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The Price of Transitional Justice: A Cost-Benefit Analysis of its Mechanisms in Post-Revolution Phase

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ABSTRACT

Transitional Justice [hereinafter T.J.] in the post-revolution phase refers to the policies that aim to deal with the autocratic past-regime violations against its people to achieve accountability and democracy and promote human rights and the rule of law. To achieve these goals, the United Nations, within its Rule of Law Initiative, issued in 2010, a set of five mechanisms that work as guidelines for nations recovering from conflicts. I argue that whatever the mechanism or combination selected by a society transforming from an autocracy into democracy is, the nature of these mechanisms requires a trade-off between multiple considerations. To explain this inevitable trade-off, I go through each mechanism in detail, analyze it from both legal and economic perspectives, and then provide a basic cost-benefit analysis. I suggest that transitional justice as a constitutional arrangement requires a holistic approach in its adoption and application because this initial cost-benefit analysis cannot be standardized for all cases. I also suggest that transitional justice policies that take into account proportionality, a combination of different mechanisms, customization of the mechanisms upon the relevant case, and adopting these policies in the formality of basic or organic laws may be expected to have the most effective outcomes achieving the goals of T.J. with the least legal complications.

KEYWORDS

Transitional Justice; Revolutions; Constitutional Law; Economics; Cost-Benefit Analysis

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INTRODUCTION

Transitioning from autocratic to democratic regimes through revolutions[1] is a path full of hard choices. One of the most challenging choices that the parties to the post-revolution phase have to make is how they deal with the concept of transitional justice [hereinafter T.J.]. The United Nations [hereinafter U.N.] guidelines on T.J., which are part of its *Rule of Law Initiative,* define T.J. as "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."[2] This article focuses on violations committed by autocratic regimes against their people. Consequently, other violations that could be subject to T.J., including those in the context of national and international conflicts, colonization, or any other form of regime transformation that does not include a revolution against an autocratic regime, are beyond the limits of this article.

[1] This article defines revolution as a movement by the people that led to a regime change through abolishing the throwing the existing government. This definition is similar to the one used by many prominent scholars including Huntington, Walt, and Colgan: *see* Jeff Colgan, *Measuring Revolution*, 29 Conflict Mgmt. Peace Sci.444, 446 (2012).Consequently, all other forms of internal or external disrupts that do not 1) have a group of the state citizens as their primary component, 2) rise against an autocratic national regime, and 3) manage to change the governing regime even if temporarily, are beyond the setup of this analysis. These other forms could include rebellions that did not succeed in throwing the government, secession from the state to form a new one, civil war between different national groups, aimless popular implosion, resistance against a foreign colonizing power, or a coup d'etat by the military. The limits of this article is the analysis of the post-revolution phase in cases of revolutions against autocratic regimes that aim to democratization. There could be two scenarios of the regime change in this case: Regime collapse or rupture, and negotiated transition. However, the differentiation between these two scenarios is beyond this article's analysis. For more on the regime ending types, *see* Tricia D. Olsen et al., Transitional Justice In Balance: Comparing Processes, Weighing Efficacy 155–59 (2010).

[2] United Nations, *Guidance Note of the Secretary-General: United Nations Approaches to Transitional Justice* 2 (2010), https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf.

Let us assume that a revolution succeeded against an autocratic regime that had committed human rights violations against its people - and probably against the revolutionaries themselves. Moreover, the revolutionaries, the new-rulers (whomever they are), and the victims (who are every citizen who was directly or indirectly suffering disutility by the corrupted policies of the past-autocratic regime) share the same preferences. These preferences are achieving T.J.'s goals, i.e., accountability, justice, conciliation, and of course, the transformation into a democracy. Obviously, this is the most optimistic scenario of a post-revolution set-up that rarely applies in reality. First, both history and rational choice theory tell us that the policy-makers and the victims would have divergent preferences in most cases. Even if the policy-makers are not part of the past regime and wish to achieve a radical break with it, this does not mean they would necessarily aspire to achieve the revolution goals. The new rulers' ultimate interest would probably be to care for their self-interest rather than the social welfare and consequently try to maximize their powers and profits. Second, even when the new policy-makers have the same preferences as the victims and aspire for social welfare-enhancing policies, there would still be behavioral biases to expect from both parties emerging from the asymmetric information between them; The policy-makers are expected to possess better information about the applied laws, involved parties, and technical details than the victims (the public).

These concerns and primary dilemmas of T.J. are, however, not the topic of this research; they constitute the first-degree T.J. dilemmas. This article deals with the second-degree dilemmas, i.e., the selection among the offered T.J. mechanisms and not resorting to T.J. in the first place as a notion. It is logical to think that these first-degree dilemmas would spill over the second-degree mechanisms' selection process. This spillover can be traced in part through the analysis given to each mechanism. However, as long as these second-degree dilemmas are the core focus of this research, the author performs the following analysis under the previously mentioned assumptions to discuss the mechanisms in a specific manner away from the primary concerns referred to earlier. The argument is that even under these assumptions used to simplify the analysis setup, the tough questions hold; Which mechanisms of T.J. to adopt? Amnesties or prosecutions? Lustration or integration? Financial reparations or symbolic compensation through finding the truth?

The Guidance Note of the Secretary-General on the United Nations Approach to Transitional Justice (2010) sets five T.J. mechanisms.[3] These mechanisms are: prosecution initiatives, facilitating initiatives in respect of the right to truth, delivering reparations, institutional reform, and national consultations.[4]

This article presents a cost-benefit analysis [hereinafter C.B.A.] of each mechanism to explain the trade-off that the policy-makers need to do in the post-revolution phase. The objective of this C.B.A. is to present comprehensive guidance to the expected trade-off between social costs and benefits that each mechanism involves derived from a law and economics analysis and actual examples. Using this basic C.B.A. would then help future informed decisions by policy-makers dealing with T.J. mechanisms' selection processes by identifying the calculations' inputs, but not their outcome that depends on the case.

The main parties to the tackled post-revolution phase are: first, the past-regime members, including the high-ranked members like the president or the chief of the governing political party, and the less-ranked members like governorates or members of that party. This group's primary concern is how to keep influence on the new regime and avoid any punishing mechanisms. Their impact on the policy-making in the transitional phase differs upon the type of transformation and the second group's preferences, i.e., transitional rulers. Second, transitional rulers are the group governing the post-revolution phase. This group does not necessarily have to be the same group that started the revolution, but it is the group that has sufficient power to control the state after removing the last government. How this group weighs the costs and benefits of any T.J. mechanism depends in the first place on how far their preferences are aligned with the first or the third group. Third, the victims, who are the citizens directly or indirectly negatively impacted by the past-regime policies and violations. Among these victims, there are those supporting the revolution and those favouring the past regime.

[3] The guidelines use the terms "components" and "elements" to refer to the mechanisms of T.J. For the sake of consistency and clarity through this article, I only use one term "mechanisms" to refer to them, to not confuse the reader. The literature uses "mechanisms", "components", "elements", "policies", "tools", and "measures" alternatively. However, they are all referring to the same issue, being the processes through which T.J. is applied.

[4] Consequently, the guidelines do not include amnesties as one of the T.J. mechanisms, although both literature and practice do, *see* e.g., Carlos H Acuña & Catalina Smulovitz, *Guarding the Guardians in Argentina: Some Lessons about the Risks and Benefits of Empowering the Courts*, *in* Transitional Justice and the Rule of Law in New Democracies 93 (A. James McAdams ed., 1997); Jack Goldsmith & Stephen D. Krasner, *The limits of idealism*, 132 Daedalus, no. 1, 2003, at 47; Tom Hadden, *Punishment, Amnesty and Truth: Legal and Political Approaches*, *in* Democracy and Ethnic Conflict: Advancing Peace in Deeply Divided Societies 196 (Adrian Guelke ed., 2004); Mark J. Osiel, *Why prosecute? Critics of punishment for mass atrocity*, 22 Hum. Rts. Q. 118 (2000). ; Stephen John Stedman, *Spoiler Problems in Peace Processes*, 22 Int'l Sec., no. 2, 1997, at 5. ; Leslie Vinjamuri & Jack Snyder, *Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice*, 7 Ann. Rev. Pol. Sci. 345 (2004); Paul W. Zagorski, *Civil-Military Relations and Argentine Democracy: The Armed Forces under the Menem Government*, 20 Armed Forces Soc. 423 (1994). As this research depends on the U.N. guidelines as its reference point, it will be restricted to the five mechanisms they uphold.

However, as long as the popular revolution succeeded in throwing out the past regime, one can presume that the preferences of most of this group are affiliated with the T.J. purposes, including achieving democracy, accountability, and reconciliation, at least in the early stages of the transitional phase when the T.J. policies are still under design. As referred to earlier, this C.B.A. performs under the assumption that both the second and third groups share the same preferences of achieving T.J. goals. At first thought, at least in theory, this should ease the T.J. policy design process and minimize any principal-agent problems to a great extent. However, even under these optimal assumptions, the calculations of the selected policies/mechanisms are complicated.

My argument is that no matter what the adopted mechanism is, there will always be costs for this adoption, including the opportunity cost of adopting a different mechanism, especially since they do not adhere to the same philosophy (approach) in dealing with past crimes or future arrangements. The different entries quantification, multiplied by their probability, in each mechanism C.B.A. depends on the context these mechanisms are applied within. As a result, this quantification cannot be standardized. Consequently, although the compared costs and benefits may be constant, their weighing and the maximization of their outcome is not. This also suggests that not only holistic approaches are expected to be the most efficient in achieving T.J. goals, but in specific, the balanced approaches that combine different mechanisms are expected to promote this efficiency. By efficiency, we refer to Kaldor-hicks efficiency, which C.B.A. is based upon.[5]

Although T.J. deals with past violations, it is an *ex-ante* constitutional arrangement. First, it is a legal arrangement with a constitutional nature because it regulates the state authorities, human rights of the citizens, and institutional reforms. In some cases, this nature meets formality when T.J. laws are generated in the constitutional text or organic laws. Second, it is an *ex-ante* arrangement because it also sets rules for future institutions besides dealing with past human rights violations. This is normal in a legal arrangement in transitional times, also as Teitel puts it: "Law in transitional periods is both backward-looking and forward-looking, retrospective and prospective, continuous and discontinuous."[6] In the T.J. context, political actors are deciding under uncertainty and imperfect information on a future trade-off between the expected utility and the expected cost, in the shadow of a risk margin.

[5] A situation is considered Kaldor-hicks efficient when the economic gains of that situation exceed the economic losses to whomever they occur, *see* Cento G. Velianovski, Economic principles of law 33 (2007). This is the same rationale used to run the C.B.A.. Accordingly, in our context, a mechanism is considered efficient if the benefits out of its adoption exceed the costs of its application, even if, for instance, the benefits are all accumulated by the victims while the past-regime members incur all the costs.

[6] Ruti G. Teitel, Transitional Justice 215 (2000).

Their decisions will influence their positions in the new political order. Consequently, the options in the C.B.A. should be evaluated based on *ex-ante* efficiency.

This quantification is expected to be made using an inspired utility equation of the *Becker model*,[7] according to which. As a constitutional arrangement, T.J. is not a contract, and it does not have a third-party enforcer who would guarantee its application. The judiciary that enforces the constitution and other laws in the typical situations when the government abstains or precludes their application is themselves a party to the conflict. The courts of an authoritarian regime would most probably need institutional reform. Moreover, some judiciary members might benefit from a form of reparation and might serve as witnesses in the truth commissions. In other words, the typical enforcer of the law is here a party, either as a victim, perpetrator, or a policymaker, who has their own costs and benefits of any relevant mechanism. Consequently, T.J. policies, like other constitutional arrangements, need to be self-enforcing. A self-enforcing T.J. policy would be the one in which its benefits (*b*) exceed its costs (*c*) for the different parties, or that the costs of its absence are so high, which gives them the incentives to apply it. The rest of this article tries to present this equation's potential entries within each of the T.J. mechanisms.

The C.B.A. is a methodology that is used differently in each field. In the sphere of public policy making, there are many debates over how far we should rely on C.B.A. results and concerning their limits. This may especially be an issue when C.B.A. is applied to topics that involve considerations that are difficult – or even impossible – to be monetized.[8] This debate, however, is not the subject of this research. However, it is necessary to mention that quantifying the relevant entries in the C.B.A. presented here, and even adding to or deleting from them, is both flexible and inevitable. The given value to each entry, the kind of costs and benefits of each mechanism, and the priority of goals over other goals vary from case to case. The following provides a basic analysis that is meant to be customized through the relevant policy-makers who wish to take it as guidance.

The central research questions this article answers are: What is the economic rationale behind T.J. mechanisms? By "economic," I do not mean only the financial

[7] Becker model for criminal deterrence is a mathematical model presented by Gary Becker (1968) that treats criminals as rational actors who desire to maximize their wellbeing but through illegal means rather the legal ones. Accordingly, Becker suggests that for a criminal sanction to achieve deterrence there should be an equation that takes in account the expected gain of the crime to the perpetrator and the cost resulting of the severity and probability of punishment. For more on Becker's seminal work on crime and dealing with it as a economic concept, *see* Velianovski, *supra* note 5; Christine Jolls et al., *A Behavioral Approach to Law and Economics*, *in* Behavioral Law & Economics 1471 (Cass R. Sunstein ed., 2000); Elena Kantorowicz-Reznichenko, *Any-Where-Any-Time: Ambiguity and the Perceived Probability of Apprehension*, 84 UMKC L. Rev. 27 (2015) ; Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968).

