

POLICY OPTIONS FOR TRANSITIONAL JUSTICE IN ETHIOPIA

TRANSITIONAL JUSTICE WORKING GROUP OF EXPERTS

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TRANSITIONAL JUSTICE

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The need for TJ process in Ethiopia

Why TJA ?

- National context demands comprehensive transitional justice approach
- An effective transitional justice process plays a positive role in state-building and its sustainability
- Democratization and lasting peace are not possible in the absence of an effective transitional justice
- Implementation of transitional justice lays foundation for ensuring human rights and rule of law

Transitional Justice Mechanisms

A) Prosecution: which violations?

**Option One:
Focus on gross
human rights
violations
(genocide, war
crimes, crimes
against
humanity,
other grave
crimes).**

Strengths

- Provides opportunities to apply other mechanisms as prosecution would only focus on some serious crimes;
- Provides opportunities for speedy trial as the mechanism would handle only some types of crimes;
- Contributes to proper selection process as this focuses on prosecuting gross international crimes and other grave crimes;
- In line with international commitments to prosecute and punish gross violations of human rights

Risks

- Challenges related to investigation and collection of evidence as crimes are complex and have international character;
- Will not satisfy all victims as it will only target certain types of crimes
- Gaps in domestic legal framework for some of these crimes

Prosecution: which violations?

Option two: Prosecution for all violations of human rights

Strengths

- Broader accountability as it prosecutes more violations;
- Responds to victims' demands for justice;
- Avoids hierarchy of crimes and enhances prevention by promoting deterrence;

Risks

- Overwhelms the system as many more criminal matters are subject of the process;
- Overshadows the gravity and nature of crimes by diverting focus from the most serious crimes;
- Increases workload of the judicial process and demands allocation of more resources to handling multiple criminal cases;
- Delays and protracted processes due to the scope of the prosecution which could reduced public optimism towards the process.

Prosecution: Who should be prosecuted?

**Option one:
Focus on principal
offenders (who
gave orders,
planned and
coordinated
actions/inactions
including persons
holding high
positions**

Strengths

- Mitigates the burden on staff and institutions that conduct investigation and prosecution;
- Directs limited resources to prosecuting the most serious crimes;
- Provides space for other TJ mechanisms to be applied on non-principal offenders;
- Ensures accountability-based transition by prosecuting all principal offenders;

Risks

- Leads to grievances from victims and the public as offenders face different fates based on their level of participation;
- Undermines deterrence as some offenders would not be criminally responsible;
- Opens room for abuse at the stage of identifying suspected offenders to prosecute.

Prosecution: Who should be prosecuted?

**Option Two:
prosecution of
all persons
involved in
gross human
rights
violations in
any capacity**

Strengths

- Reduced grievances in the process as the process includes all offenders;
- Addresses victims' demands for justice' in a better way

Risks

- Reduced focus for other mechanisms of transitional justice;
- Risks overwhelming the transitional justice system due to the large number of suspected offenders;
- It is difficult, at practical and technical levels, to bring all persons who have participated in conflicts and injustices. When attempted, it would be a hasty process that would result in inconsistent decisions.

Institutional Issues: Judicial process

**Option one:
Establishing
special
benches
within the
high and
supreme
courts**

Strengths

- Creates a bench with proper vetting and assigning appropriate judges to address concerns on judicial independence and capacity on the existing courts
- An opportunity to use existing institutions and structures that contributes to institutional reform
- Saves resources by promoting better use of existing human and institutional resources

Risks

- Using existing structures that are not reformed or not to be perceived as reformed impacts the legitimacy of the judicial process
- Lack of capacity within existing structures given the complexity of the cases

Institutional Issues: Judicial process

**Option Two:
Establishing
special Court
(with first
instance and
appellate
benches) to
administer the
cases**

Strengths

- Creates better legitimacy and acceptance by establishing new institution
- Allows for assignment of external and new judges to create better capacity to administer complex cases

Risks

- Takes more time and resources to establish new courts
- Limited contribution to institutional reform and capacity building
- Establishing special court could raise constitutional challenge

Institutional Issues: Investigation and Prosecution

**Option 1
Establishing
separate
(dedicated)
teams within
existing police
and
prosecution
institutions**

Strengths

- An opportunity to use existing institutions and structures with some distance from the normal structure
- Saves resources by promoting better use of existing human and institutional resources
- Builds capacity through experience and contributes to institutional reform

