

The Transitional Justice Models and the Justifications of Means of Dealing with the Past

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Abstract

The development of transitional justice measures can be fully understood only when one takes into account the values, rationales and justifications that lie at the roots of various ways of dealing with past wrongs. Seeing transitional justice as an ontologically complex structure, the article aims to relate the legal instruments that concentrate on past abusers to the axiological layer of settling accounts with the past. In order to do so, three basic models of transitional justice – a retribution model, a historical clarification model and a thick line model – all based on the measures implemented during democratic change, are presented. Then, with the use of a classic division between consequentialist and deontological argumentation, the article describes transitional justice justifications. Next, the values emblematic for each of the models are identified. Finally, the article proposes a structure of transitional justice moral reasoning that may guide transitional decision-making process on the axiological level.

Key words

Transitional justice; moral argumentation; principles and values; mechanisms of dealing with the past

Resumen

El desarrollo de medidas de justicia transicional sólo puede entenderse en su totalidad cuando se tienen en cuenta los valores, razones y justificaciones que subyacen en las raíces de las diversas maneras de tratar con los errores del pasado. Al ver la justicia transicional como una estructura ontológicamente compleja, el artículo pretende relacionar los instrumentos jurídicos que se concentran en los agresores del pasado con la capa axiológica de ajustar cuentas con el pasado. Para conseguirlo, se presentan tres modelos básicos de justicia transicional -un modelo de retribución, un modelo de esclarecimiento histórico y un modelo de línea gruesa-, todos basados en las medidas aplicadas durante un cambio democrático. Seguidamente, el artículo describe las justificaciones de la justicia transicional, con el uso de una división clásica entre argumentación

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consecuencialista y deontológica. A continuación, se identifican los valores emblemáticos de cada uno de los modelos. Por último, el artículo propone una estructura moral de justicia transicional argumentando que puede guiar el proceso de toma de decisiones transicional a nivel axiológico.

Palabras clave

Justicia transicional; argumentación moral; principios y valores; mecanismos para resolver el pasado

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1. Transitional justice as an ontologically complex structure

During the last quarter of the twentieth century two remarkable developments of political and legal nature have taken place. In the process commonly referred to as a 'third wave of democratization' (Huntington 1991), over thirty authoritarian regimes in the southern Europe, Latin America, Africa, Asia and the former Eastern Bloc have either collapsed or agreed to give way to the establishment of democracy. During the transitions, new governments had to face profound political, economic, legal and social dilemmas, many of which were of fundamental importance to the future shape of democracies *in statu nascendi*. One of the most demanding and symbolic of these problems was the question of dealing with the legacy of past human rights abuses. Different measures implemented to handle this dilemma – including criminal trials, truth commissions, vetting, reparations and the politics of memory – were driven by divergent moral and political rationales. Together with the actors involved in the process and factors influencing their actions, they constitute what may be called – borrowing the name from Elster (2004) – 'the universe of transitional justice'.

As Teitel (2000, p. 3-4) notes, there are two basic perspectives on the legal measures implemented during fundamental political change. According to the realist account, the transitional justice measures are a mere outcome of the prevailing balance of power. How the past is approached is a sheer result of how it can be approached given the existing political and economic situation. On the other hand, the idealist perspective views transitional justice as a yet another field of action of the universal moral principles. Therefore, some of the measures unique to the times of democratization are often seen as perversion of justice, rather than exceptional tools used in extraordinary environment of transition. Teitel argues that neither of these two approaches can fully account for the role of the law throughout political change and for the unusual nature of justice during this period.

Even if one rejects the claim that justice during transition is *per se* exceptional and – as does de Greiff (2012) – one believes that transitional justice is an ordinary justice in extraordinary circumstances, it is still easily recognizable that the purely realistic perspective fails to note the significant influence of morality and justice both on the legal system and the society itself. It is not only that the transitional political debate and lawmaking is often informed and justified by moral references. During this period both legal jurisprudence and the practice of law – mainly court rulings – become frequently saturated with legal philosophy, as it is visible in the cases of the Berlin Wall Shooters (*Mauerschützenprozesse*) in which a large part of the verdicts relied explicitly or implicitly on the Radbruch's formula (Zajadło 2003, p. 118-166). In fact, even in the cases not related to transitional justice, the axiological gap created by a sudden normative shift makes it often necessary for the courts to seek for the justifications of their verdicts outside the legal system (Kordela 2002). Therefore the influence justice and morality have on law and society during the times of democratic change makes it necessary to incorporate these notions into the core of the transitional justice debate.

Transitional justice may be defined as 'the conception of justice associated with periods of political change' (Teitel 2003, p. 69), as 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses' (United Nations Security Council 2004, p. 4) and finally as 'political decisions made in the immediate aftermath of the transition and directed towards individuals on the basis of what they did or what was done to them under the earlier regime' (Elster 1998 cited Sadurski 2008, p. 344). These three definitions locate the nature of transitional justice in three distinct spheres: (1) in the sphere of justice, (2) in the sphere of the measures used in dealing with the past and (3) in the sphere of government decisions.

Accepting these intuitions, transitional justice can be seen as an ontologically complex structure, comprising of three distinct, yet connected levels. On the

axiological level, transitional justice may be seen as a concept of justice which comprises of moral imperatives and their justifications focusing on the problems of dealing with the past. The level of instruments consists of different legal and non-legal measures concerned with the legacy of the past abuse. Finally, on the level of decisions, the abovementioned ideas of justice are one of the factors contributing to the choice of specific transitional justice mechanisms and therefore become incorporated into implemented measures. Nevertheless, on this level there are other factors – political, social and economic – which also influence this decision and therefore shape the final form of the instruments of transitional justice.

The article aims to outline the connection between the axiological level of transitional justice and the instruments used in the process of dealing with the past. In order to do so, three models of transitional justice based on the measures implemented during democratic change are introduced. Then, with the use of a classic division between consequentialist and deontological argumentation, transitional justice justifications are described. Next, the values emblematic for each of the models are identified. Finally, in order to relate the values to the choice of a specific model, a structure of transitional justice moral reasoning is presented.

2. Models of transitional justice

Even though the ways in which societies deal with painful past differ significantly, it is nevertheless feasible to offer a typology of various approaches towards the legacy of human rights abuses adopted by newly established democratic governments. The generalization of measures implemented during democratic change makes it possible to distinguish several ideal types of transitional *modus operandi* which can be referred to as models of transitional justice.

2.1. Models of dealing with the past in transitional justice literature

Even though the work on models of ways of dealing with the past has not been the main focus of transitional justice literature so far, there are notable typologies of approaches towards this question, including the one developed by the Max Planck Institute in Freiburg and the one proposed by S.A. Garrett.

