

## **Presentation to the Pontifical Commission for the Protection of Minors**

David Smolin, Professor of Law and Director, Center for Children, Law, and Ethics, Cumberland School of Law, Samford University

September 19, 2023

### **TRANSITIONAL JUSTICE AND THE CHURCH**

I am grateful and honored to be speaking with you today.

My theme today is the use of transitional justice, an approach from international human rights law, by the Catholic Church in regard to sexual abuse, particularly of children, and including abuse by clergy.

#### **I. What is transitional justice?**

Transitional justice can be described as a means or set of tools for societies to respond to the legacies of massive and serious human rights violations.

Transitional justice typically is applied after a transition--at a stage when these large-scale human rights violations have passed and are in the past. Often a political transition also has occurred, from one regime, or kind or regime, to another.

Examples of the kind of large-scale human rights violations addressed by transitional justice would include the Dirty War and the Disappeared in Argentina (1976 – 1983), the Rwandan Genocide in 1994, the killings and many other rights violations from 1975 to 1979 in Cambodia under Pol Pot and the Khmer Rouge; and of course the genocides of the German Nazi regime during WW II.

Transitional justice is also applied to transitions from authoritarian regimes to more democratic regimes, such as that in the Philippines from the Ferdinand Marcos regime of 1965 to 1986, to a more democratic regime.

In addition, transitional justice is also applied to the transition from civil war or internal armed conflicts to the post-conflict period, as a means of healing and reconciliation, assisting victims, addressing human rights violations, and avoiding future violent conflict. Transitional justice has been applied to conflicts in Colombia, Sierra Leone, and Liberia.

Transitional justice has at least four elements: Truth, Justice, Reparation, and Guarantees of Non-Recurrence. "Truth" involves methods, such as investigations, truth commissions, and acknowledgments of wrongdoing, that establish the truth about past large scale human rights violations. "Justice" typically includes criminal prosecutions, especially of those most responsible for large-scale abuses. "Reparation" focuses on remedies and reparations for victims, including compensation, official apologies, and needed services. "Guarantees of Non-Recurrence" involve reforms designed to avoid the repetition or continuation of violations and violence. Within these elements, memorialization includes efforts to publicly recognize victims and events and raise public awareness.

We will speak more about these elements as we proceed, but initially you may notice that these concepts were not invented by transitional justice. Indeed, there are correlates in most legal systems, and correlates in Catholic theology as well. The elements are not in themselves new. Taken together,

the elements of transitional justice look backward to provide justice and reparations for past abuses, and look ahead to prevent future abuses and violence and to provide societal reconciliation.

This description of the origins of transitional justice indicates why there may be initial objections to the use of transitional justice in regard to sexual abuse related to the Catholic Church. The situation in many ways is different:

First, the Roman Catholic Church has legal personality in international law, but beyond the tiny area of Vatican City is not a State but only an analogy to a State. In saying this I do *not* intend to minimize or undermine the very important role of the Holy See in international relations. However, in relation to abuse of minors, the distinction between the functions and roles of Church and State is critically important. The Church is responsible for the selection, training, supervision, and internal discipline of clergy, but lacks authority for criminal prosecution. The State lacks authority over how religious groups select clergy, but has authority over criminal prosecution and law enforcement. Cooperation between the Church and State, including the Church's responsibility to make reports of allegations to the State, must be set in the context of recognizing the distinction.

Second, the Catholic Church has not experienced a regime change or violent internal conflict of the sort discussed in transitional justice.

Third, while child sexual abuse in church settings is a very serious human rights abuse, it is different from genocide and many of the kinds of rights violations traditionally addressed by transitional justice--although the use of sexual violence as an act of genocide and in the context of war has been addressed by transitional justice.

Some may initially perceive the application of the term transitional justice to the Church as a kind of insult or even libel, intended more to harm than to help the Church.

These objections are understandable. However, they represent, as I will explain, an outdated and overly rigid understanding of transitional justice. In recent years, transitional justice has been applied to more varied contexts, including some that are similar to sex abuse in the Church. Transitional justice invites both creativity and a broader narrative that could be very helpful to the Church.

## **II. Transitional Justice and the Church**

Let me explain, then, how and why transitional justice could be adapted to the Church sex abuse context, and in being so adapted could be very helpful.

1. What you are doing--what the Church has been doing--is, whether you call it transitional justice or not, in fact already a form of transitional justice. This is true in two senses. First, you are creating and marking out a transition, a before and after, between the period when there were widespread abuses and those abuses were mishandled and covered up in a way that allowed them to continue, and a new period when safeguarding, reporting, investigations, and care for victims make abuses rare and provide appropriate responses. But these transitions are not uniform throughout the global Church. Pope Francis' recent Apostolic Letter, "Vos Estis Lux Mundi," acknowledged such, stating: "Even if so much has already been accomplished, we must continue to learn from the bitter lessons of the past, looking with hope towards the future." Cardinal O'Malley's May 2023 Address, on your website, also acknowledges the progress made in the past while seeking, through the creation of a Universal Guidelines Framework,

Capacity-Building, and an Annual Report, to create processes to make those transitions and gains universal throughout the global Church.

