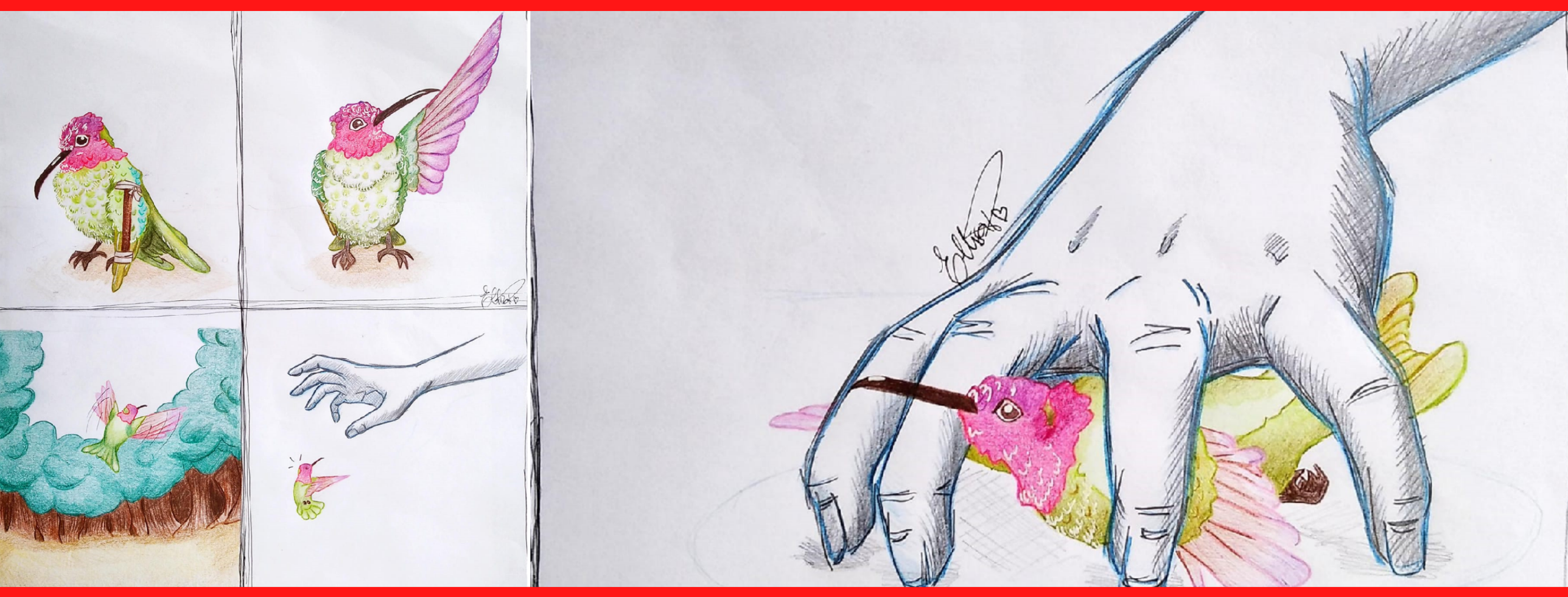
THE BRAZILIAN TRANSITION

MEMORY, TRUTH, REPARATION AND JUSTICE (1979-2021)



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THE BRAZILIAN TRANSITION: MEMORY, TRUTH, REPARATION AND JUSTICE (1979-2021)[1]

[1] Parts of this book have already been published, in earlier and less updated versions, in the e-book **Justiça de transição e democracia**. And excerpts served as the basis for the preparation of one of the chapters of the Report on monitoring the fulfillment of the Brazilian State's obligations before the Inter-American Commission on Human Rights.

INTRODUCTION

The present paper aims at reflecting on the Brazilian transitional process that started with the Political Amnesty Law in 1979 until today. The transition from the state of exception experienced by Brazil to the Democratic State of Law can be established based on several criteria. For the purposes of the reflection developed here, we will use, as a criterion, the one that came to be called "structuring axis" (ABRÃO, 2012) of the political amnesty in the process of national transition.

For this reason, the first analysis will be of the Political Amnesty Law itself, Law 6.683, of August 28th, 1979, thus marking the beginning of the transition in 1979. To establish the final milestone, it would be necessary that the transition had been completed, or at least sufficiently advanced. In a certain aspect, it is true that there have been many advances, but, as we will see, the setbacks are so significant that we will carry out the analysis until the current year, 2021, the third of the four years of the mandate of President Jair Bolsonaro, a contumacious defender of the civil-military dictatorship.

After a legal-dogmatic analysis of Law 6.683/79, we will make a brief ponderation on the transitional process, taking the Federal Constitution itself as the basis of legitimacy. As the main thread of all the thought developed here is political amnesty, it will be very important to analyze the role of the Amnesty Commission, without, however, forgetting the other State Commissions, namely the Special Commission on the Dead and Political Disappeared and the National Truth Commission.

Finally, we will point to the fragility of Brazilian democracy, because from the presidential term of Michel Temer on, the Amnesty Commission will be weakened, and this circumstance will be aggravated with the election of Jair Bolsonaro, deepening what was already outlined as a reverse transitional justice (DE STUTZ E ALMEIDA, 2017).

1 - THE LEGAL NATURE OF THE POLITICAL AMNESTY LAW AND THE POSSIBILITY OF ACCOUNTABILITY

This chapter intends to demonstrate that the debate about what, effectively, was amnestied in Brazil in 1979 has unfortunately been conducted in a mistaken manner by most of the actors involved. This is because they have been discussing the scope of the political amnesty, or, in other words, "which crimes were amnestied in 1979?" The question has also been formulated like this: "which facts were forgotten by the 1979 political amnesty? Or else: "who was amnestied in 1979? All those involved in the political events, including torturers, for example?".

The misunderstanding of these questions is that they start from the assumption of the legal nature of the political amnesty as an amnesty of forgetfulness, and in this way, some claim that the scope of forgetfulness is limited and others that the scope is unlimited. For this reason, a narrative of the alleged controversies of Law 6.683/79 was elaborated.

The present text attempts to demonstrate that the most correct debate is the one that must start from the analysis of the legal nature of the Political Amnesty Law, because such definition protects us against misunderstandings. To do so, we will use the thesis already developed by us (DE STUTZ E ALMEIDA, 2020), based on François Ost (2005). The themes of political amnesty, memory, truth, and justice will be correlated in order to demonstrate that, differently from our neighbors in the so-called Southern Cone, the Brazilian political amnesty is an amnesty of memory and not of forgetfulness. At the end of the chapter, we will evaluate some consequences of this classification, including for the establishment of a Democratic State of Law in Brazil.

From the outset it is worth pointing out that the legal nature of a political amnesty can be of two types: 1) amnesty of facts or forgetfulness; and 2) amnesty of convictions or memory (OST, 2005: 172). In this text we will argue that the Brazilian amnesty was of the second type: "in other words, this is a constitutional thesis of resistance to the still hegemonic idea that amnesty is always forgetting; a thesis to link the 1979 political amnesty with memory and truth" (DE STUTZ E ALMEIDA, 2020).

To this end, we will initially demonstrate that, despite our legal system having characterized the political amnesty since 1979 as an amnesty of memory, paradoxically the public debate since then has been engaged in the construction of the narrative of amnesty as forgetting.

In the following, the equivocation of such construction will be demonstrated, since Law 6.683/79 could have been the result of political agreements at the time of its drafting, but it was legally characterized as a law that advocated memory. Amnesty as anamnesis and not as amnesia. We will emphasize here the legal nature of the amnesty institute, because, after all, this is exactly the characteristic that must be sought (the legal nature) of any legal instrument in order to evaluate what the consequences of the application of the same institute are.

Therefore, it is the legal nature of the amnesty that will imply the reach of this amnesty, and not the intentions of those who played a role in possible agreements or interests at the time or afterwards. This is a dogmatic analysis. It is also necessary to analyze the *Ação de Descumprimento de Preceito Fundamental* nº 153 (ADPF 153), which was heard by the Supreme Court in April 2010. This is because, again, there is a lot of noise and misunderstanding about this decision, as well as expectations of all kinds for the judgment of the appeals still pending.

Finally, it will be shown that the legislator's choice was legally configured as an *amnesty for the convictions* and not for the facts. Such configuration, voluntary and conscious or not, turned the Brazilian political amnesty tool in 1979, 1985, 1988 and 2002 into *a political amnesty of memory and truth*. It is this legal nature that allows the reparation and accountability of those who imposed any form of human rights violation as an instrument of politically motivated state persecution. If the political amnesty regulated by constitutional or infra-constitutional legislation in any of those years had been one of forgetfulness, there could never even be reparation, because the facts, that is, the events of political persecution would have been erased from history.

It is necessary to put the debate about the Amnesty Law on the right track, starting by analyzing the legal nature of the *political amnesty instrument* in the Brazilian case, because disregarding this legal nature turns the discussion into a battle of narratives, which is what has been happening in Brazil in recent years, and does not collaborate at

all for an adequate solution to the legislative decisions taken since 1979, which have always intended to bring pacification to Brazilian society.

A very important premise for all the analysis that will follow is the following: political amnesty, whatever its legal nature, is an "all or nothing" rule (DWORKIN, 2007). In other words: if it is an amnesty of facts, *all facts have been forgotten*; if it is an amnesty of convictions, *all convictions have been erased*, although *all facts prevail*. There is no possibility of some facts being erased and others not; or some convictions being erased and others not. This is why it is wrong to ask about the reach of the Amnesty Law, because either the whole universe (of facts or of convictions, depending on the legal nature) is reached, or nothing is reached. Amnesty is a legal instrument that generates the effect of erasure in an objective manner, that is, it is independent of interpretation. Therefore, the question about the reach does not arise. The reach of Law 6.683/79 is the reach foreseen in its own terms. Objectively.

To have a debate about the scope only confuses and prevents national pacification. The correct debate is about the legal nature of the law, because with this definition the effects are the legal effects provided for that specific characteristic of law.

Nevertheless, let's demonstrate how we got to this state of affairs, this sterile debate about the reach of Law 6.683/79. What has occurred and still occurs in Brazil is a real war of narratives: one that disregards the legal nature of the law, and, therefore, only serves to aggravate tempers, polarization, and misunderstanding in the application of legal norms; and one that starts from the legal nature of the law, and serves national pacification, but which unfortunately has been forgotten.

1.1 Political narrative out of sync with legal norms: amnesty as forgetfulness

In 1979, the social context was that a portion of the population demanded a broad, general, and unrestricted amnesty, due to the existence of political prisoners who had been convicted in military police investigations (IPMs), as well as political exiles. It is understood that as of Institutional Act no. 2 (AI-2), of October 27, 1965, the competence of the Military Justice was expanded and all acts considered political crimes, that is, all crimes against the State and the political and social order began to be judged by the

Military Justice. In this way, any and every act considered subversive was appreciated by the Military Boards, which almost always confirmed the prison sentence. It is also worth mentioning that the penalty of banishment returned to the Brazilian legal system after AI-5, as a form of hardening of the authoritarian regime.

It is not up to us here to detail the judicial processes of that time, nor to evaluate the dictatorship that followed the coup d'état in 1964. Nevertheless, *"it is fundamental to reiterate that the basic assumption for any and all discussion on the issues of so-called transitional justice is precisely the fact that Brazil was under a state of exception from the year 1964 onwards"* (DE STUTZ E ALMEIDA, 2019). In this sense, from 1975, with the many arrests and exiles, several Brazilian Committees for Amnesty (CBAs) were created to try to articulate a political struggle to have an amnesty law in Brazil. In 1979, two bills were submitted to a vote in the National Congress; one from the opposition, which provided for amnesty without exceptions, and the other from the government, which won and became Law 6.683/79.

With this law, which had exceptions for crimes that were not amnestied, many Brazilians were able to return to the country, and many others were released from prison. However, the authoritarian period was still far from over, and, therefore, there was no way to begin the transition to the rule of law. In spite of the legal norm, the political environment was one of an attempt to formulate a kind of national agreement based on oblivion to enable a democratic opening. In other words, *regardless of the legal nature of the political amnesty that took place in 1979*, there seems to have been an intention on the part of both the military regime and sectors of civil society to erase the facts that occurred during the dictatorship, or at least all facts that occurred prior to August 28, 1979, the date of enactment of Law 6.683/79. This intention remains up to the present day, as will be demonstrated. It is worth pointing out that such intention is in dissonance with the legal nature of the Amnesty Law.

The Amnesty Law, as it became known, fulfilled its legal effects, i.e., it allowed those who had been dismissed for political reasons to return to work, freed those who were imprisoned, and allowed those who were in exile to return to the national territory, with the exception of those who had been excluded from amnesty by the law itself. However, at that time there was still media censorship, and the existence of both the dictatorship and the serious human rights violations were daily denied by the constituted

authorities. Silence was permanently imposed on the entire Brazilian society, and there was not even public debate about the dictatorship, let alone how to get out of it. Perhaps this environment was sufficient to create an illusion that Law 6.683/79 was a law of forgetting, of erasing the facts. Perhaps this was the intention of both the authorities and the parliamentarians when they voted for it.

What followed was a gradual and slow political opening, culminating in the convening of the Constituent Assembly through Constitutional Amendment 26/85, which reiterated and expanded the amnesty granted by Law 6.683/79. We will return to this moment in the next topic. For the understanding of the narrative that was built, for now it is enough to notice that in 1979 there was the first moment of amnesty with the discourse of forgetfulness and when the Constituent was convened, again the same narrative of erasing the facts. Note that it was necessary to try once again to erase the facts precisely because they had not been erased; however, this subtlety was not perceived at the time, and the policy of oblivion was imposed.

