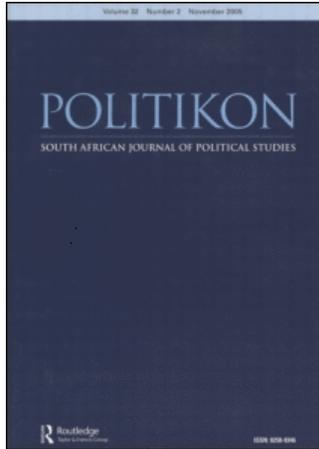


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In Exchange for Truth: The Polish Lustrations and the South African Amnesty Process

ROMAN DAVID*

ABSTRACT Poland and South Africa have each inherited a similar legacy of human rights violations perpetrated by previous authoritarian regimes; they each underwent complicated political transitions and used similar methods of dealing with the remnants of their previous regimes. South Africa granted amnesty from criminal prosecution to perpetrators in exchange for truth about their involvement in the violations of the past. In Poland leading public posts were granted in accordance with the same principle of truth exchange. However, existing frameworks for the study of transitional justice do not allow for immediate comparison of the relative benefits and pitfalls of granting amnesty to criminals vis-à-vis measures to provide public sector employment. This paper extends the existing framework of transitional justice and applies it to the study of the major policy choices of the Polish lustration process (1999–2002) and the South African amnesty process (1996–2000). They encompass components such as the formal scope of truth, the choice of particular procedures, sanctions, transparency and impartiality. The comparison provides us with a more nuanced understanding of the institutional mechanisms that allow for the utilisation of the meaning of truth in complicated transitions from authoritarian regimes.

Countries undergoing the transition from authoritarian rule often adopt measures to deal with past injustices. These include the payment of compensation to victims, the restitution of nationalised properties, the prosecution of perpetrators of gross human rights violations and the exclusion of the past regime's loyalists from the new administration. However, the substance and shape of these measures usually depends on the mode of transition. If the old elite was defeated, the new leaders have free reign to decide on a policy for settling scores. If the transition was negotiated, the new representation faces political and structural constraints that undermine or obstruct any serious attempt to deal with the past.

In trying to overcome such constraints, South Africa and Poland have developed fairly sophisticated procedures of transitional justice. Both the South African

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amnesty process and the Polish lustration process have advanced the potential of 'truth telling' to address vital socio-political and moral needs in transitional societies. Both are based on the principle that wrongdoers should be granted a second chance in exchange for telling the truth about their deeds. The South African amnesty process makes the waiver of criminal charges conditional upon the revelation of truth, while the Polish lustration process provides access to high public offices in exchange for the potential candidate's truth about his/her involvement in the past.¹

Both ways of dealing with the past are unprecedented and a comparison of their relative merits and shortcomings may be of great importance to other countries involved in a complicated process of transition. However, the truth processes in Poland and South Africa occur on different levels and through different institutional mechanisms. A simple comparison utilising existing frameworks of transitional justice research would be inappropriate. This paper therefore starts by developing a comparative framework on a higher level of abstraction to overcome this difficulty. It studies major institutional components of both the recently accomplished South African amnesty process and the ongoing Polish lustration process. Theoretical considerations, the assessment of the processes and their impact on their respective societies enable us to gauge the applicability of the various components of these processes to other countries in transition. Did the components of the respective processes serve the interests of their divided society? What can we learn from the South African and the Polish processes for dealing with the past? How can we enhance the success of similar mechanisms in countries facing similarly fragile political situations? What should they avoid?

In order to meet this objective, this paper examines the legal foundations of both processes, the reports that were written about the processes, the findings of opinion polls that evaluated their operation and newspaper articles that reviewed their performance.

Rethinking the framework for analysing transitional justice

Although transitional justice theorists differ in their priorities, aims and expectations, many stress the important, but somewhat contradictory, role that truth about the past regime plays in the transition to democracy. One of the functions of truth is that it is a vehicle for reconciliation. Thus, truth may help a country to come to terms with its past: it provides an opportunity for understanding the motives of former adversaries and for acknowledging past wrongdoings. It can help to alleviate social tensions and to establish trust amongst people and between people and the state. Yet its effects may be contradictory in that more truth may not necessarily be beneficial. Learning horrific stories may deepen existing differences, create new divisions or perpetuate past conflicts. Moreover, the process of achieving truth may seriously affect the results and prejudice perceptions in society. Because of these contrary effects institutional mechanisms for advancing truth need close attention. This paper seeks to answer a further set of questions: how should societies in transition define and organise the institutional

setting in order to let truth perform its role more successfully? What do the South African and Polish processes teach us about the institutional framework?

A comparison of truth processes is not straightforward. Although amnesty and lustration processes converge in their methods, they are conducted on different levels, the truth that emerges from the respective processes has a different scope and the processes have different objectives. Truth exchange in the amnesty process occurs on the criminal justice level, whereas the lustration process concerns public employment and, as they put it in Poland, the moral level. 'The full disclosure of all relevant facts', as South Africans defined the truth for the purpose of the amnesty process, concerns *gross human rights violations* committed during the course of the past conflict. The truth in the Polish lustrations concerns work for, and *collaboration* with, several security organs of the totalitarian state. While the amnesty process is primarily backward-looking, addressing crimes committed in the past, lustrations are primarily forward-looking, addressing the issues of the past mainly within the scope of the establishment of impartial and trustworthy administration.

Their different focuses, levels and their respective definitions of truth make various established research frameworks, including outcome evaluation models, of limited use to the study. Variables that are easy to utilise—manifested in success-failure ratios, for example—have limitations because processes have different objectives: the backward-looking amnesty process is open to everyone who committed a certain politically motivated crime in the past, while forward-looking lustrations are required for only those who want to hold senior public posts. These different objectives influence the parameters, substance and quality of the truth that is revealed.

