When Life Gives You Lemons: The Case of Mexico's Popular Referendum as an Unconventional Adaptation of Transitional Justice

Cuando la vida te da limones: el caso de la consulta popular en México como medio de adaptación no convencional de la justicia transicional

Quando a vida lhe dá limões: o caso do referendo popular mexicano como adaptação não convencional da justiça de transição

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Abstract

This article explores the two predominant models of transitional justice (TJ) and the way each one may address the two most broad-gauged moments in Mexico that comprise unsolved legacies of human rights violations and the distinctive way in which each one of these moments fit—or not—the conventional model of TJ (CMTJ), or on the contrary, may fit an unconventional model of it (UMTJ). Through such distinction, we vindicate the relevance of shifting from the CMTJ to a more functional approach through unconventional adaptation (UATJ). We illustrate the plausibility of the UMTJ through the case of the 2020 popular referendum, which represented a silver lining for TJ in Mexico. It also introduces a test to determine the applicability of the UMTJ in conflicting societies that need to implement TJ strategies.

Keywords

Unconventional adaptation; Mexico's dirty war; Mexico's war on the drug cartels; Mexico's popular referendum; Murphy's test.

Resumen

Este artículo explora los dos modelos predominantes de justicia transicional (JT) y examina la manera en que cada uno de ellos permite abordar dos grandes momentos de la historia reciente de México que han dejado legados aún no resueltos de violaciones a los derechos humanos. En particular, analiza la forma en que cada uno de esos momentos se ajusta —o no— al modelo convencional de justicia transicional (MCJT) y, en su caso, puede ser abordado mediante una adaptación no convencional de la justicia transicional (ANCJT). A partir de esta distinción, el artículo reivindica la pertinencia de transitar del MCJT hacia un enfoque más funcional que, mediante dicha adaptación, permita articular un modelo no convencional de justicia transicional (MNCJT). La plausibilidad de este último se ilustra a partir de la consulta popular de 2020, que pudo abrir una ventana de oportunidad para la justicia transicional en México. Finalmente, el artículo propone un test para determinar la aplicabilidad del MNCJT en sociedades en conflicto que requieren la implementación de estrategias de justicia transicional.

Palabras clave

Adaptación no convencional; guerra sucia en México; guerra de México contra los cárteles de la droga; consulta popular en México; prueba de Murphy.

Resumo

Este artigo explora os dois modelos predominantes de justiça de transição (JT) e a forma como cada um deles pode abordar os dois períodos de maior abrangência no México, que envolvem legados não solucionados de violações de direitos humanos, bem como o modo particular pelo qual cada um desses períodos se adequa — ou não — ao modelo convencional de JT (MCJT) ou, em contrapartida, enquadrar-se em um modelo não convencional de JT (MNCJT). Com base nessa distinção, defendemos a relevância de redirecionar o foco do MCJT para uma abordagem mais pragmática, por meio da adaptação não convencional da JT. Ilustramos a plausibilidade do MNCJT por meio do caso do referendo popular de 2020, que representou um marco para a JT no México. O artigo também apresenta um teste para aferir a aplicabilidade do MNCJT em sociedades em conflito que precisam implementar estratégias de JT.

Palavras-chave

Adaptação não convencional; guerra suja do México; guerra do México contra o narcotráfico; referendo popular mexicano; teste de Murphy.

Summary. 1. Introduction. Towards an Unconventional Adaptation of Transitional Justice to Contemporary Political Transformations. 2. From Conventional to Unconventional Adaptation: Two Models of Transitional Justice. 3. *Status Quaestionis* of Transitional Justice in Mexico. 3.1. A Heavy Legacy From the Past: The Dirty War of the 1970s and 1980s. 3.2. Radical Evil in Mexico: The War on the Drug Cartels (2007–present). 4. *Getting Lemons:* The Case of the Popular Referendum. 5. *Making Lemonade:* Testing UATJ in Mexico. 6. Conclusion.

1. Introduction: Towards an Unconventional Adaptation of Transitional Justice to Contemporary Political Transformations

Conventionally accepted preconditions of transitional justice (TJ) may be at odds with contemporary political processes.[1] The conventional narrative depicting TJ as a process bridging a past authoritarian rule characterized by systematic human rights abuses (HRA) and a rising democratic regime based on the rule of law and a firm commitment to protecting human rights appears insufficient to explain TJ's role in modern societies.[2] In times of liberal democracy backlash, in which landslide majorities overshadow and ultimately threaten institutional mechanisms and practices to assure the rule of law and the protection of minorities, the conceptual premises of TJ and its effectiveness, as conventionally predicated, may be limited in the context of current processes of political transformation.[3]

Modern societies may not face legacies of massive HRA but rather legacies of low-intensity, but equally systematic and enduring, violations of rights not only from state agents but also by an array of informal participants that equally represent a threat to human and civil liberties, as is happening in Mexico with the war on the drug cartels.

Hence, our core inquiry aims to validate the usefulness of TJ even in political transformations that do not necessarily entail transitions from authoritarianism to democracy but rather occur in defective democracies with unresolved

1 Colleen Murphy, "How Nations Heal," in *Boston Review*, 21 January 2021, at https://www.bostonreview.net/articles/colleen-murphy-transitional-justice/. This article by Professor Murphy provides a good example of the need for a TJ perspective to address the momentous transformations taking place worldwide, including in the United States.

2 Ruti G. Teitel, "Transitional Justice in a New Era," *Fordham International Law Journal* 26 (2002), p. 893, at https://ir.lawnet.fordham.edu/ilj/vol26/iss4/2. Professor Teitel clearly anticipated the need to adapt TJ to the continuous changes that have characterized the post-nation-building period, particularly the first two decades of this century.

3 Paul Gready and Simon Robins, "From Transitional to Transformative Justice: A New Agenda for Practice," in *International Journal of Transitional Justice* 8, 3 (2014), p. 339–361, https://doi.org/10.1093/ijtj/iju013. Gready and Robins contend that TJ needs a new concept that is more *transformative* than *transitional.* To do so, they elaborate on the limitations of TJ based on practical experiences in peacebuilding and conflict transformation. Their fundamental contention is that the transformative character of TJ requires a broader definition of its current epistemic and practical boundaries.

legacies of HRA and corruption that, due to more pressing current societal predicaments, are recurrently ignored.[4]

This article underscores the need for an unconventional adaptation of TJ (UATJ) to this type of predicament, framing it as part of a continuous process of recalibration and refinement that a given political order in ever-changing societies undergoes to undergo societal and political transformation.[5] We argue for the necessity of incorporating a new perspective on TJ to illuminate contemporary societal problems, as the conventional conception is limited to the unfolding of political transformations.

The term "unconventional adaptation" was coined by Professor Bruce Ackerman in his early works on modeling political and constitutional change.[6] On Ackerman's account a more effective and realistic approach to succeed in the enterprise of constitutional change is by means of what he describes as *revolution on a human scale* through a technique of *unconventional adaptation*, that in a nutshell can be defined as the discriminatory relationship between the new and the old order, in which the former "may reject key elements of the preexisting legal mix, (and) may also seek to retain others unchanged, while adapting yet others into the new system of revolutionary legality they seek to establish."[7] The key roles of unconventional adaptations in revolutions on a human scale are not those of constitution-makers, but rather their successors,[8] as lawmakers who adapt the constitution to fit the demos and *nomos* of the polity as it evolves.[9] These transformative arguments are especially applicable to TJ as a comprehensive strategy for implementing political and constitutional changes.[10]

4 This unconventional approach to transitional justice has been largely developed by Ezequiel González-Ocantos. See Ezequiel González-Ocantos et al., *Prosecutors, Voters, and the Criminalization of Corruption in Latin America*, New York, Cambridge University Press, 2023, https://doi.org/10.1017/9781009329835. See also Ezequiel González-Ocantos, *The Politics of Transitional Justice in Latin America: Power, Norms and Capability Building*, New York, Cambridge University Press, 2020, https://doi.org/10.1017/9781108869973.

5 Jaime Olaiz-González, *Transformaciones políticas y cambio constitucional. Estrategias de transformación para el diseño constitucional en México*, México, Tirant Lo Blanch, 2022. In this book, Olaiz elaborates on the connections between political transformations and constitutional change, and on how these connections have been predicated in Mexico's constitutional history. It acknowledges the distinctive role of TJ as a cement to restore divided polities.

6 Bruce Ackerman, "Revolution on a Human Scale," in *Yale Law Journal* 108 (1999), p. 2279, https://doi.org/10.2307/797388.

7 Ackerman, p. 2293.

8 This is illustrated by the enduring debate on the attitude that present generations should have towards the constitution: whether by acknowledging the legacy of the past and the will of the drafters of the constitution, or by assuming the latter as a living body that must be adapted to the problems of the day. In the U.S. constitutional experience, this is reflected in the debate between originalists and living constitutionalists.

