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trANSitioN Judiciary, rule of law and coStitutioNal democraCy: preliminary study on the role of rights arising from the political transition for the realization of the democratic rule of law1

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Summary

This preliminary study seeks to investigate the historical formation of the concept of transitional justice and its normative implications as a means to assess its positive impact on the realisation of Rule of Law through Constitutional Democracy

Keywords: transitional justice; democratic rule of law; human rights.

Abstract

Transitional Justice, Rule of Law and Constitutional Democracy: Preliminary study about the role of transitional rights to an effective democratic rule of law

This preliminary study searches historical conception of transitional justice and its impacts as an instrument to measure its positive impact on implementation of a Rule of Law through a Constitutional Democracy.

Keywords: Transitional justice; democratic rule of law; human rights.

INTRODUCTION

Considering the criticism to the conceptual overlapping present in the idea that the establishment of a formal democracy of electoral bias can already mean, in itself, the achievement of "democracy", and not a mechanism of it, in a reasoning that disregards material aspects relevant to the debate about what a democracy is, the present article will seek to conceptualize what is "transitional justice" and what is its relationship with the idea of "rule of law".

In this way, the limits and counterbalances of a legal system are presented so that transition can be seen not simply as a means of installing an honest electoral regime, but also as part of the broad process of building a democracy. Moreover, the present study aims to verify how transitional justice allows establishing substantial distinctions between lawful transitional mechanisms

and illicit and also catalyzes the achievement of a special kind of democracy: constitutional democracy. To this end, a substantial view of what the "Rule of Law" is will be adopted, starting from a conception formally linked to the premise shared with the republican ideal of a "government of laws" (cf. Besson and Martí, 2009), but, also, materially linked to the values of the so-called constitutionalism (or neoconstitutionalism) in what concerns the idea that even the laws elected by a people in a democratic way and under the mantle of a legitimate constitution are limited, only and only, by the democratic principle itself (which they cannot voluntarily depart from) and by human rights, which guarantee the minimum essential integrity and legitimacy of the rights system as a system of intersubjective sharing.

Methodologically, the historical process that allowed the set of transitional measures undertaken in different countries over time to give rise to a concept of non-ideal justice will be presented, typical of these moments of political flux between a non-democratic vision of the world and a democratic vision and guided by the idea of the existence of inalienable rights and limitations to power, arriving at a set of substantive dimensions of transitional justice, which overlap and interconnect in the concrete context of the search for justice in periods of political change. The legal accumulation generated in the national and international concrete processes, embodied in these dimensions and connected to a substantial idea of Rule of Law, is what allows the extraction and detection of the normative limits imposed by the idea of "transitional justice", leading to the affirmation of the existence of a set of obligations of the states in transitional and post-transitional periods and, more especially, in the formulation of the foundation of public policies undertaken in the post-transitional period to deal with the historical and cultural heritage of authoritarian governments at a time when the political priority of society ceases to be transition itself and becomes transition justice.

In this way, these mechanisms are understood as a way of, at the same time, giving retroactive and prospective extension to the Rule of Law, compensating and repairing past violations by re-establishing the typical effects of the Rule of Law, especially equality before the law and the predictability of the legal system, so as to ensure non-repetition of violence and avoid the existence, in the society that intends to found a constitutional democracy, of an "authoritarian estate", composed of acts that cannot be subjected to judicial control of legality and people who cannot be prosecuted.

1 THE HISTORICAL DEVELOPMENT OF THE CONCEPT OF "TRANSITION JUSTICE

During the 20th century, dozens of countries went through processes of transition from non-democratic to democratic regimes. Many political models considered totalitarian, authoritarian, post-totalitarian or even sultanitarian, with various forms of economic organization, from the obvious socialist example to subsistence and dependent economies, undertook political liberalization changes, generally associated with democratic openings and, in a significant number of cases, produced states of law based on the idea of a constitutionally limited democracy organized around certain values universally recognized by the international system, such as human rights.

At first reading, there are few possible connections between the political transitions experienced by the Axis countries in the post-World War II period, the countries of colonial Asia and Africa that became independent (although not always democratic), the countries of Southern Europe in the historical period of the 1970s, the Latin American democracies after military regimes and dictatorships subsidized by foreign powers and, finally, the countries resulting from the division and opening of the former "communist block" headed by the Union of Soviet Socialist Republics, regarding the formulation of the concept of a given type of "justice" specific to the transitional context.

Nevertheless, there is a common element to all these transitions, and the way to deal with it has led to the creation of numerous international treaties and resolutions, as well as hundreds of national and regional laws and processes, culminating in the formulation of a contingent concept of justice to be applied in concrete cases. The common element, however, is negative: it is a collection of violations of the minimum and fundamental rules of protection for human rights combined with state action or the action of large organized groups in the state territory aimed at carrying out these violations. What remains common to all these transitional processes, therefore, is the need to re-establish the rule of law and, at the same time, to address the violations committed in the name of this same State during the period of exception and authoritarianism.

Transitional Justice" is the name given to a series of initiatives undertaken at the international, regional or domestic levels in countries undergoing liberalization or democratization processes, encompassing their public policies, legislative reforms and the functioning of their justice system, to ensure that political change is successful and that, at the end of it, there is not only an electoral democracy (characterized by procedurally fair elections), but a Rule of Law in the substantial sense of the term. The conception of "transitional justice" as a field of action and study is very clear from Bickford's definition:

> Transitional Justice refers to the field of activity and inquiry focused on how societies deal with their legacies of human rights abuses, mass atrocities, or other forms of severe social trauma, including genocide and civil wars, in order to build a more democratic, just, or peaceful future. (2004, p. 1045).

