

# The role of Constitutional Courts in Transitional Justice: Colombia and South Africa\*<sup>1</sup>

## *El papel de las Cortes Constitucionales en la Justicia Transicional: Colombia y Sudáfrica*

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### ABSTRACT

This work focuses on a compared analysis of the South African decision related to the “peace and reconciliation act” of this country’s Parliament, and the Colombian decision regarding the amendment of the constitution called “The juridical framework for the peace.” Turning to the structure, it is developed in three major topics: 1. It provides a brief of the historical context, political background and an overview of the two decisions. 2. It gives a structural analysis of the powers that each Court has and the nature of the constitutional mechanism through which both Courts decided the constitutionality of the said norms 3. It presents a critical analysis on the similarities and differences between the two systems and judgments. It presents some conclusions.

### RESUMEN

El presente documento es un análisis comparado de la decisión sudafricana sobre el acto del Parlamento de “Verdad y reconciliación,” y la sentencia colombiana sobre el acto legislativo “Marco jurídico para la paz.” Pasando a la estructura, este se desarrolla en tres puntos: 1. Una breve descripción de los antecedentes históricos y políticos que rodearon las dos decisiones, y un resumen de cada caso. 2. Un análisis estructural sobre los poderes a los que los tribunales constitucionales en cuestión están facultados, de acuerdo a sus sistemas y el mecanismo a través del cual se dio la controversia. 3. Finalmente, se desarrolla un análisis crítico sobre las similitudes y diferencias entre los dos sistemas. Seguido de las conclusiones generales.

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1. This academic article is the product of the investigative efforts in the field of Comparative Constitutional Law developed by the author in the context of the Master in International Human Rights Law of the University of Notre Dame. This is unconnected to the view of the Inter-American Court of Human Rights related to this issue.

Este artículo académico de reflexión es el producto del ejercicio de investigación terminada en materia de derecho constitucional comparado, desarrollada por la autora en el marco de la Maestría en Derecho Internacional de los Derechos Humanos, en la Universidad de Notre Dame. No guarda relación alguna con la visión o postura de la Corte Interamericana de Derechos Humanos al respecto.

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## SUMARIO

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## Methodology

This is a juridical investigation that used the normative-descriptive method, and the analytic-comparative as well.

## Introduction

This document analyzes two programs of transitional justice in order to evaluate the role of Constitutional systems, in accomplishing the overcoming or improvement of a situation of large-scale abuses against human rights. South Africa, as a typical example of successful transitional justice in the world; That in terms of constitutional appropriation of the framework that would conduct that country through the path of peace, reconciliation, justice and reparation to the victims of gross human rights violations of a war that was deeply rooted in racial discrimination. And Colombia, as a country that is currently engaging in application of measures of

transitional justice, which is based on constitutional norms that let its Constitutional Court take an active role in determining the responsibility of the state in having a program of reparations; besides the fact of stating the peremptory need of achieving the peace with rebel groups.

This work will compare two judgments; one issued by the South African Constitutional Court titled “Azanian Peoples Organization (AZAPO) and others v President of the Republic of South Africa” (1996), which reviewed the constitutionality of an act of the parliament known as the “Truth and Reconciliation Act.” And the other one issued by the Colombian Constitutional Court, the decision C-579 of 2013 that in its turn reviewed an amendment of the constitution; the legislative act 01 of 2012 known as “The juridical framework for the peace.”

Both courts considered that it was reasonable to sacrifice, or no to see as an absolute one, the value

of justice in their constitutional systems in order to achieve a real transition to a democratic society. Even though, they relied in different principles to achieve that conclusion. The South African Court built this insight from the direct mandate of the preamble of the interim constitution which ordered “...to transcend the divisions and strife of the past...” Whereas the Colombian Constitutional Court implied it from the exercise of balancing the “right to peace”, and the international commitments contracted by the state, such as the obligation to try grave violations of human rights and the rights of the victims of the armed conflict.

Turning to the structure; 1. It gives a brief context of the historical background that surrounded each decision and an overview of each case. 2. Provides a structural analysis of the powers that each Court has and the nature of the constitutional mechanism through which both Courts decided the constitutionality of the said laws. 3. Similarities and differences of each system, and how do they find room in the reasoning of the Courts regarding the following issues: a. the nature of the norms and/or constitutional principles in which each Court relies in order to provide its judgment. b. The method of interpretation utilized by the Court’s in order to uphold the said transitional justice mechanisms c. The outcomes and how the elements stated before come into play, and finally, some conclusive remarks.

