Set the junta free: Pre-transitional justice in Myanmar's democratisation

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Myanmar is in political deadlock. In part, this is because the opposition has not confronted problems of transitional justice, notably how to deal with members of the military junta who have participated in gross human rights violations. There are therefore few incentives for the ruling generals to consider talking about change. To tackle this problem, the article develops a model of pre-transitional justice that is focused on the critical 'torturer problem'. It is also informed by recent developments in international criminal law, and by the spread of truth commissions and lustration systems. The integrated reconciliatory model that results is suitable for political negotiation, capable of generating discontinuities with an authoritarian past, and legally and technically feasible. Applying it to Myanmar, the article holds that qualified amnesty is necessary for political reform.

Since March 1962, when military forces left their barracks to suppress the democracy created at independence from Britain in January 1948, Burma/Myanmar has been one of the most problematic Asian states. From 1962 to 1988, supreme leader General Ne Win subjected Burma to catastrophic experiments in authoritarian politics and socialist economics. In 1988, his successors brutally repressed a mass democracy movement that had emerged to demand political reform. In 1989, the ruling generals instituted by decree the name change from Burma to Myanmar that was to take on enormous symbolism in subsequent years. In 1990, military leaders again turned their backs on democracy by refusing to acknowledge the opposition's sweeping victory in a nationwide general election. For more than 15 years since, Myanmar has been trapped in political deadlock, with neither the military junta nor the array of opposition groups that face it able to impose a viable political solution on the country. Meanwhile the situation of more than 50 million ordinary citizens is approaching the level of humanitarian crisis. Despite mounting international pressure on the regime, attempts at reconciliation and democratisation have led nowhere.

Political deadlock in Myanmar can be explained in a number of ways. Both internally and externally, key forces exist in a grim sort of balance that prevents either

side from seizing the initiative and promoting real change. Inside the country, the military controls extensive resources of repression. However, it still struggles to impose its will on non-Burman ethnic groups inhabiting hill country on Myanmar's long borders with India, China and Thailand, and it is unable to shift from repression to positive forms of state and nation building. Facing off against it, the opposition has immense moral authority, much of which is focused on the iconic figure of Aung San Suu Kyi, leader of the National League for Democracy. Some ethnic groups also control significant tracts of territory in the hill regions. Nevertheless, in such a repressive context it is impossible for the opposition to promote meaningful change. Outside the country, a mirroring balance exists between Asian proponents of some degree of constructive engagement with the military junta and Western advocates of some form of sanctions. In this case, stalemate is multi-layered, and consequently deeply entrenched (Holliday 2005a).

One aspect of the Myanmar standoff that is particularly important, but rarely examined, is what might be expected to happen to the current military junta if and when a democratic transition takes place. The junta itself has thought about this, and has made known its views through a National Convention that has worked sporadically since 1993 to draft a new constitution. Its answer is evident from the principles laid down to guide that process, all of which point to an entrenched political role for the military in nominally democratic institutions. By contrast, the opposition has taken little interest in the fate of the current junta, and has failed to recognise the weakness of the powerful rooted in military leaders' fear for their fate once a full democratic transition takes place. The result is that there is a critical problem here. On the one hand, the generals who now rule the country are not likely to negotiate about real political reform without receiving credible assurances of immunity from punishment. On the other, the opposition has made no more than minimal progress in crafting a viable exit strategy for military leaders who may justifiably fear prosecution under a succeeding democratic regime (Jagan 2005).

In this article we consider how to design transitional justice measures that might facilitate a process of genuine democratic reform in a context where neither government nor opposition can claim a clear political victory. We begin by setting the issue in its contemporary context through a review of competing analyses. We then focus on the central 'torturer problem' and evaluate policy options that have been floated in the literature, looking first at classic formulations and then at newer variants developed in response to the development of international criminal law, truth and reconciliation commissions and lustration systems. On this basis, we re-examine the classic torturer problem, expanding it to a reconciliatory dimension and taking in administrative justice. In this way we construct an integrated reconciliatory model of pre-transitional justice, which we then apply to the current political deadlock in Myanmar.

Our argument is that when all sides to a political stalemate are trapped in positions that have little chance of leading to reform, it is important to find ways to release them. While this means that compromises are necessary on all sides, attention clearly focuses on existing power holders. In Myanmar, until the generals who currently run the country can be persuaded to take political reform seriously, there is little chance of initiating a process of change. To prompt key members of the regime to sit down around the table and discuss reform, it is essential to provide them with incentives. We argue that a system of qualified amnesty offers the only secure foundation for political change in the country. However, we also maintain

that the qualifications are important, and that in them can be found the quid pro quo sought by opposition figures.

Put another way, it is necessary to set the junta free if Myanmar is to be coaxed along the road to democracy. By this we mean two main things. First, the junta needs to be given an opportunity to release itself from the entrenched position it has taken over many years, and in which it is now essentially trapped. Second, individual members of the regime need to be offered personal incentives to cooperate with a process of democratic change.

Transitional and Pre-transitional Justice

Myanmar is not the first society to confront problems of transitional justice, and it will not be the last. It is also not the only country ever to have found itself locked in a political stalemate between a repressive authoritarian regime and a vibrant popular opposition. Looking around the contemporary world, the most visible of all too many other cases include Belarus under Lukashenko, Cuba under Castro, and Zimbabwe under Mugabe. For societies such as these, a critical issue is the range of possibilities that faces the opposition. One option is of course to go for a clean break with the existing authoritarian regime. When the chances of such a break taking place look remote, however, other options need to be considered. An alternative is a more negotiated and nuanced transition, built around some sort of deal with members of the outgoing regime. In the celebrated South African case, which took this latter route, an amnesty was negotiated at Kempton Park talks between the governing National Party and the opposition African National Congress (Spitz and Chaskalson 2000, 31, 413).