The author goes on to present what, roughly speaking, he is referring to when using the concept of transitional justice:

> The concept is commonly understood as a way of confronting the abusive past as a component of macro-political transformation. This usually involves combining complementary judicial and extrajudicial strategies, such as investigative action against torturers, the establishment of truth commissions, and other forms of investigation into the past; focusing efforts toward reconciliation in divided societies by developing reparations en bloc for those most heavily affected by violence or abuse, bringing to the fore the right to memory, and remembering victims; and reforming a broad spectrum of state institutions that served the perpetration of abuses (such as security, police, or military services). (Ibidem, p. 1045).

From the institutional point of view, therefore, the term transitional justice refers to the body of experiences undertaken to overcome authoritarianism, and from the academic point of view, to a broad investigative field, interdisciplinary par excellence, that focuses on knowledge and evaluation of these highly complex measures to confront the authoritarian legacy. But Bickford also draws attention to another important element, alluding to a value added to the concept: "[...] the human rights movement has strongly influenced the development of the field, making it self-consciously victim-focused" (ibid., p. 1045).

Thus, the reference to transitional justice has, notably, a different meaning from the reference to transition to democracy, since in the latter, the central focus of concerns is on the stabilization of a reasonably democratic electoral system, even confusing the essential requirements of a democracy with the minimum procedures necessary to conduct an election.

The development of the field of transitional justice, especially with regard to institutional experiences, generates an interesting source of law, since the accumulation of these experiences can be consolidated not only in technical opinions, comparative experiences, international agreements and treaties, and so on, but also in a large body of case law, both domestically and, most especially, internationally.

Academic studies have gradually been able to classify these concrete experiences in dimensions that have come to influence the way in which states have organized the insertion of new mechanisms in their international processes and, above all, the way in which courts, both national and international, have come to verify compliance with certain legal obligations, so that, in this double-sided dynamic, some sets of normative effects have been consolidated. [2] It is this process that leads Teitel to formulate a legal conception of the concept in the following terms: "Transitional Justice can be defined as a conception of justice associated with periods of political change, characterized by legal responses of confrontation the wrongdoings of the previous repressive regime" (2003, p. 69 - free translation).

We can see, therefore, that the idea of "justice" present in the term differs from that presented in abstract conceptualizations of justice, such as, for example, a Rawlsian conception (Rawls, 2002), since the starting point is eminently concrete and contingent, so that the knowledge of the genealogical process of the idea of transitional justice is important for the historical location of its contents, sources of normativity and references in the positive law, since the concrete cases of transitions are what modulated, over time, the very scope of the concept.

There is broad consensus on the "ground zero" of modern transitional justice. According to Elster "the modern history of justice of transitions to democracy essentially begins with the defeat of Germany, Italy and Japan in 1945. In Germany, transitional justice processes began immediately after the war and still continue in the present." (2006, p. 73 - free translation). Starting from this same precedent, Teitel will decompose into three phases the formulation of our concept of transitional justice today, signaling that, already in 1945, the inauguration of the first phase is accompanied by a historical criticism of the inability of the democratic forces to have established, in 1919, a process of justice capable not only of satisfying the past justice alluding to the first war, but also, and definitely more relevantly, of avoiding the repetition of the perpetration of barbaric crimes:

> The administration of the first post-war model of transitional justice, characterized by the failure of national trials, was left to Germany. Viewed from subsequent history, it was clear that the national trials of the first post-war period did not serve to deter future carnage. In an overtly critical response to the past, the transitional justice of the second postwar era began by refraining from national trials, instead seeking international criminal accountability for the Reich leadership. (2003, p. 72 - free translation).

Thus, the birth of the modern idea of transitional justice is viscerally connected to the idea of non-repetition, electing the criminal route as an effective means both for the application of retributive measures and for the formulation of a significant social framework of repudiation of certain practices.

The first phase of the formulation of transitional justice extends from 1945 until the mid-1970s and has, therefore, an internationalist and punitive character, since it was necessary to move away from national jurisdiction in order to punish those responsible for the atrocities of World War II.

This model of the application of concrete justice has, therefore, an umbilical connection with the transition model in question. It was only possible given the complete collapse of the nation state that harboured criminal activities. It is in the first phase, therefore, that those that will be two of the key elements of transitional policies are mapped out: (i) the reform of the institutions perpetrating the crimes with a view to non-repetition and the
(ii) individual accountability and punishment of offenses perpetrated in the name of the regime. The first measure, furthermore, will unfold into a second: the process of purging the public machine, with the removal of the servants who supported the regime from the essential public functions of the state (cf.: Mayer-Rieckh and De Greiff (org.), 2007).

While the first phase of consolidation of transitional justice had as its concrete panorama a set of dismantled states being rebuilt under the aegis of national powers that spoke on behalf of the international community, the transitions of the second phase of consolidation, situated between the mid-1970s and 1989, In most cases, the anti-democratic experience and the transition itself are related in some way to the bipolar dispute between the United States and the Soviet Union, which was coming to an end.

Moreover, if in 1945 a broad international intervention was possible for the reconstruction of the belligerent states, in the transitions of the third phase most of the processes will be of national initiative and execution, so that the reestablishment of the rule of law can count on international law not for the promotion of judgments, but only as a reference of reasonable legal parameters to be applied in the democratic resumption. At this stage, external interventions were frowned upon by the international community itself. Since the decades of the Cold War had made ideological foreign interventions commonplace, the policy of the moment was to allow countries in transition to develop their own paths to democracy, avoiding the resurgence of local disputes that were linked to the disputes of the old, decaying international order.

