

## **Transitional Justice in Latin America: Experiences and Impact**

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### **Workshop abstract:**

Transitional justice (TJ) is now a crowded field. Is TJ in Latin America today just a logical extension of what it was in the 80s, or have there been surprises or paradigm shifts? Have decades of experience provided evidence of the alleged impact that TJ has on enhancing accountability? This workshop invites experts to debate and reflect on method and theory based on TJ experiences in a cross-regional perspective.

### **Questions for discussion:**

#### **1. After 30 years of experience with TJ in Latin America, in what areas do you think transitional justice has made a significant contribution?**

In terms of positive contributions of 30 years of transitional justice, I'd like to start by highlighting that it is in large part through TJ that Latin American societies have developed meaningful human rights practices, a powerful human rights language, and influential regional human rights institutions.

Human rights groups, both domestic and transnational, have come into being around issues of TJ, particularly through associations of relatives of victims and afectados. Activism around TJ has introduced powerful norms of truth, justice, accountability, rights of victims, reparations for human rights violations etc. The Inter-American Human Commission on Human Rights and the Inter-American Court of Human Rights have become consolidated as a regional human rights system through its dealings with TJ issues over the last thirty years.

And, we should not overlook the fact that the global contributions of Latin America's TJ experiences have been significant. At the normative/jurisprudential level, e.g. forces

disappearances, right to truth, right to identity. At the institutional level, many of the key actors on the global TJ scene draw actively on their Latin American experiences: from Juan Mendez in his various roles in a number of international TJ/human rights organisations to the Argentine and Peruvian forensic teams that travel the world to offer their scientific expertise with exhumations in the aftermath of mass atrocities.

But how about the other side of the coin, that is: to what extent have TJ activism contributed to broader human rights issues, beyond the sometimes narrow confines of truth and justice concerning past atrocities under previous regimes? Here the contributions are more limited I'd argue in many contexts. There are fairly few human rights organisations that have been able to make the transition from activism against an authoritarian regime to human rights advocacy in deeply uneven and problematic but still democratic societies. Also, in many contexts, the intimate association in the minds of significant sectors of the population between human rights and abuses by military regimes, has limited the advocacy agenda of many groups to abuses of the past, whilst for many sectors of society, the widespread abuses of the present constitutes a bigger problem. Also, the association of the vocabulary of human rights with military abuses of the past has made it difficult to mobilise the human rights discourse around pressing contemporary human rights challenges, such as for example, land issues and regular police violence.

The close connection between TJ and human rights therefore can be both empowering and limiting, often depending on the specific societal context, which of course, differs between countries.

## **2. Have 30 years of TJ experiences changed our understanding or definitions of "accountability" and "impunity"?**

There have indeed been important shifts in understandings of 'accountability' and 'impunity' over the course of the last few decades; both in terms of substance and scope.

In terms of substance, the influences from the rapid development of international criminal justice have been particularly significant. International criminal law has shaped notions of accountability to focus primarily on individual culpability. This is in contrast to the more collective notions of accountability – political or regime accountability – that shaped TJ debates in the early transitional period. The enmeshment between international criminal law and TJ has in other words both criminalised and individualised accountability debates in TJ.

In terms of scope, a wider range of actors are increasingly being targeted in terms of crimes committed, which increasingly include sexual crimes and economic crimes. This latter category of crimes in particular has led to efforts to hold civilian actors accountable for their involvement in violations during military regimes, and for benefitting from violent extortion and corrupt business practices as cronies of military regimes.

But still, in my view, with a few notable exceptions, there is still a quite significant gap between the terms of accountability debates in the TJ literature, and the political science literature for example on various forms of political accountability. This is perhaps something that we can come back to in our discussions.

### **3. How can we address or measure "accountability"? And what remain the main challenges to accountability for human rights violations in the region?**

There are others on this panel who will discuss human rights measurements. I just want to highlight the inherent difficulties in measuring accountability developments because of different measures used (number of people charged, brought to trial, successfully convicted etc), and the difficulties in assessing what the actual impact of these cases are beyond individual convictions on broader concerns of democracy and human rights.

In terms of the challenges to accountability, there are of course many institutional and political obstacles to holding individuals to account for their crimes. But, perhaps one of the key challenges is to address the question of what is this all for? Now, clearly, TJ matters for the many victims of abuses. But what are the broader impacts of TJ policies, and how can broader public support for TJ policies be generated, when in fact in many contexts TJ has, arguably, become viewed as a set of special interests? And how to tackle indifference of large sectors of the public?

Most importantly perhaps, how can the continuing pursuit of TJ policies for crimes committed 30 years ago, shape and contribute to the transformation of the very structures that gave rise to the violations in the first place? There's a lot more to be said about the transformative potential of TJ, but it seems clear to me that a rather narrow understanding of what TJ should seek to do has generally prevailed over broader notions. That is, the focus on past crimes has increasingly come to push concerns regarding the present and future consequences of the pursuit of accountability for the past to the margins of debates.

