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**THE ROLE OF INSTITUTIONAL REFORM IN TRANSITIONAL JUSTICE AND
THE OBSTACLES FOR ITS DEVELOPMENT**

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SUMMARY

The essential concept of transitional justice is settled, though some elements are still in debate. I define it as a public policy to address the legacy of grave human rights violations in post-conflict or post-repressive rule societies, with the aim of achieving reconciliation, strengthening the democratic rule of law and promoting guarantees of non-recurrence. Transitional justice comprises judicial, legislative and administrative measures, such as the promotion of accountability for perpetrators of human rights violations, truth-seeking initiatives, victims' reparation, the recovery of memory, and institutional reform. Although these five policy areas should ideally be pursued in a coordinated manner, few countries have succeeded in implementing all of them together. Empirical evidence suggests that institutional reform has been the most neglected among these policies. This research will analyze the role that institutional reform is expected to play in transitional justice processes and, more specifically, what actions can be adopted to reshape security forces that were involved in human rights violations. It will also address the question of what the obstacles that hinder the implementation of institutional reform are and if – and in what level – the gap of institutional reform compromises the achievement of transitional justice aims. Finally, it will argue that the failure in promoting institutional reform is connected to the persistence of human rights violations after re-democratization, using Brazil as a case study.

BACKGROUND

A brief definition of Transitional Justice

The concept of Transitional Justice has been normatively developed based on the empiric experience of: South American countries transitions during the late 1970s and early 1980s, after the military dictatorship-era; the South African transition after the fall of the apartheid regime in 1994; and the end of the soviet block in the Eastern and Central Europe, during the 1990s. It is also a reflection about the failure of the international community to prevent gross human rights violations in the former Yugoslavia (the Balkans Wars; 1991-2001) and Rwanda (genocide in 1994).

It discusses how post-conflict or post-authoritarian societies and governments should deal with the legacy of human rights violations, considering at the same time both the international law standards that bind states to ensure victims' rights and to promote justice for perpetrators, and the desired goal of strengthening democracy and preventing new periods of human rights violations¹.

While in the late 90s theoretical discussion on transitional justice was in its early stages, it has experienced a quick development since then, and the literature in the topic has grown exponentially. However, many questions are still open. This can be justified by its empirical origin and the enormous diversity of transitional situations, as well as the difficulties to get concrete evidences of the contribution that different approaches of transitional justice may bring to the field.

A consensual definition of the term is now settled². However, adopting a legal approach, I will define it in this paper as *a public policy to address the legacy of*

¹ For a historical reconstruction of the origin of TJ, see Arthur Paige. "How 'Transitions' Reshaped Human Rights: a Conceptual History of Transitional Justice", *Human Rights Quarterly*, 31 (2009), p. 321-367.

² "For the United Nations, transitional justice is the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation." Guidance Note of the Secretary-General – United Nations Approach to Transitional Justice. See http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf; For the International Center of Transitional Justice – ICTJ, "transitional justice refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional

grave human rights violations in post-conflict or post-repressive rule societies, with the aim of achieving reconciliation, strengthening the democratic rule of law and promoting guarantees of non-recurrence. Transitional justice comprises judicial, legislative and administrative measures, such as the promotion of accountability for perpetrators of human rights violations, truth-seeking initiatives, victims' reparation, the recovery of memory,³ and institutional reform.⁴

There are some elements included in this conception that deserve explanation. Due to the limited extension of this paper and the specific purpose of the research, they are going to be developed only in a perfunctory manner, nevertheless. The first of them is why I limit transitional justice to post-conflict or post-rule of law repressive societies, excluding societies that are still in conflict, but making efforts to reach peace.

While I recognize that many of transitional justice strategies can be synergic with peace building approaches – since both are bound by international law values and duties, and both have the common aim of overcoming violence and human rights violations – I consider that without ending the conflict transitional justice measures and objectives concerning victims rights cannot be achieved. Indeed, until peace is implemented or perpetrators are overthrown, victims remain vulnerable and will not be able to head or take part in the process. It is also noteworthy that peace processes and transitional justice have different aims; the first are focused on curbing violence and ending bloodsheds, mostly through disarmament, demobilization and reintegration, in order to allow the return of the rule of law; the second endeavors to achieve social reconciliation, democracy stability and guarantees of non-recurrence. Despite both being closely interconnected, transitional justice is a step after the peace process.

reform.” See <http://www.ictj.org/about/transitional-justice>.

³ Many authors do not consider the recovery of memory as an independent strategy. According to the UN framework, for example, TJ would be comprised of four different mechanisms (see “The Guidance Note of The Secretary-General: United Nations Approach to Transitional Justice”, March 2010, http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf).

