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# EDITORIAL

Revista Meritum is a traditional periodical and a reference in Law, being classified with stratum B1 by the Coordination for the Improvement of Higher Education Personnel - CAPES, through the set of procedures called Qualis Periodicals.

The year 2021 began, with Volume 16, with one more novelty: the Jurisprudential Comments section. In this section, critical comments on relevant jurisprudential decisions, nationally (preferably from higher courts) and internationally (eg from International Courts of Human Rights), will be published. Comments will be accepted: a) based on consistent doctrine; b) with criticism in a scientific way; c) using solid, current and significant references.

Articles submitted to Revista Meritum vol. 16, no. 1, were evaluated by the Editorial Coordination, which examined the adequacy to the editorial line of the journal, formal and methodological elementary and advanced aspects, among others. Subsequently, each text was sent to at least two reviewers, through the double blind peer review system, for analysis of form and content, as well as the issuance of the opinion.

In this vol. 16, no. 1, prestigious issues of the legal universe related to the Democratic State of Law and the realization of constitutional fundamental rights. It seeks to analyze and debate perspectives that help to critically interpret contemporaneity and the challenges that arise from it.

On the occasion, the Editors pay their tribute and thanks to everyone who contributed to this laudable initiative of Universidade FUMEC and, in particular, to all the authors who participated in this publication, with emphasis on the commitment and seriousness shown in the research carried out and in the elaboration of the excellent texts.

You are invited to read and/or listen to the articles presented in a dynamic way and committed to the formation of critical thinking, to enable the construction of a Law aimed at the inclusion and implementation of precepts engraved in the Constitutional Democratic State of Law.

Happy reading everyone!

*Prof. Dr. Sérgio Henriques Zandona Freitas*
*Prof. Dr. Adriano da Silva Ribeiro*
Editorial Coordination

# THE FOUNDATION OF DECISIONS AND THEORY OF LEGAL ARGUMENTATION TO THE BURDEN OF PROOF'S DYNAMIZATION: THE CPC/2015 AND THE SEARCH FOR A CONSTITUTIONALIZED PROCESS

## DA FUNDAMENTAÇÃO DAS DECISÕES E TEORIA DA ARGUMENTAÇÃO JURÍDICA À DINAMIZAÇÃO DO ÔNUS DA PROVA: O CPC/2015 E A BUSCA DE UM PROCESSO CONSTITUCIONALIZADO

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**ABSTRACT**

The article aims to analyze the duty and right of judicial reasoning, to which the theory of legal argumentation contributes, as well as the system of distribution of the burden of proof brought by the Code of Civil Procedure of 2015, to ensure the constitutional guarantee to an adequate and effective judicial protection. It was found, through the deductive method, that the judge should legitimize his argumentation, granting material isonomy to the litigants regarding the production of proof, allowing procedural cooperation to lead the process. The

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research contributes to the areas of Constitutional Law, Human and Fundamental Rights, General Theory of Process, and Civil Procedural Law.

**Keywords:** judicial decision; judicial reasoning; argumentative discourse; burden of proof; procedural cooperation.

**RESUMO**

*O artigo objetiva analisar o dever e direito de fundamentação das decisões judiciais, no que a teoria da argumentação jurídica contribui nesse ponto, bem como o sistema de distribuição do ônus da prova trazido pelo CPC/2015, como forma de assegurar a garantia constitucional a uma tutela jurisdicional adequada e efetiva. Por meio do método dedutivo, constatou-se que o juiz deve legitimar a sua argumentação, conferindo isonomia material aos litigantes no que concerne à produção probatória, pautando-se o processo na cooperação processual. A pesquisa contribui nas áreas do Direito Constitucional, Direitos Humanos e Fundamentais, Teoria Geral do Processo e Direito Processual Civil.*

**Palavras-chave:** *decisão judicial; motivação das decisões; discurso argumentativo; ônus probatório; cooperação processual.*



# 1. INTRODUCTION

The Code of Civil Procedure of 2015 (referred to as CPC/2015) brought important progress, such as the attempt to provide judicial relief within a reasonable time, legal certainty as a guarantee for citizens, and greater democratization of the process itself to the litigant parties, who collaborate with the judicial body in the best way to resolve the conflict. What CPC/2015 aims at is making the proceedings more efficient.

Such a goal can be achieved by fostering dispute settlement techniques, the precedent approach, and the prohibition of surprising decisions. The judge's duty of reasoning is also highlighted, which is an issue that has increasingly been discussed nowadays since it aims to protect the integrity of judicial pronouncement, legal certainty, and human dignity. In addition, the CPC/2015 brought changes to the general theory of the proof, innovating by contemplating the possibility of dynamic distribution of the burden of proof, despite the previous model of static distribution of CPC/1973.

This article intends to deal with the duty of judicial reasoning and the theory of legal argumentation, as well as the change in the way of facing the burden of proof under the light of the CPC/2015, searching for an interpretation under the values and rules established by the Federal Constitution. The research problem that this study intends to meet is: how can the theory of legal argumentation, along with the duty to rationalize decisions and the distribution of the burden of proof, contribute to the magistrate's activity to reach a constitutionalized civil process?

The text was divided into three parts. The first of them presents a brief explanation of the innovations brought by CPC/2015 so that judicial relief is provided adequately and effectively. The second part discusses the theory of legal argumentation and judicial reasoning as a rational demand of the Democratic State of Law, reflecting on when a judicial pronouncement should be considered properly reasoned. The third and final part provides statistical evidence and the dynamic distribution of the burden of proof as instruments capable of validating a process based

on constitutional principles. It is concluded that the mechanisms brought by the CPC/2015 are increasingly based on procedural democratization and cooperation, and the judge, when deciding, must support his decision with appropriate rationality, distributing the burden of proof according to the peculiarities of each case.

The scientific method used for the preparation of this article was the deductive one, through a documentary explanation, with data collection and analysis of its significance, from bibliographic research, readings of doctrinal works, other scientific articles, legal journals, and other texts and materials, including the analysis of the national legislation. The research, therefore, suits the areas of Constitutional Law, Human and Fundamental Rights, General Process Theory, and Civil Procedural Law.

## 2. THE INNOVATIONS OF CPC/2015 FOR ADEQUATE AND EFFECTIVE JUDICIAL RELIEF: THE SEARCH FOR JUDICIAL DECISION REASONING

The constitutionalization of the civil procedure is the methodological and interpretative bias for the understanding of CPC/15, according to which the judicial procedure must be analyzed as an instrument of the effectiveness of constitutional values (NERY JÚNIOR, 1996, p. 19). Being hierarchically superior, the constitutional rules are those to which all others must adapt, including procedural norms (REALE, 2002, p. 343).

According to Article 1 of the CPC/2015, it is possible to observe that the procedural reform had the scope of organizing the civil procedure. The judicial activity was adapted to the current needs, being the magistrate's responsibility, after analyzing the peculiarities of each specific case, to address the meaning of the norm in the light of the Constitution, emphasizing fundamental rights and guarantees (CRUZ; CRUZ, 2010, p. 03-09).

In addition, the CPC/2015 created its mechanisms for the implementation of procedural safeguards, such as the establishment of the essential elements of the judgment, the primacy of the judgment upon the merits, the parity of treatment between the disputing parties, the need to state reasons for judicial decisions, and the prohibition of surprising decisions, which allowed the full defense led to the due legal process effectiveness, and generated, as a consequence, greater democratization of the procedure (ASSAF FILHO, 2015, p. 02). The encouragement of dispute settlement methods reinforced the participation of the population in the exercise of power, making the parties protagonists in the solution of conflicts (TRIGUEIRO; BORGES, 2019, p. 321).

This democratic view is closely linked to the realization of the Democratic Rule of Law (art. 1, *caput*, CF/88), by encouraging popular participation in the exercise of jurisdictional function (SILVA; NEVES, 2017, p. 100). Contemporary democracy is characterized by a broad context of institutional guarantees in which fundamental rights can be rendered effective (ALVES, 2014, p. 37-38).

The search for providing successful judicial relief within a reasonable period is aimed at ensuring means and results. This perspective binds the legislator and limits their performance,

guiding the regulation of procedural rules in a way the Federal Constitution can be ensured to the greatest extent possible (CAMBI, 2020, p. 302-304). Contemporary civil proceedings must seek the achievement of material law's aspirations, in particular the fundamental rights (ZOLLINGER, 2005, p. 121), and it must not raise unreasonable obstacles against justice attainment.

However, for fundamental rights to be guaranteed and concretely satisfied, it is necessary to draft appropriate techniques to ensure the maximum degree of effectiveness. At the level of constitutional jurisdiction, judges are not only subject to laws, but also the critical analysis of their meaning, as a means of controlling constitutional legitimacy (CAMBI, 2020, p. 302-303). After all, it is of no use for anyone to hold a material right if there is no right to the necessary process that shall ensure its effectiveness (CAMBI, 2020, p. 305).

As fundamental rights do not operate automatically, all involved parties in the proceedings shall participate: the judge must support their decisions; on the other hand, to achieve a fair decision, the parties need to cooperate (MITIDIERO, 2009, p. 140).

Article 93, IX of the Federal Constitution of 88 establishes that the complementary law edited by the Supreme Court shall issue the Statute of the Judiciary, binding it to a list of guiding principles, among which, that "all judgments rendered by the Judiciary shall be public, *and all decisions shall be reasoned*, under penalty of nullity" (BRASIL, 1988, online, bold added). This fundamental guarantee is corroborated by article 11 of the CPC/2015. Furthermore, article 20 of the Law on Introduction to the Rules of Brazilian Law (Decree-Law No. 4,657/1942) establishes that all decisions, whether from the administrative, controlling, or judicial spheres, must be public and reasoned, all practical consequences considered, and prohibits abstract legal values to support them (CAMBI, 2020, p. 447-448). The broad publicity of judicial decisions can be restricted when the protection of fundamental rights to privacy and advertising is recommended, limiting the debate to the parties, their lawyers, public defenders, and District Attorney's Office members.

Even in these cases, any judicial decision must be reasoned and explained in a clear, express, and consistent way. Also, the reasons of fact and law that led to such understanding, as well as the merits or procedural obstacles that would have prevented the analysis shall be described. All this is so that the judicial activity is transparent, allowing its control, so that the parties and third parties can understand the decision and, if applicable, challenge it (TALAMINI; WAMBIER, 2014, p. 73).

In addition to enabling the decision to be appealed, the reasoning is a means of preventing the judge from deciding based on personal impressions, which would give room for arbitrariness. By rendering a reasoned decision, the magistrate is observing the duty of cooperation towards the parties (article 6 CPC/2015), to which the civil procedural legislator attributed strong relevance. Also, to prevent the parties from being taken by surprise, the judge must ensure the right of both parties to be heard, if new and relevant circumstances arise (supervening facts or rights, for example), or if absolute nullities are found, as established by article 10 of the CPC/2015, which is the fundamental rule of civil proceedings and is bound to the principle that prohibits surprising decisions (BRASIL, 2015, online).

> [...] According to the traditional line of thought, judicial reasoning was seen as a guarantee of the parties, and the possibility of their challenge for reform was safeguarded. This used to be the only time in which procedural laws commonly ensured the need for supporting decisions [...]. In modern times*, the political* function of judicial reasoning was highlighted, which affects not only

> the parties and the competent magistrate to judge appeals, *but any person,* to specifically assess the impartiality of the judge and the legality and fairness of the decisions (CINTRA; GRINOVER; DINAMARCO, 2015, p. 92, authors' griffins).

The absence of reasoning violates the due process of law, so the judge shall carefully present support to every rendered decision. Article 489, § 1, of the CPC/2015 lists the occasions in which the reasons are not considered to have been given in any judicial ruling.

The CPC/15 adopted the mitigated principle of complete judicial reasoning, by establishing that a decision that does not face all the arguments opposed by the parties is not properly reasoned (CAMBI, 2020, p. 426). This principle, however, does not require the judge to face every request filed by the parties. When one plea is sufficient to determine the granting or denial of the claim, there is no reason for the magistrate to examine any other legal grounds that might have been presented (CAMBI, 2020, p. 428).

This means that the judge must examine all arguments of fact and law presented by the parties that are objectively capable of altering the outcome of the case. The evidence shall be indicated, and the interpretation used must be made clear. Not all questions raised shall be answered: irrelevant and impertinent arguments shall be discredited. If the magistrate focuses on the main allegations, the most relevant evidence, and the law applied to the specific case, the decision shall be properly motivated (RODAS, 2015, online). Moreover, if there is no need to produce further evidence, providing proper reasoning, the judge may enter a summary judgment upon the merits, following article 355, I, CPC (BRASIL, 2015, online).

> The duty of judicial reasoning: a) is a guarantee against the arbitrary exercise of power; b) serves as a guarantee against the influence of personal points of view (subjectivism); c) enables the parties to know the grounds of the decision, being a form of objection and a way of controlling the magistrate's reasoning; d) contributes to a greater degree of predictability and certainty of legal standards (CAMBI, 2020, p. 428-429).

The Democratic Rule of Law requires the judge to motivate its decisions so that there is no room for the magistrate's intimate conviction. When there are rational arguments, they justify the decision themselves, it becomes unnecessary that the magistrate convinces the parties or public opinion of their "right". To avoid the arbitrary exercise of power, the judge must not lose the dimension of objectively achievable procedural truth. It is known that the human perspective of the truth is imperfect and incomplete. The search for it, however, shall not be discredited (CAMBI, 2020, p. 417).

The truth is a "political value that cannot be renounced in democratic societies" (CAMBI, 2020, p. 424), the goal of every proceeding, a crucial element for judicial reasoning, and an outcome from the evidence filed into the records. A fact is considered true if it is confirmed by the evidence produced in the process (CAMBI, 2020, p. 423).

The obligation to state reasons is taken seriously when the judge motivates both legal and factual matters. The fictitious reasoning - in which there is no justification regarding the factual matters or the ones considered legally irrelevant - must be prevented. The fight against the arbitrary exercise of power must be carried out by avoiding legal discourses based on judicial subjectivism, which are manifested through decisions without any motivation or that present fictitious motivation (CAMBI, 2020, p. 424-425).

> [...] the risk of judicial omnipotence is not waived by simply using the principle of rational persuasion of the judge and respecting constitutional principles and guarantees. The judicial body, by justifying a certain view of the facts, based on vague and undefined criteria, cannot benefit from purely rhetorical formulas, devoid of content, by alluding, for example, to "material truth", "moral proof", "moral certainty", "prudent appreciation", or "intimate conviction". Such expressions, and other similar ones, allow subjectivism and semantic manipulation to take place because they do not guarantee any rationality in the evidence analysis, as well as imply false motivation of the decision. Also, they prevent society's effective control of judicial activity, the ones submitted to the jurisdiction and the higher instance (CAMBI, 2020, p. 425).

Judicial decisions need to be socially legitimized. Politically outrageous decisions do not result in the judge's replacement; however, they generate the discredit of legal institutions and law enforcement processes, which is catastrophic to society, which becomes unstable and less cohesive (CAMBI, 2020, p. 424). It should be noted that the duty of motivation is even more complex when said sufficiently motivated decisions are questioned.

It is not possible to state what a rightful decision is without talking about the problem of infinite regress since reasoning is an exercise that can be done indefinitely, with an unlimited series of arguments that may be challenged (CAMBI, 2020, p. 428).

> It is impossible to conceive of a situation that is well-founded in all its aspects. This, however, does not preclude the possibility of judicial reasoning. It does not discard the need to rationally seek the best arguments [...] it is a commandment of optimization or a principle that must be fulfilled to the best extent possible [...] Considering article 93, IX, of the Federal Constitution of 1988 a principle means saying that it must be obeyed according to the weighting of other values in conflict (legal limits) and the available factual possibilities (factual limits) ... the reasoning of the decisions necessarily passes through all the relevant legal facts for the solution of the case (CAMBI, 2020, p. 428-429).

The judge, when analyzing the facts that are relevant and relevant, fulfills a dual function: considering proven the facts that correspond to the facts narrated in the case records and analyzing these same facts in the light of the legal system, framing them within the principles and rules. However, it is not enough to address the fact as relevant: the magistrate must say why it is considered that way without clouding the merits' judgment with personal knowledge (except when this is legally allowed).

In order to comply with the principle of impartiality, the judge must not hold prior knowledge of the facts at issue (CAMBI, 2020, p. 430-431). Also, for reasoning a decision it is not enough to merely depict the event. For example, a fabricated photograph can cause the same visual stimulus as a real one. For this reason, the judge should qualify the described event as being an accurate and factual representation (CAMBI, 2020, p. 432).

> The procedural narrative to be sought by the judge lies in the reconstruction of the legally relevant events as well as those that may be pertinent to the judgment of the case; it must be true, even if it is not good [...] Since the lawyer does not have a duty to seek the truth since they are hired to defend the client's interests, they must present the most persuasive narrative. Thus, their narrative needs to be good, even if it is not true. This may be enough to win the case (especially when it comes to trial by the Jury Court, where jurors [...] are not submitted to the duty to motivate their decision). On the other hand,

> the judge, because of their impartiality, has the primary function of seeking the true narrative, that is, adequately reconstructing the facts, even if these are not transcribed in a good way. Good narratives that included false statements and private facts of evidential support, led to erroneous, biased, and unfair decisions. Ideally, the judge should produce good and true narratives, but if the first ones are not achievable, the second ones must be sought (CAMBI, 2020, p. 432-433).

When deciding the case and applying the law, the judge must consider rules, principles, values, and facts. Since a rule may carry several meanings when objectively interpreted, the magistrate builds the decision. The outcome of the court decision for the specific case is a legal standard.

The judge starts from an issue presented by the parties and operates guided by a "pre-understanding" of both existential reality and the text to be interpreted (CAMBI, 2020, p. 433-434).

> Supporting that article 93, IX of the Federal Constitution of 1988 should be understood as a principle means determining its application as far as possible. This conception allows working around the problem of infinite regress since there is no natural end to the chain of possible arguments as the possibility of new information and better arguments to be added cannot be excluded. However, to avoid an endless process of argumentation, with the impossibility of obtaining a "single correct decision", it is necessary to draw a boundary line (CAMBI, 2020, p. 437).

The judge must also explain the relevance of the presented evidence, indicating the reasons for assessing it in such a way. Therefore, although weighing the elements of evidence is typically an act that is not bound to any specific legal rule, the judge's conviction is not entirely free, as it subjects to logical and rational criteria of decisional control. This is done so that the personal and intimate criteria of the judge are reduced, and objective guidelines for a logical and rational evaluation are established (CAMBI, 2020, p. 435).

The proper motivation delivers sufficient justifications regarding the factual and legal matters and is based on good arguments not only for the judge who renders the decision but for all those who can later weigh the reasons for such understanding. The good judge manages to persuade the legal community, supporting every rendered order after considering the relevant points for the conflict solution, in addition to observing the same line of thought in related cases (CAMBI, 2020, p. 437-438).

The law must be constantly interpreted and reinterpreted, and the judicial decisions must be well-reasoned to ensure that there is no arbitrariness and that the parties have the real dimension of the meaning attributed by the Judiciary to the rights discussed in the case. The duty of judicial reasoning, therefore, exercises an intraprocedural function, in seeking to convince the parties of the reasons that generated the magistrate's understanding, which facilitates the challenge of the decision through appeal (the party knows the reasons that should be challenged). It also holds the extra procedural function of serving as a mechanism of democratic control of the power exercise. The motivation interests the succumbing party more than the prevailing one because the losing side needs to seek comfort and clarification in the court decision. Finally, the reasons stated are addressed to society in general, which has the right to acknowledge the arguments leading to the final understanding to exercise citizenship and social control of judicial power (CAMBI, 2020, p. 439).

> [...] It is not any decision that should be accepted socially as a form of exercise of power. One must therefore seek the social legitimacy of the judicial decision, and the judge cannot hide behind the supposed neutrality of the rule. Realizing fundamental rights is not the same as turning judges into legislators. Therefore, in addition to principles and rules, there must be a theory of legal argumentation, in which it is possible to seek a rationally reasoned decision (CAMBI, 2020, p. 439-440).

It should be stressed that, although the judge has the legal responsibility to motivate decisions, all the involved parties in the case must abide by the principle of procedural cooperation and provide legal arguments for their statements and claims. This allows a more adequate, quick, and effective judicial relief, with the distribution of justice and reduction of cases and appeals that hold the sole purpose of delaying the proceedings.

The correct argument leads to the appropriate reasoning, in so far as it contributes to legal certainty, the promotion of the procedural economy, and the intervention of the judiciary only in cases in which such pronouncement is required.

## 3. THE THEORY OF LEGAL ARGUMENTATION AND THE MOTIVATION OF DECISIONS AS A RATIONAL REQUIREMENT OF THE DEMOCRATIC RULE OF LAW

As for the rationality and righteousness of judicial decisions, the theory of legal argumentation is a great tool of neo constitutionalism, which is a methodology inspired by a post-positivist conception, based on the qualification of rules and their distinction of principles. According to this theory, the law cannot be studied as a finished product, created by legislative action, and should be seen as a process at the end of which a judicial decision is rendered. This is done not only through the analysis of traditional legal aspects, but also through information from other sciences, such as Politics, Philosophy, Sociology, Language Theory, etc. The principles hold a position of relevance, for they are considered fundamental norms that operationalize the effectiveness of constitutional standards (DORICO, 2013, online).

> [...] Both rules and principles are norms because they both say what should be. Both can be formulated using basic deontic expressions of duty, permission, and prohibition. Principles, like rules, are, reasons to legitimize judgments, even if of a very different species. The distinction between rules and principles is therefore a distinction between two species of standards (ALEXY, 2011, p. 87).

The existence and effectiveness of the facts depend on the legal argumentation. The judge shall decide which arguments are relevant to the settlement of the conflict. To do so, the magistrate must be based on axiological parameters offered by legal principles and rules, when selecting events within the spheres of interests protected by the legal system (CAMBI, 2020, p. 422).

In legal argumentation, legal discourses relate to internal and external justification. In the internal justification, which implies the logical control of the decision, what is sought is whether the predetermined forms were observed. The internal logic seeks to present the premises that

must be externally justified, avoiding the hidden reasons on which the decision is based, and which may be challenged and criticized by the interested parties. Internal justification requires the interpreter to use the general rules, contributing to the standardization, legal certainty, and fairness of the decision. External justification, on the other hand, is concerned with the social dimension of the decision and is based on empirical argumentation, interpretation, dogmatics, the use of judicial precedents, and general practical argumentation (CAMBI, 2020, p. 440-441).

> In summary, in legal argumentation, one can distinguish between internal and external justification. The first one concerns the discipline of the rules and the authority (competence) of the interpretive authority [...] External justification, on the other hand, does not concern logical-deductive principles, but rational acceptability, which is the acceptability of the premises of internal justification. Therefore, it is focused on the problem of correction or righteousness of the decision; from teleological, moral, political, or other points of view, which compose the rational acceptability of the decision-making act (CAMBI, 2020, p. 441).

Regarding the argument that legal reasoning should be shown as a *practical argumentation*, Neil MacCormick points out that the first is a branch of the second and consists of *the application of reason* by human beings to decide what is the correct way to behave in situations where there is choice (MACCORMICK, 2006, p. 07, bold added). And he states:[4]

> A system of positive law, in particular the law of a modern State, encompasses an attempt to consolidate broad principles of conduct in the form of relatively stable, clear, detailed, and objectively understandable standards, as well as to provide an acceptable and inspiring process of interpersonal trust to make those standards in force ... Consequently, the logic of application of the norm is the central logic of law within the modern paradigm of legal rationality under the mantle of the "rule of law". Perhaps, to the disappointment of important theorists, this logic is in fact, relatively simple and direct. The simple but much-criticized formula "N+F=C" or "Rule plus fact generate conclusion" is the essential truth (MACCORMICK, 2006, p. 08).

According to Alexy, every dogmatic declaration put in doubt must be substantiated by the use of at least one practical argument of the general type. He believes that every dogmatic statement must face systematic proof, in both strict and broad senses. If dogmatic arguments are possible, they should be used (2011, p. 292).

Formerly, the law used to be enforced through the strength of weapons. Nowadays, such enforcement comes from purely linguistic resources, so legal arguments are instruments of persuasion to convince the magistrate who will render the judgment. For this reason, legal certainty is seen as an indispensable value of contemporary societies, for generating stability (decisions cannot be arbitrarily altered), and predictability (for requiring certainty and calculation on the part of citizens to the legal effects of normative acts, addressing reliability to the order) (CAMBI, 2020, p. 441-442).

> Legal certainty is an instrument through which the values of freedom, equality, and dignity may be achieved: i) freedom because the greater the citizen's material and intellectual access to the legal standards they must obey, the greater the conditions for them to conceive the present and plan the future; ii) equality, because the more general and abstract the norms, and the more

4 Said author, in the preamble of the work *Legal argumentation and theory of law,* states that despite several researchers defend that the law grants space to deductive reasoning or even logic, he is convinced that a form of deductive reasoning is essential for legal argumentation, not meaning, therefore, that legal argumentation is exclusively deductive, so much so that it takes care, in the work, to rethink the elements of legal argumentation that are not deductive.

> uniformly they are applied, the greater the isonomic treatment among citizens; iii) of dignity, because the more accessible and stable the standards, as well as more reasonably applied, the greater the citizen's ability to define themselves with autonomy. The legal uncertainty generated by the instability in judicial decisions is a stimulus to procedural adventures and even to the abuse of procedural law, besides meaning a factor that inhibits the observance of spontaneous compliance with obligations in the field of material law (CAMBI, 2020, p. 442).

Ensuring legal certainty through the issuance of rational correction judgments about the decisions that are interpreted is a precondition of the very legitimacy of the exercise of power. The court decision must be properly motivated, depending on a formally valid legal order, which must also be rational and fair. A decision based on an incorrect or irrational law, even if it is valid on a formal level, is flawed because it denies rationality and justice. For example, if a victim of unemployment is sentenced to prison for the criminal misdemeanor of loitering (article 59 of Decree-Law 3.688/1941), even if the decision is based on formally valid law, it is not correct, because the law is unfair, contrary to human dignity. Thus, there are ethical, political, and legal values that transcend the rules of law and guarantee their legitimacy, which must be respected by judges (CAMBI, 2020, p. 442-443).

The legal standard must be understood in the text and the act. The "living right" results from legal argumentation and the interpretation of the order necessary for the enforcement of rights, more than from the rules themselves. Tradition is a mere starting point for judicial decisions to be legitimized. An argument so far accepted by the community cannot be set aside without a justification or a stronger argument (CAMBI, 2020, p. 443-444).

> In the theory of legal argumentation, the foundation of the rules of discourse (discourse theory) is a procedural theory of practical correction. A standard will be correct and, thus, valid, when it can be the result of a procedure, that is, a rational practical discourse. The common point of legal discourse and general practical discourse is that the two forms of discourse are concerned with the correction of normative statements. Legal discourse is a special case of general practical discourse because the legal basis falls on practical issues, which concern what is ordered, prohibited, and allowed. This is a special case because the legal argument is restricted by a series of restrictive conditions, summarized in the subjection to laws, judicial precedents, legal dogmatics, and limitations imposed by procedural rules (CAMBI, 2020, p. 444-445).

In this sense, for example, it is debatable the validity of letters psychographed by mediums filed into the case records. Denying such evidence under the argument that the State is secular is invalid since if there is no official religion, all of them shall be admitted. The problem lies in the absence of logical arguments to control the discursive rationality of the evidence, which makes it impossible to exercise the right to be heard and the due legal process. The credibility of these letters must be analyzed by authenticity and veracity: authenticity can be proven by the signature of the dead person, whose spirit communicates with the medium; veracity is more difficult to prove, because it depends on the belief of each one, in the suitability and reliability of the medium. Because it depends solely on faith, the psychographed letter cannot be used as the only means of proof, since the judge's conviction must be rationally motivated, by 93, item IX, of CF/88, and article 371 of CPC/2015. Such a document, however, can be used in the Jury Court (jurors do not need to substantiate their understanding, it may be intimate). However, the decision rendered by the Sentencing Council may be annulled if it is clear that the conviction of the jurors contradicted the evidence in the file, according to article 593 of the Code of Criminal

Procedure. It turns out that a conviction based solely on the psychographed letter and which distinguishes from the evidentiary set cannot produce valid legal effects. Therefore, the judge's conviction should be built on real-life data, and not only on faith (CAMBI, 2020, p. 445-446).

Finally, it should be stressed that the collision of fundamental rights makes the motivation of judicial decisions rather complex since it requires the harmonization of principles for the solution of the specific conflict. According to article 489, § 2, of the CPC/2015, if there is a collision between legal norms, the magistrate must motivate the object and the weighing criteria applied, indicating the reasons for removing a certain norm and the technical premises that underlie the conclusion (CAMBI, 2020, p. 446).

The theory of legal discourse establishes criteria for discussion and judgment, but it is not flawless. It simply shows that it is possible to deduce rational arguments about rights. Legal argumentation is conditioned to the public to which it is addressed, it depends on the time and place, on the levels and environments of understanding, involving communication and understanding of the message. Thus, it is not argued permanently, with no infallible solutions to practical problems (CAMBI, 2020, p. 446-447).

> Judges must take the Constitution seriously, not allowing fundamental rights to become unfulfilled constitutional promises ... they must base their decisions on objective legal standards, without, debuting, acting arbitrarily or may put themselves in the place of legislators [...] the judicial body, especially in the imposition of public policies, must assess the consequences of its decision for the Democratic Rule of Law, for public order, for the economy, for the exercise of citizenship and, finally, for social well-being (CAMBI, 2020, p. 447).

Legal problems should be addressed according to the effects of the proposed solutions, in the short or long term, for individuals or the system. Interpreting is considering the consequences of alternative solutions, and choosing the one that confers greater effectiveness to constitutional principles, especially the ones linked to human dignity This is corroborated by article 8 of the CPC/2015, which determines that the judge promotes this value in the application of the legal system (CAMBI, 2020, p. 447-448).

The judge's job is to realize the constitutional duty to an adequate and legitimate basis for judicial decisions, which must be rational, predictable, accessible, and controllable, instead of arbitrary, discretionary, solipsistic, subjective, superficial, and unpredictable reasoning. However, to be effective, the judicial decision must be based on a rational perspective, with the weighting of principles for the solution of difficult cases, which is defended by the theory of legal argumentation.

## 4. THE STATISTICAL TESTS AND THE DYNAMIC DISTRIBUTION OF THE BURDEN OF PROOF AS COROLLARY OF THE CONSTITUTIONALIZED PROCESS

A criticism addressed to judges when they enforce fundamental and social rights or control public policies, is that of the credibility of the sources of information they use to judge. It is known that normative theories of fundamental rights lack rigor and knowledge, because they

address complex problems, making use of vague and imprecise terms. For decisions to be properly motivated, scientific information and evidence are needed to clarify the consequences that involve economic, social, and cultural rights. Such information, to be reliable, should indicate the context to be influenced by the decision (CAMBI, 2020, p. 448-449).

> The Model Code of Collective Procedures for Ibero-America, in the caput of article 12, asserts that "all means of proof are permissible in court, provided that they are obtained by lawful means, including statistical or sampling evidence". Such evidence, even if it is not legally regulated in the Brazilian legal system, is admissible and should be considered atypical evidence, under Art. 369 of the NCPC. Its admissibility also stems from the fundamental right to adequate and effective judicial protection (Art. 5, XXXV, CF/1998), from which the need to construct procedural techniques capable of protecting the violated material rights (CAMBI, 2020, p. 449) arises.

The statistical evidence, which has still very controversial use, indicates, probabilistically, the scientific data that is relevant to a statement referring to specific facts that need to be proven. This does not mean that low probability waives the credibility of certain data and the validity of information for certain contexts: it all depends on the scientific accuracy of the information. The great danger is linked to the use of unjustified, unverified, or unfounded data. Statistical quantifications without scientific criteria, wrong or invented, influence the generalization of false, vague, and misleading premises that cover prejudices of race, gender, nationality, sexual orientation, etc., preventing the fact from being discovered and justice from being promoted, contrary to what the Democratic State of Law proposes (CAMBI, 2020, p. 449-451).

Nevertheless, statistical proof can be very useful for the protection of the fundamental social rights of the community, especially the protection of the existential minimum, since such rights have costs that vary according to the personal condition of each one, and statistical planning is necessary for the provision of the service. For example, from lists prepared by the Guardianship Council, it can be verified the number of mothers who have small children and who need to work, and which region of the city needs greater investments in the construction of daycare centers (CAMBI, 2020, p. 453-454).