[8] For more on the discussion over and strategies of cost-benefit analysis in the sphere of public policy, *see* Cass R. Sunstein, The Cost-Benefit Revolution (2018).

aspects, but rather the economic theory that explains the logic of these mechanisms and their necessity, including both financial and non-financial components. Moreover, what are the expected costs & benefits of each of these mechanisms, including their constitutional complexities? In doing so, the U.N. Guidelines on T.J. will be used as the model of T.J. mechanisms for their international impact and given legal value as a rule book for nations transitioning from autocracy to democracy.

The article proceeds as follows: section one presents five sub-sections, each containing the C.B.A. of the five studied mechanisms. Section two gives general notes and policy implications. The last section is the conclusion.

1. THE MECHANISMS OF TRANSITIONAL JUSTICE

The T.J. mechanisms are channels set to achieve their goals. In this section, I explain them from a legal perspective, provide for the economic intuitions behind them, as well as the challenges faced. Afterward, I give a C.B.A. for each of these mechanisms. Although this C.B.A. is inspired by both theory and case studies available on the subject, it is still a positive theoretical analysis of these mechanisms. It aims at predicting the possible costs and benefits of each mechanism, but only the empirical analysis informs us about the prevailing approaches. However, because of T.J.'s contextual nature that I have referred to earlier, the reader will notice that some arguments could work as costs and/or benefits at the same time. Moreover, some mechanisms may work negatively and positively in different cases, which was also proven by the empirical studies available so far.[9]

1.1. PROSECUTION INITIATIVES

This mechanism entails that those involved in committing the addressed crimes are to be trialed and, where appropriate, punished. The measures of these trials, according to the guidelines, are the following:

[9] *See e.g.,*Oskar N.T. Thoms, James Ron & Roland Pariss, *State-Level Effects of Transitional Justice: What Do We Know?*, 4 Int'l J. Transit. Just. 329 (2010); Roman David, *What We Know About Transitional Justice: Survey and Experimental Evidence*, 38 Pol. Psych. 151 (2017) ; Olsen et al., *supra* note 1; Geoff Dancy et al., *Behind Bars and Bargains: New Findings on Transitional Justice in Emerging Democracies*, 63 Int'l Stud. Q. 99 (2019).

- The trialed crimes include *"the serious violations of international humanitarian law and gross violations of international human rights law."*[10] The word "include" infers the meaning that these crimes can also include other crimes under national laws.

- These trials have to be undertaken according to the *international standards of fair trials.*[11] There is no single comprehensive source of international law that defines what a fair trial entails. Instead, there are different measures mentioned in regional and international instruments, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights [I.C.C.P.R], the Geneva Conventions, the African Charter on Human and Peoples Rights [A.C.H.P.R], the European Convention on Human Rights, and the American Convention on Human Rights. Amnesty International provides a practical manual on free trials provisions that have been approved either as treaty obligations binding on their parties or as part of the customary international law that reflects the international community's collective will and then binding over all its members.[12] The fair trial standards include a wide range of rights that have to be observed pre and during trials.[13] However, the rules governing these standards also acknowledge the exceptional nature of emergency cases. The first condition is that the state of emergency already and lawfully exists. *"Under international human rights treaties, a state of emergency can be declared only if there is an exceptional and grave threat to the nation, such as the use or threat of force from within or externally that threatens a state's existence or territorial integrity."*[14] Although they may vary in extent, revolutions and transitional phases are usually an emergency state by nature and law. Some treaties gave the states the right to derogate from some of these fair trial guarantees under the conditions of being temporary, necessary, and proportional. However, some of them are absolute and cannot be derogated from under any condition. These absolute rights include:[15]

  - The prohibition against torture or other cruel, inhuman, or degrading treatment or punishment;

[10] International Human Rights Law [hereinafter I.H.R.L.] and International Humanitarian Law [hereinafter I.H.L] are two different complementary branches of Public International Law. Although they have the same aim of protecting the lives and rights of humans, they differ in their origins, and scopes of application. Most significantly, while I.H.L. applies only on the armed conflicts, I.H.R.L applies at all times. *See* International Committee of the Red Cross, *What is the difference between IHL and human rights law?*, *in* International Humanitarian Law: Answers to Your Questions (2014). *See* United Nations, *supra* note 2, at 7.

[11] *Id.*

[12] Amnesty International, Fair Trial Manual 1 (2 ed. 2014), https://www.amnesty.org/en/documents/POL30/002/2014/en/.

[13] For a full review of these rights, *see id.*

[14] *Id.* at 232.

[15] *Id.* at 229–338.

- The right of people deprived of their liberty to humane treatment;
- The prohibition of enforced disappearance;
- The prohibition of arbitrary arrest or detention, including unacknowledged detention;
- The right to be recognized as a person before the law;
- The right to petition a court challenging the legality of detention;
- The right to proceedings before an independent, impartial and competent court;
- The right to a public trial, in all but exceptional cases which are warranted in the interests of justice, the requirement of clear and precise definitions of offenses and punishments;
- The prohibition of retroactive application of criminal laws (including the imposition of a heavier penalty than was applicable at the time of the crime), and the right to benefit from a lighter penalty;
- The obligation to separate people held in pre-trial detention from those who have been convicted and to treat them in line with their status as unconvicted;
- The presumption of innocence;
- The right to legal aid for those without adequate financial resources;
- The prohibition of collective punishment;
- The principle that the essential aim of punishment involving deprivation of liberty is reform and rehabilitation;
- The prohibition against double jeopardy, judicial guarantees, such as *habeas corpus*[16] and *Amparo*[17], to protect non-derogable rights;
- The right to effective judicial remedies for violations of other human rights;
- The right to compensation for individuals whose innocence is established by a final judgment, in addition to the non-derogable rights guaranteed in death penalty cases.

[16] "*Habeas Corpus*" is a Latin expression that translates into "You have the body". Legally it refers to "A writ (court order) that commands an individual or a government official who has restrained another to produce the prisoner at a designated time and place so that the court can determine the legality of custody and decide whether to order the prisoner's release" habeas corpus, West's Encyclopedia of American Law (2 ed. 2008), https://legal-dictionary.thefreedictionary.com/habeas+corpus (last visited Oct 12, 2018).

[17] "The writ of Amparo is a remedy for the protection of individual or constitutional rights, found in certain jurisdictions including Mexico, Spain, the Philippines and parts of Latin America" amparo, The World Law Dictionary Project (2017), https://www.translegal.com/legal-english-dictionary/amparo (last visited Oct 12, 2018).

- The trials should be held in a *non-discriminatory and in an objective and a timely manner*.[18]

- The *jurisdiction* over these crimes is primarily the state's responsibility, so they will need to develop the necessary capacity to perform the prosecutions according to the previous standards. However, the international community can also provide help in conducting such processes. This point entails the need for national laws that conform to International Human Rights Law [hereinafter I.H.R.L.] and International Humanitarian Law [hereinafter I.H.L.][19]

- In the same context as the previous point, the guidelines also suggest, first, that *systematic monitoring* over the judicial performance within these trials can guarantee their effectiveness and fairness. Second, that in cases where the states are *unable or unwilling* to undertake *effective investigations and prosecutions*, international hybrid criminal tribunals[20] can perform a concurrent jurisdiction.[21] The guidelines assure that in such cases, such tribunals have to give *priority consideration to their legacy in the country and their exit strategy*; how will their performance influence the treated country by the completion of the prosecution? Moreover, how can one help the national authorities to improve their capacities to contribute to bringing the alleged perpetrators to justice?[22] However, this conception of international prosecutions seems problematic in many cases. On the one hand, the crimes that the past-autocratic regime members are supposed to be prosecuted for are not always under the crimes subject to the international courts' jurisdiction according to public international law. For example, financial corruption crimes, or elections manipulation, are not considered war crimes or crimes against humanity. On the other hand, even if this point was – supposedly - solved by creating a special international court – which has no precedent for similar crimes - the main obstacle lies in considerations of the principle of national

[18] United Nations, *supra* note 2, at 7.

[19] *Id.*

[20] Hybrid international criminal tribunals are tribunals that consist of both national and international elements on both the level of subjective (applying mixed laws) and procedural (having both national and international judges) levels, *see* Sarah Williams, Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues (2012).

[21] International courts in this case work as a subsidiary jurisdiction when the national courts fail to perform their jurisdiction under the principle of universal jurisdiction, like the case for International Criminal Court for example. For more on the principle of complementarity in international law, *see* Xavier Philippe, *The principles of universal jurisdiction and complementarity: How do the two principles intermesh?*, 88 Int'l Rev. Red Cross 375 (2006). I think, however, that in case of T.J. international hybrid criminal tribunals can be less problematic than purely international courts for the reasons explained in the main texts, generally related to the past-revolution circumstances and concerns.

[22] United Nations, *supra* note 2, at 7–8.

sovereignty. Efforts by international tribunals to settle national disputes, and policies on international monitoring over the national judiciary, can be rejected based on breaching the state's national sovereignty and independence.[23] Especially since any revolution, at least in the beginning, faces accusations of conspiracy and foreign interference.

Initially, the trials and prosecutions of the past-regime members who committed violations of I.H.R.L. and/or I.H.L. may aim to correct the negative externalities caused by their crimes.[24] However, in this context, the following is noted.

- The crimes of murder, mass killing, torture, and other violence crimes, were either committed during the rule of that regime or the revolutions' incidents. The other crimes, which include political or economic corruption, were committed during the past regime rule. Consequently, the probability of collecting the legally sufficient evidence, according to the international standards of criminal procedures laws, against the direct committers or against the regime's chief leaders who gave the orders is significantly low. Either because the criminals had ample time and necessary authority to destroy the evidence, which happened, for example, in Japan after World War II,[25] and in Egypt after the 2011 revolution,[26] or

[23] *See, e.g.*,Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 Am. Univ. Int'l L. Rev. 301 (2003);Robert Cryer, *International Criminal Law vs State Sovereignty: Another Round?*, 16 Eur. J. Int'l L. 979 (2005).;Atul Bharadwaj, *International criminal court and the question of Sovereignty*, 27 Strategic Analysis 5 (2003) ; Daniel Partan & Predrag Rogic, *Sovereignty and International Criminal Justice*, 1 Int'l L: Revista Colombiana Derecho Internacional, num. 1, at 53 (2003).

[24] Externalities in microeconomics are a form of market failure that happens when a third party to a voluntary action incur either a cost (negative externalities) or a benefit (positive externalities), which creates a divergence between the privately and socially optimal equilibria. The value of the uncompensated external effects to that third party is called externalities. Internalization of externalities refers to the instruments created to induce people to take account of their actions' external effects. *See* Francesco Parisi, The Language of Law and Economics: a Dictionary 114-6 (2013). Negative externalities of crimes refer to the cost that other individuals and society as a whole suffered because of these crimes. For example, the negative externalities of torture include first, the physical, psychological, and monetary losses to the tortured person and also his family; second, the costs born by the society as a result of losing the output of a citizen and the potential benefit of other citizens who would contribute more actively to the society if it was not for fear of being tortured as well; and finally, the damage incurred by the society due to lack of the rule of law, human rights, and democracy which can be cultural, political, and also economical. In this example, and most of the other examples in the sphere of transitional justice context, these negative externalities can reach infinity if we quantify them because of the complexity of included calculations as explained in the example. For more on the negative externalities of the crime, *see also* Graham Farrell & John Roman, *Crime as pollution: proposal for market-based incentives to reduce crime externalities*, *in* Crime Reduction and the Law 135 (Stephens & Moss eds., 2006); John Roman & Graham Farrell, *Cost-Benefit Analysis for Crime Prevention: Opportunity Costs, Routine Savings and Crime Externalities*, 14 Crime Prevention STUDIES, no.1, 2002, at 53.

[25] Zachary D. Kaufman, United States Law & Policy on Transitional Justice: Principles, politics, and pragmatics (2017).

