

# Critical Dialogue

**Seeking Human Rights Justice in Latin America: Truth, Extra-Territorial Courts, and the Process of Justice.** By Jeffrey Davis. New York: Cambridge University Press, 2014. 247p. \$95.00.  
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— Omar G. Encarnación, *Bard College*

This book focuses on citizens' attempts to address the human rights violations committed by murderous political regimes in Latin America, a well-traveled subject for students of Latin American politics. Since they began to return to democratic rule in the mid to late 1980s, after prolonged experiments with military rule, the new democracies of Latin America have been burdened by an ugly legacy of human rights abuses that, over the ensuing years, has given rise to a robust "transitional justice" movement. Along the way, a large and diverse scholarship has emerged to address, among other compelling questions, the political and legal mechanisms that are available to transitional justice seekers, how transitional justice is meant to influence the process of democratization, and why some nations are eager to pursue justice toward the old regime while others are more inclined to forget and move on.

Despite the familiarity of the subject, Jeffrey Davis's book is a compelling and an important addition to the existing literature. The study's core theoretical claim aims to chart new ground by arguing that "transitional justice" "is best understood as a process rather than a result, and that it is not a universal absolute but a continuum with subjective and objective elements" (p. 28). He adds that "the search for justice does not end when the truth is revealed, nor when the judgment is issued, nor when the convicted are punished. It returns home with the victims to become part of the domestic legal, economic and political struggle" (p. 28). Nor, according to Davis, is the process of legal justice constrained to domestic politics. Increasingly, "it crosses borders and oceans to inspire other who seek to overcome their own barriers of impunity" (p. 28).

These are key theoretical insights, ones that are generally obfuscated by the very term "transitional justice." Whether intentionally or not, the term tends to bracket the search for justice and accountability against a departing authoritarian regime to the transition itself, neglecting to anticipate the possibility of a more prolonged and complex

process of the kind outlined by Davis. Furthermore, the notion of transitional justice leans heavily toward the belief that whatever decisions about the past are made during the transition will forever shape the search for truth and justice. Clearly, such decisions are not set in stone. They can be revisited, and even overturned, years after the transition.

Animating Davis's arguments is a set of well-chosen empirical stories drawn from Central America (El Salvador and Guatemala) and the Andean region (Peru). This is very welcome, if only because these regions have traditionally not generated that much attention, at least not when compared to South America's Southern Cone countries. The latter have shaped the field, especially the case of Argentina, whose process of transitional justice has served as the template for Latin America and indeed much of the world. Argentina's military trials were the first war-crimes trials to be held since the end of World War II, and the Argentine Truth Commission was the first commission of its kind to gain worldwide renown. Indeed, the commission's final report, published under the title of *Nunca Más* (Never Again), became an international runaway bestseller.

One of the virtues of Davis's empirical analysis is to afford readers a different image of human rights victims and justice seekers in Latin America. Scholarly attention to human rights victims in Latin America has fallen disproportionately on intellectuals, labor leaders, and middle- and upper-class people generally of European descent. After all, it was Argentina's Las Madres de la Plaza de Mayo, the group of Argentine mothers and grandmothers, some of them hailing from the most privileged precincts of Buenos Aires society, whose advocacy during the transition on behalf of the "disappeared" put the Latin American human rights movement at the vanguard of international human rights activism. By contrast, the protagonists in Davis's narrative are ordinary people, especially rural, poor, and indigenous people, those who bore the brunt of the violence of the Central American civil wars.

A more apparent virtue of Davis's empirical work is its emphasis on "extra-territorial" justice, or the attempt to seek justice for an old regime outside of national borders, as a consequence of the limitations of domestic legal institutions. This aspect of the politics of transitional justice in Latin America is often overlooked, since Latin

American governments, to their credit, have been more willing than those from other developing regions (most notably Africa) to undertake prosecution of the old regime through their own judicial systems. Hence, intervention in Latin America by major international justice organizations, such as the International Criminal Court (ICC), so common in African countries like Rwanda, Sierra Leone, and the Sudan, has not been necessary. Tellingly, the ICC's chief prosecutor, Luis Moreno Ocampo, cut his teeth in Argentina, prosecuting former military officers. But clearly, as suggested by Davis's study, numerous domestic impediments to justice in Latin America remain firmly in place, forcing many to seek justice abroad, especially in courts in Spain and the United States, and regional bodies such as the Inter-American Human Rights Court.

