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Papeles del CEIC, núm. 2, septiembre, 2010, pp. 1-29
Universidad del País Vasco/Euskal Herriko Unibertsitatea
Vizcaya, España

Papeles del CEIC
ISSN (Versión impresa): 1695-6494
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España

Judicial review and transitional justice: Reflective judgment in three contexts

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Papeles del CEIC
ISSN: 1695—6494

Volumen 2010/2
 # 60
septiembre 2010

Resumen
Revisión judicial y justicia transicional: juicio reflexivo en tres contextos

Este artículo busca examinar las vías a través de las cuales las cortes de revisión constitucional han intentado discernir con sentimientos públicos dentro de sociedades emergentes de una situación de opresión y conflicto de alta escala. Un análisis comparativo de decisiones de revisión judicial de la Hungría post–comunista, de la Sudáfrica post–Apartheid y de la Argentina post–dictadura como casos que muestran como los jueces han, con mayor o menor éxito, reconocido y engranado pedagógicamente sentimientos sociales negativos de resentimiento e indignación hacia antiguos víctimarios y beneficiarios de violencia. Así, el artículo espera cimentar el camino para investigaciones de mayor envergadura sobre uno de las dimensiones más descuidadas de sociedades post–confictuales: la influencia pública.

Palabras clave
Justicia transicional, revisión judicial, sentimientos públicos

Abstract
Judicial review and transitional justice: reflective judgment in three contexts

This article seeks to examine the ways in which courts of constitutional review have tried to deal with public sentiments within societies emerging from large–scale oppression and conflict. A comparative analysis of judicial review decisions from post–communist Hungary, post–Apartheid South Africa and post–dictatorial Argentina is meant to show–case how judges have, more or less successfully, recognised and pedagogically engaged social negative feelings of resentment and indignation towards former victimisers and beneficiaries of violence. Thus, the article hopes to pave the way for more in–depth research on one of the most neglected dimensions of post–conflict societies: public affect.

Key words
Transitional justice, judicial review, public sentiments

Índice

1) INTRODUCTION

This paper strives to examine one of the less theorised dimensions of transitional justice (TJ): public affect. More precisely, I deal with the role that courts play in processes of dealing with negative feelings like resentment and indignation as manifested in post–oppression societies. Decisions from Hungary after 1989, post–Apartheid South Africa and Argentina after 1983 are compared to illustrate how citizens' affective reactions to political injustice have been engaged through the judicial review of TJ bills. While there is an ample literature on trials and their emotional atmosphere (Arendt, 1963; Nino, 1996; Osiel, 1997, Douglas, 2001), less attention has been devoted to the affective dimension of the review of bills enabling or blocking prosecutions. In this paper I will argue that the judicial review of TJ legislation can also help shape a democratic sentimental culture. Different arguments and strategies have been used by different judges, yet their goal was shared: recognising the appropriateness of negative feelings towards former victimisers, while also channelling them in ways non–detrimental to the normative integrity and stability of democracy.

I start from the premise that citizens' resentment and indignation towards the former victimisers function as barometers of injustice that draw signals of alarm for institutions to intervene correctively. Resentment is associated with an injustice committed against oneself; indignation is a response to an injustice committed against another. The label "negative" refers to their association with displeasure and discomfort. As such, they bear normative weight and constitute a proper object of concern for aspiring democracies. However, left unrecognised and unfiltered institutionally, they could degenerate into apathy, or get expressed abusively. The paper seeks to illustrate how courts have reviewed TJ bills in view of both recognising the moral condemnation implicit in negative emotions and of making these emotions compatible with the fundamental value of equal respect and concern for all citizens, irrespective of their political past.

Hopefully, by the end of the paper I will have disclosed a potentially more subtle democratising function of judicial review.

One caveat before delving into the comparative analysis. I argue that some courts have chosen better strategies to recognise and pedagogically channel public negative emotions. Since courts are not the only institutions to address outraged populations during political transformations it would be difficult to measure the impact their decisions have had on emotions. Impact is contingent on the courts writing decisions in ways that communicate the constraints of equal respect on emotional expression, on the collaboration of the other institutions, transparency, publicity and exposure in the media, and on victims' responsiveness, itself a function of many variables. To the extent that this paper claims courts have been "successful", "success" refers to the quality of the democratic message communicated to victims, victimisers and the society at large, and not to the effectiveness they had in changing people's emotions. No causal link is claimed between courts' judgments and civil society's responses.

2) HUNGARY

Hungary made a non–violent transition from authoritarianism to democracy in 1989. The fall of communism was the result of round table negotiations between the Hungarian Socialist Worker's party and the democratic opposition (Halmai and Scheppele, 1997). In 1990 the communists experienced a bitter electoral defeat. The new Parliament was dominated by a fragile coalition of democratic parties. Some of the newly elected MPs were anti–communist dissidents who had faced harsh repression during the one–party rule and who wanted justice to be done. This explains why the Parliament spent a lot of time and effort trying to get former officials prosecuted through the passing of subsequent laws lifting the statute of limitations for state–sponsored political crimes. The 1956 anti–Soviet revolt, which resulted in harsh political oppression

and the imposition of a stricter control by the USSR, naturally figured as one of the most important injustices in need of correction.