At the heart of the deals that have underpinned negotiated and nuanced transitions to democracy has usually been some form of impunity. This can take many guises, such as immunity from prosecution, selective prosecution and a statute of limitations. However, the most common form is amnesty. Clearly, amnesty is often distasteful and unjust. It may inflict deep pain and suffering on victims and their families and friends. It may be difficult for opposition leaders to defend. At the same time, it may offer the only realistic way forward if violence and human rights violations are to cease. In analysing real-world cases, one key task is therefore to look in detail at amnesty, and the role it can play in a process of political change. Here we do that through examination of the torturer problem. This appeared in the mainstream literature on democratisation at the start of the 1990s (Herz 1982; Huntington 1991; Pion-Berlin 1994), but in recent years it has been somewhat sidelined by other concepts, such as stages of transition, splits within elites, pacts between reformers and moderates, constitutional design, and electoral engineering (Przeworski 1991; Reynolds et al 2001). Here we return the torturer problem to centre stage.

At the same time, we extend analysis of it by recasting some of the core concepts and models found in the transitional justice literature. It is characteristic of that literature to look backward and deal with justice only after a transition has occurred. However, there is also a great deal to be gained by projecting forward and thinking through the pre-transitional justice that might be engineered in countries that have not witnessed significant change. This can be done by reformulating concepts and models of transitional justice so that they can bring about meaningful political change. In making this extension to the existing literature, we approach the problem from a viewpoint that is close to political realism. We also utilise

developments in transitional justice, which, in the face of a widespread lack of empirical research, are largely driven by idealists, whether arguing for retribution from the Kantian deontological perspective of universal justice, or for reconciliation from perspectives of Christian social thought or pacifism.

In this way, we turn amnesty into a real policy option, and make it part of a strategy for political change. To facilitate a transition from rights-violating authoritarianism to democracy, the policy must meet three interlocked conditions. First, it must establish a suitable basis for negotiation. Authoritarian rulers hold political power and are highly unlikely to relinquish it without a guarantee of amnesty. Second, any agreement must generate some measure of discontinuity with the authoritarian past so that it is presentable to the opposition and acceptable to the people (Przeworski 1991). Without this, any pact would likely be challenged, leading to further negotiation. Third, the resulting mechanism must be politically, legally and technically feasible. Any negotiated settlement has to be endorsed by the international community, compliant with international human rights standards, and amenable to implementation. Suitability, discontinuity and feasibility are our three key criteria for evaluating policy options for political change.

The Torturer Problem: Classical Formulations

Within the broad framework of transitional justice, the torturer problem focuses on how to deal with massive human rights violations, killings, extrajudicial punishments, torture, corruption and fraud committed by, for or at the behest of a departing, or departed, regime. Policy options range from impunity to sanctions, from pardon and forget to prosecute and punish. Sometimes they are said to pit vengeance against forgiveness (Minow 1998), and truth against justice (Rotberg and Thompson 2000). However, dualisms of this kind can be misleading, for it is quite possible for vengeance to exist alongside forgiveness, and truth to partner justice. The axis is not always one dimensional. For many years, the two major policy options were amnesty and prosecution.

Amnesty

Amnesty for perpetrators of political violence has frequently accompanied transitions from civil war or authoritarian rule (Kritz 1995; Elster 2004). It may take several legal forms: laws passed by conventional means, as in Argentina, Chile, and El Salvador (Roniger and Sznajder 1999); presidential pardons as in Slovakia (Constitutional Watch 2000); immunity accorded to a head of state as in the case of General Augusto Pinochet in Chile (Davis 2003); constitutional provisions as in South Africa (Republic of South Africa 1993); statutes of limitation as in Eastern Europe (Constitutional Court of the Czech Republic 1993); or approval by referendum as in Uruguay (de Brito 1997). Blanket amnesty is in many ways the most suitable option for bringing authoritarian rulers to the negotiating table. However, it has two limitations: in divided societies it may not demonstrate clearly that political change has occurred; and it may not be feasible owing to recent developments in international criminal law.

Personnel discontinuity, institutional or legal discontinuity, or still another kind of break with the past is one of the goals of all measures of transitional justice. One problem with amnesty is that by itself it is unlikely to deliver the fresh start that is

required, leading to ongoing disputes about the past. This has been very much the case in Chile, for example, where a 1978 amnesty led both to the release of many political prisoners and to a set of pardons for members of the ruling junta. To this day, however, many issues continue to be contested. This points to general difficulties associated with amnesty, including claims by victims that unpunished crimes perpetuate historical injustices (Cullinan 2001; David and Choi 2005), and fear among the public at large that past practices might recur. Indeed, *Nunca Más*, the title of the Argentinean Truth Commission Report (Roniger and Sznajder 1999), became a slogan that reverberated in many Latin American countries. Chileans, for their part, established a series of reparation truth and reconciliation commissions from 1990 onwards, but still have not fully resolved the many issues set before them (de Brito 1997; Human Rights Watch 2005). As Arieh Neier (1998) argues, the truth phase of the transition will eventually be replaced by the justice phase. Popular dissatisfaction with amnesties is one reason why they have become less feasible in recent decades.

