

The Inter-American Court of Human Rights' Report on the Herzog Case: A Reflection on the Tortuous Way for the Right to Memory and Truth and on the Absence of Justice in Brazil

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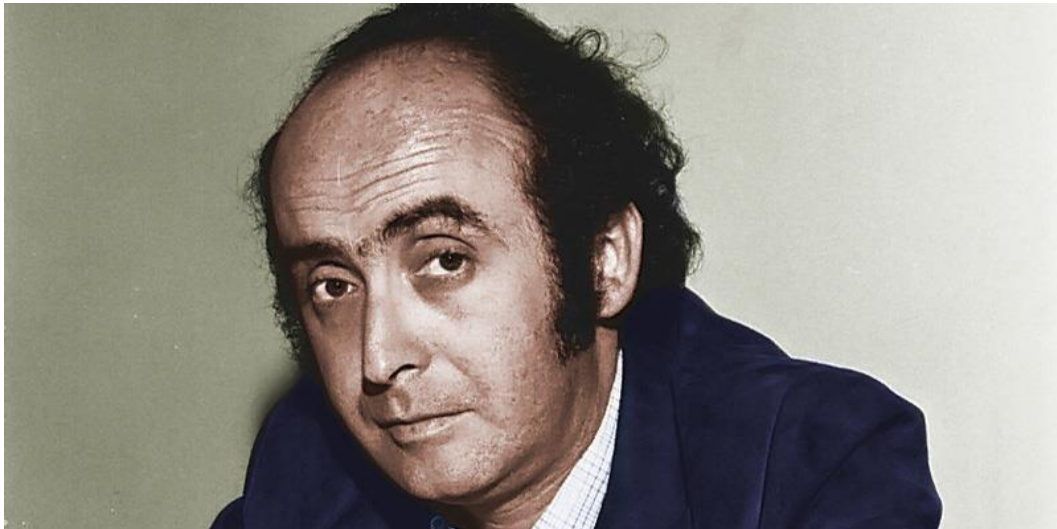
Dictatorships have unfolded in different ways in each country. This entails that each country also has its own pace to pursue a transitional process. Despite the particularities, the transitional processes are usually built on the same pillars: justice, truth, reparation and guarantees of non-repetition, which are inextricably related to the existence of international obligations and are consolidated, above all, through institutional reforms.¹ In this sense, processes of transitional justice can vary according, firstly, to the situation in the country regarding the marks that the dictatorial regimes left behind and, secondly, the effectiveness of transitional mechanisms applied. More than that, civil society groups, while often disregarded by the state, largely address the search for justice for crimes committed against humanity. Similarly, the struggle for the right of victims to a remedy and reparation varies from society to society, however, it is possible to identify a common point present in all cases: the tireless efforts of family members, who relentlessly dedicate their whole life to know the truth and achieve justice.

During the Brazilian transition, the political elite opted for an amnesty that benefited the authoritarian agents of the state. Therefore, the need to remember the past, to attribute blame and to recognize the suffering of the victims of repression still remains.² To convict the responsible state's authorities for perpetrating human rights violations is extremely necessary for dealing with the past and strengthening democracy. In comparison to all other countries that have experienced dictatorial periods in the *Cone Sur*, Brazil is the one, which has advanced the least towards the pillar of justice. The impunity to torturers and murderers, who were serving the dictatorial state, shows how Brazil is a "clear example of a country that has been unable to shake off the legacy of authoritarianism built over the course of the regime".³ This impunity is, for example, supported by the ambiguous understanding of the Brazilian Supreme Court on the Amnesty Law (No. 6683/79). This law ends up being granted to not only victims but also the perpetrators of human rights violations. Its broad, general, and unrestricted

character automatically acquits all violations of human rights that have been perpetrated by agents of political repression, making it a true self-amnesty granted by the regime to itself. That is to say, while being seen as a milestone for the Brazilian re-democratization, the Amnesty Law represents a policy of forgetfulness, as well. Its controversial interpretation still persists.