In November 1991, the MPs passed a law suspending the statute of limitations for all crimes of murder, treason and aggravated assault not prosecuted for political reasons during the communist rule (Patacki, 1992). Most of these crimes had been committed by the suppressors of the 1956 revolt. The law was introduced by two MPs from the Hungarian Democratic Forum, Peter Takács and Zsolt Zetenyi. The passing of the law was marked by a fervent, emotionally charged debate. The fact that the law would have enabled the state to prosecute some of the round table participants was an important issue of contention. Legal concerns also came to the fore. The Criminal Code set the statute of limitations for murder at 20 years, for high treason at 15 years and for aggravated assault at 8 years (Patacky, 1992: 651). Lifting the statute of limitations violated the non–retroactivity principle. In response, the proponents of the law suggested that the violations of human rights by the previous regime had not been prosecuted for political reasons and hence, the statute of limitations had only started running after 1989. Other concerns were expressed about the definition of the offences. Some terms —such as “treason”— lent themselves to multiple interpretations and could have been used for political revanchism.

Because of all these factors, the Hungarian President, Árpád Göncz, referred the law to the Constitutional Court. Aware of the implications of such legislation for Hungary but also for the entire region, Göncz decided to defer to the country’s constitutional forum. A realist would see this decision as a strategic gesture meant to avoid political responsibility for such a law, especially when communists still permeated the institutional landscape. However, Göncz himself had been a dissident, so we might interpret his decision as the result of exemplary political judgment by a man who managed to distance himself from his own political biography and who wanted to ensure that the integrity of democracy did not get undermined by a hasty law violating its guiding principles.

Before analysing the decision, it is important to examine the status of the Hungarian Constitutional Court and the legitimacy it enjoyed at the time. The Court emanated from the decisions of the round table was the product of the politically negotiated transition. The law for the functioning of the courts had been agreed upon in the 1989 negotiations and had been passed by the last communist Parliament. The judges in the Court had been selected partly at the roundtable, partly by the newly elected Parliament.

The Court began to function in 1990 and, by the time the Takács–Zetenyi law was submitted for review, it had already established a record of independence and counter–majoritarianism. Thus, we can say that, due to the wide implications and the legally problematic assumptions of this law, the President purposely delegated the decision to a young Court, which had however been working as an active check on the first inexperienced democratic Parliament. The representativeness and the legitimacy enjoyed by the Court naturally weighed in favour of deferring to its opinion (Halmai and Scheppele, 1997: 159–160).

The President's petition was based on legality concerns: the principles of non–retroactivity, of predictability and certainty of law (11/1992 (III.5) AB h). Another concern was the vagueness of the law's terms. The Constitutional Court shared most of Göncz's concerns and, in a unanimous decision, struck down the first attempt to prosecute communist abuses. The Court used arguments against the vagueness and indeterminacy of the statutory language and emphatically proclaimed that the 1991 law disregarded the basic principles of the 1989 Constitution.

The judges decided to focus on the purely formal requirements of the *Rechtsstaat*. This was reflected in their attitude towards the proponents' emotional requests that moral and political discontinuity be affirmed with the previous regime. The change of system should not be separated from the requirements of a state under the rule of law, the constitutionalists argued. The old law

retained its validity, there was no distinction between "pre–Constitution" and "post–Constitution" law. No historically symbolic statements about the nature of the communist regime were made.

The judges chose the formal argument out of prudential concerns about the destabilising effects of such a bill but also because, being at the beginning of their mandate, they needed national and, most importantly, international recognition. The didactic message towards the outraged Parliamentarians was that discontinuity should be affirmed though a break with the old habit of violating the principles of the rule of law and not by selective justice. By dismissing the idea that justice required a sacrificing of legality, the Court was giving the indignant dissidents a lesson in equal respect for all. This position was vehemently contested and yet seemed the best approach under the volatile political circumstances of the transition. The Court wrote: "A state under the rule of law cannot be created by undermining the rule of law" (2086/A/1991/14, 1992: 633). Moral purges could not withstand the test of legality. Thus, the Court saw its historical mission as a watchdog for a limited conception of legitimacy equated with legality. A cautious concern for the rights of the potential defendants meant that, for the moment, Hungary had not yet come up with a legitimate way of engaging its past, no matter how legitimate the dissidents' resentments were.

While their judgment was applauded internationally for preventing scapegoatism, the decision could not bring the Court any domestic support. The next couple of years brought repeated attempts by the Parliament to suspend the statute of limitations. The first decision came across as a post–communist "original sin" (Czarnota, 2001), the sin of neutralising the past and failing to morally repudiate it. From the point of view of post–conflict, emotionally mobilised societies, courts appear to legitimise themselves and to capitalise public support —both for themselves and the political system— by drawing a thick line

between the present and the past[1]. On this account, the line the Hungarian Constitutional Court drew was not thick enough.

As a consequence, at the beginning of 1993, the Parliamentarians who drafted the 1991 law made use of another legal strategy to get around the Constitutional Court's decision: they voted for a so called "authoritative resolution" —an act which provided interpretive guidelines for an existing law— meant to exempt the years between 1944 and 1989 from the validity of the statute of limitations (Halmai and Scheppele, 1997: 164). The emotional need for recognition and rectification was there to stay.

