LAW 6683/79 AS A LAW OF MEMORY

LA LEY 6683/79 COMO LEY DE MEMORIA

Summary

Political amnesty laws can be laws of memory or laws of oblivion. Laws of oblivion are self-amnesty laws, and laws of memory are those that strengthen democracy by building a collective memory in this sense. The Supreme Court itself, in ADPF 153, said that Law 6683/79 is not a self-amnesty law, and is therefore a law of memory. And the SC could not have come to a different conclusion, because when it decided that the Brazilian Political Amnesty Law was accepted by the 1988 Federal Constitution, i.e. that there is no incompatibility between Law 6683/79 and the fundamental precepts of the Citizen's Constitution, it would necessarily have to affirm that the law is a law of memory. Based on the reflections of François Ost, this article aims to demonstrate the reasons and the importance of affirming that Law 6683/79 is a law of memory.

Key-Words:

Transitional Justice; Political Amnesty; Democracy; Memory.

Resumen

Las leyes de amnistía política pueden ser leyes de memoria o leyes de olvido. Las leyes de olvido son leyes de autoamnistía, y las leyes de memoria son aquellas que fortalecen la democracia mediante la construcción de una memoria colectiva en este sentido. El propio Supremo Tribunal Federal, en la ADPF 153, afirmó textualmente que la Ley 6683/79 no es una ley de autoamnistía, por lo que es una ley de memoria. Y el STF no podría haber llegado a otra conclusión, porque al decidir que la Ley de Amnistía Política brasileña fue aceptada por la Constitución Federal de 1988, es decir, que no existe incompatibilidad entre la Ley 6683/79 y los preceptos fundamentales de la Carta del Ciudadano, necesariamente tendría que afirmar que la ley es una ley de memoria. A partir de las reflexiones de François Ost, este artículo pretende demostrar las razones y la importancia de afirmar que la Ley 6683/79 es una ley de memoria.

Palabras clave:

Justicia transicional; Amnistía política; Democracia; Memoria.

Summary

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Eneá de Stutz e Almeida

Introduction

This article aims to establish the differences between a political amnesty law of memory and a political amnesty law of forgetting, based on the teachings of François Ost[1]. This reflection is important and topical for two main reasons: 1) the so-called transitional justice in Brazil is still incomplete; 2) there is an ongoing collective memory dispute regarding the Brazilian Political Amnesty Law of 1979.

Furthermore, the issue of political amnesty has become a structural[2] axis of the Brazilian transition. It is therefore essential to understand the meaning of the 1979 political amnesty law, as the debate has a direct impact on the defense of democracy[3].

1. Political amnesty and memory

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

The misunderstanding of these questions is that they start from the assumption of the legal nature of political amnesty as an amnesty for forgetting, and in this way, some claim that the scope of forgetting is limited and others that the scope is unlimited. For this reason, a narrative of the supposed controversies of Law 6.683/79 has been drawn up. On

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[1] OST, F. **O tempo do direito.** Bauru, SP: EDUSC, 2005.

[2] According to a term coined by por Paulo Abrão em ABRÃO, P.; TORELLY, M. **Mutações do conceito de anistia na justiça de transição brasileira.** Political Amnesty and Transitional Justice Magazine. n. 7. p. 12–47. Brasília: Ministério da Justiça, jan./jun., 2012.

[3] With regard to the importance of the issue of political amnesty in transitions to democracy, see the excellent studies: TEITEL, R. **Genealogia da justiça transicional.** E ARTHUR, P. **Como as "transições" reconfiguraram os direitos humanos: uma história conceitual da justiça de transição.** *In* REÁTEGUI, F. (ed). **Justiça de Transição – manual para a América Latina**. Brasilia: Comissão de Anistia, Ministério da Justiça; Nova York, Centro Internacional para a Justiça de Transição, 2011.

another occasion, I have already demonstrated the reasons for stating that the most appropriate debate is the one that assesses the legal nature of the Political Amnesty Law[4]. Here it is important to detail the conceptual construction of Law 6683/79 as a law of memory, and the impacts of this construction on Brazilian democracy.