[26] *See* Watan, وطن, وثيقة المخابرات المصرية تكشف تدمير أدلة إدانة «مبارك» والداخلية نقتل المتظاهرين [The Egyptian Intelligence Document Reveals Destroying "Mubarak" and the Interior Ministry Condemnation Evidence of the Protestors Mass Killing], "Watan" , (2014) https://www.watanserb.com/2014/12/04/وثيقة-المخابرات-المصرية-تكشف-تدمير-أد/ (last visited June 29, 2020).

because of the chaotic nature of the revolution's incidents. This concern entails a high rate of error, i.e., criminals not to be punished while non-criminals may be punished. An example of the first case is a top official who misused the public resources for his private interests (rent-seeking) but could destroy all the documents that could prove so. An example of the second case could be a policeman defending his police station against violent attacks during the protests, it could be that he would never kill an innocent citizen in the usual conditions, but in the current case, he should be in a legitimate defense situation.[27] However, the probability of proving so in the middle of a chaotic, politically tensioned, and unstable security situation like a revolution,[28] could be very low. In case these difficulties led to adopting pre-decided punishment based on presumed responsibilities of the position the accused occupied without counting on the usual legal standards, this may as well result in over-deterrence for public posts holders.[29] Officials could stop doing their job duties because they are afraid of being subject to legal accountability in the heat of the moment of the aftermath of revolution and the "war" on corruption, past-regime, police violations, or whatever is targeted. This reaction can reduce the public officer's level of activity below the optimal level to social welfare while exceeding the level of care to socially disturbing levels. Such a behavior has been witnessed already in some cases and will be referred to in more detail later. In other cases, these difficulties resulted in clearing all the sentences because the authorities were unable to collect the necessary evidence, which may result in under-deterrence. The rulers of the transitional phase, the rulers of the new regime, and the public officers of these two regimes would realize that they can get away with abuses against the citizens because the probability of sanctioning them is too low due to evidence difficulties. While performing public duties, the level of care would then go lower than the optimal level for social welfare.[30] The Egyptian case, for example, witnessed the

[27] For more about the doctrine of legitimate self-defense in criminal law, *see* Boaz Sangero Boaz Sangero, Self-Defence in Criminal Law (2006).

[28] *See* Luc Huyse, *Justice After Transition: On The Choices Successor Elites Make In Dealing With The Past*, 1 Transitional Justice 337, 345 (1995).

[29] *See* Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 Colum. L. Rev. 1193, 1221 (1985). For more on the debate about over-deterrence, *see also* Keith N. Hylton, *Economics of Criminal Procedure*, *in* Oxford Handbook of Law and Economics: Public Law and Legal Institutions 325 (Francesco Parisi ed., 2017). ; Jolls et al., *supra* note 7; Richard Craswell, *Deterrence and Damages: The Multiplier Principle and Its Alternatives*, 97 Mich. L. Rev. 2185 (1999).

[30] Concepts of "optimal level of care vs. optimal level of activity" and "overdeterrence vs. underdeterrence" are borrowed from the tort law and economics literature that witnessed lengthy discussions to reach the most efficient liability rule for the social welfare. For more on these discussions, *see* Steven Shavell, Foundations of Economic Analysis of Law (2004); Michael Faure et al., Tort Law and Economics (2009).; Velianovski , *supra* note 5; Jolls et al., *supra* note 7; Craswell, *supra* note 29.

failure of many of the prosecution initiatives because of the adoption of the traditional evidence collecting methods that are not effective in the case of the T.J. process, which led to the insufficiency of the collected evidence.[31]

The difficulties of collecting the necessary evidence are maximized when we take into consideration that even in case this task is allocated to international authorities to avoid any conflict of interests, the national authorities are still involved in the process and are the primary parties who provide this evidence, because of logistic reasons.

- The difficulties in collecting evidence are not the only hardship that prosecution initiatives may face, although the T.J. literature usually overlooks it. Other legal and political obstacles include other concerns that may be present when judging the past regime because of the dispute's political nature. These concerns could include: Politicized courts,[32] the partiality of the judges,[33] the pressure of the public opinion on the judiciary,[34] sanctioning the adoption of specific political opinion, or adhering to a political party that infringes the constitutional right of freedom of opinion, speech, or association, and most importantly retroactive justice.[35]

  If the courts follow the past-regime substantial criminal laws, there is a chance that a number of the perpetrators may escape punishment because the laws were tailored to serve the goals of that regime. An example of this is the acts of the Nazis, which were lawful under the Nazi laws, or at least adopted by the then applicable legal techniques.[36] There are two broad strategies to avoid this:

  – The first and typical way includes the classic techniques adopted by the transitioning systems to finesse the long debate between the moral

[31] *See* Abdullah Khalil, 25 2011) ([The Map of Transitional Justice in Egypt Since 25 January Revolution (The Track - The Challenges - The Policies)] 440 (2017), https://books.google.de/books?id=tkihDgAAQBAJ&pg=PA1&lpg=PA1&dq= 25 source=bl&ots=l7kOfE90uE&sig=ACfU3U3B5q3acNAwOHVKi-UjPZJqRNhGXA&hl=en&sa=X&ved=2ahUKEwjjyb-u4dHqAhXR_KQKHSBjAR8Q6AEwD3oECAoQAQ#v=onepage&q= (last visited Jun 27, 2021).

[32] *See* Ellen Emilie Stensrud, *New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia*, 46 J. Peace Rsch. 5 (2009). ; *see, e.g.*, Susan Thomson, *The Darker Side of Transitional Justice: The Power Dynamics Behind Rwanda's "GACACA" Courts,* 81 J. Int'l African Inst. 373 (2011).

[33] *See* Richard Lewis Siegel, *Transitional Justice: A Decade of Debate and Experience,* 20 Hum. Rts. Q. 431 (1998). Thomson, *supra* note 32.

[34] *See* Siegel, *supra* note 33.

[35] *See* Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice,* 117 Harv. L. Rev. 761 (2004). *see, e.g.*,Marek M. Kaminski et al., *Normative and Strategic Aspects of Transitional Justice,* 50 J. Conflict Resol. 295 (2006).

[36] *See* Hans Petter Graver, Hans Petter Graver, Judges Against Justice: On Judges When the Rule of Law Is Under Attack (2014).

considerations against retroactive laws, or alternatively amnesties. Eric A. Posner & Adrian Vermeule classify these techniques into: [37]

(a) The appeal to higher pre-existing law. Either this law is the constitution, international law, or natural law.[38] Although it may be advocated that these rules, even in the absence of national law, signal the illegality of the accused's actions in breach of these legal principles, the historical application of this norm did result in genuinely controversial legal and political consequences.

(b) Taking nominal law seriously, i.e., the exact words of the laws. This methodology entails the rigid literal interpretation of the old-regime rules, which could lead in many cases to better results than its implicit goals.

(c) Interpretive statutes to the old laws. Unlike the first two techniques that courts usually practice, this technique is followed by the legislature to smooth over the conflict between retroactive laws and procedural legality. Accordingly, the legislatures may enact interpretive statutes that proclaim an understanding of the past-regime laws that, despite appearances, is different from the one these laws authorized or even allowed.[39]

(d) Retroactive extension of statutes of limitations.[40]

– The second strategy is to explicitly adopt *ex post facto* criminal legislation, which means "a law is made after the doing of the thing to which it relates."[41] This strategy initially contradicts the constitutional and international established legal principle *nullum crimen nulla poena sine lege*, which means that an act can be neither criminalized nor penalized without a pre-existing law. However, some decisions were delivered by the European Court of Human Rights addressing the cases of lustration laws against the past communist in the east European countries that approved such laws against the allegations of retroactivity. These decisions' reasoning depends basically

[37] Posner & Vermeule, *supra* note 35.

[38] The definitions and debates over what constitutes "natural law" are a subject of a voluminous legal literature. For more about its definitions and aspects, *see* Graver , *supra* note 36, at 143–151; Claus OffeClaus Offe, Varieties of Transition: The East European and East German Experience 89 (1996).

[39] An example of this technique is found in the Belgian case after World War II when the narrow scope of the treason crime in the penal code limited only to the military was widened via interpretive statues to include other forms of indirect collaboration. *See* Henry L. Mason , Henry L. Mason, The Purge of Dutch Quislings: Emergency Justice in the Netherlands 129–30 (1952).

[40] For more about these techniques, *see* Posner & Vermeule, *supra* note 35, at 791–800.

[41] William Winslow Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws,* 14 Univ. Chicago L. Rev. 539, 539 (1947).

on two pillars: First, the emphasization of the justice considerations and their contribution to the establishment of good governance. The court, in one of its decisions, explicitly stated: *"it is not a case of the retroactive application of criminal law but of an inexcusable mistake of law;"*[42] Second: that rule of law and justice considerations, and the trade-offs between them, should be interpreted and weighted in their historical, temporal and political contexts.[43]

Besides these legal concerns, the political consequences of prosecutions are also questioned. Fears of backlash by the past-regime members or supporters, especially if it was a military regime, are highly credible. The stronger and more controlling the past regime was, the wider is the range of the persons threatened with prosecutions' initiatives, the more violent is the "counter-revolution." It is like building an army against the new regime, which is still not adequately controlling the state because of the nature of the phase. Another result can be the political and social isolation of a group of society. Moreover, breaching the rule of law and free societies' principles mentioned earlier may also threaten the new democracy.[44] All of these are possible costs of prosecutions.

- As mentioned in the last point, including all the suspects in the prosecution initiatives can mean prosecuting hundreds or even thousands of people depending on every regime's government and police structure. The administrative costs of collecting the evidence and processing the trials against such a large number of accused persons will be remarkably high. These costs also include the time costs, as one of the guarantees of a fair trial is the right to appeal;[45] the prosecutions usually take years of litigation. A suggestion of selecting a limited number of perpetrators could seem problematic for equality reasons, on the one hand, and the dilemma of "whom to select" on the other. Bruce Ackerman raises these pragmatic concerns about the transitional prosecutions.[46] He argues that selecting the leading figures of the past regime will face the procedural problems of evidence since usually, their orders were implicit or unwritten. While selecting the minor figures faces the questions of liability in case they were executing

[42] Cynthia M. Horne, *International Legal Rulings on Lustration Policies in Central and Eastern Europe: Rule of Law in Historical Context*, 34 Law& Soc. Inquiry 713, 735 (2009). https://www.jstor.org/stable/pdf/40539376.pdf?refreqid=excelsior%3Ae62287ca317d373f232a93ac478af73f (last visited Jun 27, 2021).
[43] *Id.* at 734–37.
[44] *See* Huyse, *supra* note 28.
[45] Amnesty International, *supra* note 12, at 182–91.
[46] Bruce Ackerman, The Future of Liberal Revolution 69–98 (1992).

higher orders, and also causes rage against the new regime for only "haunting the small fish." However, Eric A. Posner & Adrian Vermeule reply to these arguments that this does not mean that: First, these are not typical difficulties of other organized crimes' prosecutions, and second, they do not entail that the optimal number of prosecutions should be zero.[47] In light of this debate, I think that the optimal number of prosecutions should be a result of a careful calculation of the anticipated costs and benefits of the different scenarios of the prosecuting range, which will differ from case to case. How to define and evaluate the costs and benefits for each scenario? The following cost-benefit matrix in table (1) will illustrate the entries that each C.B.A. of a prosecutions' scenario should include. This is the first step, i.e., defining. The second step is evaluating; how to put weight on these entries to solve the different equations and compare the outputs? This process would ultimately be done through national consultations. Consulting national and international experts, civil society organizations, victims' associations, and other institutions representing the pro-past regime preferences shall help each society put approximate numbers on these entries multiplied by their probability. Eventually, comparing each scenario's outcome shall help each society choose the most efficient range of prosecution. For example, legal and economic experts would help to estimate 1. the expected time and administrative costs of a scenario that includes prosecuting only the past-regime first-line members, i.e., heads of authorities and ministers, and 2. the amount of financial resources illegally accumulated by these personnel that could be restored to the state treasury and the probability of its restoration. In the meantime, national and international organizations can then advise, based on previous comparative experience, what the extent and probability of this limited range's impact are on public deterrence in the long run. This example continues for the rest of the entries and scenarios. The same strategy applies too to evaluating C.B.A.s for the other T.J. mechanisms.

- The error costs are also remarkably high. In case of false convictions, the prosecutions usually lead to either death, a huge fine, or a prison penalty. While the second could mean a non-optimal allocation of financial resources, the first and the third mean a loss of human capital. In the case of wrong acquittals, the ex-perpetrators will have space by the law, the necessary expertise, and sufficient incentives to work against the new regime. Taking into account the high probability of error, the costs in this case are multiplied.[48]

[47] Posner & Vermeule, *supra* note 35, at 800.
[48] For more about administrative and error costs, *see* Hylton, *supra* note 29.

- Back to the point of over-deterrence, the costs of mass prosecution, which means prosecuting every suspected perpetrator, as long as they somehow belonged to or served the past regime, are not only the loss of human capital or financial resources. It also may stop police officers, public employees, and even political officials from taking responsibility and doing their job duties because they are afraid of being punished. This attitude entails minimizing the level of activity far under the optimal level while pushing the level of care to be far over the optimal level in regards to social welfare.

From these notes, I do not infer that the outputs of prosecution initiatives are entirely negative. I rather argue that different measures have to be selected for different criminals and crimes and that prosecuting should not be for everyone to avoid the previously mentioned hazards.[49] Such a balance should vary from one case to another.[50] In order to reach the optimal design for each case, the policy-makers will have to make a C.B.A.

For example, let us assume that the presented case involves a revolution over a regime that had been committing severe human rights violations towards the majority of its people for long decades to the extent that this policy became inherited in the state's deep system. Consequently, the benefits of prosecutions against members of that regime, including achieving accountability for the majority of the population and deterring any possible practice of this inherited policy, are overwhelming. In this case, if the benefits could possibly either weigh or equal the costs, the policy-makers could think of controlling the costs by minimizing the scale of prosecution. For example, in this case, policy-makers may decide to prosecute only the heads of the involved authorities in these violations while choosing less costly mechanisms to deal with the lower level of criminals who constitute the more significant number. In this case, fewer prosecutions limited only to major criminals can minimize the administrative, monetary, and time costs significantly. Moreover, decreasing the number of prosecutions avoids a wide-ranged polarization in the society, and also limits the error costs that multiply each time a new accused enters the prosecution circle through complicating the cases and adding new details to them.

