
TRANSITIONS: LATIN AMERICA AND THE QUEST FOR THE QUESTION OF
SOVEREIGNTY

TRANSIÇÕES: A AMÉRICA LATINA E A BUSCA PELA QUESTÃO DA SOBERANIA

Gabriel Rezende de SOUZA PINTO*

ABSTRACT:

The article aims to introduce the relation between sovereignty and transition. It is argued that Latin American transitions defy the proper *tópos* where dwelt the traditional predicates of sovereignty. In so doing, they allow a totally different grasp of the persistence of sovereignty in terms of an ongoing aporia. On the one hand, sovereignty is the claim for sovereignty in a continent originally destituted of the European contours of the concept. On the other hand, sovereignty is the image of a world now gone, the theoretical frame of political-legal institutions pertaining to a recent but finished past. Emphasis is added to transitional pacts, the mechanisms through which transitions are deemed controlled and how they reproduce the so-called *logic of sovereignty*.

KEYWORDS:

Democratic Transitions; Sovereignty; Deconstruction.

RESUMO:

O artigo pretende introduzir a relação entre soberania e transição. Argumenta-se que as transições latino-americanas desafiam a *tópos* próprio onde residiam os predicados tradicionais da soberania. Ao fazê-lo, elas permitem uma abordagem completamente outra da persistência da soberania nos termos de uma aporia contínua. Por um lado, soberania é a pretensão de soberania num continente originalmente destituído dos contornos europeus do conceito. Por outro lado, a soberania é a imagem de um mundo agora distante, o arcabouço teórico de instituições político-jurídicas pertencentes a um passado próximo, mas findo. Enfatizam-se os pactos transicionais, mecanismos pelos quais as transições são julgadas controladas, e como eles reproduzem a chamada *lógica da soberania*.

PALAVRAS-CHAVE:

Transições democráticas – Soberania – Desconstrução

* Doutorado Université Paris 8 - Vincennes-Saint-Denis. Bolsista CAPES. (Paris/França). E-mail: grezendesou@gmail.com

INTRODUCTION

How can we think sovereignty not only as a subject matter, as a thematic, a source for reflection, but as a question? Are there any significant differences between grasping sovereignty as a problem or apprehending it as an intense and ongoing aporia? If it is so, then we can possibly begin this paper by acknowledging what would be the uncanny aspect of its fundamental option: discuss the place – or the places – of sovereignty within legal and political theory taking Latin America as its focal point. In what sense could that last sentence be interpreted in its strangeness? Where would reside this uncanny aspect? In Latin America, perhaps?

The interpretative key to understand Carl Schmitt's *opus magnum*, *Der Nomos der Erde*, lies firmly at this juncture. For him, the world in which sovereignty has prevailed is now gone. A dissolved world in the face of which one can nothing but mourn its closing: *Die Welt ist fort*, as Paul Celan would say. The syntagma *Jus Publicum Europaeum* comprised "Continental European international law, (...) a law among states, among European sovereigns. This European core determined the nomos of the rest of the earth." (SCHMITT, 1974, p. 97). The particular order and orientation of the *nomos* that reigned for four hundred years in Europe organized the whole global dynamics of law. Statehood and sovereignty were its cornerstones under the sole condition of fully resembling the self-image of European powers. Hence, International Law – and, obviously, its relation to national law – was, as Marti Koskenniemi puts it, a Victorian club. "Admission to the club was conditional on the possession of a sufficient degree of European culture". (KOSKENNIEMI, 2004, p. 82).

This is the world that vanishes in the schmittian diagnosis, opening room to the *Großräume* where sovereignty – understood as a substantial and concrete equality between territorial states – does not play a part. Putting forth some of his most pervasive prejudices, Schmitt will be astounded by the pervasiveness of the dogma of universality inside the League of Nations. He will loath, for instance, the fact that, during the discussions around Briand's plan for an "European Union", Paraguayan and Uruguayan delegates advised Europe on the unity of earth. This new era would be marked by an abusive use of universal ideas such as *humanity*, as well as a merely formal (void) comprehension of sovereignty concealing deep inequalities amongst nations. Against this background, the most influential nations hold an unprecedented amount of power. In what regards Latin American States, Schmitt affirms: "the result was that Washington could control every constitutional and governmental change of any and all states in Central and South America." (SCHMITT, 1974, p. 97). Schmitt's *R. Fac. Dir. UFG*, v. 39, n.1, p. 239-264, jan. / jun. 2015

writings from the 1940s and the 1950s anticipate the ravaging logic behind the coups d'état that devastated the continent through the 1960's onward.

From a schmittian perspective, to study sovereignty in Latin America would rather be a meaningless research, a non-sense: before the demise of the *Jus Publicum Europeum*, sovereignty was a concept restricted to European Nations; after it, sovereignty has disappeared – as least as a fundamental concept.

Nevertheless, it will be our contention here that, in a certain sense, the history of most Latin American countries could be synthesized around the quest for their sovereignty. The independence processes of the 19th century did not suffice to free those countries from enormous challenges derived from their condition as post-colonial societies in the periphery of global capitalism. Celso Furtado points out two major trends in this development: on the one hand, the birth of a bourgeoisie interested in wiping out by decree the colonial heritage; on the other, the emergence of forces trying to review critically this same heritage and “integrate the native masses into the political and social framework, in an attempt to create a distinctive and independent cultural personality.” (FURTADO, 1976, 36). Obviously, those projects will face several progresses, but also many setbacks. And yet this question will never completely leave the scene.

Under the enormous cloak represented by sovereignty, several other terms may be referred, such as political independence, rule of law, and legitimacy of the constitutional order. In Brazil, for example, the *putsch* of 1964 that overturned the democratic government and instituted a military dictatorship was followed by the so-called *Ato Institucional* (Institutional Act). This *sui generis* legal document, which stood above and under the constitution at a time, was a self-referential mechanism presented to affirm the legitimacy of the *Coup d'État* through the social imagery of a defense against communism. A sort of counter-revolution that intended to preserve national independence from the “Eastern Bloc” – even though, in practice, that meant maintaining a status quo of dependence upon the United States of America. Thus, the Institutional Act may be seen as a fine illustration of how this chain of connected concepts operates: in order to seek legitimacy for a political act, it is absolutely necessary to resort to a legal language that assures a compromise towards unconditional independence. Sovereignty is at work both as a device to produce legitimacy and as a symbol of supremacy and power. We will have the occasion to return to a more deep analysis of this logic further in this article. For now, it suffices to emphasize how the specific question around sovereignty occurs in a non-neglectable fashion.

At this point we cannot but advance serious doubts on Carl Schmitt's diagnosis. However, instead of criticizing Schmitt, it seems far more productive to follow the path that brings him to the above mentioned conclusions. After all, his arguments find their roots in a more complex philosophical layer - as Jacques Derrida has already recognized (DERRIDA, 1994, p. 101). He stands on the metaphorical shoulders of an immense tradition in western thought, which should be the object of some reflection. To put it in a different way, there is a persistent logic of sovereignty even there where it is deemed dead, gone, *fort*. Both its supporters and its critics share a certain metaphysics of sovereignty: "We know very well the paradox and the equivocality. Is it fortuitous that the same filiation rejoins several right-wing and left-wing (Marxist, post- or neo-Marxist) families?" (DERRIDA, 1994, p. 102).

