

The American Legal Programs in Brazil: From Modernization Theory to Human Rights

by Júlio Barnez Pignata Cattai



© 2019 by Júlio Barnez Pignata Cattai



Abstract

The year 2014 marked 50 years since the civil-military coup in Brazil, on March 31, 1964. Recently, Brazilian historiography has been devoting a renewed interest in this period of the military rule in the country (1964-1985). A common element in the analyses that have developed identifies a significant role for the rule of law-human rights movement in the country, from which it would have been possible to form a systematic opposition to the Brazilian dictatorship that would lead to the *transition* to democracy. Nevertheless, there is still an existing gap in this discussion about the Brazilian rule of law-human rights movement, which relates to a consistent analysis of the network of politics and practices, connected to the field of law in Western countries since World War II. It is my premise that this analysis will facilitate a better comprehension of the Brazilian transition and its historical connections with the “Global North.” The philanthropic foundations played a significant role in promoting this network. My research contributes by filling in aspects of this gap in the Brazilian debate, and provides an analysis of the role played in the rule of law-human rights international movement by the International Commission of Jurists (ICJ) and the programs of philanthropic foundations concerning the field of law directed to Latin American countries

The American Legal Programs in Brazil: from Modernization Theory to Human Rights¹

The year 2014 marked 50 years since the civil-military coup in Brazil, on March 31, 1964. Recently, Brazilian historiography has been devoting a renewed interest in this period of the military rule in the country (1964-1985).² A common element in the analyses that have developed identifies a significant role for the rule of law-human rights movement in the country, from which it would have been possible to form a systematic opposition to the Brazilian dictatorship that would lead to the *transition* to democracy. Nevertheless, there is still an existing gap in this discussion about the Brazilian rule of law-human rights movement, which relates to a consistent analysis of the network of politics and practices, connected to the field of law³ in Western countries since World War II. It is my premise that this analysis will facilitate a better comprehension of the Brazilian transition and its historical connections with the “Global North”⁴. The philanthropic foundations played a significant role in promoting this network. My research contributes by filling in aspects of this gap in the Brazilian debate, and provides an analysis of the role played in the rule of law-human rights international movement by the International Commission of Jurists (ICJ)⁵ and the programs of philanthropic foundations concerning the field of law directed to Latin American countries.

My three weeks’ research at the Rockefeller Archive Center (RAC) involved an effort to cover and form a more or less comprehensible picture of the legal programs developed by foundations in Brazil, especially during the period of military rule. My interests centered on Ford Foundation (FF) and Rockefeller Brothers Fund (RBF) archival material. It focused on the ICJ and the American Association for the International Commission of Jurists (AAICJ - the most important section of the ICJ).⁶ I also looked at records related to American legal assistance programs (the so-called “law and development movement”) for Brazil, especially the 1966 creation of the Center for the Study and Research on the Teaching of Law (Centro de Estudos e Pesquisa no Ensino

do Direito –CEPED) in Rio de Janeiro. Also of interest to me were the FF’s staff discussions in the beginning of the 1970s, about its human rights programs (and also some reports written in the 1980s and 1990s about this issue). Ford’s law programs to Brazil after 1976-1977 were also important, when, it seems, a reorganization took place – which occurred under a heading of Public Interest Law, Social Justice, and Human Rights.

It is possible to propose two different moments and purposes for these law-related programs for Brazil:

A first moment and purpose occurred between the beginning of the 1950s and the end of the 1960s, concerned directly with the export of “technocracy of development” from the United States to Latin American countries, in the form of the modernization theory. The field of law became a tool of this technocracy of development. In a broader sense, (both to the so-called “Third World” as to the Latin American countries) modernization theory, once it organized an amplified definition of the functions of executive power, stipulated a new definition to the “rule of law” concept, particularly the strict separation of state powers. For instance, between the 50s and the beginning of the 60s, the International Commission of Jurists worked with this redefinition in its congresses around the world: it produced a carefully articulated concept of the rule of law, based on the “cooperation” between powers, putting this amplified attitude of the executive power under the law.⁷