For all of its many virtues, *Seeking Human Rights Justice in Latin America* is vulnerable to familiar criticisms of works on transitional justice. First, and perhaps foremost, central to Davis's analysis about the importance of legal justice is establishing the truth about human rights abuses, which the author regards as critical to restoring the dignity of victims and preventing future violence by discouraging victims from turning to revenge. For Davis, as for many others in the transitional justice field—whether academics or activists—the essence of the truth rests in victims' testimony, as compiled by a truth and reconciliation commission and/or as revealed in judicial proceedings. But personal testimonies, especially in the absence of corroboration by other sources, are prone to manipulation and politicization, and, in any case, they are highly subjective and notoriously fallible. Not surprisingly, truth commission reports have often been criticized for conflating memory with history, a point underscored by the very popular but troubled concept of “historical memory,” which implies that history and memory always align with each other, to say nothing of creating and furthering a culture of victimization.

Moreover, while Davis makes a compelling case for the importance of truth commissions and political trials as building blocks for the creation of official narratives about human rights abuses that prevent states from denying the human rights abuses of the past, this “officializing” of the past is not without its problematic side. As several cases have shown, some of them from Latin America, the attempt to create a single, uniform narrative about the past can itself become the source of conflict rather than reconciliation. On the other hand is the experience of Spain, where, as my own book shows, democratization was pursued alongside a wholesale policy of letting bygones be bygones. Given the Spaniards' penchant for politicizing the memory of the past, the Spanish Civil War in particular, the absence of a state-endorsed narrative about the past in Spain has for the most part been beneficial to the new democracy.

It is also doubtful—and despite vigorous theorizing to the contrary—that “official” narratives can achieve the kind of national cleansing that Davis and others hope for in any process of truth seeking. It may be, as suggested by several of the stories examined in the book, that the real virtue of human rights justice rests not in what it can do for the nation as whole but, rather, in what it might contribute to people as individuals. This point is underscored by the case of Wendy Méndez, a witness in a case of human rights abuses by the Guatemalan military heard by the Inter-American Human Rights Court. Prior to her testimony, Méndez's lawyers warned her that her testimony about the rape that she endured the night her mother was kidnapped by the military might not be admissible, and that if the court agreed to hear the testimony, it could in the end decide to disregard it. Fortunately for Méndez and for the people of Guatemala, the court heard her account of the rape and ruled that sexual violence was part of the arsenal of weapons used by the military to terrorize the Guatemalan people. But it is hard to escape the sentiment that the real victory for Méndez was simply the act of being heard. As she observed to the author: “I was quite satisfied with the fact that the judges heard my testimony and the fact that representatives of the government had to sit quietly and listen to what had happened to me” (p. 222).

Lastly, one wishes that Davis had delved, however superficially, into the ironies of extraterritorial justice that his research so compellingly raises. It is hard to escape the irony of Spain, a country that never put on trial any of its military repressors under the long dictatorship of Generalissimo Francisco Franco (1939–75) becoming a haven for justice for Latin American citizens. Instead of justice and truth telling, impunity and forgetting ruled the day in Spain with the advent of “the pact to forget,” an attempt to set aside the memory of the horrors of the Spanish Civil War and the Francoist dictatorship for the sake of consolidating the new democracy. Yet more surprising—and ironic—is the role of American courts in prosecuting the very political regimes whose rise was aided by U.S. foreign policy toward Latin America. What these ironies say about Spanish and American politics can serve as the basis for a future book. For now, however, they powerfully underscore Davis's key contention about the power of justice to transcend national boundaries.

**Response to Omar Encarnación's review of *Seeking Human Rights Justice in Latin America: Truth, Extra-Territorial Courts, and the Process of Justice*.**

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— Jeffrey Davis

I am sincerely grateful to Professor Encarnación for his generous review of my book, *Seeking Human Rights Justice*

*in Latin America*. I have only a couple of matters about which to respond. First, Encarnación is of course correct that constructing the truth about human rights violations should not rely entirely on the victims' testimony. This is a point I make repeatedly in my book. One of my seven chapters is devoted entirely to the importance of proving the factual truth with empirical evidence such as government documents like the Guatemalan Death Squad Dossier. As I point out in that chapter, advocates are "revolutionizing the pursuit of justice by uncovering and analyzing documentary evidence that often contradicts decades of state denials. Moldy police files, clandestine communiqués and lost bureaucratic records are being pieced together to elevate truth over the din of impunity" (p. 117).

