MEMORY, TRUTH, REPARATION AND JUSTICE: a thesis of constitutional resistance

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1. Introduction

This text intends to present a different construction of narrative than what has been elaborated in Brazil to link the themes of political amnesty, memory and truth with justice. Or, in other words, a thesis of resistance to the still hegemonic idea that amnesty is always forgetting; a thesis to link the 1979 political amnesty with memory and consequently with the possibility of holding human rights violators accountable.

Based on the Belgian philosopher François Ost[1] I will build the arguments by demonstrating that Law 6683/79 was not a law that imposed forgetfulness, but one that advocated memory. Amnesty as anamnesis and not as amnesia. This in spite of the hegemonic politics that since then have tried to argue to the contrary. And also in a very different way from the Latin American experience of amnesty laws of forgetfulness, of amnesia.

As for the possibility of accountability of human rights violators, that is, the possibility of justice, I will rely both on these same arguments and on the Supreme Court's ADPF 153 decision from April 2010.

To do so, it is necessary to understand the choice of the Brazilian constituent and the entire context of 1979 and the 1980s, in the debate of what has been called Transitional Justice, a process that should be applied to countries that have emerged from authoritarian regimes and aim to achieve a Democratic Rule of Law.

2. The choice of the Brazilian constituent: amnesty, memory, truth, and reparation

To explain the constituent's choice regarding the transitional process it is necessary to go back to 1979 and the whole debate about political amnesty. There was a

[1] OST, François. **O tempo do direito.** Bauru, SP: EDUSC, 2005.

demand from parts of Brazilian civil society for what was called a broad, general, and unrestricted amnesty. The main objective was to enable the return of Brazilians in exile, as well as to free political prisoners and bring out of hiding those who were persecuted by the forces of repression. After heated parliamentary debate, the opposition's bill, which provided for the desired broad, general, and unrestricted amnesty, lost, and the bill that contained an exception to the amnesty, that is, it was not an unrestricted amnesty, won and became Law 6.683/79, the Amnesty Law.

It is important to note which model of political amnesty occurred in Brazil in 1979. Because these amnesties can be of two types: those that mean amnesia (forgetfulness) and those that mean anamnesis (memory). This is what Ost teaches about the political amnesties:

> These are divided into amnesty of penalties and amnesty of facts. The minor amnesty, which intervenes after conviction, interrupts the execution of sentences and erases the conviction; however, at least the process occurred in its time, thus paying a tribute to memory. In contrast, amnesty for the facts extinguishes the public action, because the facts are considered not to have been criminal. At this point, the effect of legal performance reaches its apex: we act as if the evil had not occurred; the past is rewritten and silence is imposed on memory. (emphasis added).[2]

The political amnesty of Law 6.683/79 was an amnesty of penalties, of convictions. So much so that there were sanctions to be amnestied. Without going into the merits of the type of process, that is, the type of trial that took place (without ample defense, without adversary, and other characteristics of exception processes), there was judgment, decision, and condemnation. The same can be said about the dismissal decisions: there was appreciation, deliberation and dismissal as a sanction. Law 6.683 erased these sanctions, that is, it erased the consequences of the facts. It did not erase the facts. It acted, therefore, as memory and not as oblivion. So much so that the reference, until today, to those who were imprisoned or exiled and was granted amnesty at that time is "former political prisoner" or "former exiled". The facts of imprisonment and exile have not been erased. They have not been forgotten. And nor could they have been, because the meaning of Law 6.683/79 was that of memory, of anamnesis. It is exactly for this reason that Law 6.683/79, which is in effect until today, because it was received by the Federal Constitution, erased all and any conviction that took place until August 28th, date of its promulgation. The Amnesty Law did not erase the facts that took place before August 28, 1979. It was not forgetfulness. The evil was not forgotten; on the contrary, it

[2] OST, François. **O tempo do direito.** São Paulo: EDUSC, 2005, p. 172.

is remembered to allow reparation. The Brazilian political amnesty of 1979 was memory, anamnesis.

Another conclusion that is necessary is that all the facts that occurred before the promulgation of the law that were not the object of conviction were not amnestied, because that amnesty was an amnesty of convictions. In other words: only those who had been convicted/dissmissed before Law 6.683/79 were granted amnesty; those who were not even investigated or prosecuted, such as torturers, for example, were not granted amnesty. I will come back to this subject.

