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**TRANSITIONAL JUSTICE,
DISTRIBUTIVE JUSTICE,
AND
TRANSFORMATIVE
CONSTITUTIONALISM**

COMPARING COLOMBIA AND SOUTH AFRICA

Transitional Justice, Distributive Justice, and Transformative Constitutionalism

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OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
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First Edition published in 2023

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Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data

Data available

Library of Congress Control Number: 2023946845

ISBN 978-0-19-288762-7

DOI: 10.1093/oso/9780192887627.001.0001

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

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Joint Reflection: Economic Goods and Communitarian Values

Thaddeus Metz and Nathalia Bautista Pizarro

1. Introduction

The prior contributions by us, Bautista Pizarro and Metz, address the proper way to respond to gross human rights violations in the light of certain values prevalent in South America and Africa. Specifically, considering the histories of Colombia and South Africa and some of the moral beliefs of a few ethnic or victims' communities with diverse cultural origins, we develop non-individualist and non-retributive approaches to the major conflicts that have taken place in our respective countries. Broadly speaking, we both advocate relational and constructive forms of transitional justice that make victim compensation central.

Specifically, according to Bautista Pizarro, it is important not merely to rely on legal strategies, but also to draw on the values, cultures, and traditions of local peoples, in order to resolve conflict.¹ She highlights respects in which those from three different Colombian societies believe in communitarian ways of 'restoring the normative bond' between former enemies as well as the social fabric, destroyed by the war, approaches that the state ought to consider when making reparations. Metz appeals to communal/harmonious values frequently associated with the South African Indigenous philosophy of *ubuntu* (and the Colombian Indigenous worldview of *buen vivir*) to construct an account of reconciliation, and he brings out what reconciliation entails for how to make economic restitution in a post-conflict society.² He maintains that offenders ought to undergo burdensome ways of providing property and opportunities to their victims so as to improve the socio-economic quality of their lives.

In this chapter, we consider how Metz's largely *ubuntu*-based reconciliatory approach to reparations might be relevant to Colombia in ways that he did not consider, after which we reflect on how the kinds of communitarian practices Bautista Pizarro advances might be relevant to South Africa and strengthen its transitional justice model. We conclude that these cross-applications are revealing, pointing

¹ Nathalia Bautista Pizarro, Chapter 3 in this book.

² Thaddeus Metz, Chapter 2 in this book.

out how economic compensation in Colombia should plausibly be influenced by cultural factors, and how considerations of culture in South Africa call for compensation beyond economic factors.

2. Applying *Ubuntu* to Colombia

According to the concept of compensatory justice developed by Metz, the restoration of law after an intense period of violence should include the allocation of economic goods as an important manifestation of harmony and a vital component of transitional justice. Having offenders provide property and opportunities to their victims not merely would be a way of improving the latter's quality of life, but also could and should have symbolic meaning. Indeed, following this perspective, those who have caused pain to others should compensate for damages, not necessarily via financial compensation, but perhaps by executing material compensatory acts such as building a school or working on a farm, as a way to express remorse. Part of the relational value of reconciliation would thereby be nurtured and encouraged. Taking this approach into account, we reflect on the potential role of economic goods in Colombian communities, and propose a culturally sensitive interpretation of the meaning of Metz's concept of compensatory justice for these cases.

Economic goods are a material means of configuring peoples' lives and their relations with others. Even more, they are a way to be related to the 'things' of the world, a way to materialise or realise a project that could exist only in an abstract, purely psychological manner.³ For that reason, each community needs economic goods in order to operate according to its particular understanding of the world and configure its individual and common life in accordance with that viewpoint.

In the case of the *Misak* people, discussed in Bautista Pizarro's chapter, material well-being is closely associated with access to 'territory' and simultaneously with the bonds that develop between the land, all natural beings (including humans, whose bodies are also a territory), and, in fact, the entire cosmos. Each *Misak* has the duty to care for their territory in order to maintain the balance between all beings in that locale and beyond. In this regard, one should understand that damage caused to a member of the community or a part of the territory has larger implications for the entire community, in terms of its order. In this case, as mentioned, the appropriate compensatory measures do not correspond to the meaning of retribution or indeed any other individualist ethic, but involve performing restorative

³ Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts* (first published in 1821, Surhkamp 1986) § 41.

actions that can include spiritual tasks meant to restore balance throughout society and nature.⁴

