

## Transitional Justice

**Dr. Anja Mihr**

Program Director, Center on Governance through Human Rights

The HUMBOLDT-VIADRINA Center on Governance through Human Rights fosters the concept of Transitional Justice (TJ) in post-conflict and post-authoritarian societies (Mihr 2017). TJ is a method and process that encompasses a number of different legal, political and cultural instruments and mechanisms (such as reparations, trials, truth commissions, amnesties, memorials, compensations or disarmament) that can strengthen, weaken, enhance or accelerate processes of regime change and consolidate democratic or autocratic political regimes. These measures can foster or hamper successful transition or reconciliation processes.

The measures reach from restorative to retributive justice (such as criminal and political procedures and actions) and include various kinds of institutional reforms (such as security sector reforms or constitution building, reparations and individual compensations). They aim to facilitate civil or political initiatives during transition and transformation processes. In the hands of political and civil actors such initiatives can lead to reforms in the security sector or in political institutions.

TJ measures can be divided in different categories: procedural, interpersonal, and

informational justice measures, such as trials, truth commissions, reconciliation programs, vetting, lustration, security sector reforms, apologies, amnesty laws, reparations, compensations or memorials and many different types of dealing with the past. Aim of TJ is to reconcile divided conflict-torn and mistrustful societies and establishing the rule of law (Hague Institute for the Internationalization of Law 2010).

The most significant element in any combination of the TJ measures mentioned is that they conform to international human rights standards and obligations. It is the only way in which a positive impact on democratic institution building can take place (United Nations 2010). This is especially important as “justice” in the context of TJ is meant in the institutional sense - to establish human rights abiding (democratic) institutions for the future and learn from past experiences.

Victims, survivors and international organizations, such as the UN or the EU, often urge transition governments to bring war criminals to trial by either international, hybrid or national tribunals, domestic or local courts. Victims of human rights abuse may receive compensations by governments or companies according to the wrongdoings they had to

endure during suppression, war or dictatorships. Memorials, for example, are erected by survivors, former political prisoners, civil society organizations or governments to acknowledge these wrongdoings and atrocities and to serve as a warning to future generations. Lustration and vetting procedures aim to shed light on who was responsible to what extent during times of injustice and suppression.

These so-called ‘truth seeking TJ measures’ are diverse but nevertheless serve the same purpose: namely to delegitimize the past regime and to legitimize the new, ideally democratic, regime.

The full spectrum of TJ measures and its actors such as governments, victim organizations, international organizations as well as aid and development organizations, private enterprise and companies can be equally involved in the TJ process. But The outcome of the process depends on the political will and ambition of actors and stakeholders involved.

TJ measures can only trigger necessary political, legal or security sectors reforms and change to the extent to which the stakeholders involved want them to deal with the past and to reconcile divided societies. Consequently, there is no guarantee for democracy to be the automatic outcome of TJ.

### *Overview 1: Spectrum of Transitional Justice measures*

<i>Acknowledgement</i>	<i>Restoration</i>	<i>Criminal Justice</i>	<i>Amnesties</i>
<ul style="list-style-type: none"> <li>• History commissions</li> <li>• Truth commissions</li> <li>• Apologies</li> <li>• Memorials</li> <li>• Public Debates</li> <li>• Film</li> <li>• Literature</li> <li>• Schoolbooks</li> <li>• Scientific research open archives</li> <li>• Media involvement</li> <li>• Symbolic naming of victims and perpetrators</li> </ul>	<ul style="list-style-type: none"> <li>• Reparation</li> <li>• Restitution</li> <li>• Compensation for past injustice</li> <li>• Quota and affirmative action</li> <li>• Restoration of historical sites</li> <li>• Exhumation of mass graves</li> </ul>	<ul style="list-style-type: none"> <li>• Application of international human and humanitarian law</li> <li>• Criminal justice</li> <li>• Tribunals &amp; Ad-hoc tribunals</li> <li>• Trials</li> <li>• Security system reform</li> <li>• Condemnation or probation</li> <li>• Vetting and lustrations</li> </ul>	<ul style="list-style-type: none"> <li>• Blanked or conditional amnesties</li> <li>• Silence pacts</li> <li>• Rehabilitation programs</li> </ul>

