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The protection of rights in the Brazilian transition: amnesty law, violations of human rights and constitutional form¹

In this paper we'll try to emphasize the political and legal transition in Brazil after the last authoritarian regime (1964-1985). 1

The term "transition" is very common in contemporary history. In the past one hundred years – if we adopt a purely chronological criterion – it has been used in several contexts, given the huge alternation between authoritarian and democratic regimes². In Brazil's republican experience, which started in 1889, there was a notable interchange between authoritarian and democratic regimes. In an approximately 100-year period (from 1891 to 1988) the country had six different constitutions, enacted in 1891, 1934, 1937, 1946, 1967, and 1988³. These constitutions reflected the political changes. And these changes triggered transitional waves. 2

Thus considering only the conceptual pair authoritarianism/democracy and leaving aside the internal dynamics that could prove the existence of transient processes during the term of constitutions – we can count on three clear periods of transition: (1) from the Revolution of 1930 to the Constitution of 1934, (2) the transition process which occurred between the fall of the *Estado Novo* and the 1946 Constitution, and (3) the long-lived transition between the "slow, gradual and safe" opening initiated by the military regime of 1964 and the coming into force of the 1988 Constitution. 3

So Brazil developed, since the beginning of republican times, a tradition of granting amnesty for political leaders and participants who faced criminal charges that were originated in the political struggles. That was the case in the aftermath of the 1930 Revolution, and at the end of "Estado Novo", a seven-year period of authoritarian rule under Getúlio Vargas (1937-1945). It was also common to enact amnesty laws and decrees after military uprisings which were unsuccessful, like the two movements launched during the Juscelino Kubitschek's presidency (1956-1961). 4

Our analysis focuses on the last transition. 5

To illustrate certain aspects affecting the constitutional history of that period, we will use excerpts from two documents: (1) the ruling by the Federal Supreme Court in a constitutional controversy (ADPF 153) and (2) a statement made by a former lawmaker, ex-constituent and former Chief 6

¹ I owe the following people thanks for useful comments on an earlier draft: Massimo Meccarelli, Thomas Duve, Samuel Barbosa, Ricardo Marcelo Fonseca, and Leonardo A.A. Barbosa.

² See, for an overview, G. O'DONNELL and P.C. SCHMITTER, *Transitions from Authoritarian Rule – Tentative Conclusions about Uncertain Democracies*, Baltimore and London: The John Hopkins University Press, 1986, p. 6.

³ This is a conservative count, because the Constitutional Amendment no. 1/69 could be considered a new constitution. In addition, there are institutional acts of the military regime, with its "constituent" force, for example, acts no.1 (originally unnumbered), 2, and 5. See C. PAIXÃO, *Direito, política, autoritarismo e democracia no Brasil: da Revolução de 30 à promulgação da Constituição da República de 1988*, in *Araucaria. Revista Iberoamericana de Filosofia, Política y Humanidades*, Sevilla, ano 13, n° 26, pp. 146-169.

Justice of the Supreme Court in a House of Representatives committee. Through comparing those manifestations, we may extract some interesting questions about the Brazilian transition.

It is important to situate the context of these two historical sources - and after that, highlight some parts of the text that will allow an interpretation of the persistent disputes over political transition in Brazil.

1 Amnesty and Human Rights: ADPF 153

Law No. 6.683/1979 (Amnesty Law) was enacted during the rule of the last military presidents. Passed by a Congress controlled by the regime, the law had a tortuous history. In the mid 1970s, the Brazilian amnesty committee, led by sectors of the civil society and relatives of opponents of the regime began to emerge. The core of the claim focused on the return of the exiles to the country and the annulment of the punishments imposed by the courts during the most repressive period of the regime (1968-1977). The movement gained nationwide prominence and a bill was introduced in Congress. However, during the course of the proposed statute, the government inserted a device that completely subverted the purpose of the law. With the new wording, all crimes committed by agents of the regime were covered by the amnesty. The bill passed by a margin of seven votes, with 12 dissident votes from representatives loyal to the regime – there were 209 affirmative votes against 194 opposed⁴. The bill needed 202 favorable votes to pass.

