The ambiguous function of human rights in post-authoritarian state building: the case of Argentina

In the Southern Cone, a number of states have re-established their legitimacy and their post-authoritarian credentials by incorporating human rights repertoires into official state practice. This is particularly evident in Argentina, where recent administrations have characterized themselves as the government of ‘truth, justice and human rights’. This leads to an ambiguous situation, where the state strongly supports human rights repertoires, but in doing so comes to dominate the field of practices and, therefore, set its limits. This paper addresses this issue of ambiguity through the example of Argentina, showing how the state has embraced human rights as a way of establishing its post-authoritarian political identity. In doing so, the state has also worked to establish an exclusive link between human rights and the authoritarian past, thus ‘closing’ or limiting the field of human rights and therefore the ability of groups and actors to use this notion to protest other forms of violations. Thus, it asks whether the post-authoritarian embrace of human rights through, for example, the creation of official memory practices, has seen human rights become a tool for state formation, and what are the implications of this phenomenon?

One of the key ideas behind this paper is that transitional justice has become a form of state formation, a way to build the post-authoritarian, democratic political order. Transitional justice is usually thought of as a way of shaping the post-authoritarian order at the moment of transition, a process that is implemented to produce both democratic transition, and justice. But it has proven to be an ongoing process, one that in South America at least has become a permanent space for shaping democracy and understandings of justice. Rather than a limited process applied for righting a wrong, then, it is a series of practices or a field within which different actors struggle to shape the post-authoritarian order, both at the moment of transition but also in the decades afterwards.

In the first section I will expand on this claim a little more, outlining the relationship between human rights and transitional justice, and between transitional justice and democratic state formation. Then I will show how this has played out in Argentina, which is my case study, looking at how president Nestor Kirchner employed human rights and transitional justice practices in his effort to legitimize both the state and his stewardship of it. In doing so, he instrumentalized and ‘officialized’ practices that already existed within civil society. This points to the main ambiguity that I see in transitional justice: the dual function of it as both a series of civil society demands and as a form of state formation. I will then address the
implications of this. As we will see, while the idea of a state with human rights at its political center might initially seem positive and complementary to, rather than opposed to, the demands of civil society human rights actors, in the case of Argentina what we see is that the state then defines human rights violations as something that occurred in the past, limiting present rights claims.

Transitional justice, as we all know, is a series of practices designed to deal with the past, but more importantly, through dealing with the past, they are designed to create a democratic, post-authoritarian political culture. Formal transition is not enough – to create a deep political commitment to the rule of law a ritual rejection of authoritarianism or undemocratic practices is needed. Transitional justice (TJ) is related to human rights as TJ practices look at the past specifically through the lens of human rights and seek to provide justice for human rights violations. But TJ ostensibly only looks at certain human rights violations, those committed during a period of non-democratic rule or civil war, so it is a subset of the broader field of human rights practices. It is human rights practices specifically related to resolving these particular human rights violations and, in doing so, creating a political culture which will guard against their recurrence.

These practices also serve to build up the legitimacy and the institutional capacity of the post-authoritarian order – so trials build the legitimacy and symbolic capital of the judicial system, as well as of the state that authorizes the trials. Truth commissions build the legitimacy of the state that authorizes them by officializing narratives that already circulated about the recent past and serving to symbolize a break between the past and the present. Reparations seek to reincorporate victims back into the political community and symbolically repair the social contract between the state and all other citizens. Amnesties and pardons de-emphasise retributive justice but are usually connected to a plan to provide other forms of justice (truth/information in South Africa being the classic example here). As such they are considered part of the TJ ‘toolbox’. This symbolic function of transitional justice was pointed out by some early scholars, notably Ruti Teitel writing about transitional justice in general, Richard Wilson in the case of South Africa, and Hugo Vezzetti in the case of Argentina, among others.¹ Vezzetti points out the central role of state actors in the instrumentalization of human rights and justice initiatives following the transition to democracy, becoming the central players in the process of resignifying the meaning of the authoritarian past and using

this resignified meaning to bolster the construction of a new order. The broader context is highlighted by Greg Grandin who shows the link between the rise of transitional justice and the shift from socialism to liberal democracy in Latin America. In truth commissions, for example, the past was presented ‘as a dark backdrop on which to contrast the light of tolerance and self-restraint’ that the new liberal order embodied. In this sense, then, we can see transitional justice as a form of state formation – a toolbox or field of practices available to state actors for legitimizing the liberal democratic state as a political entity after a period of authoritarian rule.