It is necessary to put the debate on the Amnesty Law on the right track, starting with an analysis of 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 happened in Brazil in recent years, and does nothing to contribute to an adequate solution to the legislative decisions taken since 1979, which have always intended to bring peace to Brazilian society.

OST's classification of political amnesty laws is as follows[5]:

> These are divided into amnesty from penalties and amnesty from facts. The lesser amnesty, which comes after conviction, interrupts the execution of sentences and erases the conviction; however, at least the trial took place in its time, thus paying tribute to memory. On the other hand, the amnesty of 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.

A very important premise[6] for all the analysis that follows is the following: political amnesty, whatever its legal nature, is an "all or nothing" rule. In other words: if it is an amnesty for facts, all the facts have been forgotten; if it is for convictions, all the convictions have been erased, although all the facts prevail. There is no possibility of some facts being erased and others not; or some convictions being erased and others not. That is why it is wrong to ask about the scope of the Amnesty Law, because either the entire universe (of facts or convictions, depending on the legal nature) is reached, or nothing is reached. Amnesty is a legal instrument that generates an erasure effect objectively, i.e. it is independent of interpretation. That's why there's no need to ask about its scope. The scope of Law 6.683/79 is the scope provided for in its own terms. Objectively.

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[4] ALMEIDA, E. de S. **A transição brasileira: memória, verdade, reparação e justiça (1979-2021).** Salvador, BA : Soffia10 Assessoria Socioculturais e Educacionais, 2022.
[5] OST, F. **O tempo do direito.** Bauru, SP: EDUSC, 2005, pg. 172.
[6] DWORKIN, R. **Levando os direitos à sério.** 2. ed. São Paulo: Martins Fontes, 2007.

Debating the scope only confuses and prevents national peace. The correct debate is about the legal nature of the law, because with this definition the effects are the legal effects foreseen for that specific characteristic of the law.

From the very classification established by OST, we can see that the debate is directly related to the concept of memory. It is therefore worth examining what he calls the paradoxes of memory.

According to OST, there are four paradoxes of memory: 1) memory is social and not individual. This is because the meaning of memory depends on an affective community, which weaves, alters and reworks this meaning over time. 2) Memory operates from the present towards the past, and not the other way around. Memory therefore only exists through collective interpretation (and reinterpretation), which occurs dynamically and continuously over time. 3) Memory is a voluntary construction, not something spontaneous. It is an anamnesis in the Aristotelian sense. 4) Memory presupposes forgetting, and is not opposed to it. In OST[7]'s own words: "Any organization of memory is also an organization of forgetting. No memorization without selective sorting" (emphasis added).

2. Self-amnesty laws: amnesties of oblivion

According to OST's classification, political amnesties can represent amnesty with amnesia or amnesty without amnesia (with anamnesis). In verbis:

> Everything, it seems, is a matter of circumstance: linked to particular political circumstances, each amnesty law is an exceptional text (which, moreover, jurists reserve a restrictive interpretation for) and ephemeral, which can only be evaluated in relation to all the elements of the context. Thus, for example, it is true that the question of returning to democracy and punishing the guilty did not arise in the same way in Western Europe after the Second World War and in Eastern Europe after the fall of the Iron Curtain. In fact, multiple paths opened up to try to re-establish the social bond: either mass criminal proceedings (as was the option in Europe in 1944-1945), or a more or less general amnesty (the preferred solution in Eastern Europe, and at the end of the military dictatorships in Latin

[7] OST, F. **O tempo do direito.** Bauru, SP: EDUSC, 2005, pg. 60.

> America), or even the rather original solutions of amnesty without amnesia"[8].