Using a specific model of truth commission as a basis for comparison is not of much assistance either. If we were to evaluate the Polish lustration system as if it represented especial kind of truth commission and then to compare it with Priscilla Hayner's 'liberal' definition of a truth commission (which provides us with a degree of flexibility in applying the term to almost any situation related to discovering the truth) (Hayner, 2001, pp.14–17; de Vos, 2002, p. 209, p. 214), it would mean assessing the Polish process against the established common features of truth commissions. We would have results such as: the process meets features *a*, *b* and *d*, and fails to meet *c* and *e*. In order to enhance it as a truth commission, we could say it should incorporate the missing components. But the Polish model is not (and does not aspire to be) a truth commission in the sense in which the term originated in Latin American countries. It does not have 'backward-looking objectives' to establish as 'a complete picture about the past as possible'. It is a forward-looking process that seeks to establish trustworthy administration staffed with honest personnel.

Existing transitional justice frameworks do not make our comparison easier. Neil Kritz, James McAdams and Ruti Teitel, to name just a few authorities in the field, have effectively separated criminal justice, administrative justice and reparatory justice from each other and from whatever justice is left (Kritz, 1995; McAdams, 1997; Teitel, 2001). This enables us only to make comparisons and

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do research on a specific level. We can compare the prosecution of military juntas in Argentina and Greece, truth commissions in South Africa and East Timor, and the reparation of victims in Chile and the Czech Republic. This does not allow us to compare the efficiency of transitional justice tools across different levels.

Yet there are striking parallels between various levels of transitional justice. In particular, there are similarities between a criminal justice level and a public employment level. Some methods of lustrations, for example the German model, resemble criminal trials; or some truth commissions resemble other lustration models. How can we theoretically interconnect the similar measures of dealing with the past?

Particular measures of criminal justice and administrative justice share a method of dealing with the past and reflect a particular political configuration. These parallels cut across the existing general framework for the study of transitional justice at another level of generalisation, one that reflects the reality of political forces. Various modes of regime change affect the political configurations that emerge afterwards and influence a particular method of dealing with the past (David, 2006).

A revolutionary change, *replacement* (if we borrow Huntington's term) enables the new leaders to adopt a retributive method of dealing with the past (Huntington, 1991, pp. 109–163). They attempt to punish those responsible for gross human rights violations (at the level of criminal law) and exclude the remnants of the past regime from the state administration (at the level of public employment). Such a method is possible when the old elite is defeated, the old regime had long been considered illegitimate and, being without significant social support, suddenly imploded.

Transformation is a regime change brought from above. The old elite retains its power, pardons its own crimes and continues to control the administration. No serious method of dealing with past injustices is adopted, unless a shift in power relations occurs.

Transplacement results in an institutionalised power-sharing pact that may lead to a reconciliatory approach. This method is manifested in naming perpetrators at the classic type of truth commissions and in inclusive lustration processes that accommodate the former elite in exchange for the revelation of the names of persons associated with the repressive apparatus. The South African model of qualified amnesty and the Polish lustration model are special kinds of this 'middle of the road' reconciliatory approach and are closer to the retributive method than to the 'null' solution of drawing a 'thick line after the past'.² Both Poland and South Africa adopted an active reconciliatory method in dealing with their pasts. Their common feature is truth exchange.

The methods that these two countries fashioned to deal with the past are the result of several competing factors. Desires for retribution, the social need for justice and demands to uncover the truth about the past are subject to power constraints in negotiated transitions, constraints that are shaped by political interests, limited by economic capacities, conditioned by conformity with human rights standards and influenced by the experiences of other countries.³ Both the South

Table 1. Methods of Dealing With The Past, Their Political Contexts and Projections Onto Two Levels of Transitional Justice

| Mode of regime change | Power of the past elite after transition | Method of dealing with the past | Criminal justice level (Maximum possible) | Public employment level (Maximum possible) |
|-----------------------|--|---------------------------------|--|--|
| Replacement | Defeat | Retributive | Prosecution & punishment (ICC Rwanda) | Exclusive lustrations (Czech Republic) |
| | | Partially retributive | Selective prosecution (post-war Germany) | Mixed lustrations (unified Germany) |
| Transplacement | Power-sharing | Actively reconciliatory | Qualified amnesty (Amnesty Committee of the TRC, South Africa) | Reconciliatory lustration model (Poland) |
| | | Passively reconciliatory | Naming perpetrators (Classic Truth Commission, e.g. Chile) | Simple inclusive model (Hungary) |
| Transformation | Continuation of dominance | Thick line, 'past forgotten' | Unconditional amnesty, the absence of a truth commission | Continuation of the former loyalists |

The basic model of lustration, which originates in former Czechoslovakia and unified Germany, is based on the exclusion of certain persons who worked in the repressive apparatus of the previous regime from holding a position of trust. In Germany, however, the authorities retain discretion that enables them to apply exclusion selectively. On the other hand, Hungary and Poland have come to a considerably softer model of lustration. They allow the person with a compromised past to hold public office on condition that the fact of collaboration is made public. In Hungary, the responsibility rests on the authorities that release the information after an *in camera* hearing. In Poland, it is the individual himself or herself who has to come forward and reveal his or her shadowy past.

The UN-sponsored International Criminal Tribunal for Rwanda adopted an absolute retributive approach that aims, at least in the beginning, at prosecuting all who committed atrocities during the 1994 genocide. The Allies, on the other hand, only punished some of the Nazi leaders at the post-war Nuremberg Trials. 'Naming perpetrators' at a classic model of truth commission, and motivating perpetrators to come forward and apply for amnesty at the new type of truth and reconciliation commission are two approaches that ideologically challenge the political *status quo*, break the silence without allowing the past to be forgotten.