At the same time, developments in domestic, foreign and international law also indicate that blanket amnesty is losing favour (Dugard 1999). Domestically, statutes of limitation were extended in the Czech Republic and Poland; constitutional provisions for amnesty were limited in South Africa; General Pinochet's presidential and senatorial privileges were lifted in Chile; and, in June 2005, entire amnesty laws were struck down in Argentina. Moreover, some countries, notably Belgium, now allow suits to be brought against resident foreign nationals for crimes committed in their home countries. In the international arena, the trend is equally running against amnesty. Building on the Nuremberg and Tokyo precedents, International Criminal Tribunals for Crimes committed in the Former Yugoslavia and Rwanda were established in 1993 and 1994. Still more significantly, the International Criminal Court was created after the 1998 Rome Statute came into force in 2002. As justice is made ever more universal, so amnesty has become ever more elusive. Today, the issue of blanket amnesty as a measure of transitional justice is almost completely off the agenda.

Prosecution

Prosecution is clearly not an option for political negotiation, and it is undesirable for additional reasons. Prosecutions rarely achieve their expected outcomes, whether driven by theories of criminal law and punishment or by a purported social need for justice. Prosecutions and punishments are said to deter new violations, satisfy victims' needs for justice, and establish truth, previously denied, thereby promoting the rule of law and reconciliation (Huntington 1991; Roht-Arriaza 1995; but see Fletcher and Weinstein 2002). However, their feasibility in complex political transitions is questionable, not only because of the simple logic of power politics, but also because of time and resource constraints in at least some transitional settings. Prosecutions frequently fail to deliver on the expectations invested in them. This limited impact makes them an undesirable option for moderate opposition leaders.

The single modern exception of a country that more or less successfully prosecuted and punished its past human rights' transgressors is Greece (Alivizatos and Diamandouros 1997; Kritz 1995, vol. 2). Elsewhere, by contrast, prosecutions have generally resulted in a dismal number of convictions, and have failed to meet social expectations. The limited number of punishments in post-war Germany was

frequently criticised (Arendt 1963; Herz 1982). By 2001 some eight transgressors had been punished in the post-communist Czech Republic, and by 2000 only two had received prison terms in Poland. These numbers contrast with thousands who perished under the communist regimes and hundreds of thousands who were imprisoned (Los and Zybertowicz 2000; David and Choi 2005). Retributive policy may even backfire. In Argentina, mounting attempts to prosecute the junta created a threat that the military would resume power, leading to passage of the Full Stop Law in 1986, which halted the prosecutions (Kritz 1995, vol. 2).

The record of international criminal tribunals is little better. In more than a decade of existence, the Yugoslavia tribunal has found only 40 individuals guilty, partly because of its lack of legitimacy among Serbs. Likewise, by May 2005 the Rwanda tribunal had delivered only 19 judgments involving 25 accused. The tribunals are also costly for the international community. In 2004–05 the annual budget of the Yugoslavia tribunal was US$272 m. Lack of resources and a crisis of legitimacy have given birth to a new generation of mixed tribunals, which combine domestic and international financial and human resources (Barria and Roper 2004). However, this has turned out to be another unsatisfactory solution. The extraordinary chambers established on this principle in Cambodia have not yet started to operate.

The Torturer Problem: New Challenges

Amnesty, though suitable for negotiation, may not generate discontinuity with the past and is not a feasible option from the perspective of international criminal law. Prosecution can provide discontinuity with the past, but it is neither suitable for negotiation nor feasible in practice. The torturer problem as formulated in the aftermath of third-wave transitions has therefore become obsolete. In addition, it has been challenged by two new developments. The first is the birth of truth and reconciliation commissions. The second is the development of lustration systems.

Reconciliation

The recent rise of truth commissions has challenged the conventional wisdom about amnesty and punishment, putting this development at variance with contemporary shifts in international law. Before the paradigmatic Truth and Reconciliation Commission (TRC) was established in South Africa in 1996, truth commissions had been used for more than a decade as a challenge to amnesties (Hayner 2001). Victims were invited to tell their narratives and provide a personal account of the human rights violations they had suffered. 'Truth' served as a proxy for 'justice' and challenged the impunity of the military. It was largely a one-sided process in which victims came forward, told their stories and 'named the perpetrators'. In South Africa, however, amnesty became part of the truth process, being established as one of its assumptions and results.

South Africans thereby settled on qualified amnesty, rather than blanket amnesty. The TRC required that the perpetrator meet several conditions to qualify for amnesty, most notably exposing the political objectives of gross human rights violations and revealing all known information related to their nature, context, and motives. It effectively granted a second chance to perpetrators in exchange for truth. The TRC's Amnesty Committee could investigate, call witnesses, cross-examine, and so on to determine whether the conditions for amnesty had been met. Based on its perceived

success, other truth commissions authorised to grant amnesty for certain types of offences have been considered elsewhere. Immunity from prosecution for less serious crimes was part of the Commission for Reception, Truth and Reconciliation in Timor-Leste (Stahn 2001). It was also proposed in Indonesia in 2004.

The central advantage of qualified amnesty is that it sets grounds for reconciliation and the renewal of civic relationships with former oppressors. In Augustine's terms, it dissociates the sinner from the sin (Murphy 2003, 80). On a public platform, transgressors are given the chance to show themselves as better people and as human beings who are capable of moral development (Govier 2002, 46–7; Hampton 1988). Thus, discontinuity with the past runs through the hearts of perpetrators who may no longer be perceived as beings stripped of their humanity (Halpern and Weinstein 2004). The disadvantage of qualified amnesty is little different from that of amnesty itself: violation of victims' rights to justice (AZAPO v. President RSA (1996)). Nevertheless, if a truth and reconciliation commission is established, even victims may benefit from the cessation of human rights violations, as well as from reparation programs that empower them individually and socially (van Boven 1996; Bassiouni 2000).