This is not, of course, the sum total of transitional justice and its political uses. While it functions as a form of state formation, the contents of the TJ toolbox are also used by civil society to oppose the state, pushing it to meet their demands regarding the past and the present. TJ, then, has what Sundhya Pahuja has called, referring to international law, both an ‘imperial and counter-imperial dimension’, it is a form of state formation and a way of opposing the state. Both of these dimensions continuously interact with each other, and so the states that are formed through TJ are always to some extent a product of this process of struggle and influence. It is a form of state formation that is ambiguous itself: depending on the particular historical conjuncture, state actors will see their dominance vis-à-vis civil society actors wax and wane.

This bring us then to the example of Argentina and the Kirchner government, which took power in 2003, 30 years after the transition to democracy. What I want to show is how he took oppositional TJ demands and practices from within civil society and transformed them into official TJ policy in order to strengthen the state. Before Kirchner came to power, there has been a number of transitional justice initiatives, both state-sponsored and oppositional. Truth and justice had been pursued at the moment of transition, then there was a retreat from retributive justice and the government emphasized reconciliation and reparation. Opposition to this retreat emerged in the form of practices around memory and demands for retributive justice, which meant trial and punishment of the perpetrators of the human rights violations during the last dictatorship. For example, during the 1990s dictatorship-era victim groups began to commemorate the anniversary of the 24 March 1976 military coup with public demonstrations, at which they would call for the overturning of the pardons issued in the name of reconciliation, declaring ‘neither forgiveness not forgetting’. Prior to Kirchner’s rise to the presidency, then, a number of different actors engaged in transitional justice both

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state and non-state, and each interacted and struggled with the other to advance their own political goals.

When Kirchner became president of Argentina it was in the aftermath of the 2001 economic and political crisis. The state suffered a crisis of legitimacy during this time, with the cry of ‘kick them all out’ demonstrating the attitude of Argentines towards the political class and the political system in general. Kirchner himself was elected with a small percentage of votes, and he lacked a distinctive political identity at the national level. He very quickly moved to change this by aligning himself with the dictatorship-era victim groups that had been developing oppositional transitional justice repertoires throughout the 1990s. In his maiden speech as president, he declared himself there ‘to propose to you all a dream of the reconstruction of our own identity as a people and as a Nation. I come to propose to you all’, he continued, ‘a dream of the construction of truth and justice … [a dream] of our generation who gave their all thinking of a country of equals.’ Truth and justice had been the central demands of the dictatorship-era human rights groups ever since the period of dictatorship itself, intensifying during the 1990s, when they were used to oppose the state policy of reconciliation. Kirchner, who was eager to differentiate himself from the policies of the previous decade, especially the neoliberal development model which was popularly seen as responsible for the 2001 crisis, found that the groups and repertoires that had opposed state policy provided the perfect way to do this. Accordingly, he titled his government the ‘government of memory, truth and justice’.

Kirchner therefore set out on a process of ‘organizational entwining’, co-opting the practices of these human rights groups and incorporating them into the state as a way of building its legitimacy and political presence. Some of his first moves were to literally incorporate representatives of the human rights groups into his government. Eduardo Luis Duhalde, ex-judge and founder of the Argentine Commission for Human Rights while in exile was named Human Rights Secretary, while the position of Human Rights Director within the Ministry of Foreign Relations was given to a lawyer from the domestic dictatorship-era human rights law organization Center for Legal and Social Studies, Alicia Olivera. A week after assuming the presidency Kirchner received eight dictatorship-era organizations in the presidential palace, many of whom were also present at the inauguration of Jorge Taiana, ex-political prisoner during military rule and former Executive Secretary of the Inter-American Commission for Human Rights, as Foreign Relations Secretary. A few months later,

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3 Clarín, 26/05/2003.
addressing the General Assembly of the United Nations for the first time, Kirchner declared that ‘the defence of human rights occupies a central place in the new agenda of the republic of Argentina’, adding that ‘we [Argentines] are the children of the mothers and the grandmothers of the Plaza de Mayo’, the most symbolic of the dictatorship-era groups.  

After incorporating individual activists, Kirchner set about incorporating the practices that different groups had developed during the 1990s to express their opposition to reconciliation. Many of these practices were focused around memory. The commemoration of the anniversary of the last military coup was one of the first commemorative practices to be subsumed into official state ritual. The first anniversary of the coup during Kirchner’s presidency, 24 March 2004, saw an official ceremony held in front of the Escuela Superior Mecánica de la Armada (ESMA) building, the most symbolically charged ex-clandestine detention centre from the authoritarian period. In attendance was Kirchner along with other representatives from different levels of government and dictatorship-era victims groups. Kirchner began his speech by declaring that he had ‘come to ask forgiveness on the part of the national state for the shame of having kept silent during 20 years of democracy.’ Ignoring transitional justice policies enacted by his predecessors, Kirchner positioned his own government as representing the realization of long-held civil society demands. In this undertaking, Kirchner declared, he was ‘guided by justice and the struggle against impunity’, central elements of oppositional human rights practices throughout the last decade. In 2006, days before the thirtieth anniversary of the coup, Congress approved Kirchner’s proposal to make the 24 March a public holiday. The proposal for the establishment of the day as a public holiday emphasised the practice of memory, explaining that memory was ‘fundamental to the construction of a more just and humane society, thanks to the lessons that the past offers for building a better future in accordance with the norms and values reaffirmed in national and international human rights law.’ Memorialisation was interpellated into the service of the democratic state.

