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Transitional Justice: Reflections and Debates for a Paradigm under Revision[1]

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Resumen

La justicia transicional es un paradigma de reciente data que aborda la gestión de un pasado con legado de masivas y graves violaciones a los derechos humanos, en contextos de transición del autoritarismo a la democracia y de conflictos a la paz. La arquitectura conceptual de este campo articula cuatro dimensiones: la búsqueda de la verdad de los hechos, el castigo a los responsables, la reparación integral a las víctimas y sobrevivientes, y las garantías de no repetición. El esfuerzo de estos mecanismos y principios se centran en contribuir a que las sociedades que han vivido ese pasado violento transiten hacia un Estado de Derecho con plenas garantías y la restauración de los lazos sociales. Y si bien hay un amplio consenso en los contenidos de este paradigma, las experiencias empíricas y conceptuales a que ha conducido, han abierto relevantes problematizaciones que reciben cada vez más interés. Desde esta perspectiva, este trabajo se esfuerza en dos direcciones, por una parte, recoge lo más relevante de su naturaleza y contenido; y, por otra parte, identifica los puntos en tensión que sigan contribuyendo a la revisión crítica de este paradigma.

Palabras clave

Justicia transicional. Justicia restaurativa. Justicia retributiva. Memoria histórica. Derechos humanos.

Abstract

Transitional justice is a recent paradigm that addresses the management of a past with a legacy of massive and serious human rights violations, in contexts of transition from authoritarianism to democracy and from conflict to peace. The conceptual architecture of this field, articulates four dimensions: the search for the truth of the facts, punishment of those responsible, comprehensive reparations to victims and survivors, and guarantees of non-repetition. The efforts of these

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mechanisms and principles are focused on contributing to the transition of societies that have lived through this violent past to a State governed by the rule of law with full guarantees and the restoration of social ties. Although there is a broad consensus on the contents of this paradigm, the empirical and conceptual experiences to which it has led, have opened up relevant issues that are receiving increasing interest. From this perspective, this paper strives in two directions: on the one hand, it gathers the most relevant aspects of its nature and content; and, on the other hand, it identifies the points of tension that continue to contribute to the critical revision of this paradigm.

Keywords

Transitional justice. Restorative justice. Retributive justice. Historical memory. Human rights.

Introduction

> "'Transitional justice' – this is the hopeful name we have begun to use to describe what is actually a very wide range of different problems. It refers to the special challenges and opportunities to achieve justice in societies that are attempting a transition to a more peaceful and democratic order" (Pensky, 2006: pp. 113).

Over the last two decades, the concept of "Transitional Justice" has appeared in different narratives, positioning itself strongly in different agendas of the international community, civil society, and States, with a broad theoretical and empirical development that has been growing and deepening relatively quickly.

This process is currently being concretized in the recognition of transitional justice as a new paradigm, a conceptual category and a term that refers to contexts of political transition in which there have been serious human rights violations and that respond to two conditions: On the one hand, they are processes from conflict to peace or from authoritarianism to democracy; and, they are oriented towards the consolidation of the rule of law under the principles of democracy and human rights.

There is also a current consensus on the four dimensions of transitional justice: The right to the truth, to know the past of human rights violations; the right to justice, to investigate and punish perpetrators; the right to full reparation for victims and survivors; and the guarantees of non-recurrence,

which is the creation of a minimum institutional framework to ensure that events are not repeated.

The rapid development of the actions and reflections of this paradigm is evidenced in a great profusion of specialized literature that analyzes and discusses it and, at the same time, in the political disputes that it has led to the interest of collective actors who demand the establishment of transitional justice processes and their detractors, in specific and concrete contexts. As a consequence of the foregoing, a scenario is presented in which, on the one hand, transitional justice in some spaces is the subject of long and deep discussions; and, on the other hand, it is still an unknown field in general terms.

In order to deepen the knowledge on transitional justice, this work is oriented towards two purposes. The first is to reflect upon the trajectory of the concept, i.e., how it evolved and consolidated and how it is currently understood; the second is to establish the main points of tension for debate involved in this paradigm.

The relevance of the topic is based upon the need to deepen the areas of knowledge that transitional justice has gathered, since it has become a field of constant exploration both from the conceptual-theoretical point of view and the empirical and political points of view. At least for the Latin American region, there are three types of processes that support the above.

Those contexts where there were transitions from conflict to peace, such as Colombia, Guatemala, and Peru, with serious legacies of human rights violations; transition from dictatorial and repressive regimes to democracy, such as Argentina, Brazil, and Chile; and situations with problems of violence and enforced disappearance, such as Mexico, where voices have been raised to establish transitional justice mechanisms.

The impact of these processes has resulted in the activation of disputes around issues such as democracy, transitions, and the demand for a rights-based approach in public management, particularly in the fight against impunity; there has also been an increase in the demands from victims and survivors of conflicts and repressive regimes, for a management of the past that is consistent with human rights.

As a result, transitional justice has also found its way into the media, through opinion columns, journalistic notes, or statements by officials and activists that keep the attention on the subject.

In general, it can be seen that the knowledge about this paradigm has been gradually generalized, particularly in the academic space, and in this sense, this

moment is considered timely to deepen the knowledge and debate on transitional justice, as a new field of study and reflection that must be updated.

But beyond the above, this new conceptual architecture is also a call to action and commitment; there is an implicit question of an ethical order in the discussions based on this topic, which invariably leads to questioning the actions of governments, perpetrators and societies in general with respect to the events that violate human rights, which in turn leads to a series of questions about the "ought to be" of individuals and collectivities in the face of the knowledge of the facts.

