Law in Times of Crisis

Festschrift for Yoram Danziger

Edited by

Eric Hilgendorf

Duncker & Humblot · Berlin

ERIC HILGENDORF (Ed.)

Law in Times of Crisis

Schriften zum Strafrechtsvergleich

Herausgegeben von
Prof. Dr. Dr. Eric Hilgendorf, Würzburg und
Prof. Dr. Brian Valerius, Passau

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יורם דנציגר

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Message from the Dean

As Dean of the Faculty of Law, University of Würzburg, I very much welcome the initiative to publish a Festschrift for former Israeli Supreme Court Justice Yoram Danziger, who is now a professor at the renowned Tel Aviv University. In these difficult times, when the Israeli constitutional system is under more pressure than ever before, it is extremely important to send a signal of solidarity to our Israeli colleagues. Our faculty's collaboration with Yoram Danziger dates back many years. Danziger has participated several times in international summer schools at our faculty and has given widely acclaimed lectures. His son organized a highly appreciated exhibition of his paintings in the faculty's Max Stern Cellar, dedicated to the memory of Max Stern, a Jewish wine merchant who emigrated to the United States in 1938. Time and again, colleagues from our faculty have visited Israel. I am especially grateful to Yoram Danziger for receiving and generously hosting alumni of our faculty at the Israeli Supreme Court. May this commemorative publication illustrate our gratitude and support to the honored jubilarian in difficult times!

Ad multos annos!

Würzburg, May 2023 *Christof Kerwer*

Foreword

On November 26, 2023, Yoram Danziger, professor at Tel Aviv University and former judge of the Supreme Court of Israel, celebrated his 70th birthday. Colleagues, students, friends and companions of Justice Danziger have taken this as an opportunity to compile a volume that is intended both to relate to various issues concerning the Israeli legal system and to reflect the broad spectrum of Danziger's thought and work.

Yoram Danziger was born in Tel Aviv in 1953. He graduated from the Herzliya Hebrew Gymnasium in 1971. From 1972 to 1975 he served in the Israeli army. In 1980 he graduated with a law degree (LL.B.) from Tel Aviv University. The same university also awarded him the Master of Laws (LL.M.) the following year. In 1983 he was awarded a doctorate in law. His thesis was entitled "The Duties of Directors of Target Companies in Takeover Bids". Danziger wrote it at the London School of Economics under the supervision of Professor Lord Wedderburn, the former Dean of the faculty.

After his return, Danziger founded the law firm "Danziger, Klagsbald & Co." in Tel Aviv (Ramat Gan) in 1984, in which he served as managing partner and head of the corporate department of the firm until 2007. Danziger's main area of work was commercial law. Moreover, he was an active member (as well as a board member for a few years) of the Israeli Association of Civil Rights and the founder of the Tel Aviv branch (back in 1980). In 2000 he published a book entitled "The Right to Information about the Company". Danziger's other publications are also mainly related to business and corporate law.

In 2007, Danziger was appointed as a justice on the Israeli Supreme Court. The appointment of a lawyer practicing in the private sector was then, and still is, very unusual. Many of his decisions were marked by their clear orientation toward secular liberalism and human rights, including freedom of expression.

In 2018, Danziger resigned from his judgeship almost six years before his official retirement, with private but probably also political reasons playing a role. At the time, the liberal newspaper *Haaretz* ran the headline "Israeli Supreme Court Loses Most Liberal Justice."

After his retirement, Danziger was appointed as chairman of the Public Committee for the Prevention and Correction of Wrongful Convictions. He also serves as a member and a board member of the Council of the Israeli Science Foundation. In 2022 he was appointed by the President of Israel, Mr. Isaac Herzog, as chairman

of the Advisory Committee to the President for the awarding of the President's medal of honor.

In addition to his highly successful legal and judicial activities, Danziger became active in academics at an early stage. In 1983 he became a lecturer on the law faculty at the Tel Aviv University, specializing in corporate law. From 1984 to 1988, he also taught at the School of Management of the same university. In addition, Danziger served as an adjunct lecturer at the College of Management (Rishon LeZion) from 2011 to 2018.