I devote another chapter of the book to describing and defining the human right to truth. In it I assert that truth is an "imprecise term" and I recognize that "[T]he perpetrator's truth may be quite different from the victim's truth" (pp. 111–12). "The right, therefore, must be to objective truth" and "must entitle victims and families to information, documents, testimony, images and other forms of recorded evidence with which an empirical analysis can be conducted" (p. 112). In fact, the power of the right to truth lies in its ability to compel disclosure of evidence that can more fully explain the violations committed.

Second, I do not make the argument that constructing official narratives through truth commissions and trials can achieve national cleansing. The foundation of my argument in the book is that legal justice is but one component of transitional justice—one that must be conceptualized in light of domestic social, political, and historical conditions. Legal justice is a multifaceted process with objective and subjective elements. I argue that conceptualizing legal justice simply as a result—for example, as a guilty verdict or a prison sentence—"misses the important contribution that each element of the legal process can make on legal justice for human rights violations. . . [and] fosters a diminished view of the importance of legal justice in the transitional justice system" (p. 48). On the other hand, if we view legal justice as a process, "we fully appreciate how each step along that process contributes not only to legal justice, but also to transitional justice, and its ultimate goals of restoring human dignity and ending cycles of violence" (pp. 48–9). Testimony, I argue throughout the book, is one important element of the process of legal justice that can help victims and survivors reclaim dignity denied to them by years of government denials. It is by allowing testimony that the truth commissions and trials effectively become part of the process of justice for victims and survivors. The key is not to equate testimony with history, but to view it as an expression of the victim or survivor's experience

that through corroboration can help build historical truth.

### **Democracy Without Justice in Spain: The Politics of Forgetting**

By Omar G. Encarnación. Philadelphia: University of Pennsylvania Press, 2014. 256p. \$65.00.  
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— Jeffrey Davis, *University of Maryland, Baltimore County*

Omar Encarnación has written a gripping account of Spain's remarkable transition to democracy despite its refusal to impose justice on the Franco regime. He tells the fascinating story of the years following the death in 1975 of Francisco Franco after four decades in power, when his hand-picked successor, King Juan Carlos, and a Francoist Prime Minister, Adolfo Suárez, worked to put Spain on the path toward democracy. He explains how and why the Right and Left endorsed a Pact of Forgetting and a 1977 amnesty law that confined the crimes of the civil war and Franco dictatorship to the past so that democracy could take root. As the author says, the purpose of the Pact of Forgetting was to "keep memory from encumbering transition" (p. 27).

While Encarnación demonstrates the success of Spain's democracy in the absence of retributive justice against the fascist regime, he acknowledges the costs. For example, "the pact of forgetting exacted a high price on Spanish democracy. . . none more obvious than on prolonging the suffering of Franco's victims" (p. 197). He concludes that "the three decades Spain took to begin to confront the legacy of its dark history, with the 2007 law of historical memory, reveal that coming to terms with the past is not as static or formulaic a process as the transitional justice movement would suggest" (p. 188). By demonstrating Spain's successful transition in the absence of justice, and by examining the many factors contributing to Spain's experience, Encarnación has made an important contribution to the transitional justice and democratization literatures.

The author argues convincingly that Spain pulled off this feat for at least five main reasons. First, Spain avoided imposing justice out of fear that doing so would derail the fragile transition to democracy. Specifically, those in government were concerned that if threatened, the military would take over. Any move toward justice against the old regime "would have put the nascent democracy in mortal danger" (p. 69). Second, Spaniards and their politicians were afraid that conflict between competing factions would erupt into civil war, and all agreed that the horrors of Spain's 1930s Civil War must be avoided at all costs. As Encarnación explains, Spaniards viewed it as a "war of collective madness that produced no winners and losers, only victims" (pp. 28–29). This fear was exacerbated by the pretransition assassination of Franco's handpicked

successor, Carrero Blanco, in 1973, and later reinforced by the attempted military coup in 1981.