It is interesting to note that some neighboring countries in the Southern Cone passed self-amnesty laws that effectively erased the events that took place, in other words, in those cases it was both de facto and de jure a policy and legislation of forgetting. This created the impression that all Latin American countries that had experienced authoritarian regimes had the same policy of amnesty as forgetting, without, however, a more accurate examination of the Brazilian legislation.

When the text that would become the 1988 Federal Constitution was being drafted, although the government was no longer led by a military man, the political atmosphere was still one of fear that the dictatorship could return at any moment if the slow, gradual and secure opening was not controlled. In this way, although censorship was no longer exercised and the national atmosphere was one of democratic celebration, there was a kind of tacit agreement not to discuss the dictatorship, as if it had been forgotten or hadn't even happened. Many authorities even declared that there had been no dictatorship in Brazil. Some still do to this day.

Throughout this context, a memory has been built up that Brazil had a slightly more authoritarian period than was desirable, but that it was 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 precisely the new Constitution, anchored in the political environment of both Law 6.683/79 and EC 26/85. This construction is still hegemonic to this day[9].

Note, for example, the logic contained in part of one of the answers in General Etchegoyen's interview given in early November 2020 to the UOL news portal, commenting on the government of Dilma Roussef: "they isolated the military, disrespected them, staged a clearly vindictive Truth Commission, defied the law to usurp clear competencies from the commanders (emphasis added)". Why does a general say that a State Commission, created by law, was a staging? Precisely because, within the

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[8] OST, F. **O tempo do direito**. Bauru, SP: EDUSC, 2005, p. 174-175. The examples of amnesty without amnesia cited by OST are the case of South Africa, with the Truth and Reconciliation Commission, and the Truth Commissions of both Chile and El Salvador.

[9] It should also be pointed out that memories are always an object of political dispute, as demonstrated in GOMEZ, José María (coord). **Lugares de memória: ditadura militar e resistências no estado do Rio de Janeiro.** Rio de Janeiro : Ed. PUC-Rio, 2018.

logic of oblivion, no Truth Commission would be appropriate. Truth about what, if nothing happened? If there has been forgetting, erasure, there is nothing to investigate. It is coherent and logical that if the facts have been erased, forgotten, there is nothing to remember, nothing to tell, nothing to record, except as a reenactment. There is nothing to repair. Because the facts have been erased, as if they had never happened.

The OST itself recognizes that if a self-amnesty law is enacted, i.e. a law of forgetfulness, "from then on you can no longer, without being accused of defamation, maintain, for example, that such a person, who now wants to exercise a political mandate, was a torturer in other times"[10].

3. Amnesty laws of memory: the Brazilian case

It is important to put into context 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 make it possible for exiled Brazilians to return, as well as to free political prisoners and take those persecuted by the forces of repression out of hiding. The government presented a bill that underwent several amendments and proposed substitutes. The political atmosphere was very tense and the debates heated. The government's own political party, ARENA, had no consensus on what kind of amnesty should be proposed (with or without exceptions)[11].

Furthermore, it was unclear whether the terms proposed in the bill that became Law 6.683/79 meant forgetting or remembering. There were groups of human rights defenders who argued that even if the amnesty was a forgetting and that it was impossible to hold torturers accountable, the proposal for a political amnesty was worthwhile in order to save the political prisoners of the time and allow exiles to return. And there were those who claimed that the final vote, although narrow (the difference was only 5 votes), creating an exception for those convicted of terrorism and other crimes, was the result of a national agreement aimed at pacification[12].

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[10] OST, F. **O tempo do direito**. Bauru, SP: EDUSC, 2005, p. 172-173.

[11] Vote on partial amnesty splits ARENA Disponível em http://memorialdademocracia.com.br/card/votacao-de-anistia-parcial-racha-a-arena. Acesso em 21 de outubro de 2023.

[12] FICO, Carlos. A negociação parlamentar da anistia de 1979 e o chamado perdão aos torturadores. **Revista Anistia Política e Justiça de Transição**. p. 318-332. Brasília: Ministério da Justiça, jul.-dez. 2010.

