

A New Paradigm of Transitional Justice

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Abstract

The main thesis of study of *Transitional Justice* is how response of State, notably the successor regime, towards demands for justice from the victims of gross violation of human rights when transformation by revolution or reformation of authoritarian government to democracy occurred. A new paradigm shows that democracy as conductor to prosecute is not the final terminal of Transitional Justice.

Keywords: *Transitional Justice, Democracy, Human Rights*

1. Introduction

Human journey in the life of the state is sometimes interpreted as an absolute power which is assumed to be able to control the variety, if possible, the whole power of other individuals. Then triggered the rise of the dictatorship and totalitarianism into a shape of government. When it came to power, the authoritarian regime without hesitation commits abuse of power in order to maintain the solidity and hegemony, especially against political opposition. Various kinds of heavy violations of human rights are committed and often justified by the manipulation of law and impunity mechanism

The dark history of the fate of the people oppressed by their own government has also degrading human dignity simply due to maintaining the power. But resistance to overthrow their government outrages, in many countries, show success. When the time authoritarian regime overthrown, the successor governments faced the question: how to manage the legacy of past crimes?

Investigation of the crime of predecessor regimes often show up in the transition from authoritarian rule towards democratic governance. This demand is not only the responsibility of the state to provide justice for the victims and their families, but it has significant implications politically and legally. Prosecutions can be a tool of political legitimacy for building people's trust in government, can support a successor and its political plans to build a democratic government. While the legal capacity, the ability of successor to prosecute perpetrators justify the involvement of the rule of law and end up the cycle of impunity that keeps protecting predecessor during his reign.

2. Transitional Justice

*Transitional Justice*¹ concept basically doesn't offer the best mechanism for settling disputes in the past for countries undergoing the process of transition of government, from the repressive towards a democratic system. But on the contrary, the Initiator of the concept of Transitional Justice learn how the state to solve it. So that this doctrine was interpreted as a study of the remarkable ways (extra-ordinary measures) which have been used by the state to face crimes against humanity in the past. Each state and transition has paradigms and different problems, which require different approaches. The point is: how the state can provide justice for the victims, who appeared in transition.

The Study of Transitional Justice collects various legal actions carried out by the successor governments in many countries. this analysis describes that most transitioning countries have the dilemma of the rule of law and legal validity. How the new government apply the law against any past state crimes, while the old regime is enjoying impunity for the legal system at the time. Even the law had legitimized all actions he has done.

Some of the successor governments choose law as a mechanism for justice for victims, means a criminal court. In the context of Transitional Justice, the courts are often seen as a moral obligation of the successor government and also pointed out that democracy must be formed based on the rule of law, to make every one equal before the law. According to Ruti G. Teitel, the other main of the aim of trial is "*to deter future crimes, either as a specific deterrent to the same criminals, or as a general deterrent for society*".² Adherence to the principles of legality and validity of the law is a complicating factor in the implementation because the purposes of the principle of legality are to enhance the certainty of the law, provide justice and fairness for the accused.³ In transition period, abnormal atrocities seem to demand abnormal measures.⁴

¹ Term of *Transitional Justice* first published by *United States Institute of Peace (USIP)*, Washington DC, USA by three books of Neil J. Kritz, *Transitional Justice: How Emerging Democracies Reckon With Former Regimes*.

² Ruti G. Teitel. 1990. *How Are The New Democracies Of The Southern Cone Dealing With The Legacy Of Past Human Rights Abuses?*

³ See Bassiouni. 1999. *Crimes Against Humanity In International Law*. p. 124

⁴ See Alexander Boraine, *A Project on Transitional Justice* (www.nyu.com).

Another choice, based on consciousness that retrospective justice is a difficult exercise and reconciliation is essential for the building of a new nation,¹ some countries chose an independent commission to seek and telling the truth. Neil J. Kritz² remind that the old guard will still have its followers, who will deny any past evil acts of which it is accused ever took place, or will suggest that they were justified by critical situation. The end of their work, they generally recommend an amnesty to the perpetrator consciously admit the mistake and as for apology.

Truth and reconciliation commission³ is based on the paradigm that democracy there must be reconciliation and in many cases, both opposition groups and government forces grossly violated human rights. Although blank amnesty irrelevant to international law, amnesty is necessary to establish the new democracy on a solid basis. Aryeh Neier⁴ said: *to indentify those responsible, and to show what they did, is to mark them with a public stigma that is a punishment in itself, and to identify the victims, and recall how they were tortured and killed, is a way of acknowledging their worth and dignity.*

3. Post Transition Dilemma (Is It A New Paradigm?)

The Study on Transitional Justice generally illustrates the choice of law and the process of resolving the case in the transition period. So it is interesting to observe how the settlement were not completed in a period of transition, and countries that have had periods of authoritarian has emerged as a democracy. This analysis departs from the desire of the Indonesian government under President Joko Widodo administration in order to establish a Truth and Reconciliation Commission⁵ in completing and fulfilling the demands of the families of victims of serious human rights violations committed during the Soeharto regime. Period elapsed with some elections and four presidential administrations. Even at this time Indonesia has been rated as the third largest democracy in the world by the United Nations Development Programme (UNDP)⁶.

There are a several of questions that must be examined starting from questions about the transition deadline. If the Transitional Justice was born and just focus on the transition from an authoritarian regime to a democratic regime, it is only logical if the time limit expired if the transitional period has formed democratic government. Generally, the main requirement is used to measure a new government can be called a democratic government have four key elements. Such as the people's sovereignty, elections are free and fair, the protection of human rights and the rule of law.

