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OPTION REPORTS

TRANSITIONAL JUSTICE

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The following report is one of a series produced by the Constitutional Design Group, a group of scholars dedicated to distributing data and analysis useful to those engaged in constitutional design. The primary intent of the reports is to provide current and historical information about design options in written constitutions as well as representative and illustrative text for important constitutional provisions. Most of the information in these reports comes from data from the Comparative Constitutions Project (CCP), a project sponsored by the National Science Foundation. Interested readers are encouraged to visit constitutionmaking.org for further resources for scholars and practitioners of constitutional design.

1. INTRODUCTION

Transitional justice refers to efforts by a new regime to deal with crimes or wrongdoing of a previous regime. It can include a mix of trials by domestic and international courts, proceedings before truth commissions, amnesties, and other modalities. We describe below the range of constitutional provisions for transitional justice.

2. DATA SOURCE(S)

The analysis reported below is based on data the Comparative Constitutions Project (please see the appendix to view the question text). As of this writing, the project's sample includes 599 of the roughly 800 constitutions put in force since 1789, including more than 90% of constitutions written since World War II.

3. CLASSIFICATION AND HISTORICAL TRENDS

Relatively few constitutions specifically address transitional justice. Overall, only about 1.3 percent of the cases in the current sample mention a commission for truth and reconciliation, and about 2.2 percent of the cases contain provisions regarding crimes committed by the previous regime. Of the latter, three constitutions specify that crimes committed by the previous regimes will be pardoned, while eight constitutions provide that crimes committed by the previous regime are punishable.

4. NOTES ON ATYPICAL CASES

A small number of constitutions suggest that there is a transitional justice process but do not explicitly state whether the crimes are pardoned or punishable.

5. SAMPLE CONSTITUTIONAL PROVISIONS

The set of sample provisions is divided into sections on:

1. Commissions for Truth and Reconciliation
2. Crimes committed by the previous regime are pardoned
3. Actions of the previous regime are punishable or subject to civil liability

5.1. Commission for Truth and Reconciliation

Responsibilities of the State: The State shall have the follows responsibilities:

(s) To constitute a high-level Truth and Reconciliation Commission to investigate the facts regarding grave violation of human rights and crimes against humanity committed during the course of conflict, and create an atmosphere of reconciliation in the society.

- Nepal 2006. Article 33.s

Article 150. The Council of the Bashingantahe for National Unity and Reconciliation is a consultative organ charged, among other things:

- to lead reflections and give counsel on all essential questions concerning unity, peace and national reconciliation, in particular those relating to the priority missions of the institutions of transition;
- to follow regularly the evolution of the Burundian society from the point of view of the question of national unity and the reconciliation;
- to issue periodically a report on the state of the national unity and the reconciliation and make it known to the nation;
- to issue proposals with a view to the amelioration of the national unity and of the reconciliation of the country;
- to conceive and to initiate the actions necessary with a view to rehabilitate the institution of Ubushingantahe to make it into an instrument of peace and social cohesion;
- to issue advice and proposals on other matters interesting the nation;

The Council of the Bashingantahe for National Unity and Reconciliation is consulted by the President of the Republic, the Government and the National Assembly. It may also issue advice and make it public, on its own initiative.

Article 151. The Council of the Bashingantahe for National Unity and Reconciliation consists of individuals recognized for their moral integrity and the interest they hold for the life of the Nation and more particularly its unity. The President of the Republic appoints the members of the Council of the Bashingantahe for National Unity and Reconciliation.

Article 152. A law determines the composition, the organization and the functioning of the Council of the Bashingantahe for National Unity and Reconciliation. This law specifies as well the creation, the composition, the organization and the functioning of the Council of the Bashingantahe for National Unity and Reconciliation at different administrative levels and their organic ties.

- Burundi 1998. Article 150, 151, 152

Article 269. The National Council for National Unity and Reconciliation is a consultative organ charged, among other things:

- to reflect and give advice on all essential questions concerning unity, peace and national reconciliation, in particular those relating to the primary missions of the institutions;
- to follow regularly the development of the Burundian society from a perspective guided by the issue of national unity and reconciliation;
- to issue periodically a report on the state of national unity and reconciliation and to disseminate it throughout the nation;
- to issue proposals with a view to the improvement of the situation with regard to national unity and reconciliation in the country;
- to conceive and to initiate the measures necessary with a view to rehabilitate the institution of Ubushingantahe in order to make it into an instrument of peace and social cohesion;
- to issue advice and proposals on other matters interesting the nation. The National Council for National Unity and Reconciliation is consulted by the

President of the Republic, the Government, the National Assembly and the Senate. It may also issue advice and make it public on its own initiative.

Article 270. The National Council for National Unity and Reconciliation is composed of individuals recognized for their moral integrity and the interest they have for the life of the nation and, more particularly, its unity. The members of the National Council for National Unity and Reconciliation are appointed by the President of the Republic in concert with the Vice-Presidents of the Republic.