> [...] The statistical test is very useful in monitoring the application of the postulate of the progressive development of fundamental rights. The realization of statistics is indispensable to measuring the meaning and effectiveness of public policy [...] This control allows us to know whether public policies, aimed at the realization of fundamental social rights, are adequate, sufficient, and capable of fully realizing the rights provided for in the Constitution. They also allow the comparison of budget percentages destined for the realization of fundamental social rights with other public expenditures, considered socially less relevant. Moreover, the evidential use of statistical data may be the starting point for the development of techniques for distributing the burden of proof that promotes the fundamental right to adequate judicial protection, avoiding the rights that require greater evidential complexity to perish (CAMBI, 2020, p. 454).

So, if used correctly and if sufficiently motivated, statistical proof can have great value in the promotion of fundamental rights, especially those linked to the dignity of the human person. The judge must make use of this type of evidence whenever the case demands to promote an increasingly adequate and effective judicial relief.

Moreover, a correct decision is not that centered solely on the figure of the judge, and there must be the participation of the parties, who must support their allegations with evidence. Such exercise, in addition to being a fundamental right, is also a burden.

> The burden consists in assigning a certain task to a subject in the interest of that subject himself. In other words, the party has prescribed the conduct to be adopted, through which he may obtain an advantage or prevent a situation that is unfavorable to him. Burden and duty are distinct legal figures in at least two aspects: (i) the duty implies a right correlation of another subject, that is, it is a conduct that the law prescribes in the interest of another person, while the burden is established in the interest of the burdened person himself; (ii) failure to comply with the duty may imply the incidence of a sanction, while failure to comply with the burden only causes the party in charge of the task to eventually lose the chance to enjoy a better situation (TALAMINI, 2016, online).

Conceptually, the burden of proof is the attribution, apart from the task of proving the facts that are favorable to you in the process, if the evidence in the file is not sufficient to do so. That is, the burden of proof is indispensable when there is no evidence of a certain claim in the case. If this evidence is already in the process, regardless of who produced it, the rules of the burden of proof are unnecessary, and the judge must recognize the effects it produces, according to the facts to the relevant legal norms (TALAMINI, 2016, online).

Thus, if there is no evidence in the case- law, the institute of the burden of proof must be applied so that the magistrate can resolve the claim, applying the right to the specific case. This is because the process cannot last indefinitely in the search for truth. On the contrary, there must be the swiftest resolution of the case, under penalty of serious affront to the fundamental right to the reasonable duration of the proceedings, to the guarantees of procedural speed and effectiveness. On the other hand, the judge cannot fail to decide on the grounds that he could not form a conviction about the facts of the case (*non liquet* prohibition). And it is, for these hypotheses in which the magistrate has not yet formed his conviction, that the law sets out the rules on distribution of the burden of proof (TALAMINI, 2016, online).

Regarding the distribution of the burden of proof between the parties, the 1973 CPC adopted the static theory. This diploma, based on the liberal-individualistic conception, considered the position of the parties, the interest in the fact to be proven, and the nature of the facts (constitutive, impeditive, modifiable, or extinguishing). There was no concern about the peculiarities of the material right to be protected or with the circumstances of the case under analysis, which was incompatible with the promotion of a collective and democratic process, and with the constitutional precepts themselves (CAMBI, 2020, p. 454-455).

> Article 333 of the CPC-1973 distributed the burden of proof, without taking into account the fundamental right to adequate and effective judicial protection (Art. 5, XXV, CF/1988), in addition to starting from the premise that both litigants were formally in parity of arms and, therefore, were equally able to produce proof [...] the rule of Art. 333 of the CPC-1973 was materially incompatible with the production of evidence in collective proceedings because it jeopardized the effectiveness of the protection of collective material law (CAMBI, 2020, p. 455).

This panorama, however, was altered by CPC/2015 in article 373, § 1, which adopted the theory of dynamic distribution of the burden of proof, surpassing the liberal-patrimonial model of the previous Code. This theory was harmonized with the microsystem of the collective pro-

cess and became materially compatible with the production of evidence in processes involving homogeneous diffuse, collective, and individual rights (CAMBI, 2020, p. 455-456).

In this sense, Article 373 of the CPC/2015 establishes that the burden of proof will be the author, "as to the constitutive fact of his right", and to the defendant, "as to the existence of an impediment, modification or extinguishing fact of the author's right" (items I and II). Paragraph 1 provides that the judge may "assign the burden of proof differently, *provided that* he does so by reasoned decision, in which case he must allow the party to discharge the burden assigned to him", which will occur both when there are "peculiarities of the cause related to the impossibility or excessive difficulty of fulfilling the burden under the caput or the greater ease of obtaining proof of the fact contrary" as in the other hypotheses provided for by law (BRASIL, 2015, online, our griffin).

It should be emphasized, therefore, that the application of the dynamic distribution of the burden of proof depends on a strictly reasoned decision that justifies the reasons of fact and law, which should be done in the sanitation of the process and never in the judgment, according to article 357, item III, CPC/2015 so that none of the parties are surprised. After all, the surprise undermines the exercise of constitutional guarantees of due process, contradictory and broad defense (CAMBI, 2020, p. 468-469).

The burden of proof is closely linked to the formation of the judge's conviction. If the magistrate, to decide, goes through a context of discovery, he must have knowledge not only of the object intended in the action, but also which of the litigants have real conditions to clarify it. The requirement of convincing varies according to the situation of the material law, and there is not a single understanding for all concrete situations. Consequently, the burden of proof cannot be seen in the same way, without considering the difficulty of conviction proper to the case analyzed (CAMBI, 2020, p. 461).

Thus, according to the new distribution system, the test is up to those who have greater ease for its realization (either by technical knowledge or by specific information). It cannot be demanded from the Public Prosecutor's Office, for example, when it filed a public environmental civil action, the burden of proving that the ad party, a company that operates telephone services, generates a risk to the health of the population by building base stations near daycare centers, schools, hospitals, nursing homes, and residences. The exploitative company is the one who must bear that burden. For this reason, the ACP cannot be dismissed for lack of evidence if there is no scientific consensus on the ills that health or the environment can suffer from radiation from telephone antennas. It is verified, thus, that the theory of dynamic distribution of the burden of proof is in line with the environmental principle of precaution (CAMBI, 2020, p. 457).

In the search for truth, the problem of the distribution of the probative burden to the parties is according to the particularities of the concrete case. The burden of proof "will be at odds with the postulates of the process under the aegis of the Democratic State of Law" when it becomes "impossible or extremely difficult to exercise the evidential faculty" (DIAS, 2016, p. 521).

> The New Code of Civil Procedure [...] revolutionizes the evidential treatment, because it breaks with the previous and abstract distribution of the burden of proof, not binding the magistrate to the criteria of the position of the parties in court and the species of facts at issue, recommended by the technique contained in art. 333 of the CPC-1973. On the contrary, it allows the allocation of evidential burdens to take into account the real condition of the parties to

> demonstrate the facts necessary to protect the material law that, given its peculiarities, may require a differentiated procedural technique to adjust the burden of proof to the nature of the intended substantial right. Thus, the NCPC reinforces the use of common sense and the maxims of experience, by recognizing, in the light of the material law discussed, that who must prove it is who is best able to demonstrate the fact at issue, to prevent one of the parties from being inert in the procedural relationship, since the difficulty of proof benefits it (CAMBI, 2020, p. 459).

The application of the theory of dynamic distribution of the burden of proof, to the detriment of the previous static theory, allows the facilitation of evidence for the protection of the legal good without the prior assessment of the judge's pre-established criteria of inversion of the burden (as it occurs in article 6, item VIII, the Consumer Protection Code). However, it is up to the judge, in addition to the cases provided by law, to assign the evidential burden differently when, given the peculiarities of the specific case, there is an impossibility or excessive difficulty in complying with it, and, on the other hand, there is greater ease of obtaining the evidence by the opposing party. With the dynamic distribution, therefore, the judge must pay due to the concrete case, being the manager of the evidence, attributing the burden of its production to those who have better conditions for this (CAMBI, 2020, p. 458-459).

The distribution of the burden of proof, thus, is no longer linked to previous, abstract, and immutable criteria that existed before. The current burden-sharing considers the phatic, axiological, and normative dynamics present in the specific case, to be explored by the judges (CAMBI, 2020, p. 459).

However, an important difference is noted between the rule contained in Article 373, § 1, of the CPC/2015, and that contained in article 6, item VIII, do CDC. This last legal law, based on the fundamental right according to which the State must promote consumer protection (article 5, item XXXII, of CF/88), establishes as a basic right of all consumers "the facilitation *of the defense of their rights, including the reversal of the burden of* proof, in their favor, in civil proceedings, when, at the discretion of the judge, the claim is verifiable or when it is hyposufficient, according to the ordinary rules of experience" (BRASIL, 1990, online, our griffin).

It is denoted that the specificity of reversing the burden of proof, inserted in the microsystem of defense and consumer protection, is justified by its vulnerability to the supply chain, considering that it does not always have the technical knowledge or information necessary to perform the test itself. For this reason, and to ensure that the parties are in a similar position to participate in the process of influencing the conviction of the judge, the reversal of the burden of proof, deferred using adequate reasoning, generates the balance of the parties, avoiding prejudice to the one who cannot prove the constitutive fact of his right, especially when it is found that the adversary is better able to prove the negative fact (DIAS, 2016, p. 522).

However, article 6, VIII of the Consumer Code can only be applied if the consumption ratio is characterized (CAMBI, 2020, p. 461). The increase in the burden of proof, on the contrary, can be applied in any case, not restricted to the common procedure, extending in a superfluous way even to special procedures. For example, the leveling of the evidentiary burden in the Food Law can be used, so that the food user is given the burden of proving his economic and financial conditions while protecting the most vulnerable person from the legal (fed) relationship. This demonstrates that the increase in the burden of proof applies beyond the hypotheses

of consumer relations, concretizing the principles of good faith and procedural cooperation, by ensuring greater equality for the hyposufficient parties (CAMBI, 2020, p. 460).

> The techniques of inversion of the burden of proof are not limited to Art. 6, VIII, of the CDC. The imbalance between the parties is not exclusive to consumer law. Inequalities also need not be economic or financial [...] within the theory of dynamic distribution of the burden of proof, it is sufficient that one of the parties is better able to prove the facts legally relevant and pertinent than the adversary (CAMBI, 2020, p. 468).

However, the mere condition of vulnerability or hyposufficiency is not sufficient for the evidential burden to be reversed or mitigated, and the limits imposed by procedural law must be respected. The dynamic, therefore, is not automatic, depending on the judicial analysis of the circumstances of the specific case. It also cannot be used as a form of prejudgment of the cause (reverse diabolical proof), since the burden of proof cannot be demanded from the opposing party when it is impossible or when it is extremely difficult to discharge it, under Article 373, § 2, of the CPC/2015 (CAMBI, 2020, p. 460).

> One cannot require someone to prove beyond what is within his reach to demonstrate, because this creates a diabolical evidential burden, that is, the extreme difficulty of proving prevents the realization of material rights. As the process is merely an instrument for the realization of material rights, there will be a denial of the fundamental right to adequate judicial protection (Art. 5, XXXV, CF/1998) if, by not formulating procedural techniques, there are no mechanisms for facilitating proof (CAMBI, 2020, p. 468).

In this sense, it is important to emphasize that, despite article 77, item I, the CPC/2015 establishes the duty of all procedural subjects to expose the facts in court according to the truth, this does not require the production of evidence in favor of the opposing party. It is authoritative to require the lawyer to sacrifice his client's interest in seeking justice or obtaining the truth, in the same way, that it is totalitarian to require apart from the duty to affirm everything he knows or to present evidence that is harmful to him (CAMBI, 2020, p. 464).

> The lawyer cannot be required to tell the whole truth to the point of harming his client by contributing arguments and evidence in favor of the opposing party. But professional ethics determines that the defense takes place within the limits of the legal system, and it is required that its action is limited to reasonable moral standards and legal limitations, and the destruction of evidence, misrepresenting or manipulating, cunningly, the facts, or even coerce or bribing witnesses, since the process as a civilizing conquest of the promotion of justice, is not tolerable, cannot allow the purposes (obtaining victory) to justify the means (CAMBI, 2020, p. 466).

The case is not reduced to a game of cleverness, in which the parties and their lawyers can do everything so that their publicist's character is lost, and the judge is reduced to a mere mediator of conflicts, a puppet of the parties in the service of concealment and fraud. This removes society's trust in justice (CAMBI, 2020, p. 466).

> The impersonal search for truth by the judicial body (art. 370 of the NCPC) allows the Judiciary to exercise its role as guardian of the Constitution, not limiting the process to a game of sophistry and trickery because the limitations of human knowledge prevent complete access to the truth of the facts, these obstacles do not imply concluding that the truth should not be pursued or that decisions based entirely on facts can be considered fair. dissociated from the

> reality of life or to legitimize any reconstruction of the legally relevant facts [...] The magistrate cannot be satisfied with purely formal equality between the litigants, having the duty, in directing the proceedings, to ensure equal treatment to the parties and to prevent or suppress any act contrary to the dignity of justice ... Good faith must guide the relationship between the judge and the parties, imposing the reciprocal duty to act within the ethical parameters necessary for the rational and peaceful resolution of conflicts (CAMBI, 2020, p. 466-467).

Therefore, even if it is stated, on the ground of freedom, that the opposing party cannot be obliged to cooperate with the Judiciary in the discovery of the truth, it is possible that techniques of dynamic distribution and reversal of the burden of proof are developed to facilitate the protection of material law. Summary 301 of the Superior Court of Justice, for example, states that the refusal of the alleged father to undergo DNA testing induces a presumption of paternity, which is relative (*Juris tantum*), assuming evidence to the contrary later. This institute, therefore, ensures the right to silence of the defendant, while avoiding that he is benefited from his inertia, since this would result in the loss of the action by the plaintiff, unable to produce proof of the constitutive fact of his right (CAMBI, 2020, p. 467-468).

Finally, it should be noted that despite the great advances in the theory of dynamic distribution, it can still be improved, so that the reversal of the burden of proof is integral and includes the financial burden since it is not reasonable that the party benefited by the institute has to bear the anticipation of expert fees (CAMBI, 2020, p. 463).

It is up to the judge to enhance the procedural dialogue, observing the contradictory, and cannot apply the theory of dynamization to surprise the parties, even if its decision is fair in the specific case. Overcoming the static model of the burden of proof distribution, the process may be an ethical instrument in favor of material equality (CAMBI, 2020, p. 460). Thus, it is verified that the facilitation of the burden of proof, through its dynamic from the CPC/2015, is a form of protection of material law, being directly linked to adequate and effective judicial protection (CAMBI, 2020, p. 462).

The exercise of the fundamental right to proof and the distribution of the burden, through its dynamic and inversion, and provided that the guarantees of the contradictory and the broad defense are respected, directly influence the search for a constitutionally fairer process, as desired by the Democratic State of Law.

## 5. CONCLUSION

This research approached the decision-making system of the CPC/2015 and the mechanisms that enabled the discussion about productivity, procedural economy and streamlining, and proactivity of the Judge and the litigant parties of the process, in the name of an increasingly adequate and effective judicial relief. The contemporary civil process, based on constitutional rules, must be open to democratization and inclusion through good faith, cooperation between procedural subjects, parity of treatment, full and effective right to defense, among other principles.

An examination of the constitutional duty to render reasoned decisions, which must be observed by the judge, was carried out so that the parties understand what leads to the

declaration of a particular right, which reasons should be debated if an objection is filed, and so that the society has the knowledge and legal certainty regarding the interpretation and application of the law.

Judicial decisions that are properly supported are predictable, accessible, and controllable, based on a rational perspective, with the weighting of principles for the solution of difficult cases, which is defended by the theory of legal argumentation. A sufficiently motivated decision, which has given the parties a prior opportunity to be heard, is a way of ensuring the Democratic Rule of Law in civil proceedings. On the other hand, if the judge does not observe the duty of motivation imposed by the Federal Constitution and the CPC/2015, procedural nullity might arise, which, would represent a major waste of time and money, discrediting the judiciary before society.

The contemporary constitutional judge must be open to dialogue with those under the jurisdiction and committed to solving the case respecting what dictates the politics and the Legislative, through well-reasoned decisions under the laws and the Constitution. This does not mean that the process should be based on judicial protagonism: the parties and other procedural subjects are summoned to dialogue with the State-Judge, to build a collaborative procedure.

The procedure brought by the CPC/2015 is increasingly based on cooperation and democratization for the solution of controversies. The greater the integration between the parties and the more consistent a decision is, the greater the compliance to the law applied, which contributes to the dejudicialization of conflicts, that shall be better solved through dialogue, inclusion, and promotion of peace.

Faced with this new scenario, the role of the Judiciary in conducting the proceedings deviates from the traditional triangular paradigm – parties subordinated to the judge, to open the way to a cooperative model, with parity between litigants and the judge. The judge must weigh the parties' interests, provide clarification, dialogue, anticipate issues, and assist them, granting a fair and effective decision within a reasonable length. Furthermore, by analyzing the specific case and the parties involved in it, the magistrate must verify whether the evidence chosen is sufficient to elucidate the matter.

Therefore, it is up to the judge to verify the sufficiency of the evidence, regardless of who produced it (considering that the produced evidence belongs to the case records instead of the party). In the case of insufficiency, however, the rule of burden gains prominence, because it is from the proof's absence that it is determined who should bear its production. The judge may, depending on each case, comply with the requests of the parties or determine *ex officio* the production of evidence, to make the process efficient.

The reverse onus clause may be applied, whether in a consumerist conflict (when there is a likelihood of the allegations or the technical hyposufficiency of the consumer), or in civil claims, by the dynamic distribution of the burden of proof (when it is impossible or extremely difficult for the interested party to produce the evidence while it is easier for the opponent to do so, or when the law so determines). Such order shall prevail only under reasonable motive, according to the case's peculiarities, to seek the truth.

It is, therefore, necessary to guarantee material isonomy to the litigants, encouraging the right to be heard and procedural cooperation, so that the controversies brought to the judiciary are solved. Civil proceedings must be an instrument of consolidation and effectiveness of

constitutional principles and values, in order not only to grant effective, quick, adequate, and fair judicial relief but also to fulfill the social purpose of the jurisdiction, which is the fair pacification of conflicts.

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# TARIFF OF EXTRAPATRIMONIAL DAMAGE AND HUMAN DIGNITY VIOLATION

## TARIFAÇÃO DO DANO EXTRAPATRIMONIAL E VIOLAÇÃO À DIGNIDADE HUMANA

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## ABSTRACT

This scientific article seeks to analyze whether the charging of extra-asset damage, in the light of Law No. 13,467/17, is unconstitutional in view of the fundamental principles of equality and dignity of the human person, embodied in the Constitution of the Federative Republic of Brazil of 1988. To achieve this goal, the work was organized into three items and demanded instruments such as books, articles, laws, and jurisprudence, to demonstrate how compensation was granted for non-material damage before the new law, as well as to exemplify discussions on the subject. The first item carries out a historical retrospective on the origin of non-material damages in the Brazilian legal system, as well as a detailed analysis of certain species of damage, in addition to providing doctrinal and jurisprudential quotations to corroborate the thought herein exposed. The second item, on the other hand, aims to outline the non-material damages from the rule set out in Title II-A of the Consolidation of Labor Laws (CLT). Furthermore, the way in which the repair takes place was questioned. Finally, in the third item, an analysis regarding the Direct Action of Unconstitutionality No. 6069, filed by the Federal Council of the Brazilian Bar Association, was carried out in order to declare unconstitutional this charge for non-material damage, as well as the violation of the fundamental principles of the dignity of the human person and equality, embodied in the Federal Constitution of 1988. At the end of this article, it shall be demonstrated whether the new rule of article 223-G of CLT harms fundamental and individual principles and guarantees.

**Keywords:** Off-balance labor damage. Human dignity. Unconstitutionality.

## RESUMO

*O presente artigo científico busca analisar se a tarifação do dano extrapatrimonial, à luz da Lei nº 13.467/17, é inconstitucional frente aos princípios fundamentais da igualdade e da dignidade da pessoa humana, consubstanciados na Constituição da República Federativa do Brasil de 1988. Para se alcançar essa finalidade, organizou-se o trabalho em três itens e utilizou-se de instrumentos como livros, artigos, leis e jurisprudências, para demonstrar como se dava a indenização por dano extrapatrimonial antes da nova lei, bem como para se exemplificar as discussões acerca do tema. O primeiro item realiza uma retrospectiva histórica sobre a origem do dano moral no*

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*ordenamento jurídico brasileiro, bem como se faz uma análise minuciosa de determinadas espécies de dano, além de realizar citações doutrinárias e jurisprudenciais para corroborar com o pensamento ali exposto. O segundo item, por outro viés, visa delimitar o dano extrapatrimonial a partir do regramento exposto no Título II-A da Consolidação das Leis do Trabalho. Ademais, foram realizadas críticas quanto à forma em que se dá a reparação. Por fim, no terceiro item, realizou-se uma análise acerca da Ação Direta de Inconstitucionalidade nº 6069, ajuizada pelo Conselho Federal da Ordem dos Advogados do Brasil, a fim de declarar inconstitucional essa tarifação por dano extrapatrimonial, bem como se observou, detalhadamente, as afrontas aos princípios fundamentais da dignidade da pessoa humana e da igualdade, consubstanciados na CRFB/88. Ao final do presente artigo, será demonstrado se o novo regramento do art. 223-G, da CLT, fere princípios e garantias fundamentais e individuais.*

**Palavras-chave:** *Tarifação do dano extrapatrimonial. Dignidade humana. Inconstitucionalidade.*



# 1. INTRODUCTION

Law No. 13,467/17, popularly known as Labor Reform, arose multiple discussions, several of which had already been targeted by the Direct Action of Unconstitutionality (ADI), such as the new article 223-G of the Consolidation of Labor Laws (CLT), contained in its Title II-A, which regulates how compensation will be granted for non-material losses in the labor sphere (BRAZIL, 2017).

The issue's constitutional relevance caused the Federal Council of the Brazilian Bar Association (CFOAB) to file, before the Supreme Court (STF), ADI No. 6069, in order to question the repairing parameters. The trial on the matter is pending.

In view of this, Law No. 13,467/2017 instituted the off-balance labor damage, consisting of the payment of such compensation in order not to reproduce the scenario of very high figures as restitution for damages, since, from now on, the new article 223-G, §1 and its respective items, consider the last contractual salary of the offended to calculate the compensation for the offense suffered (BRAZIL, 2017).

Thus, if two employees suffer the same offense, in the same situation, and both resort to Labor Justice to seek judicial relief claiming non-material damage, they shall receive different amounts if they earn different salaries. In this context, it is observed that the dignity of workers is measured by the figures presented on their paycheck.

Regarding the compensation for moral damages, it should be noted that the Consolidation of Labor Laws (CLT), before undergoing these modifications, followed the Civil Code's (CC/02) rules to determine such restitution. Thus, the value of indemnity was reached based on the individual analysis of each case, added to the judge's reasoning.

However, such discretion is not present in the new legal text, for the judge is bound to article 223-G of the CLT, because it is only possible to reach the amount of compensation owned through the off-balance labor damage, a process that takes into consideration the severity of the damage and the victim's last contractual salary.

This perception of inequality, brought to the legal world by article 223-G of the CLT, provokes a series of questions about possible unconstitutionality, inequality itself, and violation of fundamental rights and guarantees, because it is allowed to unequally treat human lives according to the salary they earn.

Thus, this article intends to analyze the unconstitutionality of the new text of article 223-G, which violates several constitutional principles, such as the fundamental principle of equality and dignity of the human person, for this regulation's objective parameters of compensation enable different responses to the same offense (BRASIL, 2017).

As for the methodology used, theoretical research techniques were adopted, such as books, articles, laws, and jurisprudence – secondary sources. Moreover, the hypothetical-deductive method was elected, since the hypothesis developed consists of the violation of equality and human dignity principles by the off-balance damage in Labor Reform.

For a better analysis of the theme, the present work was divided into three parts: the first one characterizes the non-material damage and presents a historical retrospective of the damage in the Brazilian legal system, as well as the beginning of its effective application; the second part seeks to outline the non-material damage, in addition to analyzing the fundamental principles of isonomy and dignity to investigate their possible transgressions; and finally, the third part deals with the unconstitutionality of the off-balance labor damage, as well as what are the practical consequences of the article 223-G, CLT.

## 2. OFF-BALANCE SHEE DAMAGE: HISTORICAL RETROSPECTIVE, CONCEPT, AND CHARACTERIZATION

Before approaching Law No. 13,467/17, it is necessary to recall what the moral damage was like in the Consolidation of Labor Laws before the Labor Reform, as well as its emergence and initial incidence in Brazil (BRASIL, 2017).

Oliveira explains that claiming damages used to be considered embarrassing. However, the need to validate the emotional suffering and the repercussion of offenses of such kind in a person's life, which in several scenarios becomes more harmful than the property damage itself, transformed moral damage into something fair and refundable, demystifying all prejudice in requesting repair for violations of this nature. (OLIVEIRA, 2019, p. 260).

Considering this, Oliveira states that:

> The first thought that arises, when talking about compensation, is linked to property effects, which are financially measurable. Currently, however, the law protects not only our assets but the immaterial values of personality, that is, in addition to protecting what we have, it guards and values who we are (OLIVEIRA, 2019, p. 261).

Unfortunately, it took the Brazilian legal system some time to formally recognize the compensation for moral damage. It was the Civil Code of 1916, in its article 159, that made such reparation mandatory, although there was no distinction between the moral and the material damage at first. It used to mention only the damage itself, without the legal distinctions that are currently observed.

The compensation for non-material losses was finally recognized in 1988, by the Constitution of the Federative Republic of Brazil (CF/88) and its article 5, items V and X (BRASIL, 1988).

Soon after, article 186 of the Civil Code of 2002, expressly referred to moral damage (BRASIL, 2002), consolidating the compensation for moral damage in Brazilian legislation.

Although non-pecuniary losses are part of the daily routine of legal practitioners, as well as of the whole society, being widely discussed and applied every day, it is still necessary to agree with the words of André Gustavo Andrade, who states that "moral damage is, in fact, a concept under construction". (ANDRADE, 2003, p. 139).

Given that, it is not wise to limit the scope of moral damage, nor to stipulate what fits or does not fit into this context of damage, since the constant evolution of the law has not yet reached the damage that resides in the future. It is not possible to predict, effectively, what shall configure moral damage and what shall not, because it is possible that future violations may only be seen upfront.

After this short introduction to moral damage in Brazil, the focus on the off-balance sheet damage and its characteristics must be resumed.

The term "off-balance damage" was used in legislation and is considered inconvenient by some researchers. Oliveira argues that the term "off-balance damage" is inappropriate because "moral damage" had already been consolidated in the Brazilian legal system. Thus, by using a new term, not only does the Labor Reform cause confusion but it also legitimizes the creation of a mitigated kind of moral damage in labor-related laws (OLIVEIRA, 2017, p. 02).

Moreover, it is verified in the constitutional text itself, article 5, item V, the guaranteed right of reply in case of moral damage, not off-balance sheet damage. It is evident that the legislator sought to innovate a term that had already been widely consolidated in our legal system.

Article 223-B, of the CLT, comes to conceptualize the off-balance damage: "The pff-balance sheet damage encompasses the action or negligence that offends the moral or existential sphere of the natural or legal person, which are the exclusive holders of the right to compensation." (BRAZIL, 2017).

It is verified that the expression "off-balance sheet damage" is used to understand the other species of damage, which are: aesthetic or moral damage, damage to the personality, among others.

The aesthetic damage occurs when there is an injury, resulting from the working relationship that eventually generated an accident at work, compromising the moral integrity of the victim due to a morphological change in their body, which may or may not be a deformity, a mark, a scar, as well as any change that causes shock or impact, implying a feeling of inferiority, low self-esteem and thus, violating the dignity of the human person of that worker (OLIVEIRA, 2019, p. 311).

In this context, it is observed that the aesthetic damage is even more delicate because it is not abstract, such as moral damage or damage to personality. Instead, it is exposed to the worker and the environment around, making it inevitably harder to cope with the injury. The employee must face the result of that work accident day after day having to deal with society's repulsive looks, which certainly hurts their self-esteem.

As Oliveira says (2019, p. 313), "the aesthetic damage is shown by the body; the moral damage is felt by the soul." Thus, moral damage is strictly linked to the victim's psychological and emotional suffering as well as mental exhaustion in the face of what has occurred and its

consequences, such as psychological diseases like depression or anxiety disorder. Abstract vulnerability is certainly harder to measure, for it is only sensitive to those who feel it.

Existential damage, on the other hand, compromises the very existence of the individual. As its name suggests, it is the damage to the existence of a being, it could be called "trauma". The damage to the existence of a subject affects their whole life because there is the rupture of a project, a plan, a dream. Not only does the individual itself suffer from existential damage, but their entire family and friends, as they face a new reality with the victim.

All things considered, complete repairing of such damage is required, which is nearly impossible, since the victim's quality of life is diminished along with their well-being, due to the sudden interruption of projects and dreams. What the worker once understood as "life", is no longer possible to obtain in practice, leaving, forever, the feeling of helplessness before the new facts that now affect him.

Thus, even if the Labor Court establishes a fair and reasonable amount for compensating the existential damage suffered, still, the worker will not be widely repaired, since it is very difficult to return to the status preceding the injury.

The Superior Labor Court (TST) has been delivering the same understanding:

> Existential damage is a kind of immaterial damage. In the case of work relationships, existential damage occurs when the worker suffers damage/limitations in relation to their life outside the work environment due to illegal conduct carried out by the employer, making it impossible to practice a set of cultural, social, recreational, sports, affective, family activities, etc., or to develop their life projects in the professional, social, and personal spheres. (TST, 2018, *online*)

In addition, Feliciano and Pasqualeto state that the legislator sought to clarify the application of existential damage as a kind of off-balance damage, in so far as it is imposed by article 223-B of the CLT, which says that "an action or omission that offends the moral or existential sphere of the individual or legal entity, who are the exclusive holders of the right to reparation, causes damage of an off-balance sheet nature. " (2018, p. 02).

After these considerations regarding the species of damage that are included in the broad concept of off-balance damage, it is necessary to point out that all the aforementioned species have something in common since they are necessarily "centered on the human person in the social, economic and legal order, with its various related principles, led by the principle of the dignity of the human person", as provided by Feliciano and Pasqualeto (2018, p. 02).

Therefore, it is necessary to define the off-balance labor damage.

## 3. THE DEFINITION OF THE OFF-BALANCE SHEET LABOR DAMAGE

The off-balance damage is firstly regulated by article 223-A of the CLT, but the controversy is consolidated in article 223-G of said Law (BRASIL, 2017). This article initially establishes what the judge must consider when assessing the request for off-balance damage.

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This article limits the compensation for off-balance damage to objective and static guidelines, imposing legal criteria and restrictions regarding the *quantum* to be repaired.

The non-material damage has particularities, to the extent that each one feels it differently, which necessarily entails different legal consequences since the magistrate must have the sensitivity to analyze case by case. However, the legislator, in the light of the Labor Reform, ruptured this understanding, by equally addressing the compensation for the damage regardless of the case's circumstances.

It is important to observe that the compensation for the damage suffered is fair and legitimate, although nowadays there are several discussions concerning what would be the "industry of moral damage", an expression that refers to the individual who requests legal remedy solely intending to earn profit for "minor annoyances". In cases like this, it is expected that the opposing party seeks to mischaracterize the psychological damage alleged by the victim.

However, it is questioned whether human interactions have not evolved, which results in new violations of fundamental rights and guarantees, liable to compensation, or if it seeks, on the other hand, to silence off-balance sheet damages by using the mere annoyance narrative, to intimidate the injured to resort to the judiciary and seek the due reparation for the offense suffered.

