

Being normal doesn't come easy to me¹: queering transitional justice mechanisms to enable justice-delivery for LGBTIQ+ people

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¹ "Tu normalidad me cuesta la vida" [original title in Spanish] is a line from a song by the Afro-feminist trans activist Lo Maas Bello. Her music compellingly and profoundly embodies the political stance that we have advocated through litigation and academy. Available on: <https://open.spotify.com/intl/es/track/7i2n2Bkevk66VMVIZZMSYt?si=efd501f4f8b64ea2>

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ABSTRACT

As former judicial representatives of LGBTQI+ victims before the Colombian transitional justice tribunal, we found that our demands for justice shook the positivist foundations of transitional justice, perhaps with a greater intensity than international criminal law can withstand. The formal inclusion of historically excluded populations in protocols or guidelines for justice delivery proves to be insufficient if it isn't accompanied by a profound transformation of the ways in which violence and conflict have been investigated and analyzed. This paper explores the possibilities of queering transitional justice with the use of methodological and analytical alternatives that can enable access to justice for LGBTQI+ people. Through case study, this paper explores the possibilities of queer reading and other queer coding strategies as tools for judicial investigation, analysis, and interpretation by advocates, justices, and other relevant actors in the transitional justice scenario in Colombia. Finally, it provides policy recommendations for a more comprehensive understanding and response to the gendered dimensions of conflict, enabling justice delivery for victims in other transitional justice ecosystems around the world.

KEYWORDS:

TRANSITIONAL JUSTICE, QUEER THEORY, ARMED CONFLICT, GENDER PERSECUTION.

RESUMEN

En nuestra labor de representantes de víctimas LGBTQI+ ante el tribunal transicional colombiano encontramos que nuestras demandas de justicia trastocaban las raíces positivistas de la justicia transicional, quizás con mayor intensidad de la que el derecho penal internacional puede soportar. La inclusión formal de poblaciones históricamente excluidas en protocolos o guías para la administración de justicia ha resultado ser insuficiente si no está acompañada de una profunda transformación de las formas en las que la violencia y el conflicto son investigadas y analizadas en las cortes. Este artículo explora las posibilidades de mariconear la justicia transicional a través del uso de alternativas metodológicas y analíticas que permitan el acceso a la justicia de las personas LGBTQI+. A través del caso de estudio este artículo explora las posibilidades de emplear el *queercoding* a través de metodologías como el queer reading como herramientas para la investigación judicial, el análisis y la interpretación por parte de abogados, jueces y otros actores relevantes en el escenario de la justicia transicional. Finalmente, este artículo provee recomendaciones de política para una comprensión más amplia y una respuesta adecuada a las dimensiones del género del conflicto, lo que permitiría una mejor administración de justicia en otros ecosistemas de justicia transicional en el mundo.

PALABRAS CLAVE:

JUSTICIA TRANSICIONAL, TEORÍA QUEER, CONFLICTO ARMADO, PERSECUCIÓN POR GÉNERO

1. Introduction

Transitional justice systems around the world – their processes and mechanisms – have been designed to respond to generalized human rights violations in a way that allows elasticity of traditional ways of imparting justice. These tend to promote collective approaches to conflict resolution, integrating and interpreting tools from international normative frameworks, broadening the scope of tools, methodologies, and perspectives for justice access and delivery for victims.

The Special Jurisdiction for Peace (SJP) is a transitional justice court that was created in Colombia in 2017 following the signing of the Peace Accord between the national government and the Revolutionary Armed Forces of Colombia (FARC for its initials in Spanish). The SJP is responsible for investigating, clarifying, prosecuting, and punishing the most serious crimes committed in the context of armed conflict in Colombia before December 1, 2016² and delivering truth, justice, reparation, and non-repetition measures for victims (Final Peace Accord, 2016). After 8 years of operation, the SJP has demonstrated both immense potential and numerous shortcomings of this transitional justice system, providing crucial lessons regarding justice delivery and victim participation in judicial mechanisms that are valuable for other transitional justice systems worldwide.

One of the main challenges of transitional justice is to make space for voices that ordinary justice has not previously heard. This is an absence that can be found in several fields: María Mercedes Gómez (2008), a Colombian philosopher, coined the term “prejudice-based violence” to point out those acts that were constantly overlooked by criminology and law, for they should have been seen as crimes motivated by the preconceived idea that someone deserves a punishment or an exile of their community because of who they seem to be. As Gómez points out, the efforts to name such acts as “hate crimes” rendered invisible the true discriminatory systems and contexts that allowed them to happen in the first place. Such institutions can be based on gender, race, class, religion or any other human aspect of daily life. In this case, the systems of misogyny, heteronormativity, and cissexism come together to erase the impact and urgency for judicializing acts of gender persecution committed against queer individuals. For us, this framework allows the possibility of preventing this from happening moving forward in Colombian and other transitional justice scenarios.

Such a claim of dignity, then, restores the promise of having the law as a tool that peacefully resolves conflicts. We believe that the lack of official information about the manifestations of violence and discrimination against historically marginalized people during conflict has created the need to identify and implement alternative, complementary, and innovative methodologies for documenting and analyzing information. In the case of LGBTIQ+ people, justice delivery mechanisms must be able to recognize 1) the historical invisibility and silencing experienced by LGBTIQ+ individuals in society 2) the naturalization of prejudiced narratives that tolerate and perpetuate violence against LGBTIQ+ identities and expressions 3) the instrumentalization of LGBTIQ+ people for purposes of war and 4) other aspects of the social, cultural and political context that frame the dynamics of gender-and-sexuality-based prejudice that have motivated the violence against LGBTIQ+ individuals during conflict. For transitional justice to be able to address the justice needs of LGBTIQ+ victims, transitional judges must address the limitations of current participation, investigation, and judicial interpretation methodologies by incorporating renewed perspectives and tools into their practices.