In 2018, after retiring from the bench, Danziger was appointed professor at Tel Aviv University. Since then, he has headed the LL.M. program of the Faculty of Law. In 2021 he was awarded the Order of Merit of the Federal Republic of Germany.

In the dispute over the curtailment of the powers of the Israeli Supreme Court in favor of the government, which has been going on since 2022, Danziger has been actively engaged as a defender of the separation of powers and the rule of law. In May 2023, he spoke at one of the "Saturday demonstrations" in Tel Aviv in front of more than 200,000 people.

Danziger's family has German roots, which may be one of the reasons why Yoram Danziger has traveled to Germany a number of times. A special connection exists to the old town of Würzburg, where Danziger has lectured several times at the Julius-Maximilians-University and participated in conferences and workshops.

Yoram Danziger has been married to Mrs. Ronit Danziger since 1977. The couple has three children (Yonathan, Daniela and Yoav) and three grandchildren (Cyan, Noga and Maya).

It is not easy to characterize in just a few words a person as multifaceted and active in many areas as Yoram Danziger. Four qualities that characterize Danziger are vigor, acumen, practical understanding, and optimism – all of which make the most appropriate combination for a lawyer and judge. Danziger belongs to Israel's most respected and important jurists. This Festschrift is acclaimed at making his work and thought even better known beyond the borders of Israel. Ad multos annos!

*

I would like to thank Mrs. Sina Tenbrock-Ingenhorst, Mr. Roger Fabry, Mrs. Leonora Qerimi and Mrs. Amelie Pauly very much for their help in editing the texts. In addition, I would like to thank Mrs. Larissa Szews from Duncker & Humblot for her excellent work. I would also like to express my sincere thanks to the Schulze-Fielitz-Stiftung Berlin for a generous printing grant.

Veitshöchheim, July 2023 *Eric Hilgendorf*

Contents

I. Constitutional Law and Legal Theory

II. Criminal Law and Criminal Justice

III. Corporate Law and Financial Regulation

IV. Legal Challenges in Digital Transformation and Technology

V. Ethics, Health, and Law

Confronting the Past Through Criminal Courts

Critical Reflections on the Colombian Case

By *John Zuluaga**

I. Introduction

As a result of the internal armed conflict, the Colombian population suffered many forms of victimisation. The most comprehensive report on the crimes and victimization during the armed conflict was carried out by the Commission for Clarification of the Truth, Coexistence and Non-Repetition (in Spanish: *Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición*, also known as *Comisión de la Verdad*).[1] According to that report, an estimated 8,775,884 people were victims of Colombia's armed conflict between 1985 and 2018. Most of them were civilians.[2] The sheer scale of the violence in Colombia, and the high number of victims it left, have been confronted in many ways, including by means of the criminal law.

* Prof. Dr. iur. *John Zuluaga* and Master of Laws (LL.M., at the Georg-August-Universität Göttingen, Germany). Fellow of the German-Latin American International Society of Criminal Sciences (SIGLA-CP). The author is currently Associate Professor at the Sergio Arboleda University (Bogotá, Colombia). Homepage: www.john-zuluaga.de. The author wishes to thank Sophie Rähme (MPhil./M.Poli.Sci., Goethe University, Frankfurt am Main) for her valuable comments.

[1] The Commission (in Spanish: CEV), together with the Special Jurisdiction for Peace (in Spanish: JEP) and the Human Rights Violations Data Analysis Group (HRDAG), carried out a project on human rights violations that integrated a large number of databases. The statistical work was specifically oriented towards the number of victims in the context of homicides, enforced disappearances, kidnapping, recruitment and forced displacement. One of the most important previous statistical works was carried out by the Colombian National Centre of Historical Memory (Centro Nacional de Memoria Histórica de Colombia -CNMH-), whose statistics can be found in the report !basta ya!. Cf. Informe general, Grupo de Memoria Histórica. ¡Basta Ya! Colombia: Memorias De Guerra y Dignidad. Bogotá, CNMH, 2013, p. 31 et seq.

