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The Judgment of Crimes against Humanity in Brazil: Analysis through the Critical Criminological lens of Lola Aniyar

Chaves A[1]*, Machado BA[2] and De Padua TA[3]

[1]Professor at the Strict Sensu postgraduate law program, UNIVALI, Brazil
[2]Associate researcher in the Department of sociology, University of Brasilia, Brazil
[3]PhD, Master and Bachelor's in law, University Center of Federal District, Brazil

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***Corresponding author:** Airto Chaves Junior, Professor at the Strict Sensu postgraduate law program, PhD, Master and bachelor's in law. Professor of Law at Univali. PhD and Master in Legal Science by the Strito Sensu Pos-Graduate Program at UNIVALI in the research field: Constitutional Principiology and Law Policy; also a Legal Sciences PhD at the University of Alicante, Spain, Email: oduno@hotmail.com

Abstract

In this article we discuss two recent Brazilian Supreme Court judgments about crimes committed during the civil-military dictatorship: Allegation of Disobedience of Fundamental Precept suit n. 153 (constitutionality of the 1979 amnesty law), and Extradition suit n. 1362, that discussed the extradition of an Argentine citizen who was convicted of committing crimes against humanity during the Argentine dictatorship). We analyze the role of the Brazilian Supreme Court in the (re) construction of the "criminal problem" and "criminal control" in relation to crimes against humanity perpetrated during the periods of the Argentine (1978-1983) and Brazilian (1964-1985) dictatorship. We take Lola Aniyar de Castro Thought's, seeking some inspiration, for whom the criminology of the 21st Century is the "criminology of human rights", and criminal control would be the thermometer of human rights. In the last part of this article, we discussed what seems to have been "the triumph of Lewis Carroll", in the metaphor of reversing meanings: when protecting human rights is not to protect human rights, by creating an ad hoc decision-making rule from which "remembering is to forget", and "forgetting is to remember", provided that, from the peculiar Rule n. 42, the investigation and accountability for crimes against humanity are not allowed.

Keywords: Criminal Control in the Dictatorship; Brazilian Supreme Court; ADPF 153; Amnesty; Extradition 1362; Lesa-Humanity

Introduction

"Hello darkness, my old friend, I've come to talk with you again, Because a vision softly creeping, Left its seeds while I was sleeping, And the vision that was planted in my brain Still remains, Within the sound of silence. (...) People talking without speaking, People hearing without listening" [1].

"The sounds of silence", music authored by Simon and Garkunfel, narrates one's appeal to the darkness, treating it as an old friend, telling it that people hear, but do not listen. The new interpretation of the song by the group Disturbed remains current, touching and melancholic. Talking to tired auditoriums, invented (or imaginary) can bring about the same sensation.

Thiago de Mello, Amazonian writer, despite and because of darkness, poetically announced that is necessary to keep on singing; a sublime vision that gains color when juxtaposed to the 13 articles (and plus the final one) of his "Statute of Men" (as a Permanent Institutional Act), in which the use of the word "freedom" is prohibited, that it should be suppressed from the dictionaries (and from the misleading marsh of mouths). It should become something "live and transparent", as if in a fire or a river, and whose living should (always) be in the hearts of men. By denouncing the limitation of normativity as conditioners and limiters of conduct (but also as a response to the permissive normativity to the massive violation of human rights) [2], he said, in the darkness, it was decreed that nothing should be obligatory (nor forbidden); that everything should be permitted, even and inclusive playing with the rhinos and walking in the afternoon with an immense begonia in the lapel. And that, by irrevocable decree, the kingdom of permanent justice and clarity was to be established, in which joy should be a generous flag, forever unfurled in people's soul.

The debate about the potential of art in juridical hermeneutics has awakened the interest of researchers in this area. So, as in social sciences (sociology, criminology, anthropology, psychoanalysis, political science), literature, music and film propitiate an arsenal of semantic artifacts to rethink the theory and the practice of law [3]. In this essay, the poetry and the music reminds us of the appeal of Lola Anivar de Castro (henceforth just Lola), Venezuelan criminologist, deceased in 2016; of Lewis Carrol literature, alerting us about the dangerous triumph in the "criminological view": it was strange to run so much to go to "the other side", when in, Wonderland, you run to stay in the same place and that to know the sum of a simple operation (2 + 2), it would be necessary to ask "who bosses" [4]. The meaning inversion, abundant in Carrol's literature, make us think in a deafening silence, that continues to sound, from Lola's first unburdening, the triumph of juridical rhetoric that "approves" the massive violation of human rights. The reflection take us to an initial questioning, the conductive wire of our text: are the human rights not vulnerable by the validation of juridical Amnesty Laws or by the acknowledgement of the prescritbility of crimes against humanity (cases in Brazil from the decisions of the Brazilian Supreme Court, respectively, the judgments of the ADPF n. 153, and the Extradition n. 1362)?