For transitional justice systems to effectively deliver justice for queer victims and other people who have been systematically marginalized in social and institutional settings, the methods by which testimonies and other evidence are gathered and analyzed must be revisited. To do so, we propose the use of methodologies and critical perspectives from queer studies, in particular queer coding mechanisms such as queer close reading, and other techniques that can enhance the comprehension of relevant legal categories in the criminal attribution of responsibility.

² Para el análisis de todos los ámbitos de política pública puede consultar el informe de las coautoras, González Baéz, M., Otón Olivieri, P., Reyes Gil, Y. y Vicente, E. (2024, febrero). Políticas Públicas y el Trabajo de Cuidados en Puerto Rico [Informe].

First we will explore the limitations of justice delivery for LGBTIQ+ people – specifically in transitional justice scenarios – relative to the positivist tradition of such systems. We will then explore how queer perspectives can (and have) enriched justice delivery, introducing queer coding (particularly the methodology of queer close reading) as tools that can unveil hidden truths— perhaps unconsciously buried—in the truth contributions made by war participants contributing to a more profound comprehension of relevant legal categories in the criminal attribution of responsibility in cases of prejudice-based violence. For this we will illustrate the possibilities of queering transitional justice with the analysis of three cases of LGBTIQ+ individuals who have accessed or are seeking justice before the SJP in Colombia. Finally we will share some conclusions and policy recommendations that could strengthen the capacity of transitional justice delivery for LGBTIQ+ people and other traditionally marginalized groups in Colombia and other systems around the world.

To identify opportunities to incorporate queer theory perspectives and methodologies into transitional justice processes, the method engages in 1) the case analysis of the experiences of three LGBTIQ+ victims seeking to access justice before the SJP after experiencing acts of gender persecution in the context of the Colombian armed conflict (Irañeta, 1992) and 2) the queer coding of judicial decisions and statements by testifiers in scenarios such as voluntary versions to showcase how alternative interpretations and approaches to transitional justice are necessary methodological and analytic tools that could enable access to justice for LGBTIQ+ people (Dulzaides, 2004). This will be done by exemplifying how tools such as queer reading for judicial investigation, analysis, and interpretation by advocates, justices, and other relevant actors provide new possibilities for victims to access justice and a renewed capacity of Transitional Justice in Colombia and the world to respond to the gendered dimensions of conflict.

The cases presented here come from the experiences of the authors as victim representatives affiliated with Colombia Diversa, a civil society organization working to protect the rights of LGBTIQ+ individuals in Colombia. These have been intentionally selected to exemplify crucial justice delivery barriers faced by LGBTIQ+ people while also displaying the applicability of our proposal to different scenarios of prejudice-based violence varying in time, location, and affiliation of the perpetrator. Between 2018 and 2022, we worked to document and make visible cases of gender persecution in the context of armed conflict and develop judicial arguments to facilitate access to justice for those judicially represented. This time frame corresponds to the opening of macro cases 02, a territorial case that prioritizes human rights violations in Tumaco, Nariño, and 07 which investigates the recruitment and use of children in the context of conflict. At the moment, these cases present the highest chances of justice delivery for the victims we have represented in the SJP framework.

Individually and as a team, we have participated in multiple advocacy scenarios, provided technical assistance to working groups in the SJP and collaborated with other representatives of gender-based violence (GBV) victims. During this time we also had direct and sustained litigation experience as representatives of LGBTIQ+ victims before the SJP in various macro-cases (38 individual cases documented and 17 victims accredited as of the cut-off date). With this experience, we will engage in a case analysis to illustrate the limitations and possibilities of transitional justice mechanisms to deliver justice for LGBTIQ+ victims (Irañeta, 1992).

All information presented in this article was gathered with full consent of all participants and has been made public in SJP decisions (Auto SRVR 03 of 2023), public hearings, and previous publications such as Colombia Diversa (2020a and 2020b). The cases have been made anonymous and personal information or data that can in any way harm or impair the judicial process has been omitted to fully protect the identity and process of victims. Considering victim testimonies, views, and stories had already been documented in depth by the organization and the SJP, victims were not further interviewed for this article, avoiding re-victimization.

This paper is a statement that the queer transitional work done on LGBTIQ+ survivors of the Colombian armed conflict is important and has lessons for other peace building opportunities in the world. The Colombian transitional justice scenario has the flexibility and the participatory infrastructure to enable civil society actors such as academics and organizations to think about, and contribute, to the establishment and transformation of the languages, methodologies and concepts used for truth, justice, reparation and non repetition measures. This has created a unique opportunity to discuss the crime of gender persecution, addressing the historical challenges in its definition, investigation and judicialization as well as advance in lon-

gstanding conversations regarding the recognition of the lives, bodies and dignity of LGBTQ+ people in conflict and peacebuilding.

This is our way of reclaiming our existence and the importance of our stories in a world dominated by binary, heterosexist, and patriarchal norms. Questions regarding pleasure, sexuality, love, and gender expression are important to the evolution of the language of peace building to effectively create a better world for us all. In Colombia, this has meant challenging ideas about what is "normal" and finding ways to queer feminist and human rights agendas on peace building in a country that consistently tries to avoid the open wounds from its history of armed conflict.