The typology offered by the Max Planck Institute in Freiburg (Eser *et al.* 2001), a result of comparative legal research conducted in 24 countries in Europe, Asia, Africa and Latin America, concentrates solely on criminal justice measures. The criminal prosecution model is characterized by wide and indiscriminate use of criminal trials against those accused of human rights violations. Germany, Rwanda and Greece are shown as examples of this type. On the other side of the continuum, the clean break model can be distinguished. This type can be further divided into the absolute clean break model – in which, as in Spain, Russia and Chile at that time, there exists a general lack of criminal proceedings – and into the relative clean break model, where trials are scarce, as it is the case in Poland, Czech Republic or Hungary. The main criterion for the distinction of these three models is the intensity of criminal retribution, whereas the identification of the fourth type – South African and Guatemalan reconciliation model – is based on a main transitional political goal. The aim is the restoration of shattered social bonds and with this goal in mind the model allows for the work of truth commissions and, in case of South Africa, conditional amnesty for past wrongdoers. From a methodological point of view, the use of two different division criteria can be seen as the main disadvantage of this typology.

Garrett (2000) describes four models of transitional justice which occupy points along a spectrum which stretches between 'retribution' at one end and 'reconciliation', understood here as a lack of the use of transitional justice measures, at the other. In the case of the amnesia model, which lies at the passive side of this continuum, not only does the new democratic government refrain from prosecuting past violations, but it even silences public discussion of their legacy.

Spain is given as an example of this type. On the other part of the spectrum Garrett describes the selective punishment model, in which – as in Greece – principal figures of the government and security forces are subject to legal sanctions. Between these two types lie the historical clarification model and the mixed memory and punishment model. In the first case, an example being Guatemala, a collective account of painful past is given, yet there is no attribution of individual responsibility and no legal sanctions follow. In the second instance, which existed in South Africa, a conditional amnesty may be granted, based on the level of wrongdoer's contribution to the truth-telling process. Garrett adds that apart from these four models other types are possible, such as a non-selective punishment model which was implemented in Rwanda and which could be marked even further down the retribution side of the spectrum. The typology proposed by Garrett seems to be generally correct, yet it fails to cover the full range of transitional justice responses, or to give clear criteria which could help to qualify transitional justice schemes in other countries to one of the models. Secondly, this article argues that a more accurate division should group the selective and non-selective punishment models into one ideal type. The same can be argued for the historical clarification model and the mixed memory and punishment model.

2.2. Models of transitional justice. Suggested typology

Because of the abovementioned disadvantages of the existing typologies, the article suggests its own division of transitional justice responses. The author proposes to distinguish three models of transitional justice:

- (1) the retribution model, in which people, whose connections with the previous regime are condemned in a new political environment, are subject to sanctions other than the disclosure of their links with the non-democratic government;
- (2) the historical clarification model, in which the disclosure of the nature of the previous regime as well as the connections between the individuals and the past government is not followed by the use of formal sanctions;
- (3) the thick line model¹, in which neither formal sanctions nor the disclosure are used.

The typology is based on the intensity of the use of four transitional justice measures: (1) criminal trials against members and supporters of the previous regime, (2) amnesties and pardons, (3) administrative instruments, such as vetting and purges, and (4) truth-telling mechanisms, including truth commissions, work of remembrance institutes and some of the lustration measures. The typology does not take into account reparations for victims. Therefore, the models presented here refer only to the retributive part of the transitional justice toolkit and are not related to victim-centered mechanisms.

2.2.1. The retribution model

In the instance of the retribution model connections between individuals and the former non-democratic government are subject to formal legal sanctions. The punishment may be imposed on the principal political figures of the authoritarian regime, members of the former ruling party, officers of the security forces – army, police, militia and secret political police – and their clandestine collaborators, entrepreneurs who actively supported the previous regime or propagandists and

¹ In the Polish debate the term 'thick line' (*gruba kreska*) is associated with the police statement of first non-communist Prime Minister, Tadeusz Mazowiecki, who on 24th of August 1989 said: 'We are drawing a thick line between the past and the present. We will be responsible only for what we have done to help Poland from its current state' (Gazeta Wyborcza 1989). Even though the idea behind these words was rather a creation of inclusive political sphere than a historical oblivion, the term 'thick line' became correlated with a lack of settling accounts – and in this paper it is used in this meaning.

hate speech architects. The sanctions used against these individuals can be divided into criminal and administrative ones.

Criminal sanctions affect values such as life, freedom or property rights. Death penalty, commonly imposed after the Second World War against Nazi officials and their collaborators in the Western Europe (Huysse 1995, p. 67), was seldom used during the third wave of democratization² and, at least in Europe, is now universally rejected. Instead, prison sentences of different length are used³, together with fines and loss of property acquired through crime⁴. One can also note punishments such as the loss of public rights, forfeiture of private possession, hereditary duty to pay compensation to the state and even loss of nationality (Elster 2004, p. 59, Huysse 1995, p. 67) – yet these sanctions, imposed after the year 1945 in Holland, Belgium and France, were not inflicted during the third wave of democratization.

In transitional justice literature it is often stated that 'in the long term, no ad hoc, temporary or external measures can ever replace a functioning national justice system' (United Nations Security Council 2004, p. 12) and therefore criminal trials conducted through regular domestic courts should be a tool of first choice when it comes to penal sanctions. When their use proves to be impossible due to lack of resources or independent judiciary, countries may resort to extraordinary measures such as Rwandan *gacaca* courts or international or hybrid tribunals. Universal jurisdiction – which should be regarded as a way of qualifying cases to the authority of the domestic court system rather than an independent transitional justice instrument – can also help to fill up the impunity gap.

The main administrative sanction is the loss of the right to hold certain public offices, as it was the case in the instance of the Czech decommunization process (Priban 2007). Other measures employed against state officials with links to the previous regime may include termination of contract, forced retirement, suspension, transfer to a less significant post or deprivation of certain competences (Duthie 2007, p. 24-27). The loss of the chance of promotion, as it was the case in the Argentine *impugnación* proceedings (Barbuto 2007), may also be considered an administrative sanction. Finally, a reduction of high state pensions paid to retired members of the past regime, introduced through special legislation, may be enforced with the use of administrative decisions⁵.

The proceedings in which administrative sanctions are imposed are often referred to as purges or vetting processes. As Duthie (2007, p. 18) states 'purges differ from vetting in that purges target people for their membership in or affiliation with a group rather than their individual responsibility for the violation of human rights'. As a rule, collective punishments should be excluded and each person should be judged individually based on the circumstances of their case. A mere association with the organization notorious for human right violations may only, in case of senior group officials, create a presumption of an active role of the individual in the conduct of the organization, shifting the burden of proof from the vetting body to a verified individual (Council of Europe Parliamentary Assembly 1996a, letter H).

