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THE INSTITUTIONAL ROLE OF THE JUDICIARY ON THE FOUR DIMENSIONS OF THE TRANSITIONAL JUSTICE SYSTEM

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SUMMARY:
This article aims to analyze how the dimensions of Transitional Justice can be carried out by the Judiciary. The historical retrospective shows a reduction of autonomy of the Judiciary during the dictatorship, but also a certain connivance of this power with the regime of exception. The study shows that the decisions made by the Judiciary have the capacity to directly interfere in the Brazilian transitional justice process in the four conceptual pillars. It concludes that there is a need for a change in institutional thinking, so that the Judiciary, aware and committed to the transitional process, can reduce conflicts and build a socially legitimized democracy.

Keywords: Transitional Justice; Dimensions; Judiciary; Conflicts; Society; Dictatorship; Institutions

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ABSTRACT:
This article aims to analyze how the Judiciary can perform the dimensions of Transitional Justice. A historical research shows a reduction of the independence of the Judiciary during the dictatorship, but also some permission for the exception regime. The scrutiny shows that the Judiciary decisions have capacity of interfering directly in the Brazilian process of transitional justice in its four conceptual grounds. Hence, there is a need of change thereof the institutional thinking, in order to create an awareness and a commitment from the Judiciary in the transitional process to reduce conflicts and build a socially legitimized democracy.

Keywords: Transitional Justice; Dimensions; Judiciary; Conflicts; Society; Dictatorship; Institutions

1. INTRODUCTION

This study aims to answer the following question: what has been the role of the Judiciary in relation to the four dimensions of Transitional Justice in Brazil, namely reparation for the victims, processing of human rights violators, reform of institutions and memory/truth? For this purpose, recent judgments were collected and a bibliographic-documentary methodology was used.

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The hypothesis we wish to defend is that the Judiciary has been called upon to pronounce itself in all dimensions of this difficult and nebulous issue in Brazil. Among the causes of existing conflicts in Brazilian society today, a significant part stems from transitional deficits and, along this line of reasoning, the three branches of the Republic have an important role in achieving an effective democratic rule of law.

Initially, the conduct of the judiciary during the authoritarian period will be briefly examined. Next, a more accurate observation of each of the dimensions pointed out and the relationship of the Judiciary with each one of them. At the end, by way of conclusion, a reflection on the need for the Judiciary, itself, to submit to an institutional reform and thus comply with its primary performance, namely, the provision of justice in a democratic country.

2. The Judiciary in the Military Dictatorship

Since the Constitution of 1824, the independence of the so-called Judicial Power was expressed, in addition to the harmony of the other political powers of the Empire[3]. These characteristics were repeated in all subsequent constitutional charters.

Under the Federal Constitution of 1946, the Judiciary consisted of the Federal Supreme Court, the Federal Appeals Court, in addition to the judges and courts of specialised jurisdiction in the military, electoral and labour areas[4]. There were no federal courts of first instance[5]. The constitutional prevision of the state courts was limited to a framework of principles that should be observed by the states when elaborating the rules of the respective judicial organizations[6]. The 1946 constitutional diploma was the first to express the constitutional principle of the inafastability of the Judiciary in the chapter on individual guarantees for citizens [7].

After the military coup of 1964, this constitutional principle that guaranteed broad and free access to the judiciary was mitigated. The first alterations occurred as early as

[3] Constitution of 1824. Articles 10 and 151.

[4] Federal Constitution of 1946. Article 94 of the Federal Constitution.

[5] The Federal Justice of First Instance had been extinguished by article 185 of the Federal Constitution of 1937.

[6] Federal Constitution of 1946. Article 124 of the Constitution.

[7] Federal Constitution of 1946. Article 141.

In the edition of Institutional Act no. 1, when the legal and constitutional guarantees of stability and life tenure were suspended, so as to permit the dismissal, discharge or retirement of any public [8]servant. The facts or grounds that had justified this type of penalty could not be reviewed by the Judiciary, which was limited to analyzing only the formalities of the dismissal act[9]. Acts of cassation of legislative mandates and suspension of political rights were also expressly excluded from judicial [10]control.

Institutional Act no. 2 was responsible for recreating the Federal Justice of First Instance, composed of judges appointed by the President of the Republic[11]. This act increased the number of Justices of the Federal Supreme Court from eleven to sixteen and created the Military Superior Court, composed of fifteen Justices appointed by the Head of Government[12]. After the issue of Institutional Act no. 2, any government practices based on acts of an institutional nature were excluded from judicial [13]review.

In the Institutional Act no. 3, once more, it was removed the competence of the Judiciary to appreciate the institutional measures of the authoritarian government[14]. Institutional Act no. 5 eliminated the possibility of judicial action to analyze the security measures adopted by the Minister of Justice[15]. This institutional act prohibited judicial control not only of the acts based on institutional norms, but also of all the effects that resulted from [16]them. This extended prohibition was reproduced in Institutional Acts 6 and 7, which had identical wording[17].

With the publication of Institutional Act no. 6, the composition of the Federal Supreme Court was reduced from sixteen to eleven justices and the exclusive competence of the Military Justice was maintained for the trial of crimes against national security, without the possibility of

[8] Institutional Act No. 1. Article 7.

[9] Institutional Act No. 1. Article 7, § 4.

[10] Institutional Act no. 1. Article 10.

[11] Article 6 of Institutional Act No. 2, which amended Article 105 of the 1934 Constitution.

[12] Article 7 of Institutional Act no. 2 and Article 6 of Institutional Act no. 2, which amended Article 98 of the Federal Constitution.

[13] Institutional Act no. 2. Art. 19.

[14] Article 6 of Institutional Act no. 3.

[15] Institutional Act No. 5. Article 5.

[16] Institutional Act No. 5. Article 11.

