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Restitution Judges: A Starting Point for an Agrarian Jurisdiction as a Guarantee of Non-repetition in Colombia

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Abstract

The Colombian government and the main guerrilla, the FARC, signed a peace agreement in November 2016. The establishment of an agrarian jurisdiction is one of the settlements they have reached. This article evaluates the already existing capacities the Colombian state has developed, based on an analysis of the ongoing land restitution process. Based on an analysis of some judicial decisions taken in the context of this process, and on three in-depth interviews with judicial operators involved in it, the article makes two main findings: the procedural innovations of the land restitution process and the application of the constitutional precept of the effective enjoyment of rights guarantee the effective access to justice for rural populations and to the social rights aimed at protecting and stabilising their property rights. For these reasons, these features will prove to be useful in the establishment of an agrarian jurisdiction in Colombia that will represent a guarantee of non-repetition.

Keywords

post-conflict reforms – access to land – agrarian jurisdiction – constitutional judge – inclusion through legal channels – peasants

1 Introduction

The talks between the national government and the FARC guerrilla were publicly launched in 2012, and since then partial agreements have been reached on certain points on the negotiating agenda. The first point on the agenda was the discussion on the policy for comprehensive rural development. On 21 June 2013, the dialogue table publicly announced an agreement on this first point of the agenda under the title 'Towards a new countryside in Colombia: Comprehensive Rural Reform', which included references to the establishment of an agrarian jurisdiction 'to guarantee the effective protection of property rights in the countryside'.[1]

Details of this jurisdiction were provided in June of 2014, when the full text of the agreement was published.[2] Firstly, the peace agreement conceives the

1 Gobierno de Colombia & FARC EP. "Primer informe conjunto". (2013). Mesa de conversaciones. <https://www.mesadeconversaciones.com.co/comunicados/1er-informe-conjunto-mesa-de-conversaciones-la-habana-21-de-junio-de-2013> accessed 2 March 2017.

2 Gobierno de Colombia & FARC EP. "Borrador conjunto Política de Desarrollo Rural integral". (2013). Mesa de conversaciones. <https://www.mesadeconversaciones.com.co/sites/default/

agrarian jurisdiction as an expedite mechanism for the protection of property rights. Secondly, the creation of the new jurisdiction is intended to 'prevent resorting to violence to resolve conflicts related to it [land] and as a guarantee to prevent dispossession of any type'. Lastly, it warns that this jurisdiction should have adequate coverage and capacity throughout the territories and should include mechanisms to ensure timely access to justice for the rural population.

The accessibility and timeliness of the agrarian jurisdiction depend largely on how it addresses the context of legal exclusion of the rural population. The text of the agreements mentioned above warns that in the event the objective of inclusion of peasants in the legal system is not achieved, it may become a factor for reoccurrence of the conflict. In other words, the effectiveness of the newly established agrarian jurisdiction depends on whether it becomes a guarantee for non-repetition both of the armed conflict and of forced land dispossession. Therefore, given the possible need to implement the agreements of La Habana in the short term, it is highly relevant to assess the factors and circumstances that would enable an agrarian jurisdiction to effectively become an accessible mechanism for the rural population.

The recent Colombian context itself provides useful insights for identifying the factors and circumstances that would enable effective access to legal mechanisms to protect rural property rights. Such insights are provided by the land restitution process currently being carried out by the Colombian government. Since 2012, the land restitution process has sought to restore property rights on lands affected by the armed conflict, covering those who were victims of forced dispossession and abandonment between 1991 and 2021. To this end an institutional bureaucracy was established in which two government agencies or entities stand out. The first is the Special Administrative Unit for Land Restitution Management (URT by its acronym in Spanish), which processes the requests of the victims of forced dispossession or abandonment, receives the claims, documents the cases, collects evidence and enters the lawsuits for restitution before the land restitution jurisdiction.

The second is the specialized jurisdiction for land restitution, in which the judges and magistrates rule on the fundamental right to land restitution by defining ownership over the claimed properties, while also granting victims complementary measures to guarantee the effective enjoyment of their rights. This process has had two important features. Firstly, the land restitution process includes a series of procedural innovations aimed at protecting the property rights of those affected by the conflict. Secondly, the restitution law and the land restitution judges have made use of the constitutional precept of the

files/Borrador%20Conjunto%20-%20%20Pol_tica%20de%20desarrollo%20agrario%20integral.pdf> accessed 2 March 2017.

effective enjoyment of rights to broaden the set of social rights that complement the right to property ownership affected by the situation of violent conflict in Colombia.

Our argument in this article is the following: the procedural innovations of the land restitution process and the application of the constitutional precept of the effective enjoyment of rights guarantee the effective access to justice for rural populations and to the social rights aimed at protecting and stabilizing their property rights. For these reasons, these features will prove to be useful in the establishment of an agrarian jurisdiction in Colombia that will represent a guarantee of non-repetition.

This article is structured into three four sections. Following this introduction, the section 2 presents an analysis of the land restitution procedures and land restitution rulings that demonstrate how the special restitution procedure has eliminated barriers of access to justice for rural populations and that such access has been effective. Section 3 analyses the rulings that included additional orders that complement the guarantee for restitution derived from the precept of the effective enjoyment of rights, and in-depth interviews with restitution magistrates and judges. Lastly, section 4 makes concluding observations on the effectiveness of an agrarian jurisdiction in terms of the guarantee of non-repetition.

