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PATHWAYS OF IMPACT : HOW TRANSITIONAL JUSTICE AFFECTS DEMOCRATIC INSTITUTION-BUILDING



- Three pathways through which transitional justice is expected to affect democratic institution-building are: delegitimation of past abusers and potential spoilers; promotion of reforms; and empowerment of previously marginalised actors.

- A study of transitional justice processes in Brazil, Chile, Sierra Leone and Uganda shows that the evidence as to these effects is mixed and more modest than generally assumed. In some instances, transitional justice's impact through these pathways has even had (unintended) negative consequences on democratic institution-building.

Executive Summary

- Transitional justice measures are expected to address a wide variety of demands in societies emerging from authoritarian rule or violent conflict, including reconciliation, addressing the needs of victims, peace promotion, rule of law, and direct redress for specific abuses. There are also increasing claims that it can have an effect on democratic institution-building in such societies.

- While there are numerous claims about transitional justice's impact upon democracy, precisely *how* such effects take place – the pathways of impact – is often underexplored.



Transitional Justice Impact

Transitional justice involves a range of activities developed to respond to past human rights abuses, usually serious violations of international law, in the wake of authoritarian rule or violent conflict. These are myriad and the scope of transitional justice continues to grow, but most frequently involve trials, commissions of inquiry, amnesties, restorative measures, and vetting or lustration. A range of expectations have been placed upon these processes, but much is still not understood regarding their impact.

Expectations

Advocates, scholars and practitioners have placed significant expectations upon transitional justice, particularly that this range of activities will have an “impact” on a series of important goals in a society. Transitional justice is often expected to be “victim-centred”, that is to say to respond to a wide range of needs or demands of victims for recognition, inclusion, and reparation for harm or direct restitution for losses. It is also expected to help to promote reconciliation, between victims and perpetrators, and across divided societies. At the same time, many require it at a minimum to serve retributive justice purposes and punish perpetrators, while at the maximum some expect it to deter future abuses. Some have suggested that transitional justice processes can not only provide an historical record, but also serve educational purposes for wider society about past events and about impermissible behaviour. Finally, advocates, practitioners and scholars have expected that transitional justice processes can and should promote stability and peace, and improved human rights and democracy records.

Why these expectations?

The demands set forth for transitional justice processes are ambitious, to say the least, but not surprising given that they emerge in unique circumstances: countries riven by violent conflict or emerging from repressive authoritarian rule. In such circumstances, there are strong demands for accountability, as well

as to ensure that abuses do not recur. Transitional justice measures are expected, by their very design, to address these demands, or in the case of measures such as trials, to be modified to address these demands.

What do we (really) know about impact?

As the practice of transitional justice measures has increased dramatically since Latin American transitions beginning in the 1980s, so too have scholarly attempts to measure its impact against the above goals. Numerous individual and comparative studies of country experiences as well as more recent quantitative studies have sought to ask and answer: does transitional justice have an impact? And if so, which transitional justice mechanisms have an impact on what outcomes? Systematic answers have remained somewhat elusive, as both case studies and quantitative analyses have reached conflicting conclusions, and reasonable analysts may differ. Thus one quantitative study finds that all transitional justice measures have a positive correlation with the improvement of human rights and democracy records, while another finds frequent nil or negative correlation unless measures include some form of amnesty, and yet another finds that truth commissions coincide with worsened records. Organisations which engage in transitional justice advocacy and programming have no more robust evidence, although clearly this is of great importance in deciding whether, when and how to develop any transitional justice policy.

Transitional Justice and Democratic Institution-Building

A particularly contentious point is the extent to which transitional justice impacts democracy. Existing studies have produced findings that differ significantly and are sometimes even contradictory. While some find that trials are positive for democracy because they are linked to an improvement in human rights practices, others conclude that trials do not contribute to democracy as their ability to alter nationalist

views and produce liberal change amongst political elites and the broader population is limited. A central reason for these contradictory findings is that there exists no single, determined way in which transitional justice impacts democracy. This is so because the nature of transitional justice's impact likely varies based on the aspect of democracy being studied. As democracy is a multi-dimensional process – involving different levels of agency (the state, society, the individual) and different spheres of action (political, economic, judicial, social, cultural) – transitional justice is likely to have a differing impact on these multiple dimensions. For instance, if and how transitional justice impacts citizens' attitudes and trust in government is likely to vary from its impact on restoring inter-community relations or the behaviour of the security forces.

