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THE HERZOG CASE AT THE INTER-AMERICAN COURT OF HUMAN RIGHTS (IACHR): TRANSCONSTITUTIONAL PRESSURES FOR A REREADING OF ADPF NO. 153/DF AND ITS PROBLEMATIC OFFICIAL NARRATIVE ABOUT THE BRAZILIAN MILITARY DICTATORSHIP (1964-1985)

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ABSTRACT

This paper aims to analyze what would have been the transconstitutional pressures exerted by the Inter-American Court of Human Rights (IACHR) on the Brazilian national legal order for a rereading of ADPF n. 153/DF and its problematic official narrative about the Brazilian military dictatorship. To this end, this text is divided into six distinct sections. After a brief introduction, we will present, albeit in a panoramic manner, (i) the understanding of the Federal Supreme Court (STF) in the judgment of ADPF No. 153/DF and the understanding of the IACHR in cases (ii) Gomes Lund and (iii) Herzog. Soon after, the theoretical influences essential to the understanding of the transconstitutional pressures exerted by the Court will be presented. Finally, by way of a conclusion, the inputs of the previous operations will be articulated in order to measure the possible future of the understanding upheld in the judgment of ADPF No. 153/DF.

Keywords: Transconstitutionalism. Inter-American Court of Human Rights. Herzog et al. v. Brazil. ADPF 153.

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INTRODUCTION

In a judgment dated March 15, 2018, the Brazilian state was condemned by the Inter-American Court of Human Rights (IACHR) for the death of journalist Vladimir Herzog, which occurred in 1975, during the dictatorial period that was then in force in the country. At the time, the Court understood that the episode would characterize the hypothesis of a crime against humanity, due to the finding of the occurrence of torture and murder of the victim by official agents of dictatorial repression, condemning Brazil, among others, to reopen the investigations against those responsible for the crime and to repair damages suffered by the victim's family (IACHR, 2018). Far from being an isolated decision, the case is part of the context of an already reiterated jurisprudential current within the IACHR in the sense of the need to punish the serious human rights violations verified in the context of the civil-military dictatorships that took place in the Southern Cone in the second half of the twentieth century.

In particular, this understanding is especially relevant to the Brazilian case, insofar as – contrary to what has been observed in other countries in the region – there has been practically no effective effort in Brazil, during or after the redemocratization process, to achieve the so-called Transitional Justice – thus comprising judicial or extrajudicial measures aimed at repairing and compensating for the legacy of human rights violations in the context of regimes of exception. Despite initiatives such as the institution of pensions and pecuniary reparations for those affected by acts of exception (instituted by Law No. 10,559/2002) or the belated establishment of a National Truth Commission (established by Law No. 12,528/2011), the elucidation and accountability of agents of the dictatorship in Brazil is hindered by the Amnesty Law enacted during the redemocratization process (Law No. 6,683/1979), interpreted in such a way as to exempt the agents of repression from responsibility. This interpretation of the amnesty law, in fact, had its validity reaffirmed in the face of the 1988 Constitution by the Federal Supreme Court (STF), on the occasion of the judgment of the Allegation of Non-Compliance with a Fundamental Precept (ADPF) No. 153/DF. Since then, the IACHR has ruled on the need to review the understanding adopted in the judgment of ADPF No. 153, first in the case of *Gomes Lund et al. v. Brazil* ("*Araguaia Guerrilla*") and, more recently, in the consideration of the case of *Herzog et al. v. Brazil*.

In this context, based on theoretical influences gathered (among others) from the works of Marcelo Neves (NEVES, 2009) and Günther Teubner (TEUBNER, 2016), the present work will proceed to an analysis of what would have been the transconstitutional

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pressures exerted by the IACHR on the Brazilian state, specifically taking the Herzog Case in order to better measure the possible impacts of such a decision on the national legal order, especially with regard to a demand for a review of the interpretation of accountability for the crimes of the dictatorship given by the STF in the records of ADPF No. 153/DF.

