

Essay on the State of Exception as a presupposition of validity and legitimacy of Transitional Justice in Brazil and its constitutional foundations

Brazil went through a long period of civil and military dictatorship, between 1946 and 1988, whose most devastating period occurred between 1964 and 1985, lapse of time under the military regime in which the greatest atrocities occurred, such as political persecutions, deaths under torture and disappearances of resistance fighters against the regime of exception, censorship and suppression of various civil and political rights. The regime adopted the notorious Institutional Acts (AI), seventeen in all, the most aggressive being AI-5, published on December 13, 1968, which was in force for ten years, which provided for the death penalty and banishment and abolished the habeas corpus. Moreover, the National Security Law was used to criminalize any act contrary to the repressive forces, reaching various areas, such as education, culminating with the expulsion of students through Decree No. 477; culture, with intense persecution and censorship of various cultural manifestations, censorship and extreme control of the media, just to exemplify, as indicative of some reference contributions.

In order to talk about reparation, it is important to understand that Transitional Justice in the broad sense refers to the process of change in the face of experiences of serious human rights violations, such as wars and dictatorial regimes, situations that occurred very intensely in the last century around the world. The original expression "Transitional Justice" is attributed to Ruti Teitel: "transitional justice begins to be understood as extraordinary and international in the post-war period of 1945" (TEITEL, 2011, p. 136), but its most expressive dissemination occurred from the mid-1990s, whose treatment in the world occurred in a very different way in relation to the Brazilian experience, especially with regard to justice. The concept of transitional justice is of great importance for constitutionalism, from the perspective of its significance for confronting the atrocities practiced in dictatorial regimes, in promoting reparations as a foundation for the reconstruction of democracy.

Thus, transitional justice in Brazil, after this long authoritarian experience and at this juncture, more than 55 years after the military coup of 1964, is in the process of construction and the need persists for progress and improvement as to the treatment of this authoritarian legacy in our country before the unspeakable violations

against human rights, from the lengthy process of treatment to the Brazilian model adopted, in a very disaggregated manner, considering that the most significant advance is seen in the aspects of political and economic reparations, by the executive power, a policy that more recently has suffered a serious decline and distortions.

In Brazil one can classify at least four dimensions of the transitional process that include reparation, truth and the construction of memory, the regularization of justice and the re-establishment of equality before the law and the reform of institutions perpetrators of human rights violations. So far, with some advances, in a slow way and a lot to build, considering the Amnesty Law of 1979 (Law 6. Later, some administrative measures were adopted after the promulgation of the Federal Constitution of 1988, but until the current complex and worrying moment, in addition to the near paralysis in the appreciation of reparation processes, there have been immeasurable setbacks in this sense and the total abandonment of the other pillars of transitional justice that were being built in our country, especially over the last decade and a half.

The right to reparation for people who were politically persecuted during the dictatorial regime finds support in article 8 of the Transitional Constitutional Provisions Act (Ato das Disposições Constitucionais Transitórias-ADCT), whose regulation occurred through Law 10.559/2002, which ensured political, moral and monetary reparation, of a material nature, or both, considering the period between 1946 and 1988, but in terms of implementing reparation, this lapse of time is too long for the State to implement such measures, considering that for many survivors of the nefarious violations it may be too late to see their rights ensured in life.

In this historical trajectory of reparations adopted, rather belatedly, in 1995 the Special Commission on Political Deaths and Disappearances - CEMDP (Law 9.140/1995) was created in an effort to locate evidence concerning the dead and disappeared politicians and material reparations in amounts ranging from one hundred thousand reais to one hundred and fifty thousand reais, approximately.