Table (1) sums up the previous notes in a cost-benefit matrix to indicate the weighted factors:

[49] A similar conclusion was reached by Jeremy Sarkin, *The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide*, 45 J. AFRICAN. L. 143 (2001).

[50] Customization upon the case is the same conclusion reached empirically by OLSEN ET AL., *supra* note 1.

COSTS	BENEFITS
Administrative costs	Deterrence
Time costs	Feeling of justice
Error costs	Building trust in the new regime
Incentivizing a backlash	Respecting the international legal standards
Social and political polarization and isolation	Achieving accountability
Politicizing the judiciary	Avoidance of costly direct interaction between the victim and the wrongdoers
Concerns of Unconstitutionality and Breach of Due Process Guarantees[51]	
Over or under-deterrence (depending on the adopted strategy)	

Figure 1: Table (1) Cost-Benefit Matrix of Prosecution Initiatives as a T.J. Mechanism

It should be noted, though, that the number of inputs in the matrix under the Costs and Benefits columns do not qualify to judge the weighing result. Each input of this shall have an equivalent number that refers to its weight depending on the studied case, as indicated earlier. The decision can be taken afterward by estimating the total output of this mechanism alone, on the one hand, to decide to what extent it should be applied. On the other hand, a comparison between the output of this mechanism and the other T.J. mechanisms' outputs could then lead to choosing some of them over others. This comparison can be made using models that qualify for the expected costs and benefits of every mechanism. This weighting or evaluation process cannot be constant, i.e., there cannot be a standard evaluation that will always lead to prevailing prosecutions over truth commissions, for instance, or limited prosecutions over medium-ranged prosecutions. The equation's entries as explained in the C.B.A. are probably constant in every case, but the number that shall be put on these entries to solve the equation, evaluate its output, and compare it to other potential outputs shall differ depending on the circumstances of each case. As mentioned above, this evaluation or quantifying process is to be done through multiple parties, including victims, experts, policymakers, etc.

[51] Besides the scenarios referred to earlier, the debate over the legality and constitutionality of the post-autocratic regimes is huge. *See* for example, Graver, *supra* note 35, at 144. Consequently, adopting a specific philosophy of what counts as "constitutional" will decide the weight of this cost.

Consequently, there is no way the process will not be subjective and independent of these parties' personal views. For example, some people would have a personal preference for "justice" considerations over "practical" considerations. However, the more parties are involved, and the more diverse the background they come from, the more likely this evaluation process can get closer to an accurate result that fits each given society's preferences and nature. This methodology shall also apply to weighing the other mechanisms.

1.2. FACILITATING INITIATIVES IN RESPECT OF THE RIGHT TO TRUTH

This category of mechanisms aims to assist post-conflict societies in investigating the truth behind human rights violations. This process is usually undertaken by truth commissions [hereinafter T.C.], which are "non-judicial or quasi-judicial investigative bodies, which map patterns of past violence and unearth the causes and consequences of these destructive events."[52] The mission can also be done by commissions of inquiry, or other fact-finding committees, which are similar to the truth commissions but usually operate under narrower mandates. Publishing the final results and recommendations is part of the process. Moreover, the documentation and archiving of the related evidence and materials help reveal the truth about the past, achieve the justice necessary for the transition, and keep the conflict's history.[53]

Priscilla B. Hayner gave in 1994 four primary elements for defining truth commissions: 1) they focus on the past; 2) they are not focused on a specific event but on investigating the violations of I.H.R.L. or I.H.L. over a specific period; 3) they are temporal and cease to exist by the submission of their report; 4) they are endowed with a sort of authority by their sponsor, which gives them the access to more information, protection, and impact for their report.[54] In 2011, she revisited these parameters and added a fifth element: 5) they engage broadly and directly with the affected population and gather information upon their experience.[55] In her new approach, Hayner emphasizes that what differentiates T.C. from other similar phenomena is that they intend to improve the social understanding and acceptance of the past events to influence the future, not just to resolve specific facts. The T.C.'s aim, according to

[52] United Nations, *supra* note 2, at 8.
[53] *Id.*
[54] Priscilla B. Hayner, *Fifteen Truth Commissions-1974 to 1994: A Comparative Study, in* 16 Hum. Rts. Q. 597.
[55] Priscilla B. Hayner, Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions 11–2 (2010). The other four elements were subject to marginal amendments that shall not change their nature or affect.

Hayner, is to change policies, practices, and relationships in the future in a manner that respects and honors the people who went under the past's experience.

It is argued that not only do T.C. help to find the truth behind crimes for accountability purposes, but also they give recognition to violations of the past, which is necessary to both the victims and the other sectors of the society who are pro the old regime. On the one hand, for victims, revealing the truth about the violations against them, confessing the crimes by perpetrators, and the interaction between victims and perpetrators that might also end with apologies, this whole process involved having a public voice for the victims, can have a healing effect for them.[56] On the other hand, when supporters of the past regime hear from both victims and regime-members the details and facts regarding the violations which they were subject to, this could make them understand the catalysts of the revolution and the necessity to T.J. process,[57] which mitigates their opposing behavior toward the transition process. Both these effects together not only help the society to make a clear break with the past but also to minimize the polarization between its forces and the probability of a counter-revolution. Similar reasonings motivated the formation of T.C. in many countries, getting out of violent conflict and crises, including South Africa, Haiti, Guatemala, and others.[58] However, these motivations do not necessarily turn to actual outcomes for many constraints that relate in part to the costs of T.C.s that will be explained in greater detail and to the difficulties of power-sharing in post-crisis societies generally. In the last three examples, concerns related to race biases in Guatemala, time and financial constraints, shortage of using qualified experts, limited publication of the final report in the case of South Africa, the past-regimes destroying most of the archive detailing their crimes, and the failure sometimes in formulating a clear conception of the "truth" these commissions are looking for assuming that it would be an automatic result of their mandate application, all constrained the complete achievements of these motivations.[59]

[56] Martha Minow, *The hope for healing: What can truth commissions do?*, *in* Truth v. Justice: The Morality of Truth Commissions 235 (Robert I. Rotberg and Dennis Thompon eds., 2010). ; Holly L. Guthrey, Victim Healing and Truth Commissions: Transforming Pain Through Voice in Solomon Islands and Timor-Leste (2015).

[57] Olsen et al., *supra* note 1 at 155.

[58] Audrey R. Chapman & Patrick Ball, *The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala*, 23 Hum. Rts. Q. 1 (2001). Hayner, *supra* note 54.

[59] Chapman and Ball, *supra* note 58.

The economic rationale of the truth commissions and other truth revealing mechanisms is divided into four main directions:

1. T.C.s signal the acknowledgment of the victims' losses, the criminals' accountability, and the commitment to human rights and the rule of law to all the parties of the transitional phase: the victims, the past regime, the new regime, and the judicial authorities.

2. The truth commissions can have a minimizing effect on the polarization in the society between the supporters and oppositions to revolutions, and also the bystanders. When victims speak up about the violations they have been subject to, this gives a forum within which the other parties can, for the first time, acknowledge the victims' stories and their rights.[60] Consequently, through T.C., society can have a clean break with its past.

3. In case the truth commissions precede the prosecutions, they minimize the information costs for conducting these trials. This advantage also applies to institutional reforms as they give clear information about the past system, the mechanisms were used to achieve its hostile policies, and the personnel involved in these policies.

4. In case amnesties are given to the witnesses or perpetrators who give aid to these commissions, under the condition that they are not accused of gross human rights violations, this will influence the whole T.J. process in different ways. First, it will minimize both the error and administrative costs of the prosecution thanks to the information and cooperation they will provide; Second, it will incentivize the allies of the past regime and its supporters to shift positions and take the side of the new regime as they see that they can have a place in this new regime if they cooperate with it. To maximize this influence, though, amnesties' payoffs need to be guaranteed even for perpetrators who did not give information until a late stage, so they do not abstain from positively responding to such initiative even if they resisted in the beginning due to low trust levels.

[60] Olsen et al., *supra* note 1 at 155.

However, the truth commissions also have constraints that may limit their success. Priscilla B. Hayner lists these constraints,[61] and they include:

1. The mandate: The way these commissions are called for and formed is problematic. Because of the fragile political context and the time constraints, they are usually not formed through a sufficient public debate, discussion, or referendum, which contradicts many human rights advocations.[62] This reflects a principal-agent problem[63] between the public and the policy-makers who run these commissions, where the information between the two parties is always asymmetric, and their preferences might align or not. This situation may lead to various consequences. Among these possibilities, there could be paternalistic behavior by the policy-makers that ignore the people's desires or expectations because the firsts see them as irrational or inefficient. There also could be a rent-seeking behavior of the policy-makers that disregard the original T.J. goals and abuse the people's ignorance of the sophisticated details or techniques of the mandate to achieve personal or elite payoffs. Another scenario could be heavy pressure from the public opinion to eliminate any form of amnesties even if the process could not be completed without an incentive for past perpetrators to cooperate. The possibilities go on.

2. The political constraints: Despite what has been referred to in the benefits of the truth commissions as a minimizer of the polarization in the society between pro and against past-regime sides, the later reveal of the truth can also work in the opposite direction. There is a risk that revealing the crimes heats the hatred against the members of that regime and, consequently, makes integrating them into the new regime more difficult. The answer to the question in which direction this mechanism will work can only be given through future empirical studies. The political constraints may also include the desire to preserve the image of some of the perpetrators mentioned in these investigations. In this case, the policy-makers' payoffs from keeping at least part of the truth hidden are higher than the payoffs of signaling the new regime's control to the past one.

3. Restricted access to information: Some of the information needed for T.C.s to achieve their goals may be sensitive to national security, destroyed by competent persons, or blocked because of a conflict of interests. In any case, information costs can be too high.

[61] Hayner, *supra* note 53.
[62] *Id.*
[63] For more on agency problems in the law and economics sphere, see Parisi, supra note 24, at 5–9.

4. Lack of resources: The process of investigation and collection of past violations is financially costly. Not all nations have the necessary financial, human, and time resources necessary for achieving such a process. In other terms, administrative costs can be quite substantial. This obstacle may be overcome through international aids, and there are already comparative experiences that involved so. However, accepting these aids and making the best use of them depends on the country's international relations and relevance, the acceptance of the national parties of receiving international aids and involving international parties in the national T.J. process, and how far the international experts can understand the national context they aim to help within and communicate effectively with its parties.

The interaction and sequence between prosecutions and truth commissions are problematic and complicated. While the first aim at imposing criminal sanctions on the guilty accused, the second aim at recording the truth and acknowledging it, to keep a record of the history, learn from it, and make sure that the victims are heard. They usually complement each other; however, in some cases, the truth commissions play as a substitute for prosecutions in case they were prevented because of amnesties or by force.[64] The difficulty is, however, to find the best sequence of them. Should trials precede truth commissions or the opposite, or should they be simultaneous? Alexander Dukalskis presents these three possible scenarios and the pros and cons of each of them.[65] The output of each scenario depends on the different contexts of every transition. Scenario (1) is when the truth commissions precede the prosecutions; Scenario (2) is when prosecutions precede truth commissions; Scenario (3) is when they work simultaneously. Depending on the literature's concerns and remarks on the truth commission's performance generally and their interaction with trials in specific, in addition to the precedent normative analysis, one can draw a picture of the pros and cons of each scenario. I will integrate each scenario's expected costs and benefits in the cost-benefit analysis of the truth commissions.

From the previous analysis, a cost-benefit matrix of the truth commissions can be presented as follows in table (2):

[64] Douglass W. Cassel & Jr., *International Truth Commissions and Justice*, *in* Transitional Justice; Volume I: General Considerations (Neil J. Kritz ed., 1995); Alexander Dukalskis, *Interactions in Transition: How Truth Commissions and Trials Complement or Constrain Each Other*, 13 Int'l. Stud. Rev. 432 (2011); Hayner, *supra* note 54.

[65] Dukalskis, *supra* note 63.

General Costs			General Benefits		
Time costs			Signaling commitment to the rule of law		
Administrative costs			Archiving the history		
Information costs			Achieving accountability		
Political polarization			Adherence to international standards		
Standard error costs			Reducing the costs of institutional reforms		
Costs by Scenario			Benefits by Scenario		
Scenario 1	Scenario 2	Scenario 3	Scenario 1	Scenario 2	**Scenario 3**
Error costs by providing amnesties before prosecutions	Probability of lack of incentive to cooperate in case the accusations were declared	Too high adm. costs for managing the conflict between the two mechanisms	Minimizing adm. costs of the prosecutions	Probability of incentivizing the relevant perpetrators to cooperate in case of conviction of the principal perpetrators + offering amnesties or reduced sanctions	Minimizing the costs of the other scenarios
	Multiplying the time costs		Minimizing info. costs of the prosecutions	Minimizing adm. costs of truth commissions in respect to the trialed violations	
	Higher info. costs in respect to the untrialed violations because of the time gap			Minimizing info. costs of the truth commissions in respect to the trialed violations	

Figure 2: Table (2) Cost-Benefit Matrix of Truth Commissions as a T.J. Mechanism

The general costs and benefits refer to the variables present in any mechanism of truth commissions regardless of its type of combination with prosecution initiatives. The costs and benefits by scenario refer to, in addition to the previous general variables, the costs and benefits of the truth commissions that change depending on the selected scenario. Just as in the prosecution initiatives, these variables are abstract in this analysis, and they would take different values depending on the party quantifying them and their

expected payoffs. Consequently, the more multilateral the process is, the more successful it is expected to be.