This time, the review was requested by a number of opposition MPs. Again, the Court struck this document down on the basis of non–retroactivity concerns. In addition, it challenged the Parliament's choice of means, claiming that, instead of using problematic legal artifices they needed to enact a statute and be aware of how their decision would affect numerous citizens. The Court communicated to the Parliament that constitutional democracy, as well as their institutional position as representatives of the Hungarian people, demanded that they chose the appropriate means in legislation. The dissidents' thirst for satisfaction did not entitle them to by–pass the publicity requirement. Again, the pedagogical message was clear: no matter how entitled they were to their resentments, the legislative body could not violate democratic equality.

The third attempt to get justice done was a statute meant to amend the Criminal Procedure Act in order to make it compulsory for prosecutors to charge some criminals, even if the statute of limitations had expired. As expected, President Göncz again refused to sign this into law and deferred to the Constitutional Court. The judges were consistent in striking it down as unconstitutional, providing the same reasoning they did for the other previous attempt: the commitment to democracy cannot be violated in legislation or prosecution.

[1] See, for example, the kind of satisfaction that the Peruvian public derived from the resolution of Fujimori's trial in April 2009 (Bajak, 2009) or, as I will show further on in this article, the excitement surrounding the overturning of the Argentinean amnesty laws.

The dissidents only made progress by adopting the language of international legal standards. They also avoided vagueness by specifically referring to the 1956 events (Morvai, 1993). In order to enable the prosecution of those responsible for the suppression of the anti–communist revolt, the law "Concerning the Procedure in the Matter of Certain Criminal Offences During the 1956 October Revolution and Freedom Struggle" made use of the language of "crimes against humanity" and "genocide." This move could have been a strategic re–phrasing by a governing democratic coalition that did not rank well in the pre–election polls and that hoped to get some satisfaction before losing power.

For reasons already discussed, the President chose to send the law to the Constitutional Court for abstract review. This time, due to the valid use of the language of international law, the judges struck down only some parts of the law. In decision 53/1993 (X. 13) AB h, the judges addressed the Parliament and explained that they had to distinguish between crimes that did and crimes that did not count as crimes against humanity (Halmai and Scheppele, 1997: 167). In upholding those parts of the law that dealt with crimes committed during the 1956 revolt, the Court engaged in a detailed account of why such international standards had been created and why they were relevant for Hungary. From the text we can see that the Court clearly assumed the role of a guardian of law and engaged the young Parliament in an analysis of the requirements that needed to be met in view of the alignment with the community of democratic nations.

Thus, the Parliament had first to clearly distinguish between the real crimes against humanity and ordinary domestic crimes. The Court defined for the Parliament "crimes against humanity" as homicide committed on a massive scale and as part of a large regular attack. Not all crimes that the vehement Parliamentarians wanted to include under the umbrella of the 1993 law qualified as such. Through their insistence on precision, the Court instructed the MPs in the limits that equal respect placed on the actions of the state against all potential defendants. It advised the proponents of the law to revise it in view of these

corrections. Once again, the message of the Court was that the dissidents' institutional choices for dealing with the past violated democratic standards.

In this effort, the Constitutional Court was joined by the Supreme Court judges who dealt with the first appeals in concrete cases where the revised version of the 1993 law had been used by the prosecution. Unfortunately, the Parliament had not fully integrated the recommendations of the Constitutional Court and had failed to formulate the procedural aspects of the law. This led to conditions of legal uncertainty. Consequently, the Supreme Court judges did not want to take the responsibility for deciding these cases and asked for the abstract review of the modified version of the 1993 law. The Constitutional Court agreed with the reasoning of the Supreme Court and decided the law was unconstitutional on the basis of its procedural incompleteness (Morvai, 1993: 33–34). The Parliament was again asked to make a set of revisions so that concrete cases could finally be tried without violating the principle of equal respect.

From the judgments of the Supreme and Constitutional courts we can deduce an even stronger concern with procedural fairness once prosecutions became possible. Dealing with such serious offences needed special caution so as to avoid miscarriages of justice. Given the precarious position of young institutions, the international attention on the transition processes and the lack of experience with such processes, the high courts chose prudence and made use of all the possible safeguards in order to set Hungary in what they thought was the right direction. A concerted effort by the judges of different courts was meant to keep the polity away from abusive, emotionally motivated moral purges and to exemplify a concern with the rights of all interested parties. A series of subsequent exemplary judgments by the Hungarian judges explicitly provoked the enraged dissidents to reflect on what they wanted to do in the name of their otherwise correct evaluation of past injustices, and invited them to respect the commitments that they themselves had made to democracy. The resilience of the dissidents' moral hatred did not distract judges from their forma-

tive task. The decisions feature clear explanations why not all forms of engaging the past were compatible with democratic equal respect and concern for all. Legality was not sacrificed for the sake of an unreflective search for emotional satisfaction.

3) SOUTH AFRICA

Without the amnesties associated with the political negotiations that led to the end of Apartheid, "we would have been overwhelmed by the bloodbath that virtually everyone predicted as the inevitable ending for South Africa" (TRC, 1998: 22). One of the landmarks of the negotiated transition to democracy was the "Promotion of National Unity and Reconciliation Act" instituting the Truth and Reconciliation Commission (TRC), signed by the President of the republic on the 19th of July 1995. The purpose of the commission was to look into the nature, causes and extent of human rights violations committed during the Apartheid regime. Most controversially, the document stipulated that amnesty will be awarded to persons who make full disclosure of their political crimes (TRC, 1998).