African and the Polish transitions were the result of negotiations between the opposition and the old regime. These negotiations led to a compromise between what was desirable and what was feasible in dealing with the past.⁴ The ANC and the apartheid government had a common purpose in pardoning gross human rights violations that had been perpetrated by both sides. Amnesty that was

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constitutionally provided was part of the settlement. Nevertheless, the pressing social need to address the issues of the past has not evaporated. Facing the balance of power, the new South African leaders, civil society, the churches and Archbishop Tutu were *ad idem* in the need for the establishment of a truth commission. The electoral victory of the ANC in the 1994 elections enabled the move from a passive reconciliatory approach to an active one.

The Polish transition was negotiated through round table talks from February to April 1989. They resulted in semi-democratic elections in June 1989 and power sharing until 1991. The central-right parties had an interest in arresting control of key positions in the state administration, while the ex-communists tried to hang on to their posts. The former group realised the potential of lustrations to achieve this objective, whereas the latter group tried to prevent the attainment of this objective through the approval of anti-lustration law. The divide among non-communist political parties, elected in 1991, did not provide majority conditions for the approval of the lustration law. The Democratic Left Alliance (SLD), which was dominated by ex-communists and was against lustrations, won the 1993 elections. The call to dismantle the activities of the former secret police and their collaborators gradually dominated social discourse and was echoed in parliament. The Polish lustration law was passed on the eve of the victory of the centre-right parties in the 1997 elections. At that time it had become impossible to rid the country of former communists and collaborators, but it was not too late for the disclosure of truth about the past.⁵

The distinction between various methods of dealing with the past and an understanding of their political contexts enables other countries in similar political situations to benefit from the study and helps us to clarify the objectives which the processes have in common. The retributive method seeks to transform past conflict and prevent the re-emergence of the former regime through a total defeat of the past elite, its exclusion and marginalisation. The role of former adversaries is switched, the new society is redefined according to the dictum of the former opposition and the ideological change follows political contours. Value-based judgments are made to service the ideology of those in power and measures of transitional justice may reflect this ideology. The key question of this method is how to prosecute, punish and exclude the old elite in order to prevent the recurrence of the previous regime? What serves the pursuit of this objective?

The null method attempts to 'overcome past divides' by drawing a line between the past and the present. It stresses 'the wisdom' of amnesties for the stability of the political and economic system, emphasises the experience and qualification needed for public employment, and draws attention to the future. Such policies effectively maintain the *status quo*. The usually weak opposition may be co-opted into the structures of the old regime in exchange for dropping its demands. This in turn legitimises authority and preserves institutional and ideological continuity with the past.

Reconciling political and societal differences for the sake of a shared future and the achievement of national unity are officially declared objectives of the *reconciliatory* method. Below the surface, however, we see the reality of the balance of

power and the competing efforts of its holders to impose their perception of history on society. Truth is utilised by the new representatives in the ideological battle for the picture of the past and value-based discontinuity is employed as an excuse for the inability to achieve comprehensive retribution and power discontinuity. The balance of power is typical for many Latin American transitions. Naming perpetrators at the classic type of truth commissions, or collaborators, as in lustration in Hungary, does not mean much more than the coexistence of different lives, memories and histories.

The new leaders of South Africa and Poland, on the other hand, have exchanged power discontinuity for value-discontinuity. Wrongdoers are encouraged to join the game; they can enter the new system, but only if they renounce their pasts. Their active participation provides a value-normative shift from the past. It helps transfer the past loyalties and transcend past identities of the entire society, which closely watches the drama of reconciliation. The objectives of the reconciliatory method differ from those of retribution. Inclusion replaces exclusion and forward-looking visions supersede dwelling on the past. The relapse of the non-democratic mode of governance is foreclosed through the value-normative shift (David, 2006). The key questions of this method are: how can we facilitate this shift? How can we organise the institutional mechanisms of transitional justice to better fulfil its objectives?

The above clarification helps us to understand the South African amnesty process and the Polish lustration process.⁶ Although they span different categories of transitional justice, the understanding of their shared objectives provides a fruitful base for comparison at a new level of abstraction (David and Holliday, 2006). What components of the processes best serve the interests of transformation of loyalties and identities in divided societies? For example, does the scope of the truth revealed help the transformation of a divided society? What are the experiences of South Africa and Poland? Are the lessons transferable to other divided societies in order to overcome their past?

Factors of the process

The forthcoming analysis focuses on five components of transitional justice processes that create major policy dilemmas for their respective institutional frameworks. For analytical purposes they are viewed as fundamental components of the processes, and were enshrined into the particular laws that establish and govern both processes. They include the scope of truth, a choice of particular procedures, and sanctions for not telling the truth, transparency, and impartiality. The selected components are evaluated from the perspective of the impact they have made in South Africa and Poland and are assessed with regard to their transferability to other countries. The list of policy choices is not complete; the selection of major components is open to discussion. The list could also include the powers of the quasi-judicial bodies established to carry out the processes, reporting, and time mandates that would, however, exceed the spatial limits of the paper.

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Before we proceed with the comparison, the following section briefly introduces the Polish lustration process. The South African amnesty process, which was part of the Truth and Reconciliation Commission, is well known and has been described elsewhere (see generally TRC (1998; 2003); Boraine (2001); Villa-Vicencio and Verwoerd (2000)).

The Polish Lustration Act was approved in 1997, but the process only began two years later due to difficulties in establishing the Lustration Court. This paper analyses the period between the launch of the process in January 1999 and the end of 2002, although the process continues.