Second, what the Church has been doing, and what you are doing, already involves the *elements of transitional justice*. You are seeking ways for the church to be more victim-focused, to have the capacity to accompany and support victims and their families, which is a primary goal of transitional justice. The Church is seeking to listen more to victims, and to be more responsive to the needs of victims, which is a part of reparations, one of the elements of transitional justice. You are seeking ways by which the seeking of the truth, rather than a cover-up of the truth, may characterize the Church's response to abuse. This concern for truth I believe also motivates the Holy Father's wishes for an annual report, and for an audit function, as the truth provides transparency and accountability. The Church now understands the need to report cases to civil authorities who can make independent decisions about prosecution, which is a part of justice, another element of transitional justice. While the disciplining of priests by the Church in individual cases is not a function of the Commission, the changes and reform in that area are also a part of justice, as well as a part of preventing recurrence. You are seeking to make safeguarding universal in the Church, while respecting as appropriate cultural differences, which relates directly to the goal of non-recurrence, another key element of transitional justice.

So the Church in this area has been doing, and hopes to continue to do, transitional justice.

2. Second, the Church has in the recent past used something very similar to transitional justice in regard to other historical abuses. In order to explain, please allow me to talk personally. I am a convert to Christianity, and to Catholicism, from Judaism. Indeed, as revealed by family history and even my DNA, my ancestors for untold generations were Jews; my conversion was something very new and very unsettling for my family. My religious education included being taught about the wrongs committed against the Jewish people throughout history, with an emphasis both on church-related wrongs during the era of European Christendom, all the way through the German Nazi Holocaust. Awareness of these massive human rights violations against the Jewish people were carried forward to me as a part of the legacy of being a Jew.

My mother's parents were immigrants from Slovakia. My mother told me how her father would receive letters about the relatives back in Slovakia who had been killed. Later I read about how a Catholic Priest, Jozef Tiso, the President of the Slovak Republic, had sold out the Slovakian Jews to the Nazis and allowed them to be deported to concentration camps in 1942. Most of my grandparents' relatives died in that way.

When I became a Christian, I realized that I was going to carry the burden of Christian wrongs against Jews in a particularly difficult way. Jews who become Christians often have been regarded as traitors to their people or as converting for self-interested, rather than truly religious, motivations. Regardless of motivations, a Jew who becomes a Christian unavoidably lives out the consequences of the difficult history between these closely-related faiths.

Thus, I was particularly attentive when, after my conversion to Christianity (but before my becoming a Catholic), I became aware of Saint John Paul II's actions and words to respond to the history of Church wrongs against Jews. The very fact of those efforts are what reached me. There were always criticisms that too little or too much was said or done, or that such admissions "may look like acquiescence in the face of accusations made by those who are prejudicially hostile to the Church." (International

Theological Commission, MEMORY AND RECONCILIATION: THE CHURCH AND THE FAULTS OF THE PAST, December 1999,

[https://www.vatican.va/roman\\_curia/congregations/cfaith/cti\\_documents/rc\\_con\\_cfaith\\_doc\\_20000307\\_memory-reconc-itc\\_en.html](https://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_con_cfaith_doc_20000307_memory-reconc-itc_en.html).) Yet, these efforts were based on a profound understanding of the eternal presence of the past, the mystical bonds across time and space of the Church, and the necessity before God of addressing the role of the Church in such egregious and large-scale wrongs and sins. Saint John Paul II also sought, I think, to create a “transition,” a before and after, in the hope that, across generations, reckoning with corporate sin could change the trajectory of the Church in the present and future.

Saint John Paul II’s words and actions lightened my burden in seeking to reconcile my Jewish roots with my Catholic faith, for it meant that I was not carrying that burden alone. In saying this, I am not meaning to imply that conversion is the purpose of such actions, for that would cheapen such apologies, but simply to state that the recognition of the Church’s historical wrongs is a spiritual necessity with spiritual benefits.

I find a similar understanding in Pope Francis’ recent “pilgrimage of penance” to Canada, to deal with the historical role of Catholic institutions and religious in the Indigenous boarding school systems. Such efforts seek to change the trajectory of the Church, and to change relationships within the Church and between the Church and others. These efforts are a Catholic variation on transitional justice, in seeking to create accountability, the admission of past guilt, and changed understandings within the Church that will prevent recurrences in the future, and in looking forward to intergenerational processes of reconciliation.