[17] Article 4 of Institutional Act no. 6; article 9 of Institutional Act no. 7.

interposition of appeals to the Federal[18] Supreme Court . Institutional Act no. 11 extinguished the elective Justice of the Peace[19] . Institutional Acts Nos. 12 to 17 repeated the impossibility of judicial review of any effect arising from the application of institutional norms[20].

Therefore, between 1964 and 1969, successive editions of institutional acts directly interfered with judicial activity. These normative alterations occurred along two lines, one with the purpose of reducing common judicial control and the other with the purpose of expanding the action of the federal justice of first instance and the military justice specialized in those issues of interest to the dictatorial government.

On the one hand, the exclusion of judicial review in matters of interest to the military government revealed the reduction of the scope of action and independence of the bodies of the Judiciary existing at the time. The same purpose was stamped in the reduction of the number of ministers of the Federal Supreme Court, occasioned after the departure of five magistrates of that court for political motivations[21].

On the other hand, there was an enlargement of the judicial organizational structure that allowed the inclusion of magistrates fully trusted by the dictatorial government in the federal justice system of first instance and in the Superior Military Court. In addition to structural reinforcement, the competencies of the Military Justice, the right arm of the Executive Branch to judge all issues related to supposed national security, were expanded.

Undoubtedly, the changes imposed by institutional acts exerted great pressure on the Judiciary. In a scenario illustrated by repression, arbitrariness and violence, the Judiciary was increasingly less able to exercise its judgment activities with freedom and fullness.

[18] Institutional Act No. 6, which amended Article 112, § 1 of the 1967 Constitution.

[19] Institutional Act No. 11. Art. 4.

[20] Article 5 of Institutional Act no. 12; article 2 of Institutional Act no. 13; article 3 of Institutional Act no. 14; article 4 of Institutional Act no. 15; article 8 of Institutional Act no. 16; article 4 of Institutional Act no. 17.

[21] On January 16, 1969, Justices Hermes Lima, Victor Nunes Leal and Evandro Lins e Silva, considered by the military to be of leftist orientation, were compulsorily retired based on Institutional Act no. 5. In protest against these retirements, Justices Gonçalves de Oliveira and Antônio Carlos Lafayette de Andrada also left the Court.

However, even in the face of fears of totalitarianism and the reduction of powers, the Judiciary continued to be the main holder of the judicial function, by applying rules and resolving disputes in concrete cases. It is precisely in the exercise of its jurisdictional function that the judiciary on several occasions colluded with the regime of exception and remained silent about the serious human rights violations that occurred during the military government.

One of the lines of investigation of the National Truth Commission was dedicated to studying the actions of the Judiciary during the dictatorship[22]. In this examination, the commission observed that even before the first institutional acts were issued, there were already decisions of the Federal Supreme Court that did not hear *habeas corpus cases* filed by civilian patients accused of political crimes, based on the convenient understanding that the authority was military[23]. In addition, the Federal Supreme Court has also oscillated as to the possibility of considering the matter in cases of excessive prison [24]time.

In another example, the Federal Supreme Court analysed the form of appointment of federal judges. Although Institutional Act No. 2 and Law 5,010/66 provided for the appointment of judges by act of the President of the Republic, the Federal Constitution of 1967 required judges to pass a competitive examination for appointment to these positions. In 1967 and 1968, the Federal Supreme Court ruled that the appointments of judges by act should prevail

[22] [This State policy had repercussions on the other branches of government - notably the Judiciary - which, by virtue of their constitutional powers, had to deal with serious human rights violations by examining situations of this nature through their own procedures. For the NTC, it is relevant to note that, despite the anti-democratic character of the regime, with the consequent hypertrophy of the Executive and the censorship that was established over the media, the Judiciary, at the time when they occurred, was responsible for examining these illegal conducts by public agents" (BRASIL, 2014, p. 934).

[23] It is worth noting the following excerpt from the National Truth Commission: "In short, this is the picture of the STF on the eve of the issue of AI-2: a court that was hesitant with respect to the criterion to be used in the definition of jurisdiction to judge political crimes committed by civilians, but was concerned to control some of the arbitrariness and excesses practiced in the scope of the military-police inquiry" (***Ibidem***, p. 942).

[24] There are records of people who were imprisoned for more than four months, although the deadline for instruction was sixty days. Subsequently, the understanding of the Federal Supreme Court evolved to affirm that "it is incumbent on the Federal Supreme Court, in exceptional cases in which delay in the trial of a *habeas corpus action results in* significant illegal coercion, to know before another authority may become aware of it," according to the decision handed down in *Habeas Corpus* 41.879 (***Ibidem***, p. 941).

President, on the flimsy grounds that the institutional acts would be reinvigorated and superimposed on the supervening constitutional text[25].

The Federal Supreme Court was also aware of cases of torture during the arrests and the taking of statements from the politically persecuted. In these judgments, the reports of torture presented by the political prisoners were disregarded, according to the excerpt from the National Truth Commission in the chapter that analyzes the judgments of the Ordinary Criminal Appeals before the Supreme Court:

> Many of the cases against the politically persecuted that went before the Military Courts on charges of crimes against national security contained accusations of torture presented by the defendants, as found in the research Brasil: nunca mais. Some votes by Justices of the STF in criminal appeals show that they had access to these reports, without taking any action on them and, more often than not, without expressly condemning the use of violence against political prisoners. For example, in RC 1.113, judged on 3 September 1971, the vote of the reporting justice Raphael de Barros Monteiro indicated that evidence of torture would not be sufficient reason for disregarding the confession if other elements corroborated it [...].
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> Thus, there is no doubt that news of the serious human rights violations committed by the military dictatorship against politically persecuted persons came to the attention of the STF. In some of the aforementioned rulings, the practice of torture by agents of the state was expressly admitted by the justices in the context of debates on admissible evidence for the conviction of persons for crimes against national security, without determining that the allegations of torture should be investigated (BRASIL, 2014, p. 947).