In order to carry out this work, three committees were created: a "Committee on Human Rights," dealing with gross violations, a "Committee on Reparation and Rehabilitation," meant to gather information and to make recommendations for reparations to the President, and a "Committee on Amnesty," having the power to grant amnesties for violations of human rights motivated politically and on condition of full disclosure of the truth by applicants.

Fervent debate took place around the morality, the prudence and the legal status of such an institutional response to a past of *symmetrical barbarism* (Bhargava, 2000). Numerous victims saw the establishment of the TRC as robbing them of justice. Empirical research in South Africa reveals the dissatisfaction that many felt regarding the subordination of retributive justice to reconcilia-

tion (Bell and Ntsebeza, 2001; Gibson, 2002). I shall not engage here in an analysis of the debates around the TRC. This section is concerned with one less talked about event in South Africa's transitional saga, namely the challenge to the constitutionality of the TRC initiated by the families of some prominent resisters to the Apartheid regime. Given our interest in the way the judiciary can engage citizens' negative emotions within transformational moments, I shall focus on the Constitutional Court's arguments in the "Azanian Peoples Organization (AZAPO) and others v President of the Republic of South Africa and others", case CCT 17/96 of 25 July 1996.

The plaintiffs were the families of black resistance legend Steven Biko, killed in police custody in 1976, of lawyer Griffiths Mxenge, killed by security policemen in 1981, and of African National Congress activist Fabian Ribeiro, murdered in 1986 (Saunders, 1996). The relatives could not reconcile themselves to the idea of civil and criminal indemnity for the brutal murders of their beloved. Their lawyers claimed that the amnesty obliterated rights to justice, be it in the form of criminal prosecutions or civil compensation. Therefore, they challenged the constitutionality of section 20(7) of the "Promotion of National Unity and Reconciliation Act", which provided that no person, organization or the state should be criminally or civilly liable for any act or omission that amounted to human rights violations committed for "political reasons". The plaintiffs claimed that section 20(7) was in conflict with Section 22 of the Constitution, which stipulated that "[e]very person shall have the right to have justiciable disputes settled by a Court of law or, where appropriate, another independent or impartial forum" (CCT 16/96). The constitutional status of the Epilogue to the Constitution —the text enabling the Parliament to pass amnesty provisions in the TRC statute— was contested. The plaintiffs argued that the Epilogue was not part of the constitutional text and, therefore, was not covered by section 33(2), outlining the rights overriding clauses.

Desmond Tutu and the African National Congress did not like the news of this challenge and labelled the legal action as a self–righteous attempt to undermine reconciliation efforts. In contrast, the judgment of the Constitutional Court showed a better and more sensitive understanding of the emotional costs victims had to pay in exchange for reconciliation. The Court carefully legitimised the moral outrage of the victims' relatives by recognising their validity as responses to suffering and uncertainty over the fate of their beloved. Throughout the text of the decision, Judge Mahomed expressed deep concern for the emotional strain of the population, both before and after the negotiated transition. Nevertheless, the Court ruled in support of the Parliament's decision to institute a TRC with amnesty powers. Although judges claimed that their only concern was to see whether Section 20(7) of the TRC statute was constitutional or not, they engaged in a multilayered argument as to why the TRC was the optimal choice for the post–Apartheid political circumstances. In retrospect, we can say that, understanding the emotional hardship that the very existence of the TRC created for victims and their families, as well as the novelty of such a mechanism for dealing with a past of symmetrical barbarism, judges provided an elaborate defence of the legislature's decision. The kind of representation and voice that the political elites envisaged for the victims was going to take a new, non–retributive form. The task of the Court was to persuade the victimised of the validity of this alternative form of recognition, just as valuable as that enabled by criminal justice and civil compensation.

The introduction to the decision retells the story of the unsavoury past and its legacies for the present. The oppressiveness of the regime is juxtposed to the increased levels of anger in the subordinated black population. The difficulty of building a democracy on the ruins of the Apartheid state is acknowledged. The "deep emotions", the "indefensible inequities", and the impossibility of reversing the past required that society turn its back on desires for retribution. The Epilogue of the Constitution is taken as a testimony of the will of the people

—through their representatives— to look forward to peace, unity, reconciliation and reconstruction (CCT, 16/97: 3–4). It is on the basis of this declaration of intention in the Epilogue that the Parliament legislated the statute creating the TRC. In this sense, the Court emphasises, the TRC was the product of a democratic will and hence, legitimate. With great care and by referencing section 232(4) of the Constitution, the Court explained how the Epilogue, under which the TRC statute had been legislated, was as much a part of the constitution as any other section. As such, it correctly entitled the Parliament to exercise amnesty powers for both civil and criminal offences as a means to move beyond hatred and towards a future of unity and mutual understanding.

Next, the Court engaged in a long discourse about the tragic dimension of the South African transition and a defence of the Parliament's choice of institutional means to deal with the past. The discourse showed respect for the plaintiffs' anger and sought to acknowledge the legitimacy of such emotions, at the same time explaining why the Court had to stand by the Parliament's decision. Criminal and civil liability for individual wrongdoers —as well as civil liability for organisations and the state— was subordinated to the greater social good of finding the truth for individuals and reconciliation for society. A different kind of recognition was to ensue from the proceedings of the TRC: the recognition of the victims' right to know the truth and to forgive. Let us now reconstruct the arguments that the Court prepared for the outraged relatives of Apartheid resisters.

