

## Impunity in Post-authoritarian Brazil: The Supreme Court's Recent Verdict on the Amnesty Law

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*Abstract:* While numerous countries in post-authoritarian South America have annulled Amnesty Laws issued under authoritarian rule and punished officials involved in repressive organs, Brazil continues to favour impunity. This attitude has recently been confirmed by the Brazilian Supreme Court's decision to maintain the 1979 Amnesty Law granting de-facto impunity to violators of human rights during the military regime. The article considers this verdict within its historical context, and raises two questions which have previously attracted little attention: First, why has post-authoritarian Brazil processed the experience of the military regime so differently from its neighbouring countries, and what role did the Amnesty Law play in that difference? Second, what does this disinterest in punishment mean? This article concludes that one promising theory highlighted by political scientists – the low degree of participation in civil society in Brazil – cannot fully explain why the vast majority of Brazilians are not interested in punishment, as numerous citizens mobilized during the amnesty movement. It seems to imply that the heterogeneous anti-authoritarian alliance vanished once the Amnesty Law had been achieved. Another key finding is that the disinterest in punishment cannot be interpreted as moral support for the military regime or a sanctioning of its human rights violations, as the amnesty debate in Brazil is more complex. *Keywords:* Brazil, amnesty, military regime, human rights, impunity.

On 28 and 29 April 2010, the Brazilian Supreme Court (Supremo Tribunal Federal, STF) took a historic decision in refusing to revoke the 1979 Amnesty Law (*Folha Online* 2010b), thereby ruling out the possibility of indicting officials involved in human rights violations during the military regime in Brazil (1964-1985). For the time being, it seems, this judgement has halted a lengthy and complex but ultimately marginal dispute which primarily took place among the families of victims, legal professionals, national and international human rights organizations, members of the Catholic Church and a few politicians, rather than at the heart of Brazilian society (Santos, Teles, and Teles 2009, 582). Brazil's treatment of perpetrators of human rights offences from the authoritarian era contrasts with that of most other countries in post-authoritarian Latin America. Argentina, the country with the highest number of victims of human rights violations, started prosecuting military officials involved in human rights crimes as early as the 1980s (Catela 2000, 301-15), followed by most other countries on the continent including Chile (BBC News 2009) and Uruguay (Marcelo 2009). In Brazil, this avenue now appears to be closed; the Amnesty Law remains legitimate. This article places the Supreme Court's latest decision in its historical context, and uses this key incident to illuminate an under-researched question: why has post-authoritarian Brazil processed the experience of the military regime so differently from other countries in South America, and what role did the Amnesty Law play in that difference?

The article begins by explaining the history of the 1979 Amnesty Law and goes on to re-consider some common but incorrect narratives of the amnesty. Subsequently, I contrast Brazil to Argentina, Uruguay and Chile which have either revoked their respective Amnesty Laws or interpreted them in such a manner that

prosecutions are now viable. While in these countries various agents contributed towards sentencing former human rights violators, punishment appears to be undesired or irrelevant to representatives of the Brazilian state including the judiciary, and the vast majority of Brazilian society. Instead, the arena has been left primarily to associations formed by the families of victims, national and international human rights organizations, and legal experts to contest.

This article discusses plausible reasons for that difference including the peculiar nature of the Brazilian regime, its transition to democracy and its authoritarian legacy, but most importantly the idea of a particularly weak civil society. In this respect, the article draws upon recent discussions among political scientists about the quality of democracy and the enforcement of civil rights (O'Donnell 2001; Kingstone, and Power 2000; Pereira 2000). As Kingstone and Power (2000, 5) note, political scientists have extended the definition of democracy, formerly confined to universal and free elections and alternation of power, and are now analysing the 'quality' of democracy in a broader sense, including the enforcement of civil and social rights. Guillermo O'Donnell (2001, 601, 609) stresses that Latin American democracies are characterized by a 'citizenship of low intensity' despite free elections. While O'Donnell (2001, 607-9) uses the term 'social authoritarianism' which is defined as 'the pervasive denial of civil and social rights', Anthony W. Pereira (2000, 222) favours the term 'elitist liberalism' to describe the 'non-universal application of law' in Brazil which 'justifies the granting of rights on a particularistic basis'. These concepts suggest that in many South American countries, but particularly in Brazil, citizenship is not granted equally, but that some citizens enjoy a higher status than others.

However, this article demonstrates that civil rights theory cannot fully account for the disinterest in punishment in Brazil, because the population did mobilize at key historical moments including during the Amnesty Movement itself. Another vital question raised by this article is how this peculiar attitude towards punishment in Brazil should be interpreted. A key argument is that Brazilian disinterest in punishment cannot simply be interpreted as moral support for the military regime or sanctioning of its human rights violations. The amnesty debate in Brazil is far more complex, as many Brazilians who reject punishment of former torturers nonetheless demand their moral condemnation and the establishment of an active memory culture. A comparative approach that is too broad risks undermining the historical specificity of Brazil and overlooking the arguments raised by defenders of the Amnesty Law. Hence, this article offers both a comparison with other South American countries and a detailed analysis of the Brazilian amnesty debate.

