On the exclusive competence of the AC

The transitional constitutional process is guided by Article 8 of the Constitutional Act of Transitional Provisions (ADCT):

> **Art.** Amnesty shall be granted to those who, in the period from 18 September 1946 to the date of promulgation of the Constitution, were affected, as a result of an exclusively political motivation, by exceptional, institutional or complementary acts, to those covered by Legislative Decree no. 18 of 15 December 1961, and to those affected by Decree-law no. 864 of 12 September 1969, promotions are assured, in the inactive period, to the position, job, rank or grade to which they would be entitled if they were in active service, with due regard for the periods of permanence in active service provided for in the laws and regulations in force, respecting the characteristics and peculiarities of the careers of civilian and military public servants and observing the respective legal regimes.
>
> The provisions of this article shall only generate financial effects as from the enactment of the Constitution, and remuneration of any kind is prohibited retroactively.
>
> The benefits set forth in this article shall be assured to private sector workers, union leaders and representatives who, for exclusively political reasons, have been punished, dismissed or compelled to leave the remunerated activities they exercised, as well as to those who have been prevented from exercising professional activities due to ostensive pressure or secret official expedients**.**
>
> **3.** To those citizens who were prevented from exercising, in civilian life, a specific professional activity, as a consequence of the Ministry of Aeronautics Restricted Decrees No. S-50-GM5, of June 19, 1964, and No. S-285-GM5, shall be granted economic reparation, as provided for by a law initiated by the National Congress and to come into force within twelve months as of the promulgation of the Constitution.
>
> Those who, by force of institutional acts, have freely exercised the elective office of Councilor shall have their respective periods of time computed for the purposes of retirement from public service and social security**.**
>
> **5.** The amnesty granted under the terms of this article shall apply to civil servants and to employees at all levels of government or in their foundations, public companies or mixed companies under state control, except for military ministries, who have been punished or dismissed for professional activities interrupted as a result of a decision made by their employees, as well as as as a result of Decree-law no. 1632 of 4 August 1978, or for exclusively political reasons, the readmission of those affected being assured as from 1979, subject to the provisions of § 1.

This constitutional provision creates an individual right to a declaration of political amnesty but depends on infra-constitutional legislation to regulate it.

It was Law 10,559 in 2002 that regulated it, and whose wording was amended in 2019. The changes were not significant, but only adjustments made due to the

governmental administrative reorganization in the year 2019. Essentially, there was no change in the constitutional redress process, and nor could there be, since the constitutional determination could not be changed by ordinary legislation (infraconstitutional).

This constitutional provision inaugurates the process of transitional justice in Brazil - necessary to lead the country out of the State of Exception that lasted from 1964 to 1988 - which can be broadly defined in the case of Brazil as public policies capable of overcoming the ills of the dictatorship that took power in 1964 and remained in power until the beginning of the 1988 Constitution, in the areas of memory/truth, reparation, accountability of human rights violators, and reform of institutions.

It is important to emphasize that the right to a declaration of political amnesty is an individual right created by the Constitution of 88. Considering that this right is an inaugural and fundamental part of the Brazilian transitional process, and considering that article 60, § 4, item IV prevents the passage of constitutional amendments that intend to abolish individual rights and guarantees, the understanding is that not even a constitutional amendment may suppress the right to the declaration of political amnesty granted by article 8 ADCT, let alone any provisional measure or ordinary or complementary law or presidential decree.

This understanding also allows us to affirm that the Brazilian Constitution elected the transitional constitutional process as one of the foundations of Brazilian democracy. So much so that it created an individual right to be assessed in an administrative process - regulated by Law 10.559, as we shall see below - with no deadline to be claimed, that is, any citizen, at any time, may request such declaration by the Brazilian State. There can be no limitation on this claim to claim the declaration, since the Constitution has not established a time limit for filing a claim.

There must be no confusion in the above statement with the period established in the constitutional provision itself. The period between 1946 and 1988 refers to the period of validity, at least in theory, of the 1946 Constitution and those of 1967 and 1969. The expression "in theory" is used here because, at the beginning of the Estado de Exceção, the Constitution

of '46 was, in theory, in force. So much so that several Institutional Acts began their provisions by affirming the validity of that Constitution, for what was being experienced was a State of Exception that wished to present itself as a State of Law. Thus, the Constituent Assembly opted to acknowledge the possibility of periods of State of Exception throughout the duration of the 1946 Constitution and to affirm it in the subsequent Constitutions until promulgation of the 1988 Constitution.