Hence, it is essential that the magistrate is invested with due sensitivity to proceed with the analysis of the off-balance labor damage. After these exceptions, follow what is available in Art. 223-G of the CLT:

> Art. 223G: When assessing the request, the court shall consider: I - the nature of the protected legal interest; II - the intensity of suffering or humiliation; III - the possibility of physical or psychological overcoming; IV - the personal and social consequences of the action or omission; V - the extent and duration of the effects of the offense; VI - the conditions in which the offense or moral damage occurred; VII - the degree of intent or fault; VIII - the occurrence of spontaneous retraction; IX - the effective effort to minimize the offense; X - pardon, tacit or express; XI - the social and economic situation of the parties involved; XII - the degree of publicity of the offense.. (BRAZIL, 2017)

Feliciano and Pasqualeto (2018, p. 03) point out that such restrictions imposed by the off-balance damage are motivated by legal certainty. The Labor Court was criticized for the way the magistrates were analyzing and deciding on compensation for off-balance sheet damages.

The fact that jurisprudence used to corroborate compensations of very high figures and, often, disproportionate to the damage suffered by the worker, also motivated the legislator to act in such a way, putting an end to several related complaints filed by employers.

However, the legislative change resulting from Law No. 13,467/2017 did not observe article 7 of the CF/88, which, when listing the urban and rural workers' rights, mentioned the insurance for occupational accidents borne by the employer, as shown in item XXVIII (BRASIL, 1988).

Given this fact, it is the employer's constitutional duty to fully compensate the off-balance damage that has occurred, which is not seen in real cases, since the amount to be received as off-balance labor damage is pre-determined by art. 223-G of the CLT (BRASIL, 2017).

It is noteworthy that there will be situations in which the value established by law will not serve as a full, fair, and reasonable repair to the worker, due to the impossibility of the legal standard to reach every possible event.

Moreover, it is also observed that the principle of the judge's free conviction is no longer respected therein since the discretionary margin of the magistrate ceases to exist. It should be noted that determining compensation for off-balance labor damage is more delicate than doing it for property damage. It is in the thorough and cautious analysis that a value worthy of repair is addressed, and it is essential that the judge, when analyzing the circumstances of the case, considers a fair value.

A doctrinal divergence is observed regarding the circumstances brought by the caput of article 223-G (BRASIL, 2017). According to Silva and Lima (2017, p. 08), this article, in its caput, shall only apply to off-balance damage, which for these authors would be the sum of moral damage with existential damage, thus not fitting aesthetic or biological damage.

On the other hand, Feliciano and Pasqualeto (2018, p. 02) already defend the idea that off-balance damage is the genre, being moral damage to the person, aesthetic, and existential considered species. Thus, these authors elucidate that aesthetic damage is seen as a parting genre that does not suffer charging and is therefore not included in the list of article 223-G, of the CLT (BRASIL, 2017).

That said, the paragraphs of article 223-G, subject of greater discussion among jurists, must be analyzed. The Labor Reform establishes, in §1 of said article, that in case the motion for off-balance damage compensation is granted, the judgment will set the amount to be paid, to each of the offended, according to the following parameters:

> I - offense of a light nature, up to three times the last contractual salary of the victim;
>
> II - offense of a medium nature, up to five times the last contractual salary of the victim;
>
> III - offense of a serious nature, up to twenty times the last contractual salary of the victim;
>
> IV - offense of a very serious nature, up to fifty times the last contractual salary of the victim.
>
> § 2 - If the offended person is a legal entity, the indemnification will be fixed with observance of the same parameters established in § 1 of this article, but in relation to the contractual salary of the offender.
>
> § 3 - In the event of a recidivism between identical parties, the court may double the amount of the indemnity.'" (BRAZIL, 2017)

From the guidelines above, it is verified that the criterion for assessing the amount of compensation for the off-balance damage is the value of the last contractual salary of the victim. Setting a limit in such cases has already become a matter of discussion among law practitioners. However, the establishment of compensation based on the employee's salary as determined by the Labor Reform intrigues and raises questions of all sorts.

Initially, it is worth demonstrating that Oliveira disagrees with the so-called "taxation of off-balance sheet damage", to the extent that the word "taxation" invokes its own rule. See:

> It is worth mentioning that the doctrine and even the judicial decisions present the expression "taxation of moral damage", but we prefer saying "charge of moral damages" because the word taxation has its own meaning in legal science and bears the nature of public price, treated in the field of administrative law (OLIVEIRA, 2017, p. 11).

Provisional Measure (MP) No. 808/2017 modified this calculation base on article 223-G, through Law No. 13,467/17 (BRASIL, 2017). According to the MP, the parameter would be conditioned to the value of the maximum limit of benefits of the General Social Security System, in addition to excluding from this charge the result of death. However, this Provisional Measure has neither been converted into law nor had its effects regulated by legislative decree. Thus, MP 808/2017 expired.

Feliciano and Pasqualeto consider that although MP No. 808/2017 presented a calculation basis divergent from the current sums in the CLT, providing a better scenario for the worker who has a lower income, in addition to resolving the discriminatory aspect – which will still be addressed in this article – the pricing, in the words of the authors, "still does not consider the diversity of off-balance sheet damage and its existing extent" (FELICIANO; PASQUALETO, 2018, p. 04).

Even though the majority of doctrine has established the understanding that this pricing, or rather, stabilization of off-balance sheet damages is a setback in labor legislation, Santos argues that establishing standard parameters, as well as objective criteria, generates predictability of judicial decisions, in addition to ensuring isonomy, a principle embodied in the Federal Constitution:

> [...] in the name of the highest principles emanating from the Federal Constitution of 1988, including isonomy, legal certainty, as well as the predictability of judicial decisions, to avoid colliding, conflicting, or contradictory decisions, we consider it good to establish criteria, to parameterize the values of reparations for off-asset damage [...] (SANTOS, 2017, p. 02).

However, what is maintained as discriminatory and liable to violations of fundamental rights and guarantees is not only the restrictive nature of article 223-G of the CLT, but precisely how the classification of the off-balance labor damage occurs. Establishing that the compensation will be following the last contractual salary of the victim is like affirming that the damage suffered by the employee is measured in accordance with his income.

Several constitutional principles remain incompatible with the rule herein questioned, as well as the free conviction of the magistrate and the discretionary analysis of each case, essential to earn a fair value, worthy and capable of repairing the damage suffered. The compensation's purpose is to cover the existing damages and enable the restoration to the condition there was before the injury. However, it is rather complex to measure off-balance sheet damages.

Thus, it is observed that, because one employer has workers in several positions and functions, it occurs that each one earns their income according to the performed task. Hence, as the parameter established by the new legal device is objective, the reparation is based solely on the financial aspect of that employee.

Imperative to say that in the dynamics of employment relations, the same employer will certainly have, under their command, employees earning different salaries. If two of them suffer the same offense, in the same situation, and both resort to Labor Justice to seek remedy for the off-balance damage suffered, they will receive different amounts.

Analyzing the legislation, the discrimination is clear, as it legitimizes employees to receive discrepant treatment exclusively on account of their salaries. Such conduct violates a series of constitutional principles, such as the caput of article 5 of the CF/88, which reveals the decay brought by the Labor Reform after years of attempts to extend the labor rights.

Moreover, the legislation still fails to comply with article 944 of CC/02, which states that compensation is addressed according to the extent of the damage (BRASIL, 2002). Given this, it is unacceptable that the award calculation for off-balance damages may be based on the salary of the victim. The worker's paycheck might be disproportional to the damage caused, which might result in losses and the maintenance of the effects of the damage, as well as unfair enrichment.

In addition, the magistrate must consider the seriousness of the damage, its extent, and the offenders' financial possibilities to set a value worthy of reparation. The payment for off-balance labor damage should aim for the greatest degree of reparability that is possible, as returning to *pre-injury status*, in most cases, is very difficult. Nevertheless, reparation must be as fair as possible, so that the employee, who is not to blame for the damage suffered, is granted the opportunity to restructure life in a peaceful and dignifying way.

All things considered, one might question the best way to earn a value that is worthy of reparation for an employee who perceives a minimum wage per month, in the face of damage caused by the employer, being this a multimillion-dollar multinational, based only on the last contractual salary of the offended. The indemnity must also meet both the pedagogical and punitive aspects of the penalty. The order to award compensation for damages should discourage future unrighteous practices as well as restore the loss, at least as much as possible.

The 4th Panel of the Superior Labor Court has already ruled on the theme:

> Regarding the amount set as compensation, it is necessary to highlight the pedagogical character of the conviction for moral damage. Since Article 5, V, of the Federal Constitution is considered a criterion of proportionality between restoration and the injury inflicted on the victim, it seems appropriate to affirm that reparation, in addition to fulfilling a purpose of compensation, also bears a clear punitive character to the offending agent, intended to inhibit or discourage, by the intimidating effect of economic value, the recurrence of offense to precious immaterial property subject to legal protection. [...] .....
>
> [...] Summarizing: it is up to the judicious body, in the face of the open system of setting the value by judicial arbitration, to be guided by the reasonableness and fairness in the stipulation, avoiding: on the one hand, an exaggerated and exorbitant value, to the point of leading to a situation of unjust enrichment or leading to the financial ruin of the offending; on the other, a value so low that it is derisory and despicable, to the point of not fulfilling its pedagogical function. (TST, 2015, *online*)

Thus, it is necessary to emphasize that the charge imposed by the Labor Reform does not reach a decent and fair value of reparation. The legal certainty offered by article 223-G, of the CLT, does not corroborate the pedagogical function of reparation. So, it is difficult for the employee to earn an amount capable of truly restoring the damage only based on their last contractual salary, although this criterion is discriminatory and limiting, even if there was no discussion concerning this aspect. Yet, it is worth stating that the available legal answer is insufficient in the face of a concrete case, due to the peculiarities of each one.

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Hence, when the magistrate carries out a thorough analysis of the severity of the damage, the extent of the loss (which cannot be determined through a legal and objective parameter, due to the multitude of circumstances), the financial capacity of the offenders (which also varies from case to case) and the principle of reasonableness (the amount must not be too high, nor too low as explained before), besides inhibiting future harmful acts, it results in the compliance with the pedagogical function of the conviction.

Therefore, it is imperative to highlight these facts, as well as raise these questions, in view of the way that the new labor legislation imposed on the Brazilian employee regulation regarding off-balance damage. It is necessary that the legislation allows judicial discretion since the free conviction of the judge allows the magistrate to analyze the case with the sensitivity that is necessary for the proper application of the law, especially when unavailable or fundamental rights and guarantees are regarded.

In this sense, inhibiting the discretion of law enforcement makes all individuals stand in the same balance, without due investigation of the particularities and individualities of each situation. In view of this, such standardized treatment can reproduce a series of scenarios of inequalities and unconstitutionality, the latter being discussed in the following topic.

However, regarding the scenario of inequalities that may be installed in the labor relationship, a hypothetical example may allow better understanding. Imagine that A, a production assistant of a company, earns a salary of R$ 2,000.00 (two thousand reais) per month, whereas B, general services, same company, earns a salary of R$ 1,000.00 (one thousand reais) per month. On a hypothetical day of work, imagine that both are injured in the same way, experiencing the same psychological and physical results.

In accordance with article 223-G, §1 of CLT and the correspondent paragraphs, the magistrate must perform an analysis to indicate the nature of the offense (BRASIL, 2017). All peculiarities considered, the serious nature of the offense is confirmed, and the compensation must be calculated up to twenty times the last contractual salary of the victim. Therefore, A would receive R$ 40,000.00 (forty thousand reais) as compensation for off-balance damage, whereas B would receive the quantum indemnity of R$20,000.00 (twenty thousand reais).

It should be noted that, in the hypothetical scenario, both employees were injured in the same way and experienced the same psychological and physical results, which seriously affected their moral sphere, making the restoration to the status quo prior to injury virtually impossible, having been violated their fundamental rights and guarantees, and still, they will receive different indemnification amounts. The only basis for establishing the indemnity amount was the last contractual salary of the offended.

It was determined by the legal text that it is allowed to treat human lives unequally due to their salary. The magistrate, when analyzing the case, will not investigate all the aforementioned aspects. In a scenario worse than this, the judgment awards the off-balance damage using as a criterion the employee's income. In addition, it is necessary to discuss the situation of these employees' families in contexts where the compensation is due to the worker's death. Again, the life of the Brazilian worker is quantified according to their salary, generating different indemnities.

There is already an extralegal solution, to national repercussion, regarding these indemnifications for off-balance damage. On January 25th, 2019, Brazil had been the scene of another environmental crime due to the rupture of a dam in Brumadinho, a municipality of Minas Gerais,

which resulted in the death of – by the time of completion of this article – 270 victims, and the Fire Department is still searching for 11 missing persons. (CONECTAS, 2020).

At the time, the fatal victims of this tragedy were, for the most part, Vale employees, each with the most diverse functions, who perceived salaries of different values. According to the reading of art. 223-G, of the CLT, which does not exclude the result of death of that table, each employee would receive, in the opinion, a different amount as indemnification for extra-asset damage, since it will be measured according to the last contractual salary (BRASIL, 2017).

In addition to revolting and inhumane treatment, in the face of a situation of national notoriety and public calamity, those workers, fatal victims of negligence and recklessness of the employer, have lost their lives, their greater good, of which all fundamental rights and guarantees aim to protect and protect, leaving behind projects, dreams, family. There is irreversible dismemberment of the family, which will never live again the same plan that he considered as the ideal. Bonds of friendship are broken forever. Only the pain remains in those who stay and will sustain themselves, both emotionally and economically, in the face of such loss.

Thus, in addition to the irreparable pain of losing a family member, the family still has to face the unequal treatment it receives in the Labor Court, resulting from the pricing that the paragraphs of art. 223-G bring, to the extent that the result of death is no longer excluded from this charge, as seen in Provisional Measure No. 808/2017, which has lost its effectiveness without being converted into law. However, the Public Ministry of Labor (MPT) and Vale signed an agreement in order to obtain fair and dignified compensation for the material and moral damages that occurred.

On July 15th, 2019, this agreement was approved by the 5th Labor Court of Betim, with a forecast of R$ 1,600,000,000 (one billion and six hundred million reais). It was decided that the spouse or partner, son, mother, and father of those fatal victims, employees of Vale, would receive, individually, R $ 700,000.00 (seven hundred thousand reais), and R$ 500,000.00 (five hundred thousand reais) would regard off-balance damage, R$200,000.00 (two hundred thousand reais) as additional insurance for occupational accidents and the brothers of these victims would receive R$ 150,000.00 (one hundred and fifty thousand reais) resulting from off-balance damage. (G1, 2019).

The Public Ministry of Labor also exemplified the following family context: if the worker, victim of this tragedy, was married, had two children, and had a father, mother and two brothers, this family formed by 07 (seven) people will receive R$ 3,800,000 (three million eight hundred thousand reais), (G1, 2019).

Therefore, this was the first major case that put in check the provisions of the Labor Reform on the subject involving compensation for off-balance damage, and due to an extralegal agreement between the MPT and the offending company, it was possible to obtain a value far beyond what would be arranged as a reparation, because if there were any worker who received a minimum wage, that is, R$ 998.00 (nine hundred and ninety-eight reais), the maximum that family could receive would be R$ 49,900.00, according to art. 223-G, paragraph 1, item IV, of the CLT.

However, although there is this extralegal precedent, the Supreme Court has not yet opined on the unconstitutionality of the provision contained in Title II-A of the CLT, therefore, it remains in force and producing its effectiveness, which is why it continues with the considerations about this change resulting from Law 13.467/17 (BRASIL, 2017). It is essential to question why should

the category of workers, which is acknowledged as the hyposufficient and the weaker part of the employment relationship, bear the parameters imposed by article 223-G of the CLT? Labor legislation should impose on the employer and the employee rights and duties, in order to seek, to the greatest extent possible, fair and equitable treatment between the parties.

Thus, establishing parameters of indemnification that will be unable to achieve its purpose, that is, the reparation of damages, in addition to placing at more different levels workers and employers, ends up generating a scenario of discrimination in the legal system, since sentences will be handed down in order to promote inequality between workers for the amount corresponding to their salaries.

In view of this, it is necessary to analyze whether such discrimination and promotion of inequality is unconstitutional in the light of the Federal Constitution of 1988, which is done next.

## 4. THE UNCONSTITUTIONALITY OF THE TAXATION OF OFF-BALANCE SHEET DAMAGE AND THE ANALYSIS OF THE FUNDAMENTAL PRINCIPLES OF EQUALITY AND DIGNITY OF THE HUMAN PERSON

This article has been exposing how the new article 223-G, from CLT, created a scenario of inequalities and discrimination (BRASIL, 2017). It was also emphasized that the compensation stemming from off-balance damage, given the legal rule, does not achieve proper reparation, and does not seek fair and reasonable restitution. However, it is now necessary to question whether such discrimination and inequalities are unconstitutional under the provisions of the Federal Constitution of 1988.

Considering the Labor Reform, several questions and discussions arose among legal practitioners and researchers. In this exact context, several Direct Actions of Unconstitutionality (ADI) were filed, such as ADI No. 6069, filed by the Federal Council of the Brazilian Bar Association (CFOAB), with a provisional remedy request, in order to challenge articles 223-A and 223-G, §1 and §2, of the CLT. (STF, 2019, *online*).

It is worth mentioning that under similar arguments and intent as the aforementioned ones, the Association of Labor Justice Magistrates (ANAMATRA) filed ADI no. 5870. At the time, the Provisional Measure (MP) 808/2017 was in effect and shifted the off-balance labor damage base calculation to the salary cap of the National Institute of Social Security – INSS. For this reason, the Minister of the Supreme Federal Court Gilmar Mendes, rapporteur of ADI No. 6069, filed by the CFOAB, determined the thought of the cases, so that they process together. (STF, 2019, *online*).

In the motion of Direct Action of Unconstitutionality No. 6069, the CFOAB argues that:

> It has, therefore, been established that the rules in force are very harmful to the worker and do not comply with the constitutional duty of full reparation of the damage, embodied in Article 5, items V and X, as well as hurt the functional independence of magistrates from the point of view of free conviction (art. 93,

> item IX). Also, they violate the dignity of the human person (article 1, III, of the CF), among others, which is why its unconstitutionality is evident, as it shall be demonstrated (STF, 2019, *online*).

Moreover, it is also exemplified that in regard to the MP 808/2017, although stipulating the compensation in accordance with INSS's salary cap was more beneficial to the employee than the current article 223-G, of the CLT, both cases lead to conflicts and violations of "basic principles of the rule of law because they limit compensation, contradicting the article 5, items V and X, of the Federal Constitution that clearly states that the damage must be fully repaired." (STF, 2019, *online*)

Up to the present date, this ADI's trial is pending as it is currently "held by the rapporteur under advisement" since August 28th, 2019, as extracted from the electronic system of public procedural consultation of the Supreme Court.

Regarding the unconstitutionality of the debated legal provision, it is possible to find several arguments that support such understanding. The 2nd Journey of Material and Procedural Labor Law, centered on the Labor Reform (Law No. 13,467/17), approved Statement No. 18, which provides for the exclusive application of the rule laid down in Title II-A of the CLT, as well as declared that there is discriminatory treatment.

> **OFF-BALANCE LABOR DAMAGE: EXCLUSIVITY OF CRITERIA** Exclusive application of the new provisions of Title II-A of CLT to the reparation of off-balance labor damages: unconstitutionality. The moral sphere of human persons is content of human dignity value (Art. 1, III, of the CF) and, as such, it cannot suffer restriction to broad and integral reparation when violated, and the State's duty is to protect them in the occurrence of illegalities causing off-balance sheet damage in labor relations. All existing rules in the legal system that may evoke the maximum constitutional effectiveness to the principle of the dignity of the human person (Art. 5, V and X, of the CF) must be applied. The literal interpretation of article 223-A of the CLT would result in unfair discriminatory treatment of employees, being unconstitutional for the offense to the articles 1, III; 3, IV; 5, caput and items V and X and 7, caput, all of them from Federal Constitution (AMATRA, 2018).

Given these facts, it is verified that restricting the scope of compensation for off-balance labor damage, as attempted by the legislator in article 223-A, of the CLT, remains incompatible with what the Federal Constitution proposes. In the previous item of the present study, it was demonstrated that when applying such legislation, the magistrate is unable to undergo what would be crucial steps to measure the amount to be restored as off-balance damage, such as the severity of the offense, the dimension of the losses, the financial capacity of the offenders, the principle of reasonability and the compliance with the pedagogical aspect of the conviction.

Thus, there is no way to expect the Brazilian employee to be repaired, even minimally, in view of the possibilities currently presented under the Title II-A of CLT (BRASIL, 2017). This statement comes across several constitutional principles and guarantees, such as the principle of full compensation for damage, provided for in article 5, items V and X, of CF/88, according to which "the right of reply is ensured, in proportion to the offense, as well as compensation for property or moral damages or damages to the image". Therefore, it is not conceivable that such calculation is carried out based on static standards, for the magistrate is responsible for proceeding with a particular and individual analysis of each case.

Evident is the discrimination of article 223-G of the CLT (BRASIL, 2017), which can be related to debates of the VII Civil Law Day of the Federal Court of Justice, opportunity when Statement No. 588 was approved. It attests that "the patrimony of the offended cannot function as a preponderant parameter for the arbitration of compensation for off-balance damage" (BRAZIL , 2015). In view of this, it was understood that the subject's income can be considered, as long as it is not the only parameter, nor the most important criterion at the time of the magistrate's analysis, under penalty of violating the aforementioned principle of full compensation for the damage.

In order to corroborate this understanding, Oliveira says:

> The inclusion in the Federal Constitution of 1988 of the right to reparation for moral damages indicated that injuries of this nature should be fully compensated, without the ties of limiting parameters. According to Article 5, V, the award must be proportional to the injury; as it is not possible to limit the intensity of the offense, it is also not possible to limit the amount of compensation, under penalty of creating, in certain cases, a disproportionate reparation, for the benefit of the aggressor [...] (OLIVEIRA, 2017, p. 12).

Furthermore, as stated by article 5, item X, of the Federal Constitution, " – the privacy, private life, honor, and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured". It should be noted that the rule herein questioned does not deny that compensation is due for off-balance damage, however, it remains impracticable to apply a reparation that does not comply with the constitutional guidelines, due to the limits imposed on the employee's compensation, which, according to article 223-G, shall be calculated conforming to the last contractual salary (BRASIL, 2017).

Therefore, it is imperative to affirm that the principle of full compensation for the damage is clearly violated, as it remains impossible to restore the status preceding the injury.

Article 7, *caput*, CF/88, presents the "rights of urban and rural workers, among others that aim to improve their social conditions". Item XXVIII encompasses "occupational accident insurance, to be paid for by the employer, without excluding the employer's liability for indemnity in the event of malice or fault; " (BRASIL, 1988). Therefore, it is the employee's right to obtain fair and dignified compensation for the damage suffered.

It is necessary to emphasize that when referring to the "fair indemnity", this implies that the amount received as reparation for off-balance labor damage does not aim at the worker's enrichment. A refund is sought in order to restore the status preceding the offense to the greatest extent possible, enabling the victim to seek mechanisms for medical and psychiatric treatment, psychotherapy, among others.

Art. 223-G of CLT (BRASIL, 2017) disrespects the constitutional text. Working is a social right, as provided for in article 6 of CF/88, thus, a fundamental right. Therefore, the law should go beyond the code, and mechanisms for its effective implementation should be enabled.

Due to its nature as a fundamental right, working is also a human right, being regulated by the Universal Declaration of Human Rights (UDHR) in the sense that all persons, without any distinction, have the right to decent and fair working conditions, which also regards what is herein discussed. A working environment that fails to allow the worker to seek compensation for any damages that may have proceeded, fails the UDHR itself. Its article 23 states:

> (1) Everyone has the **right to work**, to free choice of employment, to **just and favorable conditions of work**, and to protection against unemployment. (2) Everyone, without any discrimination, has the right to equal pay for equal work. (3) Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. (4) Everyone has the right to form and join trade unions for the protection of his interests. (UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948) (bold added).

It is imperative to consider the constitutional principles of equality and the dignity of the human person in light of the evidence of a constitutional violation. As exhaustively explained herein, the chances of a court order granting compensation for off-balance damage differently to workers with divergent incomes, is not only highly likely but also possible.

Thus, how can we not verify express discrimination, legitimized by the Judiciary itself and corroborated by labor legislation that conditions the damage compensation to the victim's salary? It is a direct and explicit offense to the principle of equality, embodied in the caput of Art. 5 of the CRFB/88, for "**all persons are equal before the law,** without any distinction whatsoever, **Brazilians and foreigners residing in the country being ensured of inviolability of the right to […] equality**." (bold added).

If the Constitutional Charter, guardian of all fundamental rights and guarantees, expressly prohibits the inviolability of the right to isonomic treatment among all, an attempt to obtain ordinary law, in this case, the CLT, to allow discriminatory and unequal treatment motivated by the worker's income would be frustrated. It is imperative to point out that there is no possibility of there being discriminatory treatment because there will always be, in every case, a party harmed by the decision of the magistrate who grants a value, as compensation for non-pecuniary damage, different from another, only for the value of his salary.

The new legislation fell back on the promotion of fundamental rights and guarantees. Saying that it legitimizes degrading and inhuman treatment is an understatement. No one is better, greater, or superior, in any way, to anyone, by the value of their income.

Feliciano and Pasqualeto share the following understanding:

> In this sense, there is no way to understand advanced or modernizing, legislation that tariffs and limits non-measurable damages, that disregards the principles of equality and proportionality and that makes labor legislation go back for centuries (FELICIANO; PASQUALETO, 2018, p. 08).

Moreover, the worker's income, under no circumstances, should be a criterion for the magistrate's analysis regarding compensation for off-balance damage. In the wise words of Oliveira (2017, p. 12), "Why establish several indemnities, according to the victim's income, for off-balance sheet offenses of the same intensity and with the same degree of severity?".

It is necessary to emphasize that one of the fundamental objectives of the Federative Republic of Brazil, as stated in article 3 of the CF/88, item III, is precisely the reduction of social inequalities (BRASIL, 1988). However, the new article 223-G proposes, in the 21st century, a new form of social inequality.

All things considered, solely with what has been explained, it would be possible to discuss the unconstitutionality of the provision in question, given that the fundamental principle of

equality had been put in check, violating guarantees and fundamental rights, such as the right to broad and full indemnification.

The form of compensation for off-balance damage should consider the damage itself and its circumstances. The magistrate's analysis should be focused on the fact, in the case, what occurred and how it occurred, and under no circumstances should one take into question, as a basis of calculation of reparation, the salary of the offended.

Miranda and Lima defend this same perspective by stating:

> [...] it is possible that the device is considered unconstitutional at the time of its validity, because the off-balance sheet damages must be fixed on the basis of the damage itself, not by the worker's salary, under penalty of losing their extra-patrimonial nature, because they relate to the damage to morals suffered by the worker, under penalty of violation of the principle of isonomy (MIRANDA; LIMA, 2017, p. 09).

In addition to the principle of equality, it must also be affirmed that the principle of the dignity of the human person conflicts with what dictates the new labor legislation. First, it is emphasized that article 1 of the CF/88, in its item III, states that one of the foundations of the Federative Republic of Brazil is, precisely, the dignity of the human person (BRASIL, 1988).

It must be ratified that the dignity of a being is unavailable, irreplaceable, and irreducible. It cannot be the object of sale, nor is there any possibility of anyone giving up their dignity, precisely because it is inherent in being because all persons are born invested in this fundamental principle. In this sense, all laws must excel in provisions that respect and encourage the constant respect, progress, and fulfillment of such dignity.

Thus, if there is any legislative change, especially if it is a relevant change, such as the Labor Reform, which provided a series of drastic changes in the text of the CLT, the thematic coherence of the new law with the Federal Constitution must be observed, which is not seen in the contested scenario. The legislator's goal of charging off-balance damage based on the last contractual salary of the offended must be questioned.

In addition to failing to meet the basic purposes of the indemnity, such as the severity of the damage, the size of the losses suffered, and the financial capacity of the offenders, the legal text standardizes that the income of the Brazilian worker shall serve as the basis for reaching an amount of indemnity for off-balance damage, which occurs, precisely, when the worker's dignity is violated.

It is necessary to exemplify that the dignity of a human being encompasses all the factors essential to a balanced, fair life with individual guarantees and rights. Thus, human dignity is disrespected when life events lead to a shock in this individual's psychic balance, which asks for compensation. It has already been explained in the present research, preferably in item 02, that this mental exhaustion can cause several diseases, such as depression, anxiety disorder, and/or panic syndrome, being these pathologies difficult to treat and sensitive only to those who feel. They can destroy a whole life, end projects, and dismantle families.

Therefore, any legislation that seeks to charge compensation for off-balance damage is unacceptable, precisely because of the subjective and divergent nature of such compensation, since each person feels differently. It is not possible to nationalize, nor to establish a single parameter for damage that does not have such precise accuracy. In fact, this kind of psychic

offense is not solved with mathematical calculations. The value attributed to the worker as a reparation must attempt to provide a dignified, harmonious, and fair life to the greatest extent possible, in respect of the dignity of the human person and the fundamental principle of equality.

The Supreme Federal Court ruled on this matter in the Charge for Non-Compliance with Fundamental Precept (ADPF) No. 130, which referred to Press Law No. 5,250/1967, whose Chapter VI "Civil Liability", especially the articles 51, 52 and 56, sought to charge the moral offense that might be committed by the press. In the decision, the Supreme Court pointed out the need to observe the fundamental principles of equality and reasonability when it comes to fixing compensation for moral damage.

This is the text of article 51 provided by this law:

> Art. 51. **The civil liability of** the professional journalist who contributes to the damage of negligence, malpractice, or recklessness, **is limited**, in each writing, transmission, or news: I - to 2 minimum wages of the region, in the case of publication or transmission of false news, or disclosure of true truncated or misrepresented fact (art. 16, ns. II and IV). II - five minimum wages of the region, in cases of publication or transmission offending the dignity or deca of one person; III - to 10 minimum wages of the region, in cases of the imputation of fact offensive to the reputation of someone; IV - to 20 minimum wages of the region, in cases of false imputation of crime to someone, or imputation of a true crime, in cases where the law does not allow the exception of the truth (art. 49, § 1). (bold added).

Analyzing the ADPF no. 130, it is necessary to enforce that although it regards a slightly different theme from the one herein debated, they are certainly correlated, since both deal with off-balance damages and in both cases, the same consequences can be observed – violation of fundamental principles such as equality, the dignity of the human person and proportionality, as well as the principle of full reparation for damage. Also, and also provides a scenario of inequalities and discrimination.

Given these considerations, the vote of Minister Ricardo Lewandowski filed into the ADPF records, is worth mentioning:

> [...] the principle of proportionality, as explained in that constitutional provision, can only materialize in the face of a specific case. That is, do not lead to a legal aprioristic discipline, which takes into account abstract models of conduct, since the universe of social communication constitutes a dynamic and multifaceted reality, constantly evolving. [...]
>
> .....
>
> [...] In other words, I do not think it is possible for the ordinary legislator to establish, in advance, the material limits of the right of retorsion, given the myriad expressions that can present, in daily life, the injuries conveyed by the media in its various aspects (STF, 2009, *online*).

It may be inferred from the excerpts above, that the effective realization of the principle of proportionality, which avoids exaggerations or insufficiencies in the law, only occurs according to the particularities of each case, therefore, it is necessary that the magistrate, faced with a concrete situation, addresses the fairest and most dignified value as reparation for the injury suffered, in a way that any attempt of limitation by labor law or standardization of compensation does not prevail.

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Therefore, to abstractly analyze the compensation for damage, as if all present and future cases were fully covered by the taxation of the labor legislation, and to believe that article 223-G of the CLT is capable of culminating in a dignified and fair reparation, is another inadmissible attempt of the legislator to put all imaginable and unimaginable situations under the same weight, which is not only impossible, incomprehensible, and impractical but also unconstitutional, because it violates a series of individual rights and guarantees by establishing that a person's compensation will be tied to their last salary, allowing infinite hypotheses of affronts to human and fundamental rights.

Thus, the dynamicity of relations does not allow any legislative framework to restrain how compensation shall take place, since it may be granted in an inferior way than it should have been, reproducing inequalities and discrimination.

Moreover, this discussion around the Press Law culminated in Precedent 281 of the Superior Court of Justice, which states that "compensation for moral damage is not subject to the taxation provided for in the Press Law.". Thus, once again, it is envisioned the understanding of the Superior Courts on the theme around the taxation for off-balance damage, confirming that the standardization of indemnifications imposed by the CLT is harmful to labor rights.

## 5. FINAL CONSIDERATIONS

The worker is in an unfavorable position compared to the employer, who most of time, has greater technical, legal, and financial possibilities to face labor lawsuits. It cannot be allowed that, in the name of an alleged economic advance for the Brazilian State, labor and fundamental rights are mitigated and constitutional principles violated.