### **The history of the amnesty law**

The military regime in Brazil (1964-1985) and the ensuing transition to democracy were distinct from other authoritarian regimes in Latin America in several respects. One crucial difference was the regime's effort to appear democratic despite its reliance on dictatorial methods (Aquino 2000, 275; Smith 1997, 187) – a policy which I refer to as the 'democratic façade'. Pereira (2000, 224) employs a similar term – 'legal façade' – to highlight the fact that the regime provided 'legalistic' justification for acts of repression. The democratic façade refers to the practice of maintain-

ing democratic institutions, procedures and terms while manipulating or redefining them to conceal authoritarian rule. To illustrate this, while in Argentina and Chile, Congress was closed and elections were abandoned, the Brazilian regime maintained democratic institutions and procedures but in a distorted form. Brazilians were allowed to vote, but elections were manipulated. The Brazilian Congress remained open between 1964 and 1985, but was threatened and shut down when it refused to comply with the regime's instructions. Congress, for example, was shut in 1968 when it refused to withdraw the political rights (*cassação*) of a Deputy, and in 1977, to enable the regime to amend the voting system in its favour. Unlike in Chile and Argentina, the authoritarian regime in Brazil was governed by alternate military leaders rather than a single dictator. The transition process to democracy in Brazil was similarly distinctive. In contrast to Argentina, the Brazilian regime did not abruptly collapse (Hagopian 1993, 468), but instead underwent a long and gradual process of political opening, initiated under military rule by President Ernesto Geisel (1974-1979). Geisel instigated the so-called *distensão* (literally 'depressurization', Montero 2005, 20) which led to a notable reduction in human rights breaches long before the regime's demise.

A key feature of the Brazilian transition is that the legacy of the armed forces has been less negative than in Argentina. Comparatively, Brazil had a significantly lower number of dead and disappeared. The official report of a special commission published in 2007 calculates that there were 474 deaths in total at the hands of the regime (SEDH 2007, 32-33). In contrast, estimates for Argentina are in the region of 10,000 to 30,000 and in Chile between 3,000 and 10,000 (Aquino 2000, 271). As the number of families directly affected by human rights violations during the regime was significantly lower in Brazil, fewer families have insisted on punishment. In addition, the armed forces in Argentina were discredited by the combination of a military defeat in the 1982 Falklands/Malvinas War and financial disaster (Hagopian 1993, 468). In Brazil, by contrast, the armed forces have continually justified military rule by highlighting the spectacular economic growth achieved between 1968 and 1973; the so-called economic miracle. Scholars such as Sônia Draibe (1994) have made the valid criticism that the miracle myth hides the one-sided growth which intensified both social stratifications and the foreign debt crisis. Nonetheless, it is undeniable that the rates of economic growth were historic, and that the myth took root among large sections of the Brazilian population, thus contributing to a positive perception of the military regime in retrospect. All of these differences contributed to the retention of significant power by the armed forces in Brazil after democratization in comparison to other South American countries (Hunter 1995, 426), particularly in contrast to Argentina. Wendy Hunter's (1995, 427, 441) research, however, has also qualified the argument whereby Brazil is viewed as a 'tutelary democracy' (Zaverucha 1994) – a democracy continuing under strong military rather than civilian domination – by arguing that clientelist relations among civilian politicians during the election campaign served to undermine military influence along with the introduction of a civilian-led Defence Ministry.<sup>1</sup>

It is important to stress that the Brazilian people played a significant role in the transition process and that large parts of the population mobilized in support of a return to democracy from 1975 onwards. While much of the literature tends to

overemphasise the view that this innovative military policy was predominantly driven ‘from above’ (Gaspari 2004), other scholars have stressed that it was significantly demanded ‘from below’, as the popularity of the regime declined in the 1970s (Lamounier 1980, 7; Alves 1985; *Jornal do Brasil* 1977).<sup>2</sup> The debacle of the 1974 elections lends further weight to the latter position: while the government party, the Alliance for National Renovation (Aliança de Renovação Nacional, Arena), lost a substantial amount of votes, the opposition party, the Brazilian Democratic Movement (Movimento Democrático Brasileiro, MDB), won a clear victory (Lamounier 1980). Files from the former intelligence service, the National Information Service (SNI), opinion poll surveys, and weekly summaries of letters sent to President Geisel held by the Geisel Archive in Rio provide hints that levels of dissatisfaction among the Brazilian public increased during the 1970s. An analysis of the 1974 elections by the SNI interprets the government’s defeat as a ‘public condemnation of the revolution’ (EG Pr 1974, 2). According to a survey by the U.S. opinion poll institute, Gallup, Geisel’s popularity decreased markedly in 1976 and slumped further in 1977 (BS 1981).<sup>3</sup> Although the weekly summaries of letters sent to President Geisel are filtered by the collection’s compiler and only provide a distorted view of the original letters which were not preserved, the letters of congratulation received during the anniversary of the Geisel government take on a distinctly disillusioned tone from 1976 onwards. While in 1975 Geisel was praised for his ‘excellent political, economic and social results’, in 1976 letter writers merely ‘acknowledge[d]’ Geisel’s ‘efforts...in such difficult times’ (EG Pr 1974.11.25, *Resenha Semanal* No. 16, and No. 68).

