JURIS POIESIS

REVISTA DO CURSO DE DIREITO DA UNIVERSIDADE ESTÁCIO DE SÁ

Dossiê Especial

Revista Juris Poiesis, Rio de Janeiro. v. 24, n. 36, 2021.

ISSN 2448-0517

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HUMAN RIGHTS IN FOCUS:

CHALLENGES TO BE FACED IN CONTEMPORARY SOCIETIES EXTENDED DOSSIER

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A. PRESENTATION BY ANNE OAKES

The COVID-19 pandemic which took hold initially in 2019 and within months reached global proportions, prompted governmental interventions on a scale unprecedented in peace time with major implications for the lives of citizens all over the world. The Law and Society Annual Meeting which took place virtually in 2021 brought together scholars from the Global North and the Global South under the aegis of the collaborative partnership developed by Birmingham City University, Birmingham UK, and Estacio de Sa and Fluminese Universities, Niterói, Brazil and LSA/CRN 01[1] to explore some of these implications in the context of three discussion roundtables.

Roundtable 1: Covid & the Administrative State examined governmental responses to the pandemic. Participants were asked to focus specifically on the issues of administrative challenges, such as resources, adequacy of infrastructure/ problems of federal design, etc, and the implications for democracy and human rights protection. This session was organised by professors Perlingeiro (Brazil) and Oakes (UK) and professor Perlingeiro served as chair.

[1] For more information, see: https://lawandsociety.site-ym.com/page/CRN01

Roundtable 2: Giving Content to Human Rights stayed with the issue of human rights protection but took a broader focus. This roundtable examined the ways in which national courts translate international human rights guarantees into a form that is compatible with the conceptual frameworks of national constitutional commitments. In particular, participants were encouraged to take a comparative view by, for example, comparing the human rights jurisprudence of the European Court of Human Rights with that of the Inter-American Court of Human Rights, and to consider what, if any, might be the role of transnational judicial dialogue in this process. This session was organised by professors Duarte (Brazil) and Oakes (UK) and professor Oakes served as chair

Roundtable 3 Vulnerable Populations in Focus Roundtable dealt with issues regarding vulnerable populations. Building upon CRN1 Asia and the Americas socio-legal and political research, participants were asked to focus on the issues of recognition for democracy and human rights and human rights protection. This session was organized by professor Cristina Lúcia Seabra Iorio (Brazil) and professor Fernanda Duarte (Brazil) served as chair.

The collaboration generated a rich collection of papers. A full list of participants together with short abstracts of the papers presented has already been published in Juris Poeisis (August, 2021) a selection of which are now abstracted in extended form. In this issue a selection of these abstracts is presented in extended form.

ROUNDTABLE 1 COVID & THE ADMINISTRATIVE STATE

Fabio Giglioni of Sapienza University Rome started us off with a keynote paper that recognised the potential threats to democratic legitimacy inherent in the requirements of an effective administrative response. Ana Fiero from Centro de Investigación, Docencia Económica (CIDE) picked up this theme in relation to the specific issue of access to reliable public information concerning administrative responses to the pandemic emergency. She emphasized the importance of transparency in relation to agency decision-making and the role of plain language communication if fake news is to be effectively countered and public confidence in administrative processes is to be achieved and maintained.

Sarah Cooper, Birmingham City University (BCU), Michael Baynham, Arizona State University, and Thomas Nicklin, BCU, considered the relationship between public health and incarceration in the United States. They noted that correctional facilities quickly emerged as places with the largest number of known Covid-19 infections—[2]leading to calls for state (and federal) authorities to 'slow the spread' through *inter alia* reducing correctional populations.[3] Their research investigated the availability of state-based statutory powers that could be used to remove inmates from correctional facilities as a mechanism of disease control but concludes that to date, these mechanisms have so far largely not been used.

Anne Oakes and Ilaria Di-Gioia, both from BCU and Vanice Valle from Rio de Janeiro considered the extent to which in Brazil and the United States, the pandemic has accentuated the problem of intergovernmental tension that can be inherent in a federal system. They examined the constitutional frameworks of Brazil and the United States, with particular reference to the role of municipalities in what Professor Hirschl terms 'old-world' and 'new-world' constitutions. They noted that despite apparent similarities, the mechanisms for the resolution of intergovernmental conflict are in fact very specific to the constitutional history of these two federal giants. Nevertheless they suggested that, the formal constitutional position notwithstanding, municipalities in both Brazil and the United States will continue to conduct their intra-governmental disputes with skills that are primarily political rather than legal.

I-Ju Chen, BCU, brought the discussion to a close with a consideration of the extent to which the impact of COVID-19 might be said to have contributed to the development an emerging Global Administrative Law which can draw on but eventually transcend national systems of administrative law. She argues that, although still in their infancy, the developments that she identifies can provide the foundations for a new system of global governance which can break down the dichotomy between domestic and international regimes and more effectively respond to the administrative challenges of COVID-19.

[2] Alexandria Macmadu *et al*, *COVID-19 and mass incarceration: a call for urgent action*, The Lancet (Comment), October 09, 2020 ("In the USA, more than 40 of the 50 largest clustered outbreaks in the country have occurred in jails and prisons." https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30231-0/fulltext. (last visited Nov. 11, 2021).
[3] Peter Wagner & Emily Widra, *Five ways the criminal justice system could slow the pandemic*, Prison Policy Initiative (March 27, 2020), https://www.prisonpolicy.org/blog/2020/03/27/slowpandemic/ (last visited Nov. 11, 2021).

ROUND TABLE 2 GIVING CONTENT TO HUMAN RIGHTS

Fernanda Duarte and Rafael Mario Iorio Filho, both of Universidade Estácio de Sá/UNESA. Universidade Federal Fluminense/UFF, Brazil, discussed the issue of dialogue between national and international courts in the context of the role of human rights law and courts in systems of transitional justice. Specifically they argued that the conflicts between the jurisprudence of the Inter-American Court of Human and the Brazilian Supreme Court concerning the scope of the provisions of the Brazilian Amnesty Law represent a dimension of an important question that is arguably the biggest challenge facing human rights courts today, namely, to what extent can these courts respond appropriately when faced with conflicting perceptions of what situational justice should be.

Picking up the theme of transitional justice, Ebba Lekvall from Birmingham City University presented a comparison of the jurisprudence of the European Court of Human Tights and the Inter-American Court of Human Rights regarding domestic reparation programmes. (DRPs) Her paper explored how and the extent to which recent jurisprudence from these courts has slowly begun to change the standards for DRPs and what the consequences might be, both for the right to reparation for victims receiving reparation through DRPs and for victims who bring cases before these courts.

Guilherme Calmon Nogueira da Gama, Estácio de Sá University; State University of Rio de Janeiro presented a paper on the response of the Inter-American Court of Human Rights to human rights abuses in the Brazilian penitentiary system, concluding that, even though close monitoring continues to be required, the “Urso Branco Penitentiary” case is paradigmatic in demonstrating how the Inter-American Human Rights System can act effectively to reduce or even reverse situations of serious violations of human rights, resulting in prisoner deaths and serious injuries in the period from 2002 to 2006 in the state of Rondônia, in the northern region of Brazil.

Finally for this selection Lissa Griffin, Elisabeth Haub School of Law at Pace University, NY brought a perspective from the United States. Her paper considered the “uneasy” relationship of the United States to international human rights norms and enforcement mechanisms, the

explanation for which lies not simply in a deep-seated belief in its own moral exceptionalism but also in its constitutional jurisprudence and federal structures which circumscribe the ability of the federal government to bind the sovereign states and ensure regard for international treaty obligations throughout the nation. On a positive note she points out that the US is a signatory to the ICCPR, and as such has subjected itself to international human rights norms through the United Nations Human Rights Commission and continues to engage with its monitoring processes via the mechanism of the Universal Periodic Review.

ROUNDTABLE 3: VULNERABLE POPULATIONS IN FOCUS

This Roundtable considered the consequences of the Covid-19 pandemic with particular reference to the struggles of vulnerable peoples for democracy and for recognition and protection of their human rights. Rubens Beçak and Rafaella Marineli Lopes, both of the University of Sao Paolo, considered the response of the the Supremo Tribunal Federal (STF) to the failure of the Brazilian federal government to provide a Covid-19 General Coping Plan for indigenous peoples. They argue that although the response of the STF was, from one point of view 'activist', from another point of view it can be seen to have exposed the limits of judicial activism when courts are called upon to make determinations concerning executive failures but have no power to formulate and carry out remedial policy.

Ana Paula Felipe of Universidade Estácio de Sá, presented on the issue of violence against women. She considered the Maria da Penha law, a historic landmark in the defence of women´s rights and, according to the United Nations, (UNO) one of the world's most advanced legislative responses to the issue domestic violence against women, third only to those of Spain and Chile. She argues that in spite of its progressive nature the legislation has still to be internalised by the population and that much remains to be done if real and lasting social and behavioural changes are to be achieved.

Lara Denise Góes da Costa, of Superior War College (Escola Superior de Guerra/ESG) tackled the issue of trafficking of women and girls in Brazil. She considers the link with organised

crime and argues that current control measures are largely inadequate as criminal groups exploit the absence of adequate policies at the state level.

Cristina Iorio, Universidade Estácio de Sá, considered the effects of the pandemic on the Roma community. She considers the historical origins of the racism and discriminatory practices to which Roma people continue to be subject and argues that in spite of brazil's internaitonal commitments, not only is there no systematic remedial programme in place but on the contrary the public cleansing attempts by public authorities to respond to the pandemic have actually worsened the condition of the Romna peoples.

Filipa Pais d'Aguiar and Tânia Gaspar both of Lisbon Lusíada University considered the human rights position of the Roma people with particular reference to the Lisbon Lusíada University research project *"The Music, Health, Social Inclusion, and Human Rights Lab."* This is an innovative and exciting project led by a multidisciplinary researchteam of psychologists, social workers, music and law professors with the aim of researching the human rights impact of musical performance activities on matters related to the health, social inclusion, well-being, and quality of lifeimprovement of marginalized peoples.

Birmingham UK, November 2021.

B. EXTENDED ABSTRACTS

B.1. ROUNDTABLE 1: COVID & THE ADMINISTRATIVE STATE

This roundtable examined governmental responses to the Covid pandemic with a particular focus on the issues of administrative challenges, such as resources, adequacy of infrastructure/ problems of federal design, etc, and the implications for democracy and human rights protection.

The Emergency Administration between Normality and Exceptionality

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1. The Administrative State dispute in the Covid19 age

The Covid19 pandemic has been the incident to be involved again in traditional disputes with the Administrative State, given that the reaction of public powers has been very impressive[4]. As is well known, traditionally speaking, law scholars are divided according to two different approaches. Most common law scholars express skepticism about the Administrative State (for this purpose it is enough to cite the recent work by Sunstein and Vermeule[5]), whilst the European continental law scholars have a more positive attitude in the name of welfare state. This basic difference has been now challenged again, because significant

[4] A summary report on the reactions of public powers worldwide can be seen here: https://lexatlas-c19.org. For comments on some measures taken by the western European countries see A. Vedaschi, *COVID-19 and Emergency Powers in Western European Democracies: Trends and Issues*, 2021, https://verfassungsblog.de/covid-19-and-emergency-powers-in-western-european-democracies-trends-and-issues/.
[5] See C.R. Sunstein, A. Vermeule, *Law & Leviathan*, Cambridge, 2020.

questions have been raised also within the European continental legal systems considering that emergency has caused severe restrictions as well as an increasing role of the central Government prevailing on Regional as well as Local authorities. What we have seen, has been the imposition of emergency administration to an unprecedented extent. The consequence has been to foster a major debate concerning the legitimacy of public authority responses.

To what do we owe this more concerned attitude of the European doctrine, assuming the emergency administration is usually considered part of the Administrative State? Four reasons can be detected. First of all, we are used to having to do with immediate emergencies,—earthquakes, flooding, landslides, natural catastrophes and so on. These are undoubtedly harmful but these types of event are usually instantaneous. In contrast the there has been a need to respond to the pandemic since January 2020 and its duration is as yet unknown.. Time is really challenging for legitimacy and that is why questions are raised. Secondly, the global pandemic surprised everyone; in a very real sense it has been a crisis without precedent in living memory. Our administrative structures and legal systems were not prepared for a crisis on this scale. Thirdly, facing the invisible enemy has required widespread and extended restrictions of freedoms previously considered inviolable. The comparison with the war effort is one of the more misused examples of commentators to highlight the extraordinary times that we have been living through. Finally, most of the legal systems have given risen to a growing number of new public authorities—extraordinary Commissioners, technical Commissions, and new Agencies endowed with special powersgiving rise to new and overlapping administrative regimes and undermine the constitutional coherence of the emergency administration.

However, my thesis is that these concerns are probably overestimated. Assuming that the most impressive measure in terms of restrictions has been the “stay home” paradigm, I try to support the reasons justifying the coherence of that provision with the democratic and liberal Constitutions. For this purpose, I make use of the main four differences related to State of exception and State of emergency.

2. Why the emergency state during the Covid19 age has not been a danger for liberal and democratic legal systems

In order to demonstrate the overestimation of the concerns about the legitimacy of Administrative State during the Covid19 emergency I take in account the most restrictive "package" of measures the States undertake, that is the so-called "stay home" or "shelter-in place" measures. These measures which restrict the free movement of people present real challenges for legal systems with the ambition to be defined democratic.

At this point it is useful to compare the State of exception[6] with the State of emergency,[7] by reference to four major distinctions. According to long-established beliefs, when the State of exception is active, you can observe that: (a) the normal Constitutional powers are at stake; (b) ordinary legality is suspended; (c) the duration of the State of exception depends on the will of the authority declaring the suspension of the Constitutional order; (d) you are definitely out of Constitutional order. On the contrary, when the State of emergency is working, you can note that: (a) the normal Constitutional powers are confirmed, but they are altered; (b) ordinary legality is recognised, but it is derogated from by new orders; (c) the duration of State emergency is strictly linked to the crisis time; (d) you definitely remain within the Constitutional legality.

With this in mind, for the first, we can concede that the "stay home" measures did not entail any suspension of Constitutional powers whether legislative or territorial. What we have seen, was a more or less shift of the ordinary power to the Central Government, but Parliaments and Territorial authorities have continued to exercise their powers within their competences. There has been no loss or removalof powers.

Secondly, "stay home" measures have not entailed putting the ordinary legality aside. Of course many norms have changed; moreover, we could have noted many derogations to the ordinary rules by government orders, but the rule of law was not contradicted. Court activities,

[6] Of course, the most important and controversial author of the State of exception concept was Carl Schmitt. See. C. Schmitt, *The Guardian of the Constitution*, Cambridge, 2015.
[7] A brilliant comment on this difference by the lawyer Gustavo Zagrebelsky was published in the Italian newspaper, la Repubblica, which has opened a huge debate; G. Zagrebelsky, *Non è l'emergenza che mina la democrazia. Il pericolo è l'eccezione,* in *La Repubblica*, 29 luglio 2020.

as for every other business, were slowed down, but have continued to carry out supervision of public authority decisions.

Thirdly, it is certainly true that the duration of the crisis is longer than others we have known so far, but restrictions and emergency administrative actions have been and continue to be strictly related to the trend of the objective data, namely the epidemiological data. As a result, restrictions have been lifted or strengthened according to the public health data. The duration of the emergency does not hinge on the discretionary will of any specific authority.

Finally, the measures taken by the Chinese authorities against the spread of infections are sufficiently clear to establish the boundaries between the emergency administration and state of exception. During the pandemic measures were put in place to limit freedom of movement but we can identify a considerable difference inthis respect. In China the emergency measures in question which were draconian were policed by force. From this point of view no one has yet been taken into custody during the current emergency administration, so that we would say this experience has remained within the Constitutional legality.

For all these considerations, the State of exception has not operated in the previous months, even when the restrictions had the most extended strength[8].

3. Conclusions with a specific focus in Italian case

Placing the Covid19 restrictions in the scope of the State of emergency helps us to understand the real challenges the legal scholars should deal with. In fact, even moving the considerations in a more abstract sense, the conclusion, which I have advanced, is also confirmed. What we note when we are in a State of emergency, is that the emergency administration is a condition through which you can see the alteration of powers and the derogation from the ordinary rules which the legal system would normally observe with the aim of protecting public interests. In this sense, emergency administration does not introduce new interests, that you can deem out of Constitutional order, but it is an attempt to fulfill the

[8] See also the conclusions by T. Ginsburg, M. Versteeg, *The bound executive: Emergency powers during the pandemic*, in *Int. J. Const. Law*, 2021, https://academic.oup.com/icon/advance-article-abstract/doi/10.1093/icon/moab059/6308959?redirectedFrom=fulltext.

mandates of the Administrative State when a sudden and unpredictable event takes place. There is a common line between Administrative State and emergency administration, even if the latter is legitimated only if a certain conditions are in force.

In the specific case of Covid19, the continuity of public interest subjected to protection has concerned public health and that is an ordinary public interest which public powers are called upon to assure. The emergency is only the condition forcing the public powers to react in order to address the new problems it has created. Of course, the extraordinary event of crisis has forced the legal system to find new ways to tackle it, but the final goal is always the same. On the other hand, if public powers, using the ordinary rule, were not able to protect the public health, the consequences, even for the Constitutional order, would be much more dangerous.

This conclusion does not mean to say that questions for legitimacy should not be raised[9]. From this point of view it is right to monitor constantly these conditions for legitimacy, at least according two points of view. First of all, it is notable that emergency administration has to be limited in terms of time. The length should not depend on the Government will but must have a legal basis and decisions on duration must rest upon objective evidence. The power of extending the emergency state has to taken in accordancewith the law and be based upon sound scientific evidence. Secondly, all the derogation and all the alteration of powers are to be strictly related to the efficacy of measures in a time of crisis, meaning that proportionality is the main tool for Courts to review and verify issues of legitimacy. Proportionality means that legality is assured if powers during the emergency administration are strictly necessary, sufficient and fit for public interests. Observance of these two basic conditions ensures that the Administrative State remains linked to the emergency state so that the Constitutional order is not upset.

To conclude, it seems to be right if we say, generally speaking, the emergency administration during the pandemic Covid19 did not infringe Constitutional legality, even if it is possible specific violations occurred: however, this is a matter that the Courts have kept under review.

The real problem was that the Covid19 situation has brought into question the recognition of the continuity between the Administrative state and the emergency administration. If I look at the Italian case, the real problem has been that the ordinary discipline

[9] See also the interesting considerations by A. Greene, *Emergency Powers in a Time of Pandemic*, Jstor, 2020.

of the emergency administration has been overlaid by new frameworks with the result that it has been limited by the new concurrent normative. A long natural disaster chain, which has hit Italy in the late years, forged a specific legislation for the emergency so that Italy can boast one of the most advanced disciplines for treating the emergency through the ordinary way. This legislation has the merit of making normal the emergency administration, including that within a precise framework. However, as the pandemic has erupted, the Government was surprised and has believed the ordinary rules for emergency were not able to be conducive for this new crisis so that new instruments were sprung up. This new framework has coexisted with the previous by creating uncertainty in terms of application[10].

For all what I said, this means that the route for the normalisation of the emergency administration seems pretty long again, but this is not a trouble for Constitutional aspects. This is a trouble for the Administrative State effects.

[10] Cf. A. Simoni, *Limiting Freedom During the Covid-19 Emergency in Italy: Short Notes on the New "Populist Rule of Law"*, in *Global Jurist*, 20, 3, 2020, pp. 23; S. Civitarese, *The Italian Response to Coronavirus and Constitutional Disagreement*, in https://ukconstitutionallaw.org/2020/04/30/stefano-civitarese-matteucci-the-italian-response-to-coronavirus-and-constitutional-disagreement/.

COVID-19 and The Right to Access to Information

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Key words: transparency, access to public information, free speech, plain language, fake news.

1. Introduction

This pandemic has placed humanity in an uncertainty that we have not experienced in a long time. We have had to face an unknown disease, which symptoms, prophylaxis, and sequelae we do not fully understand. Throughout 2020 the scientific and medical community have been informing us about the effects and solutions to this global health problem. This scenario of lockdown and uncertainty about how to react to the disease, what treatment to follow, whether there will be a hospital that can take care of our family, how vaccines work, when can we have access to vaccines concern all society. Today, timely, clear, and truthful public information has literally become a matter of life and death. On the other hand, international bodies such as the European Council[12] and the Inter-American Court of Human Rights prepared two documents emphasizing the need to respect free speech and access to public information during the pandemic. Free speech plays an important role in times of emergency. The need of timely and clear public information is essential for making health, economic and social decisions. Therefore, restrictions to free speech and access of public information must be strict to preserve a democratic society that makes public decisions about Covid-19 known to all. Media and internet should be respected as tools for keeping citizens informed of the situation, communicate the measures taken and promote cooperation between government and society. Moreover, the commitment of the media and journalists to communicate truthfully and with accountability is important. In this sense, the Inter-American Court accepts restrictions when it is attentive to national security, public order, or health; however, these restraints cannot mean prior censorship, nor a widespread suspension. In

[11]Law professor, Centro de Investigación Docencia Económica, CIDE ana.fierro@cide.edu.
[12]Council of Europe. 2020. *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis*. April 7th, 2020. June 2020*:* https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40.

addition, both media and government must ensure the protection of personal data and avoid disclosing information that promotes discrimination.[13] Thus, governments face important challenges in their task of guiding the population in prevention measures and supporting them to deal with the health and economic crisis without transgressing their rights. This paper explores the challenges that transparency agencies have during the pandemic to ensure access to information as part of free speech, collaboration, and participation in a democracy. We identify three mayor challenges: dark transparency, lack of plain language, and misinformation.

2. Transparency, free speech, and democracy

The access to public information as part of free speech is a pilar of democracy. Free speech ensures the participation in public decisions, protects individual autonomy and is one of the main forms of collaboration in modern societies.[14] To participate and collaborate citizens need to have access to clear and reliable public information. Transparency agencies should guarantee this access.[15] This is not an easy task in modern days and the pandemic has make it harder. Traditionally, free speech has been guaranteed by limiting government control over information and leaving to courts to repair damages made by defamation or liability. In general, the idea was, as Justice Holmes putted it, to let the market of ideas rule out what wasn´t truth.[16]

Today, the speed in which information flows and the advances in behavioral sciences have proven that the traditional response of ex post judicial procedures that sanction false information and offer reparation is not adequate. As Chomsky[17] points out in the public arena emotions frequently outweigh facts. In the same vein, "falsehood diffused significantly farther, faster, deeper, and more broadly than the truth in all categories of information".[18] Today is even

[13]Comisión Interamericana de Derechos Humanos. 2018. *Declaración de principios sobre libertad de expresión.* June 2020: https://www.cidh.oas.org/basicos/declaracion.htm
[14]Sunstein, Cass R. 2021. *Liars: Falsehoods and Free Speech in an Age of Deception*. United Kingdom: Oxford University Press.
[15]Fung, Archon, Mary Graham, and David Weil. 2007. *Full disclosure: The perils and promise of transparency.* United Kingdom: Cambridge University Press.
[16]Sunstein, Cass R. 2021. *Liars: Falsehoods and Free Speech in an Age of Deception*. United Kingdom: Oxford University Press.
[17]Chomsky, Noam. 2011. *Ten strategies of manipulation by the media.* June 2020: https://www.demenzemedicinagenerale.net/pdf/14-10-strategies-of-manipulation.pdf
[18]Vosoughi, Soroush, Deb Roy, and Sinan Aral. 2018. "The spread of true and false news online." *Science* 359 (6380): 1146-1151.

more truth what Arendt once said: “while probably no former time tolerated so many diverse opinions on religious or philosophical matters, factual truth, if it happens to oppose a given group’s profit or pleasure, is greeted with greater hostility than ever before”.[19] Now we also know that we are not as rational as we would like to think. David McRaney shows in his book “You are not so Smart” (2012) that our rational mind frequently makes mistakes, takes short cuts, or is deceived by our emotions. The most common errors come from:

- Cognitive biases: predicable patterns of thought and behavior that lead you to draw incorrect conclusions. Anchoring, meta-cognitive myopia.
- Heuristics: mental shortcuts you use to solve common problems. They speed up processing in the brain, but sometimes make you think so fast you miss what is important.
- Logical fallacies: like math problems involving language, in which you skip a step or get turned around without realizing it.
- Priming stimulus: the past affects the way you behave and think or the way you perceive another stimulus later.[20]

In this scenario the role of transparency agencies as the providers of public information and guardians of free speech is essential, especially during a pandemic. Nevertheless, they also confront important challenges. These challenges can be grouped in three categories:

- Dark transparency: disclosure of public information but it is inconsistent, confusing, and not verifiable.
- Lack of plain language: public information is not presented in a clear language. There is an excessive use of legal, medical, or technical jargon.
- Misinformation: it is represented by the mistrust in evidence, the denial of science and the increase in fake news.

