THE ON-GOING CASE: GETTING AROUND AMNESTY LAWS BY SEEKING JUSTICE FOR THE DISAPPEARED

O CONTORNO DA LEI DA ANISTIA NA BUSCA DE JUSTIÇA: UMA COMPARAÇÃO DAS ABORDAGENS NO BRASIL E NO CHILE SOBRE OS DESAPARECIDOS

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ABSTRACT

Internationally the amnesty laws of Chile and Brazil have been deemed invalid, but they they have been upheld locally. This paper seeks to compare the approaches in each country to use the disappeared to challenge the amnesty legislation and also sketch out the potential international consequences for Brazil, if it remains steadfast in its refusal to address the justice issues of the past.

Key-words: Chile; Brazil; Amnesty Laws.

RESUMO

Internacionalmente as leis de anistia do Chile e do Brasil foram considerados inválidas, mas localmente elas foram mantidas. Este trabalho visa comparar as abordagens em cada país ao utilizar os desaparecidos para desafiar a anistia e também esboçar as potenciais consequências para o Brasil, se caso ele continue firme em sua recusa em abordar as questões de justiça do passado.

Palavras-Chave: Chile; Brasil; Anistia.

1 INTRO

International law and norms have long established that amnesty laws for crimes against humanity – systematic state sponsored violence against its own population including torture, kidnapping and murder – are invalid. But a number of these laws still stand, challenged but intact. In Brazil, the self-appointed Amnesty Law that was passed as part of the country's move towards democracy stands, despite international pressure and domestic criticism. Even with the advent of the country's new Truth Commission, there may be a clearer understanding of what happened between 1964 and 1985, but there are no promises that the truth will lead to prosecutions. In an effort to manoeuvre through the law's loopholes and access some justice for the victims of the dictatorship, prosecutors in Brazil have attempted to follow the example set by prosecutors in Chile by challenging the time limit of the Amnesty Law in the cases of the disappeared. So far this effort has been unsuccessful.

This paper is an attempt to sketch out the different experiences of Brazil and Chile in using the "on-going case doctrine" and to explore what it will mean for Brazil both domestically and internationally if the Amnesty Law stands and the people are offered truth but no justice.

2 CHILE

On September 11, 1973 Chilean Air Force Hawker-Hunter fighters bombed La Moneda, the presidential palace in the centre of Santiago. Ushering in the military junta under the leadership of General Augusto Pinochet, the attack also marked the end of the nation's volatile foray into socialism. Before the sun set on that day, the socialist leader Salvador Allende was dead, the congress was dissolved and the constitution eliminated. A systematic and brutal programme of repression followed, resulting in the political assassinations, disappearances, imprisonment and exile of thousands of Chilean citizens, as well as widespread torture. The coup reflected the polarization between the left and right under the leadership of Allende. For some, the events of that day were an unacceptable interruption of democracy; others saw the military's move as necessary to prevent impending civil war[1].

Five years after the bombing of La Moneda, Pinochet passed a presidential decree granting amnesty to those involved in criminal acts from 1973 – 1978. That Amnesty Law still stands, three decades after it was passed and 22 years after the return to democracy. Chile serves as an important example of a country that has maintained its amnesty legislation instituted during undemocratic times while allowing some of the justice needs of democracy. But it has not been an easy road for those seeking the reversal of a presidential decree that has, for over 30 years, protected members of the armed forces that are accused of significant human rights violations.

