

# HUMAN RIGHTS AND TRANSITIONAL JUSTICE IN BRAZIL: AN ESSAY

*Eneá de Stutz e Almeida*

## **Introduction**

This paper intends to present the correlations between the themes of human rights and so-called transitional justice, as applied to Brazil. To do so, it will be necessary to make a brief historical background, followed by current reflections on both themes.

The aim is to present these flexions in accessible and didactic language, which is why the essay style has been chosen for this text.

## **The concept of human rights**

There are many doubts and many controversies when it comes to human rights. And a lot of prejudice. As a rule, common sense usually attributes the expression "human rights" to the rights of prisoners, that is, to the rights of those who have not respected, at some or many times, the rights of other people. It seems unfair, to say the least, that such elements, or bandits, or criminals, or "outlaws", can take advantage of what they have denied their fellow human beings, and take advantage as if they were all the time debauching good, upstanding citizens who do their duty.

It is a very common feeling, and I risk saying that it is very pertinent and relevant, at least in the line of reasoning that we portray. However, most of the variables in this equation are not being taken into account, which makes the result equivocal. Thus, the first necessary clarification is that human sentiment is one thing and the rational application of legislation is another. I shall return to this aspect later.

It should be emphasised that the idea of so-called civilised societies drawing up a set of rules and legal principles for

to control social coexistence is quite old. And fully accepted. No one questions the need for States to draw up their laws, which will serve as a beacon for the conduct of their respective citizens.

Herein lies the main criticism of a good part of the well-meaning population concerning the application of so-called "human rights": Those who have already broken the rules, now want to invoke them to protect themselves? Is he being a "rascal" twice over, since he first breaks the rules and then expects the state and society to comply and grant him rights?

Any citizen should really be extremely angry if this were the case. But this statement, although often presented as such, is not true. This is because the so-called rules that would be invoked in favor of such "rogues" are not created AFTER the legal infractions are committed. They are created BEFORE. Furthermore, and even more importantly, they are not directed at those who have broken the law. This is a misunderstanding. They are directed at the entire population. So it is that the idea of human rights, even if not always under this name, has existed since law itself. Because all law is made for human beings. To conduct , but also to protect.

And this is the fundamental point of human rights: the protection of human beings. Protection of whom? Everyone and everyone. Including protecting one's own state . In this sense , the right to individual property is a human right. And this right has nothing to do with prisoners, does it?

Thus, when drafting a constitution, such as the Brazilian Constitution, which is thirty years old this year, 2018, legislators need to think about what country the people want to build, with which characteristics, proposals and limits, and then condense all this into

constitutional rules. The 1988 Constitution was drafted right after a period of many disrespects to the rights of citizens, a time when the Brazilian State did not respect the rules, and that is why this time is called the State of Exception. Precisely because of this this Constitution is very special. It was called the Citizen Constitution by the then President of the Chamber of Deputies, Ulisses Guimarães, who promulgated it on October 5, 1988.

This same Constitution intended to gather in its provisions, in its articles , all the dreams of the Brazilian people : dreams, mainly, of freedom and prosperity. Dreams of hope, happiness and equality. The goal was already exposed in article 3:

Article 3 The fundamental objectives of the Federative Republic of Brazil shall be  
I - build a free, just and solidary society; II - ensure national development;  
III - eradicate poverty and marginalisation and reduce social and regional inequalities;  
IV - promote the good of all, without prejudice of origin, race, sex, color, age and any other forms of discrimination.

And the main assumption for achieving these objectives opens the chapter that follows, which refers to individual rights: the Constitution states (art. 5) that all are equal before the law. This statement does not mean, as one might think, that the law says that everyone is equal. It is exactly the opposite! I explain: exactly because the legislators know, as we all know, that people are different and that they occupy different positions in the social hierarchy, and some can even be called privileged, while others can be called carentes, exactly for this reason the LAW says that everyone deserves the same treatment.

This means that those who do not need help from the state, because they have their own methods, are an excellent

They have the financial means to hire the best professionals in any field, or a huge safety net of friends, family, business partners, a whole range of resources at their disposal to solve life's problems and still ensure a comfortable and happy existence; they also have to submit to the same rules, but they don't need help from the state or even society to organize itself to help them.

But there is a whole population contingent that is not in the same situation mentioned above. The majority of the population, in fact, does not have these same possibilities. They do not have the same opportunities and thus do not have the possibility of social ascension and improvement of life conditions. In a country like Brazil, where economic and social inequality is enormous, where there are highly developed metropolitan regions separated from others that do not have the minimum conditions of human existence, it is very easy to see the disparity between people, the great inequality in the living conditions of the population.