[2] CEV/JEP/HRDAG, Informe metodológico del proyecto conjunto JEP-CEV-HRDAG de integración de datos y estimación estadística, Bogotá, 2. 8. 2022, p. 9 et seq. Among other dramatic statistics is that of displacement: more than seven million civilians were forced to flee their homes between 1985 and 2019, generating the second largest internally displaced population in the world (cf. p. 12).

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In this context, not only forms of criminal law of the enemy[3] have been put into operation, but also alternative models of punishment aimed at promoting the demobilisation and disarmament of combatants[4] have been established. The latter has been called *transitional justice*, despite its close link to criminal justice and to the criminal legal policies upon which it was based. The Colombian case exemplifies an international trend that focuses its expectations on criminal courts to do an accounting of the historical truth of episodes of mass violence, thus contributing to processing and overcoming them.[5] The confrontation with massive human rights violations through the use of the criminal law was one of the main reasons for establishing both the Nuremberg trials of Nazi war criminals, as well as subsequent ad hoc tribunals.[6]

In order to make these interactions between criminal law and Colombian transitional justice visible, four aspects are analysed in this paper. First, an account is given of the background of the criminal procedural rules that inspired the Colombian transitional justice model. Second, the paper describes some components that may confirm/illustrate the interaction between criminal law and transitional justice. Third, an attempt is made to establish why there are punitive tendencies in this model of transitional justice. Lastly, it analyses the outcomes of this model in achieving the purposes that motivated the establishment of transitional justice in Colombia.

II. The Procedural Forms of Colombia's Transitional Justice System

Transitional justice in Colombia was not created after the end of the internal armed conflict. Rather, it arose simultaneously with other criminal trials for crimes committed during the war.[7] The judicial procedures that prior to or parallel to the transitional justice mechanisms that were employed for the investigation and prosecution of crimes committed in the context of the armed conflict corresponded to the ordinary criminal justice mechanisms in use. Thus, transitional justice in Colombia drew significant inspiration from traditional elements of criminal procedure. Rooting transitional justice in the ordinary mechanisms of criminal procedure contributed in a spe-

[3] Cf. *González-Zapata*, in: Calderón/Luis (eds.), El estado actual de las ciencias penales. Homenaje a la Facultad de Derecho y Ciencias Políticas de la Universidad de Antioquia 1827 – 2007, pp. 133 – 152.

[4] *Zuluaga*, in: Ambos/Cortés-Rodas/Zuluaga (eds.), Justicia transicional y derecho penal internacional, pp. 201 – 236.

[5] Cf. in extenso *Sander*, Doing Justice to History: Confronting the Past in International Criminal Courts.

[6] Cf. in extenso *Hafetz*, Punishing atrocities through a fair trial: international criminal law from Nuremberg to the age of global terrorism.

[7] Cf. *Botero-Marino/Saffon-Sanín/Uprimny-Yepes/Restrepo Saldarriaga*, ¿Justicia Transicional sin transición? Verdad, justicia y reparación para Colombia, pp. 11 – 14.

cial way to the strengthening of symbols typically characteristic of punitive power within transitional justice.[8]

One of the most important expressions of the intersection of ordinary criminal justice and transitional justice in Colombia is the so-called Justice and Peace Law (JPL or Law 975 of 2005. In Spanish: *Ley de Justicia y Paz*). This law was enacted to give concrete expression to Colombia's duty to prosecute international crimes to which the Colombian State was obliged as a State Party to the Rome Statute.[9] The procedural rules that were put in place by this statute are a faithful reflection of the so-called accusatorial criminal procedure ([i. e. an adversarial procedure based to a large extent on the Code of Criminal Procedure of the Commonwealth of Puerto Rico]) developed in the New Code of Criminal Procedure (Law 906) of 2004. The consequences of this duplication of procedural mechanisms for the prosecution of crimes within the framework of the armed conflict generated a high level of regulatory inflation (overregulation), due to the large number of regulatory provisions contained in JPL. Other consequences included the ineffectiveness of judicial recourse for the investigation of crimes committed by members of armed groups, limited participation of victims in phases of the process and multiple difficulties in constructing a comprehensive and systematic truth about the armed conflict.[10]