Thus, qualified amnesty can provide an opportunity for a fresh start for all, and is thereby a suitable option for negotiations. It can provide discontinuity with the past, as revelation of previously concealed truth clearly demonstrates a shift in values between the old regime and the new democracy (Hayner 1994, 228), and accountability mechanisms enable a society to learn who was responsible for human rights violations, at whose order and by whose hands (Asmal, Asmal and Suresh Roberts 1997, 12–27; TRC 1998, vol. 1, 118; Bassiouni 1996, 20). It is also feasible in respect of time, the number of processed cases and financial costs. The South African Amnesty Committee was able to process over 7000 amnesty applications in four years of operation (TRC 2003). Internationally, the South African amnesty process has not been challenged in international courts, even though apartheid was declared a crime against humanity (Asmal, Asmal and Suresh Roberts 1997; Dugard 1997). Indeed, the spread of truth and reconciliation commissions around the world signifies a tacit consensus built around qualified amnesty. The consensus becomes quite explicit when a truth commission is established as a complementary mechanism to prosecutions (Stahn 2001).

Lustration

An additional challenge to the torturer problem has appeared at another level of transitional justice. There are two kinds of sanction against perpetrators: criminal and non-criminal (Kritz 1995; Teitel 2000). The former comprise prosecutions, trials and punishments. The latter comprise lustration systems that regulate the presence of former staff in the new state apparatus. Formally, lustration systems are 'public employment measures that deal with the inherited personnel in state administration and security forces' (David 2004/2006). They are particularly prevalent in post-communist countries, where certain groups of people, especially politicians, public officials and judges, are investigated to determine whether they have been members of or collaborators with the secret police of the previous regime (David 2003). While lustrations have been criticised as illiberal measures of transitional justice (Schwartz 1994; Boed 1999), recent research largely acknowledges their utility in processing a large number of cases within a short period of time (Kritz 2004), without hampering prospects for democratic transition (Letki 2002;

Szczerbiak 2002; David 2003, 2004; Williams, Fowler and Szczerbiak 2005). Although lustrations are sometimes said to be instruments for redistributing power in times of transition (Teitel 2000), this is not always the case. Similarly, though lustration laws have been cast as truth revelation procedures (Kaminski and Nalepa 2004), this too is not necessarily so.

There are four basic lustration models: exclusive, inclusive, reconciliatory and mixed (David 2004/2006). They adopt different means in pursuit of a common aim of establishing a trustworthy and impartial public service and security apparatus. The exclusive system facilitates the removal from the new state administration of state employees above a certain rank of involvement in the prior regime. It was applied in the Czech Republic, Bulgaria, and Albania (Kritz 1995, vol. 3). The inclusive system is usually used to deal with regimes that have relied extensively on secret police. It allows perpetrators to retain their positions on condition that the fact of their secret involvement is revealed. It was applied in Hungary and Romania (Halmai and Scheppele 1997; Stan 2002), and was partly designed for the former Yugoslavia (Republic of Serbia 2003). The reconciliatory system enhances the principle of a second chance, already present in the inclusive system, in exchange for a person's revelation of all relevant facts related to the exercise of his or her previous public office. It presents state officials with a dilemma: either they reveal all the required facts and retain their position, or they try to conceal something and risk exclusion if found to be dishonest (David 2002). It was applied in Poland. The mixed system fuses elements of the three other types, drawing notably on the exclusive system. It may lead to discretionary exclusion. It may apply a more nuanced approach, taking into consideration the situation of the person, including motives for involvement in the previous regime, responsibilities, other matters of personal record, and current need for the person's skills. Alternatively, it may simply grant exceptions from a general rule of exclusion. It was applied in post-war and post-communist Germany (Herz 1982; McAdams 2001), and by the US-led Coalition Provisional Authority in Iraq (Coalition Provisional Authority 2003).

All lustration systems generate some discontinuity with the past: personnel discontinuity for the exclusive and mixed systems; value-based for the inclusive; and value-normative for the reconciliatory. All four systems are technically feasible. However, the inclusive system assumes the existence of background information that was not previously accessible to the public. In the international community, not all lustration systems may be acceptable. In particular, exclusive systems have been criticised for adopting a principle of collective guilt and punishment (David 2004). For this reason, only inclusive and reconciliatory lustration systems are widely held to provide a satisfactory basis for negotiations.

Building an Integrated Reconciliatory Model

Looking at the main ways in which the torturer problem can be handled, it is clear that they address the three main conditions required of major policy options in distinct combinations of ways. The differences in handling suitability, discontinuity and feasibility are summarised in Table 1.

