

Transitional Justice and the Quality of Democracy

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Transitional Justice and the Quality of Democracy

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Transitional Justice is a long-term process which seeks to address severe human rights abuses of the past through measures such as trials, commissions of inquiry, memorials, apologies, reforms of the legal or security sector, school textbook reforms, and reconciliation projects. These measures are usually applied by governments, but can also be initiated by civil society groups, such as victim groups, or the international community, for example the European Union or the UNHCR. Transitional justice measures are seen as catalysts for coming to terms with the past and establishing new, stable, and often democratic societies. As such, the measures are linked to the performance and efficacy of democratic institutions in the context of their accountability and responsiveness, transparency, and level of citizen participation. Thus, transitional justice is a process that aims to reconcile divided and conflict-torn societies by re-establishing (democratic) institutions. These measures can be catalysts to leverage institutional performance.

This article looks at the relationship between transitional justice measures and the quality of democracy. According to the definition used by UN High Commissioner for Human Rights this process consists of both judicial and non-judicial mechanisms, including prosecution initiatives, reparations, truth-seeking, institutional reform, or a combination of these measures. Whatever combination is chosen must be in conformity with international legal standards, including international human rights and state obligations to protect and promote them. The International Center for Transitional Justice (ICTJ) defines transitional justice as an approach seeking to achieve justice by a set of judicial and non-judicial measures implemented in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, lustrations, memorials, and various kinds of institutional reforms.

In this context, transitional justice measures are seen over a period of time as catalysts to enhance democratic performance by increasing accountability, transparency, or participation of, among, and with democratic institutions, and consequently strengthening and legitimizing them. Never-

theless, these measures can also be misused and carried out by political leaders or interest groups with a bias or political interest. This can, in return, hamper or weaken the performance of democratic institutions through corruption, victor's justice, or trials which privilege side one over the other. I will link these dimensions and explore the possible impact that different transitional justice measures have on democracy.

1. Transitional Justice and Democracy

The main objectives of transitional justice measures are to attain peace and societal stability within a conflict-torn society through means of justice and truth. In order to do so, the country's political and bureaucratic institutions must guarantee a basic level of accountability, transparency, and free participation. When and how to apply these mechanisms depends on the context of the conflict and on the post-conflict situation. For example, seeking justification for war crimes is a central concern in war-torn societies shortly after the conflict has ended, whereas a focus on investigating the collaborative communist elite has been the focal point in post-authoritarian states in Eastern Europe over a longer period of time. Ultimately,

transitional justice measures aim to support governmental efforts to delegitimize the previous regime and political elite while legitimizing and strengthening the new regime (Priban, Roberts, and Young 2003). I focus on both parallel processes.

Recent studies have shown that when transitional justice measures are applied separately, rather than in combination with other measures or in a set, they have little impact. A combination of transitional justice measures applied over an extended period, as recommended by the UN (ten years or a generation and longer), are the most likely to impact on the quality of democratic processes and institutional performance (Van der Merwe, Baxter, and Chapman 2009; Thoms, Ron, and Paris 2010). Moreover, it is important to note that not all measures are suitable to be applied at any given time, for instance directly after a conflict has ended.

Quality of democracy is an emerging sub-field of democracy studies introduced by Morlino and IDEA in the late 1990s (Diamond and Morlino 2005). Assessment of the quality of democratic institutions focuses accountability, transparency, and participation (good governance principles) and how these principles are interlinked with measures of transitional justice (Graham, Amos, and Plumptre 2003).

Therefore, in order to assess the quality of democracy with respect to transitional justice, it is necessary to look at the reactions of political and civic institutions, organizations, and actors such as lawyers, policy makers, and civil society groups involved in the long-term process of democratization as well as the process of transitional justice. Government (executive), parliament (legislative), and the judiciary, as well as the electorate and civil society, interact through these processes and transitional justice measures can catalyze their interests and interaction with citizens.

1.1. Inter-linkage between Transitional Justice and Democratic Institutions

When we assess transitional justice measures or “tools,” alongside the principles that indicate the quality of democracy and its institutions, such as accountability through

responsiveness and transparency or civic trust through participation, we look for certain criteria such as trust through civic interaction with democratic institutions and the application of the rule of law through the judiciary. The conversion of these standards into policies can help determine to what extent transitional justice measures enact legal reforms to punish or purge perpetrators, compensate survivors, and acknowledge victims, bystanders, and society at large. To measure the link between transitional justice measures and quality of democracy we look at the level of accountability, for example government responsiveness to the claims and needs of citizens, victims, or perpetrators for compensation, reparation or fair trials. To identify the level of transparency, we look at the level of compliance with international human rights law, for example equity rights, during trials or vetting procedures. The level of participation and engagement by citizens and civil society in the decision-making process can indicate the level of civic trust in democratic institutions. Overall, it is the level of accountability or responsiveness of governmental institutions towards citizens’ and other international demands that indicates whether democratic institutions are performing well. The level of citizens’ civic trust and engagement also indicates the level of legitimacy of democratic institutions and their actors (Mayer-Rickh and Greiff 2007, 501). Transitional justice measures, such as commissions of inquiry, vetting procedures, trials, or memorials, can serve as a catalysts to channel such claims and respond to public pressure. The same applies when inaugurating a memorial, issuing laws on lustration, or setting up trials: all these measures can serve as tools to leverage democratic performance. This can increase the level of effective governance and thus the quality of democracy, for example if citizen-driven pressure persuades the government to respond by holding an open parliamentary debate about past injustice, changing laws, or engaging more of civil society in the democratic process.

