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THE TAINT OF TORTURE AND THE BRAZILIAN LEGAL SYSTEM

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ABSTRACT

In Brazil, the practice of torture intertwines deeply with its own history. The literature on the subject has had a greater intensification on its registers during the Dictatorial Regime (1964 to 1985). In spite of the Brazilian Constitution of 1988, Brazil only makes efforts to investigate the crimes of torture of this period to comply with the provisions of the United Nations in 2011. Within this scenario, the National Truth Commission (Law 12.528, of November 2011) was created with the purpose of clarifying the facts and circumstances of cases concerning human rights violations, as well as the Law on Access to Information (Law 12.527 of November 2011), which have regulated the constitutional right to access public information, valid for all areas of the public administration. These laws allowed the opening of the archives of the dictatorship until denied on the basis of a severely restricted access. In this context, was created the Network Studies and Research on Violence-RIEV in partnership with Federal University of Paraíba-UFPB and Federal University of Santa Catarina-UFSC with the objective of investigating violations of human rights during the dictatorship, such as torture, persecution and violations of the right-to-live. The study of these violations is of fundamental importance for the historical unveiling of this period, especially because they were perpetrated by agents of the State. This article aims to present part of the research undertaken to understand the official legal procedures to prevent the practice of acts of torture in the national territory and how they are understood in the Brazilian legal system, with special attention to Law 9.455, of April 7, 1997 that criminalizes torture.

KEYWORDS

Violence, Torture, Legal order

1. Introduction

The research generating this article is part of a project developed by the Network of Interdisciplinary Studies on violence-RIEV that aims to investigate representations and narratives about human rights violations, such as torture, persecution and violations of the right to life, during the military regime in Brazil. The Corpus is composed of a wide set of documents available in the National Archives (Brasil, 2019), cinematographic audiovisuals and open sites.

The regulation of the guarantee of effectiveness of the right of access to information in Brazil is recent although guaranteed in the Brazilian Constitution of 1988. This milestone was fundamental for the Brazilian re-democratization process, after 21 years of the authoritarian regime, where individual guarantees succumbed to the National security. It is important to emphasize that the right to access to information on state affairs has been fundamental to ensuring the participation of citizens in monitoring the implementation of their policies. Only after more than two decades of the end of the authoritarian regime is that through Law 12,527 of November 11, 2011, the State has the obligation to provide citizens with information about documents considered hitherto as secrets. Presidential Decree 7724 of May 16, 2012, which regulates the Law on Access to Information-LAI includes the obligation of the three branches of the Union, Courts of Accounts, Public Ministry and private non-profit entities to publicize information regarding the destination of the resources received by them. It was a considerable advance that opened information from the most diverse institutional archives for the access of interested citizens (Brazil, 2012).

LAI was regulated along with the installation of the National Commission of Truth (CNV) instituted by the Brazilian government after being condemned by the Inter-American Court of Human Rights (IACHR). Since 2005, the United Nations (UN) has recommended to Brazil that measures be taken to investigate the serious violations of human rights denounced after the end of the military dictatorship. In this recommendation, it considered insufficient the governmental effort to pay compensation to the victims and their registered relatives as a way of recognizing these crimes. It called for additional measures, such as the opening of the archives for the society's full knowledge of all violations. It recommended that the right to truth and transparency to guarantee justice be fully guaranteed, 6683/79, granted amnesty "wide, general and unrestricted", both the victims and their executioners. This recommendation had a great impact due to the occurrence of serious violations during the military regime.

The National Truth Commission (CNV) was created to investigate serious human rights violations that took place between September 18, 1946 and October 5, 1988. It worked in cooperation with states, municipalities, universities, trade unions, and Sections of the Brazilian Lawyers Association (OAB). There are hundreds of groups formed, making possible an unprecedented mobilization around themes related to memory, truth and justice in this period. One can, however, verify that there are already criticisms of the final document of the CNV, one of which refers to the forgetfulness about the participation of civilians in the dictatorship and the acceptance of the torture methods used by the military.

