

# Amnesty, Memory, and Reconciliation in Brazil: Dilemmas of an Unfinished Political Transition

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“One of the more cruel exercises of oppression is the spoliation of memories”  
(Eclea Bosi)

« La nécessité de la police politique et de la magistrature politique, dans un pays où le gouvernement est en lutte avec la nation, nécessité qui déshonore la magistrature et la police, console les malfaiteurs et décourage les honnêtes gens. »,  
(Louis-Auguste Rogeard),

In November 2011, it was officially created the Brazilian Truth Commission, in a ceremony attended by the President of the Republic, Dilma Rousseff – the first women elected President in the country and an ex-opponent to the Brazilian military dictatorship who was, herself, captured, imprisoned and tortured when she was a 22 year old student, in 1970 -, the minister of Human Rights, also a woman, other ministers, members of parliament, generals and the family members of the dead and disappeared persons during the dictatorship.

The act of creation of the commission made evident its difficulties. The daughter of one of the disappeared, Rubens Paiva, an ex-Member of Parliament, had been chosen to speak on behalf of the political prisoners and the families of the disappeared, but her discourse was canceled under the allegation that it would constrain the military officers present to the act. In her discourse, she mentioned the president's past and recalled the first public act, realized in 1973, after the hardening of military rule in Brazil which started

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in 1968. On that occasion, almost forty years ago, it was distributed an open letter to the population with the word of command: "Today, silence means consent".

This presentation focus on the Truth Commission in Brazil, by proposing a reflection on both the meaning of "truth" and "silence" and the unexpected difficulties that arise when a country tries to install a truth commission twenty five years after the alleged end of the authoritarian regime.

Just as there are several truths, silence can have several meanings and people remain in silence for different reasons. There are those who do not want the truth to appear. There are others who just do not want to recall painful experiences which, at a high cost, they achieved somehow to elaborate. This perspective allows the understanding of how people that were in opposite sides during the dictatorship may now resist to breaking the silence. By considering the truth commission unnecessary, the opinion of the victims of the dictatorship may coincide with that of their torturers, who call it "revenge". Both seem to forget that the strategy of silence leaves many questions unanswered, and the search for answers becomes, sooner or later, inevitably necessary.

### Transitional Justice

If in the eighties the Latin-American countries assisted to the transition from authoritarian regimes to democracy, in recent years many people have been questioning the manner in which these transitions were made. Above all, the amnesty of the crimes and atrocities perpetrated under the military dictatorship is nowadays back into the public agenda and, while our neighbors have already initiated a process of revision of the amnesty that emphasizes the role of national memory, in Brazil this process is still to be initiated and already divides the decisive political actors.

The central aim of transitional justice is to answer some relevant questions. How to turn certain pages in history and at the same time to restore the cohesion inside hurt and divided communities? How to assure the best affordable transition to democracy, the rule of law and peace when violence and repression left deep scars on the bodies and the souls? The amnesty is a solution that has some advantages, like to close civil wars whose outcome is uncertain, to negotiate the return of the army to the barracks and to ensure social peace. Its costs, however, can be considerable, as there is an immense accumulated resentment on the part of the victims and the society renounces to take

conclusions from the past in such a way as to avoid its return. The page is turned over before it having been read, and nothing prevents the same horrors to be rewritten.

This old issue in history, for the ancient Greeks had already formulated it, acquires dramatic contours in contemporary Brazil. While our South American neighbors have already reviewed their laws of amnesty, reaffirm the importance of the right to truth and memory, and even take some of the violators of human rights during the regimes of exception to the witness stand, in Brazil the debate on the amnesty law is only starting.

In the last two and a half decades, the perception on amnesty has undergone meaningful changes, as can be corroborated by the experiences of Latin America, South Africa, Yugoslavia, Rwanda, Sierra Leone, East Timor, Cambodia, the International Criminal Court inaugurated in 1998, and which secured a conviction against Uganda in 2005. At the beginning of this evolution, there lies the progressive affirmation of the international law and the idea of non prescriptibility of certain crimes. From a double origin, constituted on one side by the humanitarian right, whose landmarks are the institution of the Red Cross in 1863, the Geneva Conventions of 1864 and 1949, the Nuremberg Tribunal which distinguished the crimes against humanity from the war crimes; and on the other side by the human rights stated by the United Nations Human Rights Declaration from 1948 and the regional pacts or specific texts; the two traditions converged at the end of the twentieth century. The present consensus is that an amnesty can only be limited, for it cannot cover more serious crimes like war crimes and crimes against humanity.

At this point one can perceive the importance of transitional justice which, according to the definition proposed by John Elster, "is made up of the processes of trials, purges, and reparations that take place after the transition from one political regime to another". (Elster, 2004) The pursuit of retrospective justice is an urgent task of democratization, as it highlights the fundamental character of the new order to be established, an order based on the rule of law and on respect for the dignity and worth of each human person. Yet it is also one of the most difficult choices to be made by any regime, as the effort to restore truth and justice where before reigned denial and impunity is frequently identified with a disruptive and retaliatory action. In such context, the temptation is great to promote a politic of oblivion and forgiveness in order to achieve reconciliation. Human right activists, however, do not cease to affirm that certain crimes are so serious that the wounds they inflict upon society cannot simply be swept under the carpet. Recent examples show that there are in fact many options between the indefensible choice of total oblivion and the improbable realization of complete justice. (Méndez, 1997)

The difficulty, and at the same time the richness, of the theme of transitional justice is that it deals with the promotion of an uneasy conciliation of many interests:

- the imperative of truth (right to memory);
- justice and reparation (right of the victims);
- the non repetition and reconciliation (democracy).

With respect to the imperative of truth, there is a meaningful anecdote about the General de Gaulle who, when president of France, in 1969, vetoed the disclosure of a film on the collaboration of the French people with the German forces of occupation during the Second World War. “We do not rebuild a nation with truths, but with myths”, would have affirmed de Gaulle on that occasion. (Siefert et alii, 2008) The problem with official forgetfulness, that is the one supported by state authorities, is that it represents a mortgage difficult to redeem. A collective amnesia is simulated in the name of the understanding of the present facing the future. The psychoanalysts know, however, that to occult the truth and pretend to ignore it compromises any attempt to rebuild a society taking as a principle peace and harmony. In the long run, sacrificing the memory in the name of the present and of presumed myths can result in elevated costs.

