

## Essay on the IMpossibility of "discounts" in the granting of financial reparation in political amnesties under Law 10.559/02

Many were the organs of repression and physical and psychological torture implemented in Brazil, both managed by the federal government and by the units of the Federation. Much remains to be discovered about Brazil's illegal repressive apparatus, but numerous official documents already provide ample proof of the horror of the State of Exception into which Brazil was transformed after 1964, among which the Final Report of the National Truth Commission stands out.

In instituting Political Amnesty in Brazil, Law 6.683/79 sought to initiate the political opening and also the reparation of the transitional process. This law was regulated by Decree No.

84.143 of October 31st 1979. This decree deserves a more detailed analysis to clarify several legal aspects that today are being confused, bringing numerous losses both for political amnesties and for the Brazilian transitional process itself, which is still dragging on, more than thirty years after the new Federal Constitution that inaugurated it.

Article 1 of the Decree reiterates the period comprised by Law 6.683, from 1961 to 1979 for political crimes. Note that §2 of article 1 makes it crystal clear that the 1979 Amnesty was not, under any circumstances, a broad, general and unrestricted amnesty:

2. Those who have been convicted for crimes of terrorism, assault, kidnapping and personal assault shall be exempted from amnesty benefits.

This paragraph alone would be enough to demonstrate that the purpose of both Law 6683/79 and the Decree was to grant amnesty to (some and not all) those who had been **convicted** of political crimes. In other words, no amnesty could be granted in **advance** to someone who would in **the future** be **convicted of** a political crime, such as the cases of public agents later accused of the practice of torture, kidnapping, murder and other political crimes. But this topic is beyond the scope of the subject to be developed here, which is that of financial reparation.

To process requests for return to service, in the case of public servants, the decree established that requests should be addressed:

IV - by a State, Federal District, Territory or Municipality employee, to the respective Governor or Mayor;

Subsequently, the Federal Constitution of 1988 came with its Article 8. This article not only granted amnesty to those who were politically persecuted, but also delineated the characteristic of reparation for acts of political persecution imposed by the State.

Art. 8. Amnesty is granted to those who [...], 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, being guaranteed promotions, during inactivity, to the position, job, rank or grade to which they would be entitled if they were in active service, in accordance with the periods of permanence in active service established 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.

3. Citizens who were prevented from exercising, in civilian life, a specific professional activity, **as a result of the Ministry of Aeronautics Restricted Decrees No. S-50-GM5, of June 19, 1964, and No. S-285-GM5 shall be granted economic compensation, as provided for by a law** initiated by the National Congress and to come into force within twelve months from the enactment of the Constitution.

The law cited in paragraph 3 of article 8 of ADCT and that regulates it is Law No. 10559 of November 13, 2002, which in its article 1 states that one of the rights pertaining to the Political Amnesty is the economic compensation:

Art. 1 The Political Amnesty Regime comprises the following rights: II - **economic reparation, of an indemnity nature, in a single installment or in monthly, permanent and continuous installments**, ensuring readmission or promotion in inactivity, under the conditions established in the caput and in paragraphs 1 and 5 of art. 8 of the Transitory Constitutional Provisions Act;

Therefore, there are two forms of compensation, not cumulative among themselves, that the legislator chose for the reparation:

- A monthly benefit to be paid to an amnesty recipient who proves professional ties at the time, whose installment will be considered as if the beneficiary had been working (with the respective promotions);
- The other benefit to be paid in a single installment, which should cover thirty minimum wages per year (or fraction thereof) of punishment, limited to a limit of one hundred thousand reais, for amnesty recipients who are unable to prove employment.

Both indemnities will be paid by the National Treasury as per favorable opinion of the Amnesty Commission and ordinance of the competent Minister (until 2018 it was the Ministry of Justice, as of 2019 the Ministry of Women, Family and Human Rights).

Even with the federal law, some federal states also enacted laws guaranteeing reparations to those who were politically persecuted. However, unlike Law 10.559, which advocates full reparation, in the wake of the constitutional process of the Brazilian transition, state laws had the eminently economic reparation character, that is, they were only concerned with compensation for those who had been victims of the misconduct of their agents. Some examples may be given:

In the state of São Paulo there is Law n°. 10726 of January 2001 that states:

Article 1 - The State of São Paulo is hereby authorized to pay compensation, as reparation, to those persons detained **under the** accusation of having taken part in political activities in the period from March 31, 1964 to August 15, 1979, who **have been under the responsibility or custody of public bodies of the State of São Paulo** or in any of their premises.