Hundreds of documents are being cataloged and opened for research in the most diverse fields of knowledge. Research institutions of the most diverse types are converging efforts to navigate the multi-faceted labyrinths of the memory of the dictatorship to bring to the scrutiny of science scenes forgotten, silenced, unknown or renegaded in an attempt to study details that may serve to problematize the young Brazilian democracy whose *mister* points for the strengthening of public spaces for training for citizenship and for the protection of human rights.

LAI can be considered as a restructuring framework for relations between the State and Society, bringing these two spheres closer together and becoming an expanding element of citizenship. In this sense, it was the basis for the CNV's work, since it provided a normative basis for access, treatment and indexation of the vast documentary repertoire on the military dictatorship available in the National Archives and in the Ministry of Justice. From 2005, by presidential determination, more than 20 million pages of the dictatorship, including the archives of the former National Information Service (SNI), were collected from the National Archives. The Portuguese translation of the Russel II Report adds to the CNV data on torture methods in Brazil and reveals how much torture has come into common use.

In the context of the rescue of the complex memory frame of this period, studies were also carried out on the versions of the military chiefs, in an initiative of the Center for Research and Documentation of Contemporary History of Brazil (CPDoc), Fundação Getúlio Vargas (FGV). The Army Library publishes ten volumes of positive analysis, interpretations of officers of the Armed Forces about what they will call the "democratic revolution" and the dictatorship that followed (Kings, 2014). Thus the ambiguities and ambivalences of the many narratives constitute the great challenge for the studies that are in progress after the opening of the official archives. A study conducted in five Brazilian capitals by Vargas (2012) based on information gathered in malicious homicide cases, which the evidence of "evidence" was obtained essentially through testimony and the confession of 80% of the defendants, has led to inquiries about the permanence or not of torture as a criterion for the production of truth. Is this a long-term epistemological belief? Thus, problematizing views and data on dictatorships and torture is a sensitive terrain for sociology and historiography, in particular the investigations developed within the framework of the RIEV. Rescuing memory is essential for what is commonly called identity, individual or collective, whose pursuit is one of the fundamental activities of individuals and societies.

The characteristics and amplitude of these documents required the use of techniques and analytical procedures of Grounded Theory with the support of NVivo software. Strauss and Corbin (2008) will attribute to the theoretical construction process in Ground Theory the conceptual ordering, in which the organization of the data generates discrete categories with specific properties and dimensions.

The preliminary data of documentary exploration point out that the study of these violations is of fundamental importance for the unveiling of the memory of this period. For this article, preliminary analytical questions concerning the understanding of how the Brazilian legal system has prevented the continuation of the practice of acts of torture in the national territory were particularized. Emphasis will be given to Law 9455 of April 7, 1997. The hermeneutical keys used were the concepts of torture, politics and power.

2. The Taint of Torture

The military assumed power in Brazil on March 31, 1964, putting an end to the legal order instituted by the 1946 Constitution.

As of mid-1969, with the apparatus of repression definitively established, the military unleashed a "dirty war" against the "armed left (wing)". Once having disrupted these organizations, State terrorism guaranteed, through fear, the immobility of the remaining reserve masses still capable of engaging in the struggle. Evidently there was resistance, however, unable to defeat the oppressive movement. Those political forces whose positions allowed them to coexist with the regime in the narrow space conferred upon them survived. Thus, under the military dictatorship, the Brazilian Democratic Movement (MDB) and the Catholic Church were institutionally constituted in the only channels of expression of social and political revolt. At the same time, the political forces housed in them practically detained the monopoly of the opposition's word.

Several protagonists appeared in the scenario of social transformation. In this context, emphasizes the role of resistance groups, formed by people from the intellectualized middle class or urban peripheries, who fought vehemently against the National

Security Law, considered the ideological pillar of the military regime. Its spaces of action were the parishes, the universities, the rubber plantations, the urban peripheries, the factories, etc. They sought better living conditions, social rights, land tenure, legal freedom and an end to censorship. They constituted a practice of active democracy, exerting pressures and inspection with its participation in the created organisms against the then holders of State power. These voices of liberty greatly enhanced oppositionist criticism, with the denunciation of increased social exploitation for the great capital that supported the dictatorship and the repudiation of torture organizations, such as the Detachment of Information Operations-Defense Operations Center (DOI-CODI) and the Department of Political and Social Order (DOPS).