If it is not fortuitous, perhaps a comprehensive account must investigate unexpected circumstances; improbable events that venture to defy this logic. Since one of the most important characteristics of sovereignty is the contention that nothing ever happens to the sovereign, "nothing that deserves the name of 'event'" (DERRIDA, 1994, p. 87), the deconstructive gesture must be necessarily connected to the radicality of the event, understood here as the *im-possible*, "the coming of any event worthy of this name, of an unforeseeable coming of the other, of a heteronomy, of a law come from the other, of a responsibility and decision of the other - of the other in me, an other greater and older than I am". (DERRIDA, 2005, p. 84).

In recent years, one of the most remarkable challenges to the – yet to be better described – logic of sovereignty has come from the so-called *Transitions do democracy* in Latin America. In no other place the very statute of sovereignty has been evinced and put into question in a more aporetic way than there. It goes without saying that breaking not only with an immense legacy of authoritarian practices, but actually overthrowing governments now deemed illegitimate necessarily puts sovereignty in the main stage. However, and this is why there is an event worthy of the name at work here, the transitional processes were also marked by a harsh contestation of the sovereignty canon.

This is a paradox in the literal sense - as reminds us Giacomo Marramao (2008, p. 397) - since the commonsensical view that envelops sovereignty is defied. What constitutes the precise *παρα-δόξω*, *i.e.* something that lies beside a common view as an alteration or change, has a strict relation to non-predictable developments of those transitions. It will be argued here that, despite of the large bibliography that comprises the *transitology* – a branch of political sciences dedicated to the study of transitions – and the hegemonic opinion

regarding the subject, the *transitions* to democracy are not confined to a mere passage of an authoritarian rule into a democratic one during the 1980s.

The response to the question “transition to what?”, cunningly formulated by Ruti Teitel (2000, p. 5), involves a much broader scope, a never ending process in which democracy is never actual, fully present, completely perfected. In this sense, democracy is *impossible*, remaining always to-come, always permeable to unpredictable events (DERRIDA, 2005, p. 84). The first decade of this century provided us of fine examples of how *transitions* are never a harmonic whole restricted in time and space, reducible to a *constitutional moment* (ACKERMAN, 1991) clearly marked by a beginning and an ending, and limited to the pacts, covenants, and bargains that forged the transitions as their very own outcome. We will be interested here in two specific developments in two different countries: Brazil and Uruguay. The two of them are more or less connected to a firm case law of the Interamerican Court of Human Rights (IACourtHR) concerning the conformity of Amnesty Laws with international human rights law in general, and with the American Convention of Human Rights in particular.

To better understand this point, at least a few premises must be first clarified. The paper will be thus divided in two separate parts, the first one corresponding to sections 1 and 2 and the second one to the remaining parts 3, 4 and 5.

In the first part, we essay a first approach to what has been called up to this point the *logic of sovereignty* and its commonsensical proliferation throughout the most dissonant discourses. More precisely, it will be argued that the dramatically influential idea of *transition*, as it has been re-coined by political scientists in the last quarter of the XX century in order to account for the “third wave of democratization” (HUNTINGTON, 1991), is underpinned by this very logic. However, the connection between transition and sovereignty is embedded from the start by an aporia: what comes as its condition of possibility is also its condition of *impossibility*.

The second part is dedicated to an analysis of how the Supreme Courts of Brazil and Uruguay have recently dealt with the aporia involving sovereignty and transition. In the *Sabalsagaray case*, the Uruguayan Supreme Court ruled unconstitutional the statutes granting amnesty for crimes against humanity. On the other hand, in the *Arguição de Descumprimento de Preceito Fundamental n. 153* (ADPF 153) – a modality of direct lawsuit to challenge the constitutionality of legal statutes – the Brazilian Supreme Court upheld congressional acts of a similar type, arguing that the 1979 Amnesty Law, dating back to the military dictatorship –

so, prior to the 1988 Constitution –, was valid. Judge Eros Grau’s leading vote made the case that the Amnesty Law integrated a sort of *Bloc de constitutionalité*. For it was part of a political agreement that allowed the transition to democracy, it cannot be simply removed from the legal order. The two cases constitute more than mere judicial review cases; in other words, they defy the logic of sovereignty – in a much more profound way than the so-called *counter-majoritarian difficulty* (BICKEL, 1986) – by reason of the object under dispute: the constitutional order’s production of legitimacy. And both of them do so by facing a tremendously complex *new nomos of earth* – to use Carl Schmitt’s expression in a slightly different way –: the non-reducible intersection of several legal orders bearing pretensions of legitimacy and authority. In these cases, IACourtHR’s case law comes to the front stage.

We will be treading carefully on the terrain of *Transitional Justice*, understood as the set of normative measures adopted during periods of political transition and “evaluated on the basis of their prospects for democracy.” (TEITEL, 2000, p. 3). *Carefully* here means a certain attitude of suspicion, a claim to safeguard against some of its most important axioms connected with the *transition paradigm* – and, therefore, with a commonsensical sovereignty. We cannot fully criticize the logic of sovereignty at work in *transitions* without a radicalization of the standard transitional justice.

1. THE LOGIC OF SOVEREIGNTY

The syntagm *logic of sovereignty* stands for a conceptual tool to penetrate the philosophical layers of modern legal and political thought. *Logic* here is deliberately used for two reasons. First, because the form of the argument to be here developed draws on a distinction – that goes back to Hegel – between the *logical* and the *ontological*. (HÄGGLUND, 2011, p. 62). Certainly, it is absolutely impossible to essay a comprehensive account of sovereignty in ontological terms, since its high dispersion in different analytical concepts, through the most different authors, and reflected in completely divergent practices, renders it unrealistic. Second, the idea of *logic* enables one to understand sovereignty not as an ontological stipulation, but rather as a structure that permeates a dense conceptual chain. Jacques Derrida will use a similar strategy in *La langue et la discours de la méthode* (*The language and the discourse of the method*). He reasoned as follows:

The minimum hypothesis to be held at this moment, and it is my hypothesis, is that between the *opus* of Descartes bearing this name and a discourse of method of which the foundation, the position would be ampler, if not structural, permanent, a-

historical, there would be a certain relation which the form must be determined, even if the determination is as difficult as it is necessary. [T]his already defines one of the tasks of this seminar: to study outside the works of Descartes, before and after it, the possibility and the necessity of a discourse of method, of a structure and of a history, if you will, in which the *Discours de la Méthode* would come to accentuate an epoch, to mark an event, and modify a structure. (DERRIDA, 1988, p. 36).

The argument could be paraphrased as a manifest interest towards the necessity and the possibility of sovereignty before and after Jean Bodin, Thomas Hobbes, Jean-Jacques Rousseau, Max Weber, Carl Schmitt or Hans Kelsen. Every single one of these authors is, at a time, structured by the logic of sovereignty, and *real* events within that very structure.