2 Barriers of Access to Justice and Land Restitution

In Colombia, peasants are a segment of the population that has been excluded from different areas, including the political-institutional and economic arenas. For example, peasants have been shut out from the institutional arrangement in terms of processing their demands, at least since the National Front.[3] This institutional exclusion is often associated with democratic representative bodies such as parliament or collective administrative decision-making bodies such as trade councils, which fictitiously claim to sufficiently represent peasants as a social productive group. Gutiérrez points out that the relationship between the governments and the trade councils, and the internal structure of the latter has largely excluded the peasants from the political process,[4] to the

3 F Gutiérrez Sanín, *El orangután con sacoleva. Cien años de democracia y represión en Colombia (1910–2010)* (Debate, Bogotá 2014) and F Gutiérrez Sanín, '¿Una historia simple?' *in Comisión Histórica del Conflicto y sus Víctimas, Contribución al entendimiento del conflicto armado en Colombia* (Bogotá, 2015).

4 F Gutiérrez Sanín, '¿Una historia simple?' in Comisión Histórica del Conflicto y sus Víctimas, *Contribución al entendimiento del conflicto armado en Colombia* (Bogotá, 2015).

point that 'by the end of the 1970s the government no longer had an interface for interacting with the peasants'.

In addition to this political exclusion of peasants, the rural population was affected by institutional arrays of property ownership that compromised the objective of guaranteeing the stability of their rights. Citing some of the propositions of Fitzpatrick, Gutiérrez shows how in countries such as Colombia the state has shortcomings in terms of guaranteeing rights, resolving conflicts and distributing resources with authority. In this sense, Gutiérrez has shown how in Colombia the interaction between formal and informal rules has weakened the regulatory capacity of the State, in such a manner that the specification and protection of property rights is not a public good, but a privatised practice.[5] The specification of property rights through the state capture by some owners has led to the dispossession, not only of small landholders, but of other large landowners as well.[6]

In these terms, certain segments of the rural population have been excluded from the legal protection of their properties. This exclusion from the legal system is not the result of any legal impossibility for peasants to file their respective claims to protect or ensure their property rights. Rather, the exclusion is the result of barriers to peasants in terms of effective access to these mechanisms.[7] The existence of barriers in the institutional design for the assignment of rural property rights that prevents peasant communities from obtaining effective recognition of the rights has been sufficiently demonstrated. In this regard, there are cultural barriers and lack of knowledge of rights; economic, geographic and operational barriers; an absence of standards regarding the quality of service of justice, and a deficit in assistance to victims and witnesses.[8]

For our analysis, not all these barriers are relevant. We will focus on those that may be related to the innovations incorporated in the restitution process and that are associated with overcoming such barriers, in other words the cultural and economic barriers. One of the cultural barriers is the absence of

5 F Gutiérrez Sanín, 'Land and Property Rights in Colombia – Change and Continuity' (2010) 28(2) *Nordic Journal of Human Rights* 230–261.

6 Ibid.

7 R Peña Huertas, M Parada Hernández, S. Zuleta Ríos, 'La regulación agraria en Colombia o el eterno *deja vu* hacia la concentración y el despojo: un análisis de las normas jurídicas colombianas sobre el agro (1991–2010)' (2014) 16(1) *Estudios Socio-Jurídicos* 123–166 and M Rengifo Gardeazábal, *Teoría General de la Propiedad. Bases para la construcción de un derecho civil realista en el ámbito de la tradición jurídica romana* (Ediciones Uniandes, Bogotá, 2011).

8 Corporación Excelencia en la Justicia, *Caracterización de la justicia formal en Colombia y elementos para la construcción de una agenda estratégica para su mejoramiento* 2.

free legal orientation. This barrier consists in a mismatch between the existing population, especially the monetary poor population, and the coverage offered by free legal orientation services. The proportion of poor people in disperse rural areas is 41.4%.[9]

The absence of free legal assistance, which also represents an economic barrier, is formally eliminated through two instruments included in the Land Restitution Law. The first is that the victims of dispossession or forced abandonment can request the URT to legally represent them in the restitution proceedings,[10] and the second is the obligation of the URT to undertake the proceedings related to the restitution requests.[11] These mechanisms guarantee free legal assistance to the victims of dispossession and abandonment, and in this manner remove this cultural barrier to the access of protection of their property rights.

Regarding the financial barriers, there are others in addition to the lack of free legal assistance, such as 'transportation and lodging costs to attend hearings and proceedings, and even the time required for the process in terms of opportunity costs.'[12] Another relevant aspect is the cost associated with the administrative procedures required to register property titles. Even though such financial and opportunity costs would affect any citizen interested in gaining access to the legal system, in the case of rural dwellers such costs can be prohibitive and become true obstacles for their access to justice and the protection of their property rights.

We have already seen how the Victims' Law removes the obstacle of free legal assistance. Additionally, the other financial expenses mentioned above are partially reduced by the Law through two tools: (a) it enables judges and magistrates to issue rulings without having to perform additional procedures such as proceedings and hearings that must be attended by claimants, and the assumption that evidence provided by the URT is valid and reliable.[13] Even though these provisions do not fully eliminate the costs, they do create the possibility of reducing them. (b) The guarantee that the property titles will be registered free of charge once the property is restituted.[14]

The table below summarizes the identified barriers to access to justice for rural populations and the measures formally included in the Law that remove or substantially reduce such barriers.

9 Ibid, 31.

10 Victims' and Land Restitution Law, Arts. 81 y 82.

11 Victims' and Land Restitution Law, Art. 105–5.

12 Corporación Excelencia en la Justicia, supra n. 9, at 37.

13 Victims' and Land Restitution Law, Art. 89.

14 Victims' and Land Restitution Law, Art. 84.

Type of barrier	Barrier	Legal measure
Cultural	Lack of free legal assistance.	Request for representation by the URT Obligation of the URT to process the restitution requests.
Financial	Lack of free legal assistance.	Request for representation by the URT Obligation of the URT to process the restitution requests.
	Costs associated with hearings and proceedings (financial and opportunity costs)	Possibility of issuing rulings without additional evidence Assumption that evidence submitted by URT is valid and reliable
	Issue and registration of property titles	Issuing and registration of property titles free of charge.