It is necessary, then, to state clearly what happened. “To each one his truth”, as argued by some people? It is possible. But what is at stake when we talk about truth is the reconciliation of the memories, of the different imaginations of the past. The torture, for instance, is a crime against a body, but it is also a crime against the imagination. (Dorfman, 2004; Lipietz, 2008) To rebuild the truth, and this is valid also for the revision of the amnesty laws, consists in a dialogue between many generations, those who saw the crimes happen, and could find out their motives, the mechanisms, their functioning, and those which, being born after, cannot remember. The importance of memory is related with the struggle against impunity. Recent research has shown that the non revision of the amnesty laws and the non preservation of memory are related with a high rate of violence and impunity. (Sikkink and Walling, 2007)

According to this point of view, the sanction of the torturers and their conviction confirm, in such a way, the recognition of the abuses endured by the victims. The amnesty can intervene only after the conviction, the public debate, and the repentance. Here enters the question of impunity. The impunity does not hurt the souls and society as much by refusing to punish, as by refusing to condemn, to say who was the criminal and “how much costs” the crime. And the debate must be public. Only then can the amnesty come.

It becomes necessary, then, to pass by the themes of justice and reparation, which are related with the right of the victims. We enter here in the realm of the facts, the material, psychological and physical wounds. Who has to pay? The criminals, and, in their absence, the State which must say: “as the representative of the whole society, I failed to protect my citizens and assume the responsibility of reparation”.<sup>3</sup>

The justice opposes itself to impunity. When it is necessary to do justice, the process serves first of all to tell who has been the victim. Many victims of torture and of the persecution by dictatorships say they feel at the same time as victims and as culprits. Well then, the justice starts by telling that there were victims and that there were culprits. And that those that have been presented as “culprits” when they were arrested, kidnapped or executed, were indeed the victims. Until a third actor, through his symbolic role and his mission of rendering judgment in behalf of the society do not state clearly: “these citizens have been victims of a barbarity and there have been people and organizations that perpetrated them”, there is no possible reconciliation. (Lipietz, 2008)

What is at stake here is, fundamentally, the idea of citizenship which, certainly not by chance, is rather problematic in Brazil. As argued by Pablo de Greiff, “one of the main aims of transitional justice is to return (or, in some cases to establish anew) the status of citizens to individuals” (De Greiff, 2006, p. 460) Only at this point, when a minimum lawful state would have been reestablished guaranteeing the right of the victims, with the reestablishment of justice and eventual reparations, it will be possible to think about the next step represented by the amnesty and the reconciliation much necessary to the reconstruction of democracy. It is a much painful albeit decisive process. The declaration of a Rwandan government official who lost seventeen members of his immediate family during the genocide that left over 500,000 dead in that country is illuminating on this respect:

“With each day, we are able to forget more. We must remember what happened in order to keep it from happening again. But we must forget the feelings, the emotions, that go with it. It is only by forgetting that we are able to go on.” (Hayner, 2011)

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3 It is in this sense that we must perceive all the importance of the declaration of the president of Brazil, Luís Inácio Lula da Silva, while in official to Senegal, in the Island of Gorée, at the Door of no Return, which was the place from where the Africans were embarked to a life of slavery and suffering: “I would like to say, president Wade, to the people of Senegal and the people of Africa, that I have no responsibility for what happened in the XVIII century, in the XVI and XVII centuries, but I think it is a good politic to say to the people of Senegal and the people of Africa: I beg your pardon for what we have done to your people.” (Presidência da República, PR741, 2005)

Because it deals with a past of violence and abuses of power of all kind, transitional justice is a painful process, but much necessary to the reconstruction of an authentic democracy. In effect, notwithstanding the many divergences that may exist between the various definitions of democracy, it is possible to establish a minimal consensus about the statement that “democracy is a system for managing difference without recourse to violence”. (Bloomfield, Barnes, Huyse, 2003) Besides, there is no universally applicable reconciliation model. While democratic compromise produces solutions regarding many issues in conflict, and can, therefore, be considered in a theoretical discussion, amnesty and reconciliation, which are the final goals of transitional justice, addresses the relationships between those who will have to implement those solutions, hence the necessity to consider the peculiarities of each case. (Bloomfield, Barnes, Huyse, 2003)

In summary, what one expects from a just and democratic society is that the victims of human rights violations obtain justice, which means that the responsible for the crimes must be judged and, when convicted, they must be duly punished. This simple procedure is not viable when we deal with mass violence episodes, for there are too many victims and criminals. Even an effective justice system would be overloaded. This is the reason why some countries have to find alternative solutions. Some of them opt to forget the past and to promote a national amnesia. The problem is that the victims can even silence about their experience, but they will never forget the suffering. Other countries decide to face the past, to clear up the facts, to listen to the account of the victims and their torturers and executioners, to hold the criminals responsible for their crimes, in short, to make justice, and maybe to forgive in order to promote a national reconciliation. (Minow, 1998)

In some occasions, the normal justice procedures are inefficient, for the crimes or their magnitude are so monstrous that they were not foreseen by the law books. This situation has been accurately expressed by Hannah Arendt, in reference to the crimes of genocide: “crimes we cannot punish, nor forgive”. In her own words: “All we know is that we cannot punish nor forgive these crimes and that, consequently, they transcend the realm of human affairs and human power capacity, which they destroy both radically wherever they appear.” (Arendt, 2001)

That is the reason why, in some circumstances, the truth commissions can perform as an alternative to the right. (Lefranc, 2002 and 2008) The french magistrate Antoine Garapon has similar views when he states that the truth commissions can “be satisfied with the establishing of the facts and the evaluation of the number of victims, take a public form or a more confidential one, imbricate themselves in the proceedings (authorizing

connections between its revelations and possible inculpations) or, inversely, be inscribed in parallel, even supersede justice (and block any procedure for the individuals that would have served as witness). All of them rejoin nevertheless in the desire to surpass the strict judicial logic and the sentence model.” (Garapon, 2002, p. 282-283)

### The quality of democracy

A recurrent diagnosis of Latin-American political systems is that they are democracies still not consolidated. Some fundamental components of more advanced democracies would be missing, which would explain why the believe in democracy as the better political regime is so low in Latin-American countries as compared with Europe. (Calleros, 2009). A democracy of “good quality” guarantees to citizens a high level of liberty, political equality and accountability, exercised by legitimate, legal and stable institutions. According with Larry Diamond, the consolidation of democracy is the result of a process which results in a wide and deepened legitimation, in such a manner as all the significant political actors, both from elites and mass, believe that the democratic regime is the more wise and appropriated for their society, better than any other realist alternative they can figure out. The political players must consider democracy (as well as the laws, the procedures, and the institutions it specifies) as the only game in town, the unique viable way to govern society and defend its own interests. (Diamond, 1999)