## I. A brief context of the historical and political background that surrounded the decisions and an overview of each case

The violence has an early appearance in the history of Colombia. From the years of the 1960’s and the

1980’s in which according to the Center for Historical Memory, the war previously carried out between the Liberal and Conservative party turned into a subversive one. It was characterized by an old heritage of barbarism and exclusion of the “internal enemy,” that resulted in the years from 1996 to 2005 in a critical humanitarian situation that remains in the present days.

The Colombian government of 2010, headed by the president Juan Manuel Santos, at that time intended to carry out peace talks between the State and the largest guerrilla group that have existed in Colombia through out its entire history, Las FARC-EP. The peace accord came into reality in December of 2015; it had to go through a detailed juridical revision though. Still today is in that process.

The decision C-579 of 2013 is considered to be key and unprecedented in Latino-America. It brought into discussion the constitutionalization of the mechanisms for transitional justice; specifically with respect of the application of criteria for the selection and prioritization of cases and individuals, in order to pursue the investigation and punishment of international crimes. This could find an explanation in the increasing concern related to a prosecution by the International Criminal Court and the respect for the provisions of the Rome Statute, ratified by this country in the year of 2002.

The norm at issue is the legislative act N° 01 of 2012 that established mechanisms of transitional justice in that country. A “legislative act” is the title given by the Colombian Constitution to its own amendments. This one included two new provisions in the Constitution. The relevant one for this discussion is the one that provides in its Article 1°, that the Politi-

cal Constitution will have a new transient provision that the instruments of transitional justice will be exceptional and therefore, the all the crimes aimed to be prosecuted will be the ones committed in a systematic form by those who bear the maximum responsibility.

The Court considered that even though the complaint targeted only the expressions “those maximum responsible”, “committed in a systematic form” and “all” contained in the fourth section of this provision, they are intimately linked to an integral system of transitional justice, and for that reason it studied the entire section instead of the said phrases in isolation.

The issue to be resolved by the Court was to determine whether the elements of transitional justice introduced by the “Juridical Framework for the Peace” were incompatible with the obligations to respect, protect and guarantee the rights of the society and the victims through the fulfillment of grave violations to human rights and the International Humanitarian Law; it had to verify whether this change implied a substitution of the Constitution or one of its fundamental pillars.

In order to carry out this analysis, the full chamber departed from the necessity of weighing different principles and values such as the peace, the reconciliation and the rights of the victims to the truth, justice, reparation and guarantees of non-repetition. It considered that in order to achieve the stable and durable peace, it is legitimate to adopt measures of transitional justice, such as the mechanisms of selection and prioritization.

The Court then turned, to the examination of the possibility to focus efforts in the criminal investigation

of the Crimes against humanity, genocide and war crimes in a systematic form, it inquired whether this provision meets the requirements of the international obligations contracted by Colombia. It concluded that by virtue of the international instruments regarding Human Rights, International Humanitarian Law and the related jurisprudence of international courts, it is legitimate to give a special application to the rules of this judgment as long as it is assured that, as a minimum condition those crimes will be tried.

With regard to the attribution of crimes to those who bear the maximum responsibility, the Court considered that the State is not resigning from its obligations because it does not imply that all the crimes against the humanity, genocide and war crimes committed in a systematic form are not going to be prosecuted. It instead allows them to be attributed uniquely to those who played an essential role in its occurrence, and that it contributes effectively to dismantle criminal macrostructures and to reveal patterns of massive violations of human rights, assuring the non-recurrence of the former.

This tribunal also analyzed the conditioned renouncement to the criminal prosecution. It clarified that this figure is limited in the legislative act, because it is clearly stated that it is not applicable to the heads of the armed groups that committed crimes against humanity, genocide and war crimes perpetrated in a systematic manner, therefore it is in conformity with the international standards. Additionally, it highlighted that this renouncement will be revoked if the requirements provided by the law are not satisfied. Among this conditions are, laying down the arms, the acknowledgement of the responsibility, and the contribution to the clarification of the truth, the integral reparation to the victims, the liberation of

the kidnaped persons and the disengagement of the minors in the war.