The military regime, which was marked by several modifications to the Constitution of 1946⁴, installed an order of exception through the so-called Institutional Acts (IA), of which there were seventeen in total. Briefly said, through these IA the constituted order in force was broken and civil rights increasingly restricted. The hardest one was the fifth IA, issued in December 1968 during the *Anos de Chumbo* (Years of Lead) from about 1965 to 1974. The IA-5 suspended legislative bodies indefinitely, allowed the executive branch to rule by decree, and provided the legal basis for a purge of "subversive elements" perceived as threats to the maintenance of the regime's security.⁵ In 1970, two complementary intelligence and repression agencies were created in Brazil. These were directly connected to the army. Their offices were established in all major cities across the country and called *Destacamento de Operações de Informações* (DOI - Department of Information Operations) and *Centro de Operações e Defesa Interna* (CODI - Center for Internal Defense Operations), best known as DOI/CODI. They formed a "political police force that took over some of the functions of the *Operação Bandeirante* (OBAN - Bandeirante Operation)" – the latter had previously been created in 1969 with the help of entrepreneurs linked to the Federation of Industries of the State of São Paulo (FIESP) in order to integrate the repressive forces of the military regime. The DOI/CODI agencies "had carte blanche to persecute, arrest, torture, and murder anyone who dared defy the regime", and further, "[t]he DOI/CODI meant the actual federalization of the OBAN, that is, it adopted the idea of the original institution that was being funded by the private sector and transformed it into a governmental office".⁶ According to official reports, from 1970 to 1973 around "fifty deaths and more than 6,700 politically motivated arrests" happened at the DOI/CODI office in São Paulo.⁷

A case in point is the death of the journalist Vladimir Herzog, who was tortured and murdered by agents of the Brazilian authoritarian state in 1975. As stated in the Inter-American Court's report on the case, his detention was part of the *Operação Radar* (Operation Radar), which had been retaken by the DOI/SP in 1973 and aimed at "combating" the Brazilian Communist Party (PCB).



Vladimir Herzog. Credits: [Collection of Instituto Vladimir Herzog.](#)

As reported in the Inter-American Court's [ruling of 15 March 2018](#)⁸, which was released on [July 4, 2018](#)⁹, in the evening of 24 October 1975 two DOI/CODI agents came over to the *TV Cultura's* headquarter, where Vladimir Herzog was working, and summoned him to accompany them to the DOI/CODI office in order to Herzog clarify his ties with the PCB. Though, after the interference of the *TV Cultura's* directorate, the security forces agreed to notify Vladimir Herzog that he should "voluntarily" appear at the DOI/CODI-SP headquarter the next morning to testify. He went Saturday morning, 25 October. As further accounted in this report, when he arrived he was deprived of his freedom, interrogated and tortured. During the afternoon, he was murdered by the DOI/CODI members, who had kept him under arrest. On that same day, the Command of the Second Army publicly announced the official version of the facts, which stated that Vladimir Herzog had committed suicide by hanging himself. The existence and diffusion of this false version has been appealed by the journalist's family since as well as during the process conducted by the Inter-American Court.

Throughout the struggle of Herzog's family members for memory, truth and justice, they received no support from the Brazilian justice system, which has filed the case's investigations several times and as of today has not punished the persons responsible. The case reached the Inter-American Court, because the Brazilian state did not execute justice. According to the [Instituto Vladimir Herzog](#):

The Inter-American Commission on Human Rights (IACHR) sent Herzog's case to the Inter-American Court of Human Rights so that the the Brazilian state could be tried for neither investigating nor punishing those responsible for the torture and execution of Vladimir Herzog.¹⁰

Before it happened, there were three attempts at national courts to investigate the case, which all failed:

The first attempt was conducted shortly after the crime by the Military Justice itself, which concluded the investigation by stating the suicide of the journalist. Such version was rejected [by the family, who then]¹¹ presented a declaratory action in the Federal Justice. The second time, in 1992, the Public Prosecutor's Office of the State of São Paulo requested the opening of an inquiry based on new information, but the Court decided to file the case based on the Amnesty Law of 1979. Finally, in 2009, there was also an attempt by the Federal Public Ministry, which again failed. At this time under the argument that the case should be filed by prescription.¹²

On top of that, as also stated in the Inter-American Court decision, the *Instituto Vladimir Herzog* reports: "[o]n 29 April 2010, the Federal Supreme Court ruled, by seven votes to two, that the Amnesty Law was compatible with the [democratic] Brazilian Constitution of 1988. This decision has a binding effect over all organs of public power"¹³. As Heinz F. Dressel, who was outraged by this decision, addresses, "it is a misconception to speak of 'bilateralism'." To set side by side torturers and the victims of terror is "offensive and repugnant", and further "this judgment of the Federal Supreme Court seems to be irrational. Torture can not be considered a legitimate function of the State. (...) Torture is a crime against human dignity and should not be amnestied".¹⁴