Evaluating the mechanisms adopted in this second phase, Teitel asserts that:

> Transitional justice in its second phase reflected a balance of values considered relevant that hardly coincided with the values of an ideal rule of law. As the aim was to promote legitimacy, pragmatic principles guided the politics of justice and the sense of adherence to the rule of law. Transitional justice connected with a conception of justice that is imperfect and partial. What is just and right in extreme political circumstances was determined by the transitional context itself. (2003,
> p. 76).

The second phase of transitional justice consolidation was therefore a moment of shifting emphasis. While in the first phase, the restoration/implantation of the rule of law used the punitive mechanism to promote full convictions and restore equality before legitimate laws through international tribunals, in the second phase, political injunctions of sufficient magnitude occurred to make the criminal alternative largely banned at the local level. Thus, in a process typical of the political dialectics of concrete life, we see other dimensions of justice promotion emerge in this period during the political flow toward democracy that will come to make up the broader and more current concept of transitional justice.

The political impossibility of bringing state criminals to justice at the national level, avoiding direct accountability along the lines of phase one, has led states to seek other forms of

equate its authoritarian debts. Two highly relevant transitional measures are a product of this phase: (i) large-scale reparations to victims (which also emerged as a consequence of the maturation of the first phase processes with regard to Nazi crimes) and (ii) the establishment of truth commissions as a form of historical accountability.

If the major criticism to the first phase focused on the incompleteness urged to promote a broad historical reconstruction of the past from an eminently judicial process (cf. Ginzburg, 2007), the second phase is characterized by the pluralization of forms of access to truth and of social construction and diffusion of memories. Teitel concludes that this phase is characterized by the migration from a perspective of individual accountability to the establishment of community processes of overcoming the past, highlighting the insurgence of concepts such as "national reconciliation", which are primarily external to the world of law:

> The truth and reconciliation project incorporates much of its discourse from outside law, in particular from ethics, medicine, and theology. Its purpose is not merely justice, but peace for individuals and society as a whole. (2003, p. 82).

However, still in this second phase, especially towards the end, we will observe a rejudicialization of transitional justice, especially characterized by the involvement of international courts for the return to the legal sphere of issues dealt with at the political level during the transitions (cf. UN: HR/PUB/06/4; Wouters, 2008). In this period, there will be a wide proliferation of international law instruments dealing with the subject, which will allow the third genealogical phase of transitional justice, started in 1989 and extended until the present, to be considered the phase of its "consolidation", with the stabilization of several normative sources to guide the policies and measures of transition. Still following Teitel, the creation of the International Criminal Court is the most evident sign of the arrival to a stable phase of development of transitional justice (2003, p. 90), since permanent institutions are stabilized, which hold among their attributions a set of action forecasts that attend the making of justice in periods of political flux.

With the definitive existence of a permanent court with a broad jurisdiction to deal with transitional issues (most notably in the criminal sphere), added to the sufficient normative development of international law and other sources, it becomes possible to affirm that transitional justice today has a consolidated foundation, to be improved over time. From the genealogy presented, it draws attention to the way in which phase two serves, doubly, to expand the pool of mechanisms available for transitional processes insofar as it attempts to deviate from the use of criminal justice and, furthermore, strengthens the normative basis of the use of criminal justice itself, to the extent that this refusal to investigate and punish leads international law to establish various precedents on the existence not of a *faculty* to investigate and punish by States, but of an *obligation to* investigate and punish crimes against human rights, with only the other crimes being subject to any form of pardon (cf. May, 2005).

For all the discussed, transitional justice can be defined as the set of legal and political efforts for the establishment or reestablishment of a democratic system of government founded on the rule of law, whose emphasis of action does not fall only on the past, but also in a future perspective. The normative basis of the idea of transitional justice has its roots in the penalizing application of international law at the Nuremberg Tribunal, and is expanded with the measures of memory, truth, and reparation undertaken mainly at the national level in countries that experienced democratization during the third wave and is consolidated in several

documents and international treaties during a phase of which we are contemporary, with the emergence of specific international bodies for the processing of certain claims, as is the case of the International Criminal Court. It is also important to highlight that, because of its emergence in the struggle against impunity and tyranny, transitional justice is characteristically geared towards the promotion of victims' rights and, therefore, the focus given to this issue by studies "of political transitions" and "of transitional justice" is different.

As we have seen, transitional justice measures go beyond what the law traditionally deals with, and it is interesting to see now how legal and political mechanisms are equated in processes of consolidation of democracy and the rule of law.

2 THE PROBLEM OF NON-SUBSTANTIAL CLASSIFICATIONS: LEGAL JUSTICE AND POLITICAL JUSTICE IN THE CREATION AND APPLICATION OF TRANSITIONAL MECHANISMS

Jon Elster charges the existence of at least three possible types of "justice institutions" in a transitional process: legal justice, administrative justice, and political justice:

> [...] we can represent the institutions of justice in a single line, with pure legal justice at one end and pure political justice at the other. Administrative justice can be located closer to one or the other extreme [...]. Moreover, legal justice can be impure, and still be recognized as legal. On the other hand, some forms of political justice share important characteristics with legal justice. (ELSTER: 2006, p. 104)

Elster clearly indicates the existence of two central components in the idea of justice: law, understood as formal law, and politics, understood as majority deliberation. The analysis of concrete cases demonstrates how there is an enormous wealth of interactions between law and politics in the practical resolution of problems of transitions. To mention just one case - which is probably the most notorious and studied case of the 1990s

– in South Africa it was decided to grant amnesty to rights violations - even those against human rights - provided that they were publicly acknowledged, with the aim of enabling historical clarification and social pacification, strengthening the post-apartheid national identity. In a process of this nature, clearly a political justice option supplants what would be the most logical path of legal justice: the promotion of trials (Cf. Bois-Pedain, 2007).