It is interesting to note that the neighboring countries of the Southern Cone made self amnesty laws that effectively erased the facts that had occurred, that is, in those cases it was as much a de facto as a de jure policy and legislation of oblivion. This created a feeling that *all Latin American countries* that had experienced authoritarian regimes had the same amnesty policy as forgetting, without, however, a more accurate examination of the Brazilian legislation.

When the text that would become the Federal Constitution of 1988 was being drafted, although the government was no longer exercised by a military officer, the political environment was still one of fear that the dictatorship could return at any time, if that slow, gradual, and secure opening was not controlled. Thus, although censorship was no longer exercised and the national environment was one of democratic celebration, a kind of tacit agreement to not discuss the dictatorship prevailed, as if it had been forgotten or had not even occurred. Many were the authorities that even declared that no dictatorship had ever taken place in Brazil.

Throughout this context, a narrative was created, an argumentative construction that Brazil had a slightly more authoritarian period than desirable, but that it had been a lesser evil, or a necessary evil, and that there was a need for a national pact to erase this

memory. This pact would be exactly the new Constitution, anchored in the political environment of both Law 6.683/79 and CA 26/85. This construction is still hegemonic to this day.

Note, for example, the logic contained in part of one of the answers in the interview General Etchegoyen gave in early November 2020 to the news portal UOL, commenting on the government of Dilma Roussef: "they isolated the military, disrespected us, *staged a clearly vindictive Truth Commission*, affronted the law to usurp clear powers of the commanders (our emphasis)". Why does a General claim that a State Commission, created by law, was a staging? Exactly because within the logic of oblivion there would be no Truth Commission. Truth about what, if nothing happened? If there was forgetting, erasing, there is nothing to be investigated. It is coherent and logical that if *the facts* have been erased, forgotten, there is nothing to remember, nothing to tell, nothing to register, except as a reenactment. There is not even anything to repair. Because the facts have been erased, as if they had never occurred.

It is important to understand that there is nothing new in this understanding of General Etchegoyen. Let us see: more than twenty years after the promulgation of the Constitution, at the end of 2009, there was a serious crisis in the then second mandate of President Lula, led by two of his aides: the Minister of Defense, Nelson Jobim, and the Special Secretary of Human Rights, with the *status* of Minister of State, Paulo Vannuchi, regarding the launching of the third part of the National Human Rights Program (NHRP3). The press reported at the time that both the Minister of Defense and the Military Commanders informed that they would resign from their positions if a Truth Commission was implemented, as was foreseen in the actions of the NHRP3. They said they would not accept a Commission that investigated military personnel, but did not investigate militants of the left who acted as terrorists during the dictatorship.

After heated debates, the political solution was to remake NHRP3 to exclude, among other points, the creation of the Truth Commission, thus consolidating the public policy of forgetting and reinforcing the illusion that Law 6.683/79 had been a law that erased the facts. Note that the reformulation of the NHRP3 was a political decision and not a legal impossibility motivated by the Amnesty Law. There was no legal evaluation of the impediment to the creation of a Truth Commission, that is, there was no legal

consideration of the impossibility of ascertaining the truth motivated by the forgetfulness of the facts.

In summary: the political understanding in 1979 was to create a law that would erase the facts that occurred before its promulgation, which would prevent any attempt of reparation, memory or truth about the period. And the same political understanding persists until today, with the understanding that what happened in Brazil between 1964 and 1979 cannot be remembered, repaired, or held accountable, because it was forgotten. The facts would have been erased.

This is the political narrative that has been constructed and continues to be defended. If the Amnesty Law had been a law of forgetting, of amnesia, the political narrative would be compatible with the legal reality. But this is not the case, as will be shown.

1.2 The legal narrative: amnesty as memory, truth, and reparation

It is important to contextualize that there was a 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 release political prisoners and bring out of hiding those who were persecuted by the forces of repression. The government presented a bill that suffered several amendments and proposed substitutes. The political environment was very tense and the debates heated. The government's own political party, ARENA, did not have a consensus on what type of amnesty should be proposed (with or without exceptions).[2]

Furthermore, it was not clear whether the terms proposed in the bill that became Law 6.683/79 meant forgetfulness or memory. There were groups of human rights advocates who argued that even if the amnesty was forgetfulness and it was unfeasible to hold torturers accountable, the proposal of political amnesty to save the then political prisoners and allow the return of the exiled was worth it. And there were those who claimed that the final vote, even if tight (the difference was only 5 votes), creating

[2] http://memorialdademocracia.com.br/card/votacao-de-anistia-parcial-racha-a-arena

exception for those convicted of terrorism and other crimes, was the result of a national agreement aimed at pacification (FICO, 2010).

The context at the time, therefore, was one of intense political dispute. Dispute, including the narrative that was beginning to be built of the type of political amnesty that was being voted by Parliament. Nevertheless, it is important to analyze the legal instruments used at that historical moment. The intention of congressmen, the intention of the ruling military, an eventual agreement between sectors of civil society and parliament, none of this is relevant to legally characterize the institute of political amnesty, since its nature will depend on its terms objectively enshrined in the legal text and applied over the years. This analysis will become even stronger with the advent of the Federal Constitution of 1988 and the interpretation of the Federal Supreme Court that Law 6.683/79 is still in force because the political amnesty was one of the pillars of the Federal Constitution itself.

It is thus necessary to analyze the legal nature of the Political Amnesty Law. And to understand the legal nature of the Brazilian Amnesty Law, we shall return to the classification of the two possibilities recommended by Ost (2005: 172), remembering what the Belgian author teaches about 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 the 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.

In this way, a political amnesty law can be amnesty for convictions or it can be amnesty for facts. The political amnesty of Law 6.683/79 was an amnesty of penalties, of convictions and not of facts, even in the exception provided. Let us start with the exception:

> Art. 1 Amnesty is granted to all those who, in the period between September 2, 1961 and August 15, 1979, committed political crimes or related to these, electoral crimes, to those who had their political rights suspended and to the servants of the Direct and Indirect Administration, of foundations linked to public power, to the Servants of the Legislative and Judiciary Powers, to the Military and to union leaders and representatives, punished on the basis of Institutional and Complementary Acts.
>
> (...)

> § 2 - Excluded from amnesty benefits are those that have been convicted of terrorism, assault, kidnapping and personal attack crimes. (our emphasis)

If the amnesty had been of forgetfulness, that is, political amnesty of the facts, the exception should have said that the exception was for the *acts* of terrorism, assault, kidnapping and personal attack, and not for those who *were convicted* of such acts. Strictly speaking, if the purpose was to give amnesty to facts with the exception of the practice of terrorism, assault, kidnapping and personal attack, a much simpler and more direct law should have been drafted, since it would have said that there was amnesty for all facts that occurred before its promulgation, with the exception of the aforementioned acts. Nothing else would have been regulated, since there could not be any form of reparation, such as, for example, the return to work activities for both civilian and military public service (art. 2).

Likewise, note the provisions of article 6, which deals with the declaration of absence:

> Art. 6 - The spouse, any relative, or kin, in the straight line, or in the collateral line, or the Public Minister, may request the declaration of absence of a person who, involved in political activities, is, until the effective date of this Law, missing from his/her domicile, without news of him/her for more than 1 (one) year.
>
> § 1 - In the petition, the petitioner, showing proof of his legitimacy, shall offer a list of at least *3 (three) witnesses and the documents relative to the disappearance*, if any. (our emphasis)

Now, if the law imposed forgetfulness, it would necessarily have to be the forgetting of the *facts*. And the fact regulated in this provision is the disappearance. To erase the disappearance means to affirm that there was no disappearance. At least there was no disappearance *before* the promulgation of the law. So, following a reasoning of formal logic, it is possible to build the following statement: if someone did disappear, but a law is passed that imposes that this fact did not happen for all legal purposes, the absence must have its initial term with the promulgation of the law, that is, August 1979.

In other words: if the condition (the political agreement that would have materialized in the Amnesty Law) had imposed the consequence (the legal understanding that the facts that occurred before the law were erased) the fact "disappearance" could

only arise after the promulgation of the law by absolute presumption, that is, absence could only be characterized as of August 1979.

But this was not the provision of Law 6.683/79. On the contrary, the reproduced provision requires *proof of the fact* "disappearance" with witnesses and documents in order to make the declaration of absence viable. If the law itself requires proof of the facts, it is because it presupposes that they occurred. Furthermore, the condition explained above could not exist without generating legal consequences. This shows that the law has not incorporated in its text any agreement, any condition, and therefore cannot generate any legal effect from a non-existent condition. Therefore, it can be said that the Amnesty Law requires the memory of the facts to take effect.

It is exactly the opposite of what the authoritarian regime intended when it constructed the narrative of forgetfulness. *The legal norm of 1979 was characterized, by its terms, as a political amnesty of memory and truth. It was an amnesty of anamnesis, and not of amnesia. It was an amnesty of condemnations only, and not of facts*.

And it is for this reason that for many years it has been possible to have reparation. If the facts had been erased, as seen, it would not have been possible to return to civilian or military public service (art. 2), or the return of employees in the private sector, dismissed due to a strike (art. 7), nor even the declaration of absence in terms other than those regulated by the Civil Code of the time (art. 6).

In other words: if Law 6.683/79 had granted amnesty to the facts, it would have had to state that the facts occurred up to the date of its enactment are considered not to have occurred. Thus, whoever was arrested, fired or exiled on August 29, 1979 should have returned to the *status quo ante*, that is, freed, employed and residing in the national territory, because all facts were erased from Brazilian history with the advent of the Law. Those who disappeared would have disappeared (by legal fiction) on August 28, 1979, and from then on, with the rules of the Civil Code in effect, one could begin to compute deadlines for the steps of the declaration of absence.

In summary, the explanation is quite simple: there are only two possibilities for the legal nature of a political amnesty: 1) amnesty of facts; 2) amnesty of convictions. Law 6.683/79 belongs to the second type. This is also the obvious reason why reparation

is possible. Only memory can make reparation possible. Forgetfulness impedes reparation, just as it impedes accountability and truth.

Nevertheless, the efficiency of the created narrative of a law that imposed oblivion needs to be highlighted. This narrative, let us repeat, is still hegemonic in Brazil. And for this reason there is a feeling that the law should have erased the heinous facts that occurred in Brazil during the period of the state of exception. They are such barbaric and cruel occurrences that should not have happened. If they did happen, the legislation must impose silence, erase the facts. If this was the intention of legislators and authorities in 1979 and the years that followed, this intention *did not translate into the legal system*.

The legal interpretation needs to be made based on the legislation and the legal effects generated, and not based on a supposed historical context totally alien to the legal norm. Thus, it was possible to make reparations in 1979 and subsequent years, and years later to install a National Truth Commission as a State Commission, which fulfilled its legal role of producing a report on the facts that occurred during the dictatorship. The facts were not erased and, contrary to the narrative explained in the preceding item, were remembered and recorded.

There are other arguments that demonstrate that the Brazilian political amnesty is an amnesty of memory, and not of forgetfulness. Let us look at the legislation subsequent to Law 6.683/79: as said, in 1985 there was a call for a Constituent Assembly, through Constitutional Amendment no. 26. This Amendment brings provisions about the Constituent Assembly in the first three articles. Articles 4 (and its paragraphs) and 5 regulate 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" (our emphasis).

Who was granted amnesty? Who had been punished. In other words, Amendment 26/85 confirms the 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:

> §1º. 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, there would have been an amnesty for the facts. In other words, if the facts had been forgotten, we would necessarily have had to "erase the evil", as if it had never occurred. In this case, the authors of political crimes and related crimes would have had amnesty, and *therefore* (as a logical consequence) the facts would have been erased; as if they had never happened. Hence (another logical consequence), it would not be possible to investigate/ prosecute anyone because everyone would have been amnestied in 1979.

Why is this reasoning legally inconsistent? Because its premise is that the amnesty of Law 6.683/79 was one of forgetting and not of memory. 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.

The fact is that since 1979 the persecutions (be it imprisonment, banishment, exile, dismissal, and any others) have been repaired. Those who were fired for political reasons, for example, requested and obtained reinstatement to their jobs. Those who were imprisoned or exiled have been 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. There was no forgetting what happened. And there cannot be, by legal determination.

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 Transitional Constitutional Provisions Act (*ADCT*, in Portuguese):

> Art 8º. Amnesty shall be granted to those who, during the period from September 18, 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 December 15, 1961, and to those affected by Decree-Law no. 864, of September 12, 1969, The promotions, in inactivity, to the position, job, rank or graduation to which they would be entitled if they were in active service, in compliance with the periods of permanence in activity 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, are assured.

Once again there was an 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 and 1985, 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 of the facts, he could not refer to the dictatorship in 1988, because it would have been erased; forgotten in 1979. But political amnesty in Brazil was only of sanctions. *It was and is memory, not forgetting*.

Another conclusion that is necessary with the statement that *only convictions* were amnestied is the following: only those who had been convicted/dismissed before Law 6.683/79 were granted amnesty; those who were not even investigated or prosecuted, such as some torturers, for example, were not granted amnesty.

1.3 The binomial memory/truth and reparation

If the Brazilian political amnesty was an amnesty of memory, it is worth considering the meaning of the memory/truth binomial in order to understand the consequences of this classification. This is one of the mechanisms of the aforementioned transitional justice, and it is not the mere compilation of individual or family memories 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 the Dead and Political Disappeared); Law 10.559/02 (creates the Amnesty Commission) and finally Law 12.528/11 (creates the National Truth Commission). Let us examine these norms more closely.

About the normative context, we have already seen that both Law 6.683/79 and CA 26/85 affirm memory, truth and reparation, and that the Federal Constitution imposed a transitional process based on reparation, memory and truth. With Law 9.140/95, for the first time the Brazilian State took responsibility for the deaths and disappearances of Brazilian citizens, giving sequence to the transitional constitutional process. Note that once again the binomial memory/truth is present, since the families needed to *prove the facts* that had occurred so that their loved ones could be recognized as having been killed by the repressive State, thus being entitled to both financial and documentary reparation, with death certificates and other provisions.

