

## Amnesties, pardons, and national reconciliations

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**Summary:** Making use of political philosophy and law, we approach the theme of the pardon and its implications in contemporary public policies, especially regarding the experiences of countries with authoritarian traditions, like Brazil, Argentina, Chile and South Africa. Considering the reflections on the theme of the pardon by Jacques Derrida and Hannah Arendt, we seek to understand the relationship of actions like amnesties, pardons, and national reconciliations to the tension between memory and forgetfulness of the violations of human rights. Rethinking the traditional idea of pardon when confronted with politics and law requires one to consider an intrinsic relationship between the concepts of democracy and crimes against humanity.

**Keywords:** human rights, democracy, memory, pardon

### 1. Introduction

The collective catastrophes imposed by regimes of authoritarian nature, be they of racist character like *apartheid* in South Africa, or be they of strictly political character like the military dictatorships in Argentina, Brazil and Chile, require daily efforts of reflection as well as political action. These governments were characterized by the systematic violation of their citizens' rights by brutal military and police institutions. (Worst of all.) The whole scheme was set up and maintained by the state which institutionalized the imprisonment, torture, disappearance<sup>2</sup> and murder of political opponents, as well as people without any

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2 Of all of the crimes committed by the authoritarian regimes, the most repugnant maybe that of the disappearance - it is a process in which the victim is arrested and tortured for some time, before being murdered and to have his/her body hidden away. This has been a practice that left very clear the dictators' intention not to be processed or incriminated in the future. The regime gets rid of the political opponent without the need of legalizing his/her detention and of proving his/her fault, besides terrifying the relatives and any opposition. The physical destruction of the political opponent without giving any answer to society seems to have initiated in the sixties, in Guatemala, where for the first time the word disappeared was used to designate the victims of the repressing state. It is adopted as governmental politics during dictatorial regimes

link to, or participation in, resistance movements. Although in these countries, transitions to democracy have been negotiated, often with the dictators in their public offices, their societies see themselves confronted with the problem of how to reconcile the painful past with a democratic present, and still manage the conflicts that don't end with a mere institutional passage from a dictatorial government to a democratic one. Human rights violations were not limited to the political institutions, but went beyond; they reached individuals, and they altered the subjectivity of those societies significantly. The question remains: why after more than three decades of the crimes, and even twenty years of democratic construction, does a considerable portion of the Brazilian society call for justice and for freedom of communication including the opening of the files recording the repression? What are the limits of the agreed-upon transitions? The attempts to answer these questions, although different in each country, show the importance of the fact that, even with every pressure for forgiveness, pardon, amnesty and national reconciliation, the investigation of the past is needed within the new democracies.

## 2. Negotiated Transitions

The authoritarian regimes of the twentieth century have demonstrated an outstanding element of modern time: the dissolving of memory. In societies that discard tradition and the past in favor of a future objective, memory doesn't influence the process of legitimizing political power. If tradition and the events of the past do not seem to be the criteria of social stability anymore, then the model of the social contract, i.e., the consent of the majority becomes more important. Volitional capacity, i.e., the ability to make rational choices, doesn't have a social history and its formulation seeks a natural process to be accomplished by institutional regulation and political action. The depreciation of memory in modern times is not due to a mere lapse, but to the rise of certain concepts and principles of action for political power, e.g., sovereignty, the general will, efficiency, etc.

For modern thought each person's behavior, public opinion and institutions have become elements of a calculated political logic, transforming action into a process that follows predetermined stages. The technique of the action is the consequence of the specialization of politics, a procedure in which only those qualified by the technique are enabled to participate. In current democracies, the citizens have distanced themselves from the public dialogue, not only due to the lack of practicality (there is great difficulty in gathering all of the individuals at the same time), but because they have distanced themselves politically as well (the current indifference for political issues is more than obvious). They also lack a particular knowledge of the political process which is reserved for their representatives, the professional politicians.

In turn, although dictatorial regimes have usurped freedom of expression and imposed a severe control of information in the public realm, the imposition of forgetfulness was

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and reaching fateful numbers in Chile (4.000) and in Argentina (9.000) - according to estimates of human rights and family entities. In Brazil, where we have about 160 political missing persons, the Law of Amnesty, in one of its articles, disposes on the supply of certificates of 'supposed death' for the people who disappeared *during the military regime*

perpetrated by intervention in the most hidden spheres of society. Governments that violated human rights turned the manipulation of information into an efficient tool of social submission; because the inverse of this, i.e., the use of memory narrated freely, would become an inopportune instrument of resistance and condemnation of these regimes. Therefore, any attempt to return to the plots of the past would be rendered as an act of sabotage against the negotiated transitions.

