

## Judging Memory

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For two decades, “memory, truth, and justice” was emblazoned on banners, spray-painted on miles of blank walls, shouted loudly at protest marches, and penned in countless editorials as the rallying cry to repeal two laws passed in the wake of Argentina’s democratic transition that had effectively provided amnesty for the perpetrators of the country’s so-called Dirty War. When the laws were finally repealed in 2003, 20 years after the return of democracy and 16 years after their passage, the rallying cry transformed from a political slogan into a theoretical justification for prosecution. Judgment, it was argued, was necessary not only to mete out punishment to those responsible for the forced disappearance of over nine thousand citizens during Argentina’s last military regime between 1976 and 1983, but to discover and disseminate the truth of what happened so as to instill a social memory of Argentina’s horrific past. “Can we achieve a real, integral, and effective regime of human rights in our country if we throw a cloak of forgetting over one of the worst violations that’s ever occurred in our country?” asked deputy Araceli Estela Méndez de Ferreyra during the congressional debate over repealing the amnesty laws, echoing a common sentiment.

The desire for memory and truth was not cast as an ancillary hope, in the sense that trials might uncover truth and instill memory while pursuing justice. Rather, the proponents of repealing Argentina’s amnesty conceived of memory and truth as equal objectives alongside justice. When Argentina’s Supreme Court upheld the congressional repeal of the amnesty laws in 2005 in the *Simón* decision, it held that the amnesty laws were “constitutionally intolerable” because they were “oriented toward ‘forgetting’ grave violations of human rights.”<sup>1</sup> So described, the antidote

to amnesty (to forgetting) is memory through trials.

This is a laudable ambition. Argentina—and the world—must remember the last dictatorship to prevent a return of the hell of state terrorism. Memory is also a valuable end because the dictatorship’s victims were anonymously discarded into the river or burned in mass graves; memory becomes a substitute for the ordinary rituals of mourning that have been denied to the family members of the military’s victims, a way of bringing the past into public life.

Nevertheless, memory is not ordinarily the object of a criminal trial, a fact that has caused significant tension in Argentina’s recent wave of prosecutions. An ordinary trial considers only the evidence that may prove or disprove the charges at issue. When memory is introduced as an object of the trial, the foundation of legal relevance is disturbed, as what is significant for memory may not be relevant to the charges at issue. In other words, if a normal trial asks what the defendant did, a memory trial asks the larger and harder question of why he did it and how it came to pass. Likewise, using trials to foster social memory changes the relationship between the court and the viewing public. Ordinarily, the public acts as a check on the judiciary. Public access to the courts is guaranteed by right to ensure that proceedings are conducted fairly. But when memory is the object of the trial, the public becomes an audience. The end of the trial is not just a verdict but a lesson (or, in case of disagreement about memory, a debate). A memory trial demands an audience so that someone may learn the lessons of the hearing.

For the past five years, I have closely followed Argentina’s human rights trials for an upcoming book. During 2009 and 2010, I attended most of the hearings of a criminal case against 18 officers from Argentina’s Naval Mechanics School (Escuela Superior de Mecánica de la Armada, ESMA), sometimes called the Auschwitz of the South. Every day, I saw this tension play out in the courtroom.

One notable example illustrates the point. In November 2010, Jorge Mario Bergoglio, now Pope Francis, was called to testify about two Jesuit priests who were disappeared in May 1976 when he was head of the Jesuit order in Argentina. The priests, Orlando Yorio and Francisco Jalics, were detained during a raid on the Bajo Flores slum and secretly taken to the ESMA. Both were hooded, shackled, and starved. Neither was allowed to properly relieve himself for some time, and each was forced to wear his soiled clothing for over a month. Yorio, the more political of the two, was drugged, interrogated, and threatened with electrocution. After five days, the two priests were transferred to a secret country home on the outskirts of Buenos Aires, and after five months, they were drugged and abandoned to their fate in an open field.

Activists were interested in Bergoglio’s testimony for two reasons. First, he had long been accused of failing to protect the two priests, and the activists saw his testimony as a chance to cross-examine him about the incident. Second, as the highest-ranking member of the Argentine Catholic Church at the time of his testimony, he served as a proxy for the church at large. Nevertheless, his testimony on the issues in dispute was completely irrelevant. In 1985, during the trial of the junta (one of two cases prosecuted in the 1980s before the amnesty laws were passed) the Federal

Criminal Appeals Court had already established that both Yorio and Jalics had been illegally detained in the ESMA, and the court had convicted Admiral Emilio Massera for their kidnapping. When Bergoglio was called to testify about their ordeal in 2010, only one defendant was charged in the incident, retired Admiral Oscar Montes. Montes, the former chief of naval operations on the Navy General Staff, was charged under a theory of command responsibility. To prove the case against Montes, the prosecution had to prove that Montes was in the chain of command and supervised the officers that kidnapped Yorio and Jalics. Montes argued that Admiral Massera, his superior, had circumvented the chain of command and that as a matter of fact he had no power over decisions at the ESMA. The fact that Yorio and Jalics were kidnapped and that they were held in the ESMA was not in dispute.