By and large, we have seen governments in Germany, Chile, South Korea, and South Africa use different measures to shape their democratic institutions. Issues of past wrongdoing often come onto the political agenda during election processes or at national anniversaries, for example German or South Korean commemorations of the end of World

War II or in post-Apartheid South Africa. During such commemorations and election campaigns, political actors and stakeholders reference the past and often call for more or different transitional justice measures to deal with it. By doing so, they make concessions to dealing with the past, and open doors for first, albeit often singular transitional justice measures. Nonetheless, such concessions indicate that the past has a direct link to present political performance or culture. Some countries, like Germany, Spain, or Argentina amnestied perpetrators to gratify a certain constituency and electorate during transition. Amnesty laws are seen as a transitional justice measure of last resort. They can however, be seen as a stabilizing measure immediately after the end of dictatorship or war, as was the case in post-Franco Spain in 1976 and 1977 or in post-war Germany after 1949. The aim of amnesties is to satisfy former political elites and prevent them returning to power through military or violent means (Roehrig 2009; Frei 2002; Rigby 2000). Thus, amnesty laws are most likely to be passed if there is a real threat by the former elite – often militant – to seek power again soon after the conflict or regime has ended. Although amnesties do not necessarily hamper transitional justice processes, they can lead to a culture of impunity that in the long run makes a further transitional justice process impossible. But amnesty laws can also be overruled by constitutional court decisions, presidential decrees, or referendums, as occurred in some Latin American countries. Unsurprisingly, even decades after the conflict has ended, not all societies feel ready to abolish amnesty laws, fearing acts of vengeance or other repercussions by former perpetrators, for example in Turkey after 1980. Others, like Spain, simply fear social repercussions in society at large, if the glorious mystery of their former state leader, General Franco, and his constituency and supporters (of which many have remained in powerful positions as judges or in ministries) were to be demystified.

During early transition processes and democratic institution-building, vote-winning majorities usually dominate the political and economic discourse in a liberal democracy. These majorities are not necessarily in favor of transitional justice measures, as was seen in many post-communist countries. In consensual democracies there is a greater likelihood that victim groups will be included in the decision-

making and democratization process at an earlier stage (Lijphart 1999). One of the reasons why the first years of transition challenge both transitional justice and democracy measures is that many of those actors or new political elites who appear as fully-fledged democrats overnight actually have a long anti-democratic past, having supported the previous violent or autocratic regime, and consequently fear retributive measures. Obviously they have little interest in starting a transitional justice process to which they themselves might be subject, sooner or later. Liberal democratic concepts aim to privilege majority opinions in parliament and in legislative power structures. For societies in transition, this can mean that citizens vote for the previous elites who are the most outspoken: they know the “political game,” possess the largest resources for campaigning, and have an existing relationship with citizens in which voters “know what they are getting.” This is a common phenomenon in transitional societies, even if it means electing those who were largely responsible for previous atrocities, injustices, and conflict. Other new political actors, sometimes victims of the previous regime or marginalized political groups, are often inexperienced in public campaigning and have little or no governance record. During ruptured transition processes, new governments oppose the inclusion of old elites and therefore advocate punitive transitional justice measures, as in Tunisia, which can lead to victor’s justice practices. In pacted transitions like in Spain, where old and new political elites govern side by side, transitional justice measures are more reluctantly applied and amnesties favored over retributive measures. Consequently, the composition of the new political elites or actors will predict whether, when, and why transitional justice measures are applied. A thoughtful combination of old and new elites is more likely to succeed than a complete shift in political leadership. Political institutions in consensual democracies focus more on citizens’ participation and inclusion, from which minorities (such as victim groups) benefit. Moreover, consensual democracies emphasize social justice, distribution of resources, long-term peace, and the common well-being of society (McGann 2006, 177). Hence, consensual democracies are more responsive to their citizens’ demands and claims than liberal ones, since the latter rely more on the rule of law.

1.2. Timing of Transitional Justice in Democracies

The impact of transitional justice measures largely depends on how political elites channel processes and deal with the past, but there is no set guide on when to start the process. What is certain is that where citizens' claims exist, executive and legislative power should be responsive, as this will leverage institutional legitimacy and stability. The resulting quality of democracy also depends on how inclusive the process is. In this respect, Hazan points out that in conflict-driven societies governments should first develop symbolic bonding systems between institutions and citizens without denying the past (Hazan 2006, 46–47). One must be mindful that memory and remembrance are dynamic processes that should also permit forgetting. Equally, political actors should be aware that each generation reinterprets the events of the past. The first post-conflict generation, twenty to twenty-five years after the transition starts, is usually the first that is not afraid to institute thorough transitional justice measures. Needless to say, much of this early process depends on political leadership managing these reforms and institutions. Interestingly, we observe that after one generation, or twenty years into the democratic process, a new political generation, free from fear and responsibility for the past, raises stronger demands to come to terms with the past. This is also the time when in democratic societies at least a minimum of international human rights standards have been integrated into domestic legislation, a shift in political power has taken place through peaceful elections, and institutions have been stabilized to a certain extent. This is a period where one is most likely to see whether transitional justice measures, such as trials or vetting procedures, have impacted these societies and led to more effective institutional reforms, for example changing military security laws into more liberal ones as was the case in West Germany in the 1970s, twenty-five years after the country turned formally to democracy. Hence, it often takes at least a decade or two after the end of the abusive regime before all formal mechanisms are in place to allow democratic institutions to fully apply the whole spectrum of transitional justice measures based on international human rights law, as seen in post-World War II West Germany (Frei 2002). The first post-transition or post-conflict generation benefits most from these formal democratic reforms. They are free from guilt or fear of

facing repercussions (from former military or political elites), because they do not bear any personal responsibility for the suppressive regime or war. Furthermore, authors like Hazan (2006) argue that unless there are effective monitoring procedures in place, such as an independent judiciary, transitional justice measures may prove ineffective and instead become a convenient alibi for inertia. Thus, monitoring institutions and a judiciary should be in place not only to ensure fair and open trials or commission of inquiry, but also to guarantee the safety and security of witnesses and accused. Institutional monitoring procedures, such as courts or commissions, may better facilitate democratic transition and enhance the quality of democratic institutions if they leave room for participation by societal and political actors from all sides that lead to various kinds of response by government institutions.