2. How did we come to queer transitional justice? Examining the possibilities of current justice-delivery structures

This paper argues that the positivist tradition of transitional justice systems and current methodologies for investigation and victim participation reduce the scope of criminal responsibility and the justice they can deliver for LGBTQ+ individuals. In response, we explore queer studies as an approach capable of broadening the scope of victims to whom justice can be delivered. This would be possible because the specific discriminatory-based crimes they have suffered would become visible to the law through improved methodologies of investigation and richer comprehension of the criminal law categories. To explain this thesis, we will explain how the male gaze and a male optic of law have shaped systems and structures –law and judicial mechanisms –.

We will then discuss how this relates to a positivist tradition of law and justice delivery and how this is expressed during justice seeking processes. We will then present queer theory as a conceptual framework capable of expanding positivist ideas of law to improve the capacity of judicial systems to deliver justice to LGBTQ+ victims and victims of discriminatory crimes in general.

2.1. The male state

Latin American states have been built by men, and for men, since their establishment responding to a division of labor based on gender. The construction of the State and its institutions has been shaped by the naturalization of the role of men in the public sphere (from public space to political participation) while relegating women to the private sphere (the domestic realm) (Pateman, 1988) without acknowledging the significant relationships between what has been considered private/local/feminine and public/international/masculine (Enloe, 1989). This has built and sustained an imaginary of the male citizen as the legitimate and universal body and experience (Segato, 2016) and has not only led to the consolidation of structures and systems specifically tailored to the needs of the male citizen, but also contributed to the understanding of others (those who are not men, white, cisgender, heterosexual) as "Others". This happens through different routes, from liberal rights that allow your existence before the law (as being considered a citizen, having the right to vote, being capable of making your own decisions, among others) to the use of language and construction of entities in speech Yang y Hill (2021), Bhabha (2004) y Spivak (2009).

This marginalization or distinction poses immense difficulties in comprehending and responding to the needs of the other as a legitimate being deserving of the same rights and state protection (Segato, 2016).

Understanding the law as "the institution that recognizes and inscribes the silhouette of each of the communities whose lives it seeks to govern" (Segato, 2016), feminist struggles throughout history have been configured in the legal space seeking the recognition of women's existence in relation to the State and international law (O' Rourke, 2014). However, despite progress in the civil and political rights of women through legal reform and policy-making, few women –especially from lower and middle classes, queer, black or brown, or women with a disability– have truly managed to be included in the public sphere. A colonial (Mohanty, 2008) and cis-heteronormative model of the country persists (Curiel, 2013) failing to comprehensively recognize citizens who differ from the norm, disrupting the construction of the collective subject and homogenous society.

In this sense, the bodies, lives, loves, and the experiences of discrimination and violence of "mi-

normities”—in this case women and individuals with non-normative gender identities, expressions, and sexual orientations—are understood as apolitical. They are deemed to belong to the private sphere and, consequently, are considered external to the functions of the State (Gómez, 2006). This is how the law constructs and perpetuates an exclusive notion of the state and reality, both through its direct actions, via judgments and legal provisions with a “universal” subject in mind, and indirectly through a discourse that invisibilizes life experiences that do not fit into this imaginary (Segato, 2016).

2.2. The positivist perspective of criminal law

The construction of the male state and masculine structures of law has used positivist theory to express itself, which is why a mention of this legal theory is much needed. Legal positivism emerged in the second half of the 19th century alongside the development of the conception of the modern State (Guamán, Hernández, & Lloay, 2020). According to Norberto Bobbio (1999), legal positivism is a complex term that encompasses a theory, an ideology, and an approach to the study of law. Legal positivism stems from an attempt “to turn Law into a science like the physical/mathematical, natural, or social sciences as a product of philosophical positivism” (Bobbio & Morra, 1993, p. 145). Thus, the law is considered a set of facts from the natural world that are “capable of being studied in the same way that scientists study natural reality, that is, without making value judgments” (Bobbio & Morra, 1993, p. 145). By rejecting value judgments, legal positivists limit themselves to determining whether a norm is valid — understood as belonging to the legal system — and not whether it is just. This conception of law implies that the interpretative task performed by judges is static, “purely declarative or reproductive of the existing law” (Bobbio & Morra 1993, P. 215).

Understanding the positivist perspective of law is necessary to analyze the interpretative methodologies of transitional courts. The positivist perspective of law as a stance taken by judges can be limited to justice provision in some cases, as it defends the neutrality of their interpretative work by considering the existing law legitimate, valid, and complete. This perspective disregards the fact that positive law in the liberal state was constructed from a hegemonic position and in favour of specific interests (Segato, 2016). The dominant power of Men has become institutionalized at the expense of the interests of feminized bodies, so the claim of neutrality in the positivist approach of liberal law can only be upheld based on the masculine as the standard of the rational (MacKinnon, 1989).

2.3. Queer theory, queer coding, and the act of queering

Queer theory is a critical project that questions existing gender structures and dynamics while proposing new perspectives to create and redefine what gender and sexuality can be (Lauretis, 1991; Barker & Scheele, 2016). The critical perspective put forward by queer theory can help reread, rewrite, and expand social and cultural systems and products, questioning their contents regarding gender, sexuality, and ideas about the feminine and masculine to challenge gender binarism and heteronormativity. In that capacity, queer theory, or the act of queering, is a useful vehicle to move forward the capacity of current systems to provide justice to LGBTQ+ victims.

To “queer” something—in this case, justice—stems from the concept of “queering” or “queer reading” related to North American queer feminist theory³. The word queer emerged in the United States within LGBTQ+ social movements during the 1980s and 1990s as a polysemic term.