A state of exception is installed that, to exercise power and control, strips political rights, persecutes and punishes those who constitute obstacles to the system. It is installed as Agambem (2003) asserts the state of exception, understood as a regime in which the norm holds, but does not apply. Acts that do not have the value of law acquire strength. According to Gaspari (2002), there were numerous records of the practice of physical and psychological violence as fear diffusion mechanisms. It affected urban workers, field workers, trade unions, field workers leagues and nationalist military. This dictatorship lasted for 21 years, with vigilance over groups deemed hostile, based on the motto of maintaining order to achieve progress. Gaspari and Rezende (2013), emphasizes the role of these resistance groups, which met in parishes, universities, rubber plantations, urban peripheries and factories. Many of these voices have been muted by torture organizations.

The dismantling of structures of political power and institutions has led to an increase in violence and the practice of torture confirming what Arendt (2010) asserts that power is not the property of an individual and belongs to the people. Without a group or people there is no power, since the human ability to act is always in network, in groups. As Agamben (2005) asserts, the effects of the suspensions of democracy and law lead to arbitrariness and concentration of power and violence.

The state-of-exception strengthened a structure where violations of rights prevailed in the dark and permanent spaces of torture. Violations of rights were institutionalized and violence was considered legitimate for the maintenance of power. According to Bechara and Rodrigues (2017) and Gorender (1987), the result was that the procedures of the judgments by the National Security Law, in an arbitrary manner, renders ineffective the letter of the law to lawyers for the defendants, who was accused of political crimes, and had suspended the habeas corpus prerogative. Torture was institutionalized by the Detachment of Information Operations –Destacamento de Operações de Informação-Centro de Operações de Defesa Interna (DOI-CODI)–, an intelligence body subordinated to the army, designed to combat internal enemies and ensure institutional security.

It has become the largest means of repression, censorship and torture, producing what Agamben asserts that violence has the immediate effect of denying the freedom of the one on whom it is exercised, annihilating the word by the use of force, denying the classic sense of the essential attribute of politics where language gives meaning to the practice of non-violence.

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Gaspari (2002) emphasizes the role of these resistance groups, which met in parishes, universities, rubber plantations, urban peripheries and factories. They sought better living conditions, social rights, land tenure, legal freedom and an end to censorship. Many of these voices have been muted by torture

organizations. The preliminary data collected and systematized from the available collections show disrespect to patterns of alterity and radical changes in behavior patterns and attitudes of agents of the State that have compromised democratic spaces such as the street, school, manifestation of free thought in the media and other spaces of social coexistence compromising the meaning of what is understood as dignified human life. The dismantling of structures of political power and institutions has led to an increase in violence and the practice of torture confirming what Arendt (1994) asserts that power is not the property of an individual belongs to the people. Without a group or people there is no power, since the human ability to act is always in network, in concert.

In Agamben's (2003) conception the individual who has denied his political existence is separated from his social essence and violated his rights, it is denied to access a dignified life. It lives in an empty space of rights. A "state of exception" is attributed to agency over life and death. It creates zones of indifference where there is an indistinction between violence and law within the State itself. The regime of exception comes to an end with the indirect election of the civilian president in 1985, via Electoral College. The democratic rule of law gives force to the new democratic process, now ordered by the 1988 Constitution with a return to the guarantee of civil and social rights. The new political moment begins with the promise to undo the injustices of the past. The logic established for the new Brazilian legal system is to break with all procedures that put at risk the degeneration of the new democratic order legitimized by the constituent power.

Under the banner of protecting the country and ensuring democratic order, the Democratic State of law was defaced, violating in a forceful way the dignity of the people. It was common to resort to violence to impose respect. Torture is used as a protection mechanism for the State with flagrant disrespect for human rights. There is no longer any freedom to exercise political rights, freedom of thought, opinion, assembly and the presumption of innocence is decreed. There was flagrant disrespect to the Brazilian legal system for the exercise of the unlimited power of the State.