The other instances were also responsible for issuing judgments that legitimized inhumane State practices and neglected to apply minimum guarantees to the victims of these excesses. The case of the Araguaia Guerrilla War is a good example of this type of stance by the Judiciary. In the last decade of the dictatorship, in 1982, the families of dead and disappeared guerrillas filed the first lawsuit with the purpose of condemning the Union to indicate the locations of the graves of their relatives[26]. In 1985, the first degree sentence extinguished this process without trial of merit for legal impossibility of the request.

[25] The judgment refers to Writ of Mandamus No. 18.973, in which the Federal Supreme Court ruled that: "the advent of the Constitution and the adoption of a new system would not justify the interruption of the application of a process supported by a legal text that has its foundation in the institutional act, approved these acts by the Constitution that invigorated them" (***Ibidem***, p. 938).

[26] Case 82.00.24682-5, which was heard by the 1st Federal Court of the Federal District Judiciary Section.

According to the grounds of the judgment, there was no rule requiring the Union to indicate the place where the bodies of the deceased [27]would be .

The Judiciary was aware of various atrocities committed by the Executive Branch and succumbed to authoritarian repression, whether through judicial endorsement of the acts of the military government or through silent omission. By acting in this way, the Judiciary was essential to convey some semblance of justice to the abuses that insisted on prevailing under the military dictatorship. With parliamentary control and judicial confirmation, centralized authoritarianism in government was able to prosper for more than two decades, to the detriment of democracy and citizens. The Truth Commission Report expresses this same conclusion:

> It is therefore emphasized that the decisions of the Judiciary during the dictatorial period often reflect its time and its masters; they are expressions of the dictatorship and its context of repression and violence. The magistrates who were there - or rather, who remained there - were often part of that conjuncture, including because they were guaranteed a seat on those courts by the military dictatorship. Whoever was appointed to the STF, for example, during the dictatorship, was aware of the circumstances to which they were bound and what votes they were expected to cast; they were aware of the lack of guarantees for magistrates; they were aware of the reforms made to the composition and powers of the court; and, above all, they were aware of whom they were supposed to serve. In this context, it can be concluded that the institutional omission and legitimization of the Judiciary in relation to the serious human rights violations that were being denounced at the time were part of a broader hermetic system that was cautiously woven to create obstacles to any and all resistance to the dictatorial regime, which had as its starting point the authoritarian bureaucracy of the Executive Branch, passed through a lenient Legislative Branch and ended in a Judiciary majority committed to interpreting and applying the law in unequivocal consonance with the dictates of the dictatorship (BRASIL, 2014, p. 957).

To a certain degree, civil society was responsible for the abuses of the dictatorial government, whether through direct participation or through omissions that permitted such repressions. It was no different with the Judiciary, which reinforces the civil-military nature of the dictatorship[28]. Judicial decisions legitimized acts practiced by the dictatorship, came closer to the

[27] Only in 1993, therefore after the Federal Constitution of 1988, was this decision reversed by the Federal Regional Court of the 1st Region. The appellate court decision was upheld in the higher courts. Even so, only in 2006 were the steps that should be taken by the Federal Government in the first instance specified. New appeals were filed. The sentence enforcement phase began in 2009.

[28] Some doctrine has highlighted the support of sectors of civil society during the entire period of military dictatorship. This support was provided by companies (steel, oil, banking and automobile companies), social organizations (religious and class representative institutions) and public bodies, including the Judiciary. On civil participation in the military dictatorship, see the documentary Cidadão Boilesen, 2009, directed by Chaim Litewski.

government interests and abandoned the enforcement of rights to those opposed to the regime.

Because of the Judiciary's inevitable share of participation in the dictatorial past, it must be integrated into the institutional changes that seek a better transition from the totalitarian regime to the democratic rule of law. In addition to institutional responsibility, the Judiciary must be aware that by exercising its jurisdictional functions in a context of re-democratization and the strengthening of human rights, it will end up playing an important role in the Brazilian transitional process.

3. The Judiciary and the Dimensions of Transitional Justice

Transitional Justice comprises the set of mechanisms capable of confronting the authoritarian past and building a path to democracy and respect for human rights, with various strands: judicial or extrajudicial; national or transnational; preventive or repressive; individual or collective; social or institutional. From this variety and breadth of action, the doctrine has classified transitional justice measures into four main pillars: a) reparation to victims; b) processing of perpetrators of human rights violations; c) memory policies; and d) reform of institutions (ALMEIDA, 2010, p. 42). These four dimensions are harmonious with one another and are of equal importance to transitional justice.

As Paulo Abrão mentions, the Brazilian transitional justice system focuses especially on the powers of the Executive Branch (ABRÃO, 2015, p. 377). In fact, most of the transitional justice activities in Brazil are more easily perceptible in the performance of this power. For example, reparation for victims in general is centralized in the joint action of the Amnesty Commission and the Ministry of Justice[29]. In the field of memory, the Amnesty Caravans [30]and the National [31]Archives are also under the responsibility of the Ministry of Justice.

[29] Law 10.559/2002. Articles 10 and 12.

[30] On the Amnesty Caravans, see: Brazil. Caravanas da anistia: o Brasil pede perdão. COELHO, Maria José H.; ROTTA, Vera (Org.). Brasília, 2012.

[31] Ordinance No. 2.433/2011 of the Ministry of Justice.