Giacomo Marramao, sketching a critical history of sovereignty, distinguishes two dimensions. In the *general* sense sovereignty means the supreme authority, “*superiorem non recognoscens*”, and so it is simply associated with the idea of supremacy”. (2000, p. 300). This characterization is not far from the one proposed by Hans Kelsen in *Das problem der souveränität und die theorie des völkerrechts*, which described traditional sovereignty – since Bartolus – as the idea of a highest point within a given hierarchical chain of command and power. (KELSEN, 1960).

The *specific* sense, on the other hand, is more akin to a secularization process through which society faces its internal differentiation. Influenced by a certain weberian diagnosis, Marramao writes:

‘In the *specific* sense, otherwise, the concept of sovereignty denotes a process of rationalization of political power, which consist in the transformation of force in law [*legge*], of fact in law [*diritto*] and conducts to an *auctoritas* endowed with the prerogative of absoluteness (that is: of independence from the person that embodies it and, so, of impersonality) and indivisibility’. (2000, p. 300).

It comes as no surprise that the category of legitimacy will play an important role in Marramao’s further analysis. The *specific* sense reveals one of the central issues related to sovereignty, *i.e.*, its singular positioning in western thought pointed towards the absence of fundament of modern society. Since the latter cannot but be grounded in a self-referential production of legitimacy, sovereignty is erected as a mechanism to translate political power in juridical language. In constitutional democracies, for example, this idea is developed in the formula “legitimacy through procedure”. (LUHMANN, 1969; HABERMAS, 1996).

Marramao rapidly dismisses the possibility of reading both *senses* as absolute ontological categories. They are nothing but abstractions, fictional hypostasis sustained by a

metaphysical worldview. To that extent, Marramao engages in a thoroughly contextualization of some important uses of those categories. The almost insurmountable ambiguity, or rather the opacity of the concept of sovereignty has led many interpreters to lay it aside. Amongst them, there are some who came to the far more radical conclusion that legal thought was just an apologetic disguise for dynamics of *discipline*. (MARRAMAQ, 2000, p. 305-6).

Of course the name of Michel Foucault is unavoidable here. Although he never limited his diagnosis to a strict temporal succession between sovereignty and a paradigm of security (FOUCAULT, 2004, p. 10-12), he emphasizes the limits of the legal-political sovereignty, arguing in favor of an analytical model based on discipline and biopolitics. Marramao criticizes this perspective by demonstrating how it fails to apprehend the nuanced discourses that are actually at work within legal-political thought. In a more derridean lexicon, we would be tempted to say that Foucault and its followers fail to capture deconstruction at work at two levels. Firstly, they undervalue the legal form and its contradictions. And secondly, they dismiss the possibility to deepen “the unthought of the theory of sovereignty, digging in the paradox of decapitation”. (MARRAMAQ, 2000, p. 319).

The paradox of decapitation is key to understand the logic of sovereignty. It allows a critical dialogue with Freud and all psychoanalytical theory that stands in its path, most notably with the insights presented in *Totem and Taboo*. Since we are zeroing a *logic*, a *structure*, we are also necessarily circulating around a certain notion of repetition. This repetition should be understood in its neurotic character as an obsession. The paradox of decapitation comes thereof.

The originary paradox of modern doctrine of sovereignty lies in the fact that the “obsession” tends to reproduce itself not in spite of, but thanks to the sovereign’s decapitation. In other words: the concept of sovereignty presupposed the king decapitated. (MARRAMAQ, 2000, p. 313).

How is it possible in the first place? How can this paradox be demonstrated? For Marramao, the history of sovereignty is far more complex than traditional historiography is ready to admit. Normally, the accepted image of sovereignty as a theological-political device in early modernity is accompanied by a full range of adjectives describing the perpetual, absolute, undivided, supreme, and exclusive power of the monarchs. Drawing on a standardized version of Bodin’s *Six Livres de la République* (1986), the canonical writings on sovereignty usually reduce the thematic to a commonsensical image of royalty that faces a process of neutralization along the path of modernity. This conception poses several

problems. The most compelling one is the tendency to reproduce a superficial stratum of those very discourses. Without a comprehensive account of their tensions, contradictions and ambivalences, we end up losing sight of underlying social realities. In other words, we finish by endorsing the self-reflected phantasms of an absolute sovereignty. On this basis, Marramao will turn Foucault against Foucault in order to show dispersion, plurality, and circularity already at work in the very beginning of sovereignty *as such*.

“Ambivalence, double contingency, circular causality, deterrence, suspension and postponement: these are the proper marks of the productivity of a power that externalizes itself not – as Foucault retains – through devices and apparatus rigorously goal-instrumental, but rather through structures characterized by an energetic dispersion”. (MARRAMAIO, 2000, p. 313).

In dealing with this seemingly difficult question, Marramao rebuilds modern pathogenesis of legal-political power. The Freudian *Ur-szene* is reinterpreted in its radical sense, since for Marramao it is not *simpliciter* a primal or primeval scene, but the original scene of a solution that has already passed beyond a primordial power. In other words, the origin of power is not so much an original unity of power embedded in a primeval father, but rather a fraternization, an association of brothers, a *conjunction*, a parricidal conspiracy. “The king is dead, now what?”

This is the image of modernity’s conundrum: how to deal with the absence of fundament. In that sense, the question is already dispersed in the plurality of possible answers. Power is dispersion since the beginning. Marramao makes the case that the modern formula of sovereignty (*summa legibusque solute potestas*) is nothing other than a repetition of the *Urszene*. The decapitated father, the king without a head, becomes a totem by the hands of his murderers, his sons, his subjects. In the words of Freud:

In order that these latter consequences may seem plausible, leaving their premises on one side, we need only suppose that the tumultuous mob of brothers were filled with the same contradictory feelings which we can see at work in the ambivalent father-complexes of our children and of our neurotic patients. They hated their father, who presented such a formidable obstacle to their craving for power and their sexual desires; but they loved and admired him too. After they had got rid of him, had satisfied their hatred and had put into effect their wish to identify themselves with him, the affection which had all this time been pushed under was bound to make itself felt. It did so in the form of remorse. A sense of guilt made its appearance, which in this instance coincided with the remorse felt by the whole group. The dead father became stronger than the living one had been—for events took the course we so often see them follow in human affairs to this day. (2004, p. 116).

The dead father is much stronger than the living one for the simple reason that now he is a projection. For he is the product of the remorseful sons, he obeys a fictional logic. The father, or as Kelsen will put it, the “totemic mask” (2000, p. 93) is necessarily embedded in a certain *as if* (*comme si*) (DERRIDA, 2001, p. 27), a structure of virtuality, fiction, narrativization. The social imagery conformed by Hobbes confirms this diagnosis. His Leviathan is the product of human art, the outcome of man’s inventive power, man’s ingeniousness, an artificial political man created by human imitation of God’s power of creation. “Art is here, like the institution itself, like artificiality, like the technical supplement, a sort of animal and monstrous naturality.” (DERRIDA, 2009, p. 27). It may be worth remembering the initial words of *Leviathan*:

Nature (the art whereby God hath made and governs the world) is by the art of man, as in many other things, so in this also imitated, that it can make an artificial animal. For seeing life is but a motion of limbs, the beginning whereof is in some principal part within, why may we not say that all automata (engines that move themselves by springs and wheels as doth a watch) have an artificial life? For what is the heart, but a spring; and the nerves, but so many strings; and the joints, but so many wheels, giving motion to the whole body, such as was intended by the Artificer? Art goes yet further, imitating that rational and most excellent work of Nature, man. For by art is created that great Leviathan called a Commonwealth, or State (in Latin, Civitas), which is but an artificial man. (HOBBS, 1996, p. 9).

