Transitional Justice in Brazil and Uruguay: different solutions to the tension between human rights and democracy

Christian Jecov Schallenmueller

Abstract: The issue of the tension between popular sovereignty and law has special relevance in the field of Transitional Justice. The rulings of the Inter-American Court of Human Rights (IACtHR), e.g., on the need to hold former human rights violators criminally accountable has been challenging policies of many countries that have designed some kind of criminal exemption for state agents who committed crimes during authoritarian rule in those countries. Taking this context into account, this paper aims at assessing how Brazil and Uruguay have adopted different positions concerning the tension between the obligation to convicting perpetrators - as determined by the IACtHR - and domestic legislation that guarantees impunity. The author intends to assess whether and how decision-makers on the implementation or blocking of Transitional Justice’s normative expectations in those countries issued recommendations and rulings of the Inter-American System of Human Rights. In order to do it, the author will analyze particularly: 1) in Uruguay, the creation of a law that revoked, in 2011, the Law of Expiry, and, in Brazil, in the same year, the creation of a Truth Commission; 2) the arguments deployed by the Supreme Courts of both countries complying with or repealing decisions of the IACtHR.

Keywords: Transitional Justice; Brazil; Uruguay; Amnesty; Ley de Caducidad

Introduction

Within a country, the expectations for memory, truth, justice, reparation and institutional reform, which are the main normative axes of transitional justice, are linked to internal and external demands to some extent inspired by experiences of transitional justice in other countries. The experience in one place on the planet feeds the horizon of normative expectations of the field also elsewhere. In this sense, it is important to try to

1 Working paper presented for the General Conference of the European Consortium for Political Research (ECPR), taking place in the University of Glasgow, from the 3rd to the 6th of September, 2014.
2 Ph.D. candidate in Political Sciences at the University of São Paulo (USP), Brazil, grantee of the CAPES-Fulbright Program at the New School for Social Research in New York and grantee of the São Paulo Research Foundation (FAPESP) in Brazil.
think these experiences in a comparative perspective, whether from an approach that includes several experiences, which therefore has the advantage of a broader comparative scope, either by a more detailed approach, which examines more deeply the historical development of fewer experiences, which is the case of this text. Much of the demands coming from political movements would hardly have the degree of articulation (and similarity to the demands found in other countries) if it were not for the ongoing context of internationalization of law.

Until the postwar period, a still predominantly Westphalian era, the fair was generally reputed to the historical building of domestic law. At best, with the aggregation of non-strictly legal criteria for assessing the legitimacy of laws: i.e., that they have been democratically created or not. On the other hand, international law on human rights has asserted itself in a post-Westphalian era, eventually even challenging legalities that could be even considered as (some more, some less) democratic. One of the outcomes of this process is the assertion of a vision of the state as a member of the international community, with a flexible sovereignty, which recognizes the primacy of human rights.

The debate on the tension between constitutionalism and human rights on the one hand and popular sovereignty on the other is well known. Human rights and Constitution, as they enjoy a legal status superior to all other laws enacted by majority, introduce limits to the autonomy of popular sovereignty, a central concept for democracy. The main argument for maintaining the privileged legal status of the Constitution and human rights in a democracy refers to the preservation of individual and collective rights of minorities, without which democracy itself would be threatened. The so called “neo-constitutionalism” establishes a larger view of democracy, adding to the principle of majority the need to ensure the rule of law (see Dahl, 1989, Maravall and Przeworski, 2003; Elster and Slagstad, 2001).

Nevertheless, the issue of the tension between popular sovereignty and law gains special relevance in the field of transitional justice. This is because, unlike the old hesitations of authors related to the field of transitology concerning the viability of trials, like Huntington (1991), O’Donnell, Schmitter and Whitehead (1986), Linz and Stepan (1996), among others, transitional justice nowadays stands out among its main

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3 Though from a different methodological perspective, the philosopher Jürgen Habermas, for example, dissolves the contradictions between human rights and sovereignty of the people viewing them as co-originating. For Habermas (1998), human rights do not compete with popular sovereignty because they coincide with basic conditions for the practice of a public and discursive formation of will.
normative principles the need to prosecute and condemn former human rights abusers. And this obligation arises as an imperative in spite of many amnesties that many states granted or grant to these offenders before, during or even after transition between political regimes.

Given that there are very distinct social, political and cultural realities in different countries that have faced transitions from authoritarian to democratic regimes, it is not possible to speak of a single model of transitional justice. Even so, in recent decades, theoretical discussions on the subject deepened, as well as the jurisprudence of international tribunals. With the settling of some patterns in recent years, it was possible for literature to systematize a set of four basic requirements: 1) the reform of political institutions, 2) the assertion of the right to truth and memory, 3) the prosecution and sentencing of public agents who violated human rights, and 4) the economic and symbolic reparation for victims of political repression.

It means that transitional justice holds a sense of universal justice, which seeks to assert itself in a way that keeps it somewhat safe from democratic deliberation. In this sense, the increasingly cogent understanding of the IACtHR on the need to apply criminal sanctions to former perpetrators, e.g., challenges, within its jurisdiction, policies of many countries that created some kind of immunity for human rights violators.

In an article I wrote together with Raphael Neves and Renan Quinalha (2014), we tried to show that the course of the Uruguayan transitional justice is emblematic of

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4 Some say there are five or even six requirements. Either way, all of them are considered in this following series. See, e.g., Teitel (2000), Roht-Arriaza and Mariezcurrena (2006) and the systematization of the IACtHR in the case of Velásquez Rodríguez vs. Honduras.

5 Both from the point of view of law, expanding the civil and political rights, and from the point of view of human resources, so that, gradually, at least the government and the state bureaucracy replace old human rights violators in their staff.

6 There are basically two objectives related to this mechanism: the elucidation of how the repressive apparatus operated, seeking to identify violators and those who fought against repression, and the development of a culture of disapproval toward authoritarianism and arbitrariness. For a comparative study on various Truth Commissions, see Hayner (2001).

7 Besides the aspect of retributive justice in the application of criminal and/or administrative penalties against those who committed crimes, with the end of impunity for human rights violators occupying important positions in the previous authoritarian regime, the new order sets up a break in past arbitrariness, creating social credibility to establish the rule of law, under which no one can be immune from law and human rights enforcement.