### 3. (In)justice in the New Democracies

In certain countries, those responsible for the repression allege that they received a superior official's orders (e.g., Argentina); in others, the most usual allegation is that only some uncontrolled or undisciplined sectors committed abuses (e.g., Brazil). These are used to excuse the charges. In most of the transitions to democracy, the unequal balance of power affected the negotiations of the amnesties. However, more and more the legality of such amnesties is put into doubt. Let us look at the Argentinean case, in which the Supreme Court cancelled *Ley del Punto Final* (Law of the Final Point) and *Obediência Devida* (Owed or Proper Obedience) in 2004. In Brazil, the Law of Amnesty excluded political and related crimes from legal prosecution, including the practice of torture, disappearances and political murder. The exiles returned to the country and clandestine militants and persecuted people received full rights, but in compensation those responsible for these crimes didn't have to face any lawsuits. According to international law, in which the concept of "crimes against humanity"<sup>3</sup> is used, crimes concerning human rights violations are considered separately from those crimes which benefited from amnesty laws. This idea was well formulated by Dalmo Dallari:

The torturers who killed their victims committed homicides, which is felony against life. They were not forced to torture and many times, by their own will, imposed a kind of suffering on the victims that, for its nature and intensity, would kill any normal person. Besides, the torturers were public servants, either civilian or military, acting professionally, for remuneration, not being able nor in the position to allege political objectives. The crime committed by them is autonomous in relation to the political crime committed by the leaders. If some of them want to sustain that he/she acted under coercion, then he/she should explain who gave the order on behalf of which they tortured and the Jury's Tribunal will decide whether or not the proof of that allegation is convincing.<sup>4</sup>

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<sup>3</sup> Aware of the national problems and limitations reemerges the interest for an international jurisdiction capable to process the accused for crimes against humanity. This jurisdiction, signed by 120 countries in 1998, in the document "Statute of Rome", in the city of same name, became only valid from this date on. Certain countries already hold reciprocal and own agreements for which the national amnesties didn't have any validity (this was the case of Pinochet's prison, in England, in 1998, at the request of a Spanish judge).

<sup>4</sup> DALLARI, Dalmo de Abreu, "Crimes sem anistia". In: TELES, Janaína (org.), *Mortos e desaparecidos políticos: reparação ou impunidade?* São Paulo: Humanitas, 2000, p. 23-25.

#### 4. National Reconciliation and Amends

Amnesty laws or pardons<sup>5</sup> and the subsequent reparations through compensations were intended to conjure up the memory of the multiple ruptures and displacements produced by the repression. In Brazil, the *Lei de Anistia* (Law of Amnesty) was promulgated by the National Congress during the authoritarian regime in 1979. The laws regarding recompense to the relatives of dead and missing persons (national law) or of the torture victims or victims of political violence committed by the State (state laws), restricted to a few states, were implemented in the nineties. The amnesty brought the exiles back to the country and legality to persecuted and clandestine individuals. However, in the case of the dead and the disappeared, the Brazilian law instituted a certificate of unknown whereabouts with presumed death which exempted the State from investigating the circumstances of the crimes or even the whereabouts of the bodies. The crimes of the dictatorship were simply no matter for discussion, not even so that they could be objectively forgiven. The crucial point alleged by the political institutions for this vacuum in the law was the possibility of a break in the process of gradually opening up that had been adopted by the military and to some extent by the National Congress. Sixteen years after the amnesty, President Fernando Henrique Cardoso's government faced the need to fill in the gap in the history of the country by presenting the project of *Lei dos Desaparecidos* (Law of the Missing Persons) to the Congress. This law intended to compensate family members who were not considered by the law of 1979. The law was limited to confirm the family relationship of the relative to the dead or missing person and to compensate the family member without opening the files of the repression. The same government, contradicting constitutional law, mandated during the last week of its term in office in December of 2002 that the opening of secret public files be delayed for an indefinite time. (According to the law of the Federal Constitution of 1988, the files were to be opened in 20 years, with an extension of another 20 years at most, i.e., a maximum of 40 years.) In March of 2005 the Câmara Federal approved MedProv228, presented by the government of the current President Lula, which extended "indefinitely" the time of prohibition of publication, which hardly alters the previous government's measures. Thereby, Brazil represents a model country for the politics of forgetfulness by displacing the vivid tensions of political memory with the cold approach of the laws of reparation and recompense.

In Chile, the military granted itself amnesty already in 1978, thus trying to legalize the regime long before it was feasible to think about a transition to democracy. Pardon laws were decreed by the government of *Conciliación* (Reconciliation) in 1989. With the return of civilians to power in 1990, the *Comisión Verdad y Reconciliación* (Commission for Truth and Reconciliation) was created. Its purpose was to establish a record of the disappearances and deaths, including investigations about the locations of the missing and dead. At the same time the commission recommended indemnifications and

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5 Because of social interest, the amnesty seeks to turn anybody non-imputable that, presumably, has committed some crime, although there may not exist any certainty of guilt and not even a condemnatory process. Yet the pardon is granted to people that have been condemned for their crimes. The cases of criminals who assume publicly their crimes are included in the pardon as, for instance, violators of human rights who have admitted their crimes at the *Truth and Reconciliation Commission* of South Africa.

compensations to the victims or their families. At the beginning of the current decade, leaders of the former military regime were to be tried and condemned for human rights violations. The most well known result of this was the detention of former dictator Augusto Pinochet for prosecution for frauds related to the public treasury.