Risks

- Concerns of legitimacy and public trust in the process when using existing institutions without actual or perceived major reforms;
- Limited capacity to undertake the activities

Institutional Issues: Investigation and Prosecution

Option 2 Establishing special prosecution office to coordinate investigating and prosecution

Strengths

- Opportunity for new institution with better legitimacy and independence;
- Speedy process as investigation and prosecution tasks fall under the same institution;
- Opportunity for increased support (resources) because of the additional focus to such institution;
- Incentivizes victims and the general public to support and participate in the process
- Improves ownership in and accountability of the process;

Risks

- Takes more time and resources to establish new courts
- Difficulty of finding capable and experienced staff from the job market;
- Limited contribution to institutional reform and capacity building;
- Additional strain on the limited state resources;

Truth Seeking

Elements of Truth seeking

Finding what happened, determining the extent of damage and subsequent acknowledgment to fulfil victims' demand for justice and inclusion in historical records laying the ground for reconciliation.

- Victims- centred approach
- Participation of suspected offenders
- Documentation of violations
- Publicizing the truth

Institutional Issues: who should lead on truth seeking processes?

Option 1 Through a new commission

Strengths

- In line with international best practice
- Opportunity for new institution with better legitimacy, popular acceptance and independence;
- Better effectiveness and capacity to undertake the tasks with a dedicated institutions mandated to undertake elements of TJ
- Attract professionals with required skill set and experience

Risks

- Additional strain on the limited state resources;
- Political fatigue on establishing new commissions
- Challenges of reach given the vast geography and number of issues with a time limited mandate

Institutional Issues: who should lead on truth seeking processes?

Option 2 Using existing institutions (National dialogue commission and Ethiopian human rights commission after legal modifications)

Strengths

- An opportunity to use existing institutions and structures with some distance from the executive
- Saves resources by promoting better use of existing human and institutional resources
- Builds capacity through experience and contributes to institutional reform

Risks

- These are already stretched institutions with broad mandates and responsibilities
- Not in line with internationally accepted models and against best practice
- Capacity gap to undertake TJ activities in the expected standard
- Requires amendment of laws

Reconciliation

Kinds of reconciliation during a TJ process

Bringing together people and communities divided by widespread human rights violations, war, conflict and injustice-induced social fractures, hate and fear and enabling them to embark on the path of reconstructing a shared future.

- Self-reconciliation
- Individual reconciliation
- Social and political reconciliation
- Institutional reconciliation

Who leads the reconciliation process?

Option 1: truth and reconciliation commission:

Strengths

- Ensures better effectiveness since reconciliation constitutes one of the core pillars of a transitional justice process;
- Is afforded more legitimacy because of such institution's independence and impartiality, and its bent on a participatory process;
- Is likely to be a professional pursuit as the institution will attract expert-level staffs;

Risks

- the establishment of new institution requires a huge state resource;
- a similar commission was tested in the past and had failed;

Who leads the reconciliation process?

**Option 2:
National
Dialogue
Commission:
recourse to
such option
requires a
legislative
amendment to
specifically add
a mandate to
the institution.**

Strengths

- it saves state resources;
- benefits from greater legitimacy as the institution is established to be independent and impartial;

Risks

- the process will likely be ineffective given that the Commission is already over-burdened with mandates and responsibilities;
- requires legislative amendment which likely takes time to carry out;
- granting such mandate raises concerns of incompatibility with internationally accepted models;
- this model may suffer from potential gaps in coordinating with other mechanisms;

Amnesty

Conditions of Amnesty

Unconditional amnesty would lead to miscarriage of justice, promote impunity and serve as a precursor for future violations; and is against international law

- Offenders level of participation
- Nature and gravity of the crime
- Collaboration of offenders
- Finding the truth
- Repentance and apology

Institutional Issues: Who grants amnesty?

Option 1 Through a new commission

Strengths

- Ensures the application of a trusted process as such institutions are independent, impartial and inclusive;
- Encourages offenders to participate in transitional justice;
- A dedicated institution is more fit to conduct conditions relevant to amnesty: check fulfilment of preconditions, listening to victims' voices and enforcement of conditions.

