On the constitutional status of the reparatory policy for acts of exception: brief reflections on the constitutional norms allusive to the reparatory policy for damages caused by regimes of exception in Brazil

There is no doubt that regimes of exception, such as Nazism, Fascism and the military dictatorships in the Southern Cone, leave deep and indelible marks on the societies through which they pass and that the evils practiced during these regimes are of incalculable depth and consequences. "Devastating" is an adequate word to synthesize the deeds caused by regimes of exception, not only by the semantic evocation of the destructive effect caused by some force, but also by the association that is made regarding the need and the yearning to rebuild, from the ashes of what remained, life, society, and freedom. If something good can be extracted from the regimes of exception, this something is the lessons about everything that should not be repeated and about how important freedom and democracy are for life in society.

Although they cannot be considered identical, even due to the particularities of each social context, it is undeniable that the regimes of exception present more similarities than distinctions, especially for those who are considered an "enemy of the regime", an "opponent", a Jew in Nazi Germany or a communist in South America. Perhaps, the unbearability of life experienced in those societies is the common denominator among the regimes of exception. However, the most concrete and incontrovertible common characteristic among them is the disrespect for the human condition, since it is unquestionable that in all regimes of exception so far known, the systematic violation of human rights is the element that brings them closer to each other and, to a certain extent, makes them equal, especially from the point of view of the victims of the most varied types of abuses, such as torture, rape, forced disappearance and murder, openly practiced in regimes of exception.

In the case of Brazil, the last formally and materially recognized regime of exception dragged on for a long twenty-four years (1964-1988), although it is recognized that many believe that the regime of exception ended with the revocation of the institutional acts and the approval of the Amnesty Law (Reis Filho, 2014). In that period (between 1964 and 1988), not that all forms of atrocities were not already practiced here, as they still are, Brazil went through particularly difficult times. The 1946 Constitution, which had great emancipatory potential, was simply supplanted by forces that were already part of the

Brazilian authoritarian tradition since before the Republic.

As a result of the coup, Brazilian society experienced severe restrictions in the field of political rights and thousands of people were victims of serious and systematic human rights violations. The Brazilian military dictatorship, far from being a *dirty dictatorship,* as some say, was a highly violent and cruel regime and, taking into account the strategies implemented to preserve and prolong that state of exception, it can be said to have been extremely efficient. In addition to severe restrictions on political rights, during the military dictatorship, thousands of people suffered at the hands of the military and other public agents in charge of preserving the regime. It is no exaggeration to affirm that during the Brazilian military dictatorship there was a true policy of extermination and the implementation of effective state terrorism. In fact, in addition to the execution of murders and forced disappearances of political opponents, the survivors did not come out unscathed. Arbitrary arrests became acts of mere expediency, so that there were no guarantees assecuring freedom. Torture was institutional practice and tolerated as a means of proof against subversive acts, although "legally proscribed. But what about the Judiciary? Slavish, dominated, except for rare episodes of courage on the part of some magistrates, it pretended to do justice. To the women suspects, besides the "conventional" means of torture, the humiliation of rape and the terror of separation from their children, many of whom were born while they were in custody. Finally, under the aegis of the military dictatorship in Brazil, there were many violations of the most fundamental human rights.

The coup of 1964 not only (re)inaugurated a period marked by systematic human rights violations, arbitrariness and authoritarianism. The coup interrupted a process of construction of Brazilian citizenship that, at the time, was laying the foundations of a democratic culture in the country. The deconstruction of the democratic arrangements that were being designed at that time came in the form of a civil-military dictatorship that knew how to use all the strategies of domination and repression known until then, always camouflaging the most varied forms of violence with the cloak of legality.

It happens that the groans of pain leaked from the cellars of the dictatorship, someone missed the disappeared and, after some time, fear no longer prevented the emergence of protests for freedom. Without going into details, after the 1964 coup, it was only in 1979 that the dictatorial government signaled a democratic opening. In that year, the National Congress, although dominated by the dictators, approved the Amnesty Law. After that, the democratic transition process dragged on until the convening of the National Constituent Assembly (EC no. 26/85), a remarkable sign that, in fact, a regime transition would occur.