It is precisely for people considered vulnerable, that is, those who do not have support and protection networks - be it financial, influence, recognition, and social prestige - that the State and organized civil society need to act so that these citizens and citizens can get a little closer to the favored. In other words, as the assumption of the Brazilian State is that all are equal before the law, those who in real life are not equal may become equal, even if by the hand of the State itself.

In order to do so, the State establishes a series of rights, called fundamental rights, or human rights, that should be attained by all people, without any distinction. The majority of the population will not even need to

know what these rights are because they will not have to resort to them: for example, the rights of prisoners should only be of concern to those who are in prison. Since the vast majority of the population are not in prison, they do not need to invoke them.

I will now return to the sentiment I mentioned at the beginning of this reflection: one thing is the human sentiment and another thing is the rational application of the law. And any law or set of laws, as for example, the rules concerning human rights. A recurring question is the following: If I, who now write these reflections, had my daughter killed by a bandit, would I have the courage to defend him/her claiming human rights? My answer is always the same. All of us human beings have feelings.

Emotion is something inherent and almost uncontrollable in each of us. Feeling desire, anger, indignation, sadness, hatred, love, fear, among others, is natural to the human condition. The decision, which must be rational, is what we will do with these feelings. Will we let them out? If something happens and we feel like hitting someone, sometimes someone we love deeply and unconditionally, like our children, will we do it?

My answer is that I sometimes feel like hitting my daughter, because for a few moments, anger at her disobedience or mischief rises to the surface. However, a few seconds later, the feeling has changed, and I cannot act on it at the first moment, but rather after reflecting that the desire to have any violent attitude cannot thrive. Anyone dealing with a child will do the same. They will have to stop, take a breath, and take the most appropriate rational action to restrain the child, if necessary, or discipline him, without any exaggeration.

It cannot be the feeling that guides, but the rational decision. To feel anger is normal and human; to give vent to this feeling is uncivilized and

The law exists for that. The law must not be applied out of a sense of revenge, to punish this or that person, or to take away rights from this or that person because the person "does not deserve" them. The law must be applied in the same rational way to all those who are in the situation of being framed. And this framework can be to determine a conduct, apply some punishment or attribute some right.

Most of the time, it is only necessary to resort to the law to have some right guaranteed for the vulnerable person to whom I referred earlier. And since the State is not able to provide this guarantee for all these vulnerable people, it is common for society to organize itself into groups that intend to assist in these tasks: in these cases, they are the groups committed to human rights.

So, to answer the question I am often asked: yes, I defend everyone's human rights, because if I am in a vulnerable situation, I will want someone to come to my rescue to secure my rights. And this has nothing to do with any feelings of anger or revenge that I might have, because I am human and feelings are inherent to me.

In this sense, it is worth asking, what are human rights? They are the rights of all vulnerable people who are in a situation of inferiority, whether for a permanent or temporary condition. These rights are guaranteed both in the Brazilian Constitution and in international legislation. And the Brazilian State is obliged, by constitutional determination, to respect and enforce these rights; even when they are rights of persons against the State itself. One example is the right to the inviolability of the domicile. Neither the police, nor the armed forces, nor anyone else can enter in a home without the permission of the person residing there, or without a court order.

And this was one of the rights that was routinely disrespected by the Brazilian state itself during the dictatorship years between 1964 and 1983. In order to ensure that this never happens again, we need to carry out what is called Transitional Justice in Brazil.

### **Transitional Justice**

Transitional Justice is a term used to signify the procedures that a given country needs to face after a period of conflicts, be it civil wars or an authoritarian or exception state, as we had in Brazil with the civil-military dictatorship, in order to reach the democratic rule of law. Thus, the idea is to move from the State of Exception (outside the law, outside the rule) to the Rule of Law, and even more, to the Democratic Rule of Law (submitted to the rule, subordinated to the law).

It has four dimensions as pillars, namely 1) memory/truth, 2) reparation, 3) institutional reform and 4) justice (or the prosecution of human rights violators).

As for the first, dealing with memory and truth is also dealing with the relationship of law with time. If transitional justice advocates that there should be a transition from conflict-ridden states to democratic rule of law, one of the basic assumptions is that there was a period of authoritarianism and persecution of citizens that the state itself should protect.

Therefore, the axis of memory/truth is not the mere compilation of individual or family memories of adverse events. But it is the version of those who were defeated in that struggle, the truth of the defeated, revived, resized and mainly re-signified in the present moment.

