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978-0-521-51792-8 - The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations

Edited by Ruth Rubio-Marín

Excerpt

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Introduction: A Gender and Reparations Taxonomy

Ruth Rubio-Marín

In recent years, work in a variety of disciplines has sought to illuminate and highlight women's experience of conflict and authoritarianism. UN Security Council Resolution 1325 on women, peace, and security¹ reflects this when addressing the need to recognize the impact of armed conflict on women and girls, the role of women in peacebuilding, and the gender dimensions of peace processes and conflict resolution. The serious and pervasive nature of gender-based violence in conflict, especially sexual and reproductive violence, has also been increasingly recognized under international criminal law.² Relevant discussions about how other transitional justice measures, including truth-telling mechanisms, can do better justice to women have followed.³ It comes as no surprise, then, that the time is ripe to raise the question of how reparations programs for mass human rights violations can be designed in ways intended to redress women more fairly and efficiently.⁴

The fact that reparations programs are becoming an increasingly frequent feature of transitional and post-conflict processes renders the topic of this book

¹ United Nations Security Council, Resolution 1325, S/RES/1325 (2000), October 31, 2000.

² Proof of this is the Rome Statute of the International Criminal Court, which adopts "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" as part of its definition of crimes against humanity and war crimes. See the Rome Statute of the International Criminal Court, Arts. 7 and 8.

³ Debra L. DeLaet, "Gender Justice: A Gendered Assessment of Truth-Telling Mechanisms," in *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies*, ed. Tristan Anne Borer (Notre Dame, IN: University of Notre Dame Press, 2006), 151–181; World Bank, "Gender, Justice, and Truth Commissions," Washington, DC: World Bank, June 2006; Vasuki Nesiah et al., "Truth Commissions and Gender: Principle, Policies and Procedures," (New York: ICTJ, 2006); Fionnuala Ni Aoláin and Catherine Turner, "Gender, Truth and Transition," *UCLA Women's Law Journal* 16 (2007): 229–279.

⁴ International civil society has started to echo this concern: in March 2007, the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation was adopted. See <http://www.womensrightscoalition.org/site/reparation/signature.en.php>.

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only more relevant and urgent. Indeed, there is a growing conviction that doing justice in transitional scenarios requires not only doing something against the perpetrators, but also doing something specifically for victims.⁵ This trend is confirmed by the recommendations of several truth commissions, and by the jurisprudence of both national and international human rights bodies, including the European Court of Human Rights and the Inter-American Court of Human Rights. Nations as diverse as Argentina, Chile, Brazil, South Africa, Guatemala, Peru, and Morocco are examples of countries that have thought of reparations initiatives as an important component of their package of transitional justice measures. The UN has also supported this evolution toward enhancing the importance of the reparative venue and giving victims adequate recognition and redress: in 2005, the General Assembly approved the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*,⁶ and just recently the High Commissioner for Human Rights has produced a tool on reparations programs as part of its series of *Rule-of-Law Tools for Post-Conflict States*.⁷ The latter document is intended, among other things, to guide state practice on how to render the *Basic Principles* operative.

The moves toward “engendering transitional justice” and pushing forward the reparations agenda have thus far progressed in parallel and without meaningful encounters. For the most part, reparations initiatives around the world have to this day failed to raise systematically the question of how to incorporate women’s specific needs and concerns. This is striking in view of the fact that a significant number of victims of authoritarianism and conflict are women who are known to experience both phenomena in distinct ways. Similarly, it is common knowledge that in most cases women play a crucial role in the follow-up of violence – searching for victims or their remains, trying to reconstitute families and communities, carrying on the tasks of memory, and

⁵ See Pablo de Greiff, “Introduction,” in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2006), 1–18 [*The Handbook*, hereafter].

⁶ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147, March 21, 2006 [*Basic Principles*, hereafter]. See also the UN Secretary General’s 2004 report, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616, August 23, 2004; *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, E/CN.4/2005/102/Add.1, February 8, 2005; Diane Orentlicher, *Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity*, E/CN.4/2004/88, February 27, 2004; and *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, E/CN.4/2005/102, February 18, 2005.

⁷ Available at <http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf>.

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demanding justice. Despite all of this, reparations programs have not been designed with an explicit gender dimension. And yet, there are few reasons to believe that so-called “gender-neutral” reparations programs equally facilitate the achievement of the underlying goals of reparations programs, including recognition, civic trust, and social solidarity for men and women.⁸ True, the goals of a reparations program are to provide a measure of justice, albeit imperfect, to victims; but reparations are also intimately tied to building a just and peaceful foundation for a transitioning society. A program that fails to provide redress or justice to women in effect weakens the link between the goals of reparations and their contribution to the establishment of a democratic state.