Let us continue, then, with the same two possibilities: 1) if the Amnesty Law had been a law of forgetfulness, of erasure of facts, it would be legally impossible to prove that someone died or disappeared by persecution by the Brazilian State due to political motivation. These facts would have been erased by legal fiction and could no longer be recovered; 2) since the Amnesty Law was a law of memory, it is perfectly compatible and pertinent that there is a requirement of proof of the facts and causal link of the disappearance of the person with the State's politically motivated persecution actions in order to have reparation. Nobody ever contested the unconstitutionality or illegality of Law 9.140/95 alleging incompatibility with Law 6.683/79, but if the Amnesty Law had been a forgetfulness law, this incompatibility should be imposed. After all, how would it

be possible to prove state persecution if such facts never happened (since they would have been erased by legal determination)?

On the contrary, Law 9,140/95 produced its effects and continues to do so, since the Special Commission on the Dead and Political Disappeared continues to act, although, admittedly, with somewhat diminished contours since the year 2019. Between 1995 and 2019, however, many were the initiatives of this Commission in the sense of revealing the truth of the facts that occurred with those who died due to the responsibility of the state of exception; and this despite the various attempts to disqualify the Commission, within the narrative logic of trying to impose oblivion.

The next legal norm was precisely the one that regulated the constitutional provision of the transition, article 8 of ADCT. It is Law 10.559/02, which created the Amnesty Commission to carry out integral reparation, including actions of memory and truth. According to its provisions, in the field of financial reparation, there are two possibilities: economic reparation in a single payment, calculated according to the law itself, equivalent to 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 cases 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 that was interrupted due to political persecution (art. 1, IV), in 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[3]) and other actions, with emphasis on the Testimonial Clinics, considered to be 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, the assumption of the Brazilian State's mistake for having persecuted its own citizens for their opinions and political positions. It is the *never again!* It is the memory of the facts. Otherwise, there would be

[3] 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 persidos políticos no Brasil. Brasília: Ministry of Justice; Florianópolis: Instituto Primeiro Plano, 2013.

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 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 for the Brazilian society that was being constituted at that moment: that the State would never again persecute its citizens.

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. And they have not been. They are even requirements 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.

In absolutely all situations the facts are recovered. They were not erased. On the contrary, the facts must 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.

Finally, we come to the last legal landmark mentioned, Law 12.528/11, which created the National Truth Commission. For a better understanding, it is worth detailing the conjuncture of the first decade of this century, because it is a conjuncture that highlights this paradox of wanting to impose a hegemonic policy of forgetfulness while at the same time establishing legal norms of memory, truth, and reparation. 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 *consensus of falsehood*, 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. (our emphasis). (OST: 2005, p. 315)

In this sense, to serve such market democracy, the hegemonic politics of oblivion had to prevail, and for that, conflicts had to be hidden. The result was not good, as we will see below.

Let's return to the crisis referred to in Lula's second term, in 2009: the presidential campaigns had begun and the then Minister of State Dilma Rousseff was already a candidate to succeed President Lula. She herself, it is important to emphasize in this context, a former member of groups of armed struggle against the dictatorship, and still condemned in the military instances of the time as a subversive and terrorist.

As seen, after a period of internal clashes and negotiations in the sphere of the federal administration, there were changes in the NHRP 3, and the hegemonic policy of forgetfulness won, forgetting the constitutional commandment of the transition, which imposed and still imposes memory, truth, and reparation. The concealment of conflicts won.

Nevertheless, the themes of dictatorship and transition never again left either the media or Brazilian political-institutional life. Until then, the policy of forgetting had prevailed exclusively. From that moment on, it was no longer possible to deny that a dictatorship had occurred in Brazil, and the hegemonic forces were left to try to reiterate the narrative of forgetfulness based on a mistaken 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. However, as seen, paradoxically there was already a legal order imposing memory, truth, and reparation.

At the end of 2010 Brazil had elected Lula's successor, Dilma Rousseff as President of the Republic, and the clashes of narratives were just beginning. On November 18, 2011 there was the enactment of Law 12,528, which established the National Truth Commission (NTC). Many 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 (OST, 2005). And to know the facts, which were not erased.

It should be reiterated that if the amnesty of Law 6.683/79 had been of the facts, there would not be a National Truth Commission (NTC). To clarify what, if nothing happened? If everything had been erased, if the amnesty had been of forgetfulness, it would not be the case to touch the subject, because the social pact would have been to erase the facts, not to remember in order not to repair or 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.

About the NTC, some aspects should be highlighted. One of the reasons that caused a certain feeling of frustration at the time was the fact that the NTC did not use some powers granted by the legislation, such as the mandatory conduct 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[4] that a member of the military, summoned to appear before the Commission, wrote in his own handwriting on the summons that he did not collaborate with enemies, and no more energetic action was taken. The deposition simply did not take place.

In spite of this and other setbacks, the NTC produced a Final Report that reflects the official position of the Brazilian State regarding the facts that occurred during the

[4] News site Jornal do Comércio Portal: https://www.jornaldocomercio.com/site/noticia.php?codn=17147. Published on 12/01/2010.

dictatorship. Therefore, it was not a "staging", but the production of an official document regarding the facts that occurred during the authoritarian period, recognized as true and the responsibility of the State.[5]

1.4 The judgment of ADPF 153

There has been the propagation of a mistaken idea that the judgment of ADPF 153 imposed the silence, the oblivion so desired by those who insist on affirming that Law 6.683/79 was an amnesty for the facts. One of the consequences of this line of reasoning is precisely the affirmation of the impossibility of holding any and all violators of human rights during the authoritarian period accountable as a result of the SC's decision in this case.

The idea of prosecuting human rights violators in Brazil causes many controversies. Initially it is necessary 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 for this reason it is important to reiterate that there are other areas of judicial prosecution.

Having made this first observation, it is worth emphasizing that, unlike the path chosen by other countries, such as Argentina, for example, which chose accountability as its fundamental axis for the transition, promoting the prosecution, including criminal prosecution, of those who kidnapped, tortured, and in some way became agents of the state of exception, Brazil has always avoided dealing with this mechanism.

The issue of accountability is the most hidden issue (politics of forgetfulness) and around which a real taboo has been created in the spectrum of the Brazilian transition. 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 and with all the guarantees of adversarial proceedings, ample defense, and due legal process, brings the goal of achieving reconciliation.

It is appropriate to remember that the SC exercised constitutionality control in the judgment of ADPF 153. And so the basic question posed in that case was about the reception or not of Law 6.683/79 by the 1988 Constitution, in view of the fundamental

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

constitutional precepts. The SC's answer was positive. There was a reception. And the control of constitutionality was exercised by the competent authority.

This understanding was explained by Justice Carlos Ayres Britto when commenting on the ADPF 153 decision in another action submitted to the SC (Recl 12.131 (468), Min. Rel. AYRES BRITTO, 03/10/2011): "Hence, the following question arises: what was decided in the aforementioned action of abstract nature? Answer: it was decided, against my vote, for the 'integration of the amnesty of the 1979 Law into the new constitutional order". In other words, the *decision* in ADPF 153 is that Law 6.683/79 is in force because it was received by the 1988 Constitution. That is all. It is, as stated, the control of constitutionality and nothing more.

In the aforementioned ADPF, the Supreme Court (SC) did not address the legal nature of the Amnesty Law, nor was it the right place to do so. There was a debate about whether or not it was integrated into the Brazilian legal system after the advent of the Constitution, as Justice Ayres Britto objectively stated.

Contrary to those who intend to impose the narrative of oblivion, when considering whether Law 6.683/79 is a law that erased the facts or not, Justice Cármen Lúcia, in her vote on ADPF 153 (p.3) emphasizes

> (...) by reason even of what has been concluded socially and legally and what has prevailed so far, contrary to what is commonly stated that amnesty is oblivion, what we have here is a very different situation: Brazil is still seeking to know exactly the extent of what happened in the sixties, seventies and early eighties (the period of the attacks against the Federal Council of the OAB and Riocentro) (...).

It should be reiterated that the object of ADPF 153 was the reception or not of Law 6.683/79 by the Constitution in force. And, as we have seen, the SC's answer was positive. The Amnesty Law was accepted and is in force. Nothing more was decided. It was not up to the SC to examine the legal nature of Law 6.683/79, in other words, it was not up to the SC, in an ADPF, to examine whether the Amnesty Law is a law of forgetfulness, which erased the facts, or a law of memory, which only erased the convictions.

Unfortunately the still hegemonic policy of imposing silence, by affirming that the Amnesty Law is a law of forgetfulness, has been used without adequate care even by the Judiciary. It is not uncommon for this decision in ADPF 153 to be presented as an obstacle for the Judiciary to appreciate initiatives by the Federal Public Prosecutor's

Office in an attempt to hold accountable those who violated fundamental rights during the authoritarian period. However, ADPF 153 cannot be presented as an obstacle to the examination of any fact that occurred at the time under the amnesty allegation because, as demonstrated, *the facts have not been amnestied*, but *only the convictions* that occurred before August 28, 1979.

The recent understanding of the Superior Court of Justice was not different, when the Second Panel decided to unanimously follow the Rapporteur of the Special Appeal No. 1836862 - SP (2019/0268276-9), Minister Og Fernandes (p. 17-18). The statute of limitations was set aside because the acts in question were political persecution, and thus, the legal consequences of ascertaining the facts should be examined by the Judiciary, without the claim of incidence of the Amnesty Law, because it is unacceptable:

> It is this Court's understanding that civil actions based on acts of political persecution, torture, homicide and other violations of fundamental rights committed during the military regime of exception are imprescriptible, regardless of what the Inter-American Court or treaties have provided. By the way:
>
> CIVIL PROCEDURE. ADMINISTRATIVE. INTERLOCUTORY APPEAL ON SPECIAL APPEAL. POLITICAL AMNESTY. FUNDAMENTAL RIGHTS. OFFENSE OCCURRED, IN THEORY, DURING THE MILITARY REGIME. NON-APPEALABILITY. PRECEDENTS. 1 - The jurisprudence of this Court has established the understanding that damages resulting from the violation of fundamental rights which occurred during the Military Regime are indefeasible. For example: REsp 1.565.166/PR, Reporting Justice Regina Helena Costa, First Panel, DJe 2/8/2018; REsp 1.664.760/RS, Reporting Justice Herman Benjamin, Second Panel, DJe 30/6/2017. [...] (AgInt in REsp 1.602.586/PE, Reporting Justice BENEDITO GONÇALVES, FIRST TURMA, judged on 7/2/2019, DJe 12/2/2019).

For all these reasons, the decision of ADPF 153 cannot be claimed as an obstacle to the investigation of facts that occurred before August 28, 1979, nor as an impediment to the legal consequences of such facts. ADPF 153 *was not intended to answer the legal nature of Law 6.683/79*, limiting itself, as seen above, to deciding on the validity of the rule, on its reception into the legal system. Affirming the validity of this rule means that there can be no execution of any sanction prior to August 1979, because the convictions have been erased. And only this. Nothing more. The truth of the facts can and must be ascertained. And if facts that characterize illegal acts are found, let the pertinent consequences follow. Legal infractions are indefeasible and have not been amnestied, and therefore memory, truth, reparation and accountability are possible.

1.5 By way of summary

The purpose of this reflection was to determine the legal nature of Law 6.683/79, the Amnesty Law. Based on Ost's classification, which explained the two possible types of political amnesties, and further elaborating on the thesis we have already elaborated, we scrutinized the Brazilian situation to explain the two distinct possibilities:

1) The Amnesty Law is a law of forgetting because it erased the facts: this means that by legal determination there was no dictatorship; there was no authoritarian period in Brazil because the evil did not occur; it was erased. Consequently, there can be no memory, no truth, no reparation, no accountability, because *for legal purposes, nothing happened*. This is the narrative that has been recurrently constructed by the interests of not bringing to light the fact that Brazil lived a state of exception.

2) The Amnesty Law is a law of memory because it did not erase the facts, but only the legal convictions: this means that by legal determination *the executions of the convictions* ended on August 28, 1979 and were erased. The executions could not continue because the sanctions were erased from the legal world. The facts that gave rise to these sanctions *have not been erased*. Therefore, if other legal instruments regarding the passage of time, such as the statute of limitations, are set aside, *the facts can still produce legal consequences, such as reparation, accountability, and memory/truth*.

We have shown how the narrative that the Amnesty Law would be a law of forgetfulness has been built over the years, to serve the interests of those who want neither memory, nor truth, nor reparation, nor accountability. And we also demonstrated that this narrative does not correspond to the legal nature of the Brazilian legislation on political amnesty, since both Law 6.683/79, the Constitutional Amendment 26/85, the Federal Constitution, and the three laws that created the three State Commissions, namely Law 9. 140/95 (creates the Special Commission on the Dead and Political Disappeared), Law 10.559/02 (creates the Amnesty Commission) and Law 12.528/11 (creates the National Truth Commission) follow the same legal logic of establishing the Brazilian political amnesty as amnesty of memory and not of forgetfulness. Amnesty of convictions and not of facts.

We then analyze the impact of the ADPF 153 decision on this debate to conclude that the legal nature of Law 6.683/79 was not subject to deliberation by the SC.

It is worth pondering that understanding the legal nature of the 1979 Amnesty Law is fundamental for the already belated completion of the democratic transition in Brazil. The mechanisms of transitional justice mentioned throughout the text, namely, the binomial memory/truth, reparation, and accountability, need to occur in order to complete the transition from the authoritarian period to the Democratic State of Law, so as to make it clear, once and for all, that in Brazil we will not forget so that it will not happen again.