When, after a transition from an authoritarian regime to democracy, we assist to its consolidation, there happens a change in the political culture that results in the internalization of the rules, procedures and practices of democracy by the many actors who conform instinctively and routinely to the rules, be they formal or not, even when there are serious disagreements. As argued by Larry Diamond, “consolidation requires more than a commitment to democracy in the abstract, that democracy is 'in principle' the best form or government. For a democracy to be consolidated, elites, organizations, and the mass public must all believe that the political system they actually have in their country is worth obeying and defending.” (Diamond, 1999, p. 66) This legitimacy involves a shared normative and behavioral commitment to the specific rules and practices of the country's constitutional system, what Juan Linz calls “loyalty” to the democratic regime. (Linz, 1978)

Originated from the studies about political transitions from an authoritarian regime to a democratic regime, the works on the theme of democratic consolidation aim at a posterior period. In effect, the studies on political transitions focus the moment of the initial choices realized by a restricted elite, while the works on consolidation focus a posterior

moment of diffusion of the democratic rules and stabilization of the institutional context. It is for this reason that Guillermo O'Donnell distinguishes two transitions in the processes of democratization: the first transition from an authoritarian regime to the introducing of a democratic government; and the second transition from the introducing of this government to the consolidation of democracy, or the effective operation of a democratic regime. The paths that lead from a democratic government inaugurated after the first transition to an effectively democratic regime are various and uncertain, as it is much easier and consensual to criticize an authoritarian regime than to criticize a democratic government. For this reason, this author insists that the only way to deepen the process of democratic construction is to practice democracy in the political sphere and, at least, to combat despotic patterns of authority in all levels of society.

#### The present debate on the amnesty law in Brazil

At this point, it is clear how much the discourse on transitional justice is related with the debate over the quality of democracy. Controversial themes such as the subordination of the military chiefs to civilian authorities or the judgment of the officers accused of common crimes by civilian tribunals instead of military courts have not yet been considered only in countries that have not adequately surpassed their authoritarian past. This contributes to the degradation of the quality of democracy.

It is not by chance, therefore, if the launching of the Third National Plan of Human Rights (PNDH-3) by the Lula government, in December 2009, caused so much uneasiness in some sectors of the armed forces in Brazil, up to the point of transforming the question of human rights and the PNDH-3 in one of the hottest topics of the presidential campaign in 2010. The controversy was caused by the inclusion of a proposal to “create a working group to follow up, discuss and articulate, together with the National Congress, initiatives of laws which propose to revoke the remaining laws of the period 1964-1985 which are contrary to human rights or have supported serious violations.” Immediately, sectors of the higher ranks of the armed forces accused the federal government of having the intention to revoke the Amnesty Law N° 6.683/79 dated from 1979 and launched a counterattack in the media. Consulted by the Brazilian bar association over the interpretation that should be given to the Amnesty Law, the judges of the Supreme Federal Court decided on the 29<sup>th</sup> April 2010 that the referred law protects the torturers and cannot be disputed.<sup>4</sup> It is

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4 According to Criméia Almeida, from the Commission of the Relatives of the Dead and Disappeared, “with this decision the Supreme Court did what João Batista de Oliveira Figueiredo (the last military President) had not the courage to do. The ex-president was more secretive. The Amnesty Law does not say that

revealing that, exactly one year before, in another judgment which took place on the 30<sup>th</sup> April 2009, the same court decided that the Press Law of 1967 was incompatible with the present Federal Constitution which entered into force in 1988 and must be respected. Consequently, on the 24<sup>th</sup> November 2010, the Brazilian government was notified by the Inter-American Court of Human Rights which stressed the incompatibility of the Amnesty Law with the international obligations assumed by the country under the American Convention on Human Rights. Based on international law and its constant jurisprudence, the Inter-American Court concluded that the provisions of the Amnesty Law that prevent the investigation and punishment of serious human rights violations are incompatible with the American Convention and lack legal effect, and as such, cannot continue to represent an obstacle for the investigation of the facts of that period or the identification and punishment of those responsible.<sup>5</sup> This historic decision represents a serious onus for the Brazilian government since the Court decided that the Brazilian State must criminally investigate the facts of that period in the ordinary justice system and that the time elapsed since the facts cannot be invoked in their favor. Among other things, the Court also admonished the National Congress to elaborate a law defining the crime of forced disappearance of individuals and to create a Truth Commission.

After many hesitations the Chamber of Deputies approved on the 21<sup>th</sup> September 2011 the creation of a Truth Commission with the term of two years to “investigate and clarify the serious violations of human rights” perpetrated under the military rule. However, the text of the law approved does not modify the Amnesty Law of 1979, which precludes the judgment of the violators of human rights during the dictatorship and their subsequent criminal responsibility. Moreover, the period to be investigated was extended to the two decades prior to the military regime and the truth commission will officially investigate the crimes perpetrated between 1946 and 1988. The text of the law did not take into account the critics of the relatives of the dead and disappeared under the military rule. For this reason, many refer to the approved commission as the “half truth commission”. The federal deputy Luiza Erundina (PSB-SP), an old friend of the relatives of the dead and disappeared who when mayor of the city of São Paulo between 1989 and 1993 commanded the exhumation and identification of more than one thousand corpses from a

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those who committed common crimes are pardoned.” At the occasion, some analysts even considered that the hearing of this decision at the Inter-American Court of Human Rights might cost Brazil its coveted seat at the United Nations Security Council. (Zero Hora, 30/04/2010)

<sup>5</sup> The official text of the Judgment can be viewed at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_219\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_esp.pdf)

clandestine cemetery created by the military in 1971<sup>6</sup>, is part of those who suspect that the government does not have the intention to find out all the truth, based on four weaknesses she identifies in the approved law. The first one is that the commission will not have budgetary autonomy: it will remain dependent on allotments from the presidency and will lack independence and autonomy. The sessions will be closed to the public and with many arrangements to guarantee secrecy. The second is that it will have only two years to conclude the activities. The third weakness is that the Commission will be composed by only seven persons, including a military, appointed by the Presidency without participation of civil society to investigate such an ample period of time. The fourth is that the text of the law that created the Commission mentions truth, memory and national conciliation, but does not refer to justice.<sup>7</sup>

In order to appropriately assess these critiques, we must remember that the majority of the truth commissions created in Latin-America were installed just after the period of exception they were to investigate, as can be confirmed on the chart below (Chart 1: Truth Commissions created in Latin America). Therefore, a truth commission that will start to function more than 25 years after the end of the military regime, limited by the working conditions determined by its constitution and whose results will not be directly connected with a judicial procedure does not seem much promising.