[19]Arendt, Hannah. 1967. "Truth and politics." *Truth: Engagements across philosophical traditions*: 295
[20] McRaney, David. 2012. *You Are Not So Smart*. New York: Gotham Books.

3. Dark transparency

We can describe dark transparency as the situation in which there is a lot of information, but with little order and is difficult to find. There is a proliferation of official internet sites, but they have a vision of mere compliance with transparency laws or guidelines. It is a question of pouring information with little attention to the quality of the information and its possibility of use, for example, documents or data in PDF formats that do not allow processing or re-use. It is information that does not consider their audience, or the complexity of the information given. This dark transparency, that perhaps complies with the law, does not actually serve the purpose of informing decisions.

The problem of dark transparency results from an absences of a transparency public policy that understands public information as a strategic resource for decision-making and collaboration among agencies and society.[21] As Merino points out, having a transparency policy implies the deliberate purpose of acting and deciding based on information that must be public. It should be conceived as an organizational value and a framework for public deliberation. It is a policy that produces, uses, and distributes public information as a strategic resource.[22] Making public the outcome of decisions taken by the authorities should not be understood as a second-rate task. As Morales, Lopez, Ackerman, Arellano, Cossío have pointed out transparency implies that public decisions must be made in a glass box, based on evidence, and must be known to all. Public decisions should allow the broad participation of society. This builds trust in government and legitimacies their outcomes.[23] When decisions are made in small groups, without clear information and a lack of public deliberation it erodes public trust and of course decreases collaboration.

4. Plain Language

A second challenge in public information is the way we present it. In health matters, it is particularly challenging to communicate complex scientific information such as: forms of virus' transmission or different types of vaccines, so that it is understandable to the public. We

[21]Aquino, Romy and Lilibeth Álvarez .2020. "Acceso a la información pública y fake news: efectos de la pandemia por covid-19". *Ius Comitialis* 3 (6): 261-285.
[22]Merino, Mauricio. 2008. "La transparencia como política pública", en John M. Ackerman, *Más allá del acceso a la información. Transparencia, rendición de cuentas y Estado de derecho*, 251-252. México: Siglo XXI.
[23]Holmes, Stephen. 2008. *Más allá del acceso a la información: transparencia, rendición de cuentas y estado de derecho*. México: Siglo XXI.

must ensure that public information comes from reliable, evidence-supported sources in a plain language. Plain language is defined as: "clear and effective communication".[24] In Garner's Dictionary of Modern Legal Usage (1987), plain language is also defined as "Language that most effectively presents ideas to the reader".[25] To do so it uses only as many words as are necessary. Because of this, "it is language that avoids obscurity, inflated vocabulary, and convoluted construction".[26] To communicate information through a plain language, it is necessary that "the text should match the audience's reading skill".[27]

In this respect it is also useful to take advantage of information and data processing technologies. Both elements are part of Open Government commitments as tools for promoting plain language[28]. Plain language helps people understand complex problems and the strategies that the government adopts to overcome them. Communicating public decisions in plain language earns trust in the authorities and promotes collaboration. Some good examples of use of plain language are:

- **Covid-19 information section for children - Ministry of Health (Secretaría de Salud de México)**: The Covid-19 web page for children of the Federal Ministry of Health uses various materials that explain, in simple and easy-to-understand language, information about Covid-19. In order to make the information understandable, it is supported by stories, infographics, videos, and suggestions of activities for parents to do at home with their children. A useful tool to bring the information even closer to the children is the participation of Sesame Street characters to communicate the message. [29]
- **Information for Children - National Institute of Statistics and Geography (INEGI, by its Spanish acronym):** INEGI has a section on its website that is designed specifically for children. In small articles of no more than 200-400 words each and with the use of illustrative images, INEGI communicates in a simple and clear way

[24]Kimble, Joseph. 2002. "The Elements of Plain Language". *Michigan Bar Journal.* Retrieved from: https://www.plainlanguage.gov/resources/articles/elements-of-plain-language/
[25]Garner, Bryan. 2001. *A Dictionary of Modern Legal Usage.* Oxford: Oxford University Press.
[26]Eagleson, Robert, Gloria Jones, and Sue Hassall. 1990. *Writing in Plain English.* Australian Government Publishing Service.
[27]DuBay, William H. 2008. "Working with Plain Language. A Train Manual". *Impact Information*. Retrieved from: http://www.impact-information.com/Resources/working.pdf
[28]González Rincón, Ana C. 2020. "Acceso a la información y protección de datos en México en tiempos de la pandemia. ¿Qué esperar de un gobierno abierto y responsable?". *Iuris Tantum* 34 (31): 45-55.
[29]Children's section of the Ministry of Health's website: https://coronavirus.gob.mx/ninas-y-ninos/

information on complex topics such as: maps, soil types, hurricanes, water, different types of weather, the environment, among others. [30]

- **Virtual social networks, particularly Twitter- Mexico City Government**: The Twitter account of the Mexico City Government is updated daily with information on the Covid-19 pandemic in the city (vaccination sites and dates, Covid-19 cases in Mexico, good hygiene habits, use of mouth covers, to mention a few examples). This information is written with a plain language that uses simple words, short paragraphs and emojis that facilitate the comprehension of the message for the audience to whom the tweets are addressed. Likewise, almost all publications are accompanied by infographics, images and/or videos that convey the message in a few words and in a forceful way.[31]

5. Misinformation and fake news

Perhaps this is the most important challenge to fight. It is a disdain for the evidence and information provided by science, pointing out that other data is available, questioning the use of evidence, as has happened in many parts of the world, erodes confidence in public information and in the institutions of a democratic state.[32] This phenomenon of post-truth has been on the rise around the world, both in the public and private spheres. Denied protests related to the pandemic, or climate change, or anti-vaccine movements are an example of this problem. Truth itself and its attributes are underestimated, such as: objectivity, consistency, impartiality, sincerity, respect for evidence, accuracy, recognition of fallibility, and the pursuit of error minimization.[33] Procedures for attaining truth are belittled. There is disdain for the research process that hypothesize, formulates ideas, and confronts them. Social media is a fertile field for misinformation. Unfortunately, this situation has also affected public information. Misinformation is a phenomenon that we must fight as a society. As Victoria Camps says, it is vital that, in the face of misinformation, it does not matter whether we are public servants,

[30]Information for children from the INEGI website: http://cuentame.inegi.org.mx/territorio/default.aspx?tema=T
[31]Mexico City Government Twitter: https://twitter.com/GobCDMX
[32]Carrera, Pilar. 2018. Estratagemas de la posverdad. *RLCS. Revista Latina de Comunicación Social* 73: 1469-1481.
[33]Castillo-Riquelme, Víctor, Patricio Hermosilla-Urrea, Juan P. Poblete-Tiznado, and Christian Durán-Anabalón. 2021. "Noticias falsas y creencias infundadas en la era de la posverdad". *Universitas, Revista de Ciencias Sociales y Humanas* 34: 87-108.

teachers, or citizens, let us put doubt before the visceral reaction. It is important to doubt, reflect and weigh pros and cons. Camps proposes a set of practical criteria to purge our interpretations of biases or deformations caused by political or partisan interests that sometimes move away from reality. To achieve this, we must: go back again and again to the reality we want to analyze, know the various interpretations regarding the facts and evaluate them through dynamic and open dialogue with others.[34]

Faced with the threat of misinformation such as fake news, it is important to remember Hannah Arendt's advice; in a democracy we must always defend the "repositories of truth" such as: the judicial system, the university, the education system, science, and journalism. These are the venues where divergent visions are dialogued, data is collected, and evidence is generated.[35] Truth repositories are the antidote to misinformation. Therefore, it is essential to preserve and use them when making public decisions. By having strong truth repositories, that inform public decisions, society can rely on its authorities and the information they publish. Trust results from rigorous analyses and open dialogues that repositories of truth guarantee.

6. The role of Transparency agencies

Transparency public policies play a key role in guaranteeing the existence of truth repositories. The OCDE defines transparency policy as the necessary actions to create "an environment in which government program´s objectives, its legal, institutional and economic framework, policy decisions and their rationale, data and information related to monetary and financial policies, and the terms of agencies' accountability are provided to the public in an understandable, accessible and timely manner".[36] Furthermore, a transparency public policy is necessary because: only governments can compel the disclosure of information from private and public sectors thru legislation backed by the legitimacy of a democratic processes.[37] To achieve it we need independent, reliable institutions, with a clear and efficient transparency

[34]Camps, Victoria .2016. *El Elogio de la duda*. Barcelona: Arpa Editores
[35]Arendt, Hannah. 1996. "Verdad y política", *Entre el pasado y el futuro. Ocho ejercicios sobre la reflexión política*, 49-100. Barcelona: Península.
[36] OECD. 2020. *Code of Good Practices on Transparency in Monetary and Financial Policies*, Part 1—Introduction, Approved by the IMF Executive Board on July 24, 2000. Retrieved from: http://www.imf.org/external/np/mae/mft/sup/part1.htm#appendix_III
[37] Fung, Archon, Mary Graham, and David Weil. 2007. *Full disclosure: The perils and promise of transparency.* United Kingdom: Cambridge University Press.

policy.[38] Transparency agencies should promote cooperation and exchange of information within agencies and with the private sector, especially media.

Limiting free speech should not be the solution to fake news. Even though in a time where anyone can post information without checks and it can become viral, it is very tempting for governments to do so. On the contrary, in a time of social networks and information highways, transparency agencies must guarantee reliable sources of information by ensuring voice to all points of view, promote the use of plain language thru guides and good practices. Transparency agencies should also encourage critical thinking by funding independent fact checkers. More information not less is the antidote for fake news.

Transparency agencies should also develop guidance for social media to self-regulate content. In this area experiences such as tweeter's policy of deleting posts that are disputed as fake news when revised by third party fact checkers[39] or Facebook's council administrative adjudication, a group of experts that analyze content that has been denounce and determines if it should be taken down, may be useful. Nevertheless, further research of these tools is required to guarantee that decisions are impartial and do not constitute limitations to free speech. It is also necessary to ensure open data of social media to have checks and balances of all agents involved in generating public information, including transparency agencies itself.

Information is power, in the information era even more so. The Covid-19 pandemic has made evident the importance of having reliable information for making both public and private decisions. Therefore, having an agency responsible of guarantee a good transparency policy has become a strategic resource for governments that wish to ensure free speech and democratic process for public decisions.

[38] Sunstein, Cass R. 2021. *Liars: Falsehoods and Free Speech in an Age of Deception*. United Kingdom: Oxford University Press.
[39] Estrada-Cuzcano, Alonso, Karen Alfaro-Mendives, and Valeria Saavedra-Vázquez. 2020. "Disinformation y Misinformation, Posverdad y Fake News: precisiones conceptuales, diferencias, similitudes y yuxtaposiciones". *Información, cultura y sociedad: revista del Instituto de Investigaciones Bibliotecológicas* 42: 93-106.

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Disease Outbreak & Corrections in the United States: [Existing] Statutory Options

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Keywords: *COVID-19; corrections; disease outbreak; removal of inmates*

1. Introduction

Correctional facilities quickly emerged as large COVID-19 clusters — places with the largest number of known infections — in the United States (US).[43] Noting calls for state (and federal) authorities to 'slow the spread' through *inter alia* reducing correctional populations,[44] we investigated what, if any, statutory mechanisms exist to support such efforts. Within the

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[42] PhD Candidate, Birmingham City University, UK.
[43] Alexandria Macmadu *et al*, *COVID-19 and mass incarceration: a call for urgent action*, The Lancet (Comment), October 09, 2020 ("In the USA, more than 40 of the 50 largest clustered outbreaks in the country have occurred in jails and prisons." https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30231-0/fulltext. (last visited Nov. 11, 2021).
[44] Peter Wagner & Emily Widra, *Five ways the criminal justice system could slow the pandemic*, Prison Policy Initiative (March 27, 2020), https://www.prisonpolicy.org/blog/2020/03/27/slowpandemic/ (last visited Nov. 11, 2021).

broader context of the relationship between health and incarceration in the US, this short article shares on overview of our investigation with some broad, provisional findings.[45]

2. Part I: Health, Incarceration and COVID-19

Over 2 million people are incarcerated in the US.[46] Following *Estelle v. Gamble*,[47] federal law provides that — because a prisoner must rely on the authorities for treatment — the state has an "obligation to provide [adequate] medical care for those whom it is punishing by incarceration."[48] A "deliberate indifference"[49] to a prisoner's serious illness or injury violates the Eighth Amendment's prohibition of cruel and unusual punishment, although inadvertent and/or negligent failures to provide adequate care will not.[50]

Delivering adequate healthcare in correctional facilities can be challenging, however. For one, the US' incarcerated population is not only large, but is also ageing.[51] The stresses of incarceration can accelerate the ageing process,[52] and ageing prisoners (generally recognized as those aged 50+)[53] are "relatively more likely to suffer from a variety of medical conditions and require more contacts with healthcare providers."[54] More broadly, evidence shows that the US' incarcerated population as a whole has "a high burden of disease…."[55] Members of the incarcerated population are more likely than those in the general US population to be part of

[45] All data is on file with the authors. Please note this is an ongoing project and our analysis of the data collated is provisional at this stage, following our presentation to the 2021 Law and Society Association Conference. Given the scope of this article, we provide a selection of examples only.
[46] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Policy Initiative (March 24, 2020), https://www.prisonpolicy.org/reports/pie2019.html (last visited Nov. 11, 2021) ("The American criminal justice system holds almost 2.3 million people…").
[47] *Estelle v. Gamble*, 429 U.S. 97 (1976).
[48] *Id* at 103.
[49] *Id* at 104.
[50] *Id* at 105-6.
[51] American Civil Liberties Union, *At America's Expense: The Mass Incarceration of the Elderly,* (June 2012) (noting one third of prisoners are expected to be aged fifty-five years or older by 2030).
[52] *Id* at v. ("The lack of appropriate healthcare and access to healthy living prior to incarceration, added to the heavy stresses of life behind bars, accelerates the aging process of prisoners so that they are actually physically older than average individuals.").
[53] *Id* at i. ("According to the National Institute of Corrections, prisoners age 50 and older are considered "elderly" or "aging" due to unhealthy conditions prior to and during incarceration.").
[54] *Id* at 28.
[55] National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, 202 (Jeremy Travis et al. eds., 2014) https://doi.org/10.17226/18613 [hereinafter, NRC].

"social variable[s]"[56] categories — such as the unemployed, poor and homeless — "strongly associated with poor health."[57] As such, they can enter correctional facilities with compromised physical and/or mental health. These conditions can then be exacerbated by factors that have accompanied increased incarceration rates, namely overcrowding, reduced rehabilitation programs, and stretched medical and mental health services.[58] Through providing opportunities for structure, screening, prevention, diagnosis, and treatment, correctional institutions can have an important role in promoting and safeguarding prisoner (and, thus, public) health,[59] yet they "too often serve as ill-equipped treatment providers of last resort for medically underserved, marginalized people."[60] COVID-19 spotlighted these issues.

In 2014, the US National Research Council reported, "Contagious diseases … have traditionally been a major health problem in correctional facilities."[61] COVID-19 has been no exception. In the US, correctional facilities quickly emerged as "COVID-19 clusters" — places with the largest number of known infections. [62] This was unsurprising. With health-compromised populations; finite supplies of personal protective equipment and cleaning products; limited screening and treatment programs; and architecture that frustrates social distancing and isolation practices, correctional facilities present ideal transmission environments. Concerned, stakeholders called upon state and federal authorities to 'slow the spread.'[63] Across the US, policy responses included facilitating early release, reducing admissions to correctional facilities, and widening healthcare access and social support for inmates.[64] Concern remains, however, that "Lawmakers failed to reduce prison and jail populations enough to slow down the spread…"[65] Noting the states incarcerate more people than the federal government,[66] our investigation focused on what statutory mechanisms existed to support state efforts to reduce incarceration when the COVID-19 pandemic struck.

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[56] *Id* at 203.
[57] *Id*.
[58] *Id* at 6.
[59] *Id* at 204.
[60] David Cloud, *On Life Support: Public Health in the Age of Mass Incarceration*, 5 (Vera Institute of Justice ed., 2014) https://www.vera.org/downloads/Publications/on-life-support-public-health-in-the-age-of-mass-incarceration/legacy_downloads/on-life-support-public-health-mass-incarceration-report.pdf.
[61] NRC, *supra* note 16, at 208.
[62] Macmadu *et al*, *supra* note 4.
[63] Wagner & Widra, *supra* note 5.
[64] Prison Policy Initiative, *The most significant criminal justice policy changes from the COVID-19 pandemic*, (Nov. 10, 2021). https://www.prisonpolicy.org/virus/virusresponse.html (last visited Nov. 12, 2021).
[65] *Id*.
[66] *See* Sawyer & Wagner, *supra* note 7.

3. Part II: Our Investigation

A literature review focused on incarceration, release and systemic health crises, led us to the *UCLA Law COVID-19 Behind Bars Data Project*,[67] and, specifically, Littman's catalogue of *Statutory Release Powers* for all 50 states and D.C.[68] We harnessed this catalogue to identify statutes, in each state and D.C., relating to removal powers within the scope of our investigation, employing standard legal research methods on Westlaw and Lexis. For each statute we identified the following information: title; citation; year of first derivative/enactment; language pertaining to removal/disease/emergencies necessitating removal; criteria for procedural initiation; and decision-makers. This exercise produced the following provisional findings.

Procedures, Enactment, Categorization and Labelling

Our review identified 84 statutes across all US states and D.C., with all states having at least one statute. A provisional typology emerged, with statutes falling across three categories, namely: (1) the removal of inmates specifically due to disease outbreak (*Removal for Disease*);[69] (2) the removal of prisoners during an emergency, including explicitly or implicitly a disease outbreak (*Emergency Removal*);[70] and (3) the executive's ability to modify or suspend laws that could frustrate dealing with an emergency, which could effectively be used to remove

[67] *See* Sharon Dolovich et al., *UCLA Law COVID Behind Bars Data Project: Prison/Jail Cases and Deaths Dataset*, (Dec. 5, 2020). UCLA School of Law, https://uclacovidbehindbars.org. (last visited Nov. 12, 2021).
[68] *See* Aaron Littman et al., *UCLA Law COVID-19 Behind Bars Data Project: Statutory Release Powers Spreadsheet*, [Dec. 5, 2020]. UCLA School of Law. (last visited Nov. 12, 2021).
[69] For example, Ariz. Rev. Stat. Ann. § 31-106 ("When a pestilence or contagious disease occurs in or near a jail and the physician in attendance certifies that it is liable to endanger the health of the inmates, the judge of the superior court may, by an order in writing, designate a safe and convenient place in the county, or the jail in a contiguous county, as the place of confinement.")
[70] ERP statutes are typically worded similar to RFD statutes, however they do not specifically address a disease or infection within the prison. Instead, ERP procedures will state that when an emergency situation exists then removal may be necessary to avoid the harm to the inmates. ERP statutes vary in type of language that allows for removal. We sub-categorized these as positive and negative statutes as one grants the authority to remove, while the latter does not allow for removal unless dealing with a specifically stated emergency. An example of the former is Mont. Code Ann. § 7-32-2222 ("When there is good reason to believe that the inmates may be injured or endangered, the detention center administrator shall remove them to a safe and convenient place and confine them there as long as necessary to avoid the danger."). An example of the latter is Colo. Rev. Stat. Ann. §13-45-111 ("Any person committed to any prison or in the custody… shall not be removed from the prison or custody into any other prison or custody, unless it is by habeas corpus or some other legal writ; or where the prisoner is delivered to some common jail; or is removed from one place to another within the county, in order to effect his discharge or trial in due course of law; or in case of sudden fire, infection, or other necessity.").

inmates on safety grounds (*Executive Emergency*).[71] The final category is the largest grouping by far (50+). Our review of first enactment information, suggests (in the data-set) the earliest statute was a Massachusetts *Removal for Disease* statute in 1816,[72] and the most recent came in 2015 in the form of an Ohio *Emergency Removal* statute.[73]

No overall uniform label emerged, but similarities across categories are evident. Many statutes categorized under *Removal for Disease* are a variant that includes '*Removal of Inmates*' and '*Disease.*'[74] *Executive Emergency* statutes also share a common variant referring to 'Governors Emergency Powers'[75] or some sort of executive branch powers during a state of emergency. The *Emergency Removal* category offers the least consistency, with examples ranging from "Emergency Rules and Regulations"[76] to "Plans for Emergency Evacuations of Inmates."[77]

Decision-makers

The decision-maker refers to the individual granted the authority to make release decisions. We found 24 different decision-makers across the 84 statutes. A provisional analysis suggests that, across the three categories, decision-makers fall across six groups: Corrections Executives, State Executives, State Judiciary, Sheriff, State Legislature, and State Health

[71] EEP statutes are the most distinguishable from the other two categories as these statutes broadly address "in the event of an emergency." There is an EEP statute in place for every state, except for Ohio, who includes EEP procedures within their state constitution.
[72] *See* Mass. Gen. Laws Ann. ch. 111, § 108.
[73] *See* Ohio Sup. R. 14.01.
[74] For example, Minn. Stat. Ann. § 243.57 ("In case of an epidemic of any infectious or contagious disease in any state correctional facility under control of the commissioner of corrections, by which the health or lives of the inmates may be endangered, the chief executive officer thereof, with the approval of the commissioner of corrections may cause the inmates so affected to be removed to some other secure and suitable place or places for care and treatment; and, if the facility is destroyed, in whole or in part, by fire or other casualty and becomes unsuitable for proper detention and custody of the inmates, the chief executive officer, with the approval of the commissioner, may remove them, or any number of inmates, to another safe and appropriate place as may be provided.")
[75] For example, Mich. Comp. Laws Ann. § 10.31 ("Sec. 1. (1) During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled, either upon application of the mayor of a city, sheriff of a county, or the commissioner of the Michigan state police or upon his or her own volition, the governor may proclaim a state of emergency and designate the area involved. After making the proclamation or declaration, the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control…")
[76] *See* Va. Code Ann. § 32.1-42.
[77] *See* Alaska Admin. Code tit. 22, § 05.050

Department. Unsurprisingly, given *Executive Emergency* statutes form the largest category, decision-making authority is most commonly vested in the Governor or State Executive.