This work is developed around these reflections, in hopes of contributing to the debate and generation of new knowledge in different disciplinary bodies, such as justice, politics, and history, since transitional justice articulates them and activates mediations between them. It is also expected to provide theoretical elements that guide discussions in the field of social and political interventions in specific contexts from a critical perspective.

Following the ideas outlined, two sections are developed: "Transitional justice: a complex and dynamic paradigm" and "The intrinsic tensions and disputed fields of transitional justice."

Finally, the paper concludes with brief reflections upon the course of the text, in an effort to emphasize that these discussions are topical and need to be critically reviewed again and again; that the contexts in which transitional justice narratives emerge are a field in dispute over democratic consolidation and approach of rights; and that in societies where there have been massive human rights violations, there is an inherent need to manage that past to move towards a more peaceful situation, preventing such events from recurring.

Transitional justice: a complex and dynamic paradigm

Approaching the evolution of concepts over time reveals an interesting phenomenon: the discovery of events and contexts that gave rise to them, the understanding of the theoretical path they have followed, and how they finally formed a conceptual category with a broad consensus of acceptance in different communities of thought.

In order to achieve this approach to transitional justice, three records of a different nature are developed. The first refers to the origins of the paradigm as a term, the accounts that appear in Paige Arthur's text *Cómo las "Transiciones" reconfiguraron los derechos humanos: una historia conceptual de la justicia transicional [How "Transitions" Reshaped Human Rights: A Conceptual History of*

Transitional Justice] (Paige, 2011). The second deals with the evolution of the paradigm from four major approaches, interpreting how it was consolidated into how it is known today, elaborated by Pablo de Greiff in the text *Enfrentar el pasado: reparaciones por abusos graves a los derechos humanos* (De Greiff, 2006). The third is a perspective on transitional justice as a field of interpretation that articulates processes, institutions, and theoretical proposals, developed by Félix Reátegui in the introduction to the work *Justicia Transicional. Manual para América Latina* (Reátegui, 2006).

Through this journey, it is possible to appreciate not only how transitional justice has evolved, but also how, through its application, a conceptual architecture of reference for the understanding of complex processes, such as political transitions and the management of the conflictive or authoritarian past, has been established.

Transitional justice in its origins

The first text explains that the first appearance of the term was in the Boston Herald article about the *Charter 77 Foundation's*[3] 1992 Conference in Salzburg, "Justice in Times of Transition," clarifying that the reporter covering that conference noted in passing that this was to be the first in a year-long series of meetings on transitional justice "In the lead-up to the conference, its organizers, Tim Phillips and Wendy Luers, as well as other advisers such as Herman Schwartz and Ruti Teitel, used the phrase sporadically" (Arthur, 2011: 82).

The organizers of the event ultimately opted to describe their activities as "justice in times of transition." Indeed, later in 1993 they founded a new organization, the *Project on Justice in Times of Transition*, a name that Alex Boraine, the future vice-chair of the South African Truth and Reconciliation Commission as well as a co-founder of the International Center for Transitional Justice, then borrowed and adopted for his organization Justice in Transition in South Africa (1994)" (Arthur, 2011: 83).

The author goes on to explain that whoever the original author of the phrase was, and there were probably several, most notable among them Ruti Teitel, its

[3] Thanks to the initiative of the Czech nuclear physicist František Janouch, who had been living in Sweden since the mid-1970s, the Charter 77 Foundation was established in that country at the end of 1978. This entity followed the lines of Charter 77, a key document of the Czechoslovak anti-communist dissident movement, and set itself the task of helping people who in communist Czechoslovakia were members of various independent political and cultural initiatives, for which they were persecuted by the regime" (Vonderková, 2018: 1).

transmission and acceptance was most significantly aided in the mid-1990s by the publication of Neil Kritz, who had been in attendance at the 1992 Salzburg Conference): *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Arthur, 2011: 83).

Kritz's four-volume compendium had a noticeable impact, being reviewed by people with a range of institutional affiliations and competencies, and in a number of influential outlets. It is considered that this material represented a key driver in the early proliferation of the term.

> More importantly, the structure of the volumes suggests that transitional justice was a fully formed and rather well-understood set of practices in 1994—so much so, that one could compile a neat list of transitional justice measures and the controversies that might arise in undertaking them. These measures were commissions of inquiry, prosecutions, lustrations or purges, and restitution or reparation programs (Arthur, 2011: 85).

There are two essential elements to comment on in Kritz's work, from Arthur's text. On the one hand, that the work was considered to be a canon of the literature on transitional justice and was expressed in the very subtitle of the work: "how emerging democracies reckon with former regimes?" Thus, transitional justice was something undertaken by "emerging democracies," States that had undergone a change of regime. And, on the other hand, that all but one of those who reviewed the work accepted the definition uncritically (Arthur, 2011: 85).

Following the analysis of the effects of Kritz's work, three reflections are presented in this regard. For Siegel, transitional justice referred to the choices made, and quality of justice rendered when new leaders replace authoritarian predecessors presumed responsible for criminal acts in the wake of the "third wave of democratization" - referring to Samuel Huntington's book on transitions to democracy in the late twentieth century. For the Washington Post, the basic idea of Kritz's book was to present the experiences of countries that have made a more or less successful transition to democracy, such as Belgium, Chile, and Czechoslovakia. For Piccone, the issue was about how new democracies had attempted to strike a balance between redressing the abuses of the former governments and integrating victims and perpetrators in a postconflict society (Arthur, 2011: 85).

