Transitional Justice in Latin America: Toward What Kind of Justice?[1]

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1. Introduction

This article analyses various models of transitional justice and their practical implications in Latin American contexts, by considering the advances, potential, difficulties and limitations associated with each model. Transitional justice as a paradigm emerged gradually as a normative *dispositif* to respond to the rights and demands of victims of human rights violations and political violence caused by authoritarian regimes and internal armed conflicts that took place in Latin America in the second half of the twentieth century. This massive and systematic violence left profound wounds that continue to have a dramatic impact in many areas of present-day social, political, legal and even economic life in Latin America. The first policies and initiatives in the search for truth and justice for dictatorship-era crimes took place in the 1980s in the Southern Cone, in particular Argentina and Uruguay. Over time, these mechanisms were replicated in other Latin American countries and the transitional justice ('TJ') paradigm was consolidated. The expansion of the use of TJ mechanisms in Latin America has turned the region into a central referent in international debate on how to address the legacy of authoritarian regimes and armed conflict.

The objectives of TJ are many and varied, dependent on context, but one or more of the following often feature: i) to make known the truth of what happened (Hayner, 2002); ii) to identify, and if possible sanction, those responsible; iii) to provide official recognition of the crimes committed; iv) to extend legal, economic and symbolic reparations to victims (De Greiff, 2008); v) to contribute to the construction of a peaceful, inclusive, democratic order (Lambourne, 2009, Baker & Obradovic-Wochnik, 2016);

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vi) to strengthen the legitimacy of, and confidence in, the rule of law and the institutions of the new political regime or order (Gloppen, 2005) and; vii) to guarantee the non-repetition of crimes (Zalaquett, 1995). These objectives represent on the one hand, the aspirations, demands and rights asserted by a range of actors who are advocating for social change to help construct more inclusive, democratic and peaceful societies. Paradoxically, on the other hand, these objectives do not necessarily call into question a liberal, exclusionary economic model. In fact, the implementation of transitional justice policies has in various contexts been conducive to the consolidation of a neoliberal economic and democratic model. Post-Fujimori Peru offers one example, where, as Ulfe (2016) points out, the conceptualisation of reparations and compensation for victims adopted minimal standards. When we consider Latin America's present political and economic configurations alongside its recent TJ processes, a range of questions therefore arise: what concrete interests have been served by TJ instruments? What has been their scope? What transformative horizons, if any, has TJ in the region adopted?

In order to answer these questions, this article first traces the evolution of the transitional justice paradigm in Latin America. It goes on to examine three normative and theoretical conceptualisations of what type of justice transitional justice ought to be, explaining, in turn, restorative, retributive, and transformative approaches to TJ. Each takes a different view as to the proper function and objectives of the TJ paradigm. The article goes on to analyse praxis, looking at the kinds of TJ policies applied in Latin America through to the present day, to deduce which of these perspectives have been adopted. For this purpose, we will focus particularly on four measures: amnesty, truth commissions, reparations, and criminal prosecutions. A survey of the use of these processes continent-wide will allow us to see what their achievements, limits, and challenges have been.

2. *The Transitional Justice Paradigm in Latin America*

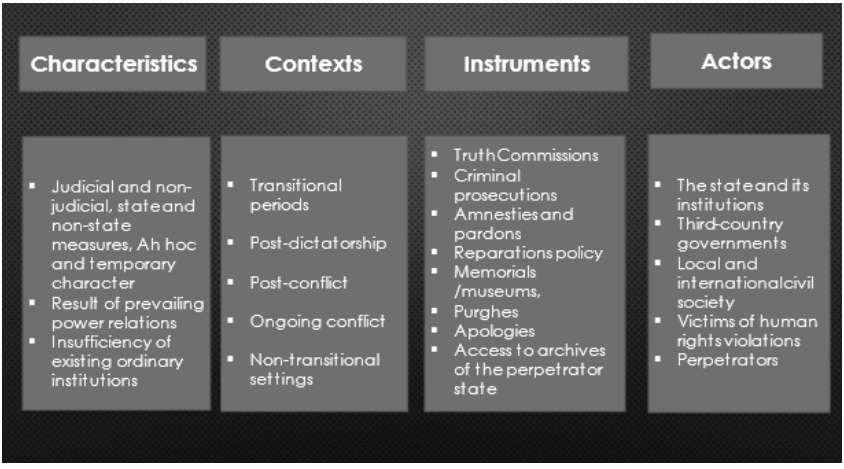
Transitional justice has experienced a veritable 'boom' over the past three decades, becoming an almost obligatory paradigm in what are referred to as transitional scenarios. This notion tends to refer to a specific ideal type of transition and/or process of change, accompanying the move from an authoritarian regime or armed conflict toward a democratic and peaceful regime. Latin America has today become the region with the largest repertoire of TJ policies at its disposal. Instruments such as truth commissions; civil and criminal legal processes; amnesty laws, and reparations for

victims of massive human rights violations have become familiar parts of the vocabulary of many transitional processes for addressing the legacy of a violent past. The formulation and implementation of TJ measures is not, however, a haphazard affair. It represents a space in which power struggles between a range of actors and interests are conducted, each in its particular time frame and socio-political context. Some actors see their demands reflected in the measures finally adopted, while others do not. The creation of these measures, which tend to be ad hoc and time-limited, also reflects the fact that existing institutions are incapable of providing a response to the overwhelming consequences that state crime and other types of political violence have. These consequences weigh not only on directly affected victims, but also on a broad range of other social groups. Resort to TJ measures has grown so exponentially in Latin America that they have moreover ceased to be applied only in the contexts traditionally classified as "transitional" or "post-transitional" (Collins, 2010), increasingly appearing also in "non-transitional" contexts (Cantú Rivera, 2014). The case of Mexico offers a prime example, with the creation, in 2018, of a Presidential Commission for Truth and Access to Justice (*Comisión Presidencial para la Verdad y Acceso a la Justicia*) to investigate the case of the disappearance of 43 students in Ayotzinapa (Figari Layús, Krüger & Peters, 2021; CNDH, 2018). This increasingly frequent deployment of TJ instruments is an indicator of the transit of the TJ paradigm itself, from exceptionality to normalisation.