Up to this point we have shown how the Victims' Law and its chapter on land restitution formally eliminate barriers to access to justice for rural populations. But these barriers were not only eliminated in the formal sense. The rulings we have studied include specific cases that demonstrate the high level of inclusion achieved by restitution for the people who live in distant rural areas in Colombia.

The analysis of the rulings used the following methodology. Firstly, a total of 1100 restitution rulings were obtained issued between October, 2012 and July, 2015. The relevant information was extracted from each ruling to establish the characteristics of the claimants and the complementary orders related to social rights that complement property restitution. Based on the above, the rulings were grouped by category according to the variables related to the orders issued in each ruling, the legal basis for each order, and the descriptions of the claimants in each restitution process. From this exercise, 11 relevant rulings were found for our analysis, which will be referenced throughout this text as relevant.

The rulings do not provide an in-depth description of the claimants, and such an exercise would require access to the legal files and the evidence gathered by the URT, access to which is restricted by law. But some of the land restitution rulings that were studied enabled us to identify four facts or circumstances that allow us to infer that the land claimants were residents of rural areas or peasants, thereby providing evidence of the potential of the restitution process for the inclusion of peasants.

The first is that the claimed assets are located in rural districts (*veredas* or *corregimientos*, which are municipal sub-divisions that cover areas that are disperse and far removed from the town centers).[15]

The second is that the rulings of the judges and magistrates ordered to prioritize the claimants for delivery of rural housing subsidies[16] or delivery of comprehensive land subsidies.[17] Such subsidies are targeted exclusively at persons who own assets located in rural areas and who are peasants who qualify for agrarian reform.

The third is that the judges and magistrates found that they fulfilled the requirements for granting title over vacant lands, and one of such requirements is that they are agricultural workers, generally peasants.[18]

Lastly, the judges and magistrates often describe the situation of the assets requested for restitution in terms of the economic activities performed there, and these are generally agricultural activities carried out by rural dwellers. For example, 'performing agricultural activities such as growing coffee, kidney beans, maize, plantain, rice'[19] or 'the applicant and his family [...] performed agricultural activities on the property such as planting yucca, plantain, raising cattle, three ponds for fish farming, sugar cane mill, fruit, tangerine, orange, soursop and avocado trees'.[20]

The fact that these four elements are present in the studied rulings indicates that the claimants are primarily peasants, and that this vulnerable population that is highly excluded from access to justice has managed to become involved in restitution processes and to obtain fulfillment of the right to land restitution

15 2015-04_Abr-D47001312100220130008000 Sentencia 201541104247, p. 6.
2015-04_Abr-D47001312100220130009100 Sentencia 20154111103, p. 1.
2015-04_Abr-D47001312100220130009800 Sentencia 20154112221, p. 1.
050003121101-201400023-00 Granada 18 marzo 2015, p. 4.
200013121001-2012-000147-00-San Diego-8 de Febrero, p. 1.
200013121001-2013-00147-00_San Alberto_05-06-2014, p. 1.

16 2015-04_Abr-D47001312100220130008000 Sentencia 201541104247, p. 41.
050003121101-201400023-00 Granada 18 marzo 2015, p. 21.
200013121001-2012-000147-00-San Diego-8 de Febrero, p. 47.

17 050003121101-201400023-00 Granada 18 marzo 2015, p. 21.
200013121001-2012-000147-00-San Diego-8 de Febrero, p. 29.
200013121001-2013-00147-00_San Alberto_05-06-2014, p. 37.

18 2015-04_Abr-D47001312100220130008000 Sentencia 201541104247, p. 38.
2015-04_Abr-D47001312100220130009100 Sentencia 20154111103, p. 29.

19 2015-04_Abr-D47001312100220130008000 Sentencia 201541104247, p. 38.
050003121101-201400023-00 Granada 18 marzo 2015, p. 18.
200013121001-2012-000147-00-San Diego-8 de Febrero, p. 5.

20 200013121001-2013-00147-00_San Alberto_05-06-2014, p. 2.

thanks to the procedural innovations of the land restitution procedure. In addition to the formal and material inclusion of peasants in formal justice, another feature of the land restitution procedure is its constitutional nature.

3 Constitutional Nature of Land Restitution and the Effective Enjoyment of Rights

3.1 *Restitution Judges and Magistrates as Constitutional Judges*

Law 1448 is based on the premise that the armed conflict in Colombia is associated with the specification of rural property rights, and consequently establishes an institutional design in which restitution judges play a key role. Understanding the role of the judges from the perspective of democratic constitutionalism, enables understanding the role they play not only in restitution and in the inclusion of the rights of the dispossessed, but also in the development of a legal doctrine to enable the historically excluded peasants to have access to justice and recognition of their rights, following the agreements of Havana.