9 See Robert Cover, "The Supreme Court 1982 Term," in *Harvard Law Review* 97, 1 (1983), p. 4, 28, https://doi.org/10.2307/1340787; see also Robert Post, "Who's Afraid of Jurispathic Courts?: Violence and Public Reason in Nomos and Narrative," in *Yale Journal of Law & Humanities* 17 (2005), p. 9.

10 A very illuminating critical approach to the limits of transitional justice and its difficult relation with the constitution is provided by Carlos Bernal, who reflects on the inherent aporia of transitional justice when effectively implemented, as in the cases C-579 of 2013 and C-577 of 2014, decided by the Colombian Constitutional Court. In Bernal's view, the strict application of the constitutional substitution doctrine would imply the failure of the transitional project. Such a functional approach is more consistent with our model of UATJ. See Carlos Bernal Pulido, "La aporía de la justicia transicional y el dilema constitucional del Marco Jurídico

We contend that the case of the first popular referendum in Mexico[11] and its subject matter illustrates a shift towards a model of UATJ by broadening its scope and possibilities, relaunching the public debate on the need to activate mechanisms to dwell in the remote and the recent past of the country as a necessary strategy to predicate its contemporary process of political transformation.

This article explores the connections between an unsolved past of impunity and contemporary efforts to set the record straight, in light of the legacy of abuse of power and corruption that has historically characterized Mexico's constitutive process.[12]

This article proceeds on the basis of a distinction that is often blurred in the literature but is analytically necessary for present purposes: the distinction between the *conceptual scope* of TJ and the *contexts* in which its mechanisms are applied. While a significant strand of scholarship has expanded the range of contexts in which TJ operates—most notably from transitions from authoritarian rule to democracy, to transitions from armed conflict to peace—this article suggests that contemporary cases such as Mexico require not only a contextual expansion, but also a reconsideration of the functional scope of TJ itself. Accordingly, the notion of an "unconventional" approach developed here should not be understood as a departure from the concept of TJ as such, but rather as an attempt to recalibrate its application, taking into account forms of political and social transformation that do not fit conventional paradigms. This reconceptualization aligns with a broader scholarly effort to rethink the scope of TJ, considering its expansion into new contexts and its engagement with structural forms of violence and inequality.[13]

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para la Paz," in Carlos Bernal Pulido et al. (editors), *Justicia Transicional: retos teóricos*, Bogotá, Universidad Externado de Colombia, Ejército Nacional de Colombia, 2016, p. 38–44.

11 As it will be explained ahead in more detail, Mexico's constitutive process did not contemplate mechanisms of direct democratic participation, such as plebiscite and referendum, until a constitutional amendment incorporating them was passed in 2014. Since then, it appears that Mexico shifted from a monist to a dualist paradigm of democracy, at least at the prescriptive level, according to the Ackermanian narrative. See Bruce Ackerman, *We the People, Volume 1: Foundations*, Cambridge, The Belknap Press of Harvard University Press, 1991, p. 3–57.

12 Michael Reisman, "A Jurisprudence from the Perspective of the Political Superior," in *Northern Kentucky Law Review* 23 (1996), p. 605, at https://openyls.law.yale.edu/server/api/core/bitstreams/04b64db2-36c1-40f4-8297-1760cc988aa7/content. According to Reisman, the term *constitutive process* refers to "that portion of a group's activity concerned with establishing, maintaining, or changing the fundamental institutions and procedures of decision-making. From the perspective of a jurisprudence for those making choices, a focal lens which clearly identifies when constitutive decisions are being taken and how they are likely to impact and shape the constitutive process in the future is important."

13 For a broader discussion on the expansion of transitional justice into new domains, see Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria*, Oxford, Oxford University Press, 2008, https://doi.org/10.1093/acprof:oso/9780199226832.001.0001; Colleen Murphy, *The Conceptual Foundations of Transitional Justice*, Cambridge, Cambridge University Press, 2017, https://doi.org/10.1017/9781316084229; and Ruti G. Teitel, *Transitional Justice*, Oxford, Oxford University Press, 2000, https://doi.org/10.1093/oso/9780195100648.001.0001.

2. From Conventional to Unconventional Adaptation: Two Models of Transitional Justice

Canonical definitions of TJ frame it as "[the] conception of justice associated with periods of political change, characterized by legal processes to confront the wrongdoings of repressive predecessor regimes."[14] As Priscilla Hayner explains, the field of TJ refers to the societal inquiry of coming to terms with past crimes in "[countries] confronting questions of justice and accountability in a wide range of political contexts, following the end of a military regime or repressive government."[15] In more recent works, Professor Collen Murphy contends that "[The] term *transitional justice* is generally taken to refer to formal attempts by post-repressive or post-conflict societies to address past wrongdoings in their effort to democratize."[16] These definitions agree on the extraordinary nature of TJ in addressing equally exceptional past wrongdoings and abuses in a process of societal transformation.[17]

These conceptions of TJ, which we will frame as the *conventional model* (CMTJ), gained currency amid the so-called third wave of democratization in the last quarter of the past century,[18] during which a comprehensive transition from authoritarian to democratic regimes occurred worldwide.

In a nutshell, the CMTJ is characterized by a three-fold perspective comprised of (1) a distinctive backward-looking perspective, hence (2) focusing on past events and wrongdoings, chiefly (3) performed by repressive regimes.[19] The CMTJ inserted TJ into the field of legal theory and practice as one of the most influential perspectives for articulating modern processes of political transformation. This model continues to provide, to this day, a theoretical and empirical compass for addressing complex processes of national introspection and redefinition. However, over time, the CMTJ has become limited in providing sufficient clarity on the predicaments that contemporary transformations entail.

Historically, the CMTJ was mainly focused on punishing perpetrators of past HRAs and other wrongdoings and holding them accountable. As political transformations unfolded and consolidated, the need for a different reading of TJ became more evident.[20] Such a change came with the phase that Professor Ruti

14 Ruti G. Teitel, "Transitional Justice Genealogy," in *Harvard Human Rights Journal* 16 (2003), p. 69, at https://journals.law.harvard.edu/hrj/wp-content/uploads/sites/83/2020/06/16HHRJ69-Teitel.pdf.

15 Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, New York, Routledge, 2010, p. 7, https://doi.org/10.4324/9780203867822.

16 Murphy, *The Conceptual Foundations*, p. I.

17 Teitel, "Genealogy," p. 69.

18 Samuel Huntington, *The Third Wave. Democratization in the Late Twentieth Century*, Norman, University of Oklahoma Press, 1993.

19 Teitel, "Genealogy," p. 85. See also Teitel, "New Era," p. 894.

20 Owen Fiss, "The Awkwardness of the Criminal Law," in *Human Rights Quarterly* 11, 1 (1989), p. 1, https://doi.org/10.2307/761934. In this essay, Professor Fiss contends that the convenience of exploring different ap-

Teitel defines as the *steady-state* or the normalization of the law of violence,[21] as part of what she frames as the genealogy of TJ to explain its evolution.

A growing body of scholarship has critically examined the expansion of TJ beyond its classical paradigms. Ruti Teitel herself anticipates this evolution through her account of the "steady-state" phase, in which TJ becomes increasingly normalized within legal and political orders.[22] Similarly, Christine Bell has documented how TJ has been embedded in peace processes and institutional design beyond regime transitions,[23] while Kieran McEvoy[24] and Rosemary Nagy[25] have highlighted its transformation into a broader global project addressing diverse forms of violence and injustice. This literature suggests that the boundaries of TJ are neither fixed nor exhausted by its original paradigms, but remain open to reinterpretation in light of evolving political realities.

In Teitel's account, inasmuch as the two foundational phases focused on creating the international and domestic framework, respectively, to address past wrongdoings from the vantage point of violations inflicted to humanity at large—as in World War II and the Holocaust—to those caused in more domestic or local contexts—such as the repressive authoritarian regimes that preceded the third wave, the third phase of the TJ genealogy that coincided with the beginning of this century was characterized by the incorporation of new challenges to an expansive conception of TJ that was no longer exclusively backward-looking and chiefly focused on retributive and restorative justice as in the previous phases.[26]

Rather, a more contemporary idea of TJ portrays it as an overarching conception for mapping and piloting current processes of transformation structured around a series of commonly shared values necessary to maximize a world public order grounded in human dignity.[27] Let's call this updated conception of TJ the *unconventional model* (UMTJ).

proaches to the retributionist perspective when addressing legacies of human rights violations. Regarding the distinctive focus on the civil rights experience in the United States during the 1960s, he argues that, rather than relying on the predominance of a criminal law approach to address racial segregation, the structural revolution of that period was chiefly based on "forward-looking remedies like the [civil] injunction."