Yet, the question regarding how an agent liable for damages could comply with these restorative ends of special justice is something that has to be defined by the Indigenous communities on a case by case basis, since they are, or at least should be, autonomous.⁵ In general, the recognition of damages inflicted on ‘the peoples, communities, their members, authorities, as well as on the ancestral territory and its spirituality’ has been demanded.⁶ Likewise, the reparation must be ‘transformative’ in regards to these dimensions of the damages, taking into account that these are peoples, cultures, and territories that have been ‘historically violated in their material and immaterial dimension.’⁷ Thus, reparations must also aim to strengthen self-determination of peoples and the elimination of ‘frameworks of discrimination and marginalisation’ as possible causes of victimising acts.⁸

A wrongdoer who is not from the community could have some difficulties in fulfilling these tasks due to cultural differences. However, taking into account the cooperation between Indigenous communities and state organs within the framework of the peace process, liable agents could at least undertake logistical tasks or provide resources for members of the community so that they can carry them out. The aforementioned would also conform to the sanction with a restorative function of the Special Jurisdiction for Peace and the measures of reparation of the Final Peace Agreement.⁹ In this sense, there are cases in which the community itself has expressed the need for external support to conduct restorative actions, as was the case, in fact, of a group of *Misak* and *Nasa* women, who sought the help of several organisations to make ‘memory weaves’ in response to the violence inflicted against women.¹⁰

A second major way that culture should probably influence economic reparation, beyond facilitating healing ceremonies and collective actions, would be to return stolen land. Economic compensation for the *Misaks*, as for all the ethnic communities in Colombia, should involve guaranteeing free access to their

⁴ For broadly similar views amongst Indigenous African peoples, see Egbeke Aja, ‘Crime and Punishment: An Indigenous African Experience’ (1997) 31 *Journal of Value Inquiry* 353.

⁵ The autonomy of the Laws of Origin and Nature, the Word of Life, the Major Law, or the Special Law of Indigenous peoples shall be recognised in all the proceedings and stages of the Special Jurisdiction for Peace. *Diversidad étnica y cultural, pluralismo jurídico y consulta previa. Instrumentos de coordinación y articulación entre los pueblos indígenas y el sistema integral de verdad, justicia, reparación y no repetición (SIVJRNR)* (2019) 11 <<https://www.jep.gov.co/DocumentosJEPWP/protocolo.pdf>> accessed 1 September 2020.

⁶ *ibid* 12, numeral 5 ‘Transformative reparation’ (*Reparación Transformadora*).

⁷ *ibid*.

⁸ *ibid*.

⁹ Act 1957/2019, arts 128 and 141; Final Peace Agreement 5.3.1, eg, Plans for collective reparation with a territorial approach 5.1.3.3.2.

¹⁰ Gestoras de memoria histórica del Resguardo de Jambaló, *Hilando Memorias para tejer resistencias: Mujeres indígenas en lucha contra las violencias* (Centro Nacional de Memoria Histórica 2016).

ancestral territories, which is of utmost importance, as their meaning of life is determined by their material and spiritual connections to their respective lands. That is the reason why *Misaks* think that the period of violence for them began with the Spanish conquest, when free access to their territory was blocked by the process of colonisation. Consequently, next to the recognition of their cultural identity and political autonomy, land reform is one of the main issues to be considered when compensating an Indigenous community in Colombia and contexts similar to it. Considerations of culture arguably should shape the form of economic restitution, with land being central and unable to be substituted with, say, the provision of money or education. The right way to show remorse and to improve the quality of life of Indigenous Colombian communities, such as the *Misaks*, is at least partly by considering what they find important. That means attending to their spiritual and material relation to their territory and Nature as well as applying restorative measures such as guaranteeing free access to the land.

The point also applies to Afro-descendant communities in Colombia, whose ancestors were taken from Africa and brought as slaves to the Americas, and who have an interest in recovering ways of life that had been suppressed. They suffered harm in that they were forced to learn a foreign language and to try to forget their religious and cultural origins. An apt form of compensation would enable Afro-descendants to retain and develop their ancestral customs and related practices, which, in turn, would also mean according them their own territory.

Recalling the case of the *Afroatratenian* community from Bautista Pizarro's prior chapter, as with the *Misaks*, the meaning of economic goods for them is defined by the connection to their territory and Nature. The territory is inhabited not only by the living, but also by the dead and other spirits, with whom the living must stay in contact. Furthermore, according to the *vivir sabroso* philosophy, the community needs to be in motion to exist, and, thus, the construction of personal relations increases through the extension of the rivers. Free access to their territory, in particular, freedom of movement, was impeded by the presence of armed groups. Many members of the community were, and still are, being murdered and forcefully displaced. In this regard, compensating this Afro-descendant community should be defined through the meaning of being connected to a specific territory, sharing it with the dead and the spirits, and being able to move through a land that is connected by the rivers. In this sense, Colombian constitutional case law has in fact recognised the Atrato river as a subject of rights and has publicly called for its protection.¹¹ This is an important precedent not only to accept its channel as a stage where the memory of the damages of war is depicted, but also to acknowledge the rightful actions of their inhabitants to resist.¹² Likewise, the community

¹¹ Constitucional Court T-622/2016.