New judicial mechanisms attempted to overcome these qualitative and quantitative deficits in the processes implemented under JPL. Initially, adjustments were made to JPL, primarily through the so-called Legal Framework for Peace (Legislative Act 01 of 31 July 2012 or *Marco Jurídico para la Paz*), which amended transitional articles 66 and 67 of the Colombian Constitution.[11] Subsequently, the Special Jurisdiction for Peace -SJP- (In Spanish: *Jurisdicción Especial para la Paz* -JEP-) was introduced as part of a comprehensive system of transitional justice. The SJP represented an additional step toward judicial mechanisms in criminal procedure that were progressively introduced to resolve Colombia's armed conflict. As it was a mechanism that functioned simultaneously with the ordinary criminal court jurisdiction and the JPL, the SJP has not been seen as a real attempt to overcome the problems of the

[8] On this subject, cf. *Zuluaga*, Símbolos punitivos y transición política en Colombia, ambitojuridico.com, available at: https://www.ambitojuridico.com/noticias/columnista-online/constitucional-y-derechos-humanos/simbolos-punitivos-y-transicion (accessed at 21. 3. 2023).

[9] Cf. *Bueno/Ruiz-Rosas*, in: Rothe/Meernik/Ingadottir (eds.), The Realities of the International Criminal Justice System, p. 219 et seq.; *Lyons*, in: Lyons/Reed (eds.), Contested transitions: dilemmas of transitional justice in Colombia and comparative experience, pp. 15–27.

[10] Cf. *Zuluaga*, in: Molina-López (ed.), Lecciones de Derecho Penal, Procedimiento Penal y Política criminal, pp. 571–634.

[11] Cf. the treatment in extenso by *Eckhardt*, Der Marco jurídico para la paz und die Rolle der transitional justice in Kolumbien.

judicial framework of the transitional justice system. Rather it is seen as a third attempt at generating criminal justice.[12]

The different levels of evolution of transitional justice in Colombia show judicial development that combines strict procedural rules with alternative sanctions for combatants. Moreover, the combination of rigid procedural rules and flexible judicial outcomes made the Colombian model a paradoxical device. On the one hand, it promised to prosecute all crimes related to the conflict but sets rigid procedural rules for the handling of such cases. On the other hand, it was conceived as part of a comprehensive transitional justice system but excluded multiple actors and crimes on the basis of case selection and prioritisation rules.[13]

III. The Intersection Between Criminal Law and Transitional Justice

Within the framework of Colombia's transitional justice schemes, the main judicial mechanism is currently the SJP. The normative basis for this mechanism goes far beyond ordinary Colombian criminal law. With the implementation of the Peace Agreement[14], by which the SJP[15] was created, different normative frameworks were contemplated as points of reference to support the work of this jurisdiction. This normative basis is relevant because it was the basis for the legal charges of suspected crimes that occurred during the armed conflict.

Among the legal provisions that delimit the normative framework of SJP, particular mention should be made of Transitory Article 5 (6) of the Political Constitution of Colombia (CPC), which was introduced by Legislative Act 01 of 2017. In this section, reference is made to the bodies of law on which the judicial work of the SJP is based. This includes the Colombian Criminal Code (CC) but also International Human Rights Law (IHRL), International Humanitarian Law (IHL) and International

[12] *Zuluaga*, Hacia una tercera generación de justicia transicional. De la Jurisdicción especial para la solución del conflicto armado en Colombia, En Letra: Derecho Penal, pp. 7–12.

[13] *Zuluaga*, in: Ambos/Cortés-Rodas/Zuluaga (eds.), Justicia transicional y derecho penal internacional, p. 203.

