

TRANSITION THROUGH CONSULTATION: THE URUGUAYAN EXPERIENCE*

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A. INTRODUCTION

1. In my presentation I won't refer to the aspects which Dr Louise Mallinder from the "Beyond Legalism: Amnesties, Transition and Conflict Transformation" project analyses brilliantly in her report on Uruguay in the Amnesty law research. Instead, I will examine other aspects of the Uruguayan transition more closely.

Uruguay is a small country with 3,000,000 residents, a high rate of literacy and a strong social convocation which is based upon the secular, free of charge and obligatory education system. In comparison to neighbouring countries, Uruguay did not suffer periods of military dictatorship until the 1930s and is in possession of the longest-lasting democracy of the continent.

Until 1973 Uruguay was considered not only the most secular country but also the most democratic one in Latin America. It was well-known as "The Switzerland of the Americas". The nickname isn't only due to its government system, but also to its strong banking market based on the "bank secret".

2. During the "cold war", Uruguayan soldiers "left the barracks" and became engaged in domestic security under a 1971 presidential decree. This expansion of their role into the domestic sphere was justified on the need to combat the leftist guerrilla movement called Tupamaros. The military defeated the guerrillas in almost two months.

Nonetheless, in 1973 the military arranged a coup d'état together with the civilian president Juan Maria Bordaberry, who dissolved the Parliament. The military and its civilian supporters established a de facto government.

Between 1973 and 1984 functionaries of the de facto government committed crimes against humanity that can be described as "state terrorism" or "state criminality".

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The torture and illegal deprivation of liberty of a large portion of Uruguayan citizens were the most commonly committed crimes during the dictatorship. These crimes were used as methods to increase terror.

Those who were opposed to the de facto regime, were considered revolutionaries according to the doctrine of the national security and the theory of Carl Schmidt on the battle against the “interior enemies”.

3. Relative to the forced disappearance of persons, in its 2003 final report, the Commission for Peace confirmed the disappearance of 32 Uruguayans during the dictatorship, in the countries of Uruguay and Argentina.

Although since the transition, the Uruguayan military have argued against the concept of “state terrorism”, maintaining instead that during the “dirty war”, two hostile forces had fought each other (for example, leftist guerrillas versus the state forces), in 1992 the opinion of the Inter-American Commission of Human Rights differs. After analysing the consulting opinion of the Inter-American Commission of Human Rights we can conclude that, from the interior conflicts which took place in Latin America in the Seventies, only the one in El Salvador qualifies as an armed interior conflict.

4. Considering what I have presented, my **first conclusion** is that in Uruguay there was no armed conflict and instead during dictatorship, the state committed systematic and widespread crimes committed against human rights.

B. NEGOTIATING TRANSITION

1. Secret negotiations between the military forces and some politicians were held To reintroduce constitutional government. This process led to a transactional or agreed transition (in Naval Club Pact), in which the delivery of the power and the return to constitutional rule was exchanged for penal and/or civil immunity for the illegitimate holders of the de facto power.

The political transition was based upon a political negotiation which introduced democracy by exemption of punishment, as the best manner in which to build the fundamentals of the new institutionalism.

The accomplices and a part of the opposition negotiated “the change in peace”, slogan used in the political campaign of Sanguinetti, the first President in Uruguay since the return to the democracy in 1985. This type of negotiated transition took place as well in South

Africa and El Salvador. The opposite example is the transition in Chile, because instead of a negotiation about the possibility to grant a pardon to human rights violators, the Chilean military introduced “auto-amnesty” law.

2. As a **second conclusion**, one can say that Uruguay had a negotiated political transition. This influenced the following transitional justice process to resolve the situation of state crimes and dealing with the past.

C. PUBLIC CONSULTATION DURING THE PROCESS OF TRANSITION

1. The fundamental characteristic of the Uruguayan transition process, is that in Uruguay so notably, all stages of the process were engraved by moments of public debate and by direct public participation. This debate explains the title of this lecture. It means, that the Uruguayan transition has been supported by “public consultations”.

2. The *first public consultation* took place in 1980 when during the dictatorship the population unexpectedly rejected a draft constitution, which would have institutionalised and made permanent the role of the armed forces in national government.

3. The *second big public consultation* took place with a Referendum of 1989 to annul the amnesty law called **Law Nullifying the State’s Claim to Punish Certain Crimes**. This law shielded the functionaries of the military regime from investigation or prosecution for serious human rights violations. The Referendum was a consequence of a public movement against the amnesty law that was spontaneously organized, headed up by the relatives of victims and social movements, which over the course of 12 months collected more than 250.000 signatures, which surpassed the threshold outlined in the constitution to trigger a referendum on any legislation.