The confusion of the two types of legal nature of Law 6.683/79 only interests those who do not recognize, as demonstrated, that the political persecution perpetrated by the State is inadmissible and incompatible with the democratic normality desired by Brazilian society and commanded by the citizen Constitution. Today and always. What has not been investigated, revealed, repaired, and held accountable needs to be done, under penalty of not completing the democratic transition. And we do not affirm the incompatibility of the Amnesty Law with the Federal Constitution, *but rather the uselessness of its validity*. Affirming its validity *does not mean preventing any accountability, in the criminal sphere or not,* but it does mean saying that there can be no execution of any sanction prior to August 28, 1979; which proves to be useless, since it would not even be the case to execute a conviction handed down more than 42 years ago. Hence, in our opinion, the validity of the Amnesty Law today is absolutely innocuous due to its legal nature of memory.

Asking about the reach of the Amnesty Law is also wrong, as we have shown, because the question "crimes of which perpetrators were amnestied by Law 6.683/79? Was it only the crimes of the militants or also eventual crimes of public agents? "Or, in other words, "which facts were amnestied by Law 6.683/79?" As seen, either all the facts are amnestied, or none. But Law 6.683/79 was not an amnesty for facts, and therefore this debate is misguided and sterile.

The discussions, whether political or judicial, need to be based on the understanding of the legal nature of Law 6.683/79, which was an amnesty of convictions. And, as in the previous reasoning, all convictions, in any area of law, were amnestied. The facts persist because they have not been forgotten by the legislation. The memory persists and must be permanent. So that it is not forgotten, so that it never happens again.

2 - THE CONSTITUTIONAL PROCESS OF THE BRAZILIAN TRANSITION

The theme of this chapter is the constitutional configuration of the so-called Transitional Justice applied to the Brazilian case. Since the end of the 20th century, due to the various situations of state authoritarianism and the people's desire for Democratic States under the Rule of Law, much has been reflected upon and produced on the subject, whose conceptualization, in a simplified way, is the set of tools or protocols that should be implemented in societies starting from the State, so that there is consensus and awareness about the democratic posture both in the relations between the State and Society and in social relations themselves. The goal is to reach a level of trust and solidarity such that makes national reconciliation and the healing of eventual wounds from the traumas of a period of exception and/or armed conflict feasible.

In the case of Brazil, as we saw in the previous chapter, this theme has been discussed in relation to the most recent dictatorship to which the country was subjected in the two decades between the 1960s and 1980s. It is common knowledge that the 1988 Federal Constitution inaugurated the Democratic State of Law in Brazil after this disastrous authoritarian period. However, it is curious that in recent years, discourses that value repression, authoritarianism, and violence seem to be seducing part of Brazilian society, romanticizing the so-called "years of lead", losing focus on what exactly the desire for freedom means in disconnected, truncated, and irrational narratives.

This is one of the reasons that motivate this text, which intends to explain the Brazilian transitional process based on the constitutional decision, expressed in provisions that should be observed very carefully. At the time of the promulgation of the Constitution, on October 5, 1988, congressman Ulysses Guimarães referred to the hatred and disgust he felt for the dictatorship, and presented our desire for freedom expressed in constitutional norms, which should guide the construction of a more just, solidary, plural, and inclusive Brazil. To do so, we should necessarily have fulfilled the agenda of the transitional process, that is, we should have implemented the mechanisms of transitional justice that would make the organization of a Democratic State of Law feasible. But, unfortunately, as we shall see, this is not what happened. On the contrary, Brazilian

society finds itself in a moment of deep division, shrouded in discourses of distrust, hatred, and violence, with contradictory, anachronistic, and illogical narratives of defending freedom and life through repression and death.

Thus, this text will update another text that already anticipated the current adverse scenario, in which I coined the expression *reverse transitional justice* (DE STUTZ E ALMEIDA, 2017) to translate my reading of the contemporary Brazilian situation.

The mechanisms, or dimensions, or axes, or pillars, or tools, or protocols of transitional justice are four: 1) the binomial *memory and truth*; 2) *integral reparation*; 3) *reform of institutions*; and 4) *accountability or justice*, and that can also be made explicit in the expression *prosecution of human rights violators*. There is no hierarchy among these mechanisms, and they are interdependent on each other. It is important to note that if any of them are not implemented, the goal of national reconciliation is unlikely to occur.

Obviously, the fundamental assumption to move forward is that there was a state of exception in Brazil. It may seem strange to make this statement, but in a historical moment in which fake news as the media and social networks have called it, as well as the concepts of the so-called post-truth, proliferate, it is important to establish the background of the very need to draw up the 1988 Federal Constitution: objectively Brazil affirmed to itself and to the world that it no longer constituted a state of exception, but that it wished to build a Democratic State of Law. This amounts to the affirmation that Brazilian society wanted to constitute itself and the Brazilian State based on freedom and no longer based on repression. Therefore, the elaboration of a new Constitution was essential. Between 1985 and 1988 Brazilian society mobilized, debated, participated, and finally transformed its dreams of freedom into the constitutional provisions that make up our Magna Carta. For this reason, I have already had the opportunity on other occasions to call our Constitution *the Charter of the dreams of the Brazilian people*. If there was already freedom and fair and solidary relations in Brazilian society, what would be the point of writing a new Constitution? What was the point of the president of the Constituent Assembly, congressman Ulysses Guimarães, declaring his hatred and disgust

for the dictatorship, supported by all the constituent congressmen? There is only one possible answer: there was until then a state of exception in Brazil.[6]

I reaffirm that this is the fundamental assumption for all and any discussion of the construction of democracy in Brazil, because it is an objective truth. And here, I reiterate what I have already said before: truth is objective. It is not subjective. To illustrate the common thread of the whole text that will follow, I will resort to a Zen-Buddhist tale about truth.

A disciple came to his master and asked: "Master, if truth is an objective thing, how can I reach it directly? Do I need some tool? How to choose the best tool? And the master explained: The truth is like the moon - it's there in the sky, it doesn't depend on you or me to be there. But I can only see it (reach it) if I look at it, and sometimes I need someone to show me, to point to it, especially if there are many clouds in the sky and I don't know where it is. In this case, the finger of the one who points to it is the tool. Similarly, to reach the truth you need words, in the form of narratives. But these narratives are not the truth, because the truth is objective. However, to reach it, I need the words, the texts, in short, some narrative, that leads me to it. Subjectivity appears in these narratives. The narrative will not always be correct, and if it is not, it will not show me the truth. Narratives work like the finger. If you point it the wrong way, I won't see the moon. So you need the finger, but you can't fixate on it, because otherwise you will be limited to the tool, discussing the tool, and you will miss the goal, which is the moon. Look at the moon and not at the finger.

This chapter is about the moon, which is the 1988 Federal Constitution. It has to be respected and fulfilled. And in it lies the command of the transitional process that has been ignored or subverted. It is imperative that we stop looking at the many fingers pointing in different and antagonistic directions, and start looking at the moon!

[6] In this regard, see the brief text published in the blog of the Research Group that I coordinate: http://justicadetransicao.org/houve-um-estado-de-excecao-no-brasil/, as well as the opinion for a popular action against the commemorative note of the Ministry of Defense on the 2020 anniversary of the coup d'état (http://justicadetransicao.org/parecer-para-o-stf/). As strange as it may seem to insist on this statement, that there was a coup d'état in Brazil in 1964, this is justified because the many narrative constructions that have been made to valorize the dictatorship include the negation of the coup d'état, as seen in the previous chapter.

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

As seen in the previous chapter, the political amnesty of Law 6.683/79 was an amnesty of penalties, of convictions. When drafting the Constitution, the choice of the Brazilian constituents to lead the transitional process fell on the dimensions of reparation, memory, and truth, through, again, political amnesty, as also seen in the previous chapter.

Art. 8 of the ADCT referred to in the previous chapter again brought amnesty from the consequences, convictions, penal and labor sanctions, and any others that resulted from political persecution. Note that as a regulation of this constitutional provision, Law 10.559/02 establishes as a right, in item IV of article 1, the return to studies for those who were expelled as a result of political persecution. This shows that the constitutional amnesty was and is, as in 1979, about penalties and not about facts. Otherwise, the expulsion would have been "erased", "forgotten", and the legislation could not provide for the return to studies as reparation, since logic would impose the following reasoning: "if such a person studied in such a course and did not finish it, since nothing happened during the course, but even so the person did not finish the course, something must have motivated the interruption and the Brazilian State has nothing to do with it. Therefore, nothing can be done about it. The expulsion would have been forgotten as political persecution by the amnesty. However, precisely because the facts have not been forgotten, the legislation imposes the reconstruction of what happened and foresees the possibility of returning to the studies that were interrupted because there was an exclusively politically motivated persecution. *It was and is memory and not forgetfulness*.

We will see in the next chapter that this strategy of "altering" or interpreting the facts to affirm a certain narrative, as seen in the previous chapter, was not only used in relation to the 1979 Amnesty Law, but is being applied at this moment by the current government, including in the reasoning of the Amnesty Commission's votes.

As stated earlier, all transition mechanisms are interdependent and need to be implemented in order to achieve national reconciliation and rule of law. The opposite argument is also true: not implementing one or more of these tools means not achieving reconciliation and endangering the democratic rule of law. This is, unfortunately, the current situation. Hence the relevance, timeliness, and urgency of implementing all dimensions of transitional justice. And this means saying that it is urgent to comply with

the Constitution. As illustrated at the beginning of this chapter, so that we do not get lost in sterile debates looking at the different fingers and not at the moon, let us examine what is meant by each of these tools, these dimensions, that make up the Brazilian transitional constitutional process. It is asserted here that the construction of the Democratic Rule of Law depends on it, though not only, in contemporary Brazil.

2.2 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 those who were defeated in that struggle, the truth of the defeated, revived, resized, and mainly re-signified in the present moment.

Ost (2005) states that there are four paradoxes that make the mode of production of the past, and thus, the action of memory, complex. The first is that memory is social and not individual. In this way, only the meaning for a certain affective and social community, or a certain current of thought in a given society, will be able to construct this or that memory.

The second paradox is that memory operates from the present. In other words, the narratives will always be produced from the present toward the past, rewriting and reworking what occurred, and in this way creating an identity from social memory that will always be reworked and rewritten.

The third paradox, intrinsically linked to the second, is that memory is always voluntary. That is, if it is constructed and reconstructed from meanings of the present toward the past, this means that it has nothing spontaneous or passive about it, but is a voluntary construction, or an *anamnesis*. It is a voluntary evocation of the past, the arranging of episodes from the present, signifying and re-signifying events known to the collectivity or not.

And finally, the fourth paradox is that memory is not opposed to forgetting, but rather presupposes it. In other words, the organization and construction of collective

memory also presupposes the organization of forgetfulness. In this sense, thinking about the politics of memory implies thinking about the politics of forgetting.[7]

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

In this aspect and returning to the point of the policies of memory and forgetfulness, a question should be raised: who is in charge of controlling these processes? Ost himself (2005: 25), 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.

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 can we fight for another memory, another meaning, counter-hegemonic, liberating, and in the direction of establishing more democratic relations in Brazil? Ost's lesson means to affirm that just as groups in civil society with unmentionable interests allied themselves with the Armed Forces to put down the coup in 1964, there were also groups in civil society that allied themselves with the same Armed Forces to construct and maintain as hegemonic the narrative, the memory that 1) there was no coup d'état in 1964; 2) there was no state of exception after the coup; 3) there was forgetfulness with the Amnesty Law in 1979. Even though all these affirmations do not hold up when set against the facts/legislation.

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 previous and current governments of the Brazilian State until it became a government commission. Even for this reason, it is important to affirm that the fight for redemocratization in Brazil is still ongoing, now

[7] In the Brazilian case the policy of forgetting was the political amnesty of convictions, but that, as we will see, was distorted to become a public policy of forgetting the facts. Unfortunately it became an obscure and inadmissible negationism.

more than ever, and that all debates about political amnesty imply in memory, truth, and reparation, and never in forgetting.

About the normative context, we have, thus, that Law 6.683/79 affirms memory, truth and reparation; the Federal Constitution imposes a transitional process based on reparation, memory and truth; Law 9.140/95 for the first time holds the Brazilian State responsible for the deaths and disappearances of Brazilian citizens, following the constitutional transitional process based also on reparation, memory and truth; and Law 10. 559/02 creates the Amnesty Commission to carry out the full reparation, including memory and truth actions, which were fulfilled by publications, events, seminars and mainly by the Amnesty Caravans (COELHO, 2012), which were moments of consideration of the requests in the place of the occurrences, with the possibility of testimony of the applicants surrounded by their relatives and people of their social bonds, allowing the history of the vanquished to prevail, besides being an extremely didactic way of informing the new generations what happened in Brazil after 1964.

Unfortunately, one of the enormous setbacks that the Brazilian transitional process faces 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.

Let us also recall that the amnesty issue returned to the main scene in Brazil's highest trial court in April 2010, right after the reported clashes regarding the NHRP 3, starting in December 2009. The themes of dictatorship and transition never again left either the media or Brazilian political-institutional life. With a decision that has not yet become res judicata, because there are embargos to be appreciated, the SC affirmed the reception of the Amnesty Law, but unfortunately, in the reasoning of some votes it seems to have 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.

