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Maria Paula Saffon and Rodrigo Uprimny*

Reparations for Land Dispossession and Distributive Justice in Colombia

Saffon and Uprimny propose the notion of 'transformative reparations' as a more adequate perspective from which to conceive reparations to victims of the Colombian armed conflict, and particularly to victims of land dispossession, than the more traditional perspective of restitution. Such a notion attempts to look at reparations not only as a form of corrective justice, but also as an opportunity to overcome structural conditions of inequality and exclusion, which might be root causes at the basis of a conflict, and which are in any case contrary to distributive justice.

I. Introduction: Land and Armed Conflict in Colombia

In Colombia, the problem of unfair distribution of land is inextricably linked to the country's internal armed conflict. It has operated both as one of the most important causes of conflict in Colombia and as one of the factors that have most contributed to the permanence and sharpening of such conflict.

Since the 19th century, Colombia has been characterized by a very unfair distribution of property, which has never adequately been addressed by the state. The main attempts to promote a meaningful land reform in the 20th century have failed. This has resulted in a very high concentration of land ownership in the hands of a few. The situation was only to worsen with recent conflict dynamics, which made land appropriation a systematic practice of all illegal armed actors, mainly for the purposes of power accumulation and asset legalization. As a result, what has been labelled a *counter-agrarian* reform took place in the most recent stage of the armed conflict, leading to a substantial worsening of the country's unequal land distribution: Around 5.5 million hectares of land were subject to dispossession, corresponding to approximately 11% of Colombia's agricultural area. Further, from 1984 to 2003, the amount of the country occupied by estates smaller than 20 hectares decreased from 14.9% to 8.8%, while estates larger than 500 hectares went from occupying 32.9% to 62.6%.

The persons most affected by this phenomenon were those who were forcibly displaced by the process, who amount to around 7% of the Colombian population and constitute perhaps its most vulnerable sector. Before their displacement, 51% of the affected family groups were living below the poverty line, while 31.5% were living in conditions of extreme poverty. After the displacement, these figures increased to 97% and 80.7%, respectively. The vulnerability of these groups and individuals is not only related to their socio-economic profile but also to the lack of protection of their rights over land: Even though 55% of the displaced family groups claim that they were forced to abandon land, and 67.3% of these groups have indicated that they are owners of land, apparently only 18.7% are owners in a formal legal sense. This situation is all the more problematic given that the country currently lacks a complete, accurate and actualized information system covering land rights.

In the face of such a context, it seems crucial to reflect on the perspective from which reparations to victims of atrocities in general, and to victims of land dispossession in particular, should be addressed in Colombia. Indeed, the restorative perspective, from which reparations are usually addressed, seems insufficient in societies that were already profoundly unequal before the conflict and where victimization processes have disproportionately affected poor populations. That perspective is aimed at returning victims to the situation in which they were prior to the violation of their rights, to

the extent that can be done. As such, it seems simultaneously too demanding and too minimalist. It seems too demanding in contexts in which the numbers of victims are too great and resources scarce, in that reparation then competes with the need to address other problems, such as general poverty alleviation. However, it seems too minimalist in contexts where atrocities were committed in the midst of great inequality, and where returning victims to the situation prior to the violations can imply returning them to a situation of severe deprivation. This leads to an obvious perplexity, since it is clear that for moral and legal reasons reparations should be made to victims for the damages they have suffered, but doing so from a restorative perspective might hinder efforts to overcome situations of massive rights violations in unequal societies. To deal with this dilemma, we propose an alternative approach to reparations, aimed not only at correcting the injustices committed against victims through atrocities, but also at promoting the democratic transformation of societies.

2. The Notion of Transformative Reparations

The alternative approach to reparations offered by the notion of transformative reparations aims primarily to go beyond the usual restorative goal of reparations to transform structural relations of inequality, subordination and exclusion. Such a transformative approach is particularly relevant in societies, such as that of Colombia, that were unequal before conflict and whose social structures of inequality have been an essential causal factor in relation to conflict, as is clearly the case with land distribution in Colombia. Indeed, a purely restorative approach would be incapable of ensuring one of the main objectives of reparations, which is to ensure that atrocities do not recur, since it would leave such a causal factor unaddressed. Moreover, a purely restorative approach could be consistent with corrective justice, but not with distributive justice, as it would preserve situations that are in themselves unfair and that violate victims' dignity.