In the vote on 16 April 1989, 84.74% of eligibility voters participated in the Referendum, 47% of whom voted to maintain the law.

In my opinion the Referendum result does not so much represent consent to impunity of criminals as the best legal way to deal with the past, but rather a sense among the electorate that amnesty was the best political way to defend the recently recovered democracy.

It’s important to emphasize that the Referendum allowed citizens to decide whether to annul or ratify the exemption from punishment of the criminals.

The consequences of Referendum could be considered in both a positive and a negative light, from the point of view of the fight against impunity and forgetting. On one hand, the Referendum campaign provoked an unprecedented public debate about state crimes. As a consequence citizens, learned to use the resources contained in the Constitution to limit the extent of state powers.

In spite of the result, the Referendum debate was the strongest public statement against impunity. For example, nobody celebrated the result of the Referendum, because even many of those who supported the preservation of the amnesty law did so more to preserve an apparently fragile democratic consensus than out of any real support for the principle of impunity.

The political parties were not the main actors of the public mobilization against the law. Women had the most active role during the Referendum campaign in seeking to annul the law.

It could be said, that the referendum had an important political consequence because it gave Uruguayan society a reason to come together, beyond identification with the positions of political parties on this issue.

On the other hand, the referendum campaign to annul the amnesty law was concentrated in the capital city, neglecting the half of the Uruguayan citizens who live in the countryside. The debate concentrated on the moral and ethical aspects of impunity, without taking into account the political aspects of the discussion.

The Referendum shows that the public discussions could have been more political, taking into account the Uruguayan national character. Uruguayan voters are conservative, with a small c. They need more specific proposals to make the important decision of rejecting the political “negotiated” solution to recover democracy.

Those who campaigned for annulment of the law could not give a satisfactory answer to the question: what will happen after annulment?

During the public campaign the political parties did not talk about human rights violation during the dictatorship. The supporters of the amnesty law managed to convince the voters that annulment of the law meant going along with a campaign led by the Tupamaro guerrilla movement and the Communist Party.

4. The *third stage of public consultations* occurred following the election of President Jorge Batlle in 2000, as he created a Commission for Peace, to achieve the reconciliation of the Uruguayans. Batlle was the first democratic President who has listened to victims demands for truth and who tried to deal with the past. But like the previous Presidents, he made use of the amnesty law to impede any prosecution of state criminals.

5. The *fourth stage of the public consultations* began in 2005 with new policies introduced by President Tabaré Vázquez, the first left-wing President in Uruguayan history, who issued a “reinterpretation” of the amnesty law, in a manner that sought to allow the courts to prosecute the gravest human rights violations. Because of the inaction of the previous Presidents and their political parties in Uruguay, the defence of human rights is associated with the left-wing Party Frente Amplio and the workers association.

6. In the *fifth stage*, currently taking place, there is a discussion about the need to annul the amnesty law through a second public Referendum. This time via the use of a *Plebiscite*, that will submit for consideration, a constitutional reform which annuls the legal effects of the amnesty. This impulse came from the same minority civil society current which is pressing for trials, and was a response to favourable signals from Vazquez which sought to move the issue on another step. President Vázquez recently said, during a visit in a foreign country, that he as a private individual approves of the Plebiscite campaign. This campaign, like the previous one, is being led by social movements and victims associations. The pro-plebiscite movement has already collected the necessary signatures to put the question of amnesty annulment before voters.

7. As a **third conclusion** one can say, that both the political transition and the process of transitional justice in Uruguay were brought about by citizen mobilisation and engagement in methods of direct democracy, even during the dictatorship.

D. STAGES OF TRANSITIONAL JUSTICE

1. Because I don't have enough time to analyse the meaning of transitional justice, I can just explain that in general terms that transitional justice is a process which comprises transitions from dictatorships to democratic regimes or from war to peace. Actually transitional justice could be defined as a way to realize justice by combining elements of penal justice, the search of the truth and the compensation of victims and different institutional reforms that has to bring along a new legal regime.

2. In the Uruguayan transition you can see three clearly separated stages.

The **first stage** prioritised institutional stability to the disadvantage of the other aims of a process of transition. The dilemma was, firstly: to liberate the political prisoners locked up in military prisons, secondly: the penal persecution of those responsible for the crimes against humanity.

The first problem was solved in May 1985 by the parliamentary enactment of an amnesty law for all political, common and military criminal acts connected with those committed from the first of January of 1962 onwards. The law excluded soldiers and policemen who committed crimes against humanity.

The second problem was the most complicated to solve, because of a threat of military revolt – soldiers did not want to be responsible for their crimes in front of the penal justice system – to avoid the risk of another *coup d'état* it was necessary in December 1986 an amnesty, through the *Law Nullifying the State's Claim of Punish Certain Crimes* number 15.988, to grant a pardon to the criminals of the state.

