

Amnesty in the Age of Human Rights Accountability

COMPARATIVE AND INTERNATIONAL PERSPECTIVES

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Resistance to Change

Brazil's Persistent Amnesty and its Alternatives
for Truth and Justice

Paulo Abrão and Marcelo D. Torelly

This chapter aims to analyze transitional justice in Brazil, particularly the developments in the fields of reparation and memory and the reasons behind the persistence of the 1979 amnesty law for perpetrators of grave human rights violations. In order to do so, the chapter is divided into three parts. It begins by analyzing the development of four main dimensions of transitional justice in Brazil, namely reparations, truth and memory processes, institutional reform, and the regularization of justice and reestablishment of equality before the law. It argues that the policy of reparations to victims is the lynchpin of the Brazilian transitional justice agenda, a mechanism that has fostered progress in the recovery of truth and memory, and more recently, in the pursuit of justice. Second, the chapter analyzes the political and judicial reasons behind the effectiveness of the 1979 amnesty law. Finally, it concludes by examining the ongoing pursuit of truth in Brazil as well as justice alternatives for addressing human rights violations.

The main argument is that Brazil has had an ambiguous amnesty process. The reparations policies adopted under the current democratic regimes emerged from a concept of "amnesty as freedom and reparations" substantially different from the concept of "amnesty as oblivion and impunity" imposed by the regime in 1979. In this sense, the reparations process has the potential to craft a democratic concept of amnesty. The reparatory policies contained in the 1988 constitution and developed during the governments of Fernando Henrique Cardoso and Luis Inácio Lula da Silva were carried out in a way that challenged the idea of a bilateral amnesty. The reparatory process connects amnesty and reparation, focusing on the politically persecuted and excluding the perpetrators. In this sense, progress with the policy of reparations legitimized amnesty for the victims and delegitimized amnesty for perpetrators. This allowed for the development of other transitional justice dimensions that would otherwise be blocked by the idea of "amnesty as impunity and oblivion." Therefore the reparations process opened up a national dialogue through which greater accountability might be possible in the future. This process

involved an internal challenge to the culture of impunity in Brazil. Today, impunity faces additional external challenges, such as the IACtHR 2010 decision in the case of *Gomes Lund v. Brazil*. The Brazilian policy of reparations, coupled with international pressure, has fomented debate over the concept of amnesty without threatening democratic stability. The process has been slow, and often unsatisfying, but it is not over.

TRANSITIONAL JUSTICE IN BRAZIL

The process of transitional justice after authoritarian rule is comprised of at least four key dimensions: reparations; truth and memory processes; institutional reform (particularly of the judiciary and police); and the regularization of justice and reestablishment of equality before the law (including the obligation to prosecute grave human rights violations).¹

In Brazil, each of these components has been implemented with varying degrees of success and many measures have lagged behind those of other Latin American countries. In the following section, we present an overview of the development of each dimension followed by a contextual analysis of transitional justice in Brazil.

Reparations

The genesis of the Brazilian reparation process developed gradually while the Brazilian military dictatorship (1964–85) was still in power. The reparations offered to those who were politically persecuted was a legal victory achieved through the promulgation of the amnesty law (Law No. 6,683/1979). The law formed the legal cornerstone of Brazil's political transition. It provided, in addition to amnesty for political and related crimes, reparation measures, including the restitution of political rights to the persecuted (i.e., the right to register in political parties and to participate in elections) and the right to job reinstatement for civil servants and military personnel who had been removed from their positions for political reasons.

It is important to emphasize that the amnesty law in Brazil was the result of popular demand, unlike the passage of other amnesty laws in the region.² For example, the Argentinean amnesty was imposed by the authoritarian regime and was an explicit self-amnesty designed to maintain impunity for the crimes perpetrated by the state. In Brazil, the amnesty was supported by civil society because it was originally intended to pardon crimes of resistance committed by the politically persecuted

¹ Teitel, *Transitional Justice*.

² Heloisa Amélia Greco, "Dimensões fundacionais da luta pela anistia" (Ph.D. dissertation, Minas Gerais Federal University, 2003), 2 volumes.

who had been banished, exiled, and imprisoned, thus promoting amnesty "as freedom and reparation." The fight for amnesty was so strong that Brazilian civil society viewed it as its first victory against the regime. Despite these claims of victory, the Brazilian civil society petition to parliament for a "broad, general and unrestricted" amnesty for the politically persecuted was denied. Instead, a partial victory was achieved when the legislature, controlled by the executive branch, approved a much more limited amnesty project. This amnesty was constructed by the regime and, though it did allow for some benefits to the politically persecuted, it also set the political basis for an extensive interpretation of bilateralism, including a dimension of "amnesty as oblivion and impunity" for the perpetrators. To this day the victory, albeit limited, achieved by the Brazilian Committees for Amnesty and supported by international pressure resonates throughout the country.

After the 1979 law's approval, Amendment No. 26/1985 was added to the 1969 constitution, which provided for the restitution of political rights to student leaders and added rights (mainly labor rights restitution) to amnesty law No. 6,683/1979. Furthermore, with the publication of the new constitution in 1988, the right to reparation and resistance for the politically persecuted was renewed as a constitutional guarantee and included in article 8 of the "Transitional Constitutional Act," sheltering broad sectors of society affected by the repression.

The reparation commissions were created under the government of Fernando Henrique Cardoso (1995–2002), more than two decades after the amnesty law and a decade after the Transitional Constitutional Act. The first commission, the Special Commission for Political Deaths and Disappearances, was restricted to the recognition of the state's responsibility for killings and disappearances (Law No. 9,140/1995). The second, the Amnesty Commission, aimed to offer reparation to those affected by acts of exception (such as the "institutional acts" that revoked fundamental rights), torture, arbitrary arrests, dismissals and transfers for political reasons, kidnapping, forced hiding and exile, banishment, student purges, and illegal monitoring (Law No. 10,559/2002).

The reparation program was not restricted to financial compensation. The laws included the declaration of political-amnesty (a sort of official state apology) and provided other rights, such as the right to take time spent in exile and prison into account for retirement purposes, the right to resume education in public schools, and the right to recognize foreign university diplomas, among many others.

Furthermore, Law No. 10,559/2002 contained two procedural steps to comply with the 1988 constitutional reparation mandate: first, the declaration of political amnesty contingent on an examination of the facts and provisions in cases of persecution determined by the 1988 statute. The declaration of political amnesty is both an act of political recognition of the politically persecuted's right to resistance

and an acknowledgment of the wrongdoing of the state against its citizens.³ The second step was the granting of economic reparation.⁴ It is possible for someone to be granted political amnesty without receiving economic compensation: because they have already been materially compensated by past legislation; because they are no longer eligible for compensation as a result of the victim's death, (such rights are not transferred to adult descendants, except for widows and dependents); or because they fall into specific categories excluded from Law No. 10,559/2002.

These legal findings highlight the substantial difference between being granted political amnesty and receiving economic reparation. To determine economic reparations, the constitution used criteria compatible with the most common repressive practice utilized by the authoritarian regime: the arbitrary termination of employment. Job loss only increased when the struggle against the dictatorship joined the strike movements in the 1980s and led to the final demise of authoritarian rule. In contrast to what occurred in other Latin American countries where the dictatorships were extremely violent, the military regime in Brazil was more legalistic; this led to a relatively smaller number of deaths (when compared to Argentina and Chile),⁵ but also to a larger amount of institutionalized victimization, particularly through economic and social repression.⁶ Thus, the Brazilian reparation model favors the restitution of lost employment or the return to education as a way to reestablish the

³ The concept of the term *recognition* comes from Axel Honneth, *Luta por reconhecimento: A gramática moral dos conflitos sociais* (São Paulo: Ed. 34, 2003). It is also employed by Roberta Baggio, "Justiça de transição como reconhecimento: Limites e possibilidades do processo brasileiro," in *Repressão e memória política no contexto ibero-americano*, ed. Boaventura Santos et al. (Brasília/Coimbra: Department of Justice / Center for Social Studies of the University of Coimbra, 2010).