In 1985 there was a call for a Constituent Assembly, through Constitutional Amendment no. 26. This Amendment makes provisions about the Constituent Assembly in the first three articles. Articles 4 (and its paragraphs) and 5 normatize political amnesty, in the same spirit as Law 6.683/79, in the following terms: "Amnesty is granted to all civil public servants of the direct and indirect administration and military, punished by acts of exception, institutional or complementary" (emphasis added).

Who was granted amnesty? Who had been punished. In other words, Amendment 26/85 confirms amnesty as memory, as anamnesis, and not as forgetfulness. Amnesty of penalties, of sanctions, and not of facts. It could be argued otherwise that §1º of this same art. 4º establishes such a broad and unrestricted amnesty when it mentions related crimes:

> § 1 is granted, equally, amnesty to the authors of political or related crimes, and to the leaders and representatives of trade union and student organizations, as well as to civil servants or employees who have been fired or dismissed for exclusively political motivation, based on other legal diplomas.

The legal text presupposes that the same treatment given to the political crime should be given to the related crime, whatever the concept of related crime may be. If this political amnesty had been one of forgetfulness, of amnesia, an amnesty for the facts would have occurred. In other words, if the facts had been forgotten, we would necessarily have had to "erase the evil", as if it had never occurred. It cannot be said that the authors of political crimes and related crimes are amnestied and, therefore (as a logical consequence) the facts have been erased; they never happened. Hence (another logical consequence), it is not possible to investigate/process anyone else because everyone was amnestied in 1979.

Why is this reasoning inconsistent? Because it is premised on the premise that the amnesty of Law 6.683/79 was one of forgetting and not of remembering. It would have been, in this logic, an erasure of evil. Amnesty for the facts. As if they had never occurred. Well, if they never occurred, they cannot give rise to any type of reparation, since reparation requires proof of the occurrence of the facts. Memory. And since 1979 the persecutions (be it prison, exile or dismissal) have been repaired. Those who were fired for political reasons, for example, asked and obtained reinstatement to their jobs. Those who were imprisoned or exiled were released or returned to Brazil, being characterized as former political prisoners or former exiles. The facts are remembered. The evil has not been erased. Everyone refers to the period since 1964 as a dictatorship, and not as a period of democratic normality. The facts have not been erased. What occurred has not been forgotten.

Therefore, the only logical conclusion possible is that both Law 6.683/79 and Amendment 26/85 established a political amnesty of memory, of anamnesis, because they were political amnesties of penalties, of sanctions, and not of the facts.

When the Constitution was being drafted, the choice of the Brazilian constituents to conduct the transitional process fell on the dimensions of reparation, memory, and truth, through, again, political amnesty, as can be seen in the caput of Article 8 of the Act of Transitional Constitutional Provisions (ADCT):

> Art. 8 Amnesty is granted to those who, in the period from September 18, 1946 to the date of the promulgation of the Constitution, were affected, as a result of exclusively political motivation, by acts of exception, institutional or complementary, to those covered by Legislative Decree No. 18 of December 15, 1961, and to those affected by Decree-Law No. 864 of September 12, 1969, guaranteed promotions, in inactivity, to the position, job, rank or grade to which they would be entitled if they were in active service, in compliance with the periods of the amnesty of penalties, consequences, convictions, labor sanctions, and any other sanctions that may have resulted from political persecution.

Once again there was amnesty for penalties, consequences, convictions, criminal and labor sanctions, and any others that may have resulted from political persecution. Note that, as a regulation of this constitutional provision, Law 10.559/02 makes it possible for those who were expelled due to political persecution to return to their studies. This shows that the constitutional amnesty was and is, as in 1979, about penalties and not about facts. Congressman Ulysses Guimarães himself, when promulgating the Constitution, referred to the hatred and disgust of the dictatorship. Now, if there had been an amnesty

for the facts, he could not refer to the dictatorship, because it would have been erased; forgotten. But the political amnesty in Brazil was only of the sanctions. It was and is memory, not forgetting.

3. Memory and truth

The axis of memory/truth is not the mere compilation of individual or family recollections of adverse events. But it is the version of the losers in that struggle, the truth of the defeated, relived, resized, and especially resignified in the present moment. Truth is objective while memory is subjective.