⁴ I understand that this is not an exhaustive list, since some other policies can be added to the set of transitional justice measures, according to local specificities. It would be the case of educational approaches, mainly in societies in which children were directly affected by violence; or economic and social rights promotion, where – for instance – the origins of the conflict were directly connected to the fight for scarce resources.

Secondly, I need to briefly justify what I consider to be the aims of a transitional justice process⁵. As mentioned, I identify three final goals to be achieved: reconciliation, strengthening of the democratic rule of law, and the non-recurrence guarantee. As (1) reconciliation — a term that in the literature is still controversial — I refer to two phenomena: (1.a) the reestablishment of people's confidence in the state and its agencies; and (1.b) the trust among social groups. Dictators and authoritarian governments keep their power by granting privileges to the social groups that support them and intensively repressing dissidents, which, as a consequence, creates division in society, fracturing the notion of civic trust and stimulating hatred towards divergent political, ethnic, religious, racial, ideological or economical opinions.

These practices erode civic trust in both a vertical and a horizontal perspective. Indeed, while the violence and harassment of one or more social or political segments breaks out the relations between citizens and public institutions (vertical perspective), it also contaminates the trust between the social groups, which see each other with suspicion (horizontal perspective). Thus, reconciliation refers to the action of rebuilding civic trust in public agencies, but it also expresses that groups that had been opposed before have started relying on each other.⁶ Both goals are dimensions of the principle of equality. When – and if – the State shows willingness and capacity to treat different social group interests without privileges, the reasons for rivalry and distrust among them decrease and, at the same time, the trust of the discriminated in the public agencies increases. These are “two sides of the same coin”, or two effects of the respect by public authorities to the essential value of equality.

This notion of reconciliation is closely related to the recognition and reparation of victims, because it is the signal that the state has addressed their rights and has been adopting measures to reintegrate them in a more egalitarian society. Another crucial element for reconciliation, this way understood, is the promotion

⁵ Most of my ideas in this issue have been developed since the studies of Pablo de Greiff. See “Theorizing Transitional Justice”. In Williams, Melissa. *Transitional Justice*. New York: NYU Press, 2012, p. 31-77.

⁶ See Pablo de Greiff, “The Role of Apologies in National Reconciliation Processes: On Making Trustworthy Institutions Trusted”, in Mark Gibney, Rhoda E. Howard-Hassman, Jean-Marc Coicaud and Niklaus Steiner (eds.). *The Age of Apology: Facing Up to the Past*. Philadelphia: University of Pennsylvania Press, 2008.

of accountability; the criminal persecution of perpetrators indicates that justice is a value enforceable for anyone, even for high-level authorities, reinforcing the principle of equality before the law.

The second aim is the strengthening of democracy. While here is not the place to discuss what democracy means – which is a very contested concept and that has deserved extensive literature for centuries –, it is necessary to at least delineate its boundaries for the purpose of this research. The aspiration of democracy in the context of transitional justice is related to the concept of political democracy⁷, but not merely in a procedural or formal sense (periodic and fair elections). The consolidation of the democratic principle is achieved “when under given political and economic conditions a particular system of institutions becomes the only game in town, when no one can imagine acting outside the democratic institutions”⁸; that means, when is fully assumed by all stakeholders that any conflict or crisis must be decided and solved according to the rule of law (following the constitutional procedures and by the constitutional institutions), and without any fear or threat of authoritarian outbursts. Moreover, it involves the sense that the government and its civil and military agencies recognize and respect the citizens as the holders of the state power, accepting that they can – and shall – access and control public authorities and take part whenever possible in decision-making processes (participatory democracy). Thus, in a consolidated democracy the vast majority of the social groups accept and respect the rule of law and the political procedures and, at the same time, the entire public sphere is committed to its constitutional duties and aware that every citizen shall be treated as holding rights before any authorities.

Transitional justice strategies are a powerful drive in addressing democratic values and, in a post-conflict or post-repressive society, are able to create shortcuts to incorporate their standards in daily life. I mean that, if a perpetrator

⁷ The Transitional justice approach is not able to deal with all the questions of economic and social democracy, but that does not mean that economic and social rights should be left out of the process of consolidating democracy. The development of social and economic rights is essential to the exercise of freedom and, therefore, for the autonomy to take part in a democratic society. It is also connected to the idea that a democratic state must have social justice as one of its standards.

⁸ Adam Przeworski, *Democracy and Market: political and economic reforms in Eastern Europe and Latin America*. Cambridge: Cambridge University Press, 1991, p. 26.

faces accountability (transitional justice initiative), it is an indication that the state is ready to deal with justice and that the law is binding for anyone, no matter his or her social level or political influence (democratic achievement). Under a similar perspective, a truth seeking process (transitional justice initiative) push the right to access information and the culture of transparency in public affairs (democratic achievement). Transitional justice performs, therefore, a significant role towards the affirmation of democratic values.