From the accumulation of historical experiences and the normative framework formulated over the years, the set of mechanisms to promote transitional measures can be classified into four broad descriptive categories (Cf. Elster, 2006; Van Zyl, 2009; Brito, 2009; Teitel, 2000; Bickford, 2004; Genro, 2009):

– Institutional and administrative reform measures;
– Policies of reconciliation, forgetting and memory;
– Reparations policies for victims of abuse;
– Changing the Justice System for the due processing of crimes.

Each of these sets has its own characteristics, but roughly speaking, it can be said that the first two sets have a more political profile (translating into measures that depend on the approval of the majority, directly or represented), while the last two have a more legal profile (since it is possible to formally deduce their necessity from the legal system itself). With this observation, it is possible to identify the privileged forums for the implementation of each set of measures.

While institutional and administrative reforms, as well as policies for reconciliation, memory and forgetting, are primarily conducted by the legislative and executive branches, reparation policies for victims tend to be implemented by courts (even when administrative courts with extraordinary competence, located in the executive branch, in a model that Elster's classification would define as legal administrative justice) and accountability for crimes and atrocities, as a priority, processed by the regular national justice system (the use of the international system being an indication of the inefficiency of the national system). Thus, it makes no sense to imagine a court conducted by the legislative branch, or even that the judiciary should be the agent deliberating on which reforms the state should undertake so that human rights violations do not happen again.

Following with Elster, we have that it is highly recommendable that legal justice is the main guide of action of the transitional process, since it is to it that concepts such as "legal security" and "legality" refer in the ordinary use of Law, but that this is not always possible or desirable when considering the concrete situations on which transitional justice must focus. [3] This situation becomes more evident when we analyse the components of Elster's concept of pure legal justice:

1Clear laws

2ºIndependence of the judiciary

3º Impartial judges

4th Obedience to Due Process of Law

The definition of legal justice is formatted from the perspective of a fully functioning democracy, with the consolidated Empire of Law. This is what situates Elster's typology - as the author himself assumes – on a necessarily ideal plane, since in the 20th century it is rare to identify any transitional process that does not start from a constitutional document and a previous legal-political system, which defined the criteria of legality in a strict but, even so, illegitimate way. In a positive-normativist conception4 the two sets of transitional measures concerning the reparation of the victims and the accountability of state criminals are severely undermined, since, in many cases, the justice system and the law itself were altered to formally justify the persecution of the victims, to benefit the criminals, or even, the regime itself inserted impunity measures into the legal system, with the hope that the positivization of such measures would legitimize them in the legal system. Such facts generate legal aberrations where the form of the law undermines the very substance of the law.

This creates an additional difficulty for the implementation of the group of measures more directly related to the legal field, since without a substantive definition of the rule of law, which guides an interpretation (including constitutional) appropriate for the solution of typically transitional controversies, the implementation of any measure will be breached by the clash with the previous legality. Moving away from the normativist perspective and seeking an analysis in political science we can better situate this metaproblem:

> [...] restoring the Rule of Law is, perhaps surprisingly, easier in countries where the legal system did not have any autonomy during the authoritarian period (Chile and Argentina) than in countries that went through a semi-legal form of authoritarianism and experienced great continuity between authoritarianism and democracy (Brazil and Mexico). This is so because in cases where authoritarianism changed the very structure of the Rule of Law, it is practically impossible to retroactively reach with the Rule of Law the period prior to democratization. (Avritzer, 2005, p. 105).

What Avritzer notes is that in countries like Brazil, where the system of repression was installed founded on broad undemocratic consensuses of various civilian and military elites the system of legality

and legal culture are affected. The heritage is not only restricted to the legislative and judicial production of the period, but also the production of culture, and culture is a necessary reference-media for any form of interpretation.

In the same direction as Avritzer's conclusions are those of Pereira, who in extensive research accuses the consensus between Brazilian judicial and military elites as one of the main reasons for the existence in the country - unlike what occurred in South American neighbors who also lived under repressive regimes – of the extensive use of "legal" means for the prosecution of political "criminals". For Pereira, the Brazilian transitional process may have been able to install new laws, but it was not able to change the authoritarian reading given to others, still lacking, therefore, substantial efforts regarding the change of mentalities that allow the revision of the authoritarian past in a democratic narrative, which depends on adjustments both in the legal field, with the removal of laws formally valid but illegitimate, and with regard to the political production of consensus about the past, with the creation of transitional mechanisms for obtaining information and producing socially legitimate truths:

> [...] it is no surprise that Brazil's democratic transition prevented both truth commissions and trials of torturers. This is well known, but what is less recognized is how actively both the military and the judiciary defended the *status quo* in Brazil, while shaping a transition in which a false amnesia - combined with pride in the authoritarian past - was the order of the day. (Pereira, 2000, p. 162).

The difficulty of dealing with the past in a way that is both affirmative of democracy and legally legal, exceeds the explanatory capacity of a formal concept of Rule of Law that sees the rule of law as a simple rule of law, because by using this syllogistic methodology of directly associating "law" and "law" we end up inserting in the law a whole set of authoritarian values illegitimately included in the legal system by the regime itself, so that the judiciary functions as a mechanism of perpetration of authoritarianism in time.