8 Through the fulfillment of this obligation, the regime that succeeds authoritarianism takes responsibility for past violations. Besides the aspect of corrective justice for individuals and families whose lives have been harmed (in different ways: from exile, dismissal from public office, even murder, enforced disappearance and torture), economic reparation to victims of violations also has the purpose to make it clear that, in the new regime, any victim of arbitrariness on State’s behalf will be compensated. On the other hand, symbolic reparation aims at reversing the old accusation of “terrorists” and such stereotypes that might be assigned to those who fought or resisted in different ways against authoritarianism.
this kind of tension. Actually, the Uruguayan case could be interpreted as a hard case in that sense. In Uruguay, the Ley de Caducidad (or Law of Expiry), which exempted from criminal liability state agents who committed crimes during the dictatorship, had been ratified by two direct popular polls. Still, in the Sabalsagaray case, the Uruguayan Supreme Court (Suprema Corte de Justicia - SCJ) declared the invalidity of that exemption. And in October 2011, the country’s Congress issued a law declaring the non-application of statutes of limitations to crimes committed during the dictatorship, hence revoking the Law of Expiry. However, contrary to the determination of the IACtHR for the country, even more recently, in 2013, the SCJ also considered this law of 2011 as unconstitutional and then declared that the crimes committed by public officials during the Uruguayan dictatorship have already reached the statutory limitation term.

In Brazil, the Amnesty Law was established in 1979, still during the dictatorship, when Congress had its representativeness and autonomy limited by compulsory bipartisanship and by constant threats to members of the opposition. Even so, a decision of the Brazilian Supreme Court (Supremo Tribunal Federal – STF), in 2010, declared the Amnesty Law as constitutional under the new regime. The main arguments of the constitutional judges referred to the “democratic” aspect of the amnesty in 1979 and to the principle of non-retroactivity of laws that typified crimes only after transition, which is, e.g., the case of torture in Brazil. Moreover, trying to comply with a requirement of the IACtHR, the Brazilian government passed in Congress, in 2011, a law creating a Truth Commission, which aims at clarifying the history of violations until 1988, when the new Constitution was promulgated.

In the following topics, the author will try to detail and problematize these processes in both countries.

**From the Amnesty Law to the creation of the Truth Commission in Brazil**

In Brazil, according to literature, institutional reform should be the mechanism of transitional justice which would have seen more progress so far. Although criticized in many respects, reparation also took place. Nonetheless, the right to truth and memory
and the prosecution and sentencing of perpetrators had not advanced at least as far as the major works on the subject could have analyzed.  

From 2010 on, among other things, a National Truth Commission was created and the Brazilian Supreme Court faced an opportunity to reverse the persistent immunity of the military government personnel who committed crimes. In this regard, two of the four transitional justice mechanisms were triggered in recent years, intensifying the debate on the topic in the national policies’ agenda.

The Amnesty Act, enacted in 1979 still under military rule, is probably the most important milestone for transitional justice in the country. At the same time that it provided a reinvigoration on the national political scene by allowing the return of the exiled, releasing from prison and returning civil and political rights to many others, the Amnesty Act initiated the idea – which would go on hegemonic over time – of a reconciled democratization in Brazil. According to its terms, supporters and opponents of the military regime could begin the process of forgetting past violations, re呸ting each other free of any kind of criminal or administrative liability. This "pact" of "forgiveness" and forgetfulness would be essential to make way for a secure transition, which would not occur, under this interpretation, if the immunity of state officials who committed crimes during the dictatorship would also not be ensured.

For Eloisa Greco (2003), the 1979 amnesty expressed the internal logic of the Doctrine of National Security as it excluded the guerrillas from its benefits: instead of an effective reciprocity, the Act configured a complete amnesty for the agents of repression, but a partial amnesty for members of the opposition. This incomplete reciprocal amnesty would not exempt violent crimes committed by armed opposition groups. In a way, this incomplete reciprocity of the 1979 amnesty would eventually be based on reasons similar to those used to justify the convenience of the military coup in 1964, which, through the Institutional Act number 1 (AI-1), promised a return to

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10 "Pact" and "forgiveness" are placed in quotation marks here because they do not refer to the typical political conceptualization of these terms. A pact or agreement requires a balance of power between the parties, which was not the case between government and opposition during the military regime, even at the time known as "distension" (threats of dismissal from office over more radicalized opponents were still in vogue, to say the least). Likewise, forgiveness, in its political sense (discussed, e.g., by Hannah Arendt, 1998) does not mean forgetting. One can not forgive effectively if the power to punish is interdicted. Forgiveness only commutes a sentence into another, e.g., a criminal penalty in duty to disclose the truth. On the concept of forgiveness applied to transitional justice in South Africa, see Teles (2007).
"normalcy" and "order" through repression of "subversive groups" that threatened the peace and democratic institutions of the country.

Throughout the 1980s, the decade of the Brazilian democratization, the idea that the Amnesty Act catered to popular demand was cultivated. But even after the amnesty, arrests and arbitrary repression continued. A familiar example relates to the repression against strike movements of the unions of the ABC Paulista, at which time the former president of Brazil, Lula, was arrested, also for political reasons. Another peculiarity of the Brazilian amnesty relates to the fact that it did not put an end to dictatorship. In fact, it was only a first step on the long move towards democracy under the tutelage of the military regime.

In 1985, along with the convening of the Constituent Assembly, the Congress received from the transitional Presidency a constitutional amendment bill dealing with the amnesty granted to the military. That would have been enough, according to Mezarobba (2006, p. 56), for the appearance of a group in Congress that would link the 1979 amnesty to the Constituent Assembly. Once the 1988 Constitution turned out to be enacted with a provision on the Amnesty Law, the latter would be considered to hold status of constitutional rule.

In the years that followed democratic transition, only from the Fernando Henrique Cardoso’s governments on transitional justice in Brazil has been again enlarged. The law n. 9.140/1995, which established the Special Commission on Politically Motivated Deaths and Disappearances, and the law n. 10.559/2002, that created the Amnesty Commission, brought advances such as the recognition of violations committed by state agents and the consequent economic compensation for relatives of the disappeared or murdered under the responsibility of public officials (Mezarobba, 2010, p. 111).

