

Transitional justice, a pending subject

Abstract

This article shows important aspects that have to do with Transitional Justice as a pending subject in Mexican Law for social development with a descriptive, critical and analytical methodology that refers to the design of the research, critical observation of problems and analysis of sources of information that will be carried out on the topic in the context of the contemporary Mexican political situation. Several relevant topics are presented with a pluralistic perspective based on traditional justice and the theory of law, with the purpose of exposing how this model of justice works and under what criteria in our country. The first topic is the definition of Transitional Justice, the prevailing need to apply it in Mexican law as well as a current overview of the usefulness of its development to establish a deductive reference framework that allows us to elucidate what the current situation is like in the life of the nation. Following this, there is a brief and concise contribution on the problems involved in Transitional Justice, as well as the methodological solutions that are presented, as well as the main theoretical approaches to address its study. The way is then clear to expose the topic regarding transitional justice in our country today. In this way, the necessary issues to conclude will be exposed: Transitional justice is located between those who fight against it based on an ideological conception and, on the other side, those who adopt it as a means to implement or consolidate an ideological project of longer range. Transitional justice becomes a tool to generate a connection between justice and peace, generating equality between victims and perpetrators and forming scenarios of compensation and social reconciliation.

Keywords: transitional justice, issues, solutions, theoretical approaches

Volume 7 Issue 1 - 2024

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Received: January 08, 2024 | **Published:** January 26, 2024

Introduction

Over the years, the history of humanity has been framed in scenarios of wars and conflicts, because the nation-state has its reason for existence and its greatest formation in war. But in addition, that same story has clearly humanitarian episodes whose main objective is to end existing conflicts, in addition to strengthening relations between nations and between States, between affected communities and between all the actors involved in said conflict, with the sole and primary in order to promote effective and efficient lasting relationships where well-being is guaranteed and work is done towards a hopeful future.

In this regard, Marroquin Pineda¹ states that transitional justice, understood as extraordinary justice processes that a country launches after having transitioned from an authoritarian regime to a democratic one, is no longer applicable in Mexico. With the deliberate failure of the Special Prosecutor's Office for Social and Political Movements of the Past, created by the first democratically elected president of the Republic in 2000, the potential of subsequent instances of transitional justice was also annulled.

Furthermore, having left unpunished the human rights violations committed in the sixties and seventies of the last century, contributing to the explosion of criminal violence that tears the country apart at the present. Mexico simultaneously suffers from victimization caused by the authoritarian regime of the 20th century and victimization at the hands of state agents and criminal organizations of the present. Hence the need for a new approach to transitional justice, which clarifies the atrocities of the past, and also allows us to move from a situation of high victimization to a situation of security and full respect for human rights.¹

Transitional justice constitutes a fundamental issue within our constitutional States, but also in the field of international law and in the

agendas of the states both in Mexico and in much of the world. This is used as an instrument to try to provide a solution to the problems of the past: to the impunity of atrocious acts and situations, to the systematic violence of human rights; It seeks to offer reparations, punish the guilty, compensate the victims, and produce institutional redesigns, let's say more rational, more civilized. In other words, it seeks to "recompose a social order." A social order that both dictatorships and armed conflicts have prevented from materializing, they have denied. It is the incessant search for democracy, for peace, for reconciliation: an order that constitutes the order of rights.

Development

What is Transitional Justice, why should it be applied and what is its greatest usefulness?

Transitional justice is the set of theories and practices derived from political processes through which societies try to settle accounts with a past of atrocity and impunity, and do justice to the victims of dictatorships, civil wars and other wide-ranging crises. spectrum or long duration, with the purpose of advancing or returning to democratic normality. Transitional justice is made up of the criminal, purification and reparation processes that take place after the transition from one political regime to another.²

In this author's terms, transitional justice or transitional justice is the new and challenging field of studies and experiences in which ethics, international law, constitutional law and political science converge to face the arduous problem of forging a political of State presided over by justice as a virtue and as a public service, which guarantees truth and reparation to the victims, retribution to the perpetrators and reconciliation or peace to society, in accordance with democratic constitutionalism and international human rights law.²

Transitional justice compared between its different situations and cases also teaches that reparation, in the form of compensation paid

by the State to the victims of conflict or tyranny, is necessary but not sufficient, to the point that it should not only be extended to other aspects contemplated by the new United Nations doctrine, but, to be legitimate and effective, it has to be accompanied by clarification and sanction.