² One notable example is the death sentence imposed against colonel Georgios Papadopoulos and two other members of the military junta that ruled Greece from 1967 to 1974. The sentences were later commuted to life imprisonment (Alivizatos and Nikiforos Diamandouros 1997, Garrett 2000).

³ In the trials of the East German Berlin Wall Shooters the sentences were considered to be lenient. Out of 106 people found guilty of crimes related to deaths at German-German border, 88 were given suspended sentences (Schaeffgen 2000, p. 4, Zajadło 2003, p. 177-184). Longer prison sentences were imposed on members of Argentine and Guatemalan juntas (Americas Watch 1991, p. 14-19, ICTJ 2013).

⁴ See for example article 77 (2) of Rome Statute of the International Criminal Court.

⁵ On 23rd of January 2009 the Polish parliament passed a bill which reduced the base of retirement pensions of former security service officers and members of WRON, a military junta which *de facto* ruled the country during the 1981-83 martial law. The statute was referred to Constitutional Court which on 24th February 2010 upheld the law, quashing only the reduction of base of the pension of WRON members for a period before martial law was introduced (case number: K 6/09). European Court of Human Rights, which also ruled on the case, found no violation of the European Convention of Human Rights (case number: ECHR 15189/10).

In the post-communist countries of Eastern Europe vetting is often referred to as lustration. Czarnota (2009, p. 311) notes that the term is used in three meanings: (1) a procedure of screening candidates for public posts on the basis of their security credential (which is similar to vetting), (2) a disclosure of the identity of former secret service collaborators (lustration *sensu stricte*) and (3) a process of disqualification of individuals who held significant positions in the previous regime from the current public life (decommunization). These processes can be qualified to the retribution model if they result in a disqualification of an individual from holding public offices or the use of other institutional sanctions. A mere disclosure of former collaboration with an authoritarian regime would ascribe the procedure to the historical clarification model.

The use of criminal and administrative sanctions may differ in its scope. According to the Human Rights Watch (2011, p. 1), Rwandan *gacaca* courts which for over a decade were charged with the duty of hearing cases related to the 1994 genocide, have examined about 1,2 million of cases, laying judgments on over one fifth of adult population of the country. Yet, the Rwandan example is exceptional and in most cases punishment is selective. In transitional societies, as Orentlicher (1991, p. 2602-2603) notes, prosecutions 'focused on those most responsible for designing and implementing a past system of rights violations or on the most notorious crimes would best comport with common standards of justice'. The scope of administrative measures may stretch from a wide decommunization purge (Czech Republic) to a more humble initiatives, such as the Argentine *impugnación* process.

One of the most prominent examples of the retribution model is the case of settling accounts with the legacy of the East German communist regime. Until 1999 over 62.000 criminal trials against 100.000 of people were launched, yet only around 300 of the accused were in fact convicted (Schaeffgen 2000, p. 1); in the case of DDR it was the prosecution that was universal, not the punishment itself. Apart from criminal trials – the most famous being the cases concerned with border shootings – a widespread vetting procedure was introduced. The process concentrated on the links with the notorious Stasi secret police, whose well-preserved archives could serve as a ground for screening programs. The vetting of the public sector, including city councils and universities, was decentralized. With time, the percent of dismissals became lower, which can be attributed both to the decreasing demand for punishment and the increasing number of proofs of loyalty towards the democratic system (Wilke 2007).

Another example of the model may be found in the instruments introduced in Timor-Leste to reckon with the crimes conducted during the 25 years of Indonesian occupation. In June 2000 Special Panels of the Dili District Court, a hybrid tribunal with exclusive jurisdiction over genocide, war crimes, crimes against humanity and torture, were established. Until May 2005, when the tribunal was dissolved, the court managed to hear cases of 87 people, acquitting only three of them. Nevertheless, the court was unable to gain custody over the leaders of the Indonesian army, who were accused of orchestrating the crimes (Reiger 2006). Less serious cases could be processed through the Community Reconciliation Program. In this case, the perpetrator, who revealed all the important aspects of the crime, could be offered an amnesty. The motion alone did not guarantee the impunity as the prosecutor could decide to proceed with the case. The amnesty itself was also conditional and was possible only if the community and the wrongdoer agreed to a settlement. Even though in some cases the apology was the sole requirement, in many other compensation or community work was demanded. Until March 2004, 1.317 settlements were reached (Burgess 2006). The possibility of prosecution and the need to fulfill the obligations arising from settlement arguably permit to assign the Community Reconciliation Program to the retribution model.

Other examples of the model include the criminal trials and *impugnación* in Argentina, the penal sanctions imposed in Rwanda and Greece, the Czech lustration laws, provisions in Latvian election law and the dissolution of Polish communist political police.

2.2.2. The historical clarification model

In the instance of the historical clarification model, the attempts to deal with a painful past concentrate on the exposure of the nature of the fallen authoritarian regime and – in most cases – on the role of certain individuals as the creators, supporters or collaborators of the oppressive political system. As a rule, no legal sanctions follow such disclosure. The only exception may be the infliction of punishment on those who fail to contribute to the clarification process or use their free speech to distort the historical account of the crimes of the fallen authoritarian government.

The instruments used in the truth-seeking initiatives can be divided into the means of collective clarification and the instruments of individual disclosure. The mechanisms of collective clarification, such as truth commissions, are established in order to create a general overview of the character of the past political system. Individual accounts, if presented, serve rather as examples of overall tendencies. On the other hand, the individual disclosure instruments, such as some types of lustration, do not aim to create a thorough narrative on the past, but try to expose the connections on a personal level. As Rumin (2007, p. 408-409) notes, the post-communist states are characterized by the excess of uncertain information, whereas in post-conflict states – where 'deniable forms of repression', such as forced disappearances, were used (A. Neier 1994 quoted in Ross 2004, p. 73) – there exists a general lack of information. Therefore, post-communist countries resort to individual disclosure measures, while in the countries on the wake of internal armed conflict the collective clarification mechanisms are more commonly used.