It is worth noting that the Brazilian democratic transition, although imposed by social clamor, counted on the acquiescence, permission, of those who held dictatorial power, so that it was designed and manipulated to be "slow, gradual and safe. In other words, it can be said that the transition to democracy in Brazil did not result from a true political break with the dictatorship then in power, since the transition process was negotiated with the dictators, an absolutely relevant circumstance for understanding the particularities of the Brazilian democratic transition and the difficulties that are still faced today.

Despite intermittencies, advances and setbacks, the transition occurred and, in fact, allowed notable democratic achievements in the country, among which stands out the greatest of them, the promulgation of the 1988 Federal Constitution.

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With modernity, the *conquest of the law* is translated into the symbol of political victories, just as the substitution of the flag in the field of the enemy signals the dominance of the victors. In this sense, changes in political regimes are always accompanied by changes in laws, since the social dynamic both constitutes the legal field and is constituted by it.

Regarding the social constitution through the legal, or the *conquest of the law,* it is relevant to take into consideration the considerations of Geertz (2014), especially regarding the effects that the "legal" causes in social reality. For Geertz, "the 'legal' part of the world is not simply a set of rules, regulations, principles, and limited values, which generate everything that has to do with the law, from jury decisions to distilled events, but part of a specific way of imagining reality". In the same vein, the aforementioned author states that "legal thought is constructive of realities and not a mere reflection of these realities", so that there needs to be a "rejection of a view according to which the practical power of law results from social consensus, in favor of a search for meanings". In other words, for Geertz "law, even a type of law as technocratic as ours, is, in one word, constructive; in another, constitutive; in a third, formational". Following this line of reasoning, Geertz (2014) states that a legal process is "a way of getting our conceptions of the world and our verdicts to ratify each other", that is, "that these conceptions and these verdicts are respectively the abstract and the practical side of the same constitutive reason".

By understanding the legal as a form of construction, constitution and formatting of social realities, Geertz's thought is in dialogue with the notions of Law and "symbolic power" found in Pierre Bourdieu. Indeed, for Bourdieu (1989), the

symbolic power is also a form of construction of realities, and the Law would be the main form of transmission of this type of power. Law, therefore, is the preferred means of emanation of symbolic power, which, in turn, has the ability to constitute social reality through the discourse it enunciates:

> "Symbolic power as the power to constitute the given through enunciation, to make one see and make one believe, to confirm or transform the vision of the world and, in this way, action on the world, thus the world; quasi-magical power that allows one to obtain the equivalent of what is obtained by force (physical or economic), thanks to the specific effect of mobilization, is exercised only if it is recognized, that is, ignored as arbitrary."
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> "Law is undoubtedly the form par excellence of the symbolic power of naming which creates the things named and, in particular, groups; it confers on these realities arising from its operations of classification all the permanence, that of things, which a historical institution is capable of conferring on historical institutions. Law is the form par excellence of the acting discourse, capable, by its own force, of producing effects. It is not too much to say that it makes the social world, but with the condition of not forgetting that it is made by this world" (BOURDIEU, 1989).

The understanding of the issue also involves understanding the debate that articulates the notion of time and the power of law as an institution mechanism of social reality. According to François Ost (2005), while time is a social institution, the main mission of law (of the "juridical") would be to cooperate in the institution of the social, i.e., "law is a performative discourse, a fabric of operative fictions that redefine the meaning and value of life in society". It happens that "the law directly affects the temporalization of time, while, in turn, time determines the instituting force of law". With this, Ost means that:

> Law temporalizes, while time institutes. It is a matter, then, of a profound dialectic and not of superficial relations that are linked between law and time. Time does not remain external to legal matter, like a simple chronological framework in which its action would unfold; in the same way, the law does not limit itself to imposing a few normative deadlines on the calendar, leaving it to the rest to
> time unwinds its thread. Rather, it is much more from the inside that law and time work mutually. Against the positivist vision that has done nothing but externalize time, [...] far from turning to the formal measure of its chronological unfolding, time is one of the greatest challenges of the instituting capacity of law.