Pre-conditions for Procedural Initiation

Pre-conditions for procedural initiation refers to any statutory requirements that must occur for the removal process to begin. These are steps that must, or can, be taken should a relevant scenario arise. Pre-conditions vary by procedure, however similarities exist between categories. *Removal For Disease* statutes contain similar language that requires a physician to certify that the disease is likely to endanger other inmates or the community surrounding the prison.[78] *Emergency Removal Power* statutes do not require a physician to certify the potential for danger, and allow for the relevant decision-maker to make the determination as they see fit.[79] *Executive Emergency* statutes have fewer pre-conditions, if any, as these statutes are discretionary powers granted to the Governor, and solely require that an emergency declaration be issued by the Governor which in turns grants the Governor the power to remove inmates as they see fit in response with the emergency.[80]

4. Conclusion

Our investigation has produced a rich data-set to both refine and explore. We now have a basis for understanding state-based statutory powers that could be used to remove inmates from correctional facilities in events such as COVID-19. Interestingly, our first pass review suggests *Removal for Disease* statutes— arguably the most relevant mechanisms — have not been not utilized during COVID-19. Correctional facilities are not closed communities — they play a role in promoting and safeguarding public health.[81] As the National Research Council has concluded, "There is need for systematic study of ways to capitalize on public health opportunities associated with incarceration, particularly for infectious diseases…"[82] We can harness our study to support such efforts, particularly as there is so much to learn from

[78] *See* Mass. Gen. Laws Ann. ch. 111, § 108.
[79] *See* Mont. Code Ann. § 7-32-2222.
[80] *See* Neb. Rev. Stat. Ann. § 81-829.40.
[81] Claire Fortin, *A Breeding Ground For Communicable Disease: What to Do About Public Health Hazards in New York Prisons*, 29 Buff. Pub. Int. Lj. 153 (2011).
[82] NRC, *supra* note 16, at 229.

experiences had by all stakeholders during COVID-19. Initial ideas include producing state-based case studies, tracking use of statutes and judicial interpretation of provisions, and the development of model statutes.

The Intersection of Federal, State and Local Government Responsibilities to Protect Public Health During the Pandemic in the United States and Brazil

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The United States and Brazil are federal countries with constitutions that diffuse regulatory power away from the centre in favour of state and local governments. In the absence of strong presidential leadership, the frontline of response has been at these lower levels but the result has been intra-governmental conflict concerning allocation of responsibilities and a patchwork of responses that have done little to promote public confidence in the ability of their governments to control the spread of the disease. In both countries public health emergency orders which have closed businesses and schools, required masks to be worn on public transport and in public places and at their most extreme, required citizens to stay at home or 'shelter in place' have generated law suits framed not only in terms of infringement of constitutional rights but also of separation of powers at both horizontal and vertical levels. This paper focuses specifically on the way in which management of the pandemic has generated intra-governmental conflict at the vertical level. It notes that in the United States two- tier constitution which recognises only federal and state governments and has nothing to say regarding local autonomy, local authorities seeking to put in place increased measures of public health protection have struggled to develop legal strategies that can withstand state gubernatorial opposition. This is not the case in Brazil where the Brazilian Constitution of 1988 gives municipalities equal federative partnership with states and the federal government, a status recently confirmed in relation to the management of the pandemic by two recent decisions of the Federal Supreme Court of Brazil (SFT)

This paper considers these issues in the context of related responses, by specific reference to the role of municipalities in what Professor Hirschl terms 'old-world' and 'new-world' constitutions.[83] The paper is in two parts. In Part 1 we consider the position in Brazil in the context of a conflict between a federal government led by a Covid-impact-denying President and states and municipalities seeking to put in place measures for the protection of public health and the control of the pandemic. The conflict reached the STF which has been asked to pronounce specifically upon the constitutional allocation of competencies on two occasions. Part I considers these law suits and the context in which they arose with the premise that they have something important to contribute to our understanding of federalism and constitutional design in Brazil.

By way of contrast, Part II moves to the United States where the public health concern is similar but the constitutional dynamic is different. In this Part we identify and examine disputes between five states and their municipalities. In the absence of a constitutional framework that can recognise and empower local authorities vis à vis the states to which, in legal terms, they belong, the disputes to date have not made it into a federal court but are framed in terms of state law under which they stand little prospect of success. We note however that in some of the court filings it is possible to discern the rudiments of an argument for independent local autonomy which its proponents claim is deeply rooted in the U.S. concept of democracy and consider whether this is an argument whose time may now have come.

We return in conclusion to the position of municipalities in 'old-world' and 'new-world' constitutions. We note the prediction that the "new urban era has begun"[84] and suggest that, the formal constitutional position notwithstanding, municipalities in both Brazil and the United States will continue to conduct their intra-governmental disputes with skills that are primarily political rather than legal.

[83] RAN HIRSCHL, CITY, STATE: CONSTITUTIONALISM AND THE MEGACITY (2020).
[84] Parag Khanna, *Beyond City Limits*, 181 FOREIGN POLICY 120, 122 (Sept/Oct. 2010): The 21st century will not be dominated by America or China, Brazil or India, but by the city … the age of the nation- state is over. The new urban era has begun.

1. Part I and Intergovernmental Relations in the Federal Republic of Brazil

In Brazil the pandemic has tested the fragilities of constitutional design at both the intersection of federal, state, and local government competencies and the processes for managing intergovernmental disputes. What has emerged is a story of a president who, for political gain, has pitted himself against the federation, but in the words of UACES commentators Rodriguez and de Valera, the result has been a "positive outcome for the Brazilian federal system":

> new horizontal intergovernmental relations have been strengthening subnational autonomy and decentralization. A broad recognition that states and municipalities are doing the right thing is spreading both national[ly] and internationally. The Brazilian federation will [...]not [be] the same after the pandemic. [85]

This outcome is in no small part attributable to the role of the Federal Supreme Court of Brazil (STF) which has handed down a number of major decisions which have had the effect of strengthening the autonomy of regional and local authorities as against the federal government. Part I of this article proceeds as follows. In Section 1 we briefly outline the early chronology of the federal and state responses to the emerging public health crisis. We note that the pattern of responses was shaped by underlying political conflicts which came before the STF, framed in terms of constitutional competences. In Section 2 we examine the STF responses by reference to the constitutional framework that was put in place following the adoption of a new democratic constitution in 1988. We focus specifically on these issues: a) the formalization within the new federal union of a role for municipalities as equal members the union together with the states and the federal government, b) the poor quality of constitutional drafting which has required the judiciary to take on an enhanced role in terms of filling the silences and omissions of the 1988 document; c) the judicialization of intergovernmental disputes as politics by another means and d) in the particular context of induced intergovernmental politics, the recent judicial pronouncements which have enhanced the authority of local decision-making in relation to constitutionally allocated competences. While in the context of this particular emergency, the outcome has been positive for regional government and municipal autonomy specifically, we query whether the preference for a judicial solution to what are essentially political disputes will in the longer term erode the

[85] Gilberto M. A. Rodriguez & Vanessa Oliveiras de Valera, *Brazil and: The President Against the Federation*, UACES Territorial Politics, https://uacesterrpol.wordpress.com/2020/06/05/brazil-and--the-president-against-the-federation/

authority of the Court which has no power of implementation that is not dependent upon the support of effective political support.

2. Part II Challenges to State Authority in the United States

In the United States, as in Brazil, the absence of a strong presidential lead placed management of the pandemic at the centre of partisan politics. When for political reasons governors either refused or were slow to act, the frontline of response shifted to the local level, but the patchwork of gubernatorial and local orders requiring *e.g.* citizens to stay home, and or wear masks in public places, businesses to close and restricting attendance and the conduct of ceremonies at houses of worship, exposed intra-state governmental tensions which constitutional theory struggles to manage. Where governors refused to issue lock-down orders and mask mandates, local governments asserting legislative rights to protect the health, safety and welfare of their residents, presented governors and state attorneys-general with conflict situations to resolve. The reverse dynamic was seen, albeit to a lesser extent, when state governors who imposed lock down measures faced local authority opposition and refusal to collaborate in implementing the restrictions. In this context, disputes became sites of political rather than legal contestation as this section explores.

Part II of this article is structured as follows. In section 1 we outline briefly the orthodox explanation of the allocation of power between the two layers of government that are recognised by the U.S. federal constitution, focussing specifically on the state police power which gives to the individual states regulatory power and responsibility for ensuring the health and welfare of their citizens. We note that the orthodox explanation of intrastate relations sees municipalities as creations of the state from which they derive their powers but note also that gubernatorial restrictions have faced litigation challenges, not just from residents and businesses but also in some cases from municipalities seeking to exercise their home rule powers. In section 2 we consider some of these challenges and locate these in the wider context of assertions of municipal authority that are not unique to the issue of Covid but extend across a spectrum of seemingly diverse contentious issues. We comment on the practice of pre-emption as a strategy now routinely employed to contain these assertions and note that in the absence of constitutional recognition or grant of rights to municipalities, litigation challenges will most likely be resolved

in favour of state authority. In this situation, litigation becomes primarily a strategy of political manoeuvring, the outcome of which will reflect political skills and bargaining power as opposed to strength and quality of legal argumentation.

We conclude however with the following observations. As the significance of the place of the modern city as a service and amenity provider with a role that is central to the lives of many, if not most of the population, continues to grow, a jurisprudence which subordinates municipalities looks increasingly outdated. As a passionate advocate of local government autonomy has argued: "A modern jurisprudence recognizing a right of local, community self-government will only emerge as more municipal communities enact local laws securing and exercising that right."[86] In the United States the pandemic has not been the only context for local authority and community muscle-flexing but as Georgetown University law professor Sheila R. Foster has observed, "the crisis has shown dramatically why local government, where mayors and health officials are on the frontlines of responding to global health threats like pandemics, is increasingly where effective governance happens in America."[87]

The same is true of Brazil and indeed more generally as Professor Hirschl has argued. In the United States, as cities attempt to extend their regulatory ambit in relation to such contentious matters as gun control, environmental regulation and sanctuary cities[88] the impetus for independent local democracy will surely grow. The question then becomes, what exactly are the lessons of these conflicts and how might a response be shaped? Specifically can they be translated into constitutional terms as Professor Hirschl seems to be suggesting and if so can or indeed should, the U.S. federal constitution accommodate these changing realities? Even more specifically, are there lessons from the constitutions of the new world and in particular from Brazil which not only gives constitutional recognition to municipalities, but supplements this with legislative guidelines designed to ensure and enhance democratic city management? The authors suggest that while the lesson from the Covid-19 experience, if there is one, is that although the effective resolution of intergovernmental disputes is as much a matter of politics

[86] Thomas Linzey, *A Phoenix From the Ashes: Recognizing a Constitutional Right of Local Community Self-Government in the Name of Environmental Sustainability*, 8 ARIZ. J. ENVTL. L. & POL'Y 1 59 (2017).
[87] Sheila R. Foster, *As Covid-19 proliferates, Mayors Take Response Lead, Sometimes in Conflicts With Their Governors*., Georgetown Law, https://www.law.georgetown.edu/salpal/as--proliferates-mayors-take-response-lead-sometimes-in-conflicts-with-their-governors/.
[88] *See generally*, Carol S. Weissert et al., *Governors in Control: Executive Orders, State- Local Preemption, and the Pandemic*, 51(3) PUBLIUS 396 (2021).

and political bargaining power as it is of judicialization, the formal position matters and in the United States at least will sooner or later have to be addressed.

The Impact of COVID-19 on Global Administrative Law

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This article has two rationales. The first is to examine global administrative challenges and governmental responses to COVID-19. The other aim is to assess the impacts of the pandemic on a newly-emerging field of Global Administrative Law (GAL). The required measures of COVID-19 control, including national lockdown designation and implementation, have presented challenges which governments have struggled to deal with since early 2020. The problem has been further complicated by the anti-science stance of populist leaders such as Donald Trump and Jair Bolsonaro, who have downplayed the COVID-19 crisis and failed to take prompt and decisive measures of response. Administrative challenges arising from these failed measures revolve around racial inequality, contested access to healthcare systems and affected human rights, as well as impeded cross-border sharing of scientific data for global health efforts. These are the challenges to which a 21st century GAL must respond. GAL can be understood as a regime, which is composed of the legal rules, principles, and institutional norms applicable to processes of administration which are undertaken in approaches that implicate more than purely intra-state structures of legal and political authority. GAL as an emerging international legal regime entails dual insights. On the one hand, GAL is usually termed as global governance; on the other hand, such governance can be regulated by national administrative law. As a result, the discovered impacts of COVID-19 on the development of global administrative law include positive and negative effects. This article concludes that GAL plays a key role in responding to the pandemic as well as providing legal frameworks outlining states' governance.

[*] I would like to appreciate Sahar Aamer and Rachel Williams for their research assistance.

1. Introduction

The rapid spread of the COVID-19 pandemic has highlighted the extent to which citizens look to state institutions and governments to provide directions and concrete solutions to severe public health threats. The requirements for measures of COVID-19 control including, at their most extreme, national lockdown designation and implementation have presented challenges which governments had struggled to meet. The problem has been complicated by the anti-science stance of populist leaders, particularly Donald Trump and Jair Bolsonaro. Their failures in this respect have not only propelled their countries to the top of the league tables in terms of COVID-19 related deaths but have also inhibited their nations' ability to engage with international efforts to respond effectively to the COVID-19 crisis. These are therefore challenges to which a 21st century GAL must respond.

GAL is an emerging and embryonic international legal regime, which was identified by Benedict Kingsbury[89] in early 2000s. His theory focuses an effort to systematise studies in national, transnational, and international settings that are related to the administrative law of global governance.[90] GAL entails dual insights. On the one hand, GAL is usually termed as global governance; on the other hand, such governance can be regulated by national administrative law.

This article is structured as follows. Section 2 evaluates administrative challenges, particularly caused by populist leaders' policies at a national and international level. Section 3 presents an overview of GAL, followed by a discussion of the impacts of COVID-19 on GAL in Section 4. Section 5 concludes.

[89] Prof. Benedict Kingsbury, professor of international law and Director of the Institute for International Law and Justice at New York University. He has co-directed a number of international law projects, including the project on global administrative law with Prof. Richard B. Stewart.
[90] Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 1, 15 (2005).

2. Populist Leaders' Responses to COVID-19 and Caused Administrative Challenges

Populist leaders usually claim to champion[91] the cause of those who feel themselves, for whatever reason to be excluded by the perceived elite or establishment.[92] Populist movements can speak to elements of the political left and the right, which oppose large-size business and financial interests but are also contrary to established socialist and labour parties.[93] Nevertheless, no definition of populism will describe all types of populists since populism is a thin ideology and only relates to a minimal part of a political agenda.[94]

The COVID-19 pandemic saw borders closed in a scale which had not been seen since the Second World War. In terms of populist leaders' responses, those of the Brazilian president Jair Bolsonaro and the former U.S. president Donald Trump are probably the two best documented, although populism is not all they have in common.[95] At the beginning of the pandemic, both Bolsonaro and Trump repeatedly treated COVID-19 as if the coronavirus was not a serious life threat. Additionally, they conveyed disinformation about COVID-19 while thousands of their citizens died and healthcare systems were overwhelmed.[96]

By contrast, not all populist leaders reacted to COVID-19 with this degree of negligence. For example, in Europe, the Italian coalition government led by the populist Five Star Movement under independent Prime Minister Giuseppe Conte, Prime Minister Andrej Babis of the Czech Republic, and Prime Minister Boyko Borisov of Bulgaria took serious and proactive COVID-19 measures which were at least as early as those of several major countries of Western Europe, notably the U.K., France, and Germany.[97]

The administrative challenges arising from these COVID-19 measures fell into two main categories. Firstly, the most existential challenges – race relations, inequality, problematic immigration and healthcare systems – are longstanding issues and not easily resolved,

[91] André Munro, *Populism: Political Program or Movement*, BRITANNICA.
[92] Nadia Urbinati, *Political Theory of Populism*, ANN. REV. OF POL. SCI. 119 (2019).
[93] Munro, *supra* note 3.
[94] CAS MUDDE & CRISTÓBAL ROVIRA KALTWASSER, POPULISM: A VERY SHORT INTRODUCTION 19-20 (OUP 2nd ed. 2017).
[95] Brett Meyer, *Pandemic Populism: An Analysis of Populist Leaders' Responses to COVID-19*, TONY BLAIR INSTITUTE FOR GLOBAL CHANGE RESEARCH PAPER 4 (Aug. 2020).
[96] *Id*.
[97] *Id*, at 10.

particularly in the U.S.[98] Moreover, the Trump administration failed to address the subsequent economic fallout. These policies in the U.S. consisted of inadequate public health responses; years of slashing safety nets; a failure to help workers; an indifference to state and local struggles; and a failure to help small businesses.[99] With regard to the Brazilian Government, Bolsonaro's anti-lockdown and social distancing policies led to critical issues undermining human rights and controversial treatment towards independent media in Brazil.[100] The second category of administrative challenges relates to the consequences of expanding enabling state power in a way that undermines democracy and damages economy and security. The rapid spread of COVID-19 has dealt a devastating blow to people's lives and economic security. As businesses closed and international travel came to a halt, COVID-19 was no longer merely a health crisis but also a global economic crisis.[101]

In summary, administrative challenges arising from several populist leaders' COVID-19 measures are critical and at national and global levels. This results in the importance of an emerging administrative law for inter-State administrative issues and governance.

3. An Overview of GAL

In the early 2000s, research had witnessed the emergence of a global administrative space – a space in which the strict dichotomy between domestic and international regime had considerably broken down, in which administrative functions came to be performed in often complex interaction between institutions and officials on different levels, and in which regulations could be strongly effective regardless of predominantly non-binding forms.[102] GAL, a newly-emerging field of law, begins with this observation that much of global governance can be understood as regulations and administration, and its development is based upon dual insights. One insight is usually termed as global governance and can be characterised as global

[98] Hadas Aron & Emily Holland, *The Covid-19 crisis shows the failure of populist leadership in the face of real threats*, LSE PHELAN US CENTRE (Mar. 24, 2020).
[99] Ryan Zamarripa, *5 Ways the Trump Administration's Policy Failures Compounded the Coronavirus-Induced Economic Crisis*, CENTRE FOR AMERICAN PROGRESS (Jun. 3, 2020).
[100] Reuters & Anthony Boadle, *Brazil's Bolsonaro sabotaged anti-COVID efforts, says Human Rights Watch* (Jan. 13, 2021).
[101] Mely Caballero-Anthony, *COVID-19 and Global Governance: Waking Up to a Safe New World*, COUNCIL ON FOREIGN RELATIONS RESEARCH PAPER.
[102] Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17(1) EU. J. OF INT'L L. 1 (2006).

administrative action.[103] The second insight of GAL is that increasingly such action is being influenced and regulated by national administrative law, which studies the legal rules, principles, and institutional norms applicable to processes of administration of governments[104] as well as domestic administrative court's. However, this latter insight of GAL is contested. This is because this traditional dualist separation between the domestic and the international is not long lasting in the integrated global administrative space. Moreover, the relationship between these two legal regimes requires continuous pragmatic adjustment and re-theorising at fundamental levels.[105]

Overall, GAL can be defined as "comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make".[106] Nevertheless, this definition, as for every new legal regime at its beginning, is contested since the defining process of GAL will reveal similarities and contradictions between domestic and global administrative law.

Nevertheless it is still the case that, GAL can provide foundations and solutions for administrative challenges of COVID-19 due to its multifaceted approaches to administrative function.

4. The Impact of COVID-19 on the Development of GAL

This article considers that a positive impact of COVID-19 on the GAL might be a greater level of necessity of GAL for global administrative governance. For such an emerging legal regime, it is important to set out reasons for innovating the adoption of a new body of law.[107] The key reason is the essential purpose of creating GAL. According to Kingsbury, GAL aims

[103] Benedict Kingsbury, *Introduction: Global Administrative Law in the Institutional Practice of Global Regulatory Governance*, THE WORLD BANK L. REV. 3 (2011).
[104] Benedict Kingsbury & Megan Donaldson, *Global Administrative Law*, MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW.
[105] Kingsbury, Krisch & Stewart, *supra* note 2, at 31.
[106] *Id*, at 17.
[107] Jarrod Hepburn, *The Duty to Give Reasons for Administrative Decisions in International Law*, 61(3) INT'L & COMP. L.Q. 641, 641-645 (2012).

to bring long-term changes in the nature of the global political and social order.[108] These increasing changes are expected to refine regulatory arrangements with intentions to overcome collective action problems and market failures and to strengthen global cooperation in combating the pandemic.

Domestic administrative lawyers can help facilitate the development of GAL.[109] Domestic courts have identified several potentially useful instrumental and intrinsic rationales for the duty to give reasons. Moreover, Hepburn addresses four points arising from his previous research on the case-study of the duty to give reasons.[110] First of all, the "accuracy" rationale suggests that forcing administrators to give reasons for their decisions will enable them to make better and more accurate decisions. Secondly, the "review" factor advises that the provision of reasons facilitates review, partially by providing information on the relevant expertise of the initial decision-maker. Thirdly, the "public confidence" rationale suggests that having the duty to give reasons serves as a public demonstration that laws are being applied consistently and carefully. Meanwhile, the "respect" rationale justifies reason-giving on the ground that explaining a decision to an affected party indicates due respect to their intrinsic personhood.[111]

Nevertheless, the unhelpful impact is that the complexity of cross-border administrative challenges intensifies weakness and difficulties to develop GAL. The main difficulty affecting this legal development might be a lack of incentives for governments to further develop GAL during the pandemic. The fact is that COVID-19 has required a significant amount of time and attention on the part of states to contain the outbreak of the coronavirus and protect their citizens' lives. In this context the development of a novel legal regime during the pandemic is unlikely to be a state priority, with negative consequences for international GAL scholarship. Other obstacles include the difficulties of a delineation of normative demands relating to principles and procedures, without the commitment and support of national governments for this exercise.

[108] Kingsbury, *supra* note 15.
[109] Jarrod Hepburn, *Global Administrative Law and the Role of Domestic Administrative Lawyers*, ADMINISTRATIVE LAW BLOG (Nov. 29, 2017).
[110] Hepburn, *supra* note 19.
[111] Hepburn, *supra* note 21.

5. Conclusion

This article concludes with the observation that a new field of GAL has the potential and indeed the responsibility to respond to the challenges posed by the pandemic at a national and global level.

List of Abbreviations

GAL – Global Administrative Law

Reference List

André Munro, *Populism: Political Program or Movement*, BRITANNICA

Benedict Kingsbury & Megan Donaldson, *Global Administrative Law*, MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW

Brett Meyer, *Pandemic Populism: An Analysis of Populist Leaders' Responses to COVID-19*, TONY BLAIR INSTITUTE FOR GLOBAL CHANGE RESEARCH PAPER 4 (Aug. 2020)

Benedict Kingsbury, *Introduction: Global Administrative Law in the Institutional Practice of Global Regulatory Governance*, THE WORLD BANK L. REV. 3 (2011)

Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 1, 15 (2005)

CAS MUDDE & CRISTÓBAL ROVIRA KALTWASSER, POPULISM: A VERY SHORT INTRODUCTION 19-20 (OUP 2nd ed. 2017)

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2.2. ROUNDTABLE 2: GIVING CONTENT TO HUMAN RIGHTS

This roundtable examined the ways in which national courts translate international human rights guarantees into a form that is compatible with the conceptual frameworks of national constitutional commitments. In particular, it will take a comparative view - eg comparing the human rights jurisprudence of the European Court of Human Rights with that of the Inter-American Court of Human Rights, and will consider what, if any, is the role of transnational judicial dialogue in this process

Giving Content to Human Rights and transnational judicial dialogue: is there an anthropological challenge to be faced? The case of Brazilian Amnesty the Law, through the eyes of the Brazilian Supreme Court and the IACtHR.

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The impact and relevance of human rights today, as well as the demands for their protection and promotion, specifically in the international arena, is mirrored in the expansion of judicial bodies that culminated in the creation of the Human Rights Courts (such as the European Court of Human Rights and the Inter-American Court of Human Rights) within the regional system of protection of HRs, after World War II. Responsible for the application and interpretation of the respective human rights conventions within the Council of Europe and the Organization of American States - OAS, these courts, in the exercise of their functions, end up ruling on violations caused either by the domestic law and/or by the very member states that

are bound to them. Such rulings presuppose an understanding of domestic law based on international parameters, constructed outside the local legal experience.

This circumstance, if on the one hand, as stated in the literature on the subject, may allow the construction of dialogues between the courts, since it is based on the idea of multilevel protection of rights and on a relationship of conventionality, on the other hand it may also generate situations of dissonance between what was decided by the international court and what was ruled by the national court, as for example, in the case of the Brazilian Amnesty Act (Law n. 6.683/1979) that was disapproved by the Inter-American Court in 2010 and 2018, but was considered constitutional by the Brazilian Supreme Court (*Supremo Tribunal Federal* in Portuguese) in 2010. This is the case we will explore briefly and some historical facts have to be pointed out in order give the adequate context to this hard case faced by the Brazilian domestic court and the Inter-American Court of Human Rights (IACtHR) as well.