An interesting position was that of the one reviewer who called into question the utility of the linguistic invention of the term "transitional justice": For Ash, the title of the book was too narrow and in fact no word or phrase

existed in English that captured the full range of all of its attending processes. He thought of ideas that referred to how to confront, cope with, and overcome the past. Ash asked who might be best equipped to do justice to the past, and "decided that the answer is, or at least should be, historians" (Arthur, 2011: 86). Ash's disagreement proved relevant to Arthur:

> I have discussed Ash's article at length because it offered actual resistance to the emergence of this new term. In particular, it challenged the idea that the contents of what Kritz had presented as "transitional justice" could capture real-world complexities. This dissension is significant in that it shows what was (perhaps surprisingly) lacking from the proposed canon at the moment of the term's invention: the famous German *Historikerstreit,* or historians' debate, of the 1980s. This debate was taking place in the media outlets of West Germany at the same time discussions in Latin America explored how to deal with former regimes. The historians' debate was a sophisticated, and highly public, conflict about how to interpret the Nazi era and the Holocaust. In particular it questioned how and when the memory of such events might be "overcome" or "mastered," and a more positive image of German history accepted (Arthur, 2011: 86-87).

After delving into the implications of these reflections in the context in which they emerged, particularly around the political debate: "Those historians most intimately involved with the production of truth about the past still disagreed about what the past meant, as did large segments of the German population" (Arthur, 2011: 87).

The author then offers an interpretation relevant for the course of the conceptual evolution of the paradigm in question. She points out that this statement said something about Kritz's (and others') conception of transitional justice. Of the forty-two texts of his work, none were written by historians, and the German historians' debate merits only a single passing reference. She writes that the reason for the omission is not hard to guess: historians simply were not involved in the production and debates of Kritz's book, and concludes that "instead of "coming to terms" with historical complexities (as one might expect in an effort to deal with "the past"), transitional justice was presented as deeply enmeshed with political problems of a legal-institutional and, relatively, short-term nature." This sheds light on the areas of interest behind the effort: human rights, law and compared political science (Arthur, 2011: 88).

The centrality of justice and political issues highlighted by the author is an important guideline that will impose an initial feature to transitional justice;

issues with other thematic and disciplinary interests will emerge later. Particularly, the role of historians regarding transitional justice will eventually become extremely relevant, in the light of debates on Memory, as a social category resulting from the work of human rights collectives, and on History, a product of historiographic science.

The evolution of transitional justice mechanisms

The former United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, and recognized expert on the subject, Pablo de Greiff, wrote in 2006 the article mentioned in previous paragraphs, in which he elaborates a journey through time of how transitional justice evolved, structuring an organized and coherent logic of diverse social and political processes, and interpreting and grouping them together.

This effort resulted in two contributions. The first was to articulate a long arc of time segmented into four stages; the second was that, ultimately, he managed to consolidate, argumentatively, the four dimensions of transitional justice that are accepted today.

The author's reasoning considers that transitional justice measures have been attempted and tested for a long enough time "to have undergone important modifications," roughly corresponding to historical periods, but that it would be more appropriate to consider them as developmental rather than temporal stages, explaining that in general terms the following four approaches could be identified.

For the author, after World War II and under the influence of the Nuremberg trials, the international community adopted a retributive stance towards those who violated human rights, as a message that they would be persecuted, captured, tried, and punished. However, this required strong international cooperation, but the post-war consensus quickly gave way to the Cold War, "which weakened international cooperation on justice and human rights issues, making countries, especially the major powers, more inclined to adopt ´realistic´ attitudes at the international level" (De Greiff, 2006: 206).

The second approach is placed by the author in the early 1980s, indicating that there seemed to be an innovative approach to transitional justice, aimed primarily at achieving the stability of fragile regimes, an objective that perfectly fit the Cold War policies. "Thus, the policy of forgiveness and forgetfulness gained some advocates," but the author clarifies that even those who supported it understood that it was acceptable only under existing political constraints,

including the balance of powers. "However, the renunciation not only of criminal justice, but of the very possibility of investigating past crimes, was considered, briefly, as an admissible concession in the interest of stabilizing incipient democracies" (De Greiff, 2006: 2006).

To explain the third approach, the author indicates that the record he presents is incomplete, since it focuses on the attitudes of international cooperation, of the community of national states with their own interpretations and interests. He then highlights the issue of other actors of significant importance for transitional justice, the national and international non-governmental organizations (NGOs) who "rarely gave up hope that some kind of justice would be done, even if it was impossible to get to criminal justice." He suggests that the stagnation of criminal trials may have been an incentive to seek other types of measures (De Greiff, 2006: 207).

> Be that as it may, the third identifiable approach to the problems of transitional justice is one that focuses predominantly on truth commissions. Thus, the experiences with truth commissions in Argentina, Chile and El Salvador became decisive foundations of transitional justice, which led to the establishment of other commissions in more than twenty countries around the world (De Greiff, 2006:207).

Finally, De Greiff explains the fourth approach, the most complex one, in which he articulates the four different components that today are recognized in transitional justice. Starting from the issue of criminal trials that received a new impetus with the adoption of the Rome Statute of the International Criminal Court; the continuity of efforts in truth commissions that show a trend towards greater depth, breadth and rigor, he states that "it is now common for transitional justice policies to be considered in terms of a series of measures that include, at a minimum, criminal justice, truth-telling, institutional reform and reparation," the latter being a topic of increasing interest (De Greiff, 2006: 208).

De Greiff's work makes a great contribution, the vision of an articulating, integral and systemic process of what we know today as transitional justice; by mediating events, narratives, and interpretations that in a dispersed way were identified as part of different mechanisms and giving them a coherent organicity as part of the same conceptual body.