The main feature of the Polish lustration process is the verification of an affidavit, submitted by a person who applied for a position specified in the Lustration Act, with regard to whether he or she worked or collaborated with the security services of the communist regime during the period between July 1944 and May 1990.⁷ The collaboration concerned positions held in several security organs, such as the Ministry of the Interior, the secret police (SB), army intelligence, army counter-intelligence and other security services. It also included civil and military organs and the institutions of foreign states with tasks similar to the aforementioned organs. The affidavit has to be submitted by the highest constitutional officials, including the president, members of parliament and persons appointed by them; general directors of a ministry, a central or a regional office; judges, prosecutors, and advocates; and those who occupy leading and supervisory positions in the publicly financed media. If the substance of the affidavit reveals collaboration, it is officially published in the government gazette, the *Polish Monitor*.

The Act provides a special judicial procedure directly connected to ordinary criminal procedures. It establishes a special lustration prosecutor, the Spokesperson of the Public Interest, and authorises the Warsaw Court of Appeal as the Lustration Court. The Spokesperson or his deputy at the Court could initiate the lustration process. The Court either decides whether the affidavit is true or false, or suspends the case. The lustrated person is in the position of an accused and he or she could appeal against the judgment. The results of the lustration are published in the *Polish Monitor*. A false affidavit is sanctioned by the loss of 'moral qualification' for ten years, which implies the loss of eligibility for specified public positions during that time.

A. *The scope of truth*

Does the scope of truth resulting from the processes help overcome past divides? What information is required to qualify for a second chance? The South African focus on truth was much broader than that of Poland. The truth concerned the revelation of wrongdoings, their legal and factual nature, context, objectives, the motives of the perpetrators, whether they were committed in the execution of an order, etc.⁸ Learning the truth, however, did not restart civil war as the turbulent period between 1990 and 1994 may have suggested. Empirical research suggests that truth did not deepen old divisions and that it indeed contributed to reconciliation in South Africa.⁹

In Poland, the truth concerned the admission of the applicants' work and service for, or collaboration with, the listed totalitarian security organs. It concerned the past *status* of a public official in respect of his or her work or collaboration with the repressive apparatus. It did not involve any single act, for instance, informing on one's fellow citizens, although such an act might have served as evidence at the Lustration Court. This means that the truth that resulted from the Polish lustration process was significantly narrower than that which emerged from the amnesty process. In South Africa, the truth focused on an *act* or series of *acts* (or omissions) perpetrated by the amnesty applicant.

This difference is underlined by the output of the process. In Poland, it was only the identity of the person who revealed his or her collaboration with the repressive apparatus or who was found to have been dishonest in his or her revelation that was officially published. The essence of the affidavits published in the *Polish Monitor* only included (and still includes) a brief official statement that the person revealed his or her collaboration¹⁰ or that he or she did not submit a true affidavit.¹¹

The public could ascertain whether a state official had collaborated with the security organs but not the nature of that collaboration, its motives or whether it had harmed anyone.¹² The activity of former secret police remains, to a large extent, concealed. The results of other investigations, such as those carried out by the Institute of National Memory, which had been established to investigate crimes committed against the Polish nation, were also unsatisfactory.¹³ Poles demanded to know more. According to a poll conducted in 1999, about 55 per cent of Poles thought that everyone should have access to their own files, a right that has so far been denied and which factually perpetuates the policy of totalitarian secretiveness (Karpinski, 1999). Moreover, the majority of voters supported and demanded lustrations throughout the whole decade (Szczerbiak, 2002, pp. 553–554).

Despite the polarisation of Polish society and divisions among political parties and the media, supporters of lustration have not taken any extreme measures against those who revealed their collaboration. On the contrary, it seems that the majority of supporters are willing to give their discredited leaders a second chance. According to a poll conducted in 2000, 52 per cent of Poles considered presidential lustration a necessary measure; 72 per cent of them said it was necessary to know the past of candidates and 10 per cent stated that lustration proved the trustworthiness of a candidate (Rzeczpospolita, 2000). Given the absence of revelation about details, one of the possible interpretations of these results may suggest that supporters of lustration were interested in the formal act of truth disclosure rather than in the material outcome of the lustration process. Nearly three-quarters of them trust a person who worked for the secret service and who has revealed this fact (Rzeczpospolita, 2000).

In summary, even the limited truth that results from the Polish lustration process may still lead to reconciliation, perhaps because it demonstrates a change of attitudes on the part of wrongdoers. At the same time, however, people do not give up their desire for truth and the Poles are dissatisfied with being deprived of the opportunity to utilise the lustration process to come to terms with their past. Reconciliation and truth-seeking are different, though overlapping, social

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processes. Policymakers should note that coming to terms with the past also requires a truth commission, not only a narrowly drawn reconciliatory committee. The South African amnesty *process* offers food for thought in formulating contextual *definition* of truth that goes beyond an isolated act of wrongdoing and encompasses its societal context; one that is not limited to a perpetrator-centred approach.

B. Sanctions

Conditional amnesty is an essential feature of both processes. It signifies that anyone who is considered to have been dishonest is not eligible to receive a second chance. But what happens if the person does not qualify? Sanctions for dishonesty are a necessary requirement that ensures the integrity of the process. Sanctions should encourage the participants to take the process seriously and at the same time should not discourage them from participation.

Participation in both processes depends primarily upon the wrongdoers' estimation of potential gains and losses. In the South African model, a perpetrator had to balance the probability of being convicted in a trial against public exposure at the amnesty hearings, which might have damaged his or her reputation. In Poland, a collaborator has to balance the benefits of access to public positions against the chance of being found to be dishonest during screening.

However, perpetrators in South Africa faced another dilemma: even if they disclosed all relevant facts about their criminal acts or omissions, this would not guarantee automatic impunity. This meant that perpetrators were aware that the full disclosure of truth might eventually lead to their conviction (although it could not be used formally as evidence against them), if amnesty was not granted. This uncertainty was exacerbated by the fact that it is more difficult to predict the outcome of a non-judicial process.