Aiming to extinguish the communist threat, corruption and re-establish democracy[112], the Brazilian military dictatorship was the regime set up on April 1, 1964, which lasted until March 15, 1985, under successive military governments. It is interesting to mention that, according to some Brazilian historians,

> Although the dictatorship as a succession of generals exercising the presidency with imperial powers, between 1964 and 1985, that power was shared with the ministries of Planning and of Finance. All the ministries were civilians from the Research and Social Studies Institute, and hey controlled the entire economy […] (Schwarcz and Starling, 2018, p.517).

Authoritarian and nationalistic in nature, it began with the military coup that overthrew the government of former President João Goulart (which was democratically elected as Vice-President and took over the Presidency after the presidential resignation of Jânio Quadros in 1961).

> The regime had authoritarian characteristics, but was different from fascism. No effort was made to organize massive governmental support. No attempt was made to build a single party to run the state, nor to devise an ideology that might win over the

[112] The years right before 1964 when the President was João Goulart (were politically strained with many conflitcs that got ideologically rasher with radical positions being defended by the Left and by the Right. that called for institutional instability. For the Left "fomal democracy was considered "a mere tool to aid the privileged"(Fausto and Fausto, 2014, p. 268) whereas the Right that called for "defensive intervention". According to Fausto and Fausto, "The tragedy of the last few months of the Goulart administration can be captured in the fact that a democratic solution to the conflicts was discarded as impossible or objectionable by all political actors. The Right had won the moderate conservatives over to its thesis: that a revolution was necessary to purify democracy, to end the class struggle, to topple the unions, and to avoid the dangers of Communism." (2014, p. 268)

> educated members of society. Quite to the contrary, leftist ideology continued to dominate thought at the universities and among Brazil´s intellectual in general. (Fausto and Fausto, 2014, p. 303)

It ended when José Sarney took over the presidency[113] and the period known in Brazilian history as the New Republic (*Nova República*, in Portuguese) began. Altogether the military regime lasted for 21 years.

This period[114] is considered a somber period of Brazilian recent history (called *anos de chumbo* [the leaden years] in Portuguese), scarred by political repression, suppression of liberties, censorship, violence, torture, armed struggles and terrorism. But on the other hand, it was a period of economic development, modernization, industrial growth, state intervention and foreign investments which was known as the "Brazilian Miracle" that has also led to a severe economic crisis in the 80´s and an impressive international debt.

In 1979, as part of a political agreement between the military forces and other political forces, the Brazilian Congress passed the Amnesty Act (Law 6.683, of August 28, 1979[115]), which granted reciprocal amnesty both to political prisoners - the left-wing militants who opposed the dictatorial regime - and to State agents who committed torture and other crimes that violated human rights during the military dictatorship in Brazil.

The amnesty granted by law however excluded those condemned by final and non-appealable judgment for crimes of terrorism, assault, personal attack or kidnapping - the so-called "blood crimes". The act also prohibited the criminal prosecution of the violations against

[113] Actually the presidente elected in 1985, despite the indirect electoral system that has prevailed at that time as part of the redemocratic transition, was Tancredo Neves. Unfortunately he got sick and was sent to medical care right the day before his inauguration which was scheduled to March 15. He died almost a month later on April, 21, never having the chance to take office. So hisVice-President José Sarney was the politician who became the first civilian in charge of the Presidency after the military regime.

[114] A detailed narrative account of the period is provided by Schwarcz and Starling (2018). Fausto and Fausto (2014) offer a concise view of the period too. For a non-Brazilian view, check Levine (2003).

[115] This law had also other kind of provisions, besides providing amnesty to most Brazilian political prisoners and exiles. "While benefiting approximately 4,500 people, the act excluded any persons found guilty of murder, kidnapping, or terrorist activities and classified them as common criminals. Sixty-nine amendments were added to the bill, including one that allowed families of missing people to petition for a certificate of presumed death and another that guaranteed normal benefits to families of those political prisoners who had died while in custody. The amendments also allowed exonerated former government employees to petition for reinstatement at their previous grade. By allowing the return of opposition leaders from exile, the Amnesty Act was an important step toward the return of free elections in Brazil". ("Brazil, Amnesty Act (1979), Encyclopedia of Latin American History and Culture).

human rights and in this sense barring investigations into past human rights abuses and extinguishing criminal liability of the crimes committed during this period.

At that time, the Amnesty Act was considered one of the keys for the re-democratization period of Brazilian history. But for some, the Amnesty Act was, in fact, an "agreement behind closed doors", not corresponding to the wishes of the population, which clamored for a "broad, general and unrestricted" amnesty, represented by the several entities that gave voice to the "Amnesty Movement" in Brazil[116].

In the 1990s, the ongoing efforts of victims, family members, and human rights organizations led to parliamentary and governmental initiatives, in order to mitigate the policy of official forgetfulness about the dead and disappeared, with a growing influence on the issue of the right to truth, justice, and memory at the international level. And another legislation was passed, Law nº 9.140, of December 4th 1995 which recognized the State's responsibility for the deaths and disappearances reported, due to participation, or accusation of participation, in political activities during the period from September 2nd 1961 to August 15th 1979.

Nevertheless, despite operating on the level of civil liability of the State, with provisions for payment of compensation, Law 9.140/1995 did not resolve the issue of criminal prosecution of these crimes.

The lack of criminal response due to the Amnesty Act was presented to the Brazilian Supreme Court for abstract review (ADPF 153, 2010)[117] in order to decide about its constitutionality. In a very controversial decision delivered in 2010[118], the Court, by a narrow

[116] Westin (2019) portraits the different views on the process that has led to the Amnesty Act and also explains the dynamics of the Brazilian Congress at the time, as well as the expectations of the Brazilian social moviments on the matter.

[117] The complete judgment of the Court as well as the Justices opinions can be found here: https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=612960

[118] "An issue widely observed by critics of ADPF 153 highlights the comparison between Brazil and the outcome of dictatorships in other Latin American countries, taking as an example the case of Argentina, where the Amnesty Law was finally set aside, enabling the prosecution and punishment of those responsible for human rights violations. As a matter of fact, a brief chronology of the facts will demonstrate the back and forth in the debate of the issue in that country: in September 1983, Law no. 22.924 (Amnesty) was created, in which the regime itself signed its pardon; on 22 December 1983, the Argentine National Congress voted Law no. 23.040 which cancelled the amnesty granted by Law no. 22. On December 23, 1986, the Final Point Law was passed (Law no. 23.492/86 - it declared the extinction of the crimes committed by any person accused of the crimes listed in Law no. 23.049) and soon afterwards the Due Obedience Law (Law no. 23.521/87 - it considered military personnel who committed the crime while complying with the orders of their superiors to be incapable of punishment). However, years later, in September 2003, the Argentine Congress issued Law 25.779 that simply declared the laws of full stop and

majority, hold the law constitutional, calling it a "historic agreement" that paved the way for the re-democratization of Brazil.

The Court adopted a deferential position towards the Legislative, acknowledging that is not up to the Judiciary to review the political agreement that resulted in amnesty for those who committed political crimes in Brazil during the dictatorship. The Court understood that the historical context which has led to the end of the military regime and the r-democratization of the country should be the interpretative guide to be followed, stating that the Amnesty Act "must be interpreted from the reality at the time it was conquered".

According to Justice Eros Grau, who was the rapporteur of the case and who wrote the leading opinion,

> It is the historical and social reality of the migration from dictatorship to political democracy, of the conciliated transition in 1979, that must be pondered so that we can discern the meaning of the expression related crimes in Law 6683. It is the amnesty of that time that we are considering, not the amnesty as conceived by some today, but the one that was conquered at the time.[119]

Although the Supreme Court has delivered its opinion[120], the situation regarding the violation against human rights that occurred in the period was not settle within Brazilian society.

The Amnesty Act was also challenged within the Inter-American System of Human Rights in the case Gomes Lund et al. – *Guerillha do Araguaia* - v. Brazil[121], which deals with

obedience due null and void. Something similar occurred in Uruguay, where in October 2011, Parliament passed a law that rendered Uruguay's amnesty law null and void". (Ávila, 2016) (verted into English by the authors)

[119] This piece of the decision was verted to English freely by the authors. This is the original piece in Portuguese: "É a realidade histórico-social de migração da ditadura para a democracia política, da transição conciliada em 1979, que há de ser ponderada para que possamos discernir o significado da expressão crimes conexos da Lei 6683. É da anistia de então que estamos a cogitar, não da anistia tal e qual uns e outros hoje a concebem, senão qual foi na época conquistada".

[120] It is important to mention that despite the decision taken by the Brazilian Supreme Court and due to some procedural manouvers, there is still litigation regarding the issue related to torture that was carried on against political dissidents at the time by state agents, aiming to have the culprits convicted. For instance, this is the case of ADPF 320 which intends to recognize the binding effect of the IACtHR decision in the case Gomes Lund v. Brazil.

[121] This case Gomes Lund and Others v. Brazil consisted of a claim filed on August 7, 1995 to the Inter-American Commission on Human Rights, which in turn has it submitted for examination and judgment to the IACtHRon March 26, 2009. The case discuss the responsibility of the Brazilian State due to arbitrary detention, torture and forced disappearance of seventy people (some members of the new Communist Party of Brazil and other peasants of the region), as a result of the action of the Brazilian Army to contain and eradicate the Araguaia Guerrilla, during the Brazilian military dictatorship (1964-1985). More information about the "Guerrilha do Araguaia" is given by França (2014). The author also explores the position taken by the IACtHR and the Brazilian Supreme Court towards the Amnesty law.

the forced disappearance of dozens of communist guerrillas in the Brazilian State of Paraná during Brazils' military dictatorship of the 1970s. The case addressed many issues such as enforced disappearances as continuing violations of human rights, the validity of amnesty laws, and the right to truth, historical record and recovery of bodies for burial. The final judgment of the court[122] was rendered in the same year of that from the Brazilian Supreme Court - 2010 - and the IACtHR decided that the Brazilian Amnesty law "lacks legal effect" and is therefore null and void, as it has decided before regarding similar cases[123].

> Given its express non-compatibility with the American Convention, the provisions of the Brazilian Amnesty Law that impedes the investigation and punishment of serious human rights violations lack legal effect. As a consequence, they cannot continue to represent an obstacle in the investigation of the facts in the present case, nor for the identification and punishment of those responsible, nor can they have equal or similar impact regarding other cases of serious human rights violations enshrined in the American Convention that occurred in Brazil (Gomes Lund, ¶174).

In short, the Brazilian Amnesty Act was subject to a double layer of review. The Brazilian Supreme Court has checked its constitutionality whereas the Inter-American Court of Human Rights reviewed its conformity to the Inter-American system of human rights.

The domestic court considered the act compatible with the 1988 Constitution, taking into account its historic context but the international court considered that the law violated the American Convention on Human Rights on the grounds that serious human rights violations committed by agents of the dictatorship do not prescribe and must be investigated and punished.

In a very unique and peculiar situation the courts have decided differently in clear opposition to each other which might rise many issues, such as a challenge to the idea of transnational judicial dialogue, problems with both court´s legitimacy and effectiveness and compliance to international courts judgments.

On the other hand, if these decisions can be perceived as two different views on the matter, regardless one´s personal opinion, they can be taken as different moral perspectives, therefore conveying different meanings of justice and fairness.

[122] The cases can be checked on the IACtHR website and the judgment of the case is available in English on: https://corteidh.or.cr/corteidh/docs/casos/articulos/seriec_219_ing.pdf
[123] For instance, see cases Barrios Altos e La Cantuta vs. Peru; Almonacid Arellano e outros vs. Chile; Gelman vs. Uruguai; Massacre de El Mozote e lugares vizinhos vs. e El Salvador; Caso Mapiripán vs. Colombia.

In this sense, beyond the discussion on the cogent force of international law and the mandatory compliance with the decisions of the Human Rights Courts, if law can be taken as a set of local discourses and practices and if culture interferes in socialization and social efficacy of law (which brings us back to the idea of legal sensibility, proposed by the American Anthropologist Clifford Geertz[124]), an anthropological challenge rises as well.

Are the international courts of human rights fit to come up with a concept of human rights that take into account the plurality of justice conceptions of different peoples that inhabit our planet? Or should the international view prevails as a paramount reference to be used to evaluate commitment and compliance to human rights?

This is one of the biggest challenge these courts may face and a question that remains open.

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[124] "That determinate sense of justice I spoke of – what I will be calling, as I leave familiar landscapes for more exotic locales, a legal sensibility – is, thus, the first object of notice for anyone concerned to speak comparatively about the cultural foundations of law. Such sensibilities differ not only in the degree in which they are determinate; in the power they exercise, vis-à-vis other modes of thought as feeling, over the process of social life (when faced with pollution controls, the story goes Toyota hired a thousand engineers, Ford a thousand lawyers); or in their particular style and content. They differ, and markedly in the means they use – the symbols they deploy, the stories they tell, the directions they draw, the visions they project – to represent events in judiciable form. Facts and law we have perhaps everywhere, their polarization we perhaps have not". (Geertz,1983, p.175)

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Changing Standards of Reparation – The Inter-American Court of Human Rights and Domestic Reparation Mechanisms[125]

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The individual right to reparation in the form of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition is well established in international human rights law (IHRL),[126] including in regional human rights systems. Since its very first case, *Velásquez-Rodríguez v. Honduras*, the Inter-American Court of Human Rights (IACtHR) has continuously held that victims have a right to adequate reparation,[127] meaning that to fulfil their obligation states have to ensure the reparation provided is adequate. Some transitional justice states (TJ) states, i.e. states transitioning from authoritarianism to democracy or from conflict to peace while attempting to address past violations through mechanisms of truth, justice, reparation, and guarantees of non-recurrence, have argued that they should be allowed to provide reparation to victims in cases before the IACtHR through domestic reparation mechanisms. Consequently, the IACtHR has had to address the issue of how to deal with such reparation mechanisms. One might expect the Court to evaluate domestic reparation mechanisms according to its own standards and only allow states to provide reparation through these mechanisms as long as the reparation is in line with the Court's standards. However, it is unclear whether this is what the IACtHR is doing; in fact, it seems that the Court may be changing the legal standards of reparation applicable to domestic reparation mechanisms. This paper will discuss how jurisprudence from the IACtHR may have begun to change the Court's standard of reparation for domestic reparation mechanisms and briefly explore some of the

[125] This extended abstract is based on research from my PhD thesis entitled 'Addressing Challenges for the Application of Existing Legal Standards of Reparation to Domestic Reparation Programmes in Transitional Justice Contexts', submitted to University of Essex on 29 September 2020.
[126] See e.g. Resolution 60/147: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005) UN General Assembly, A/RES/60/147, as well as extensive case law from regional courts and UN treaty bodies.
[127] *Velásquez-Rodríguez v. Honduras*, IACtHR, Reparations and Costs, Series C No 7, 21 July 1989, para 25.

issues of the Court's approach and what the consequences may be for victims' right to reparation.

Reparation can be provided through domestic reparation mechanisms, such as judgments and decisions following judicial proceedings or domestic reparation programmes (DRPs). DRPs are an out of court, administrative process often used by states to provide reparation to large numbers of victims and where various forms and measures of reparation are provided to specific categories of victims, often based on the violation suffered.[128] DRPs are said to be 'the most effective tool for victims of gross human rights violations and serious violations of humanitarian law to receive reparation',[129] as they provide faster results and are more accessible for victims than courts.[130] Both Guatemala and Colombia have, with varying degree of success, argued before the IACtHR that they should be allowed to provide reparation ordered by the Court through their domestic reparation mechanisms.

Guatemala, unsuccessfully, made the argument in three cases concerning massacres of members the indigenous Maya community committed by the Guatemalan Army during the 1980s. In *Plan de Sánchez*, the state argued that it should be allowed to provide compensation through its already established DRP.[131] However, when discussing reparation, the IACtHR did not appear to analyse the DRP at all, but ordered compensation to be paid according to its standards.[132] In *Rio Negro Massacres*, Guatemala argued that the victims who had already received reparation through the DRP should be considered duly compensated and that it could provide reparation to the remaining victims also through its DRP.[133] The IACtHR did not provide any in-depth analysis of the DRP, but noted that 'the differences between parties stem from the standards or criteria used by the [DRP] to calculate or allocate the compensatory amounts to the victims,' and proceeded to order the state to provide compensation in the

[128] See e.g. Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence (UN Human Rights Council, 2014), 6.
[129] Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence (UN General Assembly, 2019) A/HRC/42/45, para 32.
[130] Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence (UN General Assembly, A/69/518, para 4; Guidance Note on Reparations for Sexual Violence, 6.
[131] *Plan de Sánchez v. Guatemala*, (Reparations), para 71.
[132] Ibid, para 72-111; Clara Sandoval, 'International Human Rights Adjudication, Subsidiarity, and Reparation for Victims of Armed Conflict' in Cristián Correa and others (eds), *Reparation for Victims in Armed Conflict* (Cambridge University Press), 199-200.
[133] *Río Negro Massacres v. Guatemala*, IACtHR, Preliminary Objection, Merits, Reparations, and Costs, Series C No 250, 4 September 2012, para 297.

amounts set by the Court.[134] Nevertheless, the IACtHR stated that 'the amounts that have already been awarded to the victims in this case at the domestic level under the [DRP] must be recognized as part of the reparation due to them' and Guatemala was allowed to deduct these amounts from the compensation ordered by the Court.[135]

Finally, in the case of *Miembros de la Aldea Chichupac y Comunidades Vecinas del Municipio de Rabinal*, Guatemala argued that its DRP had been subject to improvements and provided victims with restitution, compensation, rehabilitation, and measures to dignify victims, and that there was an office in the municipality of Rabinal, the municipality where the victims lived, as well as suitable personnel that could offer care to victims in their own language.[136] In addition, the state argued that most of the victims of the case had already received reparation through the DRP and had signed a settlement agreement which obliged them not to make any future claims for reparation. [137] The IACtHR, however, noted that the reparation already provided to some victims was for violations outside the jurisdiction of the Court and therefore there was no clear relationship between the reparation provided and the violations established in the case, leaving the Court unconvinced that the victims of the case had received reparation for those violations.[138] The IACtHR noted the evidence provided by Guatemala in relation to compensation paid through the DRP to some of the victims, before ordering compensation.[139] Nevertheless, Guatemala was again allowed to deduct the amounts already paid from the compensation ordered by the Court. In relation to rehabilitation, despite arguments by the state that this could be provided by the DRP, the IACtHR ordered this form of reparation according to standards defined by the Court.[140] While the Court did not really analyse the rehabilitation provided by the DRP, its decision seems to have been based on information that the DRP headquarters in the municipality of Rabinal had closed, meaning perhaps that the Court did not believe Guatemala would be able to provide rehabilitation through its DRP in this location.[141]

[134] Ibid, paras 297-303, 309
[135] Ibid, para 304.
[136] *Miembros de la Aldea Chichupac y Comunidades Vecinas del Municipio de Rabinal vs. Guatemala*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No 328, 30 November 2016, para 1.
[137] *Miembros de la Aldea Chichupac vs. Guatemala*, para 276.
[138] Ibid, para 280.
[139] Ibid, 326-327.
[140] Ibid, paras 301-304.
[141] Ibid, paras 302.

While Guatemala has so far not been able to persuade the IACtHR that it should be allowed to provide reparation through its DRP, Colombia has been more successful.[142] In the cases of *Manuel Cepeda Vargas, Massacre of Santo Domingo,* and *Rodríguez Vera et al.*, the IACtHR allowed Colombia to provide part of the reparation through its domestic reparation mechanisms, including in proceedings before national courts. In all these cases, the court ordered the state to provide measures of rehabilitation, satisfaction, and guarantees of non-repetition according to its usual standards.[143] However, when it came to compensation, the IACtHR seems to have applied different standards than its usual standard of adequate reparation.

In *Manuel Cepeda Vargas*, the IACtHR stated that when national mechanisms exist to provide reparation, unless they 'satisfy criteria of *objectivity, reasonableness and effectiveness* to make adequate reparation for the violations of rights recognized in the Convention […] it is for the Court, in exercise of its subsidiary and complementary competence, to order the pertinent reparations.'[144] The IACtHR found that the victims had received compensation from the domestic mechanism based on objective and reasonable criteria, although without specifying what these criteria were, and that the amounts were reasonable and thus declined to provide reparation for the same harm.[145] The Court did, however, order compensation for some harm that had not been addressed by the domestic mechanism.[146]

In *Massacre of Santo Domingo*, the IACtHR declined to provide compensation to victims who had already received compensation under the domestic reparation mechanism, since this compensation had been what victims had claimed and agreed to, but without explaining or analysing whether this compensation was in line with the standards expected by the Court.[147] Regarding victims who had not yet received compensation through the domestic mechanism, the IACtHR ordered the State to 'grant and execute, within one year and using a

[142] The Court has also allowed this in a case against Chile, see *García Lucero et al. v. Chile*, para 189.
[143] *Manuel Cepeda Vargas v. Colombia*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No 213, 26 May 2010, paras 214-241; *Massacre of Santo Domingo v. Colombia*, IACtHR, Preliminary Objections, Merits and Reparations, Series No 259, 30 November 2012, paras 299-323; *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No 287, 14 November 2014, paras 566-579.
[144] *Manuel Cepeda Vargas v. Colombia*, para 246 [emphasis added]. The Court took the same approach in *García Lucero et al. v. Chile*, para 189.
[145] *Manuel Cepeda Vargas v. Colombia*, para 246.
[146] Ibid, paras 247-253.
[147] *Massacre of Santo Domingo v. Colombia*, paras 334-336.

prompt domestic mechanism, the pertinent compensation and indemnities for pecuniary and non-pecuniary damage, if appropriate, which must be established based on the *objective, reasonable and effective* criteria'.[148]

Lastly, in *Rodríguez Vera et al.* the IACtHR again stated that when a national mechanism to provide reparation exists, the Court must 'determine whether the compensation awarded meets the criteria of being *objective, reasonable and effective* to make adequate reparation for the violations of the rights recognized in the Convention that have been declared by this Court.'[149] The IACtHR found that although the domestic mechanism granted compensation on a slightly different basis than the Court, this was done based on criteria that were objective and reasonable and that therefore it was 'not in order for the Court to order additional compensation' to that already provided.[150] Nevertheless, like in *Manuel Cepeda Vargas*, the IACtHR found that some victims had not received compensation from the domestic mechanism, or not for violations found in the Court's judgment, and ordered compensation for these victims, but allowed the state to deduct any compensation already provided at the domestic level.[151]

In *Operation Genesis* and *Yarce y Otras*, the IACtHR had to address Colombia's argument that reparation should be provided through its newly established DRP created by Law 1448/2011, the Victims' Land and Restitution Law.[152] In these cases, the Court stated that in contexts of transitional justice where states must 'provide reparation on a massive scale to numerous victims' DRPs are a legitimate way of satisfying the right to reparation.[153] The IACtHR further stated that in such contexts, the DRPs must be understood in conjunction with the TJ mechanisms of truth and justice, provided they meet certain criteria, including 'legitimacy – especially based on the consultation with and participation of victims; their adoption in good faith; the degree of social inclusion they allow; the reasonableness and proportionality of the pecuniary measures; the type of reasons to provide reparations by family

[148] Ibid, para 337 [emphasis added].
[149] *Rodríguez Vera et al. v. Colombia*, para 593 [emphasis added].
[150] Ibid, para 595.
[151] Ibid, paras 602-605.
[152] Ley 1448 de 2011 (2011) Diario Oficial, No. 48096; *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No 270, 20 November 2013, para 463; *Yarce y Otras vs. Colombia*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No 325, 22 November 2016, para 321.
[153] *Operation Genesis v. Colombia*, para 470; *Yarce y Otras vs. Colombia*, para 326.

group and not individually; the distribution criteria among members of a family (succession order or percentages); parameter for a fair distribution that take into account the position of the women among the family or other differentiated aspects, such as whether the land and other means of production are owned collectively.'[154]

In both these cases, the IACtHR ordered rehabilitation according to its standards, but allowed this to be provided through the DRP stating that victims of the case should receive immediate and priority access,[155] and in *Genesis* the court declined to order some of the restitution measures requested since it considered that this could be provided by the DRP.[156] Except for one victim, the IACtHR in *Genesis* declined to order compensation and said that this could be provided through the DRP, but specified that the state should give victims 'priority access to the said [DRP], and that it proceed to pay them, as soon as possible, irrespective of the time frames that domestic law may have established for this, avoiding obstacles of any type.' In *Yarce*, the IACtHR awarded compensation on the basis of equity since Colombia had not provided sufficient information about the compensation available under the DRP, or any compensation already provided to victims.[157]

Following the above, it seems that the IACtHR in certain instances has departed from its usual standards of reparation when faced with domestic mechanisms of reparation. Furthermore, the Court seems to recognise the particularly challenging circumstances in which reparation is often provided, including difficult political contexts and a lack of financial, human, and institutional resources to implement reparation.[158] While this might be an understandable development considering the very large number of victims and difficult contexts faced by many TJ states, the Court's approach does raise some issues that need to be further addressed and clarified.