Through economic compensation, there was recognition of state responsibility towards the victims of political persecution. But Janaina de Almeida Teles (2005, p. 08) points out that the “Law of the Disappeared” (as the law n. 9.140/1995 would be known as) was limited by the parameters of the Amnesty Law and its interpretation as “reciprocal”. Article 2 thereof, e.g., states that the provisions of the law and its effects should be guided "by the principle of national reconciliation and peace", which could only be obtained through the “reciprocity” of the amnesty.

In recent years, relatives of the disappeared increased their pressure on the federal government to create a truth commission. Its implementation, which took finally
place in 2011, was primarily driven by two factors. The first one was the National Program of Human Rights 3 (PNUD-3), established by presidential decree in 2009 after a series of public hearings where civil society movements had the right to speak and be heard. As a result of this process, the PNUD-3 provided for the establishment of a truth commission that would have more prerogatives and autonomy than the one that ended up being created.

The initial project was not implemented until 2010, when the IACtHR, in the wake of the case of Gomes Lund and others vs. Brazil, urged the country to speed up the process of creation of a truth commission. In response to this exhortation, and using the faster possible legislative process, the federal government approved some revisions to the original text giving less autonomy and prerogatives to the work of the Commission, and finally passed the bill in Congress.

The law establishing the National Truth Commission (CNV) provides the purpose of examining and clarifying, within the Ministry of Internal Affairs of the Presidency of the Republic, mass human rights violations committed during the period from 1946 to 1988, in order to promote "national reconciliation". Also inserted in the law that created the Special Commission on Politically Motivated Deaths and Disappearances in 1995 as well as in the technical argumentation of the constitutional judges in the review that considered the Amnesty Law as constitutional, and having its origin in the Amnesty Law itself, the purpose of "national (re)conciliation" reappears as central in the development of transitional justice in Brazil. Given this goal, and referring to the need for observance of the Amnesty Act, the law establishing the National Truth Commission also ensures that the work of its members will not have juridisdictional nature.

Once created, the Commission has the prerogative to request documents and information to agencies of the government, even in any degree of secrecy, but may not disclose the contents of these documents and information to third parties. At the discretion of its members, the Commission may maintain the confidentiality of some of its activities to protect the intimacy and the image of people involved in degrading circumstances that may be subject to the Commission’s investigations.

Considering what they regarded as limits of the bill, the Committee of Relatives of Dead and Missing People and the Women's Collective for Truth and Justice drafted a petition that suggested some changes to the project. Among these changes, the petition pleaded: the delimitation of the scope of the Commission's investigations to the period
of the military regime; the increase in membership\textsuperscript{11}; the replacement of the term "national reconciliation" by "consolidating democracy"; and autonomous budget and further injunctive prerogatives for the Commission.

Despite these criticisms, one may recognize that the creation of such an institution in Brazil is an important progress in the development of the process of transitional justice in the country. Committee members will have the opportunity to at least challenge the ordinary sense about what finally received the title of a "ditabrandana"\textsuperscript{12} (a smoother dictatorship) in the country. As emphasized in the technical advise\textsuperscript{13} of Senator Aloysio Nunes (PSDB-SP), member of the Committee on Constitution, Justice and Citizenship of the Senate, which was responsible for the bill's appreciation before being approved by Congress, besides showing the authorship of torture, killings, enforced disappearances and concealment of corpses, the Commission will have "a broader task: to identify and publicize the operation of the enforcement structure built during the dictatorship".

Nevertheless, the law creating the Truth Commission restores some of the essential parameters of the "political pact", which set the amnesty as essentially elaborated still during the last military government.

The fact that the Truth Commission will not have the power to punish crimes committed by state agents would not be objectionable from the normative perspective of transitional justice, since most truth commissions in the past did not have jurisdictional nature. Some of them had only the prerogative of forwarding documentation to judicial processes that eventually took place in Courts of Justice (see Hayner, 2001; Hafner and King, 2007). The problem lies in the fact that, if its task will be to elucidate truth, the text of the law would not need to engage on a new guarantee for public agents, nor reiterate the goal of "national reconciliation", which refers to the objectives of the Amnesty Act. Hafner and King (2007), e.g., show that truth commissions unlikely provide "healing" and "reconciliation": its effectiveness is generally linked to its immanent goal of elucidating factual truth.

\textsuperscript{11} Priscilla Hayner (2001), for example, shows that one of the factors that influence the effectiveness of truth commissions is the number of members: the longer the period and the amount of human rights violations to be investigated, the greater should be the staff of the Commission. Among the most successful commissions in her study, the majority had hundreds of members.

\textsuperscript{12} Distorting the definition of the term as originally formulated by O'Donnell, Schmitter and Whitehead (1986), the famous Editorial of the newspaper Folha de S\’ao Paulo on February 17\textsuperscript{th}, 2009, is here only as representative for the majority of the media opinion in Brazil on the subject.

\textsuperscript{13} It can be found on: http://legis.senado.gov.br/mate-pdf/98119.pdf.
The work of the National Truth Commission is still going on, but to the extent that its first partial reports began to be published and public statements began to gain some prominence in the work of the Commission, the first reactions to its performance began to emerge. The most systematic effort analyzing the work of the CNV done so far was conducted by ISER (Institute for the Study of Religion). While recognizing the progress that the Truth Commission represents, particularly with regard to the public recognition of violence and state terror as a political model during the dictatorship, the ISER has made a consistent critique to the work of the Commission.\textsuperscript{14}

One of the main issues highlighted by ISER is the lack of a consistent methodological planning. The CNV has conducted research on various sources such as public and private files, interviews and hearings. But it seems not to systematize the information gathered so far in a database that would allow its personnel to organize information to support quantitative and qualitative analyses.

Also with respect to about 20 partnerships that the CNV made in its first year of operation, there is the question about how tasks are divided and if there is some kind of standardization of procedures and methods of systematization of the information collected. The ISER also criticizes the lack of consideration by the CNV of the restorative dimension that could take place in the testimonies given by the victims.

I would add that the Truth Commission so far also does not take advantage of the occasion of the testimonies provided by public agents involved in serious human rights violations to require from these agents what Rainer Forst (2012) calls "right to justification" and my colleague Raphael Neves consider as a form of accountability alternative or auxiliary to criminal liability in transitional justice processes (see Neves, 2014).