This expansion of the transitional justice paradigm is also reflected in the increasing breadth of the spectrum of actors linked to TJ processes (see Table 1). While in the beginning – in particular, in the 1980s Southern Cone – TJ policies were primarily the concern of national governments and local civil society, from the 1990s onward, a greater number and range of actors became involved (Teitel, 2003; Collins, 2010; Subotić, 2012). These include third-country governments, international donors, NGOs, churches, universities, peasant and indigenous communities, women's organisations, the LGBTQI community, and experts from various other regions of the world (Scheuzger, 2009; Arthur, 2009). The burgeoning growth of organisations, conferences, research, publications, and academic offerings on the subject of TJ have turned the field into a discipline in its own right. This has brought in its wake a high degree of professionalisation, standardisation, and sometimes even banalisation, something which has come in for frequent criticism (Bilbija & Payne, 2011; Lefranc & Vairel, 2014). The increasing complexity and dynamism of the TJ scenario may lead us to ask: what type of justice, and therefore what sorts of social and political change, has transitional justice wrought in Latin America? In

order to establish which has been the predominant model of TJ in Latin America, and evaluate its aspirations and actual potential for change, we need to consider, first, the diverse theoretical and methodological conceptualisations of transitional justice that exist, and their actual application and implications in the region. Accordingly, in the following sections the paper explores the main perspectives that transitional justice has adopted, in theory and in practice.

Table 1: Features of the transitional justice paradigm



Source: Author's own construction.

3. *Models of transitional justice*

Transitional justice comprises a broad range of instruments, both judicial and non-judicial, state and non-state. These may include truth commissions, investigative commissions on the past, criminal prosecutions, amnesty, reparations programmes or policies for victims, the creation of memory sites and museums, security sector reform, purging from public office of members of the previous regime, and official apologies (Kritz, 1995; Teitel, 2003). It is possible to discern, depending on which TJ instruments are prioritised, the predominant underlying position or perspective as to what kind of justice is aspired to. This in turn can tell us what types of social, political, legal and economic change have been identified as desirable. The implementation of one model of TJ rather than another

is not necessarily the result of conscious choice or free decision: it is more likely to expose the power struggles and conditions of socio-political possibility that are hegemonic or predominant in a particular society. Recourse to one or other TJ mechanism reflects the results of a political, material and symbolic struggle between the various political (and economic) interest groups in a society. This struggle is both ongoing and dynamic over time, giving rise to alternation of different voices, interests and rights. In general terms, we can identify three perspectives on what type of justice TJ ought to pursue: retributive, restorative, and transformative. These three perspectives – retributive, restorative and transformative- are in no way intended to be exhaustive, nor do they preclude the existence of other conceptualisations.

3.1. Transitional Justice as (Imperfect) Retributive Justice

This perspective views criminal justice as one of the most important instruments the state can offer to provide reparation to victims and contribute to guarantees of non-repetition (Figari Layús, 2017; Sikkink, 2011, 2016). Criminal justice within the framework of transitional justice in Latin America has taken a range of forms. In cases such as those of Chile and Argentina, existing courts and criminal codes were used to carry out investigation and trial of members of the armed forces and police, who had been responsible for human rights violations during the respective civilian-military dictatorships. Contexts where internal armed conflict took place – have sometimes instead create special legal frameworks to judge those who committed crimes against humanity, or other serious violations of international human rights law, international humanitarian law, or the laws of war during the course of the armed conflict. Colombia is one such example, with the 2005 Justice and Peace Law for paramilitary demobilisation, or 2016 creation of the Special Jurisdiction for Peace, JEP.[2] The statute that defines the material competence of the JEP clearly limits its mandate to conduct that took place "by cause or reason of, or in direct or indirect relation to, the armed conflict" before 1 December 2016.[3] It

2 The acronym, derived from the official title of the body in Spanish (*Jurisdicción Especial por la Paz*) is in sufficiently common usage in English-language texts that it is preserved here.

3 "[C]onductas cometidas con anterioridad al 1 de diciembre de 2016, por causa, con ocasión o en relación directa o indirecta con el conflicto armado." Ley Estatutaria 1957, 2016, art. 8.

is in this kind of case that the political and partially negotiated nature of TJ is perhaps most clearly visible. In such cases criminal sanctions may be reduced, or foregone altogether, in return for an end to violence, the revelation of truth, or the provision of some kind of reparation to victims. Various authors have nonetheless questioned whether criminal law, even in these attenuated forms, can ever be appropriate for addressing the consequences of violent regimes. These critics would argue that criminal justice only contributes to more violence, obstructs access to truth, and marginalises victims (Forsberg 2003, Hayner 2002). Additionally criminal prosecution is one of the most difficult measures to apply, given its high direct impact on perpetrators. This is self-evidently particularly true where perpetrators still hold power in the post-transitional order.