Another dimension is the key role that transitional justice measures can play in the empowerment and mobilization of the civil society. Indeed, victims and non-governmental organizations are prominent in the whole process of transitional justice and such engagement provides skills and abilities that later will help them in taking part in the daily process of controlling and advocating before policy-making authorities. Thus, the strengthening of democracy is an inexorable consequence of a holistic process of transitional justice, not only because it facilitates the incorporation of its essential values in political and normative fields, but also as a tool to empower civil society as a relevant stakeholder in the advocacy of rights.

Nevertheless, it is clear that transitional justice sets of policies, by themselves, are not enough to consolidate democracy and are not even the sole condition to achieve such goal. However, it is undisputable that there is a causal link between transitional justice policies and the substantive concept of democracy. These processes are interconnected and they gradually restore the confidence in justice, equality and truth as essential values for social and political life. I remember that these strategies have been initially studied from a descriptive perspective, based on the experience of many countries in Latin America, Eastern Europe and South Africa, which were dealing with accountability for perpetrators, truth-seeking and victims reparations. After that, a conception has been in development, pointing out that a coordinated development of these groups of initiatives, together with other measures related to memorialization, education and reform of public institutions could increase the possibilities of democracy consolidation and guarantees of non-recurrence. Obviously that it is a normative approach, from which policy-makers can build concrete solutions to

address the challenges faced in the field. However, it is not a utopian or unrealistic goal. The more committed to these principles a society is, the closer to the guarantee of non-recurrence it will also be (the third goal of transitional justice). Indeed, the strengthening of democracy and the civic trust provide the conditions to prevent repetition of past wrongdoings, specially the temptation of considering authoritarianism a shortcut for stability or development, or that human rights can be treated in relative terms for the achievement of other objectives.

Non-recurrence, however, is not only a look at the future, to prevent *repetition* of previous failures, but also a tool to overcome the legacy of authoritarianism that remains in public agencies even after (re)democratization. Indeed, institutions that during dictatorships or conflict-eras were structured and orientated to repress dissidence – restraining rights and perpetrating human rights abuses – will probably not give up their powers or be able to change their culture by themselves, merely because the regime collapsed. Thus, it is not uncommon that such institutions (specially security forces) continue violating citizens' rights during and after transition, following the pattern they had adopted during the former regime, in a phenomenon that may be called *perpetuation* of human rights violations.

Transitional justice policies shall curb such practice, mainly by implementing cultural and structural reforms in these institutions, and breaking impunity through accountability for perpetrators of human rights violations.

For this reason, I argue that transitional justice aims towards more than the avoidance of repetition; it addresses the continuity of bad behaviors of officials as well. Thus, the guarantee of non-recurrence comprises two goals: one is the prevention of repetition, in the sense of forestalling the return of an authoritarian regime; and the other is the cessation of wrong practices that democracies perpetuate as a legacy of the past. The first is focused in the future, while the last is concentrated in the present.

As repeatedly mentioned, for the achievement of these three final objectives (reconciliation, consolidation of democracy and guarantee of non-recurrence) several sets of measures or strategies are recommended. Although the issue of

categories of measures is still controversial, I adopt a division according to their specific goals.⁹ I call these objectives as intermediate or immediate, since they are stages in the whole transitional justice process (which has the final and main objectives described above). I identify, at the least, five immediate aims: promotion of justice, truth seeking, memory recovery, reparations for victims and institutional reform¹⁰.

In a nutshell – and for the purpose of this introductory note – we may refer that justice is achieved mainly through the criminal persecution of perpetrators of grave human rights violations or crimes against humanity¹¹; truth is sought when ordinary or special institutions – such as Truth Commissions – succeed in investigate human rights violations and the breach of the rule of law, as well as their origins, causes and consequences¹²; memory is recovered if the remembrance of the atrocities are registered, preserved and revealed through a trans-generational approach¹³; reparations are granted for victims if the remains of their missing loved ones are searched and identified and if their individual and collective rights are restituted or compensated¹⁴; and institutional reform is implemented when public agencies and institutes are submitted to changes in their people, culture, structure and normative levels, in order to commit them to the democratic and constitutional values, including the full respect of human rights.¹⁵

⁹ I recognize that this is – as almost all initiatives to assign categories in social science – an extremely artificial expedient. Nevertheless, it is useful for didactic purposes and, moreover, it is consolidated in the literature of transitional justice and in the language of international law.

¹⁰ See footnotes 3 and 4.

¹¹ See Marlon Alberto Weichert. “Crimes contra a humanidade perpetrados no Brasil. Lei de Anistia e prescrição penal”, *Revista Brasileira de Ciências Criminais*, v. 74, p. 170-229, 2008.

¹² See Marlon Alberto Weichert. “A Comissão Nacional da Verdade”, in SILVA FILHO, José Carlos Moreira da; TORELLY, Marcelo; ABRAO, Paulo (orgs.). *Justiça de Transição nas Américas – olhares interdisciplinares, fundamentos e padrões de efetivação*. Belo Horizonte: Editora Fórum, 2013, p. 161-180.