⁴ Law No. 10,559/2002 provides, as a general rule of indemnity, the setting of a monthly payment of a permanent and continuing corresponding amount or remuneration pattern that the person would be receiving if he/she were on active duty, if he/she had not been removed from his/her employment status, or other arbitrary values based on market research. The other criterion set for the persecuted who did not lose their employment status is a single compensation of up to thirty minimum wages per year of political persecution with a legal ceiling of R\$ 100,000 (±USD 58,000). Law 9,140/1995 also provides a single payment with a legal ceiling of R\$ 152,000.00 (±USD 88,000) for the relatives of the dead and disappeared. This model is criticized because people affected by torture, disappearance, or death with no loss of employment status in their history of repression may eventually be compensated with lower values than people whose history includes the loss of employment status. For specific discussions on the asymmetries of economic reparations in Brazil and the severance payment special criterion, different from the classical division between material damage and moral damage in the Brazilian Civil Code, see Paulo Abrão and Marcelo D. Torelly, "Justiça de transição no Brasil: o papel da comissão de anistia do ministério da justiça," *Revista Anistia Política e Justiça de Transição* 1 (2009): 12–21.

⁵ While estimates of the dead and disappeared in Brazil reach 400, in Argentina the number ranges from 9,000 to 30,000 and in Chile the number is estimated at about 3,000.

⁶ Anthony Pereira, *Political (In)Justice – Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina* (Pittsburgh: University of Pittsburgh Press, 2005).

previous status quo. If conditions make the recovery of jobs or education impossible, the reparation model allows for economic compensation.

Taking into account the full range of possible reparation measures (i.e., restitution, compensation, rehabilitation and satisfaction measures, and guarantees of nonrepetition)⁷ the systematic achievements in Brazil are summarized in Table 6.1.

Lula's government (2003–10) broke new ground in Brazilian reparation policy by adding a range of symbolic reparation mechanisms. The government initiated the project "Right to Memory and Truth" (*Direito à Memória e à Verdade*), with an official record of deaths and disappearances, and the "Amnesty Caravans" (*Caravanas da Anistia*), with public concessions of amnesty and official apologies to the victims at the locations where the violations had occurred. The Lula government also created the project "Revealed Memories" (*Memórias Reveladas*), which made archives from the years of the military dictatorship available to the public. Bills to create a national truth commission (No. 7,376/2010) and to allow for the right to access public information (No. 41/2010) were also proposed. Since 2007, the Amnesty Commission has used the declaratory act of political amnesty to officially apologize for the wrongdoing committed by the state.

Table 6.2 lists the recent reparation measures taken by the Brazilian government under President Lula.

It is thus possible to draw conclusions regarding the reparations process carried out in democratic Brazil. The first important conclusion is that reparations are strictly connected to the amnesty process. The second is that article 8 of the Transitional Constitutional Act provided for the explicit recognition of the rights of resistance and reparation of the politically persecuted. Third, despite Law 6,683/1979, the constitution of 1988 and subsequent legislation granted amnesty to the persecuted, not the persecutors, promoting an idea of "amnesty as freedom and reparations" linked to civil society demands for amnesty in the 1970s. In other words, the 1988 constitutional amnesty rejected the notion of "amnesty as oblivion and impunity" imposed by the military's interpretation of the 1979 law. Finally, Brazil is also implementing a wide range of reparation measures, individual and collective, material and symbolic; on the other hand, rehabilitation measures for victims are almost nonexistent.

Institutional Reform

In Brazil, institutional reform has been an ongoing task, carried out through the implementation of a set of measures adopted over twenty-five years of democratic governance: the extinction of the SNI (National Intelligence Service); the creation of

⁷ Pablo de Greiff, "Justice and Reparations," in *The Handbook of Reparations*, ed. Pablo de Greiff (New York: Oxford University Press, 2006).

TABLE 6.1. *Legal reparation measures in Brazil*

Exception and repression measures	Main fundamental rights violated	Modality of reparation	Provided rights	Legal provision
Politically persecuted and those affected by <i>lato sensu</i> exception acts	General fundamental rights and liberties	Public satisfaction and guarantee of nonrepetition	Declaration of the condition of those granted political amnesty*	Article 1, section I of Law 10,559/2002
Political disappearances	Right to life project Civil liberties and political rights Civil, cultural, and religious rights	Compensation and guarantee of nonrepetition	Economic compensation in a single or monthly payment for political persecution of living persons *** and Right to find, identify, and delivery of remains	Article 11 of Law 9,140/1995** Article 1, section II, Civil Code Article 9, single paragraph of Law 10,559/2002**** Article 4, section II of Law 9,140/1995
Dead	Right to life Civil liberties and political rights	Compensation and Compensation	Economic compensation in a single payment for death and Economic compensation in single or monthly** payments for political persecution of living persons	Article 11 of Law 9,140/1995** Article 1, section II, Civil Code Article 9, single paragraph of Law 10,559/2002
Tortured	Right to physical and psychological integrity	Compensation	Compensation in a single payment	Article 1, section II, Civil Code Article 2, section I of Law 10,559/2002
Arbitrarily imprisoned	Right to liberty, right to due process	Compensation and restitution	Compensation in single or monthly payments and time count for pension purposes	Article 1, section II, Civil Code Article 2, section I of Law 10,559/2002 Article 1, section III of Law 10,559/2002

(continued)

TABLE 6.1 (continued)

Exception and repression measures	Main fundamental rights violated	Modality of reparation	Provided rights	Legal provision
Arbitrarily removed or compelled to leave employment in the public sector, with or without impediments to also pursuing one's specific professional activity in civilian life	Right to life project, right to work, right to freedom of thought, right to trade union association	Restitution or Compensation and restitution and rehabilitation	Ensured reintegration/readmission, promotion if inactive or economic compensation of monthly payment Time count for pension purposes Indirect benefits maintained by the Public Administration to servers (insurance plans, medical, dental, and hospital care and housing finance)	Article 1, sections II, V, Civil Code Article 2, sections IV, V, IX, XI Article 1, section III of Law 10,559/2002 Article 14 of Law 10,559/2002
Arbitrarily removed or compelled to leave employment in the private sector	Right to life project, right to work, right to freedom of thought, right to trade union association	Compensation and restitution	Economic compensation in a single or monthly payment and Time count for pension purposes	Article 1, section II, Civil Code Article 2, sections VI, XI Article 1, section III of Law 10,559/2002
Punished with a work location transfer necessitating a change of residence location	Right to employment stability and to employment liberty, right to equality	Compensation	Economic compensation in a single or monthly payment	Article 1, section II, and Article 2, section II
Punished with loss of earnings or part of remuneration already built into the contract of employment related to an administrative career	Right to remuneration for their work and right to equality	Compensation and restitution	Economic compensation in monthly payment and time count for pension purposes	Article 1, section II and Article 2, sections III, XII Article 1, section III of Law 10,559/2002
Prevented from taking office after a valid tender	Political rights	Compensation and restitution	Economic compensation of monthly payment and time count for pension purposes	Article 1, section II and Article 2, section XVII Article 1, section III of Law 10,559/2002
Punished with forfeiture of already provided or inactive retirement benefits with pay loss	Right to equality, constitutional guarantees to employment	Compensation	Economic compensation in monthly payment	Article 1, section II, Article 2, sections X, XII of Law 10,559/2002
Compulsorily retired from the public sector	Right to equality	Compensation	Economic compensation in monthly payment	Article 1, section II and Article 2, sections I, XII
Forced underground	Right to liberty, right to identity, right to life project	Compensation and restitution	Economic compensation in a single or monthly payment and Time count for pension purposes	Article 1, section II and Article 2, sections I, IV, VII
Banished	Right to a nationality, right to liberty, right to life project, right to family life	Compensation and Restitution	Economic compensation in a single or monthly payment and Time count for pension purposes Recognition of foreign qualifications	Article 1, section II and Article 2, sections I, VII Article 1, section III of Law 10,559/2002 Article 1, section IV of Law 10,559/2002
Exiled	Right to liberty, right to life project, right to family life	Compensation and restitution	Economic compensation in a single or monthly payment and Time count for pension purposes Recognition of foreign qualifications	Article 1, section II and Article 2, sections I, VII Article 1, section III of Law 10,559/2002 Article 1, section IV of Law 10,559/2002