Although, it is important to stress that, in this regard, as shown by Hafner and King (2007), the mechanisms of transitional justice are most effective when articulated. In South Africa, for example, within the Truth and Reconciliation Commission, the disclosure of factual truth by the testimony of those who committed crimes against humanity during \textit{apartheid} was stimulated largely by the likelihood of criminal sanction that the offender could undergo if he or she would not have contributed to revealing his or her deeds. In Brazil, so far, the possibility of criminal liability is very low due to the declaration of the constitutionality of the Amnesty Act by the Supreme Court. So, in

\textsuperscript{14} See the ISER report on: http://www.iser.org.br/pdfs/II_relatorio_CNV-ISER_WEB_160713_ALT.pdf
this sense, the likelihood of cooperation and justification through these testimonials is low from start on.

Another feature that has also been criticized was the communication made by the CNV with civil society so far. The report of activities is quite succinct, without records or transcripts of meetings, so that it is not very transparent how the work has been done. There are also reports that there is a lack of integration among the commissioners, who would work in small groups with little coordination between each other. In short, there would be a democratic deficit in an institution that has among one of its prime objectives rightly affirm democracy as a positive, universal and desirable value.

**From the Law of Expiry to the law that has revoked it in Uruguay**

Like the Brazilian case, the Uruguayan transition is emblematic of the tension between human rights and democracy, a subject that many experiences of transitional justice raise. But the Uruguayan case could be interpreted as a hard one in that sense.

In Uruguay, the civil-military dictatorship installed in 1973 under the excuse of fighting the guerrillas, especially the Tupamaros group, lasted for twelve years, reaching proportionally high numbers of political arrests, torture and other degrading treatments, also leaving a legacy of nearly 200 records of disappearances.

In some respects, the Uruguayan transition resembled the Brazilian one, since it took long for the country to deal with the normative requirements of justice and truth. Until the year 2000, the country had not yet tried agents who violated human rights during its dictatorial regime nor established a truth commission. As in Brazil, the first civilian post-dictatorship governments sought to draw a line in the past and insisted on a narrative that sanctified the national consensus (Roniger, 2011, p. 695).

The Law of Expiry, from 1986, is probably the main institutional framework of this narrative and obstacle to the implementation of the normative requirements of truth and justice in the country. For long prevailed a picture on the Law of Expiry as a secret pact that would have allowed the transition to democracy in Uruguay. The law

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15 In fact, Uruguay basically had two amnesty laws: the Law of National Pacification, from 1985, amnestied political prisoners (except those convicted of murder) and the Law of Expiry of the Punitive Intention of the State, which exempted from criminal liability state agents.
provided the exemption from criminal liability for members of the security forces involved in conducts that violated basic human rights, with the exception of cases such as embezzlement, rape, processes already under judgment at the time of its entry into force, in addition to other exceptions. The law also stipulated as a prerogative of the executive to order investigations in situations where people have been detained by military or police or in case of missing children in similar circumstances.

The Law of Expiry reproduced "the logic of facts" or "the Naval Club Pact," as the agreements between political parties and the armed forces in 1984 came to be known (Britto, 1997). The president himself, Sanguinetti Coirolo (1985-1990, in his first term) spoke of the relevance of the Law of Expiry for the establishment of a "symmetry of guilt" between Tupamaros and the military and as if it were actually based on the Spanish amnesty of 1977, which would be "a source of constant inspiration" with its "exemplary transitional process" (Sanguinetti quoted by Buriano 2011, p. 176).

But unlike Brazil, which has never seen a mass campaign to repeal or annul the "reciprocal" nature of its Amnesty Law, Uruguay, since 1989, experienced a high degree of public debate on the subject. In 1989, the first referendum in the country on the revocation or not of articles of the Law of Expiry took place. After an intense campaign, the immunity of the military was maintained by 56.7% of the valid votes.

The first civilian governments tried to convince society that the issue had already been set out once and for all, sanctifying the idea of a consensus for the sake of democracy. Military circles also expressed their satisfaction with the outcome and reiterated the narrative on the historical justification for the strategies adopted during the dictatorship (Roniger 2011, p. 702). Moreover, the most remarkable impact was perhaps the fact that the outcome of the referendum was one of the main factors that, for over ten years, contributed to close the path to legal attempts to overthrow that immunity.

But instead of disappearing with the outcome of the referendum of 1989, the debate on human rights abuses intensified over the continued mobilization of historical memory by civil society and by occasional and intermittent state policies. Especially between the late 1980s and throughout the 1990s, a certain mismatch took place between the agendas of the federal governments on the one hand and the engagement of civil society and intellectuals for memory and justice on the other. The speeches of President Sanguinetti, who took office twice (1985-1990 and 1995-2000), are representative of this detachment. While advocating a "policy of reconciliation", he
consistently refused demands for truth. He also dismissed requests which demanded judicial inquiry on the whereabouts of missing persons.

Only from the 2000s on, when president Jorge Batlle (of the Colorado Party) took office, some of the demands for justice and truth reached government initiatives, especially efforts aimed at revealing the whereabouts of missing children. With the purpose of clarifying the fate of missing persons, the Commission on Peace was established in his government. Considered by literature as a limited truth commission, it had no power to request information from the military or to identify violators of human rights. In 2003, it came out with a report that confirmed enforced disappearances and the fact that many Uruguayans were tortured and killed in police and military facilities of the country. The Commission also recommended the search for bodies in these offices, full compensation to victims, the criminalization of torture and enforced disappearance, as well as the installation of a permanent entity engaged in locating the disappeared. During the government of Jorge Batlle, new cases were filed against military officers, and the first convictions occurred in 2002.

The 2009 elections in Uruguay were accompanied by a new popular, this time a plebiscite, on keeping or not the provisions of the Law of Expiry. The purpose of the plebiscite was to annul Articles 1 to 4 of the Law of Expiry, which concentrated the legal core of the immunity to state agents. The plebiscite was controversial even within the Frente Amplio, for the ruling party was historically known for respecting previous popular decisions and keeping electoral commitments within its coalition.

