



RESENHA

La construction du “droit à la vérité” en droit international By Patricia Naftali.

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Abstract

This book analyzes the emergence of the right to the truth regarding gross human rights violations in International Human Rights Law, focusing on the different mobilizations and strategies that have led to its recognition. Through a cartography of the agents that promoted the creation of this new subjective right, their claims and forms of action over time, the book argues that the diversity of causes and the tensions between them help to explain the plurality of representations that the right to the truth has acquired.

Keywords: Right to the truth; human rights; legal mobilization; enforced disappearance; truth commissions.

Resumo

O livro analisa a emergência do direito à verdade sobre violações graves de direitos humanos no Direito Internacional dos Direitos Humanos, com foco nas diferentes mobilizações e estratégias que levaram ao seu reconhecimento. A partir de uma cartografia dos agentes que promoveram a criação desse novo direito subjetivo, suas demandas e formas de ação ao longo do tempo, argumenta que a diversidade de causas e as tensões entre elas contribuem para explicar a pluralidade de representações que o direito à verdade adquiriu.

Palavras-chave: Direito à verdade; direitos humanos; mobilização do direito; desaparecimento forçado; comissões da verdade.



1. The study of the emergence of a new fundamental right¹

To study the conception of the “right to the truth” as a legal category is interesting and challenging as it is a recent, transnational event, a product of diffuse legislative and jurisprudential deliberations in different spheres, based on the demands of civil society.

The right to the truth is one of the measures conceived as a response to a difficult and current problem: how to react to massive or systematic human rights violations. It was first invoked as part of international law in the face of gross human rights violations perpetrated by Latin American dictatorships between the 1960s and the 1980s, which characteristically adopted the systematic or massive use of enforced disappearances, and denial, secrecy and concealment as techniques of political repression. It was afterwards institutionalized in international human rights systems and became part of the research and practice field named “transitional justice”. Currently the right to the truth is part of an agenda whose debate is practically inescapable in post-conflict situations and political transitions.

This book, published in 2017, derives from Patricia Naftali’s PhD thesis, completed in 2013 at the *Université libre de Bruxelles*, which is among the first important studies fully dedicated to the subject.² It focuses on the different types of mobilization of the right to the truth that have taken place over time and how they have affected changes in international human rights law. The book shows how social movements, human rights NGOs, and individuals committed to coping with the violations are not only at the origins of the conception of this new human right; they are also present in decision-making spaces and thus influence the meanings that this right acquires.

According to Naftali, the various actors who were interested in the recognition of the right to the truth did not always have the same goals. There were internal dissents in their struggles, linked to disagreements about the representation of truth, the relationship between truth and justice, and the nature of justice considered desirable. Her thesis is that the diversity of causes and the tensions between them help

¹ I would like to thank Ana Carolina da Matta Chasin and Iagê Zendron Miola for their comments on the draft of this review.

² Only after the conclusion of my own PhD thesis on the right to the truth (Osomo, 2014), did I get to know about Naftali’s research, which had been developed at the same time, and which I could access after the book was recently published.



to explain the plurality of representations that the right to the truth has acquired. The divergent goals and strategies of the various promoters of the right to the truth have led to the construction of an “ambivalent” or “floating-content” concept. With the process of generalization and universalization, tensions have been neutralized but in a way that may be detrimental to the same causes that have led to the recognition of the right.

2. The book's analysis of the construction of the right to truth in international law

The volume is divided into four parts. The first part examines the emergence of the right to the truth in the context of social mobilizations against enforced disappearances, starting from the organization of the victims' families into associations. It was within these mobilizations that the denial of the truth came to be perceived as a specific violation suffered by the family members, different from that of which the disappeared are victims. The *Madres de Plaza de Mayo* (Mothers of the Plaza de Mayo), in Argentina, were, according to Naftali, the first fundamental rights movement to use the idea of truth to express its demands (Naftali, 2017: 43-45). This led to the formulation of institutional responses within the framework of the United Nations (UN) and the Inter-American Commission on Human Rights (IACHR), that recognized a right to know the truth about what happened to the disappeared (Naftali, 2017: 63-72).

