

Transitional Justice in Colombia: Between Retributive and Restorative Justice

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The Colombian internal conflict has been ongoing for decades between insurgent groups, guerrillas, narco-paramilitary groups, and governmental forces (Albarracín, 2021), leaving a toll of more than 8.3 million victims: 7.3 million displaced people, almost 1 million homicides, more than 160,000 disappeared and other victims such as kidnapped people, victims of sexual abuse, torture or child soldiers (El Orden Mundial, 2018).

Although the main approach from successive Colombian governments has been military-oriented and focused on fighting these groups, there have been several peace initiatives. Of particular importance is the dialogue established between 2012 and 2016 between the newly-elected government of Juan Manuel Santos and the *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* (FARC-EP), the most important armed group operating in Colombian territory and opposing the government. These peace talks made possible a “final, comprehensive and definitive agreement” between the parties.[1]

The Final Peace Agreement constituted the Comprehensive System of Truth, Justice, Reparation and Non-Repetition (SIVJRNR) as a way to conduct transitional justice in Colombia. This research briefly describes this system and exposes the debate between restorative and retributive justice. This has been at the core of the case of Colombian transitional justice. Moreover, the analysis focuses on how these different approaches have been reflected in the SIVJRNR, especially in the Special Jurisdiction for Peace (JEP) – through its mixed nature – and what strengths and weaknesses they present.

Transitional justice: The Comprehensive System of Truth, Justice, Reparation and Non-Repetition

When an agreement between the government and the FARC-EP was reached, President Santos sought to legitimize it by organizing a binding referendum for the Colombian population to approve it. The vote was held in October 2016 and the peace agreement was rejected by a very small margin. This manifests the divide between two approaches of justice: retributive and restorative justice. The opposition to the agreement suggested the establishment of a more effective system of privation of liberty. However, the agreement has been more prone to restorative justice, which seeks the restoration of harm and reparations to victims that satisfy their rights, establish responsibilities and assures non-repetition and reconciliation (Tonche and Umaña, 2017: 26-27). Consequently, Santos' administration and FARC-EP resumed negotiations to approve the agreement in Parliament. Eventually, the *Acuerdo final para la terminación del conflicto y la construcción de una paz estable y duradera*—hereafter “the Final Peace Agreement”—was passed by the legislative chamber on November 24, 2016.

The Final Peace Agreement (2016) differed from past agreements inasmuch as it addressed fundamental issues such as “human rights violations, impunity and the rights of the victims of the internal conflict” (Quintero, 2019: 13). Therefore, it established a mechanism of transitional justice to reintegrate former combatants into civilian life without affecting the rights of the victims of the conflict (*ídem*). Moreover, it was formed by six points: 1) rural development policy; 2) ending the conflict with a ceasefire and the following processes of demobilization, disarmament and reintegration of combatants (DDR); 3) political participation through the constitution of FARC-EP as a legal political party; 4) the problem of illicit drugs; 5) victims; and 6) implementation, verification and endorsement (Jiménez, 2019).

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More importantly for the purpose of this analysis, the Final Peace Agreement created the *Sistema Integral de Verdad, Justicia, Reparación y no Repetición* (SIVJNR) under national law with constitutional status.[2] SIVJNR is made up of three institutions: the truth commission (*Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición* – CEV), the search unit for disappeared persons (*Unidad de Búsqueda de Personas dadas por Desaparecidas en el contexto y en razón del conflicto armado* – UBDP) and the Especial Jurisdiction for Peace (*Jurisdicción Especial para la Paz* – JEP).

These institutions are temporal, although their term can be extended by the Parliament. Hence, the JEP is supposed to operate for 15 years, the UBDP for 20 years and the CEV for 3 years (Quintero, 2019: 28-29). Moreover, although the JEP is the only judicial authority, people who aim for SIVJNR's legal benefits are also bound by the CEV and UBDP. The three institutions are to work in coordination because "individually they cannot fully guarantee victims' rights" (*idem*).