Judge Mahomed first dealt with the issue of immunity from criminal prosecutions. He began by acknowledging the emotional frustration of a victim's family when amnesty got granted to their relative's killers: "Every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity" (CCT, 16/97: 11). Since the abuses took place a long time ago and since the previous regime was based on lies and secrecy, there was no reliable data to ensure an

accurate establishment of responsibility. As a consequence, amnesty was a safer bet from the point of view of justice. A democratic concern with the risk of abusive trials recommended the commission. In addition, a TRC where survivors could meet and share stories was more likely to give voice to all sides and hopefully lead to reconciliation. However, without the incentive of freedom from criminal prosecutions, relatives of victims would never get the truth about the lost ones, while the victimisers themselves would have to carry the guilt and anxiety associated with culpability.

Disregarding some problematic psychological assumptions about the relationship between truth, healing and the anxiety that human rights violators experience, the Court expressed here a clear concern with the emotional responses to human rights violations. More importantly, a very acute understanding of the importance of a stable emotional environment for the furthering of political and social reform transpired. Had amnesty not been proclaimed, prosecutions would have been selective, information would not have been readily available and truth would not have surfaced. Negative emotions would have remained alive and would have prevented the crossing of the historical bridge towards a brighter future.

However, says the Court, we must not forget that the amnesty was not unconditional. It was only upon full disclosure of the truth and only for politically motivated crimes that immunity was granted. The Committee for Amnesty was to closely follow the criteria for identifying politically motivated actions. In addition, the Court emphasised the fairness of the amnesty: this was not a Latin–American style, self–proclaimed amnesty by a military *junta* losing power, but a democratically chosen transitional measure.

Once the lack of a domestic obligation to prosecute had been dismissed, the Court proceeded to the claim that international law required that gross human rights abuses be prosecuted. The Court responded by showing how international legal instruments could not become valid law for South Africa until

made so through legislative enactment. Since that had not happened yet, there was no international duty to prosecute. In addition, the type of conflict that had plagued the South African society could not be subsumed to the kind of contexts the Geneva Conventions dealt with (CCT, 17/96: 26–31).

The next step was the justification of the annulment of civil liability for individual wrongdoers. By way of a semantic analysis of the term ”amnesty”, the Court explained why it could not be limited to criminal liabilities. It would have been counterproductive to proclaim amnesty for one kind of offences only. Horizontal consistency required such an approach.

The issue of the civil liability of the state raised the bar of justification higher. In the end, the Court got around this problem by pointing to the scarcity of resources and the need to channel them into national reconstruction policies. Lastly, the immunity from civil liability by organisations to which the victimisers belonged was redeemed by pointing to the fact that it was due to the efforts of these organisations —in negotiation with the alternative elites— which democracy came about. Their contribution to democracy required that they be let free of civil obligations.

In conclusion, Judge Mahomed expressed the Court’s conviction that “the Constitution authorised and contemplated an ‘amnesty’ in its most comprehensive and generous meaning so as to enhance and optimise the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future” (CCT, 17/97: 46). The Court thus fully embraced the judgment of the lawmakers and, in its turn, decided to uphold the constitutionality of the TRC statute.

Given the interest of this article, it is important to stress the Court’s attention to a certain dimension of legal claims: the affects. The text shows the judges understood the importance of a stable emotional climate of the transition, as well as a sober awareness of the material and political constraints that

limited the prospects of redress. The deep fractures in the South African society and their emotional expression in hatred and resentment were a constant theme in the Courts' arguments. The judges acknowledged that such emotions were legitimate, but tried to persuade the public that recognition did not necessarily have to take the form of retribution. To the contrary, finding the truth and being given voice within the TRC constituted an alternative, yet just as valid, form of institutional recognition. The TRC provided a compensatory venue for these feelings to be expressed in public. A rather strong, and some might say unfounded, belief was expressed that social catharsis would ensue from encounters between victims and victimisers. But, under the circumstances, it is not surprising that the judges reflectively endorsed the decision of the Parliament. Through their arguments, they tried to engage the judgments underlying the victims and relatives' negative feelings in a way that they thought was most conducive to the strengthening of the South African democracy: asking them to accept the political experiment in truth and reconciliation that the commission embodied.

Given the exclusion of retribution from the institutional arrangement and the emotional frustration, the complainants were disappointed with the decision of the Court. The Azanian People's Organisation claimed that "[I]t takes away a fundamental right of the people to apply to the courts for adjudication. We think this has important consequences for democracy in this country" (Saunders, 1996). In spite of the Court's commendable attempt to talk to their emotions, the attempt to appease resentment and indignation by truth rather than retribution, and their argument as to the inevitably selective and abusive form that criminal justice would take, did not meet the South Africans' expectations. The inevitable institutional and normative limitations of the TRC, its problematic relationship with the Prosecutorial Office, the lack of a holistic evaluation of the Apartheid regime, and their faulty attendance to the victims' needs (Graybill, 1998) left the

immediate families of the victims, as well as large segments of the population, dissatisfied and angry.

