TRANSITIONAL JUSTICE, RIGHT TO THE TRUTH AND HUMAN RIGHTS: CASE GOMES LUND AND OTHERS (ARAGUAIA GUERRILHA) X BRASIL

Robison Tramontina [1]

1 INTRODUCTION

On December 14, 2010, the Inter-American Court of Human Rights had announced the sentence Case ”Araguaia Guerrilla” x Brazil, which considered null the interpretation given by the Supreme Court to the Amnesty Law, requesting Brazil to investigate violations human rights have occurred. So, was created, in theory, a contradiction between the decisions of the Supreme Court, the highest guardian of the Constitution and the Inter-American Court, an international court recognized voluntarily by the Brazilian State in the exercise of its sovereignty.

The Inter-American Court of human rights decision has generated controversy in the political and legal ambit. The main point of contention lies in the question of criminal prosecution. With the decision of the Inter-American Court Brazilian state should encourage and promote the accountability of state agents who have committed serious crimes during the military government (1964-1985). But such a procedure is not possible according to the decision of the Brazilian Supreme Court. This article is to analyze the arguments used by the Ministers of the Brazilian Supreme Court in ADPF 153 (Ação por Descumprimento de Preceito Fundamental) informed by literature and judicial decision on transitional justice and the right to the truth.

To achieve the goal proposed argumentative structure of the text is as follows: i) transitional justice definition and their genealogy; ii) the right to the truth: limits and reaches; iii) analyze the Votes of the Ministers of the Brazilian Supreme Court in the case entitled “Arguição de Descumprimento de Preceito Fundamental 153” (ADPF 153); iv) investigate the arguments set out in the inter-American court decision human rights on the case “Guerrilha do Araguaia”; v) comparison between both decisions – Brazilian Court x Inter-American Court - from the perspective of human rights.

2 METHODOLOGY

This article uses two types of search technique. In the first two steps to analyze the transitional justice and the right to truth, uses the technique of reading, analysis and interpretation of texts. In the last two, employs the technique of analysis of judicial decisions.

3 TRANSITIONAL JUSTICE DEFINITION AND THEIR GENEALOGY

According Teitel (2003) transitional justice can be defined as the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.[2]For a better understanding of this definition it is necessary to investigate how it was built in the history of ideas. In other words, it is necessary to analyze your genealogy.

[1] robison.tramontina@unoesc.edu.br

[2] See on this topic: Call (2004) and Hansen (2011).

The genealogy of transitional justice can to be divided into three phases (TEITEL, 2003). Phase I began in 1945, after the Second World War, and ended with the end of the Cold War. At this stage the transitional justice is recognized by international law. However, this development was not enduring, due to its association with the exceptional political conditions of the postwar period. Accordingly, this first phase of transitional justice, associated with interstate cooperation, war crimes trials, and sanctions, ended soon after the war.

Phase II is associated with a period of accelerated democratization and political fragmentation that has been characterized as a ”third wave” of transition. The collapse and disintegration of the Soviet Union led to concurrent transitions throughout much of the world. These transitions were rapidly followed by post-1989 transitions in Eastern Europe, Africa, and Central America. While these changes are often described as isolated developments or as a series of civil wars, many of these conflicts were fostered or supported by international power politics and were therefore affected by the Soviet collapse

Phase III began in the end of the twentieth century. This third phase is characterized by the acceleration of transitional justice phenomena associated with globalization and typified by conditions of heightened political instability and violence. Transitional justice moves from the exception to the norm to become a paradigm of rule of law.

The transition in Brazil can be located in second phase.

4 THE RIGHT TO THE TRUTH: LIMITS AND REACHES

The right to truth is a concept that has developed in the last twenty years in international law scope. It emerged as a response to the lack of clarification, investigation, prosecution and punishment of cases of serious human rights violations and breaches practiced by States (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2014). In the context of human rights, families have used it to compel states to provide information about missing relatives (GROOME, 2011).

The right to the truth can be identified in three legal instruments: a resolution of October 2009 of the Human Rights Council, in Article 32 of the First Additional Protocol to the Geneva Conventions and in the Preamble of the International Convention for the Protection of All Persons from Enforced Disappearance. They recognize that there is a right to know what happened to the disappeared persons.

