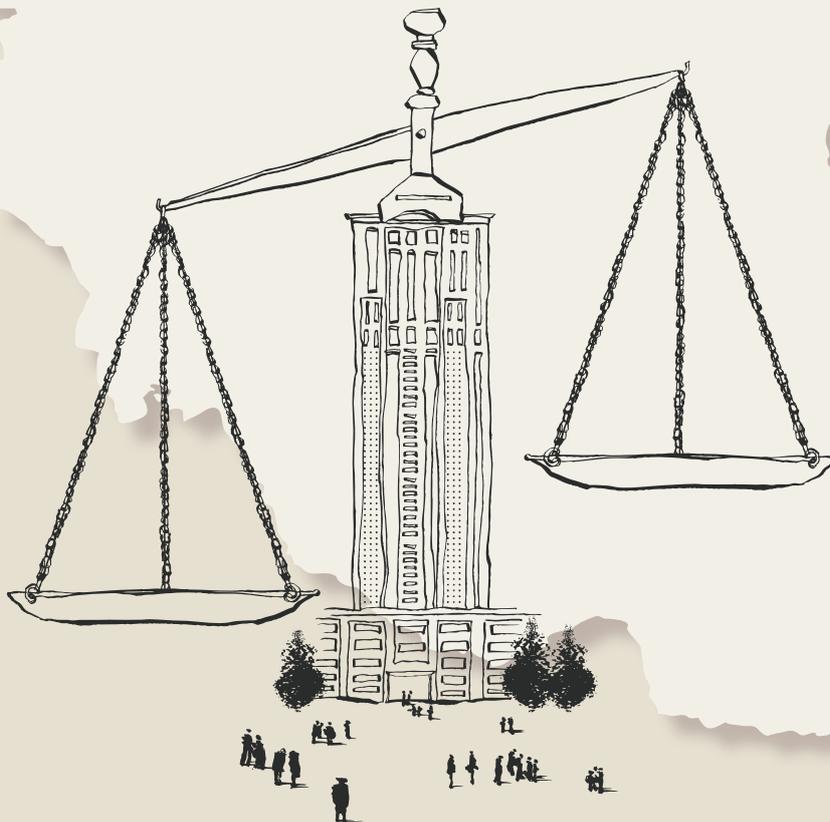


THE FUTURE OF IRAN: TRANSITIONAL JUSTICE
Iranian Civil Society NGOs and
Transitional Justice
WHAT CAN BE DONE BEFORE THE TRANSITION?

By Ladan Boroumand



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This working paper was produced for the Legatum Institute's workshop on Transitional Justice in May 2012. The workshop was part of 'The Future of Iran' project, which is designed to encourage Iranians to begin thinking about the challenges they will face if, or when, they suddenly find themselves in a position to carry out major political, social and economic reforms.

In 2001, my sister Roya Boroumand and I co-founded the Abdorrahman Boroumand Foundation whose main project is the creation of an electronic memorial to the victims of the Islamic Republic of Iran¹. Keeping the record of more than 30 years of state violence and making it available to a future truth commission in Iran, was one of the main reasons for the establishment of the Foundation. We strongly believe that the work on transitional justice in Iran should not be postponed until the transition takes place; rather it should precede the transition and prepare it.

In my presentation I will first briefly put into historical context the current initiatives being undertaken to bring the Iranian regime to account. Then, referring to the Iranian experience of revolutionary justice, which is somehow a form of transitional justice, I will elaborate on the philosophical and political reasons in favour of preparing and planning for transitional justice before transition. I will conclude by enumerating the difficulties and constraints we have been facing while trying to plan for transitional justice, when the state is still a perpetrator.