Like many of the neighbouring regimes, the Pinochet military junta went through stages of repression. The intensity of repression was greatest during the first years of the dictatorship. With time, the repression became more selective, not due to a greater respect of human rights but due to the decrease of legitimacy of the Pinochet regime, the need for efficiency and international and economic pressures[2]. In total well over 3000 people were killed or 'disappeared' during the military junta. Thousands more were tortured. In 1978, Decree law No. 2.191 (18 April, 1978) introduced a blanket amnesty for crimes committed

[1] Marivic Wyndham and Peter Read, 'From State Terrorism to State Errorism: Post-Pinochet Chile's Long Search for Truth and Justice', *The Public Historian*, 32 (2010), 31–44.
[2] Hugo Fruhling and Frederick Woodbridge, 'Stages of Repression and Legal Strategy for the Defense of Human Rights in Chile: 1973-1980', *Human Rights Quarterly*, 5 (1983), 510–533.

during the first five years of the dictatorship. Article 1 of Chile's amnesty legislation provides that: "Amnesty shall be granted to all individuals who committed criminal acts, whether as perpetrators, accomplices or accessories after the fact, during the state of siege in force from September 11, 1973 to March 10, 1978, providing they are not currently subject to legal proceedings or have been already sentenced"[3]. In practice, the law created a blanket amnesty which protected persons, whether convicted or not, from prosecution for non-excluded criminal acts. Some crimes were excluded from the amnesty, including infanticide, armed robbery, rape, incest, fraud, embezzlement, dishonesty, and drunk driving. However, murder, kidnapping, and assault were not. The language of the decree covered both the military and its opponents, but in reality the law benefited the military the most because of the magnitude of criminal acts committed by the armed services and because most of the opposition had been murdered, disapeared or exiled.[4] Violence against citizens continued after the amnesty decree, though they were increasingly sporadic towards the later period of the regime. The impunity afforded to the agents of the regime continued more or less uninterrupted until Patricio Aylwin took office as Chile's first democratically elected leader in 1990. Despite promises to the contrary by a succession of Chilean presidents, the amnesty law of 1978 has remained largely untouched. The politicians, for their part, have been unwilling to challenge the military and insist on accountability.

Challenges to the Decree law 2.191, both domestic and international, have pivoted on the efforts of civil society groups and on changes in the top level of the judiciary. The shift in the make-up of the Chilean Supreme Court has been fundamental to the acceptance of cases punching through the loopholes of the amnesty decree.[5] It must be noted that Pinochet's amnesty law does not prevent investigations into human rights abuses but it gives the courts power to close cases and investigations before indictments are handed down.[6]

In the face of political unwillingness to remove the blanket amnesty, the most significant progress has been made by prosecutors and victims working to get around the legislation. By describing disappearances as an on-going crime, lawyers were able to claim that the amnesty law, with its strict time limit, could not be applied. Chile's jurisprudence has gone through a number of phases that set the groundwork for the acceptance of this challenge to Pinochet's Amnesty Decree.

Requa[7] argues that there have been three phases in Chilean accountability jurisprudence. Phase I (1990 - 97) is defined by the vestiges of authoritarianism and marked in particular by the Supreme Court's decision in *Insunza Buscuñán.* Representing 70 disapearences, petitioners challenged the constitutionality of the amnesty legislation. Rejecting the petition, the Court elevated the amnesty law above other constitutional norms at the time of its application as well as international agreements such as the Geneva Convention. According to the Court, "the declaration of amnesty is a use of legislative power which suspends a declaration of criminality – essentially extinguishing the criminal character of an act."(p.6). A handful of cases not covered by the time limits of the amnesty legislation were successful before the courts, most noteably the 1995

[3] Marny A. Requa, 'A Human Rights Triumph? Dictatorship-era Crimes and the Chilean Supreme Court', *Human Rights Law Review*, 12 (2012), 79 –106 <doi:10.1093/hrlr/ngr043>.
[4] Naomi Roht-Arriaza and Lauren Gibson, 'The Developing Jurisprudence on Amnesty', *Human Rights Quarterly*, 20 (1998), 843–885.
[5] Cath Collins, *Post-transitional Justice: Human Rights Trials in Chile and El Salvador* (Penn State Press, 2011).
[6] Roht-Arriaza and Gibson, 843–885.
[7] Requa, 79 –106.

prosecution of former secret police chief Manuel Contreras for the bombing assasination of Orlando Letelier and his US assistant in Washington in 1976.[8]