Queer is not a defined concept, category, or identity. It is a way of understanding the world, the self, and others outside the structures of cis-heteronormativity, living individual gender and sexuality identities and expressions that become movements, languages, knowledge production, activism, and collective resistance against oppression, discrimination, and violence.

Queer epistemology involves recognizing that there is a world that does not belong to us. A world that has been named, categorized and set in motion without considering our lives, our bodies,

³ Although queer is a concept traced to North America, we propose that queering can translate to or complement *mariquiar* – particularly in Colombia and the global south – as a way of recognizing the local social, cultural, and linguistic trajectories of discrimination and resistance of queer people in Latin American societies. The use of *marica* both as a slur and a collective and individual identifier is crucial to understand the construction of local epistemologies on gender and sexuality that account for the individual, social, aesthetic and political experience of LGBTQ+ people. Such dynamics have a lot to contribute to justice institutions and justice delivery mechanisms.

or our pleasure. The world that has been deemed "Normal"⁴ or "objective" is not indifferent toward us; on the contrary, the world presented as "Normal" punishes our joy, evades our pleasure, denies our existence, avoids our encounters, and promotes things that harm us, such as silence, violent confidentiality, repression, and the voracious consumption of a culture that invisibilizes us and turns us into "Others".

This way of understanding the world outside of cis-heteronormativity has recently found a place in the field of peace building (Bueno-Hansen, 2015, 2018; Duggan, 2012; Fobear, 2014, 2024; Hagen, 2016; Maier, 2020; Schulz, 2020; Serrano, 2017, 2024) so that queer theory, or the act of queering, in its capacity to transform social products, practices, and institutions that have historically excluded us, becomes a useful vehicle to advance the specific examination of the capacity of current transitional systems to deliver justice to LGBTQ+ victims (Bueno-Hansen, 2015). For Bueno-Hansen (2018), queering transitional justice "requires a queer, intersectional, and decolonial analytical lens that underscores the relevance of global LGBTQ+ politics and critiques the fundamental assumptions of transitional justice regarding temporality and binary logics" (p. 1). This approach makes the discriminatory roots of violence and impunity against LGBTQI individuals visible while advocating for the guarantee of their citizenship.

Regarding the temporal assumptions of transitional justice, Serrano (2024) has emphasized that queering transitional justice involves "destabilizing the illusion of a transition from chaos to order" and the return to 'normalcy' that this type of justice has established as part of its teleological temporal logic. This logic does not work for LGBTQ+ people, for whom 'the before', 'the 'normalcy', was already a violent order that must not be restored or recovered but rather radically transformed. From a queer perspective, the times proposed by the normalization logic inscribed in transitional systems are "queered" (Serrano, 2024). It is about understanding transitional justice as provoking "a transition in terms of movement and not in terms of resolution" (p. 272).

On the other hand, Biddulph (2024) argues that what Bueno-Hansen (2015) posits about queering transitional justice implies moving beyond integrationism toward transforming the global governance of transitional justice, understood as a paradigmatic project that is institutionalized, standardized, and exclusionary, also based on patriarchal and colonial institutional architectures, legal mechanisms, like the male states and positivist traditions still embedded in transitional law research and analysis methods, as explained in previous sections of this article.

As part of the responses to this structural exclusion of our lives within the classical transitional paradigm, its assumptions, and its operational forms, Serrano (2024) has highlighted the importance of incorporating a perspective "from below" to queer transitional justice. This perspective places subordinate queer groups at the center and addresses the heterogeneity among them, highlighting the value of knowledge and strategies developed by social organizations defending queer dignity. It also reinforces the recommendations made in this article regarding the importance of victim participation in queering the mechanisms of transitional justice themselves (Foerber, 2014).

Serrano (2017) highlights the need for interaction among social, historical, and judicial truths, as well as their differentiated forms of production, in order to address and transform violence against queer people within transitional justice. This element is crucial to this article because queering transitional justice has required us (as representatives of victims) to develop concrete proposals for documenting, representing, and analyzing prejudice-based crimes motivated by SOGIESC, committed during the armed conflict. These proposals, as we have observed, need the complementarity emphasized by Serrano, to give significant weight to social truths and the specific context in which these events occur.

One method proposed by queer theory that we believe can help us queer transitional justice is "queer coding" (Kim, 2017). It proposes the identification of queer experiences through identity markers different from one person's explicit assertions regarding their sexual orientation or gender identity. The ability to read between the lines and decode details that talk about gender and sexuality also allows us to recognize particularly hostile or dangerous environments where our existence and safety are at risk. It helps us see threats and develop tools to inhabit a world that is not entirely ours. Living in this double register has made us experts in the "narratology of life"

(Genette, 1972): the ability to understand who speaks, in what way, what things are said without having been mentioned, who this story is about and who the agent is, among other things. And it is precisely this ability to interpret subtleties -to understand instructions about bodies, pleasure, and love; to find the traces of celebration or discrimination- that we believe can improve the pos-

⁴ Proper noun: Although the group of behaviours deemed appropriate or normal may vary slightly between contexts, Western culture has chosen to believe in a set of desirable behaviours (those which are Normal) and a set of proscribed or undesirable behaviours.

sibilities of justice and reparations offered by transitional justice mechanisms for LGBTIQ+ victims.