It is not at all simple to reflect on the past and it is important to realize that there are four paradoxes that make the way of interpreting the past, and thus, the action of memory, complex. The first is that memory is social and not individual. Thus, only the meaning adopted by a certain social-affective community, or a certain current of thought in a given society, will be able to construct this or that memory.

The second paradox is that memory operates from the present. In other words, narratives will always be produced from the present towards the past, rewriting and reworking what occurred, and thus creating an identity from social memory that will always be reworked and rewritten. (OST, 2005: 56s)

The third paradox, intrinsically linked to the second, is that memory is always voluntary. That is, if it is constructed and reconstructed from meanings of the present toward the past, this means that it has nothing spontaneous or passive about it, but is a voluntary construction, or *anamnesis*. It is a voluntary evocation of the past, the arrangement of episodes from the present, meaning and re-signifying events known by the collectivity or not.

And, finally, the fourth paradox is that memory does not oppose forgetfulness, but rather presupposes it. In other words, the organization and construction of collective memory also presupposes the organization of forgetting. In this sense, thinking about the politics of memory implies thinking about the politics of forgetting. I will return to this point shortly.

One of the objectives of this foundation is to build another memory that gives new meaning to a stance of valuing life, equality, and freedom, and that rises up against repression and authoritarianism. Much has been produced in Brazil regarding this

The law that created the National Truth Commission (Law 12.528, of November 18, 2011) has had a greater impact on this binomial.

There was already a substantial production on the subject by then, as a result of specific actions by both resisters/survivors of the dictatorial regime and families of deceased and disappeared politicians. At this point, a brief digression on the history of the struggle for the construction of these memories is in order.

The first important Brazilian legislation on the subject is Law 6.683, of 28 August 1979, the so-called Amnesty Law. This law was the result of many demands still in the period of constitutional exception in Brazil, due to the political prisoners and exiled people. Since 1975 there were already popular demonstrations with banners and posters calling for "ample, general and unrestricted amnesty". It was a common slogan in that period, repeated like a mantra.

The National Congress had two bills, one from the government and another from the opposition, to regulate the amnesty. The opposition project met these demands for a broad, general and unrestricted amnesty, that is, it granted amnesty to all those who had been imprisoned, banished, exiled or prosecuted for political crimes, restoring their freedom or allowing the return of those living abroad. The government project was the victor in the vote that took place in August 1979, by only five votes! It provided for a restricted political amnesty, since it excluded the possibility of amnesty for so-called "blood crimes".

Some years later, in 1985, when  
Constitutional Amendment 26, which called for the  
Constituent Assembly, the issue of political amnesty was  
addressed again, which meant that this issue was still to be worked on in  
Brazil and needed to be part of the new Constitution. And so, in the Transitory  
Constitutional Dispositions Act (ADCT), in article 8, it was established that:

**Art. 8** Amnesty shall be granted to those who, in the period between 18 September 1946 and the date of promulgation of the Constitution were affected by institutional or complementary acts of exception for exclusively political reasons, and to those who were covered by Legislative Decree no. 18, of December 15, 1961, and to those affected by Decree-Law no. 864, of September 12, 1969, promotions in inactivity to the position, rank or grade to which they would be entitled and while in active service are assured. The periods of permanence in activity provided for in the laws and regulations in force shall be complied with, respecting the characteristics and peculiarities of the careers of civil servants who are military personnel and the respective legal regimes shall be observed.

This is the *caput of* the provision that inaugurated, in the new historical constitutional moment experienced by Brazil, the transitional period governed both by political amnesty and by the axis of reparation. With this constitutional command, Brazil chose reparation through political amnesty to be the structuring axis of its transition. This decision had normative consequences, since 1995 saw the publication of Law 9.140, which granted compensation to the families of those who died or disappeared under the regime of political exception, and 2002 saw the publication of Law 10.559, which created the Amnesty Commission as a State Commission, not a Government Commission, under the Ministry of Justice.

This legislation also allowed the Commission itself, as a State Commission, to make efforts to stimulate and conduct public policies on memory and truth in the wake of the Brazilian transition.

Within the context of the global economic crisis of 2008, and with the struggles for human rights throughout the world and also in Brazil, the time has come to promote the third part of the National Program for Human Rights (PNDH 3) at the end of 2009.

It should be noted that the first part was published during the first government of Fernando Henrique Cardoso (May 1996); the second part was published during the last year of Fernando Henrique's second government (May 2002) and the third part was promulgated in December 2009, the penultimate year of the second Lula government. It should also be remembered that in the second Lula government, the Minister of Defense was Nels Jobim and the Minister of Human Rights (a Special Secretariat elevated to the *status of a Ministry*) was Paulo Vannuchi, and there were constant public clashes between the two portfolios and their two representatives.