Note also that the "standard error costs" refer to the margin of error possible in any mechanism, as different from the "error costs," referring to the errors in judicial decisions.

1.3. DELIVERING REPARATIONS

The reparation programs seek to redress the victims of human rights violations through material or symbolic benefits.[66] The right to reparation of the victim in case of violations of I.H.R.L. and I.H.L. is a well-established principle under international law.[67] This reparation may take different forms.

The forms of reparation include: 1) *Restitution* which aims at restoring, to the victim, the situation before the violation, to the possible extent; 2) *Compensation* which provides financial recognition for the purpose of redressing violations; 3) *Rehabilitation* which entails providing services for the victims to restore their dignity, health, and reputation, including legal, medical, and psychological care services; 4) *Satisfaction* which aims at restoring the dignity and reputation of the victims through different measures like judicial decrees or official declaration, public apology, the acknowledgment of violations against the victims, commemorations, and tributes to the victims; 5) *Guarantees of non-repetition* by ensuring effective civilian control over the military and the police, and the obligation of the different parties by the international legal standards of due process and fairness.[68]

Reparations as a T.J. mechanism have the same economic reasoning as tort law with respect to internalizing the harm caused by the wrongful party to the victim and inducing other persons to invest in taking cautions to prevent such harm. It is also a way through which law manages the bargaining between parties who have relationships with relatively high transaction costs, taking into consideration the possible difficulties of direct bargaining between the victim and the wrongdoer.[69] These difficulties are

[66] United Nations, supra note 2, at 8–9.

[67] *See generally* Theo Van Boven, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, *in* Transitional Justice; Volume I: General Considerations (Neil J. Kritz ed., 1995).; Lisa J. Laplante, *The Plural Justice Aims of Reparations*, *in* Transitional Justice Theories 66 (Susanne Buckley-Zistel et al. eds., 2014). ; Luke Moffett, *Transitional Justice and Reparations: Remedying the Past?*, *in* Research Handbook on Transitional Justice: Research Handbooks in International Law Series 377 (Cheryl Lawther et al. eds., 2017;Conor McCarthy, Reparations and Victim Support in the International Criminal Court (2012).

[68] United Nations, *supra* note 2, at 9; Van Boven, *supra* note 67, at 548–9.

[69] *See* Robert Cooter & Thomas Ulen, Law & Economics 189–90 (2011).

supposed to be more intense in the case of a transition from an autocratic rule that involved mass violations against the victims' human rights.

However, in many cases, reparations cannot, alone, achieve the internalization and the avoidance of the costly direct negotiation between the victim and the wrongful party, for two main reasons:

1. By their nature, as mentioned earlier, reparations include other T.J. mechanisms as well, like investigating the truth and Institutional Reforms. For example, the fifth T.J. mechanism, which requires the guarantee of non-repetition, will necessarily entail an institutional reform.

2. Most importantly, some damages either cannot be assessed, or their assessment costs will be significantly high compared to the costs of other mechanisms. For example, what could be the correct way to assess the harm caused by a corrupted election's authority that was in power for several years or even decades? Moreover, in case of an error in the reparations' allocation, this will result in an inefficient allocation of the already significantly limited resources because of the phase nature, as indicated earlier.

Additionally, the more powerful the past regime, the longer it ruled, and the more severe and common its violations, the more victims it should have, and the more resources are needed to cover their redress, especially if the financial costs of these reparations are not covered by the past-regime members.

However, in case the state will be responsible for delivering the reparations, rather than the wrongful persons directly as a consequence of their criminal liability, the reparations mechanism has a competitive advantage. The probability of proving only the damage that the victims suffered from is significantly higher than the probability of proving the criminalized acts against specific persons and the causation linkage between these acts and the damage. Many criminal evidence rules and criminal law procedures are lifted in case of seeking the proof of damage rather than seeking the criminal liability of specific persons. This advantage is especially significant in big-scale crimes, which affect a wide range of victims and crimes in which the probability of the proof of criminal liability is low. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power states under its section addressing the "Victims of Crime", that:

> 2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.[70]

However, there will still be costs for proving the harm that happened to the presumed "victim," beyond this there are potential erroneous costs in case someone was proved to be a victim, or vice versa; a standard error in any possible mechanism.

This separation between the criminal conviction and the reparations could also be an effective way to internalize the harm of the crimes with less polarization in the society because it does not require holding specific persons accountable. Moreover, it saves human and financial capital that is needed for prosecutions.[71] However, the value of these advantages depends on the source of these reparations. Is it covered from the state budget or by international actors, or through payments that the wrongdoers secure in exchange for guarantees given to them to escape the criminal liability or the possibility of political isolation? In both cases, there will be costs.

This issue brings us back to the error costs point. Besides the standard error costs, there is a form of reparations that could involve an additional margin of error. This form is the suspension of the custodial or financial sanctions against the members of opposition to the past-regime. The assumption that whoever was prosecuted by the past regime for a crime that has a political aspect, like: terrorism, violence crimes, attempt to change the regime (in the systems that have such a crime), membership in an illegal organization, or any other form of a relevant crime, can be either proven or falsified. However, given the time element and the high administrative costs, this can be either highly costly or, in some cases, impossible. In case the sanctions against these "victims" are not suspended or re-evaluated, this disturbs the goals of the whole process and adds new enemies to the new regime. In contrast, in case the sanctions were mistakenly suspended, the harm that can be caused by these "victims" can be very severe. For example, there are cases where members of past illegal organizations were subjects of amnesties in the context of T.J. processes, who were proven later to have partaken in terrorist behavior.

[70] *See* United Nations: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; General Assembly Resolution 40/34 (November 29, 1985), , *in* Transitional Justice; Volume III: Laws, Rulings, and Reports 646 (Neil J. Kritz ed., 1995).

[71] Note that in this part there is no comparison between reparations and prosecutions as two mechanisms of T.J., but an explanation of the possible advantages of separating reparations from criminal liability.

The Egyptian case could be a useful reference in this regard.[72] In other words, the lack of due process towards the past-regime combats is not by itself a guarantee that they are entitled to a declaration of the accusations against them or of other possible accusations. This is a probable error-cost related only to this form of reparations. I call this the "False Benefit of Doubt Error."

Table (3) shows the C.B.A. of reparations as a T.J. mechanism:

Costs	Benefits
Administrative costs	Possibility of eliminating part of the proof costs (in case of comparison to mechanisms that require proof, like prosecutions or lustration)
Assessment barriers	Inducing an optimal level of caution and activity
Standard error costs	Internalizing the harm to the victim
Probability of a significant number of victims	Adherence to the international legal standards
Financial resources limitations	Avoidance of costly direct interaction between the victim and the wrongdoers
Probability of false benefit of doubt error	

Figure 3: Table (3) Cost-Benefit Matrix of Reparations as a T.J. Mechanism

Note that this C.B.A. represents the case where reparations are granted on the basis of the harm, as explained earlier, and not based on a criminal conviction or tort liability. Consequently, no probability of error costs is added to the costs because reparations, in this case, are not dependent on other judicial decisions other than decisions related to the reparation itself, if any. Thus , the error that could happen is just the standard error in any mechanism. However, if the reparation mechanism was designed in a way that requires a judicial trial that identifies and convicts a perpetrator, then the judicial procedures' error costs should be included in the calculation as well, among the other costs and benefits of the prosecutions.

[72] *See* Hossam Bahgat, *Who Let the Jihadis Out?*, Mada Masr (Feb. 16, 2014), https://www.madamasr.com/en/2014/02/16/feature/politics/who-let-the-jihadis-out/.

1.4. INSTITUTIONAL REFORM

The institutions involved in causing the conflict by breaching human rights have to be transformed into institutions that respect these rights and the rule of law's values to prevent the recurrence of these violations. This transformation should include both lustration and training on applying human rights law and humanitarian law standards.[73]

Institutional reforms are a mechanism that can have a broad or limited meaning. Its limited one refers to lustration, purges, and vetting, which are processes that aim to change the corrupted personnel existing within the state institutions. Its broad meaning refers to changing the state institutions in a way that prevents the repetition of the past violations; in other terms, the repetition of policies and state actions that represent the same philosophy and approach of the past regime. In the case of revolutions over autocratic regimes, this includes human rights violations and autocratic behavior. Under this interpretation, constitutional change, structural change of the authorities' performance, mentoring institutions, and any other effort to stop the culture and the institutional cycle that produced the past, are all considered as part of T.J. Although the second meaning sounds more crucial to achieve T.J. goals, it is hard to be specified in specific policies, and it is too broad to be tackled within these research limitations. Consequently, I here adopt the narrow meaning of institutional reforms.

Because of its legal complications and mixed-blessings, lustration is usually the most problematic aspect of institutional reforms; hence , it will be the focus of this sub-section. Lustration is "the disqualification and, wherein office, the removal of certain categories of office-holders under the prior regime from certain public or private offices under the new regime."[74] Lustration has many complications and various advantages and disadvantages. I will first discuss its legal complications and then present the economic reasoning behind lustration laws and their social costs and benefits.

Some of the legal complications of the application of lustration are the typical challenges of prosecution initiatives referred to earlier, including retroactivity, hardships of collecting sufficient evidence, and other due process considerations.[75]

[73] United Nations, *supra* note 2, at 9.

[74] Herman Schwartz, *Lustration in Eastern Europe, in* Transitional Justice: How Emerging Democracies Reckon with Former Regimes. Volume I: General Considerations 461, 461 (Neil J. Kritz ed., 1995).

[75] *Id.*; *See* Susanne Y. P. Choi & Roman David, *Lustration Systems and Trust: Evidence from Survey Experiments in the Czech Republic, Hungary, and Poland* 117 Am. J. Socio. 1172 (2012).

However, besides these complications, there are other specific legal challenges of applying lustration laws.[76] These challenges include:

1. Considerations of inequality and discriminatory treatment as a cause of the breach of I.H.R.L.[77] and unconstitutionality of lustration laws accordingly;

2. The scope and basis of lustration or vetting processes.[78] For example, dismissing the collaborators of the past regime is faced with problems of collective responsibility and guilt, and the legality of the orders given to them by the previous legal system;[79]

3. In case lustration was applied directly through the legislature or an executive act without prior prosecutions, this could be challenged in a court as a denial of the right to a fair hearing guaranteed by I.H.R.L.;[80]

4. Lustration laws may also violate individuals' right to work.[81]

These considerations, however, could be countered by the following arguments:

1. The right to equal treatment and to work guaranteed by I.H.R.L. and most of the constitutions do not prevent the state from applying sanctions on its citizens or listing specific conditions for some of its offices;

2. These mechanisms can be justified by the protection of the state against threats of its order;[82]

3. Lustration laws as administrative or labor laws have privilege over the criminal laws used in the ordinary prosecutions. This advantage is the application of the "Presumed Liability" principle, or *"responsabilité objective / responsabilité sans faute"* as known originally and established by the French state council and legal

[76] Beside these challenges, a typical argument against lustration laws is that some people were just following the orders, especially the minor officials. There is a huge debate on this point. For more on this, *see* Graver, *supra* note 36, at 148; Posner & Vermeule, *supra* note 35, at 778. Whatever side of the debate one can take, this still shows how it could be better to lustrate only the main officials, not the minors as well.

[77] *See* Roman Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice*, 37 Columbia J. Transnatl. Law 357, 357–402 (1999).

[78] Lustration and vetting are usually used as synonyms in the literature. Although they are both forms of personnel institutional reforms after crises, there is a scholarly work on differentiating between them on the base that the last is more general than the first. According to this differentiation, the lustration policies are more gravitated to the extra-regional cases. For more on this, *see* Cynthia M. Horne, *Transitional Justice: Vetting and lustration, in* Research Handbook on Transitional Justice 424 (Cheryl Lawther, Luke Moffett & Dov Jacobs eds., 2017).

[79] Schwartz, *supra* note 74, at 463–4.

[80] Boed, *supra* note 77.