3.2. Transitional Justice as Restorative Justice

The concept of restorative justice is usually understood as a form of justice that contributes to repairing the harm done, not only to direct victims but also to other social groups affected by violence. Many therefore characterise this type of justice as 'relational', since it aims to address and repair the damage done to social relations by violence (Clamp, 2014; Laplante, 2014). This perspective places emphasis on non-punitive mechanisms such as truth commissions, memorials, apologies, and reconciliation and dialogue initiatives as alternative forms of dealing with the past, questioning the reparatory potential of criminal justice. This model of justice frequently includes amnesty laws. Restorative initiatives, unlike criminal justice, do not depend entirely on state support, although the state may be behind them, as is the case of many truth commissions. In fact, many cases present themselves in which acts of commemoration, informal memory sites, artistic interventions and local-level dialogue between actors previously in conflict with one another take place without the involvement of any state institution. The downside or risk associated is that these restorative actions are often characterised by high levels of informality and arbitrariness, which can spark new local conflicts if those who take part have divergent views about the past (Bernuz Beneitez & García Inda, 2015). Although in the 1990s public debate tended to portray restorative and retributive

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[La JEP] conocerá de forma exclusiva de las conductas cometidas por causa, con ocasión y en relación directa o indirecta con el conflicto armado." http://www.secretariasenado.gov.co/senado/basedoc/ley_1957_2019.html.

justice as antagonistic and mutually incompatible, more recent thinking seeks to view them as potentially complementary.

3.3. Transitional Justice as Distributive-Transformative

A third perspective considers transitional justice to have potential to exercise a transformative function, at the level of structures, in order to achieve one of its most prized objectives – guarantees of non-repetition. Some scholars link this perspective to economic compensation or other types of reparations entitlements, such as differential access to specialised health and education services for victims and survivors. To date, however, these types of policies have tended not to have massive reach, nor to have shown themselves capable of generating profound structural changes (Uprimny & Saffon, 2007). According to this view, justice and reparations initiatives should be accompanied by, and co-ordinated with, more structurally-focused policies and social intervention. These might contribute, for instance, to combating socioeconomic inequality, rebuilding infrastructure, offering psychosocial support, promoting economic development and social integration, and initiating political reform that will allow greater participation by marginalised sectors. The underlying idea is that transitional justice must respond to the underlying causes of social conflict if it wishes to be genuinely effective in ensuring non-repetition of crimes and achieving peaceable, inclusive democracy (Lambourne, 2009: 30). Various authors point out that neither perfect judicial processes nor exhaustive truth commissions can avoid violence breaking out once again, if fundamental social, economic and political injustices are not addressed (Evans, 2016: 4; Franzki, 2012: 69, Servaes & Zupan, 2010: 3). The dominant strain of transitional justice implemented to date has however appeared to ignore the importance of social, economic and cultural rights as a fundamental condition for achieving substantive, inclusive and sustainable peace and democracy (Muvingi, 2009; Alexander, 2003). The exclusion of a redistributive emphasis is precisely the weak point many identify in the capacity of the TJ paradigm to achieve real transformation in pursuit of its own oft-reiterated long-term objectives (Franzki, 2012; Mani, 2008). Others meanwhile question whether TJ is a sufficient, or the most appropriate, tool for the meeting of such objectives (Waldorf, 2012: 176p.). Which transitional justice perspective has been hegemonic in Latin American TJ practice to date, with what consequences?

4. Implementing Transitional Justice in Latin America

This section analyses the scope of implementation in Latin America of what are defined below as four central or classic transitional justice instruments (criminal trials, amnesties, truth commissions and reparations). In doing so, it will examine what kinds of transitional perspective have been prioritized, and what kind of consequences, challenges, transformations and changes implementation appears to have brought about to date. Table 2 provides a detailed overview of TJ measures applied in Latin America, setting out which type(s) of instrument has or have been utilised in each of the 18 Latin American countries that has chosen to adopt at least one mechanism from the transitional paradigm.[4] The table clearly shows which TJ policies have proved 'possible' in Latin America over the past 40 years, allowing us to see also which type of model, and conception of transitional justice, has predominated in the region. The table is historical, in the sense that it records measures implemented at any point over the past four decades, irrespective of whether these remain live in the present day (for example, the amnesties/ pardons deployed in Argentina and in Peru are included even though they are no longer in force). For reasons of space, the table cannot exhaustively document every transitional justice instrument used. Accordingly, it concentrates on four of them, linked to the models of justice described in the preceding section: truth commissions, amnesties, criminal prosecutions and reparations. Three of these four transitional justice mechanisms – namely trials, amnesties and reparations - can only, strictly speaking, be carried out by the state. The case of truth commissions is potentially more complex, depending on what definition is adopted. In this article the truth commissions are defined as "official" bodies - i.e. commissions carried out by or at the behest of the state (Hayner, 2002). Hence, the table below excludes other commissions created only by non-state actors, this includes initiatives conducted by civil society organisations and the Catholic Church.[5]

4 The countries and island states of the Caribbean are not included, as TJ mechanisms have not been applied there.

5 Other truth initiatives were created by social movements and organizations (such as in Honduras) and-or impulsed by the Catholic Church (for example in Brazil, Guatemala, and Uruguay).

