Burma’s Democratic Transition: About Justice, Legitimacy, and Past Political Violence

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Burma is a nation in crisis. It faces severe economic stagnation, endemic poverty, and serious health and social welfare challenges, all within a context of significant international isolation. Burma’s status as an international pariah represents a global response to a history of gross violations of human rights as well as the refusal of the State Peace and Development Council (SPDC), the ruling military regime, to recognize the National League of Democracy (NLD) party’s overwhelming victory in the 1990 elections. It is difficult to imagine how Burma can respond to its current crisis without addressing its global political isolation, a process that will almost certainly require a political transition from authoritarian rule to a constitutionally-based electoral democracy. In this sense, the question facing Burma is not so much whether there needs to be a democratic transition, but rather how this transition will be managed and when it will take place.

Transition and the Legacy of Human Rights Violations

One of the most important and contentious issues of a possible Burmese political transition involves how to respond to the military regime’s legacy of human rights violations. Among those interested in Burmese politics, this issue is often presented as a binary opposition of “prosecute and punish versus forgive and forget”. This perspective creates an impasse with democracy and human rights activists claiming the first option and the SPDC assumed to advocate the second.
Understanding Burma’s future as a choice between criminal prosecutions or a general amnesty fundamentally misreads contemporary ideas on transitional justice as well as the current demands of a world increasingly committed to the internationalization of justice. Such a position is likely to increase tension between the negotiating parties, delay a possible transition and ultimately produce results different from those intended by any of the parties. Conversely, a willingness on the part of the Burmese military to accept responsibility for past violations of basic human rights may well provide them with more long-term protection than a negotiated general amnesty. In order to move beyond this tension, strategies for enabling a political change in Burma should be evaluated in relation to their ability to confer legitimacy on the transitional process, particularly as regards a reckoning with the nation’s legacy of gross violations of human rights.

Burma’s Crisis and the Necessity of a Democratic Transition

To state that Burma is experiencing a crisis is not to suggest that the nation is facing challenges of a focused and temporary nature, but rather that the country’s problems express a constant level of basic dysfunction as a result of decades of governmental mismanagement. Burma’s crisis is, above all, a political problem in which the negative impact of authoritarian rule impacts every sector of society.

The SPDC is a highly repressive regime whose actions have broad economic, social and cultural consequences. Gross violations of human rights are common, including disappearances, extra-judicial killings, torture and rape, particularly in rural areas dominated by ethnic minorities. The regime detains and imprisons citizens at will, targeting virtually anyone involved in activities understood to be even remotely expressive of political dissent. The regime engages in widespread surveillance, censors all published material and prevents citizens from gaining legal access to outside information through television, the internet, newspapers or magazines. There is no independent judiciary in Burma and no meaningful Rule of Law.

Economically, Burma is in a very difficult situation. Despite exceptional natural wealth, the nation’s per capita income is only 300 dollars per year. The nation’s infrastructure is crumbling, living standards are poor and attempts to stimulate foreign investment have been largely unsuccessful.

Socially, Burma suffers from endemic poverty within a repressive system that offers residents precious few opportunities. The government’s repressive policies have severely impacted the educational system, leaving the country with a serious lack of trained professionals necessary for sustained development. In addition, Burma is deeply divided along ethnic lines and faces several armed
ethnic resistance movements.

Burma’s crisis is profoundly exacerbated by the nation’s international isolation such that it is difficult to imagine how the nation can address its political, economic and social crisis without re integrating itself within the larger world system. By ending its isolation, Burma will gain access to foreign investment and international aid, including loans, financial assistance, training, infrastructure projects, and other mechanisms of encouraging national development. However, it is highly unlikely that Burma can move beyond its current pariah status without engaging in a democratic transition.