This book seeks to lay the foundations for a gender-sensitive analysis of reparations programs that would increase their effectiveness as redress measures available to female victims and their families. The analysis is also intended to maximize the transformative potential of reparations programs and thus their capacity to help advance toward more inclusive and egalitarian democracies (potential and capacities that it is important not to overestimate). The book is the result of an ambitious three-year research project undertaken by the International Center for Transitional Justice (ICTJ). Besides learning what reparations programs to date *in fact* have done with respect to gender issues, the project took to heart the task of starting to articulate what future programs *ought to do* if they aspire to do justice to female victims in transitional or post-conflict situations, and thus of articulating the normative goals of reparations programs with respect to gender issues. This dual empirical and normative perspective characteristic of ICTJ research projects would, it was hoped, make it possible to identify best practices and, more importantly, to propose innovative approaches to the integration of a gender perspective into the design and implementation of reparations programs. It would ultimately also serve to test and to illustrate the project’s underlying hypothesis, namely, that a gender perspective *would* make a difference in the field of reparations.

The first task was to make up for the dearth of factual information on the different needs of men and women vis-à-vis reparations. We tried to do this by compiling case studies that provided detailed accounts of how six countries – Peru, Guatemala, Sierra Leone, Rwanda, Timor-Leste, and South Africa – have dealt or failed to deal with gender issues in their discussions about how to repair victims.⁹ Then came the challenge of thinking about the topic both

⁸ These are some of the goals that are attributed to reparations programs by Pablo de Greiff in his “Justice and Reparations,” in *The Handbook*, 451–477.

⁹ See the six case studies in Ruth Rubio-Marín, ed., *What Happened to the Women? Gender and Reparations for Human Rights Violations* (New York: Social Science Research Council, 2006) [*What Happened*, hereafter].

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thematically and normatively, which is what the present book attempts to do – benefiting from the empirical information gathered in the previous volume.

Before entering into a brief discussion of the contents and structure of this collection, two preliminary comments are called for. The first one has to do with the prevailing emphasis that the book places on women. Of course, “gender” need not refer to women alone. However, given present conditions, concerns about gender and gender sensitivity in this and most other contexts in which justice issues arise refer to the disparities and inequities in access, power, opportunities, and rights experienced by women across a wide spectrum of spheres. Although we have followed this well-established use of the term gender in this book, most authors have come up with insight on how patterns and notions of masculinity can interfere either with the assessment of the harms that men are subject to during times of repression and conflict, or with their possibilities for redress, thereby underscoring the need to conceptually broaden the gender and reparations agenda so as to include men and boys.

The second comment has to do with the overwhelming (if not exclusive) focus on reparations programs as opposed to other modalities such as judicial reparations procedures, which typically operate on a case-by-case basis and which individualize compensation measures, tailoring each of them so as to compensate in proportion to the harm suffered by each individual victim. There are general and gender-specific reasons for our focus on programs rather than court procedures. In general, international practice seems to suggest that more and more countries are coming to the realization that when reparations are owed to a large universe of victims resulting from widespread and systematic use of violence, administrative programs may be better suited to the task. In part, this choice is motivated by reasons of expediency. However, there may be another important reason to favor massive programs: in compensating everyone within the same category of violation in roughly the same way, rather than adjusting the payment in accordance with calculations of individual harms, the programs avoid a potentially inegalitarian message and consequent divisions among victims.¹⁰ Also, in providing redress for the violation of *rights* rather than compensating the loss of wealth, the programs indicate their nature as rights-promoting and rights-enhancing measures.¹¹ Reparations then become mainly a form of recognizing victims as citizens and equal rights bearers.

¹⁰ See de Greiff, “Justice and Reparations,” 458.