Table 2: Transitional Justice Policies in Latin America (1975-2020)

Country and period of military regime or armed conflict[6]	**Truth Commissions**	**Criminal trials**	**Economic reparations**	**Amnesties/ pardons**
Argentina (1976-1983)	X	X	X	
Bolivia (1964-1982)	X		X	X
Brazil (1964-1985)	X		X	X
Chile (1973-1990)	X	X	X	X
Colombia	X	X	X	X
Costa Rica				X
Ecuador (1984-2008)	X		X	X
El Salvador (1980-1992)	X	X	X	X
Guatemala (1960- 1996)	X	X	X	X[7]
Haiti (1991-1994)		X		X
Honduras (2010)	X			X
Mexico (2014)				X
Nicaragua (2018)				X
Panama (1968-1989)				X
Paraguay (1954-1989)	X	X		
Peru (1980-2000)	X	X	X	X
Uruguay (1973-1985)	X	X	X	X
Venezuela (2007-2015)				X
Total	**12**	**9**	**10**	**17**

Source: Author's own construction

The aim of the table is to provide an overview of which transitional justice mechanisms have been most frequently implemented to date, allowing us to appreciate which model of justice has dominated in the region, and what the consequences of this have been.

6 This column specifies first the country, and then the time period to which the respective transitional justice mechanisms refer.

7 A limited amnesty was contemplated in Guatemala's Law of National Reconciliation, approved during the signing of peace accords and introduced in 1996.

4.1. Amnesties

At least 17 Latin American countries have extended amnesties and pardons to those responsible for human rights violations, mass atrocities or crimes against humanity, meaning that impunity is the continent's most frequent measure to deal with these kinds of crimes. Governments tend to justify recourse to amnesty laws by appealing to peace, truth, and even to the highly disputed notion of reconciliation (Figari Layús, 2017: 27p.). However, the question is unavoidably raised of whether amnesties have really contributed to these objectives. Has amnesty been an effective instrument of transformation towards sustainable peace and stronger democracy?

We should note here that impunity does not only take the form of laws. As a sociopolitical as well as a legal state, impunity may be *de iure* – established legally, through statute – or *de facto*. In the latter case it may consist of the state's omitting to act, or of acts of corruption that mean that existing laws and criminal codes are simply not applied or invoked against those responsible (Ambos, 1999). Legalised impunity has taken various forms in Latin America. We may distinguish four types of laws of exemption from, or reduction of, criminal sanctions, according to the moment of political transition during which the laws were approved. Such laws may be brought in before, during or after regime change or the signing of a peace accord. Those brought in beforehand tend to be self-amnesties, approved by the same actors responsible for human rights violations, in order to avoid criminal sanctions once they formally leave power. This type of law was applied principally in Chile, Brazil, Argentina and Peru. While these laws remain formally on the books in Chile and Brazil, the other two of these self-amnesties were annulled shortly after elected administrations were sworn in: in Argentina, after Raúl Alfonsín assumed the presidency in 1983,[8] and in Peru, where an adverse 2001 Inter-American Court ruling finally helped to quash self-amnesty laws

8 Argentina also experienced subsequent 'impunity laws', introduced some years after transition (see below, main text), but the reference here is rather to a failed self-amnesty attempt by the outgoing military regime, in 1983. Law 22924, officially entitled the 'Law of National Pacification' (*Ley de Pacificación Nacional*) but widely referred to in common parlance as the "self-amnesty law" (*ley de autoamnistía*), sought to grant blanket amnesty to members of the security forces for all crimes committed 'in order to put an end to terrorism or subversion' between May 1973 and June 1982. The proposed start date is in itself revealing, showing that illegal repression by state forces predated the actual military coup of 1976. This law was repealed by the Alfonsín administration immediately on taking office in 1983.

decreed in 1995 by the country's autocratic then-ruler, Alberto Fujimori. Next come the laws whose negotiation begins before transition, but which take shape while it is in progress. This type of amnesty often comes about in contexts of peace processes such as those taking place in Colombia, El Salvador, or Guatemala. Here, full or partial amnesty or exemption from criminal sanction becomes a tradeable good, a key bargaining chip for negotiating demobilisation. A third type of amnesty law, brought in after transition, demonstrates the residual power exercised by those responsible for grave violations and/or crimes against humanity. Argentina and Uruguay provide clear examples of this type. In Uruguay, a statute called the Law of Cessation of the Punitive Pretensions of the State (*Ley de Caducidad de la Pretensión Punitiva*), was brought in in 1986. It declared that the statute of limitation on politically motivated crimes committed by officers of the police or armed forces prior to 1 March 1985 had run out. In Argentina, two laws were passed in 1986 and 1987: the Full Stop Law (*Ley de Punto Final*, 1986) and Due Obedience Law (*Ley de Obediencia Debida*, 1987). These acted in various ways to impede the prosecution of those who had formed part of the repressive apparatus of the civic-military dictatorship and had participated in kidnap, torture, homicide, and enforced disappearance.