Now, following this position, the combination of truth, punishment and reparation, both in quality and quantity, depends on the specific circumstances of each society at the moment in which it faces the task of advancing or returning to full democratic normality through a certain balance between peace and justice, between the search for reconciliation and the defense of human rights. However, it is evident that the quantity and quality of truth, punishment and reparation that the State is in a position to offer to the victims of a past of barbarism and impunity will be greater the more consolidated the democratic culture is in the society. ²In the case of transitional justice, a State's respect for its historical and cultural reality, as well as for its internal law, cannot be used as a valid excuse to fail to comply with the requirements of international legality or to avoid the lessons of other people's experiences.

Regarding the need to apply Transitional Justice, De Greiff³ states that in a situation in which it seems to become something like a "universal tool" that solves a seemingly endless list of problems, regardless of the context, it is worth keeping in mind that this is a field that was born from practice, and of course, in order to solve specific problems. The author points out that what marks the beginning of the field was not so much conceptual innovation since, after all, mostly familiar instruments were used. Even truth commissions, the newest instrument in the "tool bag" of transitional justice, had extensive precedents in different investigative commissions.³

There are two characteristics of the context in which the transitional justice "paradigm" emerged that are important to keep in mind. First, the measures were applied in countries with relatively high degrees of both horizontal and vertical institutionalization: these were not countries in which state institutions were completely absent from large portions of the national territory, nor countries in which large spheres of the relations between citizens, and especially between the latter and the institutions of the State, were yet to be regulated.

Secondly, the measures of what came to be called transitional justice were adopted in response to a certain type of violations, that is, those associated with the abusive exercise of power. Needless to say, this reveals deep connections between these two factors; Only relatively institutionalized and efficient States can commit violations of a certain degree of magnitude, but, above all, of systematicity.³

The notion of "transitional justice" encompasses the full range of processes and mechanisms associated with a society's attempts to resolve problems arising from a past of large-scale abuses, in order to hold those responsible accountable for their actions, serve to justice and achieve reconciliation. Such mechanisms may be judicial or extrajudicial and may have varying levels of international involvement (or no international involvement at all) and may include prosecution, redress, truth-seeking, institutional reform, vetting, removal of the position or combinations of all of them.

Transitional justice, regardless of the variations in the way its different components are implemented in different countries, became part of the package of measures predictably discussed and frequently adopted in transition situations.

Regarding the usefulness of transitional justice, it can be defined as the conception of justice associated with periods of political

change, characterized by legal responses that aim to confront crimes committed by previous repressive regimes. A genealogy of transitional justice demonstrates, over time, a close relationship between the type of justice pursued and the relevant political constraints. Currently, the discourse is aimed at preserving a minimum rule of law identified mainly with the preservation of peace.⁴

The political considerations associated with the typical transitional response to the Cold War of the late 20th century are illustrative. It was said that the objective of the action plans and transitional guidelines would be the goal of peace, rather than democracy. The turn toward alternative strategies, whether theological or therapeutic, was encouraged by the forward-looking goal of reconciliation. Teitel⁴ says that forgiveness becomes the counterpart of the political request for apology, understood as an act of contrition in the domain of unity policies.

A wide variety of conciliatory mechanisms emerged in many societies in transition, with the ostensible purpose of stabilizing the internal political situation. These policies became the signs of an era of restoring the rule of law in global politics. However, these types of reconciliation policies can very well have negative consequences in the long term. For example, encouragement to settle claims for past acts may have conservative ramifications.

The persistent discourse of the last years of the 20th century was that of transitional justice. Attitudes seeking closure, associated with both the end of the century and the end of the millennium, reflected a dominant sense of meta-transition. At the end of the century, there was an evident increase in situations of the permanence of old injustices and of postponed transitional justice.⁴

Transitional justice implies a non-linear treatment of the temporal dimension. This phenomenon is reflected in legal actions that frequently take the form of postponed lawsuits and litigation, to extend the sphere of action of transitional justice towards case-by-case litigation. At the international level, this dilemma was resolved through the adoption of the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, although this has not necessarily resolved the concomitant political tensions. The definition of Transitional Justice goes hand in hand with its importance in the application to the validity of the Law and its usefulness in the review and defense of the universal guarantees that it maintains.