First of all, as seen above, the IACtHR does not use the same criteria when evaluating domestic reparation mechanisms, even in cases from the same country. However, no explanation for this has been provided in its judgments. Furthermore, the IACtHR does not explain the criteria used or their relationship to the Court's standard of adequate reparation, nor

[154] *Operation Genesis v. Colombia*, para 470; *Yarce y Otras vs. Colombia*, para 326.
[155] *Operation Genesis v. Colombia*, para 453; *Yarce y Otras vs. Colombia*, para 340.
[156] *Operation Genesis v. Colombia*, para 461.
[157] *Yarce y Otras vs. Colombia*, para 328-330: Sandoval in *Reparation for Victims in Armed Conflict*, 210.
[158] Sandoval in *Reparation for Victims in Armed Conflict*, 215.

applied them to the facts of the cases, which leaves several questions. In the cases where the IACtHR used the criteria of objective, reasonable and effective, it is unclear whether the Court considers that as long as decisions on what forms and measures of reparation, including levels of compensation, are provided based on these criteria the reparation is considered adequate, or whether as long as decisions are made based on these criteria the Court is less concerned about particular forms and measures being adequate. *Manuel Cepeda Vargas* and *Rodríguez Vera et al.* seem to suggest the former, but this should be made clearer in the Court's analysis.

Similarly, the criteria used for DRPs in *Operation Genesis* and *Yarce* were not explained or applied in the Court's analysis. Nor did the Court in these cases explain how the criteria relate to adequate reparation. As has been pointed out elsewhere, several important questions about these criteria need to be answered such as when victims need to be consulted, what kind of consultation would fulfil the standards of the Court, whether the consultation is about process or about the forms of reparation to be provided, how the Court understands what compensation would be proportionate and reasonable, whether states could provide less compensation than what would be provided by the Court in individual cases, and whether states could legitimately argue that a lack of financial means prevents them from providing reparation to the Court's standards.[159]

Additionally, the fact that the IACtHR may be adopting a new approach to domestic reparation mechanisms poses questions about what this means for the right of victims to reparation. In *Chichupac*, Guatemala cautioned against the IACtHR becoming a 'parallel instance of reparation' for some of the victims of the armed conflict with different procedures for determining the beneficiaries of reparation and for defining the forms and amounts of reparation which would, in addition to exceeding the financial capacities of the state, also hinder the proper functioning of its DRP.[160] Regardless of whether this argument was made in good faith, these are issues that need to be addressed. Furthermore, if some victims in a state where a domestic reparation mechanism exists are able to receive reparation from the IACtHR at the Court's standards whereas victims who are not able to bring their case to the Court have to receive reparation through the mechanism, this may also create inequalities and tensions between groups or communities of victims which does not benefit transitional justice efforts,

[159] See Sandoval in *Reparation for Victims in Armed Conflict*, 216.

victim satisfaction and redress. It may therefore seem logical that the IACtHR allows states with a functioning domestic mechanism to provide reparation in cases before the Court through these programmes, as long as they fulfil the criteria set by the Court.

However, the new approach to domestic reparation mechanisms may also produce inequalities between victims who bring cases before the Court and are from states were no such mechanism exists or where the mechanism is not accepted by the Court, and who will therefore be awarded reparation according to the Court's usual standard, and victims in states where a domestic reparation mechanism is accepted by the Court. This of may course depend on whether the IACtHR considers that its criteria for domestic mechanisms are different to the standard of adequate reparation normally employed by the Court, or whether the fulfilment of the criteria means that the reparation provided by the mechanism is adequate and thus fulfils the standard of the Court. Because of this, it is vital that the IACtHR makes its criteria of reparation for domestic reparation mechanisms, including their relationship to adequacy, clear to all involved parties and relevant stakeholders, as mentioned above.

The IACtHR is bound to continue to adjudicate on cases where states argue that they should be allowed to provide reparation to victims in the case through an existing domestic reparation mechanism. The fact that the IACtHR has not explained its criteria or clearly applied them to the facts to provide a proper analysis is problematic both to states and for victims who need to understand the criteria and arguments of the Court, as well as for other relevant stakeholders involved in discussions about the scope of the right to reparation for victims of armed conflict.[161] As has been argued elsewhere, it seems that at the moment all that is clear is the IACtHR is reconsidering its approach to reparation and domestic mechanisms when it sees good-faith efforts by states to provide reparation to victims.[162]

[161] Sandoval in *Reparation for Victims in Armed Conflict*, 215-216.
[162] Sandoval in *Reparation for Victims in Armed Conflict*, 215.

The Brazilian Penintential System, Case "Urso Branco" and the Inter-American Court of Human Rights

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In 1996 the "José Mário Alves da Silva" Detention House (better known as the "Urso Branco" Penitentiary) was inaugurated, which in the early 2000s became the largest prison in the northern region of Brazil with approximately 1.300 prisoners. The number of places available to prisoners, however, was only 450. In January 2002, due to the problems detected in the prison, there was the second largest slaughter in Brazil (behind only the Carandiru slaughter in the State of São Paulo), with the death of 27 prisoners, some were even quartered.

Due to the Resolution of the Inter-American Court of Human Rights, dated June 18th, 2002, provisional measures were determined in relation to the Brazilian State, in particular the use of the measures necessary to protect the lives and personal integrity of all prisoners held at "Urso Branco" Penitentiary, carrying out an investigation of the events that led to the adoption of provisional measures, information on the measures adopted and the presentation of an updated list of all prisoners held at the Penitentiary. The Inter-American Court instructed the Inter-American Commission on Human Rights to present its observations on the periodic reports submitted by the Brazilian State.

On several subsequent occasions (August 2002, April and July 2004), the Inter-American Court issued resolutions on the case, always repeating the provisional measures previously employed, including some new ones.

The Brazilian Republic has been a State Party to the Inter-American Convention on Human Rights since September 1992 and, according to its art. 62, recognized the contentious jurisdiction of the Inter-American Court in December 1998. The art. 63.2, of the Convention, establishes that "in cases of extreme gravity and urgency, and when it is necessary to avoid irreparable harm to people", the Court may order the provisional measures it deems relevant in

matters that have not yet been submitted to its consideration at the request of the Inter-American Commission on Human Rights.

In 2014, a new rebellion at the "Urso Branco" Prison caused the death of 14 prisoners. In July 2004, the Inter-American Court of Human Rights (ICHR) issued a Resolution[163] on the provisional measures related to the Federative Republic of Brazil involving the case of the "Urso Branco" Penitentiary, imposing measures on the Brazilian State regarding the realization of human rights to life, integrity and the protection of prisoners, as well as the identification and punishment of those responsible for the tragic massacre that occurred inside the prison.

In terms of international human rights law, provisional measures are not only precautionary - in order to preserve a certain legal situation - but especially protective, since they protect human rights as they seek to prevent irreparable damages to people directly involved in certain events. Provisional measures have become a true preventive jurisdictional guarantee in the international human rights system.

In this particular case of the "Urso Branco" Penitentiary, due to the responsibility of the Brazilian State to employ measures to protect the people subject to its jurisdiction, the Inter-American Court considered that this duty is stricter because it involves prisoners in a state prison center, hypothesis in which the State is the "guarantor" of the rights of the people under its custody. In 2004, unsatisfactory conditions of security, infrastructure, hygiene and health were found at the "Urso Branco" Penitentiary, as well as new episodes of homicides and acts of violence inside the prison.

In the period from 2002 to 2006, there were still some serious violations of the human rights of prisoners, with "massacres" practiced by rival groups within the Penitentiary, which motivated several decisions of the Inter-American Court in the sense that the provisional measures ordered by the Court were not really being implemented since the beginning (2002). In October 2008, the Attorney General of the Brazilian Republic requested federal intervention in the State of Rondônia from the Supreme Federal Court due to the chaos identified in the state prison system, notably in the "Urso Branco" Penitentiary.

[163] https://www.corteidh.or.cr/docs/medidas/urso_se_04_portugues.pdf. Visited 05.01.2021.

In the same year of 2008, the Governor of the State of Rondônia decreed a state of emergency in the State prison system, assigning part of the responsibility to the federal government for not providing the construction of new prisons in the State, which could lead to a significant reduction in overpopulation of prisoners in Rondônia.

It is clear that federal intervention has not been decreed in the State of Rondônia, but the action of the Public Prosecutor's Office has had practical effects, including the state jurisdiction regarding the prosecution of people accused of several murders committed against prisoners in the massacres identified in the "Urso Branco" Penitentiary.

With the monitoring of the measures employed by the Brazilian State which had been enforced by the Inter-American Commission on Human Rights, and due to the celebration of the "Pact on the improvement of the prison system and the lifting of provisional measures" celebrated by the federal and state authorities of Rondônia and Brazilian entities for the protection of human rights, the Inter-American Court lifted the provisional measures, with the edition of the Resolution of August 25th, 2011. However, the Inter American Court emphasized that, despite the lifting of the provisional measures, it was necessary to remember "that the lifting of the provisional measures did not imply that the State was relieved of its conventional protection obligations".

The Brazilian legal doctrine about human rights and Constitutional Law considers that the human rights protection system provides an international supervision and control above the state acts and activities, when the state mechanisms are absent or failed in protecting and putting in effect human rights rules[164]. Accordingly International Law, the responsibility on human rights violations lies on the Federal Union which has legal personality in the international order.

In the Brazilian legal system the President of the Republic is authorized to conclude international treaties because of his duty as the State Chief of the Brazilian Republic. International norms are of national territory, binding all the branches and spheres of the Federation according their constitutional competences and obligations[165].

[164] PIOVESAN, Flávia. Direitos humanos e o Direito Constitucional Internacional (Human Rights and International Constitutional Law). 7. ed. São Paulo: Saraiva, 2006, p. 279.
[165] TIBURCIO, Carmen; BARROSO, Luís Roberto. Direito Constitucional Internacional (International Constitutional Law). Rio de Janeiro: Renovar, 2013, p. 131.

Each state in Brazil, like the State of Rondônia, has no legal personality in the international order. In 2004 the Brazilian Federal Constitution created a new mechanism about prosecuting the huge violations on human rights with the objective of effectiveness of the international treaties on human rights in Brazil: the removal of the jurisdiction on a specific case from the state justice to the federal justice when the state organisms failed about investigating or prosecuting the criminals whose illegitimate behaviors are related to the human rights violations.

The National Council of Justice, in Brazil, carried out some activities to identify compliance with the deliberations of the Inter-American Court of Human Rights. In 2014, the National Council of Justice held a prison task force at the "Urso Branco" Penitentiary, presenting a diagnosis regarding the situation of the prison establishment, which still had overcrowding problems and the lack of adequate health care for prisoners.

The verification of prison overcrowding problem occurred again in the "Urso Branco" Penitentiary showed that, even after the formal closing of the case before the Inter-American Court of Human Rights, the management of the prison system has again incurred violations of human rights at the same level as the most critical period between 2002 and 2006. Other violations were also found by the National Council of Justice: lack of hygiene in the Penitentiary's premises, infiltrations with fungi and bacteria in the area, insufficient number of penitentiary agents for the unit prison, and lack of a custody hospital. There were reports that two prisons were under construction in the state of Rondônia and that, once opened, they would greatly reduce the problem of prison overcrowding.

In 2019, two new prisons in the State of Rondônia were already in operation, the "Urso Branco" Penitentiary was vacated to carry out the renovation of its infrastructure. And the State Government of Rondônia decided that, after the necessary reform in the Penitentiary's premises, the "Urso Branco" should only be used for the imprisonment of convicted criminals who are of low danger, which has been happening ever since.

On 12.17.2020, Edson Fachin, judge of the Supreme Federal Court in Brazil, granted the preliminary injunction[166] in part regarding the determination of Brazilian judges to evaluate

[166] BRAZIL, Supreme Federal Court, Precautionary measure Habeas Corpus n. 188.820/DF,

prison cases for people incarcerated in establishments in addition to the number of existing vacancies, members of the group of COVID-19, involving other conditions.

The research presented at the LSA 2021 event presents the case involving the "Urso Branco" Penitentiary, in particular the Resolutions of the Inter-American Court of Human Rights, generated some modification of the Brazilian national penitentiary system, notably in matters relating to the effectiveness human rights to life, integrity and protection of prisoners.

In the same way, it's important to verify if the Brazilian organs of the prison system control - National Council of Justice, Prisons Corrections Department, Public Prosecutor's Office, Public Defender's Office - have acted effectively to give concreteness to the determinations of the Inter-American Court.

Finally, the work clarifies the investigations and punishments involving the massacres that took place in the "Urso Branco" Penitentiary. The State of Rondônia is bound by the international norms of the American Convention on Human Rights and, within the limits of its constitutional competences, has the duty to comply with them[167]. And also all the Inter-American Court judgments are mandatory for the Brazilian Federative Republic, which includes all the twenty six states and the Federal District.

The Inter-American Court of Human Rights has already stated that a State cannot claim its federal structure to fail to comply with an international obligation[168].

The "Urso Branco" case, from the State of Rondônia in the Brazilian Republic, highlights the importance of the internationalization process of human rights. The national states, due to the relativization of their sovereignties, were able to be held accountable internationally, when violations of the rules established in international human rights treaties and conventions were found.

Author: Union Public Defender's Office; Patients: prisoners beyond the capacity of vacancies, members of groups at risk for COVID-19 and who have not committed crimes with violence or serious threat.

[167] TIBURCIO, Carmen; BARROSO, Luís Roberto. Direito Constitucional Internacional (International Constitutional Law). Rio de Janeiro: Renovar, 2013, p. 135.

[168] Corte IDH. *Caso Escher y otros vs. Brasil*, sentença de 06.07.2009, Série C, n. 200, p. 65-66; Corte IDH, *Caso Garibaldi vs Brasil*, sentença de 23.09.2009, Série C n. 203.

The inter-American human rights system is composed basically by four normative instruments of relevance: the OAS Charter (1948), the American Declaration of Human Rights and Duties (also 1948), the American Convention on Human Rights - also known as the San José Pact of Costa Rica (1969) - and the Additional Protocol to the American Convention on Economic, Social and Cultural Rights, better known as the San Salvador Protocol (1988).

Even though problems remain that need to be constantly monitored in the Brazilian penitentiary system, the "Urso Branco Penitentiary" case is paradigmatic in demonstrating how the Inter-American Human Rights System can act effectively to reduce or even reverse the situation of serious violations of human rights, as it was the example of homicides, serious body injuries verified in the period from 2002 to 2006 in Rondônia, State of the northern region of Brazil.

It is true that the presence of civil society entities in the field of human rights, combined with the performance of public control bodies - Public Defender, Public Prosecutor's Office, National Council of Justice, National Council of the Public Prosecutor's Office, for example - are essential for the identification of violations and the forwarding of reports of serious affront to human rights. In this way, the international system for the prevention and protection of human rights will work satisfactorily, seeking to implement the fundamental objectives of fraternity and solidarity among peoples worldwide, in the search for peace and amicable solutions to conflicts that may exist.

The role of the International Courts, in addition to acting against serious abuses and violations against human rights, is also to re-politicize and re-legalize the public human rights policies of national states, at least in what minimally consolidated themselves as rights inherent to human beings in their dignities. Although the sanctions imposed by the International Courts are more political than coercive at various times, they serve as reliable references regarding the internal human rights policies of a civilized nation and based on humanist values.

Giving Content to International Human Rights – the US Perspective

Lissa Griffin*

The United States has an uneasy relationship with international human rights norms. The US approach to international human rights norms and standards might even be called reluctant or even dismissive. These attitudes are to a large extent grounded on the US perception of its own "exceptionalism," a remarkably durable belief that the United States is different from other countries and to a large extent exempt from international norms.[169]

Of the two most direct avenues for incorporation of international human rights standards – through treaty obligations or membership in a super-national human rights tribunal – the United States is an outlier: the US has refused to join most major international human rights treaties[170] and is not subject to any super-national tribunal. To be sure, the US Constitution makes adoption of a foreign treaty difficult, discouraging international accountability in its own right: acceptance of a treaty requires the President's signature and a vote of two-thirds of the

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[169] For examples of the extensive literature on the connection between American exceptionalism and human rights, see, *American Exceptionalism and Human Rights* (Michael Ignatieff ed., 2005); Mugambi Jouet, *The Exceptional Absence of Human Rights as a Principle in American Law*, 34 Pace L. Rev. 688 (2014); Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 Mich. L. Rev. 391 (2008); Harold Koh, *On American Exceptionalism*, 55 Stan. L. Rev. 1479 (2002).

[170] Of the eleven major human rights treaties, The United States is a signatory on only three: The International Covenant on Civil and Political Rights (ICPRR), signed in 1977 and ratified in 1992; The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), signed in 1966 and ratified in 1994; and The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), signed in 1988 and ratified in 1994. International Covenant on Civil and Political Rights, art. 10(1), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 172, (entered into force Mar. 23, 1976); International Convention on the Elimination of All Forms of Racial Discrimination, *entered into force Jan. 4, 1969*, 660 U.N.T.S. 195; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *entered into force* June 26, 1987, 1465 U.N.T.S. 85.

It is also a signatory of the Convention on the Prevention and Punishment of the Crime of Genocide, signed in 1948 and ratified in 1988. It has signed but not ratified the Convention on the Rights of Persons with Disabilities (CRPD), The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and The Convention on the Rights of the Child (CRC). It has neither signed nor ratified The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), The International Convention for the Protection of All Persons from Enforced Disappearance (CED), and The Convention on the Rights of Persons with Disabilities (CRPD).

senate, a supermajority that is difficult to secure.[171] Once properly ratified and made enforceable, treaties are as binding as domestic law, but, of course, their terms are subject to interpretation.[172] Of the treaties it has joined, the US has maintained several significant reservations.[173] Although other countries remain under the formal jurisdiction of super-national human rights tribunals,[174] the United States is not subject to the jurisdiction of any international or super-national court. In addition, during the Trump administration, the US distanced itself from international human rights responsibilities by withdrawing from the UN Human Rights Council[175] and the UN Education Scientific and Cultural Organization (UNESCO),[176] suspending cooperation with UN rapporteurs about potential domestic human rights violations,[177] and rejecting the legitimacy of the International Criminal Court.[178]

Despite this resistance to accountability under international human rights norms, the US legal system does find itself contending with international human rights standards in several ways. First, as a signatory on the ICCPR,[179] the United States is subject to international human rights norms through the United Nations Human Rights Commission and its Universal Periodic Review.[180] Second, the US has signed some treaties, although often with major reservations, including extradition treaties. Third, the US Supreme Court has recognized human rights norms in interpreting the US Constitution, specifically the eighth amendment prohibition against "cruel and unusual punishment." Fourth, human rights advocates have increasingly articulated

[171] U.S. CONST. art. II § 2.
[172] U.S. CONST. art. VI, cl. 2 ("The laws of the United States… and all Treaties…shall be the supreme Law of the Land and the Judges in every State shall be bound thereby…..").
[173] For a complete list of the US human rights treaty reservations, *See U.S. Reservations, Declarations, and Understandings to Human Rights Treaties*, UNIVERSITY OF MINNESOTA HUMAN RIGHTS LIBRARY, http://hrlibrary.umn.edu/usdocs/usres.html (last visited Jan. 19, 2021).
[174] *See, e.g.*, the European Court of Human Rights, the International Court of Justice, the International Criminal Court, and the Inter-American Commission on Human Rights.
[175] Gardiner Harris, *Trump Administration Withdraws US from UN Human Rights Council*, N. Y. TIMES, (June 19, 2018), https://www.nytimes.com/2018/06/19/us/politics/trump-israel-palestinians-human-rights.html.
[176] Eli Rosenberg & Carol Morello, *US withdraws from UNESCO, the UN's cultural organization citing anti-Israel bias*, WASH. POST., (Oct. 12, 2017), http://www.washingtonpost.com/news/post-nation/wp/2017/10/12/u-s-withdraws-from-unesco-the-u-n-s-cultural-organization-citing-anti-israel-bias/?utm_term=.5cc4e3a47b19.
[177] Ed Pilkington, *US halts cooperation with UNJ on potential human rights violations*, GUARDIAN, (Jan. 4, 2019), https://www.theguardian.com/law/2019/jan/04/trump-administration-un-human-rights-violations.
[178] Mark Landler, *Bolton Expands on His Boss's Views, Except on North Korea*, N.Y. TIMES, (Sept. 10, 2018), https://www.nytimes.com/2018/09/10/us/politics/trump-plo-bolton-international-criminal-court.html; Jordan Fabian, *Bolton threatens sanctions against International criminal Court*, HILL, (Sept. 10, 2018), https://thehill.com/homenews/adminisration/405871-bolton-threatens-sanctions-against-international-criminal-court.
[179] International Covenant on Civil and Political Rights, art. 10(1), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 172, (entered into force Mar. 23, 1976).
[180] UN General Assembly Resolution 60/251 (2006).

and relied on international human rights norms in their grassroots advocacy, including for example, death penalty abolitionists and even workers' rights organizations.

Finally, the Alien Tort Statute (28 U.S.C. § 1350) ("ATS") gives federal courts jurisdiction to hear claims brought "by an alien for a tort only committed in violation of the law of nations or a treaty of the United States." However, in a series of cases, the most recent in June 2021, the US Supreme Court has severely limited the reach of this explicit statutory authority for US courts to adjudicate human rights claims and hold US actors accountable.

This essay will explore and evaluate the role of each of these avenues for bringing international human rights standards to bear in the United States.

1. The ICCPR and the Universal Periodic Review (the "UPR")

The UPR process, begun in 2008, invites the United Nation's 193 member states to review the human rights record of each other member state on a four-and-one-half-year cycle. The review is based on the Charter of the United Nations, the Universal Declaration of Human rights, the treaties to which the examined state is party, voluntary commitments, and international humanitarian law.[181] Running contrary to the notion of US exceptionalism, the UPR process is intended to "ensure equal treatment for every country when their human rights situations are assessed."[182] The review invites all member states to submit recommendations to the other member states about how they can improve their human rights records.

The process produces four underlying documents: the National Report prepared by the state under review; the Compilation of information, an overview of conclusions and recommendations of other UN bodies; and the Summary of Stakeholders' information, which summarizes the recommendations submitted by other members and interested parties, which usually includes NGOs and human rights institutions. The Compilation Report and the Stakeholder Report are limited to ten pages each, as is each stakeholder's submission. The results are collated into an Outcome Report to which the state under review must respond, and

[181] UN General Assembly Resolution 5/1 (18 June 2007), para 1.
[182] Office of the High Commissioner for Human Rights, 'Universal Periodic Review," www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx.

is also adopted at a public plenary session in Geneva. Before the plenary session, member states can submit questions to be answered orally by the state under review.[183] On the other hand, the state under review has no obligation to respond during the interactive dialogue.[184] Recommendations are accepted or noted, or supported in part, with noted recommendations amounting to rejections.[185] Any accepted recommendations must be implemented and will be the focus of the state's next review.