To build another memory, which resignifies a posture of valorization of life, equality, and freedom, and which rises against repression and authoritarianism is one of the goals of this foundation. Much has been produced in Brazil regarding this binomial, especially since the law that created the National Truth Commission (Law 12.528/11). There was already substantial production on the subject by then, as a result of actions and testimonies both from resisters/survivors of the dictatorial regime and from family members of the dead and disappeared politicians.

By the way, the legal frameworks of the Brazilian transitional process all make the same choice by emphasizing the binomial memory/truth and also the dimension of reparation. They are: Law 6.683/79 (Amnesty Law); Constitutional Amendment 26/85 (calls for a Constituent Assembly and extends the 1979 amnesty); the Federal Constitution itself (especially article 8 of ADCT); Law 9.140/95 (creates the Special Commission on Political Deaths and Disappearances); Law 9.140/95 (creates the Special Commission on Political Deaths and Disappearances); and Law 9.140/95 (creates the Special Commission on Political Deaths and Disappearances); Law 10.559/02 (creates the Amnesty Commission), and finally Law 12.528/11 (creates the National Truth Commission).

It is interesting to note that although the Amnesty Commission's main purpose is reparation, as we will see later, Law 10.559/02 also established memory and truth as its objectives, following the constitutional choice.

Nevertheless, it is worth noting that since 1979 the official policy has been one of forgetfulness, similarly to neighboring countries in Latin America that also went through

national security regimes. The official narrative is one of forgetting, in direct opposition to what the legal system has established since 1979; however, as we have seen, narratives are subjective, they are constructed according to hegemonic interests. We should ask ourselves: who is responsible for controlling these processes? Ost himself, when establishing that the cultural elaboration of time is a challenge of power, states that whoever is able to impose to the other social components his or her temporal construction is the true holder of power. The market, for example, currently imposes time and dictates the measure to all States of the planet in the framework of a globalized and privatized economy.[3]

Now, if the globalized market imposes time and the construction of a single thought in the direction of a social memory with repressive and authoritarian narratives, how to undertake the struggle for another memory, another meaning, counter-hegemonic, liberating, and in the direction of establishing more democratic relations in Brazil?

This was precisely the struggle waged by the Amnesty Commission, sometimes with victories and most of the time with adversities and defeats. Unfortunately the Commission was mischaracterized by the Brazilian State until it became a government commission. Even for this reason, it is important to affirm that the struggle for redemocratization in Brazil is still ongoing, now more than ever, and that all legal and political debates about political amnesty imply memory, truth, and reparation, and never forgetting.

Regarding the normative context, we have that both Law 6.683/79 and Constitutional Amendment (CA) 26/85 affirm memory, truth, and reparation; the Federal Constitution imposes a transitional process based on reparation, memory, and truth; with Law 9. 140/95 for the first time the Brazilian State takes responsibility for the deaths and disappearances of Brazilian citizens, following the constitutional transitional process also based on reparation, memory, and truth; and Law 10.559/02 creates the Amnesty Commission to carry out integral reparation, including actions of memory and truth. In absolutely all situations the facts are recovered. They are not erased. On the contrary, the facts need to be recovered and demonstrated in order to give rise to reparation. Now, if the facts can be proved, it is because they have not been erased. The convictions and sanctions were erased. Amnesty as memory.

[3] Idem, p.25

Let us observe, then, the conjuncture of the first decade of this century, which will lead to the last legal milestone, which is Law 12.528/11. It is a conjuncture that highlights this paradox of legal norms of memory, truth, and reparation, and at the same time seems to want to impose a hegemonic policy of forgetfulness. Before that, however, it is worth reflecting if this policy of forgetting could not imply an enormous risk for the democracy that the public authorities claimed to be building:

> Thus, it seems that democracy must permanently guard against two opposing dangers: either the exacerbation of conflict, or its concealment. In the first case, without agreement on a common rule of the game, without reference to a minimum of shared values, the party degenerates and leads to the exclusion or destruction of the adversary, then treated as an "enemy": deprived of the minimum of trust, presupposed by the promise that binds the future, the political game narrows. On the contrary, when divergences of interest are hidden, and oppositions are minimized behind façade consensus, there is a great risk that future outbreaks of violence will develop. This is, without a doubt, one of the risks currently linked to the establishment, all over the planet, of "market democracy" and the single thought that accompanies it.[4] (emphasis added).

In this sense, to attend to such a market democracy, the hegemonic policy of oblivion should prevail, and for this, conflicts needed to be hidden. The result was not good, as will be shown below.