In 1985, the first year of President José Sarney's term, a national constituent assembly was convened. This occurred through the adoption of a constitutional amendment⁵. In addition to predicting the functioning of the House, the Constitutional Amendment 26/85 reiterated the amnesty granted in 1979, significantly expanding the universe of beneficiaries, especially in relation to the persecuted public servants.

The national constituent assembly carried out its task from February 1987 to October 1988. It was not an exclusive assembly – the representatives and senators elected in November 1986 (plus 1/3 of elected senators in 1982) would have constituent powers. However, contrary to initial expectations, the constitutional process was gradually moving away from everyday political activity and the end result was a constitution committed to fundamental rights. The amnesty granted by Law no. 6.683/79 and the CA 26/85 was expanded and reshaped. Torture was placed as a non-bailable crime.

Therefore, we can identify three moments in which political amnesty is proclaimed in recent Brazilian history: 1979, 1985, and 1988.

In July 2008, the Ministry of Justice held a public hearing with human rights defense organizations and dictatorship victims' representatives. The possibility of carrying out criminal investigations and subsequent litigation with the goal to punish serious human rights violations committed in the

⁴ See J. C. M. SILVA FILHO, *O Julgamento da ADPF 153 pelo Supremo Tribunal Federal e a Inacabada Transição Democrática Brasileira*, in *Trabalho e Regulação – as lutas sociais e as condições materiais da democracia*, org. Wilson Ramos Filho, Belo Horizonte, Fórum, 2012, pp. 129-177.

⁵ Constitutional Amendment no. 26/85, hereinafter CA 26/85.

authoritarian period such as forced disappearances, executions, and torture was there discussed for the first time⁶. The Brazilian Bar Association forwarded "a complaint of breach of fundamental precept" directly to the Federal Supreme Court (STF) which received the number 153⁷. It was a constitutional action which pled that the Amnesty Act (1979) would not be an obstacle to the punishment of the agents of the regime responsible for serious human rights violations.

The ruling was issued in 2010. By seven votes to two, the Supreme Court decided that the Amnesty Act (1979) remained valid *even after the enactment of the 1988 Constitution*. Reading the decision, especially two of the opinions, may be useful to our theme. We will see how the court's reasoning revolves the debate on the transition to varying degrees.

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2 The reasons of the court

The leading opinion of the ADPF 153's ruling was written by Justice Eros Grau, professor at the University of São Paulo Faculty of Law, and a former militant against the military regime. In his opinion, Justice Grau *rejects* the possibility of punishing violators of human rights during the military regime. To support his view, he points out what he considers the fundamental aspect of the case: the amnesty would have been the result of a major effort of the Brazilian society towards democratization. It would represent a crucial moment in the resumption of institutional normality and, therefore, would not be justifiable to say that the 1979 Law is no longer binding.

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Two aspects are particularly important in the opinion: the fact that the Brazilian transition was based in the notion of "reconciliation" (a term used twice in the opinion) and the reiteration of the 1979 amnesty in CA 26/85, which, in Justice Grau point of view, would be part of the "original rule", namely the 1988 Constitution.

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The line of argument of the opinion is essentially focused on the defense of the political transition "without violence" as an essential part of Brazilian democracy, which would have culminated with the promulgation of the 1988 Constitution.

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This same line of argument is taken up in Justice Gilmar Mendes's concurring opinion, which stems from the issues addressed by Justice Grau, and seeks to deepen the constitutional debate on amnesty.

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Justice Mendes's opinion brings forth important arguments for our discussion.

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Firstly, there is the repetition of the "covenant", "reconciled" nature of the 1988 Constitution. According to the opinion, "the new constitutional order can be understood as the result of a pact between plural forces somehow antagonistic, which gives it the nature of a *Commitment Constitution*, inset in the group of Western constitutions that were generated after crisis periods"⁸.