¹¹ For an elaboration of the reasons why in transitional situations reparations programs may be a better response than individual case-by-case judicial procedures, see de Greiff, “Justice and Reparations”; Pablo de Greiff and Marieke Wierda, “The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints,” in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, ed. Marc Bossuyt, Paul Lemmens, Koen de Feyter, and Stephan Parmentier (Antwerp: Intersentia, 2005) [*Out of*

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If all of the above is true in general, I have argued elsewhere that there are also gender-specific reasons to favor large-scale reparations programs that place the emphasis on the recognition of victims as opposed to judicial reparations seeking compensation in proportion to harm.¹² Maybe the most important one is that reparations programs can obviate some of the difficulties and costs associated with litigation, including high expenses, the need to gather evidence (which in some cases may be unavailable), the pain associated with cross-examination, and the lack of confidence on the part of victims in judicial systems¹³ – difficulties that may have a particularly strong disparate and negative effect on women. Overrepresented among the poor, the illiterate, those with little information, those facing language barriers, and those overburdened with family-related obligations that make traveling long distances a difficult task, women may find it particularly difficult to access the court system. Also, the large underreporting of gender crimes even in “normal times” speaks of the challenges women face in most societies in trying to make use of criminal processes that can so often result in their further victimization.

STRUCTURE AND CONTENTS OF THE BOOK

The first two chapters of the volume were conceived as the normative framework of the project. Margaret Walker’s “Gender and Violence in Focus: A Background for Gender Justice in Reparations” provides an overview and analysis of the nature and varieties of violence and harms that are known to affect women in contexts of armed conflict and political repression. The chapter examines both the forms of violence that affect women and the gendered character of these forms of violence. Current research establishes that violence and harms suffered by women in these contexts are many and are often linked in complex ways. The links create destructive synergies of loss and suffering: violence inflicted on women harms women; some harms expose women to further violence and additional harms; and serious, even life-altering

the Ashes, hereafter]; Debra Satz, “Countering the Wrongs of the Past: The Role of Compensation,” in *Reparations: Interdisciplinary Inquiries*, ed. Jon Miller and Rahul Kumar (New York: Oxford University Press, 2007); and Naomi Roht-Arriaza, “Reparations in the Aftermath of Repression and Mass Violence,” in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, ed. Eric Stover and Harvey M. Weinstein (Cambridge: Cambridge University Press, 2004).

¹² See Ruth Rubio-Marín and Pablo de Greiff, “Women and Reparations,” *International Journal of Transitional Justice* 1, no. 3 (2007): 317–337.

¹³ See de Greiff, “Justice and Reparations,” and Heidy Rombouts, Pietro Sardaro, and Stef Vandeginste, “The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights,” in *Out of the Ashes*, 488.

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or life-threatening harms result from forms of violence and repression that do not target primarily women but that nevertheless affect them decisively. The chapter begins with the assumption that certain forms of coercion and violence against women are recurrent to a greater or lesser extent in many contemporary societies. It develops a critical and cautionary perspective, however, on the idea that violence in conflict is best seen as being “on a continuum” with everyday violence against women. Though a unifying explanation of violence against women serves important purposes for policy analysis and designing future-oriented preventive measures, it does not capture adequately the experience of catastrophic and life-changing violence many women experience in conflict situations. A victim-oriented perspective is crucial for understanding the meaning and consequences of violence with an eye to reparations. Walker articulates seven factors that emerge as salient in conceptualizing and understanding the violence and harm women suffer: (1) some of the forms of violence that target women are status-defining male exchanges; (2) violence is often used as a threat and punishment for women’s gender transgression in political contexts; (3) many of the forms that violence against women takes target women’s sexuality or reproductive capacity; (4) violence against women also takes the shape of women’s property being appropriated or destroyed; (5) women’s access to and their roles in creating social capital are frequently damaged by violence; (6) women are exposed to special and intense forms of shame and exclusion after they experience violence; and (7) women are frequently blocked from being, or insecure or socially discredited as, testifiers to violence to themselves. The chapter proposes the nonexclusive categories of *gender-normative violence*, *sex-, reproduction-, or care-specific violence*, *gender-skewed violence*, and *gender-multiplied violence* as constituting an analytic grid for tracking different ways in which harms befall women “because they are women,” sexually, psychologically, socially, and politically. These categories are rooted in research on actual instances of conflict and repression, and the idea is that they can help us ask the right questions about how women are harmed.

The aim of Chapter 2, “The Gender of Reparations in Transitional Societies,” is to flesh out the potential of large-scale reparations programs in transitional democracies for recognizing and redressing women victims of human rights abuses. It also provides insight about the transformative potential of reparations, namely, the potential to subvert, instead of reinforce, preexisting structural gender inequalities and thereby to contribute, however minimally, to the consolidation of more inclusive democratic regimes.¹⁴ The chapter

¹⁴ For the concept of transformative reparations, see Ruth Rubio-Marín, “Gender and Collective Reparations in the Aftermath of Conflict and Political Repression,” in *The Politics of Reconciliation in Multicultural Societies*, ed. Will Kymlicka and Bashir Bashir (Oxford: Oxford University Press, 2008), reproduced at the end of this volume.