Chart 1: Truth Commissions created in Latin America

Country	Years of operation	Dates covered
Bolivia	1982-1984	1967-1982
Argentina	1983-1984	1976-1983
Uruguay 1	1985	1973-1982
Chile 1	1990-1991	1973-1990
El Salvador	1992-1993	1980-1991

6 The information that corpses of oppositors of the regime had been buried in a common grave in the neighborhood of Perus, on the western limits of the city of São Paulo, came to the surface on the 4<sup>th</sup> September 1990 and was confirmed later by the deposition of a grave digger who had witnessed the transportation of corpses from the police trucks, leaving a trace of blood until the place where they were deposited. The investigation that ensued was the first initiative at a government level addressed to the searching and opening of the truth, archives and information from that period. Two days later Erundina determined the place to be guarded by the Metropolitan Civilian Guard after members of the Civilian Police tried to take the corpses from there. On the occasion, she declared: "I will go to the ultimate consequences, surpassing all the obstacles that may appear. I want to contribute for the peace of the families of the disappeared. On finding their disappeared relatives, even dead, they will be relieved. I have a feeling of profound responsibility, since I am the mayor and have participated of struggles with many of those who are missing today. I have a historic responsibility in the elucidation of everything." (Patarra, 1996, p. 171)

7 Luiza Erundina, interview with the authors, September 2011, São Paulo.

Haiti	1995-1996	1991-1994
Ecuador 1	1996-1997	1979-1996
Guatemala	1997-1999	1962-1996
Uruguay 2	2000-2003	1973-1985
Panama	2001-2002	1968-1989
Peru	2001-2003	1980-2000
Chile 2	2003-2005	1973-1990
Paraguay	2004-2008	1954-2003
Ecuador 2	2008-2010	1984-2008

Source: HAYNER, P. B. *Unspeakable Truths: transitional justice and the challenge of truth commissions*. New York: Routledge, 2011.

Moreover, while in many countries the process of restoration to democracy comprehends a political transition and mechanisms of transitional justice, in Brazil the political transition was achieved without the necessity to look back and to purge the horrors perpetrated under the military rule.

The comparison with the processes of transition in Argentina, Brazil and Chile is illustrative on this concern. While the Argentinean and Chilean dictatorships were relatively more violent and repressive than the Brazilian one, their transitions to democracy were shorter. Between the announcement of the intention to give back the power to civilians and the taking of office of a president elected by the people, the Brazilians had to wait 15 years, while in Argentina and in Chile the whole process did not last more than two years.

The historic reconstitution of the process of transition in these three countries and the recent unfolding of the revision of the amnesty allow to highlight some dates and to place them in a chronological axis in order to facilitate the comparison.<sup>8</sup>

Chart 2: Chronology of the transition in Brazil, Argentina and Chile

<p><b>Brazil</b></p> <p>1974 – Announcement by the military of the intention of giving back the power to the civilians</p> <p>1979 – Amnesty Law</p> <p>1985 – First civilian president to be elected after the period of authoritarian rule</p> <p>1988 – New Constitution</p> <p>1989 – Direct popular election for president</p> <p>1995 – Beginning of the Reparations</p> <p>2007 – First Declaratory Proceedings of a victim of torture against the Federal Government.</p>
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<sup>8</sup> (Mezarobba, 2007; Novaro and Palermo, 2007; Fausto and Devoto, 2004) were consulted to the reconstitution of the events.

## Argentina

1982 – Announcement of the intention of giving back the power to the civilians

1983 – direct popular election for president, first civilian president, Amnesty (Law of National Pacification, also known as Law 22.924, from the 22<sup>th</sup> September 1983) and revision of the amnesty (the 18<sup>th</sup> December 1983, Alfonsín signed the Decree 158 establishing that all the members of the first three military Junta should be judged by the higher military court in the country, the Supreme Council of the Armed Forces; and the 27<sup>th</sup> December 1983 promulgated the Law 23.040, that declared invalid the auto-amnesty newly conceded by the military)

1984 – September, conclusion of the report of the CONADEP (National Commission on the Disappearance of Persons), subsequently published under the title *Nunca Más*

1985 – 9<sup>th</sup> December, conviction by the Federal Court of the members of the military juntas (the generals Jorge Videla and Emilio Massera to perpetual imprisonment, the general Roberto Viola to 17 years of imprisonment, the admiral Armando Lambruschini to 8 years, and the air force general Orlando Agosti to four and a half years).

1986 – Law of the Final Point

1987 – Law of Due Obedience (nº 23.521)

1989 – Laws of Forgetfulness

1994 – Payment of the first reparations

2005 – 14<sup>th</sup> June 2005, in a historic decision, the Argentinean Supreme Court declared invalid and unconstitutional the laws of the Final Point and of Due Obedience, opening, definitively, the possibility for the prosecution of the main crimes committed during the military rule.

## Chile

1978 – Law of Amnesty

1988 – 5<sup>th</sup> October, plebiscite on the permanence of Pinochet with was rejected

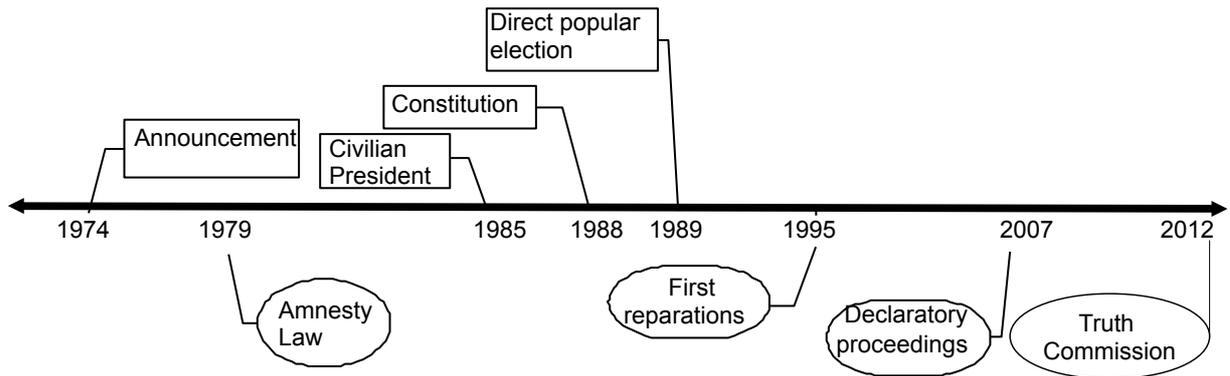
1989 – Presidential election, civilian president, reforming of the constitution