Queering transitional justice is a method to facilitate the critical reading of criminal law, transitional justice, and the institutions that build and sustain these systems to propose a more complete and complex view of identity, gender, and sexuality in the protection and response to human rights in peace building processes. The process of queering transitional justice is based on the flexibility and adaptability that these processes entail and, especially, on its commitment to the victims in the search for justice and reconciliation. It is a matter of renouncing the gaze of law as satisfactory or sufficient and instead tracing and reinterpreting details, languages, and dynamics that seem alien to the conversation, to propose a complete and more complex look at gender and sexuality from the root, not as annexes or additional measures (Serrano, 2017, 2024; Bueno- Hansen, 2017).

3. What queering transitional justice can do for victims around the world

For transitional justice systems to effectively deliver justice for queer victims and other people who have been systematically marginalized in social and institutional settings, we propose a queer close reading technique. This technique stems from the suspicion cast upon traditional methods for gathering and analyzing information, which closes a tighter noose around the confessional testimony in transitional justice scenarios. We believe that such overreliance on confessions is one 16 of the many demonstrations of the positivist heritage of transitional justice models, and is one legacy that can be revisited to improve access to justice in those atrocities that had been fuelled by prejudice against its victims.

Access to justice for prejudice-based crimes is scarce, given the low amount and poor-quality information available regarding cultural and implicit pacts around historically marginalized social groups (Gómez, 2008). Deviant or specific atrocities must be ordered, written even. But what about the violence which already exists in daily life and is only being exacerbated by conflict? Such violence does not need an instructor or a voice of command to exist. This is the case for LGBTIQ+ people. Violence against us is a part of the established social order. Hence, the instrumentalization of our bodies in conflict is merely an extension of this social order. Such obstacles are further exacerbated by the lack of willingness of former combatants to acknowledge or confess their discriminatory intent or the gravity of their actions. In our litigation before the SJP, for example, former combatants have consistently denied partaking in any act of discrimination or mistreatment of LGBTIQ+ individuals, or they have justified acts of violence, such as making homophobic "jokes," making gendered job assignments or taking advantage of the expulsion of queer teens from home (Special Jurisdiction for Peace [SJP], Auto SRVR 03, 2023).

The Colombian case has revealed that former combatants are interested in maintaining the best possible reputation to support their political and cultural aspirations. This is no secret: political involvement is one of the causes and hopes for reconciliation processes. All parties in conflict want to continue to express their worldview and access positions of power where they can materialize it. However, this democratic aspiration appears to be the best excuse to deny or justify the occurrence of prejudice-based crimes. The Colombian experience documented by the National Center for Historical Memory (hereinafter "CNMH" for its initials in Spanish), and feminist and LGBTIQ+ organizations had foreseen this reluctance as former combatants keep a strong interest in maintaining a good reputation (Cinco Claves, 2020). This teaches future transitional justice scenarios the importance of institutional design that aims to reduce the impact of this denial strategy. Such institutional design should consider the approach of queering transitional justice from below (Serrano, 2024) to assess the power asymmetries between LGBTIQ+ victim groups and former combatants (Krystalli, 2019, cited in Serrano, 2024; O'Rourke, 2013).

The positivist features of transitional justice do not contribute to changing this trend. Although this attitude from former combatants was foreseeable, the institutional design did not initially propose a methodology that could curb denial and impunity. In other words, transitional justice mechanisms have often limited themselves to verifying objective facts based on unequivocal responses from the respondents and asking closed-ended questions. It has conducted a purely exegetical exercise that is inadequate for three reasons: 1) it presupposes that words have a unique meaning, discouraging follow-up questions and requests for definitions or explanations from the respondents 2) it overlooks the fact that there was a logic that organized the development of the armed conflict

and 3) it freezes or neutralizes possible discussions about broader categories (like gender and sexuality) within the scope of peace building and the courts' transitional legacy for communities served.

Failure to acknowledge both the crimes of prejudice based violence during warfare, and the attachment to the positivist traits of transitional justice, contributes to what has been called the 'politics of not knowing' that hinder access to justice for LGBTQ+ individuals (Serrano, 2024, according to Nordstrom, 1999). In our case, for example, we litigated the constant violence against queer individuals as the crime of gender persecution (Colombia Diversa 2020a, Colombia Diversa 2020b). This meant overcoming the positivist view of judicializing each crime separately (e.g. two murders, four forced displacements, etcetera), and facing the challenge of proving discriminatory intent in contexts where no explicit order of discrimination had been issued (ICC, 2010). It was a type of violence that was already justified during peaceful times, it had risen to the level of "what is expected to happen" in queer lives. It didn't require further instructions in order to be used in favour of every armed actor's interests.

Our proposal for such a challenge was to use former combatants' testimonies to build evidence of a hostile and discriminatory context to prove discriminatory intent. In other words, this subjective element of the crime could be verified (at least indicatively) through the evidence of gender rules and sanctions incorporated by the perpetrator(s) at the time and place of the events. Even though their explicit words were "no", "I don't know about that", and "we never did such a thing", the rest of their narrative was full of queer-coded threats, dismissals, and overall prejudice.

There are numerous methods to discover things that have not been explicitly stated. Narratology, psychology, interpretation, translation, dramatic representation, judicial assessment, and history, among many others. On this occasion, we will propose queer close reading in the transitional justice scenario. This proposal stems from our experiences in litigation before the SJP, but it can – and should – be replicated in all future peace building scenarios that involve contributions to the truth from former combatants.

Firstly, words and expressions have different meanings when the elements of their environment change: who says it, how they say it, to whom they say it, with what rhythm they say it, with what gestures they say it, at what volume they say it, at what speed they say it. Saying that one is a fan of the black shirt at a Juanes concert in Medellín is not the same as saying it at an Italian historical memory event⁵. Even if the words, emotions, and gestures of the speaker are identical, the context and the historical and cultural significance of where they land can change and modify their meaning. This should be taken into account by transitional judges to recognize that there is a meaning that is not necessarily the same as the one they have exegetically understood. Therefore, they must ask more questions to clarify and secure an understanding of the meaning of what the respondents are saying in their context.