ACCOUNTABILITY AND TRANSITIONAL JUSTICE: A GROWING CONCERN WITHIN IRAN'S CIVIL SOCIETY

Today, the demand for accountability and justice is being voiced mainly by the victims' relatives and Iranian human rights NGOs, of which the Abdorrahman Boroumand Foundation (ABF) is a component. Documenting human rights abuses and the Iranian state's violations of its international obligations regarding human rights constitute the bulk of the preliminary work that is being done at the moment to bring the Iranian regime to account.

This has not been always the case. The emergence of civil society and human rights NGOs as key players on the Iranian political stage is a new phenomenon. A brief historical background might be helpful to better understand why the work on accountability is slowly gaining ground in Iranian society and why it is not only useful but indispensable.

In the 1970s, 1980s, and even in the 1990s, key players and major actors in Iran were political parties. We have the privilege today of having with us Dr. Lahidji, the president of the oldest independent Iranian human rights NGO. At the time of the revolution his NGO, the Iranian League of Human Rights², was the only Iranian human rights NGO

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in the country. The prevailing understanding of politics and political action was that the control of the state apparatus was the only means to achieve political ends. So essentially when there was some political freedom, people would join political parties rather than organize around NGOs. In 1979, the Iranian political landscape resembled that of any other authoritarian nation-state. In the wake of the 1979 revolution, we could see a constellation of various Communist parties, nationalist groups with socialist, centrist and right wing leanings, as well as Muslim organizations—some with liberal tendencies (Liberation Movement), others with extreme left leanings (People Mojahedin) and even some with fascistic aspirations (the pro-Khomeiny Feda'in of Islam). In the years following the Islamists' takeover of the state apparatus, when the short lived pluralism of 1978-1979 ended abruptly, a good number of Iranian political elite took refuge in the West where the same political constellation saw the day in its exiled version.

To see the birth of Iran's civil society as a political actor, we had to wait almost another 20 years—the demise of Communism in the world and the failure of Islamist reform within the country³. In the early 21st century, Iran witnessed an unprecedented development of its NGO community. NGOs were established to, among other things, encourage the state to reform its discriminatory laws or abolish cruel, inhuman and degrading punishment. The abolition of stoning, for instance, was one of the campaigns that were launched in 2006 inside the country. And, in fact, except for the Defenders of Human Rights Center⁴, founded in 2001 by five prominent lawyers among whom was the Nobel peace laureate Shirin Ebadi, most of Iranian human rights NGOs were founded in the wake of the of the 2005 presidential elections that brought Mr. Ahamadi Nejad to Iran's presidency. Human Rights Activists in Iran⁵, the Committee of Human Rights

Reporters⁶, and the Kurdistan Human Rights Organization, are among the human rights NGOs created after the 2005 presidential elections. A similar trend could be seen within the exile community who, abandoning moribund political parties, turned more and more to human rights activism in early 2000.

The majority of these human rights organizations were understandably focused on helping those immediately at risk. Defending political prisoners was the mandate of Ms. Ebadi's Center. Campaigning against inequitable and discriminatory or cruel laws or alerting the world to the situation of people on death row were tasks taken up by other NGOs. Human rights news and advocacy, rather than steady and sustained documentation work, was the main objective of these energetic and brave newcomers to the world of human rights activism.

With this background in mind it seems to me that ABF was the first NGO, created in 2001, with the explicit mandate of gathering data in provision of a future truth commission or transitional justice court. A few years later, in 2004, Iran Human Rights Documentation Center⁷ was created with the explicit mandate of gathering documentation in view of "promoting accountability and establishing responsibility for a pattern of human

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rights abuses." Since October 2007, a group of former Marxist activists and relatives of executed political activists have created the Iran Tribunal Campaign⁸ with the purpose of assessing: "the possibility of setting up a Truth Commission and a People's Tribunal." After the 2009 contested presidential elections and the ensuing repression, mothers who had lost their children during the protest created The Mourning Mothers, a gathering that later became known as The Laleh Park's Mothers⁹, named after a park in Tehran where they used to gather to demand justice for their loved ones. Soon, these mothers were joined by other mothers whose children had been executed in the last 30 years. The Laleh Park's Mothers issued a statement against the death penalty in all its forms. They demand to know the truth about the death of their children and they demanded that the perpetrators of human rights abuses be brought to justice. Soon a multitude of little groups sprang up within the Iranian Diaspora by the name of The Supporters of Laleh Park Mothers in Los Angeles, Dortmund and Frankfurt. These groups or small NGOs took up the task of relaying the demands of the Mothers to the international human rights community.