Besides public mobilization, another vital reason for Geisel’s policy shift was frictions between different military camps. Scholars distinguish between ‘hardliners’ (*linha dura*) and ‘moderates’ – terms applicable to both military officers and civilians. As Fico (2004b, 23) has demonstrated, it is a highly problematic heuristic categorization, but the only appropriate one available. The term ‘hardliners’ refers to those who supported repression and favoured the continuation of military rule. The label ‘moderates’ is applied to those who were also authoritarian, yet generally rejected repression, justifying it only in exceptional cases. ‘Moderates’ regarded military rule as transitory and ultimately intended to transfer power to civilians. Hardliners opposed Geisel’s political opening and disliked his attempts to curb their power (Couto 2003, 144, 148; Gaspari 2004). Thus, instead of a collapse, Brazil experienced a long period of transition which represented a response to the demands of the population and intra-military conflicts alike. As Alfred P. Montero (2005, 20) expresses it, transition was a combination of government-initiated gradual political opening and popular mobilization.

### **The amnesty law — a compromise**

The Brazilian amnesty movement, which gained momentum from 1975 onwards, was one of the first social movements to demand the public acknowledgement of human rights violations committed between 1964 and 1985.<sup>4</sup> The increasing press coverage of human rights violations from 1975 onwards, coupled with international denunciations following the assassination of the journalist, Vladimir Herzog, contributed to the growing public support enjoyed by the amnesty movement (San-

tos, Teles, and Teles 2009, 162). Key agents in the socially and ideologically broad amnesty movement included the Feminine Amnesty Movement (Movimento Feminino pela Anistia, MFA) founded in 1975, and the numerous Brazilian Amnesty Committees (Comitês Brasileiros pela Anistia, CBA's) formed in 1978 (Santos, Teles, and Teles 2009, 162-63). This amnesty movement contributed to the passage of the 1979 Amnesty Law which is best characterized as a compromise, as it represented the result of extensive negotiations between the opposition party, the Brazilian Democratic Movement (MDB), the government, and military hardliners (Alves 1985, 211). Both Carlos Fico (2009) and Daniel Aarão Reis (2004) highlight the delicate political situation during which the amnesty was created, as the freer policies of President Geisel came under attack by hardliners. Geisel's group wanted to utilize the Amnesty Law to weaken the MDB, the only opposition party permitted during the regime since the installation of a two-party system in 1965. The amnesty movement itself was divided. Fico (2009, 4-5) differentiates between one faction who insisted on punishing human rights transgressors and a second camp who viewed a general amnesty as a compromise. Reis (2004, 46) makes a further distinction: one group favoured a general amnesty – 'anistia ampla, geral e irrestrita' – but, in addition, demanded the clarification of human rights violations committed during the dictatorship, and the dismantling of the notorious repressive organs responsible for those crimes. A second group aspired to reconciliation in the form of a total silencing of the past or, in Reis' (2004, 46) words, 'an amnesty which reconciled the *Brazilian family* [sic]'. The majority of members of the MDB opposition party, for example, accepted a general amnesty. Rather than viewing it as a defeat, the opposition regarded conciliation as the appropriate strategy to pursue at that historical moment. They accepted the general Amnesty Law, despite its granting of total impunity to military officials involved in the repressive organs (Fico 2009, 1, 13; Skidmore 1991, 426).

The Amnesty Law (Law No. 6683) was eventually ratified by the Brazilian Congress on 28 August 1979. The so-called *anistia recíproca* was allegedly to the benefit of both 'torturers' and 'tortured' alike (Reis 2004, 47). It is noteworthy that both public discourse and historical narratives on the amnesty tend to perpetuate the notion of a bilateral amnesty, although this was not the case in reality. As scholars (Couto 2002, 278; Alves 1985, 211) identified, amnesty was neither granted to political prisoners sentenced for trying to re-establish illegal parties nor to militants involved in the armed struggle or charged with what the authoritarian state labelled 'blood crimes'. 'Blood crimes' refers to crimes which represent an attack on the life of other persons (Reis 2004, 46). Furthermore, army officials who had experienced forced retirement for political reasons (*militares cassados*) were not permitted to return to military service yet were entitled to full, rather than partial, pensions (Couto 2002, 278; Alves 1985, 211). Likewise, academics and civil servants who had been purged were not immediately allowed to reoccupy their posts until they had been cleared by a special investigation committee (Couto 2002, 278; Alves 1985, 211). On a more positive note, the Amnesty Law permitted all exiled persons to return to Brazil. Moreover, those politicians who had lost their political rights regained them and, at least in theory, were able to resume their political careers. The exclusive group who enjoyed full amnesty were officials from the repressive apparatus who were all cleared of any wrong-doing. Alves (1985,

211) interprets 1979 as ‘a clear victory for the hard-line sectors’. Janaina Teles, whose family faced imprisonment and torture during the regime, argues that the Amnesty Law failed to meet several demands raised by the amnesty movement, such as clarifying cases of human rights crimes and returning corpses to the victims’ families – demands which remain outstanding to this day (Santos, Teles, and Teles 2009, 162-63). Although the 1979 Amnesty Law was issued by an illegal regime, no post-1985 civilian government has annulled it.