Eneá de Stutz e Almeida and Marcelo D. Torelly go further and observe that the two dimensions of reparation for victims and the processing of perpetrators of violence have characteristics that are identified with judicial action, an idea that refers to the Judiciary Branch; although, in fact, this activity may occur in judicial trials or in administrative trials, as occurs in Brazil with the Amnesty Commission. The other two dimensions of reforming institutions and building memory have a more political and managerial profile, which translate into identity with the Executive and Legislative Branches. Thus, according to the authors, it is possible to identify the fertile ground for each group of transitional activities:

> Each of these sets of measures has its own characteristics, but roughly speaking it can be said that the first two sets [institutional reforms and memory policies] have a more political profile (translating into measures that depend on the approval of the majority, either directly or represented), while the last two [reparations for victims and processing of perpetrators] have a more legal profile (since it is possible to formally deduce the need for them 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, victim reparation policies 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 (with 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 (ALMEIDA, 2010, p. 42).

The same conclusion can be reached from the temporal reflections brought by Fraçois Ost. The author clarifies that, at first, the judge sentences with a look to the past, while the legislator projects a promise for the future. With the same care, the author reminds that the rule proposed by the legislator also rewrites the past and the judge's decision is equally able to influence future events:

> From this one can see that the retroactivity of the judgment, far from being an anomaly as in the case of the law, is on the contrary of the very essence of the decision. The legislator prepares the future, it is up to him to rewrite the past; the judge, on the other hand, states the law for the past (thus disconnecting what had been clumsily or unjustly connected), and it is with problems that he pronounces by way of general rule valid for the future (OST, 1999, p. 191).

Thus, the two pillars of restitution to victims and justice against perpetrators would seem to relate more to past events, while the pillars of memory and

institutional reforms would turn more towards promises of a future of non-repetition. But, based on the same reservations made above, it can be inferred that compensation to victims and the imprisonment of torturers are equally capable of giving a new meaning to the future of a society, while the policies of remembrance and the reforms of institutions present themselves as viable solutions for a re-reading of the collective past.

With this thought, it is not difficult to understand that the three powers, Legislative, Executive, and Judiciary, can act on the four dimensions of transitional justice. One of the characteristics of transitional justice is precisely to allow a conceptual opening and to rethink traditional legal institutes. It is enough to remember the possibility of reparation for damages or the prosecution of human rights violators, even after the expiration of prescription or decadal periods, for example. This typical breadth of transitional justice was presented at a conference held by the United Nations:

> Despite its recent nature, this "special justice" is based on four fundamental principles
> essential "pillars" that, in turn, provide various mechanisms with which a society marked by hatred and devastating violence can begin a process of reconciliation and normalisation. More concretely, the aim of transitional justice is to address the heavy legacy of abuses in a more comprehensive and complete manner, which comprises the right to truth, the right to justice, the right to reparation, and guarantees of non-repetition with the advent of institutional reforms. However, the area of transitional justice is sufficiently broad and open to allow for new and innovative approaches to achieve one or more of its goals (MOTTET; POUT, 2011, p. 12) [32].

Transitional law, in this line of flexible legal thought, is identified with the movements of reformulations of legal theories, in a sensitive way to the social field, such as the Law Found on the Street (SILVA, 2015, p. 473). Nor could it be different, because the change from an oppressive regime to an attempt at reconciliation translates into such an important step in the search for democracy that simply shows itself incompatible with the simplicity of an orthodox academic thought, old legislative predictions or intransigent judicial decisions. It is a matter, as stated by Reyes Mate, of a trajectory of

[32] Translation into French: *"En dépit de son caractère récent, cette "justice spéciale" repose sur quatre "piliers" essentiels qui, à leur tour, fournissent de nombreux mécanismes sur les lesquels une société meurtrie par la haine et la violence dévastatrices pourra amorcer un processus d "apaisement et de normalisation. More specifically, the objective of transitional justice is to address the heavy heritage of abuse in a comprehensive and holistic way that encompasses the right to truth, the right to justice, the right to reparation, and guarantees of non-repentance through institutional reforms. Cependant, le domaine de la justice transitionnelle est suffisamment large et ouvert pour permettre de prendre en compte de nouvelles approches innovatrices et susceptibles de répondre à l'un ou plusieurs de ses objectifs".*

exceptional nature, giving rise to the innovation of legal conceptions that need to be rethought:

> This normalisation of transitional justice does not clear all the doubts of the jurist in the previous step. Because if there is no longer a difference between the operation of the rule of law in a democratically consolidated society and one in transition, what does emerge is a loss of rigor in the application of the rule of law in a consolidated democratic society. In the end, transitional justice is linked to exceptional political circumstances, hence the flexibility in its application; without forgetting, on the other hand, all those meta-legal adherences with which transitional justice was conducted or reconducted in the previous stage (Teitel, 2011, 169) (MATE, 2015, p. 157) [33].

This thought allows us to argue that the Judiciary will also be one of the actors responsible for participating in the Brazilian transitional process. With a past as influenced as it was by the military dictatorship, the Judiciary emerges in the redemocratization scenario with the tasks of guaranteeing the protection of human rights, allowing the development of the social democratic order and seeking the reduction of inequalities. The constitutional principle of impartiality, so restricted during the dictatorship, returns in the 1988 Constitution as a permanent clause, without apparent limits in the constitutional [34]text and ends up causing a framework of constant judicialization of Brazilian [35]law.