1990 – National Commission of Truth and Reconciliation

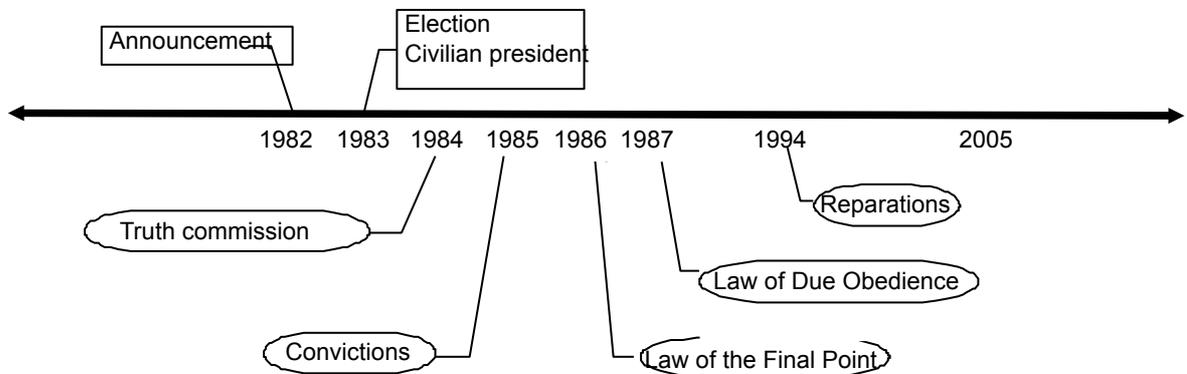
1991 – Official asking of pardon and reparations

2002 – First conviction

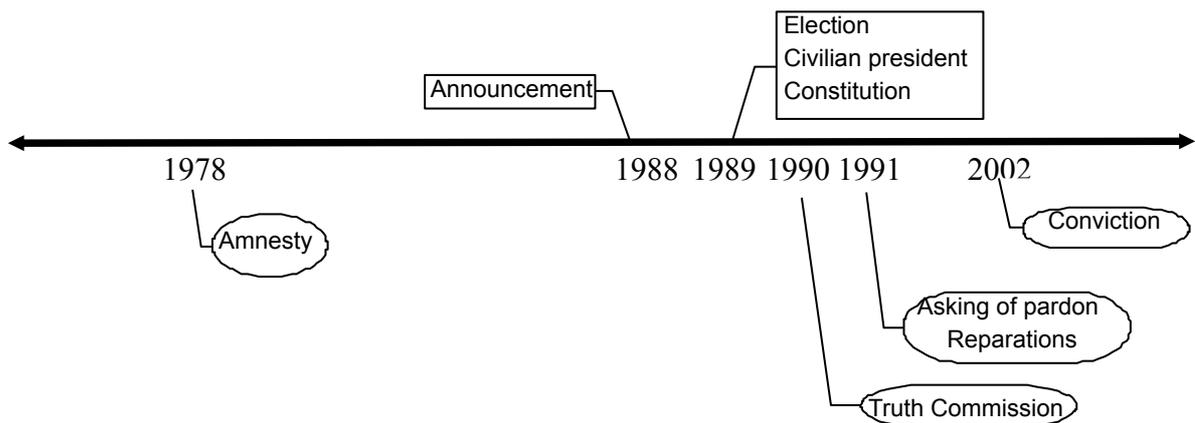
## Brazil



## Argentina



## Chile



On the superior part of the axis are indicated the relevant events relative to the political transition, while below it are indicated the facts related with the transitional justice. The comparison between the three countries shows that the process of transitional justice

extends for a longer period than the political transition in the case of Argentina and Chile. Since in Brazil the political transition was extremely extended in time, it can be inferred that process of transitional justice and the revision of the amnesty will be even slower.

### Truth Commissions

Two reputed precedents may be considered when debating truth commissions: the Argentina's National Commission on Disappearance of Persons (CONADEP) and the South African Truth and Reconciliation Commission (TRC).

In the eighties, Argentina struck the attention of the international community for two widely divergent reasons: atrocious human rights violations, and subsequent efforts to punish those responsible. Between 1976 and 1983, the country was governed by a military dictatorship that committed horrendous crimes against thousands of citizens. With the election of a civilian president, Raúl Alfonsín, in 1983, world public opinion focused on his efforts to reveal the hidden history of the crimes of the so-called “dirty war”, and his government efforts to hold its authors accountable. Almost instantly, Argentina lost its pariah status in the international community and became a model demonstrating the possibility of bringing some of the responsible for the atrocities to the witness stand. (Mendéz, 1991) This radical change was the result of a national revulsion against the cruelties practiced by the government of the generals, as properly stated by Inés González Bombal: “I affirm that what is here exposed is what all the Argentinean society experienced when, upon confronting the reflex of itself, it retroceded in front of the horror, and, judging its past, enunciated a new principle for the culture: “Never More” (power without law).” (Bombal, 1995)

The National Commission on Disappearance of Persons (CONADEP) was established by President Raúl Alfonsín on the 15<sup>th</sup> December 1983, upon the restoration of democracy in Argentina with the mission of hearing testimonies from relatives of the disappeared, survivors, and other witnesses; gathering evidence; inspecting the clandestine detention centers where the disappeared were held; localizing the kidnapped children; denouncing to Justice each and every attempt to hide or destruct proofs linked with these facts; and publishing a final report. The CONADEP was composed of ten personalities from civil society and three representatives from the Chamber of Deputies. (Crenzel, 2008) On the 20<sup>th</sup> September 1984, the CONADEP delivered its report to the President: 50 thousand pages and a summary published with the suggestive title *Nunca Más*, with a list of 8,961 disappeared and 365 clandestine detention centers. The report

describes with numerous examples the methods of repression and occultation of the facts. The conclusion emphasizes the incapacity of the judicial system to fight against the disappearances, the existence of a civilian support to repression and the responsibility of the armed forces. (Lefranc, 2002)

The book *Nunca Más* exposed the characteristics and dimensions of the system of disappearance of persons and the responsibility of the State. Immediately the report became an unprecedented bestseller on the subject. It was translated into English, Italian, Portuguese, German, and Hebrew and was also published abroad, with 503,830 copies sold as of March 2009. (Crenzel, 2010) The importance of the *Nunca Más* was even more increased when the investigations undertaken by the CONADEP offered resources for the strategy of the prosecution in the judgment of the military juntas and the tribunal legitimated its conclusions as truth and accepted the report as a proof. Furthermore, the particular treatment of the past of political violence in Argentina caught the attention of other actors of the processes of democratization in other countries in the region. In this context, the CONADEP and the *Nunca Más* were considered by diverse States and human rights organizations as vehicles for the transmission and exposition of the political violence underwent by the peoples of the continent in the seventies and eighties. (Sikkink, 2008) Thus, the truth commissions became the principal instrument of production of a knowledge and a truth about these processes and – even if these investigations were not associated to judicial processes, or when their reports have served to other narrative and explanatory strategies –, the Argentinean *Nunca Más* constituted itself in an unavoidable model for the countries of the region:

Chart 3: Reports produced in Latin-America inspired in the *Nunca Más*

Title of the report	Country	Year
<i>Brasil: Nunca Mais – um relato para a história</i>	Brazil	1985
<i>Nunca Más</i>	Uruguay	1989
<i>Paraguay Nunca Más</i>	Paraguay	1990
<i>Informe de la Comisión Nacional de Verdad y Reconciliación</i>	Chile	1991
<i>De la locura a la esperanza: la guerra de 12 años en El Salvador</i>	El Salvador	1993
<i>Guatemala: memoria del silencio</i>	Guatemala	1996
<i>Guatemala: “Nunca Más”</i>	Guatemala	1996
<i>Colombia “Nunca Más”: crímenes de lesa humanidad</i>	Colombia	2000
<i>Informe final</i>	Peru	2003

From the middle of the nineties, the *Nunca Más* entered in a new cycle of massive diffusion on being considered as a privileged instrument for the transmission to the new generations of some of the past. The book was incorporated in the educational curriculum, edited and distributed with newspapers of national range and together with films of that period. But nothing is more eloquent than the introduction to the report: “Many of the events described in this report will be hard to believe. This is because the men and women of our nation have only heard of such horror in reports from distant places. The enormity of what took place in Argentina, involving the transgression of the most fundamental human rights, is sure, still, to produce that disbelief which some used at the time to defend themselves from pain and horror. In so doing, they also avoided the responsibility born of knowledge and awareness, because the question necessarily follows: how can we prevent it happening again? And the frightening realization that both the victims and their tormentors were our contemporaries, that the tragedy took place on our soil, and that those who insulted the history of our country in this way have yet to show by word or deed that they feel any remorse for what they have done. With this first stage of investigations complete, the Commission on Disappeared People takes the weighty but necessary responsibility for affirming that everything set out in this report did indeed happen, even if some of the details of individual cases may be open to question. These questions can only be resolved conclusively by the testimony of those who took part in the events.” (Conadep, 1984, p. 15)

The South African Truth and Reconciliation Commission (TRC) was created by an Act of the Parliament<sup>9</sup> in 1995, with a mandate to focus mainly on three issues: to establish as complete a picture as possible of past human rights violations committed on both sides of the political spectrum; to give victims of human rights abuses the opportunity to speak publicly about the violations they endured in the past; to concede amnesty to the perpetrators of politically motivated crimes against human rights on condition that they give a detailed account of their acts and omissions. (Gobodo-Madikizela, 2003) One of the strongest arguments in favor of a truth commission in South Africa was the lack of faith in the courts. It was widely perceived that apartheid crimes could not be handed over to the old criminal justice system.

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<sup>9</sup> Promotion of National Unity and Reconciliation Act 34 of 1995.

## The Brazilian Truth Commission

When confronted with these previous experiences, the Brazilian Truth Commission appears with very vague objectives. An evidence, however, is that it will not be used to produce evidences that could lead to judgments of the crimes committed before 1979, henceforth protected by the Amnesty Law. In consequence of this very law, it does not make much sense to speak of amnesty and reconciliation in Brazil, since according with the transitional justice principles exposed above the final purpose is precisely the amnesty. Hence the frequent accusations that it is a question of revenge and of a supposed intention of reviving the wounds, with the possibility of endangering the process of democratic consolidation.

A legislative bill to amend the Amnesty Law, registered in the Congress by the deputies Luiza Erundina (PSB/SP) and Chico Alencar (PSOL/RJ), was rejected in September 2011 by the Foreign Affairs and National Defense Commission, which renders unlikely its approval. The bill determines that the crimes committed by public officers against adversaries of the dictatorship cannot be pardoned. The decision in the Commission was taken only after many maneuvers on the part of the Government to withdraw the subject from the agenda until an agreement could be accorded in the Congress with respect to the Truth Commission. According to the Government appraisal, the bill would provoke adverse reactions from military sectors who could block up the creation of the Truth Commission. (O Globo, 14/09/2011)

For the voting of the Bill that created the Truth Commission, the Government took advantage of a provision of the internal rule of the National Congress that allows the Government to request “urgency very urgent” (*urgência urgentíssima*) on a determined bill which then goes immediately to the plenary assembly for the vote of the deputies. By this procedure, it is not necessary to announce the voting beforehand and the result is the disarticulation of the opposition. On this particular episode, the deputy Luiza Erundina can give a detailed account:

“They requested urgency very urgent which means that they do not need to publish it previously, and the reporting is made at the same moment in which the bill starts to be debated. They choose a reporter who does know nothing about this matter, who was never involved in this cause. He reported the bill in a few minutes, at the end of a session, at night, and with a very strong pressure all the day long, with the presence of ex-ministers, Nilmário Miranda, for instance, who has been National Secretary for the Human Rights, who when militant also suffered under the military rule, who stayed all day long patrolling

the house, in such a way as to inhibit us because he circulated all the time in the plenary, sitting with us and chatting, but it was always to intimidate, to pressure. And all the ministers passed the whole afternoon and the whole evening: the Minister of Justice, the Minister of Human Rights, the Minister of Defense, assessors like Genoíno who has already been deputy, the Leader of Government, the Leader of the Workers Party who is a very powerful young, imposing a pressure and an absolute intransigence regarding what was to be discussed, for it is always possible to propose amendments, motions, but they only accepted amendments and motions from the DEM, the PSDB and the PPS, precisely the parties from the opposition to the government. They not even accepted one of the amendments which considered the themes we had debated with the relatives. It was ostensible. It was as if they said: we don't want to hear you. And it was not us, the deputies, but it was the relatives. Of course, they know it, we represent the relatives. We resent the disrespect for the relatives. It is something unacceptable, the disregard, the insensibility.”

It may be surprisingly, but the strategy for preventing undesirable modifications in the bill that created the Truth Commission in 2011 are much similar to the ones employed in 1979 for the approval of the Amnesty Law. Created in 1975, by Therezinha Zerbine, the wife of a discharged general, the Feminine Movement for the Amnesty (MFPA) evolved in the subsequent years in an important social movement against the dictatorship. The movement was amplified in 1978 with the creation of the Brazilian Committees for the Amnesty (CBA) that defined as its principles the fight for:

- an ample, general and unrestricted amnesty for those considered as political criminals and “enemies of the regime”;
- the eradication of torture;
- the elucidation of the circumstances in which occurred the tortures, deaths and forced disappearances;
- the restitution of the mortal remains;
- the juridical accountability of the State and the repression agents;
- the dismantling of the repressive apparatus;
- the end of the “laws of exception”.