The process is based on cooperation among the member states to generate ideas to improve national policies, to share best practices, and to offer assistance to members in complying with human rights norms.[186] It has succeeded in attracting 100 percent cooperation of member states. As a cooperative, peer review process, the UPR differs from treaty compliance bodies, which provide review by experts and are directed at compliance by specific countries.[187]

The US has received more recommendations than any other member state.[188] During the first periodic review, which was begun in 2010, fifty-six government delegations made statements primarily focusing on the US refusal to ratify core international human rights treaties, e.g., the ICESCR and the Rome Statute, as well as on capital punishment, juvenile life without parole sentencing and the failure to close Guantanamo Bay. Of the 228 recommendations compiled by the Working Group, the US agreed, in whole or in part, to adopt 173. Ten of those recommendations related to the rights of indigenous peoples. In 2010, although the US had originally opposed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), it reversed its position and expressed its conditional support of UNDRIP as a "moral and political force," although not a legally binding treaty or statement of current international law."[189] The following year the US announced its support for the Native Hawaiian Government Reorganization Act, which extends the concept of self-governance to

[183] For example, in 2015, Belgium, Germany, Norway, Sweden and Switzerland all submitted advance question to the US regarding preventing the execution of the intellectually and mentally disabled. Storey, p 19.
[184] In 2015, for example, Germany, Azerbaijan, Sweden and Belgium each asked questions relating to the death penalty that were not responded to. Id. at 20.
[185] Id. at 8.
[186] Hilary Charlesworth & Emma Larking, Human Rights and The Universal Periodic Review 214 (Cambridge University Press 2014)
[187] Id.
[188] UPR Info, 'Database of Recommendations' www.upr-info.org/database.
[189] Charlesworth & Larking, supra, n. 18 at 218, n 26.

native Hawaiians. In 2015, the US received 343 recommendations of which 150 were accepted, 83 noted, and 110 supported in part. [190]

Two recommendations (from Uruguay and Australia) addressed the US record of discrimination against LGBTQ persons. Since then, the US has repealed the "Don't Ask, Don't Tell" policy and the Defense of Marriage Act, which defines marriage as a heterosexual union, has been declared unconstitutional. Migrants' rights and racial profiling were also subjects of complaint. Twenty-one countries made recommendations concerning the abolition of capital punishment, a recurring issue in the second periodic review, as was juvenile life without parole sentencing.

After the first review cycle, which ended in 2012, the overall reaction to the process was a "cautious endorsement,"[191] with then-Department of State Legal Advisor Harold Koh describing it as a "useful tool to assess how our country can continue to improve in achieving its own human rights goals."[192]

In the second cycle, which was in 2015, the US received 343 recommendations, 43 of which were with respect to the death penalty. It accepted 10 of the 43 in whole or in part, including 23% of the death penalty recommendations. It also received three recommendations regarding climate change, including rescinding its withdrawal from the Paris Agreement, which has now been accomplished. Arguments were made that the right to a safe environment is a human right and that the right to life, water, sanitation, food, health, housing, self-determination, culture and development are all linked to climate and environmental safety. There were also recommendations regarding ensuring the human rights of people in custody, including reforming mandatory minimum sentences, ending life without parole for juveniles and non-violent offenses. These were partially supported by the United States. The US also accepted recommendations to improve conditions in its prisons and to enhance health care generally and with respect to vulnerable populations, including prisoners.

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[190] Alice Storey, *Challenges and Opportunities for the United Nations' Universal Periodic Review: A Case Study on Capital Punishment in the USA* 25 (2021) (unpublished manuscript) (on file with the University of Missouri Kansas City Law Review).
[191] Charlesworth & Larking, supra, at 7 n 32.
[192] Harold Hongju Koh, "Statement upon adoption of Universal Periodic Review Report," Human Rights Council, Geneva, 18 March 2011.

The third cycle has just been completed. The Summary of Submissions addresses many of the same areas that were raised in the earlier reviews, including racial and gender inequality, the death penalty, climate change and the absence of effective fossil fuel control measures, and work and health-related conditions. It also included recommendations in other areas, for instance, the excessive use of force by law enforcement, gun violence, mass incarceration and sentencing reform, immigration, the absence of statehood for Washington, D.C. and US territories, voting identification requirements, and suppression of political dissent.

As an international accountability mechanism, the UPR has at least resulted in an international dialogue concerning member states' per performance on human rights, including the United States.[193] While it is difficult to document a causal connection, in the United States, the UPR process has at the very least coincided with progress in the rights of indigenous Americans, barriers to LGBTQ rights, and limitations on capital punishment and on juvenile life-without-parole sentencing. It has been observed that the UPR process seems to be most successfully implemented if the recommendations relate to issues attributed to the executive branch and to a lesser extent by the courts addressing domestic constitutional standards. Issues requiring legislative action seem to be more entrenched.

The UPR process suffers from several weaknesses. Among those weaknesses are its reliance on collaboration and voluntary commitment, a lack of transparency about what recommendations actually are included in the Summary to which the member state must respond, and the process by which those ultimate recommendations are selected. Given its weaknesses, concern remains about the UPR's efficacy as a regulatory mechanism and whether the process has produced meaningful changes in human rights in practice.[194]

[193] See, e.g., Recommendations on Criminal Justice, Universal Periodic Review of the United States of America, May 2015, recommendations 176.165 through 176.213 (41 recommendations related to capital punishment).
[194] *See, e.g.,* Emma Hickey, *The UN's Universal Periodic Review: Is It Adding Value and Improving the Human Rights Situation on the Ground?* 7 Vienna J. on Int'l Const. L. 4 (2013), https://perma.cc/724C-YA7F; Constance de la Vega and Tamara N Lewis, "Peer Review in the Mix: How the UPR Transforms Human Rights Discourse, in M. Cherif Bassiouni and William A. Schabaas (eds,) New Challenges for the UN Human Rights Machinery What future for the UN Treaty Body System and the Human Rights Counsel Procedures? (Intersentia 201); Roland Chauville, "The Universal Period Review's First Cycle: Successes and Failures," in Hillary Charlesworth and Emma Larking (eds,)Human Rights and the Universal Period Review: Rituals and Ritualism (CUP 2015).

2. Extradition Treaties

In addition to the ICCPR, the United States maintains extradition treaties with over 100 countries that at least indirectly subject it to international human rights norms. That is, a US request for extradition of a foreign national may be denied on human rights grounds. Most frequently these refusals have been based on the existence of the death penalty in the United States.[195] Indeed, the European Court of Human Rights has held that the UK could not extradite a UK citizen to the United States unless the US agreed not to impose the death penalty.[196] Arguments have also been made that the proliferation of criminal charges and the plea bargaining process effectively violate the defendant's right to trial.[197] Moreover, as demonstrated for example by the UK's refusal to extradite Wikileaks' founder Julian Assange, treaty members are seriously concerned with whether the US prison system will adequately protect their own citizen's human rights, in that case the defendant's mental health.[198]

3. Recognizing International Human Rights Norms in Constitutional Interpretation

Another way in which the US recognizes international human rights norms is through the still-controversial view on the US Supreme Court that the Court's constitutional interpretation may properly include consideration of international norms and global practices.[199] This view was put forth by Justice Anthony Kennedy, almost twenty years ago in interpreting the requirements of substantive due process to declare the criminalization of consensual adult sodomy to be unconstitutional.[200] More well known, perhaps, was the consistent reference to international human rights norms in the series of decisions he authored interpreting the eighth amendment prohibition against cruel and unusual punishment.[201] In Roper v. Simmons, for example, declaring capital punishment of juveniles to be

[195] http://www.mjilonline.org/federal-death-penalty-international-obligations-and-extradition-agreements
[196] Soering v. United Kingdom, 161 Eur. Ct. H.R (ser. A) (1989).
[197] https://lawprofessors.typepad.com/comparative_law/2014/05/extradition-a-new-perspective-on-the-us-plea-bargaining-process.html.
[198] Jill Lawless, *UK judge refuses extradition of WikiLeaks founder Assange*, A.P. NEWS, (Jan. 4, 2021), https://apnews.com/article/julian-assange-uk-refuses-us-extradition-5b148b0b6b9f72a20eedad4218e8227a.
[199] See e.g., Lawrence v. Texas, 539 US 558 (2003) (substantive due process prohibits the criminalization of consensual adult sexual conduct); Roper v. Simmons, 543 US. 551 (2005) (the execution of under-eighteen-year-old juveniles violates the eighth amendment prohibition against cruel and unusual punishment).
[200] Lawrence v. Texas, n. 12 supra.
[201] Miller v. Alabama, 567 US 460 (2021); Graham v. Florida, 560 US 48 (2010); Roper v. Simmons, supra n. 12

unconstitutional, Justice Kennedy cited to the UN Convention on the Rights of the Child, even though the US was not a party, and to Article 6(5) of the International Covenant on Civil and Political Rights, even though the US had lodged a reservation against article 6.[202] Justice Kennedy, writing for the majority in striking down the death penalty for juveniles as unconstitutional, noted [it] is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty."[203] He also referred to the UK's having removed the juvenile death penalty decades before it abolished capital punishment, observing that "[t]he United Kingdom's experience bears articular relevance here in light of the historic ties between our countries."[204] This pattern continued in Miller v. Alabama and Graham v. Florida, which held unconstitutional the mandatory sentencing of juveniles to life without parole and the imposition of a life-without-parole sentence on a juvenile for a non-homicide crime, respectively. In those opinions, the Court did not hold that the Court was bound by international agreements and human rights standards in its interpretation of the Eighth Amendment, but clearly found some persuasive value in the overwhelming international consensus against the US's harsh treatment of juveniles. In these opinions he was uniformly joined by Justice Ginsberg, although they were not the only two justices to do so.

Indeed, as long ago as 1982, in Enmund v. Florida,[205] the Court, in an opinion by Justice White, struck down the death penalty for felony murder stating, inter alia, that it was "worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe."[206] In Atkins v. Virginia,[207] in striking down imposition of the death penalty on the mentally retarded, Justice Stevens cited to an amicus brief that acknowledged that the "world community" overwhelmingly disapproves of executing mentally retarded persons.[208] Justices Breyer and Sotomayor have both argued that a recognition of international standards and practices is appropriate, but so far neither has authored an opinion specifically doing so.[209]

[202] See, Senate Executive Report No. 102-23, 11 (1992).
[203] Roper. 593 US at 575.
[204] Id. at 577.
[205] Enmund v. Florida, 458 US 782 (1982).
[206] Id. at 458 n. 22.
[207] Atkins v. Virginia, 536 US 304 (2002).
[208] Id. at n. 21
[209] Stephen Breyer, America's Courts Can't Ignore the World, The Atlantic, Oct. 2018; Clive Crook, Foreign Law and Sotomayor, The Atlantic, August 7, 2009; Collin Levy, Sotomayor and International Law, Wall Street Journal, July 14, 2009.

4. Using International Human Rights Norms in Grassroots Advocacy

A fourth avenue for bringing international human rights norms and mechanisms to bear in the United States is through their use by grassroots advocates.[210] Historically, in the United States, social reform comes about not by official government but rather from the ground up. This is what occurred with the innocence/wrongful conviction movement, for example, where groups like the Innocence Project worked through advocacy and the court system to secure the adoption of measures to prevent and cure wrongful convictions.[211] In contrast, when the problem of wrongful convictions was first recognized, the UK responded by creating the Criminal Cases Review Commission, an official non-governmental body created for the same purpose.[212] Similarly, in the United States organizations, such as Amnesty International and the US Human Rights Network, have used international human rights norms in their advocacy strategy.[213] Some of these organizations are part of international networks, a fact that in several ways can enhance their impact.[214] Prison Reform Advocates have invoked international norms and the Convention against Torture, one of the three human rights treaties the US has joined, to argue for reform of prison conditions, in particular against solitary confinement.[215]

Recently, the invocation of international human rights norms has expanded in interesting ways. For example, international human right norms were invoked to support race-neutral admissions procedures at the University of Texas;[216] reform of conditions for Vermont's dairy workers:[217] The "Milk with Dignity" program advocates for worker safety and fair wages to protect workers' human rights at all levels of the dairy industry.[218] Similarly, The Vermont

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[210] For an excellent description of this phenomenon, *See* Amy C. Finnegan, et al., *Negotiating Politics and Culture: The Utility of Human Rights for Activist Organizing in the United States*, 2 J. of Hum. Rts. Prac., 307 (2010).
[211] Innocence Project, https://innocenceproject.org/.
[212] See, Jon Robins, *University innocence projects: where are they now?*, GUARDIAN, (Apr. 27, 2016), https://www.theguardian.com/law/2016/apr/27/university-innocence-projects-where-are-they-now.
[213] https://www.amnesty.org/en/what-we-do/detention; https://ushrnetwork.org/membership/miats/prisoners-human-rights-miat
[214] *See* Margaret E. Keck & Kathryn Sikkink, *Transnational Advocacy networks in international and regional politics*, 51 Int'l. Soc. Sci. J., 89 (1999).
[215] Alvin J. Bronstein & Jenni Ginsborough, *Using International Human Rights Laws and Standards for US Prison Reform*, 24 Pace L. Rev. 811 (2004) https://www.amnestyusa.org/reports/entombed-isolation-in-the-us-federal-prison-system/ .
[216] https://prrac.org/pdf/Fisher_Amicus_-_Intl_Human_Rights.pdf.
[217] JoAnn Kamuf Ward, *Vermont Dairy Workers Demand Justice and Human Rights- Will Ben & Jerry's Respond?*, HUMAN RIGHTS AT HOME BLOG, (June 28, 2017), https://lawprofessors.typepad.com/human_rights/2017/06/vermont-dairy-draft-workers-demand-justice-and-human-rights-will-ben-jerrys-respond.html.
[218] https://milkwithdignity.org/about.

Workers Center's "health-care-is-a-human right" campaign led, in 2011, to Vermont being the first state to establish universal health care. [219] The organization's successful strategy has been described as follows:

> (1) by learning about the human right to health care and sharing experiences, Vermonters were motivated to demand universal health care; (2) mobilizing Vermonters around a unified message on the right to health care made universal health care politically important; (3) using the human rights framework to assess new proposals enabled the Vermont Workers' Center to respond quickly to new policy proposals; (4) framing health care as a human right provided an alternative to the dominant economics-based discourse; and (5) while economics continues to dominate discussions among Vermont leaders, both legislative committees on health care use the human rights principles as guiding norms for health care reform. Importantly, the principles have empowered Vermonters by giving them more voice in policymaking and have been internalized by legislators as democratic principles of governance.

The process of relying on international human rights norms and mechanisms has also historically included amicus curiae briefs in the US Supreme Court by international human rights groups.[220] The inclusion of international human rights norms through amici submissions has been hastened by the explosion in the US Supreme Court's amicus curiae practice.[221]

5. The Alien Tort Statute

Interestingly, the United States has a statute that explicitly empowers the US courts to entertain claims by aliens based on international human rights violations by US actors. The Alien Torts Act (18 USC § 1530) gives federal courts jurisdiction to hear claims brought "by an alien for a tort only committed in violation of the law of nations or a treaty of the United States." However, the US Supreme Court has interpreted this statute very narrowly. Thus, while

[219] Gillian MacNaughton, et al., *The Impact of Human Rights on Universalizing Health Care in Vermont, USA*, 17 Health and Hum. Rts. J., (2015), https://www.hhrjournal.org/2015/12/the-impact-of-human-rights-on-universalizing-health-care-in-vermont-usa/.

[220] *See, e.g.*, list of filings in Lawrence v. Texas, 539 US 558 (2003). https://www.theyoungcenter.org/stories/2021/1/27/rights-organizations-file-amicus-supreme-court-brief-telling-the-stories-of-children-harmed-by-the-remain-in-mexico-policy; https://1.next.westlaw.com/Document/I2b6d51fe45d911e1aa95d4e04082c730/View/FullText.html?listSource=RelatedInfo&list=Filings&rank=18&docFamilyGuid=I2b6d51ff45d911e1aa95d4e04082c730&ppcid=bd5a782fd1af409bb9e070944675d56e&originationContext=filings&transitionType=FilingsItem&contextData=%28sc.UserEnteredCitation%29 (Amnesty International amicus brief in Miller v. California, in support of petitioners); https://www.aclu.org/sites/default/files/field_document/chart_of_amicus_briefs_filed_in_support_of_government_in_zubik_v._burwell_final.pdf (center for Reproductive Rights amicus setting forth international human rights law and practices with respect to contraceptive availability).

[221] Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 Va. L. Rev. 1901 (2016); Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. Rev. 175 (2018).

it theoretically could hold US defendants accountable for international human rights violations, it has not and is not likely to have a major impact in the United States.

The US Supreme Court's most recent interpretation of the statute is Nestle USA, Inc. v. Doe.[222] In *Nestle*, the plaintiffs alleged they were victims of child slavery practices at the Ivory Coast cocoa farms that supply Nestle and Cargill Inc. with their cocoa. They claimed that the corporations provided training, equipment, and cash to the farms in exchange for the exclusive right to buy cocoa and knowingly aided and abetted those child slavery practices. The Court held five-to-four, that the statute did not permit the claim.

In an opinion by Justice Thomas, the Court acknowledged that the statute authorized US courts to create private rights of action. However, relying on its prior precedent establishing that the ATS does not apply extraterritorially,[223] it noted that plaintiffs' injuries all occurred in the Ivory Coast. Plaintiffs' claim that the ATS applied because the defendants made "major operational decisions" in the US was characterized as alleging "general corporate activity" that was insufficient to create a cause of action.[224]

The Court went further, however, to limit the extent to which ATS permits the courts to create private rights of action rather than deferring to Congress's authority to do so. Again relying on a prior decision,[225] the Court limited the courts to recognizing only the three causes of action that existed in 1789, when the ATS was enacted: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[226] It interpreted its own post-*Sosa* precedent[227] to require that the courts "refrain from creating a cause of action whenever there is even a single sound reason to defer to Congress."[228] Significantly, as the Court noted, it has never found that demanding standard to authorize judicial creation of a cause of action under the statute.[229]

[222] Nestle USA Inc. v. Doe, 593 US_____ (2021). Justices Gorsuch, Alito and Kavanaugh, concurred; Justice Sotomayor, joined by Justices Breyer and Kagan, concurred in part and concurred in the judgment.
[223] Kiobel v. Royal Dutch Petroleum Co., 569 US 108 (2013).
[224] Nestle, n. 54 supra at 1935
[225] Sosa v. Alvarez-Machain, 542 US 692 (2004).
[226] Id. at 724
[227] Hernandez v. Mesa, 140 S. Ct. 735 (2020).
[228] Id. at 747
[229] Id.

In a separate decision Justice Sotomayor concurred in part and concurred in the judgment, joined by Justices Breyer and Kagan. While she agreed that the plaintiffs had failed to allege sufficient US conduct to support domestic application of the ATS, she refused to join Justice Thomas's limitation of the ATS to the three international law torts that existed in 1789 and that to do so "contravenes both this Court's express holding in Sosa and the text and history of the ATS."[230] Quoting *Sosa*,[231] Justice Sotomayor explained that "'courts should require any claim based on a present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms' contemplated by the First Congress (i.e., norms regarding safe conducts, the rights of ambassadors, and piracy."[232] Justice Sotomayor quoted the two-step process laid out in Jesner v. Arab Bank, PLC[233]: "whether a plaintiff can demonstrate that the alleged violation is 'of a norm that is specific universal and obligatory (citation omitted)." "If so, then it must be determined further whether allowing [a] case to proceed under the ATS is a proper exercise of judicial discretion."[234]

6. Conclusion

The United States sense of its own exceptionalism continues to restrict the extent to which it can be held accountable for violation of international human rights norms. Its limited assumption of treaty obligations is the best example. On the other hand, its ratification of the ICCPR permits other UN member states to critique its human rights performance and to require a US response, raising the level of human rights discourse to include awareness of US accountability for international human rights. The US has also run into difficulty in achieving its extradition goals based on its inability to protect international human rights. It remains to be seen whether Justice Kennedy's willingness to rely on international human rights documents and norms will continue now that he has left the court. And clearly, the Supreme Court's

[230] Id. at 758-59.
[231] Sosa, n. 57 supra, 542 US at 725.
[232] Nestle, n. 54 supra, 593 US ____ (2021), opinion of Sotomayor concurrent in part and concurring in the judgment at 3.
[233] Jesner v. Arab Bank, PLC, 584 US____ (2018).
[234] Nestle, n. 54, supra, opinion of Sotomayor, J. at 4, quoting Jesner v. Arab Bank, n. 65 supra (plurality opinion), slip op at 11-12.

evisceration of the ATS severely curtails the accountability of US corporations for international human rights violations.

At the same time, human rights advocacy has increased in the United States as social justice advocates increasingly invoke international human rights norms to challenge domestic conditions. The increased reliance on the judiciary for resolution of major social and political problems, and the accompanying increase in amicus practice in the Supreme Court have provided an additional avenue for raising international human rights norms. What will happen over the next few years with the change in administration should be interesting to watch.

B.3. ROUNDTABLE 3: VULNERABLE POPULATIONS IN FOCUS

This rountable dealt with issues regarding vulnerable populations, considering CRN1 socio-legal and political researches that relates to the topic. It adopted a particular focus on their recognition for democracy and human rights and human rights protection.

Vulnerability in focus: domestic and family violence against women

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1. Introduction[236]

Amongst other social disturbances, violence against women within the domestic and familiar domain it is an evil that afflicted societies from the world for centuries. This conflict, supported by Brazilian Criminal Law, creates social instability and keeps women victims in vulnerable situation

It is important to clarify that the Law 11.340 was a great achievement for the Brazilian society bringing a more strict treatment towards offenders supported by it, and its main

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[236] This present essay is a part of a research initialized during the Law PHD, which I have been carrying on in the postdoctoral in PPGD/UNESA, with scholarship from CAPES, together with the Nucleus of Studies on Law, Citizenship, Proceedings and Discourse at Estácio de Sá University. Consequently, many of the reflections here presented have already been published beforehand.

objective is to inhibit and prevent such practice of crimes. However, this legislative strictness has not been able to decrease the cases that enter into the Justice System.

In this present essay, firstly, there are some considerations about the specific Brazilian legislation related to familiar and domestic violence against women, Afterwords it is going to be analysed the practical field where these conflicts are placed as well as the vulnerability related to its management.

2. Brief considerations about Law 11.340/2006

The Law 11.340, also known as Maria da Penha Law. It is specific legislation that creates mechanisms to inhibit and prevent crimes of domestic violence against women. It brought a stricter treatment towards offenders, inserted social and protective policies of criminal nature, establishing the enrolment of offenders in the recovery and re-educational programs, aiming crime prevention.

Maria da Penha law is considered a historic landmark in the defence of women´s rights and, according to the United Nations, (UNO) it is the third best and more advanced world legislation facing family and domestic violence against women, only behind Spain and Chile. It is one of the most known Brazilian Laws by our population. However, in the course of my researches it was possible to observe that, in practice, our society has not yet internalized it and have not yet socialized with the rules determined by this law. It was also possible to observe that the fact of such rules be imposed, make the subjects do not act actively in the standardization process, what direct impact in the management of the conflicts by the Judiciary System.

The Supreme court (STF), in plenary section realized in 09/02/2012, judged the requirements from the actions ADC 19/DF[237] and ADIn 4.424/DF[238], confirming, respectively, a constitutionality of the articles 1º, 33 e 44, moving away, consequently, the incidence of the Law 9.099/95 for judging the penal offenses and misdemeanors occurred in the home

[237] Judgment of the Declaratory Action of Constitutionality 19/DF. Rapporteur: Min. Marco Aurélio. Available at: http://portal.stf.jus.br/processos/downloadPeca.asp?id=217154893&ext=.pdf. Last access: 10/03/2018.
[238] Judgment of the Direct Action of Unconstitutionality 4.424/DF. Rapporteur: Min. Marco Aurélio. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=6393143. Last accessed on 10/03/2018.

environment and confirming the stiffening of the law 11.340/2006 by removing the decriminalizing measures, making conciliation impossible and reinserting the possibility of arrest in flagrante delicto in defined infraction of lesser offensive potential in that Law. This decision from the Supreme Court reaffirmed the penal rigor penal brought from Law Maria da Penha.