Whether after democracy embodied the doctrine of Transitional Justice ended anyway? That means, it is not relevant for successor to use extra-ordinary measures. Conversely, is the resolution of cases of gross violations of the past as a prerequisite for the formation of a democratic government?

The existing studies did not state explicitly that it qualifies as a new form of democracy or occur "renorming" rule. If the rule of law is a prerequisite for democracy, then it means putting everyone equal before the law. If a crime is not given legal verdict then occur discriminatory and impunity which violates the principle of the rule of law. It also means that it is not achieved democracy. Thus, even if a country has been able to meet other main elements of democracies, but if the factor of the rule of law is not met, then the country can not be said as a democracy. Instead, the approach that the rule of law means adhere to the principle of legality that the principle of non-retroactivity, then prosecute past cases of "legitimate" because it legitimized by "the old law" it is a violation of the principle of the rule of law. For that efforts to form a new government with more law ensure that similar violations do not recur can be categorized have to realize democracy. If this proposition is accepted then the transition is declared ended.

When the state is rated as a democracy while there are still victims of serious human rights violations in the past are demanding justice, the main question is whether the government can try to use the new law? Adherence to the rule of law closes the opportunity. But, if the government can still use extraordinary means, such as forming the Truth Commission, as the legal options offered Transitional Justice? If that is done then the proposition that democratic governance can be awakened is negated itself as a transitional government. Or other propositions that may form a new paradigm that the concept of Transitional Justice does not end in the formation

¹ John Dugard, *Retrospective Justice: International Law and the South African Model*, in A.James Mc Adams (ed.) 1997. *Transitional Justice and the Rule of Law in New Democracies*. p, 286

² Neil J.Kritz (ed.). 1995. *Transitional Justice, How Emerging Democracies Reckon With Former Regimes. Volume I, II, III*. p. xxvi

³ Some of the most popular of Truth and Reconciliation are held in South of Africa and Argentine. See Argentine National Commission on The Dissapeared. 1986. *Nunca Más*. And Hayner, Priscilla B. 1994. *Fifteenth Truth Commissions – 1974 to 1994: A Comparative Study*

⁴ Aryeh Neier. 1990. *What Should Be Done About The Guilty?* p. 34.

⁵ Indonesia's Law on the Truth and Reconciliation Commission has been canceled by the Constitutional Court because it is considered contrary to the principle of legality in the law because it applies retroactively.

⁶ UNDP's Indonesian Democracy Index, 9 July 2014. Source: <http://www.asia-pacific.undp.org/content/rbap/en/home/presscenter/articles/2014/07/09/indonesia-world-s-third-largest-democracy-goes-to-the-polls.htm>

of a democratic government, but it would be accomplished after all the problems of the past have been resolved, either through retributive justice and restorative justice. Proposition latter will give democratic legitimacy that the government can investigate past events are categorized as extraordinary crime by means of the extraordinary.

In the new paradigm, if democracy is characterized by the rule of law, the establishment of special courts or Truth Commission as a legal option should not constitute a waiver of the rule of law. Justification of the choice are put on the character of crimes committed. Generally, gross violations of human rights has stigmatized as extraordinary crime and became an international crime. Special courts can attribute legal norms in international law, instead of forming a new positive law, to satisfy the principle of legality. However, if the choice is a court of law, it is difficult to be conducted fairly and provide justice for the victims, especially if the transition process does not involve the whole apparatus of the old regime. The court often become a means of retaliation which is jeopardizing the democratic process that has been established.

But, if the state is unable or fair trial Unable organize an international crime that has *hostis humani generis* nature, then the victim can take an international judicial mechanisms. The international experience noted some ad hoc international tribunal set up to due to the state is unable or unwilling to prosecute. Indeed, for the victim attempts to realize it is very heavy because it must gain the sympathy of the international community, especially the UN Security Council. Not to mention if the country had gained the sympathy of the international community as a democratic state that is highly respected. The inability of the victim to force democratic government established to investigate past cases move victims and activists to do the people's court. Like The international people's tribunal, was held in The Hague, therefore, is a political action aimed at making the Indonesian government accountable for the alleged mass crimes it committed in 1965. Although the decision is not legally binding on the government but the people's court has tarnished democracy building.

In a study on Transitional Justice, in addition to the court, the Truth and Reconciliation Commission could be an alternative dispute resolution to preserve the democratic process that has taken place. Although international experience suggests that the choice of using the Truth Commission is a reconciliation effort to "start" to build democracy, but because this commission has been accepted as an attempt to provide justice and uncover the truth, then it should not be a problem if the established democracies do. So that the Truth Commission is not just an alternative in the transition period, but has become an alternative settlement to resolve the case of violation of the law (Restorative Justice). This extraordinary action can be taken against the extraordinary crime.

4. Conclusion

A new paradigm that complements the Transitional Justice concept is the settlement of the past problems that should not stop just because a country has established a democracy. In fact it should be added by notion of imperfect democracy of a country if the government did not resolve the case law of the past. Allowing the past and do not consider past events as a major problem for human rights stigmatize the government's inability to give a difference and neglectation can also be regarded as a "justification" for the actions and did not make a bold statement that what has happened is a mistake.

Conversely, if the past case should be settled can be expressed as a democratic regime, that government until whenever otherwise provide settlement will continue to be assessed as a transition government. So the proposition of the transition period should not be referred to as a period after the collapse of the authoritarian regime until the establishment of a democratic system, because it does not resolve the case and did not break the chain of impunity. Otherwise, it does not give justice for the victims and humanity.***

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