Kirchner did not just incorporate the repertoires of civil society groups. In 2006 he decided to re-release the report of the 1984 truth commission investigation into those who had disappeared during the dictatorship. A key feature of the original report had been its

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5 ‘Discurso Pronunciado el Día 24 de Marzo 2004’ Discursos del Presidente Dr. Néstor Kirchner, Buenos Aires, Presidencia de la Nación, no date.
prologue, which sparked opposition amongst victim groups because of the way it framed the violence as the result of a way between two equal and opposing sides, ‘two demons’. The Kirchnerist edition had a new prologue, which, like the dictatorship-era groups, rejected this framework. It replaced it, however, with one that emphasised the link between the Kirchner government and the achievement of justice for the past:

Our country is experiencing a historic moment in terms of human rights, thirty years after the coup d’état that instated the bloodiest dictatorship in our history. These exceptional circumstances are the result of a confluence between the national government, which has made human rights the fundamental pillar of its public policy, and the unwavering demands of truth, justice and memory maintained by the people throughout these three decades.7

The re-released prologue linked democracy and the protection of human rights with current state policy, positioning the latter as the ultimate expression of the human rights and transitional justice repertoires of the 1990s. As it continued, ‘behind the flags of justice, truth and memory in defence of human rights, democracy and republican order … nunca más [never again, the name of the report] is a vast program undertaken by the national State, by the provinces and municipalities and by Argentine society as a whole, if we want to construct a truly integrated Nation and a country more just and more humane for all.’8 Again the long-standing demands of dictatorship-era human rights groups for justice, truth and memory were incorporated into a state-sponsored policy whose ultimate aim was post-authoritarian nation-building.

Given these examples, I see that, in this case, transitional justice has operated or been used as a tool for, firstly, building the legitimacy of Kirchner himself, but also for building the legitimacy of the nation-state itself. By co-opting already-existing repertoires, he accumulated symbolic capital on the part of the state, a central element in Bourdieu’s conceptualization of the state. This process of co-optation did not seek to remove the dictatorship-era groups from being politically active but it did seek to incorporate them within, and thus subordinate them to, the state. Kirchner consistently positioned the state at the centre of debates about human rights and transitional justice, articulating the promotion and protection of human rights and

8 Ibid., 8-9.
justice as something that could finally be realized now that (his) state was involved.

This process of embracing transitional justice and presenting it as state human rights policy has implications for other groups whose demands and concerns fall more into the sphere of economic and social rights rather than the civil and political rights addressed through transitional justice. Even within this latter group, some organizations, such as those working around issues of police violence and abuse of powers, fall outside of the official transitional justice policies as they deal with human rights abuses in the democratic, rather than in the authoritarian period. Through the embrace of transitional justice, human rights has developed an exclusive (negative) link with the authoritarian past, as well as (positively) with the present government. This is despite the fact that, since the return to democracy, human rights issues began to be defined more broadly as not just transitional justice but also including civil rights more broadly, such as police violence as mentioned above, as well as education, service provision, labour relations, as well as group claims such as for women’s rights, sexuality-based claims, indigenous rights. Demands that are predicated on the present, opposing state actions and seeking redress for them, do not receive the same symbolic embrace as demands predicated on the past.

An example to illustrate this is the case of Luciano Arruga, a young man from the province of Buenos Aires who disappeared in 2009. Many dictatorship-era advocacy groups, as well as groups organizing around police violence, picked up on the case as it was suspected that Arruga had disappeared at the hands of the police, who had been accused of torturing him one year before his disappearance when he had been jailed on charges of petty theft. In 2014 his body was finally located, but in the intervening years no single state agency had committed resources to finding him. This stood in stark contrast to the well-resourced and high-profile state agencies in charge of identifying the remains of those disappeared during the dictatorship and those charged with locating the missing children of those who died at the hands of the military.

This is what I see as the implications of the ambiguity of human rights in the Southern Cone. The imperial and counter-imperial dimension to human rights allows for the possibility, as in the case of Argentina, of its transformation, through transitional justice, from a series of practices opposing the state to a series of practices that constitute the democratic state. through the positioning of transitional justice as a privileged series of human rights practices, the field of human rights becomes limited and the ability of other demands to receive the same reception and to impact state policy becomes restricted.