The **second stage** begins in 2000 with the formation of the Commission for Peace, a quasi-truth commission, to investigate the cases of forced disappearance, in regard to article 4 of 1986 amnesty law which provided that the government must investigate all cases of disappearances and inform the victims' families. The Commission for Peace attempted, like other special commissions outside of the American continent – without much success – to illuminate the historical truth and recommend compensation for the victims. The Commission was limited in its investigative capabilities because it could only “receive, analyse, file and compile information” related to disappearances. As it was not a judicial organ, it could not compel testimony and any meetings it held with military representatives were conducted under strict confidentiality. The families of persons who were “disappeared” as a result of state terrorism, periodically received information of the Commission, which confirms the prior aim of “obtaining information” about the true history of the events. However, if one is aware of the fact, that there was almost no collaboration from the military forces or the police and that the principle sources of information used by the commission were the victims and some individual testimonies from lower grade soldiers, it can be argued that this Commission was not functional according to the victim's interests.

Definitely the principle contribution of the Commission for Peace, in addition to reinforcing the place of the issue of human rights violations on the political agenda, was the

official recognition of the responsibility of the state. The presidential decree Number 146/2003 declared as “official version” the final conclusions of the Commission for Peace, among others, the recognition of the phenomena of the criminality or state terrorism.

The **third stage** began in March 2005, when the administration of President Vázquez pressed ahead not only with a new political-criminal orientation but also a new law relating to dealing with the past. Vázquez has sought to reinterpret the amnesty law to “read in” the following exclusions to the amnesty: disappearances, crimes committed by civilians, crimes committed by high-ranking military and police personnel, crimes committed outside Uruguay; and crimes committed before the start of the dictatorship in 1973. The exclusion of the crime of disappearances reflected developments arising in the case law, where in response to complaints from victims’ families, the courts had begun to rule that disappearances were a continuous crime, not covered by the amnesty.

Despite this reinterpretation of the amnesty law and the consequent reopening of cases that had previously been closed, the penal prosecutions of state crimes committed many years ago has struggled against problems with existing guaranties (within) Uruguayan penal law. Among these, the prohibition of retroactivity and the prescription are an obstacle for penal condemnations for criminal offences committed years ago. From 2005 until today, investigations and penal judgments have been initiated as a result of complaints detailing precise evidence of disappearance and/or homicide, which have led to trials and imprisonment of the leadership of the dictatorship and other military functionaries and those of the police who were involved in the criminal apparatus of the state.

As one of the positive outcomes of the process of Uruguayan transition is that the official recognition of state crimes by the Uruguayan government has opened the doors for a new attempt at state- compensation for victims, via a law that is now under discussion in parliament. One has to emphasize the intermediary aspect of that law that not only will serve to compensate the victims of the state, but also the victims of the military and of the police, for having taken action in the so-called war against “subversion”.

Another positive consequence is the attempt to get to know the truth and punish the persons responsible of the crimes against humanity through penal law. But it is not clear if the principle of justice can only be successfully achieved by penal law or if there are other ways to obtain these aims. For some people, mainly supporters of military forces, this last stage of the transition is under suspicion of being victorious justice.

At last, as the process of transition is in full development, a **fourth stage** could arise, according to José Mujica, a senator and ex-guerrilla fighter who suffered years in prison under completely inhuman conditions, who today is a candidate for the presidency. Mujica affirms that in a similar manner to the South African solution, one should change, suspend or not apply penalty to those state criminals, who assume voluntary responsibility for the crimes committed and who bring trustworthy dates for the acknowledgment of the true history. The validity of Mujica's proposals under international law are unclear, as the International Criminal Court has not yet given its opinion of the possibility to renounce punishment in exchange for the acknowledgment of the truth and compensation of victims.

This fourth stage proposed by senator Mujica could be called an "acknowledgment for amnesty scheme" or "amnesty in exchange for truth".

3. Considering the events expressed up to now I can summarize some conclusion about the transitional process in Uruguay.

First: The Uruguayan case serves to affirm that once the illegitimacy of a situation has been brought to full attention, the wounds created tend to last longer, so that a "mere acknowledgement" of the situation does not suffice. One must be prepared to work with the past in order to heal the wounds created. Although the search for truth can be separated from the task of administering justice and reached in alternative ways (for example, Commission for Peace) the Uruguayan transition shows that this administration is not sufficient, unless it is accompanied with symbolical acts. Acts that relate to the individualism of the different players involved in the conflict, like the victims or the delinquents. Nevertheless an immoderate reaction to those who committed the injustices, treating them even with the same injustice that they used to unlawfully achieve the power, is not wise either because it endangers the core of the constitutional state.