Importantly, transitional justice may impact some but not all democracy dimensions. Efforts at measuring transitional justice impact thus need to focus on particular dimensions of democracy, rather than rely on a single aggregate measurement of democracy. Transitional justice is for instance unlikely to determine what kind of electoral system is adopted (though it can impact electoral outcomes, as suggested by the ICC indictments of leading political figures in Kenya) or condition the incidence of anti-government actions such as strikes or public demonstrations. However a level at which transitional justice can reasonably be expected to have an impact is democratic institution-building. This refers to the strengthening of foundational democratic institutions and principles – such as an independent judiciary, democratic security forces, and participation – as well as the improvement of the performance of these institutions. While institution-building is not a sufficient condition for democracy – which also requires changes in attitudes and beliefs as well as a remoulding of state-society relations and socio-economic practices – it is a necessary component of it. Below we highlight a few widespread assumptions about the links between transitional justice and democratic institution-building.

Rule of Law

Rule of law is an essential pillar on which democracy rests as it protects rights, enforces accountability and constrains political abuse of power. It entails the primacy of the law and its equal application to all public and private agents. A central component therefore of rule of law is the performance of the judicial system: the judiciary needs to be independent, accessible, effective, and respect the principles of due process, legality and equality. Transitional justice pursues some of the same objectives as rule of law – promoting justice and human rights – and is therefore often seen as acting in complement to rule of law policies. But transitional justice is also expected to directly contribute to building the rule of law in countries transitioning from authoritarian rule or armed conflict by reasserting the principle of accountability, encouraging changes in judicial practice, or focusing societal and political debates on questions of justice. Transitional justice, it is further argued, supports rule of law by educating people about rights standards and inducing governments to act in line with publicly known human rights and rule of law standards.

Security forces

In countries emerging from authoritarian rule or armed conflict the security forces have usually played an important role in the past regime and commission of human rights abuses. Democratic rule can be seriously hampered by military authoritarian enclaves, security forces that do not support democratic governance and human rights, or are incapable of enforcing state authority over parts of the territory. Democratic institution-building therefore relies on the restoration of democratic control over the security forces and their de-politicisation to ensure their mandate is geared towards serving the interests of society rather than its own narrow interests or those of a select group of civilian leaders. Because transitional justice is meant to directly address the question of past human rights violations, including those committed by state forces, it is believed to play an important transformational role and help end impunity. By

highlighting responsibilities and causes for the abuses, it can force changes in the nature of the relationship between the security forces and civil authorities, as well as with society at large. It also makes it more difficult for security forces to excuse their repressive behaviour and political interference, or can highlight the necessity to implement improved human rights monitoring mechanisms.

Participation

Democracy rests on inclusive political and societal participation, which refers to the ability of all citizens to take part (directly or indirectly) in political processes and debates and enjoy full citizenship and civil-political rights. Countries emerging from armed conflict or authoritarian rule are often characterised by legacies of exclusion and disempowerment that place significant constraints on participation. These include weak civil society mobilisation as well as discrimination towards ethnic, religious, regional, political, gender or age groups. Transitional justice is meant to support inclusive participation by creating impetus and space for citizen mobilisation around demands for rights. By exposing structural deficiencies that lie at the roots of past human rights violations, it is also hoped that it will stimulate changes in government policy regarding previously excluded groups and a strengthening of human rights protections for these groups. Transitional justice can moreover constitute a first platform for renewed direct interaction between the state and citizens, which not only serves an educational purpose towards citizens but also encourages governments to become more responsive to citizens' demands.

Pathways of TJ Impact

Much of the focus of debates on transitional justice's impact on democratic institution-building has been on whether this impact is positive, negative or nil. While an important starting point, it is insufficient to really understand the relationship as it fails to address the crucial question of 'how': through

which means does transitional justice exert its impact? There is a broad set of assumptions about what it is that transitional justice does – such as exposing responsibilities for human rights abuses, providing a platform for public debate about the past, creating a shared history, deterrence, etc. – but little investigation into how exactly these link to democratic institution-building. The question that needs to be asked is not whether transitional justice causes democracy – it is evident that a multiplicity of factors lead to the emergence of democracy and that at most transitional justice will be one of many contributing factors – but through which pathways transitional justice affects democratic institution-building. Widespread claims about transitional justice impact can be grouped in three types of pathways: delegitimation, reform and empowerment. Drawing from experiences in four countries (Brazil, Chile, Sierra Leone and Uganda) we here explore the validity of these claims and its implication for democratic institution-building.