As a narrative, we do not (re) present "the truth", but the "possibilities" or "alternative readings", as observed by Lola when she responded Rose Del Omo in "America y su criminologia". A story can only be a simple narrative of events, a relation of documents, dates, lists, books, names (...) what was once called "the dead weight of history". But it can also be one interpretation in tune with a selected paradigm to understand society. Often, they are paths that interpenetrate, with the presence of the always possible risk, not always calculated, of partiality, both in evaluation about the selection of documents, from epistemological to personal guidelines, and in limitation of the hermeneutic formulas that lead to desired arrangements [5].

The two "truths" of Lewis Carrol seem immutable to Lola's eyes considering the experience of Latin-American countries with the factors of power and "criminal problems" in dictatorial regimes. In honor of the critical legacy of the Venezuelan thinker and this important provocative fragment, let us resume Lewis Carrol's others two truths. It is worth remembering the highlight given to Brazil in the 23rd International Course on Criminology held in Maracaibo, Venezuela, in august 1974 [6,7]. When our representatives, those present at the event, opted to talk about the traffic delicts, in a moment which echoed the political violence in the country, we preferred to run and stayed in the same place while, at the same time, we gave the impression of having inquired who bossed to know how much was the result of the sum 2+ 2. After 40 years, because of the deafening "silence", we resume the reflection with a similar end: to say that the writing of Lewis Carrol remains current and instigating. A sort of "contingency herald of the human rights".

Our writing inspires in a metaphor contained in "rule n. 42" of Wonderland and, yet, in a fragment of the "Snark Hunt", to think on an appeal to truth by repetition. In the narrative, when a" thing" is repeated thrice, it means it must be true, in a "self-fertilizing" process, which evokes the character of captain Bellman in "The Hunting of the Snark" [7], which describes "an impossible trip, of an improbable crew, in search of an inconceivable creature" [8,9]. In the case of the judgment of the "pie theft", in relation to Alice's testimony, a singular scene surges from Carrol's plume, when the rules were created to favor or disadvantage certain people, in given circumstance. The fragment refers, implicitly, to the "complaint" of selectivity of the penal control agencies. The rule n. 42 [9], materializes very well the metaphor of the "criminal problem" and of the "criminal control", and the articulation between both, central to rethink the contribution of Lola to analyze our marginal realities [10].

The inspiration in Lola's legacy reveals itself useful to reflect about different manifestations of the criminal control. In this case study, we have used two decisions of the Brazilian Supreme Court. We suggest that the FSC of Brazil, when confronted with a possible moment of reckoning with the past, when asessing the constitutionality of the Amnesty Law [11], in April 2010, ruled the ADPF 153, and, when evaluating the imprescriptibility of the crimes against humanity (Extradition 1362), opted not only to "run to stay in the same place", inquiring the legislator of the dictatorial regime how much was the sum of the moment, but also

as it seems evident opted to repeat the story that, only by repetition, pretended it had become true, creating, with this, its own "rule n. 42".

To descant about the treatment the courts concede to oblivion (whether in the relative notion of amnesty or prescription), can lead us to talk about it (oblivion) from different theoretical and imagetic arrangements, whether the oblivion as antipode to remembrance (!?), to the oblivion as punishment (!?), to the oblivion as a limit and protection. But it will always be inevitable in the pictures and images that certain annoying questions will arise: Remember (forget) what? Why? Whom? What for? Our proposal is to discuss the Brazilian Supreme Court conceptions of penal control [12], from Lola's criminological critical thought, in two judgements whose object were the acts practiced during the Brazilian (1964-1985) and Argentinian (1976-1983) period.

Fragments of the Latin-Maerican Criminolgical thought: Interpretation Vectors for a Criminal Rereading of the Crimes against Humanity

In the late 60s, critics of the criminological movements, started in Europe and in the United States, promoted a radical critic to the etiological criminology (bio criminology and criminal sociology), whose object has historically been the causes of crimes. This rereading, oriented through a Marxist lens, lead to the reconfiguration of the social reaction paradigm, now turned to the structures, especially economical, that mold the social defense ideology, justify penal law and criminological thoughts that traditionally justify the exercise of the punitive power [13].

The critical movement in Latin-America, impelled by the Congress held in Venezuela, in 1974, captained by Lola and Rosa de Olmo, constituted a historical mark in the Latin-American critical agenda, by redirecting the focus to an institutional violence exercised by the elites. The multidisciplinary approach, articulated the political and social transformation project, attended by representatives from Colombia, Brazil, Chile, Venezuela and Brazil (amongst other countries) and dedicated to debate roots of the great social and economic inequalities in the countries of the region and, especially, to denounce the violence of the State, in the form of criminal practices such as torture, forced vanishings and death.

Throughout the 1980s, one of the most relevant themes in the Latin-American criminology critic was the judgement and accountability of the authors of the crimes against humanity, practiced by the dictatorial regimes [14]. One important moment in the critical debate occurred from 1985 onwards. Lola is interpellated and responds an article from Novoa Monreal, who appointed the supposed "confusion" of the Latin-Americans among the fields of scientific research and that of the social fight. Inspired by the romance "El Jardín de el lado", from Donoso, Chilean writer, Lola reaffirms the critical position of engagement in the fight for social transformation and rebuke the accusation, considered distant and alien to the reality experienced by marginal societies [15].