Within the context of the 2008 global economic crisis, and with the struggles for human rights around the world and also in Brazil, the moment came for the promulgation of the third part of the National Human Rights Program (PNDH 3) at the end of 2009. It should be noted that the first part was published during Fernando Henrique Cardoso's first administration (May 1996); the second part was published during the last year of Fernando Henrique's second administration (May 2002), and the third part was promulgated in December 2009, the penultimate year of Lula's second administration. Remember also that in this second Lula administration, the Minister of Defense was Nelson Jobim and the Minister of Human Rights (a Special Secretariat elevated to the status of a Ministry) was Paulo Vannuchi, and there were constant public clashes between the two portfolios and the two representatives.

When the PNDH 3 was published, a real battle began, through the media, between the two holders of the mentioned portfolios, precisely for the control of the whole process of construction of memory and truth in the Brazilian transition. While the Human Rights portfolio supported several of the public policies initially made official in the PNDH 3,

[4] Idem, p. 315.

such as the prosecution, including criminal prosecution, of human rights violators during the dictatorship, the changing of public landmarks that contained the names of torturers and high-level leaders of political repression in the same period, and the creation of a National Truth Commission, the Defense portfolio, which brings together the Armed Forces, was radically opposed to all of these policies.

In the meantime, the presidential campaigns had already begun and Dilma Rousseff, then Minister of State, was already a candidate to succeed President Lula. She herself, it is important to underline in this context, was a former member of groups of armed struggle against the dictatorship, and was still condemned in the military instances of the time as a subversive and terrorist.

After a period of internal clashes and negotiations in the sphere of the federal administration, there were some changes in the PNDH 3 and a republication with the suppression of those more controversial policies, especially the criminal prosecution of torturers. The hegemonic politics of forgetfulness won, forgetting the constitutional mandate of transition, which imposed and still imposes memory, truth, and reparation. The concealment of conflicts won. Subject to this understanding, very soon afterwards, in April 2010, coincidentally, the Federal Supreme Court put on its agenda the judgment of the Action for breach of fundamental precept (ADPF) 153, which aimed to discuss the non-reception by the Federal Constitution of the 1979 Amnesty Law, precisely because it was not the expected broad, general, and unrestricted amnesty.

This is how the amnesty issue returned to the main stage in Brazil's highest court of judgment, and the issues of dictatorship and transition never again left either the media or Brazilian political-institutional life. Until then, the politics of oblivion had prevailed. From that episode on, it was no longer possible to deny that a dictatorship had occurred in Brazil, leaving the hegemonic forces to try to construct a narrative of forgetfulness based on legal interpretation. And perhaps it was not that difficult, since throughout Latin America there was a consensus that every political amnesty is one of forgetting.

With a regrettable decision, but completely in accordance with the interests of the controllers of time and the constructions of historical narratives, or social memory, the Supreme Court intended to "put a stone in this matter"; or in other words, to forget what happened in Brazil during the dictatorial period and move on. The Supreme Court did not state that both Law 6.683/79 and CA 26/85, as well as the Federal Constitution itself,

made a choice in favor of the transitional process. Perhaps because of the urgent need to give some kind of answer and put an end to that unwanted debate for the moment, trying to impose the narrative of erasing the facts and hiding the conflicts, there was no analysis on the type of political amnesty practiced in Brazil in 1979, in 1985, and in 1988, and thus the Supreme Court did not even evaluate that the Brazilian political amnesty was of the convictions and not of the facts.

The decision caused enormous astonishment not only nationally, but especially on the international scene. So much so that in November 2010 the Inter-American Court of Human Rights of the Organization of American States (OAS) put on trial a case that sought to condemn Brazil for noncompliance with several provisions of the American Convention based on what happened in the Araguaia region.

The lawsuit had been filed several years before, but because of Brazil's prominence in the fight for human rights and also because of a major Brazilian foreign policy investment, since Brazil was seeking a permanent seat on the UN Security Council at the time, there were no plans for a trial. Until the Supreme Court's decision changed the scenario, for the worse. And unlike the expectations until then that Brazil would not be condemned, the Inter-American Court handed down a harsh and extensive condemnation.