Instead, a transformative approach to reparations should aim at addressing not only the damage caused to victims, but also the conditions of deprivation in which victims lived and that allowed or facilitated their victimization. Accordingly, transformative reparations would be capable of contributing to the sustainability of peace in the long term, as well as to the overcoming of injustices and the consolidation of a democratic state. In that way, reparations could be conceived as a mechanism of both transitional and distributive justice. They

would thus connect concern for the past with concern for the future in transitional contexts. Moreover, they would operate not merely as a legal mechanism, but rather as part of a wider and more ambitious political project of democratic transformation.

This alternative approach to reparations is still consistent with existing legal standards on reparations for victims of atrocities. Indeed, in recent decades, the concept of reparations underwent an important change in international law, as it no longer focuses on restitution exclusively but instead sees the latter as merely one of several components of reparations, which also include compensation, satisfaction, rehabilitation and measures to ensure non-recurrence of atrocities. The different components of reparations are regarded as complementary and are not ranked hierarchically. Depending on the particularities of the case, these components should be combined to achieve integral reparation.

From this perspective, the restitution component is very pertinent for cases of asset dispossession or loss, as it requires the return both of the relevant assets and of rights over them. However, this does not mean that the restorative approach to reparations should prevail in such cases, as restitution measures need to be complemented by the other components of reparations, and they could all have a transformative approach or vocation. Indeed, all the components of reparations, including restitution, can be used to transform power relations and inequalities. In the case of restitution, this would imply the return of assets, but with the assurance that victims will be no longer submitted to conditions of exclusion and vulnerability. Therefore, a conceptual distinction can be established between restitution as a component of the legal imperative to make reparations and the restorative approach to restitutions. The former does not necessarily go against the transformative approach to reparations.

3. Distinction Between and Articulation of Transformative Reparations, Social Policy and Humanitarian Attention

The ambitious character of the transformative approach to reparations does not imply its confusion with or dilution in the general objectives of economic and political transformation of the social order that exists in transitional settings, which have a much wider scope. In particular, the state's duties to make reparations to victims, to provide humanitarian aid and to implement social policy are different in their legal bases and purposes, even if their materialization occasionally coincides in practice.

Reparations are different from social policy because they seek to redress a specific damage caused by direct violence. Hence, even though they must have a relevant material component, reparations must also always have a symbolic component, aimed at acknowledging the suffering of victims. On the other hand, even though victims of atrocities should receive humanitarian aid from the state, the latter cannot fulfil the duty to make reparations. Indeed, humanitarian aid simply seeks to temporarily stabilize the situation of victims, without redressing the damage caused by the violation. This is so even when humanitarian aid becomes more permanent, including not only urgent attention but also more complex and long-term measures like socio-economic stabilization.

Now, reparations, humanitarian aid and social policy should be adequately articulated so as to assure coherence among them, as well as to promote a democratic transformation of society. However, the objective of political and economic transformation of the social order should not be restricted to reparations measures. Indeed, these mainly benefit victims and not the entire population (at least directly), and they primarily seek to transform structural conditions that permitted the commission of atrocities, and not all structural conditions of exclusion. The transformation of a situation of massive and systematic violation of human rights requires much more than the implementation of reparations, the transformative vocation of these notwithstanding.

The proposal of transformative reparations implies conceiving that reparations, which are essentially a form of corrective justice, can make a relevant contribution to the goals of distributive justice. However, that does not imply confusing these two distinct types of justice, since the configurative efficacy of each is maintained in the approach. Reparations are always based on harm caused to victims, and therefore their conception as a form of corrective justice is fundamental for determining the beneficiaries of reparations, as well as the amounts the latter should receive. However, such amounts could be used with a transformative – instead of a restorative – purpose, and hence help achieve goals of distributive justice. This is a perfectly valid combination; in fact, many political and legal institutions articulate different justice criteria, as it is often the case in the criminal justice arena and in torts law. This combination can take place in the field of reparations because the imperative that the latter be proportional to damage inflicted should not be understood as a strict rule but rather as a *prima facie* principle, which can be limited when it is in

tension with other equally important principles, such as those of distributive justice. In particular, the duty to make full reparations for damages caused should prevail in all cases where it does not involve a profound conflict with the imperatives of distributive justice.