Within this framework, one could hypothesize whether the social contract should still play a role. Given the persistency of this concept throughout legal-political thought in the West, we cannot neglect its dissemination and, therefore, internal differentiation (MARRAMAIO, 2006). In Marramaio’s view, the social contract should be seen as the utmost symbol of the logic of sovereignty, as its inevitable symbolization through ritualistic instances. But what is exactly a social contract? And, how should it be read in light of the logic of sovereignty?

The naturalistic fiction of a social contract responds to the modern necessity of creating power out of nowhere. In doing so, it reproduces *ad infinitum* the mythological and theological structure of sovereignty by way of a narrative, a *simulacrum* of horizontal agreement of all members in a given polity (the brothers): in other words, a goal-oriented action creating a secularized authority (the father as a totem). Nevertheless, the contract is beforehand known as a *factual* impossibility, for it is an *artifact*, a creation made by the arts of man, to quote Hobbes once more. Remaining consistent with the fundamental fictional character of sovereignty, the social contract is nothing but a pact creating obligations in

favour of third parties. Thus, Marramao emphasizes the figure of the conjuration, the *cum-juratio* coupling the two major semantic dimensions at stake here.

On the one hand, the Latin preposition *cum* sets forth the idea of reunion, of gathering, the become-subject of a become-together. To the question of “how to found a wordly, *weltlich* sovereignty precisely there where the world (*κόσμος*, *mundus*) is gone, where no hierarchy of values can be deemed preponderant, and the only common ground is the absolute right of everyone over everything”, the response is given on the basis of reunion: “in the virtuality that this act would be able to produce power and law.” (MARRAMAIO, 2000, p. 319). On the other hand, *iuratio* is the oath, the sworn faith, the *serment* orbiting around the notion of *ius*, law. According to Marramao, the radical consequence to be extracted from the *Ur-szene* reaffirmed – and obsessively reproduced – in the social contract is not that there would exist an original law underpinning the oath, but rather that the oath itself creates the law. Three consequences arise at this point: a) The social contract is preceded by a polemology, a logic of the *pólemos*; b) The pact does not succeed from a horizontal agreement; it is based on a vertical reunion which transfigures itself in the abstract idea of “general interest”; c) The general interest binds the co-citizens to a goal-oriented preservation of the totemic sovereign.

2. TRANSITIONS AND SOVEREIGNTY

Further in his argument, Marramao will make the case that the social contract structure is no longer responsible for the eternal return of sovereignty in contemporary society. Other forms of ritualization, inscribed in the normality of legal procedures and political action, preserve the neurotic obsession of sovereignty. These conclusions, however, seem, if not contradicted by, at least far more complicated in light of the *transitions to democracy*.

Since the end of the 1970s, a profound social process has been disclosed in the political scenes of South Europe, Latin America and, finally, Eastern Europe (Ex-Soviet Republics). Thomas Carothers reminds us how the United States President Ronald Reagan and George Schultz, U.S. Secretary of State, constantly stressed a “worldwide democratic revolution”. (CAROTHERS, 2002, p. 5). “Transitional paradigm” is then a commonplace expression translating a commonsensical worldview in the West. Francis Fukuyama summarized this more or less diffuse perception in his much criticized *The end of the history and the last man*. (FUKUYAMA, 2006). Political science and political scientists stood

alongside these social practices in a constant feedback relationship; a sort of circularity where no constative utterance could be fairly opposed to a performative one. Operating through the binomial transition-consolidation, *Transitology* emerges as a new branch in social sciences. There are four distinguishing features in what regards the object-creating-power of transitology's methodology:

a) A rupture with the structural-functionalist pattern in social sciences. Instead of inserting social changes in the causality of long-duration structures, *transitology* privileges an *action*-based model. The work of Dankwart Rustow is exemplar in this sense (RUSTOW, 1970).

b) The idea of an action-based model leads to a variation of democratic elitism in *transitology*. To be sure, *transitology* emerges as a concurrent paradigm, and most of its affiliated authors are severe critics of the former theoretical approach. Nevertheless, since social phenomena are to be explained now by way of actors' abilities to change the *status quo* in a short space of time, the methodology ends up by focusing on social and economic elites. Transitology becomes not only a biased theory of goal-oriented practices, but also a reductive approach in what regards grassroots *struggles* for democracy. Samuel Huntington's *Third Wave* shows it most clearly: "Negotiations and compromise between political elites were at the heart of the democratization process." (HUNTINGTON, 1993, p. 165).

c) *Transitology* applies a restricted concept of democracy based solely on the regularity and social effectiveness of legal-political procedures fashioning western liberal democracies. In Adam Przeworski's formula: "Democracy is consolidated when under given political and economical conditions a particular system of institutions becomes the only game in town". (PRZEWORSKI, 1991, p. 26). *Transition* can thus be defined not only as the "interval between one political regime and another", but also as a period determined by the absence of clear rules concerning political power and the exercise of authority. An entire anistorical teleology is depicted as a somewhat natural movement towards liberalization/democratization. (GUILLOT, 2002, p. 219).

d) The *Ἐσχάτος* of *transitology* gives way to an analytical model that could be summarized as follows: a pact between elites envisaging the prospects for a liberal democracy. For the pact is the quintessence of transitology, much of the literature sets aside the rather neutral and objective discourse – believed to be "scientific" – and proceeds to a normative account on transitions. Huntington makes the case that a desirable transition should

be brought about by an allegiance of two moderate groups: the reformists (liberals and democrats) within the authoritarian coalition and the moderate democrats. (1993, p. 164).

The privilege attributed by *transitology* to the pact between moderate elite groups can be now interpreted under the logic of sovereignty. To be sure, it would be erroneous to equate the so-called *pact* in transitions with the modern natural law social contract. The former is not a simple *Gedankenexperiment*, a thought experiment supposed to give an interpretative key to the production of legitimacy in modernity.

The *pact*, however, in the words of Guillermo O'Donnell and Phillippe C. Schmitter:

[c]an be defined as an explicit, but not always publicly explicated or justified, agreement among a selected set of actors which seeks to define (or, better, to redefine) rules governing the exercise of power on the basis of mutual guarantees for the "vital interests" of those entering into it. (O'DONNELL; SCHMITTER, 1986, p. 37).

In that context, pacts are not proto-modern devices of authority creation, nor liberal constitutions based on safeguarding pre-political individual rights against the state. The nature of these compromises is completely different, since they are power-sharing agreements within civil society forces: they rearrange institutions in order to fit the complex power relations inscribed in social *praxis*. Nevertheless, it is not difficult to see here the persistence of the logic of sovereignty through the *Ur-szene*'s neurotic repetition.