While it is probably too early to know whether the nation’s transitional process has begun, over the past year there have been important negotiations between the SPDC and Daw Aung San Suu Kyi, the NLD Chairperson and recipient of the 1991 Nobel Peace Prize. While the subject of these negotiations remains secret, establishing communication, understanding, and some level of trust between the military regime and the democracy movement is certainly the first step towards the sort of negotiated political transition that will allow Burma to meaningfully address its crisis. For this reason, it is an especially important time for those interested in Burma’s future to learn from the transitional experiences of other nations with a keen sensitivity to the contemporary global political climate.

**Transitional Justice and State Legitimacy**

From the 1970s through the 1990s, dozens of countries around the world shifted from authoritarian to democratic rule, defining such political change as a key element of late 20th century politics. Since authoritarian regimes are often characterized by systematic violations of fundamental human rights, democratic transitions often involve the special challenge of responding to past political violence, a process whose theoretical and practical considerations define the emerging interdisciplinary field of transitional justice.

The justice issues raised in transitional societies are of a special nature in that they are directly linked to larger societal processes of political change that define the character of the new regime. Authoritarian states’ reliance on systemic political violence often calls into question their basic governmental legitimacy, playing an important role in domestic and international demands for democratization. Similarly, new democratic regimes have an obligation to address the moral, political and legal demands of victims as a means of distinguishing themselves from the past government and grounding their vision of democracy in a fundamental respect for basic rights and Rule of Law.

However, most transitions are negotiated processes involving parties advocat-
ing democratic rule as well as representatives of the authoritarian regime, who are often the same individuals (or members of the same organizations) responsible for political violence. As such, determining the most appropriate response to past violence is a complex challenge, particularly within those contexts where authoritarian leaders retain significant power during the transitional process. On the one hand, the new regime is compelled to respect the claims of victims of political violence through basic Rule of Law principles and as an expression of a commitment to protecting fundamental human rights. On the other hand, the new regime must ensure that the transitional process is stable, peaceful and long-lasting, which may require agreeing on limiting legal responsibility for past political violence. A successful, negotiated transition, then, typically involves balancing the demand for justice with the practical need to placate powerful representatives of the departing authoritarian regime.

When the literature on democratic transitions first emerged, discussions of these issues were often presented as a choice between “prosecute and punish versus forgive and forget”. However, it quickly became clear that this binary distinction was inadequate for documenting the complex experiences of different countries or accounting for the multiplicity of distinct strategies for dealing with the challenges of facing past political violence. To a large degree, the emergence of the field of transitional justice is the result of a growing recognition of the inherent complexity of facing past political violence and the need for more subtle, engaged and context-specific responses to these issues. It is now common to consider political transitions as involving an array of possible strategies and policy options including truth commissions, reparations, apologies, mechanisms of restorative justice, economic investment, monuments and memorialization, psycho-social healing, the opening of state security archives, and other means of facing past violence in order to build the foundations of a new democratic order.

Burma’s status as a pariah state is an expression of its fundamental illegitimacy within the international community. Claiming that a state is illegitimate involves an argument that the forces that control a particular nation wield their dominant political power in a manner that fails to meet the minimal conditions of responsible rule. Within the current global order, international human rights discourse sets basic standards of reasonable governance that play an essential role in determining state legitimacy. As such, those states that commit serious systematic human rights violations—such as the SPDC—are generally understood to be fundamentally illegitimate and therefore unacceptable as full members of the international community.

Although not always understood in this manner, democratic transitions and the related field of transitional justice are fundamentally concerned with the issue of state legitimacy. For a transition to be successful, both the process and resulting democratic state must be understood to be essentially legitimate, in both domestic and international spheres. As the ideas and mechanism of tran-
sional justice become more widespread, they become increasingly institutionalized as mechanisms of legitimizing a shift from authoritarian to democratic rule. In this way, transitional societies are obligated to use the language and policies of transitional justice as a means of ensuring that their nation’s transition is accepted, particularly within the international community.