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Secondly, there is the reaffirmation of the "constituent" role of Constitutional Amendment 26/85. Justice Mendes grounds the legitimacy of the 1988 Constitution on the amendment that

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⁶ See C. PAIXÃO, *Violação dos direitos humanos no regime militar*, in *Correio Braziliense*, 18 de agosto de 2008, Brasília, p. 15.

⁷ The action will be referred to henceforth as ADPF 153.

⁸ ADPF 153, Justice Mendes concurring opinion, p. 237.

called on the national constituent assembly. The opinion gives a series of laudatory references to the political liberalization process initiated in the 1970s, particularly the movement which led to the adoption of the Amnesty Law. According to Justice Mendes, the Brazilian political opening was a difficult process, fraught with negotiations, which should always be remembered with "tributes" to the "work done by our political leaders, especially by our congressmen, in the construction of this complex constitutional process, which resulted in the 1988 Constitution"⁹.

These two opinions have ultimately prevailed in court. The reasons posted there are representative of a particular discourse. **21**

It could be thus summarized: **22**

1. The amnesty granted in 1979 was part of a process of political liberalization;
2. This opening allowed the democratization of Brazil;
3. Amnesty was reiterated in 1985, in the same Constitutional Amendment that convened the National Constituent Assembly;
4. The 1988 Constitution, the result of this openness and democratization process is a "commitment constitution", marked by the transition, and precisely for these reasons, linked to the amnesty granted in 1979.

Thus, the Supreme Court reiterated in 2010, the validity of the Amnesty Law enacted in 1979. It also prevented the launching of investigations and actions to the determination of responsibilities for the practice of enforced disappearances, killings and torture. **23**

Still in 2010, the Inter-American Court of Human Rights (IACHR), a member of the court system of inter-American human rights protection, whose jurisdiction is expressly recognized by Brazil, tried the case Gomes Lund, which became known as "the Araguaia Guerrilla". In several previous trials, the Inter-American Court had affirmed the impossibility of granting the effects of self-amnesty laws. The cases are: *Barrios Altos* (2001), *Almonacid Arellano versus Chile* (2006) and *Cantuta* (2006). With slightly different grounds, arising from the concrete situation in the Brazilian case, the IACHR, in the Araguaia Guerrilla ruling, reiterated the statement that laws that stipulate amnesty in relation to crimes against humanity are invalid (ruling of 24 November, 2010). **24**

In 2010, Dilma Rousseff was elected president of the republic. It is important to highlight that her biography is associated with resistance to the regime. From the student movement, President Dilma joined the ranks of the resistance and joined groups opposing the dictatorship. She was imprisoned and tortured by members of the Armed Forces. **25**

In 2011, the government approved Law No. 12,528, which created the National Truth Commission. The Commission was established in May 2012. In an interesting development and which was not originally planned, local truth commissions started being created throughout Brazil, in states, cities, universities, professional and trade union bodies, all with the purpose of investigating human rights abuses committed during the dictatorship period. In October 2013, there were over 100 truth commissions operating in Brazil. **26**

⁹ ADPF 153, Justice Mendes concurring opinion, p. 241.

It is clear, therefore, that significant changes have taken place in the Brazilian political context between April 2010 (date of the ruling of the Supreme Court) and November 2013. It is important to note that an internal appeal was filed in ADPF 153, which is still awaiting trial. 27

Up to the present time, the analysis of the ruling did not bring particularly surprising elements. The manifestation of the Supreme Court can be regarded as a reiteration of the semantics of the Brazilian political transition. However, a closer look at the ruling will allow the unveiling of certain assumptions in the discourse of transition that supersede the discussion of punishment, or not, of human rights violators. These assumptions have a deeper reach: they propose an anatomy of transition – and fit into a field of conceptual disputes that remains open. Now one should propose a translation of those assumptions. 28

3 Amnesty, transition, rights: the "Brazilian case"

In our observation, we will now add another source: the testimony given by then Chief Justice of Supreme Court, Nelson Jobim, to a committee in the House of Representatives in 2006. A proposal for a constitutional amendment that inserted a 'reviewer constituent assembly' was under discussion at that time. In other words: it was a proposal that modified the way to modify the constitution¹⁰. 29