Vladimir Herzog's case illustrates the lethargic Brazilian transitional justice, which favors impunity. Concerning the just mentioned Amnesty Law, which provided a legal basis for the dictatorial regime's crimes to remain unpunished¹⁵, Brazil had a late National Truth Commission (CNV) that unfortunately "failed to overcome the greatest obstacle [that this law represents] to a comprehensive coping with Brazilian human rights violations."¹⁶

Unlike the creation of official truth commissions in Argentina or Chile, which were implemented early in the democratic process post-military regime, the Brazilian Truth Commission (CNV) was endorsed in 2011, almost 30 years after the end of the military dictatorship in 1985. The CNV's goals included: to explain the circumstances of cases of serious human rights violations between 1946 and 1988 and to "promote the clarification" of cases of torture, deaths, enforced disappearances, concealment of corpses, and clarify their authorship even abroad.¹⁷ The CNV had more than two years since its establishment to complete the work of analyzing documents from public agencies, holding public hearings, and convening persons for interviews, who might have any connection with the examined facts and circumstances. It was legally established that the CNV would not have (and in fact did not have) jurisdictional or persecutory character and that it would be the duty of public servants and military personnel to collaborate with the Commission.

Particular to the Herzog's case, as part of its attributions, the CNV stated that there was no doubt that Vladimir Herzog was illegally detained, tortured and murdered by state agents at DOI/CODI/SP on 25 October 1975 and, furthermore, demanded the rectification of the *mortis causa* registered in Vladimir Herzog's death certificate, which has been a life-long

request of the journalist's widow, Clarice Herzog. On 24 September 2013, the intervening judge ordered the statement that the death of Vladimir Herzog had occurred as a result of injuries and ill-treatment suffered at DOI/CODI-SP. The Commission of Amnesty of the Ministry of Justice made the [rectification on Vladimir Herzog's death certificate](#). The family members waited almost 38 years for this.



Clarice Herzog holding Vladimir's death certificate rectified. Credits: Paula Sacchetta.

Pondering the points outlined above, we may realize the qualifications of the Brazilian democracy (its choices and limits) and rethink it critically. Dealing with the legacies of authoritarian repression is a political and ethical challenge during the transition to democracy. Brazil has not yet addressed this challenge as it should. The deep political tensions of the country's transitional process led the government to opt for a general amnesty and, consequently, for forgetting. The permanence of the dictatorship's shadow is illustrated through repressive means exhibited by the current democracy such as the truculent police violence or the existence of an exclusive military justice and thus still affects the lives of Brazilians.

It has taken 43 years and Herzog's family had to involve international bodies, like the Inter-American Court, to obtain justice. The recent Inter-American Court's decision obliges Brazil to reopen the investigation on the journalist's death and blames the state's negligence in investigating, prosecuting and punishing those responsible for Herzog's murder.¹⁸ This unprecedented great achievement may be viewed by hundreds of other families as a victory because they similarly had their relatives subjected to enforced disappearance or murdered by the authoritarian state and had joined in the long path for justice that Brazil has ahead of it. In general, the Court's decision represents a great advancement for all cases of serious human

rights violations and crimes against humanity, which urge prompt reparation policies. Like in the case of Herzog's family, their right "to know the truth" has been largely violated by the Brazilian democratic state as well as their "personal integrity". Therefore, this sentence on Herzog's case is of extreme importance to the justice process in the country as a whole.

There are different evaluations on the quality of the CNV's [Final Report](#) released in December 2014. Some state its results were frustrating. This account is grounded to a large extent on the fact that the term "tortures institutionalized by the Brazilian state" has been avoided in the CNV's report. The general term "violations of human rights" has been used instead.¹⁹ There is certainly some truth to this view, however others see that *frustrating* may be an unsuitable term, thinking that although only few concrete results have been achieved after two years and seven months of work and many investigations were unfortunately not only hampered with but also prevented, the CNV's contribution was an important step taken in the long way of the search for the truth and to build memory. In fact, the CNV did not propose solutions to repressive mechanisms present in today's Brazilian society nor did it provide the families of the regime's victims with more than a "late truth without justice".²⁰ However, it was fundamental in raising the issue and promoting the debate so that the importance in strengthening democracy, the need to seek answers and to deal with the past could be given to the new generations. This is an achievement that can be considered as a significant success.