The second part of the book studies the formalization of the right to the truth from the end of the 1980s within the context of the “fight against impunity”, as the mobilizations against the amnesties, which were widely adopted in Latin America democratic transitions to prevent criminal prosecution, became known. Through these mobilizations, the right to the truth became an element of the debate on the compatibility of amnesties with international law. In the Inter-American System, the strategies of human rights NGOs, endorsed by the IACHR, managed to obtain the recognition by the Inter-American Court of Human Rights (IACourtHR) of a right to the truth with a judicial repressive nature, hindering amnesties of gross human rights violations (Naftali, 2017: 194). In Argentina, Naftali analyzes the legal proceedings that in 1995 brought for the first time before national courts the issue of the justiciability of the right to the truth, leading to its unprecedented judicial recognition. In Naftali's view, in those trials, that became to be known as “truth trials” (*juicios por la verdad*), the right



to the truth was mobilized as a strategy to oppose the so called “Impunity Laws” (*Leyes de Punto Final y Obediencia Debida*), albeit not directly, or to limit their effects (Naftali, 2017: 139-162).

Thus, according to Naftali, the explicit formalization of the right to the truth as a justiciable subjective right takes place in the context of the struggles against impunity. This leads to what appears in the book as the main tensions underlying the conception of this right: the divergences regarding its relation to the search for justice. Those in favor of retributive justice – in particular family associations and international NGOs that historically advocate for the development of international criminal justice, such as the International Commission of Jurists, Amnesty International and Human Rights Watch – defend the importance of the criminal proceedings and the impossibility of guaranteeing the right to the truth without trials, in line with what is ruled by the IACourtHR. Meanwhile, those in favor of a restorative justice admit the use of amnesties conditioned to the revelation of truth.³

The third part of the book examines the inscription of the right to truth in the International Convention against Enforced Disappearance (2006), analyzing the treaty’s drafting process, with focus on how it gave birth to the first provision of the right to the truth in a legally binding universal instrument. Among its main findings is that the preparatory works of the treaty, with the direct participation of family associations and human rights NGOs, reveal divergent understandings of the meaning of the right to the truth. Finally, the formalization that was possible - and which resulted in Article 24 of the Convention - adopted a general formula that avoids addressing polemic issues. Therefore, the book concludes that the right to the truth was constructed in the intersection of multiple causes, carried out by agents acting according to different logics, some of them complementary, other competing (Naftali, 2017: 316).

The fourth part of the book depicts the institutionalization of a right to truth regarding gross human rights violations in general, not only enforced disappearance, that took place when a number of UN bodies undertook the development of this right and its normative consolidation, between 2004 and 2015. According to Naftali, the competition between the entrepreneurs of the right to the truth continued to take place

³ Notably, the experience of the South African Truth and Reconciliation Commission, which had the power to give conditional amnesties in exchange for truth, divided human rights activists and scholars, and some of them started to accept “conditional” or “accountable” amnesties as legitimate (Naftali, 2017: 125).



through the exploration of the processes of formalization of the right to the truth (Naftali, 2017: 324). She observes that the right to the truth was used both by the supporters of truth commissions and international criminal justice, in order to justify each of these models of coping with the violations, and consolidate it at the international level.

Naftali believes that it was in order to solve the problem of the diversity of causes that the doctrine of complementarity was developed by international promoters of truth commissions and accepted by the UN bodies. In this doctrine, truth commissions are no longer considered an acceptable substitute for trials; they are rather perceived as complementary tools (Naftali, 2017: 398-405). However, according to Naftali's analysis, complementarity found no practical application since truth commissions most often legitimize the absence of criminal proceedings. In addition, complementarity has allowed the formal consolidation of the right to the truth as a unified category only because it has led to a plurivocal concept, capable of justifying contradictory positions. The concept was diluted to the point of no longer creating any obligations. States resistant to implementing the retributive dimension of the right to the truth may be able to adopt public policies that suit them best and still say that they have fulfilled their truth obligations.

Nevertheless, although the theory of complementarity cannot effectively establish constraints on State practice, it has continued to be supported by the promoters of the right to the truth. One of the reasons presented for this tenacity is the perception that complementarity offers a justification for the endurance of the fight against impunity without a time limit (Naftali, 2017: 452). But the most emphasized reason in the book is that incorporation of complementarity into international law has opened up new fields of action, possibilities for intervention and professional career opportunities at the international level for the promoters of the right to the truth, thus creating a "true 'global' market of truth" (Naftali, 2017: 435, my translation⁴).