## Political practice & impact

---

In post-conflict and post-authoritarian day-to-day 'realpolitik' TJ aims at dealing with an unjust or atrocious past in order to delegitimize its responsible past leadership (on all levels) and to avoid recurrence. At the same time these measures aim to re-establish and legitimize a new political and different, hopefully better, regime during transition. Regime change and transition takes place in the first five to ten years after a war has ended, a dictatorial regime has collapsed or a political regime decided to change its mode of governance from an autocratic to a democratic regime. (Teitel 2014). Regardless of the kind of regime change, TJ measures can lead to both, recurrence to an autocratic or establishment of a democratic regime and its consolidation (Mihir, 2018). The examples of reparations, apologies, lustrations, trials or commissions of inquiry used by Australian, Canadian, Japanese or German governments over the past decades have proved that TJ can leverage citizen participation, improve trust within societies and towards policy makers and thus leverage the quality of democracy as such.

TJ triggers a mutual reinforcing process between the different measures and the institutions they aim to build or strengthen, such as the judiciary, parliaments, public administration and civil society. These institutions and groups are fundamental for a democracy and the more they interact and participate without fear or intimidation and in an inclusive manner, the stronger the democratic culture within the country is.

An inclusive TJ process aims to include all parties and stakeholders in the respective society in the past and in the present. This includes victims, bystanders and perpetrators –

regardless of their social status, political, religious or ethnical background. The ideal TJ process allows putting blame and responsibilities on all sides of the perpetrators spectrum, even on those that are victors of the conflict and not just on those who lost the preceding war or the violent conflict or are disliked by the new political elite. With this inclusive process, the new political regime illustrates that they want to change politics and make it more inclusive and rule of law abiding. With such an approach, they also delegitimize the previous regimes, which were usually discriminatory and exclusive.

However, the same TJ measures can lead to a strengthening of autocratic regimes when used in an exclusive, bias, victors-justice and top-down manner without free participation and inclusion of victims or survivors of the past regime. They then serve the purpose of delegitimizing the former one, purging political enemies and privileging one victim group over the other.

This type of exclusive authoritarian TJ process usually selects victims and perpetrators, that is to say those whom the current government portrays as victimizers of the previous regime and thus enemies of the current political justice. This is winner's justice and in this scenario TJ only serves to purge political enemies.

Although it is hardly ever possible to be fully inclusive, because victims and perpetrators often cannot or do not want to cooperate and instead spoil the institution building process, it is important that any TJ process keeps a door open for future generations who might want to talk to each other despite the fact that their parents and grandparents were opposing parties or victims or victimizers.

Generally speaking, there is no fully-fledged inclusive or exclusive TJ process in this world; however, some governments have leaned more towards inclusiveness, while others have opted for a more exclusive approach. This has made a significant difference on how TJ contributed to the development of either democracy or autocracy.

### Generational effect

---

In the early years of transition (typically up to ten years) TJ measures are predominately used by stakeholders in the process for tactical reasons, i.e. to make concessions to international donors, to become member of the European Union or OECD, to appease radical victim groups or to strengthen foreign relations. (Deitelhoff, N. and Wolff, K.D. 2013).

Only after 20+ years with a new generation that is free from past legacies taking on administrative tasks societies reach the level of becoming morally capable to empathetically face their past. This generation is inclined to use the past as a constant reminder to legitimize the new and different political regime as it was the case in post-war West Germany in the late 1960s.