When exploring transitional mechanisms, O'Donnell and Schmitter run into a difficulty: pacts are not an invariably feature of all forms of transition. This factual evidence forces the authors to admit that pacts should not "be regarded as a necessary element in all transitions from authoritarian rule – even in those which are gradual or continual". (O'DONNELL; SCHMITTER, 1986, p. 39). However, the argument is promptly modulated in the form of a normative evaluation: "Pacts are therefore not always likely or possible, but we are convinced that where they are a feature of the transition, they are desirable." (O'DONNELL; SCHMITTER, 1986, p. 39).

This desirability of pacts would be derived from its allegedly uncontroversial ability to conduct a smoother transition towards a more durable and reliable democracy. The rationality underpinning these pacts comes from the compromises amongst the *de facto* holders of political-economic power, guaranteeing untouchable prerogatives and rights in transition's immediate and subsequent future. Once again we face the Freudian *Ur-szene*

where the brothers gather around a totemic father (this time the authoritarian rule) and create/distribute power. What was said about the social contract holds true for the *transitional pact*: we are still operating within an agreement between brothers creating obligations for third parties. This is evinced in the paradox of undemocratic means moving polity towards democracy, as O'Donnell and Schmitter will put it. This comprehension is, to say the least, problematic. Once one accepts this framing of the transitional structure, one is setting oneself to admit a radically elitist understanding of social changes. Moreover, politics is restricted to a goal-oriented action performed by power-holders, which induces society as a whole to an uncritical preservation of the totemic sovereign. In other words, an abstract ideal of general (common) will is more or less explicitly dictated by elite groups and bears the possibility of setting aside fundamental rights in the name of a self-referential Sovereignty.

In the next session we will make the case that Amnesty Laws in Latin American continent were a constant. By way of securing old and new elites the possibility of being accommodated in a different political project, Amnesties have often become law of the land: an enduring guarantee enforcing a controlled, moderate, elite-driven social change envisaging a liberal democracy.

But then something happened.

3. THE SOVEREIGN DECONSTRUCTED: THE QUEST FOR THE QUESTION

The presence of pacts – in the sense given by transitology – is highly documented in Latin American History. One of the most known examples is the “Naval Club Pact” in Uruguay. In the introduction to *Negotiating Democracy: politicians and generals in Uruguay*, Charles Guy Gillespie writes that: “it was the parties decision to negotiate with Uruguayan commanders in chief that made possible a relatively peaceful transfer of power to civilians and constrained those political actors who sought more radical alternative”. (GILLESPIE, 1991, p. 4). This pact was characterized not only by its secrecy – we are definitely not far from conspiracy and conjuration –, but also by an agreement around a clause seen as *condition sine qua non* for democracy: ‘no prosecution for human rights violations’. (ELSTER, 2004, p. 66). But since the transition was finally “concluded”, *i.e.*, power was given to civil authorities, many cases were initiated against military officers.

It is worth remembering amnesty was not formally included in National Pacification Law, for it was based on secret commitments. Thus, civil judiciary started a

campaign for prosecution underpinned by a human rights-oriented policy. As a counterreaction, the same political forces responsible for the secret agreement were now obliged to bring it to light. For three times, bills granting amnesty for perpetrators of human rights violations were dismissed in National Congress. However, in the words of Jon Elster, “[f]ollowing another secret meeting of the president, the minister of defense, and the leaders of the two main political parties, parliament adopted amnesty legislation two weeks before thirteen military officers were due to appear in court.” (ELSTER, 2004, p. 66). *Blancos* and *Colorados*, the two main political parties referred by Elster, gave in to the military’s pressures and enacted the *Ley de Caducidad* (*Ley 15.848*) – a statute of limitation which led, in practice, to the immunity/impunity of State officials. Gillespie recalls the fact that General Hugo Medina, a leading figure of Uruguayan Army during transition, thanked the politicians personally for the amnesty law, being named, one year later, President Sanguinetti’s minister of defense. (GILLESPIE, 1991, p. 4). This context reveals how transitional pacts are responsible for securing not only a moderate and controlled transition, but also for including old, undemocratic elite actors in the new game of democracy.

The *Ley de Caducidad* was subjected to popular referendum already in 1989, being upheld by the majority of citizens. Subsequently, in 2009, a new referendum took place. Once again the law was upheld, but in a completely different social context. For an important part of the Uruguayan population, amnesty was still seen as a condition for democracy. If a pact was made, it was so in the name of democracy; and reviewing it would represent a dangerous renewal of past tensions. And yet, legal-political institutions were now inserted in a different background. Jürgen Habermas used the expression “paradigms of law” to describe this complex chain of somewhat implicit agreements around law’s features in a given society (HABERMAS, 1996, p. 388). Neither the Liberal State, nor the Social State paradigm could claim preponderance now. Another paradigm had emerged and therewith fundamental rights have been assigned a new role. Ronald Dworkin’s formulation that individual rights are trumps held by individuals is of utmost importance here. In his words: “Individuals have rights when, for some reason, a collective goal is not a sufficient justification (...) for imposing some loss or injury upon them.” (DWORKIN, 1978, xviii). Institutional history plays a non-neglectable role in granting a comprehension of rights more akin to a counter-majoritarian defense of minorities.

The changing paradigm should also be seen as the result of a far more complex phenomenon. Under the name of fragmentation, legal theorists have shattered Hans Kelsen’s

systemic unity postulate into pieces.¹ Even the most radical proponents of a global constitutionalism (FASSBENDER, 2009) have to face up to the fact that multiple legal orders have emerged beyond state's normativity. Mireille Delmas-Marty: "I would rather see a plurality of normative spaces, even within a fragmented international law." (2004, p. 10). Since all these "normative spaces" reclaim legitimacy, one cannot but conclude that several collisions, several clashes, and several normative contradictions may possibly arrive.

The IACourtHR presents a helpful and singular example in this sense. It is particularly telling that IACourtHR's most innovative approaches to international law came from its amnesty case law. If we think of the interamerican system as whole, since the early 1990s, with the Argentinean cases gathered in the Interamerican Commission of Human Rights' Report 28/1992, the so-called Amnesty Laws have been constantly deemed incompatible with the American Convention of Human Rights (ACHR). However, it was not after the *Barrios Altos* case that the IACourtHR finally put amnesties at the center of human rights protection agenda. (BINDER, 2011, 1.203). In the words of the Court:

This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law. (IACOURTHR, *Barrios Altos v. Peru*, Merits, 2001, para. 75).

In recognizing that Amnesty Laws are in breach of Articles 1.1 (State's obligation to respect the rights of the convention), 8 (right to a fair trial), and 25 (right to judicial protection) of the ACHR, the Court emphasized the peculiar nature of the violated rights, that is, non-derogable trumps over majorities' designs. Judge Cançado Trindade, in his concurring opinion in *Barrios Altos*, makes the case that "such laws do affect non-derogable rights (...) which fall in the ambit of *jus cogens*". And he concludes: "This being so, the laws of self-amnesty, besides being manifestly incompatible with the American Convention, and devoid, in consequence, of legal effects, have no legal validity at all in the light of the norms of the International Law of Human Rights." (CANÇADO TRINDADE, *Barrios Altos v. Peru*, concurring opinion, 2001, para. 10-11). This is a particularly important argument.