In this context, as stated by Buriano (2011), the National Coordination for the Nullity of the Law of Expiry was maintained mainly by entities of non-partisan civil society and non-governmental organizations, as well as some members of the Frente Amplio, student movements, artists, personalities linked to the National and Colorado Parties and individual members of families of the victims.

The movement defended its proposal for another direct popular poll on the basis of arguments that, in the twenty years that separated the first and the following consultations, a shift took place in the political landscape and in international jurisprudence on transitional justice. Furthermore, new documents on state terror have been revealed and there was a new generation that had not participated in the previous query.

A week before the plebiscite, on October 19, 2009, the SCJ, in the trial of the Sabalsagaray case, declared as unconstitutional the Law of Expiry. It is noteworthy that
the Court expressly contradicted a previous ruling uttered in 1988, the first time that the Court ruled on the issue.

Despite that and despite the involvement of civil society organizations in the plebiscite campaign, plus international pressure, particularly from the Inter-American Commission on Human Rights (IACmHR), the electorate split: 48% of the votes were in favor of the annulment of that law and 52% against it.

With the knowledge of the result of the plebiscite, the IACmHR decided that the Uruguayan State had not given satisfactory implementation of its recommendations and then referred the Gelman case to the Inter-American Court of Human Rights (IACtHR), demanding it to order that state, among other things, to adopt legislative measures or other measures necessary for the Law of Expiry to be finally overcome. In February 2011, the IACtHR ruled in the Gelman case that amnesty laws as the Law of Expiry are incompatible with the American system of human rights protection.

In response to that, the then Minister of Foreign Affairs of Uruguay, Luis Almagro, anticipating a possible ruling of the IACtHR to Uruguay disapproving the failure of the country in complying with its decision in the Gelman case, convinced the ruling coalition to propose to Congress an interpretative law which would effectively neutralize the effects of criminal exemption for state officials who violated human rights during the dictatorship. At first, the proposal had little support from the Frente Amplio, but with the backing of President José Mujica, the bill was finally brought to Congress, being defeated by the opposition in May 2011 and later, after some amendments and through political negotiations, finally approved in October of the same year (see Roniger, 2011 and Buriano, 2011).

Therefore, the Uruguayan Congress, with great political costs for the Frente Amplio coalition, contradicted the results of two popular consultations and the Law of Expiry was finally repealed. As expected, it motivated new activism of the Uruguayan Supreme Court on the subject.

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16 Maria Claudia García de Gelman was kidnapped in Buenos Aires in 1976, at the age of 19 with seven months of pregnancy. The girl was then taken to Uruguay, where she gave birth to María Macarena Gelman and disappeared. Macarena was illegally handed over to the family of an officer of the Uruguayan police and her original identity was only restored in 2000. The claim at the Inter-American Commission of Human Rights was filed by the Argentine poet and activist Juan Gelman and his granddaughter María Macarena, respectively father and daughter of Maria Claudia, given the lack of information about the whereabouts of the remains of the mother Maria Claudia.
The Brazilian Supreme Court and the Inter-American Court of Human Rights on the Brazilian Amnesty Act

In 2008, the Federal Council of the Brazilian Bar Association filed a lawsuit (ADPF n. 153) by which it aimed to obtain a decision from the Brazilian Supreme Court (STF) declaring as unconstitutional the exemption from criminal and administrative liability for public officials of the military regime. By seven votes to two, the Supreme Court dismissed the claim.\(^{17}\)

The decision considered the Amnesty Act as a "historical moment" of the Brazilian "reconciled transition" that would have enabled the "migration from dictatorship to democracy." Also according to the decision, only if considering the Amnesty Act as a “measure-law” (in the Court’s arguable translation into Portuguese from the term “Maßnahmegesetz”, taken from German Law), i.e., only if considering the Amnesty Act under the perspective of the historical peculiarity of its purpose, one could understand the meaning of the concept of "related crimes" in the first paragraph of the first article of the law.

The term "crimes related to political crimes" is the only expression in the law giving rise to the view according to which the benefits of the Act could also be extended to public officials. In Criminal Law, on the other hand, the term usually has quite a different meaning from that conveyed by the Supreme Court. As highlighted by Piovesan (2010, p. 100), if in Criminal Law "related crimes" are actually felonies committed by a person or a group of people and which are linked to each other in their causes, in the case of the Amnesty Act, as the Supreme Court states, the term would have a “sui generis” meaning, in the midst of an also “sui generis” law (or a "measure-law"), and would determine a connection between public officials and opponents of the regime.

It should be stressed that this effort of some Brazilian constitutional judges in establishing this hermeneutics on the specific meaning of the term "related crimes" in the midst of this law was crucial to the preservation of the exemption for officials of the military regime who have committed crimes, since the Amnesty Act itself at no time reports directly to such a range of its provisions. With this decision, so far, Brazil, among all Latin American countries that have undergone a transition from

\(^{17}\) The decision can be read at: http://redir.stf.jus.br/paginador/paginador.jsp?docTP=AC&docID=612960.
authoritarianism to democracy in the last quarter of the twentieth century, is the only one which has not condemned any agents who have committed crimes as torture, murder and enforced disappearance during dictatorship (see Sikkink and Walling, 2007).

One of the main arguments of this Supreme Court’s decision contends that the Amnesty Act was enacted by a representative Congress. However, the vote by majority in Congress in other cases did not prevent the Court from changing a number of other laws, most of them, in fact, voted by Congress already during the current democratic period. Upon the logic of this argument of the Supreme Court, a legislative majority produced during the military rule seems to take advantage over other legislative majorities produced under democratic regime. Furthermore, this argument also backfires on the Court’s own activism in judicial review (according to the literature), since the existence of judicial review logically presupposes that the decision of the majority is not sufficient for the constitutionality or legitimacy of a law. If the decision of the majority were to be sufficient, judicial review would not be legitimate itself.

