

Forms of justice after evil: Argentina, Uruguay, South Africa

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What relationship to justice is established when an attempt is made to respond to the legacy of a criminal regime in the context of a new democratic beginning? To respond to this question, we must confront both the question of the foundation of a new democracy as well as the need for justice that accompanies this new beginning. On the following pages, I will offer interpretations of the different yet exemplary *forms* of responding to this question in Argentina, Uruguay and South Africa at the end of the last century. To do so, I will compare and contrast these three experiences in an attempt to shed light on an issue that is difficult to approach and entails certain debts.

Our approach is based on two premises and one hypothesis. The first premise is also a fact: after criminal regimes, *justice* must have a place. According to our second premise, this justice requires establishing a *relationship* with the perpetrators, that is, justice entails a common law and the recognition of a bond of humanity even with the criminals. This idea is inspired in a well-known speech by Saint-Just during the debate on the trial of Louis XVI. The National Convention was trying to decide whether to try Louis Capet as a citizen or not bring him to trial as Louis XVI, that is, the king, and thus inviolable according to the French Constitution of 1791. Saint-Just opposed letting him off based on the following argument: "To judge means to apply the law. A law is a legal relationship: what legal relationship is there between humanity and a king?"² The young Jacobin thus set forth the tyrannicide argument, denying any connection between Louis XVI and the French people, between the tyrant and humanity. Given our first premise (and thus rejecting tyrannicide), what interests me about Saint-Just's discourse is: the understanding of justice as a *relationship*, a *human bond*.

Using this as our basis, we believe it is possible to acknowledge that different *forms* of this necessary relationship of justice can be established in post-traumatic times, forms that depend on the different place given to the *other legitimate ends* that are sought out simultaneously with justice. By

¹ This text is a slightly modified version of my article "Regímenes criminales, refundaciones democráticas y formas de justicia (Argentina, Sudáfrica, Uruguay)," published in Claudia Hilb, Philippe-Joseph Salazar and Lucas Martín (eds.), *Les a humanidad. Reflexiones después del Mal*, (Buenos Aires: Katz, 2014).

² November 13, 1792. Reproduced in Michael Walzer, *Régicide et révolution. Le procès de Louis XVI. Discours et controverses*, (Paris: Éditions Payot, 1989): 202-211.

legitimate ends, I am referring to the goals that are in some degree connected to justice and to democracy as a polity that enables justice: returning the dignity of the victims, establishing the truth, strengthening democracy or democratic peace, not repeating the past (the concept of “*Nunca Más*”), promoting a culture of human rights and elaborating a collective memory of a traumatic past.

These are the characteristics of the issue we will address in this article. In the comparison of the three experiences of justice during the founding of new democracies, we will follow an analytical order, which we consider more fitting than a chronological one.

Argentina

The form of justice – the type of human bond – that was established in Argentina with the perpetrators of aberrant crimes was *retributive*, criminal justice. The criminals were brought to court to answer for their actions based on a common law. Without that acknowledgement of a *common* bond, without the inclusion of the *community*, it would not have been possible to apply the law, try the perpetrators, or establish a relationship of justice. The *Trial of the Juntas* was not a scene of revenge but a relationship of justice and humanity in which the perpetrators were recognised as autonomous and equal individuals. As autonomous individuals, they were responsible for their actions; and as equal individuals, they could be tried according to a common law. Because autonomy exists, an act becomes an action; but there is crime and a relationship of (retributive) justice because there is a common (criminal) law.³

Now, if their autonomy was necessarily *assumed*, it was also *staged* in different ways: for example, with the consent of the dictators to appear in court. The term consent does not suggest that the dictators willingly presented themselves but that, aware of the fact that they would be arrested and tried by civil courts, they did not flee or take up arms. On the contrary, they appeared in court, standing tall and giving evidence of their sound mind; they hired their own lawyers and even in some cases exercised their right to speak in their own defense. During the same scene of the trial, they argued that the trial was illegitimate. That is, they defended themselves on the proposed stage. This same autonomy was *also* expressed both before and after the trial through the former dictators' voluntary refusal to acknowledge the judicial process, though this time off the judicial stage. This denial as *another* indicator of autonomy was manifested in the underground or anonymous threats that were made against a democratic government⁴ and in

³ Cf. Carlos S. Nino, *Juicio al mal absoluto*, (Buenos Aires: Emecé editores, 1997).

