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TRANSITIONAL JUSTICE

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WHAT IS “TRANSITIONAL JUSTICE”?

- “The self-conscious construction of a distinctive conception of justice associated with periods of radical political change on the heels of past oppressive rule” (Teitel, 2010)
- “The set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law” (Roht-Arriaza, 2006)



WHAT IS “TRANSITIONAL JUSTICE”?

On critical perspectives

*ARE THESE DEFINITIONS NARROW VIEWS OF TJ? (Nagy, 2008)

1. Gender, customary law, culture, and social justice are virtually absent as categories of analysis
2. Building peace and building a just society are inseparable processes
3. TJ trials underrate the gendered and socioeconomic ramifications of violent conflict (based on an “international legalist paradigm”)
4. Thus: TJ requires a broader approach that encompasses structural violence, gender inequality and foreign involvement



WHAT IS “TRANSITIONAL JUSTICE”?

On critical perspectives

*AGAINST THE OVERBROAD VIEW OF TJ:

1. Methodologically: TJ is a figure for political changes; “WHEN” TRANSITIONAL JUSTICE APPLIES is

- Transitions to democracy (“traditional” transitional justice)
- Post-conflict peace-building (“new” transitional justice)

If the violence against women actually increases in the ‘post-conflict’ period (Nagy's views on South Africa), the reaction belongs to ordinary justice

2. Substantially: TJ is JUSTICE and requires the rule of law

Law is the predictive and safe way, also in ordinary justice



WHAT KIND OF JUSTICE IS TRJ?

1) INTERNATIONAL CRIMINAL JUSTICE

*The chance: Nuremberg Trials as international standard of TJ (Elster, 2004)

-Connecting international human rights law, international criminal law and TJ

*An historical lack: limited liability for German leaders – only Germany needed a political transition?

*An historical blockage: the Cold War

*Sovereignty?



WHAT KIND OF JUSTICE IS TRJ?

2) RETROACTIVE JUSTICE FOR STATE CRIMES (can criminal trials put political transitions at risk?)

-Unconditional duty to prosecute?

*Diane Orentlicher, 1991: a state's duty to prosecute “especially atrocious crimes”

*Carlos S. Nino, 1991: flexibility for the political realities of countries in transition

-Amnesty?

*Argentina: Amnesty; CONADEP; Law of “Full Stop”; Law of Due Obedience; Supreme Court repeal

*Chile: Supreme Court restrictions of amnesty



WHAT KIND OF JUSTICE IS TRJ?

3) TRUTH COMMISSIONS

- “We must establish incredible events by credible evidence” (Robert H. Jackson)
- Truth Commissions (Scharf, 1997):
 - 1) As supplement to national or international prosecution: Argentina, former Yugoslavia, Rwanda
 - 2) As substitute for prosecution, accompanied by (*de iure* or *de facto*) amnesties: El Salvador, Somalia, Guatemala, Haiti, South Africa
 - *some cases with subsequent repeal of amnesty (Supreme Court of El Salvador, July 2016), at least for genocide, forced disappearance and torture (Constitutional Court of Guatemala, January 2016)



WHAT KIND OF JUSTICE IS TRJ?

Amnesty and Impunity

1) Impunity as the only enemy to beat?

Is criminal law a (Kantian) categorical imperative against impunity?

*Punishment power is also renounce to punish (Pastor, 2005)

2) Self-amnesty as circular reasoning?

Can an entity or group that is not a state issue an amnesty law?

*A constitutional state can issue a constitutional amnesty with requirements of distributive justice (Pérez del Valle, 2001)



WHAT KIND OF JUSTICE IS TRJ?

Amnesty and Impunity

3) Is the (unconditional) fight against impunity a guarantee of the victim's rights?

Is there a right of victims to “penal harm”?

*The right for the law to be applied (to an action) cannot be equated with a material right for punishment (Silva Sánchez, 2008)

*Amnesty is a fair manifestation of *ius puniendi* when it respects the demands of distributive justice required for the common good in a post-conflict-peace-building



TJ IN PRACTICE CRITICS

*Theoretical treatment of regime transitions as a self-contained subject (Posner/Vermeule, 2003)

- *denying the relevance of comparisons between regime transitions and transitions in the legal systems of consolidated democracies

- *holding a stereotyped picture of ordinary justice (insufficient appreciation of the ordinary law of consolidated democracies)

*Practical treatment of TJ as discontinuous with ordinary justice (Posner/Vermeule, 2003)



TJ IN PRACTICE

EMPIRICAL EVALUATION

1) Rule of law

- development of laws and other regulations
- effectiveness in the implementation of transitional laws (e.g., amnesty)
- decisions of judges or courts

2) “Impact” of TJ mechanisms

-Impact on victims, and more broadly, on the population; e.g., measuring changes in perception of government, justice, and social cohesion (Pham & others, 2016)

*Measure proceedings of concrete results in the situation of affected persons or groups



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