In Argentina, the downfall of the military regime occurred at a moment in which the credibility of the Armed Forces suffered a serious crisis as the result of the disastrous expedition in the *Guerra das Malvinas* (Falklands War). With the intention of learning about human rights violations during the dictatorship, the *Cómision Nacional sobre la Desaparición de Personas* (National Commission on the Disappearance of People) was founded in 1983. It was known popularly as *Comisión Sábato* because it was presided over by the writer Ernesto Sábato. With total contempt for the findings of the commission, the laws of *Punto Final* (Final Point) were promulgated in 1986 and those of *Obediencia Debida* (Owed or Proper Obedience) in 1987, with the intention of appeasing the exalted spirits among the military, who at that time reacted with pressure on President Raul Alfonsín and revolted against the investigations concerning the dictatorship. Nevertheless, in this country some leaders of the dictatorship were also taken to the tribunals and punished. This worsened the conflict between society, the military and the political establishment. In the Argentinean case, as in the Chilean, there was also a conflict between the politics of forgetfulness and the punishment. Tensions increase as these practices are deepened, just like one revengeful action begets another.

In contrast, by valuing the narratives of the past, the South African society tried to recover the memory of the painful moments from the official burial of this information in an attempt to suture the wounds that distance punishing and forgiving. Well aware of the post-dictatorship experiences in Latin America, South Africa created the Truth and Reconciliation Commission (TRC), which determined procedures of confession and apology. Each witness of violence who made his/her deposition before the TRC gave account of the torture, abuses and lies of the repressive forces. Those who thus contributed to the survivors' mourning or even to the judgment of the ones who didn't present themselves to the Commission would receive the pardon. In spite of the innovation in the treatment of the narratives, nothing guarantees the effectiveness of the pardon because there are elements of subjectivity that are not yet analyzed and this is still an ongoing process. However, we can say that the reconciliation can be viable after a procedure for confession, but it will hardly happen where there is no such initial stage. The TRC was characterized by two innovations in relation to the other Latin American experiences: firstly, the Commission listened to the testimony not only of the victims (which is the case of the Laws of Reconciliation in Brazil, and of the Truth Commissions in Chile and in Argentina), but also to the testimony of the officials and military responsible for the killing and torturing; secondly, the TRC made these experiences public by publishing the narratives which emerged from its jurisdiction. This had an impact on society, on its subjectivity and even on the public politics adopted later.

## 5. Ethical and Legal Responsibility: the Question of Guilt and Judgment

The idea of collective guilt was applied - for the first time in history for the German people - in the “general accusations” against a society, a country, a people.<sup>6</sup> The existing fear of the societies which are inheritors of authoritarian regimes to judge, to name and to attribute guilt to the violators of the fundamental rights of the human condition is unquestionable. The point is not in wanting to judge the omission of the many within the offending nation, but to perceive institutions and societies in which personal responsibilities are investigated, and men of flesh and blood, whose actions are certainly human actions, are not confused with the systems and political regimes or even with capital sins (i.e., sins that the Abrahamic tradition considers to be susceptible to divine pardon). Considering the values of justice and law, it is important that such criminals appear before the tribunals for the transgression of laws (national or international) whose existence is seen as essential for a civilized cohabitation among human beings. The legal and moral questions are not the same, but both possess something in common, i.e., the fact that they presuppose the exercise of judgment.

The ethical questions are not limited to the personal pain and the sadness of those who suffered under the regimes, but include the difficulty the involved segments of society have in reconciling with a traumatic past. That type of redemption from the horrors of torture, death and disappearance seems, for the totality of society, to transcend the moral categories as well as our patterns of justice, something that would be difficult to condemn and to pardon. Primarily for the victims this is difficult to approach. One of the main difficulties is the denial of society and the involvement of the State in these crimes, as if, ultimately, there had been some legitimacy for the regime. A peculiar appropriation of the idea of political representation already accomplished in history by the fascist German NSDAP-regime and by some monarchies, implies that this concept suffers an inversion during the dictatorships: “it is because one governs, that one is a representative.”<sup>7</sup>

Our ethical considerations build mainly around examples and concepts of what is correct. Frequently, the conduct of the criminal is not studied. The horror of the crimes of the dictatorships is about the worst that anyone with a healthy mind could imagine. In democracies, these excesses are not thought of as questions regarding the fundamental ethical topics, but as a purely institutional occurrence, as if what happened had been just a result of conflict among violent and radicalized sections of society. This gives birth to the idea of excessive action, but supposedly just against those who made the wrong political choice. Inside of that thought, if other people besides the violent segments were affected, this happened because of the uncontrollable characteristics inherent to the violence in politics. It is a frequent view, mainly held by the victims or their relatives, that the most shocking aspect of the post-dictatorship era is the behavior of the democrats,

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6 The idea of “general attack” was formalized juridically by the definition of crimes against humanity, in the *Statute of Rome*, creator of the *International Penal Tribunal*. It is defined that those crimes are against humanity if committed by politics of a state or an organization.