¹³ The sites of conscience can assume many distinctive functions in society. For victims they may be, more than a way to remember, places for mourning. For other, they might represent a tribute or homage to the resistants and other victims. For the next generations, they shall guarantee the opportunity to know and understand the past wrongdoings of their society. See Clara Ramirez-Barat (ed.). *Transitional Justice, Culture, and Society: Beyond Outreach*. New York: Social Science Research Council, 2013.

¹⁴ See Pablo de Greiff. “Justice and reparations”. In De Greiff, Pablo (ed.). *The Handbook of Reparations*. New York: Oxford University Press/International Center for Transitional Justice, 2006, p. 451-477.

¹⁵ This idea will be developed in “Research questions”, below in this paper.

It is relevant to notice that, while each transitional measure is conceived to pursue its own goals, all them serve in reality “more than one immediate aim at a time”¹⁶. There are distinct dimensions of rights or interests that a unique policy can achieve, especially because all these sets of measures and goals are interwoven. As an example, a reparation process may gather information about repression, help to seek truth, preserve memory and promote justice against perpetrators. In any case, these measures are not a “menu” from which policy-makers can choose what to implement. They are articulated and complimentary strategies, or “parts of a whole”¹⁷, which mutually reinforce each other.

In the same sense, these policies shall be adopted in an integrated approach; simultaneously, in ideal terms, but at the least in a sequential manner. This is why I define transitional justice as a public policy. It is a set of administrative, judicial and legislative activities headed by the state to achieve aims socially relevant and politically determined.¹⁸

It is relevant to stress that this concept is entirely compatible with the idea of civil entities sharing and developing tasks; however, in a public policy there is a legal and administrative activity that necessarily request the presence of the State. Transitional justice precisely has this characteristic; while the core of its activities remains in public hands and cannot be delegated or transferred – for example, the promotion of accountability for perpetrators, the creation of truth commissions, the enactment of new laws regarding the free access to public archives, the payment of reparations for victims, and the implementations of institutional reform are initiatives that only the public authorities can lead –, civil society is an essential stakeholder during both the formulating stage of the policy and the implementation of the measures, providing the legitimacy for the entire process.

In any case, it is difficult to find a country that has been able to implement all these strategies, even sequentially, for many reasons, such as: post-conflict or

¹⁶ Pablo de Greiff. See “Theorizing Transitional Justice”. In Williams, Melissa. *Transitional Justice*. New York: NYU Press, 2012, p. 39.

¹⁷ Pablo de Greiff. See “Theorizing Transitional Justice”. In Williams, Melissa. *Transitional Justice*. New York: NYU Press, 2012, p. 34.

¹⁸ See Maria Paula Dallari Bucci. *Direito Administrativo e Políticas Públicas*. São Paulo, Saraiva: 2002, p. 241.

post-repressive rule of law governments are not entirely committed to democratic values; pressure or influence of groups that supported the old regime; the transition was negotiated and the old governments or their defenders ensured amnesty and other limits regarding past human rights violations; the scarcity of resources imposes transitional justice's policies to be traded-off against demands for economic and social rights, which – mainly after a conflict – are not only enormous but also a priority issue; the vast set of transitional justice tasks imposes long term processes, weakening through the time the social or political willingness to promote them. The consequences of these gaps are difficult to be weighed but, under a normative perspective, it is undisputable that they jeopardize the achievement of the final aims of transitional justice

The origins of the research – institutional reform gap in Brazilian transitional justice process and the persistence of police violence

There is enough evidence suggesting that, among the five transitional justice policies, institutional reform has been the most neglected.¹⁹ Indeed, the other four set of measures have been implemented more extensive and intensively. Even justice-promoting, which is the most common issue of transitional justice subjected to negotiations and trade-offs, has been largely moved forward in the last 20 years.²⁰ Truth Commissions and other actions to access information and reveal the facts are, in a similar sense, initiatives that have been developed in more than forty countries.²¹ The granting of reparations for victims²² and the

¹⁹ Empirical evidence collected through non-systematic analyzes of transitional justice processes in different countries, as well as informal interviews with national and international authorities and transitional justice activists. This perception is strongly reinforced in the literature, which has very few case studies concerning institutional reform, and concentrate almost entirely on vetting or lustration experiences.

²⁰ See Kathryn Seeking, *The justice cascade: how human rights prosecutions are changing world politics*. New York: W. W. Norton & Co., 2011.

²¹ See Priscilla Hayner. *Unspeakable truths. Facing the challenge of Truth Commissions*. Second ed. New York and London: Routledge, 2010.