At that time Brazil had already elected Lula's successor, Dilma Rousseff as President of the Republic, but the battles were just beginning in this field of the construction of memory and truth regarding the period of exception. A year after the ruling of the Inter-American Court, there was the enactment of Law 12,528, of November 18, 2011, which established the National Truth Commission (NTC), and all expectations turned to this Commission, in the sense that, finally, it would be possible to re-signify that history of authoritarianism, persecution, and repression, to inaugurate a time of freedom and autonomy for Brazilian society. It was necessary to construct this narrative, to elaborate this memory, in the sense recommended by Ost. And to know the facts, which have not been forgotten. I reiterate that the amnesty did not erase the facts, only the sanctions.

Note that if the amnesty of Law 6.683/79 had been of the facts, there would be no need for a National Truth Commission. To clarify what, if nothing happened? If everything had been erased, if the amnesty had been of forgetfulness, there would be no

need to touch the subject, because the social pact would have been to erase the facts, not to remember so as not to hold people accountable. But this is not what happened. The Brazilian State created the third State Commission for memory, truth, and justice, fulfilling the constitutional mandate of the transition and in the wake of previous legislation.

Unfortunately, what occurred was general frustration, despite the fact that a substantial report was produced, and that it brought appalling information about our past, and even about many of the authorities that are still authorities of the Brazilian Republic. One of the phrases illustrating this frustration, at the end of 2014, when the report was delivered on December 10, was that "the mountain had given birth to a mouse."

It is also important to remember that from the year 2013 Brazil was filled with popular demonstrations, almost always spontaneous and rejecting parliamentary and party representations, in a great explosion of popular will to participate in the important decisions of the country, such as whether or not to host the World Cup and the so-called "Fifa standard" of quality. These demonstrations and the many strikes that also occurred that year show how dissatisfied the Brazilian population was, and how much there was a clamor for social, economic, legal, and especially political change. It was a popular revolt against the politics of forgetfulness in a diffuse and generalized way: "forget that there are problems in health and education. What matters is that there will be a World Cup in Brazil! It even seemed like the fulfillment of what could be called Ost's prophecy: "on the contrary, when the divergences of interests are hidden, and the oppositions minimized, behind façade consensuses, there is a great risk that future violence will develop."[5]

Still about the NTC, it is worth mentioning some aspects. One of the reasons that caused a certain feeling of frustration at the time was the fact that the NTC did not use some of the powers granted by the legislation, such as, for example, the mandatory conduction of people who were lucid and had participated in important events for the clarification of many episodes, but who refused even to recognize the existence and legitimacy of the NTC. At the time it was revealed by the press that a member of the military, summoned to appear before the Commission, wrote in his own handwriting on

[5] Idem, ibidem

the summons that he did not collaborate with enemies,[6] and no more energetic measures were taken. The deposition simply did not take place.

In the conclusion, with the Final Report there was a recommendation that memory and truth work should not cease. In part, both the Special Commission on the Dead and Disappeared and the Amnesty Commission continued this task at first (throughout 2015 and early 2016). A few years after the delivery of the Final Report and with so many setbacks in the field of human rights, it is possible to resignify the work of the CNV and its Report, because it can be officially said that the Brazilian State recognizes that there was a state of exception starting in 1964, that is, there was a coup d'état, there was torture, there was persecution, there was kidnapping, there was murder, there was massacre, and more than 8,000 Brazilians died by actions of the State. Once again, memory and not forgetting.

The number of victims of the Brazilian dictatorship is another important piece of information in the CNV Report. There were not only four hundred and thirty-four victims of the state of exception, as is repeated, because only non-indigenous and peasant victims are included in this number. And there were more than eight thousand indigenous people alone, as the specific report of the CNV itself proves. In other words, on behalf of memory and truth, the work of the CNV was and continues to be fundamental, and it is very important that all the reports and files continue to be consulted and made public.[7]

4. Reparations

In the field of reparations, much has been done in Brazil. The first necessary observation when dealing with the topic of reparation is that financial reparation is only one of the forms of reparation. And it has been so since 1979. This is because already at that time, the law provided for the possibility of reintegration to work of those who had been fired due to political persecution, and many were reincorporated to their jobs. Although without any career advancement, or often in positions lower than the ones they held at the time of their dismissal, and without any compensation for the period they had

[6] Check at: https://www.terra.com.br/noticias/brasil/politica/nao-colaboro-com-inimigo-diz-militar-a-comissao-da-verdade,932961eca8658410VgnVCM10000098cceb0aRCRD.html (accessed August 22, 2020).