The same problem faced by the countries of South America, sacrificed by violent right-wing regimes, was faced by the countries of the former Communist bloc, which lived through left-wing revolutionary experiences that were equally incapable of being compatible with democracy, massively violating fundamental guarantees and human rights. This situation can only be illustrated by a brief passage from the research of Herman Schwartz, who focused on the creation and activities of the constitutional courts in the countries of the former Soviet bloc and how they faced political problems with legal implications, especially civil, criminal and administrative:

> In three of these [former Communist Bloc] countries - Poland, Hungary and Bulgaria - constitutional courts have had to deal with the cruel dilemma of coming to terms with the past: the clash between the pressing need to respond to past abuses and the need to move on. On the one hand, it is important that transgressors be punished; they need to be assured that they will not be allowed to continue their gains on the suffering of others. Even more, allowing them to continue in their public positions may sabotage the transition to democracy. On the other hand, pursuing wrongdoers can cost these countries much of their administrative, managerial, and other talent; it can penalize many of those who are no more guilty than others who will be left unpunished; it can produce a 'witch hunt'; and it can generate opportunities for blackmail, especially in cases where it is difficult to prevent leaks and other forms of misuse of files that are often incomplete or even falsified. This is also the danger of guilt by association. (Schwartz, 2002, p. 234).

In the author's analysis, the role of the constitutional courts was crucial to curb a political process of revenge against the members of the former regime, by using the counter-majoritarian premise and the substantial values of a rule of law without, on the other hand, implying that it did not promote justice. It was up to the courts to use the ideas of the rule of law and substantial concepts of justice, guided by reasonableness, which is always expected in the decision of delicate matters, to establish the legal parameters for the promotion of reparatory measures and, especially, measures restricting rights:

> Many of these issues have come before constitutional courts in Poland, Hungary and Bulgaria, requiring them to grapple with issues of restitution, doctrinal construction efforts, criminal investigations for acts that were committed years and sometimes decades ago, and the opening of secret police files. The courts have curbed revenge impulses by preventing some efforts to punish former Communist Party officials, security service personnel and their collaborators. The courts have limited the scope of many of these unjust measures by allowing only those focused specifically on the offenders and limiting themselves to the opening of files. (Schwartz, 2000, p. 234-235).

Schwartz's analysis allows for the identification of the difficult interrelationship between transitional justice policies necessary for democratic consolidation and the promotion of justice within reasonable parameters of a constitutional democracy. On the one hand, not promoting justice means endlessly postponing the conflict (see, for example, the French case: Bancaud, 2009), on the other hand, promoting only "political justice" can divide society and cause popular revolt against institutions, which will continue to be seen as partial and arbitrary, missing the opportunity to take advantage of the application of transitional measures to favor the democratic process.

On the one hand, the biggest problems of transitional justice in the former communist bloc relate to the functioning of public institutions, which should begin to work for the protection of the citizenry, and no longer for the security of the state and the revolution, and the ways to reorganize the entire society for the return of private property. On the other hand, in those countries it is the transition process itself that inaugurates (or re-inaugurates) some institutions that play a central role in the democracies, such as the constitutional courts, unlike what happened in South America, where such spaces were infected by the authoritarian regime.

When we return our gaze to South America, therefore, we have another problem: the perpetration of mass crimes by the state, under the protection of perverse forms of formal legality, under the command of permanent institutions of the state structure that survive (with or without reforms) the political transition itself. If in the former communist bloc the secret security services that acted against the citizens of the state itself could be deactivated, in countries where there were military coups it is not possible to extinguish the armed forces and the police services, only to reform them.

It is in this sense that the Eastern European dictatorships were less concerned about placing the processes of political repression in a legal context, since these processes were conducted, to a large extent, by institutions that were independent of a concept of legality in order to exist, since the main operational arms of repression functioned in a twilight zone, controlled in an eminently political way. The entire process of transition is eminently political, but the actions of the State are necessarily based on the concept of legality. It is based on legal foundations when transitions are intended to lead to constitutional democracies guided by law.

Thus, having characterized the peculiarity of the transitional moment and the clash of formal and material legalities arising from it, it is necessary to advance in obtaining the foundations of the idea of "Rule of Law" used for the implementation of the transitional measures, since what is verified here is that the application of the transitional measures presented above leads to a great tension in the basis of the idea of what Rule of Law is, pushing the limits of the formal concept to a point where it completely loses its explanatory and prescriptive capacity, starting to generate radical logical inconsistencies, such as the one that makes the principle of legality not a guarantee for a fair trial, but rather an assumption of impunity in favour of those who broke with the very legality that the principle intends to protect.

To resolve this tension, the study will focus on the analysis of the concept of Rule of Law itself in a constitutional democracy to be able to come up with a definition that is not merely formal and allows for a distinction between Law and discretion that is both legally valid and politically legitimate. This concept must therefore be applicable in the solution of the controversies that are exacerbated to the maximum in the debates of transitional periods. Only a substantial concept of Rule of Law, oriented towards democracy, will be able to solve, through hermeneutics, the apparent antinomies between formal legality and political change that arise as a product of overcoming authoritarian regimes, since this is the operative concept that connects law and politics in a reciprocally limited way, allowing the attainment of reasonable parameters of legitimate action.