In general, it is very difficult to precisely define to which extent the past social experience of Brazil's authoritarian regime bears on the present, making it an obstacle in the path for improving the quality of the country's current democracy. It is equally challenging to accurately estimate how the culture of impunity, which affects the legitimacy and effectiveness of law and its institutions, has been fueled by absence or by insufficient measures to remedy these grave human rights abuses of the past.²¹ Notwithstanding, it is equally very arduous to defend the contrary. As Miguel Arraes de Alencar, then governor of the state of Pernambuco, asserts in the joint work [Dossier of the political dead and disappeared from 1964 onwards](#) :

"(...) the facts that stand before us are unavoidable. There is no alternative but to decipher them and reveal them, even if it may be painful and the blames are untaken. It is also with deep pains and by assuming the guilt that a nation is built. To want justice does not mean to want revenge. Revanchists only reform mistakes, while those who fight for justice advance the process of re-democratization – which is still essentially formal in Brazil where an economic model that generates millions of miserable people is supported. The recognition by the State of the rights of the dead Brazilians during the military regime will represent advancement towards the re-democratization process. We know we can accomplish it with maturity and responsibility" (1995, p. xix. Free translation).²²

In conclusion, I would like to reaffirm that the only antidote or alternative facing an oppressive elite is by relentlessly defending democracy. The responsibility of Brazil towards

the commitment to justice, to the right to truth and memory is an urgent matter. These are essential to building intergenerational awareness that does not accept the idea that the period of the Brazilian exception regime, like any other repressive period lived in any other country, is a mere anomaly over the course of history or a dark past that can be solved by turning the page. It can not be forgotten, rather it must be accounted for. We must draw from these experiences and develop our self-awareness of the factors and mechanisms that once made the dictatorship possible and struggle against their legacies that still threaten our democracy. The mechanisms that lead to the dictatorship have been unimaginable once before, therefore these exact mechanisms prevalent today must be not only recognized and addressed, but also prevented. We need to challenge the legacies that remain in the democracy we live in like the extremely violent *modus operandi* of the Brazilian police force; the high police lethality; the mass incarceration; the high rates of homicides that come from the endemic violence and clearly target stigmatized and vulnerable social groups; the actual enforced disappearances; the justice system that collaborated with the dictatorship and continues to collaborate in the police arbitrariness in times of democracy.

Democracy operates as the only checks-and-balances form of government that can keep the political bodies away from extremism, and even so, such polarized groups raise. Impoverishing a society by crippling their ability to defend their own interests and self-determination, or attacking social and cultural diversity or general freedom of expression, or else attempting to curtail the liberties and freedom within the state – these reproachable measures undermine the social bases of political democracy and end up pushing the whole society dangerously to the brink of social disaster. The few but extremely important victories of Vladimir Herzog’s family throughout these last 43 years are victories of the entire society facing an oppressive state. In the same way, it is a duty of the whole Brazilian society to commit to the struggle for the right to memory and truth, and justice. To hold the state responsible for complying with the Inter-American Court’s decision on Herzog’s case is a struggle of the Brazilian people.



"Struggle!" Credits: [Collection of Insituto Vladimir Herzog](#). Free translation.

Notes and references:

¹ Sandoval, Clara. (June, 2014). Justiça de transição e a mudança social. In *SUR Revista Internacional de Direitos Humanos*. Original in English. Vol. 11 No. 20. Available at: <http://www.conectas.org/pt/acoes/sur/edicao/20/1007289-justica-de-transicao-e-mudanca-social>. Accessed on 06.07.2018.

² Brito, Alexandra Brahona de. (January-July, 2009). Justiça Transicional e a Política da Memória: uma visão global. Comissão de Anistia. In *Revista Anistia Política e Justiça de Transição*. No. 1. pp. 56. Ministério da Justiça. Brasília. Available at <http://www.justica.gov.br/central-de-conteudo/anistia/anexos/2009revistaanistia01.pdf> Accessed on 26.07.2018.

³ Mezarobba, Glenda. (December, 2010). Entre reparações, meias verdades e impunidades: o difícil rompimento com o legado da ditadura no Brasil. In *SUR Revista Internacional de Direitos Humanos*. Original in Portuguese. Vol. 7. No 13. pp. 9. Available at <http://sur.conectas.org/en/reparations-half-truths-impunity/> Accessed on 10.07.2018.

⁴ *ibid.* pp. 1

⁵ See its entire content at http://www.planalto.gov.br/ccivil_03/ait/ait-05-68.htm

⁶ Pinheiro Machado, Roberto. (2018). *Brazilian History: Culture, Society, Politics 1500-2010*. Cambridge Scholars Publishing. pp. 480.