Article 271. The members of the National Council for National Unity and Reconciliation must take an oath to defend national unity and to promote reconciliation.

Article 272. The National Council for National Unity and Reconciliation produces an annual report which it submits to the President of the Republic, the Government, the National Assembly and the Senate.

Article 273. An organic law specifies the composition and determines the organization and functioning of the National Council for National Unity and Reconciliation.

- Burundi 2004. Articles 269-273

Article 154. The Institutions supporting democracy are:

- the Independent Electoral Commission;
- the National Observatory of Human Rights;
- the High Authority on Media;
- the Truth and Reconciliation Commission;
- the Commission on Ethics and the Fight Against Corruption.

Article 155. The missions of the Institutions supporting democracy are:

- to ensure neutrality and impartiality in the organization of free democratic and transparent elections;

- to guarantee the media's neutrality;
 - to consolidate the national unity through a truthful reconciliation between all Congolese;
 - to promote and protect Human rights;
 - to promote the practice of moral and republican values.
- *Congo, Democratic Republic 2003. Article 154, 155*

The National Unity and Reconciliation Commission is an independent national institution. In, particular, its responsibilities include the following:

1. preparing and coordinating the national program for the promotion of national unity and reconciliation;
2. putting in place and developing ways and means to restore and consolidate unity and reconciliation among Rwandans;
3. educating and mobilizing the population on matters relating to national unity and reconciliation;
4. carrying out research, organizing debates, disseminating ideas and making publications relating to peace, national unity and reconciliation;
5. making proposals on measures that can eradicate divisions among Rwandans and to reinforce national unity and reconciliation;
6. denouncing and fighting against acts, writings and utterances which are intended to promote any kind of discrimination, intolerance or xenophobia;
7. making an annual report and such other reports as may be necessary on the situation of national unity and reconciliation.

The National Unity and Reconciliation Commission shall submit each year its program and activity report to the President of the Republic and the Senate and provide a copy thereof to such other State organs as may be determined by law.

An organic law shall determine the organization and functioning of the Commission.

- *Rwanda 2003. Article 178*

It is incumbent upon the Commission for Reception, Truth and Reconciliation to discharge functions conferred to it by UNTAET Regulation No. 2001/10.

The competences, mandate and the objectives of the Commission may be redefined by the Parliament whenever necessary.

- East Timor 2002. Article 162

The State shall initiate a comprehensive process of national reconciliation and healing that shall promote national harmony and peaceful co-existence among all Sudanese.

- Sudan 2005. Article 21

5.2. Crimes committed by the previous regime will be pardoned

The Congress of the Republic is authorized to enact, within two sessions and without complying with the requisites specified in paragraph (k) of Article 134 of this Constitution, an amnesty law that shall comprise the electoral crimes committed by reason of the elections held on November 15, 1939.

Congress is likewise authorized to enact, within the same period and in the same exceptional manner, an amnesty law that shall comprise crimes of a fraudulent character committed prior to the assembling of the constitutional convention of 1940, by public officers and employees in connection with the exercise of their offices, provided it is their first offense. At its first session following the approval of this Constitution, Congress shall enact an amnesty law that will totally pardon veterans of the War of Independence who are more than sixty years old, and their co-defendants, who are serving time in the penal institutions of the Republic.

- Cuba 1940, transitional provisions to title nine

This Constitution provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments we, the people of South Africa open a new chapter in the history of our country.

- South Africa 1993

Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution, all the provisions relating to amnesty contained in the previous Constitution under the heading “National Unity and Reconciliation” are deemed

to be part of the new Constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended, including for the purposes of its validity.

- *South Africa 1996.*

Until December 31, 2000, candidates for the office of President of the Republic, the *Riigikogu* or local government councils, as well as persons who seek the office of Prime Minister, minister, Chairman of the National Court, member of the National Court, judge, Legal Chancellor, Auditor-General, President of the Bank of Estonia, Commander or Commander-in-Chief of the Defence Forces or any other government or local government office filled by election or appointment must take a written oath of conscience that they have not been in the service or an agent of security organizations, military intelligence or counter intelligence services of states which have occupied Estonia and that they have not participated in the persecution or repression of citizens for their political convictions, disloyalty, social class or service in the government or defence services of the Republic of Estonia.

If a court determines that the information confirmed by the oath is untrue, the candidate shall be excluded from the list of candidates or his or her mandate shall be voided, or the person shall not be appointed to the offices noted in paragraph 1 of the present Article or the person shall be dismissed from office.

- *Estonia 1992, Article 6*

5.3. Actions of the previous regime are punishable or subject to civil liability

Article 21. Penal laws shall have retroactive effect when they are favorable to the delinquent. Excluded from this benefit, in cases where fraud was involved, are public officials or employees who commit a crime in the exercise of the position and those responsible for electoral crimes and crimes against the individual rights guaranteed by this Fundamental Law. Those who commit these crimes shall be subject to the penalties

and qualifications imposed by the law in force at the time of the offense. In cases of crimes committed in the service of the tyranny overthrown on December 31, 1958, the perpetrators may be tried in accordance with penal laws promulgated for this purpose.