Transitional justice as an articulating field

The different experiences recorded in the already very varied literature on transitional justice are contributing to several types of reflections, either political, legal, historical, cultural, and social in general. And what stands out at first glance is that the set of mechanisms studied in different contexts can provide a singular idea, the idea of how they are integrated and articulated around common principles and axes.

From this perspective, Félix Reátegui analyzes the Latin American experience and points out that since the early 1980s the countries in the region have undergone various processes of political transformation, which have generally consisted of the transition from authoritarian to democratic regimes and, in some cases – such as Guatemala and El Salvador – pacification processes after armed confrontations. Thus, the challenges and duties of societies emerging from these contexts are not only related to the achievement of an effective transition in terms of political institutionality, but also, and primarily, to tasks related to the provision of "justice measures for the victims of human rights violations, the clarification and collective and critical recognition of the facts from the past, and ultimately, the creation of conditions for sustainable peace" (Reátegui, 2006: 36).

Likewise, he indicates that it is interesting not only to point out the history of the region marked by bloody dictatorships and multiple forms of collective violence, but also to point out that the dynamism of this field is also due to a positive change in the conception of democracy. This new conception is more rigorous and comprehensive and demands more than just understanding it as an abstract institutional balance: it demands that it provide a genuine experience of citizenship to the population, "That is, an experience of inclusion, of real exercise of rights and respect on the part of the State and society." And a key element is the fulfillment of the debt of justice with those who, in the past, have been victims of human rights violations and other impacts on their fundamental rights by the action of the State or non-State organizations (Reátegui, 2006: 36).

The author explains that the recovery of democracy and the processes of pacification gave rise to the early flourishing of initiatives to confront the past in the form that would later become widely known as *truth commissions*. The *Comisión Nacional sobre la Desaparición de Personas* [National Commission on the Disappearance of Persons] (CONADEP), which investigated the crimes of the Argentinian military dictatorship (1976-1983), can be considered an inaugural

experience and in its wake a dozen official commissions and many other initiatives led by civil society have multiplied (Reátegui, 2006: 38).

Reátegui provides an interesting reflection on the region: at the same time that memory, truth and reparations are being combined, in terms of justice, with the maturation and strengthening of the regional system for the protection of human rights embodied in the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, the jurisprudence "already produced by the IACHR on human rights violations by the States parties has been constituting a normative framework with legal force for the penal treatment of crimes and the compensation of the victims" (Reátegui, 2006: 38).

The author reflects that these advances and demands for truth and justice in Latin America do not occur in isolation. Instead, they are interwoven with a broad international experience initiated with the Nuremberg trials and consolidated with the approval of an extensive conventional legal framework that proscribes the most serious international crimes: genocide, war crimes, and crimes against humanity (Reátegui, 2006: 39).

> Truth commissions, national, international, or mixed courts of justice, administrative programs for reparations to victims or those affected, official commemoration initiatives, national or communal reconciliation bodies, state mechanisms for the search of missing persons: these are some of the concrete manifestations in which transitional justice is being articulated at the present time. And parallel to them—and often proposing new relations between society, national State, and the international community—a notorious social mobilization has been unleashed, devoted to the practice of remembrance, to the elaboration of proposals for an adequate compensation for the damages suffered, to the vindication of ethnic and gender diversity in the experience of horror and resistance to it, and, finally, to the commemoration and reaffirmation of one's own dignity. (Reátegui, 2006: 40).

This articulating perspective of the processes in the author's region provides a general understanding of transitional justice as a set of practices, policies, norms, and mechanisms that have "a notorious internal diversity," that is, within each country; but also externally, among the various countries engaged in confronting the violent past.

But he goes further when he argues that there is a proper understanding of this field that goes beyond just noting its diversity, explaining that although they are quite different and sometimes "not completely reconcilable"

mechanisms, it does not mean that it is a territory left to trial and error and completely subordinated to circumstances. Rather, there is an axiological foundation, an axis of principles and values and a set of basic legal standards that define what is legitimate: the minimum legal obligations that every State must assume (Reátegui, 2006: 40).

This fundamental basis arises both from normative legal developments in international law and from the systematization and normative integration of best practices developed by various countries to combat impunity and provide justice to victims:

> Fundamental reference documents in this field are the systematizations produced within the framework of the United Nations by Louis Joinet and Diane Orentlicher on ways to combat impunity, and by Theo Van Boven on standards for reparations to victims. Documents of this kind and others, which incorporate among various sources the accumulated practices of truth and justice, delimit and specify a normative, logical and ethical structure for confronting the authoritarian or violent past. Possibly, the most concrete and effective formulation of this underlying spirit of transitional justice is the affirmation of victims' rights to truth, justice, reparations and guarantees of non-recurrence (Reátegui, 2006: 41).

This author's standpoint gives us a general overview by analyzing transitional justice in Latin America, which allows us to see the great paradox of this paradigm: the great singularity of each concrete experience, and, on the other hand, an axis of principles and values that articulates all processes, the centrality in the victims and the application of a rights-based approach.

The intrinsic tensions and disputed fields of transitional justice

Studying the paradigm of transitional justice has meant for different fields and disciplines to find a large window for reflection and knowledge of a great diversity of issues that concern human reality, ranging from historical knowledge, disputes over power and cultural dynamics, to the debate on ethics, because it calls for issues that have to do with life and death, with remembrance and oblivion, with conflicting interests and with the decisions that human beings make over and over again throughout life.

This paradigm addresses issues that humanity has experienced throughout its history, but with a novel register and from a complex perspective, as it interweaves social phenomena from a variety of angles, resulting in a systemic

analysis of an event, a process, or a set of processes. In this sense, three areas that stand out around transitional justice can be identified: the issue of power, the issue of ethics, and the non-linearity of time.