Two main instruments of collective clarification are the creation of truth commissions and the establishment of national remembrance institutes. Truth commissions can be defined as temporary bodies officially authorized or sanctioned by the state, formed to investigate a pattern of past human rights violations inflicted over a period of time, whose work usually concludes with a submission of a public report (Hayner 2002, p. 14). The commissions are often granted access to state documents and the right to collect testimonies and subpoena witnesses. The reports may include recommendations for the government and the names of the alleged perpetrators; even though the commissions have typically no judiciary competences, the evidence they collect may trigger criminal prosecution. The national remembrance institutions, contrary to ad hoc truth commissions, are permanent public bodies created to investigate the legacy of human rights abuses and to disseminate their findings among the members of society. Even though their work focuses on collective clarification, they may also create a historical account on a personal level: the Polish National Remembrance Institute is competent to publish the lists of former communist officials and officers of the secret service and to trigger prosecution for nazi and communist crimes and for lustration lies⁶. Collective clarification may also be achieved with the use of symbolic acts of parliament condemning the previous regime⁷, the penalization of genocide denial and other

⁶ See: articles 45 and 52a of Act of 18th of December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (*Ustawa z dnia 18 grudnia 1998 r o Instytucie Pamięci Narodowej - Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu*; consolidated text: *Dziennik Ustaw* – official journal – 2007, No. 63, pos.424).

⁷ An example of such legislation are some of the provisions of Czech Act on Illegality of the Communist Regime and on Resistance Against It (*Zákon o protiprávnosti komunistického režimu a o odporu proti němu, č. 198/1993 Sb.*).

illegitimate historical revisionism, official apologies by the state and memorialization initiatives, such as creation of museums and enactment of monuments.

The main individual clarification mechanism is the use of the screening procedures. If the negative outcome of vetting results in the use of formal sanctions, such mechanism can be ascribed to the retribution model; if, however, the sanctions are missing, the process can be qualified as an individual clarification instrument (an example being Polish lustration). Apart from establishing lustration proceedings, post-communist states also regulate access to the archives of the former secret police. The integrity and the reliability of the communist files are doubtful, therefore most Eastern European countries restricted the access to the archives, granting it only to the victims, the vetted, the scientists, the journalists or the members of public bodies (Rumin 2007). Nevertheless, the secret police archives still became a weapon of brutal political strife: as Teitel (2000, p. 100) notes, 'opening the old state files would not automatically bring about the open society'.

Less controversial is another individual clarification measure: the quashing of politically motivated court verdicts imposed by the former regime against the members of the opposition, an example of which are four Hungarian annulment laws (Hack 2007). Finally, when due to amnesty or because of the lack of political will there is no chance of the infliction of criminal punishment on those responsible for past violations, court proceedings may be used as a clarification measure, as it was the case with the Argentine truth trials, conducted when two amnesty laws barred the possibility of prosecution (Lichtenfeld 2005, p. 3-4).

The combined use of collective and individual measures of historical clarification may create a comprehensive account of the authoritarian political system. An example may be the work of the South African Truth and Reconciliation Commission, whose report gave a thorough overview of the origin of the apartheid system and a broad account of human rights violations perpetrated by the supporters of the regime and by the armed opposition (Truth and Reconciliation Commission of South Africa 1998). Other clarifications may be more limited in scope: individual screening measures in the countries of the former Eastern Bloc concentrated almost solely on the work or collaboration with the communist secret service.

In the case of the historical clarification model, there are no sanctions for the individuals exposed to have links with the former regime. Yet, such sanctions may be imposed on individuals who fail to take part in the clarification process. In South Africa, an amnesty was granted for past crimes committed on political grounds, provided the wrongdoer offered a full and honest testimony on the circumstances of the crime. Failure to take part in the process opened a way for criminal prosecution of the culprit (van Zyl 1999, Hayner 2002, p. 40-45). In Poland, individuals who hold public posts and candidates for office are required to give a statement on their previous work or collaboration with the communist secret service. A straightforward plea of cooperation does not impede on the right to hold public office, whereas false denial may result in a ban on holding public posts (Grzelak 2005, Czarnota 2007). Finally, many countries – including Germany, France and Poland – have made it illegal to publicly and groundlessly deny or diminish the crime of Holocaust or other nazi or communist crimes; in this instance the state acts against those who illegitimately try to distort the account of the history of human rights violations.

One should note that the establishment of the measures of historical clarification may be desirable even if the awareness of past crimes exists in the common knowledge of the society. The knowledge of past crimes differs from an official acknowledgement of their legacy by public authorities. The latter becomes proof that a period of forced silence is over and helps to construct a shared, official narrative about the wrongs of the previous regime (Hayner 2002, p. 24-27).

One of the examples of the historical clarification model may be the first phase of transitional justice initiatives in Chile. Even though in December 1989 Patricio Aylwin was democratically elected for presidential post, general Augusto Pinochet still wielded a considerable power as a chief army leader and fervently objected any legal proceedings against human rights violators. Unable to trigger prosecutions, Aylwin decided to create a truth commission. In February 1991 the Commission, headed by Raúl Rettig, published its report. Out of 2.115 people whose fate was documented, the Pinochet regime was responsible for death or disappearance of 2.025 of them. The report gave an account of the pattern of human rights violations, including the use of torture on the interrogated, extra-judicial killings and forced disappearances. The names of the alleged wrongdoers were not officially published, but were instead submitted to the appropriate courts (Chile. Comisión Nacional de Verdad y Reconciliación 1993, Hayner 2002, p. 35-38). Nevertheless, it was not until 1998 that the first case against Augusto Pinochet was opened and the trials against other perpetrators began only in 2003 (Collins 2010), signifying a shift towards the retribution model.

Other instances of the historical clarification model include: (1) the abovementioned work of the South African Truth and Reconciliation Commission which offered amnesty in exchange for an input to the truth-seeking process, (2) Polish lustration in which only the lustration lie was open to sanction and (3) Guatemalan transitional justice initiatives before the beginning of the trials of the perpetrators of Mayan genocide.

2.2.3. The thick line model

Even though the legacy of drastic human rights violations may call for some kind of retribution or at least acknowledgement, in the case of the thick line model neither sanctions nor clarification initiatives are used to confront the past. Instead, a policy of amnesties or pardons is implemented. Even where there is no *de iure* amnesty, the government *de facto* refrains from calling the perpetrators to account or even exposing their wrongful actions.

Amnesties can be defined as legal measures which bar criminal prosecution – and, in some cases, civil suits – for certain groups of individuals and for their certain past conduct or which retroactively nullify criminal liability already established. They differ from pardons which can be characterized as tools used to exempt the criminal from serving the sentence, without its nullification (United Nations, Office of the United Nations High Commissioner for Human Rights 2009, p. 5). Therefore the amnesties can be said to target the criminality of the actions, whereas pardons concentrate solely on the sanctions themselves.