In this sense, Burma has much to gain from formally engaging with the ideas and policy options of transitional justice. To grasp the significance of these issues, it is important to consider that transitional justice—in both theory and practice—is structured by two basic principles: first, a recognition that each nation’s transitional experience is unique and molded by distinct social, cultural and historical factors; and second, that there are basic moral understandings, legal principles and logistical issues common to all democratic transitions such that discussing these processes together is a useful means of developing appropriate policy responses. Burma can benefit directly from the experiences of other transitional societies in ways that allow all parties to move beyond the oversimplification of either/or policies and towards the development of strategies allowing the nation to face its past while respecting the particular demands of local culture and context.

By formally acknowledging the second principle—evoking the language of transitional justice, seeking to learn from the experiences of other nations and openly accepting basic international human rights standards—Burma may well increase the international community’s willingness to respect the first principle: Burma’s need to find its own solutions to its problems. That is, through engagement with ideas of transitional justice, Burma can ensure that a future transition is accepted at an international level while retaining a relatively high degree of autonomy as regards specific policy decisions.

The Internationalization of Justice: Two Perspectives

There is an emerging global consensus, parallel with the end of the Cold War, that there should be meaningful implications of failing to abide by basic principles of international human rights. Alongside the institutionalization of transitional justice strategies for legitimizing democratic transitions, there exists a growing number of punitive measures for nations whose transitions provide impunity for perpetrators of human rights violations in a manner widely understood to be illegitimate.

Over the last decade, there has been an increasing interest in the internationalization of justice for those responsible for gross violations of human rights. This trend is evidenced by the movement to establish an International Criminal Court, the creation of ad hoc international tribunals for Rwanda and ex-Yugoslavia and the increasing use of domestic courts to bring criminal and
civil cases against individuals accused of gross violations of human rights. All of these activities are linked to one of the most basic principles of international law, the idea that one cannot engage in an international criminal case without first allowing for the issue to be adequately processed within the domestic legal system of the nation in which the violations occurred. As such, the international cases arising out of democratic transitions typically express the measured determination of an essential failure within the transitional process. The increase in international prosecutions and the use of strategies of transitional justice to legitimize democratic change are both expressions of a global movement to pressure countries to engage in a formal reckoning with their legacy of political violence.

To help explain the interrelationship between these two global trends and their link to a future Burmese transition, it is useful to compare the arrest and detention of General Augusto Pinochet, the former autocratic leader of Chile’s military dictatorship with the international community’s response to South Africa’s transitional experience.

The “Pinochet Precedent”

From late 1998 through early 2000, General Pinochet was detained in London pending possible extradition to Spain to face charges of terrorism, genocide and other gross violations of human rights. The case became one of the most widely discussed legal issues of the century’s end, representing the first time that the domestic court of one nation was successively used to enforce internationally recognized human rights principles against a former head of state for crimes committed in a different country. While Pinochet was eventually released on medical grounds, the Spanish high court affirmed the legality of the case and the British high court ruled that the ex-dictator could be legally extradited, defining what is sometimes referred to as the “Pinochet precedent”. The case is of great legal significance in that it affirmed the principle of universal jurisdiction for prosecuting alleged perpetrators of human rights violations, negated the legal protection of general amnesties provided to former perpetrators (in the Spanish cases) and denied the protection of sovereign and head-of-state immunity for former leaders (in the British cases).

The widespread international support for the case defines an emerging international commitment to legal action against the institutionalized impunity that has long protected former leaders of brutal regimes. To a large degree, the broad support for the case expresses a general criticism of the Chilean transition as illegitimate in its provision of broad amnesty to General Pinochet and the military government he controlled. In this way the “Pinochet precedent” represents an international wake-up call for authoritarian leaders, both in and out of power, who have engineered similar ways of domestic legal protection.
The TRC’s Amnesty Process

The South African case presents a different situation in which the international community has largely supported a negotiated transition that provided perpetrators with a limited amnesty for their legal responsibility for gross violations of human rights. As a result of its apartheid policies, South Africa had long been an international pariah.