Secondly, as we explained in the first argument, conflict is not only organized through explicit orders and messages. It also draws from a context with a strict set of values that, in turn, determine what is prohibited or allowed in a society. This means that behaviors in conflict are not always a product of explicit instructions or strategies but they can also be a product of customs, practices, and beliefs that are deeply embedded in a context. Transitional justice should therefore recognize this subtlety and adopt measures to uncover the implicit order that gives meaning to what respondents are saying.

Thirdly, the potential of transitional justice systems to initiate conversations around reconciliation should not be underestimated. If judges do not inquire about the meaning of gender, instructions regarding sexuality, or perceptions of discrimination against LGBTQ+ individuals, it is highly unlikely that the respondents will ever include these issues in their attempts of reparations, truth, and guarantees of non-repetition. This goes beyond the immediate purposes of justice mechanisms to fuel a social conversation about the importance of the harm caused by conflict and a social commitment to non-recurrence: if questions about gender and sexuality are reduced to biased and predetermined answers, there will be no opportunity to enrich the social conversation about gender, sexuality, conflict, and reconciliation.

In the end, our strategy worked: Justice Belkis Izquierdo (SJP, 2023) used our argument to demonstrate that former FARC-EP combatants hold a prejudiced view against queer individuals, making it impossible to take their explicit negatives as truthful testimonies. Justice Izquierdo went

⁵ Juanes is a Colombian singer from the city of Medellín who composed a song called "La camisa negra (the black shirt)" which is about heartbreak. On the other hand, black shirts in Italy refer to the Voluntary Militia for National Security, which was part of the armed forces of fascist Italy.

beyond proving this for queer individuals, she also used this method to establish and prove discriminatory intent in crimes committed against indigenous communities, girls, and women in the Colombian Pacific coast.

That is why we come forward with our queering transitional justice proposal: we have seen first hand how other social groups or human rights advocates can benefit from our methodology to judicialize discrimination in transitional justice settings. It is about recognizing, in everyday life, both mundane and significant ways of controlling and hurting individuals for who they are, and how such acts justify atrocities in conflicts.

4. Queering transitional justice for LGBTIQ+ victims of conflict in Colombia: case analysis

To show how queer close reading increases the capacity of transitional systems to deliver justice to LGBTIQ+ victims, within this section we will discuss three cases of LGBTIQ+ Colombian victims of the internal armed conflict who have participated in judicial processes that intend to establish criminal responsibility. We argue that in these three cases, queer close reading made by justices, advocates and victims themselves have allowed them to overcome the evidentiary challenges of proving crimes based on discriminatory intent.

The three cases presented below stem from multiple interviews and both formal and informal conversations with victims we represented before the SJP. These have been chosen to illustrate the argumentation of the paper and for their contribution to broader conversations about the possibilities of justice-delivery for LGBTIQ+ people in transitional justice mechanisms. The names and some personal details of the people involved have been changed to protect their identities and their on-going journeys before this justice tribunal. All participants voluntarily chose our representation and provided informed consent for the use of their stories for academic purposes.

4.1. Attribution of responsibility

It has been documented that in criminal investigations and trials, the perpetrators refrain from accepting responsibility in gender-based or prejudice-based crimes (CNMH, 2017, p. 392). Therefore, judicial institutions face an evidentiary challenge because criminal law over relies on direct confessions for this kind of violence. As perpetrators fail to recognize these acts, it becomes legally challenging to deliver justice to the victims. As a methodological response to this obstacle, we show that reading through context, studying the syntactic expression of the testimonies, analyzing the social experience of victims, and securing victim participation, all steps of queer close reading, are powerful tools to overcome this evidentiary deficiency.

In that context, the first case is a testimony undertaken by a Colombian justice of SJP. The justice undertook the queer close reading of a victim's testimony to prove she was a victim of prejudice-based violence. Tatiana is a trans woman living in the department of Tolima. In the early 2000s, Tatiana lived with her boyfriend and his son who was a child at the time. They were a family until her boyfriend was killed by the guerrilla because he was perceived as "gossipy" (this traces back to the notion that trans women are men in disguise, and therefore a man who is the partner of a trans woman is actually a homosexual, and gay men, according to Colombian culture, are terribly prone to gossip). After his death, she continued to care for the child: she raised him and cared for him for the rest of his childhood and early adult life. When he reached his teenage years, the guerrilla struck their family again, recruiting the teenager under the claim that "a faggots house is no house for a kid". Months later he was able to escape the guerrilla and reunite with his mother, Tatiana. After this, they were forced to live somewhere else.

In 2022, Tatiana chose to participate in Macro case 07 before the SJP⁶, seeking to be recognized as a victim in the same way that other mothers of forcibly recruited children had been recognized. A positivist view would deny her claim (as the ordinary Colombian jurisdiction had done before), given that there is no biological nor legal link between the child who was a victim of recruitment and Tatiana as a trans woman. However, the SJP listened to her testimony in a formal hearing and asked questions about their daily lives: how she took care of the boy, how he referred to her, how they lived

⁶The Case in charge of judicialising the forced recruitment of minors for war.

their family routines, and what their relationship looked like in the present.