¹² Pilar Riaño-Alcalá and Natalia Quiceno, 'Presencias, sensibilidades y políticas cotidianas del habitar en el Atrato' (July–December 2020) 56(2) *Revista Colombiana de Antropología* 7–17.

gained state support to commemorate, in November 2019, the funerals of the victims of the 2 May 2001 massacre according to their ancestral practices—this is an important issue in order to overcome the episodes of violence, bearing in mind their special relation with the dead.¹³

We observe again that economic goods acquire a special meaning for Colombian ethnic communities: the material side of reparation has to respond to their spiritual identities and, vitally, to acknowledge the centrality of land to the pursuit of transitional justice in Colombia. In other words, it is not only about compensating through money or employment, important as these would be, but also about materially guaranteeing the restoration of breached rights in a way that is respectful of the cultures and traditions of affected communities and that recognises the way that land is integral to the identities of Indigenous peoples. Compensating in this way is essential for human rights violators to express remorse, or for the state to express its disapproval of the way they treated their victims.

However, there are other peoples in Colombia for whom the abilities to undertake healing practices or obtain access to a certain territory are not so important. For them, economic compensation should take a different form, although issues of culture remain relevant in principle.

In the case of the urban community of *Agroarte*, constituted by people with diverse cultural origins, the meaning of economic goods—at least as a matter of compensation in a transitional justice process—seems similar to the one in modern western society. However, there is also a demand for justice in a symbolic horizon, and, in this sense, it could be supported by Metz's conception of compensatory justice. *Agroarte* was born in an area of Medellín where people have serious challenges such as access to property, health care, and education. As mentioned in Bautista Pizarro's chapter, this community suffered a particularly intense episode of violence during a military intervention in the area in 2002, in which people lost their relatives or were displaced through force. From the perspective of a symbolic horizon, *Agroarte*, as a philosophy that speaks in the name of the victims, 'of those who do not have voices',¹⁴ demands the complete elucidation of the truth of those who have participated in this armed intervention. In one of their songs, members of *Agroarte* also demand their 'remorse' as a condition to 'forgive them'.¹⁵ In addition, they believe in restorative processes and the power of joining people especially

¹³ *ibid* 15–16; Diana Camila Orjuela Villanueva, '¿Qué hacemos con tanto muerto junto? Tratar la muerte violenta y masiva en el Medio Atrato' (July–December 2020) 56(2) *Revista Colombiana de Antropología* 7–17.

¹⁴ Interview with El Metan-o on 2 March 2018 in Medellín.

¹⁵ 'No soñamos con matar a quien nuestra gente mató, pues buscamos la verdad estando lejos del rencor, no hay perdón por lo que hicieron, pues no olvidamos nada de aquello que sucedió, escucha amigo mío, no es posible perdonar al que perdón nunca pidió' ('We don't dream of killing the one who killed our people, since we search for the truth being away from bitterness, there is no forgiveness for what they've done, as we don't forget what happened, listen to me my friend, it isn't possible to forgive someone who has not asked for it'), *Cuerpos Gramaticales*, Hip Hop Agrario.

through recovering their connection to the territory by symbolic planting and arts. Economic resources should be spent on revealing the truth about what transpired as well as fostering cultural responses to it.

The *Agroarte* points to the need for recognition of the inhabitants of the hills of Medellín as equals, especially by reinforcing the pride of belonging to the neighbourhood, as their song *Mi Barrio* alludes. In addition, in their song *Cuerpos Gramaticales*, they demand from the government the right to free education instead of conscription. In this respect, the compensation for damages to this urban community has to be defined in terms of not only the significance of truth and symbolism, but also a materially better life for the victims, on which Metz mainly focuses in his contribution. The situation of inequality of the inhabitants of these impoverished areas of Medellín has to be considered, particularly since poverty has been regularly used as an excuse or motivation to commit human atrocities in Colombia. However, it is not merely about compensating according to the economic situation of each victim, calculating the damage caused to the individual at the moment of the human rights violation, but also about understanding the victim's relative economic situation in society, before and after the violation. For this reason, the peace agreement¹⁶ and the Statutory Law of the Special Jurisdiction for Peace 1957/2019¹⁷ have created a differential approach in order to capture the special gravity of particular human rights violations that considers the vulnerability of the person (eg being a member of Indigenous or Afro-descendant communities, or being a woman, child, or elder) and specifically taking into account the fact of their being amongst the worst off. This approach could also be applied in the case of the aforementioned ethnic communities.