In the Biko case, the dissatisfaction was later fuelled by the fact that, in spite of the TRC's rejection of amnesty applications by Biko's killers, trials were not held. The official reason was the lack of sufficient evidence. A long time after the denial of criminal justice, Biko's son was still writing of the bitter taste that negotiated settlements had for victims and their families: "White South Africans must reckon with history for what it is and not for what they wish it to have been. We can then choose to roll up our sleeves, and occupy our place as citizens of significance who get on with the business of rebuilding South Africa or we can, once more, palm this responsibility off to our children. If we choose the latter, then I am afraid my children will be making these very points many years from now. Only then it may not be through the power of the pen but 'by any means necessary'" (Biko, 2006).

As the statement above shows, there is a chance that, left unvindicated, the disappointment and lack of trust in institutions will reproduce themselves across generations. This is not true only for the case of Biko's son. Empirical studies have shown that the post–Apartheid failures of justice contributed —though they do not fully explain— to the widespread culture of impunity and violence in today's South Africa[2]. The promise of the Constitutional Court was left empty by the judiciary's failure to prosecute individuals whose amnesty requests had been denied by the TRC.

To sum up, while the Court did its best to acknowledge the victims' demands and to persuade them of the merits of a truth and reconciliation forum, the novelty of the institutional experiment and the subsequent failures of the justice system left many dissatisfied. The demand that they be content with knowing the truth and work for national reconciliation did not provide all victims

[2] For such an argument see Dempster, 2002 and Nagy, 2004. Resilient systemic economic inequalities and racial tensions are probably the main factors behind heightened levels of violence.

with the kind of recognition they would have found persuasive and that would have made them support the young democratic regime. It was inevitable that not everybody would accept justice as recognition as an alternative to retributive justice (du Toit, 2000). When even the modicum of retributive justice allowed by the transitional arrangement failed to ensue on the recommendations of the TRC, resentments and indignation remained unappeased. The culture of impunity emerging from the failure to deliver the kind of justice the public appreciated left hatreds alive and led to the increased use of violence for solving conflicts within the South African society (Dempster, 2002 and Nagy, 2004).

4) ARGENTINA

The end of the Argentinean military regime only came with the defeat in the Falkland Islands war at the beginning of the 1980s. During the military rule, the Supreme Court of the land had repeatedly petitioned the leaders to clarify the status of missing individuals, but was repeatedly snubbed by a *junta* claiming not to have any knowledge of what was happening (Jacobson, 2007). Just before losing power, the military passed a self–amnesty law, the 22924 National Pacification Law stipulating a blanket amnesty for all subversive and counter–subversive acts that had taken place between May 25, 1973 and June 17, 1982. In this way, the officers exited power ensuring that human rights abuses —the most notorious of which were the "disappearances" of a large number of Argentinean citizens suspected of leftist, counter–regime activities— would not be prosecuted.

The Argentinean Truth Commission (CONADEP), established in December 1983 by President Alfonsín, reported 8,960 victims of "disappearance" (HRW, 2001). Immediately upon taking power, the President argued against the constitutionality of the National Pacification Law, which eventually got nullified. As a consequence, the prosecution of the top military and of the left–wing guerrilla fighters who had committed massive human rights abuses began.

In order to appease the military, the highest military Court was charged with the task of prosecution. But, when it refused to hear cases, the proceedings were transferred to civil courts (Nino, 1996). In addition, the President asked that the "due obedience" defence be considered valid. This meant that lower ranks could defend themselves on grounds that they had been merely observing orders from their superiors. Due to the fragile balance of power after 1983, Alfonsín and his team of legal experts opted for prudence and restraint in the quest for justice. His intention was to have an exemplary trial of the top leadership of the army in order to appease the social demand for justice, while not making transitional justice measure look like a targeted attack on the institution of the army.

The 1985 trial of the *junta* leaders was met with great public excitement (Nino, 1996). Generals Videla and Massera got life time in prison, Agosti four and a half years, Viola, seventeen years, Lambruschini, eight years. Graffigna[3] and all three members of the third military *junta* were acquitted (Di Paolantonio, 2004). The trial's shortcoming was the not–so–clear stance on "due obedience." This ambiguity opened the way for further prosecutions. Naturally, the military closed ranks and started threatening to disrupt the already fragile peace (Di Paolantonio, 2004). In response, the President and his aides prudently prepared two laws meant to limit the impact of prosecutions. The first was the "Full Stop Law" (23492 Punto Final, 1986), which gave courts and prosecutors 60 days to press charges. Unexpectedly, the courts proved very diligent in prosecuting numerous cases before the term expired working even during the vacation period. As a consequence, the military organised a serious rebellion, which pushed the passing of the "Due Obedience Law" (23521 Obediencia Debida, 1987), limiting responsibility only to the highest ranks. This latter law stopped proceedings for all the trials against middle rank officers. The Supreme Court

[3] Videla, Massera and Agosti were the members of the first military *junta* that took power after deposing President Isabel Perón in 1976. General Viola replaced Videla for a few months in 1981 as head of the *junta*. Admiral Lambruschini took over from Massera as the chief of the navy. Garrafigna was commander of the air force after Agosti.

upheld the constitutionality of the law, challenged by human rights groups. In this way, the march to justice had been halted. The final blow for victims and their families came shortly after in the form of President Menem's pardon of all officers already convicted for crimes committed during the "dirty war."