From a different perspective, the evolution of contemporary democracies has brought with it the development of scenarios in which the legitimacy of a democratic system is associated with other characteristics of democracies, such as impartiality and pluralism. This reading of political processes, proposed by Rosanvallon, recognizes that a result of these dynamics is the development of independent authorities and constitutional courts that, over time, end up taking on additional roles and leadership.[21]

In this sense, constitutional judges have been proposed as a mechanism to control rulers and as a form of social control over the citizens' representatives.[22] These considerations are relevant for discussing the land restitution judges and magistrates who, as we will show, are constitutional judges. The Colombian Constitutional Court has been the body through which the shortcomings of government institutions have been recognized in terms of adequately addressing the needs of the victims of the armed conflict. Since ruling T-025 of 2004[23] was issued, which declared an unconstitutional state of

21 P Rosanvallon, *La legitimidad democrática: imparcialidad, reflexividad y proximidad* (Paidós, Buenos Aires 2010).

22 Ibid.

23 Since this ruling, the Constitutional Court has monitored all government activities in the framework of the policy on care, assistance and reparations of the victims of forced displacement to verify that the unconstitutional state of affairs has been overcome, i.e.

affairs regarding internally displaced people, substantial constitutional jurisprudence has been issued aiming at exhorting the State to formulate public policies, programs and other means to address the deficit of protection for these population and to guarantee their effective reparation.

It should be noted that the jurisprudence issued by the Constitutional Court represents the preferred mechanism to incorporate International Human Rights Law and Humanitarian Law standards and to make them binding regarding care, assistance and reparations for the victims of the armed conflict, by endowing it with contents and broadening the scope of fundamental rights that the Colombian constitution itself incorporates through the so-called constitutional block,[24] such as the right to integral reparations.

One of the key components for the reparation of victims is the restitution of lands that were dispossessed or abandoned in the framework of the armed conflict. Ruling T-821 of 2007[25] expressly recognized land restitution as one of the components that guarantee the right to reparations, and a fundamental right that those who legally hold or held assets that were lost as a result of serious violations of Human Rights or of International Humanitarian Law are entitled to.

This exercise is aligned with the promotion of progressive access to property, as established in Articles 64, 65 and 66 of the Colombian Constitution, and as further developed by the Constitutional Court in a number of opportunities.[26] For example, the Court has placed limits on the tools through which property rights are assigned to ensure progressive access to land for rural workers, as well as to healthcare, education, housing, social security, and credit; and to prioritize the development of agricultural, fishing, forestry and agro-industrial

'the systematic and structural violation of a full set of fundamental rights of the population, as well as the reiterated omission by the authorities to prevent and abstain from such violations'.

24 The notion of constitutional block refers to a set of rules and principles which, although not expressly included in the text of the constitution, have the same hierarchy as the Constitution and operate as parameters to review the constitutionality of laws.

25 This ruling overturns the rulings of two lower courts on lawsuits for the protection of constitutional rights, which considered that different government agencies had not violated the rights of a victim of forced displacement by delaying the delivery of humanitarian assistance and social benefits. The ruling mandates the adoption of a specialized registry to enable land registration, and is an important precedent for the current Law of Victims and Land Restitution.

26 Especially rulings C-006/02, C-255/12, C-644/12 and T-488/14. All Constitutional Court rulings are available for reviewing and downloading at <http://www.corteconstitucional.gov.co/relatoria/> accessed 3 March 2017.

activities, and building of physical infrastructure works in the countryside.[27] Also, the Court has not only supported the entities' power to intervene in rural asset award processes,[28] but has placed limitations on the design of policies aimed at defining mechanisms for the protection of rural property,[29] with the objective of guaranteeing the social function of property and progressive access to land for peasants.

The enactment of Law 1448 implied issuing regulations to incorporate the work of the Constitutional Court in establishing rules to be adopted regarding comprehensive reparations and land restitution and the protection of the peasant population's access to property. In this regard, the group of judges and magistrates specialized in land restitution complement the work of the constitutional high court by performing the same work of extending and broadening the guarantee of rights for the claimants in the restitution processes.

In a previous paper we indicated the criteria that land restitution judges and magistrates could take into consideration in their role as constitutional judges. The fact that the land restitution judges and magistrates have the purpose of guaranteeing and reestablishing the property rights of victims of dispossession and forced abandonment represents the first argument, because from a material and organic standpoint, the judges and magistrates are, in essence, constitutional judges. This arises from understanding that the restitution of dispossessed or abandoned properties guarantees a fundamental human right that implies not only recognizing the ownership or possession by the victim of the property being claimed, but the obligation of issuing orders aimed at guaranteeing that the beneficiaries of restitution have material conditions to return, with the possibility of undertaking sustainable life projects, and under a scenario that guarantees the non-repetition of the victimization events.

Similarly, it should be pointed out that the specialized land restitution jurisdiction does not resolve ordinary land disputes, but rather it is a transitional justice mechanism created to resolve property rights' violations that originated in the armed conflict. It should also be taken into account that the judges and bodies that decide on matters related to constitutional rights belong to the constitutional jurisdiction and not to the ordinary civil jurisdiction.[30] As a result, according to material criteria, given that land restitution judges guarantee

27 See Constitutional Court. Ruling C-006/12.

28 See Constitutional Court. Ruling C-255/12.

29 See Constitutional Court. Ruling C-644/12.

30 M Quinche Ramírez, R Peña Huertas, M Parada Hernández, L Ruiz González and R Álvarez Morales, *El amparo de tierras. La acción, el proceso y el juez de restitución* (Editorial Universidad del Rosario, Bogotá 2015).

the fundamental right of land restitution, and organic criteria, that these judges decide on matters related to constitutional rights, the land restitution judges and magistrates are in fact constitutional judges.

Treating land restitution judges and magistrates as constitutional judges has important political implications from the standpoint of democratic constitutionalism. The democratic constitutionalism doctrine highlights the importance that discussing and negotiating rights in judicial scenarios has for the public. On the one hand, such discussions reinforce the authority of the Constitution inasmuch as they enable citizen participation through judges in the debate on how constitutional provisions are to be interpreted. This exercise of persuasion enables the possibility that even though the constitutional interpretation of a given citizen may not be accepted by the constitutional judges, the opposing interpretation is respected and accepted by all.[31] Deliberations on private property take place in scenarios that go beyond civil law, giving meaning to the right of progressive access to property by Colombian peasants and the protection of social function of property.[32] On the other hand, the restitution policy opens up the discussion on the right to property as a fundamental right which, additionally, must serve the interests of the most vulnerable populations. Under this perspective, the land restitution judges and magistrates, acting as constitutional judges,

> exercise a unique form of authority towards the recognition and guarantee of rights, which they are entitled to by virtue of the Constitution

31 R Post and R Siegel *Constitucionalismo democrático: por una reconciliación entre Constitución y pueblo* (Siglo XXI, Buenos Aires 2013).

