



# Social Rights and the (Lack of) Control of Power: The Brazilian Case<sup>a</sup>

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Review Article

Volume 6 Issue 3

Received Date: August 28, 2021

Published Date: September 29, 2021

DOI: 10.23880/ijfsc-16000241

## Abstract

One of the good indicators of social control of power is the way in which contemporary societies deal with transitional justice. The most academic approaches to transitional justice, especially in Brazil, usually does not observe the role played by The Supreme Court in particular, and the judiciary in general. This paper seeks to make a relatively different approach. We observe the regulatory frameworks of the Brazilian authoritarian periods, such as the preamble of the 1937 Brazilian Constitution and the preamble of the Institutional Act n. 1/64, looking at them as they were like the Comic Code Authority, in a comparative approach, and observing, also in a comparative way, the Supreme Court as representative of a kind of "Ring of Gyges", the mythical famous magical artifact mentioned by Plato in his Republic, in order to allow the "invisibility" of supposed heroes at authoritarian regimes, in a struggle that sought to identify "good guys" and "bad guys", or the "good" versus "evil" in a context in which normative transitional disputes resemble reports of different narratives, and within which the version matters more than the responsibility for the violation of rights and the human dignity. This paper uses the essay style, through bibliographic review as a method to talk about the theme described in this abstract.

**Keywords:** Social Control of Power; Ring of Gyges; Supreme Court; Authoritarian Regimes

## Introduction

Social Rights are Human Rights, and as such, are part of the way in which a national state deals with violations of fundamental human rights. In the Brazilian case, by the way,

solidarity and human dignity are inseparably linked. Indeed, the so-called judicialization of public policies is permanently linked to the way in which the judicial power acts to establish equality and social justice.

<sup>a</sup>This paper is partially based on the material prepared for the author's participation in a conference at Willy Brandt School of Public Policy, Erfurt University (Germany), in a panel occurred in May 21, 2015, about "Justice and Historical Memory in Authoritarian Regimes". We would like to express our acknowledgements to Willy Brandt School of Public Policy at the University of Erfurt. We also thank the professor Florian Hoffmann, and the students Eduardo Lopes Leite and Raphael Robiatti for all their effort to make that conference possible, and for organizing an exciting academic event. Our special thanks to the institutions which we are bound and that provided us, at that time, a favorable research environment: the Brazilian Center for Constitutional Studies (CBEC), where we are researchers, and we also are grateful to the workers of the Brazilian Supreme Court Archive, in the persons of Kathya Campelo and Elizângela Fidelis, which facilitated access to some primary research sources for the first part of this investigation.

As José Reinaldo de Lima Lopes<sup>1</sup> [1] and Ana Claudia Vergamini Luna<sup>2</sup> [2] record, the issue of human rights in Brazil and Latin America, especially from the 1970s and 1980s (and henceforth), has led to changes in the dynamics of power and its institutions, with the affirmation of social rights as an essential element for the achievement of human dignity, eradication of poverty and reduction of social inequalities, since the Constituent Assembly of 1987-88, which produced the 1988 Brazilian Constitution, the so-called "Citizen's charter".

However, we cannot lose sight the Roberto Gargarella's<sup>3</sup> [3,4] observation, when the Argentine teacher identifies the phenomenon of deficiency in social control of power, based on the metaphor of what he called the "engine room of the Constitution", that is, the Latin America legal social reformers would have advanced to assign social rights, but on the other hand they would have failed to insert into the Latin American constitutions mechanisms for effective exercise and control of power.

It is not surprising that one of the good indicators of the effectiveness of social control of power in Brazil, regarding its importance, has been largely neglected among researchers in the academic field of law, but not in the social sciences such as sociology and political science. As Fabiana Godinho McArthur recalled, it is very important to keep in mind that under Justice of Transition we must understand the processes and mechanisms, legal or not, through the which a society seeks to overcome the legacy of a past marked by violations and human rights abuses on a large scale, guided by the search for justice in transition for peace and democracy<sup>4</sup> [6].

In fact, it is necessary to recognize that the Brazilian judiciary has helped in a very collaborative way with massive human rights abuses and violations. It was the National Truth Commission itself that, in its final report, who predicted that the Brazilian Supreme Court in particular, and the Brazilian Judiciary in general, agreed with the arbitrariness and serious violations of human rights perpetrated by the

Military Coup<sup>5</sup> [6].