The effects of TJ are inter-generational. After 20+ years a new generation of (democratically) trained administrators and technocrats has replaced former judges, politicians or military. It is at that time when a free and independent civil society is strong enough to support the new democratic regime and its values. Those political stakeholders and regimes that do not enjoy a significant replacement of old elites often remain fragile and turn back to their authoritarian rules and values, such as seen in post-Soviet Russia, Hungary or Rwanda and

Venezuela. They opted for an exclusive TJ process during most of their transition period.

Regardless of the possible use or misuse of TJ measures, what we often find in transition countries is the desire among citizens for peace, justice and truth after violent conflicts as a common phenomenon among all societies. This momentum and catharsis after war and suppression often leads to the claim for more democracy and rule of law. If used in an inclusive way by all civil and political actors, TJ measures can strengthen institution building over a longer period.

In that case, TJ measures and (new) institutions can mutually reinforce themselves. By doing so the various actors and institutions use truth commissions, trials, vetting procedures, memorials, rehabilitations programs or reparations to connect to the citizens, victims and victimizers alike, and rebuild trust in institutions and show that the new legislative and judicial powers perform per international human rights standards rather than in a biased and arbitrary way. This requires a common narrative about what happened in the past to get the TJ process started in the first place.

On the other hand, during the transition period and first post-conflict generation, TJ can weaken and impede regime consolidation due to the permanent reminder of the past injustice. Truth commissions, trials or memorials can increase sentiments of revenge. If wrongly and exclusively done, then TJ measures can backfire and increase tensions that are either faced by opening the TJ process to more groups, or closed down, making TJ an instrument of authoritarian leadership. This occurs for example when the blame is placed on only one side or group of perpetrators or conversely none at all, certain groups are

excluded from the decision-making process or their claims are ignored, such as with the Kurds in Turkey, the Roma in Hungary, the forced child-soldiers in Sierra Leone or the abducted children in Argentina during dictatorship and war. These exclusive actions reinforce the past regime and lead to acts of vengeance. This reintegrates the culture of violence and mistrust, which is the soil on which autocracies flourish. For example, Turkey's inability to come to terms with the Armenian Genocide has led to a closure of borders and restriction of trade with Armenia and impedes diplomatic and economic relationships for over more than three generations.

### Trust & Good Governance

---

The assumption that TJ measures increase the level of trust in newly established institutions has been strongly defended in recent years. Different surveys to measure trust in institutions have shown that there is an incremental correlation between civic trust and the level of institutional performance. Hence, increasing the level of accountability, transparency and participation through TJ measures can lead to more trust in a political regime.

Nevertheless, civic trust is only fully established when the once victimized can freely and safely interact with the former victimizers and the institutions of the new political regime. If this interaction is dominated by vengeance, bigotry, force, doctrine or ideology, it will not lead to civic trust. A high level of distrust is often widely spread in post-dictatorial societies. To change this and increase the level of civil trust there must be a potential gain or incentive for the 'trust-inexperienced' citizens to engage with institutions that they never had

any good experience with, i.e. the military, the police or the judiciary. In this case a criminal judgment on past justice spoken through an international or hybrid court or tribunal (ideally of course by a national court), aims to establish a positive example and illustrate that institutions can work in favor of citizens.

International or hybrid non-bias TJ measures and mechanisms aim to leverage political and societal accountability and transparency and at the same time mobilize victims, bystanders and victimizer alike to participate in, for example, public hearings and testimonials. Symbolic acts of reconciliation or commemorations can reestablish trust of victims and survivors in the new institutions or the new or successor regime of the one that once oppressed them. An example for this is the official apology of the Spanish government to the victims of the Franco regime. TJ measures thus can work as catalysts to slowly develop trust in new institutions, leverage good governance and eventually consolidate political regimes. (Schupp, J. and Naef, M. 2009)

TJ as a concept thus explains the role of the state and/or comparable local, domestic and international governance institutions that encompass a proper democratic process. But it is also highlighted that to settle political disagreements through court-centered retributive justice and disputes alone would fail to strengthen formal and administrative justice. (Campbell, T. 2010, p. 256). A mix of TJ measures is needed to reach the anticipated trust.

