Transitional Justice in Brazil and Uruguay: different solutions to the tension between human rights and democracy[1]

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Abstract: The issue of the tension between popular sovereignty and law has special relevance in the field of Transitional Justice. E.g., the increasingly cogent understanding of the Inter-American Court of Human Rights (IACHR) on the need to apply criminal sanctions to former human rights abusers has been challenging policies of many countries that have maintained criminal immunity to some state agents who committed crimes during authoritarian rule in those countries. Taking this context into account, this paper aims at evaluating how Brazil and Uruguay have adopted different positions concerning the tension between the obligation to convicting perpetrators - as determined by the IACHR - 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 sentences of the Inter-American System of Human Rights (IASHR). 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 IACHR.

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, come from 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 think these experiences in a comparative perspective, whether from

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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 in similar situations) if it was not for the ongoing context of internationalization of law in which transitional justice takes part.

It is just because one speaks nowadays more and more of a justice with universal dimension that it makes sense to think about the fairness or unfairness of this or that amnesty. 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 enacted democratically or not. On the other hand, international law on human rights has asserted itself in a post-Westphalian era, eventually defying legalities that could be even considered as (some more, some less) democratic. One of the goals of this process is to establish a vision of the state as a member of the international community, with a flexible sovereignty, which recognizes the primacy of human rights.

The term that gives name currently to this field of study was initially coined by Ruti Teitel (2000) in a conference in Argentina in 1992, entitled "Justice in times of transitions." This paradigmatic text identifies three periods of development of transitional justice. First the post-war, which saw the triumph of international law in Nuremberg, but had its effectiveness diminished, though, during the Cold War. Then the third wave of democratization, which covered Southern Europe and Latin America since the 1970s and went through Eastern Europe, Africa and Central America since the 1990s: this phase is associated by Teitel to nation building processes, when the rulings were applied very unevenly according to local or regional criteria engendered by different transitional contingencies. Finally, from the end of the twentieth century (and, we might say, to the present day), we see the process of standardization and globalization of the paradigm of transitional justice with an universalist sense. This last phase associated transitional justice to an idea of "global" or "transnational" justice, made possible only by the historical development of international human rights law and the parallel rise and affirmation of international tribunals.

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).[3]

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 stands out among its main normative principles the need to prosecute and condemn former human rights abusers. And this obligation arises as an imperative in spite of any 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[4]: 1) the reform of political institutions[5], 2) the assertion of the right to truth and memory[6], 3) the prosecution and

[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.

[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 IACHR 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).

sentencing of public agents who violated human rights[7], and 4) the economic and symbolic reparation for victims of political repression.[8]

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 IACHR 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 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 also forgave crimes committed by state agents during the dictatorship, had been ratified by two popular consultations. Still, in the Sabalsagaray case, the Uruguayan Supreme Court (Suprema Corte de Justícia - SCJ) declared the invalidity of that forgiveness. 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, even more recently, in 2013, the SCJ also considered this law unconstitutional and then declared that the crimes committed by public officials during the Uruguayan dictatorship have already reached the statutory limitation period, contrary to the determination of the IACHR for the country.

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

[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 had, 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.

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 the case of torture in Brazil. Moreover, trying to comply with a requirement of the IACHR, the Brazilian government passed in Congress, in 2011, a law creating a Truth Commission in order to clarify 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 considered.[9]

Since then, among other things, a National Truth Commission was created and the Brazilian Supreme Court faced an opportunity to reverse the persistent immunity from 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 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, reputing each other free of any kind of criminal or administrative liability. This "pact" of

[9] See Heloisa Greco (2003), Janaína Teles (2005), Anthony Pereira (2005), Glenda Mezarobba (2006 and 2007), Edson Teles (2007) and Caroline Bauer (2011).

"forgiveness"[10] 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 through the "reciprocity" of the so-called "related offenses" and by the exclusion of the guerrillas of its benefits: instead of an effective reciprocity, the Act configured a complete amnesty for the agents of repression, but a partial amnesty for some 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 "normalcy" and "order" through repression of "subversive groups" that threatened the peace and democratic institutions of the country.