Risks

- Additional strain on limited state resource;
- Political fatigue on establishing new commissions
- Challenges of reach given the vast geography and number of issues with a time limited mandate

Institutional Issues: Who grants amnesty?

Option 2

using existing
amnesty legal
and institutional
framework:
Amnesty Board
under MOJ who
sends
recommendation
s to PM

Strengths

- Saves resources as it uses existing institutions;
- Contributes to institutional building;

Risks

- Is prone to fail because it does not follow the spirit of transitional justice;
- Does not fit to transitional justice- it does not enable an inclusive way of handling very complex cases;
- Concerns of trust and legitimacy;
- Discourages offenders from their involvement in the process.

Reparation

Building a functioning reparation system

Put in place a system to apply effective and proportional monetary or non-monetary compensation that could include reinstatement, compensation, satisfaction rehabilitation, communal compensation, memorials)

- Legal framework for reparation
- Identifying victim beneficiaries of individual compensation:
- Design ways for offenders to contribute to the reparation system:
- Establishing victims' fund

Institutional Issues: Who leads/coordinates the reparation process?

Option 1 Through a new commission

Strengths

- Better effectiveness of process because an independent institution is established to lead a complex and vast reparation scheme;
- Better responsiveness as other responsibilities of the commission will allow it address some of the questions in the reparation process;
- More legitimacy because of institution's independence and impartiality

Risks

- Additional strain on limited state resource;
- Political fatigue on establishing new commissions
- Challenges of capacity as reparation scheme requires unique competence and capacity (for example, deciding on the amount of compensation).

Institutional Issues: Who leads/coordinates the reparation process?

Option 2

Using existing institutions-
(court plus national diallage commission for collective compensation

Strengths

- Saves resources as it uses existing institutions and contributes to institutional building;
- Encourages individualized responsibility by obliging individual offenders to pay compensation through court

Risks

- Lack of capacity of such institutions to enforce a reparation scheme that is complex and that demands inclusive approach;
- Difficulty of implementing this alternative in conjunction with the other mechanisms in the transitional justice;
- Ineffective because it has proved difficult to enforce the right to compensation even in normal times;
- Ineffective because the institutions may not properly carry out this immense responsibility in addition to their existing mandates and functions;
- Potential discrimination because not all matters pass through the judicial system.

F)

Institutional reform

What would it include?

Vetting and investigation: Vetting of personnel to enable the identification and investigation of personnel who had committed or ordered the commission of gross human rights violations.

Terminate employment or position: take measures to terminate the employment and depose officials based on the vetting and investigation

Legal and procedural reform: to ensure laws and procedures are in place to prevent farther violations of human rights

Institutional Issues: who should lead institutional reform?

**Option one:
Through a
new (can
take the form
of a
commission,
a committee,
or specialized
office)**

Strengths

- Better legitimacy as process would be led in an independent and impartial way;
- Reduces interference (from politics and ethnic/ other interests);
- Improves coherence with other mechanisms of transitional justice;

Risks

- Additional strain on limited state resource;
- Political fatigue on establishing new commissions
- Lack of coherent political will for vetting and investigation

Institutional Issues: who leads the institutional reform?

**Option two:
Establish ad-
hoc units
within
relevant
institutions**

Strengths

- Saves resources as it uses existing institutions and contributes to institutional building;
- Institutional ownership, necessary political stature and responds better to risks that arise in the process;

Risks

- Limits opportunity to have an independent and impartial process; raises legitimacy-related challenges;
- Lack of capacity and interest to implement the process according to the internationally accepted standards;
- Risk of making decisions on political grounds. In other words, there is risk of giving more focus to overcoming gaps and avoiding conflict than conducting proper investigation and termination of employment.

Temporal scope

When should be the starting point of the process?

**Option 1:
before 1991**

**Option 2: From
1991**

**Option 3: From
1995**

**Option 4: From
2018**

**Option 5: Mixed-
From 1995 for
prosecution but even
before for truth and
reconciliation**

The role of sub-national administrations in transitional justice/ The role of traditional justice systems

- **Regions**
- **City admin**
- **Traditional institutions**

- Subnational administrations (regions and city administrations) will have a role in the process of TJ.
- Traditional justice systems will be made an integral mechanism to implement transitional justice without compromising human rights standards.

Thank you