If Bergoglio had anything to say about Montes's command responsibility (the only legally relevant question regarding Yorio's and Jalics's detention) nobody asked. Instead, activists grilled Bergoglio for hours over his alleged involvement in the incident and the relationship between the military junta and the church hierarchy. "Did any member of the ecclesiastical hierarchy reach an agreement with the military junta that before a priest was detained the military would inform their ranking bishop?" human rights lawyer Luis Zamora asked, among other, similar questions. The judges gave Zamora and other lawyers ample room to pursue the line of questioning, clearly tolerating the more ambitious memory purposes of the hearing. Indeed, one of the judges found the topic worth engaging. "What was the church's and the Vatican's posture in front of the dictatorship?" Judge Germán Castelli asked

Bergoglio, as if the trial could and should answer such a question.

For the human rights lawyers, Bergoglio's answers served as a representation of the church at large. He admitted that he did not speak out and did not file judicial charges when he learned of Yorio's and Jalics's disappearances. But he insisted that he worked behind the scenes to save Yorio and Jalics by securing audiences with dictator Jorge Videla and Admiral Massera. At the end of the trial, Zamora said that it was not enough. "This trial has shown the accomplice role of the Catholic Church," Zamora argued during his summation. Judge Castelli disagreed. "It's completely false to say that Jorge Bergoglio ratted out [his] priests. . . . We analyzed it, we heard this version, we looked at the evidence, and we understand that his behavior has no legal ramification. . . . If not, we would have denounced him," Judge Castelli told *La Nacion* after Bergoglio was named Pope.

If Zamora's pronouncement was premature—how could he comment on an entire institution, when only a shred of evidence about the church had surfaced?—Castelli's answer reflected the depths to which memory has been superimposed upon justice and how the two were conflated. Bergoglio was not a defendant in the case; prosecutors and the instructional judge had never subpoenaed evidence to investigate Bergoglio's role in the incident, archives from the Jesuits and the Archdiocese of Buenos Aires had never been examined, and witnesses related to Bergoglio's role in the disappearances had not been interviewed.

The investigation of the church was just one example of memory and truth that filtered into the courtroom. The object of the trial was to show the ESMA in all its

destructive dimensions as much as it was to prove the individual charges in the case. Survivor testimony was sometimes repetitive, irrelevant, or redundant, but the stories of kidnapping, torture, sensory deprivation, isolation, terror, and humiliation served to illustrate the scope of the atrocity, and were a mechanism that reminded the public at large what had happened in Argentina not so long ago. Particularly shocking was the testimony of several dozen victims who were put through the ESMA's "process of recuperation," an inquisition-like experiment where prisoners could win their freedom if they renounced their political commitments and adopted more "normal" lives. Some women who had been guerrillas were encouraged to put on makeup and embrace their feminine side; military officers took some of the male prisoners out to soccer games and for drinks on the town, all in an effort to help them "recuperate" from being political subversives. Some human rights activists also saw the trial as an opportunity to defend the activism of the victims, sometimes turning the courtroom into a seat of political debate rather than legal inquiry. The trial was also in conversation with the perceived failures of the democratic transition. "We have to end the discourse of the repressor," human rights lawyer Rodolfo Yanzón said in his summation at the ESMA trial, arguing that public discourse during the transition had justified the military repression by framing the violence of the dictatorship as a war. Even the defense partook in the memory exercise. Defendant Ricardo Cavallo, for instance, wrote a 50,000-word treatise on the history of the guerrilla movements in Argentina for his final defense. It was odd from a legal perspective, as Cavallo had flatly denied the charges against him. But he saw a moral obligation to defend the conduct of the navy.

The bigger question is whether using the courts to promote memory is appropriate. Political philosopher Hannah Arendt famously argued in her critique of the trial of Nazi Adolf Eichmann in Jerusalem that historical questions have no place in the courtroom, for the impulse to provoke memory and truth tends to suffocate those interested in the tedious business of sorting through the evidence against individual defendants. In other words, when the courtroom is used for historical projection to create a true record of the past, there is a strong impulse to instrumentalize the trial; an official history presumes only one conclusion, namely a guilty verdict for the defendants. To this I would add other concerns: What should be remembered? Whose memory? From which perspective? Are there false memories and perspectives? Should courts render judgment on the past? There are also practical concerns: when memory is placed at the center of trials, the judicial process becomes long and tedious.

Others, such as the legal scholar Mark Osiel, have defended using trials as a mechanism to provoke social memory. In his book *Mass Atrocity, Collective Memory, and the Law*, Osiel argues that so long as the proceedings respect procedural norms, trials as public spectacles can be useful in solidifying the rule of law by inculcating society with liberal-legal values. During periods of democratic transition, Osiel believes that “the need for public reckoning with the question of how such horrific events could have happened is more important to democratization than the criminal law’s more traditional objectives.”<sup>2</sup>

The debate between these two positions may never end, but we should be aware of the tension.

#### *Endnotes*

- <sup>1</sup> Causa S.C. 1767; L. XXXVIII, “Recurso de hecho deducido por la defensa de Simón, Julio Héctor y otros *s/* privación de la libertad, etc. — causa N. 17.768,” June 14, 2005, p. 120.
- <sup>2</sup> Mark Osiel, *Mass Atrocity, Collective Memory, and the Law*. (New Brunswick, NJ: Transaction Publishers, 2000), 3. ■