[14] This peace agreement was reached between the Colombian government and the guerrilla group Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo (FARC-EP). The Agreement is composed in 6 parts: 1. Towards a New Colombian Countryside: Comprehensive Rural Reform (pp. 10–33); 2. Political Participation: A democratic opportunity to build peace (pp. 34–56); 3. En of the Conflict (p. 57–103); 4. Solution to the Illicit Drugs Problem (pp. 104–131); 5. Agreement regarding the Victims of the Conflict: "Comprehensive System for Truth, Justice, Reparations and Non-Recurrence", including the Special Jurisdiction for Peace; and Commitment to Human Rights (pp. 132–203); 6. Implementation, verification and public endorsement (pp. 204–231). An English version of the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace is available at: https://www.peaceagreements.org/viewmasterdocument/1845 (accessed: 21. 3. 2023).

[15] Cf. *Sedacca*, Human Rights Law Review 19 (2019), pp. 315–345.

Criminal Law (ICL). This reference was repeated in Article 23 of Law 1957 of 2019 (in Spanish: *Ley Estatutaria de la JEP*).

In this way, the normative reference base is made up of transitory articles 5 and 22 of Legislative Act 01 of 2017, and article 23 of the *Ley Estatutaria* of the SJP. It is expressly stated in the SJP that international law (IHRL, IHL, ICL) will be applied as the legal framework of reference. This implies a broadening of the normative framework for investigating and prosecuting crimes committed during or in relation to the armed conflict. In addition, it may lead to charges against possible defendants being different from those previously made by judicial, administrative or disciplinary authorities.[16]

This concurrence of normative frameworks generates various questions that affect legal certainty. If criminal charges are based on the Colombian Criminal Code, or the norms contained in IHL, IHRL or ICL, applying the *principle of favourability*, for example, one of the questions to be resolved would be how to determine the law which would apply in respect of criminal liability of the perpetrator.[17]

First, this problem affects all criminal charges and issues except amnesty or pardon, which must be done mainly in accordance with the Rome Statute. Second, it also affects the parameters for reviewing judicial sentencing that has not been done by the SJP but are re-evaluated on appeal by this jurisdiction. This review can be carried out, for example, for those convicted as combatants under IHL, who can apply for a review of their convictions before the Appeals Section of the SJP.[18]

In addition to the above, another way of appreciating the strong inclination of the SJP towards the ordinary logic of criminal prosecution is the evaluation of the judicial procedures that are used by this jurisdiction. Particularly illustrative of this approach to criminal procedure is how judicial procedures have been configured within the SJP. The normative framework of SJP setting the basis for implementation at trial have the following characteristics:

1. Two types of procedures are foreseen: trials in which the defendants plead guilty (acknowledgement of truth and acknowledgement of responsibility), and trials where they do not plead guilty (absence of acknowledgment of truth and responsibility, cf. article 73, Law 1957 of 2019).
2. The main structure of SJP has two levels. The first tier consists of three Chambers of Justice (in Spanish: *Salas de Justicia*) and the second tier consists of four Chambers that make up the Peace Tribunal (in Spanish: *Secciones del Tribunal*

[16] Cf. *Osorio-Vásquez*, in: Murillo-Granados/Tarapués-Sandino (eds.), Estudios sobre derecho penal, constitucional y transicional. Tomo II, pp. 101 – 152.

[17] Cf. *Ferdinandusse*, Direct application of international criminal law in national courts, pp. 267 – 268.

[18] See *Osorio-Vásquez*, in: Murillo-Granados/Tarapués-Sandino (eds.), Estudios sobre derecho penal, constitucional y transicional. Tomo II, pp. 101 – 152.

para la Paz) (transitional article 7, Legislative Act 01 of 2017 and article 72, Law 1957 of 2019).