Judicial reform and ideological shifts in the makeup of the Court were markers for change in the way the Supreme Court handled challenges to the amnesty law. Steps towards justice in the second phase of Chilean accountability jurisprudence were made along two parallel paths, one globally significant while the other made most headway within confines of domestic courts.[9] In January 1998, the Communist Party submitted a complaint for the deaths of party leaders killed in the secret extermination programme called 'Calle Conferencia'. A few days later families of those that died in the infamous 'Caravan of death' also submitted a similar complaint. Both named the former president Pinochet as at least partly responsible. In a first for the court, these complaints were accepted for investigation. In September of the same year, the Court decided on the unrelated *Poblete Cordova* case. The Court finally accepted that disappearance amounted to kidnap, a so-called 'ongoing crime' until remains were found or the victim's whereabouts otherwise proven.[10] The Court's findings in the *Poblete Cordova* case became established doctrine in disappearance cases and marked a turning point in Phase II of jurisprudence in Chile.[11] The verdict also affirmed that the 'state of internal war' decreed by the dictatorship in 1973 was sufficient to trigger Geneva Convention protections for prisoners. This would eliminate the use of amnesty altogether for certain crimes, regardless of when they were committed.[12] This case was also significant in the Court's acceptance of the hierarchical superiority of international law – in this case the Geneva Conventions – over domestic law. The court found though, that for officials to meet the requirements of international treaties it might be sufficient to simply investigate the facts before applying the amnesty law. That said, in the second phase of the judicial development in Chile, there was a marked preference in the Supreme Court to deal with dictatorship-era cases applying solely domestic legislation, rather than international treaties and norms.[13] The overall preference to deal with challenges to Decree Law 2.191 in the domestic legal realm as opposed to internationally was put to the test by Spanish judge Baltazar Garzón. In 1998 Garzón issued a warrant for the arrest of Pinochet, who at the time was in Britain for medical treatment. After much debate, Pinochet was returned to Chile on the promise that he would be held accountable for the human rights violations under his stewardship.

The third phase of jurisprudence in Chile since the transition (1999 – 2007) is one marked by a consolidation of rights protection related to past abuses. Legislation deemed political in nature – such as the Amnesty Law and certain military decrees – was increasingly identified as invalid. A number of cases (*Sandoval, Arón, Villa Grimaldi and Tomás Rojas)* solidified the ongoing crime doctrine of the disappeared cases as well as finding that core international principals have constitutional pre-eminence over internal law.[14] But the application of this new human rights perspective has been limited and is dependent on which judges are hearing the case.

> Notwithstanding the weaknesses mentioned above, the jurisprudential shift – from loyalty to the authoritarian regime to a fierce defense of international

[8] Cath Collins, *Prosecuting Pinochet: Late Accountability in Chile and the Role of the 'Pinochet Case'* (Center for Global Studies, 2009).
[9] Collins, 2009; Requa, 79 –106.
[10] Collins, 2009; Reed Brody, *The Pinochet Papers:The Case of Augusto Pinochet in Spain and Britain*, 1st edn (Springer, 2000).
[11] Requa, 79 –106.
[12] Leah Barkoukis and Charles Villa-Vicencio, *Truth Commissions: A Comparative Study - Chile*, Truth Commissions: A Comparative Study (Cape Town, South Africa: Institute for Reconciliation and Justice, Conflict Resolution Program, Georgetown University, 2011).
[13] Requa, 79 –106.
[14] Requa, 79 –106.

> rights – is striking for taking place in the post-dictatorship era without legislative change to the Amnesty Law. Between 1990 – 2007, the Chilean Court moved from upholding the law at the onset of an investigation, without assessing its lawfulness or the validity of claims, to tentative evasion of the law and eventual rejection of it. (pg 18, Requa, 2012).

