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## The complexity and effectiveness of transitional justice in Latin America and Eastern Europe

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The violations of human rights by the authoritarian regimes in Latin America and Eastern Europe created growing popular anger that exploded in mass uprisings and demands for change, bringing the regimes to an end. It was a bottom-up process: a gradually rising discontent of ordinary people who, in the aftermath of the changes, made continuous calls for justice and for the perpetrators to be brought to account, and simultaneous calls for compensation for the victims. The demands for justice and compensation faced initial reluctance, partly because political forces connected to previous regimes remained powerful and influential. The processes of transitional justice have been controversial and complex, sometimes involving demands for extra-judicial punishment or similarly unacceptable calls for blanket forgiveness.

### Complex transitions

One inherent complexity of transitional justice after authoritarianism, compared with post-conflict justice, is the demarcation between victims and perpetrators. In armed conflicts, the evolution of international humanitarian law crystallized a distinction between combatants and non-combatants, between victims and perpetrators, between individual and collective responsibilities, between the architects of violations, the commanders, and rank-and-file executioners. In post-authoritarian transitions, however, the distinctions could be more problematic: almost everybody

suffered from authoritarian regimes but not many can establish the guilt of a particular state official. Ironically, the same individuals may simultaneously be identified as "silent supporters" and as "hidden victims" of the same regime. In Eastern Europe, many talented workers were accepted as members of the Communist Party as a kind of "reward" for their good work, but they remained hidden dissidents. In 1989, such people became "ex-Communists" overnight, facing potential stigmatization without having been privileged by the Communist regime. In contrast, people who were not Communist Party members prior to 1989 could pretend to be "heroes" and demand unwarranted privileges.

Another complexity is that the highly sensitive nature of gross human rights violations has to be "de-emotionalized" when parties enter into legal proceedings. Justice means dealing with evil in a civil way, facing inhumane acts with a humane approach. Judgments in courtrooms need to be reached through undisputed evidence and respect for the defendants' rights. For some victims and relatives, experiencing deep trauma, these legal niceties might look cold and indifferent to their suffering; however, justice and accountability mechanisms are guided by broader societal needs in addition to the need to redress the suffering of the victims. Transitional justice has had to perform a balancing act: paying full respect to grievances – traumatic and divisive as they are – while also taking into consideration strategies for societal reconciliation.

To add another layer of complexity, not only junta or Communist leaders but also democratically elected officials, who came to power during the transitions, became subjects of investigation and prosecution. The first Slovak Prime Minister, Vladimír Mečiar, was investigated for destroying secret documents. Andrei Lukanov (ex-Prime Minister of Bulgaria) was arrested for embezzlement; the charges were later dropped, but, in a sad irony, he would have been safer in prison. Instead, he was murdered outside his house. The first democratically elected President of Brazil, Fernando Collor de Mello, was forced to resign because of corruption charges and impeachment threats from the Senate. Carlos Menem, ex-President of Argentina, was arrested on charges of arms-trafficking; he was exiled to Chile and investigated later on embezzlement charges. Gonzalo Sánchez de Lozada (twice President of Bolivia) was forced to resign and is facing charges for extra-judicial killings and crimes against humanity. In what is probably the most notorious case, Alberto Fujimori (ex-President of Peru), after extradition from Japan and a landmark trial, received the maximum 25-year sentence for grave human rights violations committed during his term in office. Democratically elected leaders in Eastern Europe have also received prison sentences. Yulia Tymoshenko (ex-Prime Minister of Ukraine) received a seven-year sentence for abusing her powers of office in a gas deal with Russia, a sentence that provoked wide-

spread suspicions of political bias. Adrian Năstase (ex-Prime Minister of Romania) received a two-year sentence for corruption; his defence also appealed against the sentence, claiming this was an act of revenge by a political rival.

A major lesson derived from the East European and Latin American experiences is the importance of detaching the justice processes from the battle between political parties at elections. If political parties use power for revenge, or use justice mechanisms as a tool to win elections, both processes may be exposed to manipulation. What we have also learned is that collective memory of the past may never be fixed or frozen forever. History can be re-investigated and even rewritten, but it is necessary to avoid doing this on the basis of political or nationalistic interests. In this context, the past can be understood as a social schism between victims, who suffered, and perpetrators, who enforced authoritarian ideologies. Interestingly, because many people are situated in between, this large group – neither victims nor perpetrators – was often influential in balancing the historical claims.