ADPF NO. 153/DF AND THE OFFICIAL NARRATIVE ABOUT THE BRAZILIAN MILITARY DICTATORSHIP

In October 2008, the Federal Council of the Brazilian Bar Association (CF/OAB) filed the ADPF, which later received the number 153/DF. With the demand, the OAB sought to obtain from the STF a jurisdictional provision conferring an interpretation in accordance with the Constitution to declare that the amnesty granted by Law No. 6,683/1979 to political or related crimes "does not extend to common crimes committed by agents of repression against political opponents, during the military regime" (OAB, 2008, p. 17). In other words, it was intended to declare unconstitutional the interpretation according to which all agents of repression who committed common crimes for some political motivation would be amnestied by Law No. 6,683/1979 – crimes that would not be considered connected in the technical sense of the word (and which, in many cases, were not even in any way linked to a technically political crime)[3].

To support its claim, the OAB argued that the interpretation according to which common crimes committed by agents of repression would be amnestied would violate four fundamental constitutional precepts, namely: (i) isonomy in matters of security; (ii) duty of the public power not to hide the truth; (iii) democratic and republican principles and; (iv) dignity of the human person (OAB, 2008).

In addition, another argumentative perspective conveyed by the OAB since the entry of ADPF No. 153/DF (and of particular relevance to the present analysis) concerns the invocation of the jurisprudence of the IACHR in matters of criminal self-amnesty observed in other countries of the Southern Cone. Within the topic on which the violation of democratic and republican principles was sustained, and based on the "prevalence of

[3] For contextualization purposes, the provisions whose interpretation in accordance with the Constitution was required are as follows: "Art. 1 Amnesty is granted to all those who, in the period between September 2, 1961 and August 15, 1979, committed political crimes or related to these, electoral crimes, to those who had their political rights suspended and to the servants of the Direct and Indirect Administration, of foundations linked to the public power, to the Servants of the Legislative and Judiciary Branches, to the Military and to union leaders and representatives, punished on the basis of Institutional and Complementary Acts. Paragraph 1 - For the purposes of this article, crimes of any nature related to political crimes or committed for political motivation are considered connected."

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human rights" provided for in Article 4, II of CR/88, together with the recognition of the jurisdiction of the IACHR by Legislative Decree No. 89/1998, the OAB invoked the authority of the IACHR to categorically state: "the criminal self-amnesty decreed by rulers is null and void" (OAB, 2008, p. 15).

On April 29, 2010, however, the plenary of the STF, after two trial sessions, by a majority of seven votes against two, rejected the preliminaries to dismiss the argument, in accordance with the vote of the reporting minister Eros Roberto Grau. In general, the majority formed at that time, which brought individual votes with some fundamentals that differed from each other, united in the understanding that the Amnesty Law (Law No. 6,683/1979), in the interpretation that also included the pardon of crimes committed by agents of political repression, was embodied as a fundamental political pact of the redemocratization process and would have been, it was even reaffirmed in Constitutional Amendment No. 26/1985, which convened the National Constituent Assembly of 1987/1988. In this context, there would be no need to consider the non-reception of this peculiar conception of amnesty in Law No. 6,683/1979, insofar as it itself, once reaffirmed by the constitutional amendment that convened the new constituent assembly, would appear as a premise of the new Constitution – a new Constitution that, circularly, would derive its own legitimacy from the amendment that had called for its elaboration and from the political amnesty pact itself in the understanding given to it by the STF.

Without going into the merits of such a peculiar interpretation of the constituent process of 1987/1988, which seems to us to trivialize the very complexity of such a historical phenomenon, it is important to highlight the way in which the issue of international law and comparative constitutional law was dealt with in the judgment of ADPF No. 153/DF. In particular, despite the fact that the OAB invoked in its initial petition the jurisprudence of the IACHR regarding the nullity of self-amnesties granted in the context of the military dictatorships in Latin America, the confrontation of such precedents was never made by the plenary of the STF. The issue of international law, therefore, is practically absent from the judgment of ADPF No. 153/DF. Comparative constitutional law, on the other hand, ended up being invoked as a mere rhetorical instrument of reinforcement and erudition to corroborate a previously taken conclusion. In a generic way (and with convenient omissions), the body of the rapporteur's vote invokes scattered episodes from the constitutional histories of Chile, Argentina and Uruguay in order to support a notion that any readjustment of the content of the amnesty laws should be

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operated by the legislative power (never by the judiciary). At this point, we have what Gabriel Rezende accurately called a "constitutional soliloquy". Said author, when discussing the concept and referring to the judgment of ADPF No. 153/DF with propriety, asserts:

> In fact, solitary dialogue (*einsame Rede*) – the soliloquy – can only improperly be called dialogue. It is the absence of dialogue.
> In the case of the constitutional soliloquy, something very similar happens. As in Husserl's soliloquy, it is the extreme attempt to attribute meaning in a sphere of property. This means that only that which can be restored to a secure sphere of interiority in the presence of a subject has meaning. Dialogue, therefore, only exists in the exact terms of a mere analogy or, as we will tend to interpret here, from a fictional logic. In other words, the contact between normative orders, between different jurisdictional instances, takes place within only one of them *as if* there were in fact a dialogue. Unlike *transconstitutionalism*, which operates from a logic of reciprocal learning, *cisconstitutionalism* develops through the fictitious structure of debate and dialogue that is both assured and ensures sovereignty. At least, this is his intention (PINTO, 2013. p. 55-56)

THE *CASE OF GOMES LUND AND OTHERS ("ARAGUAIA GUERRILLA") VS. BRAZIL*

Two years after the judgment of ADPF No. 153/DF, in 2010, the IACHR for the first time addressed the issue of Transitional Justice in Brazil, when judging the case of *Gomus Lund and Others ("Araguaia Guerrilla") vs. Brazil.*

On the occasion, the Court considered the claims for investigation, accountability and investigation formulated on behalf of the disappeared of the notorious episode of the "Araguaia Guerrilla", a resistance group to the dictatorial regime that settled in the Araguaia region, located in the northern and central-western interior of Brazil, and which was known to have been decimated by the regime's forces of repression.

At the time of that judgment, the IACHR found that the "forced disappearances" to which the members of the "Araguaia Guerrilla" were subjected constituted crimes against humanity and that the Brazilian State was responsible for violating several rights of ownership of the disappeared contained in the American Convention on Human Rights (Pact of San Jose, Costa Rica). Notably the rights to legal personality, to life, to a fair trial, to personal integrity and freedom, to freedom of thought and expression, and to the right to information and to the search for truth, among others – it is also stated that the Brazilian State has failed to comply with the duty of humane treatment also contained in the Convention.

Finally, the IACHR held that the provisions of the Amnesty Law (Law No. 6,683/1979) that prevent the investigation and punishment of the serious human rights

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violations dealt with in the case violate the American Convention on Human Rights, have no legal effect, and cannot remain an obstacle to the investigation of the facts dealt with in the case (IACHR, 2010). In a clear manner, the IACHR understood the need to review the understanding adopted in the judgment of ADPF No. 153/DF.

THE *HERZOG AND OTHERS VS. BRAZIL CASE*

Subsequently, in 2018 (after the IACHR itself found that most of the provisions of the *Gomus Lund Case had not been complied with* – and that it had only partially and insufficiently complied with the few provisions that the Brazilian state had actually proposed to comply with), the IACHR returned to the demands of Transitional Justice in Brazil when judging the case of *Herzog et al. vs. Brazil.*

Vladimir Herzog, a journalist and member of the Brazilian Communist Party (PCB), was approached by agents of repression on October 24, 1975, when he promised to voluntarily present himself the next morning at the premises of the Department of Information Operations – Center for Internal Defense Operations (DOI/CODI, a notorious center of political repression) to testify about his links with the PCB. which effectively came to pass. On October 25, 1975, however, Herzog died while still in the custody of DOI/CODI agents, due to something that the official bodies initially indicated was a suicide by hanging. Subsequent investigations (including judicial investigations), however, indicated that Herzog was, in fact, tortured and murdered by DOI/CODI agents.

As in the *Gomes Lund* Case, the IACHR also understood that the acts committed by the agents of the military regime against journalist Vladimir Herzog in the *Herzog* case constituted serious human rights violations, and the denial of due elucidation and punishment of those responsible for the episode would be out of step with the obligations of the American Convention on Human Rights. For these reasons, it was decided that:

> The State must restart, with due diligence, the investigation and criminal prosecution
> appropriate, for the facts that occurred on October 25, 1975, to identify, prosecute and, if applicable, punish those responsible for the torture and death of Vladimir Herzog, given the nature of these facts as crimes against humanity and the respective legal consequences for international law (IACHR, 2018. p. 102)

Additionally, on the issue of the Amnesty Law (Law No. 6,683/1979), the incompatibility of its interpretation in the form established by the STF within the scope of