⁴ In this context, however, no direct threats were made against any of the court judges.

the former dictators' decision to maintain total silence *ipso jure* with respect to the crimes they had masterminded. For better or for worse, autonomy was *also* present there. It was autonomy that was ultimately assumed by the crime they had committed, staged in their appearance in court, silent before society and threatening behind the scene.

In the same way as their autonomy, their equality was assumed and also staged. It was assumed in virtue of the rule of law, which should apply to any crime, even crimes committed under a previous regime. Above all else, this equality was staged during the *Trial of the Juntas*, which supplied an image of the nine dictators following the orders of the court, an image that continues to accompany commemorations of the return to democracy as the most eloquent staging of equality before the law.⁵

Autonomy and equality were the basis for this relationship of justice, the basis of a new human bond. As has been said on countless occasions, the dictators received exactly what they had denied their victims: a trial with due process.

However, we must also say that due to its political nature, to the fact that it was shaped in the setting of a new political order, the judicial stage was more than a judicial stage and less than a judicial stage at the same time. It was more than a judicial stage because of its symbolic potential, because it presented the implementation of a new polity. In this regard, it was not only the instantiation of a lawsuit aimed at compensating the victims for damages but also the certification of a new form of cohabitation (the most radical form of cohabitation, I would say, according to which we must live with the perpetrators under the same law). At the same time, it was less than a judicial stage because justice could not appear as an impartial third party when it was bringing two political systems face to face with one another. One was a humane system, because it established relationships of justice; the other, an inhumane regime, because it was based on crime and terror; the first was represented by the judges and the second was embodied in each of the dictators.

In terms of what has been said here about the Argentine case, I want to emphasize the way retributive justice focuses on the *perpetrator*: he is accused, he is judged, he is discussed and he is guaranteed a defense during his trial. The other aspect I want to focus on is the particular balance between autonomy and heteronomy that was established in the trial. These were the coordinates that made it possible to try the criminals for their actions under the terms of justice and humanity, without reifying them, without exiling the perpetrators under the terms of war or *demonising* them.

Cf. Pepe Eliashev, *Los hombres del juicio*, (Buenos Aires: Sudamericana, 2011).

⁵ Cf. Hugo Vezzetti, *Pasado y presente. Guerra, dictadura y sociedad en la Argentina*, (Buenos Aires: Siglo XXI, 2001).

South Africa

South Africa established another human bond, another form of justice. This was reparative justice, that is, justice oriented primarily towards compensating victims for damages, towards “healing” and returning the victims’ dignity. In this regard, the country proposed a unique exchange that required all of the perpetrators (those who were part of the apartheid regime as well as the armed opposition) to provide full disclosure, not just general descriptions or abstract *mea culpa*, of politically motivated crimes they had committed. In exchange for their confessions, a *Truth and Reconciliation Commission* (TRC) was created to grant amnesties for all of the political crimes confessed. This way, the perpetrator could be granted amnesty for one crime but not necessarily be granted amnesty for a second, third or fourth crime.

Although it can be argued that this form of justice adopts a clear strategic rationale – the well-known device of the carrot and the stick—what makes it particularly unique in our view are four elements that define the process of truth and reconciliation: the central role of the victim, the democratic responsibility, the ethical dimension and the openness towards the action of the perpetrators.