### Diversity and the complementarity of justice mechanisms

Many authors have previously addressed the variety of transitional justice mechanisms, some focusing on particular experiences in either Latin America, Africa or Europe,<sup>1</sup> but no book has so far comprehensively presented the transitions from dictatorship to a democratic system in two continents in a simultaneous timeline, as we have tried to do in this volume. This comparative analysis helps reveal both specific issues and common issues and is instructive for further evaluation and assessment. The range of justice mechanisms can be best understood when comparing cases across various regions, because only a small number are used in any one country.

Both tribunals and truth and reconciliation commissions represent crucial mechanisms for implementing justice. Tribunals are judicial bodies with the power to prosecute and sentence perpetrators. By punishing those responsible for past crimes, tribunals individualize guilt and destigmatize communities or groups that otherwise might be viewed as collective perpetrators. In doing so, tribunals can achieve a retributive and deterrent effect that other mechanisms cannot. In comparison, truth and reconciliation commissions are most effective if they have an independent and institutionally strong statutory body, are well resourced professionally and financially, and also are representative, transparent, credible and locally owned. Their mandate is to investigate past human rights violations and reconcile the divided society through a process that utilizes

restorative justice techniques and offers a common narrative of the nation's past. Although the official uncovering of truth is a form of justice in itself, I regard tribunals and truth commissions as complementary and not as alternative mechanisms that can basically substitute for each other. Tribunals deliver justice whereas commissions deliver truth, and both can award compensation to victims. Both types of mechanism are essential and they should be provided in parallel. Victims cannot simply be given the choice of one or the other. They need to see justice done and perpetrators punished, but they also need to know the whole truth of what happened and have access to verified historical records. In Argentina, for example, trials prosecuted only high-level officers and a few military commanders, whereas a Truth Commission investigated the "dirty wars" that followed the military coup of 1973, documenting about 9,000 cases and implicating a broader range of perpetrators. With the disclosure of past abuses and the naming of those accountable, truth commissions encourage societies to rebuild trust in government and democratic systems.

There can be no standardized approach to implementing transitional justice mechanisms because the paradigms that define them are unique in terms of historical, political, institutional, cultural and other factors. Transitional justice is developed in a way that is contextually appropriate and tailored to the specific needs of a society. Combinations of strategies are more likely to satisfy a society's needs for justice and should include both judicial and non-judicial mechanisms. These could be top-down efforts that are typically state driven, such as institution-building or institutional reform, the adoption of restrictive legislation (lustration), adherence to international treaties and conventions, and respect for the doctrine of universal jurisdiction. Or these could be bottom-up initiatives, which usually stem from civil society demands for accountability and are more historically rooted in the particular traditions of the country. The significance and increasing use of such initiatives worldwide attest to their broader legitimacy and accountability. Civil society can offer leadership, if that is what is missing or inadequate in state authorities; it can put pressure on the state, but also support it to develop legal and institutional reforms aimed at preventing oppressive policies in the future. Often the demands of civil society actors for justice go hand in hand with calls for fair elections and democracy, thus paving the way for strengthening democratic institutions. Given this, the extent to which the "beneficiaries" or "clients" of transitional justice are satisfied with the outcome is a subjective yet decisive measure of the effectiveness of accountability mechanisms. It is crucial to hear the voices of the victims and survivors of abuses, and such victim-centred approaches and calls for accountability are catalysts for action. For example, thanks to the mobilization efforts of relatives of vic-

tims of torture, detention and other human rights abuses in Chile, the Law Lords in the United Kingdom made a landmark progressive pronouncement in 1998 in the Pinochet case on the basis of the principle of universal jurisdiction, which had never before been tested. Similarly, *Nunca Mas!* ("Never Again") initiatives by citizens in Latin America successfully prevented former torturers from returning to public office by naming them. Reflecting on lessons learned, there is a growing consensus that the most promising approach is a holistic one that not only addresses all three aspects of victims' rights – truth, justice and compensation – but also builds reconciliation in society and strengthens the rule of law. The role played by citizens and civil society as a whole has been critical, both in determining which mechanisms are most appropriate and in promoting a sense of local legitimacy and responsibility.