[7] To access the documents of the National Truth Commission: http://cnv.memoriasreveladas.gov.br/

been away. Again, it is important to emphasize that any reparation is only possible because the facts have not been erased. Because there has been no forgetting.

Later, with Law 10.559/02, through the Amnesty Commission, in the field of financial reparation, there are two possibilities: economic reparation in a single payment, calculated according to the law itself at thirty minimum wages per year or fraction of political persecution, limited to a ceiling of one hundred thousand reais; and economic reparation in monthly, permanent and continuous payments, in the hypothesis of loss of labor activity.

In addition to these two types of economic reparation, Law 10.559/02 also expressly provides for the possibility of re-enrolling in a course of study that was interrupted due to political persecution, at a public institution in the place where the person receiving amnesty was residing at the time of the Amnesty Commission's decision. In addition to leaving open the possibility of other forms of reparation that were practiced for some years, such as changes in the public registry (addition of the father's name, for example[8]) and other actions, with emphasis on the Testimonial Clinics, considered one of the most beautiful and successful policies of the Commission.

The transitional constitutional policy of the Federal State implies, more importantly and beyond the funds people will receive, in the assumption of the Brazilian State's error for having persecuted its own citizens for their opinions and political positions. Memory of the facts! Otherwise, there would be no way to talk about political persecution. If there had been forgetfulness, amnesty of the facts, there would necessarily be no way to assume political persecution.

Furthermore, complementing each political amnesty declaration, the Amnesty Commission proceeded with the official apology from the Brazilian State for the persecutions inflicted on that person and his/her family members. It is worth pointing out that this request was not only addressed to that person or family; it was addressed to the entire Brazilian society. It was a true guarantee of the Brazilian society that was being constituted at that moment. That never again will the State persecute its citizens. Once

[8] The case of Eduarda Crispim Leite, who obtained the right to have the name of her biological father, Eduardo Leite, known as Bacuri, in her birth certificate, based on the amnesty request of her mother, Denise Peres Crispim, according to the vote published in LIVRO DOS VOTOS DA COMISSÃO DE ANISTIA: verdade e reparação aos perseguidos políticos no Brasil. Brasília: Ministério da Justiça; Florianópolis: Instituto Primeiro Plano, 2013.

again, memory! "So that it will not be forgotten, so that it will never happen again" was the slogan of the Amnesty Commission.

It is for no other reason that this moment was always the most solemn of the Commission's sessions, and the most moving. And it is significant that this very important moment is not legally foreseen anywhere. That is, it is part of the reparation that the State owes not only to that specific individual, but to all of Brazilian society.

It was part of the fulfillment of the transitional policy enshrined in the Constitution, a State policy, and it meant the recognition that in that specific case the Brazilian State acted through acts of exception in relation to a Brazilian citizen, and by doing so persecuted Brazilian society itself as a whole. That is why it owes a reparation, which includes, despite other specific ones for the case, the request for forgiveness as a guarantee of non-repetition.

Unfortunately, one of the enormous setbacks facing the Brazilian transitional process is the end of the pardon request, deliberated by the Amnesty Commission when it was still part of the Ministry of Justice, in an administrative session in April 2018.

In the face of the successful and hegemonic politics of forgetting, it is important once again to reiterate that one can only think about reparation if the facts have not been erased. If the facts have not been forgotten. And they have not been. They are even a requirement of proof for the declaration of political amnesty to be granted. It is one more proof that the political amnesty in Brazil was one of memory, truth, and reparation, and not of forgetfulness. The 1979, 1985, 1988 and its regulation, which is Law 10.559/02.

5. Accountability (or justice)

The idea of prosecuting human rights violators in Brazil causes many controversies. Initially I want to register that the reference to persecution is both judicial persecution, considered in the civil and criminal spheres, and administrative processing. Usually there is too much focus on criminal prosecution and so it is important to reiterate that there are other areas of judicial prosecution.

Having made this first observation, it is worth stressing that, unlike the path chosen by other countries, such as Argentina, for example, which elected justice as its fundamental axis for the transition, raising the liability, including criminal liability, of

those who kidnapped, tortured and in some way became agents of the state of exception, Brazil has always avoided dealing with this dimension. Still on other Latin American countries, it should be noted that political amnesties were often of the facts in those places, which is why one could think neither of memory, nor of truth, and even less of reparation, until the laws were repealed. The situation of Brazilian legislation was and is different.