Criminal and administrative sanctions facilitate democratic transitions in divergent ways. While there is some overlap, the former are primarily backward looking, while the latter are primarily forward looking. Criminal sanctions seek to progress towards the future by addressing crimes committed in the past. Lustration systems attempt to

Table 1. Evaluation of major policy options

	Retributive mode		Null mode		Reconciliatory mode	
	Prosecution	Exclusive lustration	Amnesty	Continuation	Qualified amnesty/TRC	Reconciliatory lustration
Suitability	No	No	Yes	Yes	Yes	Yes
Discontinuity	Yes	Yes	No	No	Yes	Yes
Feasibility	Partly	Partly	No	Yes	Yes	Yes

establish an impartial and trustworthy public administration by identifying those individuals who may have been involved in such crimes. Although they serve different objectives, the two forms of transitional justice mirror each another. Exclusions resemble prosecutions and punishment, while personnel continuity resembles amnesty. The inclusive lustration system is thereby aligned with classic truth commissions, while the reconciliatory lustration system is aligned with truth commissions based on the South African model. We therefore group each pair together and term them the retributive mode of transitional justice, the inclusive mode, the reconciliatory mode and the null mode. However, because the inclusive method is feasible only in particular circumstances, namely situations where the regime has relied extensively on secret police, or as a popular response to the existence of blanket amnesties, we do not consider this method in the remainder of our analysis.

These considerations have both theoretical and policy implications. Theoretically, the categorisation enables us to rethink the torturer problem. The expansion of truth and reconciliation processes and the existence of lustration systems permit us to conceptualise the two major methods of dealing with the past by adding another level and another dimension to the classic problem. This reconceptualisation is presented in Figure 1. Practically, they enable us to select a suitable policy option for transitional justice in countries moving out of authoritarianism. The reconciliatory nature of this mode makes it optimal for multiethnic societies, as well as for societies striving to bridge the gap between government and opposition.

Suitable policy options can be negotiated along the vertical reconciliatory line in Figure 1. Given the impossibility of leaving past crimes unaddressed, any reconciliatory solution must include a measure of criminal justice. This generates three policy options: a TRC of the South African type; both a TRC and a reconciliatory lustration system; or a new reconciliatory model that merges features of the TRC and the reconciliatory lustration system. We call this new model an integrated reconciliatory model. Since the features of the TRC and the Polish type of lustration system are known, we concentrate on describing our integrated model.

In the integrated model, the reconciliatory lustration system may be supplemented by a negotiable number of features drawn from truth and reconciliation commissions. Essentially, this model can be designed like any other reconciliation process: qualified amnesty can be granted in exchange for truth. The forward-looking perspective of the system means that every state employee would be required to submit an affidavit about his or her own involvement in the crimes of the past, their circumstances, nature, the chain of command, and so on. Everyone else should also have an opportunity to participate in the process. The definition of truth can be negotiated to include any information concerning gross human rights violations, such as those resulting in death, disappearance, torture, severe ill treatment, and breach of trust, including
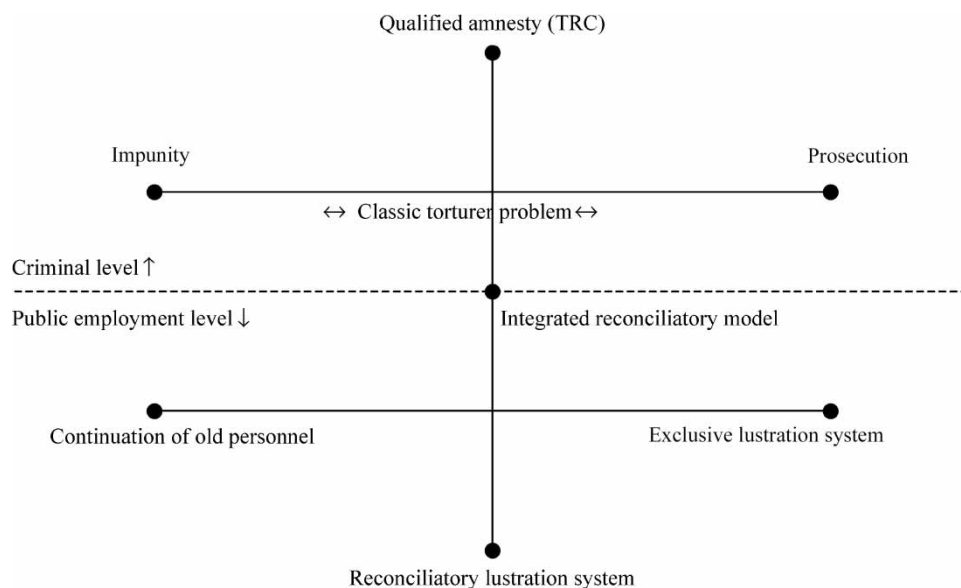
Figure 1. Integrated reconciliatory model.

informing on fellow citizens, involvement in clandestine operations, and so on. All affidavits should be officially publicised. A lustration prosecutor should examine this information against other affidavits, archival documentation, and testimonies. If evidence is found, the case should be referred for cross-examination in an open public forum at the lustration court. If true testimony has been given, the person should be allowed to retain his or her military or public position, regardless of the nature of the violations revealed. If false, the person should be dismissed, charged with perjury and prosecuted.

The affidavit thus serves as a loyalty test. Those found to be dishonest are removed and punished. Those who reveal the truth about their past disavow their prior loyalties and subscribe to the democratic transition. Thus, everyone is granted the option of a second chance, regardless of previous involvement. The choice lies with state employees and other amnesty applicants whether to make use of the second chance. The transformative potential of the process can dispel much social criticism. In addition, it can help to facilitate consensus on the illegitimate nature of the preceding regime. The transgressors' confession of the truth and the demonstration of their change of heart can enable people to reach a better understanding of the past. The truth revelation and the switch of loyalties can provide a background for a normative shift towards a new democratic order.