In other South American countries, by contrast, either the government or the Supreme Court has revoked the Amnesty Law, often in response to public demands (Argentina and Uruguay), or the state has nonetheless managed to find a legal avenue through which to prosecute human rights violators from the authoritarian era (Chile). In Argentina, families of victims and human rights organizations mobilized in the late 1970s and early 1980s to insist on the recognition and punishment of human rights violations encapsulated by the phrase ‘memory, truth and justice’ (Catela 2008, 184). Jelin (2008, 347) has illustrated that public activism gradually forced politicians to finally address this issue. The Argentinean President, Raúl Ricardo Alfonsín (1983-1989), revoked the Amnesty Law in 1983, resulting in several military generals being sentenced and imprisoned throughout the 1980s, including the former dictator, Jorge Rafael Videla (Catela 2000, 301-15; Jelin 2008, 345-47). Later, however, President Alfonsín effectively hampered the judicial process when he passed the Full Stop Law (*Ley de punto final*, 1986) and the Law of Due Obedience (*Ley de obediencia debida*, 1987), on the grounds that he wanted to avoid a national schism. These laws were revoked in 2003 by President Kirchner, opening the way for further prosecutions. Among the Latin American countries, Argentina, the country with the highest intensity of state violence during the authoritarian regime, has been the one to punish human rights violators most resolutely due to dialectics between public pressure and the active support of some politicians.

Similarly, in Uruguay, the government’s attempts to abandon the amnesty question were greeted by repeated public protests (Catela 2000, 301-15). In 1989 and 2009, the Uruguayan people mobilized and forced the government to hold a referendum. However, on each occasion the majority of Uruguayans who cast their vote favoured the current Amnesty Law or, in other words, accepted impunity: in 1989 only 43.34 per cent of the people voted against the Amnesty Law, while in 2009, 48 per cent demanded its modification (Catela 2000, 301-15; Ferreira Bastos 2009, 399-400; Garcia 2009). While a significant but insufficient section of the Uruguayan population had demanded punishment, it was ultimately the legislative and judicial forces which revoked the Amnesty Law. In October 2009, both the Uruguayan Supreme Court and Congress ruled that the Amnesty Law was unconstitutional and, on 22 October 2009, the former Uruguayan dictator, Gregorio Alvarez, was sentenced to twenty-five years in prison (Garcia 2009).

In Chile, the Amnesty Law has never been formally revoked, although the Bachelet government intended to do so (Rohter 2006). Nonetheless, Chile succeeded in finding legal ways to prosecute former human rights transgressors. In November 2004, the Chilean Supreme Court ruled (Decree Law No. 2191) that the 1978 Amnesty Law did not prevent former members of the notorious political police National Intelligence Directorate (DINA) from being convicted (Lafontaine

2005). The Chilean self-amnesty is even broader in scope than the Brazilian one, as it applies to 'all persons who committed...criminal offences between...1973 and...1978' (Lafontaine 2005, 470-71), while the Brazilian Amnesty Law explicitly relates to 'political' or thereto 'connected' crimes. The prime reasons for the Chilean Supreme Court allowing prosecutions despite the Amnesty Law were: first, that it classified cases of disappearance as continuous crimes, and, second, that it accepted the supremacy of international law over domestic legislation, particularly the 1949 Geneva Conventions (Lafontaine 2005, 471). The Chilean Supreme Court's ruling paved the way for new prosecutions. Currently, charges are being levelled against 129 former DINA agents (BBC News 2009). The Chilean President, Sebastián Piñera, has recently refused to pardon human rights transgressors older than the age of 70, as was requested by the Chilean Bishops' Conference (BBC News 2010). Some South American countries are characterized by partial impunity. In Bolivia, for example, a law safeguarded the cruel despot, Hugo Bánzer, from being brought to trial (Catela 2000, 301-15).