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ADPF No. 153/DF with the obligations assumed by the Brazilian state in the Pact of San José de Costa Rica was also highlighted, in an excerpt from the *Gomes Lund Case* itself:

> By virtue of this law, to date, the State has not investigated, prosecuted, or criminally punished those responsible for the human rights violations committed during the military regime, including those in the present case. This is because "the interpretation [of the Amnesty Law] automatically absolves all violations of human rights that have been perpetrated by agents of political repression" [...] Given their manifest incompatibility with the American Convention, the provisions of the Brazilian Amnesty Law that prevent the investigation and punishment of serious human rights violations lack legal effect. Consequently, they cannot continue to represent an obstacle to the investigation of the facts of the present case, nor to the identification and punishment of those responsible, nor can they have the same or similar impact on other cases of serious human rights violations enshrined in the American Convention that occurred in Brazil (IACHR, 2018. p.30)

Also in the *Herzog Case*, there is a clear pressure from the IACHR to review the understanding upheld in the judgment of ADPF No. 153/DF regarding the interpretation of the Amnesty Law (Law No. 6,683/1979).

THE IACHR, THE SUPREME COURT, AND THE TRANSCONSTITUTIONAL DIALOGUES

Modern society is marked by a paradigmatic change in perception of the reality of the world. It has moved from an awareness of reality to an observation of observation (LUHMANN, 2011, p. 150). That is to say, in modernity, "there is a loss of reality, in the sense of the ontological tradition" (LUHMANN, 2011, p. 151) and only "we can have access to the objective things of the world through information, through what others say and, certainly, what we say" (LUHMANN, 2011, p. 150).

> In this way, this observation of observation or second-order observation "constituted the most advanced form of apprehension in the world, in a diversity of functional fields: science. art, economics, politics..." (LUHMANN, 2011, p. 150).

Thus, world society, made up of multiple social systems,

> [...] It takes as its starting point a principle of differentiation: the system is not merely a unit, but a difference. The difficulty of this theoretical precept lies in being able to imagine the unity of this difference. In order to be situated, a system (unit) needs to be differentiated. Therefore, it is a paradox: the system manages to produce its own unity, to the extent that it makes a difference (LUHMANN, 2011, p. 101).

Social systems, although differentiated, are not hermetic and insensitive to the environment and to other systems. That is:

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> [...] there are possibilities stored (noises) in the environment, which can be transformed by the system; therefore, through structural coupling, the system develops, on the one hand, a field of indifference and, on the other, causes a channeling of causality that produces effects that will be used by the system" (LUHMANN, 2011, p. 131/132).

This reciprocal influence and provocation between systems should not, however, mean the very determination of one system by the other: "One should never lose sight of the fact that structural coupling is compatible with autopoiesis, and that, therefore, there is a possibility of influencing the system, as long as autopoiesis is not undermined" (LUHMANN, 2011, p. 132). Structural couplings would therefore constitute "mechanisms of concentrated and lasting interpenetrations between social systems" (NEVES, 2009, p. 37). And the most outstanding example is the Constitution, which functions as a structural coupling of Law and Politics.

Marcelo Neves, in the light of Wolfgang Welsh's concept of transversal reason and in view of the growing gain in complexity of world society in late modernity, proposes the overcoming of Luhmann's concept of structural coupling by the concept of transversal rationality. Neves points out that, similar to structural coupling, transversal rationalities act as transition bridges between systems.

It happens, however, that, although structural couplings (as a bilateral mechanism of transition between two autonomous systems) are necessary conditions for transversal rationality between systems, they are not, however, sufficient conditions. This is because,

> The entanglements that promote transversal rationality serve, above all, the reciprocal exchange and learning between experiences with different rationalities, importing the mutual sharing of complexity preordained by the systems involved and, therefore, understandable to the receiver (stable and concentrated interference at the level of structures) (NEVES, 2009, p. 49).

Speaking specifically of the phenomenon of transconstitutionalism between public international law and state law, as is often the case with the object of study of this paper, Marcelo Neves states that "[t]he state that "[t]he state that it is not appropriate, strictly speaking, to speak of vertical networks, which would imply admitting a hierarchical relationship between orders. Rather, it is an intertwining between orders of a different type" (NEVES, 2009, p. 132).