3 OVERCOMING THE STRUCTURAL SEPARATION BETWEEN *LAW* AND *POLITICAL JUSTICE*

If non-democratic experiences were capable of traumatizing world society in the 20th century, one cannot fail to note the efforts made and success achieved in structuring sustainable alternatives for maintaining democracy in the long term. The restructuring of national states and the creation of an international system with the capacity to act are, without doubt, two of the most exuberant products of overcoming legacies of arbitrariness and violation of rights.

At the level of national states, there has been a consolidation of a democratic and egalitarian vision of the functioning of public institutions, with a significant expansion of the attributions and possibilities of action of the justice system, whether in the promotion of democracy or in the counter-majoritarian defence of individual liberties. All these processes in the legal and political field have been given the name "neoconstitutionalism", in general opposition to the old ideas about what a constitution was and what it was for.

Barroso defines three major milestones to situate neoconstitutionalism:

> (i) as a historical landmark, the formation of the constitutional state of law, whose consolidation took place over the final decades of the 20th century; (ii) as a philosophical landmark, postpositivism, with the centrality of fundamental rights and the rapprochement between law and ethics; and (iii) as a theoretical landmark, the set of changes that include the normative force of the Constitution, the expansion of constitutional jurisdiction and the development of a new dogmatics of constitutional interpretation (Barroso, 2007, p. 20).

This classification, which starts from empirical verification to theoretical elaboration, unequivocally demonstrates the overcoming of the idea that the law, as a written text, could contain everything that is Law and, furthermore, the overcoming of the idea that Law, as a social practice, can contain a priori all the necessary answers to the problems of Justice. The idea of Rule of Law, in these terms, moves away from the

notion of the rule of law and approaches the notion of the rule of law, also connecting to democratic theory through the idea that the Constitution brings together law and democracy in the Constitutional Rule of Law.

Such elucubration becomes extremely useful for this study, since, placing the consolidation of the Democratic Rule of Law at the end of the twentieth century, ultimately, we speak of the consolidation of a Rule of Law that in many cases is post-transitional and claims to be more democratic than it is. The instrument for the permanent democratization that such claim implies will be, among others, the Constitution itself, which permeated with principles allows a permanent topical re-reading of the interrelationship between issues of Law and political issues, partly healing the problematic separation that Law had not only with Politics, but also with Morals and Ethics in the modern age. [5]

The Constitution, in this context, has a totally new role, due to its ability to mediate the relationship between Law and Politics at the most varied levels, whether in its normative use, or in its most varied symbolic uses, in the communication processes that allow the entry of political demands into the legal system, where they may follow only as symbolism or effectively gain normativity (Neves, 2007), depending on the political conceptions of justice to be adopted by the Judiciary.

Barroso defines this tension that arises in the application, especially of principles, as a tension between "the norm and reality", "from which the possibilities and limits of constitutional law derive" (Barroso, 2009, p. 80). These readings affirm the existence of independence between Law and Politics, without denying the interconnection between both. Neves works on the idea of the Constitution as a "structural coupling" between the systems of law and politics, which leads him to properly conceptualize the existence, in the Rule of Law, of mechanisms for the political system to democratically intervene in the legal sphere and vice versa:

> Through the Constitution as a structural coupling, the interference of politics in the law that is not mediated by specifically legal mechanisms is excluded, and vice-versa. A horizontal intersystemic link is configured, typical of the Rule of Law. The operational autonomy of both systems is a condition and result of the very existence of this coupling. (Neves, 2006, p. 98).

From the synthesis between Neves and Barroso, we have that constitutional law, as currently understood, forms a field of articulation of laws and values of its own, which generates norms when applied in the concrete world. There is thus an autonomy of law in relation to politics and a limitation of law in relation to reality. Thus, in the constitutional resolution of concrete cases and, consequently, in the constitutional jurisdiction, there is a double legitimation process, arising from the political legitimacy of the author and the enforcer of the rule, who act at different times, historically updating the constitutional project of the country.

From all this stems the inoperability of any hermeneutic project that seeks to extract meaning from the law with a view to the realization of political demands without visualizing the law as an articulated system of values that receives or does not receive these demands in its interior; or, even, understand the law without locating it in its historical context, which limits the effectiveness of its norms (this is the tension between the norm and reality).

Such assertions are especially valid for legal readings to be made in democratisation processes, from the perspective of transitional justice, where law and the Constitution are used politically to induce and/or sustain broader political change, in a historical context where politics (understood simply as power) is always hypertrophic in relation to law (which is dependent on it, since there is no functional autonomy), and often invades its spheres of attribution, seeking to alter the very meaning of the rule of law, with a view to making irreconcilable legal orders compatible as "Rule of Law".

In the modern political transition periods, due to the enormous positivist influence at the end of the 19th century and beginning of the 20th century, an enormous tension was created for the consolidation of the Rule of Law. Such tension, in the English bibliography, is restricted to the concept of "*rule of law*" itself. The expression is usually translated into Portuguese as "Estado de Direito", "supremacia da lei" and "império do Direito".

The difficulty of translation is not due to any demerit of the professionals of the area, but to the very difficulty of establishing a precise conceptual framework for what "*rule of law*", "*L'Etat de Droit*" and "*Rechstaat" are,* which signal partially common contents and partially distinct contents, in three strands that are at the same time concurrent and complementary for the contemporary constitutional reading (cf. Rosenfeld, 2004, p. 17-21).