On the other hand, in a somewhat confusing way, it simultaneously recognized that the Brazilian political amnesty was of convictions and not of facts.[8] The SC seems

[8] As, for example, in the aforementioned vote by Justice Cármen Lúcia (p.3): "due to what has been socially and legally concluded, and what has prevailed until now, contrary to what is commonly said that amnesty is forgetfulness, what we have here is a very different situation: Brazil is still trying to find out exactly the extent of what happened in the sixties, seventies, and early eighties (the period of the attacks on the Federal Council of the Brazilian Bar Association and Riocentro).

to have lost itself in the "many fingers" and forgotten to "look at the moon" because it has not yet made it crystal clear that both Law 6.683/79 and the Federal Constitution itself made a choice in favor of the transitional process. But, who knows, it may take the opportunity of the appellate review to finally reiterate the constitutional choice for memory, truth, and reparation.

Returning to the analysis of the year 2010, the decision caused enormous astonishment not only nationally, but especially on the international scene. So much so that in November of the same year 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 clauses 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 SC'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 clashes were just beginning in this field of construction of memory and truth regarding the period of exception. A year after the sentence 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 (OST, 2005).

What happened was a general frustration, despite the fact that a substantial report was produced, and that it brought appalling information about our past, and even about many people who are still authorities of the Brazilian Republic today. 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."

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 Political 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 NTC 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.

The number of victims of the Brazilian dictatorship is another important piece of information in the NTC Report. There were not only a little more than 400, as is repeated, because this number only includes victims who were not indigenous or peasants. And there were more than eight thousand indigenous people alone, as the specific report of the NTC itself proves. In other words, in the name of memory and truth, the work of the NTC was and continues to be fundamental, and it is very important that all the reports and files continue to be consulted and made public.

It is also important to remember that from the year 2013 Brazil was filled with popular demonstrations rejecting the parliamentary and party representations, in a great explosion of popular will to participate in 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.

The year 2013 was the turning point in the construction of the memory that had been made. Until then there had been recognition of the 1964 coup d'état, of the political persecutions perpetrated by the Brazilian state during the dictatorial period, and of the need to deepen democratic relations. From those manifestations the somber narratives that there was no coup d'état; that the Armed Forces were called in 1964 to save Brazil from communism; that the communists are on the prowl, about to return with their pretensions to power; that there was no political persecution in the dictatorship period, but only law enforcement and, finally, that all the deferments of the State Commissions (Special Commission on the Dead and Political Disappeared and Amnesty, including

economic reparations) were nothing more than a form of corruption, since they benefited political allies at the expense of fiscal balance.

2.3 Reparations

Much has been done in the field of reparations in Brazil. The first observation that is necessary when dealing with the topic of reparations is that financial reparations are only *one* of the forms of reparations. 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, as seen in the previous chapter, 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 dismissal, and without any compensation for the period they had been away.

Later, with Law 10.559/02, through the Amnesty Commission, two new possibilities became available for financial reparation: economic reparation in one lump sum, calculated according to the law itself as equivalent to thirty minimum salaries per year or fraction of the period of political persecution, limited to a ceiling of one hundred thousand reais; and economic reparation in monthly, permanent and continuous payments, in cases of loss of employment. In addition to these two types of economic reparation, Law 10.559/02 also expressly provides for other forms of reparation, as seen in the previous chapter.

As for the economic reparation, it is worth reflecting a little more on the theme, since, as far as the media is concerned, it is the only form of reparation that has deserved some attention. In general, negative. The modality of monthly, permanent and continued payment has the legal provision of being fixed as if the professional career had not been interrupted. The legal expression is "as if he had been active" (art. 6, *caput*). This means that the amount to be received by the amnestied person must be equivalent to the end of his/her career, which in many cases, may represent an amount well above the average Brazilian salary. This is because if we add this legal command to the fact that many of the urban political persecuted were liberal professionals, artists, journalists, university professors or even party militants with college degrees, even in the 1960s and 1970s, we have that these careers are reasonably well paid even nowadays.

Add to this the five-year retroactive rule (art. 6, §6) and the fact that some requests, for the most diverse reasons, take several years to be definitively appreciated by the Amnesty Commission. The equation that may result in millionaire retroactive payments has been formulated. It should be noted that, according to the constitutional principles of reasonableness and proportionality, the compensation of a person who has received political amnesty should not be perceived by the Brazilian population as a lottery prize or a state benefit devoid of purpose. Such perceptions do nothing to help build the collective memory that there should never again be a state of exception in Brazil.

For these reasons, the Amnesty Commission decided to reduce the amounts to be paid as indemnity in monthly, permanent and continuous payments, so that the retroactive amount would never reach the million-real mark. To this end, it arbitrated an average monthly payment amount.

As for the repair by single installment, until 2017 there was no controversy, since the parameter is set by Law 10,559/02 itself.

However, the Commission underwent a restructuring of its composition between 2016 and 2017, after Dilma Roussef's impeachment, and most of the new members understood that if the person has already been granted amnesty by a State Amnesty Commission and received some compensation, such compensation should be deducted from the amount now to be received. There have been many judgments by state commissions over the years.

Still in 2017, I pointed out the absurdity of this reasoning, as it is a truly accounting reasoning of indemnity sums, as if the case were only of some obligation to give, of common civil responsibility, and not of a state policy of reparations, thus determined by the Federal Constitution (DE STUTZ E ALMEIDA, 2017: 22). Moreover, state economic indemnity reparations are legally grounded in state legislation, and the Amnesty Commission must establish the economic indemnity reparations legitimized by Law 10.559/02, which is federal. They are two different funds, with different legal basis and different legal legitimation. It was the beginning of the re-signification of the concept of reparation, within the strategy of a new construction of memory/truth.

Let us remember that the transitional constitutional policy of the Federal State implies, more importantly and beyond the funds that people will receive, the assumption of the Brazilian State's error in having persecuted its own citizens for their opinions and political positions. As seen in the previous chapter, such acknowledgement is part of the guarantee of non-repetition.

2.4 Reform of institutions

This is one of the subjects on which the least has been produced in Brazil, although many normative changes have been made over the years. When dealing with the subject of reform of institutions, it is important to emphasize that they can be either normative institutions, that is, changes in legislation (constitutional or infra-constitutional), or institutions themselves, according to the concept explained below.

To support the line of reasoning developed here, I will again base myself on the work of Ost (2005: 234) when he brings the contribution of both Hauriou and Santi Romano to address the issue of institutions. First assumption: two ideas necessary for social harmony, and at the same time virtually antagonistic, are *stability* and *change*. Second assumption: it is important to keep in mind that "to study law as an institution is not, then, only to be interested in the system's states of equilibrium; it is also to take into consideration turbulences, discontinuities, states of transition" (OST, 2005: 236). What, then, would be the concept of institution?

> An institution is an idea of work or enterprise that is realized and lasts legally in a social environment; for the realization of this idea, a power organizes itself in search of organs, and on the other hand, among the members of the social group, interested in the realization of this idea, in it are produced manifestations of communion directed by the organs of power regulated through processes. (OST, 2005: 237)

Complementing, supported by Santi Romano

> The institution thus emerges as a means par excellence to durably engage the future in a legal form: it is, he will write, [Santi Romano] 'a stable and permanent unity that does not necessarily lose its identity after the mutation occurring in this or that of its elements; it can always renew itself while preserving its own individuality untouched.' On the other hand, and this is a second benefit of this institutional theory, it allows one to flee from a strictly contractualist perspective, which only engenders subjective and transient 'legal relations' between two or several persons, but without reaching the permanence and consistency of objective law. (OST, 2005: 240)

Later in the same text, stating that the state is the most important legal institution to bind the future, as long as it is conceived as a continuous power and not only as a sovereign power, he explains:

> Sovereignty stands on the side of will and thus the ability to impose itself in the moment; institutional continuity, in contrast, presupposes the faculty to last beyond the changes of persons and through the variations of power relations. (OST, 2005: 242)

Brazilian history is a history of violence. And from the assumptions listed so far, it is also a history of institutional fragility. Institutional continuity, especially in Brazilian republican history, has not been able to overcome changes in people or variations in power relations. This is why, throughout the 20th century, there were so many constitutional changes, and with such a pendular movement between more democratic regimes and others tending towards authoritarianism.

It is worth repeating that, for the purpose of the transition from the authoritarian regime inaugurated in 1964 to a Democratic State under the Rule of Law, the first and fundamental reform of the institutions effectively needed occurred and was proclaimed with pomp and circumstance on October 5, 1988: a new Federal Constitution. As stated above, a *Charter of the people's dreams*.

It was not the result of a National Constituent Assembly, which already demonstrates the absence of important ruptures. Not confronting the ruptures meant preteritizing the strengthening of the institutional path, to the detriment of the correlation of forces that made the "slow, gradual and secure opening" advocated by the dictatorial regime itself. In other words, the dictatorial regime was controlling the transition to democracy. Thus, many of those people and, mainly, the same correlations of forces would continue in command of the country.

Nevertheless, the first important step towards the beginning of the transitional period had been taken: a new, democratic Constitution, within the limits possible at the time. However, it is pertinent to note that the democratic relations of the late 20th century and early 21st century are much more complex than those of the moment of interruption of the trajectory of construction of the Democratic Rule of Law in Brazil in 1964. Now

> Parliamentary representation has lost its monopoly as the oracle of popular will; expressing itself through polls, the media, and appeals before the Constitutional Courts, the people have come out of their muteness and are now assuming the continuous tempo of a democracy on a daily basis. (...)
>
> Today it is no longer true that "Parliament makes the law": this prerogative must be shared with the innumerable "legislative entrepreneurs" who have been able to have their right to participate in the elaboration of the general norm recognized. (OST, 2005: 248)

It is a fact that soon after the promulgation of the 1988 Constitution a great hope for the reconstruction of democracy in Brazil swept over everyone. It is also a fact that at that moment in the early 1990s, both the dream inscribed in the new Constitution could be realized, in a plural way, based on the constitutional values and principles, and also could be frustrated, to the extent that there was no perspective for the future, but only immediate interests, totally ignoring those values and principles:

> By generalizing itself, the democracy of opinion could perfectly well give the spectacle of a division without a principle of recomposition and of an instantaneity without constancy. The tyranny of polls, revealing an emotional and versatile electorate, the action of certain media, generating plebiscite reflexes, and the multiplication of appeals for the annulment of laws, *motivated by selfish interests rather than by concern for principles*, are some indicators among others of the reality of this risk. (OST, 2005: 248-249) (our emphasis).

At the time of the 1964 coup, there was a series of institutional reforms, called *Base Reforms*, which could have raised Brazil to another level in the construction of a more participative, less violent, less authoritarian civil society, and of greater control over the State itself. On the contrary, what happened was a deepening of repression, violence and the empire of authoritarianism. After the opening of that regime and with the advent of the 1988 Constitution, it would be expected that the democratic path would be desired by the whole Brazilian society, and thus forwarded by the competent authorities.

But, for that, many reforms should have taken place, especially in the fields of education, agrarian and urban regulation, composition and control of the Powers of the Republic, and democratic representation itself. These reforms would have been essential to guarantee that the other axes of memory/truth, reparation, and prosecution of human rights violators were not lost in actions of greater or lesser impact, but very localized in a certain period of time, whose "expiration date" seems to be expiring in these times of deep contemporary anguish, perplexity, and intolerance. In other words, the lack of

reform of the institutions meant that the road to democracy in Brazil did not last thirty years.

Initially, the option of those public agents who led or were supposed to lead Brazil in the transition to democracy, in all branches of the Republic, was to hide the conflicts that were latent in the country. None of the important axes for following this transitional path were tackled from the start and, despite the constitutional commands that allowed progress to be made, this was done slowly, gradually and safely, as the regime of exception itself advocated.

The mistake of concealing conflicts and betting on *consensus of falsehood* (OST, 2005: 315), for almost thirty years, led to the impeachment of the President of the Republic Dilma Rousseff in 2016, and the current impossibility of institutional reforms in a calm and thoughtful way. The timing for reforms has been lost over these three decades. Violence and intolerance have taken hold. And the most incredible thing: all this occurred without the authorities admitting the institutional ruptures. Until the government elected in 2018.

This item about reforming institutions is more about the not done than the done. It is more about absence than presence. To make the picture even more complex, those forces of *opinion democracy* (OST, 2005) have been banking on the other danger that is the exacerbation of conflict since 2013. That is, if there were two dangers to be permanently avoided, Brazil has managed to incur both, and simultaneously produce the narrowing of the political game with all actors transforming themselves and acting as enemies, in an environment of distrust, violence, and intolerance. The path now is not only dangerous but deeply delicate, fragile and long.

The most important reform of the institutions, in my opinion, that was not carried out, is the very transitional politics of the Brazilian State: it would have to have been institutionalized, distinct from the moods of those elected for a given period. What we saw were different government policies (dependent on the subjects occupying the functions of public management), without any stability, and thus did not inspire the confidence necessary to build the promises of a democratic future in Brazil.

2.5 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 emphasizing that, unlike the path chosen by other countries, such as Argentina, for example, which chose justice as its fundamental axis for the transition, investigating the criminal accountability of those who kidnapped, tortured, and in some way became agents of the state of exception, Brazil has always avoided dealing with this dimension.

It is the most hidden theme and around which a real taboo has been 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, 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 process of law, 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 supposed amnesty proclaimed by the Federal Supreme Court to the statute of limitations, through the non-retroactivity of the criminal law. It is not our place here to go into this subject in depth.[9]

With regard to the judgment of ADPF 153, already mentioned above, a few considerations are in order. It is worth remembering that the SC 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 SC'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 case, the Court, the competent body to assess compliance with the convention, judged that Brazil was not complying with the American Convention on different points, and condemned Brazil, determining a series of measures and actions.[10]

One of the grounds of this decision states that

> the State is responsible for violating the rights to judicial guarantees and judicial protection provided for in Articles 8.1 and 25.1 of the American Convention on Human Rights, in relation to Articles 1.1 and 2 of that instrument, by failing to investigate the

[9] Regarding the work of the MPF on the subject of Transitional Justice since 1999, see: https://justicadetransicao.mpf.mp.br/. There is also information on the site about the path taken by the MPF to overcome legal obstacles to accountability, such as the allegation of criminal statute of limitations: https://justicadetransicao.mpf.mp.br/justica-criminal.