In the case of a negotiated transition or difficult peace talks, an amnesty may be crucial for securing democratization or an end of the internal conflict. In such circumstances, the United Nations was known to support the amnesties, Salvador and South Africa being the most prominent examples (Scharf 2005, p. 31). More recent UN publications state, however, that 'United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights' (United Nations Security Council 2004, p. 5). Accepting this principle, one should still see amnesty as another transitional justice tool, rather than simply an obstacle to achieving justice. Teitel (2000, p. 59) points out to the 'systemic role played by both punishment and amnesty practices in the construction of political transition. Ultimately, amnesties and punishment are but two sides of the same coin: legal rites that visibly and forcefully demonstrate the change in sovereignty that makes for political transition'. Carefully constructed and introduced through democratic legislation, amnesties may foster the support for newly emerging political system, rather than undermine its core values.

The creation of a normative shift is not possible where governments consciously remain inactive and reject initiatives aimed at establishing responsibility or documenting the pattern of past abuses. In these cases, a *de facto* amnesty may result from a simple prosecutor's inaction, the lack of sufficient funding for criminal proceedings or a failure to lift or postpone a statute of limitation for crimes conducted in the previous regime and unpunished due to political reasons.

A canonical example of the thick line model is the case of post-Francoist Spain. The death of general Franco in 1975 marked the beginning of the democratization process in which prominent roles were played by the members of the previous regime. The reluctance to punishment of past human rights violations, obvious on the part of the government, was not questioned by the opposition. With its support, an organic amnesty law⁸ was introduced in 1977 which barred any prosecution of crimes from Franco's era. There was also no attempt to create an account of past human rights abuses. As Garrett (2000) sums up, Spain is an example of a situation where 'a newly emergent democracy makes a conscious decision not only to avoid prosecutions of past human rights offenders, but even shuns widespread public discussion about their having taking place in the first place'. It was not until 2007, when the government of Jose Zapatero introduced the Historical Memory Law⁹, that any significant historical clarification initiatives were implemented.

Another example of this model is Uruguay where an amnesty law¹⁰ introduced in 1986 was later upheld in a national referendum. In the last decade of the twentieth century no major trials were conducted and no official historical report was published. Only after the year 2000 the scope of the amnesty was restricted through a narrow interpretation of the legislation and some of the most important figures of junta government, including former president Bordaberry, were tried, convicted and sentenced to lengthy prison terms (Mallinder 2007, BBC 2010). Nevertheless, between 1986 and 2000, Uruguay can be ascribed to the thick line model. The same qualification can be made in the case of post-Soviet Russia (Andrieu 2011).

3. Transitional justice and moral argumentation

The presented models are not mere outcomes of a balance of powers but can be also identified as results of a moral choice. The arguments in favor and against each ideal type can be described with the use of a classic division between consequentialist and deontological argumentation. It is also possible to present a typology of values influencing the decision on the way of dealing with the past.

3.1. Deontology and consequentialism in transitional justice argumentation

Two basic philosophical approaches to the problem of moral judgments: deontology and consequentialism, can be distinguished. According to the deontological stance, whether a deed is good or bad depends not on the consequences of the act but on the act itself. The question is whether the act is consistent with basic principles which guide human conduct. Because of these principles, some deeds are intrinsically right and other are intrinsically wrong. Yet, the existence of those principles is accepted *a priori* and is not subject to argumentation. Immanuel Kant is the most prominent figure of the deontological approach (Routledge 1998).

According to consequentialism, the moral value of an act lies in its outcomes. The act-consequentialism states that a certain act is right or wrong because of the results it produces; the rule-consequentialism, on the other hand, believes that one should act according to the set of moral principles, which, if used generally, would

⁸ Ley 46/1977, de 15 de octubre, de Amnistía.

⁹ Ley 52/2007, de 26 de diciembre, por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura.

¹⁰ Ley Nº 15.848, Funcionarios militares y policiales se reconce que ha caducado el ejercicio del la pretension puniiva del esado respecto de los delitos cometidos hasta el 1º marzo de 1985.

bring the best possible effects. There are different ways in which the results of a deed may be estimated. The idea that the good should be measured with general happiness, inherent for utilitarianism, is the most famous of these currencies. Jeremy Bentham is the pioneer of this way of reasoning (Routledge 1998).

Both of these schools of thought may be used in transitional justice argumentation. As Garrett (1999) points out, transitional justice can be understood as part of a broader discipline of applied ethics, which tries to connect the moral reasoning with practical human actions. When it comes to the dilemmas during the time of the democratic change, moral argumentation can be used both as a base of practical political choice and as a tool for assessing the undertaken political and legal initiatives.

Deontology is an approach often taken by the promoters of the accountability for human rights abuses. The deontologists believe, as Garrett (1999) writes, 'that "justice must out" and that to ignore past crimes is not only inherently to condone them but to offer an insult to those who suffered from egregious human rights abuses'. Therefore, the dignity of victims and their families, as well as the requirements of truth and justice (Huntington 1991, p. 213), call for retribution. This belief may be based on a theory which sees the crime as an act through which the criminals grant themselves undue advantage (especially: unfair freedom) in comparison to other citizens. In order to restore the balance, such an advantage has to be countered with sanctions (Sadurski 1988, Malamud-Goti 1995, p. 195). Even if, as some philosophers claim, the need to answer the crime with penal sanctions is socially constructed and is part of a cultural 'justice script' - and therefore relative - within the realm of certain society it still explains why such a reaction is believed to be just (du Bois-Pedain 2007, p. 275-279).

Deontology can also provide arguments in favor of historical clarification. United Nation's Anti-impunity Principles (United Nations Economic and Social Council 2005) not only grant the victims and their families 'the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate' (Principle 4) but also state that every person has 'the inalienable right to know the truth about past events concerning the perpetration of heinous crimes' and their origin (Principle 2) and that it is the state duty to 'preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations' (Principle 3). Truth, memory and true identity of a nation are therefore values that have to be protected by the state. As says Neier (1995): 'To demand accountability, especially so far as exposing the truth is concerned, is to insist that people not be sacrificed for the greater good; that their suffering should be disclosed, and the responsibility of the state and its agents for causing that suffering be made clear'.

Both the use of sanctions and the historical clarification initiatives can also be advocated from the consequentialist point of view. As Malamud-Goti (1995) asserts, the social importance of punishment can be seen as a way of preventing the criminal from repeating the crimes (rehabilitation theory) or as a tool to deter others from transgressing the law (deterrence theory). When it comes to transitional justice, this argument states that the punishment of past crimes lowers the risk of future human rights violations, whereas the impunity is the invitation to their repetition. On the other hand, the communicative rationalizations of punishment see it as a form of a discourse in which the society, with the use of sanctions, informs the criminals about the wrongfulness of their deeds, whereas the criminals, through serving the sentence, apologize for their acts. Seen this way, the punishment becomes a procedure that reintegrates the criminals as members of the community (Duff 2001, especially p. 108-110).