This period is not only a story, but also a remembrance, in the sense that it is difficult to extricate from the memory of the Brazilian times that left marks as strong as censorship, arrest, torture and political assassination. Those times that were also of political initiation for many, but for many others, a memory to be erased.

Some analyzes corroborate the understanding that the elections influenced in some way the course and accelerated the regime's transition pace, without, however, renewing its conservative direction. The so-called New Republic (1985-1990), the last civilian government of the cycle of the dictatorship-military regime, ends this long period of transition. The decade of the nineties was, according to much of the literature, the period of consolidation of the liberal-democratic regime. This process includes the governments of Fernando Collor de Mello (1990-1992), Itamar Augusto Catiero Franco (1992-1995) and Fernando Henrique Cardoso (1995-2002).

3. Combating torture in the legal system

The law 9455 1997 consists of practically an article and was published in 1997, almost ten years after the insertion XLIII of art. Article 5 of the 1988 Constitution has established "the law shall consider crimes that are rendered unfeasible and unsustainable by grace or amnesty to torture, illicit trafficking in narcotics and related drugs, terrorism and those defined as heinous crimes by the constituents, executors and those who, being able to avoid them, omit themselves". However, it should be emphasized that neither the Constitution nor the law established the imprescriptible nature of the crime of torture, unlike the crime of racism in item XLII and those of the armed groups against the constitutional order and the democratic State

Subsection I of art. 1 of the law gives general types of torture, which applies to all perpetrators or victims of this crime. In its general form, torture is the embarrassment to someone, by violence or serious threat, in conjunction with physical or mental

suffering. The commentator Nabuco Filho (2019) records that what is important to categorize is suffering, not possible bodily injury. Section II of the law deals with a crime of its own, which requires certain conditions of those involved, in this case, on the part of the passive agent, is to be under the guard, power or authority, of someone. What describes the core of the action is no longer to embarrass, but to submit, and the physical or mental suffering now has to be intense. Take the case of a minor under the custody and responsibility of the parents. According to Nabuco Filho (2019), if the parents use violence against the child and it does not cause intense suffering, the crime committed will be that of ill treatment, not torture under the Article 136 of the Criminal Code (2019). But, how to determine the sense of intensity? Since suffering is not characterized as intense, this same act could be torture if practiced by someone who did not take custody of the child, and hence did not exercise power or authority over him.

Perhaps one of the most important aspects of the law has been in relation to the treatment of prisoners who are subjected to physical or mental suffering, in which case Paragraph 1 did not require the physical or mental suffering or even been caused by violence or serious threat. It is not a matter of constraining, but of submitting. According to the doctrinaire, it would constitute torture: "deprivation of food, water or sleep, closure in solitary, unhealthy cells, serve food in a toilet, where the prisoner must eat, so as not to die of starvation; extreme gravity (much used in the military regime), or compel the subject to contemplate a corpse (Dias Pita, 2018). A fact that occurred in the military dictatorship records that a naked woman was forced to parade in the presence of her torturers by imposing on the victim serious mental suffering, without using violence or serious threat. As long as it causes physical or mental suffering if law does not authorize the act, torture will be asserted. In relation to compliance with sentences, the Torture Law provides that compliance must be initiated in a closed regime, which has also been extended to comply with the penalties of crimes considered heinous.

4. Severe physical or mental suffering

This law is an important milestone in advancing the fight against torture. According to Nabuco Filho (2019) torture was endemic during the regime-of-exception in Brazil, according to data recorded, and perhaps even today, it is endemic in the Brazilian police forces and prison system. In its general form, it requires embarrassment, violence or serious threat, unlike, for example, the Spanish penal code, which in its art. 174, defines torture as the submission of someone (España, 2018).

> "*a condiciones o procedimientos que por su naturaleza, duración u otras circunstancias, le supongan sufrimientos* físicos o *mentales, la supresión o disminución de sus facultades de conocimiento, discernimiento o decisión, o que de cualquier otro modo atenten contra su integridad moral*".