In this model, the generous treatment of the former elite makes it a milder version of the amnesty process in South Africa. Here the credible threat of prosecution for past crimes is replaced by a threat of legal sanction for present dishonesty. The shift from the past to the present increases incentives for the military and other members of the state apparatus to come forward without fearing that their revelations might later be used in a court of justice. Positive incentives are thereby offered to those members of the outgoing state apparatus who wish to retain public posts, while others are allowed simply to leave the state sector. The shift from the past to

the present and the offer of conditional amnesty to senior military and public officials make the integrated reconciliatory model applicable to pre-transitional situations.

Pre-transitional Justice and Democratisation in Myanmar

Our contention is that our integrated reconciliatory model can meet all three key conditions set out above: suitability, discontinuity and feasibility. It therefore constitutes an appropriate framework for examination of options for a transition from authoritarianism to democracy. In this section, we apply it to the Myanmar case.

Suitability is secured through the offer of qualified amnesty in exchange for truth. In Myanmar, it is unlikely that this offer will be enticing for every member of the junta. Senior General Than Shwe is widely believed to be notably hardline in approach, and certainly projects an uncompromising image. His ousting of General Khin Nyunt from the premiership in October 2004 can be attributed at least in part to his distaste for the very limited steps towards reconciliation and democratisation pursued after the Premier's unveiling of a road map to democracy in August 2003. Nevertheless, the integrated reconciliatory model may generate the necessary incentive for some members of a junta that increasingly fears prosecution to come forward and take part in the process (Jagan 2005). Moreover, there are other currents of opinion within the military hierarchy, and within the army as a whole (Callahan 2000), and an appeal pitched at less hardline elements could stand a good chance of success. Indeed, this is likely to be one of the few ways in which divisions within the army can be exploited, and hidden or suppressed reformist factions given a chance to speak out. In South Africa, Joe Slovo's proposals for shared government, a sunset clause for bureaucrats, and qualified amnesty had this objective. They were carefully designed to buy off three critical sectors of the government: leading politicians of the ruling National Party, civil servants, and security personnel (Spitz and Chaskalson 2000, 31). By and large, they succeeded.

Discontinuity is generated by the confessional nature of the reconciliation process, and the repudiation of modes of governance employed by and under a preceding authoritarian regime. In Myanmar, the sight of hitherto feared members of the military apparatus testifying about their involvement in a repressive regime would certainly go a long way to persuading ordinary citizens that things really have changed in their country, and that notorious practices like widespread use of forced labour really are a thing of the past. By the same token, every new truth revelation and every punishment meted out to those who concealed relevant facts could eventually persuade the public that change was genuine and irreversible. In this part of the process lies the quid pro quo for negotiating with the military regime that is rightly sought by opposition figures.

Feasibility is always a difficult matter. In the Myanmar case, polarisation of political positions both inside and outside the country means that it might be difficult to establish the conditions in which an integrated reconciliatory model could be set up and put to work. Technically, the allocation of sufficient material and human resources may be a daunting task in any Third World country; the establishment of an impartial body that would reflect as broad a spectrum of the society as possible may even derail the process. Almost certainly in this case, some measure of external mediation is likely to be necessary (Holliday 2005b). If at all possible, a forum similar to the six-party talks created to manage the North Korean nuclear crisis should be created. Best placed to join would be the two key external actors, China

and the United States, two additional states with which Myanmar shares long borders, India and Thailand, and the other key regional power, Japan. Adding Myanmar itself would take the total to six states. While it might be advisable to add an observer to represent the Association of Southeast Asian Nations, it is unlikely that this regional grouping would become a full player in the negotiation. Drawing on further parallels from the North Korean case, it would be highly advisable for the United States to adopt a recessive posture. In dealing with the nuclear crisis on the Korean peninsula this has proved difficult in practice, because of North Korean insistence on dealing with the United States face to face. In the Myanmar case, any such insistence would probably not be forthcoming, and the United States could properly leave Asian business to Asian players. Key among them would likely be Japan, which is well placed to broker and, if necessary, finance the kind of process envisaged here (Holliday 2005b). A final advantage of six-party talks would be that they could provide clear international support for the integrated reconciliatory model, and thereby draw much fire from the international retributive community.

Providing a second chance in exchange for truth is consistent with Myanmar's overwhelmingly Buddhist culture of compassion, forbearance and unconditional forgiveness. This spiritual congruence could go a long way to dispelling reservations, frequently heard across much of Southeast Asia, about the importation of concepts from different cultural traditions. Furthermore, many opposition groups, including the National League for Democracy, now acknowledge the need to engage in dialogue with the military regime. From outside Myanmar, *Threat to the Peace*, commissioned by Václav Havel and Desmond Tutu, issued a call in September 2005 for the UN Security Council to work with the junta to implement a plan for national reconciliation (DLA Piper Rudnik Gray Cary 2005). By and large, this call was received positively by domestic and international actors (Burma Campaign UK 2005).

Conclusion

The Myanmar case has long been genuinely intractable. Constructive engagement has been tried, and has been seen to fail. Sanctions have been imposed, but to very little effect (Holliday 2005a). While the military junta has made some progress with its National Convention, there is little chance that anything emanating from it will form the basis for real reconciliation and genuine democratisation.

Throughout, a large part of the Myanmar problem has been how to get started. The proposal made here is to begin by sketching means of handling issues of transitional justice that must feature at the heart of any democratisation process. Our approach is to float a model of pre-transitional justice that can create incentives for members of both the regime and the opposition to enable a transition process to be set in motion. Our belief is that if this approach is taken it will help not only to smooth the transition process itself but also to get it up and running in the first place. Given that this has been a critical issue in Burma/Myanmar for some 45 years since the military coup of March 1962, there is every reason to pay close attention to it. It could be that by making clear at the outset how issues of reconciliation and justice are to be handled during the transition process, it will actually be possible to make such a process a reality, rather than the pipedream that it has been for far too long.