In this context, the Judiciary, in the exercise of its jurisdictional activity, will apply the law within each of the four pillars of transitional justice[36]. Therefore, without prejudice to the activities of the other branches of government, the decisions handed down by the Judiciary have the ability to directly interfere in the course of the Brazilian transitional justice process. To reinforce this

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[33] Tradução livre *do seguinte texto escrito em* espanhol: *"Esta normalización de la justicia transicional no despeja todas las dudas del jurista en la etapa anterior. Porque si ya no hay diferencia entre el funcionamiento del Estado de Derecho en una sociedad democraticamente consolidada y otra en transición, lo que se desprende es una pérdida de rigor en la aplicación del Estado de Derecho en una sociedad democrática consolidada. Al fin y al cabo, la justicia transicional va ligada a circunstancias políticas excepcionales, de ahí la flexibilidad en su aplicación; sin olvidar, por otro lado, todas esas adherencias meta-jurídicas con las que se ha cargado o recargado la justicia transicional en la etapa anterior (Teitel, 2011, 169)".*

[34] Article 5, subsection XXXV, of the Federal Constitution of 1988. It is said without apparent limits because there are still situations in which there are limits on the Judiciary. For example, in cases of transgression committed by military personnel, the ordinary judicial power only carries out formal control of the arrest.

[35] The National Council of Justice conducted the survey "Justice in Numbers", which recorded approximately 102 million cases in progress in the country until 2016 (BRASIL, 2016, p. 17).

[36] There is an important work done regarding the analysis of transitional justice in the Judiciary: OSMO, Carla (Org.). Judicialization of transitional justice in Latin America. Brasília: Ministry of Justice, Amnesty Commission, Latin American Network of Transitional Justice (RLAJT), 2016. This publication, which is worth reading, adopts different classifications and thematic analyses than the approach taken in this paper, which

preferred to classify the actions of the Judiciary in the four conceptual dimensions of transitional justice.

reasoning, some examples of judicial activity that identify with each of the four dimensions of the transitional justice system are analysed.

3.1. Judiciary and Reparations to Victims

The dimension of reparations for those harmed by the military regime is probably the most frequent field of action for the Judiciary. By analysing, in the judicial sphere, the legality and constitutionality of administrative judgments, the Judiciary contributes to the formation of the process of transitional justice applied in kind.

An example of the Judiciary acting on the issue of economic reparation occurred at the Federal Supreme Court in the trial of Extraordinary Appeal 553.710, classified as Topic 394 of the General Repercussion. In that judgment, victims of political persecution claimed full and sole compliance with the retroactive part of political amnesty compensation by the Minister of Planning and the Minister of Defense. The Federal Supreme Court declared the constitutionality of article 12, paragraph 4 of Law 10.559/02, which deals with the form of payment of past amounts due to political amnesties, dismissed the argument that there was no budgetary availability and ordered the Executive Branch to immediately comply with such obligation[37]. The Reporting Justice Dias Toffoli highlighted the special legal situation of those who suffered during the dictatorial period, in addition to the protection of dignity and fundamental rights as the basis of economic reparation, which must be fully [38]met.

[37] Law 10.559/02. Article 12, § 4: -Requests and decisions rendered by the Minister of State of Justice in political amnesty proceedings must be complied with within sixty days by all bodies of the Public Administration and any other entities to which they are addressed, subject to budgetary availability".

[38] In this line of judgment, the refusal to include in the budget the credit provided for in Ordinance No. 84/2004 of the Ministry of Justice affronts the principle of human dignity, since we are dealing with citizens whose rights denied by acts of political exception were admitted with years of delay by the Public Power, which cannot refuse to comply with the economic compensation recognized as due and just by administrative proceedings instituted for this purpose. Despite the doctrine itself recognizing the difficulty of delimiting the scope of protection of dignity and fundamental rights, there is no doubt that the legislator's choice, in regulating and guaranteeing the rights of these amnestied persons, was to provide those whose dignity was destroyed by the anti-democratic regime once installed in our country with a minimum restoration of that dignity. It is the mission of this Supreme Court, therefore, as already noted by Ingo Wolfgang Sarlet, to transform the dignity of the human person into a lived reality and, who knows, perhaps less and less violated' (Notes on the dignity of the human person in the jurisprudence of the STF. In: SARMENTO, Daniel & SARLET, Ingo Wolfgang (Coordinators). Fundamental Rights in the Supreme Court: Balance and Criticism. Rio de Janeiro: Lumen Juris, 2011. p. 73). Having the fulfillment of these assumptions, namely, the

The Judiciary has also corrected the compensation amounts set in the administrative sphere to bring them into line with the terms of Law 10,559/02. This orientation has been adopted in the trials of various professional categories of amnestied persons, in order to allow the greatest possible fidelity between the amount of compensation and the amount received by those who remained in active employment precisely because they did not suffer professional losses during the dictatorship. In other judgments, the courts understood that the reparation of material damages for political amnesty does not prevent the addition of reparation for moral damages in certain hypotheses.

There are situations in which the Judiciary Branch has altered the form of economic reparation. In one of these cases, the administrative body had understood that the amnesty recipient should receive a single payment and not a monthly payment, since he worked as a practical dentist during the military dictatorship, an unregulated profession. The Judiciary held that the activity of a practical dentist, although unregulated, was a socially accepted and quite common activity for that time and region of Brazil, which would entail the need to transform the lump sum payment into a monthly [39]payment.

In another case, the judiciary established additional compensation for a victim who was still a child during the military dictatorship and who spent her life searching for her father until she found him dead in another country. On this occasion, the Judiciary considered insufficient the administrative compensation that had been established in a lump sum and that was limited to the year in which the father of that child had been imprisoned. The sentence clarified the need to expand the compensation40.

In all of these examples, the magistrates, by analyzing questions of fact and law, applying the relevant legislative command and the Federal Constitution, influenced the final outcome of the reparation to each of the respective victims. In performing this function, the

recognition of the debt by the direct administration body in favor of the military political amnesty and the allocation of funds in a significant amount by law, there is no way to accept, in the present records, the thesis of unfeasibility of the payment due to the absence of budget forecast to meet the claim. BRAZIL. Federal Supreme Court. Extraordinary Appeal 553.710 (Theme 394 of the General Repercussion). Federal District. Rapporteur: Minister Dias Toffoli. Judgment on 11/17/2016. Judgment pending publication. Vote made available by the Reporting Justice, subject to revision until the publication of the judgment.