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

> facts of the present case, and *by failing to prosecute and sanction those responsible*. (our emphasis).

Note that *the judgment and sanctioning of those responsible*, here, refers to both the responsible "public agents" and the 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 SC. The legal basis is the American Convention, whose competence, also exclusive, is of the Inter-American Court. Therefore, this is a false polemic, a false contradiction, between the SC'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.

Moreover, at no time did the SC make reference to the "private agents" of Brazilian repression (DE STUTZ E ALMEIDA, 2014). 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.

If legality is so dear to Brazilians (PEREIRA, 2010), it is obvious 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.

The current moment of intolerance and violence, of distrust of parliamentary representation and of democracy itself, and of deep insecurity in all aspects is putting in check even the already implemented public policies of memory, truth, and reparation. This probably means that there will be no conditions for producing a consensus with

regard to this important stage of the Brazilian transition, which is the accountability of human rights violators. The axis of accountability will, once again, be postponed.

2.6 By way of summary

The transitional process in Brazil is enshrined in the Federal Constitution. It must be fully complied with. There is infra-constitutional legislation that guides all the actions that must be implemented by the public authorities for the country to become a Democratic State under the Rule of Law. The refusal of this implementation also means the refusal of the construction of a Democratic State of Law. Hence the danger of the reverse transitional justice that we are experiencing.

Resuming the illustration of the tale about the moon and the finger, or about truth and the narratives about truth, it is necessary to look at the moon and not at the many fingers that have pointed in different directions. This means to say that many controversies about issues related to the transitional process end up wasting important energies for reaffirming the consensual assumptions and for efforts to build new consensuses in order to consolidate democracy as an uncontested value in Brazil. The consensual assumptions are that there was a coup d'état in 1964; that a state of exception is not desirable; that more democratic, fair, solidary, plural and inclusive relations are desirable and advocated in the constitutional order; and finally that constitutional mandates must be complied with.

Thus, the constitutional process of the Brazilian transition is yet to be implemented. The conquered advances have been undone, but it is necessary to stop this reversal and go back to advancing these agendas, so that it is possible to effectively build a Democratic State of Law in Brazil that will never persecute its citizens again. This is the task we have from now on.

3 - REVERSE TRANSITIONAL JUSTICE

This expression may seem like an oxymoron, since the mechanisms of transitional justice, as seen, serve precisely to bring a given State to the stage of a Democratic State of Law; otherwise, it makes no sense. How can there be, therefore, a reverse transitional justice? What is intended to demonstrate is that all the setbacks observed in Brazil as of 2015 and intensified as of 2019 are deconstructing the very hard-won advances from the Federal Constitution, and may lead to the dismantling of the Democratic Rule of Law.

The problem explored in this chapter is the set of setbacks in the obedience to the constitutional commandment of Transitional Justice applied to the Brazilian case and the hypothesis is that the situation here called *reverse transitional justice* prevents the construction of the Democratic State of Law and carries other dangers.

One of the pillars of the Modern State is the secularization of the State. In the same vein is the affirmation of the defense of the so-called human rights as the basis for constitutions, designated by the nomenclature of fundamental rights. In the Brazilian case, a group of fundamental rights, namely the individual rights, are a permanent clause in the Federal Constitution. In itself, this configuration already demonstrates their relevance among the constitutional premises.

One of these individual rights enshrined in the 1988 Constitution is freedom of belief (art. 5, VI). Therefore, it can be said that the imposition of a certain belief is forbidden by the Brazilian Constitution, since our Republic, from its very beginning, established that the Brazilian State is secular. At the same time, the emphasis on religious freedom is also one of the efforts for the improvement of the struggles for the full democratization of society. It is worth pointing out that, *contrario sensu*, the imposition of a certain belief or set of religious precepts is a form of authoritarianism.

The theme of authoritarianism has been discussed in Brazil since the beginning of republican history, in view of the recurrent dictatorial periods. The most recent experience of a state of exception was buried precisely with the Federal Constitution on October 5, 1988. At that historical moment there was an intense desire for the construction of a

Democratic State of Law that would guarantee, among other conditions, that there would never again be persecution by the State against its own citizens.

This desire is compatible with the historical context of the last decade of the 20th century, when several other Latin American States that also experienced situations of state authoritarianism, along the same lines sought to build Democratic States under the Rule of Law. As stated, in the Brazilian case, this theme has been discussed in relation to the most recent dictatorship to which the country was subjected, in the two decades between the sixties and the eighties. Nevertheless, the Brazilian authorities' narratives about the period seem to value repression, authoritarianism, and violence. Moreover, another form of authoritarianism, religious fundamentalism, seems to be stealthily implemented by the government's own initiative.

Thus, the mechanisms of transitional justice are in place, but they are being distorted and mischaracterized, constituting a true reverse transitional justice. It is speculated at the end if perhaps this reverse transitional justice would not be, strictly speaking, a political power project to take Brazil to a theocracy, which, obviously, could only occur with the compromise of the Democratic State of Law.

3.1 The reverse transitional justice concept

We have conceptualized in chapter 2 transitional justice as being *the set of tools or protocols that should be implemented in societies starting from the State, so that there is consensus and awareness about the democratic posture both in the relations between the State and Society as well as in social relations themselves, with the goal of reaching a level of trust and solidarity such as to enable national reconciliation and the healing of eventual wounds resulting from the traumas of a period of exception*, to think about the Brazilian case.

These tools are 4, as also pointed out in the previous chapter: 1) the binomial memory/truth; 2) reparation; 3) institutional reforms; and 4) accountability. In Brazil, as we have also seen, the Constitution elected reparation as the main instrument to conduct the transition, with political amnesty as its structuring axis. In the wake, public policies on memory/truth were also established.

Thus, and in face of the setbacks experienced in Brazil, we can conceptualize reverse transitional justice as being *the setback in the field of reparation, aiming to build a new memory that denies the coup d'état of 1964 and destroying democratic relations and society's trust in the State, potentiating latent conflicts and encouraging both violence and intolerance in social relations*.

Let us see how this reverse transitional justice is being constructed, which means, let us reiterate, the opposite of the transitional constitutional mandate. As we have seen, both in the field of reparation and in that of the binomial memory/truth, Brazil was able to demonstrate its achievements, even though we had not carried out the necessary institutional reforms, nor had we advanced practically at all in the field of holding human rights violators accountable. These actions were seen as public policies that could suffer attacks, but they would be State policies, understood and incorporated as such by the Brazilian State, that is, institutionalized, and thus not threatened with extinction. This is a mistake.

Instead of a deepening of democratic relations and the construction of mechanisms for a greater participation of civil society in the country's decisions and in the control of power relations, with the institutionalization of democratic instruments, what we have is the dismantling, pure and simple, of the few initiatives that were achieved, and the attempt to romanticize the period of exception.

Thus it is that a recurring phrase of the constituted authorities since 2014 is that "democratic institutions are working." However, for this statement to prove true, these same institutions should be able to promote and manage both stability and change, as noted earlier. On the contrary, what has been happening in Brazil, especially after the great popular demonstrations of June 2013, is exactly instability, according to the moods of the financial market, of those who occupy positions in the Public Administration, and even of the moment or the composition of the collegiate panels of the Superior Courts. There is no management of change, there is a change in the identity of the institutions, or more clearly explained, there is a lack of institutionalization.

If there is no institutionalization, it means that the whole transitional process is at risk, because the dimensions of memory/truth and reparation are being undone. In other words, the constitutional mandate is being systematically disrespected in order to undo the whole transitional path that has been achieved.

3.1.1 Setbacks in the field of reparations

To begin to reflect on the reversals, it is necessary to summarize some premises that existed in October 1988 and are still valid:

1) there was a state of exception, which persecuted citizens for political motivation and in so doing created a right to the declaration of political amnesty, as admitted in the 1988 Constitution itself. 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 the Brazilian transition to the Democratic State of Law;

3) the creation of an organ with the constitutional mission of examining this matter;

4) the body to be created will have this competence in an exclusive way, and will need to act according to the assumptions of the so-called Transitional Justice.

As a result of these premises, Law 10.559 was promulgated in 2002. This law was a conversion of Provisional Measure (PM) 65, issued the same year with identical wording, although the Amnesty Commission had been created the year before (2001), by means of another Provisional Measure. In other words, the Brazilian State created a State Commission, the Amnesty Commission, to examine requests for declarations of political amnesty. In this way, the very conduction of the Brazilian transitional process became the competence of the Amnesty Commission, having as its guiding thread the scope of integral reparation, under the terms of the constitutional provision.

Initially, the Amnesty Commission was linked 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 No. 10,559/02 was only amended to make this change of allocation compatible, without any change in the Commission's competencies. And it could not be otherwise, since this law regulates the constitutional provision, as seen, and so it cannot restrict or alter the scope of the Constitution, which is to account for the Brazilian transitional process. Until 2017 the Amnesty Commission maintained the concept of full reparation commanded by the Constitution. Between 2017 and 2019 this concept began to undergo a slight revision and as of 2019 it was completely mischaracterized to become non-existent.

The perspective adopted by Minister Damares, who commands the portfolio of Women, Family and Human Rights, is the same as that of the President of the Republic, conveyed in different informal or official statements that the compensation granted is corruption, because there was no political persecution, since there was not even a coup d'état.[11] And if there was no state of exception, it is evident that there was no political persecution either, but only and only compliance with the legislation, monitoring of communists and those who wanted to subvert the legal order, and punishment for terrorists and subversives in general. All within the law. This is the narrative that the current government has created and that has already been made explicit in a vote by the Amnesty Commission itself:

> [...] 13. It should also be emphasized that the public files, in the name of the petitioner, present some documents. In particular, it is worth noting the files in the São Paulo Civil Police - DOPS files: it appears in the list of metalworkers arrested on 6/11/1979; a report dated 08/04/1981 states that the receipt of a writ of exhibition and seizure of several pamphlets, related to the graffiti on the wall involving the writer; a report dated 04/1981 states, among other things, that at dawn on 08/04/1981, the writer and others were found graffiti on the building [. ...] with propaganda slogans for Chapa (...); *there is preventive arrest* on 03/14/1977, charged with art. 121; §2º, I, CP; there is arrest during a metalworkers' assembly in October 1981; there is a warrant for arrest on 03/21/1977 (convicted).

[11] Despite having declared that he would respect the Amnesty Law (https://agenciabrasil.ebc.com.br/politica/noticia/2019-07/bolsonaro-pretendo-respeitar-lei-da-anistia), president Jair Bolsonaro in a live broadcast on August 27, 2020, alongside Minister Damares, stated: that the Amnesty Law was made by the PT "to benefit their friends who perhaps went there to ask for compensation"; "The last number I had access to is 38,000 amnestied. That's too many people"; "What did these people want in the past, what did they fight for? For what cause were they fighting? What did they want to do here in Brazil? (SAID, Flávia. In live with Damares, Bolsonaro says there are "too many people" amnestied. Congresso em foco, 27 Aug. 2020. Available at: https://congressoemfoco.uol.com.br/direitos-humanos/em-live-com-damares-bolsonaro-diz-que-ha-gente-demais-anistiada/)

> *14. The analysis of the documents does not prove political persecution, relating to facts in the sphere of criminal law (graffiti on walls).*
>
> 15. It can be concluded, finally, that the present request does not fit the dictates of Law 10.559/2002, since it has not been demonstrated that the Applicant has been a direct victim of punishment or persecution that can be characterized as "exclusively politically motivated", which can be used as grounds for the amnesty declaration, referred to in article 2, caput of Law 10.559/2002. (our emphasis. Some parts containing document numbers or data that might reveal the Claimant's identity have been deleted from the citation).[12]

In the exemplified case, the metalworker who requested his declaration of political amnesty to the Amnesty Commission attached evidence that he was a militant of the Communist Party of Brazil (PCdoB), and as such was active in the Metalworkers Union of São Paulo, led strikes; because of such activities he was arrested, and there is, in the records, all the evidential documentation of such allegations. The argument for rejecting the declaration of political amnesty, that is, for rejecting reparation, is not lack of evidence. The proven facts do not constitute political persecution, since they are restricted to a mere consequence of the infraction of the criminal legislation of the time, which prohibited strikes, graffiti on walls, and subversive agitation. There is another application in which the perspective is even more explicit:

> Thus, it is verified that the decree of arrest did not occur by simple persecutory act of the State, motivated by political issues; *on the contrary, it occurred to try to curb the continuity of harmful and dangerous activities to National Security, which sought to provoke the struggle for violence between social classes and the grooming of people.* (our emphasis)[13]

Now, the statement extracted from the above-mentioned vote leaves no doubt about the Amnesty Commission's function: it is no longer a State Commission, created to carry out the constitutional mandate of transition in the axis of reparation. It is a government commission destined to fight corruption. And why fight corruption? Exactly for the thought explained in the vote above: the subversive and terrorist activities of those who dared to challenge the government that had freed Brazil from the communist danger

[12] Excerpt from the vote in Case No. 20**.**.****6 (the case numbering has been omitted to preserve the Applicant, in view of the fact that the treatment dispensed by the current Amnesty Commission has brought the fear of some additional form of persecution).

[13] Excerpt from the vote in Case No. 20**.**.****4 (the case numbering has been omitted to preserve the Applicant, in view of the fact that the treatment dispensed by the current Amnesty Commission has brought the fear of some additional form of persecution).

had to be fought; the successive governments of exception were not governments of exception, but acted in the name of national security to guarantee peace in Brazil, within legality. They were governments that continued the revolution that occurred in 1964 and fought subversives and terrorists, such as these Plaintiffs whose rejection votes were brought as examples.