The criminal trial may also be a powerful tool in establishing the truth about past events. When it comes to historical clarification, the process may be said to provide

'a vital safeguard against the recurrence of violations' (United Nations Economic and Social Council 2005, Principle 2). What is more, said process can offer a more nuanced vision of the past than a criminal trial framed in stiff legal terms and therefore promote introspection, mutual understanding and social reconciliation (van Zyl 1999, p. 667). Truth-seeking may also create an account of the past, crucial for possible future prosecutions. Both sanctions and historical clarification can also foster democracy and democratic values. Showing that no one is above the law, the measures signify the value of equality, a core of democratic axiology. As this principle is often breached in the authoritarian regimes, the change creates a normative shift, shows the supremacy of democratic values and may boost the support for the new political system (Huntington 1991, p. 213-214, Teitel 2000).

One may note, however, that consequentialist position also provides the strongest argument against the retribution or truth-seeking and in favor of *de iure* or *de facto* amnesty. When the peace is fragile or new democracy weak, the amnesty may be deemed necessary to preserve the new political environment in which the society is generally free from human rights violations and can determine its own future through elections. In these cases governments must 'act in circumstances of *force majeure*, placing the good of the whole (...) above the claims of the relative few who had directly suffered under the old regime' (Garrett 1999). The main consequentialist dilemma in such situation is whether the risk of antidemocratic revolt is significant enough to justify the resignation from pursuing accountability or historical clarification. Along with the consequentialist position one may also argue that sanctions and difficult truth may further divide the society and that it is the historical oblivion that will better serve the reconciliation. Finally, as the resources in transitional societies are usually scarce, it can be argued that the assets spent on trials or truth-seeking initiatives could be better used on other, everyday problems, such as costs of economic transformation, education or the needs of the justice system in relation to current crimes (van Zyl 1999, p. 651-653).

There are also some deontological arguments that can support the decision to refrain from retribution or even from historical clarification. One of them can be summarized with a Biblical quote: "Let him who is without sin among you be the first to throw a stone" (John 8:7). In post-communist societies in which almost all citizens supported the existence of the regime by its passive acceptance, it may seem convincing to forgo the punishment of even the most guilty (Havel 1990 quoted in Huntington 1991, p. 214). Other values which could support the amnesty are mercy and forgiveness: in the transitional setting forgiving the past wrongs may be seen as a noble act – if not a moral obligation. Finally, as Michnik (Gazeta Wyborcza 1991, p. 9) notes, refraining from ostracism and promoting social inclusion may seem to be a value which differs the new democratic elite from past abusive regime.

3.2. Transitional justice values and the models of dealing with the past

The arguments for and against the use of different transitional justice measures and the values behind such arguments can also be presented in a different manner. Taking into account two main goals of transitional justice: settling accounts with the past and supporting democratic transition, transitional justice values can be divided into two groups:

- (1) values connected with dealing with the past abuses;
- (2) values connected with the democratic political system.

3.2.1. Values connected with dealing with the past

Values linked to settling accounts with the past can be further divided into three groups. The first group is composed of the values intrinsic to the retribution model. The major value is justice, understood here as just retribution for the past wrongs. As it was noted, if justice is to be described as a hypothetical situation of balance

between the individuals, the punishment is needed to reinstall the homeostasis upset by the evil committed by the wrongdoer. The infliction of sanctions may also be considered crucial for the dignity of the victims and their families. Finally, punishing human rights abuses underlines the importance of these rights and can serve as a deterrent from their violations.

Truth and memory can be said to constitute the second group of values connected with dealing with the past. Truth, as opposed to lie, is itself perceived a value in most deontological argumentations. What is more, if it prevents future abuses, truth can promote human rights protection and may help to construct true individual and social identities. After all, 'since Locke, the answer to the question "Who we are?" has always been: The bill from the past' (Wolff-Powęska 2011, p. 51). Without truth, according to the South African Constitutional Court, both victims and their former oppressors may 'hobble more than walk to the future with heavy and dragged steps delaying and impeding a rapid and enthusiastic transition to the new society' (quoted in Dyzenhaus 1998, p. 13). The values presented are characteristic to the historical clarification model.

In the case of the thick line model, one may point to forgiveness and social inclusiveness as two of the values protected by the model. Both of them were briefly described above. Apart from them, some researches point to forgetting as yet another value connected with overcoming the past. It helps the victims to proceed with their lives and, as Smith (1996 quoted in Wolff-Powęska 2011, p. 32) points out, it is also a necessary feature of our social and scientific institutions. Even though seeing oblivion as a value may be controversial in the times when the right to the truth is still often neglected, one should remember that both of them are two aspects of the same principles of memory.

3.2.2. Values connected with the democratic political system.

Democracy – a transitional goal with which the second group of values is connected – can be defined in different ways. As Huntington (1991, p. 5-13) argues, according to the dominant procedural definition first formulated by Schumpeter, democracy is a system in which the government acquires power through free elections. Defining democracy, one may also resort to substantial, yet sometimes vague, qualities such as equality, rule of law, civic trust, open society and responsible public debate. With these distinction, two groups of values connected with democracy can be offered.

The first of them is the existence of democratic procedures themselves. Without them democratic society becomes a mere object of control, instead of being the subject that controls the government. The endurance of democracy is also crucial for the protection of human rights. According to de Greiff (2012, p. 55) 'it is not that democracies have a spotless human rights record, but on the whole they fare better on the protection of basic human rights than their alternatives'.

The second value is the creation of a mature democracy, in which the substantial democratic values are fulfilled. They do not restrict to the features mentioned above but may also include, inter alia, establishing 'the principles of subsidiarity, freedom of choice, equality of chances, economic pluralism and transparency of the decision-making process', as well as 'the separation of powers, freedom of the media, protection of private property and the development of a civil society' (Council of Europe Parliamentary Assembly 1996b, par. 2). These values can therefore be said to be concerned with the ideal of democracy that even the developed democratic systems still seek to achieve.

4. The structure of transitional justice moral choice

The models of transitional justice and values behind transitional justice arguments, presented above, may be used to propose a theoretical structure of moral reasoning that, on the axiological level, can lead to the choice of a particular way of dealing with the past. Accepted values can lead both to the implementation of

specific transitional justice mechanisms and to the moral acceptance – or rejection – of *modus operandi* used by the new democratic government. The article argues that The Law of Balancing, formulated by Robert Alexy, can be used as a theoretical framework for this purpose.