3. On the first level, there are the following Chambers: Chamber of Recognition of Truth and Responsibility and Determination of Facts and Conduct (in Spanish: *Sala de Reconocimiento de Verdad y Responsabilidad y de Determinación de los Hechos y Conductas*); Chamber of Amnesty and Pardon (in Spanish: *Sala de Amnistía e Indulto*); Chamber for the Definition of Legal Situations (in Spanish: *Sala de Definición de Situaciones Jurídicas*) (articles 79–84, Law 1957 of 2019).
4. The Peace Tribunal, at the second level, is the highest authority of the SJP. It is composed of four sections: Section of Cases of Acknowledgement of Truth and Responsibility; section in Cases of Absence of Acknowledgement of Truth and Responsibility; Revision section (in Spanish: *sección de revision*); and an Appeals Section (in Spanish: *sección de apelación)* (articles 90 bis 97, Law 1957 of 2019).
5. Additionally, the SJP has a prosecution unit called the Investigation and Indictment Unit (in Spanish: *Unidad de Investigación y Acusación*); and an Executive Secretariat (in Spanish: *Secretaría Ejecutiva*) (articles 86–89, Law 1957 of 2019).
6. Each of the courts of the SJP has its own procedural rules. These rules try to incorporate at a minimum the following principles: adversarial proceedings, due process, impartiality, public hearings, confronting witnesses *(audi alterem partem)*, defence and second hearing. These regulations were set out in Law 1922 of 2018 and Law 1957 of 2019.
7. Judges of the Special Jurisdiction for Peace are subject to the same disciplinary regime as judges and magistrates of the ordinary jurisdiction (article 120, Law 1957 of 2019).
8. It is possible to file a writ of *amparo* (in Spanish: *acción de tutela*) against decisions of the SJP, which will be decided in the first instance by the Revision section, in the second instance by the Appeals Section and may exceptionally be reviewed by the Colombian Constitutional Court (articles 145–148, Law 1957 of 2019).

In this way, both the normative basis of the SJP and the configuration of the judicial procedures show the close link between this judicial mechanism of transitional justice and the ordinary criminal justice system. In fact, the transitional justice model goes much further and includes international normative references for the investigation and prosecution of crimes that occurred during the armed conflict. This explains why the SJP is currently seen as a jurisdiction with judicial overload and anticipated inefficiency.

IV. The Punitive Nature of Colombian Transitional Justice

In addition to rigid procedural rules, it should be mentioned that the judicial mechanisms of transitional justice in Colombia have combined some elements of restorative justice with the application of criminal sanctions. The link between imprisonment, whether as an alternative sanction (as in the JPL) or with restorative conditions (as in the SJP), as a condition for the reintegration of combatants or reconciliation between victims and perpetrators, is a very important characteristic of judicial practices in Colombian transitional justice.[19] Hence the profile of transitional justice in Colombia is judicial and bureaucratic and criminal law continues to be one of the main filters for understanding the armed conflict.[20]

The processing of violence left by the armed conflict through criminal law undoubtedly offers limited possibilities for the construction of memory, reparation of victims and non-repetition of violence. On the contrary, it could be said that a solution to armed conflict violence through criminal law promotes the rhetoric of the victors and deepens stigmatisation of the enemy.[21] In other words, the criminal law reproduces in a certain way the punitive ideas that are inherent in war and do not ensure better conditions that guarantee non-repetition of violence.

This orientation of the judicial mechanisms on which transitional justice is based in Colombia is counterproductive for the protection of human rights. On the one hand, neither ordinary criminal law nor the criminal law of the enemy is useful and legitimate in times of transition. It is undoubtedly a selective and unequal criminal law vis-à-vis combatants and victims.[22] On the other hand, a focus on such judicial matters as the process of defining criminal liability ends up postponing, for example, the problems of social and economic justice.[23]

Moreover, the support of criminal procedural law during a political transition has paradoxical effects in relation to the mission of protecting the prosecuted, which is the main mission of criminal proceedings. This protective function is not conceivable in the sphere of transitional justice if one considers that this implies the disregard of multiple rights guarantees, especially the right against self-incrimination, the right to confront adverse witnesses or the right to a decision based exclusively on the evidence presented. The relaxation of these guarantees is a condition in transitional jus-

[19] Regarding the SJP see *Castro-Cuenca*, in: Peters/Ambos (eds.), Transitional Justice in Colombia. The Special Jurisdiction for Peace, pp. 85–110.

[20] Cf. *Zuluaga*, Revista Ecos 156 (2018) pp. 9–10.