The intersections between law and time show that time is not only "physical time" and that law is not only an element of the present, but also of the past and the future. This perspective also clarifies the times experienced by the various layers of society, demonstrating how the various social segments have different times and move at different paces. Furthermore, from this vision, one comes to the conclusion that those who have the ability to institute social time, availing themselves of the manipulation of the legal,

holds the power, including to control institutions, mainly because these are constituted by the legal system. Furthermore, the imbricated relationship between time and law refers to the idea of memory, including as an expression of legal time, as it is also the function of law to contribute, fundamentally, to the establishment of a social memory, primarily due to its assertiveness as to the fundamental values of a collectivity (Ost, 2005).

For better or worse, the *conquest of the law* is a necessary path for the survival of any political regime. Not by chance, the 1964 dictatorship, from its birth to its last breath, militated for the path of legality. From Institutional Acts to Constitutional Amendments, the concern was always to confer legality on acts of exception. The strategy turned arbitrary acts into something institutional, impersonal, uniform and stable. The 1964 dictatorship would hardly have lasted so long without the artifice of authoritarian legality.

On the other hand, it is also worth remembering that the struggle for freedom movements were also followed by the *conquest of the law*. When we look at the history of constitutionalism, for example, we see that there has always been a concern to give new meaning to power relations by re-founding the legal bases of the state. This is exactly what happened in the English, American and French revolutions. Likewise, whenever there is a movement of struggles for rights and liberties, the resulting achievements are always accompanied by commitments that take on a form of legality. This is what happened with the expansion of Civil Rights in the United States and in several other countries.

In the same way, the passage from a dictatorial and authoritarian regime to a democratic regime depends on the convergence of multiple factors that, in one way or another, demand the role of the legal system as mediator in the process of democratic transition. In effect, democratic transitions are never unaccompanied by understandings and commitments that crystallize in the law, since it is in the law that the struggles for freedom take the form of a guarantee of transition. Therefore, one of the great demands of the transition movements is the inscription in legal statements of the achievements of the struggles for freedom and of the commitments signed for the construction of a society inspired by the values that engendered the democratic transition itself.

There is no democratic transition without the *conquest of law*. In other words, every transition from an authoritarian regime to a democratic regime unfolds in successive advances in the legal field, not least because modern democracies have always given prestige to the law as the guarantee of their existence, since it enunciates the rights and guarantees against state arbitrary action. In this way, the democratic conquests are consolidated from the re-signification of the

legal space.

The concept itself and the structuring elements of Transitional Justice are concludes that *the conquest of law* is indispensable for democratic transition. According to Paul Van Zyl, transitional justice can be understood as "the effort to build sustainable peace after a period of conflict, mass violence, or systematic human rights violations," an effort that demands articulation of four central elements: 1) memory and truth, 2) reparation, 3) reform of institutions, and 4) justice, consisting of the prosecution of human rights violators.

In the era of states governed by the rule of law, sustainable peace after the chaos of repression, the disclosure of truth and the protection of memory, the redress of injustices committed, the reform of institutions disfigured by authoritarianism and the prosecution of human rights violators is only possible on the basis of legal guarantees that all these commitments will be, in fact, fulfilled. Precisely for this reason, every transition is consolidated and expressed in law, the symbol of conquest, which documents the commitments made to the future, without leaving aside responsibility for the past. For all these reasons, the promulgation of a Constitution is so important in the context of a democratic transition.

The history of constitutionalism reveals that constitutions symbolize the break with authoritarian state models. In this sense, the idea of constitution already carries with it a set of understandings that refer to the struggles against state arbitrary rule, so that the term constitution, despite misappropriations, was conceived to designate a set of guarantees of freedom and democracy.