The issue of justice is the most hidden issue (politics of forgetfulness) and around which a real taboo was created in the spectrum of the Brazilian transition. Curiously and paradoxically, it was the subject that inspired and triggered the entire debate that has taken place since the end of 2009, as seen in the item on memory and truth; although in a veiled manner because, as seen in the previous item, the concealment of conflicts was, until 2013, the mistaken alternative chosen by public agents in dealing with transitional issues.

Thus it is that the perception of justice, to soothe the traumas of the past and heal the wounds, not as revenge, but as anamnesis, through the mediation of the judicial process with all the guarantees of adversarial proceedings, ample defense and due legal process, brings the goal of achieving reconciliation. Note that under any aspect that is analyzed, this axis deals with accountability. But the issue of accountability here, as in any aspect of Transitional Justice, is not one of ordinary civil, administrative or criminal accountability. It is the accountability of public or private agents, in the service of the state, to persecute citizens who in some way disagreed or appeared to disagree with the authoritarian regime.

This is not an ordinary situation, and cannot be treated legally as an ordinary situation. It must be evaluated extraordinarily, because the times were exceptional.

Thus, one of the issues that usually arises in this debate is the possibility or impossibility of imprisoning military personnel who have tortured citizens to obtain information or confessions of any kind. Despite the legal obstacles raised to such criminal liability, I defend that much more effective than a prison sentence would be, by way of an eventual criminal or administrative conviction, the sanction of demotion in rank and withdrawal of honors and medals that that military person had received.

At any rate, in Brazil, the Federal Public Prosecutor's Office has filed dozens of criminal complaints against public agents. These charges have not been received by the Judiciary with the most diverse allegations, ranging from the erroneous understanding of the amnesty proclaimed by the Federal Supreme Court to the statute of limitations, to the

non-retroactivity of the criminal law. As to the allegation of the statute of limitations or the non-retroactivity of the criminal law, there is a lot of literature on the subject and it is not appropriate to go into greater detail here.

With respect to the judgment of ADPF 153, already mentioned above, a few considerations are in order. It is worth remembering that the Supreme Court exercised constitutionality control in the judgment of ADPF 153. And so the basic question posed in that case was whether or not the 1988 Constitution had received Law 6.683/79, in view of the fundamental constitutional precepts. The Supreme Court's answer was positive. There was reception. And the control of constitutionality was exercised by the competent authority.

On the other hand, in 2010, there was another control also exercised by the competent authority, which was the control of conventionality: the control of the Inter-American Court of Human Rights as to whether Brazil, a member state of the Organization of American States (OAS), complies or not with the American Convention. In this respect, the Court, the competent body to assess compliance with the convention, judged that Brazil was failing to comply with the American Convention at different points, and condemned it, determining a series of measures and actions.[9]

One of the grounds of this decision states that

> the State is responsible for the violation of the rights to judicial guarantees and judicial protection foreseen in articles 8.1 and 25.1 of the American Convention on Human Rights, in relation to articles 1.1 and 2 of this instrument, for the lack of investigation of the facts of the present case, as well as for the lack of judgment and sanctioning of those responsible[10] (emphasis added).

Note that the judgment and sanctioning of those responsible, here, refers to both "public agents" and civilian, "private agents", who, in consonance with the state of exception, persecuted Brazilian citizens. And it also means accountability in the criminal, civil and administrative spheres. And at no time is the decision of the Inter-American Court based on the Brazilian Constitution of 1988. And nor could it. This competence belongs exclusively to the Supreme Court. The legal basis is the American Convention, whose competence, also exclusive, is of the Inter-American Court. Therefore, this is a

[9] See, in this regard, the decision at http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_por.pdf
[10] Idem

false polemic, a false contradiction, between the Supreme Court's decision and the IDH Court's decision. It is yet another artifice in the wake of the two dangers for democracy brought here before: the exacerbation of conflicts and the concealment of them.

Furthermore, at no time did the Supreme Court make reference to the "private agents" of the Brazilian repression.[11] This means that not even this obstacle could be pointed out to avoid accountability in any sphere. And most importantly: these are not ordinary situations. They are situations of persecution of citizens by the Brazilian State, through its own agents or alliances with the business community and civil organizations to violate the most basic rights of freedom, constitutionally guaranteed in all Constitutional Charters, even those enacted during the dictatorship.