In arguing that the junta should be set free, we focus on critical power holders and seek ways first to release them from the tired dogma in which they have long been immersed, and second to secure their commitment to a process of change designed to make real progress towards genuine democracy. We believe that it is only on this basis that real political change can be engineered in Myanmar.

References

Alivizatos, N.C. and P.M. Diamandouros. 1997. 'Politics and the Judiciary in the Greek Transition to Democracy.' In *Transitional Justice and the Rule of Law in New Democracies*, ed. J.A. McAdams. Notre Dame, IN: University of Notre Dame Press.

Arendt, H. 1963. *Eichmann in Jerusalem*. New York: Viking Press.

Asmal, K., L. Asmal and R. Suresh Roberts. 1997. *Reconciliation through Truth: A Reckoning of Apartheid's Criminal Governance*, 2nd ed. New York: St. Martin's Press.

Barria, L.A. and S.D. Roper. 2004. 'New Efforts to Enforce Domestic and International Human Rights: The Criminal Tribunals for Cambodia and Sierra Leone.' Paper presented at the 'Judging Transitional Justice' interdisciplinary workshop, University of California at Irvine.

Bassiouni, M.C. 1996. 'Searching for Peace and Achieving Justice: The Need for Accountability.' *Law and Contemporary Problems* 59 (Autumn): 9–28.

Bassiouni, M.C. 2000. 'The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms.' E/CN.4/2000/62. 18 January.

Boed, R. 1999. 'An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice.' *Columbia Journal of Transnational Law* 37(2): 357–402.

Boven, T. van. 1996. 'Basic Principles and Guidelines on the Right to Reparations for Victims of Gross Violations of Human Rights and Humanitarian Law.' E/CN.4/Sub.2/1996/17. 24 May 1996.

Burma Campaign UK. 2005. *Ten Years of Detention: Too Many Years of Empty Words: Time for UN Security Council Action on Burma*. <http://www.burmacampaign.org.uk/reports/10_years.pdf>.

Callahan, M.P. 2000. 'Cracks in the Edifice? Military–Society Relations in Burma since 1988.' In *Burma Myanmar: Strong Regime Weak State?*, eds M.B. Pedersen, E. Rudland and R.J. May. Adelaide: Crawford House: 22–51.

Coalition Provisional Authority. Order no. 1 2003. 'De-Baathification of Iraqi Society.' Baghdad.

Constitutional Court of the Czech Republic. 1993. Pl. ÚS 19/1993.

Constitutional Watch. 2000. 'Slovakia.' *East European Constitutional Review* 9(1–2).

Cullinan, S. 2001. *Torture Survivors' Perceptions of Reparation*. <http://www.redress.org/publications/TSPR.pdf>.

David, R. 2002. 'In Exchange for Truth: The Polish Lustration and the South African Amnesty Process.' Paper presented at the joint annual meeting of the Law & Society Association and the Canadian Law & Society Association, Vancouver, BC.

David, R. 2003. 'Lustration Laws in Action: The Motives and Evaluation of Lustration Polices in the Czech Republic and Poland (1989–2001).' *Law and Social Inquiry* 28(2): 387–439.

David, R. 2004. 'Transitional Injustice? Criteria for Conformity of Lustration to the Right to Political Expression.' *Europe-Asia Studies* 56(6): 789–812.

David, R. 2004/2006. 'From Prague to Baghdad: Lustration Systems and their Political Effects.' *Government and Opposition* 41(3) (forthcoming). 2004 preprint available at <http://www.hkbu.edu.hk/~gis/DAVID.doc>.

David, R. and S.Y.P. Choi. 2005. 'Victims on Transitional Justice: The Reparation of Victims of Human Rights Abuses in the Czech Republic.' *Human Rights Quarterly* 27(2): 392–435.

Davis, M., ed. 2003. *The Pinochet Case: Origins, Progress and Implications*. London: Institute of Latin American Studies.

de Brito, A.B. 1997. *Human Rights and Democratization in Latin America: Uruguay and Chile*. Oxford: Oxford University Press.

DLA Piper Rudnik Gray Cary. 2005. *Threat to the Peace: A Call for the UN Security Council to Act in Burma*. Report Commissioned by Václav Havel and Desmond Tutu. <http://www.dlapiper.com/usfiles/tbl_s5083FileUploadwithOrder/FileUpload5661/168/Burma%20Report.pdf>.

Dugard, J. 1997. 'Retrospective Justice: International Law and the South African Model.' In *Transitional Justice and the Rule of Law in New Democracies*, ed. J.A. McAdams. Notre Dame, IN: University of Notre Dame Press.

Dugard, J. 1999. 'Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?' *Leiden Journal of International Law* 12(4): 1001–15.

Elster, J. 2004. *Closing the Books: Transitional Justice in Historical Perspective*. Cambridge: Cambridge University Press.

Fletcher, L.E. and H.M. Weinstein. 2002. 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation.' *Human Rights Quarterly* 24(3): 573–639.

Govier, T. 2002. *Forgiveness and Revenge*. London and New York: Routledge.