Considering that the reparations programme is the structural foundation of transitional justice in our country, with the creation of the Amnesty Commission (CA) and the establishment of a broader reparations system, since the Amnesty Law of 2002, with the promotion of reparations through administrative channels, However, the evolution of transitional justice has been slow, and it was only after 2002 that a more orderly implementation of reparations was envisioned until 2015, with the implementation of legal measures for individual reparations, with attention given to the political disappeared, the dead, those tortured and those arbitrarily imprisoned, removed from employment, punished by transfers, loss of income, prevented from taking office, punished by annulment of pensions, compulsorily retired, forced into hiding, banished, exiled, with annulled electoral mandates, annulled remuneration for the exercise of elective office processed by judicial and/or administrative inquiries, exiled children and grandchildren, clandestines, prisoners, tortured people, illegally monitored people and students (Comissão de Anistia, 2011).

In this way, it can be seen that the system of reparations through the Amnesty Commission, more specifically from 2016, has suffered constant setbacks, whether due to a considerable reduction in the pace of consideration of reparations cases, despite the existing demand, or due to constant manifestations, via the press, of retrograde and confused postures regarding the understanding of the Brazilian reparation programme, with regard to reparation processes on the part of the current Councilors of the Commission.

It is important to emphasize that the reparations program adopted in Brazil is not restricted to economic reparations, but leads to the important component of political reparations, the choice of which depends on the person or legal representative at the time of the request. This is important because the fundamental component is political reparation, which recognizes the State's error in the practice of human rights violations during the military dictatorship and this public gesture is intended to restore dignity and respect for human rights.

trust in public institutions, which for a time added the important public request for forgiveness, although nothing can reconstitute the physical and mental pain to which the surviving political persecuted were submitted, not to mention the irreparable loss of those who were assassinated and their families or people with emotional ties could not even count on the persecutory component of their executioners, not undervaluing also the economic component, which can be granted jointly, but no financial contribution can repair the pain of abject torture or the loss of many lives due to state political persecution.

It is also essential to highlight that the democratic rule of law presupposes, primarily, that there is balance between the three powers and that each of these pillars is respected in the legitimate exercise of its function, without overlapping, usurpation or undue hierarchy and the necessary understanding between state policy and government policy.

It is important to note the spectrum of violations of fundamental rights that in the democratic rule of law is imperative and determinant that society has ensured human rights and fundamental guarantees and involves the primary proper functioning of institutions, more than the elementary Greek concept of democracy of *the government of the people, for the people, so that* fundamental rights, equality and freedom must persist and provide that the constituted powers must, obligatorily affirm the proper functioning and improvement, towards the true democracy that we crave and, above all, prevent any regression to the achievements obtained in the last century and ensure the most recent, especially in this period of redemocratization after the long period of military dictatorship and continue evolving, which is why resistance to threats is necessary.

However, their effectiveness has not been expressed in practice as desired, and the challenges are currently enormous. For this reason, it is imperative that efforts be made to guarantee the full realization of human rights. To this end, it is necessary to fully address all dimensions of transitional justice in the reconstruction of democracy.

It is at this level of evolution that social development can be achieved in an inclusive manner, in order to promote the dignity of the human person in its entirety, both in legislation and in the implementation of administrative measures, according to the most diverse fields of action but, above all, in the application of justice and in the improvement as to the functioning of public institutions, notably about transitional justice, especially with regard to the viability of true justice in the democratization process.

In order to understand this path, it is important to analyze the political transition process in Brazil and its historical evolution in the reconstruction of democracy and the reestablishment of the guarantees constitutionally guaranteed, as well as the initiatives of the State in the improvement of its institutions and the advancement of public policies, with emphasis on justice and reparation, in this inconclusive democratic process.

The democratic rule of law imposes the recognition of human rights and diversity and presupposes their effective evolution, as well as the adequacy of political and social issues.

These perceptions about the constitutional guarantees and the process of reparation adopted by Brazil, within the framework of transitional justice, reinforces the importance of the improvement of democracy, denotes the normative conformation, presupposes the necessary characterization of the right to justice and reparation, whose nuances lead us to reflect on the removal of the theory of the two demons, in the face of the Brazilian constitutional framework under the configuration of those who were affected or suffered acts of exception perpetrated by the dictatorial regime, thus supplanting these retrograde discourses of the current executive power and the undeniable incomprehension of this reparatory process.

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