According to Neves, phenomena of this nature involve a twofold character. With regard to the state order, the constitutional courts are increasingly dealing with "constitutional problems related to human or fundamental rights or concerning the issue of

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limitation and control of power, involving claims that go beyond the specific scope of validity of the domestic order" (NEVES, 2009, p. 133). On the other hand, with regard to the international order, "it means the incorporation of constitutional issues within the scope of competence of its courts [IACHR, for example], which begin to raise the claim of deciding with an immediate binding character for agents and citizens of the States" (NEVES, 2009, p. 133).

Again, the issue is presented in a constitutionally and sociologically much more complex way than the pure and simple heterodetermination of one order over the other and vice versa. The problem arises much more, on the factual and legal level, in terms of mutual constitutional pressures between orders. These pressures do not necessarily entail an immediate binding of one sphere over the other, but rather – most of the time – the emergence of unprecedented constitutional problems and provocations that overflow the traditional binary logic *jus cogens* vs. state sovereignty.

In fact, transconstitutional imbroglios such as the one referring to the Herzog Case – in which the IACHR and the STF place different and conflicting constitutional narratives on the same issue to oppose in the public sphere – demonstrate that it is necessary to problematize the constitutional approach of these new legal issues, which do not appear normatively as a normative-theoretical imposition, but rather as something more or less accustomed to what Günter Teubner calls "fragmentation constitutional" or "Constitutionalism beyond the National State": "constitutional problems are located outside the borders of the National State, in transnational political processes; and, simultaneously, outside the institutionalized political sector, in the 'private' sectors of world society" (TEUBNER, 2016, p. 24).

To insist on a binary logic is not only to misdiagnose this new order of things, but also and above all to be far from finding constitutionally adequate solutions to these problems. As will be discussed below, the IACHR's position in the judgment of the Herzog Case proved to be much more open to this new transconstitutional paradigm than the action of the STF in the judgment of ADPF 153, an occasion in which the Brazilian Supreme Court not only controversially applied the country's constitutional law, but above all for the way in which it enclosed constitutional meanings when it closed its ears to what the international order says about crimes against humanity, unleashing the whole series of pressures from the IACHR from the Gomes *Lund and others case ("Araguaia Guerrilla") vs. Brazil*, which culminated in the recent ruling in the Herzog and *others vs. Brazil case*.

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Now, according to Marcelo Neves, a unilaterally internationalist perspective would be problematic:

> [...] Not because one can resort to the traditional principles of self-determination or sovereign equality, but because, without self-institutionalization of constitutionalism at the state level, one of the specific legal rationalities necessary for the affirmation of transconstitutionalism is lacking. The intervention model has shown its precariousness or insignificance in the construction of internal constitutional orders (NEVES, 2009, p. 133).

And he continues:

> On the other hand, when national courts intend to start exclusively from the legal-constitutional order, they are confronted – especially when it comes to the extreme case of jus cogens [precisely the central argument of the IACHR in the Herzog Case] – with the growing difficulty of setting aside the institutions and norms of public international law in the name of sovereignty, since this can no longer be legitimacy simply as a concept of territorial autonomy. but rather more and more as a notion related to 'a regional political responsibility in the structural conditions of world society (NEVES, 2009, p. 133-134).

Thus, one cannot fall, in the words of Neves, into an "internationalist pseudo-universalism", nor into a "constitutional provincialism", insofar as "both from one perspective and another, constitutional problems come to have a simultaneous relevance, requiring new models of analysis" (NEVES, 2009, p. 135).

This is because: "The 'opening of statehood', on the contrary, brought with it an 'interpenetration between the state and international order', which progressively requires learning and an exchange between experiences with specific rationalities in the two perspectives, the state and the international" (NEVES, 2009, p. 134).

With regard to the constitutionality of the Amnesty Law, which, in the interpretation given to it by the Brazilian courts, has pardoned state agents of the Brazilian dictatorship for crimes committed against humanity (notably, kidnappings, torture and homicides), two different treatments are observed by the IACHR and the STF, specifically with regard to the transconstitutional relationship between the national and international legal orders.