The first great example of how this debate on what is the *rule of law* articulates around the theme of transitional justice can be obtained from the debate between Herbert Hart and Lon L. Fuller published in 1958 by *Harvard Law Review*. Both texts discussed the legacy of the Nazi regime and the role of law to re-establish justice in what would be, in the systematization proposed here, a first phase of consolidation of the idea of transitional justice, with great emphasis on criminal justice and a heated debate about the legitimacy of establishing "retroactive" punishments, making null a legal system considered illegitimate. In the debate, Fuller refuted Hart by arguing that Nazi crimes occurred under the form of law, but not under the "*rule of law*", determining that the content of "law" comes not only from the text of the law, but also from morality (Fuller, 1958), explaining the debate between form and content in the semantics of the period, based on the division between juspositivist and jusnaturalist readings.

The same problem of consubstantiation of the concept occurs with the term "*Estado de Derecho*" in the Spanish language. Ferrajoli's attention to the polysemy of the term is quite clear in the following passage:

> In current usage, the expression "Estado de Derecho" is usually used to mean two different things which should be rigorously distinguished. In the broad, weak or formal sense, 'Estado de Derecho' designates any order in which public powers are conferred by law and exercised in the forms and procedures established by law. In this sense, corresponding to the German usage of the term Rechtsstaat, States of Law are all modern legal orders, including the most anti-liberal ones, in which public powers have a source and a legal form. In a second, strong or substantial sense, 'Estado de Derecho' designates, on the contrary, only those orders in which public powers are subject to the law (and, therefore, limited or bound by it), not only as to forms, but also in contents. In this more restricted meaning [...] States of Law are those orders in which all powers, including the Legislative, are bound to respect the substantial principles established by constitutional rules, such as the division of powers and fundamental rights. (Ferrajoli, 2003, p. 13-14).

The distinction between "formal Rule *of* Law" and "substantial Rule of Law" proposed by Ferrajoli is not far from the dispute around the concept of "*rule of law*" that took place fifty years ago between Fuller and Hart. The main difference is that, while the former took place in a context of dispute between jusnaturalists and juspositivists, the current debate takes place in the framework of the consolidation of a constitutionalist (or "neoconstitutionalist") reading of law that, in itself, already has some predicates that lead to the establishment of a "rule of law", already possesses some predicates that lead to the overcoming of the binomial relation between "jusnaturalism" and "juspositivism" through the tension and equating between "democracy" and "fundamental rights" as reciprocally limiting poles inscribed in the constitutional order (cf. Habermas, 2003).

It is in this context, where a post-positive idea of Law becomes possible without the exclusive recourse to moral rules, that Rosenfeld establishes as three minimum essential requirements for a "Rule of Law":

> In general terms, the rule of law requires (i) that the citizenry as a whole is subject only to published laws; (ii) that the legislative function is kept separate from the judicial function; (iii) and that no one among the state's leaders is above the law. (2001, p. 2).

Furthermore, Rosenfeld goes on to state that without these minimum requirements regarding the Rule of Law, what we define as a "constitutional democracy" will be harmed, since the contents that fulfill such concepts are necessarily interrelated. For a constitutional democracy to exist the following conditions should minimally be met: "[i] limitation of government powers, [ii] adherence to the rule of law, [iii] and protection of fundamental rights" (ibid., p. 03). Thus, the concept of "Rule of Law" will be responsible for mediating the relationship between the democratic will and the individual protection of people, as seen above in the example of Eastern European constitutional courts, which used the law to restrict political claims that they considered abusive, such that the idea of "Rule of Law" embodies a set of values that will not oppose, necessarily the will of a minority or a majority that seize power (as occurs in a dictatorship), but the will of men as a gender that is independent of number, given that the idea of rule of law can also limit the democratic will of the majority when this "will of most men" departs from the protection of the system of rights.

It happens that these definitions allow a negative conceptualization of Rule of Law, indicating what it is not. The problem to reach a positive conceptualization will be, logically, to face the double dimensionality of the applied juridical-political concepts, which are: the descriptive dimension, but also the prescriptive one. To illustrate the interconnection between the descriptive and prescriptive dimensions of categorizations on forms of government. Bringing this discussion to the definition of the scope of Rule of Law, Rosenfeld defines that:

> The above difficulties [about the negative concept] are compounded by the fact that there is no consensus about what the 'Rule of Law' should be, even though it is reasonably clear what is contrary to it. An important part of the problem lies in the fact that the 'rule of law' is an 'essentially contestable concept', that is a concept with both descriptive and prescriptive content about which there is a lack of agreement. Just as in the case of concepts such as 'liberty' or 'equality', the descriptive meaning of 'rule of law' depends on the prescriptive meaning ascribed to it, and typically in the context of complex contemporary politics there will be vigorous debate and disagreement about the relevant prescriptive underpinnings. (ibid., p. 04).

4 FINAL CONSIDERATIONS: TRANSITIONAL JUSTICE AND SUBSTANTIAL STATE OF LAW

Thus, if a formal view, devoid of any content, of what the "rule of law" is, may allow a dictatorship to call itself a rule of law, since it is founded on laws, a substantial view offers no shelter to such an interpretation, since when the idea of rule of law is connected to the idea of a constitutional democracy, the claim that laws that are not legitimate and disconnected from the constitutional process itself

are accepted as laws of law, and not laws of men. This is how the Rule of Law, understood as "Empire of Law", and not as "empire of the legal text", avoids what Rosenfeld defines as the greatest paradox for the Rule of Law, consisting in its use for the negation of the principles on which it is based.