## Recommendations & Ways ahead for Transitional Justice

---

Setting up restorative justice laws in the context of reparations or compensations ought to be seen as catalyst that supports longer term democratic and good governance regime consolidation based on active civil society that regains trust in institutions that have long betrayed them. But no transitional and transformation process will depend on TJ measures alone. They are complementary to other socio-economic and security sector reforms and thus are not the only factors that lead to societal shifts or changes. Although these measures are nonpartisan by nature, they depend on the political will and ambition of the actors involved in the TJ process and thus have deep political consequences for society. (Mihir, et al, 2017)

TJ measures are pivotal for societal transformation in the long run. Over the past years, “transformative justice” has become a term used often in this context to illustrate the transformative power of transitional justice. Once some TJ measures are installed during regime change, it will be more difficult for societies and their governments to deny claims for justice and the installment of TJ measures even decades after the war or the end of dictatorship. Effective tools for political and societal change without non-recurrence to past violence are high on demand by citizens, victims and those opposition groups that claim political power. We have seen that even decades or a century after wrongdoings during colonial periods or war, governments in established democracies such as Australia, Japan, the United Kingdom, France or Canada, are asked to respond appropriately to the past injustices by issuing apologies, setting up trials or commissions of inquiry or compensate

victims and their descendants after the crimes have occurred.

Trans-generational TJ in the third and fourth generation is no longer the exception but rather the rule, as we see in post-WWII Germany or Austria. Therefore, TJ measures are tools to transform conflict-torn societies on the one side, and at the same time strengthen already established democracies and its institutions, and the call for these transformative powers of TJ can no longer be overheard.

The HUMBOLDT-VIADRINA Center on Governance through Human Rights uses the TJ concept to advise policy makers, public and private stakeholders such as governments, private companies, commissions and civil society on short, medium and long-term impact of TJ. The center facilitates political, legal or historical processes to introduce TJ measures with the aim to trigger and support democratic regime transition and transformation.

## Reference List

- Mihr, A; Pickel.G. and Pickel S. (eds) (2017). Handbuch Transitional Justice. Aufarbeitung von Unrecht – hin zur Rechtsstaatlichkeit und Demokratie, VS-Verlag. Wiesbaden.
- Mihr, A. (2017) Introduction to Transitional Justice, in Simic, Oliviera (ed.) Understanding Transitional Justice, Textbook, Routledge Publisher, Abington, 1-28.
- Mihr, A (2018). Regime Consolidation and Transitional Justice, Case Studies on Germany, Spain and Turkey, Cambridge University Press
- United Nations (2010). 'Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice' (10 March 2010).
- Hague Institute for the Internationalisation of Law (2010). Tilburg University and Utrecht University, Measuring Access to Justice in a Globalising World: Final Report 2010.
- Teitel, R.G. (2014). Globalizing Transitional Justice, Oxford University Press.
- Deitelhoff, N. and Wolff, K.D. (2013). 'Business and Human Rights: How Corporate Norm Violators Become Norm Entrepreneurs' in Thomas Risse, Stephen C Ropp, and Kathryn Sikkink (eds), The Persisting Power of Human Rights, From Commitment to Compliance, Cambridge University Press, 227.
- Schupp, J. and Naef, M. (2009). Measuring Trust: Experiments and Surveys in Contrast and Combination, Institute for the Study of Labor Discussion Paper No 4087 (2009) 3.
- Campbell, T (2010). Justice. Palgrave Macmillan.



The Center on Governance through Human Rights  
is a Center of the HUMBOLDT-VIADRINA Governance Platform gGmbH.

Pariser Platz 6  
D-10117 Berlin

Learn more at:

[www.governance-platform.org/governancecenter/cogthr/](http://www.governance-platform.org/governancecenter/cogthr/)