Finally, it explained that the renouncement to the criminal prosecution is justified as a result of balancing the obligation to investigate, judge, and when there is room, to sanction; with the duty to prevent violations to the human rights in the pursue of a stable and durable peace. The

Court determined that the mechanisms of conditional suspension of the execution of the criminal punishment and extra-judicial sanctions, do not imply a substitution of the fundamental pillars of the Constitution, as long as they are oriented to satisfy the rights of the victims to the truth, justice, reparation and non-repetition, in observance of the duties of the State to investigate and sanction the grave violations against human rights and international humanitarian law. The final decision was to uphold the constitutionality of the amendment.

According to Hugo van der Merwe and Guy Lamb, the origins of the conflict in South Africa are back in the arrival of the first European settlers in 1652. They assure that gradual expansion of colonial territory brought the colonial powers and local settlers into conflict with numerous African communities over the next two centuries. The exclusion of black people was formalized through the sale and expropriation

The Court considered that the State is not resigning from its obligations because it does not imply that all the crimes against the humanity, genocide and war crimes committed in a systematic form are not going to be prosecuted. It instead allows them to be attributed uniquely to those who played an essential role in its occurrence, and that it contributes effectively to dismantle criminal macrostructures and to reveal patterns of massive violations of human rights, assuring the non-recurrence of the former.

of land and the establishment of the Cape and Natal colonies and the Boer Republics in the 1800's. They also affirm that the increasing tensions resulted in numerous military confrontations and protests. It led during the 1980's, the tensions between the African National Congress and the Inkatha Freedom Party worsen and took on an increasingly violent form. Especially after the beginning of the peace negotiations in 1989, these conflicts escalated into open warfare and the arming of Self-Defence Units and Self-Protection Units within ANC and IFP areas, respectively.

The decision *Azanian Peoples Organization v. The president of the Republic of South Africa* of July 25 of 1996, is even today a controversial one. It set out the authority of the parliament to develop the constitutional principles related to the transition to the peace in a form that better matched the South African reality, meaning this, with important renouncements to

the pursue of justice, right also mandated in the South African constitution. This was the major tension faced by the court in a decision that is summarized in the subsequent paragraphs.

Pursuant to the epilogue of the interim constitution, the parliament of South Africa enacted the promotion of national unity and reconciliation Act, also known as the "Truth and reconciliation act." The Act established a Truth and Reconciliation Commission. The

objectives of this Commission are set out in section 3. Its main objective was to “*promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past.*”

According to this decision commission was enjoined to pursue that objective by establishing an illustration as comprehensive as possible of the causes, nature and extent of the gross violations of human rights committed during the period commencing 1 March 1960 to the “cut-off date.” For this purpose the Commission is obliged to have regard to the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations. It also is required to facilitate the granting of amnesty to persons who make full disclosure of the details related to acts associated with a political objective.

Three committees were established for the purpose of achieving the objectives of the Commission. The third and directly relevant to this discussion was the Committee on Amnesty. The Committee on Amnesty was given elaborate powers to consider applications for amnesty, and granting in respect of any act, omission or offence to which the particular application for amnesty relates, provided that the applicant concerned has made a full disclosure of all relevant facts and provided further that the relevant act, omission or offence is associated with a political objective committed in the course of the conflicts of the past, in accordance with the provisions of sections 20(2) and 20(3) of the referred act.

Section 20(7) the constitutionality of which is impugned in these proceedings provided that none of those who were granted amnesty would be liable for acts, omissions or offenses related to them. Also, it states that this pardon was not transferable to other

people contingent upon the liability of the first one. Finally, it contained the controversial non-liability respecting the civil consequences of the said acts.

The constitutionality of section 20 (7) was attacked on the ground that its consequences were unconstitutional. They basically contended that the limitation to pursue justice and civil compensations for the crimes that were committed during the conflict was in detriment of the fundamental rights to protection against unlawful invasions to the right to life, right to respect for and protection of dignity, and right not to be subject to torture of any kind. Also that when those rights are impaired the act was unconstitutional because it did not allow to the people affected by this violations to obtain redress before the courts.

The court started by assessing the status of the epilogue with respect of its authority to allow a law granting amnesty. It considered emphatically that it was evident that the Parliament not only had the authority under the the epilogue to enact a law implementing an amnesty with respect of the acts, omissions and offences falling within the category defined thereupon, but that it was indeed bound to do so.