During these 15 years, there were many changes in Law11.340/2006. Always following the rigor from penal legislation, amongst them it is possible to quote the concession, by policial authority, of the protective measure of removal the offender from home or from the fellowship of the offended (article 12-C), and the classification of non-compliance with judicial decision that grants urgent protective measure. We can still mention the Law 14.132/2021 that has altered the Penal Code including the article 147-A that typifies the crime of persecution (stalking), that directly reflects in domestic and familiar conflicts against women, once, many of these conflicts involve repeated offender conduct such as physical and psychological threats, towards freedom as well as the disturbance and/or privacy of the victim.

Since the creation of the Law Maria da Penha, many campaigns[239] have been realized by the Justice National Council (CNJ) and endorsed by the Justice Courts from the states and from the federal district, together with the Institutional Defence Organizations for the defence of the Women´s Rights (Secretariats, Coordination, NGOs, etc). However, there are still some gaps in the confrontation towards prevention to Familiar and domestic violence against women, consequently, debates and researches, inside de proper Judiciary, have been incessant in order to search "solutions" that can be able to minimize the amount of demands and, at the same time, that can be satisfactory answers towards community.

3. The Conflict of Familiar and Domestic Violence against women and the vulnerability in the Justice System

I name of *familiar criminal conflict* those ones protected by Law 11.340/2006, for considering judicially, guarded from penal rights and, concomitantly, integrated to the structure,

[239] DAMATTA, Roberto. Expression used by the author in the book Relativizing (p.6) when defining social sciences or human sciences.

organization and protection of family. They are conflicts typically framed in the "raw material"[240] from social sciences, being a complex phenomenon that occurs in different social environments and, although some average of these effects are linked to the use of, legal and illegal drugs it is not easy to segregate causes and particular motivations.

It is important to observe that the consequences from domestic and familiar violence against women reach the entire familiar system and this familiar system also needs to be considered one of victims from this crime. It is what I name de "affective dimension of the conflict".

To take care of this familiar system is another stand of the public politics under the Judiciary Power and, particularly, in the stand of the do Executive Power. Such policies still try to be effective in preventing crimes.

Although, as it is possible to observe, there are still many gaps in the confrontation and prevention towards domestic and familiar violence against women, reason for the incessant debates and researches searching for exits that are able to minimize the amount of processes, the number of cases of this violence, and that, at the same time give satisfactory answers for the society.

Many adversities are experienced by the ones involved in domestic violence conflicts, as well as those ones involved in their management. And, for understanding these conflicts and the operation of the Brazilian Penal Justice it is necessary to look forward those that experience it and for their ways to regulate and manage them. It is necessary to look forward normativity. For this reason, my research searches for the support from social sciences and the field research[241] has a qualitative approach.

In these moment I make some notes observed my field research that bring vulnerability into the Justice System in what involves management of the domestic and familiar conflicts against women.

[240] DAMATTA, Roberto. Expression used by the author in the book Relativizing (p.6) when defining social sciences or human sciences.
[241] During my doctorate, my field research was carried out in the cities of Nova Lima and Belo Horizonte, both in the state of Minas Gerais/Brazil.

1) The number of professionals in the justice system is not enough to handle to the amount of processes.

This causes the impossibility to a proper management of these conflicts and creates difficulties in the access to justice. These two reasons, by the way, cause a delay in the jurisdictional provision, and consequently, its discredit.

2) Many cases that enter the criminal justice system as crimes of domestic and family violence fall under the jurisdiction of Civil Law.

This happens because the attendance at the Police Station is fast compared to the judicial one. The offended does not leave the Police Station without being attended to.

3) It can be added to the two points above relate, the delay of the jurisdictional response. And, many times, the Justice System when attending to those cases is not able to prioritize serious cases.

4) The parties involved in the domestic violence conflict do not understand how the justice system works.

This happens since the moment they report the fact in a Police Station and is repeated in relation to the judicial process.

5) There is another point observed by me: the lack of proper treatment to offenders. And, here, it is necessary to note that:

5.1) A high number of such aggressors, according to institutional research, use alcohol and illicit drugs. And the aggressions happen when they are under the effects of these legal and illegal drugs.

Those questions do not justify an aggressive attitude (there is not what can justify it). However, the imposition of the penalty, for itself, do not solve the conflict. The offender needs a expert support. The lack of proper treatment, many times, generate the recurrence of the offense.

5.2) Great part of these aggressors do not understand yet that their actions characterize as crimes. It is necessary to make awareness work.

These points, here observed, generate recurrence.

6) It was possible to notice that a large part of those involved in the conflicts have more anguishes than those facts directly related to Maria da Penha law.

4. Conclusion

Law Maria da Penha, as mentioned above, brought a more aggravating treatment to the um offences, typified by it reaching, in this way, female individual rights. Amongst the purposes of this Law, as pointed in the Explanatory Statement of The Law, there is the extinction of socio-cultural inequality and, consequently, the eradication of domestic and familiar violence against women. However, during these 15 years, since its enactment, The Judiciary has not been able to structure itself for manage such familiar penal conflicts.

The laws are created and imposed for the Brazilian Legal System, and it is up to the Criminal law the social control and the "maintenance of peace" under the threat of punishment (penalty) towards who violate peaceful coexistance. So, to the Law, only and only the creation and the imposition of the law would be enough for citizens to submit to them. "However, the standard plan, by itself, has proved incapable of conforming and shaping the intended behaviours in its texts". (DUARTE; BAPTISTA; 2014, p.5)

These are inconsistences in the Justice System. The incessant creation of laws, which often reach the legal system to appease the social clamor, followed by a profusion and doctrinal theories and counter-theories. However, without the organizational and social structure to apply them and, consequently, the justice system continues to operate only in the field of "should be". (DUARTE, BATISTA, 2014). We have, with law 11.340/2006, through the prohibitive and punitive requirements of "not doing, under penalty of punishment", typical of the penal system, the desired social conducts (must be). However, such rules, as they are not internalized by individuals in society, are not "obeyed", even if a punishment (penalty)is imposed.

There are still many challenges to achieve the historical-cultural change in understanding the treatment of women, in the domestic and intra-family context, as a human being with dignity, with duties and rights, with a will of their own and with dreams.

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Trafficking Women and Girls in Brazil: Challenges for National Defense Policies in the Global South.

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This paper aims to present an overview of the transnational crime of trafficking girls and women and its current prevention measures. To this end, reports from national and international agencies and interagency cooperation documents were analyzed as they enable the exchange of intelligence to access criminal networks. The impact of mixed, irregular or complex migratory flows is due to a variety of factors, however, national states do not consider the specific individual elements that motivated asylum seekers and, in general, the reception of migrants or displaced persons or refugees is based on justification policy that give it refuge status.

However, mixed and irregular migration flows are a challenge for the state in terms of sovereignty because people who participate in these movements suffer deprivation, human rights violations and discrimination and therefore require individualized assistance. The issue is aggravated as human trafficking as a transnational crime persists in recent decades despite efforts to contain, prevent and punish the networks of criminal organizations involved beyond the national state. According to an Interpol report, most victims are girls between 10 and 19 years old for sexual exploitation and/or forced domestic work. They are generally chosen according to their vulnerabilities and trafficked between countries through the use of coercion or deception.

Upon reaching their destination, “they are stripped of their autonomy, freedom of movement and choice, being forced to work in precarious and inhumane conditions. In addition, smuggling of people is linked to various other crimes, including illicit cash flows, use of fraudulent travel documents and cyber crimes, as well as their connection to factions of drug trafficking networks. Even so, the punishment for human trafficking is lenient with the perpetrators and preventive measures are still insufficient to eradicate this transnational crime.

From the construction of policies for specific migratory situations in the region, there is a need to adapt to the global south and its premises and diversities in the international scenario, and to turn to a project to ensure the role of the State, where it welcomes individuals and communities, promoting human security with respective access to fundamental rights. While we see the need for acceptance as well as understanding, we know how much the State must act together with bodies and other institutions that consolidate legal regulations and specific public policies.

In this wake Rover (2006, p. 313) "affirms that it is the responsibility of the international community of States to prevent these acts against women and girls, in the same way that the judgment and punishment of these crimes against humanity are the responsibility of the State. In this way, in recent years, the Brazilian government has taken several steps towards implementing an intelligent border control system in the country.

Since 2014, the country has been signing cooperation and information exchange agreements with the US Departments of State and Defense, the European Union Agency for Police Cooperation (Europol), the International Criminal Police Organization (Interpol), the Organization International for Migration (IOM), the United Nations High Commission for Refugees (UNHCR), among others. . Brazil is also massively investing in information and communication technologies to collect, store and exchange personal and biometric data between the country's customs and migration agencies. Actors as diverse as the Superior Electoral Court, State and Union Public Attorneys, Catholic charities, humanitarian NGOs, private security companies, as well as hardware and software companies, are increasingly involved in border control as as a result of this process.

Among other initiatives adopted in this regard, body measurement technologies that have been put into operation in dry and wet ports and airports with the largest circulation in the country. It is anticipated that by the end of 2018 all Federal Police Migration Precincts will have completed the transition to computerized systems for the collection and processing of fingerprints from migrants and asylum seekers, replacing dactyl receipts still used in many precincts. In another example, the Ministry of Justice of Brazil launched in 2018 a new 'Electronic Protocol Program', through which all documents gathered by asylum seekers, their lawyers and case owners are expected to be presented. Finally, a decree signed in February

2018 established that all migrants in the country will be re-registered for a new “Temporary National Migration Registration Document.

The current panorama of the transnational crime of trafficking in girls and women and its current prevention measures regarding organized crime, however, is "outside" of international norms given the peculiar relationship of trafficking that is placed as regional, international, or transnational, as it is perpetrated by criminal groups that use state control “gaps”. Reports from national and international agencies and interagency cooperation documents only partially enable the exchange of intelligence to access criminal networks, as the impact of mixed, irregular or complex migratory flows is due to a variety of factors, however, national states do not they consider the specific individual elements that motivated the asylum seekers and, in general, the reception of migrants or displaced persons or refugees is given by the political justification that grants them a refugee status.

Currently, there are 241 routes in Brazil that have been mapped for human trafficking. Most of them are concentrated in the northern region of the country, which has the worst human development rates in the country. In this index, in which longevity, access to knowledge and a decent standard of living would enable human development, the north of Brazil, especially the states of Roraima, have the worst unemployment rates, while the state of Pará remains one of the lowest rates of unemployment. human development. in Brazil it is mostly female in cities in the North and Northeast detected on farms for “export” to the sex industry in European countries and the United States. While in São Paulo, Brazil, human trafficking is directed towards slavery, mainly male immigrants from other Latin American countries.

In both cases, there are few measures and containment policies. Even with the national policies of repression of organized crime and assistance to victims, the lack of financial resources and the State's involvement in the fights, shows the continuity of human rights violations through human trafficking in Brazil. The latest figure is about 250,000 people who were trafficked between 2011 and 2015. And there are only 940 cases of documented forced labor lawsuits. There are, among others, two forms of exploitation in Brazil via human trafficking: internal trafficking, that is, between regions of the country for the purposes of sexual exploitation, forced prostitution or forced labor, usually girls from rural farms and cities to urban areas. And International Traffic, that is, via immigration from neighboring countries mainly: Bolivia, Venezuela for jobs analogous to slavery. Combined with the lack of

prioritization in the anti-trafficking agenda with the few transnational initiatives to contain organized crime, in Brazil, the social patriarchal discourse maintains the rhetorical structure that moralizes prostitution and makes victims responsible. Furthermore, Brazil still lacks public policies to repress crime and support victims. In this sense, organized crime such as trafficking people and women is not politicized, as the State, in theory, is absent.

The Music, Health, Social Inclusion, and Human Rights Lab: A Lisbon Lusíada University Project for Human Rights promotion through music

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Right on the foundations of Human Rights one can find the Human Dignity Principle which is both the home and the lighthouse for several of its autonomous, yet intertwined dimensions such as sustainability, digital and biological existence. The Portuguese Republic Constitution first article determines that "Portugal is a sovereign Republic founded on Human dignity […]" which expresses the enhanced value of Human Dignity in Portuguese constitutional order. But one might ask, why is it important to implement this project, at this exact moment, in the middle of a pandemic? Precisely because the population's isolation demanded by authorities to address the pandemic's spread has yet the potential to increase the risk of exclusion of individuals that, prior to the pandemic, were already facing challenges concerning inclusion and Human Dignity protection. Furthermore, the Portuguese Republic Constitution's twelfth and thirteenth articles also establishes the Universality and Equality principles that, combined, provide non-discrimination basis determining that no one can be privileged or discriminated or excluded from any right or duty owing to gender, origin, provenance, religion, sexual orientation, economic status, political or ideological belief, *etc*.

The observance and respect for these principles' dimensions and, *in fine*, for Human Dignity, gained particular focus on the question's selection for the 2021 census questionnaire. In fact, The High Commission for Migrations 2021 Census working group on ethnic-racial questions, (created by the Despacho n. º 7363/2018) worked on recommendations towards the possibility of including questions, in the census questionnaire, that could help to perceive the Portuguese population ethnic-racial configuration. Nonetheless, the Portuguese National Statistics Institute excluded ethnic-racial questions from the 2021 census questionnaire considering that: firstly, the population census questionnaire cannot be used as a population

classification instrument; secondly, the issue's high complexity, namely, self-classification-basedanswers; thirdly, the lack of enough information (for instance, in Europe only Ireland and the UKask this kind of questions). So, to prevent the risk of discrimination towards minority groups, *v.g.* Roma communities, and of menacing both Human Dignity and the respect for fundamental rights but still recognizing information relevance, it was decided that, during the 2021 second semester, Portuguese population will be addressed a pilot survey on this issue (DN. Lusa, 2019).

Not long before, the Human Rights council resolution 26/4, 14 July 2014 had already recognized that "[…] Roma have faced, for more than five centuries, widespread and enduring discrimination, rejection, social exclusion and marginalization all over the world and in all areas of life." (UN. General Assembly, 2014), (UN. OHCHR, 2015c); showing concern that "[…] Roma continues to be socially and economically marginalised, which undermines the respect of their human rights, propagate prejudice and impedes their full participation in society and the effective exercise of civic responsibilities." (UN. General Assembly, 2014), (UN. OHCHR, 2015c).The 26/4 Resolution also recognized that "[…] Anti-Gypsyism constitutes a major obstacle to thesuccessful social inclusion of Roma and the full respect of their human rights." (UN. General Assembly, 2014), (UN. OHCHR, 2015c). And, by the Council of Europe definition, anti-gypsyism is "[…] «a specific form of racism, an ideology founded on racial superiority, a form of dehumanization and institutional racism nurtured by historical discrimination, which is expressed, among others, by violence, hate speech, exploitation, stigmatization and the most blatant kind of discrimination»". (UN. General Assembly, 2014), (UN. OHCHR, 2015c).

The 26/4 UNHR Council resolution operative paragraph n. º 3 invited the Special Rapporteur on Minority Issues: first, to produce a global study on the human rights situation of Roma worldwide; second, to present concrete recommendations; third, to submit the global study to the 29th Human Rights Council session (15 June 2015) (UN. General Assembly, 2014), (UN. OHCHR, 2015a). The Special Rapporteur on the Human Rights situation of Roma WorldwideReport aims to: firstly, provide an overview of "[…] the human rights situation of Roma worldwide, applying a minority rights-based approach to the protection and promotion of the rights of Roma, including the protection of their existence; […]" and a description of the "[…] trends in State practice, highlighting positive developments as well as challenges." (UN.

OHCHR,2015c). Secondly, obtain response to questionnaires addressed to States and National Human Rights Institutions. Thirdly, engage in a consultative approach towards "[…] numerous international and regional organisations, non-governmental, grassroots organisations and Roma rights experts […]" (UN. OHCHR, 2015c). Finally, the report's methodology was grounded on thefour pillars of minority rights: protection of a minority's existence; protection and promotion ofthe identity of minority groups; guarantee of the rights to non-discrimination and equality; rightto effective participation in public life and decision-making process (UN. OHCHR, 2015c).

Portugal's answers to the Special Rapporteur on the Human Rights situation of Roma Worldwide questionnaire also mirrors the Portuguese National Roma Communities Integration Strategy, founded in 2013 and, in 2018, extended until 2022. NRCIS priority was to "[…] create an Observatory of Roma Communities and to draft several studies, including a national study on Roma Communities in Portugal. This study was concluded by the end of 2014 and launched on the 20th January 2015." (UN. OHCHR, 2015b). In answer to question n. º 6 (*Has your Governmentidentified the main priority areas for Roma inclusion? If yes, what are the main goals? Please provide relevant details in this respect, as well as an estimate of funds allocated on measures relating to national strategies and policies for Roma inclusion.* (UN. OHCHR, 2015b)), there were identified four strategic areas (education, employment, healthcare, and housing) and onecrosscutting pillar with eight dimensions (I – Knowledge of socioeconomic context of Roma communities and follow-up mechanism of National Strategy; II – Discrimination; III – Educationfor Citizenship; IV – Roma history and culture; V – Gender Equality; VI – Justice and Security; VII – Mediation; VIII – Social Security). And in answer to question n. º 9 (*Is Roma history and culturepart of the national curriculum? Is the International Roma Day celebrated and if yes, how?* (UN.OHCHR, 2015b)), several initiatives were referred such as the Intercultural School Award (existing since 2012, with the High Commission for Migrations (ACM) and the Ministry of Education collaboration to develop projects and promote diversity as an opportunity for learning); the Intercultural School Kit (developed by ACM, consisting of educational materials about intercultural aspects that can be used by all education professionals and is available online); and celebrating International Roma Day (on the 8th April) and National Roma Day (24th June) (OHCHR, 2015b).Therefore, the Special Rapporteur on the Human Rights situation of Roma Worldwide report and questionnaire highlighted the major importance of the education strategic area as apath for inclusion, Human Rights and Human Dignity protection, particularly relevant on minority protection. Also, the Convention on the

Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 highlights the importance of education in children development, for instance in article 29th considering that: "[…] education of the child shall be directed to: (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; […]." Hence, the awareness arising of youngsters for the vital importance of Human Rights and of the Human Dignity several dimensions' can be developed through education. On the one hand, this awareness may also promote health, social inclusion, cooperation, and communication skills on populations at risk of social exclusion. On the other hand, music, as a universal language, has the potential of gathering youth in an educational context. Some young people face socio-economic and cultural challenges, which have an influence on their engagement and success in school. Young people from economically disadvantaged and ethnic minority backgrounds could have difficulty adapting to traditional teaching and learning environments. In order to promote success, positive future expectations, and inclusion in adult and professionally active life, it is necessary to use innovative, motivating methods that promote competence rather than reinforce difficulties and inadaptation. Music, communication, expression, and interaction through music can act as a facilitator to reach these young people and promote their strengths, socioemotional skills, and success.

The Lisbon Lusíada University research project *"The Music, Health, Social Inclusion, and Human Rights Lab"* is a shared project that combines two research centres (CEJEA - Centre for Environmental, Economic and Law Studies, Public Law and Political Theory research group; and CLISSIS - Lusíada Centre for Social Work and Social Intervention Research, Citizenship, psychosocial intervention and quality of life research group) and one faculty (Faculty of Architecture and Arts, Jazz and Modern Music degree). Therefore, this multidisciplinary research group, formed by a team of psychologists, social workers, music and law professors and researchers looks forward to observing and study the real impact of education for Human Rights through musical performance activities on health, social inclusion, well-being, and quality of life improvement. To do so, it will be applied quantitative and qualitative evaluation methods at the beginning and at the end of each of the two moments/phases that comprise the project program (pre post intervention assessment). The first moment/phase includes forming the *MusicLab* at a public school where young students from one of the Lisbon

parishes will weekly meetprofessional musicians, learn from jam sessions, organise fortnightly small concerts and start introducing discussion groups related to Health, Social Inclusion, and Human Rights developed by psychologists and law professors. This first pilot phase will take place in 2021, during which amodel of a health promotion and social integration program through music will be planned andtested. As a result of this pilot phase, an intervention model will be implemented in the second moment/phase and applied to a broader group of both students, geographic areas, and themes such as Human Rights, Human Dignity, integration (within the rights of minorities and migrant communities) and health in a biopsychosocial perspective. The program project is currently on its first moment/phase.

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Indigenous Lives Matter: Biological Cataclysm and Themission of The Supremo Tribunal Federal

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Rafaella Marineli Lopes[243]

1. Introduction: Cataclysm Beyond Pandemia

Brazil 2020 is going through a new wave of biological cataclysm. An expressionused by anthropologist Henry F. Dobyns[244] to describe the effect of the epidemics brought by European invaders on Amerindian populations, cataclysm is synonymous with a major environmental catastrophe, or a major change that changes the organization of a society; tragedy.[245]

There are those who say that epidemics were the silent weapon of the conquest of America. The historical vulnerability of Brazilian indigenous populations to biological agents imported into their territories has brought devastating episodes. The Brazilian biological war takes place long before anyone can imagine. The construction of highways was the major cause of indigenous contamination by fatal viral diseases from the 1950s onwards. In 1955, 97% of the Tuparis' population was extinguished after a measles epidemic caused by contact with white people. In the 1960s, farmers and prospectors purposely donated clothing and food in boxes infected with smallpox virus and other highly contagious diseases to Indians from coveted lands. In the years 1974 and 1975, in the construction of Highway BR-210, in Roraima, the Yanomami population suffered a drastic reduction after contamination by smallpox.

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[244] Anthropologist specialized in ethno-history and demography of native peoples in the American hemisphere, known for his innovative demographic research on the size of American indigenous populations before the arrival of Christopher Columbus in 1492.

[245] Meaning of the Michaelis dictionary. Available at: https://michaelis.uol.com.br/moderno-portugues/busca/portugues-brasileiro/cataclismo. Accessed on: May 11, 2021.

If the process of colonization of the Americas, as Tzvetan Todoróv[246] well analyzed, was the greatest genocidal process in history, infinitely superior to the Jewish holocaust, with anthropological data estimating the extinction of 90% of the Brazilian indigenous population, we can boldly say that Covid -19 may be the end of this process to the indigenous population, but not only due to the viral factor. Brazil is experiencing the greatest socio-environmental disruption in recent years, fueled by aggressive mining, agribusiness and mega development projects, whose process of expansion and destruction has existed since colonization, undoubtedly, and has been accelerated at a speed difficult to keep up with.

In 2017, the Federal Government revoked a nature reserve in favor of mining, land grabbing and extraction of ores in the Amazon, in a space between the States of Pará and Amapá, which, amazingly, total the size of the State of Espírito Santo. In 2020, data from INPE - National Institute for Space Research,[247] revealed the sweeping devastation of the Amazon Forest between the years 2018 and 2019, emphasizing an increase of 40% in the deforested areas of Brazilian forests when compared to data fromprevious years. In August 2020, Germany decided to suspend the transfer of 150 millionreais to Brazil for the protection of the Amazon, while Norway blocked the amount of 134 million reais that would be transferred to the Amazonian fund in view of Brazil's high deforestation rates.

Not that Brazil's history has been favored by environmental protectionism and its indigenous peoples over the years. Since the Hereditary Captaincies, the interiorization of Brazil has been destroying national biomes and their original populations in favor of the colonizer and capital. The indigenous genocide and the depopulation of the continent added to the commercialization of slaves was fundamentalfor the establishment of a social system based on the capitalist, racist and patriarchal hierarchy; In Juan Manoel Domínguez's view, the extermination of a people considered by the European white as “idle, unproductive and pagan” was essential. Religion, in the author's view, was a master key to legitimizing barbarism, under the Church's argument that the decline in the indigenous population was the result of a “divine punishment” forcenturies of paganism.

[246] Author of the work “A Conquista da América”, where he exposes his research on the concept of otherness, existing in the relationship of individuals belonging to different social groups.