7 CHAUÍ, Marilena, “A tortura como impossibilidade da política”. In: *I Seminário do Grupo Tortura Nunca Mais*. Petrópolis: Vozes, 1987, p. 32.

even more than the behavior of the criminals, in facing the great fear of the disclosure of the past.

These situations take us to the need of rethinking our ethical categories and also our judicial ones. The ambiguity found regarding the crimes against humanity is due to the fact that on one hand, the people prefer to forget the traumas and to opt for actions to pacify society. This is comprehensible as an attempt to put an end to the experienced suffering. On the other hand, people are shocked by the reports of the committed crimes and the impunity of the perpetrators. If a certain sense of justice makes us think of punishment, that same common sense informs us that not all our desires are viable.

It is important to highlight the fact of personal responsibility. When we name criminals, that is not to be confused with the “political responsibility that every government assumes for its predecessor’s acts and malefactions, and that which every nation assumes for the acts and malefactions of the past.”<sup>8</sup> That vicarious responsibility of a nation or a government, assumed by mistakes that we didn’t commit, is not the same which a criminal should assume in front of the jury. Although it is not a voluntary action, which is debatable, the admission of collective guilt would result in the non-guilt of all.

Another question appeared with the end of the dictatorships: the idea of a criminal action executed in obedience to superior orders, as if it would be the duty of a government employee, as supposition to absolve the author of the crimes<sup>9</sup>, however, in front of a jury, not a system, an association, a history, but always a person. An employee of the State, no matter what the crime might be, is a human being, and in this condition he can find himself in the defendant’s seat. In that way, it is not possible for the individual to allege in front of a jury, that the participation in the crime was due to the condition of being a government employee and not a voluntary choice. One may not argue that in order to work properly, one had to follow the orders of one’s superior. Hannah Arendt, when analyzing the characteristics of a bureaucratic political system, as a government giving authority to positions instead of giving authority to individuals, concluded that it would constitute a regime with no one in charge, because the guilt relapses on all and, as we have already observed, it is the same as if nobody were to be blamed, thus making impossible “the location of the responsibility and the enemy’s identification.”<sup>10</sup> Therefore, so that personal responsibility, i.e., legal guilt can be established, it is necessary to transform the employee of a certain position into a human being and citizen. When appealing to the arguments of the collective responsibility of the State or to obedience to superiors, things get mixed up because the chain of command, i.e., the authority over the subordinated posts must be considered in a tribunal, in order to establish the instigator of a certain crime. Finally, it should be emphasized that the operators of the repressive apparatus were not only mere employees of low rank, in the majority, they belonged to the military elite. The officials trained at preparatory schools composed the most general net of the repression and were responsible for analyzing the data obtained by torture and for the ensuing criminal action. We should still emphasize that the employees’ personal

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8 ARENDT, Hannah, *Responsabilidade e julgamento*. São Paulo: Cia. das Letras, 2004, p. 89.

9 The model of this idea was the *Lei de Obediência Devida*, approved by the National Congress of Argentina, in 1987.

10 ARENDT, Hannah, *Sobre a violência*. Rio de Janeiro: Relume-Dumará, 2000, p. 33.

responsibility doesn't eliminate the need for judgment of the political system from the legal and ethical point of view, or even as an aggravating circumstance.

In the classic philosophy of the State, exceptional or emergency measures are not outside of the jurisdiction belonging to the legal structure, because in principle they are sovereign measures of governments forced by emergency situations to implement extreme actions. However, concerning the crimes of the dictatorships, this concept is not applied because these governments were not forced by some need to save democracy against a communist threat, as it was alleged in Brazil. Although "Reason of State" appears similar to "reason of self defense" it must be considered within a situation of legality, and executed only in order to restore normality, which is impossible if the state is not constitutional. There is the idea spread by several scholars - and in the case of Brazil, undone by Elio Gaspari's meticulous historical and journalistic work - which asserts that torture, disappearance and murder didn't pass beyond being activities of criminal groups embedded in the government and did not correspond to some coordinated action of the State. Although certain types of actions were restricted to repressive groups, the outcome was the spread of fear and terror among the whole population, especially among those who thought of resisting, thereby strangling any attempt of a more open opposition. In the seventies, Olimpio Mourão Filho, a general who participated in the coup d'état of 1964, made this analysis: "The tortures were the source of the inquires enforced in the attics of the DOPS or of the barracks, and the whole society was dominated by fear, anguish and suffering".<sup>11</sup>