The third factor, according to Encarnación, was the erroneous belief that all sides were responsible for the Spanish Civil War and its atrocities. This belief proved a disincentive to calls for justice against Franco's regime, even though, as the author demonstrates, it bore the most responsibility for the war, for wartime killings, and for violent repression during the decades of his rule. It is, of course, true that all sides in Spain's Civil War committed atrocities and this "collective culpability" contributed to the lack of will to confront the past. Fourth, according to Encarnación, Spaniards had mixed feelings about the legacy of the Franco regime, and this led to ambivalence about the need to hold officials accountable for the violations they committed (pp. 119–20).

Fifth, there was widespread support from nearly all parties for the Pact of Forgetting and the 1977 amnesty law. Encarnación provides polling and election data in support, but the most convincing evidence comes from the description of the 14 years of rule by the Spanish Socialist Workers' Party (PSOE) from 1982 to 1996. The PSOE government declined to push for justice even when in power, and even after the democracy was safely entrenched and serious fears of violence breaking out had ebbed (p. 88). After winning power, the PSOE reiterated that it "firmly believed that delving into the past created nothing but trouble" (p. 81).

Encarnación supports his arguments with first-person accounts, voting data, polling data, and a robust analysis of the political factors interacting in Spain's transition. For example, when discussing the fear that motivated the Left's endorsement of the Pact of Forgetting and amnesty law, he quotes a leader in PSOE saying that "we forgot about what the right wing had done on the condition that it did not repeat the same behavior" (p. 69). He points out that 93% of those voting in parliament supported the amnesty legislation (p. 72). He cites the opinion piece of Socialist Prime Minister Felipe González in *El País* to show the importance the government placed on joining Europe (pp. 89–90). These and many other first-person accounts support the author's arguments and add a richness to the overall narrative.

Encarnación paints a detailed portrait of the political interplay between the Left and Right that preserved the pact of forgetting. For example, he describes the political compromises that resulted in the constitutional monarchy, a more limited but still powerful role of the Catholic Church, and the allowance of some self-rule for Spain's regional governments in Catalonia, Galicia, and the Basque country (pp. 74–76). As he states, "With the past conveniently tucked away with a commitment to forget, Spanish politicians were able to secure compromises on all the pivotal issues" (p. 74).

The author analyzes the "complicity of civil society" in the "strategy of forgetting" (p. 102). This absence of a grassroots movement for justice demonstrates that "one variable that is hard to predict [is] societal impulses toward justice and accountability" (p. 188). He points out that justice movements in other countries have been driven to a large degree by civil society, a point I argue strongly in my research on Latin American justice efforts. This phenomenon may be a factor that explains the Spanish case even more than Encarnación acknowledges. By giving opposition voices full voice in democratic institutions, the Spanish transition to democracy may have silenced civil society's calls for retributive justice.

Encarnación may overstate the extent to which Spain's example can teach generalizable lessons about democratizing without justice. While he argues that Spain disproves the argument from some transitional justice scholars that justice is necessary for successful transition, he acknowledges that Spain's experience is exceptional. He recognizes that the "pact of forgetting is unique" (p. 27) and that "Spain is a miracle" (p. 17). He also recognizes the fact that most of the violence and repression took place three decades or more before democratization began, and this is not typical of other transitions. The transition was driven significantly by the fact that the amnesty strategy in Spain was enacted by the democratic successor regime, with the participation and support of nearly all sides, and not by the outgoing repressive regime. This makes Spain's experience more like South Africa's and less like Latin American transitions.

This critique does not take away from Encarnación's argument that transitional justice is inextricably linked to domestic political factors. It is certainly true that the author's work on this point teaches crucial and generalizable lessons. He effectively refutes the transitional justice literature to the extent that it portrays transitional justice strictly as a legal choice isolated from domestic political and social considerations. However, he may paint transitional justice scholars as having too narrow an appreciation of this point. There are indeed transitional justice scholars whose work emphasizes the complexity of transitional justice and its link to domestic political and social factors, such as Eric Stover, Kieran McEvoy, Laurel Fletcher, Harvey Weinstein, and Brian Grodsky, to name but a few.