One of the most important initiatives in this field was the “law and development movement,” which was based on the modernization theory premise that economic development would lead to the foundations of democratic institutions, safeguarding countries like Brazil against totalitarianism.⁸ American legal assistance, involving the Agency for International Development (AID), the American Bar Association (ABA), the American Society of International Law, the International Legal Center, the FF, the Peace Corps, and leading American law schools, was provided initially in the mid-1950s for the newly independent countries in Asia (and afterwards in Africa), focusing on legal research and teaching. In sum, the law in those

countries should play a central role in what Eisenhower's Secretary of State, John F. Dulles, called "an orderly evolution" from the colonial to an independent status, distant from any radicalism or neutralism.⁹

In the mid-1960s, based on the *educational* approach successfully experienced in the Third World, the law and development movement turned its efforts to reform Latin American legal education in Chile, Colombia, Peru, Costa Rica, and Brazil.¹⁰ According to James Gardner, a former Ford Foundation staff member in Latin American, the "... relevant literature increasingly expressed the need to get formal law 'out of the way' of development, however, as well as the need to replace legal formalism with a more 'creative' and 'constructive' instrumental approach to law".¹¹

In 1966 in Brazil, the AID, the Ford Foundation and a group of Brazilian lawyers (most of whom were active in the corporate sector) created a new center to reform legal education in the country: the Center for the Study and Research in Legal Education (CEPED), formally connected to the law faculty of the State University of Guanabara, in Rio de Janeiro but, in practice, independent.¹² CEPED exemplified the typical form in which American legal assistance took shape in the Latin American region. It was against legal formalism, associated with an impediment to developmental change; the program defended the need of replacing this kind of legal approach to a more imaginative and dynamic one. In other words, the Center intended to create a professional who was pragmatic and omnipresent, like an engineer capable of solving problems impeding modernization. This kind of lawyer would have, in this sense, a social role to play in developmental efforts, a social function to perform.¹³ (It is important to remember that, at this time, the countries in the region were putting into practice modernization programs, which involved the creation or redefinition of political and economic institutions, universities, post-graduate studies and so on, and largely could rely on this new professional of the law¹⁴.)

However, the referenced American legal model also tended to undermine the role of the law as a potential source of opposition to state power. In fact, when opposition movements in Latin American countries started to organize and

grow, they relied on traditional rule-of-law jurisprudence, eschewing the rule-skepticism and instrumental law in which the American legal model was based. Accordingly, as James Gardner puts it, “those models... were simply too lacking in ethical and value content or informed social theory, too closely identified with policy and power, and too readily vulnerable to executive or authoritarian ordering and abuse.”¹⁵

In fact, at the end of the decade, the liberal anticommunism of American foreign policy and its international activism started to manifest a moral exhaustion. This was due, in a general sense, to the war in Vietnam. However, it was also related to the fact that the politics of reform could not solve the problems of the exclusion of minorities in the United States and did not lead to democratic regimes in Latin America or in Third World, as expected, by intellectuals like Arthur M. Schlesinger, Jr. On the contrary, the military dictatorships, in many cases, supported by the U.S. government, started to pullulate all over, and with them, the expansion the human rights abuses.¹⁶

A second moment and purpose of legal programs in Brazil, began in the 1960s to the 1970s, and extended until the second half of the 1980s. They correspond in a general sense to the formulation of an answer from the Ford Foundation’s perception of the role that law should play in Brazil and others Latin American countries.

Thus, the political answer to this moral exhaustion came from a re-evaluation of human rights language.¹⁷ In turn, this re-evaluation fundamentally came from a reaction to Latin America realities, especially in Argentina, Brazil, and Chile.¹⁸ Beginning in 1970, some groups in the U.S. Congress starts to devote great attention to the human rights abuses in Latin American and Third World countries, putting the issue at the center of the political arena. Based largely on reports produced by the ICJ, Amnesty International, and the Red Cross concerning human rights abuses, Congress enacted legislation linking United States aid and military assistance to the human rights situation in the target country; furthermore, Congress would demand the creation of a special bureau on human rights within the State Department.