The diversity of criminological thoughts, the configuration different research and object fields, have been awakening the attention of specialists for many years. In a recent research we sustained that the crimologies can be described as concurrent scientific subsystems. The paradigms are not successive; they are on constant adaptation, with new theoretical and methodological paradigms [16]. In this article, we would rather resume the analytical modes proposed by the Venezuelan criminologist, inspirational to think in a theoretical matrix to reflect about the crimes against humanity.

The criminologies, as pluralistic classified in the taxonomy proposed by Lola [17], preoccupies each one of them with specific objects of study: the classic criminology (*delict*), the positivist criminology (*delinquent*), and organizational criminology (*delinquency*), the interactionist criminology *(social reaction*), and, the radical criminology or critic of the Human Rights (*social control*), with quite remarkable attributes and descriptions:

In the model proposed by Lola [18], there is a logical sequence of analysis of the called "criminal matter", which refers to the "social control" as a starting point. In its conception, the social control would be a defining instrument of the concepts of delict, delinquent, delinquency, primordial to the "criminalization process", which are selective and of political nature.

The reflection inquires the ideal diffused by the Jurisprudence of Concepts in the XIX century. In the "Heaven for Legal Concepts" [19], full of caricature expressions, certainly there would be a "producing machine of delicts and delinquents", beyond the already known "tallow stick of juridical concepts", the "combing hair machine", the "fiction machine", the "building machine, the "the reconciling contradictory passages machine", the "dialectic drilling machine" and the "wall of vertigo". However, we would not be talking about a "paradise", but very appropriately of a "hell" or a "purgatory", closest to what Robert Ferguson conceived when he referred to Dante's two first comedy books [20]. In other words, for us to think about a "hell or purgatory of juridical concepts", in which certainly the "delict and

delinquent producing machine" would occupy prominent place.

Classic	Positivist	Organizational	Interactionist	Radical Critic and of Liberation	of the Human Rights
Speculative, legal	Classic Criminology, criminal sociology, sociology of deviance conducts	Criminal Justice, Systemic Criminology	Social Reactions	Power and interests	Emancipators and generalizable interests
Non-retroactivity, legal reserve, codification, disciplined interpretation, proportionality	Focus on "causes" of actions in delicts	Criminal Politics	Labelling Approach	Politology of the normative delict. Social compromise	Victim's primacy; minimal penal law
Penal Law	Individual (individual in society)	Penal Justice Appliances: penitentiary criminology, police, Courts, post-penitentiary	Social Reactions	Search for the essence behind appearances	Measures and alternative penalties to the deprivation of liberty Participation. Human Rights as an object and as a limit
Repression: legal control	Reintegration, society reform	Efficiency in reintegration			

Table 1: The radical criminology or critic of the Human Rights

In Lola's synthesis, inspired by a long tradition of the critical criminological thought, both European and north-American, marked by the reinterpretations of the traditions known as Labelling Approaches under the Marxist focus, we see that the "social control" creates the delicts when it defines them (legislative-wise), as well as it produces the delinquent by labelling, selectively, those deviants who will receive the label (judiciary-constabulary level), besides instituting the official criminality (apparent) when it defines the delict and selects the cases included in the registers of the official organs, operating in levels of formal penal control (police, courts, prisons, etc.) and non-penal control (religion, school, family, media, political parties, public opinion, etc.) [21].

No criminological focus of critical nature could prescind from primary socialization forms (education), once it institutes the appropriate conditions of consent and legitimacy, observing, yet, the fact that the treatment and repression (reeducation) are substitute socialization forms. Very especially, occupying a prominent place in Lola's research, there is the search for understanding the correlation between media, the economical-political power, and the construction of fear [22], which leads to the backbone of this article. Such indoctrination apparatus and the production of caricáture of the intern enemy were put in full functioning by the dictatorial regime of 1964, in Brazil, and of 1976, in Argentine.

We propose to observe, critically, part of the legacy of both recent dictatorial regimes, as the ones kept in Brazil (1964–1985) and in Argentina (1976-1983), that would have followed similar paths in what refers to the construction of the "criminal problem", in the design of a common enemy (through forms of formal and informal control).

Brazilian Supreme Court and the trial of Crimes against Humanity: Penal Control and the Large Termidor

The penal control is the "thermometer of the human rights". It constitutes a series of elements of democracies

and, in some forms, of all governments that seek to legitimize their ideologies by juridical rhetoric [23]. Lola, in a mature perspective as theoretician and militant, maintains in her writings of the 2000s that the criminology of the XXI century would be the criminology of the human rights [24]. In her proposal, the authors of crimes against humanity should be criminalized and held accountable, mainly in the periods of dictatorship, when massive violations of rights occurred [25].