It is exactly the assumption of the State of Exception that gives rise to the generating fact of a right to declare political amnesty. If this right is an individual right constitutionally created within the transitional process, and, it is affirmed here, for this very reason it becomes a permanent clause; if this right inaugurates the Brazilian transitional process by electing the dimension of reparation as the first to be fulfilled in this trajectory towards the consolidation of democracy; the question was: how to make this right operational? What is the path chosen by the Brazilian State to account for the constitutional transitional process of reparation? Before answering these questions, it is necessary to reiterate and synthesize some premises that existed in October 1988 and that remain valid:

1) There was a State of Exception, admitted in the 1988 Constitution itself, which persecuted citizens for political reasons and in doing so created a right to a declaration of political amnesty. In other words, there is the right to political amnesty **for those who were persecuted** by the Brazilian State;
2) The reparation process was chosen to inaugurate Brazil's transition to the democratic rule of law;
3) A body should be set up with the constitutional task of examining this matter;
4) The body to be created will have this exclusive competence, and will need to act according to the assumptions of the so-called Transitional Justice

The answer to these questions came in 2002 with Law 10.559. This law was a conversion of a Provisional Measure edited the year before with the same wording. In other words, the Brazilian State created a State Commission, the Amnesty Commission, to assess requests for declarations of political amnesty. In this way, the very conduct of the Brazilian transitional process became

to be the competence of the Amnesty Commission, with the scope of full reparation as the guiding principle, under the terms of the constitutional provision.

The Amnesty Commission was initially allocated to the Ministry of Justice and remained there until 2019, when it was relocated to the Ministry of Women, Family and Human Rights. However, Law 10,559 was only amended to make this change of allocation compatible, without any change in the Commission's powers. It could not be otherwise, since this law regulates the constitutional provision, and as such cannot restrict or alter the constitutional scope, which is to account for the Brazilian transitional process.

So let us see what the terms of Law 10,559 say about the powers of the Commission. It is what is stated in Article 12 of that Law:

> Art. 12. The **Amnesty Commission is** hereby created within the Ministry of Women, Family and Human Rights for **the purpose of examining the requests referred to in article 10 of this Law and advising the Minister of State in his or her decisions**. (emphasis added).

A more detailed examination of this legal provision is in order, but first it is necessary to reproduce the article 10 cited:

> Art. 10. The Minister of State for Women, the Family and Human Rights shall be responsible for deciding on applications based on this Law.

Law 10.559, which regulates the constitutional provision allowing for the processing of applications for the declaration of political amnesty, an initial and fundamental step to carry out the Brazilian constitutional transitional process, creates a State Commission exclusively for this purpose. In other words, the Amnesty Commission is not just any public body; it is special, with a constitutional purpose of unparalleled importance to ensure Brazilian democracy! It is also not a government Commission, to act according to the political-party orientation of those in office at the time.

What does Law 10.559 impose? That the administrative act (a ministerial ordinance) to be published in the Official Gazette of the Union, with the declaration of political amnesty with its effects (or the denial of the same declaration) must be signed by the holder of the ministerial portfolio: currently, the Minister of State of Women, Family and Human Rights. The decision to sign the ordinance or not is up to the Minister. If she decides to sign, that is, she agrees with the examination made by the

Council of the Amnesty Commission, the ministerial office arranges for publication in the official press after signature by the holder of the Portfolio. If it decides to disagree, i.e. disagree with the examination made by the Amnesty Commission's Council, what can the holder of the portfolio do? Would she be a mere "rubber-stamp" of the decision rendered by the Council, even with the legal affirmation that the decision rests with the Minister? Of course the answer is no! The person in charge of the ministerial portfolio where the Amnesty Commission is allocated decides whether or not to publish. If he/she decides for publication, it means that he/she agrees with the fundamentals of this decision. If he does not agree or has any doubts as to the grounds (vote of the Council), he must formulate his questions and return to the Council for further consideration.

This means that this is a complex act: the Amnesty Commission Council has **exclusive** competence to examine and advise the holder of the Ministerial Portfolio. This is the intelligence of article 12 of Law 10.559. The law leaves no room for doubt about such competence. These are the exact terms of the law! What is the competence of the person holding the Ministerial office? Only to consent to the Council? Obviously not. There may be a whole debate between the holder of the Ministerial Portfolio and the Council, within the administrative process of the application for political amnesty, but the final decision to be published in the form of a ministerial decree, and therefore signed (decided) by whoever is in charge of **the** Portfolio, **can only be based on the examination made by the Council of the Commission!**

Another doubt that may occur: if the Minister of State does not agree with the examination made by the Council, rendered in the form of a vote, and wants to open the debate with the Council, can he resort to other bodies of the Public Administration to formulate his concerns or doubts using opinions to question the Council of the Commission? Of course they can! The competence of the examination is of the Council of the Commission. The competence of the signing and publication of the ordinance is of the Minister of State. If the Minister is not convinced of the correctness of the Council's vote, he can and must formulate his questions and present his arguments, returning the administrative proceeding to the Council, but the **examination of the** matter is the **exclusive competence of the Amnesty Commission's Council**.