The context at the time, therefore, was one of intense political dispute. It was also a dispute over the narrative that was beginning to be constructed about the model of political amnesty that was being voted on by Parliament. Nevertheless, it is worth analyzing the legal instruments used at that historical moment. The intention of the parliamentarians, the intention of the military rulers, a possible agreement between sectors of civil society and parliament, none of this is relevant to legally characterize the institute of political amnesty, because its nature will depend on its terms objectively enshrined in the legal text and applied over the years. This analysis will gain even more strength with the advent of the 1988 Federal Constitution and the Supreme Court's interpretation that Law 6.683/79 is still in force because political amnesty was one of the pillars of the Federal Constitution itself.

In other words, which construction of memory do we want to reinforce with regard to Law 6683/79? Remembering OST's teachings, the four paradoxes: is the Political Amnesty Law a law of self-amnesty (a law of forgetting) or is the Political Amnesty Law a law of memory?

The Federal Supreme Court has already answered this question in the Action for Breach of Fundamental Precept (ADPF) 153. The votes of Justices Cezar Peluso and Celso de Mello, who voted to dismiss the case**, state verbatim that Law 6683/79 is not a self-amnesty law.** That is why it is not at odds with the fundamental precepts of the Constitution and has been accepted.

In this regard, please note the provisions of Article 6 of Law 6683/79, which deals with the declaration of absence:

> Art. 6 - The spouse, any relative or affinity, in the direct or collateral line, or the Public Minister, may request a declaration of absence of a person who, being involved in political activities, has, up to the effective date of this Law, disappeared from his or her home, without any news of him or her for more than one (1) year.
> § Paragraph 1 - In the petition, the applicant, showing proof of his or her legitimacy, shall offer a list of at least 3 (three) witnesses and the documents relating to the disappearance, if any. (emphasis added).

Now, if the law imposed forgetting, it would necessarily have to be forgetting the facts. And the fact regulated in this provision is disappearance. Erasing the disappearance means stating that there was no disappearance. At least there was no disappearance before the law was enacted. So, following a line of formal logic, it is possible to construct the

following statement: if someone has in fact disappeared, but a law imposes that this fact did not happen for all legal purposes, the absence must have its initial term with the enactment 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 of "disappearance" could only arise after the enactment of the law by absolute presumption, that is, the absence could only be characterized as of August 1979.

But that's not what Law 6.683/79 says. On the contrary, the provision reproduced requires proof of the fact of "disappearance" with witnesses and documents to enable the declaration of absence. 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 any agreement or condition into its text and therefore cannot generate any legal effect from a non-existent condition. For this reason, it can be said that the Amnesty Law requires the memory of the facts in order to take effect.

This is exactly the opposite of what the authoritarian regime intended when constructing the narrative of oblivion. The 1979 law was characterized by its terms as a political amnesty for memory and truth. It was an amnesty for anamnesis, not amnesia. It was an amnesty exclusively for convictions and not for the facts. It was not a self-amnesty law.

This is why reparations have been possible for many years. If the facts had been erased, it would not have been possible to return to civil or military public service (art. 2), or the return of private sector employees dismissed for striking (art. 7) and not even the declaration of absence in terms other than those regulated by the Civil Code of the time (art. 6).

Final Considerations

In short, there are only two possible legal types of political amnesty: 1) amnesty of forgetting; 2) amnesty of memory. Law 6.683/79 belongs to the second type. This is also the obvious reason why reparations can be made. Only memory can make reparation possible. Forgetfulness prevents reparation, just as it prevents accountability and truth.