[39] BRAZIL. Federal Regional Court of the 1st Region. Civil Appeal No. 0031627-61.2008.4.01.3400. Rapporteur Federal Judge Jirair Aram Meguerian. Judgment Published in the Electronic Justice Gazette on 03/18/2013.

[40] BRAZIL. Judiciary Section of the Federal District. Ordinary Action No. 63856-69.2011.4.01.3400. Judgment of the 4th Federal Court. Excerpt of the sentence published in the Electronic Justice Gazette on 04/06/2013.

Judiciary ends up allowing the realization of this important pillar of transitional justice.

3.2. Judiciary and Prosecution of Human Rights Violators

There are ongoing cases in the Judiciary Branch that deal with changing the justice system to enable the prosecution of perpetrators of human rights violations. The lawsuits seeking to hold retired Colonel Carlos Alberto Brilhante Ustra accountable for torture during the horrors of the dictatorship have [41]gained repercussion.

Another example is a criminal action filed against six people accused of participating in the explosion of a bomb during the celebration of Labor Day, an event known as Riocentro bombing. This case is pending review by the Superior Court of Justice[42].

The reinterpretation of the legal norms that authorize the prosecution of human rights violators represents one of the greatest resistances in the Judiciary. Several decisions have been handed down in the sense that it is impossible to prosecute human rights violators based on the mere mention of the judgment of the Brazilian Supreme Court's Ação de Descumprimento de Preceito Fundamental (ADPF) No. 153. The ADPF did not rule that perpetrators of human rights violations during the dictatorship could not be prosecuted, but simply declared the constitutionality of Law 6.683/79, the Amnesty Law. It defined the compatibility of that Law in accordance with the 1988 Constitution, exercising the constitutional mandate of controlling constitutionality.

Misinformation, probably due to lack of knowledge, especially in the media, spread the understanding that the STF declared a broad, general and unrestricted amnesty of Law 6.683/79 and thus prevented the judicial processing of any accountability of any public agents who are still alive, whether such accountability in the civil, criminal or administrative sphere. Nothing could be more mistaken than this

[41] Most of the cases, however, were not accepted by the judiciary. For example, a sentence handed down by the 1st Federal Criminal Court of São Paulo in case 0016351-22.2014.4.03.6181, which rejected the complaint against the torturer on the grounds of the statute of limitations and amnesty for torturers.

[42] Superior Court of Justice. 6th Panel. Interlocutory Appeal in Special Appeal 818.592. Reporting Justice Rogério Schietti. Case of origin: 0005684-20.2014.4.02.0000.

understanding, but at least until 2017 it has been the posture of the Brazilian Judiciary in this dimension of Transitional Justice.

3.3. Judiciary and Memory

The Judicial Power has also acted to correct some misinformation and historical untruths of the period of exception. In this sense, the sentence of the Judicial Power, in the competence of the court of public records, which determined the alteration of the death certificate of journalist Vladimir Herzog, murdered for political reasons during the military dictatorship, was noteworthy. The following excerpts from the decision are worth transcribing:

> The objection partially opposed by the prosecution, with regard to the annotation of the cause of death, despite the firm argument invoked, does not hold. It would be truly iniquitous to prolong the martyrdom of the widow and her relatives and to affront the national public conscience by renewing the investigation into the cause of death when it has long been established, in terms of unshakable conviction, especially through the ordinary jurisdictional channels, that the journalist Vladimir Herzog lost his life as a result of ill-treatment and injuries sustained in circumstances known to all. To cling to juridical filigree, at the indicated conjuncture, would constitute inadmissible recognition of the continuity of suffering imposed by the imputation of suicide, whose version was not proven according to previous judicial definition. The National Truth Commission has already established its understanding in relation to the matter, about which there is no further need to inquire, in this particular case. [...] The matter, therefore, calls for the reestablishment of the truth to adjust, _albeit belatedly', the occurrence to the state of accuracy. Therefore, for the reasons presented, and in accordance with the manifestation of the National Truth Commission, I grant the proposed request in order to order the rectification of the death certificate of journalist Vladmir Herzog, to state that the death resulted from injuries and mistreatment suffered in dependencies of the II Army - SP (DOI-CODI)[43].

Although this has not yet occurred to the desired extent, the Judiciary has also issued judgments in which it determined the opening of important documents for the clarification of facts and the construction of a national memory. This was the case in Constitutional Complaint No. 11.949, in which the Superior Military Court was ordered to make available to a group of researchers not only recordings of public sessions from the period of the military dictatorship, but also recordings of secret sessions held during the dictatorial [44]regime. In his vote, Justice Celso de Mello

[43] Sentence rendered in Case No. 0046690-64.2012.8.26.0100 by the Judge of the 2nd Court of Public Records of São Paulo.

[44] BRAZIL. Federal Supreme Court. Complaint 11.949. Federal District. Rapporteur: Minister Cármen Lúcia. Judgment on 03/16/2017. Judgment pending publication. Vote made available by Minister Celso de Mello, subject to revision until the judgment is published.

notes, based on Norberto Bobbio, that democracies are incompatible with mystery and that all citizens have the right to know the past in order to exercise social control over public power (BOBBIO, 1986).

Therefore, the dimension of remembrance has been put to the appreciation of the Judiciary. In this field, the Judiciary collaborates to the construction of a social memory and the search for truth, understood in Hannah Arent's concept as everything that cannot be changed, such as the ground below our feet and the sky above our heads (ARENT, 2006, ***Apud*** BARBOSA; VANNUCHI, 2009, p. 59).