Research by the North American political scientist Anthony Pereira states that the political repression in Brazil reached much smaller figures of dead and political missing persons than in countries like Argentina and Chile, even with a regime of longer duration, because there was a "judicialization of repression." In Brazil about 400 people disappeared and died - in Argentina 20,000 and in Chile 5,000. In Brazil 7,378 processes were opened, at the Argentinean tribunals this number reached 350 processes, and in Chile about 6,000. I cite an interview with Anthony Pereira:

"The gradation and the judicialization of the Brazilian repression had a positive side, because it gave the defense attorneys time and institutional space to defend the life and the rights of their clients. On the other hand it also 'normalized' the repression and divided the responsibility in a quite harmful way under the perspective of a democratic judicial reform after the end of the military regime. In the Brazilian repression, the promoters of the Public Prosecution Service (Ministerio Publico) accused people for national security crimes, civil judges in the military courts judged the crimes, and the Supreme Court revised (and frequently maintained) the sentences. This motivated important sections of the civil judiciary elite to defend the military regime and it motivated them to blockade the reforms after the return of the civil regime. They perpetuated the vision that the repression of the military regime had not been that bad."<sup>12</sup>

<sup>11</sup> GASPARI, Elio, *A ditadura envergonhada*. São Paulo: Cia. das Letras, 2002, p. 142.

<sup>12</sup> Anthony Pereira, Interview for the newspaper *Folha de S. Paulo* of 5th of April of 2004, p. A10. The book with the completes of this work should be published in 2007, under the title *Political (In)Justice: National Security. Legality in Brazil and the Southern Cone* (University of Pittsburgh Press).

Because the crimes against humanity were actions carried out as operations of the repressing State, they were generally carried out with the legal consent of the constitutions granted by these regimes. The explicit racism of the South African constitution is worth mentioning because it classified the people as white, black and colored and established segregated territories for the different ethnic groups. The authoritarian regimes of the twentieth century differ in this from the tyrannies of previous times: everything happened inside an imitation of legality and even in the name of the law.

Up to now we have examined considerations regarding guilt and personal responsibility within a dictatorship, especially those perpetrators of crimes against humanity. Now it is also necessary to contemplate vicarious responsibility, i.e., the situation of the responsible individual for things in which he/she did not participate actively. We know that it is not possible to feel guilt for something that was not done. Guilt is something strictly personal and it doesn't refer to intentions and potentialities. Responsibility differs from the legal and judicial definition of guilt, because it has its origin in political action and refers to social relationships in the public sphere. However, if the political questions send us to the collective sphere, the problems of ethical or legal origin have a point in common different from politics: the reference is the individual, or the action of a single person. Thus, it is possible to point out two necessary conditions for establishing collective responsibility: first, a person may be considered responsible even if he/she did not participate actively at the event; and second, the reason for this responsibility is membership in the offending group. Now we can propose a differentiation between the collective responsibility of political origin and the legal or ethical fault of personal character. In Hannah Arendt's words we find the political condition of the collective responsibility:

“That vicarious responsibility for things that we didn't do, to assume the consequences for actions we are entirely innocent of, is the price we pay for the fact that we live our life not by ourselves alone, but among our fellow humans, and that the ability to act which, after all, it is the political ability par excellence, can only become real in one of the many and multiple forms of human community.”<sup>13</sup>

## 6. Amnesty and Pardon

Every State has the prerogative, usually defined in its constitution, of forgiving those who offend its laws. In the Brazilian Federal Constitution of 1988, amnesty exists as competence of the Union (“Art. 48. It belongs to the Union: [...] XVII - to grant amnesty”) and of Congress, with the President's approval, [...] to dispose on all matters which are in the competence of the Union, especially on: [...] VIII - concession of amnesty”). When a pardon is proclaimed for an entire social group it is called amnesty, a word that usually comes associated with human rights (Consider for example the organization *Amnesty International*<sup>14</sup>). Pardons and amnesties have long existed in human history, sometimes

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<sup>13</sup> ARENDT, Hannah, *Responsabilidade e julgamento*. São Paulo: Cia. das Letras, 2004, p. 225.

<sup>14</sup> The NGO 'Amnesty International' was founded in December 1961, by the English lawyer Peter Benenson, instant in which the term 'prisoner of conscience' was coined, aiming to render solidarity to anyone who is persecuted by authoritarian regimes.

because of benevolence (granted to those who have already suffered some punishment for their crimes), for political reasons (to put an end to civil wars or insurrections), for legality (to absolve people who appeal their innocence) and for festivities (to celebrate some important date). The constitution of each state tries to determine the conditions or limits for the application of individual or collective pardons. I would like to mention again an example from the Brazilian Federal Constitution. In Article Five it expounds on the limits of amnesty: “XLIII - the law will consider as non-bailable crimes, insusceptible for grace or amnesty; the practice of torture, illicit traffic of narcotics and similar drugs, terrorism and acts defined as hideous crimes. The instigators, the executioners and those who could have prevented carrying out these acts are answerable for them.”