Naftali concludes that the right to the truth derives its strength from its capacity to support various objectives, but paradoxically this is also its fragility as its indeterminacy allows it to be used to limit the causes of its own promoters. The directions in which the right to the truth will continue to expand through its multiple reappropriations, the author argues, are impossible to predict (Naftali, 2017: 494).

⁴ In the original in French: "*véritable 'marché' global de la vérité*".



3. Some reflections on the book's conclusions, illustrated by the Brazilian case

Naftali's work offers great contributions to the understanding of the processes that led to the creation of the right to the truth. One of them is the systematic and critical analysis of the archives related to these processes, such as those of the UN, the Belgian government, and of non-governmental actors, concerning the drafting of the International Convention against Enforced Disappearance (Naftali, 2017: 495). An analysis of this nature explains not only the origins of legal texts such as the Article 24 of the Convention but also why they are silent on certain subjects.

Another important contribution is the focus on processes of legal change beyond official institutions and formal decisions, through the identification of the participating social movements and other non-state actors. The book highlights the role played by civil society activists of this cause, most of them of Latin American origin, in obtaining the unprecedented international recognition of a fundamental right, and in shaping the meanings attributed to it. The right to the truth is thus revealed as an instructive case for the observation of the processes of the recognition of human rights and the transformation of international law from the social struggles for these rights, or "from below" (see McEvoy; McGregor, 2008; Rajagopal, 2003; Santos, 2015). In addition, the book openly faces the dilemmas that the right to truth brings and the difficulties in its implementation, and in so doing provides grounds for the development of reflections aimed at the effort to prevent the existence of this right being restricted to an ideal.

Three arguments were selected for a brief dialogue: (a) the ambiguity of the concept as a consequence of the diversity of mobilizations that led to the formalization of the right to the truth in international law; (b) the goals and strategies attributed to its promoters; and (c) how the debates and challenges regarding truth relate to the issue of justice. These comments will be made from the perspective of a researcher in law in the field of human rights, who has been professionally engaged in transitional justice policies and has as a reference the Brazilian experience, different from that of Naftali's.

(a) An ambiguous concept to respond to a multiplicity of causes



Naftali argues that the objectification of the right to truth as a subjective right only becomes possible at the cost of making it a clause of abstract terms that masks political deadlocks in important issues. This construction of a legal right through the abstraction of the political conflicts that underlie it is a common feature in law making processes (Naftali, 2017: 29, 398), and, thus, not a peculiarity of the origins of the right to the truth. In the book, the cartography of the “truth entrepreneurs” and their dissensions are enlightening not only as an example of the operation of lawmaking processes in general but also as key to understand the different meanings attributed to this right.

However, the focus of the book on the internal divergences between the promoters of the right to the truth must not be read as meaning that those internal divergences are the principal cause of the constraints faced in the formalization and implementation of the right to the truth. Often they are not the main causes, especially when what is at stake are the uses of the right to the truth related to the access to justice.

At a national level, processes of coping with human rights violations may be controlled by sectors that participated in or supported their perpetration. In Brazil, the democratic transition was controlled by the military and marked by the permanence of authoritarian structures and people who supported the military regime in the different State bodies. For a long time there was no room in the public sphere for disputes between civil society activists around the issue of the desirable truth about political repression. The exercise of this right in its different dimensions was blocked by the restricted access to information and a lack of investigation or hearing of testimonies. Families of the victims and some civil society supporters of their causes carried out alone the task of searching and systematizing information and pressing for the adoption of public policies (Araújo et. al., 1995).

It took around ten years for the Brazilian State to acknowledge its responsibility for the deaths and disappearances through the establishment of the first national commission of reparation and almost thirty years to create a truth commission. The Armed Forces have never acknowledged their responsibility for the violations. Marcelo Torelly, in an article on the process that led to the establishment of the National Truth Commission (NTC), its activities and accomplishments, depicts how the military maintained control and influenced decisions even after democratization, exercising a



veto power on the policies related to the past violations. Torelly points out that one of the late achievements of the NTC was the challenge to the military power of veto (Torelly, 2018).

The Brazilian experience thus illustrates how the tensions involved in the construction and implementation of the right to the truth may stem above all from other factors besides internal divergences between its promoters.