21 Teitel, "Genealogy," p. 89–94.

22 Teitel, *Transitional Justice*, Chaps. 1–3.

23 Bell, *On the Law of Peace*.

24 Kieran McEvoy, "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice," in *Journal of Law and Society* 34, 4 (2007), p. 411–440, https://doi.org/10.1111/j.1467-6478.2007.00399.x.

25 Rosemary Nagy, "Transitional Justice as Global Project: Critical Reflections," in *Third World Quarterly* 29, 2 (2008), p. 275–289, https://doi.org/10.1080/01436590701806848.

26 There is an enlightening debate between Carlos Nino and Diane Orentlicher around the juncture between traditional backward-looking strategies to confront past HRA and forward-looking approaches, in problematic transitional settings, that illustrate the shifting character of the CMTJ towards a more unconventional one. See Carlos S. Nino, "The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina," in *Yale Law Journal* 100 (1991), p. 2619, https://doi.org/10.2307/796904; and Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," in *Yale Law Journal* 100, 8 (1991), p. 2539, https://doi.org/10.2307/796903.

27 Michael W. Reisman et al., "The New Haven School: A Brief Introduction," in *Yale Journal of International Law* 32 (2007), p. 580, at https://openyls.law.yale.edu/server/api/core/bitstreams/04b64db2-36c1-40f4-8297-

This UMTJ—which Teitel, in its earlier stages, described as the *steady-state* phase of TJ—appears to be more in tune with the pressing predicaments that contemporary transformations entail. Murphy eloquently describes this shift from the conventional to the UMTJ through a more up-to-date definition of TJ as "[both] a legal and philosophical theory and a global practice that aims to redress wrongdoing, past *and present*, in order to vindicate victims, hold perpetrators to account, and *transform relationships*—among citizens as well as between citizens and public officials."[28]

We conceptualize unconventional TJ as a series of institutions and procedures—both context-oriented and dependent—to address past and present fundamental HRA and wrongdoing, to fight impunity and oblivion by transforming societal relationships to approximate a world public order of human dignity. This aligns with an equally unconventional notion of political change, not as an episodic but as a continuous process of refining and recalibrating rules, procedures, and institutions toward the maximization of a public order of human dignity.[29]

The shift between these two models of TJ—and the contexts in which they are applied—can be explained, though not exclusively, through the vantage point of the role of the perpetrators in each of these models: whereas state-driven violence was a constant of the CMTJ, with the evolution of the social process and the incorporation of new non-state participants, violence and HRA were no longer exclusively generated from the state, and gradually became a variable rather than the constant of the process that Teitel frames as the normalization of the law on violence,

> [Transitional] justice frames the dilemmas that it tries to address in terms other than sanctioning a regime, to include other diverse values of the rule of law, and to involve the community that had hitherto been left out of the transitional justice project. This move away from judgment reflects a demonstrable shift in transitional justice that is associated with the more complex and diversely felt necessities of State-building in contemporary political circumstances. Whereas, in theory, transitional justice appeared to assume its potentially limitless universal extension into the law, in its late twentieth-century applications, the responses are concededly more contextual, limited and provisional.[30]

1760cc988aa7/content. "[A] public order of human dignity is defined as one which approximates the optimum access by all human beings to all things they cherish: power, wealth, enlightenment, skill, well-being, affection, respect, and rectitude. This, in a nutshell, characterizes the contribution the New Haven School has made to the law's academic and policy enterprise."

28 Murphy, "How Nations Heal," p. 2 (emphasis added).

29 Jaime Olaiz-González, "At the Turn of the Tide: A Framework for a Policy-Oriented Inquiry into Strategies for the Transformation of the Constitutive Process of Authoritative Decision in Mexico" (JSD diss., Yale Law School, 2015), p. 28–31, at https://openyls.law.yale.edu/entities/publication/dd066668-359c-4502-931c-715138dfe470. In this dissertation, Olaiz defines political transformations as "constant and continuous processes of authoritative decision-making by virtue of ongoing collective and inclusive deliberations dedicated to the improvement of the structure and operation of political institutions and their relations with social forces."

30 Teitel, "New Era," p. 896.

Comparative experiences evince that the conventional canon of TJ is not one-size-fits-all. To the contrary, each attempt to address past HRA—notwithstanding the political will of those conducting the process—underscores the contextual, limited, and provisional character of the responses to these challenges.

Context determines the desired outcomes of the transitional enterprise and sometimes trumps the maximization of expectations for effective retributive or restorative justice, depending on the case at hand.

The scope of TJ is necessarily limited by the temporary and substantive constraints imposed by the abuses to be addressed and ultimately redressed. No matter how effective the transitional process would be, its responses would be limited.

Finally, the provisional nature of TJ is a constant, given the possibility of recalibrating and refining the process as it unfolds and the fact that responses may remain applicable until a new cycle of violations arises.

Any attempt to extend the scope of TJ must be grounded in a clear account of its underlying purposes. At its core, TJ seeks to respond to situations in which patterns of serious wrongdoing—whether perpetrated by state or non-state actors—have eroded the normative foundations of political community. In such contexts, TJ operates as a framework for restoring legitimacy by vindicating victims, establishing accountability, and transforming relationships between citizens and public institutions.

However, extending TJ beyond its conventional paradigms raises an important concern: the risk of conceptual overextension. If TJ is understood as applicable to any context involving injustice or institutional failure, it risks losing its distinctive normative function. For this reason, its application must remain anchored in specific circumstances that justify exceptional institutional responses.

In this regard, TJ should not be conceived as a permanent or all-encompassing framework, but rather as a context-sensitive and functionally limited set of mechanisms triggered by configurations of systemic wrongdoing. The challenge, therefore, is not simply to expand its reach but to articulate criteria that allow for its principled application in contexts beyond traditional paradigms without diluting its conceptual coherence.

This broader understanding of TJ is consistent with an emerging strand of scholarship that emphasizes its relevance in addressing structural and socio-economic forms of injustice. Pablo de Greiff has underscored the importance of integrating economic, social, and cultural rights into TJ processes,[31] while

31 Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, U.N. Doc. A/HRC/21/46, 2012, at https://documents.un.org/doc/undoc/gen/g12/158/58/pdf/g1215858.pdf.

Paul Gready and Simon Robins have advanced the notion of "transformative justice" as a framework oriented toward addressing entrenched patterns of inequality and exclusion.[32] In a similar vein, Dustin N. Sharp has argued for emancipating TJ from its paradigmatic confines, highlighting its potential applicability to contexts of ongoing structural violence.[33] These contributions reinforce the need to reconceptualize TJ in functional terms, while remaining attentive to the risks of conceptual overextension.

Hence, the contextual, limited, and provisional character of TJ points to a different perspective, more in tune with these features, that departs from the CMTJ and is more akin to the one-size-fits-all conception.

All in all, this approach implies that the scope of inquiry in the resulting UMTJ is no longer restricted to past wrongdoings and abuses performed by military juntas or political despots assisted by military and paramilitary groups, nor addressed exclusively from the top-down by succeeding power elites, but from the bottom-up by newly enfranchised relevant participants with a say on the TJ project.[34]

The UMTJ may equally address present HRA, structural inequality and humiliation, systemic political corruption, non-state actors' influence on the maximization of violence, racial oppression, systemic police violence, voter suppression and disenfranchisement, human trafficking, structural violence against women, failed implementation of public policies, just to mention a few.

The narrow character of the CMTJ also shows that it is unable to channel complex processes of transformation that do not entail backward-looking strategies to punish past wrongdoings by repressive regimes.[35] To the contrary, the UMTJ is more context-oriented, adequately equipped with a broader scope of inquiry to capture the signaling of processes of societal transformation that do not fit the general standards of more traditional conceptions of TJ. This breadth provides enough flexibility to incorporate the array of challenges contemporary transformations address into the domain of TJ.

32 Gready and Robins, "From Transitional to Transformative Justice."

33 Dustin N. Sharp, "Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition," in *International Journal of Transitional Justice* 9, 1 (2015), p. 150–169, https://doi.org/10.1093/ijtj/iju021.

34 Sharp, p. 899. This is underscored by Professor Teitel: "[There] has also been a distinct privatization of the transitional response, involving devolution to new political actors, juridical and alternative, such as civil society—including churches, human rights groups, and other transitional non-state actors—to its relegation to private parties, whether through litigation or other alternative strategies."

35 An interesting argument of predicting and projecting future trends of TJ was articulated by Siegfried Wiessner and Andrew Willard, in which they introduced a series of unconventional alternatives and recommendations in the global common interest that departed from the CMTJ. See Siegfried Wiessner and Andrew Willard, "Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity," in *American Journal of International Law* 93, 2 (1999), p. 316, https://doi.org/10.2307/2997992.