[81] *Id.*

[82] *Id.* at 399.

literature, on the leading officials of the past-regime. This principle dispenses with the "fault" element of proving the liability and takes into account only the elements of "harm" and "causation."[83] Consequently, it could be an effective strategy to solve the low probability of collecting sufficient evidence in these cases. The principle of Presumed Liability is originally used for establishing monetary damages. However, up to my knowledge, there is no legal barrier to apply another aspect of the administrative liability, which is the qualification conditions of the state offices, as long as it is not a penal sanction, to avoid the unconstitutionality concerns based on the breach of the principle of the "Presumption of Innocence."[84]

4. Finally, the rulings, decisions, and opinions of the competent international legal bodies, mainly the European Courts of Human Rights, International Labor, and the Office of the United Nations High Commissioner for Human Rights [hereinafter O.H.C.H.R.] in lustration cases are not anti-lustration per se. They forgo the challenges of retroactivity, discrimination, and employment barriers, as a part of the whole democratization structure. As referred to earlier, they also advocate for protecting and interpreting the rule of law and justice considerations in their historical context and accordingly, favoring the compelling interests of achieving justice and strengthening the new democracy, in such cases of exception like transitioning from crises or autocratic regimes. The problem with lustration laws, according to these rulings, is not with the philosophy of these laws, but with their implementation.[85] There should be legal guarantees for lustration processes to be aligned with international legal principles. These rulings, added to other literature on lustration as a mechanism of T.J.,[86] advocate for two essential considerations to be taken into account to avoid the costs and illegal concerns of lustration:

   (1) The guarantee of fair hearing, due process, legal certainty, and clarity;

   (2) The individualization of the process, which means that a differentiation should be made between the different officials of the past regime. According to that differentiation, the lustration decisions should be made after a proper investigation, hearing, and evaluation of the relevant official's fault and his/her possible threat to the new order. In other terms, an evaluation of

[83] *See* Raed Mohamed Adel Bayan, *Al Asas Al Qanooni Lelmasooleya Al Edareya Bedoon Khataa : Derasa Moqarna [The Legal Basis for the Administrative Responsibility without a Mistake : A Comparative Study]*, 43 Dirasat Shari a Law Sci. 289, 289–304 (2016), http://platform.almanhal.com/CrossRef/Preview/?ID=2-90655.

[84] For more about the "Presumption of Innocence," *see* Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, 63 The Jurist 106 (2003).

[85] Horne, *supra* note 42; O.H.C.H.R., *See Rule-of-Law Tools for Post-Conflict States: Vetting: an operational framework* (2006), https://www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf.

[86] Boed, *supra* note 77; Choi & David, *supra* note 75; Schwartz, *supra* note 74.

whether the costs of their violations could be cost-justified. However, is this possible? This takes us to economic reasoning.

The question then remains: why do states need to apply lustration processes in the first place? Unlike other institutional reforms, lustration and similar measures have a punishment aspect that is in the core basis of the critics mentioned above. Lustration policies not only reform the institutions but also punish the personnel involved in past violations by preventing them from the benefits of one of their constitutional rights, i.e., the right to hold public offices. Consequently, a significant aspect of the lustration's rationale could be found in the original debates over the reasoning, effectiveness, and efficiency of punishment per se. The economic reasoning of crime and punishment is subject to lengthy debates.[87] Some scholars reason the notion of punishment by the external cost that crime causes, which needs to be redressed.[88] Others give more attention to the unconditional deterrence that punishment should achieve to force criminals not to substitute a market transaction.[89] However, besides criminal laws' job in pricing the harm of the crime to internalize it and achieving deterrence to other people to not commit the same crimes, some actions are criminalized to prevent their repetition by the same perpetrators.[90] Accordingly, in some cases, the aim of the punishment is not the typical mission of public deterrence or pricing, but to prevent the repetition of the same crime by the same persons through their elimination from positions they can use to cause the harm, or in other words, the incapacitation of the criminal.[91] The literature refers to this distinction as specific deterrence vs. general deterrence.[92] An example of that is imprisoning a criminal, forcing him/her to stop their criminal activity.[93] This reasoning applies to the category of crimes, of which a small proportion is socially cost-justified. An example of a socially cost-justified crime is theft under the dire of deadly hunger. Nevertheless, this is a low probability and might be non-criminalized at all. So, the smaller the proportion of such a socially cost-justified crime is, the smaller the social cost is , and the higher the social benefit of its prevention is, and that is why such crimes tend to be prevented instead of priced.[94]

[87] Veljanovski, *supra* note 5, at 241–262;Samuel Cameron, *The Economics of Crime Deterrence: A Survey of Theory and Evidence*, 41 Kyklos Int'l Rev. Soc. Sci. 301 (1998).
[88] Becker, *supra* note 7.
[89] *See, e.g.*, Richard Posner, *Criminal Law, i*n Economic Analysis of Law 273 (9th ed. 2014).
[90] Posner, *supra* note 29; *See also* Charles H. Logan, *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates*, 9 Contemp. Socio. 389 (1980).
[91] A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law, in* Handbook of Law and Economics 403.
[92] For a review, *see*Mark C. Stafford & Mark Warr, *A Reconceptualization of General and Specific Deterrence*, 30 J. Rsch. Crime & Delinq. 123 (1993).
[93] Imprisonment as an incapacitation measure is, though, debatable. For more, *see* Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses* J. Econ. Persp., Winter 2996, at 43.
[94] Posner, *supra* note 29, at 1214–5.

the common crimes involved in T.J. processes, including genocide, torture, corruption, and other human rights violations, be cost-justified? The cost of these crimes is too high that only a small proportion of them could be cost-justified, and then prevention via lustration can be argued to be more efficient than just punishing the act if it repeats.

Incapacitation can be achieved through different mechanisms, not only imprisonment but also by nullifying a license to perform a specific activity, for example.[95] In the case of T.J., the same reasoning applies to the rationality behind lustration laws. It is not about internalizing the harm of the crimes, because this can be done through reparations. It is also not only about deterrence, because this can be achieved through criminal prosecutions. However, the main reasoning is preventing the same corrupt persons or the persons who adopted past-regime strategies from corrupting or disturbing the new regime.

The question of the social cost and benefit of such laws and whether incapacitation should be executed through lustration or imprisonment, or even the death penalty, is however, subject to the calculations of every different society, depending on other variables. As presented by A. Mitchell Polinsky & Steven Shavell, the basic equation is that the harm caused by the prospective criminal is larger than the cost of his/her incapacitation.[96] Some studies find that this harm is reduced with age,[97] i.e., the older the criminal is, the less is the harm expected to be caused by him/her to society if he/she is incapacitated. This tendency could be due to the lifetime left for his/her potential criminal activity or health reasons. In our case, though, it can be argued that it is reduced by time, given that the more time passes since a transition, the new regime increasingly consolidates, and consequently, the ability of the past-regime members to spoil the transformation and repel the new rules decreases. Accordingly, the incapacitation should continue as long as the cost of the harm caused by the relevant member of the past regime is more than the cost of his/her incapacitation. These costs are to be assessed by the policy-makers, with technical experts' help, at the given point in or after the transition. For the side of the equation reflecting the cost of the harm caused by the considered member, there should be:

- A variable standing for a rough estimation of the costs resulted from his/her past behavior divided by his/her years of service to reach an estimation of these costs per year. The word "rough" is used because many of these past-violations costs are

[95] *See* Polinsky & Shavell, *supra* note 91, at 443; *see also* James L. Nichols & H. Laurence Ross, *The Effectiveness of Legal Sanctions in Dealing with Drinking Drivers,* 22 J. Safety Rsch. 117 (1991).
[96] *See*McNollgast, *The Political Economy of Law*, *2 in* Handbook of Law and Economics Volume 2, 1651-1738 (2007).
[97] Polinsky & Shavell, *supra* note 91, at 443.

hard to estimate and have long-lasting domino effects. Consequently, what would be feasible is assessing only the direct impact of the rent-seeking activity; for example, evaluating the financial losses caused to the national treasury because of allocating lands to well-connected investors without fair compensation to the state. Some harms would be easier to evaluate than others, and the evaluation process itself is costly. That is why these calculations are not widely common.

- The previous variable would be multiplied (1) with the probability of repeating the past behavior given the extent of the new-regime consolidation and control over the authority where this member operates. (The variable would be multiplied (2) also with the number of years remaining in his/her service until retirement.)

For the equation's side concerning the cost of incapacitation, the exact general costs of lustration indicated in table (4) apply (G). However, an added variable would be the probability of the availability of an efficient member of the new regime to replace the considered past-regime member(P_o).
Accordingly, to apply incapacitation, $C_y \times P_r \times N$ should exceed $G - P_o$.

However, Richard A. Posner refers to a critical qualification that should be entered into the calculation, which is the effect of the offenders' elasticity of supply.[98] If this elasticity is "very high," the effect of taking one criminal out of the scene would be making room for another criminal to get in.[99] This theory may not apply to the crimes committed amid the revolution incidents because of the mass violation and chaotic nature of the situation, which influences a rational actor's standard calculation. However, taking into account the high payoffs that politicians can expect of the rent-seeking activity manifested in autocratic policies, this could be possible in the case of T.J. also. Lustration policies are, indeed, ex-post arrangements dealing with the old-rulers; they will be removed from power and replaced by new-rulers adopting the revolution's goals. However, lustration alone does not guarantee the non-repetition of the past. The new-rulers themselves, or the officials who were removed from their positions in the first place, could still have tempting incentives to reproduce their own autocracy, especially that this behavior would be *per se* in their self-interest. This rationale justifies the combination of this mechanism between "lustration" and "training" under one mechanism labeled "institutional reform". If it is only for removing the past regime's criminals, there will be no effective impact of this mechanism. The aim is to prevent the repetition of the crime, or reducing its probability to be more specific, because a zero-crime probability would be too costly[100] and reducing the supply of

[98] Posner, *supra* note 29.
[99] *Id.* at 1217.
[100] *Id.* at 1215.

criminals. The way to do so is by accompanying the lustration laws with training, policy reforms, and monitoring that could guarantee the transformation of the institutions themselves.

On the one hand, the use of lustration laws may also result in a loss of human capital by diminishing the dismissed persons' technical and administrative expertise.[101] The more persons lustration is applied to , the more is the loss of human capital, and consequently, the weaker the institutions may become; thus, the higher is the probability of polarization in the society and an organized backlash by the dismissed officials. These drawbacks could apply to other mechanisms as well, like criminal prosecutions. As mentioned earlier, the weighing of the effectiveness, cost, and benefits will differ by case depending on other variables. For example, the range of members targeted by lustration systems and/or prosecutions.

On the other hand, keeping the key past-regime officials increases the probability of the repetition of their past performance and leads the people to suspect the transparency and loyalty of the new regime to the values of the revolution, i.e., the distrust in the prior regime because of its corrupted policies could spill over to the relationship between the people and the new-regime.[102] Some systems, however, tried to escape this dilemma by adopting what is called "lustration systems," which differentiate between three strategies of lustration: dismissal, exposure, and confession. Dismissal aims to purify the government by sacrificing its "tainted officials", but by demeaning them socially; exposure aims to increase the transparency of the government, but inadvertently stigmatizes its "tainted officials" socially; confession is an act of self-purification by the "tainted officials" to be "morally re-born" under new conditions [103]. However, a systematic empirical study is still lacking to measure these mechanisms' effectiveness in achieving the original purposes of lustration laws.[104] For example, although they can save the loss of human capital, their impact on preventing new corruption crimes can be questionable.

Gordon Tullock briefly referred to institutional reforms as one of the possible smooth democratization processes out of autocracy.[105] He argues that when a tyranny thinks of retirement, most probably, the main reason that would make him abstain

[101] Schwartz, *supra* note 74, at 464.
[102] Choi & David, *supra* note 75, at 1173–4.
[103] *Id.* at 1173.
[104] For experimental evidence from Hungary, the Czech Republic, and Poland on the different effect of these three strategies on trust *see* Choi & David, supra note 75. However, a general theory can't be derived from such a study. Moreover, it measures only the effect on trust, while other purposes of the lustration laws are not discussed.
[105] *See* Gordon Tullock, *Revolution and Its Suppression; "Popular" Uprisings, in* The Selected Works of Gordon Tullock (Volume 8): The Social Dilemma of Autocracy, Revolution, Coup d'Etat, and War 219 (2005).

would be worrying about his safety after retirement. Consequently, a good strategy for him would be creating a democratic constitution and holding elections to choose a new government. Tullock thinks that in this case, the new government will both be grateful to the past tyranny and too busy sorting the new system out to harm him, which would be the best case for the autocrat. However, most of the examples of this approach in South America involved a reversal back to autocracy after a few years.[106] The reason, in my opinion, is that the case which Tullock presented is neither a case of revolution nor of democratization. The reason is that there is only one way for the autocrat to be sure that his own autocratic government will not turn behind him and attack both him and the new democratic government, defending their benefits from the autocratic regime: namely by ensuring that the new democratic government being a new version of the same past officials and beneficiaries. In this case, although this approach is a safe exit for the autocrat and his government that could save the country lots of blood and costs, it does not represent any form of real institutional reform. First, the past abuses were not recognized, and no one asked for forgiveness or promised the non-repetition of these violations. Second, it is probably a mere change in the *de jure* without a change in the *de facto* application of constitutional democracy principles. Consequently, any thinking of the safe exit principle for autocrats to de-incentivize them to hold on to power should also include two necessary conditions: a genuine institutional reform, ridding the dictator of his top officials so they may not reproduce his government; and recognition of his violations in return to giving him, and probably his family, a blanket amnesty. This definition of institutional reforms entails lustration policies against the first line personnel, who usually include the governing party's directory board, the cabinet, and heads of the leading state authorities, e.g., the parliament's head. Although these persons , in addition to the autocrat, do not perform alone, and they are usually connected to a complex and broad net of beneficiaries and collaboratives, they are the most critical because they control this network. Consequently, minimizing their influence could ease controlling the rest of the system.