SIVJNR is focused on victims' rights but has been criticized for granting benefits to perpetrators of crimes, human rights and international humanitarian law violations during the armed conflict. However, these "benefits" – meaning amnesties, reduced prison sentences or no privation of liberty– are conditioned to perpetrators committing to the acknowledgement of the truth and to reparations for the victims. Therefore, according to the Colombian Constitutional Court,[3] this "conditionality regime [...] ensures that only those people who are committed to the System and to realizing victims' rights may receive its benefits" (Quintero, 2019: 27-28).

Both the CEV and the UBDP are extrajudicial, autonomous, and independent bodies. Moreover, the declarations and documents used in the CEV and findings made by the UBDP cannot be used to bring criminal charges before any judicial authority nor will have probative value except for forensic pieces of evidence provided by the UBDP (Quintero, 2019: 30).

On the one hand, the CEV's purpose is to establish the truth in the context of the Colombian armed conflict and to support the elucidation of violations committed in this period and explain them to society. Therefore, its works are aimed at the clarification of the events, contributing to the acknowledgement by perpetrators and promoting coexistence (Comisión de la Verdad, 2022). Finally, it has to produce a final report with the findings. On the other hand, the UBDP is focused on directing and coordinating humanitarian action to search for disappeared persons –dead or alive – in the context and because of the conflict. When it is determined that someone has died, the UBDP should find and identify the remains and return them to the relatives (UBDP, 2021).

Finally, the JEP is the justice component of SIVJNR with the objective to administrate transitional justice and determine misdemeanours committed in the context of the armed conflict before December 1st, 2016. This includes human rights violations, crimes against humanity, war crimes and political and related crimes. While trying to provide satisfaction to victims through the truth and reparations to build sustainable and lasting peace, the JEP focuses on the most serious offenses of the armed conflict committed by former combatants of the FARC-EP, members of the state's military, state officials, and third parties civilians (Jurisdicción Especial para la Paz, 2018a).

The Special Jurisdiction for Peace has exclusive and prevalent jurisdiction.[4] Until it has issued a ruling, the ordinary justice system must conduct its investigation normally. However, once someone has been accepted under the JEP's jurisdiction, the ordinary justice system cannot attribute responsibility to that person, nor issue custodial measures, subpoenas for judicial proceedings or arrest warrants against him or her (Quintero, 2019: 32). As of today, the JEP is working in seven macro-cases that represent the most serious offences of the Colombian conflict on a variety of issues such as the taking of hostages and kidnappings, killings and forced disappearances presented as deaths in combat by State agents, recruitment of child soldiers, etc. (Jurisdicción Especial para la Paz, 2018b). Moreover, it has engaged with 13,399 persons.

The JEP's mixed approach: Between retributive and restorative justice

The response to massive human rights and international humanitarian law violations and international crimes needs "a complex and integrated response comprising a variety of complementary mechanisms, including prosecutions,

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truth-seeking mechanisms, institutional reforms, reparations and programmes that reintegrate ex-combatants” (Office of the United Nations High Commissioner for Human Rights [OHCHR], 2006a: 9). This way of transitional justice focuses on overcoming the conflict and achieving positive peace, which will require avoiding impunity for perpetrators. Nevertheless, overly ambitious plans can backfire when perpetrators feel attacked so they can threaten the stability and the protection of witnesses can be more difficult (OHCHR, 2006a: 5).

The rationale behind these mechanisms, such as truth commissions, is to “help a society understand and acknowledge a contested or denied history, and in doing so bring the voices and stories of victims, often hidden from public view to the public at large” and “to prevent further abuses through specific recommendations for institutional and policy reforms” (OHCHR, 2006b: 1-2). To that end, the Final Peace Agreement emphasized restorative measures to provide remedies to victims during the conflict and achieve justice not only through retributive sanctions by stating the following:

“The sanctions will have the overall aim of realising the rights of victims and consolidating peace. They will need to have the greatest restorative and reparative function in relation to the harm caused, and will always correspond to the degree of acknowledgement of truth and responsibility demonstrated before the judicial component of the comprehensive system for truth, justice, reparation and non- repetition through individual or collective statements.”