The law used two verbs, to constrain and to submit, which lead to the same result, suffering. It is examined why the physical and mental suffering has been qualified as intense to minimize actions of authorities, especially of the police. If the suffering caused by such agents is not intense, it will not be torture. The thesis of Nabuco Filho (2019) is not that this writing was intentional, but it would be technical drafting failure: "Strictly speaking, it seems that it is a mere writing failure, which confirms that the law is a bad legislative technique". The law left vague meaning of what is suffering, both physical and mental.

5. Regression?

The 1997 law made progress in combating torture. It is possible to rewind legislation, vis-à-vis the advent of Law 13491 of 2017 that changed the jurisdiction for the trial of crimes related to the Military Penal Code. In particular, it is a small change that the above-mentioned law made in item II of art. 9 of the aforementioned Military Penal Code, under the terms of its Article 9. The expression that makes a difference is "and those provided for in criminal legislation." In this change, torture crimes com-

mitted by military, navy, as Lopes Jr. (2017) points out "There has therefore been a very serious setback [...]" It also creates the risk of effective corporatism.

In any case, the 1997 law has advanced in the fight against torture. Despite this progress, it is possible to reverse the legislation, currently, vis-à-vis the advent of Law 13,491 of 2017 that changed the jurisdiction for the trial of crimes related to the Military Penal Code. In particular, it is a small change that the law made in item II of art. 9 of the afore mentioned Military Penal Code, under the terms of its Article 9. The expression that makes a difference is: "and those provided for in criminal law" (Brazil, 2017).

Rather, the wording of the aforementioned provision was as follows: "II. The crimes foreseen in this Code, although they are equally defined in common criminal law, when practiced: (...)". By this wording, crimes that attract the competence of the military justice should be provided for in the Military Penal Code itself, without prejudice to also appear in other legislation. What the mentioned reformulation did was to eliminate this requirement that the crime be defined in the military penal code itself. By the new edition, the competence of the military justice extends to cover any crime, as long as it is practiced by a Union military, that is, of the navy, army and air force. Thus, by the modification made, the novel legislation gives to the military justice the prosecution of the crimes of torture practiced by military of the army, navy and air force. As Lopes Jr. (2017) points out, "There was, therefore, a very serious setback."

What is the problem of this crime being prosecuted by the military courts? The problems listed by the doctrinaire are: lack of structure to handle so many crimes; risk of effective corporatism, especially in relation to crimes of abuse of authority and torture, because "there is generally a perception and appreciation on the part of the military that is completely distinct from the civilian population about the severity and typification of these behaviors." (Luban, 2014)

In addition to this, this change is bad considering that the Brazilian tradition has part of the public security with a military character, especially the one responsible for that ostensible nature. The processing of crimes against civilians by the common justice was an indication of a change of this culture in the sense that the public security should be done by civilian means and not by military means, as a democratization of public security, but there is a clear tendency of society to direct itself to military organization, as is the case of firefighters and civil defense itself: "[...] this expansion of competence represents a setback, as well as unnecessary and completely inadequate to the level of democratic evolution that has been achieved (or imagined to have reached...). " It should be noted that, this aspect, was not overlooked by Human Rights Watch, which recorded:

> "A 2017 law moved trials of members of the armed forces accused of unlawful killings of civilians from civilians to military courts." The law also moved trials of military police-the state police force that patrols the streets in Brazil-accused of torture and other crimes to military courts, although homicides by them remain in civilian jurisdiction. This means that the armed forces and military police investigate their own members who are accused of crimes, should be investigated by civilian authorities and tried in civilian courts."

6. Repercussion in the Supreme Court

The Brazilian Lawyers Association (OAB) filed a ruling alleging breach of fundamental precepts- ADPF no.153 / DF with a request to interpret the Amnesty Law, Law 6,683 / 79 according to Constitution, that the mentioned article did not reach common crimes, such as homicide, torture, related to political crimes. According to the OAB, the advent of the 1988 Constitution had made torture a crime, in such a way that the Amnesty Law deserved an interpretative reprimand in that regard. The piece does not explicitly mention the law of torture, but only mentions the constitutional provision referring to it, however, such law is mentioned in the vote of the rapporteur of the case, Minister Eros Grau.