### **The Brazilian disinterest in punishment**

The cases of Argentina and Uruguay show that punishment is not simply the result of a governmental or judiciary decision, but that popular demands have acted as a vital catalyst. In Brazil, by contrast, the Amnesty Law has neither been challenged by a civil government nor triggered massive protests in the streets which suggests that there is little social interest in punishment. This seems to be confirmed by analysing the reactions to the Supreme Court's verdict. While families of victims along with national and international human rights organizations heavily criticized the decision, the larger Brazilian public did not mobilize against it; only a few dozen demonstrators gathered in São Paulo to protest against the verdict (Bocchini 2010). The survey research institute, *Datafolha*, reports that 40 per cent of the Brazilian population support punishment of former perpetrators of human rights offences while 45 per cent oppose it (Franco 2010b). Key questions that need to be addressed are, first, how can this disinterest in the matter be explained, and, second, what does it mean? While this article avoids constructing problematical direct causal relations, it demonstrates that nonetheless some hypotheses seem more convincing than others. As the total number of victims was relatively low in Brazil, particularly compared to Argentina, fewer citizens were directly affected and thus driven to express an immediate concern. Moreover, authoritarian rule lasted significantly longer in Brazil than in most other South American countries, and it is conceivable that critical political thought has been wiped out and hence requires more time in which to redevelop. A further hypothesis is that other issues are simply more pressing. Several scholars (Pereira 2000, 228; Kingstone, and Power 2000, 2) have highlighted the fact that poverty and violence constitute the main concerns of present day Brazilians, as paradoxically the intensity of violence has multiplied in democratic Brazil (Pinheiro 1994, 244).

Another vital factor that needs to be discussed is the enforcement of civil and social rights. As mentioned previously, political scientists today (O'Donnell 2001; Kingstone, and Power 2000, 5-6) focus on diverse factors which constitute democracy, extending beyond basic political rights such as fair elections. They stress that

the achievement of civil and social rights is still lacking in many Latin American countries but particularly in Brazil where social inequality is extreme. While O'Donnell (2001, 607, 609) uses the concept of 'social authoritarianism' defined as a 'the pervasive denial of civil and social rights', Pereira (2000, 217-18, 222) coined the term 'elitist liberalism', to describe the gap between formal legal rights and their real 'political and social practice'. Sérgio Pinheiro (1994, 237, 243) likewise refers to a '*socially rooted authoritarianism* [sic]' to explain the Brazilian pattern of impunity and the unequal rule of law which he, similarly to Pereira, regards as a long-standing tradition rather than a legacy of the military regime. All these concepts highlight the unequal status of Brazilian citizens, predominantly along the lines of skin colour and wealth (Pereira 2000, 217). O'Donnell (1984; Pereira 2000, 222) contrasts the elaborate social hierarchy and low level of popular mobilization in Brazil with the more egalitarian society in Argentina, where citizens commonly mobilize publicly to claim their political rights. The theory of weak civil society participation seems plausible given that, historically, broad social and political mobilization has never been a Brazilian tradition (Montero 2005, 96). Ronaldo Costa Couto (2003, 274) and Renato Lemos (2002, 289, 296, 312) confirm that Brazil has a long history of conciliation and counter-revolution. However, the weak civil society theory does not account for occasions when Brazilians broke that hierarchical pattern and mobilized, for example, during the amnesty movement in the 1970s, the *Diretas Já!* campaign in 1982 and 1983, or popular mobilization in 1992 aimed at removing President Fernando Collor from office. Reflecting on democracy in Brazil, Kingstone and Power (2000, 261) conclude that these unprecedented mobilizations demonstrate that: 'Mobilization is now always on the agenda'. Scholars (Friedman, and Hochstetler 2002; Montero 2005, 96) have also pointed to an increasing institutionalization of civil society and the growing importance of Civil Society Organizations. Nonetheless, it appears that major social movements demanding the protection of human rights, such as the broad amnesty movement, merely led to a brief period of popular mobilization which rapidly vanished again. Montero (2005, 98-99) argues that the heterogeneous interests subdued during the anti-authoritarian struggle re-emerged in 1979 with the re-installation of a multi-party system and civil society mobilization became fragmented. Pereira (2000, 223), by contrast, believes that the 1979 Amnesty Law weakened the cross-class coalition against state violence. If the Amnesty Law resulted in a demobilization of Brazilian citizens who were fighting for human rights, it is reasonable to argue that the 1979 Amnesty Law did indeed contribute to Brazil's unique way of dealing with former human rights violators.

The question remains whether the amnesty movement did in fact object to human rights violations against political opponents, or whether the struggle for amnesty was primarily used as a means to attack military rule and fight for democratization. Reis (2004, 48) reminds us that the victims of the military regime have never enjoyed much popular sympathy and the Brazilian public's disinterest in punishment seems to reflect this. Most victims came from a minority of largely young, urban, middle-class Brazilians with social-revolutionary aims (Reis 2004). Today the main victims of state violence in Brazil are the marginalized poor and non-whites (Pinheiro 1994, 241, 247; Pereira 2000, 218). It seems that then, as now, there was little interest in the victims, as the notion prevails that either their

lives do not count or 'they deserve it' (Pinheiro 1994, 241; Hamber 1998, 11; Pereira 2000, 218). As Pinheiro (1994, 241) notes, while torture during the military regime provoked protests, because the victims belonged to the white middle classes, the same practices used against the marginalized poor are currently being tolerated by large sectors of the Brazilian population. However, if the disinterest in human rights victims was a general phenomenon, independent of the victims' class affiliation, then the theory of socially rooted authoritarianism (Pinheiro 1994, 249; O'Donnell 2001, 607, 609; Pereira 2000) needed to be qualified, as even victims from the upper and middle classes are unable to generate significant mobilization, at least not since the 1979 Amnesty Law.