To be aware of the habits of individuals, it is necessary that the institutions of the Disciplinary Society build mechanisms of disciplinary control according to their own interests, as noted by Michel Foucault<sup>6</sup> [7].

Some aspects of the Brazilian Supreme Court are very important during periods of authoritarianism, and the Court participation in the aid and perpetuation of dictatorial regimes suggest the need to revisit some historical events. We will share some brief reflections on them.

As quoted a long time ago by Aliomar Baleeiro (1905-1978), one of the former justices from the Brazilian Supreme Court (1965-1975)<sup>7</sup> [8], talking about our first dictatorship, in transitional period (from monarchy to republic in 1889) the new regime dissolved the Legislative Assembly, keeping the judiciary untouched, and especially the Supreme Court of Justice, former name of the Brazilian Supreme Court, because it proved to be "docile and adherent" to dictatorship. It is very important, though little reflected, look deep to the relationship between the judiciary and the dictatorships, at least in Brazil and Latin America: there is a kind of flaw in the matter<sup>8</sup> [9-11].

To address the proposed theme, this article uses the essay style through literature review as a research method.

### The Brazilian Social Control of Power: Court-Packing Plan

It is often remembered the initiative of Franklin Delano Roosevelt to propose the "Judicial Procedures Reform Bill of 1937", also often called "court-packing plan" in an attempt to threaten the Supreme Court in order to obtain victories to

1 Lopes, José Reinaldo de Lima. *Direitos Sociais: teoria e prática*. São Paulo: Método, 2006, p. 34 e ss.

2 Luna, Ana Claudia Vergamini. *Direitos Sociais: controle jurisdicional de políticas públicas*. Dissertação (Mestrado em Direito) - Faculdade de Direito da USP, 165p. 2012, p. 14 e ss.

3 Gargarella, Roberto. *Latin american constitutionalism, 1810-2010: the engine room of the Constitution*. Oxford: Oxford University Press, 2013. Gargarella, Roberto. *Constitucionalismo latino-americano: direitos sociais e a "sala de máquinas" da Constituição*. Trad. Thiago Pádua. *Universitas Jus*, v. 27, n. 2, 2016.

4 McArthur, Fabiana Godinho. *Justiça de transição: o caso brasileiro*. *Revista Anistia Política e Justiça de Transição*, Brasília, Ministério da Justiça, n. 7, 2012.

5 Ribeiro Da Silva, Marina. *Justiça de transição e poder judiciário: o relatório da comissão nacional da verdade e a atuação do Supremo Tribunal Federal entre 1964 e 1969*. Dissertação (Mestrado em Direito) - Faculdade de Ciências Humanas e Sociais - Universidade Estadual Paulista "Júlio de Mesquita Filho", 212p. 2017.

6 Foucault, Michel. *Microfísica do Poder*. 5. Ed. Tradução de Roberto Machado. Rio de Janeiro: Graal, 1985, p.73.

7 The biographical data about Justice Aliomar Baleeiro is contained on the José Levi Mello do Amaral Júnior's excellent research: "jurisprudential memory", in: Amaral Júnior, José Levi Mello do. *Memória Jurisprudencial: Ministro Aliomar Baleeiro*. Brasília: Supremo Tribunal Federal, 2006.

8 Two excellent exceptions in Latin America are the works of Juan Pablo Bohoslavsky and Carlos Santiago Nino; in general terms, about the german nazi jurists, we may cite the great work of Ingo Müller. At: Bohoslavsky, Juan Pablo (Org.). *Usted también doctor? Complicidad de jueces, fiscales y abogados durante la dictadura*. Buenos Aires: Siglo Veintiuno, 2015; Müller, Ingo. *Los juristas del horror - la "justicia" de Hitler: el pasado que Alemania no puede dejar atrás*. Caracas: Alvaro-Nora, 2009; Nino, Carlos Santiago. *Radical Evil on Trial*. New Haven: Yale University Press, 1996.

the executive branch, by threatening the Court composition<sup>9</sup> [12].