It is in this way that only a substantial vision of what Law is allows it to operate legitimately as a mechanism for implementing the will of the majority and with respect for the individual freedoms that underpin the democratic regime:

> In terms of the institutional structure needed for constitutional democracy, and the implementation of the will of the majority through law, the Rule of Law definitely appears on the side of the state, and often against the citizens. Conversely, in connection with the protection of fundamental rights, the rule of law appears on the side of citizens against the state. The extension of constitutional law can be invoked by citizens against the laws and policies of the state. (Rosenfeld, 2001, p. 04 - free translation).

Considering this paradox as a permanent part of the very idea of *Rule of Law* as the rule of law, Rosenfeld will be able to complement his negative conceptualization and finally develop a minimal and positive conception of Rule of Law:

> The 'rule of law' is often contrasted with 'rule by the will of men'. Whereas generally "regulation by the will of men" (or, as we say today, "regulation by the will of individuals") usually has the connotation of an unrestrained and potentially arbitrary personal rule by an unlimited and perhaps unpredictable legislator, this will be understood in more general terms. For the present purpose, even regulation by law will be regarded as 'regulation by the will of men' if the law can be changed unilaterally and arbitrarily, if it is largely ignored, or if the legislator and his associates constantly remain above the law itself. At a minimum, then, the rule of law requires [i] generalized justice regulated by law,
> [ii] a substantive amount of legal provision - through laws of general application, published and widely expected; [iii] a meaningful separation between the legislature and the judiciary; and, [iv] broad adherence to the principle that no one is above the law. Accordingly, any legal regime that fits these minimum requirements will be deemed satisfactory for the prescriptions of 'the rule of law in the strict sense'. (Ibidem, p. 12).

Finally, when connecting the ideas of Rule of Law and Constitutional Democracy, the question of legitimacy remains pending, for which Rosenfeld also presents three minimum necessary conditions that, nevertheless, may not be sufficient for the legitimation of the rights system in concrete cases when the substance contained in the idea of "rule of law" is undermined: "To be legitimate the Rule of Law seems therefore to have to be [i] democratically accountable, [ii] procedurally fair, and even,
[iii] substantially grounded" (ibid., p. 13).

The normative ideas contained in the concept of transitional justice, in this sense, add political force for the consolidation of the democratic rule of law, to the extent that the political contours contained in the decisions that limit democracy in the name of fundamental rights become visible. In this case, the lesson is that certain rights cannot be limited by democracy, under penalty of disfiguring the rule of law. Obviously, in these terms, there is no legitimacy of exception present in a dictatorship that can do so.

Furthermore, the substantialization of law allows for the establishment of clear distinctions between what is law and what is discretion, providing a way out of the positivist "trap" that prevents the questioning of the laws of a dictatorship simply because these laws are a positive set ordered according to a prior rule.

This is how the debate on transitional justice allows a fuller affirmative reflection on the Rule of Law, enabling concrete paths for its implementation in extremely delicate areas. Transitional Justice, at one time, deals with a large legacy of violations of human and fundamental rights in the past, but also with a set of political ideas that made them viable and acceptable (even if tacitly) in a given period. The rescue of this debate and its return to the terms of justice allows, at one and the same time, the restoration of the civic trust of citizens in the State, the re-equalization of all as equals before the democratic and self-limiting law and, above all, a denial by the Democratic State of Law of every form of arbitrariness and violation of the past - even those held in its name.

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NOTES

[1] Part of this text is a product of the master thesis "Transitional Justice and Constitutional Rule of Law: theoretical-comparative perspective and analysis of the Brazilian case" presented by Marcelo D. Torelly at the Law School of the University of Brasilia, under the guidance of Eneá de Stutz e Almeida. A preliminary version of this text was debated in the XIX National Congress of the National Council for Research and Post-Graduation in Law (CONPEDI).

[2] For the development of this debate, see "Justiça de Transição no Brasil: a dimensão da reparação" (Abrão and Torelly, 2010).

[3] "[I]t is possible that violations [of pure legal justice in the transitional process] are inevitable, and even desirable in some situations, and even when they are neither, they may be understandable and even forgivable. When many violations accumulate, or when the violation is of fundamental criteria, of all sorts, one reaches a point where the very idea of legal justice is replaced by that of political justice." (Eslter, 2006, p. 108).

[4] Barroso defines a positive-normativist conception of the Constitution, which consequently binds the legal system, establishing its opposition to a sociologist conception, in the following terms: "On the opposite slope lies the strictly legal conception of the Constitution, seen as the supreme law of the State. Linked to normativist positivism, this current had its culminating point in the theoretical elaboration of Hans Kelsen, considered to be one of the greatest jurists of the 20th Century. In search for a scientific treatment that would confer "objectivity and accuracy" to Law, Kelsen developed his pure theory, in which he sought to purify his object from elements of other sciences (such as sociology and philosophy), as well as from politics and, to a certain extent, even from reality itself. Law is norm; the normative world is the world of should be, and not of being. In this dissociation from other sciences, from politics and from the world of facts, Kelsen conceived the Constitution (and Law itself) as a formal structure, whose note was the normative character, the prescription of a should be, regardless of the legitimacy or justice of its content and the underlying political reality." (2009, p. 79).

[5] In this regard, Barroso states: "The philosophical framework of the new constitutional law is post-positivism. In a certain sense, it presents itself as a third way between positivist and jusnaturalist conceptions: it does not treat with unimportance the Law's demands for clarity, certainty and objectivity, but it does not conceive it disconnected from a moral philosophy and a political philosophy. It contests, thus, the positivist postulate of separation between Law, moral and political, not to deny the specificity of the object of each of these domains, but to recognize the impossibility of treating them as totally segmented spaces, which do not influence each other". (2007, p. 06).