A remarkable illustration of this expanded understanding of TJ can be found in the Colombian experience. The design of the *Jurisdicción Especial para la Paz (JEP)*, as part of the Integral System of Truth, Justice, Reparation, and Non-Recurrence, reflects a sophisticated attempt to address large-scale violence in a context that does not neatly fit into the framework of classical transitions from authoritarianism. As scholars such as Rodrigo Uprimny[36] have argued, the Colombian case illustrates the possibility of articulating TJ frameworks in settings characterized by protracted armed conflict and institutional continuity. This experience has significantly expanded the scope of TJ beyond its original paradigms, incorporating hybrid models that combine accountability, restoration, and institutional transformation. Structured around the principle of restorative justice, this model is not limited to the conventional aspects of TJ; rather, it is designed to address the multiple challenges that arise from a transitional process.[37]

The UMTJ may be more fitting to cases in which some societies—notwithstanding the fact that they are not passing through or coming from a conventional process of political change, namely transitions to democracy, nor coming from a repressive regime or a national internal conflict—are equally compelled to confront an array of systematic past and present wrongdoings that must be dealt with to reconcile society and restore the social thread that was severely damaged by such wrongdoings.

In sum, the distinction between conventional and unconventional approaches to TJ requires further qualification. Rather than a rigid dichotomy, it is more accurate to conceive of TJ as operating across a spectrum of contexts. At one end lie the paradigmatic cases associated with the so-called "third wave" of democratization, in which TJ emerged as a response to authoritarian rule. A second set of contexts includes transitions from armed conflict to peace, where the TJ framework has been adapted to address large-scale violence involving both state and non-state actors. More recently, a third category has begun to emerge, encompassing societies that, while not undergoing a formal regime transition, are nonetheless characterized by persistent patterns of structural violence, impunity, and institutional fragility. It is within this third category that the Mexican case can be more accurately situated, and from which the need for a functional recalibration of TJ becomes most apparent.

36 Rodrigo Uprimny, "Transitional Justice Without Transition? The Colombian Experience in the Implementation of Transition Measures," in *Inter-American Institute of Human Rights, Contribution of Truth, Justice, and Reparation Policies to Latin American Democracies,* San José, Inter-American Institute of Human Rights, (2011), p. 121–152, at https://archivos.juridicas.unam.mx/www/bjv/libros/12/5799/6.pdf; Rodrigo Uprimny, et al., "Justicia transicional y proceso de paz en Colombia", *Aportes. Revista de la Fundación para el Debido Proceso*, 18 (2013).

37 Juana Acosta-López and Cindy Vanessa Espitia Murcia, "Justicia restaurativa y reparación: desafíos de la JEP frente a una relación en construcción," in *Vniversitas* 69 (2020), p. 1–31, https://doi.org/10.11144/Javeriana.vj69.jrrd.

3. *Status Quaestionis* of Transitional Justice in Mexico

TJ has been characteristically elusive in Mexico. In contrast to other distinctive experiences in Latin America, there is a kind of Mexican exceptionalism[38] in analyzing its record of successfully articulating and implementing policies to address past HRA. Conversely, if there has been a non-written official policy, it has been that of utter oblivion.[39]

Mexico's widely known tradition of concentration of power over the 20th century revolves around a single-party political system mainly incapable or unwilling to channel institutional political opposition and social dissent,[40] resulting in the so-called *Dirty War* (DW) against political opponents and activists. It took place for almost a quarter of a century, between the late 1960s and the early 1990s, during which the State deployed a shameful series of strategies to kidnap, torture, kill, or disappear thousands of individuals who pushed for a more democratic and inclusive system of government.

The lack of institutional policies to investigate, prosecute, and punish these crimes has tainted Mexico's commitment to the international system for the protection of human rights,[41] notwithstanding some institutional initiatives that have lured it to no avail. Mexico's failure in the early 2000s to come to terms with its past of systematic HRA[42] fostered a culture of anomie[43] and impunity that ultimately led to the unprecedented maximization of violence and the corresponding human rights crisis that resulted in the so-called *war*

38 Mexican exceptionalism in the field of TJ can be explained by the modest or absent record in coming to terms with the legacies of past HRA during the dirty war of the 1970s. The lack of policies with a TJ perspective has positioned Mexico as the exception in Latin America in the implementation of restorative justice. From another vantage point, there is also the claim that, since Mexico has not experienced an actual transition to democracy, there is no place to discuss TJ in Mexico. See Mara Hernández et al., *Reflections on Transitional Justice in Mexico: Paradoxes and Possible Processes*, International Center for Transitional Justice, Briefing Paper, November 2020, at https://www.ictj.org/publication/reflections-transitional-justice-mexico-paradoxes-and-possible-processes.

39 Jaime Olaiz-González, "Coming to terms with the past: The Mexican Juncture between remembrance and forgetfulness," in Nadine Grotkamp et al. (coordinators), *Erinnern und Vergessen*, München, Martin Meidenbauer, 2007, p. 312–325. See also Jaime Olaiz, "Enfrentando el pasado: Disyuntiva de México entre el recuerdo y el olvido," in *Ars Iuris* 35 (2006), p. 183–200.

40 Enrique Krauze, *La Presidencia Imperial. Ascenso y Caída del Sistema Político Mexicano (1940-1996)*, México, Tusquets, 1997, p. 128–159.

41 Juana I. Acosta L. and Ana María Idárraga M., "Alcance del deber de investigar, juzgar y sancionar en transiciones de conflicto armado a una paz negociada: convergencias entre el Sistema Interamericano de Derechos Humanos y la Corte Penal Internacional," in *Revista Derecho del Estado*, 45 (2020), p. 55–99, https://doi.org/10.18601/01229893.n45.03.

42 Jaime Olaiz, "Justicia, verdad y reconciliación: Claves para la reconstrucción moral de México," in *Ars Iuris* 36 (2006), p. 201–227.

43 Carlos S. Nino, *Radical Evil on Trial*, New Haven, Yale University Press, 1996, p. 47. Nino describes what he calls the "four recurring dynamics" that emerged in Argentina since the beginning of the 19th century: ideological dualism, corporatism, anomie, and the concentration of power. Considering the remarkable parallels between Argentina and Mexico, not only in shaping their cultural mindsets but also in their historical development, and given empirical evidence, Nino's description of these trends is very useful for analyzing their influence on Mexican contemporary history as well. With respect to the notion of *anomie*—a legacy of the Spanish colonial period in Latin America—it is perfectly captured in the words of Professor Nino: "Here the law is respected, but not obeyed."

on the drug cartels (WDC) initiated in the administration of President Felipe Calderón, which continues to this day.[44]

There is an important distinction between these two periods of massive human rights violations in Mexico:

Inasmuch as the DW was chiefly conducted by state actors against political opponents, the WDC has displayed an array of non-state participants that are alien to the CMTJ of traditional justice—such as organized crime, thugs, kingpins, and drug lords—leaving traditional state actors performing a more marginal and yet equally serious role by allowing the drug cartels to control extensive parts of the territory and perpetrating massive killings without an effective institutional response to bring them to justice.

With this in mind, we will demonstrate that the way in which the DW was conducted mainly by state actors during a period of political repression, the enterprise to come to terms with these events fits the CMTJ, whereas the predominance of the drug cartels in perpetrating massive human rights violations makes this period more fitting to what we have described as the UMTJ due to the contextual, limited, and provisional character of the causes and the potential responses to these events.

3.1. A Heavy Legacy From the Past: The Dirty War of the 1970s and 1980s

The social changes and international movements of the 1960s affected Mexico's middle class, prompting a series of protests by doctors, peasants, railroaders, and, most importantly, students, who demanded plural democracy and civil liberties. The government's reaction was further entrenchment and persecution of political opponents and dissidents using police and law enforcement agencies that ran amok for almost two decades. This period is known as *Mexico's dirty war*,[45] and its estimated number of victims ranges from 1,200 to more than 3,000, comprising extrajudicial killings, torture, disappearances, and il-

44 Olaiz-González, "At the Turn of the Tide," p. 248–254.

45 Roderic Ai Camp, *Mexico: What Everyone Needs to Know*, New York, Oxford University Press, 2011, p. 113–115. Camp explains Mexico's Dirty War: "[The] persecution of left-wing political activists [began] in earnest after the 1968 student movement. After imprisoning many activists following the tragic massacre of students and bystanders in October 1968, the government instructed its security forces to persecute other potential leaders. In December 1970, President Luis Echeverría, the former minister of government who oversaw the massacre of student demonstrators under his predecessor (Gustavo Díaz Ordaz), took office and began his own contradictory strategy of dealing with dissident groups. He recruited some former student leaders to the government and pursued others through the Federal Security Agency in the Secretariat of Government or directly through the armed forces. Several groups resisted the violent reprisals, and several guerrilla organizations emerged during the Echeverría administration (1970–1976). [During] this period, units of the Mexican Army were involved in human rights abuses throughout Mexico, including the murder of prisoners."

legal detentions.[46] The *modus operandi* was very similar to *Operation Condor*,[47] implemented in the Southern Cone of South America, particularly in Chile and Argentina. In contrast to both countries, in Mexico, these abuses have not been prosecuted or punished. There is no official account of what really happened over those years.