But in general old elites, authoritarian traditions, and bigotry dominate the political spectrum. Many of the “liberators” from the past regime, such those as in Rwanda after 1994 or in Sierra Leone after 2000, had committed war crimes or human rights violations themselves. In our contemporary understanding, war criminals on the “winning side” should also be brought to justice in the transitional period. That was not always the case, and history shows that they are often exempt from prosecution and instead hold great political power (Peskin 2005; Biddiss 1995). In fact, liberators or victors, such as Paul Kagame's government in Rwanda, often use transitional justice measures to cleanse the political arena of personal opponents and political enemies, by purging them or imposing life imprisonment or the death penalty. Those new political elites have little or no interest in setting up the kind of inclusive transitional justice process with trials and commissions that would investigate all perpetrators alike, regardless of which side they were on. By failing to do so, they establish benefits for only one side and distort the distribution of blame (Vlaming 2012).

Consequently, at the beginning of any transition process transitional justice measures are often used as tools to set political agendas. Moral responsibility for atonement is not on the political agenda at first. Therefore, we find a number of transitional justice mechanisms applied in

autocracies, oligarchies, and democracies alike, that are principally used to delegitimize the previous regime and solidify autocratic power, but completely without the aim of improving the quality of democracy or democracy. Governments in Russia and China, for example, use many of these transitional justice measures (anniversary commemorations, history commissions, or demands for apologies by former enemies) to manifest their own autocratic and anti-democratic power, based on the simple notion of good (victims) and bad (perpetrators). They use these measures to fuel hostile positions toward neighboring countries, such as Japan, in order to distract public attention from domestic problems (Andrieu 2011; Greedy 2009, 184–85).

While many young, fragile democracies in transition are at risk of returning to authoritarian rule, they also have a unique opportunity to strengthen the rule of law and create strong democratic institutions by using transitional justice measures. A traumatized and fearful society is often the deciding factor for the success or failure of transitional justice processes. The process can fail if the country has little experience with democratic institutions, the transitional justice measures are not carefully applied, and/or the new political elite is not fully committed to good governance principles (Kiss 2006). Traditional domestic, political, and civic conditions have to be taken into account as well. Hazan observes that unless there is a popular, national catharsis, which allows a substantial majority of population to agree that something has to be done about the past, transitional justice measures may not lead to the desired outcome. It may be useless to even begin the process if there is no overall agreement in society about dealing with the past (Linz and Stepan 1996, 5; Diamond 1999, 68). Thus, a national catharsis is fundamental to starting any transitional justice process, because it channels the common fears and different narratives that exist in society and opens doors to dealing with the past. Through the voicing of truth and narratives, for example, a national catharsis emerges. It allows a common history and narratives to be written of mutually exclusive and antagonistic memories and identities (Hazan 2006, 26). A catharsis does not define the measures yet it helps to initiate a dialogue between the different parties and between institutions and citizens – as was the case in the post-conflict peace process since 2010 in

Cote d’Ivoire in which, according to the International Center for Transitional Justice and the UN, such a dialogue was a key step in the process of national catharsis through which the Ivorian people must recognize and accept the profound moral and political causes of the past violence and human rights violations and eradicate their long-term social, cultural, and psychological consequences (UN News Service, 13 August 2013). Nonetheless, the specific measures have to be chosen by political and civic elites, who decide which best serve the interests and rights of victims and victimizers alike. Most post-conflict societies experience such a national catharsis immediately after the conflict has ended, but it often exists for only a brief period of one year or less. This “window of opportunity” is a timespan for policymakers to address past wrongdoings and utilize the catharsis as a catalyst to institute legal or political reforms, i.e. through vetting or judicial procedures, often closes long before commissions of inquiry have completed their reports, trials have started, or democratic institutions have been established. Sometimes this “window” is shorter than one year, or up to five years. Instead, new outbreaks of violence are often the result (Quinn 2009). The window usually opens again when the first post-conflict generation gains political power.

2. Transitional Justice Measures as “Catalyst” for the Quality of Democracy

In its 2006 guiding principles for transitional justice the OHCHR concluded that transitional justice measures are a substantial factor in aiding democratization processes (UN Doc GA Resolution 60/147, 21 March 2006). But in order to work as such, the basic democratic institutions have to be in place, and the safety of perpetrators and victims has to be ensured. The UN guidelines emphasize that transitional justice measures can achieve sustainable peace and justice as well as enhance democratic performance, but only if they are enforced through democratic institutions with wide civil-society participation, and that they should not be applied against the will of the citizens. Yet, I argue that many of these institutions can be re-installed and stabilized – or destabilized – while using transitional justice measures as catalysts; for instance, the South African commission of inquiry’s ability to create transparency and obtain a certain level of accountability and transparency

that led to more engagement by citizens with these institutions and thus a higher level of civic trust. Other domestic circumstances, political and legal cultures, and factors such as whether an independent judiciary is already in place, must also be taken into account (Davis 2010). International and regional organizations and institutions can facilitate, but not impose this process. The UN “Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence” appointed in 2012 is one of many initiatives by the international community to monitor the implementation of transitional justice measures in post-conflict and authoritarian societies under the conditions mentioned (Greiff 2012). For example, victims who receive reparations or compensation will invariably identify themselves with the democratic institutions of the new regime and thus promote the democratic process, while victims or perpetrator groups that have negative experiences with biased trials or unfair compensation issued through institutions, feel excluded. As a consequence, they often tend to act outside legal and political frameworks, as the resistance movement of *campesinos* in Colombia or the ongoing Hutu resistance to the government in Rwanda.