A final mode of exemption from criminal sanction, and one which also takes effect after the handover of power, is the pardon or presidential pardon. This may involve the dissolution or commutation of a sentence already handed down, that is, it is necessarily applied only after someone has been convicted. This type of measure tends to come into play some years after regime change. Examples include decrees issued in 1989 and 1990 by Argentine president Carlos Menem, in 1989 and 1990, pardoning civilian and military perpetrators - including some of high rank - who had been sentenced after the Junta trial. In 2017, then-Peruvian president Pedro Pablo Kuczynski pardoned Alberto Fujimori for purportedly 'humanitarian' reasons (Ulfe & Ilizarbe, 2019). Regarding amnesty laws, some – e.g. those of Chile and Brazil– are still in force, even though there have been significant advances in removing or reducing the scope of others, by derogation, annulment, and/or declarations of unconstitutionality (examples include Argentina, Peru and El Salvador). The use of amnesty laws for grave violations has been challenged by a range of national and international actors, including victims' associations, human rights organisations,

and the Inter-American Court of Human Rights (Caso Barios Altos vc. Peru, 2001).[9]

Impunity, whether *de iure* or *de facto*, is one of the principal indicators that perpetrators still wield power and are able to impose conditions on the new regime – especially, but not only, when impunity prevails for crimes against humanity and other grave violations of human rights or international humanitarian law. Impunity has social and political, as well as legal, consequences. In many contexts, particularly in small rural communities or places otherwise removed from large urban centres, it was and is common for surviving victims to come face to face with perpetrators in the street, or be forced to live alongside them in the same neighbourhood. This enforced proximity often goes hand in hand with incidents of ongoing or renewed perpetrator intimidation of victims (Figari Layús, 2018).

In this way, impunity becomes one of the principal mechanisms of reproduction of fear, and a method of exercising social control: over victims, and in time, over other social groups also. This situation of (victim) vulnerability is reinforced when perpetrators retain their status as authority figures or public officials, particularly at local level, despite regime change or a peace process. Impunity, and the continuity in office of known or suspected perpetrators that comes with it, therefore stands as testament to fault lines in the concept of transition. Similarly, and as Castillejos (2017) has emphasised, transitions do not connote total system change. Even changes from authoritarian to constitutional regimes are characterised by continuities, as well as rupture. Such continuities signify not only the continued presence of certain persons in the new regime or socio-political order, but also, often, the persistence of repressive practices within the culture of the security forces. This phenomenon has been observed, for example, in various of the northern provinces of Argentina Figari Layus (2017: 82-85). Similarly, paramilitary groups continue to exist, and to exercise social control, in various regions of Colombia. Alongside the persistence of a range of violent and repressive practices, many post-con-

9 The Inter-American Court of Human Rights has emphasized in several of its judgments that states parties to the American Convention on Human Rights cannot invoke domestic law provisions such as amnesty laws, to justify failing to meet their obligations to ensure the full and proper functioning of the justice system. In the Barrios Altos case, for example, the Court held amnesty provisions, statutes of limitation and the establishment of exclusions of responsibility that seek to prevent the investigation and punishment of those responsible for the crimes committed to be incompatible with the international obligations of states under the American Convention (Caso Barios Altos vc. Peru, 2001)

flict or post-peace-agreement settings such as that of Central America or Colombia see an increase in other forms of aggression. These may include violence against social leaders (Human Rights Watch, 2020), or incidence of juvenile crime by or between criminal groups or gang members, who have seen little prospect of increased inclusion in the aftermath of peace processes in their respective countries (Kurtenbach, 2014).

These continuities of violence in post-conflict contexts are often related to high levels of impunity and corruption. They also proceed from the lack of redistributive social and economic measures to address the needs and exclusion of those most affected by social inequalities, inequalities which themselves often have roots in armed conflict (Parlevliet, 2017). As explained above, amnesties and the reduction of criminal sanctions are usually implemented under restorative perspectives on transitional justice. Impunity for serious crimes, whether it comes about as result of pressure of perpetrators or as part of peace negotiations, cannot lead to genuine conflict transformation and the elimination of violence, unless the political, economic and social rights of those who were involved in the conflict are properly addressed (including demobilised ex combatants). Impunity can only contribute to the reproduction of social inequalities, marginalisation, and the continuation of practices of corruption and violence by and on behalf of the state (e.g. excessive use of force by the security forces, criminalisation of social activism, repression of protests, etc). It also fuels violence at the non-state level (gangs, drug trafficking, the illegal economy, and the persistence or emergence of paramilitarism), as the cases of Colombia, Guatemala and El Salvador show (Kurtenbach, 2014; Aguirre Tobón, 2016; Nussio & Howe, 2016; Devia Garzón et al., 2014). [10] Although these conditions do not always or automatically prevail in post-conflict and post- authoritarian settings, the link between impunity, poverty, marginality, violence, and the absence or precariousness of the

10 A distinction must be made here between the formulation of transitional justice measures in or around peace agreements, and their actual implementation. In some cases, such as El Salvador and Guatemala, peace agreements included some economic, social and institutional reform measures, but these were not effectively implemented (Matul & Ramírez, 2009). Between 25 and 30 years after the signing of the peace accords in these two Central American cases, the political, social and economic scenario in Central American countries is influenced by different forms of economic and social exclusion. These lead in turn to various forms of criminal activity, further increasing levels of insecurity and violence in the region. The peace agendas were only partially implemented, without proper follow-up (Devia Garzón et al., 2014).

state in guaranteeing basic rights and needs is undeniable in many of these contexts.