Even so, once enacted, the Amnesty Act actually provided a significant opening of the political realm. Despite the controversy and the defects pointed out by the opposition and by various popular movements, the amnesty promoted a reinvigoration of the political scenario in the country with the return of many of the exiled (Cunha 2010, p. 32). The Military Higher Court also went to work to release thousands of prisoners.

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 trade unionists strike movements 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 precisely to the fact that it did not put an end to dictatorship. In fact, it was only a first step of the long move towards democracy under the tutelage of the military regime.

[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 cassation 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 in another, e.g., a criminal penalty in duty to reveal the truth. On the concept of forgiveness applied to transitional justice in South Africa, see Teles (2007).

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, giving it 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 Janaína 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 Act 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."

More recently, 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 powers and autonomy than the one that ended up being created.

The initial project was not implemented until 2010, when the IACHR, in the wake of the case of Gomes Lund and others vs. Brazil, urged the country to create 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 passed the bill in Congress.

The law establishing the National Commission of Truth provides the purpose of the Commission to examine and clarify, 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 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 constitutional, and having its origin in the Amnesty Act 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 Truth Commission also ensures that the work of its members will not be of jurisdictional nature.

The Commission has the prerogative to request documents and information to agencies of the government, even in any degree of secrecy, just 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 their 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[11]; the replacement of the term "national reconciliation" by "consolidating democracy"; and autonomous budget and administrative 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 destabilize the common sense about what finally received the title of a "ditabranda"[12] (a smoother dictatorship) in the country. As emphasized in the technical

[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 committees in her study, the majority had hundreds of members.

[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 São Paulo on February 17th, 2009, is here only as representative for the majority of the media opinion in Brazil on the subject.

advise[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".

Still according to his opinion, the institutional framework does not determine all aspects of what may or may not achieve the Commission. About the criticism related to the short duration of two years of work, one should recognize, as does the Senator Aloysio Nunes, that the Commission will not start its work from scratch, but can and should (according to the law) make use of documents and reports already produced by the Amnesty Commission and the Commission on Politically Motivated Deaths and Disappearances, along with other federal and state agencies.

Nevertheless, the law creating the Truth Commission restores some of the essential parameters of the "political pact", which sets the amnesty as essentially elaborated still during Figueiredo's government.

That the Truth Commission will not have the power to punish crimes committed by State agents during dictatorship would not represent a limit objectionable from the normative point of view 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 did 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 in the case of Brazil, which, by the way, is indisputably considered as a consolidated democracy nowadays. 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.

The work of the National Commission of Truth is still ongoing, 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

[13] It can be found on: http://legis.senado.gov.br/mate-pdf/98119.pdf.

began to emerge. The most systematic effort to analyze the work of the National Truth Commission done so far was conducted by ISER (Institute for the Study of Religion). While recognizing the progress that the Truth Commission holds, 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.[14]

According to ISER, in order to ensure its pedagogical goal and put in focus in the public debate the continuities and breaks in the past of authoritarianism, the Truth Commission should adopt some radical changes on its current operation. Among the main points of criticism of the current operation of the CNV, ISER points out 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 them 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 reparative 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 during the dictatorship to require from these agents what Rainer Forst (2012) calls "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 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

[14] See the ISER report on: http://www.iser.org.br/pdfs/II_relatorio_CNV_ISER_WEB_160713_ALT.pdf

declaration of the constitutionality of the Amnesty Act by the Supreme Court. So, in this sense, the likelihood of cooperation and justification through these testimonials is already low.

Another feature that has also been criticized was the communication made by the CNV with civil society. The report of activities is quite succinct, without minutes 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 as one of its prime objectives rightly affirm democracy as a positive, universal and desirable value.

From the Law of Expiry to the unconstitutionality of 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 case in that sense, in so far that it takes this tension to its ultimate consequences.

In Uruguay, civil-military dictatorship installed in 1973 under the excuse of fighting the guerrillas, especially the Tupamaros group, lasted until 1985, reaching a considerable proportion of people with high number of political arrests, torture and other degrading treatments, and left a legacy of nearly 200 records of disappearances.