The history of the period show us that the New Deal laws were being systematically declared unconstitutional by the US Supreme Court, what represented severe losses to the government. At that time, President Roosevelt presented his controversial plan to retire those Court's Justices that had completed 70 years and 6 months. If they refused to resign, the president would have the right to appoint a new judge to the Supreme Court, up to six, the exact number he needed to sustain the New Deal legislation.

In these terms, Brazil has an older and more intense history of court-packing. Five are the key dates of the practice of a "packaging the Brazilian Supreme Court: 1863, 1931, 1965, 1968 and 2015. In all these dates, but 2015, the Judiciary has been punished or intimidated to act in certain way in line with the dictatorial regime, that were entered into a peculiar struggle between good and evil.

In 1863 the Emperor Dom Pedro, The Second, ordered the retirement of four (4) Justices of the Brazilian Supreme Court because they had decided against the interests of his lover - the Countess of Barral - in a judicial inventory<sup>10</sup> [13], and the due process was a kind of legal joke<sup>11</sup> [14].

In 1931, the so-called Vargas Era, then was determined the retirement of six Justices of the Supreme Court because they acted against the military insurgent class interests, that

9 Caldeira, Gregory. Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan. *The American Political Science Review*, vol. 81, issue 4, 1987, p. 1139-1153.

10 Silva, Evandro Lins e. *O Salão dos passos perdidos: Depoimento ao CPDOC*. Rio de Janeiro: FGV, 1997, p. 400.

11 In this sense, the important narrative of Pedro Calmon: "[About Pedro II] boasted of never having fired an employee for his ideas, he never superimposed on the worthiness of a teacher philosophical belief, and never have supported corruption, and awarded the carelessness of a judge, of so rigorous duties in the society, as the sovereign who watched them. So, why impose a retirement of the Supreme Tribunal judges, violently above the law, in an administrative scandal that roiled the country? For intimal feeling! The count of Barral, husband of the governess of his daughters, the spiritual lady of Barral and Pedra Branca - had complained as he left for Europe, that the inheritance of his father in law remained in the forum gear, swallowed by corrupt judges ... Huh? Should he determine an investigation? ... He saw that it would not produce any results. Already on another occasion, justifying similar disciplinary retirements, Nabuco de Araújo confessed that it's never got proved that kind of charges ... so, angry, Dom Pedro II imposed the correctiveness decree, which rip the nobility of the togas his best privilege, the intangibility. The Cabinet approved. Resisted with a stubbornness undaunted, the Chief Justice, Montserrat, old man, irreducible, Independence statesman and as man of steel, who preferred to resign to give in. He was honored with a gold crown by the people, and the opposition. Dom Pedro II stood in silent." (author's translation). See: Calmon, Pedro. *O Rei filósofo: a vida de D. Pedro II*. Edição ilustrada. São Paulo, Rio de Janeiro, Recife, Porto Alegre: Companhia Editora Nacional, 1938, p. 123-124.

would come to power some time later<sup>12</sup> [15,16].

In the third period, in 1965, through Institutional Act no. 2, the Military Dictator President Castelo Branco increases the number of Supreme Court justices, from 11 to 16, including the justices Adalício Nogueira, Prado Kelly, Osvaldo Trigueiro, Aliomar Baleeiro, Carlos Medeiros; in addition, to filling the previous vacancy resulting from the retirement of justice Carlos Medeiros, the military dictatorship did the appointment of justice Elói da Rocha. Mostly composed of politicians with previous experience in the branches of executive and legislative power, with links to the former political party UDN (National Democratic Union).

The fourth period would take place in 1968, after the Institutional Act number 5, with the retirement of the justices Hermes Lima, Evandro Lins e Silva, Victor Nunes Leal, Laffayette de Andrada e Gonçalves Oliveira. These last two starring a "theater" of retirements by exchange of letters, in solidarity with the three former justices, reminding the episodes that first tarnished the Court in 1863 and 1931<sup>13</sup> [15,16].

Actually, as Felipe Recondo's vast and extensive research demonstrated<sup>14</sup> [17], a group of Brazilian Military Generals met in 1964 (date of the military coup), under the advice of Francisco Campos, the same jurist who collaborated with the Dictatorship of Getúlio Vargas in the 1937 Constitution, where they discussed what they then called the "elimination" of 6 Supreme Court judges: Aducto Lúcio Cardoso, Antonio Carlos Lafayette de Andrada, Antonio Gonçalves de Oliveira, Evandro Lins e Silva, Hermes Lima and Victor Nunes Leal.