Conversely, 'participants' in the Polish lustration process were more motivated to tell the truth in comparison to their South African counterparts. The revelation of the truth about one's collaboration does not pose any threat to oneself in the future. One would only be sanctioned for present dishonesty, not for the act of past collaboration. The sanction in the Polish lustration process was not related to the past. The reason for the evolution of this idea is simple: informing on fellow citizens was not illegal under the Communist regime; an attachment of sanctions related to the past would generate allegations of the breach of the principle that prohibits retroactivity of law. Thus, inserting the South African model of sanction on the Polish one is impossible; however, the Polish-like composition of sanction for present dishonesty is possible to implement in any country that would follow the South African amnesty process.¹⁴

The composition of backward-looking sanctions indicates that the South African amnesty process was inconsistent in the following respects. First, South Africans wanted to know the truth about the past, but the composition of sanction exposed perpetrators to the risk of facing criminal trial, which might have inhibited their truth-telling. Second, according to its architects, one of the motivations

for the process was to avoid criminal trials, which might be costly, lengthy and ineffective (Asmal, 1997, p. 19; Tutu, 1999, p. 27).¹⁵ However, it might not have achieved this aim as those who were not granted amnesty could be tried. Although conducting trials is a politically plausible option in today's South Africa, this may not be the case in many other countries, for example Latin American countries with an influential military.

In this respect, South Africans could learn from the Polish experience. In order to establish as complete a picture as possible about past human rights violations, they could motivate perpetrators to be more truthful using the threat of a sanction for their present dishonesty, not for their past wrongdoings. Similarly, since criminal law sanctions dishonesty in testimony, a person who submits a false amnesty statement could be charged with perjury instead of the act committed in the past. An immediate sanction seems to be more rational than reopening and hearing the same case once again.

C. Procedures

The choice between judicial and non-judicial procedures may significantly affect the reconciliatory capacity of this method of transitional justice. It directly impacts on fairness of the process, its speed and the number of cases processed. One of the features of fairness is to ensure that similar cases will be handled similarly and different cases differently; the large scale of power abuses may require managing a large number of cases; and the speed of the process is crucial to serve the needs of societies in transition.

These three requirements altogether bring a kind of paradox. It is impossible to achieve all of them at the same time without spending a large part of the country's budget and reallocating a considerable portion of human resources. The decision-maker has to sacrifice at least one objective for the benefit of the remaining others. It seems that it can (a) process a large number of cases in a relatively short period of time but at the expense of fairness; or (b) ensure fairness, handle many cases but the process may take longer; or (c) focus on fairness and speed but conduct fewer cases.

Given the absence of its procedures in the TRC Act, the South African Amnesty Committee itself had to invent a special non-judicial procedure. Within the five years of its operation, the Amnesty Committee heard and processed over 7,000 cases, thus taking on the first approach. Yet the fairness of the process has been questioned and several high-profile cases, including that of Winnie Mandela, proved to be contentious and divisive. The lack of corroboration and insufficient opportunity for cross-examination that led to the reduction of the truth to 'hearsay' is one of the central arguments of Jeffery's criticisms (Jeffery, 1999, pp. 49–67) and was echoed in a dissenting opinion from the TRC Report submitted by commissioner Malan ('Minority Position', in: TRC, 1998, Vol. 5, pp. 441–442). The commissioners themselves accepted that the absence of precedents and decisions taken in various panels caused many inconsistencies (TRC, 2003, Vol. 6, Chapter 1.1, paras. 34 and 35).¹⁶

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Poland adopted judicial procedures. It ensured fairness at the expense of speed and the number of resolved cases. The lustration process, therefore, resembles the second and the third approach. Although screening of about 23,000 affidavits of senior public servants and judges was accomplished within four initial years, the hearing of suspected cases was a very lengthy process. By December 2002, the Lustration Court of Appeal only managed to close 51 cases, initiated by the Spokesperson, of which 17 were declared truthful, 25 dishonest and nine were dropped (Lesiński, 2002).

The experience of South Africa suggests that adopting improvised, non-judicial procedures carries a significant risk of undermining the credibility of the whole process. The process of overcoming past divides is carefully watched by various segments of society, politicians, participants and the media. Established judicial procedures that ensure 'fair reconciliation' seem to be a better option even at the expense of a smaller number of processed cases. National reconciliation is more a matter of elite accommodation in times of transition, a process that is widely transmitted by the media, rather than a prolonged process of reconciliation between citizens at the grassroots level.

D. Transparency

If the cases are heard *in camera*, does that impair the processes' potential for overcoming past divides? What are the risks of the closed-door policy? Worries of keeping state secrets and protecting personal rights and safety of the person under scrutiny are the main arguments for closing the door of many courtrooms in transitional countries. At the same time it is a particularly contentious topic in any transition from police states that heavily relied on clandestine operations, secret police and networks of their informers. Their victims may rightfully argue that justice should not only be done, but it should also be seen being done.

There are three main reasons for opening the process: ensuring its transparency, thus preventing the results of the process from unsubstantiated criticism; winning the public trust in the state that is usually low under any authoritarian rule and is further undermined by dissatisfaction with a deal negotiated between the government and the opposition; and contributing to the change of identities and loyalties, which is crucial in divided societies. The latter change cannot be reduced to a single act of a signature, a submission of an affidavit or a half-hour (public) hearing. These changes do not only concern persons under scrutiny but the society as a whole. The whole process of establishing the truth is a process in which concerned individuals influence society, which in turn influences individuals. The media are expected to play an important role in the process of creating new identities and loyalties and providing a sort of a hermeneutic dialogue between society and the individual.