In some respects, the Uruguayan transition resembled the Brazilian one, since it took long 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 or 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.[15] 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 provides for the exemption from criminal liability to members of the security forces involved in conduct 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 established 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 became known (Britto, 1997). The president himself, Sanguinetti Coirolo (1985-1990, in the 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 in 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, although it took long to comply with the normative expectations of transitional justice, experienced a high degree of politicization and public debate on the subject.

In 1989, moreover, the first referendum in the country on the revocation or not of articles of the Law of Expiry exempting agents from criminal and administrative liability 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 has 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 notable 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.

[15] In fact, Uruguay basically had two amnesty laws: the Law of National Pacification, of 1985, amnestied political prisoners (except those convicted of murder) and the Law of Expiry of the Punitive Pretension of the State, which exempted from criminal liability state agents.

But instead of disappearing with the outcome of the referendum of 1989, the issue of 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 and the engagement of civil society and intellectuals for memory and justice. 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 rejected requests to order judicial inquiry on the whereabouts of missing persons.

Only from the 2000s on, when president Jorge Batlle (of the Colorado Party) took office, that some of the demands for justice and truth reached government initiatives, especially efforts aimed at revealing the whereabouts of missing children. With this same fundamental purpose of clarifying the fate of missing persons, the Commission on Peace was established in his government. Limited, this Commission 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 consultation, this time a plebiscite, on keeping or not the provisions of the Law of Expiry. A week before the plebiscite, the Uruguayan Supreme Court, in the trial of the Sabalsagaray case, ruled the unconstitutionality of that law. 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 it was historically known for respecting previous popular decisions and keeping electoral commitments within the coalition.

In this context, as stated 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 popular consultation 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.

After some time trying to mobilize civil society for the consultation campaign in 2007, in its V Ordinary Congress, the Frente Amplio has revised its original position and decided to support the proposal of the plebiscite, although still important and numerous internal divisions took place and there was low mobilization in the party to collaborate with the initiative (Buriano 2011, p. 186).

A week before the plebiscite on October 19, 2009, the SCJ, in the trial of the Sabalsagaray case, declared 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, 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 Inter-American Commission on Human Rights decided that the Uruguayan State had not given satisfactory implementation of its recommendations and then referred the Gelman[16] case to the Inter-American Court of Human Rights (IACHR), asking 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 IACHR the ruled that amnesty laws as the Law of Expiry are incompatible with the American system of human rights protection.

[16] Maria Claudia García de Gelman was kidnapped in Buenos Aires in 1976, at the age of 19, and seven months pregnant. The girl was then taken to Uruguay, where she gave birth to Mararena 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 of Macarena.

In response to that, the then Minister of Foreign Affairs of Uruguay, Luis Almagro, anticipating a possible ruling of the IACHR 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 though 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.

Until then, at least from the early 2000s until early 2011, the relationship between the Executive and the SCJ seemed to be a cooperative relationship with regard to asserting the possibility of criminal accountability of state agents who have violated human rights during the Uruguayan dictatorship. However, as of May 2011, this scenario began to change.

The first step of this change would come in the SCJ ruling on a motion submitted by the People's attorney Mirtha Guianze after a decision made by the Court in which it 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 to classify the conducts of those soldiers as crimes of enforced disappearances, which are considered 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 may not be awarded retroactively to those two soldiers.[17]

Considering those crimes as common felonies and not as serious crimes against humanity, the SCJ established indirectly November 1st, 2011, as the maximum date before the expiry of all crimes committed during dictatorship, because the Uruguayan

[17] 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-lesa-humanidad/.

Penal Code provides for a maximum of 26 years and eight months as the statute of limitation for punitive claims on common crimes.

Taking this process into account, the then Minister of Foreign Affairs of Uruguay, Luis Almagro, not satisfied with the failure of compliance with the IACHR sentencing in the Gelman case, convinced the ruling coalition to propose to Congress an interpretative law that would effectively neutralize the effects of criminal immunity to state officials who committed crimes against humanity during the dictatorship (Roniger, 2011; Buriano, 2011).

The current President José Mujica and the Frente Amplio began to face a delicate situation because, historically, the coalition had created an image of greater respect and affinity with the popular will and the commitments previously taken. Partly for this reason, the support for the interpretive bill was intermittent among the leaders of the Frente Amplio. This project entailed a defeat in Congress in May 2011, which would be reversed only in October of the same year (Roniger, 2011).