(continued)

TABLE 6.1 (continued)

Exception and repression measures	Main fundamental rights violated	Modality of reparation	Provided rights	Legal provision
Politicians having their electoral mandates revoked	Political rights	Compensation and restitution	Economic compensation in a single payment and Time count for pension purposes	Article 1, section II and Article 2, sections VII, XIV Article 1, section IV of Law 10,559/2002
Politicians having their remuneration revoked for the exercise of elective office	Right to equality and right to remuneration	Restitution	Economic compensation in a single payment	Article 2, section XIII
Sued by judicial and/or administrative harassment inquiry, with or without disciplinary punishment	Right to liberty, right to due process	Compensation	Economic compensation in a single payment	Article 1, section II and Article 2, sections I, VII
Exiled children and grandchildren, illegal immigrants, imprisoned, tortured or affected by any exception acts	Right to life project, right to liberty, right to family life, right to physical and psychological integration	Compensation and restitution	Economic compensation in a single payment Time count for pension purposes, in some cases	Article 1, section II, Civil Code Article 2, section I of Law 10,559/2002 Article 1, section IV of Law 10,559/2002
Illegally monitored*****	Right to privacy	Compensation	Economic compensation in a single payment	Article 1, section II, Civil Code Article 2, section I

Other exception acts, in a broad sense	General fundamental and political rights	Compensation	Economic compensation in a single payment	Article 1, sections I and II, Civil Code Article 2, section I
Students expelled from College	Right to education and right to a life project	Restitution and rehabilitation	College registration in public university	Article 1, section III

* The declaration of political amnesty is an act of recognition of the victims and the right to resistance. It is a condition for all other reparations of Law 10,559/2002.
The victim or his successors or dependents must request it (Article 2, § 2 of Law 10,559/2002).

** The indemnity provided in this act is granted to the following persons in the following order: spouse, partner, descendants, ascendants, collateral relatives up to the fourth degree (Article 10 of Law 9,140/1995).

*** In case of death of the person with political amnesty, the right to economic compensation is transferred to his or her dependents. This includes compensation in monthly payments in cases of proven loss of employment status because of persecution, in other cases compensation of a single payment. The compensation (economic reparations in single or monthly payments) of the Act 10,559/2002 cannot cumulate. The compensation can be cumulative with restitutions and rehabilitations, except the reparation in monthly compensation which cannot cumulate with work reintegration. The compensation of Law 10,559/2002 can cumulate with the compensations of Law 9,140/1995.

**** All economic indemnity reparations of Law 10,559/2002 provide the right to exemption from income tax.

***** The Amnesty Commission understands that the right to compensation only applies to cases in which monitoring made other repressive measures tangible.

TABLE 6.2. *Individual and collective reparation policies under the Lula government (2003–10)*

Type of measure	Body	Governmental and state actions
Official apology requests	Amnesty Commission (AC)	Amnesty Caravans
Recognition of the victims	Death and Disappeared Commission (DDC) AC	Report "Right to Memory and Truth" (Direito à Memória e à Verdade) Project "Record of Oral History" (Marcas de Memórias)
	National Archive	Project "Revealed Memories" (Memórias Reveladas)
Public tributes	AC	Memory sessions of the Amnesty Caravans
	AC	Act of homage to the thirty years of the former political prisoners' hunger strike
	AC	Public act commemorating the thirty-year fight for amnesty
Public hearings	AC	Thematic public hearings on the labor movement
	AC	Public statements on the amnesty caravans
	AC	Forum of representative bodies of politically amnestied
	Legislative Branch (LB)	Special amnesty commission of the House of Representatives
	AC	Public hearing on the scope of the Amnesty Law of 1979
Memorials, Monuments, and Signs	AC	Public hearing on the legal rights of the politically persecuted
	DDC	Amnesty Memorial Project
Bills	LB	Project "Indispensable People" (Pessoas Imprescindíveis)
	Civil House	Law of reparation to the National Union of Students
	Civil House	Bill on access to public information Bill to create the National Commission of Truth
Education and dissemination	AC/DDC	Photographic exhibition
	AC	Seminars and events about amnesty and transitional justice
	AC	Cultural amnesties
	AC/DDC	Publication of teaching material
	AC/DDC	Official publications of memory
	AC	Publication of the <i>Political Amnesty and Transitional Justice</i> magazine

the Ministry of Defense, which subjected the military command to civilian control; the creation of the Public Ministry to protect democratic rule and guarantee collective and individual civil rights; the creation of the Public Defender of the Union; the creation of educational programs in human rights for the police, promoted by the Ministries of Education and Justice; the extinction of the repressive apparatus, specifically the dismantlement of DOI-CODI (Department of Information Operations – Centre for Internal Defense Operations) and DOPS (Department of Political and Social Order); the repeal of the dictatorship's censorship law; the elimination of the DSI (Division of Institutional Security) related to direct and indirect public administration agencies; the creation of the Special Secretariat for Human Rights; varied and comprehensive reforms to the authoritarian legislative framework; and the creation of independent electoral courts with functional and administrative autonomy. In addition, the country is continually expanding institutions that uphold the rule of law in order to deter future human rights violations.

Hence, there is an undeniable institutionalization of political participation and political competence maintained regardless of the political group in power. In addition to significant judicial reforms, control mechanisms designed to ensure bureaucratic transparency have also been implemented. Reforms to the military and public security systems are pending.

Truth and Memory

Brazil has made considerable progress toward implementing truth and memory projects. Besides publishing the book *Right to Truth and Memory*, the Special Secretariat for Human Rights maintains a photographic exhibition called "Right to Memory and Truth – the dictatorship in Brazil 1964–1985" ("Direito à Memória e à Verdade – a Ditadura no Brasil 1964–1985"), and it has recently released two publications, "The History of Children Victimized by the Dictatorship" ("História de Meninas e Meninos Marcados pela Ditadura") and "Women's Memories" ("Memórias do Feminino").

The Reference Center of Political Struggles in Brazil (1964–1985) – Revealed Memories (Memórias Reveladas) was created on May 13, 2009 and is coordinated by the National Archive.⁸ The Center was designed to be a space of convergence for the dissemination of documents and the production of studies and research on the political regime in power from April 1, 1964 to March 15, 1985. It brings together

⁸ The Revealed Memories database contains the descriptions of the documentary collection kept by participating institutions. In some cases, it is possible to see cartographic, iconographic, and text documents, among others. It is also possible to search for electronic publications, virtual exhibitions, videos, and interviews at the Centre's webpage: <http://www.memoriasreveladas.gov.br>.

public and private institutions and individuals who possess documents related to the political history of Brazil under military rule. Part of the "truth from the repression" – which allows access to a particular version of the truth produced by the regime – is recorded in official documents of the military regime, available in the Revealed Memories Reference Center. These documents are filled with authoritarian ideology, evident in records that misconstrue facts and attempt to justify the widespread acts of human rights violations.

It is important to mention that some of the richest collections of archives from the repressive period are currently in the possession of the reparatory commissions, which have contributed to the construction of historical truth through the eyes of the politically persecuted: the "truth from the resisters." Without the work of these commissions, created under Cardoso's government, much of the information available on the history of repression would not exist. However, there can be no doubt that the Lula government's initiative, which sent a draft law to the congress to create a national truth commission, will contribute to a new and crucial stage of revelation and knowledge of the recent history of the country, laying the groundwork for collective memories that will enrich our national identity.