The latest such organization is Justice for Iran about which its founder, Shadi Sadr, will provide ample information. The recent developments in the Iranian human rights community show that accountability and transitional justice are becoming an ever-growing concern.

I should also mention that on January 20, 2012 the Crown Prince, Reza Pahlavi, published and submitted a report to the United Nations Security Council on crimes against humanity, which were ordered by Mr. Ali Khamenei, Supreme Leader of the Islamic Republic, and carried out on the people of Iran. In his letter to the Security Council's

member states he wrote, "I strongly urge the members of the United Nations Security Council to give top priority and their highest consideration to this vital matter and expeditiously refer these crimes to the International Criminal Court."¹⁰

PLANNING FOR TRANSITIONAL JUSTICE BEFORE THE TRANSITION: A NECESSITY FOR THE TRANSITION TO DEMOCRACY

How useful do we think working on transitional justice before the transition is? To answer this question I will go back in time to the roots of what was to become, Omid, a Memorial in Defense of Human Rights, an archive created by ABF to help with the work of a future truth commission in Iran. As far as we are concerned, the idea of creating a memorial to document the cases of those killed and stress their abused rights goes back to 1982-1983, when we published a first non-exhaustive list of victims in a book entitled *Iran: in Defense of Human Rights*.

At that time, transitional justice had not yet emerged as a recognized field of legal expertise as it has today. Democratization in Latin America was in its early stages,

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the Berlin Wall was still standing, and Nelson Mandela was still in prison. Thus, in a way, the urge for telling the truth and creating an archive for the future, but not only for the future, was not so much inspired by two decades of transitional justice and democratization around the world, but stemmed actually from the existential experience of Iran's Islamic Revolution.

The whole revolutionary experience, as far as transitional justice is concerned, could be encapsulated in one night, the night of February 15, 1979, and the week that followed. What happened that night and the following week brought to the fore all the key elements at stake in a time of transition and their determining impact on the advent of a democratic or undemocratic polity. On February 15, four days after the demise of the Monarchy, an extraordinary tribunal was set up secretly not in the courthouse but in a school where the leader of the Islamic Revolution had taken up residence. Its staff was anonymous, so was the judge. Three high ranking officers of the Royal Army, arrested three days earlier, were brought to justice. The trials lasted 10 hours and defendants were not assisted by a lawyer; they were not given time to gather evidence and mount their defence. The charges brought against them were vague and collective: "Treason and murder of the people". The defendants were found guilty of "corruption on earth", a crime that did not exist in Iran's penal code before. The appeal process, if we dare call it appeal, consisted in the tribunal staff visiting the leader of the Revolution, Ayatollah Khomeini, the same evening and asking for his approval of the verdict, which he approved. At 11:00 p.m. the same day the three defendants were executed, or rather, judicially murdered.

In the wake of the executions, some protested against the secrecy of the trial, many on the left, whether secularist or religious, lauded the procedure and asked for more revolutionary executions. Too few people however understood the ominous consequence of the violation of due process of law and the rights of the accused by the newly established revolutionary tribunal; for the very denial of due process constituted the bedrock of the nascent totalitarian regime whose emergence was no doubt facilitated by the lack of strong reaction on the part of the society and its elite. The prevalent political culture of the time strongly influenced by Marxism disregarded due process of law as a mere formality.