Power is an issue that permanently underlies the logic of transitional justice, since dealing with political transitions evokes the dispute between regimes, their triumphs, and defeats. Since the transition to democracy or the transition from conflict to peace are fundamental components of the paradigm, power is central to the analysis, since it will determine the capacities of a collectivity or a nation to manage the past, based on the will for significant change in the face of massive human rights violations and their legacy. Thus, the advances and setbacks in the application of mechanisms of truth, justice, reparation and guarantees of non-recurrence imply competing powers that respond to real interests that dispute the continuity of a regime of opprobrium, or the struggle for the transition to a more humane society.

Regarding ethics, transitional justice has produced a great deal of literature. Narratives about good and evil, cruelty and goodness, love and hate are in numerous records. Issues that revolve around questions such as: why did they exterminate them? Why did they reach such savagery? How to exchange that hatred for compassion? How to be more humane? How to build a new humanity? Thus, the dispute over values is invoked repeatedly, playing a fundamental role in the management of processes, in their narration and transmission.

And about time, transitional justice becomes a useful tool to think of ourselves in a transtemporal way, since at the same time that it summons the past, it works for a better future, but implying decisions from the present. That is to say, it gives us an idea of a process of long arcs of time, and if a greater effort is made, it leads to a transgenerational dimension. Responsibility to future generations will depend on what we do now, so knowing and managing the past becomes a task of commitment and solidarity that runs on different timelines, hence the proposal to make the mention of "non-linearity."

Everything described in previous paragraphs shows the complexity behind transitional justice, since it brings visibility to problems that were perhaps hidden, forgotten, scattered; because it problematizes human beings from the conscience and responsibility before others; and because it questions individuals and communities about their actions and responsibilities. However, due to its very complexity, this paradigm opens a field for deep discussions about the social processes involved.

Among the most problematized dilemmas of transitional justice, three stand out: the integrality or predominance of its four components; the modalities and demands of mechanisms and transitional justice in relation to a model or canon; and transitional justice from an inclusive perspective.

Comprehensiveness or predominance among the components of transitional justice

As it is evident from the evolution of De Greiff's four approaches, the four components of transitional justice were added as its theoretical-empirical architecture was being cemented. This last mention refers to the fact that the narratives of the paradigm have shown a great dynamic between the intervention in concrete processes and its conceptual configuration. On the one hand, projects of international cooperation, civil society, governments, and some states and, on the other hand, the disciplinary discussion in academic circles and the media system, have contributed to determine what is now widely conceived and accepted about the paradigm.

Within the abundant literature, the production of the United Nations System acquires relevance, due to its international normative nature, which currently has eighty-nine documents organized into eight categories, under the heading General Principles and Elements of Transitional Justice. They can be found on the webpage of the Office of the United Nations High Commissioner for Human Rights (OHCHR) Mexico:

1) "*General principles and elements of transitional justice*" (32 documents)
2) "*Consultation and participation*" (3 documents)
3) "*Right to the Truth*" (20 documents)
4) "*Combating impunity*" (12 documents)
5) "*Transitional justice with a gender perspective*" (5 documents)
6) "*Transitional justice and the rights of children and adolescents*" (4 documents)
7) "*Reparations*" (9 documents)
8) "*Guarantees of non-repetition*" (4 documents)

(OHCHR, 2018: 1).

One of the key documents dealing with the components of transitional justice is Human Rights Council Resolution 21/15 of 2012:

> *Stressing* that the full range of civil, cultural, economic, political and social rights should be taken into account in any transitional justice context in order to promote, inter alia, the rule of law and accountability,
>
> 1. *Emphasizes* the importance of a comprehensive approach to transitional justice incorporating the full range of judicial and non-judicial measures, including, among others, individual prosecutions, reparations, truth-seeking, institutional reform, vetting of public employees and officials, or an appropriately conceived combination thereof, in order to, inter alia, ensure accountability, serve justice, provide remedies to victims, promote healing and reconciliation, establish independent oversight of the security system and restore confidence in the institutions of the State and promote the rule of law in accordance with international human rights law; (UN, 2012: 3).

What is synthesized in these paragraphs about transitional justice will be a recurrent approach in the literature on the subject, which is to make prevail a vision of integrality and complementarity among its components, with a global approach and the combination in the use of mechanisms of justice, truth, reparation, and guarantees of non-recurrence.

There have been times when these components have come into tension, when perpetrators offer to tell the truth about what happened in exchange for amnesty. In these cases, the dilemma between truth and criminal justice becomes a complex case where the interests of the parties, both States and victims, and other interests at stake, must be weighted.

Another level of tension occurs when forgiveness, punishment and reconciliation are set against each other; the differences between what the victims expect and the demand for reconstruction of the social fabric have often been complex and difficult issues to resolve, since individual and collective considerations are at stake. In this line of work, there has been a relevant impulse to restorative justice, with non-judicial processes, but they contribute to resolve mechanisms of truth, reparation, and guarantees of non-recurrence.

Successive conceptual debates and the analysis of experiences in processes related to transitional justice have allowed the paradigm to continue to be discussed and nurtured by new lines of analysis and proposals. In this sense, it should be highlighted the relevance of the statements of the United Nations Special Rapporteur for the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabián Salvioli, in his report to the Human Rights Council in mid-2020, regarding "memorialization" in the context of serious violations of human rights and international human rights law as "the

fifth pillar of transitional justice". The report explains the key relationship of the new component to the other four already known:

> The approach to be taken to the crimes committed is based on the pillars of transitional justice: without the memory of the past, there can be no right to truth, justice, reparations, or guarantees of non-recurrence. For this reason, memory processes in connection with serious violations of human rights and international humanitarian law constitute the fifth pillar of transitional justice. It is both a stand-alone and a cross-cutting pillar, as it contributes to the implementation of the other four pillars and is a vital tool for enabling societies to emerge from the cycle of hatred and conflict and begin taking definite steps towards building a culture of peace. (UN, 2020: 5).