Halmai, G. and K.L. Scheppele. 1997. 'Living Well is the Best Revenge: The Hungarian Approach to Judging the Past.' In *Transitional Justice and the Rule of Law in New Democracies*, ed. J.A. McAdams. Notre Dame, IN: University of Notre Dame Press.

Halpern, J. and H.M. Weinstein. 2004. 'Rehumanizing the Other: Empathy and Reconciliation.' *Human Rights Quarterly* 26: 561–83.

Hampton, J. 1988. 'Forgiveness, Resentment and Hatred.' In *Forgiveness and Mercy*, eds J.G. Murphy and J. Hampton. New York: Cambridge University Press.

Hayner, P. 1994. 'Fifteen Truth Commissions 1974–1994: A Comparative Study.' *Human Rights Quarterly* 16(4): 597–655.

Hayner, P. 2001. *Unspeakable Truths: Confronting State Terror and Atrocity*. New York and London: Routledge.

Herz, J.H. 1982. 'Conclusion.' In *From Dictatorship to Democracy: Coping with the Legacies of Authoritarianism and Totalitarianism*, ed. J.H. Herz. Westport and London: Greenwood Press.

Holliday, I. 2005a. 'Rethinking the United States's Myanmar Policy.' *Asian Survey* 45(4): 603–21.

Holliday, I. 2005b. 'Japan and the Myanmar Stalemate: Regional Power and Resolution of a Regional Problem.' *Japanese Journal of Political Science* (forthcoming).

Human Rights Watch. 2005. 'Chile Human Rights Overview 2004.' <http://hrw.org/english/docs/2005/01/13/chile9846.htm>.

Huntington, S. 1991. *The Third Wave: Democratization in the Late Twentieth Century*. Norman: University of Oklahoma Press.

Jagan, L. 2005. 'Nervous Junta Plans to Head for the Hills; Taking Parliament Too.' *South China Morning Post* 21 July: 1 and 9.

Kaminski, M. and M.A. Nalepa. 2004. *Judging Transitional Justice: An Evaluation of Truth Revelation Procedures*. Paper 04-15. Irvine, CA: Center for the Study of Democracy. <http://repositories.cdlib.org/csd/04-15>.

Kritz, N.J., ed. 1995. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 3 vols. Washington, DC: US Institute of Peace.

Kritz, N.J. 2004. 'Dealing with the Legacy of Past Abuses.' In *Dealing with the Past, Critical Issues, Lessons Learned, and Challenges for Future Swiss Policy*. Swisspeace Working Paper, 2—2004 Koff Series.

Letki, N. 2002. 'Lustration and Democratisation in East-Central Europe.' *Europe-Asia Studies* 54(4): 529–52.

Los, M. and A. Zybertowicz. 2000. *Privatizing the Police State: The Case of Poland*. New York: St. Martin's Press.

McAdams, J.A. 2001. *Judging the Past in Unified Germany*. New York: Cambridge University Press.

Minow, M. 1998. *Between Vengeance and Forgiveness*. Boston: Beacon Press.

Murphy, J. 2003. *Getting Even: Forgiveness and its Limits*. Oxford and New York: Oxford University Press.

Neier, A. 1998. *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice*. New York: Times Books.

Pion-Berlin, D. 1994. 'To Prosecute or to Pardon. Human Rights Decisions in the Latin American Southern Cone.' *Human Rights Quarterly* 16(1): 105–30.

Przeworski, A. 1991. *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America*. Cambridge: Cambridge University Press.

Republic of Serbia. 2003. 'Accountability for Human Rights Violations Act. 2003.' *Official Gazette of the RS* no. 58/2003.

Republic of South Africa. 1993. 'Constitution of the Republic of South Africa.' Act 200 of 1993.

Republic of South Africa. 1996. '*Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa*.' 1996 (8) BCLR 1015 (CC).

Reynolds, A., A. Stepan, Z. Oo and S. Levine. 2001. 'How Burma Could Democratize.' *Journal of Democracy* 12(4): 95–108.

Roht-Arriaza, N. 1995. *Impunity and Human Rights in International Law and Practice*. Oxford: Oxford University Press.

Roniger, L. and M. Sznajder. 1999. *The Legacy of Human Rights Violations in the Southern Cone*. Oxford: Oxford University Press.

Rotberg, R.I. and D. Thompson, eds. 2000. *Truth v. Justice: The Morality of Truth Commissions*. Princeton: Princeton University Press.

Schwartz, H. 1994. 'Lustration in Eastern Europe.' *Parker School Journal of East European Law* 1(2): 141–71. Reprinted in Kritz, N.J. 1995. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. 1. Washington, DC: US Institute of Peace.

Spitz, R. and M. Chaskalson. 2000. *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement*. Johannesburg: Witwatersrand University Press.

Stahn, C. 2001. 'Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor.' *American Journal of International Law* 95(4): 952–66.

Stan, L. 2002. 'Moral Cleansing Romanian Style.' *Problems of Post-Communism* 49(4): 52–62.

Szczerbiak, A. 2002. 'Dealing with the Communist Past or the Politics of the Present? Lustration in Post-Communist Poland.' *Europe-Asia Studies* 54(4): 553–72.

Teitel, R.G. 2000. *Transitional Justice*. Oxford: Oxford University Press.

Truth and Reconciliation Commission [TRC]. 1998. Report. Cape Town.

Truth and Reconciliation Commission [TRC]. 2003. Report. Cape Town.

Williams, K., B. Fowler and A. Szczerbiak. 2005. 'Explaining Lustration in Central Europe: A "Post-communist Politics" Approach.' *Democratization* 12(1): 22–43.