What problems does Transitional Justice imply, how does it solve them and what theoretical approaches support it

Regarding the first aspect, the fight against impunity constitutes the ethical reason that made the appearance of transitional justice possible. Transitional justice then implies the incorporation of human rights, as standards, in a model of justice applicable to scenarios where a transition is necessary, which implies that the norms of transitional justice are structured on two references, namely: one legal, which refers to the incorporation of human rights standards and a political one that refers to the transition itself.⁵

Transitional justice corresponds to the model of justice used when a political transition is required, therefore, even though it contains legal elements, these are not exclusive or exclusive, given that what makes transitional justice special is precisely the existence of a transition, understanding this as "the interval that extends between one political regime and another." That is why the concept of transitional justice contains two references, namely: the legal and the political. "The legal

refers to compliance with the stated international standards, while the political implies the transition itself".⁵

Transitional justice is a contested space in which different actors, with different interests, discourses and resources, fight for the conceptualization, design and application of mechanisms to resolve political conflicts and address demands for justice for serious violations of human rights. human rights, in the context of a political transition. For the configuration of the field of transitional justice, the first thing corresponds to the limitation of the space of the field. Transitional justice is built on political and legal relationships, an overlap between the two without being one.

Transitional justice meets the conditions to be considered as an autonomous field, from Bourdieu's field theory. Although it has elements that may be common to the legal field and the political field, the particularities that arise in the tensions between actors allow a field analysis based on its constitutive elements.⁵

The struggles between actors for symbolic capital which, because they are actors who migrated from a conflict towards the search for a transition, translates into the fight for political power, not simply through the gains of an election, but for the right to govern as a justifying reason.

In relation to the solutions offered by Transitional Justice, we will say that it refers to a very old problem, related to what a society should do in the face of the legacy of serious attacks on human dignity, when it emerges from a civil war or a regime tyrannical. According to González Zapata⁶ transitional justice raises new problems, because although it is true that societies have suffered dictatorships and civil wars since time immemorial, only recently has there been an attempt to address the problem raised by the transition to other models of society - which they are not necessarily democratic—with an instrument like transitional justice.

Regarding the patent need for the truth, it would be foolish to ignore the importance for the present and future of the country of knowing the truth of what has happened. Furthermore, it must be considered that for the victims, their loved ones and society in general, it is more important to know the truth about the crimes that have been committed, their sponsors, their planners and financiers, than the punishment of those responsible.

As for justice, doing justice is a function of punishment that looks at the past and therefore necessarily implies that the truth of what happened is known. In this perspective, truth and justice are deeply intertwined, creating an aporia: according to this idea of punishment, only those who have truly been proven responsible can be punished.⁶ In discussions about transitional justice, there is talk of the need to punish, but no progress is made in the precision of the type of punishment that should be imposed; which reveals an insurmountable contradiction, because when one asks for justice, one is thinking about retribution, that is, looking to the past and this implies a fixed sentence that is fully purged.

Transitional justice has been used to achieve additional purposes to the search for truth, justice and reparation: More than a response to truth, justice and reparation, transitional justice can become a powerful instrument to perfect the task. of economic globalization through diplomatic and financial extortion on the weakest countries. Transitional justice strategically comes to serve as support for this revitalization, but it does so in the name of all humanity, relieving states of the need to justify punishment, to the extent that it appears as an obligation with the international community and the entire humanity.⁶

Finally, to close this section we will mention some theoretical approaches to Transitional Justice. There are some theses about Transitional Justice as such:⁷ transitional justice transcends the repressive limits of Law conceptualized as a coercive system; retributivism is an ethical and legal obstacle to promoting transitional justice; Transitional justice requires a theory and praxis of a guarantee nature; The State must now respect international transitional justice and abandon its current situation of unpunished anomaly.

Regarding the first thesis, it is difficult to conceive justice as a notion, a value, that goes beyond, the limits of punishment and criminal law. A first distinctive note of transitional justice acts in the transition (hence its name) from a political regime of exception or an institutional situation of permanent violation of guarantees and freedoms to a democratic system of full priority protection of the fundamental rights of all. the citizenship. As its primary objective is to compensate the rights of the victims, it may not become more repressive than ordinary jurisdiction but rather constitute a decision weighed by the reconstruction of the truth of what happened.