4.2. Truth Commissions

Over the past few decades, Latin America has been the site of over a third of all the truth commissions, ever carried out worldwide. These kinds of instrument are second only to amnesties in the list of measures most frequently adopted in the region and are one of the mechanisms classically associated with a restorative perspective on TJ. At least 12 countries have set up an official truth commission at some time over the past 40 years (see table 2). Truth commissions are state sponsored temporary bodies whose objectives usually include: a) piecing together the violent past and satisfying victims' and society's right to truth; b) investigating and identifying patterns of violence and repression, their causes and consequences; c) acknowledging victims' voice and narratives; d) constructing an inclusive, forward-looking collective memory, and e) preventing new acts of violence (Hayner, 2002; Beristain, Páez, Rimé & Kanyangara, 2010). To this end, commissions normally collect testimony from victims and other relevant actors, as a basis for drafting and publishing a report that includes recommendations designed to ensure non-repetition (Bakiner, 2016: 24).

Although truth commissions have made significant contributions, and have usually been important for victims and societies, they have not been exempted from criticism and debate over issues including their impact, role, and relevance. The themes, patterns and perpetrators that they decide to include or leave out; their use of innovative strategies for truthseeking, and their political limitations have also attracted attention, making them one of the TJ paradigm's most studied instruments (Roht-Arriaza, 1998; Hayner, 2002; Dancy, Kim & Wiebelhaus-Brahm, 2010; Bakiner, 2014; 2016). If we want to evaluate their transformative potential, various questions arise. The rise of truth commissions has gone hand in hand with a fundamental demand, by victims, to know what happened (to themselves or to loved ones), to give testimony about their experience of victimisation and be acknowledged, and to offer an account of the causes and consequences of the violence they lived through. However, and in spite of the achievements of many commissions, it is impossible not to question their scope and transformative power, since to date most have not generated a before-and-after, or a generalised questioning whose real-world consequences challenge or change the status quo, or the continued power enjoyed by elites and/or perpetrators. In practice, truth commissions

often took place in contexts where amnesty laws or reduced sentences were also deployed. Thus, the political and legal costs to transition-era administrations of the implementation of truth commissions has not been particularly high, at least in the short term. The commissions themselves have mostly failed, at least to date, to alter the underlying interests and configurations of power that produced massive human rights violations.

Another key aspect of truth commissions that has been signalled as a limitation on their transformative power is the type of account of the past that they construct, and the repercussions of this in the present (Bevernage, 2010, Franzki, 2012). The sociopolitical implications of certain models for explaining violence - models that truth commissions have contributed to generating, reproducing and legitimating - have been called into question. The logic of truth commissions reflects a modern conception of history, presupposing a qualitative separation between past, present and future – treating them as non-simultaneous, distinguishable, and non-overlapping (Bevernage, 2010). Commissions are predicated on this linear notion of history, which helps to foster a moral consensus that crimes and injustice belong to the past (Meister, 2002: 96; Franzki, 2012, 76). This lends weight to the idea of a new order, one that does not acknowledge possible sources of continuity with the previous one in aspects such as favoured actors and interests, and/or the practice of violence and repression. A holistic analysis of the causes and patterns of 'past' violence would, for example, require investigation of civilian collaborators (not just armed actors). It might stretch, for example, to considering the possible responsibilities of businesses and the judicial branch for the exercise of violence (Basualdo, 2017). Recognition of the key role played by these sectors in the dictatorial regimes of the Southern Cone of Latin America has led these regimes to be recently re-branded as 'civic-military' dictatorships. Many of the actors involved in the exercise of past violence continue to be active in the subsequent regime or social order, even when this presents itself as completely new. Accounts that include the role played by businesses in dictatorships and armed conflict, and document the economic benefit that often accrued, can allow present-day continuities to be detected, and appropriate measures taken. Accordingly, the important question to ask here is how truth commissions, and other TJ measures can contribute to formulating demands for historical justice in ways that support current political struggles, or at least, those which seek to address social inequalities and forms of political, social and economic exclusion: instead of defining the past as something distant and completely different from the present (Franzki, 2012).

Finally, another limitation of the transformative power of truth commissions lies in the poor track record of implementation of their recommendations (Martínez Barahona & Centeno Martin, 2020). Although few academic studies to date have looked at this, those that have done so have found very low levels of implementation, combined with the absence of substantive discussion of the matter. One reason often advanced for this failure of implementation is the absence of designated (state) bodies for oversight and followup. This criticism however locates the problem in a practical obstacle: we should also keep in view the underlying political factor. Lack of political will to ensure effective implementation of a truth commission's recommendations again exposes the continuity into the present, of past interests and power struggles. These continuities will determine whether present-day political and economic forces promote or permit a profound change towards a more just, peaceful, inclusive and /or democratic regime.

4.3. Reparations

Reparation for victims, as a TJ mechanism, refers to administrative or judicial procedures designed to respond to the consequences of political violence or human rights violations with concrete measures (Correa, 2011; Laplante, 2014). The meaning of reparations has however broadened since 2010. Recent international legislation defines 'reparations' as a set of material and symbolic modes of redress for victims of human rights violations (De Greiff, 2008; Beristain, 2009). International law has established that the state has the obligation to provide measures that guarantee reparation to victims of grave violations of human rights and/or international humanitarian law. The UN principles developed by Theo Van Boven describe four types of reparation: 1) restitution, 2) compensation, 3) rehabilitation and 4) satisfaction and guarantees of non-repetition (United Nations, 2005).