The writings of the Venezuelan criminologist are inspiring to remember and reflect about the recent history of our region. In this sense, talking about the Brazilian dictatorship (1965-1985) and the Argentine one (1976-1983), of the penal control as a thermometer of the human rights, such as observed by Lola, equals to say that the penal control in these regimes (formal and underground) systematically violated the human rights, seeking to legitimize their objectives. Lola's position seems to approach the views of Joaquín Herrera Flores, for whom the human rights should be situated inside the social reality, conformed by different fields (economical, juridical, and cultural), each of one of them composed of a set of symbolic capitals, institutional, etc., distributed hierarchically and unequally in function of the relations of power and strength [26].

The tension between these forces – whether in the criminological field or in the constitutional philosophy, when we face institutional rupture, allows us to talk about a "Termidor Lake", as suggested by Gerardo Pisarello [27], in allusion to the month of the republican calendar instituted by the French Revolution which gave place to the coup d'état of 1794, against the democratic government surged after the fall of the Monarchy and the proclamation of the Republic. The expression alludes, yet today, to the rupture of the democratic experiences. Let us, then, talk about a "Termidorian Criminology", if for any reason, the traditional notions of delict, delinquent, and delinquency are perpetrated (beyond the cycle of the dictatorial regime), in which refers to the "criminal question", tied to the "political and social controls" (formal and informal), gestated during the dictatorial regimes, with the practice of massive violations of human rights that, even after the democratic opening, are observed by organizations of the justice systems as immune acts to the punitive power.

Let us take as an example, by the way, four factual-conceptual elements for the classification of crimes against humanity that were committed by the Brazilian and Argentine dictatorial regimes, respectively referent to:

- The active subject;
- The violating act against human dignity;
- In some cases, the expectative of protection in impunity; and,
- The social transcendence of the practiced act. About the active subject, there are those acts practiced by agents of the dictatorial State by direct participation, or by indirect form through sympathizers (but with their tolerance), public and explicit or even clandestinely. With regards to the violation of human dignity, it is an action that aims to denigrate one's dignity to achieve a political end, with physical or moral violation. On one side, we observe that the authors of these mentioned acts are institutionally protected by a system of fact or law that permits, favors, or grants their impunity. On the other side, the act transcends the victims, affecting all the community, even in an international context, in grave violation of dignity [28-33].

In Brazil, we face the vestiges (some of them evident) of this large "Termidor", especially if we observe the institutional rupture occurred in March 1964, realized from a concert between civilians, military, businessmen, media. The Institutional Act (IA) of 1964 created the intern enemy the it sought to fight expressed in its exposition of reasons. Here is the fragment of the IA n.1: "(…) fulfill the mission to restore economic and financial order in Brazil and take the urgent measures destined to drain the communist pockets whose purulence had already infiltrated not only the government summit but the administrative dependencies". With the posterior granting of IA n. 5, of 1968, there was recrudescence of the system, with the suspension of the habeas corpus guarantee against political crimes and against the ones committed against national security, as well as the exclusion of appreciation by the juridical power of the acts practiced under its surveillance. National historiography describes murders, tortures, permanent physical and psychological lesions, rapes, violence of gender as a power and domination instrument (crimes against humanity), largely documented in various publications, mainly in the National Truth Committee and in the research "Brazil Never More" [34,35]. The laws of the Brazilian dictatorial regime typified crimes, committing penalties (inclusive death and perpetual), enticed the use of the penal apparatus as an instrument to achieve the ends of the dictatorship, the elimination of the chosen enemy. They are exemplified, apropos, with the following normative instruments: Law n. 1802, January 5 1954; the Law-Decree n. 314, March 13 1967; the Law-Decree n. 510, 20 March 1967; the Law-Decree n. 898, 29 September 1969, and the law n. 6620, 17 December 1978.

The experience was like what occurred in Argentina, where they talk openly about the civil facet of the dictatorship: *"Esa dimensión civil incluye a actores económicos, funcionarios civiles (judiciales incluidos), la iglesia, periodistas, medios de comunicación e intelectuales"* [36]. Between us, the empirical research that thickens our argument about our "Termidor" lake, projected in 1964, finds in the work of the Hungarian

political scientist and historian René Armand Dryfus [37,38], written originally in English (State, class and the organic elite: the formation of an entrepreneurial order in Brazil 196-1965), that registered well the civil-military coup d'état, which counted with the support of power structures, including the legislative, executive and judiciary powers. Certainly, there is a necessity of studies that show the distinct institutional specificities and its practices that legitimized exception acts.

Specifically, about the role of the Brazilian Supreme Court [39], José Afonso da Silva, in his relatively recent work, observed that the Supreme Courted profoundly supported the double dictatorial centralism (federative and organic). The court considered unconstitutional expressions that "roiled the clarity of the constitutional text", data observed in approximately 80 Representations of Unconstitutionality judged by the Republic General-Attorney [40]. The juridical approval that the SFC conceded to the dictatorial regime (1965-1985) reflects in all the power structures, whether when it ceded to the explicit objectives of the coup, that included censorship of the media [41], or when it juridically validated the radicalization of the fight against the established enemy and its consequences, observable many years later, when it came to judge both the ADPF 153 and the Extradition 1362, that suggests judgment of value about the legitimacy of the dictatorial period, when the Supreme Court was "packed" in a manner like the "court-packing plan" of president Roosevelt against the American Supreme Court in the 1930s, during the New Deal [42].