From a social–emotional point of view, these events pushed the Argentinean society in two directions. On the one hand, widespread apathy, a feeling of disempowerment and heightened tolerance towards the former oppressors who continued to live next to their victims constituted a pathological feature of the Argentinean transition (Kaiser, 2002). On the other hand, mobilised civil society groups, especially around the relatives of the murdered and "disappeared", began to put increased pressure on the subsequent administrations. Political mourning became a new form of democratic participation and so were marches against impunity. Street demonstrations, litigation and various public rituals marked public resistance and abhorrence towards the unjust laws (Humphrey and Valdeverde, 2007).

Sometimes groups of activists took justice into their own hand and engaged in public rituals of disclosure, humiliation and stigmatisation of torturers and victimisers. The so–called *eschraches* brought together the children of the disappeared. The rituals were meant to shake the conscience of the Argentinean society and rally citizens in an effort to unmask and ostracise the hundreds of assassins living freely under the shelter of the amnesty laws and Menem's pardons. The demonstrators would gather in front of the torturer's house, name him as a torturer, warn his neighbours about his living there, distribute pamphlets, play music, present improvised theatre scenes, make lots of noise, write denunciations on the sidewalks and walls of the house and symbolically throw red paint on the doorsteps of the victimiser's lodging. Failure by the state to address the resentment and indignation at the impunity of human rights violators pushed citizens into symbolic stigmatising acts of punishment, shaming and public humiliation, all in the hope of drawing both the state's and the apathetic

citizens' attention to an unrectified past. The passing of time did not diminish the strength of the call for justice. Its anchoring into the emotions of the victims' relatives did not allow resignation to settle in (Humphrey and Valdeverde, 2007: 180). In this way, human rights groups drew a signal of alarm about the legitimacy deficits that the Argentinean democracy suffered from.

The judiciary eventually took up the provocation that the victims' associations launched. The legal loophole that allowed the first breakthrough was the fact that neither the amnesty laws, nor Menem's pardons covered crimes against babies. After some failed attempts to find the truth about the disappeared in the late 1990s (Abregŭ, 2000), progress came with the prosecution of cases dealing with the theft of babies from victims of torture. The military systematically took the children away from their prisoners and subsequently changed their identity in view of their adoption by childless families among their ranks. Once the systematic practice of stealing babies was uncovered, prosecutions of officers formerly pardoned by President Menem began. In between 1998 and 1999 a number of high officers were indicted. Pressure from the relatives of the disappeared increased by the day.

It was during the investigation of a case of a kidnapped couple and their baby that one of the most important Court decisions for the fate of justice in Argentina was passed. On March 6, 2001, Federal Judge Gabriel Cavallo of the Buenos Aires Federal Court of Appeal ruled that the "Full Stop" and "Due Obedience" laws were unconstitutional. An *amicus curiae* brief was submitted by The Centre for Legal and Social Studies on behalf of the Grandmothers of the Disappeared. The two amnesty laws were found to be in conflict with Articles 29 and 118 of the Constitution, as well as with international and regional human rights documents[4]. As to Article 118 judge Cavallo explained how the crimes

[4] I owe the summary of the 188 pages decision to the Human Rights Watch Report, "Argentina" and to the CELS report, "Pedido de inconstitucionalidad de las leyes de punto final y obediencia debida – Caso Poblete", 1st of November 2007, available on-line at http://www.cels.org.ar/documentos/index.php?info=detalleDoc&ids=3&lang=es&ss=&idc=592, accessed, November 20, 2008.

committed by the *junta* were serious enough to be considered "crimes against humanity" and, as such, subject to universal jurisdiction and benefiting from no statute of limitations. Judge Cavallo thus restarted the struggle against impunity in Argentina. He was shortly joined by other federal judges who reached similar conclusions in the cases they heard. In response to the judicial initiative and the public mobilisation, in 2003 the Parliament passed a law invalidating the amnesty protections (25779, 2003). In order for this repudiation of the law to become valid, the sanction of the Supreme Court was needed.

The Supreme's Court's invalidation of the Amnesty laws was delayed until 2005. In its ruling (S1767, 2005), the Court made reference to international and regional human rights documents that had priority over domestic legislation, as well as the precedent of the *Barrios Altos* case decided by the Inter–American Court of Human Rights (Jacobson, 2007). Like in the *Barrios Altos* precedent, said the Court, the Argentinean impunity laws were *ad hoc* and violated the state's internationally sanctioned duty to prosecute (CELS, 2005). The actions of the military violated the human being in her humanity and were perpetrated by state agents in the exercise of their functions. As such, they qualified for the status of "crimes against humanity", crimes recognised by international law at the time when the Argentinean atrocities were committed. Consequently, wrote the Court, there was no violation of the retroactivity requirement of *nulla poena sine lege*.

Next the Court examined whether the 2003 law passed by the Argentinean legislature violated the principle of the "separation of powers." The judges claimed that the Parliament was entitled to issue declarations of principles with symbolic political content. The passing of the law did not constitute an infringement on the judicial power. The repealing of the laws thus marked the beginning of prosecutions. Soon the courts were busy trying officers for various violations of human rights. In this way, the longing for justice that victims kept mani-

festing in various forms in the public sphere was getting its due attention from the state.

There are a few elements that make the Argentinean case interesting for this paper. First, it is important to see how, given the fragile equilibrium of forces after 1983, the democratic forces had to choose limited measures in favour of justice and eventually postpone the quest for rectification. The commitment to democratic norms had not been betrayed by the Argentinean institutions and public, it just needed to wait for propitious conditions. Second, the emotional mobilisation of the victim's families and of other forces within the civil society points to a healthy understanding of the relationship between citizens and the state which, even if not pervasive, served as a corrective force during the transition. The political use of emotions —grief, anger, indignation, resentment— was successful in bringing home the lesson that the past is an important part of the national narrative and cannot be ignored.