32 According to this view, property has internal limits—not just external ones as in the case of the liberal right to property. The owner has obligations regarding his properties. He cannot do as he pleases with his property. He is under the obligation of making it productive. The wealth controlled by owners should be put at the service of the community by means of economic transactions. The idea of the social function of property is based on a description of social reality that recognizes solidarity as one of its primary foundations.

Consequently, the state should protect property only when it fulfills its social function. When the owner is not acting in a manner that is consistent with his obligations, the state should intervene to encourage or to punish him. Taxation and expropriation are powerful tools for achieving such ends. From this perspective, the state has both negative and positive obligations with respect to property.

See S Foster and D Bonilla. The Social Function Of Property: A Comparative Law Perspective. (November 15, 2011). Fordham Law Review, Vol. 80, p. 101, 2011; *Fordham Law Legal Studies Research Paper* No. 1960022. Available at SSRN: <http://ssrn.com/abstract=1960022>.

> and the professional legal rules they employ. Citizens expect the courts to protect important social values and to impose limits on the government whenever it steps outside the bounds set by the Constitution.[33]

Restitution, as a mechanism to guarantee a constitutional right, enables a discussion on the contents and scope of the constitutional norms. Additionally, the activities of constitutional judges are considered a mechanism of democratic deliberation in which citizens are able to file claims against the State regarding fulfillment and interpretation of constitutional texts. In this sense, the possibility is ruled out that discussions in this scenario will question the legitimacy of the constitutional text. On the contrary, it reinforces the legitimacy and authority of the constitutional text.[34] This in turn implies that pressure is exerted by various actors (victims, State, political minorities) that are often reflected in the guarantee of certain rights; for this specific case, a work of persuasion is achieved with the land restitution judges and magistrates on the recognition of specific rights through a ruling in favor of the victims of dispossession and forced abandonment and the exhortation to various entities to fulfill the orders subsequently to the ruling. This demonstrates the deliberative nature of the constitutional debate that land restitution implies, which reflects the existence of an indirect mechanism of social control over the rulers, as suggested by Rosanvallon.[35]

3.2 *The Constitutional Precept of the Effective Enjoyment of Rights*

Therefore, the restitution rulings represent a scenario of political debate on the recognition of rights that in ordinary channels face different types of barriers. Since their ultimate objective is to restore rights that were violated in the context of the armed conflict, the judicial exercise opens up the debate on the redefinition of conditions for a dignified livelihood for communities, particularly rural ones. Additionally, the establishment of guarantees for nonrepetition, as one of the main elements of the transition process, implies rethinking the definition of the structural phenomena that originated or fueled the conflict.

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33 See R Post and R Siegel *Constitucionalismo democrático: por una reconciliación entre Constitución y pueblo* (Siglo XXI, Buenos Aires 2013). Translated by the authors based on the Spanish version.

34 Ibid.

35 See P Rosanvallon, *La legitimidad democrática: imparcialidad, reflexividad y proximidad* (Paidós, Buenos Aires 2010).

The Victims and Land Restitution Law, unlike ordinary statutes, grants judges a series of exceptional powers that enable them to issue orders aimed at the reconstruction of the social fabric and reordering of the territories, so as to guarantee the effective enjoyment of rights. This concept of *effective enjoyment of rights* has relevant implications because it acknowledges the existence of indicators that have been developed both by the Constitutional Court and the National Government. These indicators help monitor fulfillment of orders issued related to housing, healthcare, education, nutrition, identity, economic stability (Monitoring Resolution No. 109 of 2007), integrity, freedom and right to life (Monitoring Resolution No. 223 of 2007). These instruments guide the work of land restitution judges in the sense that their actions not only have the objective of offsetting the effects of the conflict by guaranteeing specific rights of the victims, but also imply the verification of *de facto* situations and specific actions by government authorities.

In this sense, the rulings become a means for ensuring that these redefinitions and commitments that the State must acquire, by way of the interpretation of constitutional principles, are actually fulfilled. The rulings acquire a very important symbolic force by enabling the recovery of the trust of citizens, particularly of the victims of the armed conflict, in the State and its institutions; and the judges then become the guarantors and custodians of the process of overcoming the state of affairs that allowed the unraveling of the armed conflict.

This notion of constitutional law was found in the rulings studied for this article. This is reflected in the existence of rulings that recognise collective rights and in orders that benefit the communities: build roads, schools, sewage systems, among others. Their action as constitutional judges also implies that they may 'establish any other effects of the ruling for the specific case, and shall remain competent until the right is fully reestablished or the causes of threat have disappeared'.[36] Additionally, the Restitution Law itself explicitly includes principles of transitional justice[37] to guide the interpretation of victims' rights, and land restitution judges constantly refer to these rules in their decisions.

The analysis we have carried out of legal activity in the context of land restitution has focused especially on the contents of 1100 restitution rulings issued and published between October 2012 and July 2015. The contents of these rulings were systematised by means of a matrix identifying, among other aspects, the type of orders adopted by the judges in each specific case.

36 Decree 2591 of 1991 which regulates lawsuits for enforcement of constitutional rights (*tutela*, article 27 and Law 1448 of 2011, Art. 91.