The South African amnesty process was fairly transparent. Many hearings were open to the public. The media transmitted live amnesty hearings across the country, many of which are still available in libraries or NGOs. The transcripts

of amnesty hearings are available on-line. Although some of the amnesty applications were considered *in camera* in chambers, openness prevailed (TRC, 1998, Vol. 1, pp. 271–275; Pigou, 2001).¹⁷ The wide media coverage created a virtual reality of the whole truth and reconciliation process. In a poll conducted in 2001, about 73.5 per cent of Africans, 56.7 per cent of Asians, 33.7 per cent of Coloureds, and 29.9 per cent of Whites thought that the TRC did an ‘excellent job’ or a ‘pretty good job’ in providing compensation to victims (Gibson and Macdonald, 2001, p. 21, table 2; see also Gibson and Gouws, 2003; Gibson, 2004a; Gibson 2004b). The paradox is that at that time the victims had not yet received their financial compensation.

This contrasts with the situation in Poland. Judicial hearings at the Lustration Court may be closed to the public if a lustrated person requests it. The door usually remains closed. Such an arrangement is unusual because the power to close the courtroom normally resides with the judge. This also conflicts with the essential democratic principle of transparency. Poles were deprived of the right to question the integrity of lustration decisions. This has led to accusations from competing politicians, media speculations and has contributed to an atmosphere of mistrust in society.

The concealment of the process resulted in it being attacked in the Polish media, which appeared to be biased in either a positive or a negative direction. The media made people suspicious of those acquitted in the court and of their eventual collaboration with the security services. It criticised the initiation of lustration cases, interpreted the lustration of the highest state officials as discrediting them, although the process cleared their names, treated lustration decisions as final while an appeal was pending, or denounced the Spokesperson of the Public Interest (see David, 2003; Łoś and Zybortowicz, 2000, p. 170, p. 177). In addition to this, media biases led to virtual media wars during the initial stages of the process. To illustrate this point, the newspaper *Gazeta Wyborcza* and the weekly *Polityka* attacked the daily *Zycie Warszawy* and *Rzeczpospolita*, while the latter retaliated against these criticisms (see, e.g. Michnik, 1999; Checko, 1999; Michalski, 1999).¹⁸ As a result, part of the public appeared to mistrust decisions delivered by the lustration court. On the positive side, the judicially verified grasp of truth enabled lustration officials to issue numerous statements to correct these misinterpretations.

The media were able to create a virtual reality, a fiction of the process in both countries. The openness of the process in South Africa created an impression of its success, while the closure of a lustration courtroom perpetuated a low level of trust in Poland.

E. Impartiality

The administration of justice is conditional on its impartiality, manifested in the absence of any prejudice and bias. By international human rights standards, impartiality is a two-dimensional notion, comprising of objective and subjective features. Courts must not only *be* impartial but, according to the President of the

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European Court of Human Rights, they must also *be seen* to be impartial. 'What is decisive is whether, in criminal proceedings, the accused's fear that a judge lacks impartiality can be held to be objectively justified . . . to the external observer' (Wildhaber, 2001).

Seeking such external validations is only possible when we consider justice in a particular case heard at a court of justice in a stable democracy. However, transitional societies seldom provide us with a stable platform such as a universally acceptable democracy. The issue at stake is not the trial of one thief or a murderer but the history of a nation, painted with killings, thefts and mistrust. In a fragile and fragmented political environment, impartiality is an onerous objective. The paradox is that the more difficult it is to achieve impartiality, the more vital it is in order to overcome past divides. How can we construct an impartial court of transitional justice? What can we learn from the experiences of South Africa and Poland? How was the impartiality 'achieved' in the composition of the Amnesty Committee and the Lustration Court?

There is no *a priori* blueprint for a selection of transitional judges as each country operates within specific circumstances. In general, we can distinguish two typical ways in which the transitional authorities may attempt to achieve impartiality for transitional justice measures. In countries whose judiciary retained relative independence from the authoritarian regime while only some, for example 'state tribunals' or 'military courts,' handled the 'dirty work', it is possible to select judges from within the existing system. However, in many other transitional countries, the authority of the entire judicial profession may be completely undermined. Many regimes reduced law, justice and the legal system to positive law, political justice and to a tool with which maintain power. In this situation, a body must be composed of persons previously outside of the judiciary. Its impartiality is achieved through a selection of persons that would mirror a cross-section of society.

An ongoing transformation of the judiciary and new appointments into its ranks during the 1990s enabled Poland to adopt the first approach. However, the first attempt failed, as it had not been possible to establish a lustration court of 21 judges. The judges were reluctant to be involved in passing sensitive political and moral judgments, risking their future impartiality, while low financial remuneration also played a role. The process was hampered until the law was changed. According to the 1998 amendment, the Chair of the Supreme Court appoints the lustration prosecutor and the Warsaw Court of Appeal is assigned to serve as the Lustration Court. While the lustration tribunal escaped from being questioned, the appointment of the first Spokesperson of Public Interest sparked yet another controversy. On his last day of service as the Chair of the Supreme Court, Adam Strzembosz appointed Boguslaw Nizienski, a former judge of the Supreme Court, the Spokesperson of Public Interest. Both Strzembosz and Nizienski were activists of the opposition Solidarity movement at the Ministry of Justice in the beginning of the 1980s and Nizienski's task at the Supreme Court prior to his 1998 retirement was the rehabilitation of communist victims. These would probably be the best qualifications for the post in a society adopting

the retributive approach, say of the Czech Republic or Germany, but not in divided Poland. It was no surprise that the new head of the Supreme Court, appointed by the ex-communist President Kwasniewski, was against Nizienski. This model points to the impossibility of selecting an impartial person from within the transitional judiciary. It is hard to imagine anyone who would be able to give up his or her political attitudes and forget his or her experience of living in the authoritarian regime in order to satisfy everyone.