Let me fast forward to 1982, Paris. The Great Terror in Iran with its daily execution of scores of political activists has taken its toll on the political class. While political life is interrupted inside the country, political parties' leadership or surviving members are reorganizing in Paris to continue their activism hoping to overthrow the Islamic regime. As they are publishing the list of their fellow travellers martyred by the clerics, they make sure to ignore the summary execution of their political foes. Still very few were concerned with the violation of due process and the rights of the accused. Such lack of understanding about the importance of justice and the status of the judicial power within the body politic was symptomatic of a grave democratic deficiency in the prevalent political culture of the time. It is primarily from the observation of such irreparable deficiency that originates the urge to start the work on transitional justice, before the transition.

Theoretically, the right to punish in democratic polities emanates from the original and natural right of each individual to defend his life and liberty. Each member of society renounces his right to exert violence and delegates it to the state to be used to ensure public safety. And public safety consists of nothing more than the equal rights of all members of society without discrimination. The laws determine the rights and duties of citizens and the rights and duties are of the same substance. Human justice is explicitly contradistinguished from Divine justice in democratic judicial systems; this is why laws are not retroactive. Due process of law in criminal procedure is established on the assumption that man is fallible and corruptible. That is why a strict procedure must be respected during the investigation. The independence of the investigative judges, the transparency of the defendant's detention and interrogation, the freedom of the lawyers, the respective and equal rights for the prosecution and the defence to provide evidence and freely call for witnesses, the cross examination of the evidence provided by both parties, the independence of the judge, the necessity of a jury, the prohibition of collective punishment, and above all the presumption of innocence, and the right to appeal to a different court, have been established to limit the margin of error by fallible and corruptible human beings, and minimize the probability of punishing an innocent.

That the protection of innocence from human error and corruption, becomes the cornerstone of the judicial system is the logical outcome of a political worldview that establishes the protection of every citizen's right as the primary goal of the body politic. But more importantly it is based on the fundamental postulate that the absolute truth is unattainable.

Bearing in mind the philosophical foundation of due process of law, it becomes easier to make sense of what happened on February 15, 1979, in the revolutionary tribunal. The three defendants were not the victims of a hasty and necessary vengeance against dangerous counter-revolutionary officers. The city was calm and the revolution unchallenged. The set-up of the tribunal was, per se, a form of declaration of the principles of the new Islamic body politic. The violation of the presumption of innocence, the anonymity of the judge/prosecutor, the secrecy of the trial, the vagueness of the charges such as the “murder of the people”—people being a juridical category and not a natural person—the absence of defence lawyer and defence witnesses, the denial of time to prepare a defence, the denial of the defendant’s right to cross examine the evidence produced against him, a verdict based on a crime that did not exist in the criminal code, and finally, the denial of the right to appeal, were the defining characters of the new justice in gestation.

There was an implicit postulate to be discovered through the revolutionary procedure: the objective of the body politic is no more the protection of citizens’ rights but the implementation of the truth. The anonymity of the judges signified that the judicial system is not accountable to the people, but to the leader only. The retroactivity of the law meant that the will of the citizens is no more the foundation of the social compact and the source of the law. The message of the revolutionary tribunal was the following: truth and not the will of the individual were to become the foundation of political society. This is why the facts alleged against the accused were vague, “the murder of the anonymous people”. The people were no more the arithmetic sum of unidentifiable individuals, but rather a truth, a new orthodoxy. The revolutionary truth was independent

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of the actual facts and realities and it was known exclusively by the leader and the anonymous judges he had appointed. In such context any real investigation was futile. No wonder that coerced confessions constitute an enduring feature of the investigations within the Islamic judicial system. Held by the prosecution, the truth does not need to be investigated, it only needs to be acknowledged by the defendant, hence the legitimacy of the use of torture to obtain confession.

The new leadership was and still is today the infallible depository of the truth. Thus, the denial of due process and the rights of the accused were then, and are still today, a systemic characteristic of the Islamic revolutionary justice.