Perhaps with the creation of the national truth commission, the right to truth through research may be fully realized along with the release of the locations of the intelligence and repression centers directly connected to the centers of military command structure – CISA (Air Force Information Centre), CIE (Army Information Centre), and CENIMAR (Navy Information Centre) – and the files these centers contain. Uncovering this information would identify and make public the state and private structures employed to perpetrate human rights violations, thus shedding some light on torture practices, forced disappearances, and the killing methods used, then transmitting this information to the competent justice bodies. The location and opening of missing armed forces files and the location of the remains of the politically disappeared are still debated and unresolved issues in Brazil.

Justice and the Rule of Law

The greatest obstacles to transitional justice in Brazil fall under the category of justice and restoration of equality before the law, which involves the obligation to investigate, prosecute, and punish human rights crimes.

There have been no criminal trials in Brazil for individuals who perpetrated human rights violations during the military dictatorship and a culture of impunity impedes the recognition of victims' rights to judicial protection. Taking into consideration this lack of respect for these rights, the enormous amount of crimes reported by the victims and presented to the commission in order to obtain amnesty, and the obligations Brazil has under the international human rights treaties it has ratified,

the Amnesty Commission of the Ministry of Justice hosted a public hearing, "Limits and Possibilities for the Judicial Accountability of Perpetrators of Human Rights Violations during the State of Siege in Brazil," on July 31, 2008.

This event marked the first time that the Brazilian government officially addressed the lack of accountability, almost thirty years after the enactment of the amnesty law. The public hearing was sponsored by the executive branch and tasked with encouraging the rearticulation of national pro-amnesty initiatives and integrating the various initiatives and perspectives of the Brazilian Bar Association; the Public Ministry of São Paulo; various civil organizations such as the Association of Judges for Democracy, the International Centre for Justice and International Law (CEJIL), the Brazilian Association of the Politically Amnestied (ABAP), and the Nationalist and Democratic Military Association (ADNAM).

The hearing resulted in a Supreme Court lawsuit brought under the Allegation of Breach of Fundamental Precept (*Arguição de Descumprimento de Preceito Fundamental*, ADPF No. 153).⁹ It should be noted that the legal controversy debated by the Ministry of Justice and brought to the Supreme Court by the Brazilian Bar Association was not new and came about after several other tentative initiatives. These attempts at pursuing accountability include the work of the Federal Public Ministry of São Paulo to obtain court rulings in civil suits on the legal liability of torturers from the DOI-CODI and legal cases brought by relatives of dead and missing persons, such as the charges filed by the family of journalist Vladimir Herzog that, in 1978, resulted in a judgment stating that his death was the state's responsibility.¹⁰

In the trial conducted in April 2010 on the ADPF 153, the Supreme Court, by a margin of seven votes to two, decided in favor of the applicability of the 1979 amnesty law under the 1988 constitution in relation to perpetrators of human rights crimes during authoritarian rule. The Supreme Court declared that the interpretation of a bilateral amnesty in the law was valid. The Court stated that the amnesty was a political agreement that established the basis for the democratic constitution of 1988 and that only the legislative branch would be able to review it. The practical implication of the ruling was the denial of the right to judicial protection for victims, strengthening the idea of "amnesty as impunity and oblivion."

⁹ The Allegation of Breach of Fundamental Precept is the constitutional procedure established in the Brazilian federal constitution to be used against any act by public agents that might violate a fundamental principle of the 1988 constitution (even if the act took place before the constitution's promulgation but continued to have effects in the present).

¹⁰ For more information about the case, Marlon Alberto Weichert, "Responsabilidade internacional do estado brasileiro na promoção da justiça transicional," in *Memória e verdade – A justiça de transição no estado democrático brasileiro*, ed. Inês Virginia Prado Soares and Sandra Akemi Shimada Kishi (Belo Horizonte: Editora Fórum, 2009), 153–68.

In the case of *Gomes Lund v. Brazil* in November 2010, the Inter-American Court stated that the Brazilian Supreme Court's April 2010 decision condoned impunity for human rights violations by interpreting Law 6,683 as a blanket self-amnesty for state crimes. This verdict challenged the Supreme Court's ruling. At the moment, it is unlikely that the IACHR decision will change Brazil's attitude toward the amnesty law and its implied impunity provisions. We discuss this further later in this chapter.

Assessing the Fundamental Characteristics of Transitional Justice in Brazil

The main conclusion to draw from this overview is that Brazil has experienced an ambiguous amnesty process. On one hand, the amnesty law allowed for the transition from authoritarian rule to democracy. In addition, it is considered a victory for the politically persecuted who mobilized under the dictatorship to promote it. On the other hand, Law 6,683/1979 has also been interpreted in such a way as to ensure impunity for grave human rights violations. The constitution and the laws that established the reparations process (9,140/1995 and 10,559/2002) have partially restored the earlier emancipatory and reconciliatory intentions of the original concept of amnesty supported by Brazilian civil society. Therefore, the reparations process for those politically persecuted and amnestied (as established in democratic legislation) has served as the lynchpin for the transitional justice agenda, allowing for some form of accountability through reparations, truth and memory, giving visibility to victims' claims, enabling the contestation of the idea of "amnesty as impunity and oblivion," and generating engagement between civil society actors and the state.

While reparations alone do not constitute full accountability, it is important to emphasize that the process of developing the reparations program triggered a shift in perceptions of what the Brazilian amnesty was about (focusing on the victims and not on the perpetrators). The reparations process also led to the public recognition of state crimes (which was nearly impossible to accomplish by legal means due to the ambiguity of the crimes covered in the 1979 amnesty law). Finally, the process integrated the victims' social movements with other sectors of civil society, expanding the original claim for reparations (mainly from the labor unions) to a broader demand for memory, truth, and justice supported by several politicians and civil society groups.

Transitional justice processes in Brazil are accelerating because the reparation commissions are increasingly adept at recognizing several types of civil and human rights violations that took place during authoritarian rule. Initiatives such as the 2008 Brazilian Bar Association lawsuit against amnesty for state crimes and the 2009 proposal for a truth commission took place right after the Commission on the Dead and Disappeared published its final report (August 2007) and the Amnesty

Commission organized a public hearing on accountability for state crimes (July 2008). The Amnesty Commission also started visiting all the regions of the country with the Amnesty Caravans (April 2008 to the present), bringing the commissions' reports on violations to the attention of the general public.

Even after the progress made after twenty-five years of democratic governments in Brazil, a recent public opinion poll showed that only forty percent of the population supported accountability for state crimes committed during authoritarian rule while forty-five percent opposed it. When questioned about political crimes perpetrated by regime opponents, forty-nine percent considered the amnesty valid in comparison to the thirty-seven percent who wanted criminal accountability despite the amnesty law (and knowing that most of the crimes from the opposition had actually been prosecuted by the regime before the amnesty law).¹¹ The poll showed a divided country, a division reflected in the composition of the Brazilian legislature. This polarization partially accounts for why almost all the transitional justice initiatives in Brazil have taken place through the executive branch. Recently, the executive branch, far more than the legislature or the judiciary, has been the greatest proponent of recognizing the state's international obligations to protect human rights. Unfortunately, the judicial system continues to interpret the laws in a way that maintains the culture of impunity in place under the dictatorship.

Indeed, international experiences have shown that it is not possible to formulate a distribution of benefits that establishes a particular order in which transitional actions should be adopted, considering the number of different, successful combinations.¹² Hence, the fact that the Brazilian transitional process has favored the reparatory dimension rather than the prosecutorial one is not a mark of inadequacy, but a characteristic feature of the transitional Brazilian model. It is not possible to understand the so-called late justice claim – after so many years of silence and impunity – from civil society for truth, memory, and justice without considering the role that the gradual implementation of the reparation process plays in revealing the truth regarding serious human rights violations. The reparations process has given visibility to victims' claims and has challenged the assumption that the 1979 amnesty was a bilateral amnesty that automatically led to impunity.