The tribunal pointed out with respect of the amnesty of criminal and civil liability, that it was precisely the aim of this law to solve a massive situation by giving some incentive to the perpetrators to reveal a truth that otherwise they would not uncover due to the criminal consequences provided in the ordinary legal system. It highlighted that “[t]hose who negotiated the constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, Ubuntu over victimization.”

To uphold this insight this court recalled that in order to be benefited from the amnesty it was necessary to



make a full disclosure of the violations, besides the fact that this acts must be related to a political objective; otherwise the offender would not be granted with such a profit. It inquired that in spite of the difficulty to solve the tension between the rights of the victims to pursue justice, know the truth and receive civil reparations; with the necessity of the society to achieve peace and transit to one that respects the constitutional values it was needed to find the middle point in which both are satisfied to the greater extent possible.

The court relied on the experience of different countries in addressing large-scale of abuses in the past. It called the attention to the lack of uniformity of the mechanisms that devoted any effort to pursue transitional justice. And therefore, it considered that it was legitimate to create one that was respectful of the rights of the victims to the greater extent allowed by the South African economic and legal system's realities.

With respect of the allegations on a breach of the international commitments of the South African State regarding human rights and international humanitarian law that proscribes the duty to investigate the crimes, try criminals and provide reparations for the victims; the court found that the article 6(5) of protocol II to the Geneva Conventions of 1949 provides an exception when it gives the possibility to the states parties to grant the broadest amnesty possible to those ones who participated in the armed conflict.

Nevertheless, respecting the issue of the forgiveness of gross violations of human rights the Court considered that the act fulfilled international obligations even though it provides amnesty for them, as long as full disclosure of the truth is done with the requirement that the said violations are related to political ends.

It was also contended that even in the scenario where the parliament decided not to pursue the civil liability of the perpetrators, the State as a guarantor of the rights must remain liable; to which the court responded that since the entire south African Society was victimized by the conflict it would uphold a comprehensive concept of victim, that allowed the limited resources of the state to be useful to redress the injuries. It therefore, found it reasonable to reach a solution in which the community found the greatest benefit instead of the individuals in what it called "a wider concept of reparation." It supported this decision as a matter of choice of the Parliament also in the limited resources of the State. The final decision was to uphold the constitutionality of the act.

## II. A structural analysis of the powers that each court has and the nature of the constitutional mechanism through which both courts decided the constitutionality of the said norms

The powers given to the Colombian constitutional court under which the legislative act is subjected to judicial review, the ones are given by the article 241 of the Colombian Constitution. It confers to the Court the caring of the integrity and supremacy of the constitution, and under this general premise, one of its enumerated powers is to decide the constitutionality of complaints that any citizen brings against acts which are intended to reform the constitution, on the unique ground of procedural defects in the process of its formation. Any citizen has direct access to this complaint according to the constitutional mandates, and no case or controversy is required. Therefore we are in presence of an abstract judicial review.

Since the norm at issue was a legislative act, it is considered to be in the same hierarchy than the other

constitutional provisions that is the reason why the court is only entitled to review procedural vices in order to assess its constitutionality.

However, this high tribunal has developed the doctrine of the “judgment of substitution” which considers that any act that intends to transform the constitution should not go against the foundations of the entire juridical system that are implicit or explicit in the text of this document. Under this theory, many academics assert that the court is in practice reviewing the substance of the amendments and its entire process. And indeed, the Court took into consideration other substantive norms in order to study the constitutionality of the juridical framework for the peace and concluded that the reform was not violating the cornerstones of the Constitution.

The South African Constitutional Court at its turn acted under the powers given by the section 98 of the interim Constitution of 1993; which stated that the Constitutional Court had jurisdiction over all matters relating to the interpretation, protection and enforcement of the provisions of that Constitution, including, any inquiry into the constitutionality of any law or Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of that Constitution. It exercised this authority also through a direct complaint raised by a group of citizens as will be explained.

The juridical problem to be resolved in this case, was between two norms of different hierarchy, namely, the constitutional norms embodied in the preamble of the interim constitution and the “truth and reconciliation act;” also the internal coherence within the constitution, that led to an assessment whether there was a prevalence of some constitutional provisions

over others, such as the right to seek for criminal investigations of gross human rights violations, its punishment and civil or state’s remedies versus the preamble of that constitution.

In its decision the court uphold the constitutionality of the act under the premise that it did not conflict with the said constitutional norms, also that the constitution was completely coherent, and the act was in compliance with international law under a broader interpretation of amnesty, reparation and transitional justice.