However, if the Constitutional Law stipulates equality between all, the CLT, ordinary law, could not treat the matter differently, as it has been exhaustively exemplified in the present work. Changes must be carried out in the text of Law No. 13,467/17 (Labor Reform), so as to constantly promote development in fundamental and individual rights and guarantees.

Moreover, it was observed in the present study that there are several jurisprudential understandings concerning the subject, in particular, the ADPF No. 130, which considered unconstitutional the objective taxation of moral damage in Press Law No. 5,250/1967. Also, several statements, aiming to challenge the text of article 223-G, CLT, and to avoid the violation of fundamental guarantees, were approved. It is worth mentioning the extra-legal solution promoted by the Labor District Attorney's Office and Vale, in order to repair, in the fairest and most dignifying way possible, the relatives of the victims of the tragedy in Brumadinho.

Therefore, if the current legislation corroborates judicial decisions that promote inequality among employees, both the Federal Constitution and the Universal Declaration of Human Rights are being violated. The fight on behalf of labor rights cannot cease, and rules that disrespect the Consolidation of Labor Laws (CLT) should not be allowed.

In view of what was herein exposed, it is unquestionable the violation of several fundamental principles, such as the principle of isonomy, as stated by article 5 of the Federal Constitution,

which is assertive in declaring unconditional equality before the law, without any distinction, as well as the dignity of the human person, which is one of the foundations of the Federative Republic of Brazil in accordance with article 1, item III of the CRFB/88.

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# THE RIGHTS VIOLATION OF CHILDREN AND ADOLESCENTS BY PSYCHOLOGICAL HARASSMENT IN SOCIAL AND VIRTUAL ENVIRONMENTS

## A VIOLAÇÃO DE DIREITOS DE CRIANÇAS E ADOLESCENTES POR ASSÉDIO MORAL NOS AMBIENTES SOCIAIS E VIRTUAIS

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## ABSTRACT

This article conducts a study on the violation of the rights of children and adolescents through moral harassment in social and virtual environments. Its general objective is to analyze the confrontation of systematic intimidation practices in social and virtual environments, in the light of the theory of integral protection. The specific objectives are: to contextualize the violation of children's and adolescents' rights by bullying in social and virtual environments, differentiating *bullying from cyberbullying*; verifying the legal treatment of the matter, based on Law No. 13,185/2015 and the Program to Combat Systematic Intimidation; and to demonstrate the confrontation of systematic bullying practices, in the light of the principle of integral protection, identifying actions to prevent the occurrence of such practices. The research problem was: How does the practice of systematic intimidation occur in Brazil to perform the integral protection of children and adolescents? It was hypothesized that confronting the practice of systematic intimidation requires, in the light of the theory of integral protection, measures that go beyond the identification and/or accountability of the perpetrator of violence, demanding preventive and sensitization actions on the part of the actors of the System of Guarantees of Rights, as well as acting through public policies, aimed at reducing the rates of violence and the effective promotion of comprehensive protection. The method of approach was deductive and procedure method, monographic, using bibliographic and documentary research techniques. Among the main results achieved,

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we obtained the confirmation of the hypothesis, in addition to identifying the importance of some actions, such as the realization of an accurate diagnosis of violence, the management of prevention based on the identified causes, the realization of prevention from early childhood education, the intersectoral approach, as well as listening and consideration to the statements of children and adolescents throughout the process of coping with systematic intimidation.

**Keywords:** Human Rights. Child. Adolescent. Bullying. Virtual Environment.

## RESUMO

*O presente artigo realiza um estudo da violação de direitos de crianças e adolescentes por assédio moral nos ambientes sociais e virtuais. Tem por objetivo geral, analisar o enfrentamento das práticas de intimidação sistemática, nos ambientes sociais e virtuais, à luz da teoria da proteção integral. Os objetivos específicos são: contextualizar a violação de direitos de crianças e adolescentes por assédio moral nos ambientes sociais e virtuais, diferenciando o bullying do cyberbullying; verificar o tratamento jurídico da matéria, a partir da Lei nº 13.185/2015 e do Programa de Combate à Intimidação Sistemática; e demonstrar o enfrentamento das práticas de intimidação sistemáticas, à luz do princípio da proteção integral, identificando ações de prevenção à ocorrência das referidas práticas. O problema de pesquisa foi o seguinte: Como se dá o enfrentamento, no Brasil, à prática de intimidação sistemática, para a realização da proteção integral de crianças e adolescentes? Partiu-se da hipótese de que o enfrentamento à prática de intimidação sistemática, requer, à luz da teoria da proteção integral, medidas que vão além da identificação e/ou responsabilização do autor da violência, demandando ações preventivas e de sensibilização, por parte dos atores do Sistema de Garantias de Direitos, bem como, a atuação por meio de políticas públicas, visando a diminuição dos índices de violência e a promoção efetiva da proteção integral. O método de abordagem foi o dedutivo e o de procedimento, o monográfico, utilizando-se as técnicas de pesquisa bibliográfica e documental. Dentre os principais resultados alcançados, obteve-se a confirmação da hipótese, além da identificação da importância de algumas ações, como a realização de um diagnóstico preciso da violência, a gestão da prevenção a partir das causas identificadas, a realização da prevenção desde a educação infantil, a abordagem intersetorial, bem como a escuta e consideração às falas das crianças e dos adolescentes ao longo de todo o processo de enfrentamento à intimidação sistemática.*

**Palavras-chave:** *Direitos Humanos. Criança. Adolescente. Assédio moral. Ambiente Virtual.*

# 1. INTRODUCTION

The rules for the protection of the rights of children and adolescents essentially seek to guarantee the integral protection of children and adolescents in Brazil. According to Law No. 8,069 of July 13, 1990, which approved the Child and Adolescent Statute (ECA), children and adolescents enjoy all the fundamental rights inherent in the human person and must, according to the provisions of Article 3, *caput*, have ensured all opportunities and facilities that enable them to have physical development, mental, moral, spiritual, and social, in conditions of freedom and dignity. The ECA also provides in Article 5 that no child or adolescent may suffer any form of negligence, discrimination, exploitation, violence, cruelty, or oppression, and establishes punishment (in the form of the law), for any attack, by action, or omission, to their fundamental rights.

Although they receive specialized protection, children and adolescents are victims, in Brazil, of the most varied forms of violence: structural, physical, physical, sexual, psychological, urban, institutional, moral violence, among others. Sometimes these acts of violence happen in the school environment and more recently, also occur in so-called cyberspace.

Considering the bullying, it is possible to infer that, in addition to globalization and the increase in the use of social networks, the actions of intimidation that, until then, were limited to the school environment or to community spaces where the child and adolescent socialize, now gain another dimension, which is the virtual space, of digital technologies: social media, mobile phone, online *games*, etc.

Thus, bullying against children and adolescents occurs both in social and virtual environments. A survey conducted by the United Nations in 2016 of more than 100,000 children and young people worldwide showed that two-thirds of them (therefore, more than half) had already *suffered some form of bullying*, related to physical appearance, sexual orientation, gender, ethnicity, or country of origin. Another request, which is more recent in June 2019 by UNICEF and its partners, from U-Report (a free social messaging tool), including the response of more than 170,000 participants in 30 countries, revealed that more than a third of young people in the 30 countries reported being victims of cyberbullying. According to the survey, one in three young people were bullied *online* and one in five young people left school because of *cyberbullying* and violence.

Bullying, in social or virtual forms, presents violence, which, in turn, corresponds to a violation of the law. The life of the child or the adolescent will be impacted by the intimidation suffered.

The significant number of cases of systematic intimidation in Brazil motivated, therefore, the delimitation of this theme. The general objective of the research was to analyze the coping of systematic intimidation practices in social and virtual environments, in the light of the theory of integral protection. In addition to this objective, the study also aimed to: contextualize the violation of children's and adolescents' rights due to bullying in social and virtual environments, *differentiating bullying and cyberbullying*; verifying the legal treatment of the matter from Law No. 13,185/2015 and the Program to Combat Systematic Intimidation; and to demonstrate the confrontation of systematic intimidation practices, in the light of the theory of integral protection, identifying actions to prevent the occurrence of these practices.

This research sought to answer the following problem: how does the confrontation occur, in Brazil, the practice of systematic intimidation, to perform the integral protection of children and adolescents?

It was hypothesized that coping with the practice of systematic intimidation, embodied by moral harassment in social and virtual environments, especially *bullying and cyberbullying*, respectively, demands, in the light of the theory of integral protection, measures that go beyond the identification and accountability of the perpetrator of violence. Therefore, it offers preventive and sensitization actions on the part of the actors of the System of Guarantees of Rights, as well as the action, through public policies, aiming at reducing the rates of violence and the effective promotion of integral protection.

The theoretical approach to this theme is justified since the practice of systematic intimidation affects the child and/or adolescent in physical and psychological forms. Likewise, the theme has social relevance, because, just as violence occurs in the social environment and generates different consequences for children and adolescents, its solution also permeates prevention and measures that must be known to the whole society, which is part of the triple shared responsibility. Moreover, the work presents its academic importance, as it contributes

to the theme, promoting new reflections and studies to approach the theme, based on the promotion of the rights of children and adolescents.

To carry out the research, the deductive approach method and the monographic procedure method were used. Regarding research techniques, bibliographic and documentary techniques were adopted.

The main results achieved were that the confrontation with systematic intimidation practices in Brazil occurs from governmental, non-governmental action, educational establishments, civil associations, and international protection agencies, as well as that it is necessary, aiming at the realization of integral protection, the detailed diagnosis of violence and, management of prevention based on the identified causes.

## 2. THE VIOLATION OF CHILDREN'S AND ADOLESCENTS' RIGHTS THROUGH MORAL HARASSMENT IN SOCIAL AND VIRTUAL ENVIRONMENTS

To analyze the violation of the rights of children and adolescents by moral harassment in social and virtual environments, it is necessary to first formulate the concept, the delimitation of systematic bullying actions, differentiating *bullying* from *cyberbullying*. In general, the initial understanding that needs to be made is that the action of systematic intimidation, in any modality, corresponds to violence. This is an unacceptable act that needs to be socially discouraged. Another initial reflection that fits in this first moment, made in due course by Antunes (2008, p. 14), is that "to name something is not to control this something". Therefore, the action intended here goes far beyond the conceptualization, characterization, or differentiation between institutes: it seeks to confront the issue in a preventive and broad way.

The bullying against children and adolescents, reflected here in the actions of systematic intimidation, can take place anywhere: on the street, in the family, in the condominium, at school, in the virtual networks. Where there are people relating, there is the possibility of its occurrence. School *bullying*, for example, dates back to the emergence of the school itself. However, it only began to be researched in 1970, with the pioneering of the Swede Dan Olweus (SANTANA, 2013).

In Brazil, studies on school violence date back to the 1980s, initially focusing on depredations in schools, and then focusing on the scope of interpersonal relationships, with the analysis of verbal, physical, or threat aggressions. Discussions about *bullying were* then introduced from the end of the 20th century and the beginning of the 21st century (ANTUNES, 2008).

> The word *bullying*, in the English language, is derived from the *noun bully*, which means, in this context, aggressor, and the verb *to bully*, which means mistreating someone, especially who is weaker. In Portuguese, the word that most closely approximates these is the verb "bully", which means to annoy, to disturb. Therefore, because there is no precise translation, the term bullying is *used* in Brazil, as well as in almost all other countries concerned with this type of violence. (SANTANA, 2013, p. 15)

The definition of *bullying* according to its precursor researcher, Dan Olweus, consists of aggressive behavior, with some special characteristics: an asymmetric power relationship and some repeatability. For the most part, *bullying* occurs without apparent provocation by the targeted child or adolescent (OLWEUS, 2013). The author's definition, therefore, is based on three essential aspects or criteria: the intention to harm, the repetitiveness, and the imbalance of power (THORNBERG; HUNTER, HUNTER, HUNTER. HONG; RÖNNBERG, 2020).

Several other researchers propose similar definitions. For Santana (2013, p. 14), *bullying* "[...] it is a set of face-to-face, aggressive, intentional and repetitive actions practiced by one or more people against someone, without apparent motivation, causing them suffering." Fante (2005, p. 28-29), defines it as "[...] a set of aggressive, intentional, and repetitive attitudes that occur without evident motivation, adopted by one or more students against another, causing pain, anguish, and suffering. "." Bullying is also conceived as "[...] a violent, sadic and elective attitude, determined by the prejudice of the aggressors." (WASCHECK, 2016, p. 9).

From the definitions of the authors mentioned above, therefore, it can be considered *that bullying* is based on actions. The practice of *bullying requires* that something be done. These actions are intentional. That is, there *is* no bullying without means or by carelessness: the aggressor is determined to practice it. Furthermore, it is said that action, or actions, require constancy: they are repetitive. Another important feature is that *bullying occurs* in an inequality of power. There is an asymmetry of power entre who practices and who is intimidated so that the student who is exposed to actions has difficulty defending himself. Finally, one must always keep in mind that *bullying actions are* intended to harm someone, to cause them suffering.

Given the concept of *bullying*, it is important to know how to identify actions that do not fit the institute. This is because it is proper for children and adolescents, specific situations of stress or disagreements, which are part of the development process of any human being. In this sense, "[...] it is *not bullying*, nor are they: an act of punctual violence, occasional fights, bad jokes, games of age, games without the intention of hurting, occasional insult, and exchange of offenses in the heat of an argument. " (SANTANA, 2013, p. 12). Likewise, it does not *configure bullying* when the provocation is done in a friendly and fun way, or when two students, with the same strength or power, fight or argue (OLWEUS, 2013).

The repetitive actions that shape *bullying are*: saying mean and offensive things about the person; making fun of; making fun of them; calling the person mean and offensive names; ignoring or completely excluding the person from their group of friends; purposely leaving them out of events; pushing; kicking; locking them inside a room; telling lies or spreading false rumors about the person; trying to make other classmates and/or students not like to like it (OLWEUS, 2013).

Bullying *reveals* cruel behavior, in which the strongest ones turn the weakest ones into objects for their fun and pleasure. Persecution, humiliation, rejection, derogatory nicknames, and threats are constant actions. Such behaviors can, therefore, occur in two ways: direct, which includes physical and verbal agressões; and indirect, possibly the worst of the two forms (due to the possibility of creating irreversible traumas for the intimidated person), which consists of the dissemination of rumors, to promote discrimination and social exclusion of the victim (FANTE, 2005).

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Most researchers argue that there are three *subjects involved in bullying*: the aggressor, the victim, and the spectator (FANTE, 2005; SANTANA, 2013; WASCHECK, 2016). Considering school *bullying*, the spectator is the student who witnesses the action but does not suffer it or practice it. It represents most students who live with the problem and fear being the aggressor's next target (FANTE, 2005). There are four types of spectators: the passive spectator, who is silent in the face of the act of aggression, even if he does not agree with the actions of the aggressors; the neutral spectator, who suffers a certain emotional "anesthesia"; as if he did not feel anything; the active spectator, who encourages the aggressor through laughter or shouting, but does not engage directly into action; and, finally, the agent spectator, who is willing to take action towards the end of *bullying*. The latter, it is the spectator who feels uncomfortable with the action and leaves his static position to rebuke the aggressor, to promote the victim to promote the complaint, or to make, anonymously or nominally, the denunciation of the situation witnessed (SANTANA, 2013).

Antunes (2008) points out that the delimitation *of bullying behavior cannot* be considered natural or immutable, as if it were an exact formula, with frozen and distant variables, specific to science that aims at neutrality. It is necessary, according to the author, to do a critical exercise, to deconstruct such a configuration as ready and finished data, with an a-historical foundation and an "independent" concept. A concept in these modes is part of an instrumentalized science, which lends itself to the maintenance of an unequal social order.

> One should think to what extent the classification made possible by the adoption of this typology of violence does not mask the social processes inherent to behaviors classified as *bullying* or, even admitting the existence of such processes, treats them as natural. This is a fundamental step that science must take if its goal is in fact to contribute to the development of humanity and not to the adaptation of individuals to an unequal social order such as the existing one. (ANTUNES, 2008, p. 40)

The author invites us to think about the concept *of bullying*, in the light of criticism of instrumental reason. Thus, it is no longer enough to quantify the occurrence of behaviors or link them to social, ideological, cultural, or individual factors present in the social reality. The criticism of instrumental reason demands that such behaviors be problematized and questioned, thought beyond the configuration or classification intention.

After the concept of *bullying*, it is now necessary to delimit *the cyberbullying* that, in general, *is the bullying* carried out through digital technologies.

The new technologies, access to an increasing number of people, show that digital relationships are changing social dynamics today. People are connected, being a striking feature of this new technological era, hypervisibility, that is, the constant and voluntary exposure of acts and facts of everyday life (FERREIRA; DESLANDES, 2018). However, in addition to the facilities and sociability that were possible with new technologies, the virtual world also proved to be a space for the practice of crimes and acts of systematic intimidation and, in the same way, a space for the violation of the rights of children and adolescents.

*Cyberbullying consists*, then, of aggression perpetrated through digital technologies (*online* or mobile), against children and adolescents. Just like any *bully*, the *cyberbully* acts to hurt, causing harm to his target. Another similar feature is *that cyberbullying* occurs in pouco sites monitored by adults: text messages from a personal cell phone, *through online games, or* even

on social networking sites. Access to digital technologies allows for a lot of information but makes children and adolescents vulnerable to *online* harassment (LIVINGSTONE; STOILOVA; KELLY, 2016; NEVES, 2015).

In *cyberbullying*, the aggressor can operate by writing or image. The writing, very recurrent using text and email messages, may aim at the dissemination of gossip, malicious rumors, lies about the bullied, defamation, or fake news. The aggressor can even impersonate the victim by posting offensive messages on his behalf. In the use of the image, it aims at the visual embarrassment of the target, through embarrassing photos or video posting (SANTANA, 2013).

It turns out, therefore, *that bullying* and *cyberbullying* go hand in hand. However, there is one fundamental difference: *cyberbullying* leaves a digital trail. In addition to this difference, some other authors point out: *while bullying demands the* aggressor and the victim to be at the same place, *cyberbullying does not need to* happen face-to-face, which contributes to the increase in the number of records in this type of aggression. Cyberbullying *ends* up encouraging those people who wouldn't have the same bravery face to face. That is, *cyberbullying confers* the illusory mantle of anonymity (LIVINGSTONE; STOILOVA; KELLY, 2016).

Another one-off issue *of online* harassment is that it can occur all the time and hit the target at any time. In *cyberbullying*, violence reaches private and hitherto safe places for the victim, such as the home itself.

> In the school environment, for example, offenses have a beginning, middle, and end. The victim knows that the assault is perpetrated at a specific place and time. When these occur over the Internet or are available virtually, accessibility is unlimited.
>
> The victims are persecuted as if by a "ghost", who suddenly arrives with no intention to leave, causing much suffering also for family members and close people. (NEVES, 2015, p. 31)

By gaining an unlimited dimension, you have the ultimate difference between *bullying and cyberbullying*: in *cyberbullying you* only need one action. There is no need for the presence of the repetitiveness of the action. There's no need for aggression. So, it only takes a post or a single video to set up an assault. Messages are easy and widely shared and viewed to multiply the number of viewers. On the Internet, you lose control of what has been conveyed. The materials spread faster, reaching a larger audience, and accentuating the victim's suffering (NEVES, 2015; LIVINGSTONE; STOILOVA; KELLY, 2016).

Violence is an evil that needs to be understood from a multifactorial look (MATA DIZ; PENIDO MARTINS, 2017). There are many causes behind *bullying practices*. As mentioned earlier, the student often becomes an aggressor because of the fear of becoming the next target of intimidation, as a defense strategy. Or the desire to achieve certain popularity among peers. Scholars also list other causes, such as affective deficiency, absence of limits, excessive control, and power of parents over children. Physical abuse and violent emotional outbursts suffered due to the "educational practices" of parents can generate in children or adolescents the need to reproduce them against others, whenever they encounter personal insecurity, seeking, through *the practice of bullying*, social recognition, or self-affirmation (FANTE, 2005). In addition to these, the following are mentioned: social changes and inequalities; easy access to media tools; exposure to scenes of violence presented in television shows; the call to consumerism; religious, ethnic, and racial intolerance; homophobia; socially learned aggression; high com-

petitiveness in various sectors of human life; the absence of positive examples and humanist educational models (SANTANA, 2013; FANTE, 2005; ANTUNES, 2008).

It is necessary to understand violence as a social phenomenon, identifying the cultural elements that produce a society prone to barbarism. It is necessary to highlight the cultural demands that are imposed for the subject to be socially accepted, which makes violence not only instinctive but cultural. The socio-historical contextualization of violence allows the understanding of *school bullying*. Although the most latent characteristic *of bullying* is violence (physical, psychological, or moral), the act is characterized as a type of "traumatic violence", which removes from the victim the ability to absorb all the pain and anguish felt. Moreover, considering the asymmetry of forces, *bullying reveals the selective* sadism of the one who practices it. That is, the aggressor rationally selects his target. Finally, the basis of *bullying actions* is prejudice (WASCHECK, 2016). Prejudice, discrimination, and stigmatization are close words, which reveal revulsion for the different. It is not for another reason that, often, the aggressor's target has some characteristic that differentiates him from the others: too high, too low, fat, too thin, too smart, too shy, with vision problems, some physical limitation, or because he does not fit the social "standard" either by ethnicity, cultural heritage, sexual orientation or religious doctrine (FELIZARDO, 2017).

> There are two possible impacts on people so stigmatized by those who attribute to them, with public consent, stigma. The first is a painful blow to the self-respect of the stigmatized person (or who shares the supposed generic failure of a group), resulting in the agonies of humiliation and shame; which, in turn, leads to unbearable self-deprecation and self-loathing, and – if the stigmatized accepts the verdict of the "broader society" – ends in depression and often impotence. (BAUMAN, 2017, p. 44-45)

Systematic bullying actions violate the integrity and dignity of children and adolescents. These are actions that affect them in the different stages of development, with implications not only in the areas of health and emotional well-being, but also in the areas of education, but also the areas of school health, and well-being. As consequences of such violence, the authors point out: depression, lack of appetite, fatigue, stomach and headache pain, sleep disorders, mood swings, feelings of anger, sweating, nocturnal enuresis, nightmares, sadness, fear, impotence, low esteem, anxiety, shame and, in the most serious situations, suicidal thoughts suicide or even murder. They are emotional, psychological scars that can accompany the child or adolescent until adulthood (NOTAR; PADGETT; RODEN, 2013; PAIS, 2016; FELIZARDO, 2017). "The specificity of *bullying lies* in its power to cause trauma to the psyche of its victims, destroying their self-esteem, their physical and mental health, factors that make a defense even more difficult." (NEVES, 2016, p. 34)

It is, therefore, a complex public health problem, which strongly violates the rights of children and adolescents, to demand legal, political protection, as well as the support of society, the family, the System of Guarantees of Rights, but it is possible to quickly and adequately manage this form of violence. For the extinction of systematic intimidation practices, it is necessary to promote a cultural and social change, since "[the] violent behavior of students reproduce the barbarism of society, the failure of authority and the dehumanization of the civilizing principle." (WASCHECK, 2016, p. 36-37).

## 3. THE REGULATION OF THE PROGRAM TO COMBAT SYSTEMATIC INTIMIDATION

The analysis of the rates of systematic intimidation against children and adolescents in Brazil (moral harassment, commonly regarded *as bullying and cyberbullying*), demonstrates that the *theme* is still poorly diagnosed in the country. They are sampled, in spaced times, from fragmented research, made by the initiative of international organizations, government agencies, as well as by independent researchers who are dedicated, individually, to the study of schooling experience and forms of violence against children and adolescents. Thus, it is worth presenting, first, the research conducted by the Program for the Prevention of Violence in Schools of the Latin American College of Social Sciences (FLACSO), which promoted, in 2015, fieldwork of 8 months in a set of schools, state and municipal, in the capitals: Belem, Fortaleza, Maceio, Sao Luiz, Belo Horizonte, Vitoria, and Salvador, entitled "Participatory diagnosis of violence in schools: young people speak".

The research included 6,500 students, aged 12 to 29 years, from a total of 129 schools in the seven capitals mentioned and, based on the perception of adolescents themselves about the guitars and violations that occur in their schools, pointed out that 69.7% of the students consider that some type of violence has already occurred in their school, in the twelve months before the survey. When analyzing the occurrences in schools, pointed out by the interviewees, it is verified that *cyberbullying* accounts for 7.8% of the total situations (ABRAMOVAY; Castro; SILVA, U.S.; CERQUEIRA, 2016). Considering the most expressive occurrences, the following table is:

| Distribution of occurrences | (%) |
|---|---|
| Fights | 15,1 |
| Swearing | 14,4 |
| Graffiti | 11,0 |
| Thefts/thefts | 10,1 |
| Threats | 7,8 |
| *Cyberbullying* (mocking, threatening, or swearing over the internet) | 7,8 |
| Discrimination | 6,5 |

**Source:** ABRAMOVAY; Castro; SILVA, U.S.; CERQUEIRA, 2016.

In addition, the survey reveals that 42% of the interviewees claimed to have already been assaulted at school and 27.4% revealed that they had suffered some type of discrimination (ABRAMOVAY; Castro; SILVA, U.S.; CERQUEIRA, 2016). Therefore, from the survey conducted by FLACSO, it can be seen that the school environment represents a place of violence for children and adolescents. Despite the expressive indication of *cyberbullying*, occurrences such as fights, name-calling, threats, and discrimination, can reveal situations of systematic intimidation in school. In this research, there was no exact categorization of *the term bullying*, but it is likely that many of these acts of violence occurred in a context of systematic intimidation: often, in

an unequal relationship of power and causing great suffering to that or to those who suffered the action.

In the analysis of discriminatory actions, the following have been identified as types of discrimination (which represent the grounds for discrimination) as follows:

| Types of discrimination suffered | (%) |
|---|---|
| For the place where you live | 19,2 |
| For another reason | 18,1 |
| By your color or race | 17,9 |
| For your religion | 17,3 |
| For your social class | 7,3 |
| For your sexual orientation | 6,0 |
| For physical disability | 5,6 |
| For your political preference | 4,2 |
| For being a man/woman | 4,1 |

**Source:** ABRAMOVAY; Castro; SILVA, U.S.; CERQUEIRA, 2016.

Based on the acts of discrimination that occurred in these schools that were part of the research, are essentially the markers of class, race, religion, and sexual orientation. The FLACSO survey also indicates that 15.0% of the adolescents interviewed reported having eaten some type of violence in their school in the last twelve months (ABRAMOVAY; Castro; SILVA, U.S.; CERQUEIRA, 2016). It is, therefore, an important indication of violence in school spaces, among which is *cyberbullying*. These data also point out the themes that should be contemplated by prevention policies and actions, in the planning and implementation of measures against *bullying* and *cyberbullying*.

Another relevant data is found in the report National Survey of School Health - PENSE, also carried out in 2015, through a formalized agreement between the Brazilian Institute of Geography and Statistics - IBGE and the Ministry of Health, together with the support of the Ministry of Education. The research evaluates the health situation of adolescents at school, including various themes, such as family context, eating habits, sexual and reproductive health, violence, use of health services, among others. PENSE 2015, the third edition of the research, was made from two sampling plans: one with students from the 9th grade of elementary school (Sample 1 - age configuration already adopted in previous research) and another, with students from 13 to 17 years, attending the stages of the teaching of interest, more specifically, from the 6th to 9th grade of elementary school and from the 1st to the 3rd grade of high school, corresponding to Sample 2 – which fits the indicators of the *Global School-based Student Health Survey* - GSHS, conducted by the World Health Organization.

Hence, the REPORT PENSE 2015, which includes students from Brazilian schools, public and private, from urban and rural areas throughout the national territory, present the analysis, adding the two samples of 112,998 questionnaires, applied in a total of 4,812 classes, in the school year 2015. With a sampling error of approximately 3% and a confidence level of 95%,

each, the samples point out, regarding the violence suffered in the family and school spheres, that *bullying actions are* part of the school routine (IBGE, 2016).

When asked about how often their school classmates treated them well or were helpful, considering the 30 days before the survey, 61.9% of the participating students answered that yes, they were well treated by their colleagues. Then, asked how often the schoolmates listened, intimidated, mocked, or mocked to the point of being hurt, upset, annoyed, offended, or even humiliated, in the 30 days before the survey, 7.4% of the students answered affirmatively. In other words, almost 8% of the students felt humiliated by the provocations received. This percentage is approximate if the gender category is considered: 7.6% of the boys felt offended, while 7.2% of the girls were bothered by the acts of their colleagues. However, when analyzing the occurrence of the practice in public and private schools, it is verified that systematic bullying actions affect more public-school students, 7.6%, while in private schools, it corresponds to 6.5%. Analyzing the regions under the research, the Southeast region and the State of São Paulo presented the highest percentage of students who reported suffering embarrassment or humiliation, being 8.3% and 9.0%, respectively (IBGE, 2016).

In turn, when asked if they had already been intimidated, bullied, or mocked by their colleagues, in the 30 days before the survey, 19.8% of the students answered yes. The report also highlights that the main reasons for the provocations suffered are the appearance of the body (15.6%) and the appearance of the face (10.9%), reasons that reinforce the stigmas and prejudices present in the most varied social contexts (IBGE, 2016).

The fourth edition of PENSE, held in 2019, will bring a single sampling. It was made with approximately 188,000 students, from 13 to 17 years old, in 4,361 schools, belonging to 1,288 municipalities of Brazil, as stated on the website of the Ministry of Health (BRASIL, 2019a). It will be an important way to assess the recent situation of *bullying in* Brazilian schools, as well as to compare it with the indexes of the survey conducted in 2015. However, the 2019 survey has not yet been published.

Another survey, now carried out in the city of São Paulo, in 2017, was based on the São Paulo Project for the Social Development of Children and Adolescents (SP-PROSO), coordinated by Maria Fernanda Tourinho Peres and Manuel Eisner, which had the support of and partnership of various institutions and people, such as of the Department of Education of the State of São Paulo, the Municipal Department of Education of the Municipality of São Paulo, the Center for Studies of Violence of the University of São Paulo (NEV/USP), the Brazilian Forum of Public Security (FBSO), the Faculty of Medicine of the University of São Paulo (FM-USP), the Institute of Criminology of the University of Cambridge (United Kingdom), the *British Academy/Newton Foundation* and the São Paulo State Research Support Foundation (FAPESP).

The research came from a sample of 2,702 9th grade students from 119 public and private schools in the state capital and points out, in the report "Violence, *bullying* and health repercussions: results of the São Paulo Project for the social development of children and adolescents (SP-PROSO)", which 28.7% of adolescents interviewed, male and female, reported being bullied in 2017 (PERES; EISNER, 2018). The actions suffered were:

| ***Bullying* suffered by adolescents** | **(%)** |
|---|---|
| Laughed/made fun/offended | 17,5 |
| Picked up/destroyed/hid objects | 11,5 |
| Ignored/excluded | 9,7 |
| Sexually harassed | 6 |
| They hit/bit/kicked/pulled hair | 3,7 |

**Source:** PERES; EISNER, 2018.

It turns out that the enjoyment, offense, destruction of personal objects affect the students of the schools subject to the research. Regarding self-reported perpetration, the research indicates that 15.3% assumed to have *committed bullying* with colleagues. The social markers of skin color, sexual orientation, body weight, and disability were analyzed, the prevalence of victimization was verified among adolescents who declared themselves non-heterosexual and those who claimed to live with some type of disability. The report also shows that the perpetration *of bullying and* violence was higher among adolescents who reported drug use and that both adolescents who suffered and those who perpetrated severe violence in the last 12 months showed worsening in their health. Essentially, the document reveals: that cases of *bullying and* violence among adolescents in schools are not rare events; that they result from clearly identifiable causes; and that can be avoided (PERES; EISNER, 2018).

Finally, the most recent data is presented by the International Student Assessment Program 2018, *in English, The Programme for International Student Assessment* - PISA, which counts on the collaboration and effort of the countries *of the Organization for Economic Co-operation and Development in English, The Organisation for Economic Co-operation and Development* – The ECD, as well as experts and international institutions. PISA has become the main indicator in the world of quality, equity, and efficiency in learning outcomes in countries, enabling reform in education, as well as the development of public education policies. In 2018, approximately 600,000 students carried out the assessment, representing about 32 million adolescents, aged 15, in schools in the 79 OECD participating countries and economies (SCHLEICHER, 2019; OECD, 2019).