3.4. Judiciary and Reform of Institutions

Some institutional reforms and adoptions of public policies in the post-re-democratization period were directed to sectors of the Judiciary. Examples include the constitutional provision of small claims courts and their consequences[45], the creation of the National Council of Justice for the purpose of exercising control over the Judiciary, and the possibility of judicial decentralization through itinerant justice[46].

But the Judiciary can also be called upon to make decisions that involve other institutional reforms. For example, in 2014, the National Council of Justice established a working group to study the restructuring of the Military Courts. The National Justice Council's analysis evaluated various institutional issues, from the possibility of abolishing the State Military Courts or absorbing the attributions of the Military Courts into specialized courts of the Common Justice System to reducing the number of Justices of the Superior Military [47]Court.

Thus, the pillar of institutional reforms can also be exercised by the judiciary. However, just as relevant as institutional change is the reform of the Judiciary's own thinking to realize that it plays an important role in the transitional justice system. It is important to critically analyze the elements present in the institutions of the Judiciary that reveal remnants of the influence of the period of exception.

[45] Article 24, X of the Federal Constitution. Law 9.099/95, Law 10.259/2001, Law 12.153/09.

[46] Constitutional Amendment 45/2004.

[47] Report of the National Council of Justice. Working Group established by Ordinance 216/2013.

In this reflection, the Judiciary will not only play a judicial role, but will also collaborate with mechanisms that ensure the completeness of the Brazilian transitional process.

4. By way of conclusion: the need for institutional reform of the judiciary

The Judiciary keeps residual characteristics of the dictatorial regime, such as traditionalism, formalism, exacerbated positivism and distancing from society (LUNARDI, 2012, p. 168). It is necessary for the Judiciary to engage with other institutional actors to free itself from the ties that conservatism implies to the development of the transition from dictatorship to the Democratic Rule of Law. Judicial activity should not be seen as a field of revenge, but as a terrain of social action (FABRIZ, 2006, p. 38). This democratic legitimation will never be achieved if institutions remain resistant to understanding the transitional process itself (SOUZA JÚNIOR, 2008, p. 14).

If the survival of democracies depends in part on the vitality of their institutional systems, the Judiciary must perform a critical self-analysis and identify the predicates that prevent it from continuing the Brazilian transitional process (PRZEWORSKI, 1997, p. 125). As Paulo Abrão states, the need for institutional construction and reconstruction is also incumbent on the Judiciary:

> In the face of this range of abuses, the State must assume the responsibility of promoting responses in different areas: reparation, prevention, criminal liability, and non-repetition. These adjectivations qualify the Transitional Justice that is intended in processes of effective overcoming of the authoritarian regime. They qualify and guide the postulations for institutional reforms, including in the sphere of justice (ABRÃO, 2015, p. 384).

Vanessa Dorneles Schinke recalls that the judiciary cannot shirk from facing all the consequences that the delicate transitional process demands, including institutional responsibilities within its own power. If it remains averse to such changes, with stances contrary to measures of truth or reparation, for example, the judiciary will exercise an antidemocratic force that is detrimental to the transitional measures achieved:

> In this same sense, the complexity of the issue is illustrated by the thesis built by Paloma Aguilar (2013, p. 2), in the sense that the more direct the involvement of the Judiciary in authoritarian repression, the less likely the establishment of

> judicial accountability or truth-telling measures during the democratization period. That is, when responsibility for repression can fall on members of the Judiciary (not restricted only to military and police forces), judges and prosecutors tend to be reluctant to approve punitive measures against repressors. Likewise, members of the Judiciary would also react more incisively against the publicization of the past through truth commissions, since public scrutiny regarding judicial acts can denounce procedures carried out without minimum judicial guarantees, questioning the smoothness and independence of judicial bodies (SCHINKE, 2015, p. 449 ***Apud*** AGUILAR, 2013, p. 2).

For the transition to be complete and effective, it is necessary that the judiciary is an independent institution, socially legitimized and committed to the objectives of transitional justice. These characteristics will lead to a strengthening of democratic institutions with the consequent development of a transitional process in its best form and the consolidation of the rule of law, in the terms set out by Arnould and Sriram:

> Just as democracy is a multidimensional process - involving different levels of actors (the state, society, the individual) and different spheres of action (political, economic, judicial, social, cultural) - transitional justice is likely to have different impacts on these multiple dimensions. [...] Transitional Justice might influence some, but not all democratic dimensions. [...] However, the degree to which transitional justice can be expected to have a reasonable impact is on the democratic development of institutions. This indicates the strengthening of fundamental democratic principles and institutions - such as an independent judiciary, democratic armed forces, and social participation
> — as well as improving the performance of these institutions. Although institutional development is not a sufficient condition for democracy
> — which also requires changes in attitudes and convictions as well as reshaping of state-society relations and socio-economic practices - is an indispensable component. [The rule of law is an essential pillar on which democracy rests as it protects rights, imposes legal responsibilities, and constrains the abuse of political power. It implies the primacy of law and its equal application to public and private actors. Therefore, the central component of the rule of law lies in the performance of the judiciary: the judiciary needs to be independent, accessible, effective and respect the principles of due process, legality and equality. Transitional justice pursues some of the same goals as the rule of law - promoting justice and protecting human rights - and consequently often complements the politics of the rule of law. But transitional justice is also expected to contribute directly to building the rule of law in countries that are in transition from authoritarian rule or armed conflict by reaffirming the principle of identifying responsibilities, encouraging changes in judicial practices or focusing political and societal debates on justice issues. Transitional justice deepens debates, sustains the rule of law by educating people about minimum standards of rights, and induces governments to act in accordance with known human rights and rule of law norms (ARNOULD; SRIRAM, 2014, p. 3)[48].