To sum up, while Metz in his chapter maintains that a just response to human rights violations requires offenders to compensate their victims with economic goods, his analysis is one-sided, failing to take account of how an *ubuntu* communitarianism plausibly means that culture should influence the allocation of these goods. Upon reflection, we have suggested in this chapter that the relevant economic goods depend at least partially upon a given community's self-conception, which in some cases will mean a focus on providing resources that would facilitate spiritual healing and reconnection with land.

3. Applying Colombian Communitarianism to South Africa

African societies have mainly been the ones known for featuring reconciliation as a way to respond to large-scale social conflict. Although South Africa's Truth and Reconciliation Commission (TRC) is the best known, also influential have

¹⁶ 5.1.2., I, 7.

¹⁷ Art 13.

been reconciliatory processes in Sierra Leone, Zimbabwe, and Rwanda. These approaches grew out of Indigenous value systems that prize relational values such as a sense of togetherness, cooperation, mutual aid, and compassion. Bautista Pizarro's chapter reveals that similar values pertaining to harmony or community have been salient amongst Indigenous Colombian peoples¹⁸ and that they have also tended to ground a broadly reconciliatory approach to human rights violations.

Of particular interest are Bautista Pizarro's discussions of the *Misak* and *Afrotratenian* communities. The former focuses on reciprocal recognition, an inclusive and egalitarian relationship meant to include not merely human beings, but also the natural world as a whole, while the latter is centred on *vivir sabroso* (meaning living lusciously or well) and idealises balance or harmony between human beings, ancestral spirits, and the environment. Bautista Pizarro traces the way that both communitarian value systems have grounded responses to the Colombian conflict that are not retributive and are instead focused on repairing broken relationships, where doing so includes addressing people's identities and hence their religions, aesthetic orientations, senses of place, and, particularly, their relationships to land.

The relevance of people's identities for reconciliation had not been particularly visible in either the South African reconciliation processes or the normative reflections on them in the literature, at least until recently with the rise of the 'decolonial' and FeesMustFall movements in 2015. The practical and theoretical focus, at least in respect of South Africa's TRC and other policies adopted at the end of apartheid, had largely been on obtaining the truth about past misdeeds and then allocating money, land, and similar kinds of resources expected to improve socio-economic conditions. However, Bautista Pizarro's analysis of the way that culture should be considered relevant to effecting reconciliation in Colombia is pertinent to the (South) African context and can make sense of the movements mentioned in Section 2. If reconciliation of the right sort includes an expression of remorse on the part of the offender, which, in turn, means undertaking labour that will improve the quality of his victims' lives, then he ought to attend to all the major ways he has harmed them. And harm from human rights violations are often not merely socio-economic in a narrow sense, but can also involve impairments to, and degradations of, people's self-understandings developed through the cultures in which they have been embedded.

For a first example in the South African context, consider that it is typical of Indigenous black peoples to believe in what are often called the 'living-dead'. That is, they tend to think that people survive the deaths of their bodies and continue

¹⁸ For the suggestion that harmony is typically foundational for small-scale or non-western peoples, see George Silberbauer, 'Ethics in Small-scale Societies' in Peter Singer (ed), *A Companion to Ethics* (Basil Blackwell 1991) 14, and Daniel A Bell and Yingchuan Mo, 'Harmony in the World 2013' (2014) 118 *Social Indicators Research* 797.

to reside on Earth (at least for a certain amount of time), perhaps in a certain animal or at a particular place. Some of the living-dead count as 'ancestors', those who significantly influenced the clan and have the task of continuing to provide moral guidance to it. In the words of a black South African woman who went to court to be able to visit the grave of her dead son located on land held by a white farmer:

[I]t is our custom and religious belief that when a member of our family passes away, he/she gets only physically separated from us but spiritually that person will always be with us and is capable of sharing a day to day life with us though in a different form. It is against this background that a graveyard to us is not only a place to bury our deceased, but a second home for those of us who live in the world of spirits.¹⁹

When, therefore, Indigenous peoples in South Africa were systematically deprived of land, they lost out not merely on an important economic resource, but also on what they understood to be access to their family members. The hardship of being unable to relate to family merits its own kind of compensation, or at the very least is arguably an additional consideration to factor in when effecting land reform. Even if, for example, a farmer who had obtained a large tract of land as a result of colonial era policies were allowed to retain it, say, for the sake of food productivity, he ought at least to be required to allow people to visit a gravesite or other territory where they believe the spirits of their family members continue to reside.