The right to the truth is not explicitly reflected in the Inter-American human rights instruments. However, since its outset both the Inter-American Commission and Inter-American Court have determined the content of the right to the truth and consequent obligations of States through the comprehensive analysis a series of rights set forth in both the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights.

The right to the truth, in the inter-American human rights system, initially was linked to the phenomenon of enforced disappearance. However, both the Commission and the Court has held that the forced disappearance of persons affects a plurality of rights such as the right to personal liberty, personal integrity, life and recognition of legal personality. Thus, the disappearance act begins with the deprivation of liberty personal and his subsequent lack of the information about your location, and remains until you identify the whereabouts of the disappeared person or locate exactly his remains (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2014).

According Inter-American Commission (2014), the right to the truth includes two dimensions. First, is recognized the right of victims and their families to know the truth regarding the facts that led to serious violations of human rights and the right to know the identity of those involved in them. This implies that the right to the truth entails the obligation of States to clarify, investigate, prosecute and punish those responsible for cases of serious human rights violations and, depending on the circumstances of each case, ensure access to information on serious violations of human rights that are at facilities and state archives.

There is also the understanding that the right to truth is a right of society as a whole.

But, this interpretation is appropriate? The political transition occurred in Brazil in the early 80s. In the 90s the Brazilian government recognized the excesses committed during the military period and paid compensation to the families. However, according to some institutions and families of disappeared persons there is the need for criminal prosecution. The right to the truth presupposes the criminal persecution?

5 ANALYZE THE VOTES OF THE MINISTERS OF THE BRAZILIAN SUPREME COURT IN THE ADPF 153

On October, 2008, the ADPF 153 was proposed by the Federal Council of the OAB (Ordem dos Advogados do Brasil). The core of the constitutional controversy concerned the interpretation of paragraph 1 of Article 1 of the Amnesty Law (Law n. 6.683 / 1979), which considered related, the crimes of any nature associated to political crimes committed or by motivation political.

The legal action questioned whether the law would have been received by Federal Constitution of 1988. On April 2010, the ADPF 153 was rejected. In number of seven votes to two, prevails the understanding that the law of amnesty was valid. According to this conciliatory way, the amnesty as granted by Law n. 6.683 / 79, also contemplate the crimes committed by state government officials.

According Eros Grau, rapporteur of legal decision, The law of amnesty: not offend the principle of human dignity, it covers the related crimes, is a measure law, it cannot be reviewed by the Supreme Court and was received by the Federal Constitution in his inaugural act, amendment 26/85. Therefore, law of amnesty is valid.

Minister Carmen Lucia follows the rapporteur. For the Minister, the determining sign of Law. 6.683 / 79 would be precisely the fact that it represents the first step in democracy building.

Ministers Ellen Gracie and Marco Aurelio follows the rapporteur and have their votes insisting on the concept of amnesty. The central thesis is that amnesty is always general and unrestricted. The same position is held by the Minister Gilmar Mendes.

Minister Celso Mello says that the law of amnesty has legal and political legitimacy, is not a self amnesty and that the alleged crimes attributed to State agents already prescribed. Cesar Peluso also highlights the issue of prescription of crimes.

The dissenting opinions were presented by Ricardo Lewandowski and Ayres Brito. Both admit the possibility of criminal prosecution of state agents in cases of heinous crimes.

The main arguments for rejecting the legal action were political and social nature. It was recognized that the law of amnesty was built democratically and that it was important step toward democratization.

6 CONCLUSIONS

The decision of the Brazilian Supreme Court is not compatible with the literature on the subject and judgments arising out of international courts. The disagreement not only has hermeneutic nature, but also political and social.

REFERENCES

BRASIL. *Ação por Descumprimento de Preceito Fundamental*. Available from: <<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=612960>. Access on: Sept. 10 2016.

CALL, C. Is transitional justice really just? *Brown Journal of Worlds Affairs*, v. 9, i. 1, Summer/Fall, 2004.

GROOME, D. The Right to Truth in the Fight Against Impunity. *Berkeley Journal of International Law*, v. 29, n. 1, 2011.

HANSEN, T. O. Transitional Justice: Toward a Differentiated Theory. *Oregon Review of International Law*, v. 13, n. 1, 2011.

COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS. *Derecho a la verdade en las Americas*. 2014.

TEITEL, R. Transitional Justice Genealogy. *Harvard Human Rights Journal*, v. 16, 2003.