The continuing existance of the Amnesty Law in Chile has been deemed incompatable with international agreements. While the Chilean Supreme Court has focused on domestic law to get around the Decree 2.191, the Inter-American Court of Human Rights, of which Chile is a signatory, ruled in 2006 that the Amnesty Law is incompatable with the right to truth afforded by the American Convention. This decision increased the pressure on Chilean politicians to address why this law still stands. The government's response to criticism is that while they have denounced the legislation, it could not revoke constitutionally based legislative process and, though it may not always agree with the Supreme Court, the court is autonomous. Regionally, at least, Chile and its Supreme Court is considered in contravention of the ACHR.

3 BRAZIL

The dictatorship in Brazil began with a military coup of March 31st, 1964 that ousted president João Goulart and lasted until the election of Tancredo Neves in 1985. The military government pushed forward legislation that included censorship, political persecution, suppression of constitutional rights and the repression of those who stood in opposition to the military regime. During more than 20 years of authoritarian rule thousands were killed, tortured, forced into exile and "disappeared". In 1979, as part of then-President General Ernesto Geisel process of a "slow, gradual and safe" political opening, the Amnesty Law (Law no. 6683) was passed:

> Article 1 - It granted amnesty to all those who in the period from September 2, 1961 and August 15, 1979, committed, crimes related to these political, electoral crimes, those who had their political rights suspended and servers Direct and Indirect Administration, foundations linked to the government, the servers of the Legislative and Judiciary, the Military and the managers and union representatives, punished on the ground and Complementary Institutional Acts.
> § 1 – They are considered related for purposes of this article, the crimes of any nature related to crimes committed by politicians or politically motivated.

Since its enactment, it is possible to identify four phases in the discussion around the Amnesty Act: the first is characterized as the struggle for political amnesty, which aimed mainly at the recognition of political rights and expression, also a push to allow back the return of thousands of exiles, the second refers to the need for reinstatement of employment lost by exile and imprisonment, the third is characterized as the search for public awareness of dictatorship era crimes through literature, film, theater and television, among other means, and finally the fourth phase, is characterized by seeking the recognition of errors by the state and symbolic reparation and financial compensation (Danyelle Nilin Gonçalves, 2008, p. 38-39). Currently, the debate on the amnesty centers on the law's legitimacy and the Brazilian state's refusal to address questions of justice, on reparations for crimes committed by the State, requests to open files, the creation of the Truth Commission and questions around whether crimes against humanity such as torture and other violations of rights human are eligible for amnesty.

There are a number of objectives that motivate the use of truth commissions as a mechanism to move a country from it's authoritarian past to its potentially democratic future. The objectives that generally underpin truth commissions are: to combat impunity,

the right to truth, to emphasize the responsibility of the State and recommend possible reforms and reduce conflict, and ultimately contribute to justice and reparation. Achieving these objectives, particularly the last one is a significant hurdle for the Brazilian Truth Commission. The Commission does not have the scope nor legitimacy to pass judgement of guilt for the crimes committed by the state during the dictorship. However, history has shown that the final reports of a number of commissions for justice were used to initiate civil actions and / or criminal proceedings against the perpetrators (Center for the Preservation of the Memory Politics, 2011).

The debate on the revision of the Amnesty Law in Brazil is being pushed by both internal and external pressures. Domestically, organizations like *Grupo Tortura Nunca Mais* and the *Order of Lawyers of Brazil (OAB)* have sought to raise public awareness and initiate lawsuits that question the interpretation of the Amnesty Law. Externally, the Brazilian state, as much as the Chilean state, has received critizism at a number of levels: the Inter-American Commission on Human Rights (IACHR) - part of the Organization of American States (OAS) - groups like Amnesty International (AI), and the United Nations through the High United Nations High Commissioner for Human Rights – OHCHR. Unlike most of Latin America, Brazil has taken more than two decades to establish a Truth Commission and continues to be resistant to any review of the amnesty law.