The court has, of course, denied the applicant's claim with the following argument. The Amnesty

Law was not law in the material sense, only in the formal sense. It would be a measure-law, a special administrative act, so it could not be reached by a new law that could revoke or modify it, since it is not imbued with the predicates of generality and abstraction, typical of a law in the material sense. As can be read in the text The Constitution and the Supreme:

> "The so-called Amnesty Law conveys a political decision taken at that time –the time of the conciliated transition of 1979. Law 6.683 is a measure-law, not a rule for the future, endowed with abstraction and generality. Law 6.683 / 1979 precedes the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment– adopted by the General Assembly on 10-12-1984, effective from 26-6 And Law 9,455, dated April 7, 1997, which defines the crime of torture, and the precept contained in article 5, XLIII, of the Constitution –which declares that the practice of torture is not subject to grace and amnesty crimes– does not reach, by logical impossibility, amnesties before their consummation consumed. The Constitution does not affect the laws of measurement that preceded it. [ADPF 153, Eros Grau, 29-4-2010, P, DJE of 6-8-2010.]"

In addition, in a second argumentative axis much more substantive from the doctrinal and constitutional point of view, as well as of its possible consequences, it referred to the Constitutional Amendment n. 26/85, which was understood by the court as being the constituent power of the 1988 Constitution. The referred amendment dealt with amnesty, including crimes related to political crimes, in art. 4th,

> "Amnesty is also granted to perpetrators of political or related crimes, and to the leaders and representatives of trade union and student organizations, as well as to civil servants or employees who have been dismissed or dismissed on purely political grounds, on the basis of other; § 2 The amnesty includes those who were punished or prosecuted for the acts attributable to them provided for in the "caput" of this article, practiced in the period between September 2, 1961 and August 15, 1979. "

In this way, the minister-rapporteur concludes, regarding the amnesty that "the new Constitution reinstated it in its original act". Clearly, the torture law had no implication for the acts of torture committed during the military regime that began in 1964.

7. Conclusions: Is the "time-of-validity of the crime of torture a taint in the Brazilian Constitution?

The STF's understanding of Constitutional Amendment n. 26/85 of November 27, 1985, as declined in the context of the ADPF 153 judgment, undermines the Brazilian Constitution. As seen, in the decision on whether or not the Constitution received the Amnesty Law, Law 6.683 / 79, the STF used the argument that the mentioned amendment would be the constituent power of the current Constitution, and that constituent amendment amnestied political crimes or connected, including, precisely by connection, the crimes of torture.

It sounds strange that a constituent power is already marked by content, since the constituent power is above all formal. It might even be argued whether a constituent power would have certain contents, intrinsic to its own formality, and thus whether it would be possible to conceive such power in a completely formal and empty form. In the case of the constituent power of the Brazilian Constitution, according to the body that is its guardian, the STF, it has already been marked by a certain content that seems to disagree with the direction that human rights have taken in the world.

Indeed, the post-war Nuremberg Trials preceded the Universal Declaration of Human Rights. Such judgments are nevertheless problematic, as exemplified in the discussions between Hart and Fuller at the end of the 1950s. Hart was well aware that, no matter how great the moral motives justifying the trials, especially with regard to prosecuting major crimes against humanity, there were other moral motives to be considered, such as that of strict legality or prior criminal law, as consolidated in the principle *nulla poena sine lege*:

> "If inroads have to be made on this principle in order to avert something held to be a greater evil than its sacrifice, it is vital that the issues at stake be clearly identified. A case of retroactive punishment should not be made to look like an ordinary case of punishment for a n act illegal a t the time. A t least it can be claimed for the simple positivist doctrine that morally iniquitous rules may still be law, that this offers no disguise for the choice between evils which, in extreme circumstances, may have to be made". (Hart, 1994: 211; 212)

In this sense, the Trials may even have been a wrong way to express human revulsion for certain types of crimes, but at least there was such an unequivocal manifestation, which indicates an important symbolism.