[21] *Correa-Henao*, in: Bernal-Pulido/Barbosa-Castillo/Ciro-Gómez (eds.), Justicia transicional: El caso de Colombia, pp. 25–172; *Orozco-Abad*, Justicia: el centro de los desacuerdos respecto del Acuerdo, available at: http://www.razonpublica.com/index.php/conflicto-drogas-y-paz-temas-30/9813-justicia-el-centro-de-los-desacuerdos-respecto-del-acuerdo.html (accessed at 21.3.2023).

[22] *González-Zapata*, Estudios Políticos 31 (2007), pp. 23–42.

[23] See in extenso *Cortés-Rodas*, Del arte de la paz: reflexiones filosóficas sobre justicia transicional.

tice for access to the punitive benefits that motivate the intervention of combatants in the development of judicial mechanisms.[24] It must also be said that reducing transitional justice to the logic of criminal proceedings reduces the right of confronting witnesses to a minimum. This reduction in confrontation takes place because confrontation is replaced by the confession of the person being prosecuted.

V. Colombian Transitional Justice: A Model for the Continuity of Criminal Justice Problems?

The configuration of the transitional justice system using the logic of criminal trials raises profound questions about the purpose and possibilities of overcoming the violence linked to armed conflict. Several levels of impact should be differentiated here. First, the persistence of a certain optimism in criminal punishment to confront human rights violations ends up reinforcing a "pan-judicial illusion". This illusion involves a "conception of law and criminal proceedings as both exclusive and exhaustive remedies for any infraction of the social order, as well as major crimes being linked to the endemic degeneration of social structures and the political system […]".[25]

Second, it reinforces uncritical adherence to international punishment requirements and hinders any recognition that obligations to punish are not absolute.[26] Punitive optimism, i. e. the belief that a society can be transformed through criminal law, avoids differentiating between transitional justice and ordinary criminal law. This reliance on punitive powers as a factor for fostering social change makes worse many shortcomings in conflict resolution of the criminal law, such as, for example its selective, discriminatory, unequal and highly instrumentalised character.[27] The criminal trial as the core of transitional justice begins as an exceptional mechanism and ends up being normalized and regularized as a way of administering criminal justice.[28]

It is in this sense that transitional justice could be conceived of as a model for continuity.[29] If one takes into account that violence in Colombia has multiple sources and

[24] On the tensions between the rights of the prosecuted and victims see *Baldosea-Perea*, Derecho Penal y Criminología 38 (2017), pp. 151 – 177.

[25] *Ferrajoli*, Derecho y Razón. Teoría del garantismo penal, p. 562 ("[…una] concepción del derecho y del proceso penal como remedios al mismo tiempo exclusivos y exhaustivos de cualquier infracción del orden social, de la gran criminalidad ligada a degeneraciones endémicas del tejido social y del sistema político […].").

[26] See *Greco*, in: Ambos/Cortés-Rodas/Zuluaga (eds.), Justicia transicional y derecho penal internacional, pp. 89 – 104.

[27] *González-Zapata*, Estudios Políticos 31 (2007), p. 38.

[28] Cf. *Posner/Vermeule*, Harvard Law Review 117 (2003), pp. 762 – 825.

[29] *Zuluaga*, Derecho Público Integral. Diario Penal Nr. 23.

interests in its production and reproduction,[30] and then considers that a central aspect of the armed conflict was the persistence of different forms of illegal commerce and different local controls of political and social processes,[31] then the insistence on judicial and penal devices does not represent an adequate approach to understanding and confronting these causes of violence.

VI. What Can Be Expected from Criminal Procedure in Times of Political Transition?

An approach to the potential capacities of criminal procedural mechanisms within the framework of transitional justice should begin by recognizing some of its limitations. Regarding the material reality of crime, it is indisputable that criminal procedure is unable of attaining objective knowledge of the truth.[32] This means that, confronted with object of knowledge (the crime), criminal procedure has a limited scope for the reconstruction of its historical reality. Cognitive restrictions on the investigation and prosecution of crimes are unavoidable for the criminal procedure of transitional justice.[33]

The crucial question to be resolved is how the recognition of criminal procedure as a limited and methodically controlled mechanism for the determination of procedural truth can be used to achieve the aims of transitional justice. However, a fair solution/answer would require recognising that the criminal justice system has no real capacity to deal with all the crimes that occurred in the context of the armed conflict, nor to document what happened during the war, and define the construction of historical truth. The fact that not all crimes committed during the conflict can be investigated and prosecuted through criminal proceedings also means that transitional justice cannot aspire to be the formal and controlled processing of each of the crimes committed in the context of the violence of war under to the rules of due process.