### Assessing effectiveness

Some transitional justice literature has been over-prescriptive, following a model and not always paying sufficient attention to whether the processes have been appropriate to the particular country and effective. A difficult methodological challenge lies in analysing the effectiveness of the mechanisms and choosing what benchmarks can be used to judge their success. Even more challenging would be to ask the question "effective for whom?" in order to differentiate between effectiveness for victims, for states and for societies as a whole.

In Chapter 2 in this book, Sikkink offers three parameters to judge effectiveness: (1) comparison with the ideal; (2) counterfactual reasoning (would an alternative mechanism have served justice better?); and (3) empirical comparisons (what are the public's feelings about the process and the final results?). This is an excellent start to thinking about effectiveness. The various elements of justice are difficult to quantify and evaluate and we may never know the number of potential violations that have been deterred through using one or another justice mechanism. Moreover, forgiveness, reconciliation and apology are abstract notions that cannot be meaningfully defined, assessed or quantified. For example, one cannot easily measure the independent impact of the justice initiatives undertaken by an incoming regime on the consolidation and stabilization of a transitional society. Transitional justice often coexists with and is implemented alongside other processes such as political and public reform, economic reconstruction, institution-building and democratization. It would be difficult, if not impossible, to measure the effectiveness of the justice component of such a variety of initiatives and to isolate it from other political and social processes that unfold in times of transition.

In my view, effectiveness should refer to the extent to which justice mechanisms contribute to the broader satisfaction of goals and meeting certain objectives, rather than to whether or not countries have been effective in setting up various mechanisms. To give an example, in Bosnia-Herzegovina all of the various possible mechanisms, including an international tribunal and a domestic truth and reconciliation commission, have been established, yet satisfaction is still far from accomplished, as Chapter 11 in this book demonstrates. It is a matter of identifying what the key stakeholders seek to achieve by engaging in the process of transitional justice and accountability. In the broadest sense, effectiveness relates to the goals of promoting a culture of human rights protection, consolidating democratic institutions and accountability, and establishing social trust and peace through justice. There is a need not only for justice per se but also for justice to be done as part of a broader strategy to promote peace and reconciliation. One methodological challenge is to calibrate the effectiveness of the various mechanisms found out about from the case/country study. For that matter, it would be useful to assess the rationale of establishing justice goals and how obstacles were dealt with. In addition, it would be constructive to ask whether or not the *modus operandi* of the mechanisms was successful in relation to the original goals set by transitional justice.

Effectiveness is highly dependent on the agents who implement the justice mechanisms. In this regard, one can investigate, for example, to what extent the newly elected authorities have agreed to address the legacy of the past regime and whether society has made collective demands for justice. A clearly manifested public call for justice and accountability can serve as a strong motivating force for the government to adopt a comprehensive set of mechanisms and policies. Other key factors include the balance of power, the nature of the country's political and moral leadership and the influence and behaviour of the old authoritarian order. The dynamics between old and new political actors form a critical basis on which to judge whether a transition is enforced or negotiated and the degree to which historical and judicial truths are pursued. The Slovenian transition is an example of a negotiated justice process that has been described as "rule by consensus". The negotiation of justice between the authoritarian and post-authoritarian regimes may not satisfy the victims. For example, the transition in Argentina was partly hindered by the military, which demanded immunity from prosecution for its officers through the use of legal acts such as the "Full Stop Law" and the "Due Obedience Law". Slovakia demonstrated that leadership can play a role in defining accountability mechanisms as well as reshaping opinions towards legitimate governance: it was Ján Langoš (a former dissident) who, although lacking institutional support, campaigned for legislation

that made truth revelation possible. This kind of grassroots leadership might be more effective than prosecutions or vetting in uncovering the truth because it requires minimal cooperation from individuals in the judicial and executive branches of government, many of whom may be otherwise unsupportive of retributive justice.