As a result, measures such as commissions of inquiry, history commissions, domestic or international trials, memorials, or apologies can function as catalysts and a forum to take up violent claims or grievance wishes for vengeance. These measures hence catalyze claims and convert them, i.e. into reports, indictments, commemoration events, to which governmental institutions can respond, for example with compensation funds. By doing so, public institutions as well as the government or parliament respond and engage with citizens and vice versa. In return, citizens’ involvement leverages the performance of democratic institutions. This is how transitional justice measures can contribute to the quality of democracy.

Hence, these measures can help to turn false allegations, myths, conspiracy, silence, and mistrust into facts, figures, and notions that attain truth, transparency, and trust, which add invaluable to the process of achieving justice and democracy. These measures can prevent society at large from undertaking arbitrary acts of vengeance or violence and channel those desires toward more peaceful con-

flict resolution and transition. Citizens (re-)learn how to make use of institutions, petition parliamentarians and expect responses, or dare to file a claim without fearing repercussions. If citizens and victims see their claims addressed responsively, they are more likely to refrain from taking justice into their own hands through violent means. This is, thus, a stabilizing factor for conflict-torn societies. In this same context, Olson, Payne, and Reiter argue that applying only particular, exclusive transitional justice measures while leaving others out may have diminishing effects on sustainable democratic development (2010, 141–45). Thus, if the demands of citizens are focused on memorials, vetting procedures, and trials, they should at least be addressed by governments and policy makers, and not ignored. But as Baxter highlights, different transitional justice measures impact different sectors of society (2009, 325–26). Expectations of these measures range from those who wish to leave the past behind to those who cannot wait to see their oppressors punished. The variety and disparity of interests must be carefully assessed and balanced, and this can pose a serious challenge to political actors when deciding what kind of transitional justice measures to apply.

Political and legal traditions as well as international and regional monitoring mechanisms, such as those operated by the Council of Europe, the Inter-American regime for human rights, or the African Union, also play an important role in this process. Just as, if there is no bottom-up approach by citizens there is no transitional justice process, the same is true where there is no external pressure and no incentives at all, either from the international community or from below from citizens’ movements. The less a country in transition can count on support, initiatives, or pressure from the international community, the less likely its political elites are to start the process. The same is true for a lack of popular pressure and truth-seeking initiatives. Governments often find themselves in a situation where they have to be accountable to the international community as well as to local pressure groups (constituencies, victims’ groups, or electorate), and use the same transitional justice measures to be responsive to both. Installing commissions of inquiry, for examples, is a response to the pressure and indicates that they take the unresolved issues

of the past seriously. At the same time democratic institutions indicate a certain level of responsiveness and accountability which leads to more civic trust. In this situation, transitional justice mechanisms also must comply with constitutional and international human rights norms. At the same time, international courts like the ECtHR have taken Kurdish victim groups' claims for reparations against the Turkish government as a trigger to also launch recommendations and issue sentences against the government in Ankara. The government in return had to respond to these claims and sentences domestically and internationally. Pressure groups take the decisions of an international court as an incentive to pressure their government for further reforms. Consensual democracies may contest that claims have to be dealt with immediately, as in the case of the Japanese government and the forced prostitution of the so called "comfort women" during World War II in Korea and China (Tanaka 2002). In this respect, I would argue that the pace and extent to which governments and parliaments respond to claims indicates the level of responsiveness and thus accountability. Governmental response to claims can take place at any stage of democratic development. There is no "*punto final*," no "*Schlussstrich*," as some politicians demanded in 1980s Latin America or post-World War II Germany (Roht-Arriaza 1998).

As the United Church of Canada's apology to the First Nation People in recent years demonstrated, crimes and injustice can be addressed decades or even centuries after they occur. The value that transitional justice measures hold for all democratic institutions, old and new, is always the same: increased legitimacy. Often it takes a second or later generation of victims and descendants or bystanders to raise the issues of the past (Schabas and Bernaz 2012). In some cases international criminal justice and customary law apply without any strict time limitations. But if governments fail to respond at all to these citizens' claims without providing sufficient rationale, this represents a lack of accountability and thus effective and qualitative governance. Then, political unrest, civil disobedience, and turmoil may occur because citizens are unsatisfied. The moment a group puts an issue from the past on the political agenda, the executive and legislative ought to respond in an open way.

Unsurprisingly, we find that transitional justice measures are more likely to be successfully applied in more stable democracies than in less stable ones. New democracies face serious constraints and political opposition that often allow them to focus on only one or two transitional justice measures and leave out others. They also fear negative consequences for their new and fragile regime. New political elites who were in some way connected to the previous regime avoid holding trials as they fear being subject to prosecution themselves one day (Spinner-Halev 2012, 164).