In summary: if former subversives/terrorists, who were fought within legality, started to turn to the Amnesty Commission to ask for reparation, especially economic reparation, they are doing nothing more than requesting public money for their former comrades (note that between 2003 and 2016 the federal government was in the hands of the PT), either in the form of a single payment or in the form of monthly payments, as in the scandals involving parliamentarians (as in the so-called "mensalão"), thus configuring a form of corruption.

The main argument is that there is no cause for any form of reparation, because there was no political persecution. And there was no political persecution because there was no state of exception. Those who got compensation in the period before 2019 at the Amnesty Commission got it because the previous governments were part of corrupt schemes (giving money to these subversives who created problems in the past and now want to get rich off public money).

Furthermore, one of the recent decisions of the Amnesty Commission clearly demonstrates the revictimization of those who seek a State Commission. The Commission should be fulfilling the constitutional commandment of providing full reparation due to political persecution previously imposed; on the contrary, the current Commission reveals a new political persecution because it states that those who suffered in the past deserved such suffering. This was a person who was an engineer in Santa Catarina and a member of one of the resistance groups, called Revolutionary Movement 8 of October (MR8). He was fired, arrested, with evidence in the files, but the Commission understood that there was no political character in the arrest and persecution of the applicant, because his opinions and militancy, at the time, were not allowed by the legislation. The statements of the process decision are elucidative of the Amnesty Commission's position:

> (...) 9. Therefore, it is held that the applicant militated in an organization engaged in armed struggle, responsible for deaths and attacks.

> 10. *The question does not involve freedom of political thought, but militancy in an organization outside the law, since many citizens manifested their thoughts and were not persecuted. There was legal opposition within the political parties and in other segments of society, including academic and artistic circles. There were free elections, song festivals, protest songs, and bookstores sold books with socialist and Marxist lines.*
>
> 11. *Being monitored for belonging to the framework of the illegal and criminal armed struggle does not configure political persecution, as it happened and would happen, today, in any police investigation, most of all, militating in criminal groups. He was not a political militant in a legal organization; on the contrary, he was part of an organization outside the law, which committed barbaric crimes and violence.*
>
> 12. For the arguments presented, I understand that this request is not supported by Law 10.559/2002. (emphasis added)[14]

Finally, crowning the re-victimization of those who suffered political persecution by military governments during the dictatorship, and who since 2002 have been seeking full compensation for the same persecution from the Amnesty Commission, a touch of cruelty from the current Federal Public Administration: Minister Damares Alves signed a Technical Cooperation Agreement with the Air Force Command to issue subpoenas and personal notifications.[15] This means that any and all communication/information with those people who are already traumatized by the persecution suffered by or involving military personnel will now no longer be made by post, as it has always been. People will now be informed of the progress of their applications by uniformed military personnel from the Air Force.

Another very serious situation was the surreal discussion about the competence to examine applications for political amnesty. Until 2016 there was no doubt about this, because Law 10.559/02, which regulates the matter, is quite clear:

> Art. 12 The Amnesty Commission is created, within the scope of the Ministry of Justice, *with the purpose of examining the requests referred to in art. 10 of this Law* and advising the respective Minister of State in his decisions. (emphasis added)

Before proceeding further, it is worth making reference to the ementa of Law 10.559/02. It reads as follows: "Regulates art. 8 of the Transitory Constitutional Dispositions Act and makes other provisions". This means that this is the legal norm that

[14] Full text of the administrative process at https://tinyurl.com/w745hma4.
[15] https://www.in.gov.br/en/web/dou/-/extrato-de-acordo-de-cooperacao-tecnica-343945921

will regulate the reparation policy of the Brazilian State, starting with the political amnesty announced by the 1988 Constitution. It is not just any administrative norm, because it is the concretization of the constitutional policy of reparation, and consequently, in the Brazilian case, the inauguration of a State Commission with the administrative competence to appreciate requests for political amnesty, and which would be, simultaneously, the flagship of the Brazilian transitional process.

The constitutional decision for the transition to democracy was given by article 8 ADCT. And to regulate this constitutional provision, a Commission was created, obviously of State, that is, institutionalized as that Commission that should implement the reparation policy, starting from the applications for political amnesty. It was created within the Ministry of Justice, but it could have been autonomous or in any other Ministry. So much so that since January 2019 it became allocated in the structure of the Ministry of Women, Family and Human Rights.

While the Commission was under the Ministry of Justice it meant that the signatures of the political amnesty ordinances were up to the Minister of Justice to generate legal effects. And article 10 of the same law said exactly that: "the Minister of Justice shall decide on the requests based on this law". If the final decision was the Minister's and the Amnesty Commission is the State body to advise him on this matter, it was perfectly possible that the Minister did not agree with any vote cast by the Commission. And he could ask the Commission to review its position.

But the Minister could not obtain the basis for his reasons from another body, under penalty of misuse of purpose. There is jurisprudence from both the Superior Court of Justice and the Federal Supreme Court in the sense that the competence of the *decision* lies with the Minister of Justice. And it could not be otherwise, since Law 10.559/02 is express in this sense. The same jurisprudence also states, as does article 12 herein reproduced, that the advisory body for this specific theme is the Amnesty Commission. Thus, the Minister could reject the Commission's position, as has often occurred, return it for reconsideration with his reasons for disagreement, and the case would be taken to a new analysis by the Amnesty Commission's Council.

However, as of 2017, the holder of the Justice portfolio, when disagreeing with the votes cast by the Amnesty Commission, requested the advice of another body of the

Ministry, namely, the Legal Consultancy (Conjur). Conjur considered itself competent to elaborate an opinion and thus many were the cases in which Conjur acted as a reviewing body of the Amnesty Commission. The alleged reasoning, that the decision was up to the Minister and that both the Commission and Conjur are advisory bodies, disregarded the fact that Conjur is indeed an advisory and consulting body for any legal aspects; in the common, ordinary, daily situations of any instance of Public Administration. However, the transitional constitutional policy is not a common, ordinary, daily situation of the Public Administration.

For the purposes of a State constitutional policy, institutionalized by article 8 of ADCT and specifically regulated by Law 10.559/02, there is no other possibility of advice, since this Law created an organ also of the State, and therefore, institutionalized, which should be immune to the moods of the people and the correlations of political forces. This body is the Amnesty Commission.

In 2019, with the inauguration of the newly elected government, there was an administrative reform, which created the Ministry of Women, Family and Human Rights, and transferred the Amnesty Commission from the Ministry of Justice to this new Ministry. The Minister in charge of the portfolio changed almost completely the composition of the Council and elaborated new internal regulations for the Commission. With the new configuration, the Commission ceased to be a State Commission and became a Government Commission. And the tasks of the constitutional policies of reparation, memory, and truth were totally destroyed. To exemplify, the new counselors are people who do not recognize the coup d'état in 1964, besides proclaiming that some torturers were heroes, and from time to time calling the applicants present at the sessions for consideration of their requests for political amnesty "terrorists".[16] This is a complete subversion of the Amnesty Commission, and therefore of the constitutional mandate.[17]

[16] This situation has already been reported in the press many times, as in the example: https://noticias.uol.com.br/politica/ultimas-noticias/2019/08/10/anistiando-terrorista-e-decisao-com-base-em-infancia-militar-as-decisoes.htm.

[17] One of the great signs of the reverse transition is the new posture of the Amnesty Commission and of Minister Damares, assuming the narrative of amnesty as forgetfulness, that is, nothing happened in Brazil, nothing should be investigated, there was no coup d'état, there should be no reparation, no accountability, no memory, and no truth, because the facts were erased with Law 6.683/79. There was an incorporation of the narrative of forgetfulness.

Perhaps it is not just a coincidence that this whole reversal is taking place under the portfolio of Women, Family and Human Rights. One possibility of analysis that we point to here is precisely that a kind of "trial balloon" for something like a theocracy is being built on the bangs of Brazilian constitutionalism, based precisely on the narrative reworking of constitutional liberties, taken from the perspective of religious fundamentalism. Even if this possibility is completely unreasonable, it is certainly a clear guideline to reverse the mechanisms of transitional justice, and thus acting, institutionally, the Brazilian State prevents the construction of the Democratic State of Law.

Returning to the actions of Minister Damares Alves, regarding the change in the internal regulations, it is stated here that there was a usurpation of the Commission's competence to examine political amnesty requests, since the possibility of administrative appeal to the Commission was suppressed. According to the new rules, the Council deliberates and, if the applicant does not agree, the appeal will be addressed to the Minister herself, who has only issued a simple order, usually dismissing all appeals. There is no vote, no appreciation, no judgment, no discussion. There is only an order deciding for the rejection. And by someone who has no administrative competence to analyze, because the analysis is the exclusive responsibility of the Commission's Council and not the one who signs the ordinance. One cannot argue that the internal regulation gives this competence to the holder of the portfolio, since Law 10.559/02, which is a legal norm hierarchically superior to the regulation, attributes this competence exclusively to the Amnesty Commission's Council.[18]

The decision to sign the ordinance or not is up to the Minister. If she decides to sign it, that is, if she agrees with the examination made by the Amnesty Commission's Council, the ministerial office provides for its publication in the official press after the Minister's signature. In other words, the person in charge of the ministerial office where the Amnesty Commission is located *decides* whether or not to publish it. If he decides for publication, it means that he agrees with the fundamentals of this decision. If he disagrees or has any doubts about the grounds (the Council's vote) he must formulate his questions and return to the Council for further consideration.

[18] See, in this regard: http://justicadetransicao.org/wp-content/uploads/2019/07/Compet%C3%AAncia-exclusiva-da-CA.pdf.

This means that such act is an administrative complex act: Amnesty Commission's Council has the exclusive competence to examine and thus 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. It is the exact terms of the law. There may be a whole debate between the holder of the 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, pronounced in the form of a vote, and wants to open a debate with the Council, he may resort to other Public Administration bodies to formulate his concerns or doubts, using opinions to question the Commission's Council. *The competence of the examination is that of the Commission's Council. The Minister of State is responsible for signing and publishing the ordinance*. 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 process to the Council, but the examination of the matter is the exclusive competence of the Amnesty Commission's Council.

In December 2008, there was an exclusive norm to regulate the procedures in a detailed manner: Ordinance no. 2523, of December 17, 2008 (whose art. 1 defines its purpose as approving the Amnesty Commission's Procedural Norms, in the form attached to the Ordinance), which states in its art. 22:

> Art. 22 It is incumbent upon the Minister of State of Justice, upon receipt of the Commission's Conclusive Opinion, to *recognize, declare or reject* the amnesty dealt with in Law No. 10,559, 2002, fixing the rights recognized to the amnesty holder. (emphasis added)

In other words, the procedural norms of the Amnesty Commission are in accordance with Law no. 10.559/02, since they attribute exclusive competence to the Commission's Council to cast the vote of appreciation of the request made. The Minister of State is responsible for acknowledging the vote cast. It is inferred that in case of

disagreement, the Minister must return the case to the Council with his questions, since *he/she has no legal competence to examine the application*.

A very important observation is that Ordinance 2523/08 was never revoked. In other words, it is still a current Ordinance. And it is an extremely detailed Ordinance about the Amnesty Commission's procedures for examining applications.[19]

We have, therefore, that those measures that were already pointed out as setbacks in the transition process, with the use of opinions from Conjur by the competent authority at the time (the Minister of Justice) to sign the political amnesty decrees, and which were considered a misuse of purpose, have now become much worse. What has happened, as seen, is the suppression of the debate of the Amnesty Commission Council, the only competent body to assess political amnesty requests, and the usurpation of this competence by the holder of the portfolio to decide without the debate provided for in the legislation.

Let's see the steps of this reversal: Ordinance No. 376, of March 27, 2019, approved the new Internal Rules of the Amnesty Commission. In its article 1, it conceptualizes the Amnesty Commission as, a body of assistance to the Minister of State, part of the Ministry of Women, Family and Human Rights (*MMFDH*, in Portuguese), and which has the purpose of: I) examining political amnesty requests and advising the Minister of State in his decisions, pursuant to Law No. 10,559/02; II) maintaining the Brazilian Political Amnesty Memorial and its collection; and III) formulating and promoting actions and projects on reparation and memory, without prejudice to the competencies of other bodies.

In summary, in 2019, with the new elected government, there was an administrative reform, which created the Ministry of Women, Family and Human Rights, and transferred the Amnesty Commission from the Ministry of Justice and Public Security to this new Ministry. The Minister in charge of the portfolio almost completely changed the composition of the Council and drew up new internal regulations for the Commission.

[19] The affront to the due legal process is so great, in this case of the Procedural Norms, that not only is a current Ordinance, but it is also informed in a booklet presented by the Ministry of Women, Family and Human Rights itself, as can be seen at: https://www.gov.br/mdh/pt-br/navegue-por-temas/comissao-de-anistia-1/anexos/cartilha-informativa_ca-mj_2010.pdf/view

Before going into the intrinsic aspects of Administrative Rule 376/19, it is important to remember that the political amnesty regime in Brazil initially arose with Provisional Measure (*MP*, in Portuguese) 2151, dated May 31, 2001. This MP regulated article 8 of ADCT, and was later re-edited by MPs 2151-1, of June 28, 2001, 2151-2, of July 27, 2001 and re-edited with alterations by MP 2151-3, of August 24, 2001. Finally, it was revoked by PM 65, of August 28, 2002, which was later converted into Law 10,559/02.

As seen, since the first MP the Amnesty Commission was created as a State Commission to fulfill the constitutional mandate of article 8 of ADCT, which imposes the constitutional process of the Brazilian transition, starting from full reparation. It is worth noting that there are three Brazilian State Commissions created to comply with the constitutional provision, namely: Special Commission on the Dead and Political Disappeared, Amnesty Commission and National Truth Commission.