The first element, that is, justice oriented first and foremost towards the victims, can best be seen in how it differs from *retributive* justice. The latter focuses on the victimisers, on the guilt or innocence of the accused, and the evidence for the criminal acts is based on the testimony of the victims. In *reparative* justice, in contrast, the crimes are analyzed separately to offer a response *to each victim*.⁶ In the first case, a response is given for *each victimiser accused* of crimes; in the second, a response is given for every victim who asks for truth but also from every victimiser who voluntarily presents himself as a perpetrator and as an offeror of truth towards his victims or towards their family members.⁷ The South African experience thus teaches us that what appears to be the sheer notion of justice – in other words, returning dignity to the victim – may require focusing on the victim and not, at least not necessarily or not above all else, *persecuting* the victimizer. Naturally, the threat of the South African victimisers being tried persisted, to the point where it could be argued that the significance of the actions of the TRC greatly depended on whether at least some of the perpetrators who did not respond to the offer to exchange truth for liberty could be obliged to provide an account of their actions. It depended, in other words, on following through on that promise of the stick.⁸

⁶ Cf. Philippe-Joseph Salazar, “Récit, réconciliation, reconnaissance, à propos des *perpetrators* et de l’amnistie en Afrique du Sud”, s.d. p. 9.

⁷ Cf. Philippe-Joseph Salazar, “Un conversion politique du religieux”, *Le genre humain*, 43, November (Paris: Seuil, 2004): 62-63.

⁸ On this topic, see Charles Villa-Vicencio and Erik Doxtader, *The provocations of*

The second feature of the responsibility attributed to the representatives of the South African people is the creation of a bond of trust that would lay the foundations for the incipient democracy. In this regard, South Africans mistrusted retributive justice and its effects – and perhaps continue to do so even today. Unlike the significance of the *Trial of the Juntas* in Argentina, the retributive form of justice was viewed in South Africa as a kind of vendetta, revenge or reprisal, one that would revive and prolong the conflicts that people wanted to leave in the past. From this perspective, criminal retribution would obstruct the “*historic bridge*” between past and future that South Africans hoped to build, a bridge that required the consent of the victimisers, who would have refused to sit back and watch as a door opened for judicial revenge. With regards to the heavy burden that was thus being imposed on millions of victims, President Thabo Mbeki said:

Together, we decided that in the search for a solution to our problems, nobody should be demonised or excluded. We agreed that everybody should become part of the solution, whatever they might have done and represented in the past. We agreed that we would not have any war crimes tribunals or take the road of revenge and retribution. ...We said that as the majority, we had a responsibility to make our day of liberation an unforgettable moment of joy, with none condemned to remember it forever as a day of bitter tears.⁹

This aspect of the South African solution reminds us of the feeling of “crushing responsibility” that led the Athenian democrats to grant amnesty to the oligarchs after defeating them in the civil war that put an end to the tyranny of the Thirty in the year 403BC. The victors could have used their new sovereignty (*kurios*) to try the defeated. However, the democrats experienced the superiority of their victory with a “crushing responsibility”,¹⁰ and thus decided to grant an amnesty (though not to the Thirty) as a way of

amnesty. Memory, justice and impunity, (Cape Town: David Philip Publishers/Institute for Justice and Reconciliation, 2003).

⁹ See Thabo Mbeki, “Statement to the National Houses of Parliament and the Nation, at the Tabling of the Report of the Truth and Reconciliation Commission”, in Philippe-Joseph Salazar and Erik Doxtader, *Truth and reconciliation in South Africa. The fundamental documents*, (Cape Town: New Africa Books, 2007): 460. See also in this volume the ruling of the Constitutional Court in response to a lawsuit for access to (retributive) justice: “Judgment in the matter of AZAPO, Biko, Mwenge, Riberio v. The President of South Africa, The Government of South Africa, The Minister of Justice, The Minister of Safety and Security, The Chairperson of the Truth and Reconciliation Commission, Constitutional Court of South Africa, 1996”, p. 31.

¹⁰ Nicole Loraux, *La cité divisée: L’Oubli dans la mémoire d’Athènes*, (Paris: Payot, 1997): 260-261.

renouncing their superiority (*kratos*). According to the classification by Aristotle, *kratos* is what situated *demokratia* within a set of polities in which one part of the city imposed itself on the other, that is, within tyrannical regimes.¹¹ By renouncing this *kratos* of democracy, the Athenians founded a regime that took the name of all of the constitutional regimes, the *politeia*, a system of equality in which no one's will was imposed on others, leaving a legacy in which politics was joined to the *polis*.