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) by which it should declare 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 as ungrounded.[18]

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 highly contestable translation to 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 term "related crimes" contained in the first paragraph of the first article of the law.

[18] The decision can be read at: http://redir.stf.jus.br/paginador/paginador.jsp?docTP=AC&docID=612960.

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 to establish 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 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).

Moreover, according to the Supreme Court, the peculiarity of the interpretation of the term "related crimes" would be more appropriated to the "friendly" character of the Brazilian society.

One of the main arguments of this Supreme Court's decision contends that the Amnesty Act was passed by a representative Congress. It is worth noting, however, that the vote by majority in Congress in other cases did not prevent the Court of changing a number of other laws, most of them, in fact, voted by Congress already during the current democratic period.

Therefore, under the logic of that 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 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 was to be sufficient, judicial review would not be legitimate itself.

The Brazilian Supreme Court stands a high degree of activism in judicial review, widely exercising its anomalous legislative work not only negatively (declaring unconstitutionalities), 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).[19]

Following this trend in the politicization of the 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 laid the foundations on which the new democratic regime would stand, and derived from a so-called broad national “outcry", 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 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

[19] 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. 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.

the new regime, because it - more than being part of the new regime - would be its condition of possibility.[20]

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

A few months after this sentencing, the IACHR ruled on the case of Gomes Lund and others vs. Brazil and, as expected, has deployed some of the universal principles of human rights applied to transitional justice. Since the General Assembly of the United Nations (UN) in 1946, in its resolutions 3 and 95, the principles contained in the Nuremberg Tribunal regarding the non-application of statutes of limitations and the insusceptibility of amnesty for crimes against humanity were approved. In 1968, another UN General Assembly ratified these terms. All these resolutions had already been signed by Brazil before or during the dictatorship.

In this respect, the Commission on Human Rights, in its General Comment n. 31, had pointed out that in those cases where public officials or state agents have committed torture and other cruel, inhuman or degrading treatment, murder or enforced disappearances, "states [which take part to the International Covenant on Civil and Political Rights] can not exempt the offenders from their personal legal liability, as in certain amnesties [...] and earlier immunities. Furthermore, no official position justifies exemptions from legal liability […]" (see UN Human Rights Commission, 2010).

Since the 1948 Universal Declaration, human rights protection is ought to transcend the boundaries of nation states. After the hard processes of learning from the totalitarian experiences in Europe, human rights were protected in international law as universal and indivisible. This means that when a human right is violated, all mankind

[20] 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 toward historical objectives. According to the author, in these terms, the constitutional courts would assume the condition of a sort of "prophetic master," who 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 vision of 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).

is, and legal standing is given to different actors of any signatory state of the Declaration and subsequent resolutions for the protection of these rights (Piovesan, 2010, p. 94).

Still with regard to the principle of non-impunity, it is important mentioning two excerpts of the ruling of the IACHR in Gomes Lund and others vs. Brazil, which disapproves 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 IACHR'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) prepared 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 art. 2 of this bill stated that any provision for exclusion of criminal liability of these agents should be rejected. In addition to quoting excerpts from the IACHR's decision on the Araguaia case, the justification of the bill argued that the exemption from criminal liability for

[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.

crimes against humanity also violates the Federal Constitution. It means that the bill openly contradicted the understanding of the STF on the topic.

The Committee on External Affairs and National Defense Board, though, followed the technical advice[22] of congressman Mr. Hugo Napoleon (DEM-PI) and rejected the bill. In his understanding, Mr. Napoleon reiterates the idea that the amnesty was the main historical event that laid the grounds on which democracy could emerge. Napoleon 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 trial of the Supreme Court on the ADPF 153, the congressman emphasized that the constitutional amendment n. 26/1985, which allegedly gave Constituent status to the amnesty, would be a "norm of origin", therefore integrating the Constitution of 1988. According to him, the Amnesty Law formalized an agreement of forgiveness. The technical advice also referred to statements of President Dilma Rousseff in the press, according to which there was no room for "revenge" and the original terms of amnesty should be maintained.