The most frequent use of amnesty in the Occident has been to put an end to civil conflicts or revolutions. It is used as a military measure to interrupt hostilities such as the case of the American Civil War. It has also been used to contain political conflicts and to restore ‘harmony’ in the social life and politics of a nation. The amnesty granted by the American President Gerald Ford to his predecessor Richard Nixon in the Watergate scandal is an example of this. Amnesty has been granted to members of governments charged with corruption or human rights violations in order to make them non-imputable. One should notice that amnesty granted to political prisoners by authoritarian regimes pretends exactly the opposite, i.e., to undo an injustice committed in the past (in general by the state), and to return citizenship to the affected individual. However, amnesty is usually a result of political negotiation in which criminals of the recent past are granted non-imputability as a form of political and social pacification.

The real proposition of an amnesty - and this can be verified in practice - is not to promote national reconciliation or to decrease feelings of revenge in a nascent democracy, but to make it possible for affected people to participate in the daily life of a nation. In transitions in which the democratic sectors don't possess the necessary strength and conditions to find a fair solution for the committed human rights violations, i.e., to punish those responsible, amnesty is used to assure the continuity of the process of democratic retaking. Without amnesty the conflict could get out of institutional control. Cases in which injustice is perpetuated when the military or corrupt individuals discredit the concept of amnesty need to be questioned on the basis of their ethical merits. Because in many cases amnesties have been promulgated by governments who were involved in crimes against humanity to protect their own interests, the Statute of Rome and the International Penal Tribunal (TPI or International Criminal Court) were created. According to these international instruments of human rights, crimes against humanity can not be annulled and these amnesties are void. Rulers who forgive torturers before trying them might have to face up to the international penal courts.

The Truth Commissions created in some Latin American countries (Peru, Bolivia, Uruguay, Chile, El Salvador and Haiti) and in South Africa have been an attempt to solve the dilemma of forgiving or condemning the rulers and the military involved in these crimes. The Commissions were established as a type of pre-judgement of the torturers and political murderers because they act independently of any judiciary action, but they have frequently been used as an alternative to justice. This is because while the Truth Commissions find enough facts and findings to incriminate those responsible for crimes

against humanity, those responsible for the crimes are often still in powerful positions within the democratic State. A pardon can be useful for political transitions, but it often falls short of what should be done with respect to the obligation of processing and punishing those responsible for human rights violations. A Truth Commission could serve the valuable purpose of justice, collecting evidence for subsequent judgments, if it were organized independently from government and political institutions. However, institutions and rulers rarely grant this status to the commissions. The contemporary democracies evolved from authoritarian regimes are born of a fragility that is inherent to them; for they are political orders of diversified compositions which don't eliminate conflicts but look for a peaceful coexistence among the different groups. They end up aligning themselves with those who previously were responsible for the violations. The lack of courage and political will of the political elite as well as the fragile organization of the different social groups add to this condition.

The fall of the military regimes in South America during the eighties and the disintegration of apartheid in South Africa have resulted in the most notable investment in human rights since the end of the Second World War. It should be noted that exactly in the southern hemisphere of our planet - an area of our world considered inferior for many centuries, at least in terms of knowledge and social relationships - that important investments in human rights are being made. We used to accept the circumstances and theories of the so-called "first world" and we reduced our demands to a simple application of what comes from outside. What is valid for our history, our politics, our culture, our society, is equally valid for our reflection and for the actions we undertake on this basis<sup>15</sup>.

The history of the negotiated democratic transitions in Latin American countries shows that the judiciary system and the search for truth about what happened during the dictatorships don't form the basis for reconciliation and the democratic awakening. The first measures of the new governments were to compensate the victims and their relatives, but without giving any account for the circumstances of the crimes. In the case of missing persons, the compensations have done little to alleviate the pain of the relatives, because they have not even been able to bury their family members. However, following this period of recompense, the more the countries develop their democracies, the more the subject becomes prevalent again and the clamor for justice increases. In Argentina the amnesty laws of the Alfonsín and Menem governments are being reconsidered by the Supreme Court; and in Brazil the judiciary has determined that facts and circumstances of the disappearance of the *Guerrilla of Araguaia* participants have to be investigated, and it has decreed that the respective military documents must have full public disclosure. Democratization becomes unviable for a country in which society gives credit to the idea that amnesties ensure democracy or promote national reconciliation. If repeating the offense through revenge is the natural reaction to a damage - returning to the transgressor the same damage he or she caused - ; then a pardon is "the only reaction that doesn't just re(verse)-act, but acts new and unexpectedly, without being conditioned by the action that provoked it and its consequences free so much the one who grants the pardon as the one who receives it."<sup>16</sup> According to Hannah Arendt, the pardon is an

<sup>15</sup> RIBEIRO, Renato Janine, *A sociedade contra o social. O alto custo da vida pública no Brasil*. São Paulo: Cia. das Letras, 2000. p. 11.