It is a fact that transitional justice measures in Brazil are well behind those adopted in other Latin American countries such as Argentina and Chile, but the Brazilian case has many peculiarities. It would be unlikely for a country that lived a transition by "transformation"¹³ and that took nearly ten years to complete the first cycle of

¹¹ Datafolha pool, *Folha de S. Paulo*, June 7, 2010.

¹² According to: Javier Ciurlizza, "Entrevista: Para um panorama global sobre a justiça de transição: Javier Ciurlizza responde," *Revista Anistia Política e Justiça de Transição* 1 (2009): 26.

¹³ Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman and London: University of Oklahoma Press, 1991), 126.

political liberalization (1979–88) to adopt measures with the same impact as those implemented in Argentina, where the military collapsed in the wake of total defeat by the British in the Falklands War. The Brazilian approach to reparations allowed society to explore different means of accountability and, as we can see in current debates, actually stimulated the involvement of social movements in the transitional justice agenda, which in turn sparked a demand for a truth commission and for criminal accountability for perpetrators.

Facile claims that the reparation process alienates society by offering a payoff for nonaccountability ignore reality. The reparation process has helped unite civil society in the dispute over amnesty, has provided visibility to the human rights violations the regime denied took place, and has promoted the development of memory and archival projects designed to illuminate these violations. In addition, the establishment of the commissions to implement the reparation program created new governmental players that work from inside the state to expand the transitional justice dimensions of memory, truth, and justice. With the consolidation of the reparation process and the recognition of state crimes, human rights violations became more public, which led to stronger pressure for historical clarification and to increasing doubts about the legitimacy of the assumed bilateralism of the 1979 amnesty. The reparatory processes simultaneously legitimated the amnesty for the victims and delegitimized the amnesty for the perpetrators. This has led to a gradual (and still ongoing) erosion of society's support for the idea of bilateral amnesty or, at least, to the recognition of the necessity of other transitional justice measures related to truth and memory. In conclusion, we can state that, in Brazil, reparations created greater opportunities for further accountability despite social resistance to changing the scope of the amnesty law.

In this sense, it is possible to identify at least three positive outcomes of the reparations process in Brazil's transitional justice. First, the work of the reparation commissions has advanced the search for truth, revealing stories and deepening awareness of the need to make all violations public. Second, the official acts of recognition by the state of serious human rights violations and the evidence collected to prove that those violations really happened have served as the factual basis for legal initiatives within the Public Ministry, encouraging the pursuit of justice in a context where the evidence of the vast majority of crimes was destroyed by the old regime during the transition. Finally, the reparation process is making a significant contribution toward sustainable memory policies by publishing essential works like the book *The Right to Truth and Memory* that officially acknowledges state crimes, or by sponsoring programs such as the Amnesty Caravans and the Amnesty Memorial¹⁴ that

¹⁴ The Political Amnesty Memorial includes a museum, an archive, a site of conscience, and a tribute to the victims. The Memorial is being built in the city of Belo Horizonte, Minas Gerais State (to be inaugurated in 2013), and will encompass a permanent exhibition about the dictatorship and

advance individual and collective memory building and challenge Brazil's tradition of oblivion. The reparation process has made public, for the first time, historical evidence of wrongdoing and has provided access to security force documents of repression as well as to recordings of oral testimonies of the politically persecuted. Transitional justice in Brazil is a dynamic and evolving process, with noticeable progress in some areas (reparations) and disappointing setbacks in others (justice). Despite notable progress in transitional justice, more could and should be done to bring accountability for past crimes. The next section analyzes the obstacles to carrying out criminal prosecutions against human rights violators.

THE CONTINUED ABSENCE OF CRIMINAL ACCOUNTABILITY IN BRAZIL

Legal and political factors explain the limitations on justice for past political violence in Brazil. We examine how political context and judicial culture combine to form "empty legalities," or what Pereira refers to as "authoritarian legalities,"¹⁵ where the dictatorship's impunity remains in place despite the new democracy and its rule of law system.

Analyzing the development of transitional justice in a particular case involves verifying the pro-justice mobilization strategies employed by a group of players and the success of these strategies, whether in the political or legal sphere, against the barriers put up by their opponents from the old regime. Members of the old regime intend to maintain, to some extent, popular support, and thus will attempt to impede judicial proceedings that may tarnish their reputations. It is in this sense that Leonardo Filippini and Lisa Margarrell state that "[...] the success of a proper transition depends on the right action planning, observing all the components of the process."¹⁶

The restoration of the rule of law can take place in a two-way manner: by the establishment of minimum legal guarantees for the future, and by reparations and justice for past violations. José Zalaquett highlights that "The ethical objectives and measures [...] must be fulfilled facing the political reality of different transitions. These transitions impose different degrees of restriction on the action of new

the social struggle for amnesty in Brazil; a public square with artistic tributes to the victims; and an annex with a center for research and documentation that will gather all of the Amnesty Commission files collected over more than a decade of investigation. For more information on the Memorial see: Paulo Abrão and Marcelo D. Torelly, "Dictatorship, Victims and Memorialization in Brazil," in *Museums and Difficult Heritage*, ed. Jari Harju and Elisa Sarpo (Helsinki: Helsinki City Museum, forthcoming).

¹⁵ Anthony Pereira, *Political (In) Justice*, 191.

¹⁶ Leonardo Filippini and Lisa Magarrell, "Instituciones de la justicia de transición y contexto político," in *Entre el perdón y el paredón*, ed. Angelika Rettberg (Bogotá: Universidad de los Andes, 2005), 151.

authorities."¹⁷ In the Brazilian case, initiatives with retroactive temporal coverage, such as the investigation of past crimes, face severe political constraints from the old regime because these investigations would directly implicate former regime members in human rights abuses. Measures of reparation for the victims and guarantees of future rights are more successful at breaking through political obstacles since these measures do not directly affect the members of the old regime and the limitations the regime imposed over the transition while it was still in power.

Political Reasons

We identify at least three political causes for the persistence of the amnesty law and impunity in Brazil: authoritarian legacy, judicial complicity, and fragmented social movements.

Authoritarian legacy. The Brazilian transitional process was strongly influenced by the outgoing regime. Samuel Huntington classifies the Brazilian transition, along with the Spanish one, as a "transition by transformation" and states that "[...] the genius of the Brazilian transformation is that it is virtually impossible to say at what point Brazil stopped being a dictatorship and became a democracy."¹⁸ The former regime controlled the democratization process from its very beginning. Authoritarian influence is apparent in the wording of the 1979 amnesty law and extended at least until 1985, when political forces that supported the dictatorship, despite strong popular pressure, prevented the approval of the constitutional amendment in favor of direct presidential elections. In the indirect elections of 1985, the democratic opposition candidate, Tancredo Neves (Brazilian Democratic Movement-MDB), made an alliance with a leader of the regime's party, José Sarney (formerly National Renewal Alliance – ARENA and Social Democratic Party – PSD, who subsequently joined the Party of the Brazilian Democratic Movement – PMDB), to become his vice president. The result was a winning alliance in the indirect election which represented a moment of reconciliation between the institutionalized opposition and former political sectors that supported the regime.

In Brazil, the transition was labeled as controlled because the military would only accept a "slow, gradual and safe transition." Military officers delegated power to politicians and bureaucrats who defended the legitimacy of the allegedly pacted transition and advised reconciliation with the majority of the opposition. In this context the old regime was able to sustain a bureaucratic process of forgiveness in which the military would forgive opposition members who had fought against it during

¹⁷ José Zalaquett, "La reconstrucción de la unidad nacional y el legado de violaciones de los derechos humanos," *Revista Perspectivas* Special Issue 2 (1999): 395.

¹⁸ Huntington, *The Third Wave*, 124–6.

the dictatorship, trying to turn the amnesty into a process of forgetfulness ("amnesty as impunity and oblivion"). Victims rejected this concept of forgiveness because they did not consider their struggle against the authoritarian regime as criminal, but instead as resistance against tyranny.