Encarnación uses a rather narrow conceptualization of transitional justice, limiting its meaning to retribution/punishment or reconciliation. Transitional justice can, of course, include these elements, but as I have tried to show in my work, justice is a far more complex and robust concept. Indeed, the transition to democracy in Spain may have quieted calls for justice for a time because democracy itself was seen as a form of justice. If the crimes of the Franco regime included the removal of its opposing political parties from power in the

Civil War and then repressing their voices for four decades, then establishing a democracy in which those parties have full voice and participation is an ideal form of restitutive justice. Even some separatists were appeased in the democratic transition through the political compromise that granted several regions limited home rule. As I have argued in my own research, justice is a complex political process, and perhaps when parties who have been excluded from government for decades are given full rights to participate, at least that injustice is remedied. Full democracy is the perfect remedy for the crime of political exclusion.

A look at Latin America shows evidence of the overlap between justice and political voice. When Chile elected Michelle Bachelet, a former political prisoner and torture survivor, as president, this was perhaps a form of justice for all those who struggled for a voice during the Pinochet regime. In El Salvador, the former insurgent organization, the Farabundo Martí para la Liberación Nacional (FMLN), changed its tune on the repeal of that country's amnesty law upon winning greater political power. In Guatemala, where the democratic transition has been more troubled, we see an attorney general, Claudia Paz y Paz, forced from office for pursuing justice against the former president, Ríos Montt.

Encarnación argues that the Spanish case demonstrates that “[d]omestic circumstances can take precedence over international human rights norms in shaping how states settle a dark past” (p. 187). I would argue that domestic circumstances do not take precedence over human rights norms, but the processes used to implement these norms must be built from domestic social and political circumstances. While our books examine fundamentally different questions, our conclusions are strikingly similar. We both urge a “more nuanced and pragmatic understanding of justice” and a “mixture of approaches [that] might lead to better results” (p. 26). *Democracy Without Justice in Spain* is an excellent contribution to this endeavor.

### Response to Jeffrey Davis's review of *Democracy Without Justice in Spain: The Politics of Forgetting*.

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— Omar Encarnación

Jeffrey Davis has written a fair and generous appraisal of my work. For that I am very grateful. Above all, I think that he grasped the greatest challenge that I faced when confronting the complex subject of the rise of the politics of forgetting in Spain, which was to highlight what is unique about the case (such as how the trauma inflicted by the Spanish Civil War created a stiff resistance among Spaniards toward any revisiting of the past during the transition) while remaining attentive to what the case

contributes to the comparative study of the connection between democratization and justice.

Two points in Davis's review caught my attention. The first one relates to the absence of demands for justice against the Franco regime during the democratic transition, a pivotal factor in the rise and maintenance of Spain's politics of forgetting. I view this development as a sign of “civil society complicity” with the political elite, rooted in the shared fear of repeating the past—especially the Civil War, the socialization of the public under the Franco regime, and the public's rush to embrace modernity and Europe by erasing anything about Spain that seem un-modern and un-European. But Davis takes a different angle by suggesting that the absence of societal demand for justice is reflective of the successful incorporation of the opposition into the process of democratization. He notes that: “by giving opposition voices full voice in democratic institutions, the Spanish transition to democracy may have silenced civil society's calls for retributive justice.”

The second point is Davis's claim that my analysis reflects a narrow view of transitional justice, by limiting myself largely to the legal and political aspects of transitional justice, such as political trials and truth commissions. He argues that a more expansive view of transitional justice, for which his own work strongly advocates, would result in a somewhat different conclusion in Spain. In particular, he notes that evidence of transitional justice in Spain can be seen when the right was forced to relinquish power and cede some decision-making power with the left. As noted: “Giving the left a full voice and participation is an ideal form of restitutive justice. . . Full democracy is the perfect remedy for the crime of political exclusion.”

I am quite receptive to the first point, since it echoes a large theme of the book: that democracy's success in Spain served to legitimize in the eyes of the public the decision made by the political elite to set the past aside. But I am skeptical about the second point, if only because despite the incorporation of the left into the decision-making process of the democratic transition, the transition nonetheless left in place considerable authoritarian residues. Indeed, the Francoists did not relinquish power as much as they chose to share that power with the opposition. All that said, both critiques ultimately underscore points on which Davis and myself appear to be in full agreement. Divergent levels of inclusiveness during the democratic transition and its aftermath between Spain and many Latin American countries have created different rationales and incentives for citizens to pursue justice against the old regime. This point, in turn, echoes the need to pay closer attention to domestic contexts in understanding how nations deal with difficult and painful pasts. There clearly are no one-size-fits-all solutions.