In the South African experience, it is possible to hear the echo of that *crushing responsibility*: in both experiences, retributive justice is perceived as a threat for both democracy and for the perpetrators, who must be incorporated to the new polity, in the new relationship of justice and humanity that was in the making. This is the notion as understood by the South African constituent assembly in 1993 when agreeing on the need for amnesty. They argued that the conflicts of the past and the legacy of hatred, fear, guilt and vengeance had to be overcome, as noted in the epilogue to the Interim Constitution, through a "need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation".¹²

The judicial threat had to be limited to what was agreed on with the perpetrators and framed in the spirit of reconciliation and *ubuntu* that inspired the new democratic beginning. This is the third element: the ethical dimension, the dimension of reconciliation and brotherhood, of generous humanity in relation to the *other* that the term *ubuntu* refers to¹³ and that which established the basis for the South African solution. In addition, at the ethical level, revenge, demonisation and a threat of an eye-for-an-eye retribution were prohibited. In the words of D. Tutu and N. Mandela, in order for there to be a democracy that allowed freedom in South Africa, the perpetrators had to be included in this democracy, and to achieve this, these perpetrators also had to be set free.¹⁴ This ethic of liberation assumed a particular balance between autonomy and heteronomy that expanded the

¹¹ See *Politics: Book III* by Aristotle. Cf. Loraux, *La cité divisée*, 259-260; also Barbara Cassin: "Politiques de la mémoire. Des traitements de la haine", *Multitudes*, 9 (6), 2001, 177-196, (<http://multitudes.samizdat.net/Politiques-de-la-memoire>).

¹² Salazar and Duxtader, *Truth and reconciliation in South Africa*, 5, 29-32.

¹³ This humanist philosophy is reflected in the Zulu proverb "umuntu, ngumntu ngabantu!" which could be translated as "people are people through other people". Cf. Wilhelm Verwoerd "Towards the recognition of our past injustices", in Charles Villa-Vicencio and Wilhelm Verwoerd, *Looking back, reaching forward. Reflections on the Truth and Reconciliation Commission of South Africa*, (London/Cape Town: University of Cape Town Press/Zed Books Ltd., 2000), 158; and Philippe-Joseph Salazar, *Amnistier l'apartheid. Travaux de la Commission Vérité et Réconciliation*, (Paris: Éditions du Seuil, 2004).

¹⁴ See Jacques Derrida, "Versöhnung, ubuntu, pardon: quel genre?" in *Le Genre Humain*.

figure of the victim to include the perpetrators. "In the larger sense, we were all victims of the system of apartheid, both black and white."¹⁵ It is a notable contrast with Argentine justice, whose retributive nature was based on incriminating the military retroactively for their crimes, on equality before the law and on the autonomy of the perpetrators; in the South African experience, equality and liberty were reestablished by acknowledging their absence in a past of injustice. The goal was for all South Africans to make the words of the preamble to the 1996 Constitution their own: "We, the people of South Africa, recognise the injustices of our past."¹⁶ Everyone was a victim of a lack of acknowledgment by the other, of the lack of democracy, of the lack of humanity and *ubuntu*.¹⁷ Democracy had to be restored for all the victims, that is, all South Africans.

The fourth element of the form of South African justice is derived from the first three. The South Africans proposed transforming the perpetrators into "active, full and creative members of the new order."¹⁸ The condition placed on perpetrators was the public offering of a self-condemning truth (repentance was not a condition, though occasionally it appeared) open to public indictment. A defensive and self-offensive act, interested and disinterested at the same time. A new shared space was thus created *among* South Africans and potentially also *among* the perpetrators themselves, a space in which the perpetrators could acknowledge their crimes and testify on what they had done. They could thus move away from *that which they were*, disidentify and be born again (politically), to borrow the terms of Hannah Arendt.¹⁹

These four elements – the priority of the victim, democratic responsibility, the ethic of *ubuntu* and the transformation of the perpetrators – distinguish the new form of South African reparative justice and its human relationship. Here a new equality among citizens is seen, one that joins on the same stage those who had been *segregated* under *apartheid* law and violence

¹⁵ Salazar and Doxtader, *Truth and Reconciliation in South Africa*, 467.