The parallel is important [43]. In the Brazilian case, the Constitutional Amendment n. 16, of 1965, instituted the abstract control or norms, which allowed the judgment of law in thesis, in face of the Federal Constitution (without the necessity of a concrete case as a background), a mechanism instituted during the dictatorship, and the IA n. 2, of 1965, that increased from 11 to 16 the number of judges in the Brazilian Supreme Court, all them by direct indication of the President of the Republic. In his interview to the "Oral History of the Brazilian Supreme Court", Rafael Mayer, retired justice from the FSC, remembered his indication to the court in 1978, observing that at that time the Court was counting again with 11 judges, because "in a certain period, the Court, the military government had created 16 vacancies in the Court precisely because it wanted to get rid of certain things" [44].

The "packing" of the Brazilian Supreme Court represented the initial act of alignment with the regime, from the indication of new judges, but the engineering would only be finalized with the posterior retirement of the ministers that apparently did not support the dictatorship postulates, what we can call as "unpacking" of the non-aligned justices. It was the cases of the retirements of Evandro Lins e Silva, Vitor Nunes Leal and Hermes Lima, removed from office by the IA n., of 1968, considering yet the "voluntary" retirements of two other ministers, Laffayete de Andrada e Gonçalves de Oliveira, that starred what was depicted as "theater" of resignations, reminding us of previous episodes (in 1863 and 1931) that marked the history of the Court [45].

In simple arithmetic logic, the presidents of the dictatorship nominated initially 5 judge (with an increase from 11 to 16), and later forced the resignation of 5 judges, when the Court once again counted with 11 members, not forgetting, yet, the retirement of 5 more judges that composed the Court before the increase in the number of vacancies. It is important to observe that all data are important, because hat it not occurred the civil-military coup in 1964, in 1965 general elections would be held, and the eventual president elect would be able to indicate at least 5 judges (in a total of 11) to the Court, what suggests intense dispute to control it. We register, in this sense, the composition of the FSC, from the alteration realized with the granting of the IA n.2, from 1965, the judges indicated by presidents of the dictatorial regime [46].

The presidents of the exception regime nominated 32 judges to the FSC, many of whom stayed in the Supreme Court for long years after the end of the dictatorship, having influenced the jurisprudence even after the advent of a new Constitution, helping to conform to an interpretative model on which the new constitutional device is interpreted in light of and from the perspective of the anterior constitutional ordinance, what by convention has been called the "retrospective interpretation" [47,48], bringing to light the advertence that the most decisive and lasting political legacy of the President of the Republic is their indications to the Supreme Court [49].

In a pioneer study about the decisions of the Brazilian Supreme Court in moments of political instability, between the periods of 1964-1975, Osvaldo Trigueiro do Vale made questionnaire with some of the justices of the Court, some of them compulsorily retired due to an act of force of the regime, coming to the conclusion that in Brazil, in the periods of dictatorship and rupture with the democratic experience the legislative is closed, but "not the courts", although manipulations do occur in respect to the number of judges, with substitutions by justices aligned with the regime, and retirement of those that cause some annoyance, fact also quite documented in the work "The Brazilian Supreme Court Untold History" [50].

It is a fact relatively little divulged that, in April 1978, the military government intended to transform the Brazilian Supreme Court in a Constitutional Council [51], *"whose*

political functions would substitute the discretionary action of the revolutionary government", in a political reform project [52]. In a certain sense, if the Court were to keep unshaken the structures of the dictatorial regime, even after its debacle, it would not only assume the face of the regime, but it would also seem to show that it does not have any inconvenience in supporting it. It substitutes the discretionary action of the dictatorship, in a silent, informal, and normative transition [53].

One indicative that the legitimizing rhetoric of some decisions of the Brazilian Supreme Court to the dictatorship of 1964-1985 was what the regime expected from the FSC, as inferred from the changes in its composition throughout history, repetitions of the packing ("Court packing") [54], with 16 judges retired due to acts of force in three distinct moments (1863, 1931, and, 1968). Based in thesis and juridical arguments, the Brazilian Supreme Court, after the democratic opening and posteriorly in the constitution of 1988, remains approving acts practiced in the dictatorship, as the recognizing of impunity of those accused of crimes against humanity during the civil-military regime, especially in the trial of the case of unconstitutionality of the Amnesty Law of 1979 (ADPF 153), or the refusal to cooperate with other neighbor countries to permit the process and trial of those accused of torture and others crimes against humanity committed during the dictatorial regimes, as in the case of Extradition 1362, required by the Argentine State [55].