Firstly, because it will be deepened in the Court's case law. In the *Gomes Lund* case, for example, the IACourtHR affirmed that Amnesty Laws are devoid of legal effects, whether they are self-amnesties or not. The non-compatibility stems from its *ratio legis*, i.e.,

from the material violation of underogable rights (IACOURTHR, *Gomes Lund et al. v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, 2010, para. 175).

Secondly, due to its inherent protectionist logic, which re-interprets the relation between International Human Rights Law and National Law in a rather monist approach. Christine Binder argues that:

In the field of amnesties, the impact of the Inter-American Court of Human Rights' lawmaking is thus considerable. Through the direct incorporation of the ACHR in most Latin American constitutions, the Inter-American Court's jurisprudence gains immediate force at the national level as it is relied on by domestic courts when exercising a constitutionality/conventionality control. This is supported by the radically monist understanding concerning the relationship between international and national law as regards human rights norms prevalent in most Latin American states. (BINDER, 2011, p. 1.203).

The intriguingly disseminative feature of this case law is surprising. If one thinks of the Court's fragile position, financially dependent on a comparatively weak international organization (Organization of American States - OAS) (PIZZOLO, 2007, p. 202), and constantly targeted by voluntarist and narcissistic pretensions of States,² it is amazing how the jurisprudence concerning amnesty laws was effective. The assumption that an advantageous political climate favored the authority of the Court - as defended by Binder - is not correct. Evidence of this is the above mentioned 2009 referendum in Uruguay: important strata of Latin American population still reject the idea of reviewing the old amnesty laws.

For what has been said, the Amnesty Laws, as fundamental parts of the *transitional pacts*, are not simply close to the core of sovereignty, they are the core of sovereignty in post-transitional Latin American societies. No other legal-political institution demonstrates the persistence of the logic of sovereignty in a better way. Thus, it would be misleading to place IACourtHR's amnesty case law as a simple example of norm-collisions or, in the sense of Andreas Fischer-Lescano and Günther Teubner, regime-collisions (2003-2004). In the limit, we are not only referring to a legal order claiming global validity for itself, but rather to a legal order reviewing the validity of another legal order. This point will be made clearer when we arrive at the ADPF 153 (section 5).

4. THE SABALSAGARAY CASE

The famous Sabalsagaray case remains the most prominent decision that coupled fundamental rights and the IACourtHR's singular authority. The case involved an *R. Fac. Dir. UFG, v. 39, n.1, p. 239-264, jan. / jun. 2015*

investigation on the circumstances of Nibia Sabalsagaray's death inside a military facility in 1974. The Federal Prosecutor challenged the constitutionality of some provisions of the *Ley de Caducidad* that would prevent a full investigation of Sabalsagaray's killing. In an unprecedented ruling, the *Suprema Corte de Justicia* (Uruguayan Supreme Court) held Articles 1, 3 and 4 of the referred Act unconstitutional. We are not interested here in an exhaustive analysis of the arguments presented by the court. However, some of them may prove useful in handling the following aporia: to affirm sovereignty is also to neglect it.

The first major argument deals with the question of (popular) sovereignty. The Court emphasized that Articles 4 and 82 of Uruguay's Constitution provide that sovereignty resides fundamentally in the nation. Moreover, sovereignty shall be exercised by voters (*Cuerpo electoral*). But there is more. Article 1 of the *Ley 15.848*, by way of a bizarre legal technique, recognizes that a certain *logic of facts* (*lógica de los hechos*), derived from a political agreement between political parties envisaging the transition to democracy, implies necessary limits. So, in order to comprise with the *transitional pact*, the law is enacted as a statute of limitations. The Court found that such *logic of facts* is a clear breach of nation's sovereignty. Otherwise, one would have to recognize that an undue pressure exercised by military and political forces has the ability to create legitimate Law, which is in manifest contradiction with democratic principles.

The *Ley de Caducidad* was though confirmed in a subsequent referendum. If sovereignty resides on the voters, an exercise of direct democracy would suffice to render an original legal defect unimportant. However, does the referendum possess such a power? Can a popular majority diminish and disregard fundamental rights under the necessity of a *transition to democracy*?

In the affirmative case, a majority of citizens, invested with sovereign powers, would be enabled to decide on the suppression of minorities' fundamental rights. Consequently, an entire legacy of constitutionalism would be immediately devoid of its minimal sense. Obviously, the very concept of sovereignty is at stake here.

On the one hand, sovereignty represents a guarantee against illegitimate political pressure. Sovereignty implies a certain power to oppose pure violence. For this reason, Derrida speaks of a deconstruction of sovereignty never to be confused with its destruction.

We must not hide from ourselves, that our most and best accredited concept of "liberty," autonomy, self-determination, emancipation, freeing, is indissociable from this concept of sovereignty, its limitless "I can", and thus from its all-powerfulness, this concept to the prudent, patient, laborious deconstruction of which

we are here applying ourselves. Liberty and sovereignty are, in many respects, indissociable concepts. (DERRIDA, 2009, 301).

In the context of post-colonial societies, this coupling of sovereignty and liberty becomes what we have called the “quest for the question”. Anthonie Anghie has shown the particular features of Third World sovereignty in the development of international law as a lack of effectivity. Nevertheless, explains Anghie, “at the very least, Third World peoples did acquire political sovereignty, an important development that was consolidated through the evolving law of self-determination”. (ANGHIE, 2004, p. 303). The *quest for the question* takes the form of a resolute affirmation against colonialism in all its different forms, which also means the internal struggle against elite groups that historically profited from the *status quo* of domination. Liberty and self-determination are organized around sovereignty as legal-political independency.

On the other hand, the construction of sovereignty after the colonial experience necessarily takes the form of a certain deconstruction. Since the very structure of international law, as a consequence of colonialism, is what bars the concept of sovereignty from being fully appropriated outside imperial powers, Third World sovereignty cannot be simply a reproduction. Under the syntagma “quest for the question”, the idea of a long process, a laborious struggle for autonomy and self-determination shifts from limitlessness to infinite questioning of limits. In contrast to the concept of sovereignty embedded in the tradition of the *jus publicum europaeum*, a Third World sovereignty departs from the absence of a substantial sovereign, *i.e.*, it is already inscribed in a secularized *Weltbild* where the sovereign cannot be a baroque image (MARRAMAIO, 1995). If one follows Reinhart Koselleck in considering our experience of temporality indissociable from a notion of “politics as destiny”, certainly that can only mean a radical inversion of the schmittian postulate: sovereign is not who decides on the (state) of exception (SCHMITT, 1985, p. 5). Without radical rupture with the concept of sovereignty bequeathed by the *jus publicum europaeum*, Third World sovereignty’s quest for emancipation, liberty, and self-determination falls nothing short of an (other) exclusionary paradigm.