The first attempts to investigate these crimes date back to the 1980s, when numerous claims were filed with the Human Rights Office of the Ministry of Interior. Over time, this office became the National Commission of Human Rights, a constitutionally independent agency of the Mexican government responsible for overseeing the protection of human rights nationwide. However, during the first decade after its creation, the Commission avoided the DW case and its ominous legacy of abuse.

This systemic neglect started to change—though gradually—by the beginning of the millennium, with the historical shift in power when Vicente Fox won the presidential election after seven decades of a single-party regime in Mexico. Over those years, the Commission issued an official report on the forced disappearances of the 1970s and 1980s, which comprised the analysis of 532 documented cases on this matter, evincing the institutional responsibility of state agents—especially of the military—in performing these violations. Around 275 forced disappearances were fully validated by the Commission to no further avail from any law enforcement agency.

This report was the first documented official undertaking addressing human rights violations committed during the DW and therefore represented Mexico's government's first official acknowledgment of their existence.[48] Based upon this report and within its scope of jurisdiction, the Commission issued Advisory Opinion 026/2001 recommending that the Executive Branch create a special prosecutor's office to investigate the forced disappearances and human rights violations documented in the report. As a result, President Fox issued a decree creating the Special Prosecutor's Office (FEMOSPP) to investigate, within federal jurisdiction, the series of crimes and abuses described in the report. By establishing this office, the Fox administration signaled a promising endeavor to come to terms with the past, but, as it eventually showed, it utterly failed.

46 See Mariana Mas Minetti, "A Victory for the Truth about Mexico's 'Dirty War'," in *Open Society Justice Initiative*, February 8, 2017, at https://www.justiceinitiative.org/voices/victory-truth-about-mexico-s-dirty-war and The National Security Archive, *Official Report Released on Mexico's 'Dirty War'*, November 21, 2006, at https://nsarchive2.gwu.edu/NSAEBB/NSAEBB209/.

47 *Operation Condor* was a broad strategy to target, kidnap, torture, disappear, and murder political opponents to the military dictatorships that ruled most countries of the southern part of the western hemisphere, particularly Chile, Argentina, Uruguay, and Paraguay, in the late 1970s and early 1980s. See Giles Tremlett, "Operation Condor: the cold war conspiracy that terrorized South America," in *The Guardian*, September 3, 2020, at https://www.theguardian.com/news/2020/sep/03/operation-condor-the-illegal-state-network-that-terrorised-south-america.

48 Available at www.cndh.org.mx/sites/default/files/doc/Informes/Especiales/2001_Desapariciones70y80.pdf.

The FEMOSPP was procedurally constrained from prosecuting the alleged perpetrators due to applicable legal limitations and an underlying policy of covering up prominent actors of the past who took part in these crimes.[49] A good illustration of this was the Supreme Court's decision in 2005 about a students' massacre on 10 June 1971.[50] Deciding on a writ of *amparo* to prosecute those involved in these events, the Court denied claims to prosecute alleged perpetrators due to the incorrect classification of the alleged crimes and the application of domestic law on limitations.[51]

All in all, the only plausible outcome of the FEMOSPP was a report that, in a very limited fashion, unveiled the record of crimes and abuses during the DW,[52] which by 2006 was already widely known from the national and international press and media outlets. Thus, the report did not contain any substantial revelations and did not result in the initiation of any effective criminal proceedings against anyone, in good part due to the applicable statute of limitations.

However, the report from the FEMOSPP was eventually used by the Inter-American Commission of Human Rights as supportive evidence to substantiate the case of *Rosendo Radilla*, who was disappeared by members of the military in 1974. The evidentiary value of the report was vindicated by the Inter-American Court of Human Rights (IACtHR) in the Radilla case, adjudicated in 2009.[53] The IACtHR found Mexico responsible for the forced disappearance of Mr. Radilla and for violating the rights to access to justice, legal guarantees, and judicial protection of his relatives. Such violations were a consequence of a disproportionate regulation to maintain a privileged status for the members of the military when facing charges of alleged human rights violations against civilians: it only required a member of the military to be involved in the alleged crimes to grant competence to the military jurisdiction at the detriment of basic judicial protection of the victims. Considering this, the IACtHR established the obligation of Mexican judges to adjudicate cases involving forced disappearances in accordance with international standards.[54] The internalization of this

49 Jaime Olaiz, "Los derechos humanos y la superación del pasado en México: clave fundamental para consolidar la transición democrática," in *Ars Iuris*, 31 (2004), p. 101–131.

50 See https://nsarchive.gwu.edu/briefing-book/mexico/2021-06-10/corpus-christi-massacre-fifty-years. The so-called *Corpus Christi Massacre* or *Halconazo*, which occurred on June 10, 1971, involved the killings of hundreds of students by paramilitary groups coordinated by the *Dirección Federal de Seguridad* (the intelligence agency and secret police in Mexico that performed most of the HRA during the dirty war). From the very day of the massacre, public opinion pointed to President Luis Echeverría and the Secretary of the Interior, Mario Moya Palencia, as the responsible officials ordering the killings. This case was investigated and prosecuted by the FEMOSPP and resulted in the issuance of arrest warrants against former President Echeverría—something alien to Mexico's political culture—under the charges of genocide.

51 Resolución del Recurso de Apelación Núm. 1/2004 [Decision on the Appeal 1/2004], Primera Sala de la Suprema Corte de Justicia de la Nación [SCJN] [First Chamber of the Supreme Court], February 23, 2005, at https://www.scjn.gob.mx/sites/default/files/resoluciones/2017-02/7.1Anexo07-2005-J.pdf. The substantive error from the prosecution was the inaccurate classification of the massacre as genocide and not as a crime against humanity.

52 It was the National Security Archive at George Washington University and the work of Kate Doyle that played an instrumental role in disclosing not only the FEMOSPP report, but more importantly, the pending issues that the report failed to clarify. See https://nsarchive2.gwu.edu/NSAEBB/NSAEBB209/.

53 *Radilla Pacheco v. Mexico*, Judgment, IACtHR (ser C) Num 209 (November 23, 2009), para. 73.

54 *Radilla Pacheco v. Mexico*, para. 266.

momentous decision would trigger fundamental and systemic changes in how the judiciary would address grave human rights violations going forward.

3.2. Radical Evil in Mexico: The War on the Drug Cartels (2007–Present)[55]

By 2006, drug violence had become a constant in Mexico's daily life. Nearly all areas of social activity were affected, from small villages to larger urban settings, dramatically changing the Mexican way of life: most citizens changed their routines and behavior, considering deteriorating public safety due to the ceaseless struggle of the drug cartels to control different regions of the country.

This scenario became more complex when President Calderón ordered in 2007 the deployment of military forces throughout the country, especially in some regions of Mexico where the presence of the drug cartels was more evident and strong enough to undermine the authority of democratically elected local authorities.

The causes for this crisis were manifold: from the power vacuum left by the PRI after losing the Presidency in 2000 that were eventually filled by formal and informal relevant participants, such as state governors or drug cartels kingpins, respectively, to the gradual deterioration of the social net due to the exaltation of drug trafficking and its economic impact in insulated communities across the country or the unstoppable expansion of the cartels through the maximization of violence and intimidation within the members of those communities.[56] The government's decision was based upon the belief that a frontal response against the uncontested growth and dissemination of the cartels was the last choice to preserve civility, security, and ultimately, the way of life in Mexico. This was rapidly proved wrong.

The escalation of violence since 2007 was also due to the success of increasing law enforcement operations against the leaders of the cartels, which necessarily created leadership vacuums, often followed by bloodshed and killings until new leadership was assumed, or, as has occurred in numerous cases, the respective drug cartel is fragmented.

The outcome from this initiative was an unlimited spiral of violence that has resulted in more than 350,000 homicides over the last fifteen years, with an average of 25,000 deaths per year, and almost 80,000 people have gone miss-

55 Olaiz, "At the Turn of the Tide," p. 249–254. Olaiz explores the influence of the maximization of the expectations of violence in Mexico's constitutive process of authoritative decision-making. Some parts of this section are drawn from that study.