Hart's lesson is that the decision is not easy. On the one hand, it is a matter of giving a clear signal of a change in the course of humanity, including what can be done during a war; on the other hand, this implied disrespect for a moral principle of criminal law that has long been consolidated:

> "Hart's view is a pragmatic one. Law can indeed be used to right, in part, the wrong done in law's name. But this occurs at the cost of sacrificing a presumptive component of the rule of law: the principle of nonretroactivity—itself key to the predictability of the state's exercise of its coercive power—which Hart saw as fundamental to liberal freedom" (Lacey, 2008: 1081; 1082).

At this point, the commentator points out, lies his main objection to an excessively strong moralizing of law: "As in the case of the Nuremberg Trials, the moralized view of law may overshadow any concern with formal legality with a wider widening, evaluative judicial style implying a lessened judicial disposition to be sympathetic to claims of breaches of the principle of legality "(Lacey 2008: 1083).

On this precise point, of the symbolic meaning, there is a well-known thesis by Neves (1998) regarding a deplorable specificity of Brazilian constitutionalism. Neves' thesis of symbolic "constitutionalisation", published in Germany in 1988, seems to serve this purpose, and has even been used by Habermas to characterize a broader phenomenon in Brazil today.

In the path of emancipation, freedom, or what Habermas calls "a progressive institutionalization of equal civil rights," in a post-metaphysical era, the revolutionary option of altering the ethical basis of a culture through the revolutionary transformation of the state and society, in his judgment, is no longer available due to a problem that Hegel had already detected, namely, that of an excessive demand, that is, too much overloading on individuals. Such a transformation would have to be done through the channels of constitutional democracy in the sense of radical reformism. However, in many places, this possibility of radical reformism finds in its way the "brazilinization", a concept that refers precisely to the work of Neves in the sense that the symbolic-political aspect of the laws either does not contribute to the normative-juridical aspect or predominates on it, disregarding the standards of effectiveness. In this way, Brazilian constitutionalism provides the category of "brazilinization", intermediate between revolution and radical reformism, in the sense that the norm is not implemented and is exhausted in its symbolic sense. They are pretentious rules, but without concretization. Of course, corruption is part of this problem. As one hears "the law did not catch," like as in the Criminal Enforcement Act, the constitutional provision of procedural speed, and the effectiveness of public administration.

In this specific case, the thesis of Neves (1998) seems to confirm once again, because as the Constitution established, in its art. 5th. an extensive set of rights and individual guarantees, but there were dissonances whose explanation refers to this macula of the constituent power. The macula of the constituent power of the 1988 Constitution explains why the Constitution could not establish the "time-of-validity" of the crime of torture, as it did for example in relation to racism, because the amendment that is the constituent power of the Brazilian Constitution. In the background, established the "time-of-validity" of such crimes occurred during the military regime. If this were not the case, there would be no way to affirm the constitutionality of the law of amnesty.

In this passage, the Constitution symbolizes something equivocal. If we take the three related themes that the present study deals with, one can perceive a skewed symbology, since even when it is not in the sense of Neves's thesis, that is, when it really symbolizes something of effectiveness, not of "brazilinization", it seems be in the unwanted sense. The Constitution established a clear signal against racism, making that it does not have a "time-of-validity". It gave a clear signal to armed groups, whether civilian or military, against constitutional order and the democratic state. However, in relation to torture, it did not establish their "time-of-validity".

Of course, there may be contention about the moral justification of the "time-of-validity" or retroactivity of the law, given principles of legal certainty enshrined in the rule of law, how can there be a dispute over life imprisonment. In the specific case of torture, however, it functions as a paradigmatic moral case: "Torture and rape are thus considered not only in themselves, but centrally the paradigms of moral injury 'It is as if one could speak of moral absolutes" (Bernstein, 2005:1). Perhaps there are good moral reasons for such an absolute character of the prohibition of torture due to a happy coincidence that follows from the two main ethical theories of modernity, the utilitarian and deontological: "[...] perhaps because their specific mode of suffering can not be accounted for by reigning moral theories [...] "(Waldron, 2015: 9)

In fact, the utilitarian theory would scarcely suffice for torture, even for pragmatic reasons, such as Beccaria's (2000: 72) critique of the effectiveness of such a method of obtaining the truth:

> "Thus the impression of pain can reach such a point that, occupying the entire sensibility of the tortured man, he leaves him no other freedom than to choose the shortest path, momentarily, to subtract himself from the pen. [...] So, the sensitive innocent will plead guilty when he thinks that in this way he will put an end to the torment".