This being said, three remarks are in place. First, the aim of the article is not to argue that there exists a one-fit-all decision that should be arrived at using this procedure. Rather, it offers an outline of moral argumentation that may lead to the acceptance of a specific transitional justice model. Second, the paper does not claim that the choice of the model is actually made only at the level of morality. There are other factors, including political and economic constraints, that narrow the possible alternatives. What is presented here is only a structure that may lead to the moral acceptance of the decision which may or may not have originated on moral grounds. Finally, it is the structure itself that is important, not the assessment of the weight of the values proposed in the examples given below. The following significance of values is therefore merely explanatory.

4.1. *The Law of Balancing and the principles of law*

According to Alexy's (2000, 2002) theory of principles, the principles of law are optimization commands. They are a type of norms that command something to be achieved in the highest degree that is actually and legally possible; the level of their completion may therefore vary. The incompatibility of the principles does not cause one of them to be invalid. Instead, the situation is resolved with the use of the Law of Collision, according to which: 'If principle P_1 takes priority over principle P_2 under conditions C : ($P_1 \mathbf{P} P_2$) C , and if P_1 under conditions C implies legal effect R , then a rule is valid that comprises C as the operative facts and R as legal effect: $C \rightarrow R$ ' (Alexy 2000, p. 297).

The question which of the principles takes priority over the second one in case of their collision is decided by the Law of Balancing. The principles theory implies and is implied by the principle of proportionality, which consists of three sub-principles: the principle of suitability, the principle of necessity and the principle of proportionality *sensu stricte*. The first one implies that the use of a measure M that is believed to promote principle P_1 but interferes in principle P_2 is acceptable only if the measure actually supports principle P_1 . According to the necessity principle, if two measures: M_1 and M_2 promote principle P_1 approximately well, the principle which interferes less intensively in principle P_2 is to be used. Finally, according to the Law of Balancing that stems from the principle of proportionality in the narrow sense, the more intensive the interference in one principle is, the more important the realization of the other principle must be.

Alexy (2003, p. 436-437) notes that there are three stages of balancing of principles. First, the detriment or non-satisfaction of one of the principles is measured ($P_1 I_1$). Second, the importance of the other one is established ($P_2 I_2$) which is similar to the detriment of P_2 should the principle P_1 be observed. Finally, 'in the third stage it is established whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former'. Both the importance of the first principle and the detriment of the second one can be measured with the use of a triadic scale and be labeled as light, moderate or serious¹¹; the balancing is also possible when the scale consists only of two levels or is more diversified. Alexy gives also a more elaborated version of the balancing law, taking into account not only the degree of detriment and importance of principles, but also their abstract weight (W_1 , W_2) and the possibility that the measure in question will in fact cause the detriment or the realization of the

¹¹ A numeric equivalents are: light detriment or importance – $2^0=1$, moderate – $2^1=2$, serious – $2^2=4$ (Alexy 2003, p. 444).

principle (R_1, R_2) (2003, p. 436-448). Therefore the elaborated version of the balance law could be stated as follows: $P_1 (=I_1 \cdot W_1 \cdot R_1) / P_2 (=I_2 \cdot W_2 \cdot R_2)$.

The principles of law can also be characterized in a different manner. Kordela (2012) defines principles as legal norms that either command or forbid the realization of a defined value. Therefore, what is prescribed by the principles are values which constitute fundamental elements of the axiological system of the lawgiver. As a result, the objects of balancing are, in fact, not two colliding principles, but rather the values imposed by them. Accepting this stance allows the use of Alexy's Law of Balancing directly to the values themselves.

4.2. Balancing the values and the choice of the model of transitional justice

The Law on Balance settles the priority of principles (values) in a specific case and allows for a decision to use a specific measure in order to achieve them. In the case of transitional justice, the role of measures is played by the transitional justice mechanisms or – looking more broadly – by the transitional justice models themselves. The balancing of values can therefore lead to the choice of the retribution model (M_R), the historical clarification model (M_{HC}), the thick line model (M_{TL}) – or a specific mechanism constituting each of them.

Values which influence such choice can be divided, according to the previous part of the article, into values connected with the retribution model (V_R), values connected with the historical clarification model (V_{HC}), values connected with the thick line model (V_{TL}), values connected with a mere existence of democracy (V_{DE}) and values connected with the substantial democratic values (V_{DS}). One should note that whereas V_R , V_{HC} and V_{DS} can usually mutually support each other, they also in most cases collide with V_{TL} and V_{DE} .

Taking into account only the values connected with dealing with the past, one can offer two equations which show the possible structure for the choice of transitional justice model where the prospects for democracy are not an issue:

$$(1) V_R (=I_R \cdot W_R \cdot R_R) / V_{TL} (=I_{TL} \cdot W_{TL} \cdot R_{TL})$$

$$(2) V_{HC} (=I_{HC} \cdot W_{HC} \cdot R_{HC}) / V_{TL} (=I_{TL} \cdot W_{TL} \cdot R_{TL})$$

Where the importance of the values connected to retribution multiplied by their absolute weight and by the possibility of achieving the values through the use of the sanction is bigger than the interference with the values connected to the thick line model multiplied by their absolute weight and the risk of their infringement through the use of sanctions, the actor involved in the reasoning may choose to support the retribution model. When the balance is in favor of the thick line model, yet a similar weighing procedure executed for the historical clarification model and the thick line model benefits the former, the actor may advocate truth-seeking initiatives. Finally, when both balancing processes support the thick line model, the actor may vote for *de facto* or *de iure* amnesties.

The following example may be given. Let us imagine a government which in abstract terms strongly favors justice and dignity of victims ($W_R=4$) over social inclusion and forgiveness ($W_{TL}=1$). The government will most likely believe the importance of trying the human rights abuses to be high ($I_R=4$), as without their prosecution the justice cannot be obtained. The possibility that the trials will in fact bring about justice and dignity for victims may, because of the evidential difficulties, be estimated as medium ($R_R=2$). On the other hand, as in this particular case the wrongdoers are relatively few, the degree of the ostracism and non-satisfaction of forgiveness may be calculated as weak ($I_{TL}=1$) while the risk of this result may be calculated to be medium ($R_{TL}=2$). As a result, the total number for V_R would be 32 and the sum of V_{TL} would be only 2 which would shift the balance towards the retribution model.

We may also consider an actor contemplating the creation of the truth commission in a case where the knowledge of past abuses exists, yet the acknowledgement of the authorities is missing. Let us imagine he or she strongly supports truth, dignity of victims and true social identity ($W_{HC}=4$) but also holds social inclusiveness and forgiveness in high regard ($W_{TL}=2$). In this instance the actor may believe that, truth being already known, truth commission may still serve some valuable purposes as a tool for acknowledgement ($I_{HC}=2$) and that it is quite likely to fulfill its goal ($R_{HC}=2$). He or she may also believe that there is a moderate risk ($R_{TL}=2$) that the truth commission may modestly divide the society ($I_{TL}=2$). As a result, the actor may support the establishment of a truth commission, albeit probably not fervently.