The Brazilian dictatorship relied on two key mechanisms to ensure a sufficient level of legitimacy and control over the transition: the political dividends from the implementation of a national state developmentalist project (the so-called economic miracle) which, for a long period of time substantially strengthened the Brazilian economy; and the semantic construction of a discourse of fear, describing the members of the armed resistance as "terrorists," and the opposition in general as "subversives" and as "communists" in the Cold War context. Much of Brazilian society, fearing widespread chaos and remembering the days of economic growth, accepted this discourse. Fear tactics helped portray the opposition as enemies of the country and later depicted the amnesty as a necessary political pact for reciprocal reconciliation under the perceived threat of institutional instability or a return to authoritarianism.

During the fight for amnesty, Brazilian society was heavily mobilized in support of the approval of a "broad, general and unrestricted" amnesty law, that is: for all political prisoners, including those involved in armed conflict and violent political crimes (what this chapter defines as "amnesty as freedom and reparation").¹⁹ The campaign for amnesty represented the return of public demonstrations, marches, and demands for rights, which fostered the awakening of an oppressed society and expanded citizen participation in the political sphere.

Despite protracted campaigning, the proposal for a broad amnesty was defeated in the congress, where the bill for a restricted amnesty from the military government was approved instead.²⁰ The regime's control over the transition played a large part in the decision since one-third of the national congress consisted of so-called bionic senators, parliamentarians appointed by the executive branch rather than popularly elected. It was just after this period of civil society awakening that the concept of bilateral amnesty started to take shape in a judicial system supervised by the executive branch. The amnesty law was enacted six years before the end of military rule, allowing for authoritarian control over the amnesty and transition process.

With the increasing disclosure that many disappearances and deaths were the result of state action, social pressure for criminal investigation increased, which led the judicial branch to systematically broaden the interpretive scope of the law.

¹⁹ See Gilney Viana and Perly Cirpiano, *Fome de liberdade – A luta dos presos políticos pela anistia* (São Paulo: Fundação Perseu Abramo, 2009).

²⁰ Danyelle Nilin Gonçalves, "Os múltiplos sentidos da anistia," *Revista Anistia Política e Justiça de Transição* 1(2009): 280.

Courts began to consider the crimes of state agents as "related to political crimes" and also began to enforce the law even for crimes that occurred after 1979, outside the temporal scope of the law (such as those responsible for the *Rio Centro* case in 1980) in the name of "national pacification."

Over the years, the motto of "broad, general and unrestricted" amnesty for the politically persecuted, demanded by organized civil society and denied by the regime, became a "broad, general and unrestricted" amnesty to "both sides" displaying the strength of the regime's control. The regime was capable of manipulating popular support for the amnesty into a public guarantee of a supposed political agreement between the opposition and the existing regime that would initiate the transition to democracy. Challenging the assumption that the amnesty defended by civil society would cover crimes of state agents, Heloisa Greco asserts that:

In the fight for a broad, general, and unrestricted amnesty, the political initiative lies with organized civil society, not with the government or its institutions. The subjects or main players are the militants of amnesty entities, the exiled and the political prisoners. The locus of this initiative, the place of action and discourse, or better yet, the place of history, is the seizing of the City as a political space. That is the rupture in the historical process in which [the regime] establishes that political space or institutional arena.²¹

The concept of a reciprocal amnesty, built by the military regime and strengthened by its power over the slow liberalization process, would be explicitly endorsed by the democratic judiciary in 2010 and implicitly by civil society before that. The following democratization years witnessed an increasingly fragmented network of political activists who did not successfully pressure the judiciary to investigate past crimes.²²

The judicial branch and the "legalized" dictatorship. The Brazilian judiciary's interpretations of the 1979 amnesty law validated the notion that the political transition depended on forgiving or ignoring the regime's crimes and establishing a supposedly bilateral agreement. Law No 6,683 has been understood as bilateral, implicitly including state agents' crimes never mentioned in the text of the amnesty law. This interpretation reveals another important political institutional feature of the dictatorship and the Brazilian transition: the complicity of the judiciary in supporting the authoritarian regime's measures.

The table produced by Anthony Pereira for his comparative study of Brazil, Argentina, and Chile illustrates how each of the three regimes sought to "legalize" their dictatorship through illegitimate state actions (Table 6.3).

²¹ Greco, "Dimensões fundacionais da luta pela anistia," 203.

²² It is worth pointing out that some persecuted families presented important initiatives, but these are isolated cases within the broad set of the persecuted people that could have sought justice and did not do it.

TABLE 6.3. Features of authoritarian legality in Brazil, Chile, and Argentina

Features	Brazil (1964-85)	Chile (1973-90)	Argentina (1976-83)
Declaration of state of siege at the time of the coup	no	yes	yes
Suspension of parts of old constitution	yes	yes	yes
Eventual promulgation of new constitution	yes	yes	no
Military tribunals used to prosecute many civilian opponents and dissidents	yes	yes	no
Military courts wholly insulated from civilian judiciary	no	yes	yes
Habeas Corpus for political cases recognized in practice	1964-8 1979-85	no	no
Purges of Supreme Court	some removals and the increase in the number of judges	no	yes
Purges of rest of judiciary	limited	limited	yes
Judge's irremovability revoked	yes	yes	yes

Source: Pereira, *Political (In)justice*, 23.

In the table, it is evident that even though exceptional measures are very similar in the three countries, Brazil reflects the highest participation of civilians in the process, since one can verify their presence in military courts. The table also implicitly demonstrates judicial support of the military regime's legitimacy, evident in the smaller number of purges in the Brazilian judicial branch in comparison to those that took place in the Argentinean judicial branch.

Anthony Pereira highlights another important issue when comparing Brazil and Chile: while prosecutors were members of the armed forces in Chile, in Brazil they were civilians appointed by the regime. Civilian adherence to the Brazilian military regime (which qualifies as a civil-military dictatorship) was mostly directed toward the economic development project, but was also due to the ideology the military defended. This ideological agreement had a particular effect in the judicial branch, which could have been the last source of protection for society against oppression but was filled with legal practitioners who supported the dictatorship. It was very rare to see judges stand up to, much less oppose, the regime.

The absence of a lustration process in the postdictatorship judicial branch has allowed for the persistence of an elitist and authoritarian mentality. Judicial appointments occur slowly, with new members selected through public competitive

examination, as stated in the new democratic constitution. To illustrate this point, the last judge of the Supreme Court appointed by the military dictatorship left office in 2003, eighteen years after the end of the dictatorship. In this case, he was not removed, but retired. This enabled the survival of a conservative mentality in the Brazilian legal system that has been maintained across generations.

As shown under the legal reasons behind the lack of investigation of state crimes, the judiciary's perception of the dictatorship, the 1979 amnesty, and how the two relate to the rule of law is fundamental to the Supreme Court's politicized decision to proceed with the nonimplementation of justice for crimes committed by the regime.

Fragmented social movements. The performance of civil society in the postdemocratization years is an important factor necessary to understanding the political roots of the state of impunity in Brazil. Civil society mobilized to push the government to grant amnesty for the politically persecuted, even if it did not achieve the desired outcome. Especially after the enactment of the 1988 constitution, the traditional agendas of human rights movements related to the fight for political freedom were replaced by "new kinds of social movements" characterized more by their criticism of the structural deficits of institutional arrangements than by their proposals for broad political alternatives.²³

These social movements supported marginalized causes, such as land reform, gender rights, the right to nondiscrimination based on race and ethnicity, the rights of children and adolescents, the environmental movement, the rights of pensioners and the elderly, the rights of disabled people, and so forth. The civil society agenda after 1988 was largely fragmented in comparison to the days of dictatorship when all of the social movements had joined forces against the regime. The post-1988 social movements returned to their issue-specific agendas and began to realign their work with international players who shared their concerns, such as thematic international agencies and NGOs.