We highlight that there was not change in composition of the Brazilian Supreme Court in substantive manner, keeping the cabinet of ministers for long years yet, even after the democratic opening; the justices they intended to keep became the substitutes of action of the dictatorial government. Also for the same reason, it seems to have been kept the fidelities they had to the postulates of the previous regime, including the relationship with the "delinquents producing machine" [56], gestated during the regime, the election of the enemy included, the notions of the delict, delinquent, delinquency, to the picture of "criminalization processes", inherent to the "delict problem", and the "social control", used as background to achieve the regime's objectives, with doing crimes against humanity [57].

Time, Law and Memory

In recent research, we addressed the relevance of time and memory as hermeneutical devices, also adequate for empirical research [58]. The relations between time and law inspire philosophical discussions and have been assuming a relevant place in contemporary theoretical analysis. One of central thesis in Ost's analysis is that time must be conceived fundamentally as a social institution, and not as a given physical or psychical data. The author invests in what he identifies as frailties in law as a phenomenon that institutes time. Thus, he relates forms of "detemporalization", such as, to mention a few of them, the rejection to the evolutive and finite character of time, described as linear (without fissures) [59].

In the systemic approach time articulates directly to the function of law in relation to the past: stabilization of normative expectations. The determination of individual communications depends on the communicative complex that resorts to time. In other words, it is based on past communications and future potential connections. In this sense, juridical norms configure a set of expectations symbolically generalized. The relation indicates the function of law about the future: an effort to prepare for an uncertain future [60]. By contemplating time as a relevant unity of analysis, the systemic approach distances itself both from the empty *ahistorycism* and from the sterile relativism. The focus is oriented to differentiated functional social systems. The historical changes operated in different social systems generate permanent update of the senses [61-64]. Memory loses central relevance as psychic and collective category. It is more adequate to talk about social memory, in the form of communications supported on the difference between remembering and forgetting, according to the codes and programs of each functionally differentiated social system [65].

The function of memory is to liberate the capacity of information so that the system opens to new irritations, synthetized in the binary double remembering/ forgetting. Forgetting is not the loss of access to the past but consists in a condition for learning and evolution [66]. The social memory is not that what the communications leaves as trail into the individual consciences, but as the result of the operative communications themselves. Every communication updates a certain sense (reason of the social memory) [54]. The repetitive use of the same references allows us to infer that so shall be it in future cases. In synthesis, if evolution occurs in the form of variation selection re stabilization, the operative memory of the system is concerned with coupling the past to the future, through distinctions [67].

From the recursive mechanism of new autopoietic operations, the observer can identify the structural changes historically updated, or reestablished. Therefore, it is possible to observe the different social semantics. When the focus is directed to the social systems, the senses that events suggest (irritation) to the distinct social systems are privileged [68].

Semantics of Forgetting

Etymologically, the word "*pardon*" is constituted by the junction of "*per*", linked to "*perfectly*", and "*donare*", related to

give or prevent, used in the sense of "forgiving", and Amnesty, from Greek origin, in a similar sense. The first is used as "guilt remission", and the latter refers to the "removal from memory" [69]. In a similar way, such as the prescription, adopted by the Romanian-Germanic system, it means the extinction of the punishability by the effect of time, with the message that certain acts must be forgotten.

In the juridical lexicon, it constitutes a message from the State that we are "forgetting" that the perpetrators committed massive and brutal violations of human rights, such as torture, rape, murder [70]. In the sense proposed by Cherif Bassiouni, such acts of oblivion (impunity) configure a sort of treason to human solidarity with relation to the victims of the conflicts with which we all have the duty of justice, memory and compensation [71].

Carlos N, et al. [60] in an analysis of the radical evil judgment, approaches the central aspect of the theme with an uncomfortable question: How should we answer to the massive violations of human rights, be it by state agents or by other people with the tolerance or consent of their rulers? The answer lies in two positions: when confronted with such atrocities, the governments that succeed the terror regimes should opt to judge and punish the authors of these crimes, or, alternatively, if no measure is taken, they will be left unpunished.

The massive violations of human rights are that which Kant considered as "radical evil", in a manner that contemplates not only the atrocities committed during the holocaust, but every and any phatic situation in terms of human rights violation [72]. The reflections of the Argentine jurist recall Hanna Arendt about the nature of the "Radical Evil", and that we are "*incapable of forgiving that which we cannot punish"*, besides being *"incapable of punishing that which has become unforgiveable"*, because the "radical evil" cannot be punished or forgiven, making such acts transcend the realm of known human affairs [73].

The proposal goes beyond a mere wordplay. It refers to the notion that, for some sorts of crimes, as the ones against humanity, to think in forgiving we must before investigate, prosecute and hold one accountable. Beyond all that, we must remember them so that they will not be once again a viable option. And, especially, not to transform exceptional acts in ordinary ones, by using the known juridical terminology and shared by the jurists.

Oblivion as Punshiment (of Whom? Why?)

In another perspective, obiter, we can also observe the oblivion as a form of punishment (penalty), such as Cristina Z, et al. [63] indicated, when discussing about the effect of time in the justifying case of the historical *revisionism* of Wilson Simonal. The effects of the oblivion imposed (or caused), linked to some Hellenic notion of ostracism, would be crueler than one criminal condemnation, because it would be more lasting than the greatest penalty provided in the legislation.