²² See Trycia Olsen, Payne, Leigh A., and Reiter, Andrew G. "Transitional Justice in the world, 1970-2007: insights from a new dataset". *Journal of Peace Research* 47 (6), p. 803-809.

dissemination of the memory²³ are also spread around. Though, institutional reform, when adopted, is usually restricted to vetting and lustration policies.

Understanding this gap, its causes and its consequences to transitional justice aims has been the first impetus for the study. A complimentary motivation, however, is the Brazilian case, in which an increase in human rights violations after the end of the dictatorship has been experiencing and there is evidence that this phenomenon is, at the least, partially linked to the failure of the state in implementing institutional reform and other transitional justice measures.²⁴ Such connection between the gap of change in security forces in the context of transitional justice and the post-dictatorship state violence is a drive of the research.

To better understand this background, a short description of the Brazilian dictatorship and transition is necessary. The military made a coup d'état on April 1st, 1964, against an elected government, which were starting a process of economic and social reforms that was frightening the elites, the conservative middle class, the military, and the church. These groups – strongly supported by the US government – stimulated the military intervention under the thought that – as had happened before – the power would soon return to them.²⁵ But the dictatorship lasted for 21 years.

The transition for re-democratization was a process that started in 1979, with the enactment of an amnesty law.²⁶ The process of transferring the power to a civilian government was entirely controlled by the military and ended 6 years later, after huge popular demonstration asking for direct elections for president. Thus, in 1985 the first civil president inaugurated his term²⁷.

²³ For instance, the International Coalition of Sites of Conscience gathers more than 185 institutions in 47 countries across the world dedicated to the recovery of the memory of human rights violations. See <http://www.sitesofconscience.org/issues/>.

²⁴ See Kathryn Sikkink, and Walling, Carrie Booth. "The impacts of human rights trials in Latin America." *Journal of Peace Research*, Los Angeles, London, New Delhi and Singapore, v. 44, n° 4, 2007, p. 427-445. According to the authors, "Brazil experienced a greater decline in its human rights practices than any other transitional country in the region." (p. 437).

²⁵ See Marcos Napolitano. *1964: História do Regime Militar Brasileiro*. São Paulo: Contexto, 2014.

²⁶ The Amnesty Law (nr. 6.883/79), according to the Brazilian Supreme Court, granted a bilateral amnesty, benefiting both political dissidents and state officials.

²⁷ The Congress indirectly appointed a conservative politician of the opposition to President (Tancredo Neves), having as his vice-president the former leader of the party that supported the

In 1988 the country promulgated a new Constitution, which is the watershed in the Brazilian re-democratization process, since it has reintroduced the democratic rule of law and has provided an extensive bill of rights. However, concerning the legacy of human rights violations during the dictatorship, there is only a legal provision establishing that the government should grant reparations for those persons politically persecuted²⁸. It is relevant to notice that the Constitution did not refer to the political persecuted as victims, but as “amnestied”, sending a clear signal that the conservative forces and the military did not accept any recognition of past wrongdoings.

In 1995, a law was approved in order to establish the payment of reparations to the families of murdered or disappeared people²⁹. In 2001, a second law created a broader regime of reparations, allowing victims of any kind of political persecution to request compensation for damages.³⁰ Both laws were adopted without any reference to the framework of transitional justice, creating the feeling that Brazil was addressing the legacy of human rights violations as an economic and individual interest of victims and promoting a trade-off between justice and truth against compensation.

Only in 2007 – when the Federal Prosecution Service began to deal with the demand for accountability³¹ – was the concept of transitional justice introduced in Brazilian discussions about the legacy of the military dictatorship³². It was subsequently incorporated into the official speech of the Amnesty Commission, the Ministry of Justice and the Secretary of Human Rights.

military government (José Sarney). Tancredo Neves became sick, however, on the day before his inauguration, and died 37 days later. Thus, the vice-president took office.

²⁸ Article 8 of the Transitory Constitutional Disposition Act (ADCT, in its initials in Portuguese).

²⁹ Law nr. 9,140. It also created the Special Commission on Dead and Disappeared Persons.

³⁰ Law nr. 10,559. It created the Amnesty Commission, which is in charge of granting the reparations.

³¹ The author is a federal prosecutor in Brazil and has been involved in the discussion and implementation of transitional justice measures in the country since 1999.

³² In May of 2007 the Federal Prosecutor Office coordinated a meeting in Sao Paulo, in partnership with both the International Center for Transitional Justice (ICTJ) and the Center for Justice and International Law (CEJIL), in which for the first time in Brazil the concept of Transitional Justice was officially discussed. At the end, the Sao Paulo Letter was published, claiming for accountability, the creation of a forensic anthropology team, the opening of archives, a new legislation concerning information access and the institution of a National Truth Commission.