In 2009, 30 years after Law no. 6683 was introduced, the OAB filed a lawsuit on a review of the Amnesty Law. This was rejected by the Supreme Court the following year by 7 votes to 2 split. According to the arguments of those who voted for rejection of the revision of the Amnesty, the law was a bilateral pact. Chief Judge, Eros Grau argued that the efforts by the OAB attacked a "historic agreement that has pervaded the struggle for a broad amnesty" and held that the judiciary would not have "permission to rewrite the history of the Amnesty Law." Judge Carmen Lucia considered that “even the repulsion that is due to torture prevents recognize that the full range that is loaned to the criminal neglect of that dark period of our history can contribute to the general disarmament, with the desirable step forward towards democracy" and that "it was consolidated from that agreement fixed by Order of Lawyers of Brazil itself, that all acts, including the most heinous and deserving of utter disgust and abomination practiced in the recesses of political repression, were included among those pardoned." In the same way, Judge Ellen Gracie said "you do not make a peaceful transition from authoritarian rule and democracy without reciprocal concessions". The only two judges who voted in favour of the OAB were Ricardo Lewandowski and Carlos Ayres Britto. They stressed the monstrosity of torture and lack of clarity of the Amnesty Law and concluded that the Act could not forgive and similar heinous crimes[15].

As signatory to a number of international agreements and treatees, Brazil has not been allowed to have the debate on Amnesty alone. The OHCHR has clearly pointed out the need for for revision of the Brazilian amnesty legislation. In a statement that praised the creation of the Truth Commission in Brazil, the High Commissioner for Human Rights, Navi Pillay, clearly attacked the maintenance of the Amnesty Law by Brazil’s Federal Supreme Court. Pillay argued that the country should "adopt additional measures to facilitate the punishment of those who were responsible for human rights violations in the past "and" include the adoption of new legislation to repeal the Amnesty Law and to declare it inapplicable, because it impedes the investigation and end to impunity for serious violations human rights." Pillay points to the role of Brazil as an emerging global player and says that "being an emerging economic and political power, recognition from Brazil is an important event for both the region and to the world"

[15] Mariângela Gallucci, STF rejeita revisão da Lei da Anistia, 30 de abril de 2010 Disponível em :http://www.estadao.com.br/noticias/impresso,stf-rejeita-revisao-da-lei-da-anistia,544985,0.htm

Amnesty International, the largest and most respected non-governmental organization that defends the human rights, also puts the maintenance of the Amnesty Law as an international embarrassment for Brazil. Susan Lee, Amnesty International's Director for the Americas, states that "Brazil's Amnesty Law is against all national and international commitments have taken the government to uphold human rights. It must be declared void and those responsible for human rights abuses brought to justice without delay, "and says that Brazil is lagging behind in relation to its neighbors. Lee says that "by upholding the law That Allows crimes such as torture and murder to go unpunished, is falling behind Brazil other countries in the region have made efforts to deal with serious issues such as these." [16]

By maintaining the Amnesty Law, Brazil is in violation of a number of international treaties that challenge the right of a state to grant Amnesty for crimes against humanity. Joceli Scremin da Rocha[17] argues that the ineligibility of crimes against humanity for amnesty is mandatory rule yet to be adopted in the Brazilian jurisdiction. The lawyer's argument is that

> crimes against humanity do not admit the institute criminal prescription. The imprescriptibility is a principle of international law was recognized by the UN General Assembly, prior to approval of the Convention on the imprescriptibility of war crimes and crimes against humanity, established in 1968. And with this prop principle of international law States has a duty to prosecute and punish the officials responsible. That said, the failure to ratify the Convention on the imprescriptibility of war crimes and crimes against humanity does not relieve the State's obligation under discussion, given that the rules of that institute resort to a principle of law that was already in place prior to its approval ... Repeat that the observance of humanitarian principles of international law that reinforce the legal institution of imprescriptibility, erga omnes obligation is extended to all States, irrespective of any firmação conventional act. And, based on these principles, Brazil is obliged to prosecute and punish crimes against humanity committed in its territory and committed by state agents (p. 56).