In Brazil, the 1988 Constitution lives up to its name. The document is undeniably the greatest symbol of recent democratic achievements in the country and, in fact, represents a real paradigm shift. The very first article of the Constitution states that *the Federative Republic of Brazil is a Democratic State of Law*, with citizenship and human dignity as its foundations, among others. In the same provision, the Constitution declares that *all power emanates from the people*. Moreover, it lists, among the objectives of the Republic, *the construction of a free, just and solidary society and the promotion of the welfare of all, without prejudice of origin, race, sex, color, age and any other forms of discrimination*. The list of fundamental guarantees is fabulous, adding up to more than a hundred statements, considering the individual, collective, social and political rights.

Certainly, the prolixity of the constitutional text is proportional to the extent of the abuses experienced during the years of repression. However, it is known that the promulgation of a

Constitution does not guarantee, by itself, a change in reality, given the gap between the enunciation and its repercussion at the level of reality. However, despite this, it cannot be ignored that the promulgation of a Constitution is an important step on the road to democracy. With this in mind, it is no exaggeration to say that the 1988 Constitution is still a democratic compass. If respected, it will be safe to say that we will never go back to 1964.

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One of the great challenges of the transitional processes is to deal with the marks of the dictatorial past, especially when these marks are engraved on the bodies and souls of thousands of people who experienced the full horror of these regimes. The complex problem involves the search for means to reduce the damage caused to the victims of repression and, in all evidence, reparation cannot be limited to the financial dimension, not least because the acts of exception were not restricted to this field. To these concerns, one of the pillars of Transitional Justice, called reparation, corresponds.

Faced with the undeniable debt to all those who suffered the acts of repression, the 1988 Constitution itself, in Article 8 of the Act of Transitional Constitutional Provisions (ADCT), consecrated a true *legal status for political amnesties,* in addition to electing *reparation* as the structural axis of the transitional process. Now, the democratic state recognizes the errors committed in the past and publicly and solemnly assumes the commitment to *repair* the suffering caused.

The provision (article 8 of ADCT) provides for amnesty for those who, between 18 September 1946 and the date of promulgation of the Constitution, were affected by acts of exception for exclusively political reasons. However, the constitutional rule, as naturally occurs, does not detail the way in which the State must perform the obligations assumed in that provision, so that it is left to the infra-constitutional level to construct the procedures and designate the powers that will ensure the materiality of the fundamental right established.

In compliance with the constitutional command (article 8 of ADCT), Law 10.559/02 regulated the reparation policy, specifying the rights of political amnesties (article 1), listing those who can be considered political amnesties (article 2), regulating the forms of economic reparation (article 3 et seq.) and establishing the administrative competencies for processing and analyzing reparation claims.

It seems evident that article 8 of ADCT and its regulation (Law 10.559/02) consolidate a State public policy that, reflecting the yearning for an amnesty with

sense of *freedom* and *reparation*, is legally qualified as a true fundamental guarantee, both of individual and collective character.

First of all, it should be noted that the rules provided for in the Transitional Constitutional Provisions Act are as constitutional as any other rule found in the other chapters of the Constitution. The Federal Supreme Court (STF) has already expressed itself on this issue:

> "The Transitional Provisions Act, enacted in 1988 by the constituent legislature, is legally qualified as a statute of constitutional nature. The normative structure that is embodied therein bears, as a result, the rigidity peculiar to the rules written in the basic text of the Fundamental Law of the Republic. From this stems the recognition that there are no differences or inequalities between the rules contained in ADCT and the precepts contained in the Charter Policy, as to the intensity of its effectiveness or the prevalence of its authority. Both are situated at the highest level of legal positivity, imposing themselves, in the state order, as subordinate normative categories, to the compulsory observance of all, especially the organs that make up the apparatus of State" (RE 160.486, Reporting Min. Celso de Mello, judgment on 11-10-1994, First Class, DJ of 9-6-1995 and RE 215.107-AgR, Reporting Min. Celso de Mello, judgment on 21-11-2006, Second Class, DJ of 2-2-2007).