Nelson Jobim's statement is particularly significant in view of his political career. He was a representative constituent in 1987-1988, and the justice minister in President Fernando Henrique Cardoso's first term. In 1997 he was appointed Justice of the Federal Supreme Court. At the time of his testimony, he was in the last days in office as chief justice. Shortly after that, he retired and returned to private legal practice. In the second term of President Luis Inacio Lula da Silva, Nelson Jobim was the defense minister. 30

As a result of the confrontation between passages of the judgment rendered by the Supreme Court in ADPF 153 and some excerpts of Nelson Jobim's testimony there will arise, as we shall see, an expressive narrative about the Brazilian transition. 31

3.1 "Imported" concept: constituent power

Both Justices Eros Grau and Gilmar Mendes, in the Supreme Court trial, as well as Chief Justice Nelson Jobim in his testimony before the House of Representatives, highlight an aspect linked to the trajectory of the Brazilian constitutionalism: the tendency to "commitment constitutions", and the reiteration of that inclination in the process of the 1988 Constitution drafting. 32

Justice Eros Grau states that Constitutional Amendment 26 has a dual nature: it is both a manifestation of derived constituent power – in the form of an amendment to the constitution of 1967 – and an emanation of the original constituent power (by convening a meeting to draft a 33

¹⁰ This is PEC 157/2003. For an analysis of this proposal, see C. PAIXÃO, *A constituição subtraída*, in *Constituição & Democracia*, Brasília, no.1, February 2006, pp. 4-5.

new constitution). According to Justice Grau, CA 26/85 "is endowed with constitutive character. It installs a new regulatory system"¹¹.

In Justice Mendes's opinion, we find a similar argument. At the beginning of his presentation, he says that the Brazilian case demonstrates the impossibility of applying, to Brazil, the conceptual pair originating / derived constituent. According to his opinion, the "models that cling (especially this dualistic or binomial model originating between constituent power and derived constituent power) are, in practice, being overcome by compromise solutions, which leave room for political transactions that lead to a particular outcome"¹².

In Justice Nelson Jobim's statement, there is a similar piece, with further considerations on the historical level, aimed at the same conclusion:

All Brazilian Constitutions were always the result of transitions, i.e. there were no disruptions in Brazilian history. Immediately after a regime crumbled, a solution arose to replace the status quo. Therefore it is difficult, in Brazilian political history, to make use of overseas instruments or terminologies, for example, the concepts of original and derived constituent power¹³.

Referring specifically to the 1988 Constitution, Justice Jobim highlights the important role played by Constitutional Amendment No. 26/85 and then states:

So we need to be cautious, not only politically but also legally, of examining and bringing imported concepts that were produced in the history of other countries, such as, for example, in France. The concept of 'original constituent' is hardly viable in Brazil¹⁴

3.2 *A Brazilian singularity: "agreed" transitions*

The sources analyzed here insist on a particular point: the agreed nature of the 1988 Constitution. What implications arise from this statement?

For all authors of those texts, this tendency to "commitment constitutions" reveals a deeper stratum: a true Brazilian calling for reconciliation. After strongly defending that the 1979 amnesty was essential to democracy, and recalling the numerous amnesty laws that preceded it, Justice Eros Grau concludes: "There are historical moments when the character of a people is manifested with full clarity. Perhaps our cordiality is disclosed in the sequence of frequent amnesties granted among ourselves"¹⁵.

Justice Gilmar Mendes follows the same line, and leans towards the discussion of the acts of violence committed during the military regime. His opinion proposes a clear symmetry between

¹¹ ADPF 153, Justice Grau opinion, p. 43.

¹² ADPF 153, Justice Mendes concurring opinion, p. 235.

¹³ House of Representatives, PEC 157/2003, Public Hearing no 0100/2006, Justice Nelson Jobim's testimony (Stenographic Notes), Brasília, February 8, 2006, p. 2.

¹⁴ House of Representatives, PEC 157/2003, Public Hearing no 0100/2006, Justice Nelson Jobim's testimony (Stenographic Notes), Brasília, February 8, 2006, p. 3.

