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[1], 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 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[2] and the period known in Brazilian history as the New Republic (*Nova República*, in Portuguese) began. Altogether the military regime lasted for 21 years.

[1] 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)

[2] 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.

This period[3] 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[4]), 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 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[5].

[3] 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).
[4] 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).
[5] 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.

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)[6] in order to decide about its constitutionality. In a very controversial decision delivered in 2010[7], the Court, by a narrow 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”.

[6] 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

[7] “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 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)

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.[8]

Although the Supreme Court has delivered its opinion[9], 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[10], which deals with 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[11] 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[12].

[8] 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".

[9] 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.

[10] 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.

[11] 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

[12] 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.

> 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.

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[13]), an anthropological challenge rises as well.

[13] "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)

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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