On the right to a declaration of political amnesty motivated by dismissal for strike action

It can be stated that any strike movement is in itself a political movement, in the sense that it is a form of organization of workers to claim agendas whose negotiations have already been overcome and unsuccessful in the relationship with employers. But this is not the meaning given by the constitutional provision in article 8 ADCT, when including as recipients of the individual right to political amnesty those workers dismissed due to a strike.

See the specific article and paragraph related to the topic:

> **Art. 8** Amnesty shall be granted to those who, in the period between 18 September 1946 and the date of promulgation of the Constitution, were affected as a result of an exclusively political motive, (...), guaranteed by promotions, when inactive, to the post, job, rank or grade to which they would be entitled if they were in active service, observing the periods for remaining in active service established in the laws and regulations in force, with due regard for the characteristics and peculiarities of the careers of civilian and military public servants and observing the respective legal regimes.
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> **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.

To understand and better interpret this provision, it is necessary to look at the context of labor relations prior to the 1988 Constitution, as well as the many strikes that, still during the period of the State of Exception, began to take place throughout the country.

The first important observation regarding the contextualization, confirmed and made official by the National Truth Commission, is the fact that at the national level the organizations of the categories of workers in the period before the coup of 1964 were the main responsible for supporting the social reforms advocated at that time, acting at the national level through the General Command of Workers (CGT). In this way, the workers claimed their rights based on the search for a better quality of life for all citizens

In other words, it was a broad commitment to the construction of a more just and egalitarian Brazilian society (CNV, 2014, p 58).

This also means that organized workers were the primary target of the State of Exception, since they had always represented "the enemies of the regime. Thus, already in 1964 strikes were forbidden (Law 4330/64) and there was intervention in the workers' unions. Furthermore, companies started to organize themselves in order to elaborate lists of workers that should NOT be hired. These lists were shared between companies in the same sector. All this because any worker that was identified as someone capable of opposing the regime, or even as an effective or potential leader, should be eliminated, in two possible ways: either he should be arrested with the already known consequences of torture and possible assassination, or he should be prevented from working, almost like a civil death, so that he would not be able to exert any influence on other workers, a harmful influence in the eyes of the regime. These lists still had a "pedagogical" effect because they were not admitted as real, but everyone knew of their existence, and were also duly informed that if "they did not behave according to the orientation of the company, they could be included in them".

This context translates the true "revolutionary manifestation", almost terrorist, which meant, in the period of the State of Exception, to organize or participate in a strike. In fact, between 1964 and 1988, the simple fact of belonging to a professional category that organized a strike was already dangerous, because there was always the risk of some identification with the "subversives.

It is precisely in this context that the Constituent Assembly inserted § 5 into the ADCT, making explicit the need to declare political amnesty for those who were dismissed as a result of a strike. It is in this sense that any strike during the period of the State of Exception is treated as an exclusively political motivation. This is why it does not matter if the person organized the strike movement, or if he was caught acting during the movement, or if he was present at the actions during the strike. They may even have wanted to work and have been prevented from doing so by their colleagues; they may have been against the beginning of the strike and the whole movement; it doesn't matter. The fact that there was a strike of the category in the workplace of that person and during

or right after the strike movement the person was fired already presupposes the dismissal was exclusively politically motivated.

Contrary to what has been stated on different occasions, this is not an ordinary labor situation, but a situation covered by art. 8, § 5 ADCT. This interpretation is not new. It is the legislator's own interpretation, in the heat of the promulgation of the Federal Constitution, as one can read in the opinion prepared by the House of Representatives (attached in full):

> The Constitution of October 1988 has as its assumption, and this is clearly stated in its preamble, the institution of a democratic state, intended to ensure the exercise of social and individual rights, freedom, security, welfare, development, equality and justice as supreme values of a fraternal, pluralistic and unprejudiced society, founded on social harmony and committed, in the internal and international order, to the peaceful settlement of disputes.
> **To establish a democratic state, the legal system should not only regulate present and future situations, but also, to the extent possible, appease past facts whose harmonious solution would help solidify the democratic foundations.** This was undoubtedly the objective of the constituent legislator when he established the amnesty in art. 8 and §§ of the Transitory Constitutional Provisions Act
> (...)
> It **is important to clarify, in view of the constitutional text, that the amnesty granted to public servants and employees is broad**, and it is not up to the administrative authority to which the reinstatement benefit was requested to inquire about the form of dismissal, whether for just cause or not, but rather to examine each situation individually to determine whether the dismissal was actually carried out in the cases defined by paragraph 5 of art. 8 of the Transitory Provisions Act. The legal principle *ubi lex non distinguit nec nos distinguere debemus applies* here.
> Carlos Maximiliano, in his famous book 'Hermeneutics and Application of Law' lectures on the subject:
> 'When the text provides broadly, without obvious limitations, it is the duty of the interpreter to apply it to all particular cases which may fall within the general hypothesis explicitly provided for; do not attempt to distinguish between the circumstances of the question and others; comply with the rule as it is, without adding new conditions or dispensing with any of the expressions.
> **Thus, the administrative authority cannot interpret the constitutional rule restrictively or with merely delaying purpose, referring the public servants or public employees governed by the C.L.T. to the Judiciary for the acquisition of a right granted by the Magna Carta**. (emphasis added).