[247] Brazilian federal institute dedicated to space research and exploration. Created in 1961.

Five hundred years later, history repeats itself. Today's Brazil is counting on the destruction of biomes and their populations, including the Amazon, for the expansion of agribusiness. The country is ruled by a ruralist elite that has been perpetuating itself for centuries in the government, and which finds in the current federal government support in figures that enhance environmental destruction and use growth and progress as a justification, above everything, above everybody. The progressive idea is theassimilation of indigenous peoples in the cities, being removed from their native lands, which has violently increased agrarian conflicts with the natives, who have been attacked, tortured and murdered. The request for dialogue with the Federal Government is irrelevant, and there is currently a refusal to even discuss with the other powers about the demarcation of indigenous lands. The annihilation scenario was aggravated by Covid-19 pandemic.

2. A Cry for Help: Indigenous Hypervulnerability To The COVID-19 Pandemic

The first case of indigenous contagion with Covid-19 was that of a 20-year-old girl from the Kokama ethnic group who works as an indigenous health agent and livesin the village of São José, in Amazonas. The infection occurred in one of the DSEI - Special Indigenous Sanitary District[248] by a doctor who was returning from vacation and already had symptoms, with the health professionals of this unit not having been placed in quarantine.

Although we are all susceptible to the contagion of the new coronavirus, indigenous populations are hypervulnerable. There are precarious social, economic and health factors that amplify a potential contamination of these peoples, such as the community co-existence of the villages and the division of domestic utensils among them. There is great difficulty in accessing public health services, geographical issues ofdistance between villages and hospitals and unavailability or insufficiency of health teams and instruments that prevent immediate assistance (SANTOS; PONTES; COIMBRA, 2020, p. 3).

Another problem related to indigenous contagion is related to the underreportingof official data by the Federal Government, which fails to reflect the real extent of this

[248] In 1999, the indigenous health subsystem of the Unified Health System was created, which started to be organized in 34 Special Indigenous Health Districts (DSEI). The subsystem of the Unified Health System created to serve indigenous health suffers from a lack of structure and resources to treat more severe complications such as Covid-19.

community's pandemic. The disintegration of the data occurs mainly due to the lack of demarcation and homologation of indigenous lands, preventing the knowledge of which ethnic groups have been most affected by the pandemic.[249] APIB - Articulation of Indigenous Peoples of Brazil, an entity representing indigenous peoples in Brazil, is the one who, in parallel with the government, has been formalizing an independent surveyof cases. For the entity, the number of indigenous deaths and contaminated by Covid-19 is higher than that notified by SESAI - Special Secretariat for Indigenous Health, which is the federal government agency linked to the Ministry of Health.[250]

The situation reverberates beyond the lack of assistance.[251] The Brazilian State was responsible for other attitudes that spread the virus to the indigenous community, such as the conduct that allowed contaminated health professionals to enter villages, the non-prohibition of land grabbers and prospectors from entering indigenous lands during the pandemic, increasing the indexes of invasions and agrarian conflicts, and the preventive abstention from contamination of indigenous people who had to travel to urban centers to seek emergency assistance.

The creation of the Covid-19 Contingency Plan prepared by SESAI brought generic measures, without detailing actions necessary to the specific context of each indigenous group, putting indigenous people at risk when they released a technical report recommending to the Indians the isolation of those who were contaminated at home, but they did not need to be hospitalized, omitting the fact that in the villages the housing is shared which rises risk of contamination.[252]

Indigenous populations complained about the Ministry of Health's delay indeciding what measures could be taken to prevent the spread of Covid-19. More than a year after the start of the pandemic, very little has been done. In this scenario, the Articulation of the

[249] Data survey from independent organizations has pointed out the Xavante, Kokama and Terena ethnic groups as the most affected

[250] Up to May 1, 2021, SESAI reported 47,576 confirmed cases of Covid-19 among indigenous people, and 661 deaths, while APIB confirmed 53,329 cases of contamination, and 1,059 deaths. Available at: COVID-19 and the Indigenous Peoples (socioambiental.org). Accessed on: May 3, 2021.

[251] In March 2020, FUNAI - Fundação Nacional do Índio, suspended assistance actions by cutting basic food baskets on indigenous lands, increasing violence, malnutrition and vulnerability to Covid-19. It did not execute the Covid-19 budget by receiving more than 11 million in emergency resources for the protection of indigenous peoples and spending less than half (39%). Available at: COVID-19 and the Indigenous Peoples (socioambiental.org). Accessed on: May 3, 2021.

[252] Technical Report 4/2020 from SESAI guided health professionals to treat respiratory syndromes without taking the test to prove the coronavirus. Informe ignored the community coexistence of the indigenous tribes.

Indigenous Peoples of Brazil (APIB) and six other Political Parties, filed an action in the Supreme Federal Court of Action for Failure to Comply with Fundamental Precept No. 709, seeking answers to governmental omissions regarding the fundamental rights and guarantees of indigenous peoples during the Covid-19 healthcrisis.

3. Indigenous Life And Supreme Federal Court: The Mirror of Justice And Some Conclusions

Since the colony, the law recognized that the Indians were masters of their lands. Although the theological and legal dispute of the sixteenth century asked who the Indians were, why they were not in the Bible and whether they were descendants of the Jews because they were also worshipers of the bath, Spain and Portugal entered into the legal consensus that the Indians were lords of their lands. Being in possession and ownership in the law, however, did not prevent the colonization, expropriation of these lands and the indigenous genocide that occurred in Brazil in phases.[253]

Starting in the 19th century, when eastern Brazil had already been colonized andthe indigenous populations of this area practically extinct, the 1910s highlighted colonization in southern Brazil, when Germans and Italians installed what they called "civilization" there. In the 1940s, already under the Presidency of Getúlio Vargas, the center-west had an accelerated assimilation, becoming up to this day a center of battle for the Guarani, Kaiová and Terena peoples. The Amazon was not the focus of colonization until 1970, when the Military Dictatorship, especially after the AI-5 andthe 1970s, initiated a colonization plan in the region. FUNAI - Fundação Nacional do Índio (National Indian Foundation), created in 1967 by the military and part of the colonization plan, was associated with the Ministry of the Interior, whose developmental goal was the road construction plan along the north and northeast of Brazil. The last stage of indigenous assimilation (invasion) started there.

The 1988 Federal Constitution is a milestone in Brazilian indigenous history. Before it, indigenous politics and indigenous legislation were assimilationist, in the sense of the eternal

[253] The ideas contained in this paragraph and in the following ones were extracted from an interview by anthropologist Manuela Carneiro da Cunha, entitled "Daily life of indigenous peoples in present-day Brazil", 2017. Available at: Manuela Carneiro da Cunha: Daily life of indigenous people in present-day Brazil - YouTube . Accessed on: May 4, 2021.

search to bring the Indians to what was considered the true civilization. Darcy Ribeiro[254] demonstrated in his work that this idea did not work. When the Indians were culturally assimilated in the cities, they became the fifth or sixth population, being completely surrendered to the peripheries of society. The Constituent Assembly changed this idea of cultural assimilation to the idea of coexistence, with fundamental rights and guarantees for indigenous peoples provided for in a specific chapter of the Constitution.[255]

ADPF 709 is a victory. Only with the Federal Constitution of 1988 did indigenous peoples become subjects of rights and had the right to postulate their interests recognized in court. With ADPF 709, for the first time, indigenous people wereable to go to the Federal Supreme Court and postulate, in their own name and defendingtheir own right, through their own lawyers, a constitutional jurisdiction action.

ADPF 709 postulates the intervention of the Federal Government in the protection of indigenous peoples through two distinct plans: the Sanitary Barriers Plan containing measures to protect and promote the health of isolated and recently contacted indigenous peoples, extremely vulnerable to Covid-19, and a General Plan for Confronting and Monitoring Covid-19 containing measures aimed at the health ofindigenous peoples in general.

In theory, the Sanitary Barriers Plan for isolated indigenous peoples has effectively advanced. The General Plan for urgent Coping, however, took more than a year after the request made at the Supreme Federal Court for ratification. Only in March2021, after the presentation of the fourth version of the plan, Minister Roberto Barroso partially approved it, considering it a precarious version and which did not correctly comply with the determinations previously made by the Court to the Federal Government. For Barroso, there was a "profound disarticulation" on the part of the bodies involved in formulating the document.

Still, the partial approval occurred with reservations, among which was that the Ministry of Justice and Public Security should indicate, within 48 hours, those responsible for detailing and carrying out the actions of access to drinking water and sanitation. The decision opened the deadline for the Ministry of Justice to coordinate and present a Plan for the Execution and

[254] Anthropologist, historian, sociologist, writer and Brazilian politician, his work focused on indigenous people and education in Brazil.
[255] Chapter VIII "Dos Índios", Title VIII "Da Social Order".

Monitoring of the General Plan, which details the actions to be taken, highlighting seven points: distribution of basic foods; access to drinking water and sanitation; health surveillance and information; comprehensive and differentiated assistance; availability of personnel; equipment and infrastructure in general; governance regarding the execution of the plan.

As for the approval of the part of the Plan that deals with the isolation of indigenous lands by invaders, the STF did not approve it. It determined a new Invasion Isolation Plan to be presented by the Ministry of Justice and the Federal Police, with the Federal Police being responsible for preparing the plan's planning and execution. Barroso welcomed the request for priority vaccination of indigenous peoples from unapproved lands and those who live in the city without access to SUS, placing them on an equal footing with the indigenous peoples in the villages when determining the suspension of FUNAI Resolution 04/2021 that established "hetero-identification criteria" for assessing the self-declaration of identity of indigenous peoples. The measure had been criticized by several civil society organizations as an undue and unconstitutional restriction on the rights and identity of the original peoples, with direct consequences for the immunization policy of these populations.[256]

Forgotten, legal victory is the last hope of these peoples. The words of a Yanomami shaman that *"All this destruction is not our mark, it is the footprint of the whites, the trail of you on earth"* clearly represents the current situation of the indigenous community in Brazilian territory. The indigenous land of Arariboia, the last corner of the forest in Maranhão, territory of the Guajajara, Kaapor and Awa-Guajá ethnic groups, cannot count on state protection. Those who protect what remains of those original lands are the "Guardians of the Forest" who look for loggers and other invaders and report them to the authorities. In the words of Laércio Guajajara, killed in 2019 after an ambush in the Land of the Governor, "they want to kill everyone who is tokeep our land to produce soy, sugarcane, biofuel that they want to produce. They want to take the oil they have inside the land, gold. We are a deterrent to them.[257]

[256] The manifestation of the following entities were essential to the revocation of the FUNAI Resolution, which denounced to the STF the unconstitutionality of Resolution 04/2021, claiming to be excluding indigenous people not inhabited. The National Human Rights Council requested in the action that the entire self-declared indigenous population should receive the policy contained in the Plan of the Union, without leaving out people who are not living in villages.

[257] Sayings made by Laércio Guajajara to the documentary "The most threatened tribe in the world", from the NGO Survival International. Available at: The most threatened tribe in the world - Films from Survival International (survivalbrasil.org). Accessed on: May 11, 2021.

The state's omission has hurt since long before the pandemic. The pandemic arrived to complete the indigenous extermination. The Supreme Federal Court, like the "guardians of the forest", acts in the face of omissions, as if the law and justice were shields of protection and means of reparation for the countless executive and legislative failures that we have perpetuated against these minorities for centuries. ADPF 709 is an activist judicial response to these omissions. This is because theCourt opted, in the face of a situation of complete governmental omission, to expand theconstitutional meaning and scope in order to determine that a demand from an extremely vulnerable social layer be urgently met, in order to protect the right to life.

The idea of judicial activism is associated with a broader and more intense participation of the Judiciary in the realization of constitutional values and purposes, with greater interference in the space and in the performance of the other two powers. The activist stance was manifested, in the present case, in view of the imposition of conducts on the Public Power, notably in matters of public policy related to indigenous people, whose proportion of mortality due to Covid-19 exceeds that of non-indigenous people by 16%.

The Supreme became, in fact, the last "guardian of the promises", an expression created by Garapon[258] "expecting everything from justice, a total justice, in which the judge should not be content to say what is fair, but it must instruct and decide,approach and keep distances, reconcile and resolve, judge and communicate". Justice, infact, is "a scene that offers an inexhaustible reservoir of images and meanings in which a restless democracy seeks its foundations", and that "allows democracy to represent itself in the two senses of the term, that of understanding and that of putting themselves on the scene, offering "a world that becomes obscure for itself and for a society that is blind in its projects, the opportunity to look in the front."[259]

In the case of the Covid-19 pandemic and the indigenous community, it is as if the colonizer again presented the Indian with "the mirror" of Justice, with the promise that it would be worth the gold, and distract him to enable the invasion of his lands. Justice, in this case, is only a means of purchase and distraction, behind which there is a power of action and execution capable and eager to destroy. The Supreme has been the last hope of these peoples, the lifeline and "the means of making visible an invisible population, abandoned to its own fate, of which

[258] Garapon, 1999, p. 24.
[259] Garapon, 1999, p. 48.

it has been embracing hopes, pointing out enemies and fixing anguish", as well said by Garapon when defining "the new sceneof democracy" in his book Le Guardien de Promesses (1999, p. 49). Between mirror and lifeline, we are left with the perception that, for the Brazilian indigenous communities, unfortunately, the glass is about to break.

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The Legal Vulnerability and Invisibility of the Roma people in Brazil in times of COVID-19 Pandemic

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This paper presents my reflections, as a result of my PhD research in Law in the PhD Program at Estácio de Sá University, under the supervision of Professor Fernanda Duarte.

I argue that there is a legal invisibility of Roma people[260] in the Brazilian legal field, as an ethnic minority and vulnerable group. In fact, compared to other vulnerable minorities or groups, they seem to be the most invisible among the invisible. There is a lot of research in Brazil, in the field of Law, on various ethnic minorities or on vulnerable groups, such as LBTQI +, Afro-Brazilians, Indigenous peoples, Quilombolas, disabled people and women, some of which even have explicit constitutional status in the text, but very little material on Roma people.

The COVID-19 pandemic has exacerbated this invisibility and intensified the vulnerability of these groups.

In order to explore this hypothesis, I adopt the Methodology of Semiolinguistic Discourse Analysis, of French matrix, with its explanations of the "said", the "unspoken" and the "discursive formations" of the legal-political discourses.

In order to highlight this supposed invisibility, I try to guide my investigation through the following guiding questions: do the demands of this ethnic group reach the judiciary or not? If there are judicial decisions, what are those decisions? Are there legal references about Roma people? Are there academic legal papers about them?

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My main objective is to interrogate these texts and discourses and describe how the Brazilian legal field can give the Roma people visibility.

Despite the supposed legal invisibility of the Roma people in Brazil, we are a country that curiously has had two Presidents of Roma origin. The first one was Washington Luís (1926 - 1930), from the Calé group. And the second one was Juscelino Kubitschek (1956 - 1961), who was 50% Roma Czech on his mother's side.

The arrival of Roma people in Brazil took place around 1574, when the Portuguese crown expelled the Calon of Iberian origin, who left Spain, went to Portugal and were later exiled to Brazil. Later, from the 19th century, the Romani peoples arrived.These people who spoke the Roma language, were divided into several sub-groups, with their own denominations, such as Kalderash, Matchuaia, Lovara, Curara, Ursar and, in same time, but in a much smaller number, the Sinti, both war refugee immigrants. These groups of immigrants brought with them their metal working skills as coppersmiths, blacksmiths, goldsmiths and a rich and vibrant culture that has been readily absorbed into that of contemporary Brazil. Nevertheless it is true to say that their presence in the world is surrounded by persecution, prejudice, hatred and segregation.

In the 18th century, when they arrived in Minas Gerais, the government ordered that all Roma people who were in the province be sent to Rio de Janeiro, and from there, deported to Angola. Every citizen of Minas Gerais had the legitimacy to give a Roma people arrest warrant.

In São Paulo, in the same eighteenth century, the expulsion of gypsies was also ordered, as it was understood that the group was "harmful to the population because of playing games and other disturbances".

And so, since the arrival of the Roma people in Brazil, they have faced expulsion from the places where they try to plant roots, which leads them to migrate from place to place, because their presence was and unfortunately is still regarded as unwelcome. Nobody wants to see them in their territories. Not wanting to see them is not wanting to give voice and visibility to the Roma people people. It is thus the case that the nomadic characteristic of the Roma people is a direct result of the prejudices and persecutions they have suffered and continue to suffer. Nomadism, therefore, is not a characteristic, but a consequence of their segregation.

It is estimated that the number of nomadic, semi-nomadic and settled Roma in Brazil today is around 1.5 million. However, this data is not reliable, because, until today, neither the IBGE or any other demographic or scientific research institution has carried out a survey of the Roma population.

I do not question in my research whether there is racial prejudice and discrimination against Roma people people. This is evident as as we can see from United Nations Committee on the Elimination of Racial Discrimination General Recommendation No. 27, of 08/16/2000, which lists a series of measures that States must adopt in order to combat discrimination against Roma communities. These include action:

I. to promote respect and overcome prejudices and negative stereotypes against the Roma people community;
II. implement appropriate measures to ensure that members of Roma people communities have access to effective judicial measures in cases related to violations of their fundamental rights and freedoms;
III. develop and implement policies and projects aimed at avoiding the segregation of Roma people communities with regard to housing, considering Roma people communities and associations as partners in the development of housing construction, restoration and maintenance projects;
IV. avoid the installation of Roma people communities in isolated camps and without access to average assistance and other basic needs;
V. ensure that Roma people have equal access to health care and other social security services, eliminating any discriminatory practices in this area;
VI. initiate and implement programs and projects in the field of health for Roma people, especially for women and children, in view of the situation of vulnerability experienced by them, due to extreme poverty, low level of education and cultural differences.

Considering this recommendation and other regulations, such as Decree no. 7,037, of December 21, 2009, which instituted and instituted the National Human Rights Program - PNDH-3, the Federal Public Attorney edited RECOMMENDATION No. 14/2018 for:

1. Promotion and implementation of public policies aimed at Roma people, with the objective of guaranteeing their constitutional and legal rights.
2. Promotion and appreciation of Roma culture, such as educational campaigns, edition of booklets and teaching materials related to Roma people, dissemination in the media and promotion of cultural events related to Roma people.

Corroborating these recommendations, there is a bill, PLS 248/2015, for the creation of the Roma Statute that determines that it is the duty of the State and society to guarantee the Roma population the realization of equal opportunities, the defense of individual ethnic rights, collective and diffuse and to combatdiscrimination and other forms of ethnic intolerance.

May 24th was established as the National Day of the Roma, by means of a decree signed by then President Luiz Inácio Lula da Silva, in recognition of the contribution of Roma people to the formation of Brazilian history and cultural identity.

In the current Brazilian government, on January 15th 2019, Minister Damares Alves, from the Ministry of Women, Family and Human Rights, defended support for the Roma populations of Brazil. She recognized the need to protect this ethnic group and their traditions. Visibility for Roma people is necessary to combat prejudice. For her “knowing the history of the country's ethnic groups is important to combat marginalization”.

Despite the existence of these recommendations, of the bill, of Minister Damares' speech and of the existence of a national day recognizing the value of the Roma people, Brazilians of Roma ethnicity continue to live without public policies and effective programmes for improving their conditions of life and combatting the prejudice that they routinely still face. In the BBB - Big Brother Brazil - television program, in 2016, a woman known as Dona Geralda said: “What a bad smell this room is. It looks like a Roma tent!”. This allegation generated widespread criticism ion the part of the Roma and wider community and alike and continues to attract negative commentary on social media networks.

The racial prejudice that the Roma community is subject to seems to have only been recorded in videos and social networks, and has not yet been adjudicated upon by the judiciary. Still reflecting this atmosphere of prejudice in Brazil, we saw, in a video recorded at the ministerial meeting on April 22nd, 2020, that the Minister of Education, Abraham Weintraub, declared that he dislikes the terms "indigenous peoples" and " Roma people "because for him,

there is only "one people in this country". According to Weintraub, it is necessary to end "this business of peoples and privileges".

This environment of prejudice and lack of access to fundamental rights has deepened especially in the scenario of the COVID-19 pandemic. As can be seen in a number of reports that end up giving voice to this minority, Roma peoples in Brazil are suffering from repossession suits or even expulsion from their camps by the police, on the basis of a widespread belief that they are dirty and transmitters of the CORONA vírus.

A recent news item published by a group of researchers on indigenous populations from the Federal University of Santa Catarina[261] reported that

> "In a moment of total fragility, in the midst of this pandemic, we have news that in the last 24 hours more than 100 Roma families have been displaced in the municipalities of Dois Vizinhos-PR and Guarapuava-PR. With the presence of police officers and representatives of the municipal governments of the respective municipalities, the Roma chiefs were ordered to withdraw with their camps from the occupied territories."

The National Union of the teachers of higher education institutions, by the ANDES-SN has published a note reporting Romaphobia (or Antiziganism) and violent clashes between Roma communities and public authorities.[262]

> "In early February of this year, the Nova Canaã camp, located in the region of Rota do Cavalo, in Sobradinho-DF, was invaded by armed people in broad daylight, shooting and setting fire to the tents. The attack resulted in four deaths. Due to fear and insecurity, the group was forced to leave the land, where they had been since 2014, abandoning achievements for their survival, such as vegetable garden and chicken raising."

In June 2020, the Municipality of Paim Filho, located in the State of Rio Grande do Sul-BR filed with the Sananduva District Court a repossession action aimed at evicting public

[261] MONTEIRO, Edilma do Nascimento J.**"Eu preciso ficar em casa e minha casa é a barraca!" - Famílias ciganas são expulsas de seus acampamentos no PR.** Disponível em: <(https://nepi.ufsc.br/2020/04/02/eu-preciso-ficar-em-minha-casa-e-minha-casa-e-a-barraca-familias-ciganas-sao-expulsas-de-seus-acampamentos-no-pr/)>. Acess: 20.05.2021.

[262] Diretoria Nacional do ANDES-SN . **NOTA DA DIRETORIA DO ANDES-SN DE REPÚDIO À CIGANOFOBIA E À VIOLÊNCIA DO PODER PÚBLICO COM POVOS CIGANOS**. Disponível: <https://www.andes.org.br/conteudos/nota/nOTA-dA-dIRETORIA-dO-aNDES-sN-dE-rEPUDIO-a-cIGANOFOBIA-e-a-vIOLENCIA-dO-pODER-pUBLICO-cOM-pOVOS-cIGA/page:4/sort:Conteudo.updated/direction:DESC.> Acess: 20.05.2021

property occupied by a group of Roma who did not have authorization from public and health agencies to occupy those lands"[263]:

> "We communicate to the entire population Painfilhense that the Municipal Administration, as soon as it learned about the installation of a group of Roma people in Paim Filho without any authorization from public agencies and / or health, sought to take the necessary and legal steps to vacate the public space.
>
> Thus, still on Monday morning, June 1st, the Legal Department of the Municipality of Paim Filho filed a repossession suit with the Court of Sananduva aiming to vacate the property.
>
> Such action by the municipality is due to the current health situation resulting from Covid-19 and aims to protect the population Painfilhense and safeguard public health."

In addition, because they live in camps that often lack urban infrastructure, they do not have access to the internet, which has made it impossible for them to participate in the Emergency Assistance Program sponsored by the Brazilian government and which required them to be able to use a cell phone application, and have access to running water to wash their hands.

I still have to continue collecting my data and conducting my analyses, but we can see in these brief reflections that the invisibility and vulnerability of the Roma people has been confirmed as a hypothesis. Thank you very much for your attention and I hope at our meeting next year to present my final results.

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[263] **CIGANOS SE INSTALAM EM PAIM FILHO E MUNICÍPIO PROTOCOLOU AÇÃO DE REINTEGRAÇÃO DE POSSE COM O OBJETIVO DE DESOCUPAÇÃO DO IMÓVEL.** Disponível em: <https://www.cristalinafm.com.br/noticia.php?id=4445>. Acesso em 10.05.2021.

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