Therefore, the fight for transitional justice in Brazil was not a priority for these specialized social movements. Rather, the struggle was left in the hands of two specific groups: the relatives of the dead and disappeared, composed of a small number of families that continued to voice their demands for justice but had lost the capacity for widespread social mobilization; and the labor unions and lobbies, mainly composed of those who had been dismissed or prevented from working during the dictatorship for political reasons or because they had exercised their right of association. Sustained campaigning by victims' relatives resulted in the passage of Law 9,140/1995, which recognized the deaths and disappearance of opponents of the

regime and compensated their families. The struggles of the labor unions resulted in the promulgation of Law 10,559/2002, which set up reparation measures for the other acts of exception (not only for union members but also for those who had been exiled, lived underground, etc.).

Undoubtedly, social pressure is the foundation for the implementation of transitional measures, especially in the Brazilian context where the democratic transition focused more on the establishment of free elections than on the pursuit of justice. Assessing this issue, Ruti Teitel states that "Civil society plays a large role in keeping this discussion [of transitional justice] alive, in pursuing what is necessary, more than just elections, for a transition to be completed."²⁴ In Brazil, due to the regime's control of the transition agenda and because of the limited success of the most affected victims to generate wider support from society, the issue of accountability was not considered as important as other social claims. Agencies and institutions such as the Public Ministry created several specialized groups focused on a variety of social issues. However, the creation of the first group dedicated to transitional justice only occurred in September 2010, with the establishment of a working group on truth and memory at the federal level.

The quest for accountability is often constrained by a practical desire to move forward, for as José Zalaquett points out, "after a gradual process of political opening, the worst violations have become part of a relatively distant past and there is a certain amount of popular forgiveness."²⁵ The addition of a time factor, in combination with the minimal support of civil society, generated another major political obstacle to the pursuit of criminal accountability in Brazil.

Catalina Smulovitz proposes a similar diagnosis; by comparing the Brazilian case to Argentina, she highlights at least three key distinctions that determine why the two countries diverged in their decisions on whether to conduct trials for human rights violations. These are: the fact that the Brazilian military regime had control over the transition agenda, unlike in Argentina where the intensification of internal unrest following the Argentinean defeat in the Falklands War crippled the military; the much larger amount of civil society campaigning for human rights trials in Argentina; and the larger time lapse between the most serious violations and the restoration of democracy in Brazil. Brazilian dictators managed to devise an exit strategy that guaranteed impunity by political means, in contrast to what occurred in Argentina:

[...] the intensification of intra-military conflicts, which took place as a consequence of the defeat in the Falkland Islands, imposed great difficulties on the

²³ Dieter Rucht, "Sociedade como projeto – Projetos na sociedade. Sobre o papel dos movimentos sociais," *Cívitas – Revista de Ciências Sociais* 2 (2002): 19.

²⁴ Ruti G. Teitel, "Ruti Teitel responde (interview by Marcelo D. Torelly)," *Revista Anistia Política e Justiça de Transição* 3 (2010): 36.

²⁵ José Zalaquett, "La reconstrucción de la unidad nacional," 11.

Armed Forces to internally agree on a global exit plan. Nevertheless, the limitations encountered by the Executive Branch when attempting to impose its authority on society and the Armed Forces did not stop it from trying to politically administer the transition.²⁶

Moreover, it is worth noting that even with the low levels of Brazilian civil society mobilization, the existing advances in accountability through the reparation commissions are the result of the continued efforts of the relatives of the dead and disappeared and those labor union workers dismissed for political reasons, even though such attempts have been disorganized and fragmented. This civil society mobilization for accountability reached such high levels that the armed forces were forced to abandon the position that Stanley Cohen describes as "literal denial," where perpetrators of a given violation defend themselves from the possibility of accountability using the laconic statement "nothing happened."²⁷

More civil society interest in transitional justice began in 2002, with the approval of Law 10,559/2002, which held the state accountable for all repressive acts except "death or disappearance." With the passage of this law, new social movements following broad transitional justice agendas emerged. Groups devoted to advocacy for the right to reparation as well as those linked to labor unions of workers politically persecuted during the great strikes of the 1980s were among these movements. Recently, demands have expanded to include calls for accountability for torture, a truth commission, the right to memory, and the right to full reparation. Transitional justice issues are no longer exclusively the domain of those directly harmed by the dictatorship's repressive apparatus. Instead, these demands reflect a collective interest in strengthening the principles of democracy. With this newfound support for accountability coupled with important reports by the Commission on the Dead and Disappeared and the Amnesty Commission on grave human rights violations committed by state agents during the dictatorship, legal constraints on the prosecution of these violations have again come to the forefront of national debate.

Legal Reasons

Currently, the main legal obstacle to accountability is the interpretation of the amnesty law. The dictatorship's judicial branch interpretation – recently reconfirmed by the democratic Supreme Court in the ADPF 153 case – reinforced the

nondemocratic approach to rule of law in Brazil. The judicial branch also expanded the scope of the amnesty law. First it included a broader range of beneficiaries, adding members of the authoritarian regime. Then it extended the time frame to include events that occurred after 1979.

The Supreme Court's decision in ADPF 153 recognized the dictatorship as a legitimate rule of law regime and thus validated its interpretation of the 1979 amnesty law. It accepted the notion that a bilateral agreement between the regime and the institutionalized opposition initiated Brazil's democratization process. The Court recognized that essential elements of a democratic rule of law were put in place after the 1964 coup and were codified in the nondemocratic 1967 and 1969 constitutions. By legitimizing the alleged pact between two sides, the Court validated the use of political measures to justify the removal of a set of crimes from judicial review, thus denying in practice a citizen's right to redress for human rights violations committed by the authoritarian regime.

Eros Roberto Grau, the judge who presented the case to the Court, stated that "everyone who knows our history knows that the political agreement existed, resulting in the text of Law No. 6,683/1979," endorsing the belief in national pacification through oblivion and reiterating the authoritarian semantics of equating resistance with terrorism. Still, he continued: "What would be desired now in an attempt to, rather than rewrite, reconstruct the history? That the transition had been made, a day after the time of that agreement, with blood and tears? With violence?"²⁸

A set of judges believed that the written law, though unpalatable because it amounted to concealing torture, was useful to national reconciliation and could not be changed because it had already achieved its intended results. In other words, the amnesty was given to both sides in 1979 and could not be removed only for one side in 2010. Only two judges of the Court, Ricardo Lewandowski and Carlos Ayres Britto, voted in favor of the lawsuit presented by the Brazilian Bar Association because they believed that amnesty, if applied to torture and crimes against humanity, would not only be unconstitutional but also contrary to international law; further, the notion of a bilateral amnesty would be meaningless. Granting amnesty to both sides in the same act would not nullify the fact that the regime was receiving a self-amnesty.

Nevertheless, the most important impact of the Supreme Court's decision was that the law of 1979 was deemed legally valid under the new democratic constitution, establishing a direct and objective continuity between the legal system of the dictatorship and the democratic one and preemptively prohibiting any investigation of criminal offenses that occurred between 1961 and 1979. Until the Court's decision in the 2010 ADPF 153 case, it was possible to treat the amnesty law as a legal obstacle

²⁸ Grau, Eros Roberto. ADPF 153. Brasília: Supremo Tribunal Federal, voto do ministro relator, abril de 2010.

²⁶ Carlos Acuña and Catalina Smulovitz, "Militares en la transición argentina: del gobierno a la subordinación constitucional," in *Historizar el pasado vivo en América Latina*, ed. Anne Pérotin-Dumon accessed July 31, 2011, <http://www.historizarelpasadovivo.cl/downloads/acunasmulovitz.pdf>, 83.

²⁷ Stanley Cohen, *Estado de negación – Ensayo sobre atrocidades y sufrimientos* (Buenos Aires: Buenos Aires University Law School/British Council Argentina, 2005), 124.

that could be circumvented to pursue criminal accountability for certain crimes. In the aftermath of that decision, this possibility was severely restricted. Today, the Supreme Court's decision is undoubtedly the most significant legal obstacle to the progress of criminal accountability in Brazil. The only legal challenge that the 1979 law currently faces is the recent decision of the IACtHR in the *Gomes Lund v. Brazil* case, discussed in the following section.