There are theological nuances when the Church admits wrongs, because there is a theological sense in which the Church is “indefectibly holy.” Yet, the “Church still on pilgrimage should not deceive herself by saying that she is without sin.” (Memory and Reconciliation, sections 3.2 & 3.3). For this reason, at times it may be more comfortable theologically to speak of the sins of the sons and daughters or members of the Church, rather than speaking of the sins of the Church. However, while acknowledging the theological nuances and leaving it to the theologians to work out those nuances, as a matter of communication it is critically important, I think, for the Church to admit, on the human level, her errors and sins. There is a corporate aspect to these grave historical sins which I think Saint John Paul II and Pope Francis have recognized; they are far more than the errors and sins of individuals. This is also true in regard to abuse by clergy or religious, which has been covered up by Bishops or others with ecclesiastical responsibilities. On a human level, this is a grave error and sin of the Church, and should be acknowledged as such.

3. Third, recent developments in the use of transitional justice regarding illegal adoption provide a useful analogy for us. In September 2022, a Joint Statement on illegal intercountry adoptions was issued by various parts of the United Nations Human Rights system, including the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation, and Guarantees of Non-Recurrence—that is, the UN Special Rapporteur on transitional justice. The Joint Statement viewed transitional justice as directly relevant to illegal intercountry adoption. The Joint Statement repeatedly invoked the various elements and applications of transitional justice, including the “right to know the truth,” truth mechanisms such as independent commissions, justice in the form of criminal prosecutions, investigations which serve truth

and justice, the right to reparations for victims including compensation for economic damage, medical and psychological care, and counseling, and guarantees of non-recurrence through reform.

Maud de Boer-Buquicchio, of course a member of this Commission, in her prior role as UN Special Rapporteur on the sale and sexual exploitation of children, presaged this use of transitional justice in her 2016 Report on Illegal Adoptions by noting that “quests for truth, justice, reparation and guarantees of non-recurrence” were applicable to any instances of large-scale illegal adoptions, where “tolerated or directly committed by the State.” Thus, transitional justice applied beyond its traditional application to “countries emerging from conflict or an authoritarian regime....” (Paragraphs 86-88).

Adoption, like the Church, is intended for good purposes. Adoption, like the Church, is viewed at least by its proponents as a good and positive context. Adoption, like the Church, is not inherently related to issues related to political regime change or civil war or genocide, although like the Church adoption can be deeply impacted by such contexts. Yet, both adoption and the Church can be and have been contexts for large-scale abuses that contradict those positive purposes and represent a profound betrayal of trust.

Illegal adoptions commonly involve the illegal separation of children from families that turns upside down the purposes and premises of adoption; instead of providing homes for orphans or vulnerable children in need of family life, illegal adoptions manufacture orphans by wrongfully separating them from intact families, often in order to satisfy a demand for children or for financial profit.

Similarly, clergy abuse turns shepherds into wolves and protectors into predators, and hence is one of the worst forms of sin and betrayal, in relationship to the purposes of the Church. Clergy sexual abuse contradicts the good purposes of the Church to protect and nurture her children spiritually, emotionally, and physically.

In using the strong language of “wolves” and “predators” I do not mean to undercut respect for the vast majority of clergy and religious who have not abused others, and who have faithfully sought to carry out their vocations. Personally, I have deep respect for the clergy and religious of the Church. However, this language captures important truths about many of those who have abused children. A single abuser, with access to victims and impunity to abuse, may abuse many victims. There is often intentionality and planning, a process by which abusers identify and target vulnerable victims and by which abusers exploit their authority and position in a systematic way. Left to roam unhindered among the people of God, a relatively small minority of clergy and religious can and have done enormous damage. Hence, the grave damage done by Bishops and others who failed to respond appropriately to reports of abuse.

This analogy to illegal adoption suggests that transitional justice is fully appropriate for addressing sexual abuse in the Church.

4. Fourth, my theme is the potential use of transitional justice *by the Church*, rather than the application of transitional justice *to the church from outside*. When Saint John Paul II and Pope Francis addressed serious historical sins by the Church, this was an action by the Church. While it is appropriate for human rights actors outside of the Church, within their respective mandates, to address the Church in terms of transitional justice, that circumstance is different than that of this Commission.

I recognize that the situation of this Commission is complex, being on the one hand situated within the Church, specifically within the Dicastery of the Doctrine of the Faith (DDF), yet operating separately from

the disciplinary role of the Dicastery that adjudicates serious charges against clergy under Canon Law. In addition, as I understand it, you consider yourselves as a Commission somewhat independent in your own mandate, which independence is important to your credibility and work. This complexity creates tensions of course, and yet may be helpful in fulfilling your role. Your position inside the Church may give you greater access to information helpful to your mandate, and your voice to the Church has much greater authority given your mandate and appointment by Pope Francis. When you speak to the global Church, and to the specific national conferences, you are in a unique position to assist the Church in carrying out transitional justice and indeed in internalizing norms of transitional justice.