**1 - Those who have demonstrably suffered torture** that has caused physical or psychological impairment **shall be entitled to compensation**, provided that they have not obtained, for the same reason, compensation for moral or material damage.

The State of Paraná, in Law no. 16164 of July 6, 2009, although it does not refer to indemnity, speaks of reinstatement of the state public servant or employee dismissed due to political persecution:

Art. 1. **Amnesty shall be granted to public servants and employees of the State Public Administration, independent and foundational, as well as employees of public companies and mixed-capital companies under State control**, who, in the period between January 1, 1983 and December 31, 1990, were dismissed, discharged, laid off or dismissed for political reasons, duly characterized, or for interruption of professional activity due to strike action, under the following terms:

Art. 3. Subject to the provisions of this law and in accordance with the budgetary and financial needs and availability of the Administration, the Executive Branch shall grant the return to service of public servants or employees arbitrarily dismissed during the period referred to in Article 1.

The State of Rio Grande do Sul, created State Law No. 11,042, of November 18, 1997, which in its article 1 states that:

Article 1 - The State of Rio Grande do Sul shall indemnify, under the terms of this Law, those people that, imprisoned **or detained, legally or illegally, for political reasons** between the 2nd of September 1961 and the 15th of August 1979, have suffered mistreatment or abuse, resulting in physical or psychological harm, when they were under the custody and responsibility or under the power of coercion of state organs or public agents.

The State of Santa Catarina, in the same way, through Ordinary Law no. 10.719, of January 13, 1998, created the Special Commission, where it also recognized the State's responsibility for the misconduct of its agents, says art. 1;

The State of Santa Catarina, under the terms of this Law, is authorized to pay compensation to the people arrested **under** the accusation of having taken part in political activities, between September 2nd, 1961 and August 15th, 1979, **who have been under the responsibility or custody of the public organs of this State**, or in any of its dependencies.

Finally the state of Rio de Janeiro, through Law n° 3.744 of 21 December 2001, article 1 establishes that:

The State of Rio de Janeiro is authorized, under the terms of this Law, to pay compensation for physical or psychological torture suffered by persons detained on charges of having taken part in political activities between April 1, 1964 and August 15, 1979, who were under the responsibility and/or custody of public agencies of the State of Rio de Janeiro, in any of their facilities.

1 - Persons who, under accusation of having taken part in political activities, have been proven by witnesses, documents or the like to have suffered physical or psychological torture, and who request it within 180 (one hundred and eighty) days from the installation of the Special Commission referred to in the following article, shall be entitled to symbolic economic reparation.

In all of them, there was the need for the persecuted to prove that they were under the responsibility of the State and/or guardianship of public agencies in any of its facilities, this proof could be made through witnesses, documents or the like, such as newspaper and magazine reports.

The deadline to apply for compensation was normally 180 days from the installation of the Commission. The President of the Commission, usually designated by the Governor, had the casting vote. The indemnities granted varied from state to state.

Thus, in the State of Rio Grande do Sul, the indemnity paid could not be higher than R\$30,000.00, nor lower than R\$5,000.00; in the State of Santa Catarina, the indemnity could not be higher than R\$30,000.00, nor lower than R\$5,000.00, and the payment should be made only to the appellant himself (art. 7º); in the State of São Paulo, the indemnity to be paid could not be higher than R\$39.000,00, nor lower than R\$3.900,00, And in the State of Rio de Janeiro, although the legislation in its 1st paragraph of Article 1 mentions that they will be entitled to "symbolic" economic reparation, it determines that the indemnities shall not be higher than R\$50.000,00, nor lower than R\$5.000,00.

To determine the value of the payment of each indemnification, the obligation was the full proof of persecution, torture and death. The State of Santa Catarina, in its article 5, describes that to fix the amount, the personal, family, professional, physical and psychological impacts of each case analyzed were taken into account, and the result of the damage was considered in the following decreasing order of severity: I - permanent disability; II - psychological disorder; III - partial disability; and IV - other physical injuries.

Note that all laws refer to state situations. The State of São Paulo refers to public agencies under São Paulo's jurisdiction and the Paraná law provides for employees and servants of state entities or under state guardianship. Therefore, they constitute reparations for actions under the responsibility of the Federate State.