The PISA 2018 report pointed out that students appreciate a school environment in which bullying does not exist, where they do not feel displaced, as well as where genuine and respectful relationships with teachers are possible. As for *bullying*, the document indicates an increase of about four percentage points since 2015 in the share of students who reported being frequently bullied. That is, in the countries that are part of the research, more than one in five students claimed to *have been bullied* at school, at least a few times a month, in 2018, representing 23% of participants. This increase in Brazil was ten percentage points, which corresponds to more than double, compared to the general average of other countries, revealing that the Brazilian school environment is more susceptible to *bullying* practices. The research also points out that 8% of the students were classified as frequently intimidated, and that verbal and relational bullying was the most frequent. A positive fact was that 90% of students agreed that they like it when someone defends other students who are being bullied (SCHLEICHER, 2019; OECD, 2019).

Given the overview of the main rates of systematic intimidation in Brazil, it is now necessary to analyze the Program to Combat Systematic Intimidation, and the regulation of the theme by

Law No. 13,185, on November 6, 2015, which instituted the Program to Combat *Systematic Bullying* throughout the national territory. It is legislation that aims at preventive action, seeking to inhibit systematic intimidation through the establishment of actions, policies, and practices that are oriented, informative, and educational on the subject. Therefore, the Law does not provide for any kind of punishment for the perpetrator of the violence, nor does it indicate accountability to aggressors or even to the *parents of the perpetrators of bullying* and/or *cyberbullying*.

Logo in § 1 of Article 1, presents the concept of systematic intimidation:

> [...] systematic intimidation (**bullying) is considered** every act of physical or psychological violence, intentional and repetitive that occurs without evident motivation, practiced by an individual or group, against one or more people, to intimidate or assault it, causing pain and anguish to the victim, in a relationship of power imbalance between the parties involved. (BRAZIL, 2015, original griffin)

It is verified that the legislative conceptualization contains all the requirements already presented previously: it represents violence, physical or psychological, which occurs in a repetitive, intentional way, practiced by a person or by a group of people, against one or more people, in a relationship of inequality of power, which causes pain and anguish to the victim. Neves (2016, p. 50), makes an important criticism of the expression "without evident motivation", contained in the Law: "there is or is not a reason that led the aggressor to rape the victim, nothing can justify, much less make acceptable systematic intimidation." In this sense, it does not matter whether the motivation is evident or not, for the configuration of the practice of *bullying*.

Article 2 has a legal characterization of systemic intimidation, which occurs when there is physical or psychological violence, in acts of intimidation, humiliation, or discrimination, and also: physical attacks (item I); personal insults (item II); systematic comments, and derogatory nicknames (item III); threats by any means (item IV); derogatory graffiti (item V); prejudiced expressions (item VI); conscious and premeditated social isolation (item VII) and pilhérias (item VIII). In the sole paragraph of Article 2, the Law presents the conceptualization of *cyberbullying*, stating that there is systematic intimidation in the worldwide computer network "[...] when using the instruments that are proper to depreciate, incite violence, tamper with photos and personal data to create means of psychosocial embarrassment." (BRAZIL, 2015). That is, in addition to social harassment, virtual harassment against children and adolescents is part of the scope of the Law.

In addition to conceptualizing and characterizing systematic intimidation, the legislation brings, in Article 3, its classification, according to the action practiced. Thus, intimidation can be verbal, moral, sexual, social, psychological, physical, material, and virtual (BRASIL, 2015).

After conceptualizing, characterizing and classifying systematic intimidation, the Law presents the objectives of the Program to Combat Systematic Intimidation (Article 4),which include: prevention and combating the practice of systematic intimidation throughout society (item I); the training of teachers, as well as pedagogical teams for the implementation of discussion actions, prevention, guidance and solution of the problem (item II); the implementation and dissemination of educational, informative and awareness campaigns (item III); the establishment of conduct and guidance practices to parents, family members and guardians, in view of the identification of victims and aggressors (item IV); the promotion of psychological, social and legal assistance to victims and aggressors (item V); the integration of mass media with schools and society, identification, awareness, prevention and combating the problem (item

VI); the promotion, in the framework of a culture of peace and mutual tolerance, of citizenship, empathic capacity and respect for third parties (item VII); the avoidance of punishment of aggressors, favoring the mechanisms and alternative instruments that promote accountability and change in hostile behavior (item VIII); and the promotion of measures to raise awareness, prevention and combat all types of violence, with emphasis on recurrent practices of systematic intimidation, committed by students, teachers or other professionals of the school and/or school community (item IX). For the proper implementation and implementation of the program's objectives and guidelines, federal entities will be able to sign agreements and establish partnerships (BRASIL, 2015).

The Law also establishes the duty of educational establishments, clubs, and recreational associations to ensure measures to raise awareness, prevention, diagnosis and combat *systematic bullying and other violence*, as well as the production and publication by states and municipalities of bi-monthly reports of occurrences of systematic intimidation, for the planning of actions (BRASIL, 2015).

The regulation of the Program to Combat Systematic Intimidation in Brazil not only clarifies the contours of the theme in the country, concerning the configuration and delimitation of preventive and educational measures but also imposes on States and Municipalities the proper diagnosis and monitoring of systematic intimidation actions, so that it is possible to effectively comply with the objectives of the Program.

## 4. TACKLING SYSTEMATIC INTIMIDATION PRACTICES BASED ON THE THEORY OF INTEGRAL PROTECTION

Bullying against children and adolescents is violence, a violation of rights that cannot be tolerated. This is because the Right of children and adolescents, based on the theory of integral protection, establishes that no child and no adolescent can be subject to discrimination or violence.

"The theory of integral protection has been established as a necessary presupposition for the understanding of the Right of Children and Adolescents in contemporary Brazil." (CUSTÓDIO, 2008). It arises in Brazil with the Federal Constitution of 1988, after a necessary process of redemocratization of the country, which began in the 1980s, from the movement of society itself and which also had the participation of children and adolescents. In addition to democratic realignment, the 1988 Constitution enabled a new way of conceiving and relating to children and adolescents in Brazil, now conceived as subjects of rights, as provided for in Article 227, *caput*:

> Art. 227. It is the duty of the family, society, and the State to ensure the right to life, health, food, education, leisure, professionalization, culture, dignity, respect, freedom, and family and community coexistence to the child, with absolute priority, and to put them safe from all forms of negligence, discrimination, exploitation, violence, cruelty, and oppression. (BRAZIL, 1988)

Comprehensive protection is revealed not only because of the protection of rights in all areas and spaces of life of children and adolescents, with the provision of a broad system of guarantees, but also because of the Right of Children and Adolescents, which is consolidated

with the implementation of Law No. 8,069/90 (Child and Adolescent Statute), is intended for all children and adolescents, without any distinction (VERONESE; COAST, 2006). "Both the Federal Constitution, in article 227, and the Child and Adolescent Statute, in articles 1 and 4, expressed the guarantees to the various rights that children and adolescents have now available, [...]." (MOREIRA; CUSTÓDIO, 2018, p. 185).

Protecting integrally implies recognizing that children and adolescents are in the process of development and, therefore, must protect their special rights. Protection needs to be specialized, differentiated, and integral, favoring children and adolescents in meeting their basic needs (SOUZA, 2001; Vieira; VERONESE, 2006). This is a tripartite responsibility: it involves the family, society, and the State, and can never be neglected. Therefore, "once recognized the condition of 'subjects of rights' in a peculiar condition of development, indispensable becomes to provide the means and instruments for the enjoyment of such rights, as well as to ensure the protection of the lives of these people in their entirety." (CABRAL, 2012).

System intimidation, whether in the social or virtual modality, violates several rights of children and adolescents. First, it violates the right to respect, the right to be treated and respected with dignity as a human person. Intimidation also violates the right to freedom, as it embarrasses and intimidates the target. Victims of *bullying and* cyberbullying lose their freedom, pleasure, and desire to live and interact socially. Finally, such practices violate the right to education. *Bullying and cyberbullying*, as pointed out by the active school search program, developed by the United Nations Children's Fund - UNICEF, in partnership with the National Union of Municipal Education Leaders - UNDIME and the National Collegiate of Municipal Managers of Social Assistance - CONGEMAS integrate the causes of school exclusion, as they imply prejudice, discrimination, and violence (UNICEF, 2019a).

When a child or adolescent is exposed to a systematic intimidation action, it means that their protection is not integrally taking place. Therefore, they need to be protected immediately and have all their rights restored.

In Brazil, the face of systematic intimidation has been done through government actions, school interventions, campaigns of civil associations, non-governmental entities, and UNICEF. The educational establishments, according to article 12, item IX, of Law No. 9,394 of December 20th, 1996, the Law of Guidelines and Bases for National Education, have the task of "promoting measures to raise awareness, prevention and combat all types of violence, especially systematic intimidation (**bullying**), within schools." (BRASIL, 1996, original bold).

Among the actions of the federal government, we highlight the protocol of intentions for the promotion of the culture of peace, respect, and tolerance in schools, through actions to combat *violence and bullying, signed* on November 20, 2019, by the Ministry of Education and Ministry of Women, Family and Human Rights. The document lists a list of rights to ensure a respectful school environment between students and teachers, with the promotion of dignity and the provocation to greater participation of families in schools. Among the measures envisaged are the implementation of public policies that promote the strengthening of the family and the greater interaction of fathers and mothers in the school environment; the promotion of measures to encourage plural and respectful teaching in the school environment; the dissemination of information about the rights of students (not to be intimidated, teaching based on freedom of learning, pluralism of ideas); the guarantee of non-injury, at school, by their beliefs and convictions; protection of religious freedom, among others (BRASIL, 2019b).

There are also projects and campaigns of civil society initiatives, non-governmental organizations, protection agencies, and governments, such as the "Education for Peace Program". This program is an initiative of the State Government of Amapá, to promote the culture of peace in schools. There is also the campaign "It's my business" (#édaminhaconta), a *partnership of Safernet* Brazil and UNICEF, to raise *awareness of the fight against bullying*, promoting reflection, encouraging empathy, and respect for differences between adolescents and young people. Finally, the project "Learning without fear", a Plan International's action, a humanitarian and non-governmental development organization, which aims to contribute to the guarantee of a school and community environment free of *bullying* and gender inequality (PLANINTERNATIONAL, 2019; SAFERNET, 2019; AMAPÁ, 2017). Therefore, there are actions and policies, some local and others nationwide, to promote the culture of peace in schools and prevent the practices of *bullying*, *cyberbullying,* and other violence.

Coping with systematic intimidation practices demands, first, the demystification of some misconceptions related to *bullying*, such as *that bullying* is a "fashion thing", "psychologist freshness" or "child's play" (LISBON; VEGETABLE GARDEN; Weber, Weber, ALMEIDA, 2014). This is not a recent phenomenon or social fad. Pioneer Dan Olweus has been writing about it for over 45 years. In Brazil, so many authors have researched and demonstrated the *dimension of bullying*, statistically and qualitatively: Lauro Monteiro, Aramis Lopes Neto, Lucia Helena Saavedra, Patricia Krieger Grossi, Cleo Fante, and others, who have been researching bullying for two *decades* (FELIZARDO, 2017). Moreover, it is not possible to allow the trivialization of these phenomena. It's not about child's play. "In a joke, everyone is having fun; when there is suffering, there is no joke." (LISBON; VEGETABLE GARDEN; Weber, Weber, ALMEIDA, 2014, p. 16).

There are also myths that *bullying* "gives nothing" or that "everyone has been through it" (LISBON; VEGETABLE GARDEN; Weber, Weber, ALMEIDA, 2014), when in fact, the *consequences of bullying* and *cyberbullying* can be disastrous, irreversible for the child or adolescent who experiences them. They are psychological, relational, emotional consequences in school and academic life, as well as in various dimensions of the development of that and the one who suffers systematic intimidation. Not everyone experiences *bullying or cyberbullying*, *but those* who are vivencia know the size of pain, trauma, and serious wounds (FLEISCHHAUER, 2013; FELIZARDO, 2017).

Other misconceptions or myths are present in the *statements that bullying is* indicative of "bad education or lack of punishment", that "only boys practice bullying, girls do not", or that "bullying only happens among adolescents, children do not bully" (LISBON; VEGETABLE GARDEN; Weber, Weber, ALMEIDA, 2014, p. 17-22). These are untruths that hinder the process of coping with systematic intimidation practices, and that should be analyzed considering, even, the sexism present in Brazilian society. A society that dictates how girls and boys should behave and therefore expects girls to be affable and not to practice violence, while boys expect a certain aggressiveness, culturally tolerated or even instigated (LISBON; VEGETABLE GARDEN; Weber, Weber, ALMEIDA, 2014). In the research scans in the second part of this study, *bullying* and *cyberbullying* were practiced by girls and boys. It is also worth mentioning that *bullying is* not exclusive to adolescents. "It can involve children from 3 years of age, still in early childhood education, and continue in university." (FELIZARDO, 2017, p. 46). As well, it's not synonymous with lack of punishment. In research on the subject, Lisbon, Horta, Weber, and Almeida (2014,

p. 22) found that: "mothers who most often used punishment as an educational strategy were four times more likely to have a *child who practices bullying* at school."

Therefore, it is of utmost importance rupturing with such myths, by making the *concept and information about bullying and cyberbullying public* accessible, so that the communications of these types of rights violations are effective, quantified, and used properly by the public sector and throughout the protection network, para the structuring of the protocols of care and policies of confronting violence.

When the legal consequences of bullying or *cyberbullying* are *analyzed*, from the point of view of the damage caused to the victim, there is the possibility of civil and criminal accountability. So, criminally, although there is no specific pedestrian type for the practice of systematic intimidation, the Penal Code has some legal types that, depending on the *way bullying and/or cyberbullying is carried out*, may fall within the crimes against honor, against individual freedom, property or against sexual dignity, especially in virtual harassment, such as an injury - art. 140, illegal embarrassment - art. 146, threat - art. 147, damage - article 163, unauthorized record of sexual intimacy - art. 216-B, disclosure of sex scene or pornography - art. 218-C, among others (BRAZIL, 1940). Here is the difference: when the author is an adult, a teacher, or any professional who is in the school environment, can answer criminally. When the author of the act is a child or adolescent, they will be subject to the measures provided for in the Statute of the Child and Adolescent, ou, there is the infraction, by which: children will receive the specific protection measures provided for in Article 101, while adolescents, the socio-educational measures provided for in Article 112.

In turn, given the practice of systematic intimidation, there is also the possibility of seeking civil separation, for moral or material damage. The action for compensation can be filed in the face of the teacher who authored the violence; of the parents, when the author is a child or adolescent; of the private educational establishment, considering the relationship of consumption; and of the public school, by the theory of administrative risk (FLEISCHHAUER, 2013; NETO COAST, 2019).

However, both criminal liability and civil redress are actions that affect the consequences of an act of *bullying and*/or *cyberbullying*. They are measures that can even repair, in some way, the victim, or inhibit locally the practice of violence, but that do not contribute, significantly and, in the long term, to the interruption of the culture of intimidation, present in the social and virtual exposures where the child and adolescent interact. The World *Health* Organization's global status report on preventing violence against children points out that countries are failing to prevent violence against children and adolescents. According to the document, the number of *online violence has increased significantly* and results from increased internet use by children and adolescents. Many countries have some mechanisms to support the prevention of violence against children. However, few have fully funded action plans and only 21% said they have a database and indicators by which to monitor the effectiveness of their prevention efforts (WHO, 2020).

Thus, thinking about coping with systematic intimidation practices, based on the theory of integral protection and, above all, based on the objectives of the Program to Combat Systematic Intimidation, demands to work on the causes of violence, to act preventively. It is necessary to think about how the family, school, health, social assistance, and other actors of the System of Guarantees of Rights can contribute strategically to *the confrontation of bullying and cyberbullying,* practices that have started up a severe public health problem existing in the country.

> Prevention, as we understand in the field of public health, is the action that aims to prevent the occurrence of a particular event or injury. In this sense, prevention actions target-risk and/or protection factors that, when present, increase or decrease the chance that this event or injury will occur. This event is, for us, violence in adolescence, whether violence that victimizes our adolescents and young people or violent behavior, the perpetration of violence on the part of adolescents and young people. The actions/strategies of violence prevention are multiple, and many have already been effective in other contexts and can serve as a model for the design of responses adapted to our reality and culture. (PERES; EISNER, 2018, p. 22)

To scheme prevention actions or strategies, it is first necessary to know the real dimension of violence and its multiple causes. A detailed diagnosis is paramount in this process. This diagnosis should be made from north to south of the country, covering all states, all schools, public and private. Unlike studies that focus on adolescents from thirteen years of age, a good diagnosis should consider children, already in early childhood education. It is necessary to know who the children and adolescents are who suffer systematic intimidation, by what means, under what causes, who are the aggressors, what forms of communication and reception they find in school, in the family, and what the educational establishment develops, in attendance to the about systematic intimidation to prevent, raise awareness and combat identified bullying. This information must be taken by the federal government, which must provide publicity, so that States and Municipalities build, with absolute priority, the appropriate guidelines and public policies to combat systematic intimidation.

Once the diagnosis is made, it is necessary to design prevention, based on the identified causes, and carry out prevention from early childhood education. In other words, one must work on the multiple causes of intimidation. The analysis of the data presented in this paper already points out some directions, as it revealed causes of systematic intimidation: intrafamily violence, the use of drugs in adolescence, racial, religious, gender prejudice, sexual orientation, social equality, among others. should include work with families, which involves activities of social insertion, guidance for the promotion of a non-violent education, the creation of spaces for attention and dialogue in the family environment, the guidance to parents regarding the safe and protected use of the Internet by children), through approaches to the area of health (in the part of drug prevention, guidance on sexual and reproductive rights, full respect in the exercise of sexuality), and, finally, develop debates and spaces for dialogue on social, linguistic, ethnic differences, the questões related to gender and sexual orientation. Topics such as structural racism, patriarchal system, misogyny, homophobia, xenophobia, should be reflected. Several areas need to be developed with children, adolescents, and society, in general, so that the multiple causes are administered in multiple spaces and by different approaches. Interventions should start early and provide support for healthy relationships.

Pepler and Craig (2014) developed four principles for *bullying* prevention and intervention. The first principle is that *bullying is* a relationship problem. A problem between the child who is suffering *bullying* and the child who is practicing the act of intimidation. The authors point out that relationship problems require relationship solutions. Therefore, both children, as well as all the other children who witness harassment, should be included in the solutions. Interventions should focus on the peer group, modifying the power dynamics established there and promoting positive relationships. The second principle is that bullying interventions *require* development

albeit approaches. This is because *bullying* changes according to the developing capacities and concerns of children and adolescents, so intervention should be appropriate to the level of development in which they find themselves. That's why the importance of working on personal skills, interpersonal skills, social skills, critical thinking, empathy, emotional stupenda, and others.

The third principle is that *bullying interventions require* a systemic approach. In other words, successful interventions are comprehensive and systemic. Change must take place in the classrooms, in the general climate of the school. It should include employees, the administration, parents or guardians, and the community. Therefore, in addition to peer intervention, it is necessary for the self-awareness of adults themselves, who are supportive and models for healthy relationships between children and adolescents. Adults are responsible for promoting safe, caring, and inclusive peer-to-peer interactions. Finally, the fourth principle is that leadership is the basis for changing systems. The leadership of school principals, teachers, as well as all adults, is indispensable for the support, action, and promotion of healthy relationships. Like other forms of learning, children and adolescents learn relationship skills by trial and error. (PEPLER; CRAIG, 2014).

In general, schools should be given greater competence to care for and prevent intimidation practices. School is the space for democratic formation, for training against barbarism, for inclusion and empowerment. The school is responsible for the provision of positive educational practices, the stimulus to the peaceful solution of conflicts through school mediation, restorative practices, the creation of the feeling of belonging to the school, the elaboration of a *plan to prevent bullying at* school, channels to report violence, and multidisciplinary team – with a psychologist, social worker, and health agents – to follow-up the identified cases.

Coping with systematic intimidation practices shall be a multidisciplinary task. The multidisciplinary care of children and adolescents is a guideline of the care policy, provided for in Article 88, item IX, of the ECA. In this sense, education, health, social assistance, the management councils, and the other actors of the Rights Guarantee System need, together, to dialogue and think about the services, programs, and public policies for intervention in this theme.

> The strengthening of public policies for children and adolescents within the municipality is a set of challenges that depend on intersectoral articulation and the strengthening of the child and adolescent care network with integrated participation between governmental, non-governmental, and community organizations. (SOUZA, 2017, p. 33)

Multidisciplinarity enables the strengthening of the service network and integrated participation, especially if it remains until the final process of monitoring and evaluating actions and policies. Only in this way will full protection be guaranteed, as well as all other principles of child and adolescent law, such as absolute priority, best interest, universalization, humanization, popular participation, and dejudicialization.

Last but not least, coping with systematic intimidation practices, based on the theory of integral protection, requires full attention to the voice of children and adolescents. That is, in all this process, it is necessary to listen to children and adolescents. Listen to what they must talk about, about their experiences, and about their longings to face these themes. Children and adolescents have the right to be heard, to participate in the actions, and to have their opinions considered, in any decision that concerns their fundamental rights.

## 5. CONCLUSION

In this study, we sought to analyze the confrontation of systematic intimidation practices in Brazil, in social and virtual environments, in the light of the theory of integral protection. Systematic intimidation, embodied in *the practices of bullying and cyberbullying*, retracts violence, which affects children and adolescents and produces complex developmental consequences, affecting physical, psychological, and emotional health, in total violation of human integrity and dignity.

The first chapter of the research dealt with the violation of the rights of children and adolescents by moral harassment in social and virtual environments. Based on the concept and delimitation of systematic bullying actions, a differentiation was made between *bullying and cyberbullying*, as well as the presentation of the causes and consequences of aggression to children and adolescents who suffer violence. Despite all the classification available in the literature (actions, aggressor, victim, specter, types, means, and manners), caution is needed not to simplify the logic of violence between aggressor and victim. That is, the delimitation of *bullying* (and *cyberbullying*) cannot be seen as an exact, immutable formula, which is why it is necessary to think about intimidation in the light of criticism of instrumental reason. It is important to question behaviors, understand violence as a social phenomenon, and think about the solution to this public health problem, from a multifactorial point of view.

In a second moment, the regulation of the Program to Combat Systematic Intimidation was presented. It began with the exposure of the rates of systematic intimidation in Brazil, through the provision of Law No. 13,185/2015, until it reached the analysis itself of the Program to Combat Systematic Intimidation. In this part, it was found that the theme is still poorly addressed in the country, although there is no doubt that children and adolescents are often victims of violent actions in schools and virtual networks. Law No. 13,185/2015, of an eminently preventive nature, instituted the Program to Combat *Systematic Bullying* throughout the national territory. It is a program that aims to prevent and combat systematic intimidation throughout society, but also: the training of teachers; the promotion of educational campaigns; the promotion of psychological, social, and legal assistance to victims and aggressors; the stimulation of mutual tolerance, citizenship, empathy, and respect, within the frameworks of a culture of peace, among others. This is important legislation, which establishes the obligation for states and municipalities to carry out the proper diagnosis, with the disclosure of bimonthly reports depicting the occurrences of systematic intimidation, aiming to support the plans of action.

In the third chapter, the study of coping with systematic intimidation practices was then carried out, based on the theory of integral protection. In this part, protection was worked from the theory of integral protection, the basis for the rights of children and adolescents. Then, some myths related to *bullying were pointed* out, such as *that bullying is "fashion* stuff", "childish game" or "lack of punishment". Finally, strategies for prevention and confrontation of systematic intimidation practices were stressed, some actions from government initiatives, schools, civil associations, non-governmental entities, and UNICEF being emphasized.

To carry out this work, the following research problem was delimited: how is the practice of systematic intimidation faced in Brazil and how can comprehensive protection for children and adolescents be provided? In this study, it was verified that coping with the confrontation, in the light of the theory of integral protection, demands measures that go beyond the identification

or accountability of the aggressor. It requires preventive and sensitization actions on the part of the actors of the System of Guarantees of Rights, as well as the action through public policies, aiming at reducing the rates of violence and the effective promotion of integral protection.

The present study also allowed conclusions that went beyond the hypothesis suggested. To scheme prevention actions or strategies, it is necessary to investigate the real dimension of violence and its multiple causes. It is necessary, then: to make a detailed diagnosis, in all Brazilian States, on the subject; design prevention based on the identified causes; promote prevention from early childhood education; to give greater competence to schools for the care and prevention of bullying practices; to promote an intersectoral approach, and to listen carefully to the voice of children and adolescents.

Finally, it is appropriate to mention that this research presents limitations, especially in time and space. It did not exhaust the identification and analysis of all initiatives, be they school, government, or other areas, existing in the country. Therefore, new studies may contribute to the expansion of the debate, addressing, for example, the initiatives of schools. It is also possible to evaluate the difference in the reasons for systematic intimidation in public and private schools, in a sociological approach. Or, to ascertain whether the States and Municipalities have effectively presented the bi-monthly reports on the situation and provided due assistance to schools, for the management of this issue, in addition to other research possibilities.

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# ATTEMPTS TO SIMPLIFY DIVORCE BY THE COURTS AND LEGISLATIVE CHOICES: A SLOW, PERSISTENT AND CONTINUOUS STEP TOWARDS THE REMOVAL OF THE STATE

## AS TENTATIVAS DE SIMPLIFICAÇÃO DO DIVÓRCIO PELOS TRIBUNAIS E AS ESCOLHAS LEGISLATIVAS: UM LENTO, PERSISTENTE E CONTÍNUO CAMINHAR EM DIREÇÃO AO AFASTAMENTO DO ESTADO

RENATO HORTA REZENDE[1]


## ABSTRACT

The Constitutional Amendment number 66 of 2010 and other subsequent normative changes had many impacts on the institute of divorce in Brazil. However, social dynamics imposes many changes to which the Legislature cannot respond, such as the resistance of more conservative social sectors. Some Courts of Justice considering the potestative right to divorce and the autonomy of will have edited provisions creating the imposition divorce or regulating the existing extrajudicial divorce against express legal text in the wake of the movement directed at the dejudicialization of the institute. In view of the grounds set forth by the Courts of Justice to justify the editions of these proclamations, it was intended to investigate two situations: the potestative right to divorce and the autonomy of the will. The theoretical and investigative development of the research was done by means of a deductive scientific method, presenting general concepts, on which, in a second moment, two hypotheses were tested, the first that the Constitutional Amendment number 66 of 2010 did not institute the potestative right to divorce in Brazil and the second that the "autonomy of will" would be inadequate to justify the imposition divorce. The research has an eminently theoretical and propositional character presenting parameters to guide the evolution of divorce in Brazil. Through the investigation, it is concluded that the postestative right to divorce stems from an infraconstitutional rule and that private autonomy would not admit surprise divorce.


**Keywords:** Imposing divorce; dejudicialization; postestative right; limits; regulation.

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**RESUMO**

*A Emenda Constitucional nº 66 de 2010 e as normas infraconstitucionais posteriores trouxeram enormes impactos sobre o instituto do divórcio no Brasil, porém, ainda assim, a dinâmica social exige novas adequações as quais o Legislativo não consegue responder diante de inúmeras circunstâncias dentre as quais a resistência de setores sociais conservadores. Alguns Tribunais de Justiça considerando o direito potestativo ao divórcio e a "autonomia da vontade" editaram provimentos criando o divórcio impositivo ou regulando o divórcio extrajudicial já existente contra expresso texto legal na esteira do movimento direcionada à desjudicialização do instituto. Diante dos fundamentos expostos pelos Tribunais de Justiça a justificarem a edições de Provimentos foram investigadas duas hipóteses a justificar sua edição, o direito potestativo ao divórcio oriundo do texto constitucional e a "autonomia da vontade". O desenvolvimento teórico e investigativo impresso na pesquisa se deram por meio de método científico hipotético-dedutivo, sendo apresentados conceitos gerais, sobre os quais, em um segundo momento, foram testadas duas hipóteses, a primeira que a Emenda Constitucional nº 66/2010 não instituiu o direito potestativo ao divórcio no Brasil e a segunda que a "autonomia da vontade" não seria adequada a justificar o divórcio impositivo. A pesquisa possui caráter eminentemente teórico e propositivo apresentando parâmetros a nortear a evolução do divórcio no Brasil. As hipóteses apresentadas foram confirmadas, concluindo-se que o direito postestativo ao divórcio decorre de norma infraconstitucional e de que a autonomia privada não admitiria o divórcio surpresa.*

**Palavras-chave:** *divórcio impositivo; desjudicialização; direito potestativo; limites; regulamentação.*

# 1. INTRODUCTION

In Brazil, the divorce institute was created more than one hundred and thirty years ago, and its legal nature and contours changed slowly during more than a century rapidly, especially after the promulgation of the Constitution of the Republic of 1988.

Even in the face of profound changes and the recent evolution, there is the imposition of resistance fostered by conservative sectors of society that are reflected in timid legislative production, which often fails to advance when it could.

Given the social dynamics ahead of the legislation, the Brazilian Courts, through the systematic interpretation of the constitutional text, have granted greater celerity, in general, to the evolution of rights related to the family, recognizing homoaffective unions, socioaffective adoptions, parity between spouses and partners, relativization of criteria for simple adoption, among other endless themes.

Using its typical function of interpreting the legal system and atypical function of standardizing acts practiced by extrajudicial services, the Court of Justice of Pernambuco, the Court of Justice of Maranhão and the Court of Justice of Goiás edited provisions regulating divorce, sometimes creating a modality not provided for by law, sometimes standardizing a species already provided for by law in a totally reverse way, considering in all cases the supposed potestative right to divorce and the "autonomy of the will".

Even though after the first two provisions, the National Council of Justice has issued a recommendation stating the incompetence of the Courts to create types of divorce, it remains to be examined whether this would be, at this juncture, a potestative right emanating directly from the constitutional text and whether the "autonomy of will" would be sufficient to lift the

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current rules that require, in watering, the participation of both spouses in both consensual and litigious form.

In face of this problem, it has been assumed the hypothesis that divorce would be potestative right by virtue of an infra-constitutional rule, not deriving, therefore, directly from the constitutional text.

Another hypothesis investigated concerns the legal limits of private autonomy, seeking to examine whether this principle would be subordinated to the legal standard according to which, as a rule, the surprise dissolution of marriage is not allowed.

The theoretical and investigative development printed in the research comprises the deductive scientific method, starting from general conceptions in order to test the hypotheses raised to solve the problem presented and also propose speculative options to assist in the appropriate development to the continuation of the evolution of the divorce institute in Brazil.

The research was built in four parts, in the first section the scope of the difficult evolution of divorce in Brazil was presented; afterward, the attempts and grounds used by the Courts of Justice in the administrative regulation of the new type of divorce and the divergence from the legislative choices were examined; then the possibility of decreeing divorce *inaudita altera parte* under the current legislation was examined; finally, the Ordinary Bill number 3.457 of 2019, which intends to regulate the imposing divorce, was examined.

In order to develop this work, a bibliographical survey was conducted by consulting books and scientific articles, as well as the relevant national and international legislation, with the purpose of contributing to the development of legal reasoning on the subject, presenting parameters to guide the evolution of the institute.

## 2. THE DIFFICULT EVOLUTION OF DIVORCE IN BRAZIL

The current regulation of the dissolution of marital partnership bond in Brazil is the result of long cultural, legal, and legislative evolution, associated with debates and social efforts still in development that encounters constant religious and conservative resistance (Senado Notícias, 2017).

During the Brazil Empire period, marriage was regulated by the Catholic Church, which only admitted the dissolution by the death of one of the spouses, and it was still possible to declare the nullity of marriage when present impediments, defect of consent or in the form of celebration, with no provision regarding the dissolution of the marital bond or society by act of will (CARVALHO, 2018, p. 309).

On January 24th, 1890, through the decree number 181, the term divorce was inserted into the legal system, and the regulation of civil marriage was also closed by the Catholic Church. The aforementioned decree established the possibility of consensual or litigious divorce only through the judicial means, however, even if it was possible to separate bodies and end the conjugal society, the marital relationship was not dissolved, keeping people united even if against their own will (BRASIL, 1890).

The articles 85 and 86 of the decree required the participation of both spouses to decree the divorce both in the consensual modality, in which it was necessary the unequivocal manifestation of the parties, and in the unilateral application for divorce that required the contradictory before the evidence of guilt.