Regarding the second thesis, it characterizes retributivism as the doctrine that proposes and believes "that punishment is the fair price paid for a crime".⁷ It is another thing that it is, because, to begin with, what is the fair price of a person's life? Or, more provocative, how much is a living human being worth? Well, what actually bases this ideology is the Talion, the "eye for an eye, tooth for a tooth, hand for hand, foot for foot" of the Bible. Retribution has accompanied criminal justice almost since the world began; The fact is that a good part of humanity has believed for centuries, unequivocally, that "the damage of guilt is linked to the damage of punishment because the equality of guilt and punishment reaches down to the identity of both".⁷

The third thesis says that transitional justice requires a theory and praxis of a guarantee nature. We must clearly define what the guarantee model means. Because those currents of legal and economic neoliberalism that seek to place limits on jurisdictional activity in order to place obstacles to the control that judges must exercise over political and economic powers want to place themselves under this concept. On the contrary, a guarantee position must defend the subjection of all public and private powers to the law, for the sake of the rights of all people. For the fourth thesis, it is emphasized that the State must now respect international transitional justice and abandon its current situation of unpunished anomaly.⁷

The purposes of Transitional Justice, the general approach to understanding them and important aspects to review

In accordance with the above, the first question that should be asked is: What purposes are pursued by the imposition of sentences within the framework of a transitional justice process? To answer this question, it is essential to keep in mind that each transitional justice process is different and its institutions are delimited by the particularities of the conflict that is intended to be resolved, which is why, in relation to transitional justice processes, it is impossible to assert the existence of identical parameters for all cases, as has been recognized, among other organizations, by the United Nations Security Council.⁸

However, both in doctrine and in jurisprudence and international instruments, some minimum principles have been established that must be respected in any transitional justice process, among them:

- I. The duty of States to investigate and punish serious violations of human rights, human rights and international crimes;
- II. Guarantee the rights of victims to truth, justice, reparation and non-repetition, and
- III. The preservation of peace, the construction of democracy and the rule of law.⁸

From the minimum principles of transitional justice it is possible to obtain guidance to answer the question of what is intended by the imposition of the sentence within its framework? It could be stated that a combination of factors derived from traditional theories of punishment and the special purposes pursued by transitional justice would arise, namely:

- I. General negative prevention focused on society understanding that this type of behavior is reproached by the State and that in processes of a special nature, such as transitional justice, in which justice gives way to the consolidation of peace, penalties effective.
- II. General and positive prevention, to the extent that confidence is reaffirmed in the institutions and norms that contain the provisions that prohibit behaviors that constitute the most serious violations of human rights.
- III. Special prevention because the demobilized person is offered the possibility of rejoining civilian life, through various programs that are established with the purpose of facilitating this procedure and achieving reconciliation between the actors in the conflict and society. Likewise, it is about preventing the demobilized person from continuing to commit criminal behavior.
- IV. Retribution because although it is not explicitly stated, in the application of any penalty there is an ingredient of retribution even if this is understood only as a limit for the graduation of the penalty.⁸

With respect to the general scheme to understand the purposes of Transitional Justice, this topic is presented due to the important content and significance that the theory of criminal law has had and that it maintains its validity for the purposes of transitional justice because it should not be forgotten that it follows dealing with a criminal trial in which the responsibility of some people for crimes of great impact on human rights is analyzed - crimes against humanity, genocide, war crimes, etc. - and that even with its own variations and particularities of transitional justice, penalties are applied and not simple sanctions devoid of reproach.

It has already been mentioned that Transitional Justice is the entire set of theories and practices derived from political processes through which societies try to settle accounts with a past of atrocity and impunity, and do justice to the victims of dictatorships, wars, civil and other wide-spectrum or long-lasting crises, with the purpose of advancing or returning to democratic normality. Transitional justice is composed of the criminal, purification and reparation processes that take place after the transition from one political regime to another and the intensity of the demand for retribution decreases with the time interval between the atrocities and the transition, and between the transition and judicial processes.⁹

What should a society do in the face of the legacy of serious human rights violations when it emerges from a civil war or a dictatorship? Should those responsible be punished? Should such abuses be forgotten to promote reconciliation? The answers to these questions depend on various factors that are articulated in different

ways in each historical case. Now, beyond the casuistry, however, the fundamental challenge that transitional justice faces today is to find a reasonable balance between the competing demands of justice and peace, between the duty to punish unpunished crime and honor to their victims, and the duty to reconcile former political adversaries.

Transitional justice processes are not new at all, they have been part of the history of different societies since ancient times and have responded to the needs of each State at a specific time of profound social injustices; However, when the decision is reached to adopt this type of justice, these processes are expected to generate a breaking point within the established order, settling accounts with the past and implementing transcendental changes in society and the State.⁹

However, transitional justice produces high uncertainty and expectations among social actors regarding the expected response to their demands from the State, that is, on the one hand, there are the victims demanding their right to justice, truth and reparation; and, on the other hand, there are criminals negotiating forgiveness and oblivion. Of course, society expects the State to respond with its duty to do justice.