In Rwanda, for example, almost all transitional justice measures have been applied through a top-down approach, but the quality of democracy is rather poor. In post-World War II West Germany, after an initial top-down approach in the 1950s, most transitional justice measures shifted to a more bottom-up approach just one generation later in the late 1960s and 1970s, and this did much to enhance the quality of democracy (Herf 1997). In Spain, some of the amnesty and compensation measures put into place immediately after the death of General Franco in 1975, i.e. by granting specific pensions to former political prisoners, might qualify as transitional justice measures. In particular, the amnesty laws of 1975–76 were regarded as blueprints for many other peaceful or pacted transition processes in the following decades. But no serious transitional justice processes took place in Spain until about 2000, when the first post-Franco generation went onto the streets and into the internet and social networks to form pressure groups and NGOs to demand more extensive measures such as a commission of inquiry, trials, memorials, and so on. These participatory demands by citizens triggered governmental response and transparency, and finally resulted in a "law of historical memory" in 2007. Nonetheless, Spanish democracy is already considered to have consolidated in the 1980s, ten years after regime change. But Spanish democracy has transpired to be less resilient to political crises because old political elites kept many positions and were reluctant, for example, to pass reparation laws or listen to victims' claims. To this day, institutional flaws, deficits, and "unconsolidated" pockets in democracies such as Spain, Greece, or Chile are often connected with past wrongdoings and the unprocessed legacies of wars and dictatorships. Instead, the anti-democratic legacies and shadows of

past regimes often haunt democracies for generations and often serve to justify violent acts or terror groups such as ETA terrorism in Spain, which I call “unconsolidated pockets.” This is particularly true in regimes in which institutions continue with the same personnel and actors in place, “converting” to democrats overnight, but not allowing these institutions they represent to deal with their own past. The removal of the Spanish Judge Baltasar Garzon in 2012 after his attempts to take cases of Franco era crimes to the higher courts, is just one of many examples which show the shadow that the former Franco regime casts over the current administration and judiciary. Successors of Franco’s elites played a crucial role in avoiding any prosecution of past perpetrators. Continuing ETA terrorism and violent separatist movements in the Basque Country, Catalonia, and elsewhere are also a sign that the country never successfully delegitimized the past (Aguilar 2001). Such activists claim that because of Franco’s unsettled legacy, they are still not “free and independent” and that “centralistic autocratic power” remains in Madrid. Those who support terrorism and separatism often justify their claims in terms of the unjust legacy that still “impacts Spanish political elites” in their decision-making processes. Here, transitional justice measures could have served as a catalyst to demystify these legacies. This could have helped to avoid the ongoing violent acts, because ETA would not receive such widespread support based on myths and false legacies.

Although the absence of transitional justice measures alone does not automatically lead to the complete failure of democratic institutions, it is linked to the level of effective performance of those institutions which, in turn, affects the legitimacy and quality of democratic institutions.

In the case of Turkey, the ECtHR has been one of the main international legal institutions pressurizing Ankara to address past crimes. Cases of disappeared and murdered Kurds in eastern Anatolia or Greeks in Northern Cyprus have come before the ECtHR. The government responded to the judgments by initiating legal and political reforms and setting up compensation funds for victims (Brems 2011). The ECtHR is by no means the only transitional justice measure for Turkey, but it has contributed to the process by ruling, for example, that Turkey must set up a

reparation fund for property seized from Greek Cypriots during the conflict in 1974. Kurdish victim groups have repeatedly used the decisions of the ECtHR to pressure Ankara for more reforms. In response, the Turkish parliament launched investigative laws in the case of the disappeared Kurds. In other cases, the government appointed a Commission of Inquiry for reparations and for Greek property losses in Northern Cyprus. This took place shortly before the accession talks to the EU in 2004 (*Loizidou v. Turkey* Case No. 15318/89, ECtHR, 1996-VI, no. 26.). These were all responses to international pressure using transitional justice measures as a tool to leverage democratic performance. Because of this, citizens perceived a general increase in transparency and accountability of institutions, which, in turn, encouraged them to file more claims. The relatively slow progress of democracy in Turkey has, by and large, benefited from the few transitional justice measures so far (Mihr 2012). Henceforth, if international organizations, government, and civil society cooperate and apply a mix of transitional justice measures over a period of time, the impact on the performance of democratic institutions will be discernible.

3. Transitional Justice and the Quality of Democracy

Transitional justice measures can contribute to and/or serve as a catalyst for the democratic performance of institutions. Democracies that are considered to be very effective are those which have stable institutional structures that ensure the liberty of citizens through the legitimacy and functionality of their mechanisms. Thus, quality democracy is a regime that satisfies citizens’ needs and has the full backing of civil society (Morlino 2010, 213). To draw further links between transitional justice and the quality of democracy, one has to see that on the one side, these measures can facilitate, catalyze, and contribute to democratic reforms, and on the other side, the more democratic a society becomes, the more likely it is to institute transitional justice measures to come to terms with its past. Thoms, Ron, and Paris found that transitional justice measures can have an impact or correlation, at least on respect for human rights, adherence to the rule of law, regime legitimacy, and diversity, and consequently the performance of democratic institutions (2010, 329–42). Indicators used by Morlino (2010) to measure the quality of

democracy can be grouped into criteria that are similar to those of the transitional justice process. For example: institutional accountability and governmental response through legal reforms, commissions and trials; transparency through memorials, commissions; assurance of freedom and equal rights through independent judicial and legislative powers; and political participation through victim groups. High levels of citizen trust through engagement and participation as well as a sincere guarantee of fundamental human rights, are further indicators. Some direct links were given in the above-mentioned examples, such as 1) the level of responsiveness and thus accountability of institutional powers towards victims, perpetrators, civil society organizations claims and needs in respect to the past; 2) the level of independence and transparency of the judiciary to uphold fundamental freedom and human rights when making decisions over past wrongdoings; or 3) the level of participation and engagement, and thus civic trust, by citizens, victims, or perpetrators in state institutions; to mention but a few (Altman and Perez-Linan 2002; Lijphart 1999; Diamond and Morlino 2005).