For this history it is clear that both the Union and the Federal States have implemented public policies of economic reparation in favor of those who suffered political persecution during the authoritarian regime. Given this, the question arises: Is it possible to have compensation in reparations received from different entities? For example: once compensation has been received from the State of São Paulo, should this amount be deducted from compensation received from the Federal Government?

Considering that there is autonomy among the entities that make up the Federative Republic of Brazil, so that only in very rare and well-founded decisions is federal intervention possible in the state sphere, there is no obstacle for each state to recognize its own debt to those who were persecuted for political reasons and establish the rules of reparation that it deems fair. In dealing with accumulation, Law 10559 prohibits only those provided for in the law itself, that is, the single payment and the monthly, permanent and continuous payments made by the Federal Government.

Therefore, one cannot use the state compensation and take advantage of the action of another federal entity in order to reduce the *quantum of* compensation owed by the Union. Each one must answer for its own mistakes.

To accept such practice is to reduce human suffering to accounting, budgetary and financial criteria and to forget that human dignity is immeasurable.

But even if one wants to offer a financial aspect to the matter, according to the Transparency Portal, since June 2015 to June 2019, Brazil has paid more than four billion reais in compensation to political amnesties (both in one-time and continued installments), moreover, such spending corresponds to 0.04% of public spending between 2015 and 2017 and 0.03% of public spending in 2018 and until the month of June 2019.

When analysed in contrast to total expenditure, reparations do not reach 0.05% of public spending, so they do not represent the largest spending commitments by the Brazilian state.

Even if the global amount of more than four billion dollars spent in recent years is large, it should not be interpreted considering only the amount spent in isolation, this amount should be conceived as an expression of the suffering caused by the Brazilian state and therefore should not be relativized or object of cold analysis and accounting, financial and budgetary transactions.

Moreover, while state laws refer exclusively to economic reparation of an indemnity nature, Law 10.559 is part of a higher level of implementation of the constitutional policy of transition, in which reparation is much more than indemnity, since it provides for counting service time, the possibility of completing a course at a public institution, as well as other forms of reparation already granted, such as rectification of public birth and death records or provision of psychological assistance (care at the Witness Clinics).

Furthermore, unlike the indemnity awards of the State Commissions, under Law 10.559/2002, the payments are made based on the various damages caused. In this case what is observed is the **political persecution suffered by the applicant, regardless of militancy, imprisonment, torture or physical injury. In the State Commissions, compensation is granted due to aggressions practiced by Public Agents, or on their premises.**

These are indemnity sums with different foundations and purposes. Law 10.559/2002 aims at full compensation, while the state laws aimed at protecting the civil liability for injuries caused by its agents.

In the same way, they do not confuse the State indemnities with the Law 9.140/95 of the dead and disappeared, where their spouses, ascendants and descendants are contemplated with indemnities, also from the understanding of the civil responsibility of the Federal State, and not as integral indemnity that only came with the Law 10.559/02.

For all the above reasons, any responsibility assumed at the state level cannot be confused with the full reparation recommended by the Constitution and implemented by Law 10.559/02. No deduction can be made for any amount possibly already received by a State Commission, alleging that reparation has already been made, since constitutional reparation can only be granted under the terms of Law 10.559/02, with its criteria and guidelines. Law 10.559/02 itself establishes in article 16 that in examining the request the Amnesty Commission's Council cannot take into account other legal norms that have conferred other rights and only prohibits double payments:

Art. 16 The rights expressed in this Law do not exclude those conferred by other legal or constitutional norms, it being forbidden to accumulate any payments or benefits or compensation on the same basis, the most favorable option being permitted.

Note that the Law explicitly states that the most favorable option should be provided. This is only possible if the Law is referring to the possibility of a single payment and a monthly, permanent and continuous payment. The Claimant cannot receive both. He must choose the most favorable option. The basis of both is the same: the full constitutional reparation regulated by Law 10.559/02. If the basis for receiving either right is different (for example, a state law that provided for the possibility of compensation that has already been evaluated and granted) the first part of article 16 applies, i.e. the non-exclusion or compatibility of rights: the rights of the state compensation **do not exclude the rights of Law 10.559/02.**

What this provision prevents is the perception under the same factual basis (the persecution suffered by the State of Exception) of a single benefit cumulated with monthly, permanent and continuous benefits.

Affirming that there must be any form of discount attacks the constitutional precept of article 8 of ADCT, diminishes the transitional reparation process into a mere actuarial calculation and does not help Brazil to build its Democratic State of Law.