[48] As *democracy is a multidimensional process - involving different levels of agency (the state, society, the individual) and different spheres of action*

Above all, the Judiciary must have the perception that it is part of a transitional process in the course of Brazilian history. It is precisely this awareness that has not yet been achieved by the judiciary. There are two main reasons for this assertion.

Firstly, unfortunately, the number of court decisions that show ignorance of the subject or that refuse to apply the rules of the Brazilian transitional justice system is [49]still high. Another example of this failure is the condemnation of the Brazilian State by the Inter-American Court of Human Rights in the case of the Araguaia Guerrilla War (Gomes Lund), since the need to use an international justice system reveals the inefficiency of the national justice system (ALMEIDA, 2010, p. 43 and ABRÃO, 2015, p. 384-385).

Second, a simple search for the term "transitional justice" in the jurisprudential databases of Brazilian courts shows that there are virtually no judgments with this expression[50]. However, as seen in the previous topic, these same courts are addressing issues of torture and human rights violations under the military regime,

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(political, economic, judicial, social, cultural) - transitional justice is likely to have a differing impact on these multiple dimensions. [Transitional justice may impact some but not all democracy dimensions. [...] However a level at which transitional justice can reasonably be expected to have no impact is democratic institutionbuilding. This refers to the strengthening of foundational democratic institutions and principles - such as an independent judiciary, democratic security forces, and participation - as well as the improvement of the performance of these institutions. While institution-building is not a sufficient condition for democracy - which also requires changes in attitudes and beliefs as well as a remoulding of state-society relations and socio-economic practices - it is a necessary component of it. [Rule of law is an essential pillar on which democracy rests as it protects rights, enforces accountability and constrains political abuse of power. It entails the primacy of the law and its equal application to all public and private agents. A central component therefore of rule of law is the performance of the judicial system: the judiciary needs to be independent, accessible, effective, and respect the principles of due process, legality and equality. Transitional justice pursues some of the same objectives as rule of law - promoting justice and human rights - and is therefore often seen as acting in complement to rule of law policies. But transitional justice is also expected to directly contribute to building the rule of law in countries transitioning from authoritarian rule or armed conflict by reasserting the principle of accountability, encouraging changes in judicial practice, or focusing societal and political debates on questions of justice. Transitional justice, it is further argued, supports rule of law by educating people about rights standards and inducing governments to act in line with publicly known human rights and rule of law standards‖.

[49] For example, in Ordinary Action No. 2009.34.00.032086-3, a sentence was handed down by the 22nd Federal Circuit Court of the Federal District Judiciary Section, ruling that the claim for compensation for moral and material damages of an amnesty holder who was arrested during Operation Bandeirantes, commanded by Deputy Sérgio Paranhos Fleury, a notorious torturer under the military regime, is time-barred. In another example, in Ordinary Action No. 2009.34.00.016425-6, the decision of the 7th Federal Circuit Court of the Federal District Judiciary Section held that the Federal Government did not have passive standing to answer for amnesty proceedings and that the amnesty holder should turn against the company that fired him, in this case steelmaker Açominas.

[50] At the Federal Supreme Court, the only decision identified in the jurisprudential search with the search for the term
Transitional justice" is the judgment of ADPF 153. At the Superior Court of Justice, the case law search did not identify any judgment with this term, only a single monocratic decision issued in Special Appeal No. 1.066.047.

reparations for damages that occurred during the dictatorship, in addition to other issues and institutes specific to transitional justice[51]. It is as if the Judiciary knew only the species, but without knowing the genus of the legal institutes analyzed. When dealing with damages and reparations arising from the military regime, issues related to memory, institutional reforms or processing perpetrators of violence, the judiciary must know that such matters represent the realization of transitional justice on the national stage. Vanessa Schinke shows the challenges to be faced by the judiciary in this area:

> Currently, transitional justice is challenging the Brazilian judiciary to go beyond the bureaucratic exercise of its duties, in favor of the irradiation of the constitutional principles of protection of the human being and, consequently, the strengthening of the constitutional state. As for conflict resolution, although it is well known that the Judiciary is not the only space in which this is possible - as is the case with the organic conflict management produced by civil society (more or less organised), in which situations are better managed and resolved far from the courts - it should be recognised that the space of the Judiciary is relevant for irradiating and consolidating meanings and symbolic registers about the law. In addition to constituting itself as a means of access to justice, when affiliated with an interpretation that ensures the protection of human rights - in cases that involve serious human rights violations - the Judiciary can be characterized as a place for combating impunity, searching for the truth, reparation, and the construction of memory [....] Transitional Justice, par excellence, confronts the limits of the discursive-bureaucratic actions of the Judiciary to the extent that it encourages it to shift its concern from the application of pragmatic and technical arguments to the realization of principles of human rights protection. [The Brazilian case on the judicialization of transitional justice highlights the need for the judiciary to adopt a productive interpretation of human rights protection norms (SCHINKE, 2015, p. 450).

By realizing that the exercise of the judicial function impacts not only the specific cases being tried, but the entire transitional justice system, the judiciary will know that judicial decisions in these cases will be able to reduce conflict, assist in the formation of a lasting democracy with strengthened institutions and social support. By fearlessly confronting the past and applying transitional justice norms, the judiciary avoids repeating mistakes that tend to recur again and again.

A Judiciary with a critical and conscious thinking, aware of its role and committed to the Brazilian transition process, this is one of the bases for the construction of solid institutions and for the search of a socially legitimated democracy. After all,

[51] In both courts, hundreds of judgments appear when the search is made for the words "dictatorship", -torture and military‖, -political amnesty‖ etc.

as James Cavallaro reminds us, "Today, in Latin America, the countries that respect human rights the most are precisely those that have gone through terrible periods of repression and have gradually learned to deal with the past of abuses" (***Apud***, BARBOSA; VANNUCHI, 2009, p. 55).

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