It should be noted that Professor Keith Rosenn, from the University of Miami School of Law, cites previous work by one of the authors of this text, making the historical reference<sup>15</sup>

12 See our articles: Padua, Thiago Aguiar. *Triangulo da Violência Argumentativa*. *Civil Procedure Law*, v. 5, n. 2, 2014, p. 108-111; Padua, Thiago Aguiar; Machado, Bruno Amaral. *Reminiscências do pensamento crítico de Lola Aniyar de Castro e o julgamento dos crimes contra a humanidade*. *Utopia y práxis latinoamericana*, 2019.

13 See our articles: Padua, Thiago Aguiar. *Triangulo da Violência Argumentativa*. *Civil Procedure Law*, v. 5, n. 2, 2014, p. 108-111; Padua, Thiago Aguiar; Machado, Bruno Amaral. *Reminiscências do pensamento crítico de Lola Aniyar de Castro e o julgamento dos crimes contra a humanidade*. *Utopia y práxis latinoamericana*, 2019.

14 Recondo, Felipe. *Tanques e Togas: O STF e a Ditadura Militar*. São Paulo: Companhia das Letras, 2018, p. 155-160.

15 He mentions: "The military also packed the Tribunal and withdrew important parts of its jurisdiction. Moreover, in 1864, the Emperor removed four members of the Supreme Tribunal of Justice for having decided against the interests of his mistress (a countess) in a 1931 judicial decision. During the Vargas dictatorship, six members of the STF were forcibly retired. Thiago Santos Aguiar de Pádua We Cannot Lose Ceremony with the Constitution: The Society of 'Dead Poets' and/or the Living Ministers, 1 *Rev. Juridica Da Oab, Dist. Fed.*, 79-82 (Dec 2013)". At: Rosenn, Keith. *Recent Important*

[18,19].

And, finally in 2015, we have the Constitutional Amendment number 88, which increases the age of retirement of the Brazilian Supreme Court justices from 1970 to 1975 years. There was at time also a discussion about the need of a second - and new - confirmation of the justices before the Senate in a new hearing, something that was called blackmail<sup>16</sup> [20], because it would allow senators to reject those Justices who acted against the personal interests of the members of the legislature, and Michel Temer, the usurper.

In seeking adhesion and support of the Brazilian Supreme Court, it is as if the various dictatorial regimes (especially the Vaga dictatorship of 1937 and the military dictatorship of 1964) seek to transform the Court into a sort of Ring of Gyges, that would make invisible your bad actions and legitimate them, and thus hardly challenged in the times of transition for democracy, legitimized by the highest court of justice in our country.

### A comparison between the Comic Books and the Supreme Court

We realize here a brief comparison between comic books and the Brazilian Supreme Court, more specifically about the famous Code of Comics from 1954 and the performance of the Brazilian Supreme Court.

Moreover, as noted by the philosopher Jeff Brenzel, satisfactory answers to big questions are always difficult to find, and philosophers often spend a long time removing the fat and the bone to get some meat.

So, asking why “superheroes” are good, lead us to another question that we can interpret in different ways<sup>17</sup> [21].

How can we see some connection, at least in the Brazilian context, between the Brazilian Supreme Court (and their participation in dictatorial regimes) and the comic books? We observe that the horror comics in the 1950s provoked such a strong wave of “anti-comics” hysteria that the US Congress approved a determination in 1954 for publishers and they would also create a moral code that everyone should follow.

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Decisions by the Brazilian Supreme Court. Comparative Constitutional Law, Latin American Law, Vol., 45, No. 2, p. 297, 2014.

16 To the Blackmail charge, See: Barbosa, Joaquim Benedito. Nova Sabatina é chantagem, diz Joaquim Barbosa. See: <<http://www1.folha.uol.com.br/poder/2015/05/1630093-nova-sabatina-e-chantagem-diz-joaquim-barbosa.shtml>>, access may 20, 2015.

17 Brenzel, Jeff. Por que os super-heróis são bons? Os quadrinhos e o anel de Gíges. Em: Irwin, William (Coord.). Super-Heróis e a Filosofia. Verdade, Justiça e o Caminho Socrático. São Paulo: Madras, 2009, p. 145-156.