6. Final considerations

If legality is so dear to Brazilians,[12] it is striking that such illegality does not cause surprise. It can only be explained by the deep violence and repression characteristic of our entire history. They are greater than any form of indignation, because they provoked an atavistic fear that ends up neutralizing indignation and naturalizing authoritarianism.

Still on the ADPF 153 decision, it should be noted that one of the grounds for legitimizing the reception of Law 6.683/79 by the Federal Constitution is that the spirit of the Political Amnesty Law remained present in CA 26/85 and illuminated the Constitution. So, it is all about political amnesty as memory, truth and reparation. In other words, as said in the beginning, those who were punished before August 28, 1979 had their conviction amnestied, forgotten. Not the facts that led to the conviction. These are remembered. But the consequence, the sanction, was erased because it was amnestied. No human rights violator was ever condemned in Brazil. Not before 1979 and not after. Thus, none of them was amnestied.

If the reason for Law 6.683/79 being in force is that its spirit inspires both the CA 26/85 and the Constitution itself, and, as seen, in the three cases the political amnesty was

[11] On this subject, see another of my works: ALMEIDA, Eneá de Stutz e. Right to Justice: the question of the civilians that took part in the Brazilian dictatorship. In TOSI, Giuseppe et al (orgs). Justiça de Transição: direito à justiça, à memória e à verdade. João Pessoa: Editora UFPB, 2014, pp 195-214.

[12] Confer in this regard the important study by PEREIRA, Anthony W. Ditadura e repressão: o autoritarismo e o estado de direito no Brasil, no Chile e no Argentina. São Paulo: Paz e Terra, 2010.

of the sanctions and not of the facts, this means that it is no longer possible to agree with this authoritarian attempt (hegemonic until now) of the politics of forgetfulness. This is not the constitutional policy, as stated by the Supreme Court itself: the legitimacy of the constituent power lies in the spirit of these previous legal frameworks. And these milestones, as demonstrated here, are not of forgetting, but of memory, truth, and reparation.

Thus, it is perfectly possible to begin to do justice in Brazil, inaugurating this dimension of Transitional Justice, until now subjected to the hegemonic repressive politics of forgetfulness, which is not, to our delight, grounded in the legal frameworks of the country, as recognized by the Supreme Court.

Finally, it is important to emphasize that one cannot give in to the other danger for democracy that Ost recommends, that is, the exacerbation of conflicts, which is the contemporary scenario that leads to the exclusion or "destruction of the adversary, then treated as "enemy".[13]

I defend here the thesis that I call constitutional resistance for memory, truth, reparation and justice, because, as I tried to demonstrate, this is the policy established by the Constitution for the purpose of building a Democratic Rule of Law in Brazil. Nevertheless, the policy that intends to impose the understanding of amnesty as forgetfulness has been hegemonic and contradicts all Brazilian legislation. Moreover, it has incurred the two dangers for democracy, as also seen, previously of concealment and now of exacerbation of conflicts. A Democratic Rule of Law cannot be achieved without the constitutional process of transition.

It is time to resist and move forward in the Brazilian transitional process to fulfill the constitutional commandment of memory, truth, reparation, and justice!

References

DE STUTZ E ALMEIDA, Eneá (org). **Justiça de transição – apontamentos.** Curitiba: CRV, 2017

MINISTÉRIO DA JUSTIÇA, COMISSÃO DE ANISTIA. **LIVRO DOS VOTOS DA**

[13] OST, op cit, p. 315

COMISSÃO DE ANISTIA: verdade e reparação aos perseguidos políticos no Brasil.

Brasília: Ministério da Justiça; Florianópolis: Instituto Primeiro Plano, 2013

OST, François. **O tempo do direito**. Bauru, SP: EDUSC, 2005.

PEREIRA, Anthony W. **Ditadura e repressão: o autoritarismo e o estado de direito no Brasil, no Chile e na Argentina.** São Paulo: Paz e Terra, 2010.

REÁTEGUI, Félix (editor). **Justiça de Transição – manual para a América Latina.** Brasília: Comissão de Anistia, Ministério da Justiça; Nova York, Centro Internacional para a Justiça de Transição, 2011.

TOSI, Giuseppe; FERREIRA, Lúcia de Fátima Guerra; TORELLY, Marcelo D.; ABRÃO, Paulo (orgs). **Justiça de transição: direito à justiça, à memória e à verdade**. João Pessoa: Editora da UFPB, 2014.