¹⁵ ADPF 153, Justice Grau opinion, p. 30.

the actions taken by civil society resistance and government's crackdown. Returning to the idea of "commitment constitutions", the opinion states that the 1988 Constitution appears as "overcoming the state of belligerency." The argument goes:

The ideological opposition allowed for several assaults, that formed typical criminal facts, practiced, on the one hand, by the strong and monopolizing State, and on the other hand, by the core of ideologically opposed citizens.

(...) Aggression was committed by the State, through its repressive agents, and by politically organized citizens, round about a political direction. (...) Thus, the ideological perspective does not justify committing atrocities such as kidnapping, torture or cruel murders. Moreover, even if it were possible to justify them - and it is not - it is certain that many of those who resorted to these offenses did not pursue democratic normality, but to defend authoritarian political systems, to keep the emergency regime, or to install new forms of administration of totalitarian character, supported, trained and funded by foreign dictatorships¹⁶

It is important to note here that a peaceful, negotiated, and agreed transition is not justified only by its temporal element, that is, as it presents itself as transient. The deal was a way to overcome the excesses and violence committed by "either party". 40

4 Conclusive remarks

The Supreme Court ruling and the testimony of Justice Jobim signal something more than a simple defense of "commitment constitutions". They show us the existence of a transitional semantics – and it is so expressive that it can hardly be considered a transition. 41

Firstly, there is the defense of a certain "Brazilian" nature aimed at reconciliation. Our sources concur in this point. Justice Eros Grau speaks of Brazilian people's "friendly nature", which shows in granting amnesties. Justice Gilmar Mendes proposes an even more particular reading, directly comparing the situation in Brazil with other Latin American countries. According to Justice Mendes, the Brazilian opening process "makes us positively different compared to our Hispanic brothers, who are still stuck in an endless institutional remake process"¹⁷. 42

Justice Nelson Jobim, in turn, reflecting on the Brazilian constitutionalism affirms a kind of historical constant: "our solutions have always been conciliatory. And they were absolutely so towards overcoming the previous regimes. "To explain this uniqueness, Justice Jobim proposes a synthesis of the "conciliatory" nature of "our solutions". So he goes on: "And where does that come from? It comes from a clear and conspicuous possibility found in Brazil. Think of the world today. Is there anywhere else where the children of Abraham are still together? Jews, Muslims and Christians 43

¹⁶ ADPF 153, Justice Mendes concurring opinion, pp. 238-239.

¹⁷ ADPF 153, Justice Mendes concurring opinion, pp. 242.

are here, all living and coexisting with absolute tranquility. Why? Because it is in the nature of Brazil overcome conflicts through dialogue and reconciliation"¹⁸.

This nature would be responsible then for the peculiar Brazilian constitutionalism – contrary, as seen, to the “imported” categories such as the conceptual pair: original / derived constituent power.

But there are other developments.

Our sources reveal a true apology for the transition. But this is not a transition in the classical sense - the passage from one system (authoritarian) to another (democratic). The transition celebrated by our interpreters is justified as *a political choice, the option for parliamentary activity as a way of pacifying the society*, as an institutional means of overcoming a "state of war".

And in this context, the transition takes on a very different role. It *stabilizes* and *binds the future*. Tied by agreements concluded between 1979 and 1985, all powers are limited by Law No. 6.683/79 and by Constitutional Amendment No. 26/85. The 1988 Constitution is limited by earlier legislation - hence the eternal validity of the Amnesty Law.

Thus, controversies related to the protection of rights in Brazilian democracy are not configured as a disagreement about the past, about the meaning of transition. They are part of another dispute: the future of the constitution.

And that semantics of "binding" transition has no time limits. Associated with this tendency to reconciliation, transition prevents installing lawsuits and discussions about the past. This is implied in Justice Gilmar Mendes's reference to the difference between Brazil and our "Hispanic brothers, who are still stuck in an endless institutional remake process"¹⁹ This surely intended to describe the situation in Argentina, Chile and Uruguay, the Southern Cone countries that have gone through dictatorships and, to varying degrees, have undertaken a judicial effort to investigate and prosecute violations of human rights conducts in the authoritarian period.