The Constitution of the Republic of July 16th, 1934 ended the term divorce that did not dissolve the marriage and inserted the institute of conjugal separation, named *desquite* by the brazilian law attributing the regulation to the ordinary legislature, which, in turn, maintained the same restrictions already in force, thus clearly distinguishing the separation of bodies from the separation of fact (CARVALHO, 2018, p. 311).

The timidity in the amendments in substantiated law has also had an impact on procedural law, because the Code of Civil Procedure in force at the time, Law number 5,869 of January 11th, 1973 regulated the process of conjugal separation, named *desquite* by the brazilian law in its articles 1.120 to 1.124, presenting specific procedure for the consensual modality and the ordinary procedure for the litigious modality, requiring, in any case, the indispensable participation of the parties in the proceedings.

The absence of a significant substantial or adjective change aimed at the dissolution of marriage and the growth of divorce[2] regulation in other countries caused intense debate between those who demanded the recognition and regulation of the institute and those who were against regulation by religious or political-conservative convictions (DIAS, 2016, p. 153).

It was only after almost a century of the change made by decree number 181 of 1890, was promoted an important and transformative normative change directed to marriage. This time, through constitutional amendment number 9th of June 28th, 1977, which allowed, for the first time, the dissolution of marriage by will, subject to prior legal separation for more than three years, when proven the separation of fact for the same period or direct divorce when the separation had happened at least five years before that amendment under the terms of the law (BRASIL, 1977).

The Constitutional Amendment maintained the express attribution to the ordinary legislature to regulate divorce in Brazil, establishing, from the outset, minimum conditions for the dissolution of marriage as declined above.

At this time, Brazil was one of the few countries in South America, among those members of the United Nations (UN), that still did not allow divorce, and both internal and external [3]influence, intensified the debate on the regulation of the dissolution of marriage (Senado Notícias, 2017), the Catholic Church and conservative sectors of society once again vehemently opposed it (DIAS, 2016, p. 302).

Even in the face of great resistance, on December 26th, 1977, Law number 6.515 was published, establishing for the first time in the country the possibility of the end of the marital bond by the will and the dual system of dissolution of marriage to be instituted in court according to constitutionally established guidelines, requiring, in all cases, the participation of both spouses.

2 *Vide* Decree Portuguese of November 3rd of 1910 and Decree-Law number 261, of May 27th, 1975; and Uruguay Law number 3.245 of October 29th, 1907 and Law number 4.845, of April 28th,1914.

3 Argentina and Chile were the last South American countries to institute and regulate divorce, recognizing, respectively, on June 3rd, 1987, according to the Law number 23.515, and on April 22nd, 2004, through the Law number 19.947.

The Constitution of the Republic of 1988 maintained the possibility of dissolution of marriage by will through the dual system to be legally regulated, reduced the deadline for the application for conversion of separation into divorce from three to one year, and also reduced the term of direct divorce in case of de facto separation, from five to two years not limited to facts past the apex norm.

The change produced by the constitutional text required infraconstitutional adaptation. In this sense, the provisions of Law number 6.515 of 1977 were modified, through Law number 7.841 of October 17th, 1989 and Law number 8.408, requiring in all cases judicial action and participation of the spouses. The Civil Code, Law 10.406, of January 10th, 2002, despite regulating divorce materially, partially reproducing what was regulated by the previous Law, did not promote deep alterations in the institute.

On January 4th, 2007, Law number 11.441 was published, which for the first time removed from the Judiciary the exclusivity of the separation or divorce decree, allowing the spouses to apply for a consensual divorce through a lawyer at the notary public, when absent dependents unable.

The partial dejudicialization of separation and divorce introduced in the legal system, in addition to the objective of reducing the demands of the Judiciary also recognized the capacity and freedom of the spouses to decide (CARVALHO, 2018, p. 345), through the exercise of their private autonomy. According to Rolf Madaleno (2018, p. 391), the possibility of choice made available to the couple was the main change promoted by the mentioned law[4].

Even before the publication of the law that made extrajudicial separation and divorce possible, the Proposals for Amendment to the Constitution number 33 and 413, both from 2007, had already been presented, which intended to unify in divorce all the hypotheses of dissolution of society and marital bond. The mentioned constitutional amendment projects gave new wording to the paragraph 6th of article 226 of the Constitution of the Republic of 1988 (CARVALHO, 2018, p. 315).

With the approval of the Constitutional Amendment, the dual system of dissolution of marriage, present in the original wording was suppressed from the constitutional text, defining divorce as sufficient act for such, not requiring, also for the first time, apparently, infraconstitutional regulation and other criteria (GAGLIANO; PAMPLONA FILHO, 2019, p. 596).

The absence of constitutional provision of criteria or requirements for the dissolution of marriage through divorce enabled the infraconstitutional legislator to maintain the emancipating trajectory initiated by Law number 11.441 of 2007, reducing the invasive action on the couple's privacy and expanding the respect for private autonomy (LÔBO, 2018, p. 33).

After the constitutional amendment, the debates about the reception or not of legal separation foreseen in the Civil Code of 2002 were intensified. Given the absence of constitutional provision for such, and according to Dimas Messias de Carvalho, "the vast majority of family law jurists concluded that legal separation was not received by the amendment" (CARVALHO, 2018, p. 332).



4 Currently the congestion rate of the State Judiciary is 74% (CNJ, 2019, p. 36).

However, Law number 13.105, dated March 16th, 2015, which replaced the previous Code of Civil Procedure, published at a time after the constitutional amendment, maintained the procedural possibility of legal separation autonomous to divorce proceedings.

On March 14th, 2017, the Superior Court of Justice issued a decision in the security warrant number 1.247.098, recognizing the diversity of the legal nature of legal separation and divorce. On that occasion, it settled understanding in the sense that Constitutional Amendment number 66 of 2010 received the articles of the Civil Code, and even the procedural devices not addressed in that decision were considered constitutional.

On October 29th, 2019, Law number 13.984 was published, which inserted article 14-A in Law number 11.340, of August 7th, 2006, expanding the jurisdiction of the Courts of Domestic and Family Violence against Women to process divorce petitions, establishing preference to the petition, in the court they were in, if the violence began after the petition was filed.

Although the evolution of the institute of divorce in Brazil is undeniable, even in the face of sectorial resistance, especially after the current constitutional framework, it is evident that the advance has been more acute in the face of the original constituent power and the reforming derivative than in relation to the ordinary legislator, a fact that has repercussions on the problem proposed[5] in this research about the possibility of regulating divorce by state courts.

## 3. THE ATTEMPT OF THE STATE COURTS TO REGULATE ADMINISTRATIVELY NEW TYPE OF DIVORCE AND THE LEGISLATIVE CHOICE

The Constitutional Amendment number 66 of 2010 changed the constitutional text by removing from §6 of article 226 the dual system and the deadlines for dissolution of marriage, as well as the express determination directed to the ordinary legislature for its regulation. It became established that civil marriage could be dissolved by divorce (BRASIL, 1988).

Given the absence of extensive treatment granted by the amendment to divorce (FIUZA, 2019), several discussions have been held among Brazilian jurists, on various related topics. However, despite varied disagreements on numerous points, most authors of family law understand that the constitutional amendment assigned to divorce the status of potestative right.

It is worth noting that the potestative right is related to the exclusive will to exercise a subjective right in order to change the legal situation (SILVA, 2014, p. 740). This means that the right is considered potestative when the holder has the possibility of submitting his will to others without the possibility of valid resistance.

5 The fact that the representatives of the constituent power derived reformatory are, in Brazil, also responsible for the production of ordinary legislation could make sound as incongruous the assertion that the constitutional amendments on the subject investigated advanced more than ordinary regulations, however, as will be observed later, constitutional advances were made through rules of limited effectiveness that require infraconstitutional complement to achieve finalistic effects (SILVA, 1998, p. 89), thus overcoming the merely political-ideological function to finally achieve the legal-instrumental function, under penalty of not doing, establishing a purely symbolic norm (NEVES, 1994, p. 76).
*Vg*P: Carlos Alberto Dabus Maluf and Adriana Caldas do Rego Freitas Dabus Maluf (2018, p. 469); Dimas Messias de Carvalho (2018, p. 388); Fernanda Tartuce (2018, p. 243); Flavius Tartuce (2019b, p. 319); Maria Berenice Dias (2016, p. 122); Pablo Stolze Gagliano and Rodolfo Pamplona Filho (2019, p. 586); Paulo Lady (2018, p. 104); and Rolf Madaleno (2018, p. 464).

As for paragraph 6th of article 226 of the Constitution of the Republic of 1988, although the reforming constituent legislator has suppressed issues previously imposed on the ordinary legislator that conditioned the decree of divorce (CARVALHO, 2018, p. 340) it has not been forbidden that the institute was regulated by imposing criteria, conditions or procedures for its intent.

José Afonso da Silva (2019, p. 141) warns that every constitutional norm both positive and negative effects, that is, the constitutional norm can revoke all previous legal order contrary to its determinations, imposing non-reception, and at the same time prevent the ordinary legislator from producing laws contrary to its dictates.

Thus, it is possible to state that the Constitutional Amendment number 66 of 2010 fixed only one form of dissolution of marriage, not eventually excluding others. Therefore, if there was a previous law that prevented the dissolution of marriage, it would not be received[6], and it is incumbent upon the ordinary legislator to prevent the creation of a law that removes divorce from its constitutionally defined purpose: the dissolution of marriage.

However, the wording given to the provision under examination by the Constitutional Amendment referred to did not attribute connoted properties to divorce referring to a previously existing institute of material and procedural civil law. This, added to the absence of complete regulation by the Reform Power attributes to the constitutional rule mediated applicability requiring tacitly infraconstitutional regulation, observing, in any case, its positive and negative effects already examined.

Thus, the infraconstitutional legislator, by failing to impose material conditions to direct divorce, which it could have done due to the mediated applicability of the constitutional rule, attributed to divorce the status of a potestative[7] right, but procedurally[8] regulated its decree.

In a different way, understanding that the potestative status of divorce derives directly from the constitutional text and not from ordinary legislative choice, as well as based on the principle of autonomy of will, the Court of Justice of Pernambuco published Provision number 6 of May 14th, 2019, creating and regulating the imposing divorce with or without name change to be performed in the extrajudicial service.

The mentioned provision demanded as requirements marriage, the absence of a requirement for maintenance or division of property, as well as the inexistence of an unborn child or incapable children and the assistance of a lawyer.

The procedure created would be performed exclusively by the registry office where the marriage was registered, would require the request of only one of the spouses and the notification of the absent spouse, which could even occur by public notice before the registration.

In the same wake of the Court of Justice of Pernambuco, only six days after the publication of the Provision, the Court of Justice of Maranhão published Provision number 25 of May 20th, 2019, basing the administrative act on article 16, item one, of the Universal Declaration of Human Rights, aimed at the freedom of marriage and its dissolution, on the post-divorce right

6 It is important to note that valid marriage dissolves through divorce and also death, as recommended in Paragraph 1 of the article 1,517 of the Civil Code.

7 Dimas Messias de Carvalho (2018, p. 388) argues that it could be opposed to divorce exception, that is, the absence of marriage, thus removing the absolute character of the subjective right to divorce something that could drive away the *status* of the law of the state.

8 See article CPC 733.

arising from the constitutional text, on the constitutional principle of fraternity, on the movement of the dejudicialization of law, and also on the principle of private autonomy.

Despite creating a procedure similar to that of the Court of Justice of Pernambuco, the Court of Justice of Maranhão innovated by denominating the divorce created as unilateral, as well as providing the assistance of a lawyer. In view of the regulations promoted by Courts of Justice, only ten days after the last provision, the National Council of Justice issued recommendation number 36 of May 30th, 2019 due to the request for a writ distributed by the National Inspector General's Office filed under number 0003491-78.2019.2.00.0000 (CNJ, 2019b).

In the decision rendered in the writ that originated the mentioned Recommendation, the National Council of Justice considered the exclusive competence of the Union to legislate on procedural and registry law, as well as the infraconstitutional regulation of divorce and the absence of authorization for the unilateral or imposing divorce modality recommending that the Courts refrain from editing acts regulating the registration of extrajudicial divorce by unilateral declaration, as well as providing their immediate revocation to the contrary (CNJ, 2019b).

The National Court of Justice, when editing the above-mentioned recommendation, noted the formal obstacle in the face of the union's private legislative competence laid down in items one and twenty-five of article 22 of the Constitution of the Republic of 1988, which cannot be taken by the Judiciary. The judiciary possesses only the administrative competence to regulate the divorce by extrajudicial means and in accordance with the restricted commands set forth in article 733 of the Civil Procedure Code, being legally invalid the rules of courts that would see to expand or contradict the decision of the legislature.

The National Council of Justice also warned that there would be impediment of a material order to the provisions published in the face of the isonomy violation determined by the Constitution in the application of national laws, because the States that published the provisions cited above, would have procedures different from those that understood they did not have sufficient competence to do so.

Although it has not been the object of examination of the National Court of Justice, it is also worth noting as previously stated, that the potestative right to divorce has no origin in the constitutional text, but in the choice of the ordinary legislature that in turn issued procedural and registral rules to regulate the institute, not being feasible the direct application of the constitutional rule when it has mediata and indirect effectiveness, therefore limited.

Bernardo Gonçalves Fernandes (2020, p. 108) argues that the standard of limited effectiveness requires the action of the legislator to regulate it, only then, increased its capacity, would acquire full effectiveness, that is, by itself, it would not have immediate and direct applicability.[9]

Thus, since the legislator, whose jurisdiction is private, chose the form and requirements for the development of divorce, it is not an attribution of the Judiciary, through an administrative and restricted act, to create new species and registration procedures for the institute of divorce.

Another point presented in both Provisions published by the Court of Justice of Pernambuco and the Court of Justice of Maranhão are the fundamentals of the creation and regulation of

9 In the opposite direction check: CARVALHO, Dimas Messias de. *Direct from Families*. 6th ed. São Paulo: Saraiva Educação. 336-337, 2018.

a new type of divorce in the principle of the autonomy of will of the spouse who is dissatisfied with the marital bond.

However, it is observed that the elevation of unilateral will to a level higher than that of the Law, article 733 of the Code of Civil Procedure, as a cause and legal effects, is not adequate to the contemporaneity and evolution of the legal system that currently only admits objective freedom within the legal limits, which was convinced to be called private autonomy [10] (RIBEIRO; AYLON, 2019, p. 367).

Although it may be considered that the term "autonomy of will" has been used as a label, it is not possible to ignore that its meaning has been used as a species when it is accepted that the unilateral will can overlap the express legal text.

Another important fact about the choice of the legislator holding private jurisdiction relates to the publication of Law 13.984 of October 29th, 2019, therefore, at a time after these provisions and recommendations, which, among other provisions, amended provisions of Law Number 11.340 of August 7th, 2006, Maria da Penha Law, expanding the competence for processing and decreeing divorce and dissolution of a stable union also to the Justices of Domestic and Family Violence against Women.

It is observed that even in cases involving violence, the ordinary legislator did not opt for the possibility of an imposing or unilateral divorce, failing to create a special procedure for this, despite conferring preference in the court in which the divorce is being processed when the situation of domestic and family violence is being processed after the court.

Even after Recommendation number 36 of the National Court of Justice and the guidelines married in its grounds, the Court of Justice of Goiás issued provision number 42 of December 17th, 2019, which also regulated, against *legis,* the possibility of consensual divorce even when the couple has incapacitated or unborn children.

In the aforementioned Provision, The Court of Justice of Goiás considered relevant the regulation different from that already existing in the Civil Procedure Code on the grounds that it would be giving a " better interpretation of the rules inserted in article 733, of the Code of Civil Procedure, with regard to the proposal of dejudicialization" (TJGO, 2019).

In the last decade, the brazilian judiciary's leading role in the evolution of Family Law is undeniable, which, using a systematic and harmonic interpretation of the national legal system, recognized existing family relationships in our society, such as the decision given in the direct action of unconstitutionality (ADI) number 4.277 of 2011, "which qualified the homoaffective union as a family entity, deserving of the same protection of the State conferred on the stable union" (LÔBO, 2018, p. 33); as well as in the Extraordinary Resource number 898.060/SC in which there remained a legal thesis that there is no hierarchy between biological and socioaffective affiliation.

The aforementioned decisions do not exhaust the current work of the Judiciary in boosting the evolution of family law through interpretation according to the[11] Constitution, characterized

10 "In this new social, political and economic context, the autonomy of the will was relativized and the pure private agency was transferred to a greater state protagonism. Even this sum of factors provides the outbreak of a new vision of autonomy, which debinds from the term will and clings to private expression" (RIBEIRO; AYLON, 2019, p. 367).

11 *Vg*: ; Equality between hetero and homoaffective unions, 131 ADPF; Abbreviation of domeclaraof unconstitutionality of the article 1,790 CC, RE number 646,721 and Resp 1,635,649 (themes 498 and 809); Exceptional authorization for the adoption of a grandchild by grandparents, Resp 1.635.649; *et al*.

by the absence of revocation of legal provision, but altering the meaning of words so that they better fall within the constitutional command (STRECK, 2018, p. 217).

However, in the case of the provision issued by the Court of Justice of Goiás, as stated elsewhere, the constitutional text used a term already provided for in material and procedural law, allocating its regulation to the infraconstitutional norm, and the Constitution is limited to describing the legal nature of divorce as an appropriate institute for the dissolution of marriage, but not being the only one. In turn, article 733 of the Code of Civil Procedure, maintained the possibility of extrajudicial divorce expressly still limited the faculty to legal requirements, such as consensuality; absence of unborn or incapable children; and counselassist.

Although one can criticize the legal criteria listed above, especially the requirement of absence of an unborn child or incapable children, since the end of the conjugal relationship does not alter the bond between the ascendants and their descendants, maintaining the family power and the right to coexistence or visitation, thus ensuring the special protection conferred on the incapable, legislative choice is not contrary to the constitutional text.

However, the provision of the Court of Justice mentioned above, seems to contradict frontally the legal text, seeking to regulate matters of private legislative competence of the Union, as previously dealt with, challenging the constitutional order and the balance between the Powers of the Republic, ignoring the fact that the constitutional interpretation is not only attached to the Judiciary and that only the judiciary would have the capacity to present the best and most appropriate interpretation to the Constitution (REZENDE, 2017, p. 132).

Understanding that the Constitutional Amendment number 66 of 2010 inserted a norm of a mediative and indirect nature, being indispensable infraconstitutional regulation according to the powers established by the Constitution, and even though divorce is a law of law by virtue of material and procedural legislative choices, it is necessary to conclude, in tow, the invalidity of the regulations of Courts of Justice intended to innovate when they create a kind of divorce, as well as the illegality of acts that frontally contrary legal provision of private jurisdiction of the Union. Thus, although it is necessary to understand the adequacy of the right to social realities, it must be understood that the appropriate route for this is the legislative one in continuous respect to the constitutional precepts already addressed above.

## 4. DECREE OF DIVORCE INAUDITA ALTERA PART AND THE LEGISLATIVE CHOICE

The current Code of Civil Procedure, seeking to change the bellicose legal culture, inserted in the procedural legal system paradigm against phatic directed to dialogue and cooperation, aiming to mitigate uncooperative behaviors with the purpose of having the parties involved have the opportunity to resolve their own conflicts or influence any decision awarded (THEDORO JÚNIOR, *et al*,2015, p. 69).

The *caput* of article 9th of that legislation states that "no decision shall be made against one of the parties without it being heard in advance"(BRASIL, 2015) in respect of the principle of non-surprise of decisions. The provision of *inaudita altera parte* is legally feasible, in exceptional

cases, in accordance with the items contained in the sole paragraph of the same article[12] that made possible the exercise of deferred adversarial proceedings.

On January 31st, 2020, several legal sites reported the decision[13] handed down by the judge, Karen Francis Schubert, holder of the 3rd Family Court of the district of Joinville, Santa Catarina who granted, *inanely, inaudita altera parte*, the application for divorce formulated by the author party in provisional custody of evidence.

According to the Brazilian Institute of Family Law (IBDFAM), the magistrate based the preliminary decision on the law of divorce as well as on the autonomy of the will, as infering:

> Therefore, the expression of will of the author is sufficient maturation to depart from the anticipation of the effects of the request for dissolution of the conjugal bond.Thus, it is not reasonable to impose on the author the burden of bearing all the processing of the done and evidential dilation so that it has analyzed its claim, when it has already expressed its unequivocal interest in the dissolution of the conjugal society *(apud* IBDFAM, 2019).

Once again, it is verified that the potestative right to divorce is observed as something that arises from the Constitutional Amendment number 66 of 2010, being granted to paragraph 6th of article 226 of the Constitution of the Republic of 1988, full applicability, even if the definition of divorce is attached to the material law and its applicability to the infraconstitutional procedural law, as already dealt with in previous lines.

Again, it is important to emphasize that the principle of autonomy of the will no longer has room before overcoming the liberal individualism that sacralized the unilateral will (TARTUCE, 2019a, p.48), and it is imperative to observe the private autonomy that allows the individual to regulate his desires within legal limits, not being sufficient his mere will.

Chapter X, of Title III of the CPC, includes family actions, establishing guidelines aimed at consensualism and specific norms to citation, preliminary hearing, hearing of incapacitated and participation of the Public Prosecutor's Office, referring the process, as to the rest, to the rules of the ordinary common procedure.

It is observed that both in the special procedure (article 695) and in the ordinary common procedure (article 294), although it is possible to anticipate the effects of the intended protection, as a rule, conditions the examination of the applications to comply with the stages of the process that must excel by consensus. Thus, understanding that the mere requirement, based on the autonomy of the will, would be sufficient to remove the legislative choice by rituality, disallows legislative choice and may attack the separation of powers or even usurp private jurisdiction fixed in item one of article 22 of the Constitution of the Republic of 1988, besides being contrary to the consensual guideline of the procedure.

It is also stated that the ordinary legislature, although expressly providing for the possibility of granting provisional protection (article 695) also established the general rule about the rite (article 697) to be observed for the decree of the demands of families (article 693), including judicial divorce, thus, even if it is possible to grant the granting of evidence protection in the Law

12 In addition to the cases provided for in the single paragraph of the article 9th, also authorize the granting of a prelimary *inaudita altera parte* of those issued on the basis of article 562 of the Civil Procedural Code.

13 Cf: Ibdfam: http://www.ibdfam.org.br/noticias/7152/Div%C3%B3rcio+%C3%A9+decreed+before+even+quote%C3%A7%C3%A3o+do+husband; Conjur: https://www.conjur.com.br/2020-fev-01/juiza-decreta-divorcio-antes-mesmo-citacao-marido; Crumbs: https://www.migalhas.com.br/quentes/319569/juiza-de-sc-decreta-divorcio-de-casal-antes-mesmo-da-citacao--do-marido.

of Families this must always be observed in its exceptional character under penalty of converting exceptionality into a rule and fulminating with legal provisions formally in force, instituting the legal, the imposed or unilateral divorce.

Thus, it seems that the current legal text would not, as a rule, authorize the unprecedented injunction to amend part of the divorce, but nothing will prevent its decree, after the adversarial proceedings have been established, including by means of a partial decision of merit under article 356, item one, of the Civil Procedural Code.

## 5. THE LEGISLATIVE BILL NUMBER 3.457 OF 2019

Inspired by the provision number 06 of 2019 of the Court of Justice of Pernambuco, as well as the positioning of [14] Professors José Fernando Simão and Mário Luiz Delgado, Senator Rodrigo Pacheco (MDP/MG) presented Ordinary Law Bill number 3.457 of 2019 for the addition to the article 733-A of the Civil Procedural Code intending to regulate the unilateral extrajudicial divorce direct by endorsement (SENADO, 2019).

The legislative bill aforementioned intends the creation of a new type of extrajudicial divorce embodied in the unilateral declaration of one of the spouses, assisted by a lawyer, to be presented to the registry of births, marriages and deaths that must notify personally and in its impossibility by means of notice, the other spouse to become aware of the request, proceeding to the immediate registration (SENADO, 2019).

This project imposes as the only obstacle to the proposal for a new form of divorce the existence of unborn child and incapacitated children, in the same wake of the regulations already provided for in article 733 of the Civil Procedural Code.

The rapporteur of the Committee on the Constitution of Justice, Senator Marcos Rogério da Silva Brito (PDT) presented two amendments proposing the correction of terms used, uttering at the end a vote in favor of the matter that is ready to be based on the initiator house.

In an opinion poll on the matter of that legislative bill opened on the Senate website, it presented until April 6th, 2020, approval exceeding 91% (ninety-one percent) before voters (SENADO, 2019), in addition to also having the support of IBDFAM[15].

The aforementioned project with the support of popular and important familiarist Institute manages to supply the evident unconstitutionality present in the provisions issued by the Court of Justice of Pernambuco and the Court of Justice of Maranhão, but it ceases to advance when it continues to require the absence of an unborn child or incapable children, because the end of the marital bond between the parents does not affect their relationship or legal bond with the offspring, even if, obviously, it may reflect on the coexistence, something that could remain reserved for autonomous judicial process to deal with issues that actually directly affect minors, such as custody, coexistence and alimony, in the wake of the provision edited by the Court of Justice of Góias and commented above.

14 Cf: https://www.conjur.com.br/2019-mai-19/processo-familiar-barrar-declaracao-unilateral-divorcio-negar-natureza-coisas

15 Cf: http://www.ibdfam.org.br/noticias/6965/Div%C3%B3rcio+Impositivo+%C3%A9+presented+as+ project+de+lei+no+Senado%3B+texto+foi+elaborado+por+membros+do+IBDFAM

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It is noteworthy that the children are not and could not be object ed in any defendant related to the divorce of their parents this because they are subjects of the relationship derived from family power, not being objects or taxpayers of this action that seeks the dissolution of marriage, but rather the recipients of the exercise of the burden of creation, guidance and protection entrusted to parents who may be the object of their own action (RAMOS. 2016, p. 39).

Thus, it would be better if the aforementioned legislative bill would unbind the two institutes, divorce and affiliation, because, in addition to becoming coherent in the face of the plurality of family models in summed up by the Constitution of the Republic of 1988, in which the affiliation is independent of marriage between the parents, it could also reduce the litigiousness since the institutes were fragmented, thus being possible the realization of unilateral extrajudicial divorce directly by endorsement, and, in parallel, action aimed at the custody, conviviality and food of minors or unborn child.

Thus, the regulation given by the legislative bill, once again, is not adequate enough in view of the current social needs, however, given the history of resistance and difficulties imposed by conservative sectors, the proposed amendment may be another step in the slow evolution of family law towards the direct and incised removal of the State in matters of an exclusively private nature that requires only regulation.

## 6. CONCLUSIONS

The current legislation concerning divorce in Brazil is the result of more than a century of evolution of the institute and social, cultural and legal confrontations that opened possibilities for the dissolution of marriage. The resistance that has always existed on this institute still has reflexes and even today seems to impose unjustified obstacles to its greater agility. Faced with these difficulties, Courts of Justice of Pernambuco and Maranhão edited provisions creating and regulating the taxed or unilateral divorce to the chill of the law.

The creation and normative regulation considered that Constitutional Amendment number 66 of 2010 would have granted the divorce the status of potestative law, as well as the autonomy of the will, addressed to only one of the spouses, would be sufficient to remove the legal regulations that regulate the subject.

Even if the National Court of Justice has determined the suspension of such provisions issued by the Court of Justice of Pernambuco and the Court of Justice of Maranhão, as well as recommended to the other state and district courts to refrain from editing similar infralegal rules due to the evident formal unconstitutionality, since it is a private jurisdiction of the Federal Government to legislate on Civil Law, Procedural Law and Public Registration, it remains to be seen that the legal right to divorce originates in an infraconstitutional rule, not directly due to §6 of article 226 of the Constitution of the Republic of 1988 in view of its mediata applicability which prevents the courts from editing rules to be used to regulate the imposing divorce.

Shortly after the recommendation issued by the National Court of Justice, the Court of Justice of Góias issued a proposal seeking to expand the dejudicialization of divorce, enabling, optionally, extrajudicial divorce even for those who have underaged or unborn children, which,

although consistent with social developments, also seems to suffer from the same incurable evil as the provisions that preceded it, that is, the invalidity of the regulation in the face of formal incompetence and the mediata and indirect applicability of paragraph 6 of article 226 of the Constitution of the Republic of 1988, and is still blatantly illegal since it establishes a rule diametrically contrary to those established by Article 733 of the Civil Procedural Code.

Even judicial decisions that decree divorce, when issued in evidence guardianship in an unprecedented way, do not seem to be aligned with the principles imposed by the special rite of family actions or the common subsidiary rite of the Civil Procedural Code, because they would remove the consensus that should lead the judicial work of this kind.

However, the legislative bill number 3.457 of 2019, inspired by the above-mentioned provision issued by the Court of Justice of Pernambuco, seems to overcome questions regarding formal unconstitutionality, being still consistent with the constitutional norm of mediata and indirect efficacy and with the Democratic State of Direct, although it remained critical in the face of its shyness and the possibility of advancing in a more incisive way in order to expand the possibilities of tax divorce even to those who have underaged or unborn children, considering that the end of marital bond does not change the legal relationship between ascendants and descendants.

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# THE POSSIBILITY OFARBITRATION AS A MECHANISM FOR EFFECTING CONSUMER RIGHTS AND THE PRINCIPLE OF REASONABLE DURATION OF THE PROCESS: RESP 1.742.547 ANALYSIS

## DA POSSIBILIDADE DA ARBITRAGEM COMO MECANISMO DE EFETIVAÇÃO DOS DIREITOS DO CONSUMIDOR E DO PRINCÍPIO DA RAZOÁVEL DURAÇÃO DO PROCESSO: ANÁLISE DO RESP 1.742.547

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## ABSTRACT

An unprecedented decision handed down by the Superior Court of Justice deals with the application of arbitration in consumer law: once the option for arbitration is accepted, after the conclusion of the agreement, the consumer can no longer bring this matter to court, with a new exception to access to justice as a fundamental right as a counterpoint to the fact that consumer protection is a norm of public order. The study analyzes Special Appeal No. 1,742,547, deepening the verification of arbitration as a mechanism to enforce consumer rights and the principle of reasonable duration of the process. To support the study, a literature review involving phenomena related to the theme had been carried out, also using the inductive method for argumentation. The results pointed to two currents of analysis involving access to justice, one that considers access to justice as

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a synonym for access to the Judiciary and another that considers it in a broader character, with the arbitration institute being applicable. However, in fact, it was understood that arbitration is a valid mechanism for the enforcement of Consumer Rights and compliance with the Reasonable Principle of the Process, with this institute being more beneficial than the judicial process, as long as they are complied with some fundamental requirements, such as the parties' autonomy of will.

**Keywords:** Consumer Rights; Access to justice; Public order; Arbitration.

## RESUMO

*Decisão inédita proferida pelo Superior Tribunal de Justiça trata da aplicação da arbitragem no direito consumerista: uma vez aceita a opção pelo procedimento arbitral, após a celebração do acordo, o consumidor não pode mais levar a juízo esta mesma matéria, ocorrendo nova exceção ao acesso à justiça como direito fundamental em contraponto ao fato de que, a defesa do consumidor, é norma de ordem pública. O estudo analisa o Recurso Especial nº 1.742.547, aprofundando a verificação da arbitragem como mecanismo de efetivação dos direitos do consumidor e do princípio da razoável duração do processo. Para embasar a pesquisa, fora realizada revisão de literatura envolvendo os fenômenos relacionados ao tema, utilizando-se também do método indutivo para a argumentação. Os resultados apontaram para duas correntes de análise envolvendo o acesso à justiça, sendo uma que considera o acesso à justiça como um sinônimo do acesso ao Judiciário e outra que o considera em caráter mais amplo, abrangendo o instituto da arbitragem. Porém, de fato, compreendeu-se que a arbitragem constitui mecanismo válido para a efetivação dos Direitos do Consumidor e atendimento ao princípio da razoável do processo, apresentado esse instituto mais benéfico do que o processo judicial, desde que sejam cumpridos alguns requisitos fundamentais, como a autonomia de vontade das partes.*

**Palavras-chave:** *direitos do consumidor; acesso à justiça; ordem pública; arbitragem.*

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# 1. INTRODUCTION

Nowadays, one of the great obstacles to the effective fulfillment of the principle of reasonable duration of the process comes from confronting the culture of judicialization, in view of this, other adequate methods of conflict resolution have been discussed as a possibility of increasing access to justice, producing faster and more efficient decisions, without disregarding other guiding principles of Brazilian law.