¹⁶ Verwoerd, "Towards the recognition..." and Derrida, "*Versöhnung, ubuntu, pardon...*".

¹⁷ On this recognition of the experience of the dehumanisation of the humane by politics, see Ph-J. Salazar "La reconciliación como modo de vida ética de la república", in C. Hilb, Ph-J. Salazar and L. Martín (eds), *Lesas Humanidad* (Buenos Aires: Katz, 2014): 161-180. Also see Verwoerd, "Towards the recognition...", 158-159.

¹⁸ I return to the terms of the already cited ruling "AZAPO..." of the Constitutional Court, in Doxtader and Salazar, *Truth and Reconciliation in South Africa*, 31.

¹⁹ On the central role of the perpetrators and their conversion into founding fathers, see the articles by Ph-J. Salazar ("Une conversion politique du religieux") and by B. Cassin ("Amnistie et pardon: pour une ligne de partage entre éthique et politique") in the already cited issue of the magazine *Le genre humain*. On Arendt, see *The Human Condition*, (Chicago/London: The University of Chicago Press, 1958).

only a short time earlier. All were now allowed to speak and be heard, and thus a transaction between victims and perpetrators was staged in the exchange of truth for freedom as the promise of a new polity of citizenship.

Uruguay

The last question that remains is the relationship of justice, if such a relationship indeed existed, in Uruguay. An amnesty law in Uruguay eliminated the possibility of bring the perpetrators to trial and it took years to reach an official and public version of the truth about the crimes of the past.²⁰

In 1986, when military officers refused to respond to court summons, the Uruguayan Parliament passed the so-called the Expiry Law (No. 15,848). This law granted a general amnesty for all crimes of a political nature committed by the members of the armed forces and police. There were arguments to justify this decision, which was equated with the amnesty already granted to political prisoners who had not committed murder; the need to turn the page on the painful internal war; the previous civil-military accords on the transition to democracy; and the assurance of social peace and democratic stability. Though challenged by human rights organisations and leftist parties, who called for a referendum in April 1989, the law would obtain the majority at the polls with 56% of the popular vote.²¹

What can be said of the amnesty voted by the people? What can be said of this democratic form of responding to the legacy of violence and terror? Is it an act of justice or is it pure injustice on the part of the *demos*? We can say that in Uruguay, there was no retributive form of justice, there were no trials, just as there was no truth that could generate reparative justice, although the amnesty law expressly stated that all reported crimes should be investigated.²² Could it be said that the *demos* acted unjustly in Uruguay from all perspectives?

It is possible that Uruguayans believed that through the mere manifestation of the democratic form of power, the popular vote, an act of

²⁰ President Battle did not create the Peace Commission until the year 2000. The commission's work continued until 2003.

²¹ See Diego Achard, *La transición en Uruguay. Apuntes para su interpretación*, (Montevideo: Ingenio en Servicios de Comunicación y Marketing/ Instituto Wilson Ferreira Aldunate, 1992); Eugenia Allier Montaño, *Batallas por la memoria. Los usos políticos del pasado reciente en Uruguay*, (Mexico/Montevideo: UNAM/Instituto de Investigaciones Sociales/Ediciones Trilce, 2010).