Scholars (Pereira 2000, 233-34; Pinheiro 1994, 241) have remarked that Brazilian society itself tolerates the prevailing hard-line policy of the police and that a shift in the perception of police transgressions can only come from a change in values. A similar position has been adopted by human rights activists (Reuters 2010) who have criticized the Supreme Court's verdict for legally sanctioning impunity and thereby strengthening a climate in which human rights violations continue to go unpunished in present day Brazil. Had the STF revoked the Amnesty Law, it would have used its normative means to initiate a change in values to the benefit of the equal upholding of human rights and a generally more egalitarian society. While the Brazilian Supreme Court declined to change the value system, post-authoritarian Argentina has elevated the protection of human rights, making it a cornerstone of its new democracy (Jelin 2008, 345-47).

### **The complexity of the amnesty debate**

Thus far this article has discussed possible reasons for Brazil's peculiar treatment of former human rights violators. The remainder of this article considers what is signified by this disinterest. At first glance, it appears that the vast majority of the population is uncritical of the military regime, or even view it nostalgically. However, a refined analysis of the Brazilian amnesty debate reveals that those who reject punishment are often far from being defenders of the regime. Even victims of the regime have highly divergent views on the question of punishment. Opinions can be categorised into four broad positions: those who demand punishment of military officials involved in human rights violations ('truth and justice'); those who only seek to clarify the circumstances of the murders and whereabouts of the corpses ('truth'); those who reject renewed discussion and favour a continuation of what is often referred to as a politics of silence ('the past is the past'), and lastly, those who attack defenders of human rights and accuse them of trying to gain either power ('ideological struggle') or financial compensation. The latter position is embraced by opponents of the Workers' Party, defenders of the military regime including numerous military officials, and the centre-right press. A poignant example is the press attacks on Brazilian Special Human Rights Minister, Paulo Vannuchi, who has publicly declared himself in favour of punishing former torturers, and suggested the creation of a Truth Commission in Brazil. In January 2010, *Veja* magazine (2010, 64) described Vannuchi as a 'madman', as 'not human', and even 'a terrorist...with a pen'. Yet, the other three camps in the amnesty debate are more complex as they incorporate both followers and critics of the regime and cross

ideological and social divisions. Several senators favour leaving the military past behind, but neither are they necessarily apologetic for the regime's actions, an example being Senator Arthur Virgílio of the Brazilian Social Democracy Party (Partido da Social Democracia Brasileira, PSDB). Although military officials invaded Virgílio's house and forced his family to sing the national anthem to prove they were not communists, he prefers to forget the past, 'These wounds, I don't see the need to reopen them. Concerning the corpses of friends of mine...they ought to have the right to a place to bury them and revive their memories. But that's it' (*Globo Online* 2010). Virgílio is just one example; many other critics of the regime reject the punishment of former human rights violators including the Brazilian historian and ex-guerrilla fighter, Daniel Aarão Reis (2004, 40-41), who argues that officials responsible for repression need not be punished, as they have already been morally condemned by the Brazilian people (Conde 2009).

Even legal professionals disagree over the matter and their arguments require more exhaustive attention. Legal questions that are repeatedly discussed include the following: can torture and murder be said to have lapsed, and does the Brazilian constitution over-ride international laws? Additionally, is 'justice' exclusively achieved through legal punishment or is moral condemnation, as in the Ustra case, an appropriate alternative? The court case brought by the Almeida Teles family against Colonel Carlos Alberto Brilhante Ustra represents the first time in Brazil's history that an official responsible for human rights transgressions during the military regime has stood trial (Santos, Teles, and Teles 2009, 545). Between 1970 and 1974, Ustra led the São Paulo branch of the regime's main organ of repression, the Centre for Internal Defence – Department of Internal Order (CODI-DOI). This trial resulted in an unusual outcome; the court was barred from meting out judicial punishment because the 1979 Amnesty Law protected Ustra from a criminal judgement. Hence, in October 2008, the court condemned Ustra 'morally and politically' by pronouncing him guilty of torture (Albuquerque 2008). The Ustra case represented a symbolic trial against a convicted torturer, who – on the grounds of the 1979 Amnesty Law – enjoyed general amnesty and thus could not be penalized.