Upon the previous legal/economic analysis, the costs and benefits of lustration will depend on the adopted legal system. However, to build only a basic matrix of the cost-benefit analysis, I will assume that the previously indicated arguments counter the legal considerations and that the two broad legal guarantees required by the international rulings and literature are applied. Accordingly, the cost-benefit analysis would be as follows in table (4):

[106] *Id.*

Costs	Benefits
Administrative costs	Recovering the trust in the government
Error costs	Adherence to international standards
Loss of human capital	Deterrence
The threat of backlash by the past regime and its collaborators	Prevention of repetition of the crimes (depending on combination with training, new policies, and monitoring)
Polarization in society	
Constitutional considerations	

Figure 4: Table (4) Cost-Benefit Matrix of Lustration as a T.J. Mechanism

Note that the probability of adopting complementary mechanisms of institutional reforms, i.e., training, new policies guaranteeing the rule of law and I.H.R.L., and monitoring, is added as a prerequisite to the benefits of lustration generally. The reason is that other benefits, including deterrence, trust, and international standards, depend on them too.

1.5. NATIONAL CONSULTATIONS

This mechanism involves public participation in laying down the principles and mechanisms of transitional justice and interaction with their application. This participation also includes the necessity of the outreach of transitional justice, its knowledge, details, and implementation in society.[107] The mechanism then takes two ways: The first is integrating the public's feedback into the T.J. mechanisms' design, and the second is outreaching to the public to teach them about T.J. mechanisms.[108]

It has been argued in the literature and the analysis provided above that the design and selection of T.J. mechanisms differ and depend on the case and the context in which these mechanisms are applied. The more these mechanisms are context-oriented, the more they are likely to succeed. National consultations are a way through which the T.J. policy-makers can seek a better understanding of this context.[109]

[107] United Nations, *supra* note 2, at 9.
[108] Anna Triponel & Stephen Pearson, *What Do You Think Should Happen? Public Participation in Transitional Justice*, 22 Pace Int'l L. Rev. 103, 103-14 (2010).
[109] Phuong Pham & Patrick Vinck, *Empirical Research and the Development and Assessment of Transitional Justice Mechanisms*, 2 Int'l J. Transitional Just. 231 (2007). Triponel & Pearson, *supra* note 107.

In other terms, it contributes to solving the principal-agent problem between the public (the principal), including the victims and the policy-makers (the agents), through two means. First, involving the agents in the design of the T.J. mechanisms; second, providing more information in the market on both sides, i.e., policy-makers could know more about the needs and priorities of the victims and concerns of the pro-past regime or neutral parties, and the victims and other involved parties could understand more about how the T.J. mechanisms work and at what cost. This "low information cost"-effect that national consultations cause also minimizes other possible problems in the market, including a gap between the supply and demand of T.J. mechanisms and concerns of paternalism practiced by the policy-makers. Moreover, the integration of the public and relevant actors in the negotiation phase increases the probability of their cooperation in the implementation phase.[110]

The techniques through which national consultations are practically applied vary. They may include:

1. Doing empirical research to assess the needed mechanisms and the preferences of the public. The effectiveness of these researches and their methods is presented in a study by Phuong Pham & Patrick Vinck.[111] This empirical research may be quantitative, qualitative, or through mixed methods.[112] This is a way of using the scientific research methods, which are distinguished by being objective, to reach the most possible accurate estimations of the public needs, concerns, and preferences. Better results could be expected when these studies are run by neutral scientific institutions instead of governmental bodies;

2. In case T.J. laws are incorporated in the interim constitutions, subjecting them to national consultations and popular approval over the constitution as general. The first, in the drafting phase, happens through deliberations among the constituent assembly, which is either elected or formed by an elected authority, and the political elites generally. The public also takes part in this phase not only through electing their representatives but also through civil society organizations, national bars, media polls, and other common methods of involving society in the constitution-making process. The second process is usually conducted via national referenda;

[110] *See* Triponel & Pearson, *supra* note 108.
[111] Pham & Vinck, *supra* note 109.
[112] *See* Office of the United Nations High Commissioner for Human Rights, Rule-Of-Law Tools For Post-Conflict States: National consultations on transitional justice (2009).

3. Integrating national actors, civil organizations, non-governmental authorities, and the other relevant actors in the discussions over the T.J. mechanisms' design,[113] and the implementation and follow-up phases afterward. For example, in some cases, these entities can collect information from victims regarding their expectations from the reparations programs and communicate these expectations, victims' numbers, and their cases' details to the authorities handling T.J.. Grass-root and regional organizations are specifically helpful in this regard because of their familiarity with some levels, regions, and contexts that the high-level policymakers may not be specifically familiar with. This method was applied recently in Tunisia,[114] for instance, the only system that completed a T.J. process among the first-wave Arab Spring cases.

4. Facilitating open-access national hearing sessions regarding T.J. policies, whether in-person or aired on TV and radio or online. In addition, the media coverage of the T.J. processes, and the cultural and educational activities undertaken by the state or the non-governmental institutions, are all forms of integrating the public into the process which promotes the national ownership of it.

The two possible costs of national consultations are: First, increasing the time costs of the T.J. process by increasing its length, before and after its start; second, adding extra administrative costs to the process. Table (5) shows a matrix of the costs and benefits of National Consultations as a T.J. mechanism:

Costs	Benefits
Extra administrative costs	Minimizing the info-gap between the victims and the policymakers
Extra time costs	Raising awareness among the public
	Adherence to international standards
	Facilitating the implementation of the other mechanisms (high probability of cooperation)
	Reducing the probability of risk in adopting the other mechanisms, and consequently, reducing the costs of possible failures (time, administrative, and moral costs)

Figure 5: Table (5) Cost-Benefit Matrix of National Consultations as a T.J. Mechanism

[113] Triponel & Pearson, *supra* note 108.

[114] *E.g.*, The Tunisian Authority to Truth and Dignity (TDA), *الملخص التنفيذي للتقرير الختامي الشامل الهيئة التونسية للحقيقة والكرامة* [*The Executive Summary of the Final Total Report of the Tunisian Authority to Truth and Dignity*] 38, IVD (2019), http://www.ivd.tn/rapport/index.php.

2. GENERAL REMARKS AND POLICY IMPLICATIONS

In this section, I give some notes on the previous analysis of T.J. and its mechanisms. Some of these notes might be useful for the policy-makers, and others suggest research questions for future studies, especially empirical studies. The objective of this research was to use economic thinking in order to explain T.J. mechanisms as presented by the U.N. Guidelines in the context of revolution over autocratic regimes. A C.B.A. of each mechanism was provided to achieve this objective, drawn from the available literature and empirical findings, and following rational choice theories, especially public choice. Although this research represents a starting point for using C.B.A. in the field of T.J., there are general remarks that still have to be taken into account when doing so both by researchers, practitioners, and policymakers. These remarks include the following:

- Although the U.N. guidelines ignore amnesties as one of T.J. mechanisms and promote the value of accountability, the previous C.B.A. suggests a thorough consideration for this mechanism. Amnesties and lack of T.J. are two different things. When applying amnesties, the society and the government recognize that there were violations against the victims in the first place, that they are not acceptable, and that they will not be repeated, but they will be forgiven because seeking "justice" for them would be too costly to the extent that it would obstacle achieving T.J. goals themselves. This is different from ignoring what happened in the past altogether. I referred to this distinction earlier when discussing Tullock's thoughts on the safe exit to autocrats.

- Being, after all, a political arrangement, a C.B.A. of T.J. policies could change from one stage to another because of considerations of dynamic efficiency.[115] For example, in the beginning, starting prosecution initiatives to please the public and obtain their trust and thereby seize power may lead to over-deterrence. People holding public offices, whether top or less senior officials, could fear the legal responsibility over continuing past policies and the "fever" of chasing mistakes in the public sector. This fear can be fed by little knowledge of the applicable laws and the scope of legal liability, which finally leads to a level of activity below the optimal level for social welfare and levels of care far above the desired. After some time, however, failing to avoid or intentionally becoming stuck in the procedural and legal complications, which then lead to T.J. policies' failure or their

[115] For more on dynamic efficiency vs. static efficiency, *see* Veljanovski, *supra* note 5, at 35–6 Or as Teitel puts it: "Law in transitional periods is both backward-looking and forward-looking, retrospective and prospective, continuous and discontinuous". Teitel, *supra* note 6, at 215.

discontinuity, could lead to under-deterrence. Accordingly, the possibilities are always open, and the calculations regarding over/under deterrence are mercurial. Therefore, a careful trade-off between *ex-ante* and *ex-post* efficiency should be made when designing T.J. policies from the beginning.

- The measurement of the given variables in the presented models of T.J. mechanisms should not depend only on the universal quantitative weights given to them but also on the national and local weights to provide the most possible accurate evaluation. This local evaluation can be achieved through the pre-empirical studies referred to earlier. Even if some data will be challenging to collect, "*lawmakers would do better to use imperfect empirical analysis than perfect non-empirical analysis.*"[116] Some of the main reasons why empirical analysis is not still commonly used in the law-making processes, especially in less developed systems, are first, that most legal scholars and practitioners lack the necessary training for empirical analysis, and second, many law thinkers tend to trust the doctrinal analysis more than the empirical one. This skepticism is probably back to the conviction that "not everything can be quantified or measured." Although this might be true, still using the imperfect empirical findings to accompany, not replace, the pure legal classic doctrinal methods can be expected to give better guidance of legal design and application, especially where the momentum is critical and can not be reversed like in transitional policies. Finally, one can expect that these transitional systems would tend to lack the necessary expertise, human capital, and financial resources to run such analyses. International cooperation could help in this regard.

- One way to overcome the possible shortcomings of the pre-application empirical analysis is to consider T.J. pilot projects and phased approaches to minimize the costs of mechanisms that contribute negatively to the anticipated goals.[117]

- Although the U.N. guidelines are clear in affirming that the T.J. mechanisms should be victim centered,[118] the previous analysis shows how in many cases this focus is not realistic. Other variables in the process sometimes outweigh the "victims" considerations, like the consolidation of the new system or the practical limitations.

- The adherence to the international legal standards is a vital element in weighing the benefits of the adoption of T.J. mechanisms because: first, it endows legitimacy

[116] Robert D. Cooter, The Strategic Constitution 5 (2000).
[117] *See* Office of the United Nations High Commissioner for Human Rights, *supra* note 112.
[118] *See* United Nations, *supra* note 2.

over the new regime by giving it credibility from both the international and national actors; and second, this credibility may secure the international financial and political support which is highly needed in the transitional phase.

- The unconstitutionality considerations' concern is present in all of T.J. mechanisms because of the retroactivity of laws ban and inequality arguments. However, taking into account the international rulings on this matter, some concerns are less worrying in the contemporary and anticipated legal and political scholarship than in the past.

However, besides the already mentioned legal reasonings, one of the legal finesses that can be used to resolve the constitutional objections, which – up to my knowledge - was not mentioned in the available legal literature, is adopting T.J. mechanisms in the form of basic, i.e., organic, law. The basic laws – also known as fundamental or organic laws - are those laws that stipulate the regulation of constitutional matters, such as the rules governing the state authorities, elections, formation of the judiciary, . . . etc. However, they are not included in a constitutional document. In another phrasing, they are constitutional by nature but not by formality. Usually, such laws are briefly referred to in the constitution, and given a specific procedural framework to be issued or amended by the legislative. Accordingly, these laws have supremacy over other ordinary laws and regulations in the state, just like the constitution itself. They are considered complementary laws to that constitution. The only difference is that they are not a part of that constitutional document.[119] In France, which has a separate written constitutional document, these laws are called *Lois Organiques*.[120] In other jurisdictions, basic law is a term that is used alternatively to refer to the constitution, but with inferring the meaning that it is a temporary measure without formal enactment; however, it can last for a long time, like in the case of Germany. This codified or uncodified form of constitutions may be used for transitionary circumstances or for avoiding the claim of being the highest law for religious reasons.[121]

In the case of adopting basic laws in the first meaning, i.e. constitutional by nature, legislative by formality, the reasoning of issuing and differentiating them from both the constitutional text and the ordinary laws could have two arguments.

[119] *See* Sabry El Senousy, القانون الدستوري؛ شرح لأهم المبادئ الدستورية في المرحلة الانتقالية وأحكام دستور 2014 [Constitutional Law; An explanation for the most important general constitutional principles in the transitional phase and the provisions of the Constitution] 17, 17–23 (1 ed. 2014).

[120] *See generally* George Burdeau, Droit Constitutionnel et Institutions Politiques [Constitutional Law and Political Institutions] (20 ed. 1984).

[121] *See*David M. O'Brien, Constitutional Law and Politics: Struggles for Power and Governmental Accountability (9th ed. 2014).