⁷ *ibid.* pp. 319.

⁸ Inter-American Court of Human Rights. (March 15, 2018). Caso Herzog y otros vs. Brasil. Sentencia de 15 de marzo de 2018. Original in Spanish. Available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_353_esp.pdf. Accessed on 19.07.2018.

⁹ Inter-American Court of Human Rights. (July 4, 2018). Comunicado: Brasil es Responsable por no Investigar Crimen de Lesa Humanidad Cometidos Contra el Periodista Vladimir Herzog. Original in Portuguese. Available in Spanish at http://www.corteidh.or.cr/docs/comunicados/cp_25_18.pdf. Accessed on 19.07.2018.

¹⁰ Herzog's case. (n/a). Instituto Vladimir Herzog. Free translation. Available at <http://vladimirherzog.org/casoherzog/>. Accessed on 30.07.2018.

¹¹ **Note:** In 1976, Clarice Herzog, and her two children presented a Declaratory Action for the Federal Justice of São Paulo, requesting the Court to declare the responsibility of the Brazilian State for Herzog's imprisonment, torture and death. In 1978 the federal judge issued a ruling on the Herzog's case stating that the journalist was arrested, tortured and murdered. This represented the family's first victory towards their search for justice. See at <http://vladimirherzog.org/casoherzog/>

¹² Herzog's case. (n/a). Instituto Vladimir Herzog. Free translation. Available at <http://vladimirherzog.org/casoherzog/>. Accessed on 30.07.2018.

¹³ Inter-American Court. (July 4, 2018) pp. 2 – Free translation

¹⁴ Dressel, Heinz F. (June 7, 2010). O Brasil vai fugir da confrontação com os crimes da ditadura? Available at <http://www.menschenrechte.org/lang/de/regionen/confrontacao-com-ditadura> Accessed on 28.07.2018.

¹⁵ Comissão Especial de Mortos e Desaparecidos Políticos. (2007). Direito à memória e à verdade. Secretaria Especial dos Direitos Humanos da Presidência da República. pp. 30. Available at http://dh.sdh.gov.br/download/dmv/direito_memoria_verdade.pdf Accessed on 23.07.2018.

¹⁶ Ambos, Kai & Romero, Eneas. (January 15, 2015). The Report of the Brazilian Truth Commission: Late Truth without Justice? Available at <https://www.ejiltalk.org/12892/> Accessed on 27.07.2018.

¹⁷ See more about the CNV's working groups and their objectives at <http://cnv.memoriasreveladas.gov.br/institucional-acesso-informacao/grupos-de-trabalho.html>. Accessed on 31.07.2018.

¹⁸ Vilaverde, Carolina. (July 4, 2018). Caso Herzog, 43 anos de impunidade! O Brasil pede Justiça para crime contra a humanidade. Available <http://vladimirherzog.org/caso-herzog-43-anos-de-impunidade-o-brasil-pede-justica-para-crime-contra-a-humanidade/> Accessed on 25.07.2018.

¹⁹ See the statement of Cecilia Coimbra, founder of the *Grupo Tortura Nunca Mais – RJ* to the Brazilian newspaper *Folha de São Paulo* on 12.10.2014. Available at <http://www1.folha.uol.com.br/poder/2014/12/1560330-fundadora-do-tortura-nunca-mais-considera-frustrante-relatorio-da-cnv.shtml> Accessed on 20.07.2018

²⁰ Ambos, Kai & Romero, Eneas. (January 15, 2015). The Report of the Brazilian Truth Commission: Late Truth without Justice? Available at <https://www.ejiltalk.org/12892/> Accessed on 30.07.2018.

²¹ Quinalha, Renan. (2013). *Justiça de Transição: contornos do conceito*. São Paulo: Expressão Popular/Outras Expressões. pp. 252.

²² Comissão de Familiares de Mortos e Desaparecidos Políticos & Instituto de Estudo da Violência do Estado - IEVE & Grupo Tortura Nunca Mais - RJ e PE. (1995). *Dossiê dos mortos e desaparecidos políticos a partir de 1964*. CEPE – Companhia Editora de Pernambuco. Governo do Estado de Pernambuco. Available at <http://www.dhnet.org.br/dados/dossiers/dh/br/dossie64/br/dossmdp.pdf> Accessed on 11.07.2018.