4. Transformative Reparations for Extensive Land Dispossession in Colombia

The normative proposal that reparations should be conceived from a transformative point of view is especially relevant for the Colombian context in general, and for dealing with extensive land dispossessions in particular. Reparations in cases where individuals have been dispossessed of their land could have a huge potential for democratic transformation. Indeed, the mere restitution of property lost during a conflict could have a deep impact on the structure of agrarian property in the country, as it would require the reallocation of around 11% of the country's agricultural land to members of the forcibly displaced population, who currently live in extreme poverty. Furthermore, it would be grounded on a more solid and less contentious basis than is generally the case for land reform policies.

However, in places like Colombia, proving victims' rights over land prior to conflict is extremely difficult, not only because of the insufficiency of official information and the uncertainty of property rights, but also because the same piece of land may have had several different occupants during the protracted conflict. Therefore, a land-restitution programme might end up not having major distributive effects or even contribute to the legalization of usurped land, since land not proved to have been subject to dispossession could be assumed to have been legally obtained.

But, even if such a programme could be effectively implemented, it could still have limited effects in terms of bringing about a democratic transformation. Indeed, it would be more concerned with victims' past rights over land than with their current needs. As such, it could lead to the adoption of regressive measures, such as reconstruction of the fortunes of rich victims (which should be rather rare in Colombia) and the restoration of victims to a situation of vulnerability and deprivation.

To avoid such results, measures aimed at making reparations in Colombia should aim to recover all land that has been subject to dispossession, and to use this to ensure that victims of dispossession have access to land. But, this would not necessarily imply that victims would be given the same piece of

land they occupied before the conflict, except under special circumstances. The effective recovery of usurped land would greatly contribute to the struggle against organized crime, while its mainly redistributive orientation would help avoid the obstacles of purely restitutive measures. Indeed, victims of dispossession could access land by summarily proving that they had been dispossessed, and they would be given priority not on the basis of the certainty of their past rights but rather according to their present needs. Also, land reparations could combat the factors that permitted dispossession through measures such as, *inter alia*, the recognition of more certain rights over delivered land; the priority assignment of land to the most vulnerable victims, such as women; and the establishment of maximum and minimum land extensions.

Restitution of the precise land lost by victims should be kept as an alternative in all cases in which links with the land are very strong, as is the case with many ethnic communities and with some peasants. These cases seem to be the exception rather than the rule, however, as many victims have expressed their will not to return to their places of origin. Even though this may be the result of fear of being dispossessed once again, it suggests that victims may be willing to accept other forms of land reparation than restitution. This makes sense, given that an important component of Colombia's displaced population is made up of settlers (*colonos*).

Even in the cases where restitution should be privileged, certain transformative measures could be implemented, such as, *inter alia*, the guarantee of restitution not only to victims of dispossession who were formal owners, but also to informal owners, possessors and occupants; the establishment of flexible evidence rules for proving previous rights over the land; and the solution of conflicts among possessors on the basis of needs criteria.

5. Concluding Remarks

It does not seem justified or convenient to mechanically apply standards for reparations that were formulated for individual cases in well-ordered societies to the design of massive reparations strategies in profoundly unequal societies. This does not mean that the imperative of reparations should be set aside in favour of purely distributive justice principles, as that would ignore the claims of victims that are not only just but also have a legal foundation. The transformative approach to reparations can articulate the necessary and fair tasks of redressing victims' suffering and promoting the democratic transformation of society.

* About the Authors:

Maria Paula Saffon is a PhD student at Columbia University and Associate Researcher at the Center for the Study of Law, Justice and Society (DeJuSticia), Bogotá.

Rodrigo Uprimny is the Director of DeJuSticia and Associate Professor at the National University of Colombia.

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International Peace Research Institute, Oslo
Institutt for fredsforskning

International Peace Research Institute, Oslo (PRIO)
Hausmanns gate 7
NO 0186 Oslo
Norway
E-mail: info@prio.no
www.prio.no