First, minimizing the administrative and time costs of issuing and amending them in the usually relatively complicated constitutional process for their relatively flexible and/or urgent nature, while, second, maximizing the costs of their surpass for their vitality. In the case of adopting T.J. mechanisms in the form of laws, can these laws be considered as basic laws by nature? This can be debatable, and it is not the topic of this study to go through this legal debate. In some cases, the constitution-makers can avoid any suspicion or debates by explicitly stating that the laws of transitional justice in a specific phase will be considered or regulated by a basic law. For example, one of these cases is the Basic Law of Transitional Justice of Tunisia.[122] However, in brief, the legal opinion that this research adopts is: indeed , transitional justice laws are by their nature basic laws. The reason is that although they are genuinely relevant to criminal law because they regulate the penalizing and sanctioning of specific acts, they still regulate constitutional matters. These matters are such as: the formation of the state authorities during and after the transition, the limitation of the civil rights of some of its citizens, partial organization of the electoral rules, and most importantly, extra-ordinary judicial procedures that could not be valid under the "usual" constitutions. This last detail is utterly vital, specifically for this study, as it relates to one of the dilemmas that T.J. usually faces, which are constitutional challenges. These dilemmas were presented and analyzed through the discussion of the different mechanisms of T.J.. This formality could then work as a shield against any judicial challenge of the adopted T.J. mechanisms because the constitutions are not challenged before the supreme courts; they are the state's highest laws. The effectiveness of this solution ranges though, depending on the relevant mechanism. For example, in the case of reparations and truth commissions, because they lack the punishment aspect, unconstitutionality concerns are not as strong as in the case of prosecutions and lustration. For example, being a member of the past regime's party, or following orders that may lack moral reasoning even if they were legal, could not be sanctioned without retroactive laws or laws that could be struck down in constitutional courts based on inequality considerations between citizens.[123] Interesting enough, amnesty can be subject to the same concerns of unconstitutionality on the basis of the absence of due process, which happened in the Nepali or South African cases, for example.[124]

[122] *See* الرائد الرسمي [The Tunisian Gazette], *Organic law n° 2013-53 dated 24 December 2013, establishing and organizing the transitional justice* (2013), http://www.legislation.tn/detailtexte/Loi-num-2013-53-du-24-12-2013-jort-2013-105__2013105000531.

[123] A contemporary example of this direction is the position of the Egyptian Supreme Constitutional Court regarding the Political Lustration Law after the 2011 revolution. For more on this position and its circumstances, see Khalil, *supra* note 31, at 212.

[124] Amanda Cats-Batil, *Moving Beyond Transitions to Transformation: Interactions between Transitional Justice and Constitution-Building* 10 I 19–20 (2019), https://www.idea.int/publications/catalogue/moving-beyond-transitions-to-transformation.

Moreover, generating the T.J. policies in the form of a basic law guarantees that more of relevant actors are represented in the process of their designation because their delivery usually requires more sophisticated procedures and more representative authorities than those in the case of ordinary laws or regulations. This strategy reduces information asymmetry, which could lead to policies that are more likely to be self-enforcing. Finally, in this way, these laws can work as a pre-commitment device that includes all the interested parties, which could make feasible the movement forward through the political transformation.

Generally, a T.J. policy that takes into account: Proportionality + Combination of different mechanisms + Customization of the mechanisms upon the relevant case + Basic laws of T.J. should have the most effective outcomes achieving the goals of T.J. with the least legal complications. A balance between two considerations is needed to be done, not only by lawmakers but also by the constitutional courts. These considerations are: 1) The necessity of a radical break from the authoritarian past and the consideration of the context in which the principles of the rule of law, democracy, and due process are applied, which can justify a less strict application of their measures, and 2) The rejection for giving up the human rights considerations at all in the first step of the democratization, which could have a "killer effect" on the process.[125]

- The second step of the cost-benefit modeling should be comparing the mechanisms solely or when combined with other mechanisms. This step is, however, beyond the limits of this research and is left to future research. These models are only the basic models, and they are to be used and customized according to the different cases.

- Different combinations can be chosen of these mechanisms, they can reinforce each other, and they are not mutually exclusive, but they have to conform with the international standards and obligations.[126] These combinations depend on the outcomes of the cost-benefit analyses done by each case according to their inputs.

- Achieving deterrence regarding violations that involve political crimes is tricky. The point is that to design efficient ex-ante laws which can prevent the repetition of the past-autocratic policies, the calculations of the sufficient punishment should include the calculations of the regime itself of how to exploit the state

[125] *See* Marek Safjan, *Transitional Justice: The Polish Example, The Case of Lustration*, Eur. J. Legal Stud., Feb. 2008, at 235.*E.g.*, Horne, *supra* note 42; MMark A. Drumbl, *Prosecution of Genocide v. the Fair Trial Principle: Comments on Brown and Others v. The Government of Rwanda and the UK Secretary of State for the Home Department*, 8 J. Int'l Crim. Just. 289 (2010).Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice*, 34 J. L. & Soc'y 411 (2007). For more on the benefits of constitutionalizing T.J. policies, see, e.g.,also Cats-Batil,, *supra* note 124.

[126] United Nations, *supra* note 2, at 3,10.

resources without getting the people to the point of revolution. Moreover, the offenders should be comparing the gain from the violation with the cost if they are apprehended and punished, i.e., the probability of being sentenced is a part of the deterrence calculation.[127] This probability in T.J.'s case is very low for a couple of reasons: 1) As indicated earlier, there will be a lack of evidence and other procedural difficulties. Consequently, a rational authoritarian regime would take the necessary arrangements not to be sentenced, either by destroying evidence or through bargaining with the new regime to reach a compromise; 2) In case that the regime heads' calculations reach the point that they think they will not be able to get away with what they committed, they will not be deterred, but will exploit the people until this point, and afterward they will usually make some improvements if possible, or flee the country.[128]

- Despite the last point, T.J. policies' negative effect on the probability of repetition of past crimes, which is the same goal of deterrence, could be explained through other rationales. These rationales include: 1) The institutional reforms in terms of changing the laws and enforcing them; 2) Institutional reforms in terms of lustration and vetting policies, which should eliminate a number of the leading past criminals; 3) The national consultations can contribute to this goal by spreading awareness among the people about human rights, the rule of law, and justice, and strengthening the civil society, which is expected to increase the costs of trying to repeat the past violations.

- The combination between prosecution initiatives and/or lustration for only the head members of the past regime and reparations and/or truth commissions could be an effective strategy to avoid a counter-revolution, society polarization, over-deterrence, stigmatization of possibly innocents, and loss of human capital and qualities. At the same time, it achieves the accountability and prevention of the top criminals from continuing their criminal activities. In other words, giving the heads of the past-regime amnesties could be dangerous, unlike the inferior personnel who worked for them. This policy can be justified through the same economic rationality used by Richard A. Posner in explaining the economic reason behind the Multiple Offender Laws.[129] The first part of the justification is that the

[127] Posner, *supra* note 29, at 18.
[128] For more on the dictator choices regarding succession and retirement, *see also* Tullock, *supra* note 105; *see, e.g.*, Gordon Tullock, *The Goals and Organizational Forms of Autocracies; the Problem of Succession, in* The Selected Works of Gordon Tullock (Volume 8): The Social Dilemma of Autocracy, Revolution, Coup d'Etat, and War 82 (Charles K. Rowley ed., 2005).
[129] Posner, *supra* note 29.

leading criminals who put the policies, commanded, and directed the ordinated officials to apply them, showed a higher propensity to commit similar crimes in the future. The second is that the sanction value should be raised on people who, through their past, had shown that the return of the crime is higher for them than for other possible criminals. Accordingly, this variation in justice mechanisms should achieve a higher probability of preventing crimes and deterrence. Further systematic empirical research is needed to measure the effects of the different combinations of T.J. mechanisms

- This strategy, however, has a low probability of success in the case of mechanisms against the army and the police as a part of what is called in the T.J. literature as "Security Sector Reform [hereinafter S.S.R.]. While most of the pro-past-regime persons can find a place for themselves in the new regime and obey the new system of democracy and the rule of law, the police, the persons who used to protect the past regime and get the highest rewards in the society to do so, may find more difficulty in getting integrated into the new system. The reason is that any change in the regime incurs a loss for them; they will be deprived of the extra-payoffs they used to gain under the old regime. At the same time, if all or most of them were vetted or prisoned for a while, this will be like forming an army against the state, a trained army that lacks any incentive to work for the new regime, and many incentives to destroy it. The S.S.R. as a part of T.J. is already under-studied. The available studies on S.S.R. focus on establishing the connection between it and T.J. at all, reasoning S.S.R., its limits and challenges, and exploring some of the case studies that witnessed its application.[130] However, up to my knowledge, none of these studies analyzed this specific concern of S.S.R.. This concern forms a dilemma. A solution, however, might be replacing the leading staff of the police and the army with influential leaders who are pro the new regime. It could be successful if the big heads are pro the new regime and can strictly monitor these troops. The empirical analysis will be needed to test such a suggestion and

[130] *E.g.*, Eirin Mobekk Geneva , *Geneva Centre for the Democratic Control of Armed Forces (DCAF) Transitional Justice and Security Sector Reform: Enabling Sustainable Peace*, DCAF (2006), https://www.dcaf.ch/sites/default/files/publications/documents/OP13_Mobekk.pdf; Ana Cutter Patel, *Transitional Justice, DDR and Security Sector Reform*, Research Brief (2010), https://www.ictj.org/sites/default/files/ICTJ-DDR-S.S.R.-ResearchBrief-2010-English.pdf; Christopher Gitari Ndungú, *Failure to Reform; A Critique of Police Vetting in Kenya*, ictj (2017), https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-PoliceVetting-2017.pdf; Laura Davis, *Transitional Justice and Security System Reform*, Initiative for Peace Building (2009), http://www.peacewomen.org/sites/default/files/recon_transjusticessr_ictj_2009_0.pdf; Sumit Bisraya & Sujit Choudhry, *Security Sector Reform in Constitutional Transitions,* ICTJ (2020), https://www.idea.int/publications/catalogue/security-sector-reform-constitutional-transitions.

investigate whether this concern was existent in any of the cases that applied S.S.R. and the impact of the different strategies – if any – to deviate.

- Each of the C.B.A. presented in this article assumed that the relevant mechanism would be applied for a specific period; i.e., it is not open-ended. However, that analysis would change if this time cap is lifted. For example, one could expect that the administrative and time costs would be multiplied in this case. This argument is not a suggestion of time-limiting T.J.'s application, and despite that, any typical reasoning of the legal principle of *lapse by prescription* could be presented here; it can be faced by a counter-analysis of the exceptional nature of the subject of the violation of T.J.. The point is: To decide what the time cap of a relevant T.J. mechanism should be if there should be any, the following will be needed:

(a) an empirical assessment of the legal complications and multi-aspect practical consequences of applying the open-ended T.J. mechanisms compared to the time-limited ones.[131]

updated C.B.A. analysis that adds the aspect of the time limitations to the assessment of the costs and benefits of the relevant mechanism to be compared to the time-capped original C.B.A. .

(b) considering the possibility of innovative ways to apply the classical forms of T.J. mechanisms that could minimize the costs and maximize the benefits of lifting the time limits when applied to them. Also, considering that not all the mechanisms – and sub-mechanisms - will respond equally to the variable of "time-cap." Consequently, a comparison between the updated C.B.A. should be kept in mind.

(c) despite the last point, attention should be given to the fact that lifting the time limits has an effect that will apply to all of the cases and all of the mechanisms. This effect will open the negotiation over the truths, information, and amnesties with the past-regime member endlessly. The possible costs of negotiation, both legal and illegal negotiation, will always be present.

- Although I am not conducting a quantitative analysis using the presented models of the cost-benefit analysis of T.J. mechanisms here, I think that such an analysis would be interesting to conduct or read in the future.

[131] See for example some of the notes on the German case of the open-ended application of some of the T.J. mechanisms provided by Thomas Weber, *Time Appears to Have Run Out on the Last Nazi War Crimes Trials. But There Are Other Roads to Justice*, Time (Apr. 3, 2019), https://time.com/5563615/nazi-trials-over/ .

CONCLUSION

Systems need a radical break between the past iteration and its new form , a process which aims to internalize the past harm and promote respect of democracy and human rights to achieve their transformation from autocracy to democracy. One of the tools to achieve this transformation is Transitional Justice, which is done by adopting different mechanisms.

Each of the mechanisms provided by international law has its challenges, costs, and benefits. The decision to adopt one or more of these mechanisms should be informed by a careful analysis of each mechanism's costs and benefits and each possible combination. This article outlined a theoretical cost-benefit analysis derived from the literature on the Transitional Justice of case studies, reports, empirical studies, laws, rulings, and theoretical analyses. However, the weights given to these inputs will vary from one case to another, and that is how the output will vary as well. Consequently, an effective mechanism for one case may be ineffective to another, depending on many other possible variables. This process is costly and complex due to the nature of factors considered and the different – and even opposing - stakeholders involved. However, deliberative and multilateral solutions, including democracy, are always more costly in the short-term than authoritative and mono-designed and controlled processes. Arbitrary plans are also expected to be less costly in the short term than informed study-based plans and decisions. However, the deliberative, multilateral, and study-based decisions are expected to be less costly in the long run, especially in a critical and broad project like T.J. after a revolution.

On another note, by their nature, from a constitutional legal perspective, transitional justice laws are basic organic laws. In case their formality is aligned with this nature, this may solve some of the legal complications T.J. faces. Future empirical research can tell us more about the effectiveness of this solution and compare the efficiency of the different T.J. mechanisms and their combinations.