Three “key provisions” of the Comics Code, specifically the numbers 1, 5, and 6, corresponding to the “Code for Editorial Matter” [General Standards Part A], determined:<sup>18</sup> [22]

1. “Crimes shall never be presented in such a way as to create sympathy for the criminal, to promote distrust of the forces of law and justice, or to inspire others with a desire to imitate criminals”;
5. “Criminals shall not be presented so as to be rendered glamorous or to occupy a position which creates the desire for emulation”, and,
6. “In every instance good shall triumph over evil and the criminal punished for his misdeeds”.

In a sense of standard enforcement behavior or imposition of ideas, we can see that the three most important Brazilian historical moments of institutional rupture, in dictatorial regimes, there was this “special” and supposedly battle of “good” against evil, with the special participation of the Supreme Court.

The so called “preambles” of the Brazilian Constitution on Vargas Dictatorship (1937) and the Military Coup Institutional Act (1964) bring disputes from the discourse of fear against “communism”, something that the current government of President Jair Bolsonaro seeks to keep alive. Cite the two fragments (from 1937 and 1964).

1937 Preamble Constitution (Vargas dictatorship):

“(…) ATTENDING the state of apprehension created in the country by communist infiltration, which is becoming more extensive and deeper day by day, requiring remedies, of a radical and permanent character; WHEREAS, under the previous institutions, the State did not have normal means of preserving and defending the peace, security and well-being of the people; (…)

1964 Institutional Act Preamble (Military coup):

“(…) In order to demonstrate that we do not intend to radicalize the revolutionary process, we decided to keep the 1946 Constitution, limiting ourselves to modifying it, only in terms of the powers of the President of the Republic, so that he can fulfill the mission of restoring in Brazil the economic and financial order and to take urgent measures to drain the communist bubble, whose purulence had already infiltrated not only the top of the government but its administrative dependencies.”

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18 Code of the Comics Magazine Association of America. Inc. Adopted on October 26, 1954, the enforcement of this Code is the basis for the comic magazine industry’s program of self-regulation. See: <<http://www.comicartville.com/comicscode.htm>>, access may 20, 2020.



These are two expressive authoritarian moments in Brazilian political history. Not only authoritarian, but also burlesque moments of farce and disguise, where specific groups emulate roles of a supposed guardian, crushing popular sovereignty and human dignity.

It should be noted that just now, in 2020, the current justices of the Brazilian Supreme Court had to interpret Article 142 of the 1988 Constitution to state the obvious, that is, the fact that the Military cannot act as a kind of neutral power (or super power, or moderate power), under the Precautionary Measure in Direct Action of Unconstitutionality number 6.457.

The same Brazilian Supreme Court, with a partially different composition, judged the Non-compliance with Fundamental Precept (ADPF – Arguição de Descumprimento de Preceito Fundamental) no. 153, in which it was discussed whether the crimes committed by the authors and beneficiaries of the military coup during the dictatorship (for being crimes against humanity), should be punished or whether their actions should be made invisible.

And the decision was that we should “forget” (to remember) and “remember” (to forget), that is, the acts of torture and murder were made invisible, as if they were not crimes against humanity. Something similar to the Ring of Gyges, from the Platonic narrative<sup>19</sup> [23].

### The Ring of Gyges and the “Ring” of Brazilian Supreme Court

The Ring of Gyges is a mythical magical artifact mentioned by the philosopher Plato in Book 2 of his Republic<sup>20</sup> [23], and it granted its owner the power to become invisible. In the story of the famous ring, considers whether an intelligent person would be moral if he did not have to fear being caught or punished for doing bad things.

As everyone could see, the story of the Ring of Gyges is a backdrop to reflect on the powers of the Brazilian Supreme Court, which turns itself into a kind of invisibility ring, the ring of Gyges, so as to give super powers to “bad people” do “bad things” absolutely unpunished.