Under this principle, the JEP seeks to recognize the complexity of the conflict through a lens of restoring relations. Therefore, it tries to acknowledge victims’ needs and the problematic circumstances of perpetrators so social relations can be rebuilt, and thus, there are guarantees of non-repetition (Tonche and Umaña, 2017: 237-238). This is also the result of learning from past experiences in which transitional justice was attempted through criminal procedures. These initiatives were rather focused on vengeance and punishment of rivals – guerrilla fighters, paramilitary or military personnel, and even civilians, – but little was done to achieve substantial changes in the economy, culture or education, and even less action was taken to defend human and victims’ rights (Torres Vásquez, Echeverry Beltrán and Ortiz Vargas, 2021: 344).

Therefore, the restorative system was met by the promoters of the Final Peace Agreement with very positive expectations. Mainly, because when outrage is channelled through special sanctions and not just through punishment, the perpetrator of certain crimes can feel guilt and shame while recognizing his or her wrongdoing and being motivated to comply with restorative measures that satisfy victims’ rights (Arango, 2019: 30). Nevertheless, as the result of the referendum shows, there is a large segment of Colombian population that feared that restorative justice could become a large source of impunity. These fears are being reinforced by the current government and by President Duque himself. The lack of clear political commitment represents an enormous flaw of the SIVJRNR, since this is an essential requirement for the success of transitional justice in post-conflict societies (OHCHR, 2006a: 2).

In a nutshell, some see the SIVJRNR, and more specifically, the JEP, “as their best chance to find answers about loved ones and the country’s best hope for peace” (Turkewitz, 6th March 2021), whereas others are concerned for the lack of punishment in form of prison sentences for perpetrators of crimes. Finally, many dismiss the findings and argue that there is a bias in favour of the former guerrillas (*idem*).

Notwithstanding, narratives opposing the SIVJRNR are very focused on the conditionality regime established by the JEP: the degree of responsibility demanded by the JEP varies according to the involvement of perpetrators in the process so the more they give, the less retributive the sentence will be (Tonche and Umaña, 2017: 227-229).

Some might consider that “gross human rights violations and the massive harm they involve are by their very nature irreparable and any remedy is bound to fail to fully repair the harm inflicted to the victims” (Balta, 2019: 8). At this point, retributive responses are key to tackle moral harm as “people usually feel justice demands that the offender to be punished, above and beyond a possible restitution or compensation to the victim” (Wenzel *et al.*, 2008: 379). The general view of justice following mass victimization is that it must include the punishment of perpetrators, assert Vinck *et al.* (2008). Indeed, this perception is very common in the Colombian case as well.

“Viewed this way, punishment is seen as a precondition for the restoration of justice, which may indeed enable the

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process of mending the moral harm of victims. At the same time, it may reassure the victim that a rule of law that is punishing the perpetrators is in place, and may avoid the spiraling effect of impunity. [...] [I]mposing a punishment and thus, declaring the violation as wrongful, as something that should not have happened, has implications for the social standing and worth of the victim. In this sense, a failure to punish indicates indifference towards the victim, and even disdain.”

(Balta, 2019: 9)

Nevertheless, other studies disagree and show that this remains a contested topic asserting that “when victims are actually asked about what they want, a sincere expression of remorse from their offender is one of the most frequent responses” (Strang, 2012: 89). Following this thought, restorative justice does try to tackle impunity and to consider victims. As a matter of fact, the centrality of victims – *centralidad de las víctimas* – is one of the guiding principles of the JEP and the CEV in Colombia.