The document establishes three objectives of this new normative framework: a) To shed light on past violations, by establishing the facts and criminally punishing perpetrators; (b) To address the challenges of the present, by recognizing, honoring and commemorating the memory of victims, providing reparations, allowing stories to be told, making public apologies, combating denialism, bringing calm and restoring trust in the State and between communities; and c) To prepare for the future, by preventing future violence through education and awareness-raising, and establishing a culture of peace. "Memory processes help to promote commitment to a democratic society, encourage debates on the representation of the past and allow the problems of the present to be addressed in a relevant manner" (UN, 2020: 5).

Undoubtedly, this new inflection in the evolution of transitional justice will lead to new reflections and impacts, both academic-disciplinary, as well as social and political, since it deepens, broadens and problematizes a field that is still under permanent construction.

Transitional justice: beyond the canon

One of the main debates brought about by transitional justice has been the cases in which interventions have been sought in concrete processes of human rights violations and/or violence, calling upon this paradigm. Disputes have focused on two levels, the political and the conceptual-disciplinary dispute, which affect and impact each other.

Frequently, the discussion has been centered in two groups: those who defend that it should be a State policy or a model to implement as a demand

for justice toward the events of the past; and, on the other hand, those who indicate that the context in which it is to be applied does not correspond to the minimum conditions in which this paradigm can be implemented.

In relation to these reflections there are two materials that refer to the subject. The first is the book *After Oppression: Transitional Justice in Latin America and Eastern Europe* (2012), edited by Vesselin Popovsky and Mónica Serrano, the product of an international research work by various institutions. This work establishes a comparative study of transitional justice experiences in two major regions, Latin America and Eastern Europe, analyzing the processes in: Argentina, Brazil, Chile, Colombia, El Salvador, Guatemala, Bosnia-Herzegovina, Bulgaria, Germany, Slovenia, Poland, Romania, Slovakia, and Slovenia.

The text develops two angles, the experience of each country and the comparative perspective. The topics addressed include the role of States, the role of civil society, security systems, borders, cooperation of justice systems between different countries, the role of local justice systems, the democratic nature of transitional regimes, accountability, and different models of intervention.

The comparative analysis illustrates relevant issues on concrete experiences, providing elements to understand local characteristics and trends or generalizations that can be identified from an overall view. In this sense, the conclusions regarding different issues are relevant, such as: the impact of high-profile prosecutions on neighboring countries; the need for the mechanisms implemented for transitional justice to be transparent, credible, and locally owned; the fact that the disclosure of past abuses and the naming of those accountable can encourage victims to rebuild trust in good governance (Popovsky and Serrano, 2012: 494).

Particularly noteworthy is this statement: "Nonetheless, the transitional justice processes still have to be contextually appropriate and tailored to the specific needs of a society" (Popovsky and Serrano, 2012: 494. In other words, the variation in effectiveness and the relationship with the adoption of actions according to each specific context is shown once again, as has been common in critical reflection on transitional justice.

From another perspective, this argument is reinforced with multiple contributions contained in the document *Consultation of the African Union Commission with the Member States of the African Union on Transitional Justice*, from which we highlight two reflections. The first is that the participants of the consultation noted that the dominant discourse on transitional justice endorses

a narrow, legalistic approach, which stands in contrast to the contemporary understanding of transitional justice in Africa. Participants especially emphasized the necessity to broaden the field and to cultivate a more holistic approach to transitional justice (AUC, 2011: 9).

The second emphasizes following principles, rather than implementing a specific model:

> It was recommended that the AU (African Union) develop long-term initiatives incorporating monitoring and evaluation as opposed to *ad hoc* measures to deal with transitional justice. In addition, the sequencing and spacing of peace and justice focused initiatives, if necessary, should be informed by the local context. It was argued therefore that an African transitional justice policy framework, if developed, should not be prescriptive, but ought to be a set of guidelines and principles to guide the process and address a range of imperatives and needs such as the achievement of peace, justice and accountability, national unity and cohesion, reconciliation, gender equity, socioeconomic rights and development, and victims' right to effective remedies. (AUC, 2011; 5).

Finally, in this line of considering transitional justice more as a set of principles and mechanisms that can guide an intervention, a policy or a set of actions, Reátegui argues that with respect to the different measures known in transitional justice, one of the first lessons to be learned is that "there are no universally applicable recipes and that the collation of various international experiences can provide lessons learned, guidelines, precautions, but never a program ready to be applied (Reátegui, 2011: 40).

Inclusiveness in transitional justice: a critical approach

One of the discussions that can contribute most to the consolidation of the transitional justice paradigm has to do with an inclusive approach, not only because it is congruent with its own nature of being a rights-based approach, but also because of the relevance it has in terms of effectiveness and realism, since many processes that are included in this field are related to factors of exclusion of social groups. Therefore, it is of foremost importance to approach the paradigm discussions that have to do with the topic from three approaches: "gender," "bottom-up," and "ethno-cultural."

For the approach to transitional justice with a gender focus, there is a great diversity of literature that has clearly positioned itself from different angles.

Different studies have highlighted the role of women in actions of memory, justice, reparation and guarantees of non-recurrence, as well as their intellectual work on the subject.