Of course, there are other arguments that can be found in Beccaria's book (2000), such as the due process theses of the rule of law. In another direction, with a lot more reasons, a deontological moral refuses to torture: "[...] torture violates human dignity in both senses described above: it inflicts suffering to make visible the victim's helplessness and so it asserts absolute inequality" By humiliation I mean treating humans as nonhumans. There are many forms of such treatment; torture is one of them. So torture is an extreme form of insult and injury, of pain and humiliation "(Margalit, 2002: 119).

In addition, in relation to other rights, there are exceptions, indeterminations and disputes admitted frankly. This is the case with the right to life and the right to liberty, since in this case, even from the point of view of positive law, the death penalty and abortion are allowed, not to mention cases in which can kill without committing a crime. This is also the case with the right to liberty, since it allows for deprivation of liberty, as well as life imprisonment. As you may well realize, this is quite different for the case of torture, as there is no news of admission under any positive law. There could be discussion, as in the case of Guantanamo during the administration of George W. Bush, concerning as to whether or not such an act would be characterized as torture?

We must also mention, in relation to torture, the importance of the human body, of life, to be involved in this matter. However, it is not only the body that plays a role in this exemplary case, because in the case of the right to life, the body is also involved. It is precisely for this reason that it is possible to discuss what best supports the human rights discourse, based on the dignity that prevailed in current discourses or that of the body that seeks to survive (Westerman 2014: 16), and that remains marginal, but stubborn in appearing specifically when it comes to torture. There is also the question of suffering, in such a way that the heart of the matter seems to be, on the one hand, a suffering body and, on the other hand, someone who intentionally causes such a body to suffer. Améry (1980: 33; 34; 35) writes on both aspects. In relation to suffering, he states that the pain of torture is such that it reduces the person to his body: "But only in torture does the transformation of the person into flesh become complete, nothing else besides that ". Therefore, the pain of torture "[...] marks the limit of the capacity of language to communicate". According

to him, a characteristic trait of torture is that it has an indelible character: "Whoever was tortured, stays tortured. Torture is ineradicably burned into him, even when clinically objective traces can be detected." Already, in turn, the torturer is described as a sadist in three senses: by the radical denial of the other, by the negation of the social principle and by the denial of the principle of reality.

It was precisely in this respect that the Constitution did not choose to give a clear message to the future, even though a difficult choice should be made between "time-of-validity" and non-retroactivity of the law, as well as other moral, political principles concerning the rule of law, and a clear symbolic message to the future, that the Constitution choose to do for the case of racism. Thus, in a manner analogous to the symbolism of the Nuremberg Trials, a constitutionalization in this direction would give a clear message for the future. Clearly, Nuremberg looked forward, while the amnesty law looked back.

Lastly, it should be noted that even the principles of the rule of law could not be mobilized against the torturers in Brazil, since, unlike the Nazis who did not have a well-established declaration of human rights, in the Brazilian case, at least since 1948, the world already had such a document, and its art. 5 explicitly forbade torture. As is well known, Resolution 217 of the United Nations General Assembly was voted on December 10, 1948 at the Palais de Chaillot, Paris. Of the 58 UN members, at the time, 48 voted in favor of the resolution, among them Brazil. Therefore, the retroactivity of the law could not be claimed to punish the crimes of torture, and the STF missed the opportunity to correct this course.

So this is a stain on the Constitution, as if it had been erected on a kind of original sin that, perhaps, greatly contaminates the governability of the Brazilian state, for example, in relation to the way prisoners are treated by the prison system of the country, with overcrowding (CNPM, 2018) and other degrading treatments. Perhaps it is also based on a diffuse feeling in society that human rights constitute a kind of privileged treatment of prisoners. It is common to hear that human rights only concern criminals, not their victims.

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