Then the apparently isolated mention to the Spanish situation becomes clear - usually referred to as the “commitment constitution” model. In his opinion, Justice Mendes addresses the situation of Spanish judge Baltasar Garzón, "provisionally suspended from his duties for investigating pardoned crimes." For Justice Mendes, the disciplinary process undergone by Garzón would have been generated by the initiative to break "with his duties as a judge (...), putting into question this model of covenant or commitment" that is typical of the constitutions of Spain and Brazil. The situation of Judge Garzón would therefore be justified by the refusal to observe the nature of the agreed constitutions²⁰.

From the historiographical point of view, another reflection arises: are we still in the middle of a transition?

If the concept is associated with a transition from one system to another, it totally loses its explanatory power in the Brazilian case. If, similarly to Alfred Stepan and Juan Linz, we adopt the

¹⁸ House of Representatives, PEC 157/2003, Public Hearing no 0100/2006, Justice Nelson Jobim's testimony (Stenographic Notes), Brasília, February 8, 2006, p. 41-42.

¹⁹ See footnote 17.

²⁰ ADPF 153, Justice Mendes concurring opinion, pp. 235-236.

inauguration of President Ernesto Geisel in March 1974 as the starting point of the transition, the "hard phase" of the regime would have lasted ten years. If we associate the end of the transition, as proposed by Stepan and Linz, to the inauguration of the first president of the republic elected by direct votes in Brazil (Fernando Collor de Mello), then we would have 16 years of transition (Collor was sworn in on March 15, 1990)²¹.

However, as we have tried to demonstrate, the transition, at least for the authors of the texts that we have analyzed, was not concluded with Collor's inauguration. It was engraved in the 1988 Constitution by virtue of the process that had as timeframes the years 1979 and 1985. That transition enabled, in 2010, the ruling of the Supreme Court which prevented any type of investigation on the responsibilities of the dictatorship agents in the authoritarian period. That was the "nature", or the "character" of the Brazilian people.

This paper was written for a presentation in the international workshop "Rights, Justice, Cultural Diversity: Dynamics of Legal Protection in Times of Transition", held in the Max-Planck Institute for European Legal History, Frankfurt-am-Main, 25-26 November 2013. The research here described is in its beginnings. More sources and documents remain to be seen. Our aim was to propose a debate on the consequences of political and legal tradition in contemporary Brazil, especially regarding the protection of rights.

We could select three sets of questions to future research:

1. Is it possible that the disputes Brazil has been witnessing are not only about the consequences of the transition for constitutional rights enforcement and democratic consolidation, but about the transition itself? Maybe the difficulty faced by Brazilian prosecutors and criminal courts in trying human rights violations could be explained by the lack of an appropriate understanding of the transition. So we might ask: if Brazil is living a clash between two expressions, two semantic fields that reflect different perspectives of the political and legal transition?
2. Considering the present effects of the 1979 Amnesty Law it is doubtful that the word "transition" could be limited to the end of authoritarian regime/beginning of democratic rule. Even after 25 years of a democratic constitution, Brazil is still bound by the agreements that have shaped the slow and cautious change in the political regime. So we should question to which extent the concept of transition is applicable to Brazil, and examine if the country has developed a particular approach to legal and political transition?
3. The conceptual dispute emerging from the use of the concept "transition" is likely to spread to other legal controversies. This paper analyzed the connections made by two Justices between political transition and constitution-making. It would be interesting to look for other similar conceptual interchanges. Is the concept of constituent power useful to explain the enactment of 1988 Brazilian Constitution? To which extent the enforcement of fundamental rights should depend on the political transition? And finally, how the transition affected the relationship between past and future in Brazilian constitutional framework?

²¹ J. LINZ. and A. STEPAN, *Problems of democratic transition and consolidation – Southern Europe, South America, and Post-Communist Europe*, Baltimore and London, The Johns Hopkins University Press, 2008, pp. 166-189, 219-230.

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