When the NHRP 3 was published, a real battle began, through the media, between the two holders of the two portfolios mentioned, precisely for control of the entire process of building memory and truth in the Brazilian transition. While the Human Rights portfolio supported several of the public policies initially made official in PNDH 3, such as the prosecution and prosecution of of human rights violators during the dictatorship, the changing of public landmarks bearing the names of torturers and high-ranking leaders of political repression in the same period, and the creation of a National Truth Commission, the Defense portfolio, which brings together the Armed Forces, was radically opposed to all these policies.

In this interval, the presidential campaigns had already begun and the then Minister of State Dilma Rousseff was already a candidate to succeed President Lula. She herself, it is important to stress in this context, a former member of groups of armed struggle against the dictatorship, and still condemned in the military instances of the time as a subversive and terrorist.

After a period of internal clashes and negotiations within the federal administration, there were some changes in NHRP 3 and a republication with the suppression of the most controversial policies, in particular the prosecution of torturers. Very little time

Later, in April 2010, coincidentally, the Federal Supreme Court put on the agenda the trial of the ~~Acto~~ for breach of fundamental precept (ADPF) 153, which aimed to discuss the non-reception by the Federal Constitution of the 1979 Amnesty Law, precisely because it did not was the expected broad, general and unrestricted amnesty.

Thus it is that the amnesty issue returns to the main scene in Brazil's highest Court of Judgment and the issues of dictatorship and transition have never again left either the media or the Brazilian political-institutional life. With a regrettable decision, but completely in accordance with the interests of the controllers of time and the constructions of historical narratives, or memory In other words, forget what happened in Brazil during the dictatorship period and move on.

The decision came as a huge surprise not only nationally but especially on the domestic scene. So much so that in November 2010, the Inter-American Court of Human Rights (IACHR) of the Organization of American States (OAS) put on trial a case ~~that~~ sought to condemn Brazil for noncompliance with several clauses of the American Convention based on what happened in the Araguaia region.

The lawsuit had been filed several years earlier, but due to Brazil's leading role in the fight for human rights and a major Brazilian foreign policy investment, since Brazil was seeking a permanent seat on the UN Security Council at the time, no judgment was expected. Until the STF's decision changed the scenario, for the worse. And unlike the expectations until then that Brazil would not be condemned, the Inter-American Court handed down a harsh and extensive condemnation.

At that time, Brazil had already elected Lula's successor, Dilma Rousseff as President of the Republic, but the battles were just beginning in this field of building the memory and truth of the period of exception. A year after the ruling of the Inter-American Court, Law 12.528, of November 18, 2011, was promulgated, establishing the National Truth Commission, and all expectations turned to this Commission, in the sense that it would finally be possible to reignite that history of authoritarianism, persecution, and repression, to inaugurate a time of freedom and autonomy for Brazilian society.

Unfortunately, what occurred was widespread frustration, despite the fact that a substantial report was produced, which brought horrifying information about our past, and even about many of the authorities that are still authorities of the Brazilian Republic today. One of the illustrative phrases of this frustration, at the end of 2013, when the report was delivered on 10 December, was that "the mountain had given birth to a mouse!

It is also important to remember that in 2013 Brazil was filled with popular demonstrations, almost always spontaneous and rejecting parliamentary and party representations, in a great explosion of the people's desire to participate in the country's important decisions, such as receiving or not the World Cup and the so-called "Fifa standard" of quality. These demonstrations and the many strikes that also took place that year. The events that took place show how dissatisfied the Brazilian population was, and how much there was a clamour for social, economic, legal and especially political change.

It would have been an excellent opportunity to build this memory of struggle for freedom and of resentment towards authoritarianism and

repression. But what we saw was nothing but more repression and authoritarianism, and practically no change.

In the field of reparations, much has been done and is still being done in Brazil. This was the axis chosen to pave the way for the transitional process, initially through Law 6.683/79 and later in the constitutional text, with the aforementioned article 8 of ADCT. The first necessary observation when dealing with the issue of reparation is that financial reparation is only *one* of the forms of reparation. This has been the case since 1979. This is because at that time it was already possible to reintegrate those who had been dismissed due to political persecution back into their jobs, and many were reincorporated. Although without any career progression, or often in inferior positions to those they held at the time of dismissal, and without any reparation for the period they had been away.