Second: In the Uruguayan transition there was no possibility to resolve the conflict through a *restorative process of justice* that would have privileged the mercy and the reconciliation, because there was no voluntary assumption of responsibility on the behalf of the criminals of the state.

Third: The Uruguayan transition approves Ruti Teitel's definition of transitional justice, as a justice that has direct connection with "periods of political change". Nevertheless, the process of the Uruguayan transition proves that this definition has to be considered from a broader perspective. The justice of transition is not just a form of justice

connected to a particular period of political change, but rather the justice of transition varies with the political changes or with the change of the politic of a government, in relation to the confrontation of the past and when it deals with crimes of the state.

Fourth: As well it demonstrates that within the concept of transitional justice, fit many different forms of reactions that can be combined with each-other: process of pacification, amnesties, public consultation of legitimacy or rejection of the amnesty like the Referendum from 1989 or the next Plebiscite from 2009, the search for the truth with aims of reconciliation through a Peace or Truth Commission and criminal prosecution and material and symbolical compensations.

Fifth: One can conclude certainly, that in more than 30 years of crimes and in more than 20 years of constitutional state restoration, nor the process of transition, nor the process of absorption of the past events, have reached a climax in Uruguay.

E. AMNESTY LAW AND TRUTH RECOVERY

Now I want to refer quickly to the law of amnesty in particular and its relation with the acknowledgment of the truth. In this part I'll draw some questions of what can happen if the law of amnesty gets annulled in the next plebiscite.

1. First I want to describe the legitimacy of settling conflict by laws of amnesty as long as they answer in parameters of justice and do not block the acknowledgment of the truth.

The legitimacy of the amnesty comes from the Constitution of the Republic which allows the parliament to decide in extraordinary cases the amnesty with the absolute majority of the votes (article 85.14).

The amnesty for the political prisoners has never been questioned.

Nevertheless, the problems began with law number 15.988 which granted amnesty to state officials for human rights violations and subjected criminal prosecution to the will of the government. First the law introduces state leniency in criminal aspects, but it does not affect civil liability, or the investigation of the fate of the disappeared. Also, the law infringes a couple of constitutional principles like the separation of powers and the principle of equality before the law.

The Inter-American Court of Human Rights has declared the incompatibility of the laws of blanket amnesties and self-amnesty with the American Convention of Human Rights. The Uruguayan law does not fall into either of these categories. Nevertheless, according to the Inter-American Commission of Human Rights this law infringes some articles of the American Convention of Human Rights and the American Declaration of the Rights and Duties of Man. The Commission went on to recommend that the state of Uruguay adapt to international human rights norms.

The problems related to the law of amnesty, provoked different attempts to derogate or annul it.

2. So my **fourth conclusion** would be that, even though the amnesty is legitimate under national law, it infringes international norms of the protection of human rights, particularly in regard to justice.

F. LAST REMARKS

1. Finally I'd like to indicate some problems that could provoke the annulment of the amnesty law.

The amnesty law relating to the military will be subjected to a plebiscite in October 2009, on whether or not annulment of the amnesty is possible.

Those who strongly propose the idea of annulling the amnesty law first tried to achieve their goal via the parliament. Unfortunately, they were not successful and were forced to revert to amending the constitution through the use of a plebiscite. In order for a plebiscite to be properly established, the constitution requires the collection of signatures of more than 10% of all citizens who are entitled to vote (that means 250,000 signatures). This amendment of the Constitution would declare, null and void the amnesty law.

2. If the law is annulled, there could be several consequences that I can not explain in more detail here. On one hand, an important consequence would be the creation of problems arising from the principle of *ne bis in idem*, or double jeopardy, that you cannot judge the same case and the same people twice.

But on the other hand, a point in favour of the nullity of the amnesty law is the principle of interests of justice, also contained in the preamble of the Rome Statute of the International Criminal Court, which asserts that states parties are “determined to put an end to impunity” for crimes against humanity.

2. To finalize I would point to some questions that I am not able to answer right now:

If the sovereignty of the people is able to annul the law, even at the expense of causing some juridical problems. The Question is: Could the sovereignty of the people reintroduce slavery or determine that human rights could pertain only to particular persons for reasons of race, religion, etc?.

What would happen if this latter proposal were to be put to a vote under a similar plebiscite? What would the society decide? Should popular sovereignty be restricted if and when it violates human rights?

There is a risk that popular sovereignty in Uruguay could destroy juridical safety in the name of human rights. On the other hand I ask, relating to the principle *ne bis in idem* and juridical safety: Should it be possible for the same people who interrupted the constitutional order, and broke all the relevant international standards with impunity, to now use those same international standards to defend themselves before a reinvigorated national criminal justice system? Or should international law prevail?

Thank you very much for your kind attention!