This inside voice and role is also helpful because sometimes those outside of the Church who address the Church through the lens of transitional justice may not understand as well as you can, the nuances of the context, doctrines, and practices of the Church. I have seen experts address the Church as though she were a State, missing the fundamentally religious nature of the Church. I have seen calls by some for the Church, as a matter of transitional justice regarding sexual abuse of minors, to reconsider practices such as clerical celibacy, which inappropriately addresses religious questions beyond the competency and expertise of human rights law. While the Church certainly may consider such issues, transitional justice is not the appropriate context or forum. Such calls also represent a fundamental misunderstanding of the problem of child sexual abuse, which recent events indicate has also been a systemic problem in religious contexts where clergy are generally expected to be married, as well as in secular contexts with no particular rules in that regard.

By contrast, you, by speaking from within the Church, and yet with an important degree of independence and authority, have the opportunity to help the Church internalize transitional justice elements and principles in a way that would be authentic and organic for the Church.

5. My claim, then, is that you and the Church, if you appropriately address the issue of sexual abuse of minors, will necessarily be using many of the elements of transitional justice. In addition, you are and will be engaged in the decades-long effort to create, over time, a “transition” in the global Church from the large-scale abuses of the past to a much better present and future. You are already engaged in an already existing Catholic project of transitional justice.

### **III. The Advantages of the Church Publicly Applying Transitional Justice**

What then, are the advantages of publicly embracing the application of transitional justice, rather than using them without public acknowledgement?

First, a public embrace of an internalized practice of transitional justice could help communicate, inside the Church and outside of the Church, the seriousness with which the Church takes this issue. While many of course do not know the terminology, those who do, and those who are instructed in regard to it, will understand that transitional justice is employed for the legacies of large-scale and serious human rights violations. This would be an important and appropriate acknowledgement.

As I have already stated, such an acknowledgement is particularly appropriate for the Church, for clergy abuse of minors undermines the very purposes of the Church.

Second, the use of transitional justice provides a positive context for the acknowledgement of past progress, as well as creating the mechanisms for future progress, in the context of widely diverging experiences of different national conferences and ecclesiastical jurisdictions related to sex abuse.

In some national conferences substantial progress in safeguarding and reporting have been made over decades, and the largest incidence of abuse occurred many decades ago--even if recent revelations of that past continue to haunt the Church, as in, for example, the 2018 publication of the Pennsylvania Attorney General Grand Jury Report. It becomes important to mark that progress, which can be lost in press reports. Transitional justice defines a pathway both to mark that progress and to pursue pathways to coming to terms with what are still, for victims and also for national churches, traumatic and consequential events of the past.

Similarly, transitional justice also can appropriately address the situation of national conferences where reports of abuse have only emerged in more recent years, as perhaps has occurred in some Latin American contexts.

Transitional justice also creates the opportunity to address child sexual abuse in those parts of the global Church that have not yet engaged this issue, for whatever reasons.

Transitional justice is thus flexible enough to address the different contexts of the global Church. An internalized practice of transitional justice can be effective in responding to different pasts, and different presents, in different parts of the global Church, while hopefully providing safeguarding, reporting and other practices which would provide for a better future.

Third, transitional justice is also adaptable to the difficult reality that 100% success is very unlikely. In that way, abuse of minors is like illegal adoption and human trafficking, where complete success is unlikely, and is different from, for example, the Nazi genocide of the Jewish people. A state may simply stop carrying out a genocide and have 100% success in their jurisdiction against that evil; for example, Jews are no longer murdered by the state for being Jews in Germany today. A state may not, however, ensure that no Jew, or person, is ever murdered by anyone, and may not be able to ensure a lack of any hate-crimes throughout the entire society, no matter how diligent that state may be. Similarly, the Church should be diligent in preventing and responding to abuse, but in a world of over 1.3 billion Catholics, over 400,000 priests, thousands of ecclesiastical jurisdictions, and innumerable Catholic institutions, the Church will not be able to achieve the complete elimination of abuse.

Transitional justice is a way of marking out the difference between large-scale abuses facilitated by the actions or negligence of Church authorities, and rare abuses that occur despite diligent efforts, and which are met with appropriate responses. While even a single case of abuse is one too many, that difference between large-scale abuses and rare abuses must be recognized for the Church, as it is for the State.

The goal, of course, is that the Church and Church institutions will be the safest and most nurturing places in society for children; to that goal the Church may aspire.