As already demonstrated, the STF's decision in APDF 153 was extremely controversial and silent when dealing with the norms of international law on the punishment of state agents who perpetrated crimes against humanity. Practically no rule of *jus cogens* was faced by the Rapporteur and the other Justices during the aforementioned judgment, the Court suffering from "statist provincialism" or "unilateralism and incapacity for 'constitutional talks'" (NEVES, 2009, p. 137). This stance differs radically from that adopted

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by other Supreme Courts in South America when they judged similar crimes. In these cases, the courts have opened up not only to the norms of international law relating to crimes against humanity, but also to the jurisdiction of the IACHR, which has the constitutional competence to analyze human rights violations committed by the signatories who submit to it.

On the contrary, the IACHR's constitutional stance was one of openness and conversation, insofar as – within its competences – it demanded that Brazil respect the norms of humanitarian law with regard to the investigation of crimes against humanity committed during the 1964 dictatorship. Almost a decade after the Gomes Lund Case and repeated omission, the Court condemned Brazil again, this time in the Herzog Case. All this to demonstrate that if there was an institution that was permanently willing to inaugurate a transconstitutional conversation with Brazil, it was the IACHR.

It should be said, for the sake of convenience, that we are not necessarily defending here an intrinsic subordination of the STF to the decisions of the IACHR or vice versa. Transconstitutional dialogues do not operate with this binary and Manichean logic. What is being questioned is the "narcissistic denial" (NEVES, 2009, p. 139) of the Brazilian Supreme Court to very relevant arguments and norms (including jus cogens) for the substantive constitutional debate held in ADPF 153. The fact that the STF has closed its ears to this discussion does not make the problem disappear. Proof of this is that, after the judgment of the *Gomes Lund and others ("Araguaia Guerrilla") vs. Brazil* case, a new ADPF was filed by the Socialism and Liberty Party (PSOL) – which came to receive the number 320/DF and was distributed to Minister Luiz Fux – in which it defends, basically, the possibility of punishing state agents of the dictatorship for crimes committed against humanity, precisely with the invocation of arguments of international law.

In this way, the ghost of transconstitutionalism seems to haunt the Court, whether it wants it or not. The Herzog Case corroborates this at the international level, insofar as it demonstrates, as we have seen, that transconstitutional pressures operate in a fragmentary way, which can only be understood as dialogue and openness.

CONCLUSION: THE FUTURE OF THE NARRATIVE SUPPORTED IN ADPF NO. 153/DF

The IACHR pressured Brazil, on the occasion of the trial of the Gomes Lund Case, to take action regarding the crimes against humanity pardoned by the Amnesty Law in the interpretation given to it by the Supreme Court. This conviction gave rise to the filing of a

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new ADPF in which the applicability of the rules of international humanitarian law is questioned and requested in a new assessment of the constitutionality of the Amnesty Law. Since Brazil did not take the measures required of it in the Gomes Lund Case, the Inter-American Court, eight years later, condemned Brazil again, largely for these same conducts, this time in the Herzog Case.

Reciprocal transconstitutional pressures are, therefore, a present and urgent juridical-sociological phenomenon. It is up to the STF, therefore, to treat it responsibly, with integrity and consistent with the complexity of constitutional fragmentation, which no longer admits outbursts of authoritarianism and constitutional enclosures in the name of a concept of sovereignty that is no longer sustainable.

The scenario, however, is not encouraging. It is worth remembering, as appropriate, the recent imbroglio regarding the binding or not of the Brazilian legal system to the opinion of the International Human Rights Committee of the United Nations (UN), which guaranteed former President Lula has the right to run for President of the Republic in the 2018 elections. Both the Federal Supreme Court (Pet 7.841/PR) and the Superior Electoral Court (Rcand 0600903-50.2018.6.00.0000) decided that the opinion is not binding. Asked about the incidence of International Law in the case, Supreme Court Justice Alexandre de Moraes responded with the phrase "each monkey on its branch" (COUTINHO, 2018), which also demonstrates a mismatch between the Brazilian Supreme Court and this new transconstitutional reality.

Now, "in the democratic state of law, considered as the dwelling place of a legal community that organizes itself, the symbolic place of a sovereignty diluted by discourse remains empty" (HABERMAS, 1997, v. II, p. 187-188).

In other words, "citizenship necessarily involves the permanent reconstruction of what is meant by fundamental rights according to a dimension of temporality that encompasses the experiences and constitutional requirements of past, present and future generations" (CARVALHO NETTO, 2003).