37 Law 1448 of 2011, Arts. 8 and 9.

The systematisation found a total of 11 rulings out of all the rulings analysed that included complementary orders, the basis of which was none other than the constitutional notion of the effective enjoyment of rights. This is the case of a ruling dated February 2, 2015, in which the judge considers that:

> This procedure is complemented with the incorporation of other offsetting measures, as well as other measures to guarantee the non-repetition of the events and the active participation of the victims. Consequently, the restitution measures, in the context of the Law, are aimed at consolidating the process intended to provide for the effective enjoyment of rights for the victims and in this way achieve the reconciliation required to build the road towards peace.[38]

As a result, in this ruling the judge decided to 'order the National Roads Institute (INVIAS) to include in the infrastructure budget or create a budget allocation to enable fixing the roads that communicate and provide access to the rural district (*corregimiento*) of Siberia, *vereda* La Secreta, municipality of Ciénaga (Magdalena)'.[39]

Using the same constitutional argument, on November 19, 2014, a land restitution judge decided to order the Special Administrative Unit for Assistance and Comprehensive Reparations for Victims to include victims who received a favorable ruling 'in the design of the Comprehensive Collective Reparations Plan, and in the special arrangements for assistance to displaced populations that are returned or relocated'.[40]

Examples of rulings such as these and this systematisation show the difference between judges who restrict themselves to applying the provisions of Law 1448 of 2011, leaning on the rules of civil law, but whose rulings do not represent any special judicial activism or extra effort to rule on complementary rights to restitution; and the judges whose rulings do display judicial activism. The latter are judges who do not restrict themselves to the orders established by the Law, but who instead adopt complementary and additional orders to promote the effective enjoyment of rights, particularly in terms of social rights and benefits.

In this manner, legal activism becomes a tool for breaking down existing barriers in terms of access to rural assets, such as road infrastructure, in that the judges evaluate the specific situations of those who appear as claimants,

38 2015-04_Abr-D47001312100220130009800oSentencia20154112221, p. 18.

39 2015-04_Abr-D47001312100220130009800oSentencia20154112221, p. 41.

40 Ruling No. 031–11 RAD. 2014-00021 p. 34.

and are capable of issuing orders according to the individual needs of each family group. Evidence of this is that restitution, even though conceived as a tool to revert dispossession, has served to formalize the legal titles on the properties, thereby contributing to the solution of the problem of the informality of rights.

The analysis we carried out also identified the number of complementary orders that were adopted in the set of systematized rulings, as well as the proportion of restitution judges who decided to adopt such judicial activism in acting as constitutional judges. The rulings that include complementary orders involving social rights and public spending account for only 4.5% of the rulings that were studied (thirty nine). As shown in Table 1, such orders refer to installing and providing public water and power utility services, construction and repair of roads and the formulation of Collective Return Plans.

The rulings that have included orders of this type were adopted by seven land restitution courts out of a total of forty four judicial units. This indicates that orders that reflect judicial activism by the land restitution judges and the adoption of orders based on the effective enjoyment of rights are still isolated and exceptional. The review of the rulings illustrates that some judges have not yet internalised the nature of the land restitution process inasmuch as they continue to apply formulas associated with civil law. Others, on the contrary, admit that it has been quite a challenge to overcome their civil law tradition:

> Before coming here, I had a different view, (...) besides, my outlook was from a Civil Law perspective, on contract fulfillment, on clauses ... and here you need to break away from that, to make a full break. You cannot stick to it because nothing would ever get done in a restitution process; you would have to say "no, they wrote up a contract, or the Supreme Court already ruled on that in Cassation", but here you can't think that way, it is a different matter.[41]

TABLE 1 *Number of rulings with complementary orders*

Type of order	**Number of rulings**
Install and supply water and power utility services	Four
Build and repair roads	Thirty-one
Formulate a Collective Return Plan	Four
Total	Thirty-nine

41 Interview with Magistrate of the Land Restitution Tribunal, October, 2015.

The judges say that fulfillment of such measures faces a series of obstacles related to the institutional bureaucracy and the assignment of legal authority, which prevent the coordination between administrative authorities when the time comes to implementing the orders of the rulings. One magistrate from the Bogotá tribunal says:

> This week we had a Monitoring Hearing on the issue of housing in a rural district from a municipality in Meta, and what I observed was that: the Office of the Mayor did not fulfill the order because first the Office of the Governor had to do something and failed to do it; no one came from the Office of the Governor, even though they were summoned; from Caja Agraria, which also had to do something there, they could not fulfill the order until the Office of the Governor and the Office of the Mayor did their part, when this had already been agreed on months ago. We had already set dates, we had agreed on each party's tasks, the times; in other words a timetable had been set that was not met. They simply come here to say 'no, I can't do it because somebody else didn't do their part'.[42]

Similarly, they say that one of the difficulties in fulfilling such orders is the fact that many authorities seem not to understand the special nature of the law and the imperative need to fulfill the orders within reasonable time frames. Often the victims who benefit from ancillary measures to restitution are forced to fulfill the same requirements as any other citizen to gain access to certain resources.

In an interview at a Civil Court of the Specialized Land Restitution Circuit, a civil servant mentioned that in one case SENA refused to fulfill the court's order of providing training to victims arguing that they had not passed the admissions test. In view of this, the court notified them that it was not necessary for victims to meet said requirement because the victims are covered by the judge's order, and that such requirement is sufficient to gain access to the system.

