intentional murder 3) assault 4) property crime
- Establishing Gacaca courts on local (category 4), district (category 3) and provincial level (category 2); category 1 crimes and rape fall under the jurisdiction of state courts



Implementation of Gacaca



- Ca. 12000 Gacaca courts
- Each court has 9 members
 - Elected by the community
- Tasks:
 - Collection of information related to genocide cases
 - Assignment of cases to case categories
 - Trial of cases (or transfer to competent court)
- Sentencing powers: up to life imprisonment



Gacaca trial



Results of Transitional Justice in Rwanda



- Cases tried and adjudicated

- ICTR
 - 54 convictions

- Domestic Rwandan criminal courts
 - Ca. 10000 trials

- Gacaca courts
 - Appr. 2 million suspects
 - Conviction rate ca. 65%



Further Characteristics



- No compensation and reparation schemes
- Truth finding
 - Tasks of Gacaca courts
 - Promoting reconciliation through giving victims an opportunity to know what happened and the offender an opportunity to confess and show remorse
- National Unity and Reconciliation Commission
 - Peace education: information programmes on Rwandan history and origins of ethnic conflicts
 - Promotion of Rwandan values and leadership training
 - Training in conflict resolution, mediation and reconciliation
 - Research on causes of ethnic conflicts in Rwanda



Transitional Justice in Argentina



- 1976 – 1983
- 2000 – 3000 killings, 20000 – 30000 disappeared, torture, detention, forced adoption
- National Commission on the Disappearance of Persons
- Criminal trials against leaders of the military junta
- Amnesty laws and general pardon
- Repeal of amnesty laws
- 2005 decision of the Supreme Court declared unconstitutional amnesty in case of crimes against humanity, murder etc.
 - Right to life necessitates effective investigation
- Some 120 military staff sentenced



Truth and Reconciliation in Sierra Leone



- Civil war: killings, mutilations, rape, child soldiers, forced labor
- 1999 peace agreement: truth and reconciliation commission and amnesty for RUF leaders
- Truth and Reconciliation Commission established
- New unrest, violence
- Call for establishing an international court to bring to justice RUF commanders
- Upon Security Council's approval the UN established the Sierra Leone Special Court (treaty based)
 - Particular issues debated: child soldiers and jurisdiction of the court, amnesty agreed in the peace accord
 - Temporal jurisdiction 1996 - 2002



Relationship Between Truth Commission and Court



- Not regulated
- Particular concern for documents produced by the Truth Commission
 - Can the Court subpoena courts or witnesses who have testified under the promise of confidentiality?
- Discussion of how to organize and regulate the relationship between Court and Truth Commission



The Colombian (emerging) Model



- Legal Framework for Peace (amendment to the constitution)
 - Ensuring as far as possible the rights of the victims to truth, justice and reparation
 - Principle of “differentiated treatment for the different armed groups operating outside of the law and also for state actors”
 - Prioritization and selection
 - Investigation and prosecution, military jurisdiction, political crime and eligibility in elections
 - Ponderacion, due consideration, praktische Konkordanz
 - Truth Commission



Particular Issues in the Colombian Case



- A focus on those with the maximum responsibility
- Treatment of security forces
- Alternative sanctions, alternatives to criminal law



Why Alternative Sanction Discussions?



- Criminal punishment carries a message
 - The actor has done wrong
 - Censure
 - Stigma (removal of civil rights), exclusion

- Criminal punishment is a zero-sum game
 - Guilty or not guilty
 - Wrong or right

- This leaves no room for negotiations/no flexibility



The Problem of Politically Motivated Violence



- Old question

- Until the beginning of the 20th century many criminal code books contained special sanctions for politically motivated offenders (in particular those who aimed at overthrowing the government)
 - No loss of civil rights
 - Incapacitating sanctions only



Alternative to Criminal Law



- Transitional period is marked by particulars which could justify creation of separate transitional law which develops sanctions which
 - Avoid the stigmatizing, censoring effects of conventional punishment
 - Allow the particular goals of transitional justice to be achieved
 - Truth, justice, security, peace

- Hybrid between court and truth commission
 - Range of sanctions aimed at reparation and security



A Typology



- Transition without criminal sanctions (justice)
 - Spain, Portugal, Greece, most Eastern European countries, China, Russia
 - Rehabilitation, Restitution (general) in the course of re-privatization
- Transitional justice based on domestic criminal law
 - Germany, Argentina
- Transitional justice based on international/domestic (customary) criminal law
 - Croatia, Serbia, Bosnia, Rwanda, Cambodia
- Transitional justice based on truth/reconciliation
 - South Africa, Sierra Leone