<sup>16</sup> Cf. ARENDT, Hannah, *A condição humana*. Rio de Janeiro: Forense Universitária, 1997, p. 253.

alternative to punishment and puts an end to something that could continue in an endless chain of revenge if there were not this type of mediation. The public character of the pardon was produced and authorized by the international community and although it did not merge with the reaffirmation of human rights, its history did intersect with it. "This kind of mutation has been structuring the theatrical space in which the play stages - sincerely or not - the great pardon, the great regret scene that occupies us."<sup>17</sup> The idea of the pardon could make us think that this movement is a result of the great social and political convulsion of authoritarian regimes. But it's not just that. The pardon appears as an interesting movement in humanity's involvement to solve in a better way the conflicts that we generated on our own.

Amnesties have their function in creating the conditions for the reinstallation of democracy, but they don't guarantee the end of the conflicts generated by the crimes committed by authoritarian regimes. Traumatic political memoirs are like a mark or scar that political plastic surgery has difficulty covering. If by definition of the international court, crimes against humanity are unforgivable, there are enormous difficulties in the pragmatic process of doing justice. In principle, effects of a pardon granted by amnesty laws are limited, because forgiveness is a prerogative of the victims, not of a majority of the members of a given society, or still, of their political or judicial representatives. Because these crimes target victims in their human condition, it can be said that a pardon is humanity's prerogative. The procedure should be preceded by a confession which recognizes guilt and, if possible, by a request for pardon in the public realm in order to guarantee legitimacy and publicity and to lend authenticity to offenses that happened in the past.

The concept of crime against humanity when perceived as historical progress nevertheless possesses obscure characteristics of fragile support.<sup>18</sup> It is central to the entire movement of pardon, which in turn legitimates and sustains its discourse. This happened primarily with the Truth and Reconciliation Commission in South Africa, but also with the Truth Commissions in Latin America where autonomous investigations concerning the State were only possible by inserting them into the discourse of reconciliation and pardon. In democracies that evolved from authoritarian regimes, the discussion on how to deal with the painful past necessarily involves the concepts of human rights, crimes against humanity, and pardon, which are related to each other within the same public realm torn apart by consensual transitions arranged among the political institutions, but without the legitimation of social debate.

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<sup>17</sup> DERRIDA, Jacques, *El siglo y el perdón*. Buenos Aires: Ediciones de la Flor, 2003, p. 9.

<sup>18</sup> As crimes against the humanity just qualify those offenses which are practiced within the framework of a "general attack" on a population, which has been generating controversies. There is doubt, for instance, if the crimes of the military regime in Brazil can be qualified as "crimes against humanity", in other words, a "general attack" or only an attack on small groups without social representation. However, to my understanding, the definition of the Statute of Rome, in its art. 7.<sup>o</sup> seems to be clear: "the term 'attacks against a civilian population' is understood as any conduct that involves the multiple practice of actions referred to in paragraph 1.<sup>o</sup> [tortures, disappearance, political murder etc] against a civilian population, in agreement with the politics of a state or of an organization practicing those actions or pursuing such politics."

## 7. Acting Democratically

Modern political theory considers democracy as a system of government that is based on the process of dispute among organized interest groups forming political parties, which are elected by vote. This procedure delegates to the representatives the function of deciding what the problems are and how to solve them. Elections exercise the function of rotating the occupants of the political positions in the government, thereby avoiding the installation of an authoritarian regime. On the other hand, it is a function of elected representatives to leave channels open for stabilizing interested political wills through the general will expressed by the State in order to moderate conflicts and desires. In addition to the sphere of the institutions - the State, political parties and the judicial system - democracy also consists of the participation of society through social organizations and special interest groups. The political structure presupposes public voicing of different perspectives and the freedom of expression to determine public opinion.

The democratic system constituted by countless discourses and the established institutions, is added to modernity for possessing “an important innovation - human rights. (...) The crucial purpose of human rights is to limit the power of the ruler.”<sup>19</sup> Its relevance consists in considering the question of political power from the perspective of those who are not part of the institutions, inclusively protecting those who somehow don't enjoy full citizenship, the excluded ones. Human rights originated from individual rights as impeding values of the monarch's power, and later to control the abuses of authoritarian regimes. In the twentieth century, especially after World War II, human rights became hallmarks of democracy. “The progress of the modern democracy (or the democratic character of modern politics) is caused by rights, not representation.”<sup>20</sup>

One of the problems of the political rights is that the illusion of consensus doesn't last more than moments; losing strength the more time for political activity is needed. The danger is in paralyzing the fundamental element of politics: the freedom to act. For Hannah Arendt, this freedom is intimately related to the capacity of men and women to begin something unusual whenever they act together in the public realm and through speech. Freedom lies not in the choice of this or that way presented in the public realm, but in the possibility to act among other people without hindrance and without obscuring the narratives.