For example, to do so, the JEP organizes recognition conferences where victims and perpetrators meet face to face and the former expose their case and how they feel aggravated, and the latter recognize their responsibility. For instance, in one of these hearings in April 2022 on case 03 of the “False positives”, perpetrators admitted for the first time having committed war crimes and crimes against humanity. “Admissions of such crimes are rare – and conflicts endure – because perpetrators fear prison, while victims say offering blanket amnesty would be unjust” (Turkewitz and Willamil, 27th April 2022). Therefore, if a retributive response had been chosen, perpetrators of violations might have not been compelled to participate in the process in good faith to expose their reasoning in order to seek reconciliation for a future and more peaceful society.

Notwithstanding, other critics would argue that despite constitutional and legal mandates on access to justice for all citizens, more vulnerable and remote communities have been systematically forgotten. However, these legal positions are constitutionally entrenched so the conviction is that the right of accessing justice should imply the State’s ability to solve conflicts impartially and transparently and the recognition of proceedings that allow citizen satisfaction (Angarita, Oliveros and Valderrama, 2021: 93).

Indeed, future prospects are key for restorative justice because it is all about overcoming a major trauma and rebuilding social links in heartbroken societies. Therefore, the goal of JEP and SIVJNR “is to give the country a common narrative about the conflict, one that will allow Colombians to move forward, together” (Turkewitz, 6th March 2021). The interest in punishment and retributive responses is logical because iron-fist policies are more visible, provide faster results and do not require such an effort for victims than facing perpetrators and understanding their motives. However, as a long-term strategy for post-conflict contexts, they are less likely to promote stability and tackle the root causes of the conflict.

For restorative justice mechanisms to work, both perpetrators and victims need to have common values or identities as a common group. On the one hand, if common values are violated by a transgression, victims can reaffirm them and seek consensus in a restorative way. On the other hand, should the identification as a common group and shared values not be present, parties “will more likely see each other as negatively interdependent in terms of status and power. Victims will tend to interpret a transgression as an illegitimate appropriation of status and power and will seek to undo their humiliation and disempowerment through the imposition of punishment on the offender and subscribe to retributive justice” (Wenzel *et al.*, 2008: 387). Moreover, while acknowledging the often impossibility of restitution and compensation for gross human rights violations and international crimes, restorative justice considers other forms of remedies as suggested by the A/RES/60/147, such as guarantees of non-repetition, rehabilitation and satisfaction measures. The latter has been of special importance in this case since the JEP, alongside the truth commission, seeks to provide an accurate account of the violations, commemorations and tributes or public apologies by perpetrators.

In a nutshell, the result of the debate between restorative and retributive justice is the SIVJNR and, more specifically, the JEP. The special jurisdiction is the competent institution to establish criminal responsibility and uses a mixed system of restorative and retributive justice (Roccatello and Rojas, 2021: 3-13). This is related to the

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aforementioned conditionality regime, because this mixture of sanctions, whether retributive or restorative, depends on the level of acknowledgement of responsibility and the timing by the perpetrator. Generally, the JEP conceives restorative measures, such as the public acknowledgement of the truth and responsibility, and specific and symbolic reparations to satisfy victims and reintegrate them and perpetrators into society. Moreover, conceding amnesties also falls within this category. However, the JEP has more tools in form of retributive measures that usually convey incarceration, and privation of liberty for those who do not assume responsibility for their crimes (*idem*).

Therefore, the Final Peace Agreement states that those who recognize the truth and their responsibility for serious violations will face restorative sanctions between 5 and 8 years. The same period but with retributive sanctions will apply to those who recognize the events later, but before the sentence (Final Peace Agreement, 2016: 164). Finally, when there is no recognition, perpetrators can face ordinary retributive sanctions of privation of liberty between 15 and 20 years (*idem*: 166). By doing so, the JEP fulfils the three pillars of restorative justice set out by Garbett (2017: 202-206): encounters, amends and reintegration, and sustains retributive tools as well. First, the JEP facilitates encounters between victims and perpetrators. Such meetings create space for communications so the parties “have the opportunity to speak of their experiences of the crime, the harms that flowed from it, and impact upon their lives” and leave room for emotional language to “foster healing for both victims and offenders” (*idem*). The JEP has organized these kinds of encounters such as the previously mentioned recognition conferences. Second, the JEP also provides amends from offenders to victims in the forms of restorative sanctions and, finally, the institution seeks reintegration into society of victims and offenders.