By virtue of this irreducible aporia, sovereignty is always already split between creation and re-creation. Better said, there is no creation outside re-creation. Self-determination and fundamental rights are parts of this aporetic path. There is no exit, no possibility of crossing a line and leaving the problem behind. That is why we are using the word *aporia* instead of problem, tension, or any other similar: no geographical or geometrical metaphor

can save us here. The absolute “impossibility of a step” does not call for surpassing or overcoming, but rather for “enduring, and putting, in a different way, the experience of the aporia to a test.” (DERRIDA, 1993, p. 15).

Since the logic of sovereignty is closely connected to an idea of “I can” (*Moi, je peux*), “or at the very least the power that gives itself its own law, its force of law, its self-representation” (DERRIDA, 2005, p. 11), the second major argument to be stressed in the decision lies on its relation with the normativity of the Interamerican system.

The Uruguayan Supreme Court first recognizes that, following Article 72 of Uruguayan Constitution, international human rights conventions enjoy the status of constitutional law. However, a further step is taken towards an even broader recognition of Interamerican human rights law, for the Court holds that sovereignty can no longer be understood under the simplistic framework of national discretion. In the place of an infinite *pouvoir constituant*, or an unlimited power of the state, human rights come as a sort of displacement. And displacement turns out to be a fine word to describe the phenomenon, since sovereignty seems to be out of place, dislocated, out of joint. In the words of the Court: “[o]ne cannot disregard that the problem transcends the internal level”. Transitions, traditionally understood as the place of sovereignty *par excellence*, the autotelic motion of the self-referential state, no longer represent an internal affair. Apprehended by the very structure of *différance*, transitions face the infinite exposure to externalization, a never ending process of effacement through foreign, outlandish human rights.

The interamerican system’s case law on amnesties amount to an ex-propriation: the state is not *le seul*, as Derrida would say, not the only *one* to decide about the destiny of its own transition.

5. THE ADPF 153

Paving the way to a sort of conclusion, should we see the ADPF 153 as a setback? Setting itself aside from the major trend of reviewing Amnesty Laws in Latin American Supreme Courts, the *Supremo Tribunal Federal* (STF) opted for a rather conservative understanding of its own role. Like no other tribunal, the Brazilian Supreme Court made the logic of sovereignty absolutely clear. Examining the compatibility of 1979 Amnesty Law with the new constitutional order, the Court followed Justice Eros Grau’s leading opinion and ruled out the possibility of persecution against military personnel. The decision attempted to face the challenge of international (and interamerican) human rights law by resorting to the *R. Fac. Dir. UFG, v. 39, n.1, p. 239-264, jan. / jun. 2015*

vocabulary of the pact. Justice Grau makes the case that Amnesty Law was part of an immense social mobilization which yielded the conditions for a national agreement over the transition to democracy. The lexicon of conciliation organizes the comprehensibility of amnesty in its own historical context. After all, he suggests, Amnesty Laws are “measure laws” (*Massnahmegesetze*), *i.e.*, concrete and immediate legal statuses devoid of generality and abstraction, which should have their meaning deduced not from the present, but rather from the past, from the moment in time when it was created/enforced. This is not the place to engage in a more analytical critique of this particular reasoning. Although it is extremely important from a legal-technical point of view, what interests us is its underlying logic. A pact was made: whether there is sufficient historical evidence or not, a bilateral *transitional pact* was made in the name of democracy.

This pact envelops the possible conditions for a transitional momentum, which comprises the new constitution itself. The court adopts this particular approach borrowed from transitology to address the validity of the constitutional order. The 1979 Amnesty Law is not a single statute among others. Since the *Emenda Constitucional* n. 26, the document that convenes the Constituent Assembly, reproduces the articles granting amnesty for crimes committed by political dissidents and state officials, Amnesty Law is part of a constitutional bloc. This legal document is nothing but the manifestation of a *pouvoir constituant*, and it should be regarded as such. There is no sense in questioning the Amnesty Law’s constitutionality, for the act that institutes the new constitutional order upholds it. In other words, the *pact is the constitution*. “The reaffirmed 1979 Amnesty Law does not belong to the *ancien régime*. It is part of the new order. It harmonizes itself in the origin of the fundamental norm”. (SUPREMO TRIBUNAL FEDERAL, ADPF 153, mérito, 2010).

The idea of a *transitional pact* founding a legal-political order represents the persistence of the traditional logic of sovereignty described above. To think of an agreement creating obligation for third parties through violation of fundamental rights can neither account for the necessity of rethinking sovereignty from a Third World perspective nor for the emergence of an expropriating and displacing dynamics of human rights.

Nevertheless, at the closing of this paper we should take into consideration the outcomes of the decision. Is it really possible to secure such an image of sovereignty? Is it possible to reaffirm sovereignty precisely there where it loses its plausibility? Confronting the Brazilian and Uruguayan rulings on Amnesty Law, one doubts the ability of the former to deal with the innumerable questions raised by the latter. Should we retain the idea of a

transition based on a *pact* that violates rights in order to create legitimate and self-contained power, sovereignty will not be able to comply with the exigencies bestowed upon it. The state is not the only legal institution empowered to judge on the conditions of transition. Human rights issues run across legal borders and disseminate around different regimes countering traditional sovereign pretensions.

The fictional statute of sovereignty is put to test, and the decision in the *ADPF 153* already faces this challenge. In 2010 the ICourtHR found, in the *Gomes Lund case*, that the 1979 Amnesty Law was incompatible with the American Convention of Human Rights. The scope of the present paper does not allow a deeper analysis of this landmark decision. However, let us remark, in conclusion, a few important points:

a) The Brazilian State was condemned by ICourtHR to “effectively conduct, within the ordinary jurisdiction, the criminal investigation of the facts of the present case in order to ascertain them, determine those criminally responsible, and effectively apply the punishment and consequences which the law dictates” (IACOURTHR, 2010, p. 95).

b) A National Truth Commission (NTC) was set forth thereupon, though its mandate did not comprise criminal persecution. In addition to that, public attorneys from different regions of the country started a campaign against impunity. Several charges were filed against notorious collaborators of the *ancient régime* and opposed groups inside the judiciary started to struggle around those issues.

c) The relationship between domestic and international order assumed a novel and more complex feature ever since. Two developments should be followed by close. The first and more traditional one is the *Projeto de Lei do Senado 237/2013*, a bill proposing to amend some provisions of the Brazilian amnesty law as to comply with the obligations issued by the ICourtHR. The second one, a more hybrid specimen, is Brazil’s National Truth Commission (NTC) Final Report, issued in December 2014. The *Gomes Lund case* plays a central role in both of them, yet it is mobilized in markedly different ways. A comparative examination of their main arguments will show how the interaction between international and domestic law can be constructed in multiple and conflicting manners. Not surprisingly, the NTC sees itself as an actor inside a larger, more complex network. Against the idea of simply amending the current legislation, as the *Projeto de Lei do Senado 237/2013* does, the NTC prefers to address the problem by reconstructing the conflicts that already take place around Brazilian transitional justice. In doing so, the NTC makes the case that accountability for past crimes is already a legal obligation inside Brazilian domestic legal order.

What remains noteworthy is the unpredictable development of this entire process. The self-contained and reassuring decision rendered by the Brazilian Supreme Court was not able to restrain those events. This is what they are indeed: the possibility of im-possible events challenging the predictability of a fictional sovereign.