Later, with Law 10.559/02, through the Amnesty Commission of the Ministry of Justice, there are two possibilities for financial reparation: the economic reparation in a single payment, with a calculation provided for in the law itself equivalent to thirty minimum wages per year or fraction of political persecution, limited to a single payment of one hundred thousand reais; and the economic reparation in monthly, permanent and continuous payments, in cases of loss of employment.

With regard to the third pillar, the reform of institutions, it is important to stress that this is one of the themes on which the least has been produced in Brazil, although many normative changes have been made over the years. And in this dimension, they can be either normative institutions, i.e. changes in legislation (constitutional or infra-constitutional) or in the institutions themselves, such as those relating to security or the Powers of the Republic.

There was a first and important institutional normative reform, which was the 1988 Constitution itself. But after that, the hopes that had been deposited there, all the effort and dreams of freedom and equality, have gradually been frustrated. What is perceived today is a sense of impotence and despair, perhaps precisely because we have not been able to produce the necessary reforms in our institutions so that they could produce and guarantee a more egalitarian and democratic Brazil.

The absence of institutional reform weakens Brazilian democracy because it allows unrepublican and/or authoritarian relations to remain in the bodies that should protect citizens, not turn against them.

Finally, as for justice, to say the least, the idea of persecution of human rights violators in Brazil has many controversies. Initially, I want to register that the reference to persecution is always to *judicial persecution*, considered in its different spheres: administrative, civil and also criminal. There is usually too much focus on criminal prosecution, so it is important to reiterate that there are other areas of *judicial prosecution*.

Having made this first observation, it should be noted that, unlike the path chosen by Argentina, which elected justice as its fundamental axis for transition, raising the responsibility, including penal responsibility, of those who kidnapped, tortured and in some way became agents of the State of Exception, Brazil has always avoided dealing with this dimension.

It is the most concealed theme and around which it has become a real battleground of the Brazilian transition. Curiously and paradoxically, it was the theme that inspired and triggered the entire debate that has taken place since the end of 2009, as seen in the first item on memory and truth.

Thus it is that the perception of justice, to heal the traumas of the past and heal the wounds, not as revenge but as anamnesis, through the mediation of the judicial process with all the guarantees of adversarial proceedings, ample defense and due legal process, brings the goal of achieving reconciliation. Note that under any aspect that is analyzed, this axis deals with the accountability of those who do not respect people's rights, rights that were and remained guaranteed in the Constitutions that were in force throughout the dictatorial period. These were basic rights, such as, for example, the right to the inviolability of the home, to which I referred earlier.

## **Conclusion**

Both the theme of human rights and the theme of transitional justice have as their basic assumption the respect for the law, in a rational manner and without feelings of preference for this or that conduct being the determining factor for applying or not applying the law. This respect for the laws also includes the guarantee that all people will have access to the constitutional guarantees to achieve those objectives of the Brazilian Republic initially referred to in this essay, and which represent the dream of the Brazilian people of having a more egalitarian, fair, democratic country that allows all people the opportunities for prosperity and development, without any form of distinction.

In this regard, it is impossible to talk about transitional justice without thinking about human rights, and in the case of Brazil, it is impossible to talk about human rights without reflecting on our transitional justice system, which has not been adequately fulfilled.

That we do not lose sight of our dreams of equality, justice, welfare and democracy, and that we continue to realize that only when the entire Brazilian population has its rights guaranteed

The basic things that allow a dignified life are that we will be able to say that we are close to realizing these dreams.

**References:**

AVRITZER, Leonardo. *The morality of democracy: essays in habermasia theory and democratic theory*. São Paulo: Perspectiva, 2012.

NATIONAL COMMISSION ON TRUTH IN BRAZIL . August 2014

Available at< [www.cnv.gov.br](http://www.cnv.gov.br) >.

DE STUTZ E ALMEIDA, Eneá. *A brief introduction to Transitional Justice in Brazil*. In DE STUTZ E ALMEIDA, Eneá (org). **Justiça de Transição no Brasil - notes**. Curitiba: CRV, 2017

OST, François. *The time of the right*. Bauru, SP: EDUSC, 2005.

PEREIRA, Anthony W. *Ditadura e repressão o: o autoritarismo e o estado de direito no Brasil, no Chile e no Argentina*. São Paulo: Paz e Terra, 2010.

REÁTEGUI, Félix (editor). *Justiça de Transição - manual para América Latina*. Brasília: Amnesty Commission, Ministry of Justice; New York, International Center for Transitional Justice, 2011.

SAFATLE, Vladimir. *Just one more effort*. São Paulo: Three Stars, 2017.