I would also add time and cost considerations in judging the effectiveness of the justice mechanisms. Generally, the ability to derive maximum gain in the shortest possible time and at minimal expense defines effectiveness in any enterprise. For the analysis of transitional justice, time and cost are also important categories, but in a more complex manner. Quick and cheap justice can be the worst kind of justice. Not dedicating enough resources to delivering justice initially may result in the need to spend comparatively much more in the future, if further crimes are committed. Deterrence or prevention are similarly a major element of justice, as is the satisfaction of the victims of past crimes, but these may have different time-cost parameters.

### *Timing*

Time forms a critical element in transitional justice and this is particularly the case in trials, where both the evidence and the availability of witnesses are crucial. The challenge is to find the best balance between "not too fast" and "not too late". One has to avoid overly hasty processes and harsh sentences that depart from the rule of law and the principles of a fair trial and due process. For example, the swift trial and execution of the Romanian dictator Nicolae Ceaușescu and his wife in 1989 seemed problematic and led to similarly rushed decisions later, and were not instrumental in the subsequent transitional justice process. Human rights abuses require proper and impartial investigation, but this often takes time. Former dictatorial regimes may have destroyed detailed evidence of atrocities, which is then difficult to reconstruct.

On the one hand, a decent amount of time for a full investigation and a proper and fair trial is crucial for justice. On the other hand, time may work against transitional justice if victims do not see the perpetrators being investigated and prosecuted, on account of old age or ailing health. In many countries in Eastern Europe, alleged offenders had either died or were unfit to stand trial, or the cases against them had exceeded the statute of limitations. There is indeed a time dilemma: although there are benefits to early transitional justice, choosing the mechanisms and the actual process should not be rushed. Experience, for example in Chile, suggests that the pursuit of justice can be deferred and may mature when political circumstances are more favourable. One may also argue, however, that the windows of opportunity could be shorter and should not

be missed. Justice initiatives soon after a regime change are likely to be better received, more supported and more effective. Conversely, a combination of the regrouping of former ruling forces and a culture of forgetfulness later may create insurmountable barriers to justice. This dilemma has been tested in countries such as Guatemala, Chile and Argentina and also in several post-Communist states, where abuses from the Communist period were coupled with some older unresolved tensions from the period after the Second World War.

Time, therefore, can play a significant role in effectiveness, and the challenge remains how to accomplish the justice process while the evidence, memories and testimonies are still fresh but avoid the danger of justice being too hasty, biased and based on revenge. Balancing the time factor is further complicated because accountability mechanisms may need to adapt to gradual political and societal transformation processes. Time can also play different roles for different mechanisms. For example, truth commissions, memorials and historical records are necessarily less time sensitive than trials and can have an effective role even decades after the transition. Examples from almost everywhere suggest that it is never too late to investigate if new evidence comes to light, and it is never too late to re-examine past stories and to address grievances when goodwill exists. In this vein, the Office of the Federal Commissioner for the Files of the State Security Service in Germany continues to pursue new insights into past human rights abuses by the former East German secret service more than two decades after 1989 in order to establish a full historical record.

### *Cost*

Expenses form another and different basis upon which to calculate effectiveness. As with the time factor, when applied to justice mechanisms the cost factor does not operate in the same way as in the business-as-usual world, where cheaper and faster means more efficient. Money certainly plays a significant part in justice mechanisms because the misappropriation of funds and dissatisfaction with the large amounts of money spent compared with the inadequate results achieved can have a negative impact on justice proceedings. The high costs of justice may add to victims' feelings of bitterness, for example when comparing the costs involved in the prosecution of the oppressors with the amount of material compensation paid for their suffering. The ad hoc International Tribunals for Former Yugoslavia and Rwanda and the permanent International Criminal Court have been criticized for being too expensive, and there have been suggestions that it would have been more effective if some of those funds had been distributed as aid to the victims (see also Mettraux, 2009).