A range of measures of material and symbolic reparation have been attempted in Latin America. While symbolic reparations cover a host of forms of recognition and commemoration of victims and crimes, for present purposes the focus is on what are usually referred to as material reparations. Policies undertaken in this area include monetary compensation, whether in the form of one-off payments, or as lifetime pensions (Abrão & Torelly, 2011 on Brazil; Guembe, 2004, on Argentina). Social welfare programmes for victims, survivors and/or their dependants have been introduced in some countries, such as Chile, where educational

scholarships and entitlements to certain public health provisions have been established.[11] Brazil, like other post-dictatorial settings, introduced the right to reinstatement or redeployment for people who were arbitrarily sacked or blacklisted due to dictatorship-era persecution.[12] While all these measures have been important, they are not easy to implement: as table 2 shows, only ten countries in Latin America have established programmes and/or laws to provide economic or other forms of material compensation for victims of human rights violations and political violence.

Any discussion of the meaning of reparation for victims of human rights violations necessarily requires mention of its unavoidable limitations and fundamental contradictions. First, of course, reparation of crimes such as torture, sexual abuse, homicide and enforced disappearance is impossible. The harm caused is such that it simply has to be lived with: it is impossible to undo the pain caused by the death or disappearance of a loved one. This type of policy is therefore able at best to provide social, economic, civil and legal conditions that contribute to improving victims' quality of life. Second, the fact that reparation has an anchor point in international law does not give it a single, universal meaning across contexts. What is considered reparatory may vary from person to person, and setting to setting. While the international definition is highly relevant, and offers a general vision of the elements that a reparatory measure should contain, it does not directly address the particularities of each context. What is, or is not, reparatory takes on a particular meaning in each political and historical setting, and is intimately connected with the harm suffered by victims. Third, reparations measures – particularly monetary ones – are always selective. That is, they include certain types of victimization while excluding others. They rarely if ever cover all types of crime nor all victims (Correa, 2011). A clear example is offered by the experience of victims of sexualised violence during dictatorships and armed conflict: while there have been some advances, as can be seen in the case of the 2011 Colombia

11 In Chile, children of victims of enforced disappearance or extrajudicial execution were awarded educational scholarships (in effect, higher education subsidies), an entitlement later extended to grandchildren, and to survivors of political imprisonment. In 1991 a specialized health program, *the Programa de Reparación y Atención Integral en Salud y Derechos Humanos* (PRAIS) was created, to provide entitlement to public health assistance and to specialised attention, particularly in the area of mental health support (Correa, 2011).

12 The Brazilian dictatorial regime undertook a far-reaching program of removing so-called 'subversives' from public and private employment, particularly between 1979 and 1985 (Abrão & Torelly, 2011).

Victims' Law,[13] this category of victim has historically been excluded from a large proportion of Latin America's reparation and compensation laws and programmes (Figari Layús & Oettler, 2017; Rivera Revelo & Peters, 2017). Fourth, in many cases reparations policies implemented to date, whether individual or collective, have been insufficient or unsatisfactory in many aspects. This insufficiency manifests itself in slowness and delay, or worse, in the payment of economic compensation. In Argentina, where compensation was often awarded in the form of government bonds instead of direct monetary transfers, the fate of the bonds was linked to levels of public debt, meaning long waits as well as the danger of devaluation in case of subsequent economic instability (Guembe, 2004). In Peru, the amounts awarded were small in both absolute and relative terms, and the process of registration to obtain access has been painfully slow, particularly for victims in rural areas (Correa, 2011).

The many forms of reparation have enormous transformative potential, offering the chance to break vicious cycles of victimization and intergenerational transmission of harm. At the same time, to be successful, a transformative reparations policy must be based on acknowledgment of the crimes committed and recognition of state responsibility. It must seek to reach all victims via measures that repair the consequences of harm to the fullest extent possible, and guarantee non-repetition. This requires a holistic approach, meaning that reparations cannot be reduced to simple monetary transfer. Public acknowledgment and apologies, issued by the highest public authorities, have been relatively infrequent in Latin America, and would in any case have only limited transformative potential absent the proper implementation of effective social and material measures. Victims and survivors will meanwhile be unlikely to feel reparation has been effected if the provision of material goods or services is not accompanied by recognition of what occurred, and responsibilities for it, alongside modification of the structural conditions that made the crimes possible in the first place.

Thus, we see that while there have been some significant steps toward reparation in Latin America, these steps remain scarce and few of them contain a fully integrated holistic vision such as would help them to have real transformative potential. Accordingly, they have generally not contributed to changing victims' situation – whether because they have been minimal, have not been delivered within the promised time frame, or were not designed to produce substantial transformations capable of mod-

13 Law 1448 of 2011 (UARIV 2020).

ifying the social and economic inequalities that often underlie violence (Lambourne, 2009; Evans, 2016). These aspects are key to understanding the limited reach that reparations policies and programmes have had in Latin America.

4.4. Criminal prosecutions

Latin America is the region of the world that has carried out most prosecutions over crimes against humanity committed in the context of armed confrontation or dictatorial regimes, even though such prosecutions have taken place in only nine countries. These trials have been of former heads of state and/or of other perpetrators, whether civilians, members of the security forces, or members of illegal armed groups. Their scope, impact and systematicity varies widely across the nine countries: for the purposes of the paper we have considered countries in which at least one trial has taken place. Prosecutions, unlike truth commissions, connote concrete sanctions against perpetrators, making them difficult to carry out where perpetrators retain social, political and economic power. The fact that perpetrator prosecutions is one of the TJ mechanisms least frequently implemented in the region is testament, inter alia, to the power that these actors retain in the present day. This factor, while not the sole explanation for scarce prosecutions, is undoubtedly one of the principal ones. This continuing influence, while it varies from place to place, again raises a question mark over the notion of a rupture, or definitive transition, between past and present.