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starts by developing a normative framework for conceptualizing reparations, one that sets the main aim of reparations to be to give victims due recognition *as citizens*, something which, I argue, requires all of the following: the recognition of the wrongful violations of victims' rights; the acknowledgment of state responsibility for such violations; the recognition of harms ensuing from the violations; and the attempt to help victims cope with the effects of harms in their lives and to subvert, however minimally, the structures of subordination that might have led to the violations of their rights in the first place. The chapter then spells out what "engendering reparations" might mean in the light of these requirements. In summary, it means: first, avoiding formal gender discrimination in the design and implementation of such programs; second, looking for ways of ensuring that patriarchal norms and sexist standards and systems of values do not leak into reparations; and, third, exploring ways to optimize the (admittedly modest) transformative potential of reparations programs so that they serve to advance toward the ideal of a society altogether free of gender subordination. I try to show that taking all of this into account has an impact on how reparations programs are designed and implemented. Specifically, it affects the selection of the crimes or violations for which there will be reparations, ensuring, for example, that crimes that affect predominantly women are not left out of the list of those that trigger access to reparations programs; the definition of the notion of "beneficiary," which should reflect that violations of rights may affect male and female victims disparately, and that generally these violations affect families and communities and not only individuals; and the design of the packet of possible benefits in favor of those that will best reach women and address the multifaceted harms they experience and, to the extent possible, help women move beyond the socioeconomic status they held before the violations.

Following these two chapters is a set focusing on specific topics that are of particular importance for the issue at hand. Chapter 3 is devoted to the reparation of sexual and reproductive violence. In spite of systematic underreporting, it is well documented that both under repressive regimes and in large-scale civil conflict women and girls are often subject to many forms of sexual and reproductive abuses, including rape (sometimes mass and multiple), sexual amputations, forced prostitution, sexual slavery, forced unions, forced impregnations, forced abortions and sterilization, and other forms of sexual denigration. Men and boys are sometimes subject to similar forms of abuse, although in view of widespread cultural prejudices that "feminize" male victims of sexual violence, the underreporting in such cases is even more severe. Recent (implemented or at least recommended) reparations programs and measures, such as those in Peru, Guatemala, Rwanda, Sierra Leone, Timor-Leste, and Morocco, have reacted to the widespread use of sexual and

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reproductive violence and explicitly include sexual violence among the violations that entitle victims to reparations. In this chapter, Colleen Duggan and Ruth Jacobson address the challenges and possibilities of repairing victims of the many forms of sexual and reproductive violence, providing the most comprehensive overview of the forms of reparations that have been either implemented or recommended in the past and identifying best practices and suggesting possible innovations in the field. The challenges of coming up with adequate reparations measures for victims of sexual and reproductive violence include taking into account the variety of harms that these violations can produce, such as loss of status, communal ostracism, material destitution, contraction of sexually transmitted diseases, other harms to victims' reproductive and mental health, and the bearing and raising of unwanted children. Special difficulties for reparation come from those harms that follow not directly from the violation itself but from the reaction to the violation on the part of the spouse, extended family, or community (such as harm to the person's social status, impossibility of remarrying, repudiation by the husband and other family and community members, etc.), all of which suggest the need to come up with innovative ways to deal with reparations targeting both the individual and her environment while being careful not to reinforce sexual stereotyping or entrench sexual bias. The fact that sexual violence is the only crime for which victims themselves are often blamed is only one of the reasons that repairing this kind of violation is a particularly daunting enterprise.

It is well documented that both boys and girls are subject to various forms of abuse, including illegal detention (together with their mothers), forced recruitment, abduction and forced removal from their families, sexual abuse, sexual and domestic labor, slavery, forced marriage, and amputations, among others. Children also bear some of the most serious consequences of violations committed against their parents, such as executions or illegal detention, which can result in upbringing in an orphanage or a single- or child-headed household. Gender seems to play a significant role in the type of abuse that girls and boys more commonly experience, with girls being more often subject to sexual violence, sexual and domestic labor, and forms of slavery, and boys to forceful recruitment for combat. Also, violations affect boys and girls in gender-specific ways. Finally, given that in many societies women are the main caretakers of minors, the differential impact on whether children become beneficiaries of reparations measures on women is undeniable. All of this explains the importance in a volume such as this one of Dyan Mazurana and Khristopher Carlson's Chapter 4, "Reparations as a Means for Recognizing and Addressing Crimes and Grave Rights Violations against Girls and Boys during Situations of Armed Conflict and under Authoritarian and Dictatorial

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Regimes.” Their study classifies the forms of violations and harms that children and youth experience most typically in times of political turmoil as a result of violent acts that target them or their parents. It then looks systematically at the experiences, possibilities, and challenges around repairing children for the harms they endure, placing the emphasis on the need to consult them and include their voices in reparations processes and to draft programs that enhance the visibility of children as rights bearers and not only dependent family members.