### **4. Thirty years ago the use of 'amnesties' in Latin America was very much related to impunity; is this still the case or are amnesties now functioning alongside prosecutions in the cases you know best? Can amnesties be a legitimate part of an official justice strategy? In what circumstances?**

There are both important changes and continuities in TJ debates on the role of amnesties. Since the early transitional period, understandings and use of amnesties have varied. In the early transitional period in Argentina for example, there was a close association between the amnesty provisions adopted on the one hand and the guarantee of impunity in exchange for stability on the other. In Brazil however, the 1979 amnesty was supported by the opponents of the military regime and viewed as a legitimate mechanism to facilitate the return of exiles and to ensure political participation for example, and the gradual return to civilian rule.

At the regional level, the Argentine model, if you like, has prevailed. 'Amnesty' has become equated with 'impunity'. These regional normative developments have been largely shaped by the Inter-American Commission on Human Rights, and the jurisprudence of the Inter-American Court of Human Rights in particular. However, it is important to note that in the jurisprudence of the Inter-American Court, a distinction is made between amnesty laws per se, and the impunity effects of such laws. That is, in its various rulings on amnesty laws, the Court does not mandate a necessary overturn of amnesty laws. Rather it has argued that states must ensure that such laws do not prevent the investigation of crimes, and holding of perpetrators to account for their crimes. It is true however, that in practice many amnesty laws do exactly that - prevent prosecutions of individual perpetrators. At the same time there are of course cases, where amnesty laws remain intact, but prosecutions of certain crimes still

proceed by circumventing the amnesty law – Chile being one example of course. But there is also a trickle of cases in Brazil now, including cases drawing on regional precedents that define forced disappearances as continuing crimes and that therefore are not covered by the Amnesty Law.

A final point on the question of legitimacy of amnesties. The debate on amnesties has evolved to include discussions of circumstances in which amnesties are legitimate. There are at least two main issues to consider. One important issue is the source of the amnesty. That is, was the amnesty passed by the regime itself to cover its own crimes? This is generally not seen as a legitimate approach to deal with the past. Or was the amnesty passed through democratic political processes; for example through a legislative process that was both transparent and deliberative; in which case measures adopted in the politically contentious period of transition may enable a more stable transition – for example by ensuring that lower- and middle-ranking military officers do not actively oppose the return to civilian rule. The tricky question here of course is to assess exactly how deliberative and transparent these processes need to be in order to render a resulting amnesty ‘legitimate’. As second issue to consider is the types of crimes that amnesties seek to cover. There is now a legal consensus that there are certain crimes that cannot be amnestied, such as international crimes including crimes against humanity.

So, evolving debates on amnesties clearly demonstrate that TJ is a moving target. Political circumstances change as power balances shift, consequently altering the incentives facing relevant political actors. But more subtle changes also occur over time in the normative environment in which actors operate. In other words, what is possible and desirable is prone to change over time. Hence, although accountability claims have a tendency to persist over time, timing is important, rendering what may seem a morally desirable sequencing of transitional justice mechanisms difficult to implement. It is often not a simple matter of choosing between different transitional justice mechanisms. A wide variety of mechanisms have been employed in the region in addition to amnesties, including investigations to establish the truth and identify perpetrators, reparations programs for victims of human rights violations (financial and symbolic in terms of memory sites), institutional measures to establish mechanisms to prevent recurrence of violations, and of course prosecutions and trials. The result of the region’s decades long engagement with transitional justice and amnesties in particular is now a broad set of duties of states, rights of victims and families, and obligations to provide reparations that put pressure on governments to revise the political bargains of the past. Still, in many countries amnesty provisions are circumvented rather than overturned. Hence, a striking feature of regional trends consists of the persistence of amnesty laws despite significant challenges to impunity and pressures for accountability and for wide-ranging trials.

**5. Early TJ mechanism design, and international law, focus on what states should or should not do. But recent truth justice and memory initiatives involve both state and civil society actors. Do nonstate initiatives 'count' as TJ? Are informal justice actions such as the escraches 'part' of TJ? Does civil society truth-telling have the same status as state acknowledgment? When can memorialisation 'count' as symbolic reparations? Only when it involves the state?**

There are other people in this room who have more interesting things to say about informal justice actions and processes of memorialisation. Let me just raise one issue though

concerning the role of state institutions. Informal mechanisms and civil society initiatives are clearly important – but they cannot replace state action, for two main reasons that have to do with democratic legitimacy and effectiveness respectively.

First, in terms of democratic legitimacy, although an elusive concept, legitimacy is derived from process as well as outcome. That is, on the one hand procedural legitimacy is enhanced by participatory deliberative processes, by the transparency of procedures, and by the perceived fairness of those procedures. However important civil society groups are to these processes, they cannot replace the responsibility of a democratic state to ensure the functioning of these processes and procedures. Second in terms of effectiveness, even the most legitimate process is undermined by a lack of efficiency and practicability in its delivery. For example, in the aftermath of mass atrocity therefore, public institutions have a responsibility to ensure reparations, compensation and restitution of victims. These are responsibilities – both material and symbolic – and functions that state institutions are uniquely placed to fulfil.