Delegitimation

Transitional justice is expected to support democratic institution-building by delegitimising past abusers since this weakens the ability for undue political interference by spoilers and the persistence of authoritarian enclaves. This not only promotes political stability but also creates opportunities for the depoliticisation of the security forces and judiciary. Delegitimation of individuals or groups who committed abuses in the past can occur through the direct removal of individuals (for instance following court indictments or convictions), their naming and shaming, or ideological weakening. This is expected to curtail the ability of non-democratic forces to directly exert continued political power and weaken public, political and international support for them. This is evident to some extent in the case of Chile, where the indictment of Pinochet by Spanish and Chilean courts resulted in a stripping of his senatorial immunity, his resignation from his senatorship, and an erosion of support from right-wing parties and the security forces. While other factors also played a role in weakening Pinochet's political influence – such as

generational changes within the security forces and the eruption of the Riggs Bank corruption scandal in 2004 – the persistent human rights trials contributed to making continued support for Pinochet politically unsustainable.

Where transitional justice mechanisms fail to produce a delegitimation effect this can constrain democratic institution-building. In Uganda, transitional justice mechanisms have so far failed to address the human rights abuses committed by the army, focusing instead exclusively on crimes committed by past regimes or non-state armed groups. The result is persistent human rights abuses by the security forces, their excessive politicisation, and a failure to rethink the role of the army in Ugandan society, thereby hampering the consolidation of more democratic security forces. In Brazil, transitional justice measures have also yet to address persistent abuses by security forces, particularly by the regular and the military police. These actors regularly threaten citizen security, which works to reduce the legitimacy of state institutions.

Alongside delegitimation, transitional justice is often also expected to produce a legitimating effect which helps strengthen nascent democratic forces by signalling a new commitment to human rights and democratic principles. It can provide the new regime with international and domestic legitimacy which bolsters its ability to engage in democratic institution-building and weaken authoritarian enclaves. It can furthermore support the re-legitimation and integration of previously excluded groups thereby broadening the scope for participation. However, the evidence from the project's research to date is relatively limited. In Brazil, the blanket amnesty law of 1979, while controversial, enabled the return of political opposition members from exile, allowed the opposition to return to politics, and paved the way for reparations for their members, recognising the harm that many in the opposition had suffered. The current president of the country is a former opposition activist who has benefited from such measures.

But in and of itself delegitimation often does not seem enough to produce deeper political and institutional transformations. In Chile, exposing the complicity of the judiciary in repression did not fully result in attitudinal changes. The judiciary refused to acknowledge the findings of the commissions of inquiry and remains conservative in terms of applying international human rights law, protecting constitutional rights and enforcing limits on the executive's power. This suggests that despite courts' own increased activism in prosecuting Pinochet-era crimes, this has had a limited trickle-down effect in terms of its attitude towards human rights more broadly and its relation to the executive. While the report of the commission of inquiry in Sierra Leone contained very strong criticisms of state corruption and institutional failures, it did not provoke greater delegitimation of these, or itself foster reform. This may well be because of the return to power of high-level political elites post-conflict and the failure to address their alleged responsibility for serious abuses. The desired delegitimation effect of trials by the Special Court for Sierra Leone may also have been hampered by the limited scope of groups which it could prosecute: specifically government members and the army were not prosecuted, while rebel groups and the Civil Defence Forces were. Many Sierra Leoneans have challenged this as politicised justice.



A key challenge is also that transitional justice's delegitimation and legitimization effect can be instrumentalised for political purposes. While International Criminal Court (ICC)

indictments against the LRA rebel leadership in Uganda contributed to isolating the group, the Ugandan government has also used the ICC indictments to justify its ongoing militarisation of society. The government is able to portray the conflict as a purely criminal issue, thereby curtailing debates about broader governance underpinning armed conflicts and lack of democratisation in the country. More broadly, the government has consistently sought to use transitional justice as a means for domestic and international regime legitimisation while failing to address key human rights challenges and reforming the security and judicial sectors.