Yet, the Brazilian Supreme Court stands a high degree of activism in judicial review, widely exercising its anomalous legislative activity not only negatively (declaring unconstitutonality), but also by supplying legislative omissions. Since the promulgation of the 1988 Constitution until 2003, the STF changed more than 200 federal laws, while the Supreme Court of the United States had declared as unconstitutional, from Marbury vs. Madison to 2003, i.e., in 200 years, about 135 federal laws (Taylor, 2008, p. 13 and 14).18

Following this trend in the politicization of legal issues in the Brazilian Constitutional Court, the decision in the ADPF 153 grounded one of its central arguments in the “historical peculiarity” of transition and amnesty in Brazil, which would have built the path of “national reconciliation” by means of the “reciprocal” feature of the 1979 amnesty. Once having done the pact that would have laid down the foundations upon which the new democratic regime would stand, and derived from a

18 Arantes (2005) and Taylor (2008) point out several issues regarding the judicialization of politics in Brazil. The Brazilian case is remarkable because the country has one of the biggest Constitutions of the world and a hybrid system of judicial review. Moreover, the scope of institutions with legal standing for pleading claims aiming at judicial review is one of the largest in the world, if not the largest one (Arantes, 2005, p. 238). As Stone Sweet wrote regarding the role of the Judiciary in countries of the European continent, Taylor (2008, 27) stresses that the Brazilian Judiciary plays an important role in the final configuration of public policy in the country. Similarly, Arantes (2005, p. 250) says that the judiciary began to compete with the federal government for the primacy of political patronage over Brazilian society.
so-called broad national “outrcy”, this “reciprocal” feature of the amnesty would be irrevocable, untouchable by any social actor.

Based on an analysis of the ADPF 153 trial and taking into account a broader context of the jurisprudence of the Brazilian Supreme Court, Deisy Ventura (2011) points out that this decision of the STF conveniently chose for a "legal provincialism". If the Court had seriously considered the theory and jurisprudence on international human rights, it would inevitably have to come out with a very different decision. And this "legal provincialism", I argue, was justified in the decision on the basis of the "historical peculiarity" of the "pact of national reconciliation" and on the "friendly nature" of the Brazilian society. In the name of the reconciliatory foundation of our democracy, the Amnesty Law would hold an ethical and evaluative primacy over other valid laws under the new regime, because it - more than being part of the new regime - would be its condition of possibility.19

In this perspective, Brazil is the nation of reconciliation. The "friendly character" of the Brazilian society would be its peculiar socio-cultural background. By this argument, the Supreme Court built the preponderance of its decision over the legal arguments related to the universality of human rights.

A few months after this sentencing, the IACtHR ruled on the case of Gomes Lund and others vs. Brazil and, as expected, deployed some of the universal principles of human rights applied to transitional justice.20 With regard to the principle of non-

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19 The philosopher Jürgen Habermas (1998) weaves important considerations about the difference between ethical values and legal principles in the interpretation of fundamental rights. For the German author, the principles refer to fairness; whereas values refer to the common good of a community. Habermas (1998) argues that the jurisprudence in several countries would be increasingly being driven by values, trying to interpret the "original meaning" of the law and updating it creatively towards historical objectives. According to the author, in these terms, the constitutional courts would assume the condition of a sort of "prophetic master," which plays the updated divine will of the founding fathers of a country. Thus, it is important to emphasize that the growing power of constitutional courts lies not only in the increase of their institutional prerogatives (such as judicial review), but also in their own practice and view over the law, increasingly driven by a hermeneutics of values, not of principles. This opens space for increasingly "political" (teleological) and less "legal" (ethical) interpretations of laws. But Habermas argues that, although in the first place politics may engage the enactment of a right for teleological reasons, once enacted, fundamental rights should henceforth be regarded as principles, which have the ethical sense of a commandment, not the teleological sense of what is desirable under given circumstances (see Habermas, 1998).

20 The Gomes Lund and others versus Brazil is also known as the Araguaia Guerrilla case. In its decision for this trial, the CrIDH determined the responsibility of the Brazilian State for the enforced disappearances of 62 persons (among guerrilla fighters and civilians) between the years 1972 and 1974 in the region known as Araguaia. Furthermore, the CrIDH considered the Brazilian Amnesty Law incompatible with the international obligations assumed by Brazil in the American Convention on Human Rights (ACHR). The Court held that the provisions of the Amnesty Law that prevent the investigation
impunity, it is important to mention two excerpts of the ruling of the IACtHR in Gomes Lund and others vs. Brazil, which disapprove the impunity of state agents who committed crimes during the dictatorship in Brazil:

30. Finally, it is wise to remember that the international jurisprudence, customs, and doctrine establish that no law or rule of law, such as provisions of an amnesty, the statute of limitations, and other exclusionary punishments, should prevent a State from meeting its inalienable obligation to punish crimes against humanity, because they are insurmountable in the existence of an assaulted individual, in the memories of the components of their social circle, and in the transmissions for generations of all humanity.

31. It is necessary to surpass the intensified positivism, because only then will there enter a new era of respect for the rights of the individual, helping to end the cycle of impunity in Brazil. It is necessary to show that justice works equally in the punishment of anyone who practices serious crimes against humanity, so that the imperative of law and justice always allows that such cruel and inhumane practices never be repeated, never forgotten, and that they always be punished.21

Taking this decision into account, the Brazilian Bar Association appealed to the Brazilian Supreme Court demanding it to review its former ruling and to comply with the outcome of the Gomes Lund and others vs. Brazil trial. In response to this appeal, the Union’s Legal Council (AGU), which defends the federal state’s interests in lawsuits, stated that the IACtHR’s ruling was threatening national sovereignty.

In 2011, same year in which a similar bill was enacted by the Uruguayan Congress, the congresswoman Mrs. Luiza Erundina (PSB-SP) elaborated a bill (n. 573/2011) intended to give "authentic interpretation" to the provisions of the Amnesty Law. According to this bill, the amnesty does not include among its exemptions the offenses committed by public officials, military or civil personnel against persons who actually or supposedly committed political crimes. The paragraph on article 2 of this bill states that any provision for exclusion of criminal liability of these agents should be rejected. In addition to quoting excerpts from the IACtHR’s decision on the Araguaia case, the justification of the bill argued that the exemption from criminal liability for crimes against humanity also violates the Federal Constitution. It means that the bill openly contradicted the understanding of the STF on the topic.