Conclusions

Some international experiences show that when persistent conflicts have polarized societies it is unlikely to apply ordinary retributive justice – which would work in normal conditions to sanction perpetrators of crime and eventually reintegrate them into society. Moreover, when perpetrators are not the exception but a large segment of society, the objective of coexisting and rebuilding social links in post-conflict societies requires exceptional sanction mechanisms (Angarita *et al.*, 2021: 93).

Amnesty accords have been a key tool for transition in many post-conflict societies as a way to move forwards and forget an atrocious past. However, they can be perceived as an enormous source of impunity that violates victims' rights to truth and remedy. In any case, forgetting the past impedes any real and durable reconciliation attempts because the seeds of violence remain and can grow again (Uprimny, 2006: 25-26). Bearing this in mind, policy-makers and negotiators of the Final Peace Agreement in Colombia attempted to build a transitional justice system that mixed restorative and retributive justice whose best example is the Special Jurisdiction for Peace. The SIVJRN and its bodies, UBP, CEV and JEP try to put victims and the truth in the centre. The restorative elements assure better participation of victims and perpetrators than a purely retributive model.

On the one hand, using restorative sanctions instead of retributive ones in exchange for the recognition of the truth and responsibility can enhance participation and promote the dialogue between the parties to rebuild social links and work towards reconciliation. On the other hand, retributive sanctions imposed by the JEP send the message that impunity is being tackled, although this can dissuade perpetrators to engage in the process. Ideally, this mixed system uses restorative elements to rebuild society by fostering the recognition of responsibility and of victims' rights as well as retributive justice to deal with structural power problems (Roccatello and Rojas, 2020: 11).

By doing so, a truthful narrative of the Colombian armed conflict is to be established. Consequently, the focus of the system is to ensure non-repetition of the conflict and past mistakes. Putting the truth at the centre allows for addressing its root causes, which benefits both victims and perpetrators: their circumstances are known, their actions can be understood and the structural context that drove them can be modified. In this sense, transitional justice is very linked to the pathway towards achieving positive peace, a state that has dealt with direct, structural, and cultural violence.

Nevertheless, the lack of clear political commitment is a major systemic barrier to working effectively. Duque's government has adopted a rather ambiguous position regarding the SIVJRN since it neither defies it directly nor

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endorses it. Moreover, Duque has recovered an iron-fist policy towards guerrillas (Jiménez, 2019). Hence, the government has not assimilated the model of transitional justice yet (Torres Vásques *et al.*, 2021: 341-343), which hampers the legitimacy of the system and provokes more social scepticism towards its activities and prospects for reducing impunity. Therefore, “the [Final Peace] Agreement has been unfolding in a polarized environment” (Quintero, 2019: 16) and violence against human rights defenders and activists has increased substantially: 400 activists have been murdered since 2016 (Human Rights Watch, 2021), due to the rise of other armed groups after the demise of the FARC-EP. Hence, because of the heterogeneity of armed groups and guerrillas in remote areas unreached by the State, the conflict has not finished yet and similar efforts to that with the agreement between the government and the FARC-EP are to be sought in the future.

Notes

[1] National Government and FARC-EP, Joint statement 93, August 24, 2016. Available at <https://reliefweb.int/sites/reliefweb.int/files/resources/comunicado-conjunto-93-24-de-agosto-de-2016-vf-ingles-1472131587.pdf> [accessed: 25th April 2022]

[2] Acto Legislativo 01, de 4 de abril de 2017

[3] Tribunal Constitucional de Colombia, Sentencia C-674/17.

[4] Acto Legislativo 01, de 4 de abril de 2017 (transitory clause 6 of article 1).

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