56 Jo Tuckman, *Mexico. Democracy Interrupted*, New Haven, Yale University Press, 2012, p. 18–83.

ing since 2006.[57] The figures from the drug war have exponentially surpassed those of the DW, leaving Mexico immersed in an apparent hopeless situation.

Sparked by the WDC and its increasing collateral damage, an array of social movements comprised of the families of the civilian casualties and of the disappeared have tirelessly pushed for the implementation of effective law enforcement and policies of truth, justice, punishment, and reparation.[58]

As in the case of human rights violations that occurred during the DW, claims for violations during the war against drug trafficking were not heard either, leading to an increase in claims before the Inter-American system, which triggered a buildup of an international human rights canon in Mexico, continuing with the progeny initiated with the *Radilla* case.

The IACtHR ruled against Mexico in *González et al.*, known as *Campo Algodonero* ("Cotton Field"), concerning the disappearance and death of three women. This case evinced an environment of violence and gender discrimination in Ciudad Juárez (Chihuahua), which between 1993 and 2005 had provoked the homicides and forced disappearances of hundreds of women. Following the victims' relatives' complaints, the authorities' actions were slow and ineffective due to the lack of results and irregularities in the autopsies, in the preservation of the crime scenes, and in the collection and handling of evidence. In addition, the responsible officials reproduced gender stereotypes that led to violations of the victims' and their families' human rights. The IACtHR held that all these irregularities negatively affected the rights of access to justice and to judicial protection, as well as the rights of victims' families and society to know the truth. In doing so, the Court furthered the conceptual development of the right to truth.[59] The omissions and irregularities of the authorities in the investigations also implied a degrading treatment of the victims' families, which in turn led to violations of their right to personal integrity.[60] Thus, the IACtHR established the relationship between the right to truth and the right to personal integrity.

57 Seehttps://hchr.org.mx/comunicados/95000-personas-desaparecidas-y-52000-personas-fallecidas-sin-identificar-el-comite-de-la-onu-urge-a-mexico-a-actuar-de-inmediato-para-buscar-investigar-e-identificar/.

58 Over the last few years, a growing movement of mothers of missing persons due to the WDC—the so-called *Movimiento por nuestros desaparecidos en México*—has gained notoriety and influence in some critical areas of the government, such as the *Secretaría de Gobernación* (Ministry of Interior), to implement policies to seek and find the more than 90,000 disappeared people. Additionally, in the last decade, there have been other equally influential yet ephemeral social movements such as the Movement for Peace with Justice and Dignity (MPJD), made up of thousands of victims of the drug wars and their families. It became a paradigm for social mobilizations in Mexico and inspired similar movements to challenge the governing elites and their public records. Altogether, these social mobilizations have served as a voice for traditionally insulated minorities within the political process, fostering the belief that, with sufficient organization among NGOs, they can constitute a powerful force against the dominant elites.

59 *González et al. ("Cotton Field") v. Mexico*, Judgment, IACtHR (ser C) No. 205 (November 16, 2009), para. 388.

60 *González et al.*, para. 424.

Later, the IACtHR ruled in the cases of *Fernández Ortega et al. v. Mexico*, and *Rosendo Cantú et al. v. Mexico*, both decided in 2002, and in the case of *Cabrera García and Montiel Flores v. Mexico*, concerning violations committed in 1999. The victims in the *Fernández Ortega* and *Rosendo Cantú* cases were two indigenous women of the *Me'Phaa* ethnic group, who were raped and tortured by members of the Mexican army deployed in the mountains of Guerrero. The *Cabrera García and Montiel Flores* case dealt with the detention and torture of environmental activists by the army. The Court concluded that these cases were related by their context, namely the deployment of military forces to public security operations, which posed an elevated risk to the rights of persons in situations of heightened vulnerability.[61]

In the *Fernández Ortega* and *Rosendo Cantú* cases, the IACtHR analyzed how women were particularly affected by the situation of vulnerability. It also brought in the concept of "military institutional violence"[62] as the scenario where the rapes were committed, which were equated with forms of torture.[63] In these three cases, the IACtHR addressed the issue of military jurisdiction in the Mexican legal system as inconsistent with the *corpus iuris* of human rights protection, an issue on which it had already ruled in the *Radilla* case.

With the sole exception of *Campo Algodonero*, in all these cases, the armed forces took part in the human rights violations for which Mexico was condemned. The IACtHR reinforced two key ideas: on the one hand, the vulnerability that arises when the armed forces carry out public security tasks, and on the other, the structural violence of the military, aggravated by gender bias. In this context, the IACtHR advanced arguments to confront the militarization process that has developed in Mexico since the beginning of the WDC.

In the *Alvarado Espinoza* case,[64] the IACtHR analyzed human rights violations committed as part of the war on drugs; here, the strategy of militarization was deepened. The case dealt with the forced disappearance of Nitza Alvarado Reyes, Rocío Alvarado Reyes, and José Ángel Alvarado Herrera, who were abducted and remain disappeared. At the time of the events, state security was under the operational command of the armed forces.

The IACtHR had established in several precedents that the armed forces' intervention should be limited and exceptional.[65] Military training to defeat the

61 *Cabrera García and Montiel Flores v. Mexico*, Preliminary Objections, IACtHR (ser C) No. 220 (November 26, 2010), para. 85.

62 *Fernández Ortega et al. v. Mexico*, Judgment, IACtHR (ser C) No. 215 (August 30, 2010), para. 79. See also *Rosendo Cantú et al. v. Mexico*, Judgment, IACtHR (ser C) (August 31, 2010), para. 71 and 121.

63 *Fernández Ortega*, para. 128.

64 *Alvarado Espinoza et al. v. Mexico*, Merits, Reparations, and Costs, Judgment, IACtHR (ser C) No. 370 (November 26, 2018), para. 182.

65 *Montero Aranguren et al. v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, IACtHR (ser C) No. 150 (July 5, 2006).

enemy increases the lethality of their operations, thereby aggravating the risk to human rights.[66] In sum, the IACtHR concluded that the use of the armed forces for policing is contrary to the rule of law.[67]

The IACtHR rulings not only provided a remedy for the victims given the incapacity of the domestic authorities, but also became instrumental in a consequential constitutional amendment on human rights that incorporated, as supreme law, all the treaties and conventions on human rights signed by Mexico.[68]

This amendment triggered a series of momentous decisions by Mexico's Supreme Court to gradually internalize international standards and principles for the protection of human rights as constitutionally binding[69] and, therefore, trumping statutory rules and prescriptions that in the past encumbered any initiative of investigation, prosecution, and punishment.

In sum, these decisions, combined with the human rights amendment, comprise a canon that has paved the way for more meaningful strategies to advance TJ in Mexico.

4. Getting Lemons: The Case of the Popular Referendum

And yet, there was a significant turnout in 2018: the victims' disappointment was stoked by presidential candidate López Obrador (AMLO) during that year's campaign. He mobilized a great number of supporters by articulating a narrative of blame and retribution against past administrations, pointing out that the social, political, and economic deterioration in Mexico and the resulting human rights crisis from the WDC were chiefly due to the enduring and deeply rooted corruption among the power elites, private corporations, and public institutions.[70] This approach aimed to generate public expecta-

66 *Cabrera García and Montiel Flores v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, IACtHR (ser C) No. 220 (November 26, 2010), para. 85.

67 *Osorio Rivera and relatives v. Perú*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, IACtHR (ser C) No. 274 (November 26, 2013).

68 Hugo S. Ramírez and José M. Soberanes, *El artículo 1º constitucional: la teoría constitucional de los derechos humanos*, México, Instituto de Investigaciones Jurídicas, UNAM, 2021, at https://archivos.juridicas.unam.mx/www/bjv/libros/13/6446/16.pdf. See also Juan M. Acuña, "El parámetro de regularidad constitucional y la ley suprema de la Unión," *Cuestiones Constitucionales*, 42 (2020), https://doi.org/10.22201/iij.24484881e.2020.42.14337.

69 Jaime Olaiz-González, "Derechos humanos y cambio constitucional en México: una alternativa para la mutabilidad constitucional incremental," in Hugo S. Ramírez and José M. Soberanes (editors), *El artículo 1º constitucional: la teoría constitucional de los derechos humanos,* México, Instituto de Investigaciones Jurídicas, UNAM, 2021, p. 349–382.