Once the conditions changed, the state in general and the judiciary in particular recognised the legitimacy of the societal cry for justice and acted in order to correct past wrongs. Looking back and realising the importance of addressing wrongs committed by the state's agents, Judge Cavallo reflectively judged that it was time to end structural impunity and begin treating the victims' families with the due respect and concern. It was time the victimisers were taken out of the safe heaven that amnesty laws provided, it was high time the victims and their families' negative feelings were given proper recognition by the state. His decision signalled that a polity's violation of the principle of equal concern and respect made it a lesser democracy.

5) LESSONS TO BE LEARNT

The cases examined illustrate how the emotional atmosphere of adjudication can complicate the task of the judges reviewing legislation meant to en-

able transitional justice. We can see that the high courts' decisions heavily depended on their level of legitimacy, the nature of the former regime, the level of mobilisation of the civil society, the actors who passed transitional justice bills and those who initiated the review process. Yet all three courts were faced with the negative emotions of the proponents or objectors to these bills and with the task of engaging these emotions without undermining the integrity and stability of the new democratic order. Comparatively, the South African Court proved to be the most concerned with recognising the validity of negative affect, the Hungarian was most concerned with avoiding emotionally motivated abuses, while the Argentinean judges were pushed to act in response to indignant claims for redress.

The Hungarian Court decided to emphatically communicate how democracies deal with the agents of an unsavoury past. The fear of emotionally motivated political revanchism made the Hungarian Court engage in a sustained pedagogical effort with the enraged Parliament. In doing so, it tried to act as a guardian of democratic equal concern for all citizens, be they dissidents or oppressors. The judgment was naturally framed by the features of the political and historical context. The Court was interested in getting international recognition and attempted to lock in human rights standards. These objectives could not have been achieved if the resentful and indignant dissidents had been given *carte blanche*. Therefore, ample arguments were dedicated to persuading the proponents of the law to accept democratically acceptable means of engaging with a painful past. While partially for pure strategic reasons, the judges decided to only allow for the prosecution of the most abhorrent crimes against humanity, sanctioned by the international human rights regimes. They thus managed to prevent abusive prosecutions of former communists. However, its lack of care for the recognition needs of the victims diminished the impact that this decision could have had in re–establishing equality. An asymmetrical attention to the

interests of the potential defendants left many anti–communist dissidents unsatisfied.

Among the courts examined in this paper, the South African Constitutional Court showed the greatest concern with the emotional dimension of transition. The arguments the judges formulated in upholding the constitutionality of the TRC display both an acute sensitivity to the emotional atmosphere of the transition and a sense of realism as to how difficult it would be to satisfy the public's outrage at the Parliament's chosen mechanism of transitional justice. Although they did everything they could to gain the challengers to the side of the TRC, their arguments failed to change the addressees' emotional assessment of the situation. In spite of the Court's laudable, exemplary judgment, the lack of precedent for the institutional experiment with the TRC, coupled with the subsequent failure of criminal courts to follow up on the Commission's recommendations, placed some above the law and rejected otherwise legitimate claims for vindication. Negative emotions reproduced themselves in time and keep emerging in public discourses. Yet the imperfect form of TJ in South Africa is not the only explanatory variable. The nature, scale and duration of the Apartheid regime, as well as the resilient economic and racial inequalities can help us understand the violent realities of this society today.

Federal judges acted as a transformative force within a context in which severe impunity stained the Argentinean democracy. Displaying political and moral leadership, they ended the institutional complacency over the morally problematic settlement of 1983. Benefiting from the support of human rights and victims' groups, the courts provoked the elective institutions and the public to reflect on the internal contradictions of their incomplete democracy. In response to the courts' challenge, the legislative and the highest Court of the land nullified the abhorrent laws that had protected violators for long, painful years. In this way, the Argentinean democracy came one step closer to a social reality that corresponded to the guiding principles of equal concern and respect for all citi-

zens. The corrective force of victims and their families' resentment and indignation made its contribution to the cause of democracy and continues to do so today in response to injustices that emerged long after the transition.

The analysis of these cases strengthens the idea that successfully delivering the democratically right decision implies recognising the legitimacy of emotional responses to injustice but also launching a challenge to individuals to reflect on the kind of actions that emotions motivate. While resentment and indignation as responses to injustice cannot be suppressed without reproducing the injustice, how they get expressed in public needs to be a permanent concern of democratic institutions. Different courts will engage emotions differently, depending on the variables constraining and enabling judgment. This paper will have hopefully showcased various attempts by the judiciary to engage with the complex emotional environment of their work in transition.

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Protocolo para citar este texto: Mihai, M., 2010, "Judicial review and transitional justice: reflective judgment in three contexts", en *Papeles del CEIC*, vol. 2010/2, nº 60, CEIC (Centro de Estudios sobre la Identidad Colectiva), Universidad del País Vasco, http://www.identidadcolectiva.es/pdf/60.pdf

Fecha de recepción del texto: julio 2010
Fecha de evaluación del texto: agosto 2010
Fecha de publicación del texto: septiembre 2010