After listening to this evidence, the judge ruled in favour of the recognition of their bond as a filial one. She was his mother then, as she is his mother now. The routine of love and care between the two –which could only be understood by actively listening to her testimony– is what defines their family, not the legal documents that recognize (or not) their relationship. The analysis of the situation in Tolima also shows us the limits of the positivist reading of testimonies. Positivist reading tends to make an exegetical interpretation of testimonies, and not just of laws. On the contrary, queer close reading can read testimonies in the code of their context.

This is possible by reading through the lens of how LGBTQ+ communities interact within their chosen families and other social groups.

4.2. The Discriminatory Intent

The second case is the one of Carolina, a trans woman who was attacked and, during the crime, one of the perpetrators said: "you need to go unless you want to experience what happened to your friend". The positivist perspective would view this as a private, apolitical—or even "just" emotional—event between a perpetrator moved by rage making vague claims and the victim. On the contrary, a queer perspective of the Tolima context reveals several clues indicating discriminatory intent: 1) trans women in Tolima are seen incapable of resisting attacks, because they are kicked out of their family houses since their teenage years and there are no public communities that would take them in (like churches, clubs, schools, sports or any other collective) 2) Three trans women in Tolima had been murdered in the last few months at the time of this attack, so "what happened to" Carolina's friend was no other thing than murder 3) Trans women have woven networks of support and solidarity to resist these acts of violence, so it is perceived that all of them are "friends" with each other. Lastly, given that his perpetrator knew about the previous murder, he was indicating that he either participated in it or condoned it, signalling that he was capable of murdering Carolina.

In this case, a queer perspective recognizes that context is a sufficient tool to illustrate how gender and sexuality are socially enforced from early on. That is how dynamics of control determine what are "appropriate behaviours" for men and women. Such indicators are taught from early childhood through comments, jokes, accessories, clothing, remarks, instructions, celebrations, or jeers in both public and private spheres. This perspective allows us to expose how expressions of discrimination are varied, intense, or subtle as homophobic and transphobic violence occurs.

4.3. Interpreting testimonies

The last case focuses on the potential of applying queer close reading methodologies to interpret the testimonies of former combatants before the SJP. To demonstrate the importance – and possibility – of such an exercise, we will conduct a documentary analysis of some comments made by former combatants of the FARC-EP before the SJP⁷. We will focus on how former combatants have denied the existence of prejudice or violence against LGBTQ+ individuals, while in other responses, simultaneously, their non-explicit language reveals a deep-seated homophobic, biphobic, transphobic, or/and misogynistic prejudice.

The situation to be analyzed involves a transitional justice judge asking a former combatant about the relationship of their armed organization with civil society, particularly with LGBTQ+ individuals. The former combatant stated that they were not aware of any discriminatory acts against LGBTQ+ people committed by their organization, considering their policy was to liberate the oppressed and improve the living conditions of all individuals. However, minutes before, this same former combatant had stated that LGBTQ+ individuals were not admitted within the lines of their armed group because of their association to the consumption of illicit substances.

The negative association between the consumption of illicit drugs and LGBTQ+ individuals reveals two things: First, the participant does not believe that the notion that "LGBTQ+ = consumer of illicit drugs" stems from discrimination. They seem to believe that their connection between LGBTQ+ individuals and drugs is natural, obvious and is unrelated to questions previously asked about the dynamics of discrimination of his armed organization against LGBTQ+ individuals. This speaks to the normalization of this association in social discourse.

⁷ This is done while respecting our judicial obligation to maintain the confidentiality of these proceedings. No excerpt allows the identification of the author, and we will not disclose private or inappropriate details of the events being discussed.

Second, the association demonstrated that prejudice against LGBTIQ+ individuals is fueled by a connection with other socially rejected behaviours. In this case, the consumption of illicit drugs. This implies that transitional judges can continue to inquire about other behaviours that have been socially deemed undesirable and possibly find spurious connections with LGBTIQ+ individuals. This is of great importance as it confirms our hypothesis that homophobic and transphobic discrimination is not unusual, and does not require direct orders because it is deeply normalized and concealed in socially established and celebrated values within communities.

What the participant expresses is that LGBTIQ+ individuals should be excluded because they are undesirable and they should be seen as dangerous subjects. These kinds of conclusions can arise even from opaque, evasive, or denialist discourses but they require an enthusiastic judge who surpasses the classical ways of appreciating evidence. This requires them to analyze the discourse of the participants within the logic that prejudice seeps into language even when done subtly.

Decoding prejudice in the discourse of former combatants would not be possible through the positivist forms of law because of their explicit denial of direct acts of violence. Consequently, traditional law would lack positive verification of violent acts. This discovery is also incompatible with positivist law because it "only" presents an explicit thought or belief, while traditional criminal law traditionally deals with acts rather than the ideas that individuals may hold. We propose to encourage transitional judges to use the technique of close reading through syntactic contexts: judges should be able to find meaning beyond the explicit and literal intention of the speaker. This methodology is explained by David Greenham in "Close Reading: The basics." According to the author, words can contain an infinite amount of meanings, but they acquire certain specific meanings thanks to their context, order, and rhythm (Greenham, 2019, p. 48).