A second respect in which identity or culture is relevant to reconciliation in a South African context has to do with epistemic considerations. Part of who people are is a function of how they interpret the world, with one kind of injustice being a violation of their ability to use their own epistemic categories. Colonial powers in Africa routinely treated Indigenous people's attempts to understand themselves and their environment as inferior to the models provided by Christianity and modern science. One need not be a relativist who maintains that all belief systems are equally justified in order to find it wrong, for instance, not to teach any African philosophy in South African public universities and instead to instruct only western philosophy.²⁰ Plausibly that is wrong, regardless of whether staff are prohibited by a colonial government from teaching African worldviews or whether the post-colonial culture still inclines instructors, most of whom are of European descent, to disregard them. Decolonial theorists in South Africa have described

¹⁹ *Nkosi and Another v Bührmann* [2001] ZASCA 98 [6].

²⁰ Indeed, it is only in the past five or ten years that the African ethic of *ubuntu* has begun to be systematically taught in South African universities.

such epistemic domination as ‘spiritual genocide’,²¹ ‘cultural violence’,²² ‘symbolic castration’,²³ and ‘epistemicide’.²⁴

Making reparations in the light of cultural harm, then, would need to include redress for ways in which people were wronged in regard to their abilities to interpret the world. It is not merely tangible goods that need to be considered when expressing remorse for, and disapproval of, apartheid in South Africa, but also intangible belief systems—which would require some provision of money, labour, and related resources to investigate, enrich, and transmit them.

Concretely, this might mean that South Africa’s National Research Foundation or National Institute for the Humanities and Social Sciences prioritises support for projects that focus on indigenous perspectives. It could also involve the Department of Higher Education and Training or the Council on Higher Education urging public universities to Africanise their teaching and research, expecting them to report to the government on how they have done so. In addition, individual lecturers and scholars—and ideally those who in the past had denigrated or neglected African sources—could use them in their classrooms and journal articles, and, furthermore, could do the work of finding ways to share them with members of the broader public who cannot attend university.

We submit that the involvement of government bodies in seeking epistemic redress need not involve the micromanagement of academics, and could instead be a matter of request and negotiation of sorts that would allow lecturers and researchers to Africanise in their own ways, thereby respecting values such as institutional autonomy and academic freedom. In addition, the inclusion of under-represented African perspectives need not mean treating anything non-African as anathema: cross-cultural dialogue would be possible and presumably welcome.

4. Conclusion

In sum, taking some kind of reconciliation for granted as the proper way to respond to large-scale social conflict, reflection on the Colombian context reveals some respects in which South Africa’s TRC and related post-apartheid programmes were limited, at least for a long while. As Bautista Pizarro puts it, in a peace process, the mechanisms of justice must be improved in a way that accommodates the cultural

²¹ HW Vilakazi, ‘Education Policy for a Democratic Society’ in Siphoo Seepe (ed), *Black Perspective(s) on Tertiary Institutional Transformation* (Vivlia Publishers and the University of Venda 1998) 76.

²² Catherine Odora Hoppers, ‘African Voices in Education’ in Philip Higgs and others (eds), *African Voices in Education* (Juta 2000) 5.

²³ Catherine Odora Hoppers, ‘Indigenous Knowledge Systems and Academic Institutions in South Africa’ (2001) 19 *Perspectives in Education* 74.

²⁴ J Teboho Lebakeng and others, ‘Epistemicide, Institutional Cultures and the Imperative for the Africanisation of Universities in South Africa’ (2006) 13 *Alternation* 70.

diversity and identity of the communities.²⁵ Running with this plausible communitarian approach, we have suggested that, applied to South Africa, a full reconciliation would involve attending to what land means to victims beyond a focus on narrowly material considerations as well as effecting redress for respects in which their epistemic ways of life were suppressed. In his preceding chapter, Metz had pointed out that the beneficiaries of apartheid and the South African state have generally done a poor job of effecting reparations of property and opportunities; unfortunately, the reflection here indicates that the failure to make compensation is even greater, for having also left victims' culture and unique epistemic and spiritual relationships to the world around them largely out of the picture.

²⁵ Bautista Pizarro, Chapter 3 in this book.