To conclude this section, some important aspects to review in Transitional Justice are presented. Countries that face problems related to Transitional Justice have an enormous challenge, which is to establish a balance between all the agreements and pacts that are established with the purpose of reaching peace and the recovery of constitutional principles. specific to each State.¹⁰ However, it has not yet been possible to find a single solution that can fill these gaps, if that is what they can be called, since all the processes whose objective is to propose reconciliation agreements and restoration of justice are immersed in different factors that are of great importance, incidence, such as the impact of the conflict, the end of the restorative measure, the proposed and existing measures, among others.

Transitional justice, then, refers to all the processes from which it is intended to seek measures of responsibility aimed at redressing justice, disseminating truth doctrine, prosecuting those responsible and reforming institutions, among others. In this way, transitional justice refers to an ancient and large-scale problem, aimed at establishing what a society is obliged to do in the face of a legacy of crimes against humanity when an authoritarian, tyrannical regime ends. violates fundamental rights. Torregrosa Jiménez¹⁰ points out that it is not easy to find the exact balance between justice and peace, providing a reasonable solution to the conflict and satisfactory for all parties involved, without the victims feeling violated and unprotected, thinking that the crime went unpunished.

This is how, on the one hand, there are these aforementioned measures and requests, which seek to protect the rights of victims and give prevalence to the principles and constitutional values of nations, the needs of peace and reconciliation. typical of transitional processes. And on the other hand, there is the State's interest in determining measures that are sufficiently attractive to the actors in the armed conflict; measures through which the actors in the conflict are motivated to lay down their weapons, and for this it is necessary to implement measures such as forgiveness and forgetting of the infractions and crimes committed by them.

Transitional Justice in Mexico

In today's Mexico we are experiencing a complex social and political situation that can be seen in different voices that, whether from empirical experience or theoretical construction, are working to provide reflections and actions to confront the context in relation to

the human rights of recent history, as well as a system of high and persistent violence, which began two decades ago. The theoretical and political framework that has emerged is transitional justice, with a strong resonance today.¹¹

The problems raised by criminal justice have to do with questions such as when and on the basis of what kind of reasons a crime could actually be spoken of; who or who can be considered effectively responsible for it; whether or not punishment can be considered a justified measure against an action—a crime—that has violated a legitimately established legal norm, how its conformity with respect to the crime committed must be established and resolved; who decides what punishment to impose; On the basis of what procedures this decision is made and how these procedures are justified (Ambos, 2018).

In Mexico, transitional justice appears as a result of a context in which a system of high and persistent violence converges, together with a legacy of human rights violations in recent history, in light of which, various sectors call for address this situation, since failure to do so will jeopardize the Democratic Rule of Law. From this perspective, the recent history of the country and human rights are reviewed, the narratives and exercises of the topic as an object of study, seen from the mobilization and incidence and the State itself.¹¹

The commitment to promote the principles and mechanisms of transitional justice in Mexico is still an incipient discussion, since each society responds to its own characteristics; That is to say, there are no homogeneous models; on the contrary, the lessons learned insistently reveal that each process is extremely unique.

The emergence of transitional justice in Mexico is a consequence of a current context of high and persistent violence, which adds to a legacy of human rights violations in the country's recent history, - which has caused concern in all sectors. of society -, aggravated by continued impunity, which implies that we are facing an urgent scenario to address, through mechanisms, actions and policies that address both the causes and consequences of this reality in which we are immersed.¹²

Conclusion

Transitional justice is located between those who fight against it based on an ideological conception and, on the other side, those who adopt it as a means to implement or consolidate a longer-range ideological project. In the latter case, among those who embrace transitional justice, he states that there are conservative ideologies that have their sights set on the past, those demands for transitional justice based on the desire to restore the pre-existing state to the autocratic regime; and, on the other hand, there are ideologies whose policies are linked to a desire to transform society, to transcend the old order rather than reestablish it, and to use transitional justice, purges, trials, and confiscations to produce a new set of leaders. political and economic, 'new men' and 'a new society'.

Our country needs a new approach to transitional justice, which of course clarifies the atrocities of the past, but which also aims to dismantle the main criminal organizations, dissolve the networks of corruption and impunity that have allowed them to settle, and provide the State with the institutional capacities that allow it to investigate and prosecute those responsible for the violence, and guarantee security.

This is how transitional justice becomes a tool to generate a connection between justice and peace, generating equality between victims and perpetrators and forming scenarios of compensation and social reconciliation.

Acknowledgments

None.

Conflicts of interest

The author declares there is no conflict of interest.

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