Several texts stand out in the subject, in addition to relevant works from the UN, which are interesting to know in order to appreciate the diversity of topics on the subject that have been registered for almost a decade and a half: *Gendered Subjects of Transitional Justice* (Franke, 2005); *Comisiones de la Verdad y Género: Principios, Políticas y Procedimientos* [*Truth Commissions and Gender: Principles, Policies, and Procedures]* (Nesiah, 2006); *Masculinity and Transitional Justice: An Exploratory Essay* (Hamber, 2007); *Crítica feminista a los procesos de justicia transicional de América Latina* [*Feminist Critique of Transitional Justice Processes in Latin America]* (Bautista e Infante, 2009); *Justicia Transicional desde abajo y con perspectiva de género* [*Transitional Justice from Below and with a Gender Perspective] (Guzman and Uprimny, 2010); La urgencia de la historia. Justicia transicional, género y etnicidad en Guatemala [The Urgency of History. Transitional Justice, Gender and Ethnicity in Guatemala]* (Gonzalez and Gonzalez, 2011); *Las mujeres y la justicia transicional: el nexo entre la agenda de seguridad y la agenda de desarrollo [Women and Transitional Justice: the nexus between the security agenda and the development agenda]* (Llano, 2016); and *Del pasado al porvenir: Justicia Transicional y Género desde la experiencia internacional* [*From the past to the future: Transitional Justice and Gender from International Experience]* (Gonzalez, 2021).

A key text that raises the issue of gender in an argued, clear and concrete manner but also discusses the "bottom-up" approach is the work of Guzmán and Uprimny. The authors argue that transitional justice remains a developing paradigm that takes on specific forms according to the conditions and context in which it is applied, that there are different institutional designs, and that there is no single formula. However, they argue that it is possible to speak of a dominant paradigm.

They clarify that, although the paradigm has undoubted strengths, since it attaches great importance to compliance with legal standards of human rights that seek to ensure justice for victims and recognize that each context offers particular difficulties, "the dominant approach in the field of transitional justice also has important limitations in achieving its objectives" (Guzmán and Uprimny, 2010: 2). The two elements that characterize it are:

> (i) the discursive prevalence of legal standards developed in relation to the fight against impunity, in favor of victims' rights and peacebuilding; And ii) the articulation of processes from the central level, which implies

> that fundamental decisions are made at the national level, and from there they reach the local level (Guzmán and Uprimny, 2010: 7).

The first refers to the important development in recent years of international instruments that give a fundamental role to the rights of victims of serious human rights violations, such as the set of principles against impunity of Louis Joinet updated by Diane Orentlicher, as well as other international standards on human rights and on serious violations of the International Humanitarian Law to seek remedies and reparations; and within the inter-American system, the jurisprudence of the Inter-American Court of Human Rights (Guzmán and Uprimny, 2010: 10).

Thus, hand in hand with the recognition of the rights to truth, justice and reparation, there has been a process of institutionalization of transitional justice, installing mechanisms in its four main axes: criminal punishment of perpetrators, truth-seeking, reparation, and guarantees of non-recurrence.

> Progressively, the development of standards has influenced, guided, and even determined the specific mechanisms adopted in a transition. It could even be said that the standards tend to close the door to some formulas that could be adopted for the transition. (Guzmán and Uprimny, 2019: 8).

The second element refers to structuring processes from the centers of power, generating the exclusion of important sectors; these centers may be located in different spaces, either in economic groups, political or legal sectors, which are the ones that concentrate most of the transcendental decision-making. And this also happens with transitional justice, "which is a field of legal and political struggles in which many of the social dynamics are recreated." Thus, many of the decisions that are transcendental for a transition and for the satisfaction of the rights of the victims, are made from the national level, leaving aside the more local dynamics (Guzmán y Uprimny, 2019: 9-10).

For the authors, the dominant approach has undoubted strengths; however, with the passage of time, new experiences, and the deepening of debates, it has become evident that it also has difficulties. Two weaknesses exposed by the authors refer to the tendency to privilege vertical constructions, adopting top-down policies "that do not always take into account the concrete needs and expectations of the victims, and reinforce the role of traditional centers of power"; and the absence of differential approaches in the design, implementation and monitoring of public policies in which transitional formulas are put into practice (Guzmán and Uprimny, 2019: 11).

Moving on to the case of Colombia, which the authors analyze, they point out that "the vast majority of victims of atrocious crimes perpetrated in the context of the armed conflict belong to traditionally vulnerable and excluded populations," such is the case of women. On the other hand, they explain that, in general, public policies have not had effective participation mechanisms to ensure that the opinions and perspectives of victims are heard in the process of policy and law elaboration, which is also the case in multiple transitional justice processes in the world (Guzmán and Uprimny, 2019: 12).

> International transition experiences show a great debt in terms of the participation of victims in the transformation process and, in turn, the failure of many of these experiences is largely explained by the same lack of participation (international transition experiences show a great debt in terms of the participation of victims in the transformation process and, in turn, the failure of many of these experiences is largely explained by the same lack of participation) (Guzman and Uprimny, 2019: 12).

Based on the considerations above, the authors propose that, in order to provide an adequate and satisfactory response for victims of human rights violations, it is important to overcome some difficulties of the dominant approach; to this end, it is essential to bet on the inclusion of approaches that are more sensitive to the realities of the victims and their specific grievances. Specifically, they consider that a perspective focused on normative standards can be enriched with "the explicit and decisive adoption of a gender approach and an approach that allows for a better articulation of local processes and the voices of the victims with national and general decisions and dynamics" (Guzmán and Uprimny, 2010: 16).