Since then – but ever so slowly –, Brazil has been developing many measures of transitional justice. It instituted a National Truth Commission and dozen of regional truth commissions,³³ and edited a new legislation concerning the right to access information,³⁴ both in 2011. The Federal Prosecution Service, for its own initiative, started in 2008 to move forward on accountability³⁵. Programs of memory recovery are in progress, headed mainly by civil society.

But in the field of institutional reform almost no measure has been implemented.³⁶ Even small steps, like vetting procedures, have been refused by the government and the judiciary. Both the armed forces and the police entities have kept the same rules, structure and culture from the past. Moreover, the armed forces continue to deny that torture or human rights violations were perpetrated within their premises, preventing any opportunity for a positive discussion about responsibilities and prevention of repetition³⁷.

At the same time, Brazil is one of the few countries in South America that has experienced an increase in human rights violations after the dictatorship. It has an incredible number of almost 2 thousand people killed by police officials every year (more than 5 per day, on average)³⁸ and an endemic use of torture by the

³³ Law nr. 12,528, of November 2011. The National Truth Commission should present its report in December 2014.

³⁴ Law nr. 12,527, of November 2011.

³⁵ In spite of a decision of the Supreme Court in 2010 – which declared constitutional the Amnesty Law for human rights violations perpetrators –, the Federal Prosecution Service is pushing many investigation and has offered ten criminal complaints. The federal prosecutors are following the Gomes Lund sentence of the Inter American Human Rights Court published in 2010, which declared the Amnesty Law – as well as the statute of limitation – to be invalid before the American Convention on Human Rights and the international duties of the country. The judges, however, remain very cautious in confronting the Supreme Court and have not yet convicted any defendant.

³⁶ An exception is the reshape of the Public Prosecution Service, promoted by the 1988 Constitution. The Brazilian Public Ministry received powers to defend the legal order, the democratic regime and the inalienable social and individual rights (article 127). Although it was conceived without any connection to transitional justice framework, it may be considered a typical case of institutional reform.

³⁷ The Army, Navy and Air-force commanders answered in June 2014 an information request presented by the National Truth Commission and denied any case of torture, murder or enforced disappearance of persons could have taken place in military barracks during the dictatorship. See <http://www.cartacapital.com.br/sociedade/forcas-armadas-negam-desvio-de-finalidade-em-instalacoes-onde-houve-tortura-8372.html>.

³⁸ In 2012, there were 1,890 fatal victims of on-duty police. Other See “Fórum Brasileiro de Segurança Pública. Anuário Brasileiro de Segurança Pública. Ano 7. 2013, p. 118-127. Available at www2.forumseguranca.org.br/novo/storage/download//anuario2013-corrigido.pdf. As the UN Special Rapporteur on extrajudicial, summary or arbitrary executions attested in 2008, “on-duty

police and prison authorities to extract information, confession, or as punishment.³⁹

This persistent police violence is due to several factors⁴⁰ but the absence of institutional reform in the context of transitional justice is surely one of them. Thus, the analysis of such connection is the second issue under research.

SCOPE, RESEARCH QUESTIONS AND APPROACH

As seen, the research has origins in two concrete issues: the causes and consequences of the gap of institutional reform in the context of transitional justice, and the connections between this gap and the persistent police violence in countries such as Brazil. At the end, it intends to understand and describe the causes of these facts and to contribute, in the normative field, to develop strategies to overcome such situations.

However, acknowledging the little information available in the literature, the work will initially dedicate room to normative approaches regarding the extension and depth of institutional reform policy, which will provide the framework to address the research questions.

At this point, and due to the different levels of extension and complexity of institutional reform in post-conflict or in post-rule of law repressive societies, the scope of the research has been limited to the second situation (post-rule of

police are responsible for a significant proportion of all killings in Brazil". Report presented by Philip G Alston before the Human Rights Council, eleventh session; August, 2008; item 9.

³⁹ See the report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nigel Rodney, presented before the Commission on Human Rights, on March 2001. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G01/123/23/PDF/G0112323.pdf?OpenElement>. See also Human Rights Watch's letter to Brazilian authorities sent on July 2014 (available at http://www.hrw.org/sites/default/files/related_material/20140728_Brazil_Tortura_PT_0.pdf) and Amnesty International's Annual Report 2013 - The state of the world's human rights, p. 51 (available at http://files.amnesty.org/air13/AmnestyInternational_AnnualReport2013_complete_en.pdf).

⁴⁰ Social and economic inequalities in urban and rural areas are an undisputable factor, which push criminality and, in a vicious circle, ask for more repression and violence. The claim for security is very serious, since Brazil has 50 thousand homicides per year (a rate of 24.3 per 100.000 inhabitants), according to the *Anuário Brasileiro de Segurança Pública. Ano 7. 2013*, p. 14. See "Fórum Brasileiro de Segurança Pública. Available at www2.forumseguranca.org.br/novo/storage/download/anuario2013-corrigido.pdf.

law repressive societies). Indeed, in post-conflict cases institutional reform may deal with the legacy of large-scale fights, in which the armed forces confronted massively the population. The demand for reconciliation might, thus, reach the need for the dismantling of the army or other military force, which are not an usual element in post-dictatorship societies. This is only one example of specificity between the two models, but enough to recommend a separate approach.