It is also important to note that the *legal status of political amnesties*, inaugurated by art. 8 of the ADCT and regulated by Law 10.559/02, qualifies as a fundamental right and guarantee of an individual and collective nature and, because of this, attracts all the protection conferred on fundamental rights and guarantees by the Constitution itself. The *status of* fundamental right and guarantee, of an individual and collective nature, derives not only from the literalness of art. 8 of the ADCT, but also from the principles underlying the public policy guided by it. This understanding leads to the understanding that the rule inscribed in art. 8 of the ADCT, besides being formally constitutional, is materially constitutional, that is, it integrates a set of rules that constitute and give meaning to the very nature of the Democratic State of Law.

From the literal wording of the provision, it is clear that the Constitutional State is committed to repairing those who have been affected by acts of exception for exclusively political reasons. It should also be emphasized that the constitutional text does not limit in time the claim to demand from the State the due reparations for acts of exception. Thus, from the literalness of art. 8 of ADCT it can be concluded that the State assumes its debt towards those affected by acts of exception and that the claim is not subject to any statute of limitations. In this regard, the Superior Court of Justice (STJ) has established that "*reparation for damages, material and/or moral, is not time-barred,*

resulting from violation of fundamental rights perpetrated during the military regime, a period of suppression of public freedoms" (Special Appeal 1565166/PR, Reporting Justice REGINA HELENA COSTA, FIRST TURMA, judged on 06/26/2018, DJe 08/02/2018).

On the other hand, it is necessary to understand that the reasons that inspired the public policy of reparations provided for in art. 8 of the ADCT are directly related to the democratic transition itself. In other words, the principles underlying this provision are the same as those that inspired the transition from the regime of exception to the democratic regime. Strictly speaking, article 8 of the ADCT, in recognizing the existence of a period of exception and making a commitment to repair the damage caused by the dictatorial regime, is in dialogue with the other fundamental rights that bind the Constitutional State to the duty of respecting and protecting human rights. Recognition of the duty to repair is essentially a commitment to democracy itself, which signals repudiation of any form of persecution based on arbitrary rule. It follows from this understanding that this norm is formally and substantially constitutional, like the other fundamental rights and guarantees contained in Title II of the Federal Constitution.

It should be noted that the rights provided in art. 8 of the ADCT and in Law 10.559/02 are fundamental rights and guarantees both individual and collective in nature. As an individual right and guarantee, the norm confers rights that become part of the legal heritage of those who were victims of acts of exception. In other words, once the condition of political persecution is proven, the State cannot oppose the commitment to repair the damage. *This is* why it is understood that "*political amnesty is a binding act. Once the requirements set forth in the law and in the regulation are proven, it is the duty of the administration to declare it*" (RMS 21.259, Reporting Justice Sepúlveda Pertence, DJ of November 8, 1991; RMS 25.988, Reporting Justice Eros Grau, judgment on March 9, 2010, Second Panel, DJE of May 14, 2010).

On the other hand, the rights provided for in art. 8 of the ADCT and in Law 10.559/02 are characterized as collective fundamental rights and guarantees. It is not only the direct victims of the regime of exception who are entitled to rights vis-à-vis the Constitutional State due to the systematic human rights violations. It is necessary to understand that all of society is harmed when an exceptional regime is installed. Indeed, it is not even possible to measure the extent and depth of the damage caused by a dictatorship, even more so when it lasts for a long time, as occurred in Brazil. The indemnities awarded individually to each politically persecuted person carry more than an individual apology. In truth, when the State bows down and extends a hand to a victim of persecution, all of society receives the benefits of this act of justice. In this

In this sense, the rights resulting from the legal status of the political amnesty are qualified as a fundamental guarantee of collective nature, mainly because the reparatory policy is also a guarantee that the past will not be repeated, a right that concerns all of Brazilian society.

As fundamental rights and guarantees, the rights set forth in art. 8 of the ADCT and in Law 10.559/02 are covered by a set of specific regulations, which aim both to make these rights effective and to protect them against any attempt to suppress or reduce their scope.

In this sense, it can be said that the rights provided for in art. 8 of the ADCT and in Law 10.559/02 have *immediate* and *irradiating effectiveness*, (art. 5, § 1 of the CF), as they can be demanded of the State regardless of regulation. More than this, since the State can not only be required and obliged to fulfil these rights, but must also act to promote these rights spontaneously, so that it must create all the conditions for the exercise of these rights.