21 The ruling can be found on: http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_por.pdf. The excerpts here quoted are to be found in page 124 of the document.
Yet, the Committee on External Affairs and National Defense Board followed the technical advice\textsuperscript{22} of congressman Mr. Hugo Napoleão (DEM-PI) and rejected the bill. In his understanding, Mr. Napoleon reiterates the idea that the amnesty was the main historical event that laid down the grounds on which democracy could emerge. Napoleão also said that the Amnesty Act would be morally unfair or illegitimate, but legally valid, and therefore would have a binding effect on the system. Just like the ruling of the Supreme Court on the ADPF 153 trial, the congressman emphasized that the constitutional amendment n. 26/1985, which allegedly gave constitutional status to the amnesty, would be a "norm of origin". According to him, the Amnesty Law has formalized an agreement of forgiveness. The technical advice also referred to statements of President Dilma Rousseff in the press, according to which there is no room for "revenge" and the original terms of the amnesty should be maintained.

The Uruguayan Supreme Court of Justice and the Inter-American Court of Human Rights on the Law of Expiry in Uruguay

Some years after the referendum of 1989, the IELSUR (Institute for Social and Legal Studies of Uruguay) led the claim against the Law of Expiry in the Inter-American Commission on Human Rights through eight cases involving serious human rights violations.\textsuperscript{23} According to IELSUR, the Law of Expiry violated guarantees enshrined in the American Convention on Human Rights (ACHR), especially the right to a fair trial and judicial protection.

The argument of the Uruguayan government at the time was that the amnesty was part of its sovereign right to grant clemency and that the law had been passed by Congress, by a democratic referendum and was been held constitutional by the Supreme Court of that country. Another argument was that Article 8 of the ACHR only protected the rights of the accused in a criminal trial, but gave no guarantees for someone or institution to file a criminal prosecution.

In its final report on the case, the Inter-American Commission argued that it was not the matter to evaluate the democratic legitimacy of a national law, but whether its

\textsuperscript{22} See: http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=493311.

effects constituted a breach of the obligations of the government to the ACHR. Once the Executive arrogated to itself the investigation of violations of human rights crimes, the Commission questioned the integrity and impartiality of these investigative procedures. In this sense, the Uruguayan amnesty would prevent the access of victims to the judiciary and an impartial investigation into these violations.

The Commission also found that, in Uruguay, "no commission of inquiry was ever created, and no official report on the same serious human rights violations committed during the previous government" (§ 36 of the recommendation, whose link can be found in footnote 23). Thus, the Law of Expiry was considered incompatible with the purposes of the ACHR, because the former would prevent the victims or their representatives from pursuing a criminal trial against their offenders (§ 40). Quoting the decision of the IACtHR in the case of Velásquez Rodríguez vs. Honduras, the Commission declared that it is the obligation of the states to identify those responsible for human rights violations and impose "appropriate punishment" (§ 50).

Whereas this decision has had little impact on the Uruguayan government policy at the time, it has generated significant discussion about the amnesty, and became the basis for the campaign against impunity in the country (see Mallinder, 2009, p. 59).

In 2009, in the Sabalsagaray case, the Court sustained that, by affirming the forfeiture of any punitive attempt against public agents who committed crimes during the dictatorship, the Congress had invaded a strictly judicial competence and thereof violated the principle of separation of powers (Supreme Court of Uruguay, 2009). Moreover, the decision held that the "logic of facts" of a political agreement made under illegitimate pressure of the Armed Forces could not be taken as a source of law, nor overlap the Constitution.

With specific regard to the referendum of 1989, the Court affirmed that popular ratification would have no relevant effect over the analysis on the constitutionality of the law. It further argued that once this issue involved fundamental rights, it would not belong to "the sphere of political decision", but to the "sphere of the non-arguable" (Supreme Court of Uruguay, 2009, p. 33). The latter constitutes, according to the Court, the core of "substantial democracy", which should be constitutionally guaranteed even against "contingent majorities" (ibid., p. 34). It concluded this topic by asserting that it was typical of an "old paleoliberal paradigm" to consider jurisdiction as a limit on political democracy. Rather, democratic constitutions impose two limits to the decision-
making power of majorities: the protection of fundamental rights and the submission of the public powers to legality (ibid., p. 35).

Once published in 2011 the law which aimed to "restore the punitive claim" of the Uruguayan state against serious human rights violations committed by public officials during the dictatorial period and which considered these violations as crimes against humanity, various military officials began to challenge the new law in criminal cases in which they were the defendants. In one of these cases, the SCJ (in sentence n. 20/2013) decided, in 2013, by four votes to one, that articles 2 (on the non-application of statute of limitations to those crimes) and 3 (about being accurate to consider them as crimes against humanity) of the Law no. 18.831 are unconstitutional.24

According to the justice Jorge Chediak González, followed by three more of his four colleagues, the adoption by Uruguayan law of the typology of crimes against humanity took place only after the relevant crimes and therefore these crimes should be considered as common, susceptible to statute of limitations. Still according to him, the principle of the irretroactivity of a more severe criminal law derived from the principles of freedom and legal certainty and would be a cornerstone of the rule of law.

As explained before, in 2009, concerning the trial of the Sabalsagaray case, the SCJ had made a very different conventionality control over the IACtHR ruling, if not opposite to that of 2013. In fact, if at that time the Court had ratified the unconstitutionality of articles of the Law of Expiry based, among other arguments, also in the ACHR and in systematic jurisprudence of the IACtHR, now the Court criticized the interpretations of the Inter-American Court on the American Convention.

The SCJ then made its own interpretation on the American Convention, on the Rome Statute and on the Vienna Convention, with particular attention to the prohibitions of retroactivity, *bis in idem* and reform of *res judicata*. In the 2013 ruling, the majority of the justices also question the competence of the IACtHR on criminal law, saying that, unlike the International Criminal Court, the IACtHR would just be a "human rights tribunal" (page 28 of the decision). The decision also reiterated that, according to the Court's own precedent in military proceedings against José Ricardo

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24 The ruling can be found in: http://www.poderjudicial.gub.uy/images/resoluciones/sent_scj_22-02-13_inconst_ley_18831.pdf.
With this 2013 ruling on the unconstitutionality of the main provisions of the 2011 interpretative law, the SCJ made up its round view on the subject. Here are the key elements of this view now consolidated by the SCJ: (1) The Law of Expiry could give no amnesty to the military since it excluded from the orbit of the Judiciary the possibility to try and condemn those who committed crimes, which violated the principle of separation of powers. (2) The crimes committed by state agents during the dictatorship are common crimes, which are susceptible to statutory limitations. (3) The crimes committed during the dictatorship have all already reached the statutory limitations. (4) Lawsuits and convictions in progress may continue; lawsuits filed after the limitation period are being and will be dismissed by the Court.