Based on the Truth and Reconciliation Act, South African President Mandela appointed three judges, one of them as the chairperson, and two members of the TRC as members of the Amnesty Committee. Due to the large volume of work and in order to expedite the process, the membership of the Committee was subsequently increased to 11 in June 1997 and to 19 during December 1997 (see TRC, 2003, Vol. 6, chap. 1.2, para 6).¹⁹ All members had a legal background serving in various legal professions and all South African racial groups, political ideologies and a socioeconomic status seemed to be represented. Despite this fact, the Committee was sometimes accused of being biased in its composition, work and reports. Jeffery alleges that the whole TRC was not sufficiently representative in respect of the past conflict and that it was politically biased against the NP and the IFP (Jeffery, 1999, pp. 85–87, pp. 103–106; Malan, 1998, p. 456).²⁰

Thus, the second way of achieving impartiality in the transitional body, one in which it reflects a broader spectrum of society, seems to be a better option than seeking independent personalities within the transforming judicial system. Even critics of the process in South Africa demanded greater representation on the amnesty committee, not its neutrality. Neutrality proved to be a fiction in Poland. Nevertheless, it is important to acknowledge difficulties in establishing any fully representative body in any divided society. In order to be truly representative, the body should perhaps also include the agents of the old regime, which is an absurd requirement that would cause even more damage to its impartiality. Moreover, we should not be surprised that extreme opinions evolve around any issue. Even in established democracies, there is always someone who would not trust decisions taken by any court at any level. This does not mean that we should give up on the requirement of impartiality but we should acknowledge the limitations of our efforts.

A summary of useful lessons

Current frameworks for the study of transitional justice, including outcome evaluation models, or specific truth commission models, do not enable the examination of transitional justice measures that were conducted in different spheres of justice. Motivated by similarities between the Polish and the South African way of dealing with the past and between similar political circumstances of transition in both countries, the paper develops a new framework that cuts cross, though preserves, the existing model of transitional justice. The framework distinguishes retributive, reconciliatory and null methods of dealing with the past and their modifications.

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A particular method of dealing with the past reflects a particular balance of political powers and reaches across a criminal justice level and a public employment level. Shaped by relatively similar circumstances, the Polish lustration process and the South African amnesty process are the projections of the same active reconciliatory method of dealing with the past on two levels of transitional justice. Both processes can theoretically be merged or combined to complement each other. This would make the policy of dealing with the past more coherent and technically more beneficial. For example, information resulting from some testimonies can be utilised as evidence in both processes.

The comparison indicates that reconciliation does not depend on the scope of truth but on demonstrating the change of the wrongdoer's attitudes towards the past. The establishment of a wider reconciliatory forum and broadening the definition of truth are more important for coming to terms with the past than for national reconciliation. The societal need to know more truth, however, does not vanish and goes beyond the limited truth that results from a reconciliation process. Truth and reconciliation are different processes that require a separate institutional setting. A truth commission, an institute of national memory or a similar body is a necessary institutional component of the policy of coming to terms with the past.

Sanctions for not telling the truth or not making full disclosure should not bear any relationship to the past; it would otherwise inhibit the participation in the process. Instead, dishonesty should be punished directly in the same way as perjury.

As reconciliation needs to be fair, procedures that govern the process should be judicial, instead of administrative. At the same time, the reconciliation process should be fast, even at the expense of the number of processed cases, not at the expense of relaxing procedures. It is less problematic if reconciliation does not reach the grassroots level than if it is publicly questioned and undermined.

The process must be open and transparent. The secretiveness of the process and *in camera* hearings has proved itself to be destructive and harmful to the atmosphere of national reconciliation. It confirms an old phenomenological principle that how things actually are is not as important as how they are perceived, or, in terms of information society, how the media presents them.

In order to establish an impartial body to handle the reconciliatory process, it is better to select a conspicuous body composed of predictable representatives of various segments of society rather than 'independent' persons from within the system. It is important to acknowledge that the establishment of an entirely impartial body of transitional justice is hardly possible but must be attempted.