²² According to Article 4 of the law, "The Executive Branch will immediately order investigations aimed at clarifying these acts. Within twenty days of receiving court notification of the criminal report, the Executive Branch will inform the accusers of the result of these investigations and will supply them with all of the information gathered".

justice would be done. According to this view, democracy appeared as the only fair system and this act of voting and at the same time granting amnesty staged an unquestionable victory of democracy over dictatorship. From this perspective, like the Athenian democrats in 403BC, this act of justice was the expression of democratic power as the only legitimate power. Duplicating it through a second act of (retributive) justice could be taken as impressing the *kratos* of democracy upon the idea of impartial justice, that is, as a demonstration of the superiority of one part of society over another. This ultimate superposition of the power of the *demos* and of fair retribution would necessarily involve double jeopardy, expressing superiority and thus becoming a reprisal or a vendetta of the conquering democrats against the conquered tyrants. In a word: it would appear an act of *injustice*, an act that creates new damage and a new victim, in this case, the perpetrators of the past. To paraphrase Nicole Loraux, whose interpretation I am following here, it is as if the Uruguayan people, in the moment in which democracy is established as the sole polity that adopts the language of the just and the unjust, knowing or wanting to be the victor, had strived to clearly establish in its collective memory that it had not acted unjustly.²³ In exchange, the Uruguayans incurred in a permanent and unpayable debt with the victims, a debt that it has perhaps only begun to acknowledge over the past decade. This debt was incurred, however, in perhaps the only form in which such a lack (of justice, in fact) could become a debt: democratically, through an amnesty put to the people's vote.

One final hypothesis: beyond preventing what could have been considered double jeopardy and a fair popular decision to not bring the unjust to trial, it is possible that the Uruguayan *demos* may not have wanted to publically highlight a division that it already experienced as insurmountable. Especially because, due to the fact that this division had to be overcome by drawing a line between the just and the unjust, the Uruguayans may not have wanted to expose this with a show of force. The contrast with the case of Argentina may shed light on this idea: one thing is depicting the division of society in a court scene and providing compensation for the victims and sentences for the victimizers, all in following with a common law and the authority of the judges. Another thing altogether would be exposing that same division on the stage in which the *demos* manifests their will and their political sovereignty. Would it be possible to imagine a more punitive form of retributive justice, one more radical in the division it establishes by separating the just from the unjust, one less based on the promise of a human bond, than that in which the people, expressed through a majority, embodied in their leaders, take the place of the judge? From this perspective, it is possible to read the Uruguayan referendum as an expression

²³ Loraux, *La cité divisée*, 277.

of the “crushing responsibility” we spoke of earlier. Especially considering the feeling that weighed on the supporters of retributive justice before the referendum. In the words of one of these supporters, “On March 1, 1985, the world was our oyster, we were on top, and everything was in reach”.²⁴

The forms, the ends and the outstanding debts

On these pages, we have compared and contrasted three forms of justice in the foundation of new polities: *retributive* justice in the case of Argentina, *reparative* or *restorative* justice in the case of South Africa, and democratic justice in the case of Uruguay. To summarise, we can say that through criminal trials, Argentina focused on the victimisers, making them responsible for their actions and equal under a common law. In South Africa, the process of truth and reconciliation focused on the victims, who were offered the truth as recounted by the perpetrators who wished to become free citizens in the new democracy. Finally, in Uruguay a general amnesty was granted in a referendum that also manifested democratic legitimacy as the only rule for cohabiting on equal grounds.

At the beginning of this article, we said that justice is a human bond and an end to itself, one necessary in new post-traumatic beginnings. It takes different forms according to the way in which it has historically related to other “ultimate” *ends*: the dignity returned to the victims, the truth, democracy, the construction of a culture in which human rights are respected, peace, *Nunca Más*. The notion of one particular form of justice is thus disregarded here, and we wish to emphasise certain lessons: that justice can mean bringing to trial those who considered themselves above a common law; that it can mean concentrating on the victims instead of the victimizers; and finally, that it may require emphasising the legitimacy of democracy as the only fair polity.

At the same time, the marks left by these *other ends* on the forms of justice indicate that there may be *outstanding debts* other than those not accounted for when justice is served only partially. These debts are the ones incurred when a country opts for one particular form of justice, prioritizing certain *ends* over others. There are debts in relation to the truth, in the case where the focus was on retribution or on the *demos*; debts with regards to criminal law, where the search for truth or the popular will took priority; and debts related to the ties between justice and the *demos*, when the search for truth or the desire to punish the perpetrators took precedence.

²⁴ Quoted by Ollier Montaña, *Batallas por la memoria*, 102.