REFERENCES

ACKERMAN, Bruce. *We the people: foundations*. Cambridge: Harvard University Press, 1991.

ANGHIE, Anthonie. *Imperialism, sovereignty and the making of international law*. Cambridge: Cambridge University Press, 2004.

BICKEL, Alexander. *The least dangerous branch: the Supreme Court at the bar of politics*. 2^a ed. New Haven: Yale University Press, 1986.

BINDER, Christina. The prohibition of amnesties by the inter-american court of human rights. *German Law Journal*, v. 12, 2011, pp. 1203. 1208.

BRASIL. Supremo Tribunal Federal. ADPF 153, *Mérito*. 2010.

CAROTHERS, Thomas. The end of the transition paradigm. *Journal of Democracy*. 2002, Volume 13 (1), 5-21, p. 6.

DERRIDA, Jacques. *Aporias*. Stanford: Stanford Univ. Press. 1993.

DERRIDA, Jacques. *Force of Law*. Stanford: Stanford Univ. Press. 2005.

DERRIDA, Jacques. *L'université sans conditions*. Paris: Galilée, 2001.

DERRIDA, Jacques. *L'écriture et la différence*. Paris: Éditions du Seuil, 1967b.

DERRIDA, Jacques. *Politiques de l'Amitié*. Paris: Galilée, 1994.

DERRIDA, Jacques. *Rogues. Two essays on reason*. Stanford: Stanford University Press, 2005.

DERRIDA, Jacques. *Séminaire La bête et le souverain: volume II (2002-2003)*. Paris: Galilée, 2010.

DERRIDA, Jacques. *The beast and the sovereign*. Chicago: The Univ. of Chicago Press, 2009.

DWORKIN, Ronald. *Taking rights seriously*. Cambridge: Harvard University Press, 1978.

ELSTER, Jon. *Closing the books: transitional justice in historical perspective*. Cambridge: Cambridge University Press, 2004.

FASSBENDER, Bardo. *The United Nations charter as the constitution of the international community*. Leiden: Martinus Nijhoff, 2009.

FISCHER-LESCANO, Andreas; TEUBNER, Gunther. Regime-collisions: the vain search for legal unity in the fragmentation of global law. *Michigan Journal of International Law*, n. 25, 2004, pp. 999-1046.

FOUCAULT, Michel. *Sécurité, territoire, population*. Paris: Galimard-Seuil, 2004.

FREUD, Sigmund. *Totem and Taboo*. New York: Routledge, 2004.

FUKUYAMA, Francis. *The end of history and the last man*. N.Y.: Free press, 2006.

FURTADO, Celso. *Economic development of Latin America*. Cambridge: Cambridge University Press, 1976.

GILLESPIE, Charles Guy. *Negotiating Democracy: politicians and generals in Uruguay*. Cambridge: Cambridge University Press, 1991.

GUILHOT, Nicolas. The transition to the human world of democracy notes for a history of the concept of transition, from early marxism to 1989. *European Journal of Social Theory*, 2002, v. 5(2), 219–243.

HABERMAS, Jürgen. *Between facts and norms: Contributions to a discourse theory of law and democracy*. Cambridge: Mit Press, 1996.

HÄGGLUND, Martin. Radical atheism and “the arche-materiality of time”. *Journal of Philosophy: a cross-disciplinary inquiry*, 2011, p. 62.

HUNTINGTON, Samuel. *The third wave: democratization in the late twentieth century*. Norman: University of Oklahoma Press, 1993.

IACHR Report No. 29/92, OEA/Ser.L/V/II.83, doc.14, corr.1, (1992-93) (Argentina).

IACourtHR, *Barrios Altos v. Peru*, Concurring opinion of Cançado Trindade, Judgment of 14 March 2001, Series C, No. 75, paras. 10-11.

IACourtHR, *Barrios Altos v. Peru*, Merits, Judgment of 14 March 2001, Series C, No. 75.

IACourtHR, *Gomes Lund et al. v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 24 November 2010, series C, No. 219.

KELSEN, Hans. *A democracia*. Trad. Ivone Benedetti et al.. São Paulo: Martins Fontes.

KELSEN, Hans. *Das Problem der Souveränität und die Theorie des Völkerrechts*. Beitrag zu einer reinen Rechtslehre. Tübingen: J.C.B. Mohr, 1920.

KELSEN, Hans. *General theory of Law and State*. Oxford: Oxford University Press, 1949.

KOSKENNIEMI, Martti. *The gentle civilizer of nations: the rise and fall of international law, 1870-1960*. Cambridge, UK: Cambridge University Press, 2004.

KWEITEL, Juana; PIOVESAN, Flávia; VENTURA, Deisy. Sistema Interamericano sob forte ataque. *Folha de São Paulo*, Acessado em: 7 de Agosto de 2012<<http://www1.folha.uol.com.br/fsp/opiniaio/59213-sistema-interamericano-sob-forte-ataque.shtml>> .

LUHMANN, Niklas. *Legitimität durch Verfahren*. Neuwid: Luchterhand, 1969.

MARRAMAIO, Giacomo. *Dopo il leviatano: individuo e comunità*. Torino: Bollati Boringhieri, 2000.

MARRAMAIO, Giacomo. Messianism without delay: on the “post-religious” Political Theology of Walter Benjamin. *Constellations*, 15, 397.

MARRAMAIO, Giacomo. *Pasaje a Occidente: filosofía y globalización*. Trad. Heber. Buenos Aires: Katz, 2006.

MARRAMAIO, Giacomo. *Poder e secularização: as categorias do tempo*. São Paulo: UNESP, 1995.

O'DONNELL, Guillermo; SCHMITTER, Philippe. *Transitions from authoritarian rule – tentative conclusion about uncertain democracies*. Baltimore: The Johns Hopkins University Press, 1986.

PIZZOLO, Calogero. *Sistema interamericano*. Buenos Aires: Ediar, 2007.

PRZEWORSKI, Adam. *Democracy and the market*. Cambridge: Cambridge University Press, 1991.

RUSTOW, Dankwart A. Transitions to Democracy: Toward a Dynamic Model. *Comparative Politics*, 1970, vol. 2(3), 337-363.

SCHMITT, CARL. *Der nomos der Erde im Völkerrecht des Jus Publicum Europæum*. Berlin: Dunker & Humboldt, 1974.

SCHMITT, Carl. *Political theology: four chapters on the concept of sovereignty*. Trad. George Schwab. Cambridge: The MIT Press, 2005.

TEITEL, Ruti. *Transitional justice*. New York: Oxford University Press, 2000.

¹ For a full account of Kelsen's perspective, see his *General theory of Law and State* (1949).

² After Interamerican Commission of Human Rights determined precautionary measures regarding the construction of Belo Monte hydroelectric power plant, Brazil joined Venezuela and Ecuador in an overt campaign for restricting the interamerican system. See Deisy Ventura, Flávia Piovesan and Juana Kweitel's *Sistema Interamericano sob forte ataque* (2012).

Artigo recebido em 06 de maio de 2013 e aceito em 30 de março de 2015