In this regard, also coming from Congress, this time from the House Subcommittee on International Organizations and Movements, headed by Congressman Donald M. Fraser, was a report published in March 1974 what would represent a catalytic force in the human rights debate in United States. The report, “Human Rights in the World Community: A Call for U.S. Leadership,” demanded a significant shift in the Nixon/Kissinger’s *realpolitik* foreign policy, which was not paying the proper attention in its agenda to the issue.¹⁹ This official concern with human rights has another important moment with Jimmy Carter’s presidential campaign and, later on, with his administration (1977-1981). The Carter administration, indeed, represented the culmination of a vivid debate within the American establishment that came to replace the reformist premise, with a new discourse based fundamentally on human rights. The Carter/Brzezinski agenda had the potential of updating the design of the international alliance in the West and the political field in the United States around human rights (a moral re-foundation of American politics).²⁰

Also reacting to the human rights issue in Latin America, the Ford Foundation’s staff started to discuss its human rights policy in a series of internal reports, which prompted the formulation of the “Human Rights and Intellectual Freedom” study paper in 1975. This policy proposal, written by Francis X. Sutton in November of that year, was prepared for the Board of Trustees’ meeting in December.²¹

Further study is required, but it seems that the “intellectual freedom” aspect of this policy paper – if, in fact, it had central importance²² – provides an understanding at that time of the human rights issue as perceived by the Ford Foundation staff. Sutton’s study was written largely in response to the criticisms by David Bell, the director of the FF’s International Division, to a study prepared by David Heaps’ “Draft Report on Human Rights”, dated August 1974. Heaps argued that the essential commitment in Ford activities was to public welfare in two directions: improvement of economic conditions and reinforcement of national institutions, having not displayed “... systematic and sustained concern with what is now an epiphenomenon of the times – the pervasive abuse of human rights by arbitrary officials actions...”²³.

In this sense, Heaps defended an understanding of human rights in what it was related to *political prisoners*, paying little attention to organizations like the International Association for Cultural Freedom (IACF) and to the International Press Institute (IPI), i.e., to the *freedom of inquiry*.

It was on this specific subject that David Bell criticized Heaps' study: The Ford Foundation could help political prisoners, but the central focus of its activities should rely on issues of free inquiry and expression, with which FF was involved from the very beginning of its activities. For some reason, Bell also understood that Heaps put aside the situations of political prisoners in the Soviet Union (in spite of Heaps, as well noted by William Korey, citing Sakharov as a source of information about 10.000 political prisoners in the Soviet Union).²⁴ The subsequent Sutton's study paper, indeed, absorbed David Bell's concerns about free inquiry, which would involve important FF's activities to the communist world in Eastern Europe. (It must be remembered, for instance, that the Foundation for European Intellectual Cooperation (FEIC), created, in 1956, to defend intellectual freedom in face of the repression in the region, was an important asset of the FF's activities: through FEIC's grants about 3.000 Eastern intellectuals could travel to Paris and Western Europe).²⁵

Shortly afterwards, the Ford Foundation re-evaluated its programs in relation to Brazil and others Latin American countries. In 1977, a Wisconsin University law professor and AID and FF advisor, David M. Trubek, started a round-table discussion on public interest law and human rights in Brazil. In September of that year, after several discussions which included Brazilian legal elite, the FF's staff in Rio de Janeiro, and Trubek, a round-table was held at the Casa de Rui Barbosa Foundation. The result was the formation of a committee that would lead to the creation of a center, from where it would be possible to coordinate action effectively for programs related to social justice, i.e., law and social justice research; environmental and social groups (such as those of indigenous people and women); individual rights; and legal services for the disadvantaged. This re-evaluation was based not only on the growing protest against the military rule, but also on a perception that the Brazilian

modernization model, in spite of its substantial impact, was being made at the expense of the vast majority of the population.

As a result of these efforts, different social groups in Brazil and in others Latin American countries came to form their opposition to the military dictatorships in the region around an amplified “political center,” far from political radicalisms on the left and the right. Not only did these actors defend and publicize the situation of political prisoners through reports by the ICJ, AI and the Red Cross about the human rights violation in those countries, but also to the extent that they helped to give substance to the opposition’s agenda, which favored the political and future constitutional forms of the transition to democracy.²⁶

A more in-depth discussion of these developments is still required, but it is possible to form a picture of the legal programs which grew in Brazil and the historical connections between Latin America and the Global North. Those programs played an important role in Brazilian history, informing and influencing, for instance, the development process and, afterwards, the struggle against the military rule in the country that took shape with the rule of law-human rights discourse. It is in the form of this renewed political premise, with a human rights focus, that the country came to establish its political and institutional forms of democracy, freedom, political participation and the role of the state in relation to civil society.

It can be safely said that the materials at the Rockefeller Archive Center are of invaluable importance to comprehend Latin American history. The Brazilian historiographical debate concerning human rights and the rule of law, which is part of my research interests, has been deeply enriched with these materials. I am very thankful for the grant-in-aid award and for all the support received during my time at RAC, with special thanks to Tom Rosenbaum and Bethany J. Antos.