The 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.[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 (§ 11) and that the law had been passed by Congress, by a democratic referendum and has been held constitutional by the Supreme Court of that country. Another argument was that Article 8 of the ACHR only

[22] See: http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=493311.
[23] Hugo Leonardo de los Santos Mendoza et al. *versus* Uruguay, cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 e 10.375, Report 29/92, OEA/Ser/L/V/II.83 (1992). Find in: http://www.cidh.org/annualrep/92eng/Uruguay10.029.htm.

protected the rights of the accused in a criminal trial, but gave no guarantees for someone or institution to file a criminal prosecution (§ 24).

In its final report on the case, the Commission argued that it was not the matter to evaluate the legitimacy of a national law, but whether its effects constituted a breach of the obligations of the government to the ACHR (§ 30). 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 (§ 6). 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). Thus, the Law of Expiry was considered incompatible with the purposes of the ACHR, because the former would prevent the victims or their representatives to promote a criminal trial against their offenders (§ 40). Quoting the decision of the IACHR 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).

However, the Commission set aside the definition of "appropriate punishment". In the end, considering that the Law of Expiry was incompatible with the American Convention, in its recommendations, the Commission recognized only (1) the rights of victims or their relatives to a fair compensation for the violations suffered and (2) the need for the State of Uruguay to adopt the measures necessary to clarify the facts and identify those responsible for human rights violations.

While 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, then, the Court held that by affirming the forfeiture of any punitive attempt against public agents who committed crime during the dictatorship, the Congress had invaded a strictly judicial competence and thereof breached 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 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, by four votes to one, that Articles 2 (on the non-application of statue 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 irretroactivity of a more severe criminal law principle 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 IACHR 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 IACHR, now the Court criticized the interpretations of the IACHR on the ACHR.

[24] The ruling can be found in: http://www.poderjudicial.gub.uy/images/resoluciones/sent_scj_22-02-13_inconst_ley_18831.pdf.

The SCJ then made its own interpretation of the American Convention, the Rome Statute and 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 IACHR on criminal law, saying that, unlike the International Criminal Court, the IACHR 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 Gavazzo and Arab (n sentence. 1.501/2011), the crimes committed during the dictatorship would not be crimes against humanity (pages 33 and 34 of the Decision).

From the latter ruling it is possible to pinpoint the key elements of a completed view of the SCJ on the typology of serious human rights violations committed by public agents in the course of the Uruguayan dictatorship. Here are the key elements of the understanding 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. This is because Uruguay has become a signatory to the international system of human rights that defines crimes against humanity only after the transition to democracy. Being a more severe criminal law (declaring non-applicability of statute of limitations to certain crimes), it can not backdate and those crimes should be considered as common. (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 no longer or will not be received 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 that could give rise to an interesting comparison. The military dictatorships in both countries were attached to the same type of authoritarianism defined by Jon Elster (2004): 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". There was also in both cases a high polarization between human rights and democracy and a delay (relative to other South American countries such as Argentina and Chile) to carry out the normative requirements of transitional justice, such as economic and symbolic reparations and the affirmation of truth and justice in the strict sense. Moreover, also for a long time, Uruguayan and Brazilian governments have adopted a speech talking about the suitability of conciliation to the history of their countries. Despite all these similarities, which I think are even greater than those found between the Brazilian experience on one side and the Argentine and Chilean on another, most comparative studies in the field carried out comparisons between Brazil and Argentina and/or Chile.

But the Brazilian and Uruguayan experiences of transitional justice 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.

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 this countries *for* democracy. But 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.

Assessing the Political Terror Scale, one will see that Brazil has worsened in terms of civil rights over the period of dictatorship. This would mean that democracy alone does not guarantee improvement in basic human rights (see Sikkink and Walling, 2007). Moreover, most of the Latin American countries which tried perpetrators improved significantly their positions in the scale. Sikkink and Walling (2007) point out that countries with the same level of democracy (according to the Freedom House of Political Rights Index) have different levels of human rights violations. Brazil and Uruguay, for example, have the same index of democracy, but the performance of the first is more severe on the scale of terror. This is not sufficient to state that the

attribution of accountability over state-oriented offenders may or may not be relevant for the quality of civil rights in the present, but it sure makes this hypothesis at least plausible and demonstrates that the quality of democracy is no guarantee for the quality of human rights.

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