She also mentioned that the Health Ministry is the one that most promptly fulfills the orders, verifying whether the victims are included in the General Healthcare System, and if not they are included in the subsidized regime within fifteen days. Lastly, she mentioned that the most reluctant to fulfill the orders within the established time frames were the Ministries of Housing and Agriculture.[43] In view of such non-compliance, the judges are forced to hold

42 Interview with Magistrate – Land Restitution Tribunal, October, 2015.

43 Interview at the Civil Court of the Specialized Land Restitution Circuit of Popayán, October 8, 2015.

periodic monitoring hearings to inquire with the entities on fulfillment of the orders that were issued. As a result, the rulings and the in-depth interviews effectively demonstrate that the restitution actions have taken place in a context where, in the terms of Post, Siegel and Rosanvallon, the judges have become a means for control over government administration and the restitution public policy, and open a window for the discussion between citizens and rulers, as is the case of the monitoring hearings.

The discussion up to this point indicates that land restitution judges act sometimes as constitutional judges in the framework of guaranteeing the right to restitution and the effective enjoyment of rights. This has not only been illustrated by the interviews held with some of these civil servants, but also through the systematization of the complementary measures regarding social rights and the number of judges who issue legal orders of this type. Such an approach, in light of what is argued by democratic constitutionalism, grants the land restitution judge a leading role in reinforcing the authority of the Constitution and makes it a mechanism of democratic deliberation between citizens and government agencies.

All in all, democratic constitutionalism also contributes relevant elements to describe how the land restitution process has contributed to the democratic inclusion of peasants through legal channels and to overcoming certain barriers that have prevented the legal system from adequately fulfilling its function as a protector of the property of peasant populations.

4 Conclusion: Guarantees for Non-repetition

It is difficult to find an unequivocal definition of transitional justice, given that it is *a dynamic concept that is decanted based on the experiences and dilemmas faced by societies in transition*.[44] However, it has been agreed that, in order to make transitional justice operational, it must be supported by the pillars of truth, justice, reparations and guarantees of non-repetition for the victims.[45] It is based on these pillars that institutional adjustments have been made in Colombia aimed at enabling the correct development of the objectives sought

44 C De Gamboa Tapias, 'Justicia transicional: dilemas y remedios para lidiar con el pasado' (2005) 7(Número especial) *Estudios Socio-Jurídicos* 21–40.

45 F Díaz Colorado, 'La justicia transicional y la justicia restaurativa frente a las necesidades de las victimas' (2008) (12) *Umbral Científico* 117–130.

by the transitional justice process. Clear expressions of this are the Justice and Peace Law, (Law 975 of 2005),[46] and Law 1448 of 2011.

These two legal instruments have a marked judicial component, given that Law 975 creates a special criminal procedure aimed at establishing guidelines for the reincorporation of members of organized armed groups, particularly but not only paramilitary groups, to effectively contribute to the achievement of national peace. In other words, it is aimed at the perpetrators, whereas Law 1448 has a special chapter that creates a legal procedure whose objective is to restitute dispossessed lands to the victims of the armed conflict.

On August 26, 2012 the *General Agreement to End the Conflict and Build a Stable and Lasting Peace* signed by delegates of the Colombian government and FARC was released to the public. This agreement was not only the launch of the formal negotiating process between these two parties, but its six general points established a roadmap to steer the peace process. Even though the government highlights the importance of Transitional Justice in this process through partial agreements on judicial mechanisms,[47] confirming this tendency to think that Transitional Justice is materialised through special judicial procedures, what stands out from the documents of the negotiation process is the willingness to undertake institutional reforms that address the problems that in one way or another contributed to the generation of the armed conflict. This is precisely the window of opportunity that opens up to introduce the changes of transitional justice.

The post-conflict stage and the contents of the partial agreements provide a favourable context to undertake institutional reforms that address certain factors of rural inequality. Firstly, it should be pointed out that the inequality created by the assignment of property rights has been identified as one of the causes that originated the Colombian conflict.[48] Secondly, this situation has been found to be particularly troublesome in the countryside, and the negotiating parties in the framework of the peace talks at Havana have recognised this. For this reason, a partial agreement was reached between the government and FARC aimed at developing a *Comprehensive Policy on Rural Development*, whose specific objectives include massive formalization of small

46 C Rodríguez Rodríguez, 'Postconflicto y justicia transicional en Colombia: balance de nuestra experiencia' (2011) 8(15) *Hallazgos* 137–159.

47 Presidencia de la República, *Acuerdo sobre Justicia Transicional es un paso trascendental para la paz en el hemisferio: Presidente Santos* (Bogotá 2015).

48 F Gutiérrez Sanín, '¿Una historia simple?' in Comisión Histórica del Conflicto y sus Víctimas, *Contribución al entendimiento del conflicto armado en Colombia* (Bogotá, 2015).

and mid-sized rural properties;[49] and the *National Government will revise and carry out the institutional adjustments and reforms required to face the challenges of peace-building*.[50]

The agrarian jurisdiction has been identified by the parties as a suitable mechanism to carry out this objective of fighting the inequality in the assignment of property rights through the massive formalisation of small and mid-sized rural properties, in the sense that this jurisdiction would become a tool to defend the stability of the rights of these small and mid-sized landowners. Consequently, the intention is to identify the elements that exist in the procedures created by Law 1448 to address rural issues, in order to assess whether such elements may effectively apply to the design of an agrarian jurisdiction to be used as an instrument to implement the peace agreements. The land restitution process is related in at least two ways with the possible implementation of the agrarian jurisdiction contemplated in the agreements of La Habana. On the one hand, the procedural innovations of the restitution process that help provide peasants access to justice are elements that should be taken into consideration for establishing the procedures to be incorporated into the agrarian jurisdiction in order to enable this mechanism to fulfill the objective of providing effective guarantees for the right to property to rural populations and to become a means for the peaceful resolution of conflicts over land.