The Amnesty Commission "became a permanent part of the Brazilian State structure in 2002, with the approval of Law No. 10.559, which regulated article 8 of the Transitory Constitutional Dispositions Act" (BRASIL, 2013, p. 6).

Since the beginning of the activities of the Amnesty Commission, still in 2001, an internal regulation was promulgated in order to mark the activities of the Commission. Until 2008, the procedures of the Amnesty Commission were also regulated by internal regulations.

Over the years, the Commission had six internal regulations until 2018: 1) Ordinance 671, of August 21, 2001 (Ministry of Justice); 2) Ordinance 751, of July 3, 2002 (Ministry of Justice); 3) Ordinance 893, of March 25, 2004 (Ministry of Justice); 4) Ordinance 253, of February 23, 2006 (Ministry of Justice); 5) Ordinance 1. 797, of October 30, 2007 (Ministry of Justice); and 6) Ordinance 29, of January 15, 2018 (from the Ministry of Justice and Public Safety).

All these internal regulations provided for two instances of examination of applications for political amnesty declarations: a first instance, called Chamber in the first Internal Regulation and Chambers in the following Regulations, always composed of a smaller number of Councilors; and a second, appeal instance, called Plenary Council in

all the regulations. All people could submit their pleas to the Amnesty Commission and if they were unhappy with the result they could still appeal administratively to the Plenary, where they would have another opportunity to present their arguments and review some or all aspects of the previous assessment. The regimental change made in 2019 is unconstitutional and directly affects due process of law.

3.1.2 Setbacks in democratic relations

Another important sign to characterize what is called reverse transitional justice is the explicit rupture stated by the President of the Republic in a press statement. This is a significant fact. Until this government, all ruptures were disguised and never admitted. When the coup d'état took place in 1964, the Military Junta made a point of affirming that it was complying with the law and the 1946 Constitution, and that Brazil was a democratic country. When the government ceased to be exercised by the military and a civilian was elected as President of the Republic, the appearance was equally one of continuity, with no explicit declarations of institutional rupture.

With the democratic practice of direct elections for successive Presidents of the Republic, between 1989 and 2018, no matter how many political parties rotated and changes were made in the political projects to be carried out, there was no president who established a dividing line breaking with all the traditions and legal commandments to say: "now everything will be different because I came to power and I am in charge". One could complement the phrase: "and not the law". Until 2019.[20] For the first time the rupture is explicit, admitted and celebrated by the president and his admirers.

It is asserted here, thus, that reverse transitional justice is not just a descriptive concept of the current Brazilian processes of deconstruction of memory, truth, and reparation. It is, far beyond that, a process to prevent the construction and deepening of the Democratic Rule of Law in Brazil. These do not appear to be random, out-of-synch

[20] Again, this stance has been repeatedly reproduced by the national and international press, as can be seen, for example, at: https://veja.abril.com.br/politica/agora-o-presidente-e-de-direita-diz-bolsonaro-sobre-trocas-em-comissao/.

actions. It is systemic, because there are many actions to subvert concepts that are very dear to democracy, such as freedom, to cite a single example.

It is the power project that is being established, fed by civil society groups with little visibility, but much capillarity, deeply authoritarian and fundamentalist. The anti-system discourses that criticize the established standards of liberal representative democracy gain supporters every day, curiously and unfortunately both on the right and on the left, precisely because they operate on the bangs, with symbolic actions and proposals that strictly speaking criticize the democratic rule of law on the basis that we have built it over the two centuries that preceded us.

The Brazilian situation is emblematic precisely because it seemed, up until five or six years ago, that the country was moving in the direction of deepening democratic relations and that it would finally be possible to dream again of projects for a free, plural, solidary and fairer society. And this was only becoming a reality, it must be emphasized, because of the actions to comply with the constitutional provisions of the Brazilian transition, that is, the dimensions of transitional justice. Nevertheless, what we observe today is that this time seems very distant a few decades ago, such was the degradation of both political and social relations.

In 2016, after the impeachment of Dilma Roussef, still wishing that democratic relations were under deadlock and not in crisis, Avritzer (2016: 146) wrote:

> A fundamental question therefore arises for electoral and extra-electoral disputes: that of the resumption of a space for discussion and tolerance. It is not very clear whether Brazil was able to build tolerance and respect for diversity in these thirty years of democratization, although at times it seems that the plurality of political conceptions and values was solidly present among us. However, it also seems evident that this construction is insufficient, either because of the way political disputes have been played out, or because of the possibility that intolerance migrates to the political system and to the Judiciary. Unfortunately, we have evidence that this is already happening. The well-received declaration of vote by Congressman Jair Bolsonaro in defense of torture lights up yellow in relation to the stability of the plurality of values in the country. Even more serious is the fact that support for his candidacy for president is more present among people with higher income and education. *This means that part of the Brazilian elite has a strong attraction for a non-democratic project. The most important task today, if in fact we are heading towards a situation of crisis or strong democratic impasses, is to guarantee that this moment of strong confrontation is fought in a climate of the greatest possible tolerance, and that an attempt is made to reestablish a political center capable of containing the radicalization of political disputes.* A broad political center, so important in this period that ended with the impeachment, would stabilize the crisis. This center should seek to establish minimum agreements around rights, individual guarantees, and respect for the rules of the game, which are the fundamental values behind the construction of democracy in the country. It is these values that allowed for the strong

> social and institutional advances in the period between 1988 and 2013. It is this procedural minimum that will allow the Brazilian democratic construction not to be interrupted by the very strong political and social dispute that will certainly take a long time to be resolved. (our emphasis)

After almost five years of this prediction, we know that there have been no minimum agreements regarding rights, individual guarantees, and respect for democracy; on the contrary, radicalization and intolerance have prevailed. I assert, thus, that one of the most significant factors for the crisis that Brazilian democracy is experiencing is not only the lack of implementation of the axes of transitional justice, but this true reverse transitional justice, which assimilates the narrative of amnesty as forgetfulness, casts doubt on the existence of the coup d'état in 1964, and naturalizes destruction and death as a form of cleansing Brazilian society.

In summary, the reverse transitional justice is installed and active in Brazil, and it is an insurmountable obstacle for the construction of the Democratic State of Law so dreamed and celebrated on that far-off October 5th, 1988.

3.2 A speculation

The transitional process in Brazil is enshrined in the Federal Constitution. It must be fully complied with. There is infra-constitutional legislation that guides all the actions that must be implemented by public authorities for the country to become a Democratic State of Law. The refusal of this implementation also means the refusal of the construction of a Democratic State of Law. Hence the danger of the reverse transitional justice that we are experiencing.

Many controversies over issues related to the transitional process end up wasting important energies in reaffirming the consensual assumptions and in the efforts to build new consensuses in order to consolidate democracy as an undisputed value in Brazil. The consensual assumptions are that there was a coup d'état in 1964; that a state of exception is not desirable; that more democratic, fair, solidary, plural and inclusive relations are desirable and advocated in the constitutional order; and finally that the constitutional commandments must be complied with.

Nevertheless, it is speculated here that this process of reverse transition, beyond the harmful consequences for the construction of a democratic, plural, diverse, solidary and fairer Brazil, is useful to a larger project, since it subordinates the conceptions of freedom and human rights to a fundamentalist religious perspective, which seems to be being engineered by religious groups that have long occupied spaces of power and now develop supposedly peripheral actions, perhaps in order to configure some form of theocracy.

As said, this is just an elucubration of a possible consequence of reverse transitional justice. This is because by not complying with the constitutional commandment of transition, the country is already attacking the foundation of the guarantee of rights, that is, the guarantee of human rights as a constitutional value is replaced by a supposed guarantee of freedom in a very particular (religious fundamentalist) sense of freedom. In other words, the whole aspiration of freedom and guarantee of fundamental rights present in the constituent process is now interpreted differently, namely, subordinated to the so-called values of the supposed traditional Brazilian Christian family, which could be contained in the foundations of the constitutional theocracy established by Hirschl (2010: 3):

> The ideal model of a constitutional theocracy can be summarized by outlining four main cumulative elements: (1) adherence to some or all core elements of modern constitucionalismo, including the formal distinction between political authority and religious authority and the existence of some form of active judicial review; (2) the presence of a single religion or religious denomination that is formally endorsed by the state, akin to a "state religion"; (3) the constitutional enshrining of the religion and its texts, directives, and interpretations as *a* or *the* main source of legislation and judicial interpretation of laws – essencially, laws may not infringe on injunctions of the state-endorsed religion; and (4) a nexus of religious bodies and tribunals that often nor only carry tremendous symbolic weight but are also granted oficial jurisdictional *status* on either a regional or a substantive basis and operate it in lieu of, or in uneasy tandem with, a civil court system.

What is being stated here by way of speculation is that the constitutional mandate of the transition to a Democratic State of Law is not being obeyed, which means that the path back to authoritarianism is being taken. That compliance began in 1995, with the creation of the Special Commission on the Dead and Political Disappeared, and advanced until the mid-2010s, but then began to suffer setbacks, configuring what has been called here reverse transitional justice.

But beyond that, we speculate if it is not on purpose 1) the creation of a Ministry that brings together the words "Women" and "Family" with the expression "Human Rights" to try to reformulate the very conceptions of family and human rights according to a neo-Pentecostal perspective; and 2) coincidentally in this new Ministry are allocated the State Commissions that should promote transitional justice, at least in the aspects of memory, truth, and reparation, so that there is total control for the disqualification of these same Commissions.

In other words, if only through the mechanisms of transitional justice it is possible to glimpse the construction of the Democratic State of Law; if such a State presupposes the respect for human rights and also the respect for the secular State; if one of the requirements of the Democratic State of Law is the respect for minorities, including religious ones, besides diversity and plurality; and if the dimensions of transitional justice have started to be implemented, but have suffered setbacks to the point that today they have been completely disfigured and dismantled, perhaps there is indeed a power project that, besides jeopardizing the respect for human rights, also affects the secularization of the State and the respect for minorities, including religious ones. Hirschl states that the only way to control states with this kind of political power project would be to transform the theocracy pure and simple into a constitutional theocracy. But still a theocracy.

The strategies of Minister Damares[21] as well as of the current government perhaps make sense within a broader panorama not only of deconstruction of the transition, but of the attempt to build something similar to that model described by Hirschl, since item 1 is present in Brazil; item 2 can also be located, including in the very motto of the Presidency of the Republic ("Brazil above all; God above all"); item 3 has been seen in an increasingly recurrent form, as in the episodes of the custody of a girl who had an initiation rite in a religion of African origin or another girl who needed to change federative units to have a legal abortion after being raped by her uncle, since the authorities of the state of Espírito Santo refused to perform it;[22] and only item 4 does not exist in Brazil. Nevertheless, there are more and more Christian religious references, or

[21] By the way, check out Gregório Duvivier's program with this theme at: https://www.youtube.com/watch?v=Tzsjn2JomJU.

[22] See, about the first case https://noticias.uol.com.br/cotidiano/ultimas-noticias/2020/08/07/mae-perde-guarda-da-filha-apos-jovem-participar-de-ritual-do-candomble.htm and about the second case https://www1.folha.uol.com.br/cotidiano/2020/08/crianca-que-engravidou-apos-ser-estuprada-no-es-passa-bem-depois-de-aborto-legal.shtml.

of a certain version of Christianity, in judicial decisions. Besides the criterion used explicitly by the President of the Republic of his next nomination to the STF of someone "terribly evangelical", his former Minister André Mendonça, a Presbyterian pastor, whose approval by the Federal Senate took place during the days when this book was being finalized.

In summary, the reverse transitional justice, if it continues to prosper, can lead not only to the dismantling of the Democratic State of Law in Brazil, but perhaps to the construction of a State model similar to a theocracy that represents obscurantism allied to authoritarianism under a neo-Pentecostal fundamentalist direction.

It is urgent that the mechanisms of transitional justice be resumed and that the desire for the construction of a Democratic State of Law in Brazil be fed again.

CONCLUSION

This work intended to reflect on the Brazilian transition process, beginning in 1979, with the Political Amnesty Law (Law 6.683), and moving forward over the years until the end of the year 2021, under the government of President Jair Bolsonaro.

We seek to demonstrate how it is possible and desirable to implement accountability, including in the criminal field, for human rights violators during the dictatorship, since the commonly presented arguments of penal prescription or amnesty are fallacies that only prosper by submitting to the established narrative contrary to the truth of the facts, but still hegemonic in Brazil.

We also pointed out the desire of the Brazilian society for national reconciliation, viable only when the mechanisms of memory/truth, reparation, and justice are definitively implemented. We saw that there were very important advances, but that they are systematically being destroyed, especially by the current federal government, which denies the horrors of the dictatorship; on the contrary, it praises torturers as national heroes and proclaims that there was no state of exception in Brazil, nor political persecution of any citizen, but only and only the fulfillment of the laws and the beginning of a "cleansing" of unwanted groups of people who should not even be called human beings.

Society's trust in the Brazilian State is ever decreasing, due to the reverse transitional justice, conceptualized in chapter 3, and the level of intolerance in social relations reveals the fraying of the minimum standards of civility.

What is at risk in the Brazil of 2021 is the democratic rule of law itself. The atmosphere of discouragement, mistrust, and lack of perspective is not a healthy environment for the general elections that will take place next year, 2022. Serious human rights violations continue to occur, and have worsened in the pandemic period of COVID-19.

It is possible to rebuild hope. It is possible to rebuild the expectation of a Democratic Rule of Law. But for this to occur, it is imperative to know and implement

the transition process in Brazil. May this book serve as a subsidy for this, and may fear and hopelessness not overcome the desire and action for better days.

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