The Amnesty Commission, which is the public body with exclusive competence to examine requests for declarations of political amnesty, has established jurisprudence in the exact sense exposed above, understanding that if there was dispensation of the

worker following a strike by the category in that workplace, the exclusively political motivation was presupposed, and consequently the persecution of that worker by the State, even if exercised by a private company. One of the categories that has suffered the most dismissals, and has a few hundred applications in the aforementioned Commission is composed of the workers of the Postal and Telegraph Company (ECT). The ECT workers went on several strikes, on different dates and in different locations, between 1978 and 1997. In the months following the end of the strikes, very often workers were dismissed without just cause, formally, but the real motivation was the fact that there had been a strike, with or without the direct participation of that specific worker. By limitation of the constitutional provision, only strikes and dismissals that occurred before October 5, 1988 can be analyzed.

Here's the situation: a worker does not agree with the strike, or even participates in the negotiations to deflagrate it. With the beginning of the strike, this worker wishes to complete his workday, without, however, succeeding, because either his colleagues prevent him from accessing the workplace, or even his workday becomes impossible without the participation of other workers. Even if he is against the strike, and therefore no trace of his support for the strike is found, he can be fired after returning to work because his colleagues went on strike and he did not work on those days. It is of little importance to the employer the employee's real motives for not working. Objectively, the employee's workday was not respected, and the employer fires the employee without just cause and without stating the real cause, which is the occurrence of the strike by the class (collective workers, with or without the direct participation of that specific employee).

In other words, and summarizing the above arguments, there is no need to prove any militancy by the worker. The only necessary causal link is that there was a labor relationship in progress, there was a strike and soon after that worker was dismissed. Political persecution is **assumed by the Constitution under the terms of article 8 ADCT**.

It is worthwhile to address an understanding exposed by the Office of the General Counsel for the Federal Government (AGU) and expressed in an opinion in 1996, an understanding that is still invoked today. Unfortunately, in a mistaken manner, such understanding has been used even by the Amnesty Commission, which has been composed in great number by members of the AGU and that there on the Commission they seem to continue with the institutional position of the AGU and not with the constitutional mission of promoting the Brazilian transition.

This confrontation, in the specific case of ECT, has already been given even by the Ministry of Communications, as evidenced in the opinion (also attached to this text) which assesses that if there was a strike and consequently there was annotation of the absence of the worker on those specific days, there is presumption of political persecution:

> In the abovementioned opinion of the Office of the Solicitor General of the Federal Government of July 30, 1996, where the issue of ECT was analyzed, the illustrious legal expert commented as follows: "the dismissal is a fact and, consequently, its connection, if any, with a political motivation must be demonstrated, regardless of the date on which it was effected".
> (...)
> The dismissal of the former employee occurred without just cause on 06.03.87, on the grounds that there was inassiduity and lack of interest in the work. Although the dismissal occurred more than 3 (three) months after the end of the strike, it does not justify his arbitrary dismissal from the Company, since it is quite clear the punitive nature for joining the last strike occurred in the DR/RJ. In this sense, the causal link between participation in the strike and dismissal is more than evidenced.

Note that there is no need in *the concrete case to* demonstrate effective participation in any form of militancy, to "deserve" the repression and persecution in the form of rupture of the employment bond: the link between the existence of a strike in that place and period (in the concrete case, the dismissal occurred 3 months after the strike) is enough to characterize the presumption of political persecution! By simply applying article 8 ADCT, paragraph 5, combined with articles 1 and 2 of Law 10.559, which regulates article 8 and provides for the declaration of political amnesty for those dismissed due to persecution under the State of Exception.

Note that the Ministry of Communications itself disagrees with AGU: while AGU's opinion requires demonstration of the dismissal directly related to an explicit political motivation in the concrete case, the Ministry already anticipated the

jurisprudence of the Amnesty Commission in asserting that any dismissal following a strike in this historical period was characterized as political persecution, since this is the intelligence of the constitutional provision and regulation of Law 10.559.

It should be noted, finally, that the claims of the strike may be any aspect of labor activity, without any relation to specific political claims. It is the mere fact that **there was a strike** that transforms the dismissal into political persecution, in that historical context.