As can be seen there was in both systems a strong and explicit constitutional commitment in favor of the termination of the conflict and the reliance on further norms in order to regulate the subject of the reincorporation of the transition to the peace. The role of the South African Court in this respect was closer to delimit the scope of that transition to the extent that it did not turned into a blanket forgiveness of the past violations. Whereas the role of the Colombian Constitutional Court in this concrete decision was to study whether the mechanism chosen by the secondary constituent in the form of an amendment to the constitution fitted with the rest of the constitutional values mentioned before.

### III. A critical analysis on the similarities and differences between the two systems

This section will address the similarities and differences between the two systems and how do they find room in the reasoning of the courts regarding the following issues: a. the nature of the norms and/or the constitutional principles in which each court relies in order to provide its judgment. b. The method



of interpretation utilized and c. the outcomes of the two decisions, and how the elements stated before come into play. The Colombian Constitutional Court was found to be more protective of the rights of the victims than the South African, even though the former one explained, that stood on its position due to general limitation of resources and difficulties to carry out the trials.

The nature of the norms and constitutional principles utilized:

In Colombia the right to peace and the new mandates of the legislative act could be considered as a direct authorization to the political branches to go forward in implementing the measures that fitted the framework in order to achieve the reconciliation. It is interesting how the discussion of the right to peace, that was erected in 1991 and not originally intended to give the foundations for this specific peace agreements that are taking place today, let the Court interpret by implication that it was the cornerstone of the allegations in favor of the entire juridical framework discussed above.

In South Africa at its turn, the mandates of the interim constitution were express in its preamble; to the extent that there was no discussion that transitional justice was needed in that country. The discussion was instead to what extent the state was giving up in its duties to prosecute the violators in order to achieve the reconciliation, in detriment of the rights of the victims to have particularized judgments, truth and reparations.

The method of interpretation:

It is interesting that both Courts unanimously relied on balancing the rights of the victims and the society with the duties of the state to prosecute the criminals.

Nevertheless in their exercise of balancing they differ in the interpretation of the commitment with the international human rights law and the international humanitarian law. While Colombia considered that a minimum level of criminal investigation and prosecution is necessary in order to maintain its obligation, South Africa stated that with the only requirement of the full disclosure of the truth was enough to comply with this international mandate.

It is key also to point out how the results of the exercise of balancing in the two judgments differ with regard to the interpretation of the right to reparations owed to the victims. The Colombian Constitutional Court upheld this duty on the head of the state, individually and collectively considered. Whilst the South African one considered that a broader concept of reparation had to be utilized by this Court due to the budgetary limitations and impossibilities to cover every single person victimized individually considered.

The outcomes:

Both Courts considered as peremptory necessity under the interpretations of their own constitutional mandates, allowing the existence of transitional norms in their juridical systems. This could be interpreted beyond the pure juridical sense, as the political will of the two countries chosen, like something that was extremely influential and decisive on the Courts' decisions.

It is important to highlight that the levels of agreement in the cited political wills were not unanimous in either of the two countries. The organizations that challenged the constitutionality of the norms at issue in both cases were precisely victims of the conflict in the case of South Africa, and Human Rights organizations in the case of Colombia, that did not agree on

what they considered a step backwards in the right to justice. Therefore, it can also be considered as a legitimate choice of each constitutional tribunal in order to safeguard its juridical systems.

#### IV. Conclusion

Troubled societies in the recent history are considering achieving peace and reconciliation. Nevertheless any decision could not be accepted for the sake of the absence of the conflicts. The role of constitutional courts is ultimately the countersigning of what was already discussed by the political branches and the will of the nations in order to be attached to the basic values agreed by such societies in their constitutions. In other words, Constitutional Courts are the guarantee that open impunity will not be the principal objective of the pursuit of transitional justice.

In the two cases compared, the unavoidable question of the degree of justice that must be sought by the state in detriment of other rights protected by the constitutional systems is the key to understand the engagement of Constitutional Courts with international law. In the case of South Africa it was a renouncement to justice and a different understanding of reparations in exchange of truth, this renouncement cost several critiques to the Court and its decision, it helped to achieve today's democracy though.

In the case of Colombia, this is an open discussion that has not reached its final remark because of the political reason related to the popular countersigning and subsequent implementation of the accords with The "FARC-EP" besides the fact of the new negotiations with another guerrilla group named National Liberation Army or "ELN"

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