Reform

By highlighting the institutional failures that made human rights violations possible, it is claimed transitional justice can play an important role in triggering legislative, constitutional and institutional reforms. These serve to strengthen human rights protections and citizenship rights, as seen in the case of Uganda where the 1986 Commission of Inquiry into Violations of Human Rights contributed to the integration of a Bill of Rights in the Ugandan constitution and the creation of the Uganda Human Rights Commission, while the ICC intervention stimulated the drafting of domestic legislation on witness protection. While any effects were not immediately apparent in Chile, the report of the 1991 commission of inquiry identified a range of institutional sources of abuses, including the judiciary and the military, which were slowly addressed in the coming decades.

Reforms are also expected to improve the democratic performance of institutions such as the judiciary and security forces when transitional justice creates an impetus for institutional reorganisations and personnel changes, the redefinition of institutional prerogatives, or investment in capacity-building. But while great expectations were placed on the Special Court for Sierra Leone to have multiple such effects, the more modest effects appear to have been capacity-building of some domestic prison staff, and the impetus to create a (still-nascent) victim section within domestic court processes. Similarly, the

International Criminal Court's involvement in Uganda appears to have been mostly limited to awareness raising into the Court's functioning rather than capacity-building. Meanwhile training programmes in the justice sector have largely focused on the International Crimes Division of the High Court and therefore had a limited contribution to broader capacity-building within the judiciary.

An important challenge is that transitional justice's reform effect is highly contingent on the degree of political will for reform. All too often, reform recommendations are ignored or ill-implemented by governments. This was clearly the case in Sierra Leone where management of the implementation of reforms was handed to the Human Rights Commission of Sierra Leone without providing it a robust mandate, funding, or political support. Moreover, reforms are often politically contentious, especially if they involve a weakening of prerogatives of institutions or individuals linked to the previous regime. In such circumstances, transitional justice can hamper rather than promote reforms, even when the political will for reform is there. During the first few years of the transition in Chile domestic trials and commissions of investigation served to aggravate already tense civil-military relations, thereby contributing to blocking efforts by the government to push through reforms in the security sector.

In many instances it also appears that it is reforms which enable transitional justice developments rather than the other way round. In Chile, the introduction of judicial reforms such as changes relating to judicial appointments, the size and composition of the Supreme Court, and the power of military courts played an important role in stimulating increased activism by domestic courts to try Pinochet era-crimes. Further, if such a reverse effect is discernible—that is to say that institutional reform is part of what helps to facilitate transitional justice, or simply to assist democratic institution-building—then a further inquiry may be necessary, given the prevalence of external funding and programming for reform efforts in many

transitional countries. Thus, for example, in Sierra Leone, the bulk of institutional reform has been externally financed and driven, and while it has not evidently assisted any domestic transitional justice efforts, any domestic democratic institutional development would appear to be primarily attributable to such support.

Transitional justice may nevertheless exert an indirect reform effect by creating a more human rights sensitive or rule of law-oriented environment. While transitional justice may fail to directly trigger reforms, the increased debates it provokes around questions of accountability and the increased scrutiny of human rights practices that accompanies it can heighten the sensitivity of government to this issue. This in turn can create impetus for reforms as suggested by the case of Uganda, where transitional justice debates have contributed to an increased focus by civil society groups and donors on human rights issues, which has to some extent heightened the government's sensitivity to human rights. This has contributed to the recent adoption of reforms in the security forces, such as the creation of a Human Rights Directorate and the adoption of new rules for cordon and search operations for the army. In Chile, domestic trials played an important role in keeping human rights on the public agenda and forcing the government to be more responsive to human rights demands. However, the scope of this effect appears limited as some experts reported that it has kept the judiciary's idea of what constitutes human rights abuses limited to those committed during the dictatorship.

Empowerment

Another means through which transitional justice is assumed to impact democratic institution-building is by empowering individuals and groups to demand human rights and democracy actions on the part of the state. It does so by giving a voice to actors and opening a space where mobilisation can happen and these voices can be heard. The establishment of transitional justice mechanisms is often accompanied by increased activism by civil society groups, not

only on transitional justice issues but also broader human rights issues. Anecdotal evidence in Uganda, for instance, suggests that local communities in the north are trying to use memorial spaces not only to build a community history and press for government acknowledgment of past human rights abuses, but also to mobilise around social justice demands such as access to land and gender issues. Transitional justice can also support empowerment when it is directly mobilised as a means to reintegrate excluded or marginalised individuals. Thus in Chile various reparations programmes were set up to support the return of political exiles, the reincorporation of former political prisoners and peasants who had been dispossessed under the military regime.