Article 24. Confiscation of property is prohibited, but it is authorized for the property of the Tyrant deposed on December 31, 1958 and of his collaborators, of natural or juridical persons responsible for crimes committed against the national economy or the public treasury, and these who are enriched or have been enriched unlawfully under the protection of the public power. No other natural or juridical person can be deprived of his property except by competent judicial authority and for a justifiable reason of public benefit or social interest and always after payment of appropriate compensation in cash, fixed by court action. Non-compliance with these requirements shall give the person whose property has been expropriated the right to protection by the; courts and, if the case warrants, to restitution of his property.

Article 25. The death penalty cannot be imposed. Exception is made as to members of the Armed Forces, the repressive corps of the tyranny, the auxiliary groups organized by it, privately armed groups organized to defend it, and of confidential agents, for crimes committed in behalf of the restoration or defense of the tyranny overthrown on December 31, 1958. Also excepted are persons guilty of treason, subversion of the institutional order, or of espionage in favor of the enemy in time of war with a foreign nation; and those guilty of counter-revolutionary crimes designated as such by law and crimes which harm the national economy or the public Treasury.

- *Cuba 1959, Article 21, 24, 25*

Article 24. Property commits to duties. Its use must not run counter to the public good. Misuse of property with the intent of establishing an economic ascendancy to the detriment of the public good results in expropriation without compensation and transfer to the people's ownership.

Enterprises owned by war criminals and active National Socialists have been expropriated and will be transferred to the people ownership (without compensation). The same shall apply to private enterprises offering their services to a warlike policy.

Article 135. Only such penalties may be imposed as have been provided for by law at the time the punishable act was committed. No penal law has retroactive force.

Exceptions to this rule are measures and the application of provisions which are adopted for the overcoming of Nazism, Fascism and militarism, or which are necessary for the prosecution of crimes against humanity.

- *German Democratic Republic 1949. Article 24, 135*

No person who is serving a sentence imposed by the International Tribunal for the Former Yugoslavia, and no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina.

- *Bosnia and Herzegovina 1995, Article 9.1*

There is hereby established Gacaca Courts charged with the trial and judgment of cases against persons accused of the crime of genocide and crimes against humanity which were committed between October 1, 1990 and December 31, 1994 with the exception of cases whose competence is vested in other courts.

An organic law determines the organization, competence and functioning of these jurisdictions.

A law establishes a National Service charged with the follow-up, supervision and coordination of activities of the Gacaca Courts, which enjoy administrative and financial autonomy. This law also determines its attributions, organization and functioning.

- *Rwanda 2003, Article 152*

Transitional Judicial Organization

1. The collective judicial instance existing in East Timor, integrated by national and international judges with competences to judge serious crimes committed between the 1st of January and the 25th of October 1999, shall remain in effect for the time deemed strictly necessary to conclude the cases under investigation.

2. The judicial Organization existing in East Timor on the day the present Constitution enters into force shall remain in effect until such a time as the new judicial system is established and starts its functions.

- *East Timor 2002, Article 163*

The National Compensation Tribunal

137. There shall be a National Compensation Tribunal which shall entertain claims with respect to alleged criminal and civil liability of the Government of Malawi which was in power before the appointed day and which shall have such powers and functions as are conferred on it by this Constitution and an Act of Parliament.

Exclusive original jurisdiction

138.—(1) No person shall institute proceedings against any Government in power after the commencement of this Constitution in respect of any alleged criminal or civil liability of the Government of Malawi in power before the commencement of this Constitution arising from abuse of power or office, save by application first to the National Compensation Tribunal, which shall hear cases initiated by persons with sufficient interest.

(2) The National Compensation Tribunal shall have all powers of investigation necessary to establish the facts of any case before it.

(3) Notwithstanding subsection (1), the National Compensation Tribunal shall have the power to remit a case for determination by the ordinary courts where the National Compensation Tribunal is satisfied that the Tribunal does not have jurisdiction, or where the Tribunal feels it is in the interest of justice so to do.

- *Malawi 1994, Article 137, 138*

6. APPENDIX

This report is based on the following question(s) from the Comparative Constitution Project's "survey instrument":

[TRUTHCOM] – Does the Constitution provide for a commission for truth and reconciliation?

1. Yes
2. No
96. other, please specify in comment section
97. Unable to Determine

Instructions: Please note in the comments if you find a similar body with a different name.

[PREVLEAD] – Does the constitution mention anything about crimes committed by the previous regime?

1. Yes, these crimes will be pardoned
2. Yes, these crimes are punishable
3. No
96. other, please specify in comment section
97. Unable to Determine

Instructions: Please note in the comments if you find a similar body with a different name.

For additional documentation on the Comparative Constitutions Project, (including the full codebook, the sample, the sources of constitutional texts and translation issues related to those texts, coding procedures, publicly available data, etc.) please visit the project website at www.comparativeconstitutionsproject.org.