¹ This report is based on an attempt to form, in a preliminary way, a map concerning my thesis, specifically the contribution of RAC's collections to the research archives of my research. Nevertheless, the reader will be able to form an idea about the importance of the files kept by the Rockefeller Archive Center.

² A significant number of academic and public events took place in universities and public spaces in Brazil. In December 10, 2014, the National Truth Commission, created by President Dilma Rousseff, officially handed over the report about the human rights abuses during Brazil's military regime.

³ See: Yves Dezalay and Bryant G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States*. (Chicago: The University of Chicago Press, 2002); Pierre Bourdieu, *As Regras da Arte: gênese e estrutura do campo literário*, (Lisboa: Presença, 1996); Yves Dezalay and Bryant G. Garth editors, *Lawyers and the Rule of Law in an era of Globalization*. (New York: Routledge, 2011); and Steven M. Teles. *The Rise of Conservative Legal Movement: The Battle for Control of the Law*. (Princeton, NJ: Princeton University Press, 2008).

⁴, Thomas Bender (Ed.). *Rethinking American History in a Global Age*. (Berkeley: University of California Press, 2002); Odd Arne Westad. *The Global Cold War: Third World Interventions and the Making of Our Times*. (New York: Cambridge University Press, 2005).

⁵ The ICJ was founded in Berlin, in 1952, and financed, for over a decade, with resources channeled by the CIA. The ICJ has emerged, as a Cold War organization, in a reaction from the elite of the U.S. judiciary to the International Association of Democratic Lawyers, a Kremlin front organization. See: Howard Tolley, Jr., *The International Commission of Jurists: Global Advocates for Human Rights*. (Philadelphia: University of Pennsylvania Press, 1994).

⁶ It's important to say that the AAICJ was responsible for providing sources of financial support for the ICJ. For files related to the ICJ, see, e. g.: FF records, Grants A-B (FA732D). Folder AAICJ. Date: 1977 January 01 - 1979 December 31, Reel 2108.

⁷ See the report of the referred Congress. International Commission of Jurists. *Executive Action and the Rule of Law: a report on the proceedings of the International Congress of Jurists*. (Rio de Janeiro, Geneva, December, 1963).

⁸ James Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America*. (Madison: The University of Wisconsin Press, 1980). And Yves Dezalay and Bryant G Garth, *Internationalization of Palace Wars*.

⁹ See: Giles Scott-Smith, "Attempting to Secure an 'Orderly Evolution': American Foundations, The Hague Academy of International Law and the Third World". *Journal of American Studies*, 41 (2007); Liping Bu, "Education Exchange and Cultural Diplomacy in the Cold War," *Journal of American Studies*, 33 (1999). And Liping Bu, *Making the World like US: Education, Cultural Expansion, and the American Century*. (New York: Praeger, 2003). Maybe it's because of this understanding that the program of the three major philanthropic foundations related to The Hague Academy of International Law gave more importance to Third World elites than to those in Latin American countries. See: R. J. Dupuy, editor, *The Hague Academy of International Law: Jubilee Book 1923-1973* (Leiden: Sijthoff, 1973). For files on The Hague Academy, see, e. g.: FF records, Grants H-K (FA732D) Folder Hague Academy of International Law. Date: 1965 April 06 - 1974 December 31, Reel 3052.

¹⁰ James Gardner, *Legal Imperialism*. About CEPED, see: Joaquim Falcão, Gabriel Lacerda, and Tânia Rangel, eds, *Aventura e Legado no ensino jurídico*. (Rio de Janeiro: FGV Direito Rio, 2012).

¹¹ James Gardner, *Legal Imperialism*, 52.

¹² About CEPED, see: Joaquim Falcão, Gabriel Lacerda, and Tânia Rangel, eds., *Aventura e Legado no ensino jurídico*. (Rio de Janeiro: FGV Direito Rio, 2012). For files on CEPED at RAC, see: FF records, Grants S-Thel (FA732G) Folder State University of Rio de Janeiro, Reel 3114; FF records, Grants S-Thel (FA732G) Folder State University of Rio de Janeiro, Reel 1819.

¹³ According to Howard Tolley Jr., until the mid-1960s, the ICJ was involved with activities to define and advance through the world the “rule-of-law” jurisprudence. After that, the Commission starts to defend human rights worldwide. Howard Tolley, Jr., *The International Commission of Jurists*.