From another angle, the call for an inclusive perspective of transitional justice is reflected on the various works of Lieselotte Viaene, an author who has elaborated on the importance of the cultural aspect in the field. In her text *Justicia Transicional y Contexto Cultural en Guatemala: Voces Q'eqchí'es sobre el Programa Nacional de Resarcimiento* [*Transitional Justice and Cultural Context in Guatemala: Q'eqchi'es Voices on the National Reparations Program]* (2007) she examines both the case of Guatemala and actions undertaken by local communities in Rwanda, Colombia, and Mozambique, based on the cultural relevance of transitional justice.

From Rwanda, she analyzes the experience of "the modern Gacaca Courts," which implemented a participatory justice system, when in 1996 the government concluded that the official legal system could not be the answer to

judge the crimes of genocide. Its main objectives were to speed up trials, reduce the vast number of prisoners in jails, involve society in establishing truth and thus promote reconciliation. "Gacaca, as stipulated in the ´Gacaca Law´ of March 2001, is the transformation of a traditional local conflict and dispute resolution mechanism, now applied to genocide cases" (Viaene, 2007: 136).

The Colombian experience that the author highlights is about the massacre in the Afro-Colombian community of Bojayá in 2002; the death toll was 119, including 45 children, many wounded, and the displacement of 4,248 people. Viaene reports that a process of investigation and accompaniment brought to light the importance of the collective impact on the community in the face of the destruction of the social and natural order. In the report of this process the author highlights two interesting points. On the one hand, that the speeches promoted by various institutions were contrary to the practices of the people of the community; and on the other hand, the need to conduct collective practices typical of the communities to overcome the painful past, such as rites of the passage from life to death. (Viaene, 2007: 138-139). The author mentions that, according to the research team,

> it is necessary to recognize that "individual and collective interpretations, meanings and actions, generated by and to confront violence, are constructed in dense and complex webs and networks that give rise to particular ways of being and perceiving the world, so it is assumed that the damage (…) and the way of facing it (…) cannot be established a priori, measured according to universal standards or deduced by reference to another event, in another place, or to other people' (Viaene, 2007: 139).

She moves to the case of Mozambique, a country that had just ended a 15-year civil war, in which more than one million people died, with four million internally displaced and thousands of children under the age of 16 forcibly recruited to destroy their own villages and kill their own people. Regarding this case, Viaene describes the "Magamba Spirits' Purification and Possessions Rituals," highlighting the importance of spirit possession in that country and other parts of Africa, intricately linked to everyday life, as people can restore balance and peace in their lives through ancestral spiritual forces (Viaene, 2007: 139).

The author cites a case study, in which, while analyzing the importance of spirits, she argues that it is necessary for cooperation agencies and NGOs to take into account local understanding of war traumas and local coping

strategies, due to the relevance of the role of traditional institutions, the family and chiefs, diviners and healers and spirit mediums, in healing the social wounds of war and restoring social stability, as they are based on a shared system of meanings that organizes social life in rural communities (Viaene, 2007: 139).

Another study mentioned by Viaene analyzes the contribution of the *gamba* spirits in relation to the civil war to face peacefully the legacy of an extremely violent past. Around 1999, the *gamba* spirits broke with the culture of silence and denial created by the Government, which advised the survivors to forget about the past and avoid taking revenge. These ceremonies of the *magamba* spirits (plural of *gamba*) "are not only about the reconciliation of people, but also the reconciliation between people and the spirits of the dead, and among the spirits of the dead themselves" (Viaene, 2007: 140).

In the analysis of the experience in Guatemala, her central topic, she approaches the experience of managing the past in indigenous communities that survived a 36-year domestic armed conflict (1969-1996) with severe and massive human rights violations, as genocide. The author's contributions focus on the critical review of the actions of *Programa Nacional de Resarcimiento* (PNR) [National Reparation Program] that administrates the enforcement of reparation measures, problematizing that the local and cultural conceptions related to these measures the program has institutionalized do not reflect the cosmovision of the communities and their consequences. The aforementioned includes key standpoints of victims and survivors in a call to PNR with five main ideas: life has no price; compensation for the loss of material belongings; a petition for collective reparation; the demand of knowing and disclosing the historical memory of communities; and the need to call the lost spirit (Viaene, 2007: 155).

From this work, which is a great contribution to a topic that is still to be deepened and developed, two collaborations are recovered. The first one is related to the author's reflection that, in order to design and implement transitional justice mechanisms, it is desirable to pay attention to the cultural specificities. This indicates that, when the people affected by an armed conflict belong to a group that, according to international law, is an indigenous people, one could argue that the norms established by the international law of the indigenous peoples could be a reference framework for such countries and NGOs to acknowledge, respect and bear in mind the cultural resources of these peoples, when it comes to justice, truth, reparation and reconciliation in post-conflict situations (Viaene, 2007: 141).

The second collaboration is the theoretical reference to which the concept of "inclusive universality", developed by Brems, mentions, since it can theoretically support the argument of acknowledging, respecting and accounting for the cultural contexts in democratic transition processes (Viaene, 2007: 142).

Conclusions

To conclude this paper, we bring three final reflections. The first one suggests that, since its theoretical-conceptual development, transitional justice keeps building itself from new investigations and analyses of empirical experiences, which have to do with the tensions and debates around the original canon and scope of new considerations to be applied to concrete situations. A second reflection is related to insisting on the need to design transitional justice mechanisms bearing in mind the specific local and concrete context, with a focus on the voices of the victims, in order to have a more effective, constructive, and collaborative mediation between the decisions of the key actors, law enforcement agents, collaborators, NGOs and the communities who are targets of the measures. And, finally, an essential work is the inclusive perspective of transitional justice from the standpoint of gender and cultural belonging, which is coherent with the search for a Rule of Law based on the democratic principles and human rights.

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