In this context, we mentioned earlier the code of comics coming from the anti-comic hysteria from de 1950s. The Brazilian history was, and still is permeated by an anti-communist hysteria, as you may see when you read important

19 Platão. A República. Trad. Maria Helena Rocha. Lisboa: Calouste Gulbenkian, 1987.

20 Platão. A República. Trad. Maria Helena Rocha. Lisboa: Calouste Gulbenkian, 1987.

legal documents of the country, as the Brazilian Constitution from 1937 and the Institutional Act number 1, from 1964, both previously mentioned.

What makes a Court good or bad? It is the same kind of question when we can ask why a superhero would act good or bad. The former judge of the US Supreme Court, Oliver Wendell Holmes Jr. mentioned, a long time ago, that the head of the observer the law is the head of the bad man. This is his quote exactly:

“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience”<sup>21</sup> [24].

So, here our observation is that the Supreme Court would not be good or bad itself, but it would be a kind of “tool”, like a ring, which would give bad people the power to become invisible. This invisible “person” is who choose between good and evil, as in the story of the ring of Gyges, acting on guidance from a moral code, like the Code of Comics.

It’s not a very nice thing to say, and neither do we agree with that in legal, social, political and philosophical terms, but seems to be a factual observation on Brazilian reality, and it is a shame to almost all Brazilian people. There was never a transitional justice that caught the example of a Supreme Court Justices, in disapproval of his actions.

There is no doubt about the fact that the Supreme Court has been shaped and threatened over so many years to be a kind of invisible ring, and it is recognized that in our last dictatorship the Court helped to perpetuate military dictatorship in his double centralism: federal and organic<sup>22</sup> [25], and this is reflected in the transitional period. The Court declared that a law of one of the Brazilian states was unconstitutional because it was poorly written<sup>23</sup> [26], but refused to grant an order of freedom to a young man illegally arrested<sup>24</sup> [27].

The legacy of the Supreme Court, the Court from dictatorship times, is a ring that turns supposed heroes in invisible reptiles. The largest and most prominent court,

21 Holmes JR., Oliver Wendell. The Path of the Law. Harvard Law Review, 1897.

22 Silva, José Afonso da. O Constitucionalismo Brasileiro: evolução institucional. São Paulo: Malheiros, 2011, p. 151.

23 See: Inter alia, Representação n. 751/GB, Rel. Min. Victor Nunes Leal, de 1967.

24 See: Habeas Corpus (HC) 46.059/RJ, Rel. Min. Oswaldo Trigueiro, julg. 30/10/1968, DJ 12/03/1969.

permanently packed [28].

### Conclude Remarks

We noted in this paper that there is a well-known deficiency in the constitutions of Latin America, including the Brazilian Constitution of 1988, which is consistent with attributing many social rights, but at the same time neglecting effective social participation in the control of power and mechanisms of social participation.

It is possible to point out that one of these deficiencies would have been, in addition to many others, also the deliberate negligence in not implementing mechanisms of accountability of the beneficiaries and authors of the 1964 military coup.

Many social actors were those who committed crimes against humanity, in massive violations of rights and degradation of human dignity.

In the specific case of this paper, we identified the fact that the Brazilian Supreme Court suffered the heavy consequences of trying to act independently, being forced to act in line with the group of actors of the military dictatorship of 1964, and, in a subsequent period, did not it only supported acts of dictatorship but also acted after the 1988 Constitution to make invisible a large number of acts of massive violations against human dignity.

The diagnosis is that the Brazilian Supreme Court, and therefore Brazil itself (as a nation state), failed to ensure the protection of dignity and to ensure the accountability of social actors who used the long Brazilian tradition of exercising social power without control.

In this way, of course, the Brazilian Supreme Court acted as a kind of “Ring of Gyges”, as demonstrated by the Platonic narrative (present in “The Republic”), as it served as a tool capable of making barbaric acts committed by the military dictatorship to implement infamous crimes against humanity.

To speak of social rights, without any doubt, is also to speak about dignity, equality and otherness. Therefore, the “engine room of the constitution” remained (and in fact remains) untouched, with no changes in the aspect of social control of power.

Let us now turn the ring of invisibility but rejecting constitutional law that could be inspired by comics, because Justice does not need Batman’s and vigilantes. Instead, it needs serenity to hear opposing sides, without first taking any part in them, with impartially, respecting the most

basic and elementary human rights. And that implies in not admitting impunity for the crimes of the dictatorship, the first and most important legal assumption of constitutionally adequate coexistence.

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