Coming back to the development of the research, the first issue under analysis concerns the extension of an institutional reform, or the criteria to identify the institutions that should be reformed. Indeed, it is broadly accepted that security forces should be the primary focus of institutional reform, as they are often directly responsible for the perpetration of human rights violations. However, systematic abuses often involve the direct or indirect participation of other state agents, such as members of the judiciary or the foreign affairs ministry, among many others.⁴¹ I argue that these other public institutions should also be subject to the reform process, although in different degrees and manners.

The research follows the literature that recognizes that vetting processes are fundamental for the democratization process of public institutions, but insufficient if not accompanied by other measures in the normative and material spheres.⁴² Thus, a complete process of institutional reform must also seek to change norms, values, and structures,⁴³ entailing the dismantling of the authoritarian legacy, and the redefinition of institution's tasks and practices according to a democratic constitution.

In the normative field, as an example, the norms regulating the use of force by security bodies and establishing the responsibility of their officials for any

⁴¹ Private organizations may be responsible for providing support to authoritarian regimes and to human rights violation policies. Measures to prevent repetition among these private entities may and should be adopted. However, states cannot directly promote these reforms, but only enforce democratic laws and promote criminal and civil accountability. Because this approach entails a different set of considerations, I will not include it within the scope of the research.

⁴² See Alexander Mayer-Rieck, "On Preventing Abuse: Vetting and Other Transitional Reforms", in Alexander Mayer Rieck and Pablo de Greiff (eds.), *Justice as prevention: vetting public employers in transitional societies*, New York: SSRIC, 2007, p. 482-520.

⁴³ Indeed, this should follow a broader process than the one recommended in the *Guidance Note of The Secretary-General. United Nations Approach to Transitional Justice*, p. 9.

abuses cannot be the same from the dictatorship-era. New norms must be put in place to address such behaviors and to effectively bind institutions to the rule of law standards. In the same perspective, police practices must change to ensure respect of citizens' rights. Institutional reform processes must – furthermore – go beyond the security forces and deal with the remaining authoritarian structures and practices in other public power spheres, as it is the case of the jurisdiction of military courts.

Once this framework is drawn, it will be possible to address the main questions proposed:

1) What the obstacles are that hinder the implementation of institutional reform measures;

The guiding hypothesis here is that strong public bodies (such as the armed forces or policing entities) tend to maintain their political power after the transition as a consequence of two factors.

The first is the threat that they pose to civilian authorities. Security forces are powerful institutions in any country, since they have the monopoly of the state violence; thus, they can easily create turbulence and provoke fear in the population, especially if they adopt a – explicit or disguised – speech that reforms could jeopardize the protection of society against criminal activity. Governments would consider too dangerous to start a process that can create instability and affect their popularity.

A second reason is that security forces are supported by some sectors of society, especially from the elite that during the dictatorship supported the regime both politically and economically. Such groups have an interest in retaining their influence over these institutions, both to avoid the revelation of their own responsibility for past abuses and to maintain their influence. An institutional reform process could jeopardize this power and, to avoid any risk, they join forces with the officials to hinder any initiative of substantial modification in the security forces, forming an *alliance against change*. For the elite, despite the criminality and the high level of human rights violations, the fear of losing influence in the security forces is stronger than the losses that violence provokes

in their freedom. I do not argue that it is always a conscious decision, but the fear trends decision-makers towards conservatism.

Thus, to promote democratic institutional arrangements governments would need, first, to create awareness in society of the benefits and necessity of such reforms. A previous support of the wider range of civil society must be achieved to confront minority interests. At the same time, government must demonstrate a strong political will and the determination of implementing the changes, gathering political and social forces to overcome corporative interests of officials. A prudent use of the authority is also recommended, especially before military entities, which are historically and culturally committed to discipline and hierarchy. Institutional reform is a task that – more than other transitional justice – depends on a broad social and political agreement.

2) What the consequences are of failing to reform state structures for transitional justice's aims - reconciliation, democracy strengthening and guarantees of non-recurrence;

There are clear connections between the failure of implementing institutional reform and the three aims of transitional justice.

In respect to the reconciliation goal, institutional reform is paramount to restoring the citizens' confidence in public institutions, since it is precisely this process that redefines the role of agencies involved in past human rights abuses, and which, as a consequence, can restore the citizens' trust in public bodies. Therefore, insufficient or inadequate reform efforts stymie the possibilities for reconciliation.