Nevertheless, the efficiency of the narrative created by a law that imposed forgetfulness needs to be emphasized. This narrative, it should be repeated, is still

hegemonic in Brazil. And for this reason there is a feeling that the law should have erased the heinous events that took place in Brazil during the period of the state of exception. These events are so barbaric and cruel that they shouldn't have happened. If they did happen, the law needs to impose silence, to erase the facts. If this was the intention of legislators and authorities in 1979 and the years that followed, this intention **has not been translated into the legal system.**

Legal interpretation needs to be based on the legislation and the legal effects generated, and not on a supposed historical context that is totally unrelated to the legal norm. In this way, it was possible to make reparations in 1979 and beyond, and years later to set up a National Truth Commission as a State Commission, which fulfilled its legal role of producing a report on events during the dictatorship. The facts were not erased; on the contrary, they were remembered and recorded.

There are other arguments that show that the Brazilian political amnesty is an amnesty of memory and not of forgetting. Just look at the legislation that followed Law 6.683/79: as I said, in 1985 the Constituent Assembly was convened through Constitutional Amendment 26. This amendment contains provisions on 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 servants of the direct and indirect administration and the military, punished by acts of exception, institutional or complementary" (emphasis added).

Who was granted amnesty? Those who had been punished. In other words, Amendment 26/85 confirms amnesty as memory, as anamnesis and not as oblivion. Amnesty for punishments, for sanctions, and not for facts. It could be argued that §1 of this same Article 4 establishes such a broad and unrestricted amnesty by mentioning related crimes:

> § Paragraph 1. Amnesty is also granted to the perpetrators 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 dismissed or discharged for exclusively political reasons, 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. If this political amnesty had been one of forgetting, of amnesia, there would have been an amnesty of the

facts. In other words, if the facts had been forgotten, we would necessarily have had to "erase the evil" of the dictatorship in Brazil, as if it had never happened. In this case, the perpetrators of political crimes and related crimes would have been amnestied and therefore (as a logical consequence) the facts would have been erased; as if they had never happened. From there (another logical consequence), it wouldn't be possible to investigate/prosecute anyone because everyone would have been amnestied in 1979.

Why is this reasoning legally inconsistent? Because it is based on the premise that amnesty under Law 6.683/79 was about forgetting and not remembering. It would have been, in this logic, an erasure of evil. An amnesty for the facts. As if they had never happened. Well, if they never occurred, they cannot give rise to any kind of reparation, because reparation requires proof that the facts occurred.

Since 1979, however, the persecutions have been remedied. The facts are remembered. The evil has not been erased. What happened has not been forgotten. Nor can there be, by legal determination.

Therefore, the only possible logical conclusion 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 facts.

When the Constitution was drafted, the Brazilian constituents chose to conduct the transitional process in the areas of reparation, memory and truth, once again through political amnesty, as can be seen in the heading of Article 8 of the Transitional Constitutional Provisions Act (ADCT):

> Art. 8. An amnesty is granted to those who, between September 18, 1946 and the date of the promulgation of the Constitution, were affected by exclusively politically motivated acts of exception, whether institutional or complementary, 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, ensured promotions, during inactivity, to the position, job, rank or grade to which they would have been entitled if they had been in active service, subject to the time limits for remaining in active service provided for in the laws and regulations in force, respecting the characteristics and peculiarities of the careers of civil and military civil servants and observing their respective legal regimes.

Once again, there was an amnesty from the penalties, consequences, convictions, criminal sanctions, labor sanctions and any other sanctions that may have resulted from political persecution. It should be noted that as a regulation of this constitutional

provision, Law 10.559/02 even makes it possible for those who were expelled for political persecution to return to their studies. This demonstrates that the constitutional amnesty was and is, just as it was in 1979 and 1985, about the penalties and not the facts. A law of memory and not oblivion. Congressman Ulysses Guimarães himself, when promulgating the Constitution, referred to the hatred and disgust of the dictatorship. Now, if there had been an amnesty for the facts, he wouldn't have been able to refer to the dictatorship in 1988, because the dictatorship would have been erased; forgotten in 1979. But political amnesty in Brazil was only about sanctions. It was and is memory.

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