In this context, access to state justice and the respective procedural instruments should be more important for their potential use than because of their effective use, enabling the creation of a "new mentality" to replace the paternalism of the State, with the emergence of of a civil society in which unofficial means of conflict resolution are more used than formal and official means (GRINOVER et al., 2007, p. 791). The defenders of this thesis start from teachings such as those by Condado (2008), who point out that the modern view of access to justice can no longer be limited to access to the Judiciary, especially given its inefficiency in meeting the constitutional principle of reasonable duration of the process.

The general objective of this study, based on the literature review, hypothetical-deductive and empirical analysis methods, is to approach the arbitration procedure as a mechanism for enforcing Consumer Rights and the principle of reasonable duration of the process from an analysis of Special Appeal No. 1,742,547, unprecedented decision in which consumers signed, independently and voluntarily, in relation to the purchase and sale agreement, a term of commitment, actively participating in the arbitration procedure, which made the Judiciary's

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assessment of the same matter. The specific objectives were also delimited and, in a detailed way, it is possible to: a) make a presentation of the Consumer's Rights and its fundamental foundations, drawing a parallel with the presentation of the principle of reasonable duration of the process; b) verify what are the arguments for access to justice as a fundamental right, exploring its concept and contemplating the institute of arbitration in the context of access to justice; and, c) present and analyze REsp No. 1,742,547, pointing to aspects related to the principle of reasonable duration of the process and the enforcement of consumer rights, verifying whether the decision rendered by the Superior Court of Justice (STJ) is possible exception to access to justice as a fundamental right.

It is noteworthy that, since the decision of REsp nº 1,742,547 is quite recent, there are few opinions and no scientific studies published on the subject in Brazilian databases. Thus, with the preparation of an original study that seeks to clarify the issues analyzed, the justification for carrying out this study comes precisely from a need to cast a critical and impartial look on the topic as a whole, checking possible repercussions of the decision of the STJ.

According to Silva (2018, p. 786), the success of adequate methods of resolving disputes other than state justice is so great that it has been expanded to areas as unlikely as tax law, with an express legal provision for the use of arbitration in litigation involving tax or criminal matters under Portuguese law.

The theoretical basis for the analysis of the case in question was obtained from the literature review method, so that, it briefly addresses the historical evolution and foundations of consumer rights; then, the principle of reasonable duration of the process and the relevance of arbitration for the fulfillment of this constitutional commandment, inserted by EC nº 45/2004, is presented; and, continuously, it analyzes access to justice as a fundamental right, also presenting the institute of arbitration and relating it to other contents. Finally, such knowledge is used, specifically, in discussions involving the judgment of REsp No. 1742.54, with the promotion of jurisprudential and doctrinal dialogue on the subject, producing original conclusions about the problem presented.

## 2. CONSUMER RIGHTS AND THE POSSIBILITY OF USING ARBITRATION IN CONSUMPTION CONFLICTS

A first point to analyze the arbitration procedure as a mechanism for enforcing Consumer Rights starts with a proper understanding of some of the fundamental precepts of Consumer Law. According to Marimpietri (2001) the first movements acting on behalf of the consumer emerged between the end of the 19th century and the middle of the 20th century, since there were no specific consumer rights, who were considered a low-sufficient party in consumer relations, having any safeguards in relation to the supplier of the goods. Such movements, which emerged in countries like the United States, England and France, however, were not able to effect the creation of consumer rights, although they have been extremely important to alert consumers to possible abuses practiced by suppliers.

According to Alemida (1982) it was only during the 1960s that the consumer began to be recognized as the holder of specific rights protected by the State, with the US President John F. Kennedy being the main articulator of Consumer Law when sending in 1962 a document that considered some basic consumer rights, in the above sense: a) in the case of the Right to Health, it came to be considered essential to the protection against the sale of products that could represent a risk to the health of consumers; b) the Right to Safety involves the perception that products available in the market cannot violate the safety of consumers, making merchants responsible for any unsafe products offered in the market; c) the Right to Information sought to protect consumers from misleading advertisements, designed to induce them to buy defective products or that have a price or configuration different from those presented by the merchant/supplier; d) the Right to Choice understands that there must be a variety of products and services at competitive prices, so that consumers can select them in the purchase process; and, e) finally, there is also the Right to be Heard, which is associated with the ideal that consumers should always have their interests represented in the formulation of public policies, implementing fair, equal and swift measures in the courts.

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Thus, inserted in art. 5, item XXXII, urges to contextualize that Consumer Protection gains from the Original Constituent of 1988 the status of direct and fundamental guarantee, in addition to a permanent clause, under the terms of constitutional hermeneutics, especially when combined with art. art. 60, § 4, item IV also of the CRFB/1988 which teaches the formal, material, temporal and circumstantial limiting list, establishing the same (stone clauses) to the power of reform by the Reform Constituent Power, so that they are not liable of alteration, as they have the function of protecting the fundamental rights of individuals.

In Miragem's school (2008, p. 34), the constitutionalization of consumer protection is a result of the affirmation of the dignity of the human person as a principle that represents a kind of constitutional right of the person, promoting a qualitative change in the status of consumer rights , which became preferential in relation to rights that are based only on infra-constitutional legislation.

In this context, Bejamin (2009) even stated that the "CDC" is the "habeas corpus of the consumer", being one of the few Brazilian laws that was born from a constitutional determination, from art. 48 of the Transitory Constitutional Provisions Act, which determined the drafting of the Code within 120 days, as of the enactment of CRFB/88.

Further on, based on these preliminary observations, it becomes possible to observe that Consumer Law is the result of the work of a legal current that understands the consumer as the low-sufficient party in consumer relations, in order to protect it from possible abuses that could be committed by merchants and suppliers,

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considering that the market does not have efficient mechanisms to overcome this vulnerability, showing the necessary State intervention (GRINOVER et al., 2007, p. 6-7). Alda (2012) points out that in Brazil, although other constitutions have dealt with rights related to the economic order, it was only with the advent of the CRFB/1988, especially in article 170, caput and subsections, that the Economic Order was conceived , based on valuing work and free enterprise, should aim to ensure a dignified existence, observing criteria of social justice and orienting itself, among other principles, to consumer protection, as expressed in item V. Although there were already dedicated organizations for consumer protection, state tutelage only effectively exists in the current constitutional text.

Article 5, item XXXII of the Charter provides that the State must promote, in accordance with the law, consumer protection. When talking about Consumer Rights in Brazil, it is essential to address consumer legislation, that is, Law No. 8.078/1990, which established the CDC – Consumer Defense Code.

The main point of the existence of Consumer Rights and, therefore, of the CDC, comes from the understanding that the consumer is the low-sufficient party in consumer relations, and should therefore be protected. Soares (2015) teaches that the main foundation of consumer rights involves the effectiveness of such rights, which can only be acquired by opening up legal principles that guide consumer relations, such as transparency, vulnerability, equality, good -objective faith, the efficient repression of abuses, the harmony of the consumer market, fairness and consumption, principles which guide the Brazilian consumer legislation.

Carvalho (2013) deepened some of the guiding principles that underlie the rights of Brazilian consumers, which are presented in a summarized way: a) the Principle of Vulnerability (Article 4, item I, of the CDC) establishes that the consumer is the vulnerable person, regardless of who it is and its economic power, since it does not have techniques, knowledge and technologies, being conceived in an inferior position compared to the trader/supplier.

It is the recognition of this principle that considers the consumer as the party to be protected in consumer relations; b) associated with the principle of vulnerability, the Constitutional Principle of Isonomy applies concomitantly, which is associated with the unequal treatment of unequals, aiming that the best solution and interpretation in the specific case is based on the consumer's presumption as a constitutionally part recognized as weaker; c) the Principle of Information and Transparency is a foundation that aims to seek safe and conscious consumption, and is associated (as the name itself indicates) with the duty to provide clear and concise information to consumers about what they are purchasing, contemplating the duty of transparency in all negotiation phases; d) as for the Principle of Objective Good Faith, it comprises the functions of limiting abuse of rights, interpreting and integrating the contract and the creation of duties, seeking balance and justice, protecting and protecting the consumer in consumer relations based on rules of conduct established by legislation and doctrine; and, e) the Principle of Equity (also known as the Principle of Trust) encompasses the balance between duties and obligations, with no intentional or reprehensible conduct being required by the supplier, comprising the safety of what the consumer reasonably expects and can demand in front of a particular product or service.

These and other principles end up constituting some of the basic foundations of consumer rights in the Brazilian case. In possession of this knowledge, it becomes possible to deepen

the principle of reasonable duration of the process, bringing a parallel with regard to arbitration and its possible application in consumer matters, as Article 4, V of the CDC highlights it as a principle of the National Policy on Relations of I use the "incentive to the creation by suppliers of efficient means of quality control and safety of products and services, as well as alternative mechanisms for resolving consumption conflicts".

Through the aforementioned provision, it is possible to support the application of arbitration in consumer relations, especially when these deal with rights available or subject to availability. Thus observe Fichtner, Mannheimer and Monteiro (2019, p. 261) "that private autonomy is also present in consumer relations and that the international experience reinforces the idea that these relations are a fertile field for the adoption of arbitration."

As can be seen, although consumer law has rules of a cogent nature and of public order, the presence of private autonomy in their relations is also undeniable, and it should be noted that the purpose of imposing mandatory rules, in any area of law, it is to prevent the parties from seeking undue advantages or the practice of fraud (APRIGLIANO, 2010, p. 52).

It is important to note that the expression "public order" is expressly provided for in the Arbitration Law (art. 2, § 1), representing a clear limit to the autonomy of the parties and, according to José Antonio Fichtner, Sergio Nelson Mannheimer and André Luís Monteiro, it does not concern the availability or heritage of the cause, but rather political, economic, social, moral and cultural values relevant to the State.

Nery Júnior, one of the authors of the CDC draft, states that "the arbitration judgment is an important factor in the composition of consumer disputes, which is why the Code did not want to prohibit its constitution by the parties to the consumer contract", indicating the interpretation to contrario sensu of the norm (art. 51, VII of the CRC), which is not determined compulsorily, the institution of arbitration is possible (GRINOVER et al., 2007, p. 592).

Likewise, Alvim et al. (1991, p. 253-254) argue that despite the rigid wording of VII, of art. 51 of the CDC, it does not prohibit the use of arbitration commitment, which, in addition, has proven to be effective for the resolution of disputes involving consumer rights in developed countries.

Thus, it would be possible to apply Articles 51, VII of the CDC and 4, § 2, of Law 9,307/96, conditioning the effectiveness of the arbitration clause on the consumer's taking the initiative in instituting arbitration or its express agreement, any compulsory form of arbitration in this type of relationship (FERREIRA; FERREIRA; ROCHA, 2019, p. 94), as decided by the STJ in REsp 1,189,050/SP.

There are judgments of the Court of Justice of the State of São Paulo (TJSP) and of the Court of Justice of the State of Góias (TJGO), admitting arbitration in adhesion contracts involving consumer relations, provided that the requirements of art. 4 § 2, of the Arbitration Law (TJSP, appeals 1050534-29.2017.8.26.0100, 1019669-24.2014.8.26.0554, 3001192-12.2013.8.26.0114, TJSP, interlocutory appeal 0166160-98.2012.8.26.0000 and TJGO, Appeal No. 0237312.21.2016.8.09.0137).

It should be noted, however, that authors such as Marques, Benjamin and Miragem (2004, p. 55) maintain that the CDC norms lend themselves to serving social interests, in contrast to the dogma of private autonomy, having introduced the social function of contract before the forecast that became part of the Civil Code of 2002.

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From this perspective, Fichtner, Mannheimer and Monteiro (2019, p. 263) observe that, despite the clarity of the legislation in force authorizing the use of arbitration in conflicts involving consumer rights, most consumer doctrine defends incompatibility arbitration in consumer relations, based on art. 51, VII of the CDC, arguing that the rules that deal with consumer rights are of a cogent nature and of public order.

Filomeno states that the use of arbitration in the resolution of conflicts involving consumer rights is incompatible with "the cornerstones of the consumerist philosophy, notably those embodied in inc. I of art. 4th [...] and secs. IV and VII of its art. 51" (GRINOVER et al., 2007, p. 89).

The author argues that arbitration would be impractical in the context of consumer relations, and it would be preferable to sacrifice this method of dispute resolution in favor of maintaining the consumerist philosophy based on the manifest vulnerability of consumers in general (GRINOVER et al., 2007, p. 89 ).

Marques (2004, p. 890) states that arbitration is not the best way to resolve disputes involving consumer rights, working well in disputes involving large companies or traders, with parity of forces. According to the author, the Arbitration Law has a civil procedural nature and should not be used to "escape" or "fraud" the application of imperative material law, especially in such unbalanced and abused relations, such as consumer relations.

In addition, Amaral Júnior (1991, p. 197) argues that art. 51, VII of the CDC expressly prohibits the use of arbitration in consumer disputes, arguing that its stipulation can be extremely harmful to the interests of consumers, also emphasizing that the jurisprudence of France has considered the arbitration clause in contracts involving the consumer relations.

As noted, the application of arbitration in the resolution of disputes involving consumer rights is extremely controversial, however, a good part of the doctrine, including Nery Júnior, one of the authors of the CDC draft, and some recent judgments admit its use, making the analysis of this access door to justice relevant as a potential mechanism for enforcing consumer rights, with regard only to patrimonial and available aspects of the consumer relationship.

## 3. THE PRINCIPLE OF REASONABLE PROCESS DURATION: PRESENTATION AND ITS CONFLICT WITH THE JUDICIARY DELAY

Nunes (2017) points out that the slowness of Brazilian justice is a recurrent theme in legal debates, being associated with the delay in the provision of jurisdictional protection and also the difficulties of ensuring access to justice as a human and fundamental right, an issue that will be addressed further ahead in the present study. The duration of the process, in this sense, is one of the major factors to be considered by the State in view of the jurisdictional provision, so that the principle of reasonable duration of the process is consolidated from instruments in order to safeguard the citizen's right to obtain guardianship in a timely manner.

In light of this, Teori Albino Zavascki (1997, p. 64) observes that "under the name of the right to the effectiveness of justice", the Constitution assured the individual effective means

for the analysis of the demand brought to the State, an efficacy that is sufficient to give rise to the litigant winner the achievement of his victory, which would be equivalent to what he would naturally have if he did not have to enter the Judiciary (DINAMARCO, 2008, p. 319).

As pointed out by Soares and Alves (2017, p. 1), the reasonable duration of the process "was raised to the condition of a fundamental principle with Constitutional Amendment No. 45/2004, endowed, therefore, with immediate applicability and full effectiveness". This principle seeks to satisfy the needs of society insofar as the judicial process is conceived as the means to ensure, preserve or repair violated rights. Its application is associated with the notion that, when jurisdictional protection is lengthy, it itself represents a violation of rights, since it does not guarantee the satisfaction required by the jurisdiction, who sees himself harmed since the Judiciary Branch did not satisfactorily fulfill its primary function. Mologni and Pierotti (2009, p. 2) reiterate that the introduction of this principle in the legal system "cannot be considered a novelty, as it has always been enshrined in the Constitution, even if implicitly, an analysis of the principle of due process, or even the dignity of the human person" to confirm its existence. However, this principle began to ensure in a more express way the right to a reasonable duration of the process, equating the speed of proceedings with the constitutional guarantees.

Basically, the principle of reasonable duration of the process, in this sense, sought to improve the procedural system, aiming to optimize and speed up the jurisdictional provision, including by recognizing the same in the list of fundamental rights, since EC No. 45/2004 implied in the emergence of item LXXVIII of article 5 of the Magna Carta. This principle, however, finds a major obstacle in the slowness of the Brazilian Justice, implying reflections on the need for alternative means of conflict resolution, such as arbitration. Thus:

> [...] the principle of reasonable duration must be in harmony with other constitutional principles, also fundamental, with those of contradictory, access to justice, effectiveness, and fairness of procedure, seeking a fair and reasonable decision on the conflict. Therefore, the reasonable duration of the process cannot be a justification for shortening the procedural rite or for rejecting evidentiary steps relevant to the delinquency of the case. In fact, what is sought, according to the doctrine, is a process without undue delays, that is, that observes the contradictory, ample defense and the due legal process, but which strives for the speed of the procedure, reduces the procedural bureaucracy, eliminates the useless steps and is increasingly accessible to the citizen (SHIAVI: 2015, p. 6).

Based on the teachings mentioned, the principle of reasonable duration of the process must not be detached from other fundamental principles. Since this study seeks to analyze arbitration with a focus on access to justice, this legal foundation will also be considered throughout development, also promoting the articulation between all the fundamental precepts of Consumer Law.

## 4. ACCESS TO JUSTICE AS A FUNDAMENTAL RIGHT AND THE INSTITUTE OF ARBITRATION

According to Oliveski (2013), access to justice is a concept that is closely related to access to the Judiciary and the legal order, reflecting in a full way for the realization of citizenship.

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With CRFB/88, access to justice began to be expanded to all citizens, listing it at the level of a constitutional principle (Principle of Non-Removable Jurisdiction) provided for in item XXXV of article 5 of the Charter, in which the legislator points out that the law will not exclude from the Judiciary's assessment an injury or threat to a right. For Costa (2013), access to justice is seen as a fundamental right for all citizens and for its reach the provisions of the Constitution must be complied with, since its provision is in part I, title I of this legislation. It is a fundamental right analogous to rights, freedoms and guarantees, being an essential guarantee in the protection of fundamental rights from the perspective of the Democratic Rule of Law. Given this understanding, the author also draws a parallel between the recognition of access to justice as a fundamental right and the right to a decision within a reasonable time, pointing to the slowness of the Judiciary in the following terms:

> The conclusion of all these problems is the decrease of citizens' trust in Justice and a Justice that is increasingly far from being a right that should be guaranteed to all. Successive governments still tend to look at the problem of procedural speed and reasonable duration of the process as a problem of lack of effectiveness and efficiency, using these concepts here from a purely economic perspective of cost reduction, of de-judicialization, when it should not be looked at to the courts how one is looking at a company, but rather at a sovereign body whose problems must be resolved with the involvement and investment of the State and not with the opposite position, because this can have disastrous consequences for the rule of law Democratic (COSTA: 2013, pp. 39-40).

This is all aggravated by the mistaken view that the judicial route is the only way to access justice, making Brazil offer the world a perspective that we are experiencing a war of all against all, showing that man's vocation would be to live eternally in litigation, as a population of approximately 202 million inhabitants has more than 100 million lawsuits (NALINI, 2018, p. 29). Thus, the demand for more adequate mechanisms for the resolution of disputes is evident, which is verified in the changes promoted in the civil procedure, it has been observed that the adjudicated state justice is no longer the only instrument suitable for the resolution of disputes and alongside the state justice, with a single door, new forms of access emerged, such as arbitration, becoming the access to multi-door justice (DIDIER JÚNIOR; ZANETI JÚNIOR, 2018, p. 38). According to Fichtner, Mannheimer and Monteiro (2019), the slowness of the Judiciary as an obstacle to access to justice and to obtain a reasonable duration of the process that is contemplated highlights the institute of arbitration, understood as an alternative mechanism for the solution of controversies, obtaining faster and more technical decisions and contributing to "unburden" the courts of the Judiciary. Casado Filho (2014) defines arbitration as the institution through which two conflicting parties can hire and entrust arbitrators, appointed by them or not, to adjudicate their disputes regarding enforceable rights.

Since the slowness of the Judiciary makes it impossible to achieve access to justice as a fundamental right, as people end up not having their demands met or have their demands met with a great waste of time, arbitration and other adequate means of solution of conflicts are now contemplated as possibilities to optimize the jurisdictional provision, since they occur outside the Judiciary, reducing the demand assessed by the Brazilian courts. Ferreira, Ferreira and Rocha (2019) point out that although arbitration cannot be considered an innovation in the legal system, the Arbitration Law (Law No. 9.307/96) was conceived as an important regulatory

framework in this regard, by admitting that people can trigger the arbitration procedure to settle disputes regarding available property rights.

Procedural authors such as Dinamarco (2013) criticize arbitration as a mechanism for access to justice, since the plaintiff understands that it could not reach a satisfactory level of excellence without the foundations of the General Theory of Process, not being methodologically legitimate in itself. concern only with phenomena inherent to state jurisdiction, not considering the jurisdiction of arbitrators. Carmona (2009), on the other hand, contemplates that arbitration can not only, as it has flourished in the Brazilian case, not only because of the crisis in the judicial process, but also because of the benefits associated with access to justice, such as greater speed, secrecy in the decision of the cause, better efficiency of the technical decisions rendered by the arbitrator, this one conceived as someone with specific knowledge about the thing in merit in the arbitration procedure, among countless other aspects.

Regarding the application of arbitration in consumer relations, Olavo Augusto Vianna Alves Ferreira, Matheus Lins Rocha and Débora Cristina Fernandes Ananias Alves Ferreira (2019, p. 93) state that arbitration can be applied in consumer disputes, highlighting that this instrument of conflict resolution, by expanding access to justice and having faster and more efficient processing (which in some cases may not even generate costs, depending on the model adopted), will provide benefits to the consumer. Levy and Pereira (2018) sought to give a new focus to the institute of arbitration in the light of current Law, conceiving it as an instrument that can be used to expand access to justice and to optimize the jurisdictional provision of the State, from from the perspective of several authors. In fact, there is no absolute consensus involving the perception that the mechanism known as arbitration can be seen as a possibility to promote the optimization of access to justice and a reasonable duration of the process, especially in the context of Consumer Rights, being necessary to obtain a impartial view of its applicability in these terms.

The elements presented throughout the work included the offer of basic information to provide an analysis of REsp No. 1,742,547, verifying the possibility of contemplating arbitration as a mechanism for enforcing consumer rights and the principle of reasonable duration of the process, which occurs in the next chapter. The fact that fundamental information has been presented and substantiated throughout the previous chapters does not in any way mean that such information should not be deepened and questioned during the development of this study, which will be carried out at an opportune time.

## 5. SPECIAL RESOURCE NO. 1,742,547: A NEW EXCEPTION OF ACCESS TO JUSTICE AS A FUNDAMENTAL RIGHT?

This chapter seeks the presentation and analysis of REsp nº. 1,742,547, contemplating the possibility of verifying arbitration as a mechanism to enforce consumer rights and the principle of reasonable duration of the process, considering that in 2007, in the judgment of REsp nº. 819.519/PE, in the first judgment dealing with arbitration clauses inserted in consumer contracts, the STJ adopted the understanding that "the arbitration agreement clause inserted in

the adhesion contract, entered into under the Consumer Protection Code is null and void" (in the same sense: AgRg in EDcl in Ag No. 1.101.015/RJ).

Fichtner, Mannheimer and Monteiro (2019, p. 262), state that although consumer relations are subject to public order rules, they have an evident patrimonial nature, which is already sufficient to meet the requirements of objective arbitrability. And the same authors continue, in addition to stressing that "although free availability is not a criterion adopted by the Brazilian legal system for the purpose of objective arbitrability, in any case, the consumer's rights are available" (FICHTNER; MANNHEIMER; MONTEIRO, 2019, p. 262).

In the judgments of REsp no. 1.169.841/RJ and REsp no. 1.189.050/SP, the STJ stated that it is perfectly applicable to arbitration in consumer relations, being a defense, however, the imposition of an arbitration clause, reserving to the consumer the power to free himself from the arbitration process to resolve any eventual lead. As early as 2018, the same Court had the opportunity to analyze a different case, AgInt in AREsp nº. 1.152.469/GO in which, unlike the aforementioned, the consumer had expressed his willingness to join the arbitration, but even so chose to file an action for annulment of the arbitration award. In this judgment, the STJ established that the CDC prevents the prior and compulsory adoption of arbitration, but that it does not prohibit its institution, provided that there is an agreement between the parties and the special consent of the consumer, however, the court understood that the analysis of the Appeal Special would demand the re-examination of the factual matter of the dispute, applying Precedent 7 of the STJ, dismissing the appeal.

Given these facts, the importance of the analysis of REsp nº. 1,742,547, which was a Special Appeal filed by LCDCL and JJM, in an indemnity action for material and moral damages filed by the appellants against an engineering company, due to alleged non-compliance with the promise to buy and sell a unit in a project real estate. Below, the summary of the appeal to be analyzed is presented:

> SPECIAL RESOURCE. CIVIL AND CONSUMER PROCEDURE. ADHESION CONTRACT. ACQUISITION OF REAL ESTATE UNIT. ARBITRATION AGREEMENT. LIMITS AND EXCEPTIONS. CONSUMPTION CONTRACTS. POSSIBILITY OF USE. ABSENCE OF TAX. CONSUMER PARTICIPATION. TERM OF COMMITMENT. SUBSEQUENT SIGNATURE. REsp nº 1742547 / MG (2018/0121028-6).

In the appellants' appeal, the nullity of the arbitration agreement contained in the adhesion contract was alleged. However, the Court of Justice of Minas Gerais (TJMG) dismissed the appeal, stating that, at a later time, the appellants signed an arbitration term that grounds the litigation to arbitration jurisdiction, in the following terms, under which emphasis:

> APPEAL. ACTION FOR INDEMNITY. ARBITRATION CLAUSE FOR INSTITUTION OF ARBITRAL COURT. VALIDITY. ADHESION CONTRACT. PARTICIPATION IN THE INSTRUCTION IN THE ARBITRAL COURT. IMPOSSIBILITY OF TRANSFER TO THE JUDICIARY. VENIRE PROHIBITION AGAINST FACTUM PROPRIUM. The arbitration clause for the resolution of conflicts, through arbitration, in consumer relations arising from adhesion contracts, is null. However, the qualified party to understand what was being agreed upon, by opting for the arbitration court, participating in its instruction, gave up access to the Judiciary for the assessment of issues related to the contract, which makes it impossible for the contracting parties to seek a solution to their disputes via the Judiciary Branch.

In the case in question, the option for the arbitration procedure culminated in the abdication of access to the Judiciary Power, meaning that the authors could no longer seek the solution of disputes through this means, but through arbitration. Based on the decision, the case was dismissed without judgment on the merits, based on item VII of article 485 of the CPC/73, due to the establishment of the arbitration procedure to settle the same dispute. The REsp no. 1,742,547 contemplated the allegation of violation of item VII of article 51 of the CRC and of § 2 of article 4 of the Arbitration Law, in addition to the existence of jurisprudential agreement. Article 51 of the CRC is present in Section II of the Diploma (Abusive Clauses) contemplating that, among others, the contractual clauses relating to the supply of products and services that, pursuant to item VII, determine the compulsory use are null and void. of the institute of arbitration. In the lesson by Olavo Augusto Vianna Alves Ferreira, Matheus Lins Rocha and Débora Cristina Fernandes Ananias Alves Ferreira (2019, p. 93), the legislator's objective was consumer protection, balancing the relationship, as if there was legal permission for the use of arbitration compulsory, the consumer would be required to submit to the arbitration clause frequently by the suppliers.

It is necessary to bring to the debate that, in foreign law, the use of arbitration in consumer relations is admitted and encouraged, for example, Lemes (2003) highlights that in Portugal the Consumer Dispute Resolution Centers lead the use of arbitration, recording between 2000/2001, the average of ten thousand cases. In Argentina, where consumer law encourages arbitration, in 2002 there were 2,698 arbitration awards.

Thiago Rodovalho (2016, p. 98-100) observes that article 51 of the CRC provides a comprehensive list of clauses considered, in themselves, abusive, which must be recognized ex officio, with the Brazilian legislator failing to opt for the adopted legislative technique in other countries such as Germany and Portugal, which divide unfair terms between those that admit and those that do not allow valuation. In this way, this impossibility of valuation, may in some cases harm the consumer, considering that the option for nullity will not always be more advantageous in the specific case, such as the insertion of an arbitration clause in consumer adhesion contracts, being the ineffectiveness with relationship to the consumer, a better solution than nullity, as it would only allow the consumer, in the event of a possible dispute, to opt for arbitration before the supplier (RODOVALHO, 2016, p. 100-101).

However, Thiago Rodovalho (2016, p. 100) points out that although the national legislator has not done well, the rigidity of article 51 of the CRC has been improved by doctrine and jurisprudence, with the approximation of the German and Portuguese systems, which notes, including with regard to O REsp nº. 1,742,547. Paragraph 2 of Article 4 of the Arbitration Law, on the other hand, determines that the arbitration clause is contemplated as the convention through which the parties to a contract undertake to submit the arbitration procedure for disputes relating to adhesion contracts, so that the arbitration clause it will only be effective if the adherent takes the initiative to institute arbitration or expressly agree with its institution.

Paulo Furtado and Uadi Lammêgo Bulos (1997, p. 50-51), Joel Dias Figueira Junior (1997, p. 116-117) and Humberto Theodoro Júnior (2008, p. 344-345) argue that this provision of the Arbitration Law would have revoked article 51, VII of the CDC, but most of the doctrine followed a different path, considering that this special rule lives in harmony with the protection granted to the consumer/adherent in article 51, VII of the CDC, in this sense (CARMONA, 2009 , p. 108; CRETELLA NETO, 2004, p. 58-59; ROCHA, 1997, 34; RODOVALHO, 2016, p. 119;

FERREIRA; ROCHA; FERREIRA, 2019, p. 94; NERY JR., 2004, p. 582; FICHTNER; MANNHEIMER; MONTEIRO, 2019, p. 265). Nelson Nery (2004, p. 582) points out that the two provisions are in full force, making it possible to establish an arbitration clause in consumer contracts, obeying the bilaterality in contracting and the form of expression of will, guaranteeing the manifestation of mutual agreement by the parties.

The subject was analyzed in Special Resource n. 1,169,841-RJ, with the STJ highlighted that when the Arbitration Law came into force, three rules with different degrees of specificity came to coexist harmoniously, namely: a) the general rule, which requires the observance of the arbitration when agreed upon by the parties, to the detriment of state jurisdiction; b) the specific rule of article 4, § 2, of Law 9,307/96, with application to generic adhesion contracts, restricting the effectiveness of the arbitration clause; and c) the even more specific rule of art. 51, VII, of the CDC, which applies to consumer contracts, adhesion or not, with the imposition of the nullity of a clause establishing the compulsory use of arbitration, even if the requirements of art. 4, § 2, of the Arbitration Law. According to Olavo Augusto Vianna Alves Ferreira, Matheus Lins Rocha and Débora Cristina Fernandes Ananias Alves Ferreira (2019, p. 94) it is possible to apply articles 51, VII of the CDC and 4, § 2, of Law 9,307/96, provided that the The effectiveness of the clause is subject to the consumer's initiative to institute arbitration, or his express agreement, and the compulsory use of arbitration cannot be considered. In this sense, the STJ has already expressed itself in consideration of REsp n. 1,169,841-RJ, by pointing out that art. 51, VII of the CDC is limited to prohibiting the prior and compulsory adoption of arbitration, at the time of entering into the contract, but does not prevent its subsequent establishment, provided that there is consensus between the parties and, especially, the consent of the consumer (in the same meaning see: REsp 1,628,819/MG).

In REsp 1.785.783/GO, the conclusion was the same, having been highlighted that by the content of art. 4, § 2, of the Arbitration Law, even if the arbitration clause is on the same contract signature page, if the necessary highlights are observed, as determined by the CDC, it will be considered valid. José Antonio Fichtner, Sergio Nelson Mannheimer and André Luís Monteiro (2019, p. 267), contrary to what is stated in REsp 1.785,783/GO, note that the simple bold highlighting of the clause and the specific signature do not effectively protect the consumer, who in practice may consider that it is just another clause in bold in the contract, creating doubt as to the meaning of their choice.

The same Court of Justice, in the judgment of REsp 1,189,050/SP, ruled that there is no opposition to arbitration in the CDC, which would even encourage its adoption, only the imposition of the arbitration clause being prohibited, recognizing that there is no incompatibility between the articles 51, VII, of the CDC and 4, § 2, of Law n. 9.307/96 and that, in order to reconcile them and guarantee greater protection to the consumer, the arbitration clause will only be effective in case the adherent takes the initiative to institute arbitration, or expressly agrees with its institution. On the subject, Thiago Rodovalho (2016, p. 121-122) highlighted that while the CDC protects what is presumed to be vulnerable, the Arbitration Law aims to protect the "effectively under-sufficient", applying both rules in cases where there is disparity of forces between the contracting parties, this difference of forces being presumed in the CDC and concretely verified in the Arbitration Law.