Thus, failure to revoke the Amnesty Law is a contradictory stance to the ratified treaties that do not allow for amnesty for crimes such as torture and forced disappearances.

One way to circumvent and challenge the Amnesty Law is to argue that the cases of the disapeared ar ongoing cases and therefore not covered by the time limits of amnesty law. As stated above, this procedure has been successful in Chile. Like Brazil, Chile has refused to revoke Amnesty. The Federal Public Ministry (MPF) in Brazil laid a complaint against a former colonel in the Army, Bullfinch Sebastião Rodrigues de Moura. The MPF attempted to charge Major Curio with the crime of kidnapping. They argued that this was an ongoing crime since the militants kidnapped in the 1970s, during the repression of the Araguaia guerrillas, are still missing. In April, 2012 federal prosecutors filed a second complaint against the reserve colonel and former head of the DOI-CODI Carlos Alberto Bright Ustra and Civilian Police officer Gravina Dirceu for the kidnapping of a militant leftist Aluízio Palhano Quarry Ferreira. The complaint is based on the same arguments being used against Major Curio, that the disapeared are victims kidnapping, an ongoing crime and therefore, beyond the time limits of the Amnesty Law[18].

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[16] Brazil urged to scrap Amnesty Law that protects rights abusers. Disponível em: http://www.amnesty.org/en/for-media/press-releases/brazil-urged-scrap-amnesty-law-protects-rights-abusers-2011-08-26

[17] Revista do Tribunal Regional Federal da 1ª Região, v. 21, n. 11, nov. 2009

[18] MP pede à Justiça que reconsidere processo contra Brilhante Ustra, Tatiana Farah Publicado: 29/05/12 , Collins, *Prosecuting Pinochet: Late Accountability in Chile and the Role of the 'Pinochet Case'*.

The MPF attempts to use the disapeared to challenge the Amnesty Law were all rejected by the federal court. The arguments behind rejections were focused on validating the Amnesty Law of 1979. Judge Otoni de Matos presided over the complaint against Major Curio, noted that “To try after more than three decades to dodge the amnesty law to reopen debate on crimes committed during the military dictatorship is a mistake which, in addition to lacking legal support, fails to take into account the historical circumstances, which in a major bid for national reconciliation led to its passage”. In the case against Gravina Ustra Márcio Millani Rached, the Criminal Federal Court in São Paulo, says that "we can assert that the crimes committed during the military regime were pardoned, not only those perpetrated by who fought the regime with force, but also those committed by those who sought to maintain them. "[19]

4 CONCLUSION

The non-revision of the laws of amnesty in Chile and Brazil has significant implications at the domestic, regional and international levels. By accepting that torture, kidnapping and other human rights violations are crimes that can be covered by their laws of amnesty, Brazil and Chile undermine their responsibilities as states and put into question the legitimacy of democracies built on injustice. As an administrative and political apparatus that holds the monopoly of legitimate violence within a given territory, the classic definition of Max Weber in Politics as a Vocation, a state that pardons aforementioned crimes risks the citizen’s individual belief in the State legitimacy. From the international perspective, the ratification of agreements that then do not apply to specific signatories challenges the legitimacy of those agreements and potentially encourages non non-complience from other states, risking the internationally led protection of individuals and societies from human rights abuses.

The use of loopholes by Chilean prosecuters ensures that at least some of the dictatorship era crimes are punished, something that has thus far remained elusive in Brazil. However, even in the face of limited convictions, the repeal or revision of the amnesty law in both countries is about the position these states have taken in relation to these heinous crimes committed by former leaders aswell as their future commitments to their societies. To date Chile and Brazil can be considered violators of treaties they signed. The economic progress that these countries have experienced in recent years is in contrast with the obligations that both have. The challenge of legitimacy in the face of impunity is especially relevant in Brazil, as it aims to consolidate itself as a great power in the region and possibly in the world.

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