On the other hand, the constitutional outlook of the restitution judges that has contributed to fulfilling redistribution objectives regarding rural assets for peasants would be an essential element for a permanent agrarian jurisdiction aimed at guaranteeing additional rights to property. In this regard, constitutional provisions such as the effective enjoyment of rights, the power granted to agrarian judges to issue orders aimed at guaranteeing material equality and mechanisms to follow up on and monitor government activities to fulfill the orders would represent an improvement in the capacity for specific groups of citizens such as peasants to guarantee their rights and exert control on government acts.

Consequently, the intention is to identify the elements that exist in the procedures created by Law 1448 to address rural issues, in order to assess whether such elements may effectively apply to the design of an agrarian jurisdiction to be used as an instrument to implement the peace agreements. There are two aspects that display potential for the adoption of an agrarian jurisdiction as a mechanism to protect and stabilise peasant property rights and as a way

49 Gobierno Nacional and FARC-EP, *Acuerdo General para la terminación del conflicto y la construcción de una paz estable y duradera* (Bogotá 2012).

50 Ibid.

to materialise a guarantee of non-repetition in the transitional justice context. The first is the theoretical framework of democratic constitutionalism that serves as a framework for the judicial activities of the land restitution judges and magistrates, which addresses the particularities and specific capabilities of this population in terms of access to justice. Such a constitutional outlook goes beyond the usual approach towards property rights, linked to civil law and the liberal foundations of formal equality before the law.

The importance of this approach materialises in the second aspect: instruments in the judicial procedure that have favored the legal protection of peasant property and an active role of the State in favor of peasants to mitigate existing inequalities. These specific elements represent a constitutional perspective on property rights based on which rural matters should be approached, and mechanisms such as judicial representation, in which the State takes on the cost of procedures, etc. In this way, the legal representation of peasants by government agencies, the procedural activities related to providing all the required information and documentation at no additional cost to the claimants, and issuing and registration of titles free of charge are all necessary instruments for a permanent agrarian jurisdiction.

Land restitution and its mechanisms have demonstrated good potential for eliminating barriers and the adoption of effective legal mechanisms to enable farmers to gain access to and protect their properties and other associated rights. The perspective of the effective enjoyment of rights and transformative reparations is a product of the constitutional nature of the land restitution judges. Similarly, a certain amount of judicial activism is displayed in some of the orders issued by the judges, particularly those involving social rights, which tend to broaden their constitutional nature with the aim of guaranteeing the effective enjoyment of such rights.

In this sense, it is worth highlighting orders that refer to road construction and repair, or healthcare infrastructure or the design of return plans, which are legally supported in the general clause on the effective enjoyment of rights of Law 1448, the constitutional principles and provisions that endow judges with the tools required to deploy their constitutional role and in the discourse of transformative reparations. The above is also illustrated by the comments of some land restitution judges and magistrates, who are aware of their role as guarantors of fundamental rights and of the equivalency of their own restitution actions and the actions for the protection of constitutional rights (*tutela writ*).

In Colombia the discussion of property rights revolves around the interpretation and application of civil law doctrine, which represents a limitation for the recognition of rights of vulnerable populations, such as the victims of

dispossession and/or forced abandonment of lands. Litigation that takes place in the framework of land restitution involves one party that is evidently in a weak position and to whom the law cannot be applied following a black letter approach, as it would create re-victimization. Due to this situation, some of the standards of civil law procedures must be loosened. For example, the law removes the burden of proof from the victims, assigns to the URT the legal representation of the claimants and case documentation, among other things.

Consequently, Law 1448 incorporates standards that are more favorable to the victims of land dispossession and forced abandonment in order to guarantee true and effective reparations. In this sense, the land restitution judges and magistrates are required to interpret the victimization events in the light of constitutional law, which in turn includes all the international treaties on human rights ratified by Colombia and constitutional doctrine, which offer greater guarantees to the victims and facilitate decision-making in their favor. This appropriation of constitutional doctrine to rule on restitution cases has been a complex process with partial results, and with many challenges to overcome. The review of rulings has shown that some judges have not yet assimilated the nature of the land restitution process and continue to apply the common formulas of civil law. Others, on the contrary, admit that it has been quite a challenge to overcome their civil law perspective.

One of the effects of the application of the constitutional doctrine in land restitution rulings is the possibility of issuing orders that complement the right to restitution and that protect and fulfill the social rights of victims. The institutional design of Law 1448 addresses many of the barriers identified in the literature that place obstacles on sectors such as peasants in making effective use of legal mechanisms for the protection of property ownership. The cost of legal representation, which in ordinary civil law cases must be covered by the citizen, in this case are fully taken on by the State. According to the legal design,[51] the Land Restitution Unit is responsible for fully documenting the cases, for drafting the restitution lawsuit and assisting throughout the process, appointing a legal representative who acts on behalf of the victims before the land restitution jurisdiction.

Another example is the consolidation of gathering of evidence, and particularly the costs involved in acquiring certain types of evidence that are critical for rural processes, such as property appraisals or cadastre identification. Once again, the State covers these costs through the Land Restitution Unit and other competent public authorities. A third example are the costs associated with the formalization of ownership, issuing of titles and registration of titles,

51 Law 1448 of 2011, article 81.

which are not on the account of the victim claimant, but of the government agencies which, additionally must perform them *ex officio* and at no charge.

These examples do not exhaust all the features of the restitution process that help reduce barriers, but they suffice to demonstrate the potential of this process in terms of the government testing mechanisms that make justice more accessible to citizens. Similarly, future research on the recurrent and/or occasional litigants in restitution process should demonstrate the important democratic effect that restitution has had, at least in terms of effective access to justice.

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