The existence of privileged places of power can no longer be accepted, even within the Judiciary itself, which is responsible, in the current period of constitutionalism, for the very relevant role of concretizing rights through the interpretation of texts and equivalents to texts.

See, in this sense, what Habermas has to say about substantial arguments that allegedly hold within themselves a supposed natural truth embodied in a final opinion:

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> The correctness of normative judgments cannot be explained in the sense of a theory of truth as correspondence, because rights are a social construction that cannot be hypostasized into facts. 'Correctness' means rational acceptability, supported by arguments. Certainly, the validity of a judgment is defined from the fulfillment of the conditions of validity. However, in order to know whether they are fulfilled, it is not enough to make use of direct empirical evidence or facts given in an ideal vision: this is only possible through discourse - that is, through the path of a reasoning that unfolds argumentatively. Now, substantial arguments are never "cogent" in the sense of logical reasoning (which is not enough, because it only explains the content of premises), or of immediate evidence (which is not found in singular judgments of perception and, even if it were, would not cease to be questionable). Therefore, there is no "natural" end in the chain of possible substantial arguments; It cannot be excluded a fortiori the possibility of new information and better arguments being adduced. Under favorable conditions, we only conclude an argument, when the arguments are condensed in such a way into a coherent whole, and within the horizon of basic conceptions not yet problematized, that a non-coercive agreement arises on the acceptability of the disputed claim to validity. The expression "rationally motivated agreement" is intended to do justice to this remnant of facticity: we attribute to arguments the power to "move", in a non-psychological sense, the participants in the argument to affirmative positions. To erase this last moment of facticity, it would be necessary to close the series of arguments in a way that is not purely factual. Now, an internal conclusion can only be reached through idealization: either by circularly closing the chain of arguments through a theory, where reasons are systematically interconnected and mutually support each other - as was the case with the metaphysical concept of system; or by bringing the chain of arguments closer to an ideal limit value - to that vanishing point that Peirce will characterize as 'final opinion' (HABERMAS, v. I, 2010, p. 281-282).

Also in this sense, see Juliano Zaiden Benvindo's criticism:

> Because, after all, wanting to assert oneself as the holder of the "last word" is not a task that can be reduced to empty rhetoric. The discourse needs to have some corroboration with the practices of life, otherwise it loses legitimacy. Having the much-desired "last word" is costly, because it launches, for a single body, the final institutional defense of an entire democratic process, of a whole dialogue that wants to remain open, in which democracy and constitutionalism, as necessary paradoxes, are built and perfected. In advance, the impossibility of this task is already anticipated. Wanting to have the "last word" is a sign of not understanding the complexity inherent in a democratic society, which values citizenship (BENVINDO, 2014).

In turn, Menelick de Carvalho Netto states that

> As a condition of knowledge, then, we have precisely the requirement to know that our knowledge is limited, which requires explicit grounding and, thus, that this knowledge presents itself openly in its precariousness, offering itself to the permanent possibility of refutation, that is, it is either refutable and improvable knowledge or it is not knowledge. Legal dogmatics, therefore, is itself only admissible today as a science of law if it is not exactly dogmatic, it must be grounded, open and know that it is limited by the permanent possibility of refutation of its premises and affirmations (CARVALHO NETTO, 2003).

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Therefore, care must be taken not to fall into what João Costa Neto calls "constitutional narcissism", which "means interpreting the Constitution as a reflection of one's own values. The expression denotes the ease with which some interpreters project their personal values onto the constitutional text" (COSTA NETO, 2017, p. 175) and not as a community of principles that mirrors the historical struggles for the affirmation of fundamental rights and the guarantee of the Rule of Law, which can only mean, in the Democratic State of Law, a sovereignty that appears as an "empty place" (HABERMAS, 1997, v. II, p. 187-188), that is, as an opening for dissent in the public sphere and for argumentative and procedural conviction. Never by the enclosure of meanings and the invocation of an arbitrary "last word".

Therefore, it is expected that the STF, when judging ADPF 320/DF, will rewrite its own view not only on the 1964 Dictatorship, but also on the relationship between the Brazilian legal system and international law, in view of this scenario – real and unavoidable – of constitutional fragmentation and transconstitutional conversation between different legal systems and Constitutional Courts.

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