In 1979, we witnessed the astonishing nonchalance of Iran’s political elite in the face of such powerful statement against democracy through a judicial procedure. There were jurists, such as Dr. Lahidji and a few of his colleagues, who courageously criticized the violation of due process, but to my knowledge no one saw the crucial political meaning of the Islamic Revolutionary Tribunal. The majority of the country’s political and intellectual elite failed to understand and react against the revolutionary tribunal simply because for them, as for Khomeini, the truth, not the free will of the individual,

was the foundation of the body politic. If they found themselves in the opposition it was only because they adhered to a different truth. The source of the citizen's rights was not in his or her humanity alone, but in his or her adhesion to the party's truth. What had disappeared in Iran was the common denominator of humanity.

In this tragedy, we thought at the time, both the government and the victimized society bore their share of responsibility: criminal responsibility for the rulers and actual perpetrators, and moral responsibility for the rest of the society. Facing daily summary execution of hundreds of people, feeling at once helpless and guilty, the first thing, and alas the only thing, we could do as ordinary citizens was to retrieve our forgotten common denominator of humanity by listing all the victims without any discrimination, including victims charged with common crimes, and by mentioning their violated inalienable human rights.

Abiding by the moral imperative of restoring the denied common denominator of our humanity, we started, on a very modest scale, to lay the ground for future accountability. This work was almost concomitant with the crimes perpetrated by the state. We had witnessed how the spread of revolutionary ideology years before the revolution had laid the ground for the acceptance of the revolutionary justice. We were convinced that long term grass roots work had to begin on the necessity of due process in judicial procedure in order to promote its implicit democratic postulates.

PRE-TRANSITION WORK ON JUSTICE: A NECESSITY MADE POSSIBLE BY POLITICAL CHANGE AND TECHNOLOGICAL REVOLUTION

The publication of one report in 1982, read by a few people in exile, was just a symbolic act and could by no means meet its ambitious objective. Before this embryonic idea could result in the creation of ABF and a long term research and advocacy project for transitional justice, we had to wait two more decades: the fall of Communism, the demise of revolutionary ideology in the world and in Iran, the advent in Iran of a new generation vaccinated against revolutionary ideologies by its very experience of a totalitarian regime, the spectacular growth of an international self-asserting civil society whose help is indispensable for our work, and the extraordinary opportunity offered by the advent of the internet.

I am not certain, however, that these favourable historical new circumstances would have provided enough motivation to start the memorial project. I must confess that the driving force behind the memorial is ultimately a personal tragedy that changed our status from responsible citizens to devastated children with the unbearable filial duty of seeking justice for a murdered father. We experienced the abyss of loneliness and helplessness one goes through when confronted with an all mighty state that kills a loved one with arrogance and impunity. We learned how the smallest sign of sympathy and/or any acknowledgement of the wrong done to victims, no matter from where and from whom they come, have an invaluable healing impact on the shattered existence of the survivors.

The victims need society's acknowledgment of the injustice they suffered. We have learned from experience and from the number of thank you letters we receive, that the

work on transitional justice should not wait for the transition. Although our research work started in 2002, we launched the memorial publicly in 2006. Since then we have received over 2,000 emails and forms with information on the victims. And this is not including the scores of interviews we have done with victims' friends or relatives. With modern technology we have the capacity to constantly complete, add and update the memorial.

Moreover, with the advent in 1997 of a reformist Islamist government in Iran, we realized that there is a great danger that in some kind of transition, the truth may be sacrificed on the altar of political expediency. This seemed to us the worst case scenario of transition, for it not only deprives the nation of the opportunity to draw the lessons from past crimes in order to strengthen its new democratic institutions, but it also leaves unaddressed the suffering of tens of thousands of victims and endangers the much needed peace and reconciliation which is required in a time of transition.