In order to achieve a judicial treatment of crimes that allows for an understanding of what happened during the armed conflict, it is necessary to distinguish between

[30] The causes of the armed conflict include inequality, political exclusion, the absence of the state in many regions of the country, racism and multiple discrimination based on social class, region or way of thinking. See in extenso *CEV*, Hay futuro si hay verdad: Informe Final de la Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición. Tomo 3: No matarás: relato histórico del conflicto armado interno en Colombia.

[31] Cf., among others: *Alonso-Espinal/Vélez-Rendón*, Estudios Políticos 13 (1998), p. 51; *Duncan*, Los señores de la guerra. De paramilitares, mafiosos y autodefensas en Colombia, p. 357.

[32] *Roxin/Schünemann*, Strafverfahrensrecht: ein Studienbuch, § 1 recital 4 et seq.; *Volk/Engländer*, Grundkurs StPO, § 3 recital 2; *Kühne*, Strafprozessrecht. Eine systematische Darstellung des deutschen und europäischen Strafverfahrensrecht, § 1 recital 1.

[33] *Kühne*, Strafprozessrecht. Eine systematische Darstellung des deutschen und europäischen Strafverfahrensrecht, § 1 recital 1.

criminal procedure and the comprehensive satisfaction of victims' rights. The strong connection between the one and the other not only undermines the protective function of criminal proceedings, but also limits the fulfilment of victims' rights.

In the Colombian transitional justice model, extrajudicial mechanisms have played an insignificant role and, on many occasions, have been relegated as ancillary to the judicial components. For this reason, it is important to try to further empower alternatives to judicial proceedings in order to strengthen the participation of victims, which is sometimes neglected by the dynamics of transitional justice in Colombia.[34]

As the judicial component is not only methodologically limited, but also restrictive of victims' rights, it is even more relevant to find means and procedures that effectively contribute to the satisfaction of victims' rights. Today, more than ever, the Colombian transitional justice model must be re-invented as a forum of communication in which the public demands that victims can achieve a restorative and reconstructive dimension.

Undoubtedly, this evaluative and reconstructive facet would also provide an important service in making visible those aspects of ordinary criminal law in which excesses of power have become standard practice. These practices have been standardised in Colombia through the limitation of the rights of the accused and relaxation of the right against self-incrimination. This broader approach would prevent criminal prosecution within transitional justice procedure from reproducing the problems of ordinary justice, i.e. the dilemmas of court incapacity to deal with all the cases, selectivity and various logistical and organisational problems. It is time to take seriously other communicative practices that are broader than criminal procedural devices, in which all those involved can participate effectively and which allow rights restricted by judicial formalities to be unbound.

VII. Conclusion

Confrontation of the armed conflict in Colombia has been carried out predominantly through judicial mechanisms. Transitional justice has also attempted to combine rigid procedural forms with flexible judicial solutions for those participating in transitional justice procedures. This judicial logic has resulted in reinforcing an uncritical compliance with international demands for the punishment of certain crimes. It is fed by the belief that criminal law and criminal procedure are indispensable instruments for the resolution of armed conflict.

However, expectations about the performance of criminal justice procedures within the framework of transitional justice must be realistic. This also means that it must be recognised that criminal procedure is only a limited and controlled device, which

[34] The latter, for example, was particularly evident in the Interpretative Judgement 3 (in Spanish: *Sentencia Interpretativa* -SENIT- 3) of the SJP which limited the rights of victims to second hearings, confronting witnesses and to effective judicial remedies.

does not have the capacity to produce objective knowledge of the truth. Moreover, criminal procedure does not have the capacity to act as a transformative justice system or to devise solutions to all the problems that are linked to the armed conflict in Colombia.

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