The transition from racially-based minority rule to a government based on popular democratic elections was a complex process involving lengthy negotiations, a new constitution, the first free and fair general elections in the nation’s history, massive investment to address basic social needs, and significant legislative changes. The negotiation also utilized a special mechanism for dealing with the nation’s pressing transitional justice issues, namely the Truth and Reconciliation Commission (TRC).

The mission of the TRC was to assist the nation in facing its legacy of gross violations of human rights. To do this, the Commission was divided into three committees: a human rights committee that gathered and analyzed data and testimony on political violence and held numerous public hearings; a reparations committee that considered how to provide victims with financial assistance; and an amnesty committee that allowed perpetrators to receive full civil and criminal protection for particular crimes so long as the acts were of a political nature and the perpetrators were willing to tell the full truth about the events in question. The idea of providing amnesty to perpetrators who confess was highly contentious and led to a case that was ultimately decided by the Constitutional Court in favour of the TRC.

Without going into the specifics of the many cases considered, it is worth noting that the international community has generally viewed the TRC and the South African transition as a prime example of a legitimate and appropriate negotiated process. Because of this, it is highly unlikely that a foreign nation would be willing or capable of prosecuting those South African perpetrators granted amnesty through the TRC process. First, a careful review of the legality of the domestic process would likely support the position that the nation adequately engaged in reasonable Rule of Law procedures, as regards those crimes for which particular perpetrators received amnesty. Almost every aspect of the policies enacted were carefully designed with broad domestic and international consultations and premised upon a basic commitment to Rule of Law, with an understanding of the special challenges of a democratic transition.

Second, criminally prosecuting an individual provided with amnesty through the TRC would represent a basic challenge to the legality of South Africa’s transitional policies. If a court of one nation questioned the validity of a South African amnesty (as numerous European courts were willing to do in the Pi-
nochet case), the act would stand as a political judgment that the TRC and the larger transitional process were fundamentally illegitimate. Because the transitional process itself has generally been understood to have been highly legitimate, South African perpetrators whose amnesty petitions were approved by the TRC (though not those denied amnesty or those who never sought amnesty) are likely to benefit from a general protection against international prosecution.

For democratic transitions to be understood as legitimate within the current global world, they must appear to be genuinely engaged in a serious reckoning with past human rights violations. This is particularly true for nations such as Burma that are isolated and relatively weak in terms of their international status. To avoid the global consensus of illegitimacy regarding Chile’s general amnesty (that led to subsequent international prosecutions) and to achieve the legitimacy of South Africa’s partial amnesty (that will likely protect perpetrators from international prosecutions), Burma’s future democratic transition will require a formal reckoning with responsibility for past human rights violations.

Conclusion

There are at least three key reasons why Burma’s crisis may be most appropriately addressed by understanding the society as involved in a democratic transition, albeit in the early stages of the process.

First, as described above, the nation’s pressing needs and its international isolation can only be resolved through a shift from authoritarian military rule to constitutionally based electoral democracy. Second, it is unlikely that a legitimate transition can take place in Burma without a formal reckoning with the legacy of past political violence, though it is clear that there are many different approaches to this issue. Third, understanding a society to be in transition focuses attention on the negotiated nature of political change allowing an array of different issues to be raised in a manner that is likely to serve the long-term stability of a future democratic state.

By facing up to the violence of the past, Burma can strengthen the international legitimacy of its eventual democratic transition, thereby ensuring that the nation benefits from a variety of mechanisms of support and assistance. In addition, facing the past may prove to be the best long-term protection for members of the military regime willing to allow Burma to progress, while exiting gracefully from politics under negotiated conditions expressive of the nation’s particular needs.
To gain international legitimacy for its future transition, Burma need not engage in full-scale prosecutions and may or may not choose some form of amnesty. However, Burma can only gain the international legitimacy necessary for a successful transition through a formal reckoning with its legacy of gross violations of human rights and the related questions of responsibility.

Endnote

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