Parallel to any “wave of democratization” (Huntington 1991; Lipset 1959), the rise of human rights awareness and transitional justice mechanisms in the 1990s influenced the assessment of democracy in general. This has led to the idea that instead of measuring only the consolidation of democracy, the “quality of democracy” would be a better way to classify democracy and its institutions (Schmitter and Guilhot 2000; Diamond and Morlino 2005); alternatively “effective democracy” as Ingelhart and Welzel argue (2005). Knudsen adds that transitional justice measures can trigger egalitarian distribution of power over collective decision-making among citizens (2010, 111–12). Although this does not say anything about institutional quality and thus the level of accountability, transparency, or participation, transitional justice measures have to be seen again as facilitators and catalysts (but not more than this).

Meanwhile, measuring the quality of democracy has become a separate field of empirical investigation. It is assumed that quality, resilience, robustness, or simply best practices or good governance are relevant criteria to dis-

tinguish weak, stable, defective, and consolidated democracies. But although criteria and indicators for assessment have changed over the past decade, the core aspects of democratic consolidation remain and are found in the good governance principles of a high level of governmental accountability, transparency, and citizen participation (Diamond 1999; Huntington 1991; Gunther, Diamond, and Puhle 1995, 7; Linz and Stepan 1996; Schmitter 2005; O’Donnell, Cullen, and Iazzetta 2004). This observation by more than just a handful of researchers is pivotal because some of the “classical assessments” of consolidated democracy ignore significant issues such as “unconsolidated pockets” in their analytic framework of democracies, as explained above. It is within these “unconsolidated pockets” that minority, ethnic, religious, linguistic, or ideological groups seek a change of political regime, territorial separation, or greater autonomy through often undemocratic and violent means. What connects these “unconsolidated pockets” to transitional justice is that these groups often “justify” and legitimize their activities in terms of unsettled claims from the past – often centuries ago – and in doing so refer to past unjust and autocratic regimes that, they assert, ignored their claims or concerns. These actors and their constituencies perceive that justice has not succeeded and that the legacy of the past is still omnipresent in contemporary politics.

I therefore contest the assumption that fully consolidated democracies can have “unconsolidated pockets” over extended periods of time without affecting the general quality of the democratic regime, as in Spain for example. Old stereotypes, hatred, or mistrust towards former oppressors fuel violent groups and keep their constituencies from engaging with, and trusting, regime institutions. These groups can gain a substantial number of supporters and sympathizers, which can consequently hamper democratic development. This applies to many violent movements in both democratic and autocratic states, such as ETA in the Basque Country, the IRA in Northern Ireland, FARC in Colombia, the separatist movement in Quebec, or the Tamil Tigers in Sri Lanka (Aguilar 2001). To diminish such “unconsolidated pockets”, transitional justice measures could catalyze these violent claims by demystifying legacies by revealing facts of past atrocities

for victimizers and victims alike. That, again, can lead to the recognition that many victims in society seek, and can, in return, prevent acts of vengeance and anti-democratic movements.

3.1. Responsiveness

As indicated earlier the level of accountability through responsiveness of state institutions is fundamental to assessing the quality of democracy. Support for democratic institutions, and thus their qualitative performance, is also based on the belief of citizens that courts and parliament protect and provide freedom and equality (Morlino 2010, 215). As Linz and Stephan note in their analysis of support for democratic institutions in respect to responsiveness, only if the great majority of a population adheres to democracy and its institutions as “the only game in town” can a democracy be called, in our terms, quality democracy (Linz and Stephan 1996). The level of executive and legislative responsiveness in liberal, consensual, or representative democracies depends on how governments balance public versus institutional interests and react accordingly. The balance among legal imperatives, public safety, and pragmatic considerations is nevertheless crucial in any transitional justice process (Olson, Payne, and Reiter 2010, 154–55). The capacity and leadership of governmental institutions also determines how they respond to the needs of citizens. It is important to follow up some of the above-mentioned dimensions and links when assessing responsiveness. For example, it is helpful to examine when and how political institutions and leaders formally acknowledge past wrongdoings. In this respect, newly democratic regimes can decide to do anything from setting up compensation funds to introducing memorial days (Kritz 2009, 17). Governments and parliaments can respond to citizens’ claims by instituting restitution or reparation funds. Governments respond to citizens’ or pressure groups’ claims by initiating rehabilitation or compensation funds for expropriations, imprisonment and loss of family members. They can also set quotas for public offices so that former combatants, victims, or minority groups are proportionately represented. Another way to respond to domestic or international claims is by providing public funding to restore buildings, convert them into memorials, or maintain historical or religious sites. Many of these measures are

already humanitarian obligations under the Geneva Conventions of 1949 and are reiterated in the 2006 UN Basic Principles. Any legal reform of the penal code should conform to international human rights norms as defined in international conventions and statutes. The same applies for governmental vetting and lustration processes. Investigating public officials’ records of collaboration with the former regime and taking the necessary action to restrict their influence on the new democratic regimes can be an active measure that a new regime can take to leverage accountability. By doing so, institutional powers combat impunity and launch reform of the security system. Thus, all of these varying dimensions of institutional responsiveness are dimensions of accountability and can enhance civic trust in the new democratic institutions.