(b) The goals and strategies of the entrepreneurs of the right to the truth

Naftali highlights objectives and logics of action of the truth activists, and, by doing this, illuminates some facets of the mobilizations of the right to the truth. There are also other important facets, which do not receive similar attention in the book. Two examples will be pointed out.

Firstly, in dealing with the centrality that the notion of truth has acquired in the struggle against enforced disappearance carried out by the family associations, Naftali argues that the use of this concept served to take this agenda out of the political frameworks which it was part of. Truth offered these mobilizations a neutral and objective record, with humanitarian, religious and cultural legitimacy, taking the focus away from the direct victim (political militant) to the indirect one (mother) and avoiding the application of the “theory of the two demons”, that was used to justify state violence. The cause of the *Madres*, represented as a suffering related to private and family life, would have more chance of generalization and incorporation into international human rights law (Naftali, 2017: 46-53).

Even if there are strategies in the internationalization of families’ demands, the denial of truth in cases of enforced disappearance is in fact a cruel treatment that causes immense suffering to the relatives. In Brazil most of the information available regarding those who disappeared during the dictatorship was gathered by the families themselves, and they have persisted in their search for truth to this day, more than forty years after the disappearances. There is a real demand for truth, independently of the choices made by the families regarding how to frame their claims.

Similarly, a second justification attributed to the struggle for truth, in particular for its persistence, is that NGOs and individual truth advocates are interested in the opportunities offered in the “truth market”. Although this kind of interest may exist, and some activists have occupied prominent positions in international activities, the



emphasis on the disputes for power in the human rights field risks eclipsing the moral justification of the engagement of these actors. There are different cases of personal commitment to the causes of truth and justice, some of them with personal or family stories of persecution. At the national level, the daily struggle for truth and justice does not usually lead to positions of power and prestige; on the contrary, it may involve personal sacrifice and risks. Even if one considers only human right defenders that came to occupy positions in NGOs and public offices, the interest in attractive jobs or spaces of power should not be assumed to be the dominant explanation for their action.

(c) How does truth relate to justice

On the relationship between truth and criminal justice, Naftali argues that truth was first mobilized as a justiciable subjective right as a tool to favor justice, but truth may impair justice, since truth commissions are often created to legitimize amnesties. The Brazilian experience can be used to problematize both assertions, adding new elements of complexity to the problem.

In Argentina, as previously mentioned, the “truth trials” were grounded on the right to the truth as a strategy to make criminal proceedings move forward. As Naftali argues, truth – an apparently neutral concept – was instrumentalized with a political purpose, that of contesting the political decision of pardoning the violations. Afterwards, the IACourtHR would endorse a perspective that frames truth from the angle of the criminal trial, arguing that without justice the right to the truth cannot be guaranteed.

However, judicial claims may pursue truth independently of the quest for justice. In Brazil, in a context of a lasting denial of the violations by the authorities and the lack of investigation, the first legal actions related to the right to the truth sought the acknowledgment that these violations occurred, the declaration of state responsibility, and the inquiry into disappearances.⁵ One of these civil legal actions, regarding the disappearances in the Araguaia Guerrilla, gave rise to the conviction of Brazil by the IACourtHR in 2010. In this judgment, in addition to highlighting the hindrance posed to amnesties by the right to the truth, the IACourtHR associates the

⁵ See an analysis of these legal actions in Osmo, 2014, complemented and updated in Osmo, 2016. A synthesis in English, analyzed in relation to the understanding developed by the IACHR and by the IACourtHR, is in the chapter “Mobilization and judicial recognition of the right to the truth: The Inter-American Human Rights System and Brazil” (Osmo, forthcoming).



right to the truth with Article 13 of the American Convention on Human Rights (freedom of information), due to the refusal by the Brazilian government to hand over the information required by the families of the disappeared (IACourtHR, 2010: § 201). There were also legal actions grounded on the right to the truth to request the rectification of death certificates, which had been used to conceal executions and deaths caused by torture.

Therefore, if in Argentina the truth demanded from the Judiciary by civil society acquired a political character when used to question the Impunity Laws, in Brazil, where there was greater opposition to the revelation of the truth, the legal actions grounded on the right to the truth in most cases have not confronted the blockage that prevent criminal proceedings from moving forward.⁶ Still, they may also be read as political actions, since they aimed to face the hegemonic decision for silence or denial of the violations. As Hannah Arendt says in her essay on truth and politics, when a community adheres to organized lying, the one who speaks the truth acts politically, for he takes a step towards changing the world (Arendt, 2009: 310-311).