¹⁴ For analysis of the Brazilian modernization, see, e. g., Rodrigo Patto Sá Motta, *As universidades e o regime militar: cultura política brasileira e modernização autoritária*. (Rio de Janeiro: Zahar Editora, 2014); René A. Dreifuss, *1964: A conquista do Estado: ação política, poder e golpe de classe*. (Petrópolis: Vozes, 1987).

¹⁵ James Gardner, *Legal Imperialism*, 11.

¹⁶ See: J. Ehrman, “Liberals, neoconservatives, and foreign policy: 1945-1985”. (Ph.D. diss., George Washington University, 1993); R. Richardson, Jr., “Neoconservatism: Origins and Evolution, 1945 – 1980”. (Ph.D. diss., University of North Carolina, 2009); and Nicolas Guilhot, *Democracy Markers*.

¹⁷ Samuel Moyn. *The Last Utopia: Human Rights in History*. (Cambridge/London: The Belknap Press of Harvard University Press, 2010).

¹⁸ Soon after the military coup in Chile, on September 11, 1973, the FF increased its budget for fellowships and, after, focused on helping to create and preserve local research groups in that country. In a sense, FF protected the Chilean intellectuals directly threatened by the military. See Hugo Frühling, “From Dictatorship to Democracy: Law and Social Change in the Andean Region and the Southern Cone of South America.” In *Many Roads to Justice: The Law-Related Work of Ford Foundation Grantees Around the World*, ed. Mary McClymont and Stephen Golub. (New York: Ford Foundation, 2000). See also: Shepard Lewis Forman, *Shepard Lewis Forman (depoimento, 2011)*. (Rio de Janeiro, CPDOC/Fundação Getulio Vargas), (2h 13min). At the end of the 1960s, an important, but not value episode, can be seen as a precursor, or a sign of this change in approach. As showed in the FF and in the RBF files on the AAICJ, after the *exposé* of the CIA money channeled to international organizations, both organizations’ staffs decide, respectively, in 1968 and 1969, in spite of the unusual character of this kind of grant, to rescue the ICJ based on its important and unique work in defense of the rule of law and the human rights. See, e.g.: RBF records (FA005), Record Group 3: Projects (Grants); Series 1: Projects (Grants). Box 46, Folder 332. Date: 1969. RAC. FF records, Grants A-B (FA732A) Folder AAICJ. Date: 1968 October 19 - 1970 June 30, Reel: 1235

¹⁹ William Korey, *NGOs and the Universal Declaration of Human Rights*.

²⁰ For the reorganization of the U.S. foreign policy, see: Nicholas Guilhot, *The Democracy Makers*.; John Ehrman, “Liberals, neoconservatives, and foreign policy.”; Yves Dezalay and Bryant G Garth, *Internationalization of Palace Wars*.; and Richardson Jr, “Neoconservatism: Origins and Evolution, 1945 – 1980”

²¹ See: *Human Rights and Intellectual Freedom* (Information Paper). November 1975. In FF records (FA739). Catalogued Reports. Box 3. Shepard Forman Human Rights. RAC.

²² The centrality of this document as a turning point to the FF's activities concerning human rights is a central thesis in William Korey, *Taking on the World's Repressive Regimes: The Ford Foundation's International Human Rights Policies and Practices*. (New York: Palgrave-Macmillan, 2007). It should be said, however, that we still have to carefully analyze of this documentation.

²³ David Heaps, "Draft Report on Human Rights". August, 1975, 4. In FF records (FA739). Catalogued Reports. Box 254, Report 5643. RAC.

²⁴ William Korey, *Taking on the World's Repressive Regimes*.

²⁵ See William Korey, *Taking on the World's Repressive Regimes*.

²⁶ For instance, Sebastian Soler, an Argentinian jurist connected to the Swiss office of the ICJ, could follow the trial of Niomar Bittencourt, an editor of the newspaper "Correio da Manhã" (1969); Heleno Cláudio Fragoso, one of the most important human rights defender in Brazil and later ICJ's vice-president, wrote a report about political prisoners in Argentina (1975). The ICJ published similar reports relating human rights violation in Brazil (1970) and Uruguay (1975). See: International Commission of Jurists. *Report of the International Commission of Jurists' Activities 1966–1971, 1972*.