To illustrate the legal debate in more detail, while General Attorney, Eugênia Fávero, argues that, since the 1945 Nürnberg Trial, crimes against humanity do not fall under the statute of limitations, the lawyer and lecturer at the Getúlio Vargas Foundation, Thiago Bottino do Amaral, maintains that Brazil has never ratified the convention ruling that crimes against humanity do not lapse (Laboissière 2008). Even though Bottino argues that human rights crimes committed between 1964 and 1985 cannot be punished legally, he suggests an alternative avenue to prevent these crimes being overlooked: to judge these cases in a civil court as in the Ustra Trial and to uncover the historic truth, a step that in his view is more important than punishment (Laboissière 2008). By contrast, as mentioned previously, the Chilean Supreme Court decided that international human rights law did over-rule national law (Lafontaine 2005). Another key issue in the legal debate about amnesty has been the interpretation of the law text itself. The lawyer and regular critic of the 1979 Amnesty Law, Hélio Bicudo, has argued that torture was a common crime and thus not covered by the Brazilian Amnesty Law which, in contrast to the broad Chilean Amnesty Law, explicitly refers to 'political' and thereto 'connected' crimes (Albuquerque 2008). Altogether, regardless of any party affiliation or ideological dispo-

sition, legal experts disagree over whether it is viable to revoke the Amnesty Law from a juridical perspective. On an international level, the Inter-American Human Rights Court (IAHRC) of the Organization of American States (OAS) has recently condemned Brazil for failing to prosecute those responsible for the murder of Brazilians in the region of Araguaia, thus confirming that the Brazilian Amnesty Law violates international human rights law (*Reuters* 2010). It remains unpredictable how the government of President Dilma Rousseff will react to the verdict.

### **The OAB's appeal, the STF's verdict and reactions to them**

As neither the state nor the vast majority of Brazilians demanded the revocation of the Amnesty Law, it was ultimately the Brazilian Lawyers' Organization (Ordem dos Advogados, OAB) who appealed to the Brazilian Supreme Court in 2008 to make torture exempt from the Amnesty Law. The OAB (2008, 13-15) justified its request predominantly by arguing that torture was a common crime while the Amnesty Law clearly granted impunity to subjects involved in 'political' crimes. Furthermore, the OAB highlighted the one-sided interpretation of a passage of the Amnesty Law, which explicitly excluded those involved in acts of 'terrorism'. This exception, the OAB (2008, 16-19) claimed, had only been applied to the militant opposition, whereas human rights violations by members of the repressive organs had still not been acknowledged as acts of state terrorism: 'the systematic and organized practice...of homicide,...torture and rape against political opponents does not represent *State Terrorism* [sic]?' Additionally, the OAB (2008, 22-24, 26-27) asserted that the 1979 Amnesty Law disrespected democratic principles, that human dignity could not be 'negotiated', that the Brazilian Republic defined itself as a democratic state, and that, according to the 1988 Constitution and the UN human rights declaration, torture could not be amnestied.

On 28 and 29 April 2010, the Brazilian Supreme Court refused to revoke the Amnesty Law by a majority of seven votes to two (*Folha Online* 2010b). Most of the nine Ministers justified their opposition by claiming that the historical context of the law should be considered, and that the amnesty was bilateral (*Folha Online* 2010a, b) which, as demonstrated previously, is historically incorrect. Only the reporting Minister Grau accepted the OAB's argument that the amnesty was not bilateral, as it excluded the militant opposition condemned by military tribunals (ASCOM/MD/GLOBO 2010, 1). Four Supreme Court Ministers stressed that the Amnesty Law had contributed to present day democracy in Brazil (*Folha Online* 2010a; Seligman, and Ferraz 2010) calling it a 'landmark of democratization' (ASCOM/MD/GLOBO 2010, 1). Court reporter, Eros Grau (*Folha Online* 2010a), correctly highlighted the fact that even the OAB accepted the law at the time. His colleague, Gurgel, even read aloud from a former text by the OAB in favour of the Amnesty Law (ASCOM/MD/JP 2010, 1). Grau (ASCOM/MD/OESP 2010, 1, 2) denied that the 1979 Amnesty Law violated the 1988 Constitution, and argued that only Congress could revoke the law, because the Supreme Court was not a legislative body.

The fact that the Supreme Court Ministers rejected the appeal, however, does not mean that they wish to glorify the military past or that they approve of human rights transgressions. Most Ministers who supported the law explained that their

vote did not mean that they favoured silencing past human rights crimes. Supreme Court Minister, Eros Grau, who was himself tortured during the military regime, voted against the revocation but warned that the practice of torture should not be forgotten (*Folha Online* 2010b), and finished his speech with some lines from the following poem: ‘Some things cannot be forgotten. It is important that we do not forget to make sure that these things will never again be like they were in the past’ (ASCOM/MD/GLOBO 2010, 1). Gurgel likewise stressed that maintaining the 1979 Amnesty did not mean ‘wiping out the past’ (apagar o passado) (Seligman, and Ferraz 2010).

However, two Ministers, Carlos Ayres Britto and Ricardo Lewandowski, voted for a revision of the Amnesty Law, as they believed that torture should not be forgiven. Britto disagreed that the Amnesty Law was ‘ample, general and unrestricted’, and claimed instead that it was in fact ‘relative’ (*Folha Online* 2010a). He asserted that torture was not a ‘political’ crime: ‘The torturer is not an ideologist. Neither does he commit a crime of opinion nor a political crime. He is a monster, inhuman, a perverse maniac’ (*Folha Online* 2010a). The lawyer who defended the OAB in this appeal, Fábio Comparato, contested the notion that the Amnesty Law was a genuinely accepted compromise and argued instead that it constituted a self-amnesty, because Congress was forced to be submissive at the time of its passage (ASCOM/MD/CBRAZ 2010, 1).