Thus, there may be legal interest in the truth in itself, and the right to the truth judicially mobilized is not only a means to obtaining criminal justice. On the other hand, even in the case where one searches for truth independently of the pursuit of justice, it does not mean that one wishes for truth as a substitute for justice; it may mean that there are initiatives on different fronts. The struggles against impunity, negation and forgetfulness are often carried out by the same actors, sometimes jointly, sometimes in parallel. In particular, the cause of truth commissions does not always compete with that of justice, and a decision to establish a truth commission may not seek to legitimize amnesties.

Paulo Abrão, who participated in the working group in charge of drafting the bill to create the NTC, stated in an interview that at that time there were three divergent views on what the Commission's relationship with the issue of justice should be, and that the issue was conflictual even among Federal Government Ministries (Abrão, 2016: 35-38). As a study by Caroline Bauer shows, tensions over what should be the role of NTC in relation to the crimes committed by State agents continued to be present in the

⁶ It is important to note that in Brazil criminal proceedings for gross human right violations can only be initiated by public prosecutors, unlike in Argentina, for example (see Sikkink, 2018, p. 82-82). It would not be possible for victims, family members and human rights NGOs to initiate criminal cases.



legislative debates (Bauer, 2017: 149-163). The law that created the NTC ended up not taking a position on the question of the accountability of State agents, against the claim of the social movements that had defended its creation.⁷

The Brazilian case also shows that, regardless of the existence or not of an original decision on this issue, the truth commission may take on the aim of contributing to accountability. In the end, the NTC used international human rights law as a reference to conclude that crimes against humanity had taken place, and, consequently, the amnesty should not continue to be applied to prevent the determination of legal responsibilities (Brazil, 2014: 965-966). Criminal proceedings have not progressed despite the efforts of the Public Prosecutor's Office⁸. Anyhow, the report of the NTC is used in the criminal investigations carried out by the Public Prosecutor's Office (Marx, 2016: 65) and it informed the conclusion of the IACourtHR in a recent judgment against Brazil that the death due to torture of the journalist Vladimir Herzog during the dictatorship characterized a crime against humanity (IACourtHR, 2018).

Therefore, in observing the Brazilian experience, it is possible to understand that, firstly, truth – understood as acknowledgment, disclosure of facts, rectification of documents – is of interest in itself, independent of the quest for punishment. Secondly, one can comprehend why truth and criminal justice are objectives pursued in a complementary way, considering the great difficulties faced in dealing with the legacies of authoritarian rule and impunity.

The openness of the concept of the right to the truth, as emphasized by Naftali, simultaneously makes it unable to fully meet the demands through which it originated, and provides it with inexhaustible possibilities of appropriations and developments. We could add, using Herrera Flores' definition of human rights (2008: 22), that the right to

⁷ Edson Teles stresses how, in Brazil, the original proposal to create a commission of inquiry came from social movements, which proposed that it be called "National Truth and Justice Commission", but the word "justice" was excluded by the government of the National Human Rights Plan (*Plano Nacional de Direitos Humanos*), which established the objective of creating the commission (Teles, 2018: 25-26). The commission was later named "National Truth Commission" ("*Comissão Nacional da Verdade*"), and its mandate was not clear with regard as to how the inquiry into truth should relate to the quest for justice. The law that created the NTC (Law n. 12.528/2011), nevertheless, expressly stated that it should clarify who were the authors of the gross human right violations (Article 3, II).

⁸ In 2010 the Brazilian Supreme Court decided, contrary to the IACourtHR case law, that the amnesty in favor of perpetrators of gross human rights violations could be maintained. A few months later, the IACourtHR delivered its merits decision in the Araguaia Guerrilla case, ruling that the application of the Brazilian Amnesty Law to prevent criminal prosecution regarding gross human rights violations contradicts human rights protected by the American Convention on Human Rights. With this decision, the IACourtHR invigorated the debate in Brazil, where the application of the Amnesty Law in favor of state agents responsible for political repression would continue to be contested (see Osmo, 2016: 42-46).



the truth is part of a process of social struggle for dignity. Its formal recognitions already obtained are only provisional results in this process of struggle.

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