Punishment in Political Transitions: Comparing Global Experiences

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- A Short Introduction: What are criminal sanctions and sentencing about?

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Sanctions and Sentencing – A Comprehensive Approach

- 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
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 Law and Sentencing

- 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 hat 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, censuring 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