While, predictably, the decision was acclaimed by the armed forces, Brazilian Defence Minister, Nelson Jobim, and the Foreign Office who had rebuffed previous attacks on the Amnesty Law (Canthanêde 2010; *Folha Online* 2010c), the verdict was vehemently criticised by the OAB, Human Rights Minister Vannuchi, former Justice Minister, Tarso Genro, and various national and international human rights organizations including Torture Never More, Amnesty International, and the United Nations. The judgement was repudiated with the argument that it was an offence to the families of victims, a legitimization of human rights breaches with implications for violations in present day Brazil, and a sign of an unfinished transition towards full democracy. The President of the OAB, Ophir Cavalcante, attacked the STF as ‘not timely’ (*Folha Online* 2010b), and Fernando Mariña Menendez, a member of the UN Committee Against Torture, likewise argued that this ‘self-pardoning’ was no longer acceptable in the twenty-first century (Chade 2010). The UN had been encouraging the Brazilian government to amend the Amnesty Law since 2001 (Chade 2010). Tim Cahill of Amnesty International interpreted the verdict as ‘placing a judicial seal of approval’ on the pardoning of human rights violators. He regarded the verdict as a clear ‘offence’ to the victims (Reuters 2010): ‘This is an affront to the memory of thousands who were killed, tortured and raped by a state that ought to protect them. Once again, the victims and their families were deprived of gaining access to truth, justice and compensation’. Menendez warned that Brazil was the only Latin American country still refusing to indict its criminals and that it was becoming increasingly isolated (Chade 2010). Brazilian journalists (ASCOM/MD/JB 2010, 2-3; Kehl 2010) alluded to the wider implications of the verdict criticising the fact that it blocked Brazil’s path to becoming a full democracy. Maria Rita Kehl (*O Estado de S. Paulo*), for example, interpreted the decision as proof that Brazil was not fully democratized (Kehl 2010).

## Does the Amnesty Law explain the Brazilian difference?

This article has analysed the peculiar Brazilian way of processing human rights crimes of the military past, proposed reasons why this differed so much in comparison with other South American countries, and debated what role the 1979 Amnesty Law played in that divergence. Formally, the 1979 Amnesty Law does not account for Brazil's peculiar way of dealing with human rights transgressors, because other countries have either revoked (Argentina, Uruguay) or bypassed (Chile) their laws. However, the 1979 Amnesty Law may have contributed to one of the key differences between Brazil and its neighbours – the connivance with impunity or disinterest in prosecutions. In post-authoritarian Brazil, neither governments nor the vast majority of people, nor recently the Supreme Court, have supported the punishment of former human rights transgressors. This article has discussed reasons for this peculiar disinterest and considered what this silence means. Besides more obvious factors like the smaller number of victims, especially when compared to Argentina, a promising explanation provided by political scientists is that Brazilian society lacks the tradition of mobilization for civil rights causes including the protection of human rights. This theory, however, does not explain why numerous Brazilians did in fact mobilize at specific moments. In the late 1970s, the amnesty movement enjoyed widespread popular support which, however, appears to have vanished after the Amnesty Law, probably because of the movement's heterogeneous interests. If the 1979 Amnesty Law is interpreted as the dividing moment which weakened the mobilizing power of human rights supporters, it did in fact play a noteworthy role in the peculiar manner in which Brazil has dealt with former crimes. This article has furthermore asked what the Brazilian disinterest in punishment means, and questioned whether it can simply be interpreted as a benevolent attitude towards former torturers or the military regime. A more detailed analysis of the Brazilian amnesty debate revealed that those who favour impunity do not necessarily defend the military regime or wish to deny the military past. Many Brazilians – even victims of the regime – oppose punishment either for legal reasons, because they think that a moral condemnation is sufficient, or because they believe that further human rights abuses can be prevented simply by remembering the past. This article has demonstrated that the amnesty debate in Brazil contains many shades of grey. Yet, it remains a fair assessment to claim that the Supreme Court has missed a golden opportunity to normatively strengthen the value of human rights in Brazil.

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## Notes

1. I define clientelism as the custom of exchanging favours to enhance one's personal interests and as a means of reproducing hierarchical social relations.
2. Besides significant appraisal for Gaspari's books, scholars including Carlos Fico (2004) and Kenneth P. Serbin (2006, 190-91) have problematized the notion that his accounts are elitist because Gaspari relies heavily on specific sources, for example those of Golberri and Geisel.
3. These articles are hosted by the Library of the Senate in Brasília, Folder 'Opinião pública [19]81'.
4. Following Montero (2005, 100), I define social movements as 'short-term, mass-based protest activities' based on voluntary participation, while the term 'non-governmental organisations' (NGOs) refers to institutionalized organizations with a leadership system, a financial strategy and an ideological or normative basis.

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