One may argue that in most societies the values emblematic for retribution or historical clarification are likely to be preferred above the values typical for the thick line approach. To simply forget the past is usually not an option and most countries decide to somehow deal with the legacy of past abuse. Therefore, in order to describe why the resignation from punishment or truth-seeking may be morally accepted, one should resort to the values connected with the existence of democracy and with its substantial values.

Let us imagine that in the second case presented above there exists a risk of *coup d'état*. In this case, one should first balance the importance of substantial democratic values – which support historical clarification – against the risk of the overthrow of the democracy itself:

$$(1) V_{DS} (=I_{DS} \cdot W_{DS} \cdot R_{DS}) / V_{DE} (=I_{DE} \cdot W_{DE} \cdot R_{DE})$$

There is a possibility that an actor would truly believe that no democracy is better than a flawed one. It is more probable, however, that the values connected with the existence of democratic procedures, such as the protection of human rights, would be strongly preferred against the substantial democratic values ($W_{DS}=1, W_{DE}=4$). As Hansen (2011, p. 5) suggests, in democratic transitions 'it is a reasonable expectation (although not necessarily true in individual cases) that the new leadership will be predisposed to support transitional justice to the extent that such processes will not conflict with other top priorities of the new leadership, including, but not limited to, maintaining its stability'. Then, the actor may believe that a lack of historical clarification is bound to infringe on substantial values in a moderate way ($I_{DS}=2, R_{DS}=4$). Yet even a moderate risk ($R_{DE}=2$) of a revolt threatening a sheer existence of democracy ($I_{DE}=4$) should lead the actor to the conclusion that the value of the endurance of the democratic system has a priority in this case ($V_{DS}=8, V_{DE}=32$).

If the substantial values would take precedence over the stability of democracy, there would be no need to weigh them against the values emblematic for historical clarification, as they usually mutually support each other. Yet in the case of the endurance of democracy being regarded as more important, one has to balance it against the concurring historical clarification values:

$$(1) V_{R/HC} (=I_{R/HC} \cdot W_{R/HC} \cdot R_{R/HC}) / V_{DE} (=I_{DE} \cdot W_{DE} \cdot R_{DE})$$

Again, it is possible that an actor would prefer the deontological stance and value historical clarification more than the existence of democracy itself. Nevertheless, as it was noted, the governments seem to prefer the consequentialist approach and, therefore, it is likely that democratic stability would be strongly favored against the historical clarification ($W_{HC}=1, W_{DE}=4$). The establishment of truth commission may still be regarded as a useful and moderately effective tool for acknowledgement ($I_{HC}=2, R_{HC}=2$). Yet in this case even a slight risk of major revolt ($I_{DE}=4, R_{DE}=1$) may cause the actor to oppose historical clarification and choose the thick line model. Only with virtually no risk for democracy ($I_{DE}=1, R_{DE}=1$), the actor in such situation might have chosen to support the truth commission.

Finally, let us examine the example of Argentina. After the military junta fell in 1983, the government of the democratically elected president Raúl Alfonsín has not only created a truth commission, but also supported trials against principal figures of the authoritarian government (Americas Watch 1991, p. 13-44). As Pion-Berlin (1993, p. 115-116) writes, Alfonsín was himself a human rights activist who in the past promoted them at great personal risk; after the transition he 'unhesitatingly supported some form of judicial retribution' and believed that 'a democratic system could not be reborn by forgetting the past, and that to do so would be to build the new system upon an "uncertain ethical foundation" '. Therefore one may believe that Alfonsín hold justice in high regard, although as it would be visible in the future he valued the existence of democracy even more ($W_R=2$, $W_{DE}=4$). The quote suggests that the president considered the administration of justice to be of crucial importance ($I_R=4$) and his actions suggest he believed that criminal trials will lead to this goal ($R_R=4$). During the first years of his term, Alfonsín had to face little opposition, as armed forces were 'unable to speak with one voice or to exert any real influence over the transition or the initial policies of the democratic government' (Pion-Berlin 1993, p. 113). Therefore, there was virtually no risk of military revolt ($I_{DE}=1$, $R_{DE}=1$). Thus, as the balance was seen to have been in favor of prosecution ($V_R=32$, $V_{DE}=4$), the choice to pursue the trials was understandable.

In 1986 and 1987 the government of president Alfonsín passed two amnesty laws – *Ley de Punto Final* and *Ley de obediencia debida* – that stopped the prosecutions. As Malamud-Goti (1995, p. 192), one of Alfonsín's advisors, asserts, it was 'the fear that a military coup could bring the country back into another dark period' fuelled by 'relentless pressure from the military to stop the trial' that persuaded the president to draft the law. The fear proved to be somewhat justified as in 1987 a military compound in Cordoba revolted (Crawford 1990, p. 26). Thus, during that period the risk of major military revolt ($I_{DE}=4$) may have been seen as serious ($R_{DE}=4$). Therefore, the balance of values may have shifted towards the endurance of democracy ($V_R=32$, $V_{DE}=64$). This analysis is supported by Pion-Berlin (1993, p. 129) who states that while Alfonsín's assessment of the strength of the military 'proved to be accurate during the first half of his administration', in the end 'he may also have underestimated the military's capacity to resuscitate itself, as witnessed by the three rebellions launched during the second half of his term that forced the termination of judicial proceedings'. When the risk of the revolt rose, the use of the amnesty became morally acceptable, at least seen from a consequentialist point of view.

5. Conclusions

In the development of an empirical science, three stages can be roughly distinguished. During a prethoeretical stage, the data is gathered through observation or experiments. In the second phase, factual theories are constructed which aim to explain the collected data. Finally, in the third stage, models and idealization theories are created which describe the relations between the ideal types of the factual objects (Wronkowska and Ziemiński 1997, p. 10).

In the course of its rapid growth, the field of transitional justice has managed to collect a remarkable set of data and to offer many valuable explanations to the observed regularities. These efforts must continue. Nevertheless, in order to entrench itself as a distinct area of study, transitional justice must also consist of efforts to create a theoretical framework for the data gathered in the field. These efforts include the creation of models which can be later confirmed or falsified.

In line with those remarks, the article aimed to accept a more theoretical approach to the problems of transitional justice. Thus, a concept of transitional justice as an ontologically complex structure was presented, three models of settling accounts with the past were described and an outline of a typology of transitional justice values was given. Finally, with the use of Alexy's Law of Balancing, a theoretical

framework for transitional justice decision process was proposed. These models are open for further consideration; after all it is the critique of the ideas presented that fosters the development of scientific research.

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