Cost-effectiveness can be improved by greater efforts to strengthen domestic justice sector reforms and their adaptation to international standards of fair trial. Countries with a strong rule of law are more likely to provide an environment that is conducive to, supportive of and cost-effective for various transitional justice initiatives. However, there are some practical difficulties too. Often new governments are unwilling to accept far-reaching initiatives that might jeopardize their legitimacy or stability. Even when the political will exists, there may not be sufficient funds and capacity to prosecute perpetrators, especially in poor countries or where the transitional legal systems are weak and/or prone to corruption.

This highlights yet another shortcoming: even if perpetrators end up in jail, victims may remain dissatisfied if governments or courts fail to offer reasonable compensation. Truth and reconciliation commissions may serve as a better model for compensating victims, as demonstrated by the South African experience. However, compensation for large numbers of victims may exceed the capacity of transition economies. Interestingly, it is often ignored that compensation may be measured in ways other than money, for example by the therapeutic elements of non-material satisfaction, fact-finding and forgiveness. The question of catharsis through truth revelation also needs exploration in a more empirical manner than one based on arguments of principle.

Another consideration is the high cost of the alternative of impunity and the consequences of failing to punish atrocious crimes committed by a previous regime. The duty of governments is to invest in depoliticized justice mechanisms to prevent future violations, to give the transitional process broader legitimacy and to create or reform key institutions, especially within the judicial sector.

### Conclusion

This book demonstrates how countries in Latin America and Eastern Europe approached and applied transitional justice to address past suffering and how these processes have been complex and tentative, and sometimes have even encouraged anti-democratic impulses. One common lesson is that the way in which the new democratic regimes treated the former Communist or junta regimes served as a test of their own anti-authoritarian style of government and respect for human rights.

The book has benefited from the gradually maturing field of transitional justice and more significantly from bringing together case studies from Latin America and Eastern Europe, which has never been done before. One interesting question that remains unanswered and invites future research is whether one can identify regional models of transitional

justice or, less ambitiously, whether and to what extent neighbours can influence each other in the process of transitional justice. Readers of the book will notice that the Latin American chapters address more cases of truth commissions, trials and amnesties, whereas the East European chapters address more cases of lustration, purge laws, the opening of secret police files and property restitution. In Eastern Europe, the justice process has been influenced by regionalism, with the process of joining the European Union often providing the context for policies. High-profile prosecutions in one country had an impact on neighbouring countries. Therefore, even though there may not be a standardized approach to implementing transitional justice, nevertheless neighbourhoods generally do matter and regions can develop similar affinities with justice mechanisms. Nonetheless, the transitional justice processes still have to be contextually appropriate and tailored to the specific needs of a society. A combination of strategies that includes both judicial and non-judicial mechanisms is more likely to fulfil a society's need for justice.

A major lesson is that the justice mechanisms should be transparent, credible and locally owned. They should investigate past human rights violations, reconcile divided communities through restorative justice techniques, and attempt to offer a common narrative of the past. With the disclosure of past abuses and the naming of those accountable, societies can encourage victims to rebuild trust in good governance. The exposure of offences can put pressure on former elites to cooperate and acknowledge their crimes, sometimes in exchange for amnesty and forgiveness.

The book has not avoided the difficult question of how transitional justice can be evaluated in terms of effectiveness. It has added some utilitarian thinking to the approach towards transitional justice, seeing it not simply as an absolute end in itself but also as a means to achieve other ends – such as democratization, rule of law and respect for human rights – in the particular circumstances in a specific country. The experiences in Eastern Europe and Latin America help to contextualize transitional justice both as a duty and as a results-based exercise, providing the empirical and regional background to compare and judge effectiveness. The book identifies variables to determine the effectiveness of certain mechanisms and has built on the notion that, when tailored to the specific requirements of a country, transitional justice can form an important means to consolidate peace and promote human rights and democracy as well as to heal past wounds. The effectiveness of justice mechanisms has been approached from the angle of the extent to which these mechanisms contribute to meeting certain objectives, rather than in relation to whether or not countries have been effective in setting up various mechanisms. In the broadest sense, not only is there a need for justice, but there is a need

for justice to promote peace, reconciliation, human rights protection, accountability and the establishment of social trust.

## Note

1. To list a few of the most well known: Bassiouni (2002); Roht-Arriaza and Mariezcurrena (2006); Teitel (2000).

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