Normative consensus which is characterized by pluralism at the institutional level seeks to establish a non-contradictory diversity by appeasing social differences and by establishing reconciliation as a central and neutral axis. Central, because this reconciliatory axis resides in the centralized institutions of political power (the State, the parties, traditional social organizations, etc.) and neutral, because the language adopted by the consensus requires a peculiar discipline dealing with the antagonisms and confrontations of the social plurality. However, of the whole recent repertoire of countries reconstructing democratic systems, the tension between memory and forgetfulness has turned into a most dramatically staged controversy. Between revelation and concealment, proof and denial, subtraction and restitution, the *gestalt* of the memory remains latent

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19 .RIBEIRO, Renato Janine, *A democracia*. São Paulo: Publifolha, 2001, p. 15 and 22.

20 *Idem, ibidem*, p. 38.

because the subject of human rights violations notoriously puts the image of corpses without burial into the narratives of the social body. The image of an historical mourning is not completed. The sense of loss is not assimilated. Both maintain the unfinished mourning.

Crimes against humanity, prisons, torture, the disappearance of political opponents, were techniques employed in the attempt to silence the past. Respectively, the transitions and the politically organized democratic systems that succeeded the authoritarian regimes, contributed in most cases to the concealment of political memory in a gradual way. Yet not eliminating, but condemning the memory to be excluded from the public sphere, limits the memories of the witnesses and families to their private relationships. Through a society without intimacy with the events of the past, the inheritance of such regimes imposes on its citizens the celebration of forgetfulness and contentment with the consummation of the instantaneous, the momentary life, negating access to foundational, culture-shaping ideas. In post-authoritarian democracies, memory is threatened by the elimination of information, but also by its devaluation. In this less brutal but more efficient way, each citizen becomes a compliant agent of the politics of forgetfulness, thus causing a profound deterioration in the public dialogue. With the chilling of democratic relationships, the displacement of public problems to the private realm presupposes the imposition of the forgetfulness about conflicts which generate resentments towards the authoritarian past. Ironically, the attempt to stabilize society through the politics of forgetfulness serves to reduce the public investment in politics.<sup>21</sup>

The memory of human rights violations that have been recorded in books, commemorative plates and recompense laws creates a lineal progression of the elements, but without the resources the reports and narratives have like recombining ends and beginnings, altering pauses, going back and forth, without any subordination to pre-determined rules. As such the memory as the re-collector and the re-creator of alternative critical reflections to the programmed continuity of the institutions is curtailed. The transitions from authoritarian regimes to democratic ones have presented the subject in two ways: on the one hand, it shows the importance of remembering through positive institutional actions; on the other hand, it pronounces forgetfulness as a sepulcher of the pains of the past.

## **8. The Therapy of Memory**

Among the ideas raised in this project, we can identify three conflicting and paradigmatic movements in the political memory of transitions from authoritarian regimes to new democracies: forgetfulness, punishment and excuse. Forgetfulness takes place through the amnesty laws. In this case the proposition is that the political institutions apply a social amnesia. However, unable to undo the histories of violence, forgetting generates repression and depending on the case, more violence, creating anomalies in the new or renewed democracies. Punishment is the opposite of forgetfulness and works as a form of revenge. Punishment refers to the retaking of the past political process, bringing the lived and unresolved feelings and emotions back to the surface. Excuse is generally structured

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<sup>21</sup> RANCIÈRE, Jacques, *O desentendimento — política e filosofia*. São Paulo: 34, 1996, p. 102 and 112.

through truth commissions, by which punishment is exchanged for the confession of the committed crimes (the indult). The narrative of the past, told by the executioner or by the victims, opens up the possibility of beginning something new by relieving paralyzing and morbid emotional and social loads. In all of these situations the concept of pardon is central to reflection.

To arrive at the exceptional moment of the pardon, it is necessary that all involved parts, the uniqueness of the victim and of the aggressor, mediated by the political institution as a third party, understand each other regarding the nature of the crime, about who is to blame and for what he or she is to blame, and also concerning the harm done to life within the society. This is something extremely difficult to accomplish in a country with an authoritarian inheritance. It is within this ambiguity where the concept of pardon can be useful to begin reconciliation knowing that it will be impossible to fully realize it. Lawsuits interfere with the emerging democracies. In Hanna Arendt's concept of action, politics is not envisioned as a final product, but as a procedure of relationships; also the process of the pardon adapts to a political and judicial possibility that, after once having been initiated, should not necessarily conclude in a pardon. This action seems to have the sole character of a political strategy or a memory therapy, trying to overcome the hate and the pain provoked by a painful past. Beyond these considerations, every apology of the pardon can be characterized as simple rhetoric or subterfuge to disengage from justice and politics.