Nevertheless, some of these procedures can perpetuate division within societies. They can result in unfair vetting and lustration processes (Thoms, Ron, and Paris 2010, 329–42). Olson, Payne, and Reiter, as well as Van der Merwe, Baxter, and Chapman conclude that dealing with past injustices can provide a rationale and momentum for the new government to reform institutions and ideologies, and while this may help society to move forward, it can also impede it (Olson, Payne, and Reiter 2010; Van der Merwe, Baxter, and Chapman 2009, 19). If these measures are applied in isolation, separate from other measures, without the consent of victim groups, and with the aim of installing victors’ justice instead of a broader social justice, this can lead to functional failure of the institution or trigger corruption. Others, such as Barahona de Brito, Gonzalez-Enriquez, and Aguilar, or Wiebelhaus-Brahm, find no clear evidence (for example in case studies in Latin America or Africa) that directly links transitional justice measures to democracy, although they do not deny that they can be linked through what they call “indirect ways” and what I would call long-term spiral-correlating inter-linkage (Barahona de Brito, Gonzalez-Enriquez, and Aguilar 2004; Wiebelhaus-Brahm 2009).

3.2. Transparency and Independence through Transitional Justice

The more independently courts, tribunals, and the local judiciary can operate, the greater their impact on societal change and the functionality of democratic institutions. In

other words, the rule of law enhances transparency. Public trials and truth commission proceedings in the context of transitional justice are vital to this process. Independence of the judiciary and the rule of law is perhaps the most difficult mechanism for young democracies to establish, and for consolidated ones to uphold. Yet, the pursuit of retrospective justice is an urgent task of young and yet fragile democracy in order to delegitimize the previous regime. During the first few years after regime change, many transitional justice measures can be used to legitimize new political elites and political orders. These measures can highlight the fundamental character of the new order to be established. Many people, for example in post-communist countries, never had any positive experience with fair and open trials. It is here where trials of past perpetrators can have an educational effect and show how the rule of law can contribute to democratic stability. Sooner or later, most governments will confront the dilemma of whether or not to undertake the prosecution of previous leaders or whether they leave the past behind with blanket amnesties. If they opt for a middle path – which most countries do – they have to carefully examine the kind of sanctions and penalties they apply. If the rule of law is taken seriously, the principle of *nulla poena sine lege* (barring prosecution for an act that was not criminal at the time it was committed), has to also be taken seriously. And this is why many of the crimes of the past are difficult to prosecute under new regimes (Kritz 1995, vol 2, xxxi–xxxii). They simply were not considered “crimes” under the old legislation, as seen in the trial of former Egyptian president Mubarak in 2012 and 2013. Unless these crimes qualify as crimes against humanity, many governments in transition struggle with the dilemma, that after day X – when regime change took place – the rule of law should be applied, cannot necessary be applied retrospectively. One way to overcome this dilemma is to apply international (customary) human rights law, which applies universally. International human rights laws, norms, and standards are transparent and accessible to everyone and can be applied in any legal system regardless of whether it is based on local, traditional, domestic, or international jurisdiction. Its vagueness is its strength, giving countries in legal terms a “margin of appreciation,” and thus the possibility to adapt international law to their own legal system according to their

own legal or domestic traditions. The golden rule here is not to discriminate or harm others. But this is also where international human rights law often conflicts with traditional or domestic jurisdiction. For example, during the ongoing transitional justice process in Uganda women have largely been excluded from testifying in court. This is due to the tradition that women have no voice in court (Mibinge 2010). O’Donnell, Cullell, and Iazzetta highlight this correlation between the degree to which fundamental human rights are granted in the constitution and by the rule of law and the way democratic institutions function effectively. Traditional legal regimes or cultures that oppose modern human rights standards will most likely fail to reach a higher quality of democracy (O’Donnell, Cullell, and Iazzetta 2004, 59–69). Consequently, in order to score higher in quality performance, such new democracies have to balance international human rights norms and standards in their constitutions with domestic legislation and local and traditional judicial regimes. The more governments benefit directly by bringing former political opponents to justice, the more they will be willing to adapt their constitutions to international law. Yet, these measures depend on political agendas. The outcome of transitional justice processes can play directly into the hands of newly established governments. And in return, governments will be more likely to apply them if these measures help to delegitimize former opponents and increase their own legitimacy. Many authors who work in the field of quality of democracy share similar observations. Schmitter, as well as Bühlmann, Merkel, and Wessels, and others, for example, argue that beyond formal adherence to human rights norms, political leadership has to guarantee that these norms are applied in a transparent, accountable, and responsive way to citizens’ needs; otherwise they will be useless and ineffective (Bühlmann, Merkel, and Wessels 2008). This is where transitional justice measures can play a catalytic role. Civil society, victims, bystanders, and victimizers must all enjoy the human rights to security, freedom of expression, and fair trials. Where these human rights are restricted, the likelihood of fair trials, reconciliation workshops, memorial initiatives, and negotiation of property rights and compensation, to give some examples, are all at risk and will mostly fail. The state and (new) political system or order, however, has to have *de facto* control and