70 The pervasive effect of the aggressive expansion of the drug cartels in Mexico is unprecedented. They have been able to infiltrate almost every public institution at the federal, state, and local levels to varying degrees, revealing systemic institutional weakness. As a report from *The Washington Post* portrayed in 2020: "In a fundamental shift, the criminals of today are reaching even deeper into the country, infiltrating communities, police forces, and town halls. A dizzying range of armed groups—perhaps more than 200—have diversified into a broadening array of activities. They're not only moving drugs but kidnapping Mexicans, trafficking migrants, and shaking down businesses from lime growers to mining companies." See https://www.washingtonpost.com/graphics/2020/world/mexico-losing-control/mexico-violence-drug-cartels-zacatecas/and

tions that, if elected, AMLO would prosecute his predecessors and members of their administrations for alleged wrongdoing and corruption. Such a promise was instrumental for his landslide victory that year.

This set the stage for AMLO's call for a popular referendum. This was unprecedented in Mexico's constitutional process, as it had not historically contemplated mechanisms of direct democracy. But after a constitutional amendment in 2014, the popular referendum was incorporated into Mexico's constitutional system in Article 35-VIII, which outlines a special procedure for calling it by the President, Congress, or a substantial number of citizens. This provision requires a minimum participation threshold of 40 % of the national list of registered voters for the referendum to be constitutionally binding.[71]

This amendment was complemented by a federal statute regulating popular referendums.[72] Together, the two regulations provided an adequate framework for implementing these mechanisms from 2020 onwards.

Hence, in keeping with his campaign promises, AMLO initiated the process of calling for a national referendum to investigate and prosecute five of his predecessors for alleged corruption and wrongdoing before, during, and after their respective administrations. To do so, the government articulated the referendum question, which, under Article 35-VIII.3, had to be submitted to the Supreme Court for validation of its constitutionality. The question posed by AMLO was,

> [Are] you in agreement or not that the relevant competent authorities, in accordance with applicable laws and procedures, investigate and, if it is so, prosecute presumptive crimes and wrongdoings committed by former presidents Carlos Salinas de Gortari, Ernesto Zedillo Ponce de León, Vicente Fox Quesada, Felipe Calderón Hinojosa, and Enrique Peña Nieto, before, during, and after their respective administrations?[73]

The Court's deliberation on the constitutionality of this question was sharply divided.[74] Against all odds, the block of AMLO's appointees and the Presi-

https://www.washingtonpost.com/graphics/2020/world/mexico-losing-control/mexico-military-security-drug-war/.

71 For further analysis, see Jaime Olaiz-González, "Regresión por transformación: Cambio constitucional en tiempos de la denominada 'cuarta transformación'," *Cuestiones Constitucionales*, 45 (2021), p. 237–278, https://doi.org/10.22201/iij.24484881e.2021.45.16663.

72 The first federal statute regulating popular referendum—*Ley Federal de Consulta Popular*—was enacted on March 14, 2014, and amended on May 19, 2021.

73 Revisión de la Constitucionalidad de la Materia de Consulta Popular 1/2020 [Review on the Constitutionality of the Subject Matter for Popular Referendum 1/2020], Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court], October 1, 2020, para. 87, p. 30, at https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=274021.

74 Jaime Olaiz-González, "Mexican Supreme Court at Crossroads. Three Acts of Constitutional Politics," in *ICL Journal-Vienna Journal on International Constitutional Law* 14, 4 (2020), p. 447–472, https://doi.org/10.1515/icl-2020-0022.

dent of the Court declared the constitutionality of the question, based upon two key arguments:

First, that the Court's role in scrutinizing the constitutionality of the question for a referendum was not of a judicial but rather a political nature, and therefore, the Court was expected to perform this exercise of constitutional interpretation aiming at maximizing the prospects for the effective implementation of the referendum by applying a deferential scrutiny rather than a strict one to the question formulated by the proponent.

The second argument was much more persuasive in connecting the popular referendum to the need to implement TJ mechanisms in Mexico.[75] In this instance, the Court was especially creative in crafting an argument in favor of truth commissions in case the outcome from the referendum met the minimum threshold of 40 % prescribed in Article 35-VIII.2. The core rationale behind this argument was the government's prerogative to discretionally choose the most effective and meaningful mechanism to fulfill the mandate from the referendum. From the Court's vantage point, this dealt unequivocally with the implementation of TJ strategies and mechanisms to come to terms with the past,

> [This] Court concludes that the subject matter of this referendum *is the clarification of past events in Mexico*, which comprise an array of situations and facts that are portrayed by the proponent (President López Obrador) as especially relevant for their historic and political implications. This would mean for the Executive branch, within the scope of its constitutional powers and prerogatives, the possibility to implement a series of alternatives if the referendum results binding: *from the creation of innovative mechanisms to clarify some specific events, as in other countries that guaranteed the right for truth, through other devices that may allow competent authorities to initiate prosecutions* in accordance with Title IV of the Constitution.[76]

Nonetheless, this decision was not free of extended criticism, since, from a conventional perspective, the President's question was clearly unconstitutional and violated the fundamental right to due process of the individuals explicitly mentioned in it.[77] Furthermore, Article 35-VIII.3 specifically bars any referendum that may restrict any human rights protected by the Constitution. For these reasons and to keep coherence with its arguments of political deference to this democratic mechanism, the majority redrafted the question to be submitted for popular referendum in the following terms,

75 In this respect, it is worth exploring the role of constitutional courts in consolidating complex processes of political transition through robust judicial review as contended by Vicente Benítez and Germán González. In their view, Constitutional courts face a dramatic challenge in asserting their authority during the immediate phase following democratization, when they remain at risk of political capture. The more constitutional prestige the Court deploys in public opinion and with the other branches of government through adjudication, the less likely it is that any efforts to undermine its independence will succeed. See Vicente F. Benítez R. and Germán A. González H., "El rol de las Cortes y la protección de la democracia: una aproximación desde regímenes transicionales," in *Revista Derecho del Estado*, 36 (2016), p. 41–67, https://doi.org/10.18601/01229893.n36.02.

76 Revisión de la Constitucionalidad, para. 79, p. 28, 29 (emphasis added).

77 Olaiz-González, "Mexican Supreme Court," p. 447–472.

> [Are] you in agreement or not that appropriate actions in accordance with the constitutional and legal framework be carried out in order to undertake actions of clarification of political decisions taken in the past by political actors, aimed at guaranteeing justice and the rights of the possible victims?[78]

Ultimately, this grammar led to greater confusion and condemned the referendum to complete failure. It reached only 7 % participation, and even though the affirmative option received almost 98 % of the votes, the outcome was significantly short of the minimum constitutionally required to render the result binding.[79] Nonetheless, it triggered a national conversation on the plausibility of truth commissions as meaningful mechanisms to clarify past abuses—ranging from recent cases of governmental corruption to the massive HRA—which, from the vantage point of advocates for TJ in Mexico, represents a silver lining. Furthermore, a new generation of Mexicans engaged in such a conversation for the first time, with renewed interest and commitment to fight impunity and clarify the past. Though not ideal, the popular referendum has set the stage for the adaptation of the UMTJ in Mexico.

5. *Making Lemonade:* Testing UATJ in Mexico

Determining whether a TJ mechanism is needed in a polity is neither easy nor arbitrary. It requires societal consensus on the necessity of implementing a transformative justice process to heal the nation and its communities by repairing damage and articulating a shared understanding of the future. To do so, Professor Murphy argues that,

> [deciding] whether transitional justice is necessary for a community requires examining what I call "the circumstances of transitional justice." Transforming political relationships becomes morally necessary and is practically possible under these circumstances.[80]

Such circumstances, taken together, provide a framework for rationality to determine whether to activate or not the TJ mechanism in each society. Let's call the analysis of these circumstances *Murphy's test*, which is a three-prong test that aims at ascertaining the existence of (1) serious existential uncertainty, (2) pervasive structural inequality, and (3) normalized political wrongdoing.[81] Let's elaborate on each of these circumstances:

Serious existential uncertainty can be understood as the collective impossibility to foresee and predict the future due to the weakness of the political context, its institutions, and procedures. As Murphy explains, under such circum-

78 Revisión de la Constitucionalidad, para. 99, p. 33.
79 See https://computos.cp2021.ine.mx/votos-distrito/mapa.
80 Murphy, "How Nations Heal," p. 7.
81 Murphy.

stances, some enduring societal practices and traditions can no longer be taken for granted.[82]

Pervasive structural inequality refers to the consolidation of spheres of asymmetry, humiliation, insulation, and discrimination among the members of a polity.[83] Murphy describes it as the circumstance in which "[certain] groups of citizens are disproportionately unable to avoid poverty, participate in political and economic processes, or shape the rules and norms for interaction."[84]

Finally, *Murphy's normalized political wrongdoing* captures the circumstances "[when] human rights violations perpetrated by state actors become a basic fact of life for members of certain groups."[85] Here we must add that this description—from the vantage point of the UMTJ—equally applies to non-state actors.