At the same time, institutional reform is the major strategy to break down the resistance of security forces to change their authoritarian and arbitrary practices, which, even in a democracy, continue to pose threats to human rights. Furthermore, it may provide their officials with the tools and skills necessary to strengthen their role in preserving the rule of law, assuring that even in the case of potential authoritarian outcries they will have the capacity to resist anti-

democratic tendencies. Thus, institutional reform may curb human rights abuses and prevent repetition of repressive regimes, contributing directly to the aims of democracy strengthening and guarantee of non-recurrence.

3) What the connections are between the gap of institutional reform in Brazil and the persistence police violence in this country.

The answer to this last question intends to bring contributions to address the problem of a persistent high level of police violence in Brazil, where annually at least 2 thousand people are killed by on-duty police⁴⁴, and other forms of human rights violations, such as torture and enforced disappearance of persons are still reality. The study will enlighten the connections between this situation and the gap of institutional reform in security forces after the authoritarian regime.

Indeed, the dictatorship left a legacy – still untouched – of a military and repressive mentality in the security forces which drives police activity to treat any citizen – but mostly the poor, young, male black population – as a potential suspect and enemy.

Beyond identifying connections, the research will propose interventions to address this awful heritage. A first challenge⁴⁵ is the legal framework, since most of the legislation is still from the dictatorship-era and enacted under the “security national doctrine”⁴⁶. It is necessary to demilitarize police activity,⁴⁷ to reinforce the civil government authority,⁴⁸ to facilitate accountability of police members (restricting the military jurisdiction exclusively for disciplinary

⁴⁴ See footnote 38. See also Human Rights Watch’s report “Lethal Force”, launched on December 2009 and available at <http://www.hrw.org/reports/2009/12/08/lethal-force>.

⁴⁵ This is a preliminary and still very perfunctory list of interventions conceived to implement an institutional reform in Brazilian security forces.

⁴⁶ Public security in Brazil is mainly a task of the states (the country is a federation). Thus, each state has its own legislation. In most of them, new laws ruling the police activity have not been enacted after the end of dictatorship.

⁴⁷ In each state there are two police forces: the military police, which is responsible for ostensive and preventive policing, patrolling the streets and arresting those caught committing a crime; and the civil police, which is in charge of criminal investigations and has the duty of arresting according to judicial orders.

⁴⁸ For example, the states governors need to submit the nomination of the military police commanders to commander of the federal army. This rule weakens the authority of the civil governors before the military force.

issues)⁴⁹, and to redefine the investigation blueprint (which is concentrated in the civil police and is very bureaucratic⁵⁰). In the cultural field, educational programs shall embody the democratic role of security forces, preparing their officials to understand and respect the human rights and to adequately treat suspicious. At the same time, former and current perpetrators shall be subject to vetting procedures and full accountability, ensuring the specific and general prevention.

In conclusion, the connection of the framework of institutional reform in the context of transitional justice and the situation of human rights violations in Brazil – goal of this research – meets the claim of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, to whom “[t]he people of Brazil did not struggle valiantly against 20 years of dictatorship, nor did they adopt a federal Constitution dedicated to restoring respect for human rights, only in order to make Brazil free for police officers to kill with impunity in the name of security”⁵¹.

METHODOLOGY

To develop the work described, a combination of theoretical and empirical methods will be adopted. The theoretical approach will mainly be adopted to develop a normative framework about the extension and depth of institutional reform. The descriptive method will be used to identify and analyze the obstacles

⁴⁹ According to the standards of the Inter American Human Rights Court. See cases 19 Comerciantes (2004, párrafos 164 a 177), caso Almonacid Arellanos (2006, párrafos 130 a 133), caso Cantoral Benavides (2000, párrafos 111 a 115), caso Durante y Ugarte (2000, párrafos 115 a 118) e caso Las Palmeras (2001, párrafo 51 a 54), all availables at <http://www.corteidh.or.cr>, and the European Court on Human Rights, case “Pabla Ky v. Finland”, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=pabla&sessionid=13914493&skin=hudoc-em>.

⁵⁰ Brazil adopts the accusatory system. However, the police, through a police inquest, is in charge of conducting criminal investigation. The Public Prosecution Service intervenes only to control the investigation by the police. After the conclusion of the police inquiry the prosecutors will access the evidence of the crime and may offer the criminal complaint, close the case or ask for more investigation. The communication between police and prosecution service are registered in a proceeding.

⁵¹ Report presented by Philip G Alston before the Human Rights Council, eleventh session; August, 2008; summary.

for implementation of institutional reform and the consequences of this failure (first and second research question) and for the study of the Brazilian case (third research question).

The main tools will be a literature review; study of legal norms; analysis of reports concerning violence and human rights abuses; and interviews with Brazilian civil and military authorities, scholars, experts in public security and activists. The project will use an interdisciplinary approach, gathering arguments from the legal, social, and political fields.

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