5. Policy Recommendations

Framing judicial processes and procedures from a historical perspective: Transitional judges must consider the historical invisibility and silencing experienced by LGBTIQ+ individuals, as well as the evidentiary barriers that arise from this invisibility in legal proceedings. This entails adopting a queer stance regarding limitations in accessing information. To address this, Colombia

Diversa has proposed a series of criteria to identify prejudice that can be useful to incorporate as part of the hypothesis study on violence.⁸

- Victim participation in transitional justice processes must be binding: We recommend the inclusion of victims and their legal representatives in all stages of transitional justice scenarios, recognizing that they are one of the two direct witnesses of every crime that will be judged. Their knowledge about their lives before, during, and after the atrocities occurred can also shed light on explicit and implicit social norms to survive in the armed context given different identity characteristics. Their participation must include gathering and fully considering their opinions on legal categories, reparation measures, and qualifying the truth compliance delivered by former combatants.
- Transitional justice also requires considering and legitimizing embodied knowledge and lived experience (hooks, 2019) of historically subordinated social actors, as well as their interaction with contemporary international formations (Momin, 2016). This is developed from the perspective of queering transitional justice from below, which centers the voices and needs of subordinated bodies by considering how "the politics of knowledge and the production and representation of expert knowledge operate as a source of exclusion in the judicial system" (Serrano, 2024, p. 259).
- Former combatants' testimony must be gathered in non-judicial scenarios: As the other party that was a direct witness of atrocities, former combatants' testimony is crucial to understanding the complex web of instructions, dismissals, instrumentalization, and other warfare techniques. Their opinions regarding their crimes can enrich the context that justices will build to deliver justice, and understanding their motives can also result in better adherence to peace building commitments and truthful regret. Our proposal is based on the idea that when former combatants are not being examined by an attorney, and their answers cannot be objected, a broader understanding of the context in which conflict operated can be acquired: the possibility of listening to a former combatant speak in a semi-structured interview, in which questions about their upbringing, their context and their warfare days are told in a manner that suits

their own conscious narrative, allows for deeper and most sincere understandings of society to arise.

- Interdisciplinary approaches to testimony examination and interpretation such as close reading create a more enabling framework to prove discrimination happened, therefore increasing the chances of justice delivery for traditionally marginalized groups such as LGBTIQ+ people. However, this is not a one-size-fits-all approach, it calls for a tailored process of incorporating and legitimizing alternative methodologies for testimony examination, victim participation and judicial interpretation, according to the specific needs of victims, the social, cultural, political and historical structures of violence and discrimination and their relationship to the context of conflict. Close reading techniques among other qualitative analysis tools that stem from other disciplines such as thematic analysis and discourse analysis can broaden the scope in the understanding of individual and collective impacts of conflict and the possibilities of justice delivery for people and groups.

6. Conclusions

Queering transitional justice and peace building is much richer and complex than simply adding LGBTIQ+ individuals to a list of beneficiaries and perpetrators. It is, in fact, about uncovering the subtleties through which the context has controlled and violated queer individuals and identifying traces of discrimination in the generous testimonies of those who survived the war. This can enable the creation of institutional and societal structures that care about the well being of its citizens rather than the binary categorization of their bodies as "male" and "female." This endeavour is specially ambitious because we believe that peace building is a crucial opportunity to change the course of more solemn structures (such as transitional justice) and, in the process, shake the informal and everyday institutions that benefit from ideas of "normality" (such as discrimination, street harassment, homophobic or transphobic humiliations, among others).

This article has focused on presenting the barriers to accessing transitional justice for LGBTIQ+ people in the Colombian case by evaluating the positivist perspective and proposing a new approach: the queer perspective of the world, law, and methodologies. This starting point is relevant for the design of transitional justice institutions because their ultimate mission is to transform the social structures that caused, allowed, and sustained the war (Leebaw, 2008). This mission is not possible without recognizing how discrimination was used to sustain armed conflict.

Dismissing this perspective would leave the transitional efforts incomplete in their task to mobilize the process of political recognition in society and establishing the foundations of an inclusive democracy that enables the reparation of victims and sustains peace. To address the need to investigate these acts of violence in a particular manner, judges must interpret the systematic nature, severe impacts, and discriminatory intent based on a queer understanding of the context. To properly identify manifestations of norms surrounding gender and sexuality in different contexts, reconstructing notions of "feminine" and "masculine" is necessary.

Using resources such as media archives documenting the lives and violence faced by LGBTIQ+ individuals, legitimized public discourses, binary and sexist customs specific to each environment, mostly accepted religious traditions, data regarding the access to basic services, the assignment of allowed or prohibited places for certain individuals based on their gender, and the existence of norms penalizing or pathologizing certain gender expressions, among others.

Finally, the recognition of the urgency of changing how information about such forms of violence is collected and analyzed, and the unlikelihood that former combatants will provide truthful accounts of these events, urges the incorporation of queer coding as a methodology that allows for identifying the subtleties with which the existence of LGBTIQ+ individuals (whether desired or undesired) is marked. This represents a more complex understanding of the content of former combatants' testimonies where transitional justice can see and recognize elements that are expressed subtly or through body language, expressions, or statements, among many others.

If transitional justice is not serious about the questions about gender and sexuality in war, former combatants will continue to justify or falsely deny their involvement in crimes as serious as gender persecution. Having a judicial perspective capable of recognizing something beyond what is explicitly stated in testimonies can be the definitive change that leads to justice, truth,

reparation, and non-repetition for LGBTQ+ individuals who have survived conflict. It is the obligation of a transitional justice system that intends to fully comply with its obligations to see the pain that this society causes us to suffer:

Somebody help!

How strong are the wishes to
become a poet and
to be your love and allow confusion
about the bodies, the kisses, the time, the
leather,
the taverns, the party and the meet.

The urge to go out and walk with you and look at trees and wait. Wait for music to play, or for it to rain or to look at each other or to hold hands or to get rid of the cold or to be offered enchanted rocks or to tear our clothes off or to stumble while dancing so off-beat that we crack up laughing.

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