Naturally, the military regime had other plans for what would happen to be a blanket amnesty aimed at conciliation. To vote the partial and reciprocal amnesty desired by the high ranks, a special operation was organized on the 22<sup>th</sup> August 1979 when 800 soldiers

from the Army and the Air Force Police in plain clothes occupied the galleries of the Congress at dawn. On that afternoon, however, the militants defending the amnesty achieved to occupy the place. The press had made public the order issued by the Presidency: it was imperative to approve the bill sent to the Congress in substitution to the bill proposed by the CBA without amendments, otherwise there would be a complete veto from the President to the amnesty law. The bill proposed by the CBA clearly excluded the human rights violators from the amnesty and stated that “are excepted from the benefits of the amnesty the acts of abuse or torture, having they resulted in death or not, practiced against political prisoners”. The Government's victory was guaranteed by his numerical majority in the Congress, the rigid rules of orders and procedures, and the intricate voting ritual. (Zerbine, 1979; Teles, 2010; Greco, 2003)

In a letter dated from the 20<sup>th</sup> July 1979 and addressed to the Senator Teotônio Vilela, who presided the National Congress Commission on the Amnesty, the relatives of the political prisoners and disappeared admonished: “We, as an integral part of the Brazilian Nation, do not accept an amnesty in half, and even less deaths or lives in half.” (Vilela, 1982) One of the 23 signatories was Vera Paiva, who was prevented from speaking by a military veto in the inaugurating ceremony of the Truth Commission, 32 years later, as related at the beginning of this text.

It is for this reason that Luiza Erundina considers that to create this lame truth commission is worse than not to have one. In her opinion, if in two years from now the Truth Commission produces a negligent report, there is a real risk that those who wait for this since thirty years will lose heart as their fighting willingness will cool down. Especially that the relatives are becoming old, some of them are dying. She remembers the situation of the mother of a disappeared son, now aged 97, who still lives in the same house and has to climb the stairs to go to the bedrooms: “She does not accept to leave this house, for in case her son reappears he will know where to find her. She does not accept to change the number of telephone, and every time it rings she think it may be her beloved son. The Government knows it. She already attended reunions with Lula, with high placed personalities.”

The pain

Would the intention of the Truth Commission be to gather information on the disappeared and the crimes committed under the period of exception, the relatives of the disappeared should have be consulted, the more so as they have three decades of

experience in the question that already resulted in the *Brasil Nunca Mais* project, coordinated by the Cardinal-Archbishop of São Paulo Dom Paulo Evaristo Arns. From 1979 to 1985, the final years of the military dictatorship, the members of the project clandestinely gathered information on 1,800 episodes of torture concerning 17,000 victims after the examination of 707 files related to trials in the Superior Military Court. The information were kept secret and were only published with the return to democracy.

In his preface to the report, Dom Paulo remembers two poignant episodes. “One day”, he tells, “on opening the door of my office, came to me two ladies, one young and the other in an advanced age. The first, after having taken a seat in front of me, put a ring upon the table and said: 'It is my husband's wedding ring, who disappeared ten days ago. I found it, this morning, on the threshold. Priest, what does this devolution mean? Is it a signal that he is dead or an advice that I should persist in searching for him?' Until today, neither she nor I have had an answer to this distressing question. The older woman asked me the question she was repeating since months: 'Do you have any information of the whereabouts of my son?' Right after the kidnapping, she came every week. Then she reappeared from month to month. Her figure looked evermore with that of all the mothers of disappeared sons. For more than five years, I accompanied the search of his son. The body of the mother seemed to diminish, from visit to visit. One day she also disappeared. But her suppliant look of mother never extinguished from my retina.” (Arns, 1985)

What these two testimonials make clear is the individual characteristic of the suffering caused by political violence and the pain that results. The anthropologist David Le Breton says that every kind of pain remit to the interrogation of the meaning of our place in the world (Le Breton, 2010). In the case of the pain associated to violence, the moral question of questioning the place of the one who suffers in the world is put in a still more acute manner. Actually, violence can be defined as an unbalanced relation in which one submits the other at the same time as it is related with the unspeakable, for it represents a traumatic experience. Fiona Ross, who studied the South Africa's Truth and Reconciliation Commission, makes it clear when she writes about the “complexities of the process and the moral decision that is involved in speaking out. (...) It takes courage both to speak of harms done and to be silent in their face and aftermath. Part of the stakes of talking about rape is the undoing of familiarity. It is not just specific relationships – between oneself and a rapist – that are implicated. To speak about rape is to speak about larger systems of power that are at the base of the world one inhabits”. (Ross, 2010) She could make the same considerations on torture.

It may take a long time before the one who suffered decides to speak out of his traumatic experience. And this decision is individual. Primo Levi wrote *Se questo è un uomo* immediately after leaving the concentration camp, while Jorge Semprun waited twenty years to write *L'écriture ou la vie*, which explicits the singularity of pain. Fiona Ross reports the words of a woman who had been commander of the ANC's armed wing and was head of the Gender Commission at the opening of the Truth and Reconciliation Commission's Women's Hearings in 1997 in Johannesburg: "When today the testifiers make their sobs, they must know there's a flood of tears from those who did not even dare to come here today... because we are not yet ready to make those outward sighs of pain. As they try to free themselves today of the burden, they must know that they are freeing some of us who are not yet ready, Chairperson. I speak as one of those... I could not sleep last night, because I sat with myself, I sat with my conscience. I sat with the refusal to open those wounds." (Ross, 2003)

In 2008, the now President Dilma Rousseff was convoked by a senator to explain a declaration to a journalist when she admitted to have lied under torture during the dictatorship. The testimony she gave at the occasion makes clear the relations between torture, pain, silence and truth:

"I was 19 years old and was imprisoned for three years, and I was savagely tortured, senator. And any person who dares to tell the truth to the interrogators compromises the life of her equals, and delivers persons to death. I am very proud of having lied, senator, because to lie under torture is not easy (...) it is very hard to endure torture, because we are all very fragile. All of us are human, we feel pain, and the temptation to speak what happened and to tell the truth is very strong, senator. The pain is unbearable. You don't imagine how much it is unbearable. This is why I am proud of having lied. I am immensely proud of having lied because I saved companions from the same torture and death."<sup>10</sup>

There is no doubt that the President knows what it is to be tortured and the suffering endured by the relatives who still don't know what happened to their beloved sons, brothers, companions and parents. How to understand then the lack of leadership of the Presidency when it comes to the Truth Commission? We share the opinion of Luiza Erundina who finds it incomprehensible. Would the country had not been denounced by the Inter-American Commission of Human Rights, we certainly would not have yet a Truth Commission. Luiza Erundina says: "the government could do it differently. This

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<sup>10</sup> Session of the Senate's Infrastructure Commission held on the 7<sup>th</sup> May 2008.

government has inclusively reasons, not only political, but also historical, of legitimate resistance to a dictatorship. We cannot understand this apprehension, this preoccupation, a certain subservience with regard to the military. Evidently they have their restrictions, but up to the point of intimidating a government with a strong popular support and elected with a large popular voting is inadmissible.”