Another very important understanding of fundamental rights and guarantees concerns the *principle of the prohibition of retrogression* (*cliquet effect*). According to this principle, once recognized by the State, fundamental rights and guarantees cannot suffer retrogression, that is, they cannot be suppressed or weakened. That is why the fundamental rights and guarantees provided for in the Constitution are protected by permanent clauses (art. 60, § 4, IV). On the other hand, the principle also prevents the advances already made in the field of fundamental rights and guarantees from suffering any kind of setback, so that public policies already implemented can only be altered if the changes promote the expansion of the scope of protection of fundamental rights and guarantees, not the other way around. In this sense, for example, the revocation of Law 10.559/02 would be prohibited, since it would result, first, in non-compliance with art. 8 of the ADCT and, second, because it would mean a real regression in terms of the right to reparation for acts of exception practiced by the State.

It is also necessary to consider that art. 8 of ADCT and Law 10.559/02 lead to administrative activity of appreciation of the requests of those who consider themselves covered by the public policy of reparation, so that it is of fundamental importance to analyze, even if in a general way, the legal-constitutional regime to which the referred activity is submitted.

Initially, it is necessary to understand that every state activity is subject to its own legal regime, marked by prerogatives and subjections. In a nutshell, the

binomial designates a set of rules that concern the preservation and the unavailability of the public interest, whose parameters are extracted from the Federal Constitution itself and infra-constitutional rules that regulate the administrative activity.

Specifically regarding the administrative activity, Article 37 of the Constitution lists the principles of legality, impartiality, morality, publicity and efficiency. These principles, in addition to binding the Public Administration to its dictates, give the administered and also the politically persecuted a *fundamental right to good administration* (FREITAS, 2014). Obviously, these principles bind both the Amnesty Commission and the Ministry to which it is linked, currently the Ministry of Women, Family and Human Rights, so that the violation of any of these principles can characterize both the nullity of the act and the accountability of the public official responsible for the violation of the constitutional norm.

In dialogue with constitutional norms, it is important to emphasize that Law 9.784/99 establishes important rules concerning administrative procedure within the Federal Public Administration, which applies to the "direct and indirect Federal Administration, aiming, in particular, at the protection of the rights of the administrators and at the best fulfillment of the Administration's purposes" (art. 1 of Law 9.784/99). Obviously, the aforementioned normative diploma also applies to the Amnesty Commission and the Ministry of Women, Family and Human Rights, mainly because the activities performed by these bodies are materialized in administrative procedures.

In addition to explaining the duty to observe the principles of legality, purpose, motivation, reasonableness, proportionality, morality, ample defense, adversarial procedure, legal security, public interest and efficiency, Law 9.784/99 lists as criteria for action, among others, action according to ethical standards of probity, decorum and good faith, official disclosure of administrative acts, except in the cases of secrecy provided for in the Constitution, indication of the assumptions of fact and law that determine the decision, guarantee of the right to communication, to the presentation of final allegations, to the production of evidence and to the filing of appeals, in proceedings that may result in sanctions and in situations of litigation, interpretation of the administrative rule in the manner that best guarantees compliance with the public purpose to which it is directed, with no retroactive application of a new interpretation (art. 2, sole paragraph, of Law 9874/99).

It is important to bear in mind that, in addition to the Constitution and Law 9.874/99, the Amnesty Commission and the Ministry of Women, Family and Human Rights are subject to all rules compatible with the purpose of public policy

inaugurated by art. 8 of ADCT, so that it can be said that, in the field of Political Amnesty, there is a true *legal microsystem* that subjects all state activity, whose main objective is to comply with the constitutional command provided for in art. 8 of ADCT. In this sense, the laws 6.683/79 (Amnesty Law), 9.140/95 (law of the dead and disappeared politicians) and 12.527/11 (law of access to information), among others, all of them gravitating around art. 8 of ADCT and other constitutional rules, integrate the mentioned microsystem.

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