CONCLUSIONS: THE PURSUIT OF TRUTH AND JUSTICE ALTERNATIVES IN BRAZIL

When outlining conclusions on transitional justice in Brazil we begin with the certainty that reparations constitute both the core of social mobilization to expand the transitional justice agenda and the most effective route to historical clarification of the crimes committed by the Brazilian dictatorship. The reparation process has enabled the uncovering of historical truth, access to documents, records of testimonies of the persecuted, and the holding of public hearings on the subject.

Nevertheless, it is clear that the two major challenges facing the Brazilian transition are truth and justice. From an ethical point of view, the disclosure of the past and the processing of crimes represent a commitment to nonrepetition. Meanwhile from a strategic point of view, applying amnesties to a certain set of crimes combined with selective trials for certain acts (i.e., crimes against humanity) deepens democracy and respect for human rights, prescriptively applying what Tricia Olsen et al. describe as the "justice balance" model.²⁹

After the progress made by the reparation commissions, the principal means of breaking the silence surrounding past crimes involves the establishment of a truth commission. After a recent public debate on the creation of such a commission, which occurred at the National Conference on Human Rights and included delegates from all over the country, the proposal to create a truth commission was included in the Third National Plan for Human Rights. A working group, specially assigned to this task by the president of the republic, formulated the bill detailing the structure of the new truth commission. Bill No. 7,376/2010 was approved by congress as Law No. 12,528 on November 18, 2011, creating a commission with the following characteristics (Table 6.4).

Justice alternatives today focus on three main possibilities: international courts, domestic civil suits, and domestic criminal cases outside the reach of the amnesty law. International justice is likely to involve filing claims with the IACHR for adjudication in the Inter-American Court. The IACtHR, however, has no means of enforcing its rulings and can only recommend that the state investigate and punish

TABLE 6.4. *Truth Commission (Law No. 12,528/2011)*

Truth Commission (Law No. 12,528/2011)	
Commission objectives	<ul style="list-style-type: none"> - Examine and clarify the severe human rights violations committed between 1946 and 1988; - Produce the final report
Number of members	Seven, appointed by the president
Duration of members' mandate	For the entire process which ends with the publication of the report
Commission's mandate	<ul style="list-style-type: none"> - Clarify the facts and circumstances of severe cases of human rights violations that occurred in Brazil between 1946 and 1988; - Promote detailed awareness of cases of torture, deaths, forced disappearances, concealed corpses, and the perpetrators of such crimes, even if they took place abroad; - Identify and make public the structures, venues, institutions, and the circumstances related to the practice of human rights violations and their possible connections to several different state institutions and society; - Send all information that might help locate and identify bodies and remains of missing people to public agencies; - Cooperate with all governmental agencies in order to investigate human rights violations; - Recommend the adoption of public policies and measures to ensure the nonrecurrence of human rights violations and to promote effective national reconciliation; and - Based on evidence in the final report, promote the reconstruction of the case histories of severe human rights violations and recommend full state cooperation so that assistance to victims of such violations is provided.
Commission's powers	<ul style="list-style-type: none"> - Receive testimony, information, data, and documents that have been sent voluntarily, ensuring the nonidentification of the owner or witness when asked; - Request information, data and documents from governmental bodies and entities, even when classified; - Call in people for interviews or testimony who are not directly related to the facts and circumstances of a case; - Monitor the state's diligence in collecting or retrieving information, documents, and data; - Promote public hearings; - Request protection from public bodies for anyone in a threatening situation because of his/her collaboration with the National Commission of Truth; - Promote partnerships with national or international, public or private agencies and entities to exchange information, data, and documents; and - Request the assistance of public bodies and entities.
Commission's duration	Two years

²⁹ Olsen, Payne, and Reiter, *Transitional Justice in Balance*.

human rights violators and compensate the victims. Because the IACtHR depends on Brazilian courts to implement its decisions, IACtHR judgments may not be enforced due to the rampant culture of impunity in the Brazilian judiciary. However, international court rulings, like the IACtHR's decision in the *Gomes Lund v. Brazil* case, play a key role in mobilizing society and exerting pressure on the national judiciary. Also, some progress may be possible in the political arena since international condemnation calls into question the authoritarian reading of the amnesty law as "amnesty as oblivion and impunity" and reinforces the idea that amnesties are possible for freedom.

The IACtHR does not limit its jurisdiction to legal remedy; it has also recommended complementary reparation and truth efforts. Specifically, in addition to demonstrating that the Supreme Court's interpretation of amnesty for state crimes is incompatible with the American Convention on Human Rights (hereinafter American Convention), the IACtHR also demanded that the state locate the remains of guerrilla members killed during the massacres in Araguaia that took place between 1972 and 1974. The Brazilian government has partially complied. It formed a working group that has begun excavation in the Araguaia region to locate the remains.

The main obstacle to implementing the current IACtHR decision is the Supreme Court's interpretation of the 1979 amnesty law. Some conservative legal scholars have stated that Brazil should not accept the IACtHR jurisdiction for events that occurred before the country recognized the jurisdiction of the Inter-American Court in 1998. This position violates the IACtHR precedent that permanent crimes (such as forced disappearance) are considered ongoing until the victims' remains are located, as discussed by Par Engstrom and Gabriel Pereira in this volume.

However, the positions taken by the Supreme Court and the IACtHR may not be as incompatible as they seem. The Supreme Court states that under the 1988 Brazilian constitution, the 1979 amnesty is valid for all crimes. The IACtHR states that amnesty for certain crimes (e.g., human rights violations) violates the American Convention. The Supreme Court ruling is based on the Brazilian constitution and the IACtHR ruling is based on international agreements. Thus, it is possible to see the IACtHR position as complementary to the Supreme Court's decision. International law, and more specifically the American Convention, does not expressly prohibit amnesty. It does, however, limit its application as Mark Freeman and Max Pensky discuss in their chapter in this volume. Without repealing the 1979 amnesty law, the judiciary could exclude some crimes from it, thereby adapting the original scope of the law to Brazil's international obligations under the American Convention. This strategy has been used in Chile. Chilean domestic criminal courts try cases of human rights violations while continuing to grant amnesty for less grave crimes committed by the regime. For this to occur in Brazil, however, the Supreme Court would have to recognize the IACtHR's jurisdiction over events prior to 1998.

Brazil remains divided over accountability for human rights violations. Unlike their counterparts in other Latin American countries, Brazilian social movements have not consistently used the judiciary to challenge and weaken the amnesty law. By questioning the Brazilian Supreme Court's 2010 decision to uphold a bilateral interpretation of the 1979 amnesty law, the IACtHR's judgement in the *Gomes Lund v. Brazil* case may galvanize public opposition to the law, building pressure for change. This pressure could increase with factual revelations from the proposed truth commission. Moreover, many victims might see the IACtHR decision as an opportunity to circumvent the Supreme Court's ruling and file more lawsuits in local courts.

Domestic courts also play a key role. The following legal openings exist for prosecution despite the persistence of the amnesty law: the investigation of torture, disappearances, and deaths that occurred after August 1979 and are therefore not covered by the amnesty law; accountability in civil courts for severe human rights violations, particularly through declaratory actions in which the state is deemed responsible for crimes that cannot be punished under criminal law; the implementation of Argentine-style truth trials with the involvement of the judiciary in revealing concealed evidence; and the prosecution of forced disappearances as permanent and ongoing crimes until the victim's body or remains appear, which removes these crimes from the scope of the 1979 amnesty law.

In all cases, mobilization on the part of civil society is key. It feeds the transitional justice agenda, particularly in contexts of transition by transformation where authoritarian enclaves retain control. The strategies identified to circumvent the amnesty law depend on human rights and prodemocracy movements that actively engage state institutions. Even individuals can challenge impunity by demanding justice. The progress on reparations and its capacity to spread to other transitional justice mechanisms illustrates the importance of social movements that create institutional opportunities to advance a democratic agenda despite the political and legal obstacles that still exist.