It is also surprising to verify that many victims of the dictatorship endorse the position of the military regarding the Truth Commission and argue against its installation. Many of the victims insist upon the fact that they don't consider themselves as victims. They even claim for reparations, but from another place which is that of the protagonists of a combat, who chose a side in this combat, against an illegitimate government and an arbitrary violence.

The politic of reparations, which in Brazil is limited to indemnities in money to victims of the dictatorship, was initiated in 1995, under the presidency of Fernando Henrique Cardoso. If there is a consensus among studies on transitional justice, it is that the reparations are one of the last items to be implemented. In Brazil, the reparations represent almost the unique element of transitional justice effectively carried out, and in a very partial manner as the amounts of money for the victims are much unequal and reproduce social inequalities. These financial indemnities contributed to the dilution of the collective and political meaning of the process. (Mezarobba, 2007) Since then, about 140 cases of assassination or disappearance have been recognized and the families indemnified.

The discussion on these matters remains localized as in a particular war between the relatives of the dead and disappeared and the military involved in these episodes. The military accuse the victims to have the intention to promote a revenge. In February 2010, for instance, a general said that the Truth Commission would be formed by “fanatics” and would be transformed in a “calumny commission”. (O Globo, 10/02/2010) Luiza Erundina also remembers the decisive session in the National Congress, when the right deputy Jair Bolsonaro scorned at everyone present declaring many times from the tribune: “if you think that a general will attend a meeting of the commission”.

However, this question cannot be localized, because the crimes that were committed were not isolated episodes and many in society were aware of them. As correctly expressed by Ariel Dorfman about the general Pinochet and the atrocities perpetrated in Chile under his command: “Yes, he was the culprit. Even seeing clearly that many others were also responsible, that these crimes could only be perpetrated with the

assistance of thousands and the indifference of millions, I personified on that general my own suffering and the more vast suffering of the whole country.” (Dorfman, 2003)

In a comparative study on the relation of the Judiciary and the military in Brazil, Chile and Argentina, Anthony Pereira argue that, while the Chilean military usurped the authority of Law and the Argentinean military neglected entirely the Judicial Power, in Brazil the Judiciary cooperated with the armed forces, chiefly regarding the covering of tortures. Consequently, few judges or public prosecutors have been dismissed and the great majority of them continued to exercise their functions after the end of the dictatorship. (Pereira, 2010) Physicians participated actively of the torture sessions in clandestine centers of torture financed with private funds. Some businessmen were assiduous visitors in these torture centers where they assisted the punishments inflicted to “communists”. (Lemos, 2011)

#### The arbitrary will transfigured in law

Here appears a real difficulty for the Truth Commission in Brazil. For the torture has never been publicly acknowledged by the military. It remains, in the whole country, an entirely clandestine practice. On the contrary, under the dictatorship there was a legal and formal order, transfigured in “institutional acts”, elections, political representation, a Constitution, what Irene Cardoso calls “the arbitrary will transfigured in law”, and which represents a simulacrum of law. (Cardoso, 1997) This author speaks of a “perverse structure of the regime”. Although this regime was instituted by force, it has insisted in its legality. The violence was dissimulated and disguised by a juridical façade, like a mask, an appearance of law. In fact, it was a rare moment in Brazilian history when the law overcame private interests. How then can we speak today of what happened when the Brazilian society was submitted to this simulacrum? What has changed? How can we speak today of the torture that was never admitted and which is the real problem the Truth Commission has to face? Which truth are we talking about?

As accurately perceived by Fiona Ross, the truth is not neutral: “the event is not what happens, the event is that which can be narrated”. The torturers also want to obtain the truth. And we must consider that public persons may not want to recognize publicly that they have been humiliated by inhuman practices. We face here a tragical confluence in favor of the silence. If we agree with Talal Asad who speaks of torturable corpses, we may consider that the untorturables remain in silence out of a kind of perverse hope: that the event was an aberration, not to be repeated, unique. While the torturables also remain

in silence, but for other reasons: they know that it has always been like that, that they have much to lose and don't want to be identified to outlaws. A good way to apprehend these subtleties is to read the following dialogue between the Captain Segura, the chief of police in Havana, and an English gentleman in the thriller *Our Man in Havana*, in which Graham Greene produces a kind of theory of the torturable classes:

“Did you torture him?”

Captain Segura laughed. 'No. He doesn't belong to the torturable class.'

'I didn't know there were class-distinctions in torture.'

'Dear Mr Wormold, surely you realize there are people who expect to be tortured and others who would be outraged by the idea. One never tortures except by a kind of mutual agreement.'

'There's torture and torture. When they broke up Dr Hasselbacher's laboratory they were torturing...?'

'One can never tell what amateurs may do. The police had no concern in that. Dr Hasselbacher does not belong to the torturable class.'

'Who does?'

'The poor in my own country, in any Latin American country. The poor of Central Europe and the Orient. Of course in your welfare states you have no poor, so you are untorturable. In Cuba the police can deal as harshly as they like with emigres from Latin America and the Baltic States, but not with visitors from your country or Scandinavia. It is an instinctive matter on both sides. Catholics are more torturable than Protestants, just as they are more criminal.'" (Greene, 1958)

## Conclusion

In response to the question of what remains from the dictatorship, we could answer: much, too much. In the Constitutional Assembly formed to elaborate the new Constitution promulgated in 1988, the debates popularized the expression “authoritarian debris” in reference to the authoritarian laws passed under the dictatorship and which had to be removed from the constitutional text. The 1979 Amnesty Law still remains and prevents any attempt to make justice about the many crimes committed prior to it. The Truth Commission was created only as after the denouncing of Brazil by the Inter-American Court of Human Rights and with serious limitations that justify the skepticism about its validity. What is terrible is that it ignores a fight of thirty years for the elucidation of many

obscure episodes. The Truth Commission approved with the vetoes of the military does not treat adequately the pain and suffering of the victims. The debate on the transitional justice and the revision of the amnesty in Brazil remains a localized issue, limited to the relatives of the dead and disappeared on one side, and the military on the other side, while the government acts like a referee which does not want the issue to overflow to the whole society and try to avoid to lose face in front of the international community.

For all these reasons, the justice on those events that happened under the dictatorship will still be long in arriving, which may explain some aspects of the present crisis of the judicial system in Brazil, for as stressed by Richard Wilson:

“If Hannah Arendt was justified in writing that the first act of totalitarianism is to kill the legal impulse in citizens, then part of the role of transitional bodies such as truth commissions is to revive that juridical impulse. An important impediment to the resuscitation of the legal person has been the historical inability of the justice system to carry out prosecutions of human rights violations.” (Wilson, 2001, p. 201)

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