**Final Remarks**

Having made this brief reconstruction of the trajectory of some features of transitional justice in both countries, it is clear that they have some similarities and differences. The recent periods of authoritarian rule in both countries were attached to the same type of authoritarianism defined by Jon Elster (2004) as the military dictatorships of the Southern Cone of South America based on the doctrine of National Security. For many years, the amnesties of the two countries were seen as "democratic".

And the “democratic” aspect of those amnesties was (in Uruguay) and has been (in Brazil) associated with the alleged suitability of reconciliation to the history (in both cases) and to the sociability (mainly in the Brazilian case). This argumentation ended up building an increasingly higher polarization between “democracy” and the discourse of

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25 In a ruling of 2011, the SCJ condemned the military José Gavazzo and Ricardo Arab to 25 years in prison as responsible for 28 "very especially aggravated homicides". With this expression, the decision did not meet the request of the people’s attorney to classify the conducts of those soldiers as crimes of enforced disappearances, which are considered as crimes against humanity. The Court argued that the crime of enforced disappearance would only be valid in the Uruguayan national law system from October 2006 on, and could not be awarded retroactively to those two soldiers (on this topic, see the news from *El País* on: http://historico.elpais.com.uy/110531/pnacio-569957/nacional/Corte-ratifica-que-delitos-no-son-considerados-de-leza-humanidad/).

Considering those crimes as common felonies and not as crimes against humanity, the SCJ established indirectly November 1st, 2011, as the term for the expiry of all crimes committed during the dictatorship, because the Uruguayan Penal Code provides for a maximum of 26 years and eight months as the statute of limitation for punitive claims on common crimes.
human rights, which experienced the development of its retributive dimension specially in the field of transitional justice and, in a way even more acute, in the jurisprudence and recommendations of the Inter-American System of Human Rights.

In other words, in both cases, the discourse of national reconciliation created a higher (and to some extent, at least in the Brazilian case, also distorted) tension between human rights and democracy.\footnote{In Brazil, this tension would be at least to some extent distorted because the so-called “democratic” choice for a reciprocal amnesty took actually place in 1979, still under military rule, which lasted until 1985.} It also gave rise to a delay (relative to other South American countries such as Argentina and Chile) in carrying out the normative requirements of transitional justice, such as economic and symbolic reparations and the affirmation of truth and justice. Despite all these similarities, which I think are even greater than those found between the Brazilian experience on the one side and the Argentine and Chilean on the other, most comparative studies in the field focused on the Southern Cone of South America carried out comparisons between Brazil and Argentina and/or Chile.

When one talks about reconciliation, it is impossible not to think about the South African experience of transitional justice, which turned out to be a kind of a model for other experiences in the last decades. However, one might also agree that the South African process was very peculiar, both in terms of the previous authoritarianism and in terms of transition. One might think of analogies between the violence and the kinds of authoritarianism that took place in South Africa on the one hand and in Brazil and Uruguay on the other. Yet, those are analogies in appearance, since in all those experiences one could find thousands of cases of state or guerrilla-coordinated tortures, enforced disappearances and murder. But those experiences are quite different in nature and in its roots, since one was unfolded in the context of the South African apartheid and civil war; and the other two, in the context of South American dictatorships based on the doctrine of National Security. Even in Uruguay, the dimension of the conflicts between the Tupamaros and the military was not even close to what happened in South Africa between the African National Congress (ANC) and the armed forces.

Besides, the apartheid was a political and cultural doctrine based in social and racial segregation. Despite the increase of economic disparities during the dictatorship at least in Brazil, one could not apply such a segregated view of society to the core of the doctrine of National Security in South America. The South African society was even
formally divided in two, and violence was closely linked to this division. In this context, once *apartheid* as a system was defeated, reconciliation turned out to be the main normative goal in transition: the Truth and Reconciliation Commission designed a creative (though not always successful) way of holding perpetrators accountable, at the same time that it maintained the objective of setting both sides – aggressor and victim – as peers of the same community.\(^{27}\)

Nonetheless, it is no longer possible to do something similar in Uruguay because its truth commission already took place in a quite restricted fashion, supporting its findings rather on documentary research and in a few hearings, and in Brazil because the amnesty was already guaranteed to the military even before its truth commission was set up, so that the latter now has difficulties in turning the hearings of those involved in human rights violations into occasions for accountability: many of the deponents simply refuse to talk.

Apart from that, perhaps even more importantly in opposition to the South African experience is the fact that both Brazil and Uruguay are countries no longer “in transition” to democracy. They have been considered for decades as well established democracies. Hence it is not the case to apply the predicates of the precariousness of justice and of the paradoxes associated with the shift of paradigm in law that are usually applied to situations of “justice in times of transition” (Teitel, 2000). In both countries, even the practical argument of stability versus justice does not make much sense for a long time any more.

In this regard, the Brazilian and the Uruguayan experiences of transitional justice have recently also started to differ more from each other. In recent years, Uruguayan society saw a few trials and condemnations taking place. Even more recently, in 2009, the country’s Supreme Court ruled the unconstitutionality of the amnesty provided to exempt public officials from criminal liability. But the Commission for Peace in Uruguay, with less prerogatives than the Truth Commission in Brazil, obtained poor results, which did not avoided, though, that the memory of the dictatorship in the country remained more vivid than the memory in Brazil.

\(^{27}\) This means that they would not necessarily shake hands after a hearing where one disclosed the violations he or she committed against the other or against one relative of the other, but it means that, from this procedure on, both could see each other sharing the same community, rights and equal responsibilities, which is a minimum bound for life in society (see Neves, 2014).
Both the Brazilian and the Uruguayan democracies are considered today as fully consolidated. Therefore, the scope of the normative expectations related to the field of transitional justice would not have the primary purpose of preparing these countries for democracy. Yet, to the extent that rule of law and democracy are interdependent in contemporary political theory, it may not be possible to speak of a full experience of democracy if there are serious violations of civil rights that remain without their proper justification and accountability.

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