Even in countries where trials have taken place or are ongoing, we cannot claim that impunity has come to an end. In the Southern Cone countries, for instance, the time elapsed between the end of dictatorships and the current trials means that many suspects, victims and witnesses are elderly. Some die before or during investigations, giving rise to what has been called 'biological impunity'. Further delays produced by the Covid-19 pandemic have aggravated this issue, at least in the example of Argentina (Página 12, 2020). Impunity is also present in the fact that the actors who were involved in repressive regimes are not prosecuted in equal measure or to the same extent. Although some civilians have been prosecuted, members of the armed forces predominate on the stand. Moreover, while civilian prosecutions have included church figures, doctors, judges and individual businesspeople, the role of business per se in collaborating with grave human rights violations remains a challenge for criminal justice in particular, and transitional justice in general (Payne & Pereira, 2016).

Criminal prosecution in these types of case is not necessarily aimed only at perpetrators. It can have great significance for victims, who in Latin America have spent decades demanding justice. What is known as the 'legal paradigm', or 'juridical paradigm', considers the use of law to be the most appropriate instrument for offering reparation to victims (Figari Layús, 2017). Many academics and activists conceive of trials, and the right to justice, as a central element of social reparation in response to victims' rights and needs (Edelman, 2010: 107). It has also been thought of as a means of promoting the rule of law after massive atrocity crimes (Roht-Arriaza, 2009; Sikkink, 2011). Various studies have demonstrated that trials can contribute to: 1) the reconstruction, discovery, and diffusion of truth about crimes committed in the past (Figari Layús 2018); 2) the avoidance of future human rights abuse (Sikkink, 2011); 3) the provision of a response to victims' needs and desires (De Greiff. 2008; Capdepon & Figari Layús, 2020: 4) the promotion of the rule of law in emerging democracies, and guarantees of greater civic and legal inclusion for victims in their identity as citizens (Lutz & Sikkink, 2001; Figari Layús, 2018). Trials mark an important change, by including victims as citizens, rights holders, and members of society. Trials also provide an opportunity for victims to speak about their experiences in public, or otherwise take an active part in the justice process. The power to relate one's experience of having been victimised in a public setting that offers trust and respect, and to feel listened to, can be reparatory (Hayner, 2002; Parlevliet, 1998).

It is nonetheless important to emphasise that while trials can contribute to reparation in different aspects of victims' lives, they cannot wipe out or reverse the consequences of violence. Trials are not, either, necessarily reparatory: the way in which they are conducted, the treatment of victims and witnesses, and the sensitivity shown by judicial personnel all matter. So too do the social and political conditions that surround them. All these factors play a role in making a trial reparatory or otherwise, and these conditions can vary between settings. Other issues such as victim and witness safety, the slowness and bureaucratic nature of the justice system, inadequate training of justice system operators for this type of case, and budget problems – which can lead to inadequacies in staffing, resources, and investigation – add to the challenges faced by prosecutions that are already sensitive in divided societies. Nor can criminal justice be expected to be equal to the task of effecting deeper social transformation: this will inevitably require other measures.

5. Conclusions

This article has analysed, on the one hand, the distinct concepts and expectations associated with the transitional justice paradigm; and on the other, the types of measure that have been undertaken in practice in Latin America. For reasons of space and scope, the article has not addressed all types of transitional justice instrument, leaving pending analysis of measures such as museums, memorials, official apologies, access to archives, and security sector reform. However, the instruments studied serve to give a general idea of the forms that transitional justice has taken in the region. By observing which measures have been applied most frequently over the past 40 years, we can observe what type of transitional justice has been hegemonic. In general, the prevalence of non-punitive measures (e.g. truth commissions), combined with the high incidence of the extinction, attempted extinction, or reduction of criminal sanctions via forms of amnesty, suggests a clear predilection for a restorative conception of transitional justice (followed in second place by a more retributive one). Important efforts at reparations in various countries have not reached the heights of holism or sufficiency that might qualify them as part of a transformative approach to transitional justice. Moreover, we have as argued above, while trials, exhaustive truth commissions, and economic reparations can be important for truth and justice, they are not sufficient to effect structural change such as would produce more inclusive and equitable democracies. A vision of justice that is transformative in a socioeconomic and distributive sense has not yet taken shape. This tells us what type of change TJ has been used to pursue, and what kinds of interest have been in tension, and have prevailed, in Latin American transitions. This is to a large extent reflected in the region's current social, political and economic situation.

The paper has shown that transitional justice measures and their associated programmes, while important for society and victims, are also the object of much criticism by those sceptical of their effects, politicisation, and short and long-term scope. Latin America as a whole offers examples of both the achievements and the frequently criticised shortcomings of transitional justice processes. The privileging of one model of transitional justice over another depends on the range of factors, possibilities, and local and international interests that coexist in each setting. Decisions as to what TJ instruments to adopt, and how to implement them, are not exempt from the contradictions and difficulties that are characteristic of contemporaneous social and political struggle. This being so, the application of TJ policies brings with it a host of social, political and juridical

challenges. Some are decades old but still unresolved, others are newly arising due to current events and emerging social and political demands. These new needs and demand raise questions that require further research, concerning for example the persistence of violence, the role of a security perspective in transitional justice processes, the addressing of social inequality, and the challenges of new technologies such as those that have come to the fore in the context of the Covid-19 pandemic.

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