As it is known, Wilson Simonal was a successful singer, but had his history abruptly marked by events that linked him as an informer and ally to the military dictatorship, when he stopped being invited to television programs, talk shows, and presentations in musical festivals. The singer's trajectory was narrated in the cinebiography in rescue of his image, denouncing the perverse effects of those accusations that pushed him from stardom to oblivion [74].

The event suggests that we think of forgetting as punishment, because the forgetfulness imposed by amnesty, prescription or pardon is equivalent to penalizing the memory of victims of massive human rights violations, as well as how to prolong its effects for their families.

The Oblibion as Limit and as Protection (of Whom? Why?)

On the other side, we can also observe the effects of time, when linked to the normatively determined (and forced) oblivion as limits to punishment. The limits to punishment, evidently, adjust to the criminal political options, but also equal to treating massive violations of human rights as common and ordinary crimes.

What would be the minimum fundaments that legitimize equality of treatment between massive violation of human rights and ordinary crimes? This question evidences the protection system of human rights, and the perspective to be adopted by a determined social group. But, above all, it exposes the rhetorical use of the equally principle.

Finally, we can reflect about the oblivion as protection. When we take normatively the effects of time as one's protection mechanism, we need to ask: of whom? Why? In the hypothesis of massive violation of human rights, the protection aims to favor, largely, the torturers, rapists, and murderers in mass. This answers the first question, but it makes uncomfortable the approach to the second question.

What would be the basis of protecting the authors of such acts? From an initial perspective, we can think of a massage that approves (implicitly) the practice of massive violation of rights, because there is a background equally uncomfortable: punishing such acts would be tantamount to saying the dictatorial regime erred, and leaving them unpunished is equivalent to saying that one agrees with the practiced acts, in which man has become a thing, with ends justifying the

means (whatever they were).

From the referred possibilities of readings of the effects of time, as means of extinguishing of the punishability, with the consequent oblivion, let us briefly summarize the cases of ADPF 153 and Extradition 1362, judged by the Brazilian Supreme Court, for a global reflection on the theme.

The Adpf 153: When Forgiving is a Seal of Approval

The Federal Council of the Brazilian Bar Association judged, in 2008, the Argumentation of the Non-Compliance Precept before the Brazilian Supreme Court (ADPF 153), postulating the unconstitutionality of provisions of the Amnesty Law (Law n. 6683, from December 19 of 1979), in order to proceed with the "interpretation according to the Constitution", so that it would declared that the amnesty granted to the political crimes or related should not be extended to the common crimes perpetrated by the repression agents against political opponents, during the dictatorial regime (1964-1985).

The aim with this, it is certain, was to avoid the extinction of the punishability of the State agents or other ones with the connivance of the Brazilian State who had practiced serious violations of human rights during the dictatorship, as it can be seen from the initial petition, elaborated and subscripted by Fabio Konder Komparato and by Maruícia Gentil Monteiro.

The Brazilian Supreme Court, on April 2010, captained by the vote of minister Eros Grau, by the majority of votes (ministers Carlos Ayres Brito and Ricardo Lewandowski the lost votes and, absent, the minister Joaquim Barbosa, and minister Dias Toffoli, impeded) judged unfounded the demands, on the grounds that it was necessary "not to forget", so that things would not go back to be as they were in the past, concluding the final decision: "I judge the cause unfounded". Certainly, to base the constitutionality of the Amnesty Law on the need of "not forgetting" the acts which it seeks to "erase", refers to Carrol's literary metaphors. When the court approved the juridical act of the dictatorial regime, in 1979, it recognizes the juridical validity of all the acts practiced in exception regime: election of the regime's enemy, definition of the crimes and the criminals.

In this sense, we argue that to amnesty is to approve the acts of the exception regime. When the decision seeks contrary fundament to what it should have been ("not to forget" to forget), it is transmitted the encrypted message that the massive violation of human rights, practiced during the regime, can be less relevant than to define if entering the movie theater with popcorn and soda bought outside the establishment wounds the Constitution (ADPF 398), or if the cockfights also violate the Constitution (ADI 1856). Hence, triumphs Lewis Carrol, be it by racing in the same place, by the necessity to ask who bosses to know how much is 2 + 2, or by the repetition of the narrative, that becomes true when its simple repetition, also represent rule n. 42: forgetting is not forgetting, and vice-versa.

Extradition N. 1362: When not Extraditing is to Perpetuate the Violation

In the case of the Extradition n 1362, the Argentine State solicited Brazil a the national Argentinian to be sent to the soliciting State to be prosecuted by the practice of crime against humanity, for participating in the terrorist organization triple A (Anticommunist Argentine Alliance), causing the deaths of various people, as well as by his effective participation in the terrorist political project of the Argentine State, during the dictatorship.