The appeal of Murphy's framework lies in its ability to articulate TJ not merely as a response to historical events, but as a function of identifiable structural conditions that affect the stability and legitimacy of political relationships. By focusing on circumstances such as existential uncertainty, structural inequality, and normalized wrongdoing, Murphy provides a normatively grounded and analytically flexible account that is particularly well-suited to contexts that do not conform to classical transitional paradigms. At the same time, this framework is not without limitations. Its relative openness raises questions about the thresholds for triggering TJ mechanisms and the risk of extending the framework beyond its intended scope. For this reason, its application to the Mexican case must be understood not as a mechanical exercise, but as a critical test of its explanatory and normative adequacy.

Hence, to determine whether TJ is needed in Mexico, it is necessary to apply Murphy's Test to the prevailing political and social context. To do so, we will discern its applicability to both moments explored in this article—the DW and the WDC. Notwithstanding that each of these moments, as argued here, fits different models of TJ, this inquiry is equally necessary pertaining to each one of them.

No doubt that, in either case, the deterioration of the rule of law due to enduring impunity, the lack of accountability of past and present perpetrators, and the consistent neglect by government officials to address these wrongdoings and human rights violations altogether give credence to the existence of seri-

82 Murphy.

83 Bruce Ackerman, *We the People, Volume 3: The Civil Rights Revolution*, Cambridge, The Belknap Press of Harvard University Press, 2014, p. 127–153, https://doi.org/10.4159/harvard.9780674416499. Ackerman elaborates an illuminating argument around what he describes as *spheres of humiliation* to assert that the underlying cause of racial segregation was a systemic sense of humiliation that endured the inferiority of black children.

84 Murphy, "How Nations Heal," p. 7.

85 Murphy.

ous existential uncertainty. Present actors are uncertain or unable to predict potential outcomes due to the fragility of the legal and political systems.

With respect to the second circumstance—pervasive structural inequality—in both cases, the victims' demands have been largely obliterated, either because of applicable statutes of limitations in the case of the DW or because of a lack of political will in the case of the WDC. In both cases, the victims and the organizations demanding clarification, prosecution, punishment, reparation, and guarantees of non-recurrence have been utterly ignored and insulated from the constitutive processes related to their claims.

Due to the enduring policy of systemic oblivion of the past or neglect toward the wrongdoings of the present, there is a growing sentiment of normalized political wrongdoing from state and non-state actors. The pervasive effect of the abiding collaboration between drug cartels and state officials at different levels of the government structure evinces the deterioration of the institutional solidity necessary to foster collective trust in public institutions and law enforcement agencies.

If we adhere to Murphy's test, the need to implement a TJ process in Mexico is unequivocal. Given the distinctive, non-conventional nature of its circumstances, the approach needs to be equally unconventional and flexible enough to address an extensive catalog of enduring wrongdoings and violations from both moments of the Mexican experience that remain unaddressed and unhealed.

6. Conclusion

Despite its shortcomings, the call for a popular referendum to *clarify political decisions taken in the past [aimed] at guaranteeing justice and the rights of possible victims* reinserted the overdue claim for truth, justice, reparations, and guarantees of non-recurrence from the victims of the DW and the WDC. But it also introduced a series of unconventional issues not traditionally associated with past events involving corruption, public procurement, sustainable development, law enforcement, human trafficking,[86] and the unconstitutionality of constitutional amendments,[87] among others, that illustrate the array of phenomena that depart from the conventional framework of TJ.

86 For a comprehensive analysis of the contemporary predicaments of human trafficking as a global challenge, Professor Roza Pati's work is particularly illuminating. See Roza Pati, "Trafficking in Human Beings: The Convergence of Criminal Law and Human Rights Law," in Jennifer Bryson Clark and Sasha Poucki (editors), *The SAGE Handbook of Human Trafficking and Modern Day Slavery*, SAGE Publications, 2018, https://doi.org/10.4135/9781526436146.n14.

87 Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, New York, Oxford University Press, 2016, https://doi.org/10.1093/law/9780198768791.001.0001.

The deliberation around the popular referendum made more visible the expectations and demands of the victims and put them again at the center of a national conversation, enfranchising different stakeholders from the traditional political elites,[88] to influence potential outcomes as it is happening with the social movements comprised by the victims of past abuses that are claiming ownership over the discussion to implement different strategies to come into terms with the past.[89]

Further efforts will require disentangling the issues and events that warrant the use of TJ tools, either through conventional institutional procedures or through *ad hoc* mechanisms, such as truth commissions with a clear mandate and a defined scope of inquiry.[90] Unlike the past, there is now a robust international and domestic canon for the protection of human rights that should inform any effort to scrutinize past and more recent events that entailed HRA, corruption, abuses of power, and other wrongdoings.

The key is to address the remaining processes with a more flexible, unconventional approach. For example, time and again, from a macro perspective, each TJ effort implemented over the years has utterly failed. Nonetheless, this has not been the case with more local experiences, such as the truth commission of the state of Oaxaca to investigate and prosecute human rights violations in 2006–2007 committed by state-government officials against members of the so-called *Popular Assembly of the Peoples of Oaxaca*, which resulted in around thirty assassinations and twenty-nine cases of forced disappearances. This truth commission enjoyed structural, budgetary, and operational independence to conduct its investigations between September 2014 and February 2016 and issued its report in March 2016.[91] It set an example of an independent, efficient, and looking-forward effort to address an enduring culture of impunity, violence, and abuse in the state of Oaxaca, which should serve, from the micro perspective, to articulate more efficient TJ efforts at a national level.

88 A remarkable effort from civil society over the last few years is that of the organization *Justicia Transicional en México (JTMX)*, which, through an innovative leadership of young activists educated abroad and familiarized with the contemporary trends of transformative and restorative justice, is pushing for putting this matter and the victims at the center of the public conversation. See https://jtmexico.org/.

89 Teitel, "New Era," p. 899.

90 As a direct result of the popular referendum, President López Obrador issued a decree creating a new truth commission to address the human rights violations committed between 1965 and 1990. Though its work remains to be seen, the independence of this commission is in question, as it was with the FEMOSPP: it is within the government structure, particularly in the *Secretaría de Gobernación.* Furthermore, it excludes from the scope of its mandate the human rights violations that have occurred since 1991, especially those related to the WDC since 2007. See "Decreto por el que se crea la Comisión para el Acceso a la Verdad, el Esclarecimiento Histórico y el Impulso a la Justicia de las violaciones graves a los derechos humanos cometidas de 1965 a 1990," *Diario Oficial de la Federación*, October 6, 2021, Mexico, at http://dof.gob.mx/nota_detalle.php?codigo=5631865&fecha=06/10/2021.

91 There is consensus among human rights organizations and academia that the case of Oaxaca shows a well-organized effort from civil society to promote effective TJ efforts at the state level, which could be replicated at the national stage. The full report is at https://www.cencos22oaxaca.org/wp-content/uploads/2017/02/INFORME-FINAL-CVO-Parte-1-de-2-COMISION-DE-LA-VERDAD.pdf.

TJ is not a linear,[92] let alone ideal, process.[93] Instead, it entails a continuous effort to bring together different pieces of a puzzle that, with time, acquire a distinctive meaning and purpose. Therefore, comparative experiences on the matter evince that in the long run, the shortcomings of the present may become silver linings in the future. That has been the case of the gradual buildup of a TJ canon in Mexico and the apparently failed implementation and outcome of the popular referendum. UATJ mechanisms, rather than the conventional approach, should shed a different light on this and fulfill the overdue promise of truth, justice, forgiveness, and reconciliation in Mexico.

The approach advanced in this article is not without potential objections. A first concern is the risk of conceptual dilution: if TJ is extended beyond regime transitions or armed conflict, it may lose its analytical specificity. A second objection points to the danger of institutional overreach, insofar as the normalization of TJ mechanisms could transform what was originally conceived as an exceptional response into a permanent feature of governance. Finally, there is concern that applying TJ frameworks to contexts such as Mexico may obscure important distinctions between different types of violence and responsibility, particularly when non-state actors play a central role.

These objections underscore the need for a cautious and principled approach. The argument developed here does not seek to dissolve the boundaries of TJ, but rather to refine them by identifying conditions under which its application remains normatively justified and institutionally meaningful. In this sense, the Mexican case should not be understood as an attempt to universalize TJ, but rather as an invitation to reconsider its limits in light of evolving forms of political and social transformation.

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92 Teitel, "Genealogy," p. 86. Teitel explains, "[Transitional] justice implies a *non-linear* approach to time. This phenomenon is reflected in legal processes taken, often in the form of delayed litigation, to extend the scope of transitional justice litigation on a case-by-case basis" (emphasis added).

93 Murphy, "How Nations Heal," p. 6. Murphy argues, "[Particular] mechanisms of transitional justice are controversial and contestable in part because they are *necessarily imperfect*" (emphasis added).

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