Notes

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THE POLISH LUSTRATIONS AND THE SOUTH AFRICAN AMNESTY PROCESS

1. The Czech word *lustrace* and the Polish *lustracja* have revived the forgotten English term lustration, which is derived from the Latin term *lustrum*. *Lustrum* means 'to review, survey, observe, examine'. After 1989, lustration has come to mean the examination of certain groups of people, especially politicians, public officials and judges, to determine whether they have been members or collaborators of the secret police, or held any other positions in the repressive apparatus of a totalitarian regime. Lustration law is a special public employment law that regulates the process of the examination. The law defines who can/must be subjected to the examination, who is in charge of the examination, how the lustration procedure works, and the consequences of an eventual positive lustration. A finding of positive lustration means the examination uncovers evidence that a person worked for the repressive apparatus of the previous regime. On this, see David (2003, pp. 387–388; 2004).
2. The model is only approximate. Various factors and constraints, such as leaders' beliefs, dominant actors, structural constraints etc., may prevent the new leaders from adopting a comprehensive and robust approach to retribution manifested in punishments and exclusions. Due to these factors, we can only claim that the particular balances of political forces are necessary, though not sufficient, conditions for selection of a particular method of dealing with the past. In addition to this, there is a continuum of regime changes, which, as Huntington acknowledged, makes it difficult to distinguish transformations from transplacements, especially when the former result in a power-sharing pacts. Time is another factor. Prosecutions may not be possible immediately after transition but may become available after, e.g. an electoral defeat of a former ruling party and *vice versa*, initial prosecutions may generate a response from the old elite, which may effectively curtail them.
3. Economic constraints were a significant limitation in South Africa, where leaders worried that trials would be too lengthy and, consequently, too costly (Asmal, 1997, p. 19; Tutu, 1999, p. 27). International human rights standards and the experiences of other countries also influenced the process, both in South Africa and Poland. The South African TRC adopted many features of the Chilean TRC, as well as of similar commissions established in other Latin American countries. The Polish elite learned not only from the experiences of countries that conducted lustrations, such as the Czech Republic, Germany and Hungary, but also from international criticisms (David, 2004).
4. Although the old South African and Polish regimes differed in their character (the former was a racially-based authoritarian regime democratically legitimised by the white minority, while the latter was a politically-based totalitarian regime), they were comparably brutal. For some data on human rights violations in Poland, see, e.g. Kobos (1999). For data on South Africa, other than the TRC Report, see 'South Africa Survey', in Jeffery (1999). However, there were two significant differences, which may have had an impact on their dealing with past policies. First, the racially-based regime facilitated the identification of adversaries, whereas the population of the politically-based totalitarian regime was evenly distributed along the continuum of victim-perpetrator; overcoming the past in a homogeneous society is easier than in a heterogeneous one. Second, unlike Poland, South Africa did not enjoy the political 'protection' of any superpower. As a result, the policies of the South African regime were declared a crime against humanity. There was no such resolution condemning the policies of the Polish communist regime.
5. For data about the history of lustrations in the context of Polish transition, see Los (1995, p. 117); Kauba (1999); Misztal (1999, p. 31); and 'Constitution Watch: Poland' *East European Constitution Review* (quarterly country reports).
6. There is one more advantage of the focus model of transitional justice. In choosing mechanisms that aim to overcome past divisions, the new leaders may not only adopt a new model that enhances the Polish lustration with features of the South African amnesty process and vice versa, but also combine both approaches on different levels, making dealing with the past policy more coherent and efficient.
7. The Polish lustration process is legally defined in the Act 'on the revelation of work or service done in State security organs or of collaboration with them between 1944–1990 by persons carrying out public positions' (1997). The Lustration Act (the Act has been amended several times). For its characteristic, see, e.g. David (2003); Constitutional Watch (1997–98).
8. Promotion of National Unity and Reconciliation Act (1995), No 1111 (Truth and Reconciliation Act, TRA) Art. 20 (3).
9. Despite rampant mistrust across racial groups, only a minority considers South Africa to be a better place without other racial groups (19.4 per cent of Africans, 19.1 per cent of Whites, 5.7 per cent of Coloreds, and 14.7 per cent of Asians (Gibson and Macdonald, 2001, p. 33, table 8; Gibson, 2004a; 2004b).
10. For example, Announcement of the Chairman of the Court of Appeal in Warsaw from 21 Dec. 1999 on the essence of affidavit submitted by persons holding public offices (Mon. Pol. Nr 41, poz. 641) ('On the basis of [the Lustration Act] the following is presented to the public knowledge: I. Zbigniew Młynarczyk, son of Edward, born on Nov. 16, 1930 in Warsaw, resident in Warsaw, has stated that he worked in security organs within the meaning of the [Lustration Act].')
11. For example, Communication of the Court of Appeal in Warsaw, Department of Lustrations, from 28 Dec. 1999 (Mon. Pol. z 2000 r. Nr 1, poz. 9) ('The Lustration Court of Appeal in Warsaw, Department of

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- Lustrations, informs that in its decision from Sep. 15, 1999, No. V AL. 6/99, confirmed that Wanda Bobek, maiden surname Nalepa, daughter of Andrzej and Helena, born in 13 June 1929 in Niechobrze, submitted a lustration affidavit [that was found to be] not in accordance with truth as required by the [Lustration Act], because she concealed the fact of conscious and secret collaboration with security organs according to the [Lustration Act].’)
12. The process is silent about the status of an informer in respect of his or her position in the repressive apparatus. This might have been sufficient to estimate the scale of collaboration. Collaboration with the repressive apparatus was hierarchical, ranking reliable sources to formal positions higher than those who were, for example, forced to collaborate occasionally (David, 2004).
 13. The ‘Instytut Pamięci Narodowej’ launched investigations and prosecutions in several cases of crime committed under the communist regime, which did not bring any substantive results by the end of 2001, <www.ipn.gov.pl>.
 14. This concerns sanctions for failing to make a full disclosure, not for failing to qualify for being considered in the process. The inability to meet other requirements, such as political objectives and gross human rights violations, means that the applicant is not eligible for amnesty and that his request should be dismissed without sanctions.
 15. The impression that trials are lengthy, costly and unsuccessful, and should therefore be avoided was exacerbated by the need of the Commission to justify its existence (TRC, 1998, Vol. 1, p. 5).
 16. ‘The Act provided expressly for the establishment of subcommittees or hearings panels to deal with amnesty applications. This provision enabled the Committee to arrange for various hearings panels to hear different matters simultaneously and so expedite the finalisation of its work. The composition of these panels was not fixed, which resulted in different permutations of Committee members . . . This situation created the potential for inconsistencies of approach between the different hearings panels . . . It is important to point out that the Amnesty Committee was an administrative tribunal, and that no formal system of precedent applied to its activities.’
 17. For the proportion of amnesties decided in chambers as opposed to public hearing, see TRC (1998, Vol. 5, pp. 119–124).
 18. For the RIP’s effort to clarify these misinterpretations, see <www.rzecznikip.gov.pl/actu.html>.
 19. The Committee seldom had the benefit of acting in full composition.
 20. Jeffery also notes some inconsistencies in its first Report, which resulted in a bias against the IFP.

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