The proceeding refers to some fragments of the Argentinian history. According to the historical narrative about the political movements that alternated in power in Argentina, considered the most remarkable historical cycles (the first from 1810-1860, the second from 1860-1930, and the, third, from 1930-1983) [75], Juan Péron was deposed by the military in 1955, and exiled in Spain, keeping significant influence over politics from Madrid [76]. The military allowed, in a posterior moment, the Peronist party disputes the elections of 1973, although Perón had not obtained legal authorization for such. The elections of that year were won by Hector Cámpora, who eventually renounced after losing the political support of Perón. A new election was held, culminating in the election of Perón, that came after a few months later, when Isabela, his third wife, assumed the presidential functions, having been known for suffering profound influences of the Welfare minister, José Rega, retired police officer known for creating the terrorist group entitled Anticommunist Argentine Alliance (AAA), group to which the person to extradited belonged [77].

Passing through a profound economic crisis, corruption accusations, and the explosion of violence, the military deposed Isabel Perón from power, on March 1976 when it institutionalized, in the words of Carlos Nino, the most violent authoritarian repressive regime in the history of Argentina. The military board, headed by General Videla, the admiral Emílio Eduardo Massera, and the brigadier Orlando Ramón Agosti, led a wave of unprecedented violence, leading to abduction of those that were contrary to the regime, considered, therefore, as subversives, with acts of torture and murders, and respective concealment of their corpses. Some atrocities were internationally recognized [78]. The terror regime in Argentina accounted for more than 30.000 (thirty thousand) victims, among dead, missing, victims of

rape, torture, dead pregnant women, or the kidnapping of their children. A regime of terror that, certainly, imposes us the recognition of the acts practiced in it as crimes against humanity [79].

Despite this, on November 2016, the Brazilian Supreme Court denied the extradition request, by 6 votes against 5, under the fundament that it would have happened the prescription of the crimes practiced by the extradited, on the basis of the Foreign Statue (considering the article 77, subsection VI, of the Federal Law n. 6.815/80), that prohibit the extradition in case of extinction of punish ability by prescription. Without going further in the fundaments of the votes of SFC justices, what is beyond the scope of this essay, we observe peculiar reference to the oblivion. The Court opted to consider the oblivion as limit and protection of the extradited person, despite the consolidated position of the international organisms that consider the crimes against humanity imprescriptible [80].

The historiography indicates that the dictatorships of Brazil and Argentina acted together in many cases, under the sign of the Condor Operation. In the ADPF 153, the Brazilian Supreme Court would rather approve (perpetuate), seemingly, the massive violations of human rights than that to protect them. The juridical conception of time, selected by the Court, seems to have been "to forget" to remember [81]. The decisions suggest reflections under the *luhmanniana optics*. If the function of memory is to liberate the capacity of information to new annoyances, the forgetting presupposes the access to the past: condition for new learning and evolution [82-86]. Certainly, these were not the messages of the Brazilian Supreme Court in relation to the crimes against humanity submitted to its analysis.

Conclusion

The systemic focus allows us to deepen the discussion about the decisions (communications) of the FSC. On one side, when we compare the updated programs of the juridical system, in the form of international human rights treaties and conventions, as well as individual rights and constitutional guarantees, we argue that the analyzed decisions do not adjust to the valid law. The point of observation that we adopt (criminology of the human rights) evidence that the juridical rhetoric constitutes a legitimizing mechanism of selective processes of the penal control organizations (in the case of the FSC) [87-90].

In the definition process of the crime and the criminals, the approval of the acts of crimes against humanity in the dictatorial regimes refers to what Zaffaroni describes as *Denialist Criminology* [91]. We propose, therefore, that our look, oriented through social memory of the critical criminology, must contemplate discursive strategies to unveil the juridical argumentation that neutralizes and justifies the crimes against humanity (Precautionary Criminology) [92].

We go back to Lola, to observe that, yet, and once again, it persists the triumph of Lewis Carrol. No only by that image of running in the same place, or that to know how much is the 2 + 2 sum yet it is required to know the will of that who bosses [93,94]. "Rule n.42" materializes, whose repetition, as in the Snark hunt, intends to make it true only by the simple fact of repeating it. As they were repeated, and continue to be, the massive violations of human rights provoked by the exception regimes.

When the penal control organizations perpetuate the agenda created by the body of extrapenal control, a peculiar form of exception state is eternized. And that soon acquires the uncomfortable status of rule, even if it is the kind coined in the metaphor of "rule n.42" [95]. Lola warned us constantly about the triumph of Lewis Carrol. When reality confirms fiction, maybe we are exalted pretenders, lovers of fiction, and deservers of Bentham's critic: "By fanaticism or juridical artifice, one great deal of the juridical ordainment was locked in unintelligible characters and in a foreign language. Fictions, tautologies, technicalities, irregularities and inconsistencies remain" [96]. If fiction presents as powerful semantic artifact for the juridical hermeneutics, it is because it inspires and instigates us to widen the horizon of our senses in relation to the normativity and the facts. The memory of critical criminology, here represented by the writings of Lola, warns us about the facticity of the juridical acts funded in a sort of solipsism [97-104], indifferent and averse to history, in peculiar from of forgetting, that blocks our access to the past.

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