effective power to implement these measures. It has to guarantee both human rights and the safety of those who make demands (Bühlmann, Merkel, and Wessels 2008). This is far from the reality in many transitional societies. Some government leaders in new democracies refrain from pursuing a transitional justice process because they fear retroactive justice themselves. To better assess the expected outcome of transitional justice measures, a method called “evidence-based transitional justice,” meaning to benchmark transitional justice measures against their anticipated outcome, for example, when it is expected that these measures will establish the rule of law, has been introduced (Pham and Vinck 2007, 232). That is to say, we can only assess the outcome, impact, or correlation of transitional justice measures on and with democratic institutions if we know what was expected by citizens or governments when they were initiated. In this assessment exercise, international human rights norms and standards can serve as guidelines to trigger regime change and to overcome old authoritarian, radical, and traditional rules and regulations that once led to injustice and atrocities (McLaren 2010, 240). In negotiated or “pacted” transitions toward democracy, military elites often wait to reassert themselves, hampering the country’s democratically elected leaders if they seek to address past crimes (McAdams 2001, 239). Generous blanket amnesties are often passed, as seen in the case of Spain, although conditional amnesties are often considered a compromise to avoid impunity on the long term (Alonso and Muro 2011).

3.3. Participation, Civic Trust, and Engagement

In their assessment of the quality of democracy in Latin American countries, Altman and Perez-Linan used Dahl’s basic dimensions of quality of democracy, which focus on citizens’ participation and engagement and thus the level of civic trust. First, in order for citizens to participate and engage with democratic institutions, human rights have to be guaranteed and monitored at least to minimum standards. A “free exercise of political contestation” ought to be guaranteed that, in return, impede accountability and transparency (Altman and Perez Linan 2010, 89). Obviously, democratic institutions that fail to guarantee these rights will face mistrust and a loss of legitimacy over time. Vertical accountability such as citizen’s participation

becomes a central dimension as it grants individual citizens and organized civil society actors the means of control over politicians and political institutions (Diamond and Morlino, 2005, xiii). If citizens feel free to participate in decision-making processes they are more likely to ask for transitional justice measures as one way to attain their goals of acknowledgement, truth, and compensation. Prudent governmental responsiveness increases citizens’ participation, and along with that civic trust. That is to say, it increases the confidence of citizens to engage with and make use of public institutions. In response, citizens’ concerns are taken seriously and dealt with by state bureaucracy. The variable of “civic trust” in this context is pivotal, in line with Putnam’s argument that the greater the participation, the higher the civic trust in a democratic system (1993). That premise concurs with Tilly’s analysis, that in order to establish trust in democratic processes, the insulation of categorical inequalities in public politics and the transformation of non-state powers to state powers are necessary to establish a protective relation between citizens and state (2007, 96). Although none of these statements are surprising, the main argument in this article is that if perpetrators, victims, and bystanders gain confidence, they will make increased use of state institutions. Therefore, the interlinkage and correlation between the performance of democratic institutions and transitional justice measures depends largely upon the political expectations of, and participation by citizens. But identifying a direct causal link is difficult. If transitional justice measures serve to catalyze citizens’ or victims’ claims and encourage active participation that leads to solid democratic institutional performance, it is probably the most we can expect. But, without a minimally functioning “formal” democratic institution, i.e. constitution, courts, bureaucracies, or executive powers, no transitional justice process is likely to take place at all.

4. Conclusion

Whether it is Linz and Stepan’s metaphors on “democracy being the only game in town” (1996, 5) or Hazan’s prerequisite of a “national catharsis” that has to be in place before starting a transitional justice process, both rely on the same presumption, that there has to be an overwhelming majority in society – after regime change – that is

willing to come to terms with the past and at the same time to adhere to the concept of democracy. If this is the case, there can be a correlating effect between transitional justice measures and the quality of democracy. A majority of society generally speaking consists of two-thirds of a population, according to Diamond (1999). This majority agrees, at least in principle, that democracy is the system they want. But there is a short window of opportunity after regime change for setting the legal and political framework for future transitional justice measures; sometime the window closes within a year or less, before old rivalries return. Thus, political decision-makers have to make sensitive decisions during that period even if they only have a pre-vision of future transitional justice measures. In his quality assessment, Schmitter explains that we have to look at levels, frequencies, and timelines of societal participation, as well as the extent to which public institutions respond to demands and needs or, instead, impose decisions (Schmitter 2005, 28–29).

The inter-linkage, multi-causality, or rather correlation between transitional justice and quality of democracy depends largely on the level of responsiveness and accountability of political elites, transparency, adherence to international human rights norms, and participation by citizens. Transitional justice measures can catalyze some citizens' claims, political interests, and international norms,

and as a “side effect” strengthen democratic institutions. This process is not limited to post-conflict scenarios because it can take decades, if not generations. Thus, transitional justice measures are catalysts that can leverage democratic performance over a longer period of time, but they are not the only political, institutional or civic measures contributing to the quality of democracy. Others such as security or economic measures are crucial for any democratic development. But higher quality is generally achieved if governmental responsiveness and civic engagement, and thus trust, are merged with different transitional justice measures at different stages in the process of democracy. A mix of measures over a longer period of time, from both the domestic and international levels, is more likely to have a positive effect on democracy than a top-down or bottom-up approach alone. But control over collective decision-making is also where citizens' claims for memorials and trials can contribute to the quality of democracy (Beetham 1999, 90). In other words: the more control citizens or pressure groups have over the transitional justice process, the more it impacts the quality of democracy. The same is true for external pressure or incentives by the international community, which often trigger citizen's demands. Thus, the crucial premise is that the more responsive and sensitive executive and legislative powers are to their citizens' claims at any stage of transition, the more legitimized they will be – and the higher the quality of their democratic system.

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