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Through Omid, we acknowledge each victim's humanity and create a space for empathy. We provide loved ones with a forum to talk about those they have lost to the Islamic Republic's injustice, and even a venue within which to mount the defence that the victim was not allowed to mount in life. There is no discrimination regarding nationality, gender, religion, political ideas, or charges lodged. The most fascinating and courageous political activist gets a report identical to that of the most wretched and vile criminal, provided that this person was denied due process of law. For as much as we want to shame the perpetrators, we ourselves need to comprehend clearly what universality means. As victims we must understand that with regard to our human rights, nothing distinguishes any one of us from the other. It is by having an acute understanding of this principle that we will be able to draw the right lesson from our past errors and stop a similar tragedy in the future. For this reason the structure of the narrative for each victim's story is inspired by the international standards of the due process of law. So that to read the story is to become familiar with the logic and implicit principles of due process.

Thus teaching and promoting democratic principles through the work on the legacy of state crimes and injustices on the one hand, and alleviating the suffering of the survivors on the other hand, were the two main underlying reasons for the creation of Omid.

THE IMPLICIT POSTULATES OF THE PRE-TRANSITION WORK ON JUSTICE

If the establishment of the Islamic Revolutionary Tribunal on February 15, 1979 stands for a solemn declaration of the founding principles of the Islamic Republic of Iran, no doubt the work of an Iranian independent civil society on a transitional justice that is based on universal human rights will similarly imply that:

- Human rights are universal and constitute the foundation of the social compact.

- Protection of the natural rights of the individual constitutes the primary goal of the body politic.
- By its independent work on transitional justice, the Iranian civil society assumes its share of moral responsibility in facing the crimes committed by the state and proclaims that it does not need the authorization of the state to acknowledge the wrong done to the victims. In itself such an initiative is a strong statement on the independence of civil society from the state. It signifies that the state emanates from civil society and is accountable to it.

It is true that to bring the perpetrators to justice, we need the state or the international community of states. But nothing stops us, as civil society forces and ordinary citizens, to assume our moral responsibility, to reach out to the victims, to acknowledge the wrong done to them and to blame and shame the perpetrators. And that is what we have been trying to do in the memorial.

Today we have the technical capabilities of launching a virtual public debate held in a virtual public forum, and expand the process of truth telling and documentation. Two years ago we commissioned Geoffrey Robertson, an outstanding international jurist, to investigate and qualify state crime committed in 1988 that resulted in the killing of several thousands of Iran's political prisoners over the course of a few months¹¹. When the report was published in July 2010 and became the focus of the dissident media, former Prime Minister Mir Hossein Musavi, who during his 2009 election campaign had dismissed the issue, felt compelled to mention it while denying any personal responsibility for the massacre. This is an interesting example of the potential impact of the work on transitional before the transition. In fact, the 1988 prison massacre had never been officially recognized in Iran by the authorities; the massacres were a non-event. Having a former official who was the Prime Minister at the time of the massacres, acknowledge the reality of the crime is indeed a victory for those who struggle for justice.

That brings me to my concluding remarks, in which, drawing the lessons from 30 years of experience, I would like to allude to what more we need to do as segments of the Iranian civil society who promote the rehabilitation of the victims and accountability for the perpetrators. As our number increases, and given the daunting task ahead and its various judicial, historical, and legal dimensions, we need to consult more and join forces where we can.

We need to learn from 20 years transitional justice experience around the world. We need to overcome the obstacle of fear that is still silencing the relatives of the victims. We need to expand our outreach to the victims and encourage them to play a more active role in truth telling. We still need to learn how to reach out to former repentant perpetrators and bring them on board. For without their narrative the truth will never be known the way it should be.

As to what would be the best path in case of regime change, I assume much will depend on the modalities involved, and I hope that our discussion today with our fellow participants, who have more experience and are experts on transitional justice, will help us explore the potential paths available. Whatever happens in the end, Iran should not miss the opportunity of engaging in a very large public debate on justice.

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