But our case studies overall suggest that transitional justice's ability for empowerment is limited and, on occasion, may heighten conflict. In Chile, indigenous people, who were also targeted by the dictatorship, were generally not included in national transitional justice processes. Although a commission was created to address the plight of indigenous communities (the 2001 Historical Truth and New Deal Commission) their engagement with the Commission was low. It is therefore unclear whether they were marginalised or whether their lack of participation is indicative of the lack of legitimacy of state processes to indigenous leaders. In Uganda, the amnesty process was expressly linked to a reintegration programme for former fighters, serving as recognition that many LRA fighters had themselves been victims. However, lack of financial resources and popular opposition to this reintegration process, means that its overall impact is low and has not contributed to addressing problems of marginalisation and disempowerment. Transitional justice measures can also create controversies where they are viewed as favouring certain groups. Reparations in Brazil are often accused of having favoured leftist, former opposition members, now in power while in Sierra Leone rumours were rife that reparations favoured certain regions.

An important factor that often constrains transitional justice's empowerment effect is its

failure to address structural inequalities and discriminations and its tendency to restrictively focus on the violations of physical integrity rights. Issues of ethnic and regional marginalisation and dispossession are prevalent in Chile, Uganda, Brazil and Sierra Leone yet transitional justice mechanisms have not, or only superficially, addressed these problems. Failure to support empowerment can also result from transitional justice mechanisms' excessive focus on a particular category of victims or set of events. In Uganda, the amnesty process and trials have largely focused on the LRA – even though the amnesty in fact applies to all rebel groups – thereby creating a perception that transitional justice is aimed at 'dealing with the northern problem'. Individuals and regions in other parts of the country that have also suffered conflict and human rights violations are left on the side-lines of accountability debates, unwittingly contributing to or perpetuating their disempowerment.

Implications

- Transitional justice impacts democratic institution-building through delegitimation, reform promotion and empowerment but often to a lesser degree than has so far been assumed. In particular, its ability to promote deep structural changes appears limited. It seems that transitional justice's contribution lies more in the promotion of a normative environment conducive to democratic institution-building.

- Widely assumed pathways of transitional justice impact do not only produce the expected positive effects, but also have unexpected negative impacts on democratic institution-building. Our preliminary findings suggest that these are more likely where a clearly dominant party exists to which benefits may be ascribed or which is clearly driving a (selective) process, or where there are multiple societal cleavages enabling suspicion of some or all transitional justice measures. Transitional justice may thus not be the most appropriate instrument in all transition contexts.

- The direction of the causal relationship between democratic institution-building and transitional justice is not always clearly defined. A political context conducive to democratisation and the implementation of institutional reforms seem to both enable the implementation of transitional justice and its ability to support democratic institution-building.

- Transitional justice is more likely to positively contribute to democratic institution-building when it is embedded in broader policies of institutional transformation and where it applies to a broad rather than restricted category of both perpetrators and victims.

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About the Project

This policy paper is part of the project on the Impact of Transitional Justice on Democratic Institution-building (www.tjdi.org). The three-year, inter-disciplinary research project is conducted by researchers at the University of East London, UK, and at the Hague Institute for Global Justice in the Netherlands and examines the experiences of eight countries: South Korea, Japan, Brazil, Chile, Sierra Leone, Uganda, Hungary, and East Germany. All of these countries have experienced different forms of violence and repression and undergone different types of transition, in different regional and international geopolitical circumstances. Using qualitative methods including field research, secondary research, and incorporating insights from quantitative research, this comparative project will develop new insights regarding the impact of transitional justice measures specifically on democratic institution-building. The researchers aim at contributing to the wide scholarship on the effects of transitional justice and providing insights to practitioners regarding the role of various transitional justice measures. The project is funded under the Open Research Area Scheme through the Economic and Social Research Council (UK) and the Netherlands Organization for Scientific Research.

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