Whereas many of the forms of violence committed under dictatorial regimes and during large-scale ethnic and civil strife target men for their political activities, family members – particularly in societies predominantly organized around the family structure embracing the breadwinner model – are not only severely impacted by the violations committed against men, but also sometimes directly targeted for abuse because of their status, precisely as relatives of those who will become the “primary” victims. In either case, parents, partners, spouses, and children of the disappeared, executed, or detained persons are often left emotionally desolate and economically destitute. This is especially true of partners and spouses who are left with the entire burden of raising a family without a breadwinner, often in societies where women lack income-generating skills, have little education, and may even be stigmatized for their involvement in activities outside the home. Ironically, these are precisely the women who, in most experiences, lead the fight for justice and truth about their loved ones, frequently relegating reparations claims for their own suffering and hardship to the bottom of their list of claims. In Chapter 5, “Repairing Family Members: Gross Human Rights Violations and Communities of Harm,” I, along with Clara Sandoval and Catalina Díaz, address the challenges, possibilities, and experiences of repairing the family members of victims of grave violations of human rights. The chapter is ambitious in its scope as it tries to provide a comprehensive account as well as a critical analysis of how the subject matter has been treated under the case law of the European Court of Human Rights and the Inter-American Court of Human Rights, and by national reparations programs. Among other things, the article underscores the importance of departing from a succession paradigm, according to which family members will receive reparations only if their loved ones have died or disappeared, in favor of one that recognizes the need to repair next of kin in their own right for the moral and material harm they experience as a result of the violations.

Chapters 6 and 7 shift the focus from forms of victimization and categories of victims and beneficiaries to forms or modalities of reparations. In Chapter 6, “Tort Theory, Microfinance, and Gender Equality Convergent in Pecuniary

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Reparations,” Anita Bernstein uses tort theory as a framework to underscore the importance of providing women material redress through reparations. Doing so is important for several reasons, including the fact that by law, custom, and religion women often do not enjoy control over property and wealth comparable to men of similar class position. Also, as is well known, violent upheavals that disrupt and transform traditional divisions of labor, power, and ownership, or that involve displacement and geographical relocation, often result in dramatic and inequitable economic losses for women, or in women being unable to assert rights to property. Official statistics used to define policies of reconstruction may ignore households run de facto by women when husbands are absent or missing. With the current long-delayed and still not fully effective focus on sexual violence toward women in political conflict, there is the possibility that women’s losses of livelihood, land, wealth, and economic assets or the economic effects of violations on women’s lives may be eclipsed. Hence, placing the question of women’s material well-being to the fore when discussing reparations is important. More concretely, Bernstein’s chapter explores the possibility of giving victims shares in microfinance institutions as a promising kind of material reparations benefit. It discusses how such an alternative might encourage development in regions that are too poor to be able to dispense large payments to victims of human rights abuses. It also analyzes how, by encouraging victims’ agency and security, reparations through microfinance can be especially promising for women and help them improve their status.

Brandon Hamber and Ingrid Palmary’s Chapter 7, “Gender, Memorialization, and Symbolic Reparations,” takes us from the realm of the material to that of the symbolic. Whereas symbolic reparations measures are becoming an increasingly common feature in reparations programs (including memorialization activities, museums, naming of streets and public activities, monuments, official apologies, etc.), there has been virtually no discussion as to whether female and male victims have gained equal/proportional symbolic recognition through reparations schemes. Nor has it been discussed whether there may be good reasons to believe that male and female victims require different forms of symbolic redress, including modalities of apologies, or are differently engaged by memorialization attempts that are interactive in nature. This chapter explores the theoretical question of what engendering memorialization and symbolic reparations projects can entail. It argues that this venture requires including women in the traditional forms of representation and symbolic recognition while at the same time changing those traditional forms in ways that have the capacity to reach and be meaningful to women. More concretely, the chapter makes suggestions as to how symbolic reparations could make a