Fátima Nancy Andrighi (2006, p. 19), ponders that one should not turn a blind eye to reality, considering that the adoption of arbitration in the resolution of consumer disputes is still

incipient and that, despite this, there is already news of the misuse of this instrument by service or product providers. For José Antonio Fichtner, Sergio Nelson Mannheimer and André Luís Monteiro (2019, p. 267) "In the event that the consumer himself takes the initiative to institute arbitration, there is no greater doubt as to the full regularity of the arbitration process", serving his initiative of proof of action with freedom, conscience and autonomy in expressing their will.

On the other hand, the situation would be much more complex if the supplier took the initiative to institute arbitration, as there would be no proof in advance constituted of the consumer's freedom, conscience and autonomy of expression of will, in the case of a case that would demand greater degree of caution in the analysis (FICHTNER; MANNHEIMER; MONTEIRO, 2019, p. 268). Based on the observation of the doctrine and jurisprudence on the subject, it is observed that, in the case under study (REsp nº 1,1742,547), the voluntary adherence of consumers ended up making access to the Judiciary impossible. The appeal's rapporteur, Minister Nancy Andrighi, following the jurisprudence of the STJ and the exposed doctrine, stated that item VII of article 51 of the CRC is limited to prohibiting the prior and compulsory adoption of the arbitration institute at the time of signing the contract, interpreting that this does not promote subsequent impediment, in the face of litigation, with a consensus between the parties. Thus, it is possible to use arbitration to resolve disputes arising from consumer relations, provided that it is not imposed by the supplier or when the initiative of the establishment is the consumer, or even if the consumer expressly agrees with the supplier's initiative regarding the option by arbitration.

The reporter contemplated that, in the case in question, the consumers signed, independently and voluntarily, in relation to the purchase and sale agreement, a term of commitment, actively participating in the arbitration procedure. Since the appellants accepted such participation with the subsequent signing of the arbitration agreement, the appeal was denied. The arbitration clause would be null if it had been imposed on consumers, but it is possible to establish the arbitration procedure in a compulsory manner in consumer relations once there is later agreement of the parties through this alternative dispute resolution mechanism. This decision corroborated the applicability of arbitration, as well as the validity of the arbitration agreement in consumer relations, provided that the parties' autonomy of will considering the contractual act is present. Therefore, the authors must be submitted to the arbitration procedure with which they spontaneously agreed.

According to Lima (2018), the autonomy of the will is considered the dominant principle of arbitration, so that the institute can only be activated in the cases provided for by law in a voluntary manner by both parties. In the case in question, it was found that, once arbitration on this issue has taken place (even if later) it is no longer possible for the consumer to take the same matter to court, being a new exception to access to justice as a fundamental right , a circumstance that will be discussed later. Article 3 of the Arbitration Law determines that interested parties may submit the solution of their disputes to arbitration proceedings based on the arbitration agreement, being the arbitration clause and the arbitration commitment. According to Pinho and Mazzola (2017), by the arbitration clause, the parties undertake to submit possible disputes to arbitration, while in the arbitration commitment, the conflict is effectively submitted to the arbitration procedure, indicating the names of the parties, the arbitrators, matter under discussion, place of the arbitration award, in addition to the stipulation of the rules of procedure, respecting local limits. Once the arbitration agreement is established voluntarily, there is no

reason to 'go back' to the procedure. Therefore, an analysis will be promoted as to the reasonable duration of the process in consumer matters from this judgment.

According to Oliveira and Nunes (2018, p. 72) "the end of the litigious culture aims at the true realization of access to justice, guaranteeing the citizen respect for the due legal process and the reasonable duration of the process", recognizing that this The last principle has not been respected in the Brazilian case due to the slowness of the Judiciary, which is justified by the high demand for lawsuits assessed by it. Thus, arbitration can be seen as a means of promoting the fulfillment of the assessment of demands within a reasonable time. Once opted for the arbitration procedure, it is through it that the dispute will be resolved, and it is not possible to 'go back' to submit any consumer rights to court for the same matter. This is exactly what happened at REsp nº 1,742,547, where consumers agreed to opt for arbitration, which is the ideal way to solve the dispute and no longer the judicial way.

In his opinion on the aforementioned Special Appeal, Rover (2019) pointed out that, once a consumer signs an adhesion contract in the consumer relationship and, later, voluntarily, expressly agrees with the use of the arbitration institute, he cannot more seeking support in the Judiciary for the resolution of the conflict, since although consumer law prohibits prior and compulsory action of arbitration at the time of entering into a contract, there is no subsequent impediment once the arbitration is agreed upon by consensus between the parties. As previously presented in this study, one of the fundamental precepts of Consumer Rights resides in the principle of vulnerability, which recognizes the low sufficiency of consumers and the need for their protection. In this sense, a possible affront to the principle of vulnerability could be verified in the judgment of REsp nº 1,742,547 if the supplier had used its privileged position to force consumers to opt for arbitration. However, this was not confirmed in practice, so that the interpretation of item VII of article 51 of the CRC can be considered adequate, since the consumer legislation does not deal with subsequent adhesion.

Considering the above, it is necessary to ask: does the decision rendered in the judgment of REsp No. 1,742,547 imply a new exception to access to justice as a fundamental right by preventing the examination in court of the same matter before submission to the arbitration proceeding? In order to answer this question, Sadek's (2009) understanding should be used, in which the author points out that for the effectiveness of rights, access to justice is considered fundamental, since rights are only realized in the face of real possibility. to claim them before partial and independent courts, so that, in the event of any impediment to the right of access to justice, there are limitations or even impossibility of effective citizenship:

> In fact, rights mean little if there are no mechanisms for their realization. The real possibility of recourse to justice is the basic condition for this approximation between formal and substantive equality. Or if you prefer, it is the possibility of moving from intention to practice. Access to justice has a broader meaning than access to the judiciary. Access to justice means the possibility of making use of channels in charge of recognizing rights, of seeking institutions aimed at the peaceful solution of threats or impediments to rights. The set of state institutions designed for the purpose of securing rights is called the justice system (SADEK: 2009, p. 175).

Thus, based on the assumption that access to justice would be limited to access to the Judiciary, we would be facing a real affront to the Constitutional Diploma of 1988 in the judgment of REsp No. 1,742,547, including violating the effective citizenship of consumers by removing

them from the jurisdictional provision. However, in the present case, access to justice was reconfigured, given the option and appreciation of the arbitration procedure. It is necessary to present the understanding of Condado (2008), which contemplates that Brazilian arbitration meets the fundamental assumptions of the Constitutional Diploma of 1988, approaching the people's desire to live with a fast, safe, unbureaucratic and easy justice access. The constitutional right to jurisdiction is defended in the doctrinal field as the most fundamental among state obligations and, therefore, there is usually a direct association between access to justice and the courts, a view that, for the author of this study, does not more sustains itself. For the author, formal access to justice, based on the activation of the Judiciary, is not seen as the best model, nor as the model that provides greater access to justice, requiring a broader meaning that provides access to the citizen, not only to the courts and to the result of the jurisdictional provision, but of a just legal order. By making use of arbitration, the citizen obtains the solution to the conflict, however, if the agreement is not fulfilled, it continues with the support of the state power so that it makes use of its authority and monopoly of coercion, making use of the Judiciary and Forced Execution:

> [...] it's time to open up horizons and tread alternative paths, visualizing yourself, because, through arbitration, you will have a greater breadth of access to justice, conforming to the demands of the common good. It should be noted that the Judiciary Branch is responsible for ensuring the legality and, on multiple aspects, for the application and interpretation of Law No. 9,307/96. From another perspective, it is added that the objectification of an institute (arbitration) constitutes a social process, which can be delayed or stimulated, according to the performance of human agents related to it and, in creating the habit of arbitration, it is important to the guidance that lawyers and legal practitioners give their clients regarding the option for the arbitration process (CONDADO: 2008, p. 87).

When analyzing REsp nº 1.742.547, it is possible to speak not of a prohibition on access to justice, since this must be based on the arbitration procedure, which is effectively regulated by legislation in the Democratic State of Law. Speak up. then, in an exception to access to the Judiciary before the subsequent acceptance of the parties to the arbitration agreement in the consumer relationship. In the same sense, when considering the Special Appeal as a whole, one could only speak of a real impediment to access to justice if, in view of the non-compliance with the agreement in the arbitration procedure, the Judiciary refused to defend the interests of the injured consumers.

Silva (2005) points to two paths for the meaning of access to justice, the first being related to the understanding of access to justice as a synonym for access to the Judiciary and the second path to the understanding of access to justice through a scale of values and fundamental human rights, transcending judicialization and, therefore, not ending with access to the Judiciary. This understanding advocates two perspectives for the analytical essay of REsp No. 1,742,547: a) when considering access to the Judiciary as a synonym for access to justice, an impediment to access due to consumers is observed; and, b) when considering access to justice in a broad perspective and its modern definition, the institute of arbitration fulfills the precepts of access to justice, since arbitration would not be conceived as compulsory, given voluntary acceptance of consumers.

Thus, from the second perspective, it is considered that the decision of REsp No. 1.742.547 represents a new exception to access to justice as a fundamental right, which does not represent

an affront to the exercise of citizenship and access to justice in itself, but the removal of the judicialization of the matter to be considered before the opening of the arbitration proceeding. In the present case, there was no coercion of the Judiciary on the basis of consumers abstaining from judicial review, but an assessment of the legal provisions in which the parties' acceptance of the arbitration agreement was considered. The principle of consumer vulnerability was also not challenged, still conceived as the low-sufficient part of the consumer relationship, since at no time were consumers forced to accept the arbitration institute, which is recognized as a possibility to optimize and achieve more forcefully the principle of reasonable duration of the process.

The great obstacle to obtaining a faster decision for the case in question comes precisely from the judicialization of the case. When submitting the case for arbitration, one can make use of the teachings of Thiago Rodovalho (2017), who points to the main attractions of the institute: the judge's specialty, speed, flexibility and reliability. The legislation establishes a fixed period of six months for its end and, although its extension is not uncommon, arbitration procedures usually come to an end in just over a year, with evidence and hearings set up for the final decision without the possibility of an appeal for the challenge. Thus, it is possible to state that arbitration is a way to implement the principle of reasonable duration of the process, even though the Special Appeal analyzed has very specific nuances.

However, for the use of arbitration in matters of consumer law to be feasible, it is necessary to rule out the absence of financial resources for the establishment of arbitration proceedings, avoiding the so-called impecuniousness of arbitration. Thiago Dias Delfino Cabral (2019, p. 77), in a specific work on the subject, observes that although arbitration is generally not expensive, the amounts necessary for the establishment and its continuation may prevent the use of this mechanism by a person who has entered into an arbitration agreement, especially during periods of economic crises that impact everyone. José Antonio Fichtner, Sergio Nelson Mannheimer and André Luís Monteiro (2019, p. 61) after pointing out that there is no statistical data to demonstrate the cost of arbitration, they stated that the initial cost to initiate the procedure, such as registration fee and registration fee arbitrators' administration and fees have an immediate face value generally greater than that necessary to file a lawsuit, but they considered that this higher face value would represent a savings for the parties if diluted in the time a process in the state court usually takes , with the reduction of interest and legal surcharges, as well as with the elimination of the cost of managing a lawsuit for several years.

In state justice, according to article 82 of the CPC, subject to the provisions concerning free justice, it is incumbent on the parties to provide for the expenses of the acts that they perform or require in the process, including the advance payment of the procedural acts they wish to practice. In consumer relations, it is still common to apply article 6, VIII of the CDC, with the inversion of the burden of proof in favor of the consumer, when, at the discretion of the judge, its claim is credible or when it is insufficient, with the determination for the supplier to make advance payment of procedural acts, such as the costs of producing an expert evidence, for example.

In institutional arbitrations, Thiago Dias Delfino Cabral (2019, p. 80) points out that if one party is unable to pay the necessary costs for the initiation or continuation of the arbitration, the other may make the payment, under penalty of suspension or termination of the procedure. The situation is even more complex given the absence of the State's duty to offer assistance to the citizen in arbitrations, with no chance of benefiting from legal assistance yet (CABRAL, 2019, p. 81-82).

Thus, the possibility would arise that an injury or threat to a right would not be analyzed by the arbitrator or arbitral tribunal and the party would still be prevented from directing its claim to the Judiciary, due to the arbitration agreement (CABRAL, 2019, p. 82 ). Given this legislative gap, it is suggested in the narrow limits imposed in this study regarding the issue, that the anticipation of payment of the costs of the arbitration procedure is always the responsibility of the supplier, and the parties may provide for the responsibility for payment of the costs of the procedure arbitration at the end of the dispute, in a consensual manner, observing, in particular, the consumer's consent on this point. If the convention is silent, it is suggested to apply the understanding of Olavo Augusto Vianna Alves Ferreira, Matheus Lins Rocha and Débora Cristina Fernandes Ananias Alves Ferreira (2019, p. 286-287) for arbitrations in general, with the adoption of the regulation of the arbitration institution, if the parties have not agreed otherwise. In the last case, it will be up to the arbitrators to fix it (FERREIRA; ROCHA; FERREIRA, 2019, p. 287). Returning to the issue of access to justice, it is also important to point to the following counterpoint, under which it is highlighted:

> [...] the principle of access to justice stands out, which serves to exist a process at the same time that it protects the interest of the citizen regarding the intervention of the State to guarantee the jurisdictional protection. The principle of access to justice is sometimes called the right of action or even the inescapability of jurisdictional control. It is a guarantee of citizenship, where the State must easily allow access to justice, and the legislator cannot, under any circumstances, draw up rules that hinder or prevent access, not only to the judiciary, but in a global way to all its manifestations, maintaining always equal access to the system (CANZI, 2012, p. 1).

In REsp No. 1,742,547, the option of consumers not to be interested in the arbitration proceeding, but rather in the judicial process, remains clear, regardless of whether the first alternative is considered faster, more efficient and aligned with the principle of reasonable duration of the proceeding. Although most legal doctrine on the subject does not consider access to the Judiciary as synonymous with access to justice, there are authors such as Canzi (2012) who understand that, although access to justice has a broad meaning and includes other means suitable for resolving disputes, easy access to the Judiciary would be one of its fundamental perspectives on access to justice as a whole, which reinforces the thesis of two lines of thought for the interpretation of the Special Appeal analyzed throughout the development of this study.

Schiavi (2015) reiterates that access to justice and the principle of reasonable duration of the process must be harmonious, so that the reasonable duration cannot be justified to shorten the procedural shot, but rather by the speed of the procedure and reduction of procedural bureaucracy, eliminating useless steps that are increasingly accessible to the citizen. Therefore, the author points out that the behavior of the parties in the process is considered essential for a quick solution to the conflict. With collaboration between the parties, especially with honesty and good faith in the allegations, the process is resolved more quickly, producing a decision with more justice and in line with reality, and this same understanding is taken to the conception of the arbitration method. Even when considering arbitration as a procedure more in line with the principle of reasonable duration of the process, the behavior of the parties is another point to be considered in the result of REsp No. 1,742,547: consumers clearly stated that they sought the option for the judicial route for the resolution of the dispute with the supplier, which may indicate a hostile relationship between the parties, ruling out the possibility of reaching an arbitration decision that produces effects considered 'fair' by both parties. In the case in

question, the arbitration procedure has already been contemplated, but the possible risk is that the institute will be misrepresented, mainly due to the fact that, even in view of the acceptance of the consumers in the execution of the arbitration, the non-intention of the consumers in effectively activate the institute.

The great merit of the institute of arbitration is due to the fact that the parties voluntarily choose the institute. It would be more prudent, in this sense, to allow access to the Judiciary in the face of any party's dissatisfaction with the arbitration procedure. The creation of adequate means of conflict resolution does not mean that such alternatives should be imposed on citizens, even in the face of eventual acceptance prior to or subsequent to the signing of the commercial contract. In fact, since the judgment of REsp No. 1,742,547 took place at a recent time, there are few studies and opinions on the legal repercussions of the decision, so this study started from the theoretical basis carried out in the previous chapters to reach conclusions original to the problem exposed. It is expected that, with the results arising from the preparation of this study, other relevant analyzes and publications on the subject will be carried out.

## 6. FINAL CONSIDERATIONS

Based on the analysis of REsp No. 1,742,547 carried out throughout this study, it was found that Arbitration can in fact be appointed as a mechanism for the realization of Consumer Rights and the Principle of Reasonable Duration of the Process, especially when considering that this second, it has been largely hampered by the Judiciary's inability to produce decisions that are both swift and efficient, which had been analyzed concurrently with the perspective of the great demand for legal proceedings present in Brazilian courts.

On the other hand, the decision of the Special Appeal analyzed here brought a series of other controversies, including the principle of reasonable duration of the process and the possibility of establishing a new exception to access to justice as a fundamental right. The discussion involving this second perspective contemplates two views of thought: the first contemplates access to justice as a synonym for access to the Judiciary, which would imply an impediment to access to justice; the second, which provides for a more modern and comprehensive view of access to justice, understands that the institute of arbitration represents access to justice itself, with only a new exception rule for access to the Judiciary. It was also found that the action of the institute of arbitration is more in line with the assumptions contained in the principle of reasonable duration of the process in actions involving Consumer Rights. However, the decision of REsp No. 1.742.547, despite an adequate interpretation of the legislation that supported it, may lead to the distortion of the institute, since it is clear that consumers have no intention of submitting the dispute to arbitration, but to the court. Although there is no coercion and the autonomy of the consumers' will was configured in the adhesion to the arbitration after the signing of the contract, it could be more appropriate to review the request in court. In this way, even in the face of criticism of the decision in question, the Judiciary could only be brought into action in the case analyzed in view of the non-compliance with the agreements entered into with the establishment of the arbitration proceeding. Access to justice was ensured from

the granting of the appraisal through arbitration, ensuring a reasonable duration of the process, regardless of the parties' regret for the option of arbitration.

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# SUSTAINABILITY AND DEVELOPMENT: OBSTACLES AND PATHS FOR THE REALIZATION OF SUSTAINABLE CONSUMPTION

## SUSTENTABILIDADE E DESENVOLVIMENTO: OBSTÁCULOS E CAMINHOS PARA EFETIVAÇÃO DO CONSUMO SUSTENTÁVEL

**Ana Paula Marques Andrade**[1]


## ABSTRACT

The present study seeks to investigate the reasons that prevent sustainable consumption from taking place and therefore seeks to present some proposals that aim to achieve sustainable consumption. The economic development model based on the high standard of consumption and production, adopted since the Industrial Revolution, despite the benefits brought to society, brought socio-environmental impacts, as it contributed to both the degradation of the environment and the quality of life of people. In this perspective, the research aims to demonstrate that consumerism is the main cause of environmental degradation, as well as to show that sustainable consumption is inextricably linked to the achievement of sustainability. Thus, in the work, it will expose some of the obstacles that prevent realizing this ideal in this consumer society and then the means that can contribute to the realization of sustainable consumption, which involve ethical, economic and legislative changes, will be pointed out. For this result, the study used the deductive method, appropriating exploratory research, using bibliographic and documentary sources.


**Keywords:** Environment; sustainable consumption; sustainability.


## RESUMO

*O presente estudo busca investigar os motivos que impedem efetivar o consumo sustentável e com isso busca apresentar algumas propostas que visam a alcançar a sustentabilidade do consumo. O modelo de desenvolvimento econômico baseado no alto padrão de consumo e produção, adotado desde a Revolução Industrial, não obstante os benefícios trazidos à sociedade, trouxe impactos socioambientais, pois contribuiu tanto para a degradação do meio ambiente, como da qualidade de vida das pessoas. Nessa perspectiva, a pesquisa objetiva demonstrar que o consumismo é a principal causa da degradação do meio ambiente, bem como evidenciar que o consumo sustentável está indissociavelmente ligado a concretização da sustentabilidade. Assim, no trabalho serão apresentados alguns dos obstáculos que impedem efetivar esse ideal nessa sociedade de consumo e depois serão apontados os meios que podem contribuir para a efetivação do consumo sustentável, que envolvem mudanças éticas, econômicas e legislativas. Para esse resultado, o estudo utilizou o método dedutivo, apropriando-se de pesquisa exploratória, por meio de fontes bibliográfica e documental.*


**Palavras-chave:** *meio ambiente; consumo sustentável; sustentabilidade.*

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# 1. INTRODUCTION

The economic and social process that resulted in the constitution of the risk society, in which there is uncertainty regarding the consequences of the activities and technologies used in economic processes, so that they present "transtemporal" risks, of global reach and catastrophic potential, brought advantages, normally associated with everything that represents progress, such as electronic products, health services, telecommunications and transport, as highlighted by Carvalho (2008, p.14). On the other hand, this process also brought negative implications, such as the excessive exploitation of natural resources and the possibility of their depletion, the extensive production of waste generation, the exploitation of labor, the spread of diseases, the increase in social inequality and the production of ecological risks in general.

As society became aware of environmental and social problems and their connection with the production model adopted, proposals emerged to change the development model, in which it would bring less environmental impacts and better quality of life for individuals. Among the existing proposals, it is worth emphasizing the one that constantly appears in discussions that take place worldwide: sustainable development, which seeks to reconcile development and environmental protection.

This concern, at a global level, with the environment, which began since the Stockholm Conference in 1972, came to a conclusion 20 years later, at the United Nations Conference on Environment and Development, known as Rio 92, that the main causes of environmental deterioration are unsustainable consumption and production patterns, especially in industrialized countries, which prescribe that achieving sustainable consumption patterns should be given high priority.

Thus, the research problem boils down to the following question: how to implement sustainable consumption in a consumer society? In the search for an answer to this question, we tried, throughout the work, to answer the following questions:

1) What are the consequences of unbridled consumption?

2) What are the barriers that prevent the realization of sustainable consumption?

3) What paths should be followed to achieve sustainable consumption?

Thus, the research aims to demonstrate how sustainable consumption can be carried out in contemporary society. Therefore, the study was divided into three sections. The first chapter addresses the concept of risk society developed by Ulrich Beck, in which environmental problems are found at the heart of this theory, which are caused by the high level of production and consumption, an opportunity in which he presents what consumption is. sustainable, pointing out the deficiencies in the environmental laws that address this issue. Then, in the second chapter, the main obstacles that prevent the realization of sustainable consumption are exposed. Finally, the last chapter presents some ways to make sustainable consumption effective and, thus, make sustainability in society a reality. Therefore, the importance of the desire for sustainability and environmental education to achieve that ideal was highlighted.

Thus, the study used the deductive method, which starts from general to particular knowledge, appropriating exploratory research. This method seeks a better knowledge of the object on which it focuses, using, for that, bibliographical and documentary research.

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## 2. CONSUMPTION AS THE MAIN CAUSE OF ENVIRONMENT DEGRADATION

The Industrial Revolution brought technological changes that ended up influencing the social and economic production process, as well as the way in which man relates to nature, as large-scale production and consumption intensified the use of natural resources. Thus, the system based on capital and salaried work was consolidated, at the same time that the emergence of social and environmental problems worldwide began (ANDRADE, 2020, p. 13).

In fact, in the 20th century, problems related to the environment were increased, as shown, for example, by global warming, the loss of biodiversity and the deforestation of forests. These damages occurred due to the industrial system and the new lifestyle of a large portion of the population, governed, in particular, by consumerism (ANDRADE, 2020, p. 43).

The problems becoming more and more complex and with the potentialization of risks, modern society has become a risk society, a theory developed by Beck. In the general context, the risk society is characterized by Leite and Ayala (2015, p. 125) as "a stage of modernity in which the threats produced so far by the economic model of industrial society begin to take shape". As Beck (2011, p. 25) points out, while in the industrial society, wealth was distributed, in the risk society there is a distribution of risks, which are abstract, that is, invisible to the human sense, unlike the way they appeared in the industrial society, in which, to some extent, they were known.

Beck places environmental problems at the center of this theory, stating that there is no way to deny society's relationship with nature, arguing that such problems:

> [...] they are not environmental problems, but completely social problems - in origin and results -, problems of the human being, of its history, of its living conditions, of its relationship with the world and with reality, of its economic constitution, cultural and political (BECK, 2011, p. 99).

Thus, contrary to what a few scientists and even political leaders claim, many of the environmental problems that happen today are not attributable to natural factors, but to man himself and his activity on the planet, as already disclosed in the fourth report issued by the Panel Intergovernmental Committee on Climate Change, released in 2007. (IPCC, 2007).

With society's current production and consumption patterns, the environment has been suffering constant aggressions that, in turn, result in its deterioration, and consumerism is already the main cause of environmental degradation and aggravation of damage to it, mainly because the population is projected to reach 9 billion by 2050, according to "Report on the World Situation 2012", published by the UN, which will inevitably increase even more the rates of world consumption (UN, 2012).

To illustrate this problem at the spatial level, there is the scientific measure called "Ecological Footprint", which "is a calculation of the land needed to provide resources to satisfy the population's consumption needs" (SALZMAN, 1997, p. 1,250). Studies show that in 2007, the global ecological footprint was 2.7 gha per inhabitant, so that to maintain this level of consumption of natural resources 1.5 planets are needed (GLOBAL FOOTPRINT NETWORK, 2010, p. 106).

In this sense, it is worth emphasizing that, due to the growing impact of human activities on the earth and in the atmosphere, as a result of the irresponsible exploitation of natural resources, initiated mainly after the Industrial Revolution, 1995 Nobel Prize winner Paul Josef Crutzen and his colleague Eugene F. Stoermer, argue that a new geological era has been inaugurated, the Anthropocene, marked by environmental damage, such as species extinction and climate change, which, in turn, led to drought and sea level rise , among other ailments, as mentioned above. This new era, which follows that of the Holocene, even though it has not been formally accepted, places humanity as the main cause of environmental problems (KOTZÉ, 2012, p.2). According to this author (KOTZÉ, 2012, p. 5), these ecological changes have impacts on politics, economy and social life globally, and, as a result, people should review how to improve these impacts caused in the new era.

It was at Rio-92 that the unsustainability of production and consumption levels was emphasized, since, in the Rio Declaration on Environment and Development, principle 8 directly relates to sustainable[2] development to the need to reduce current levels of consumption: "To achieve sustainable development and a higher quality of life for all, States must reduce and eliminate unsustainable patterns of production and consumption and promote adequate demographic policies". In fact, the global Agenda 21, as Salzman argues (1997, p. 1.253) "attempts to provide useful meaning, breaking sustainable development into two parts, sustainable production and sustainable consumption", which dedicates a chapter to dealing with changing patterns consumption (chapter IV). It is noteworthy that, while sustainable production involves the least polluting mode of production and services, sustainable consumption is related to consumption itself, which in turn is divided into consumption patterns (linked to the quality of the product or service) and levels of consumption (SALZMAN, 1997, p. 1.253).

After this event, this subject became increasingly debated. In 1994, the Oslo Symposium on Sustainable Consumption took place, an opportunity in which consumption and sustainable production was conceptualized as being:

> The use of services and related products that respond to basic needs and bring a better quality of life while minimizing the use of natural resources and toxic materials, as well as the emissions of waste and pollutants throughout the life cycle of the service or of the product, so as not to compromise the needs of future generations. (UNITED NATIONS ENVIRONMENT PROGRAM, 2012, p. 12)

Although there is a consensus on the unsustainability of production and consumption levels since ECO/92, which resulted in the two documents mentioned above, these levels are only increasing. Perhaps the explanation for this, according to Salzman (1997, p. 1.247/1.251), is that between production laws and consumption laws, those stand out, and the few existing consumption laws are more related to consumption patterns than at consumption levels. Possibly, thanks to technology, it becomes increasingly easier to achieve sustainable production, in which products and services are created and executed with less impact on the environment, on the other hand, sustainable consumption, specifically when it comes to consumption levels, impacts not only people's lifestyles, but also fundamental aspects of society, such as economics, which is why laws that address consumption limitation are so rare.

2 In April 1987, the "Our Common Future" Report, also known as the "Brundtland Report" was published. This document surveyed how humanity behaved in relation to natural resources and the environment in general and, by analyzing the environmental situation of the planet, built the idea of sustainable development, conceptualizing it as "the development that meets the needs of needs of the present without compromising the ability of future generations to meet their own needs" and presenting various strategies for nations and governments to achieve such a model of development.

Furthermore, current consumption laws are unable to achieve sustainability in this practice, for four reasons, as Salzman argues (1997, p. 1.267). First, they are unsatisfactory as they represent a tentative approach, focusing on specific and isolated impacts of consumption. Second, the laws do not take product lifecycle perspectives. Third, few of the initiatives capture, or even try to capture, the externalities generated by the products. Finally, and more problematically, with few exceptions, these laws address consumption patterns rather than consumption patterns, or how well we consume, rather than how much we consume.

That said, to achieve sustainable consumption, environmental laws must focus not only on consumption patterns, but especially on laws that address consumption levels, as there is no evolution if society consumes better products, but the consumption level tends to increase. In this sense, it is believed that, before looking for ways to solve the problem, one should try to get to know it better, the following session seeks to demonstrate the causes that prevent the realization of sustainable consumption.

## 3. CHALLENGES TO EFFECTIVE SUSTAINABLE CONSUMPTION

Quantifying what can be considered sustainable consumption is a complex issue, as it involves changing the entire structure of a society, therefore, laws that deal with consumption levels are rare, and this paper will address three barriers that anyway, they impede reaching that ideal, starting with the economic system, in which most societies preach economic growth as a reflection of development, and for this reason, consumption plays a central role, being widely encouraged.

In the current Rule of Law, for example, development (or the well-being of the population) is linked to the growth of the Gross Domestic Product (GDP). Thus, the greater the consumption and production, the greater the GDP, that is, the greater the development. This logic, however, is a mistake, as, as Freitas (2016, p. 29) reminds us, "if the incidence of diseases increases, the GDP will grow, as health spending will increase, which demonstrates the glaring distortion of the indicator" .

Countries that are among the largest economies in the world demonstrate that economic growth does not mean that current and future generations will enjoy a good quality of life. With regard to the 2019 Human Development Index (HDI), in which the calculation takes into account income, health and education, China, which has the 2nd largest economy in the world, reaches the 85th position of the HDI and is the first to more pollutes the environment.[3] India, which, in

3 Such information is provided by the International Relations Research Institute (IPRI), an agency of the Alexandre de Gusmão Foundation (FUNAG), which recently released a table containing the world's largest economies with data from the year 2012 (Available at: http:/ /www.funag.gov.br/ipri/images/analise-e-informacao/01-Maiores_Economias_do_Mundo.pdf), and by the global research organization on environment and development, the Word Resources Institute, which it released in February 2020, a graph showing the main emitting countries of greenhouse gases (Available at: https://www.wri.org/blog/2020/02/greenhouse-gas-emissions-by-country-sector).

turn, holds the title of 7th largest economy in the world, occupies the 129th position in the HDI and is the 4th country that emits the most greenhouse gases.[4]

From a purely environmental perspective, there is an assessment that analyzes the sustainability of a society, known as the Environmental Performance Index. This is a project developed in conjunction with the Yale Center for Environmental Law and Policy and the Center for the International Earth Science Information Network (CIESIN) at Columbia University's Earth Institute, and this index is produced in collaboration with the World Economic Forum (WEF). Among the criteria evaluated, the air, water and sanitation quality, forests, fishing, climate, energy and air pollution stand out.

Of the 10 countries considered sustainable[5], according to the last evaluation process carried out in 2018, none of them are among the 10 nations that emit the most greenhouse gases, and, in relation to the HDI, they are occupying the first positions, with the lowest occupation belonging to France, which is in 26th place. Brazil, in turn, is considered the 69th most sustainable country, among the 180 countries evaluated, and, with regard to the HDI, occupies the 79th place. These findings allow us to conclude that there is a certain incompatibility between economic growth and protection of the environment and that countries concerned with the environment are more likely to guarantee the population's quality of life.

Alongside the economic system that prevents sustainable consumption, there is a sociocultural barrier, since the intense consumption of goods and services has given rise to what has been called consumer culture or society, a phrase adopted by Jean Baudrillard (1995, p. 60), according to which, in this society, people do not consume the object for its use value, but for the meaning that its use represents, that is, for the social position that the material good gives it.

Based on this reasoning, Bauman (2008, p. 165) calls contemporary society the consumer society, in which personal fulfillment is guided by consumption, so that "excessive consumption […] is a sign of success" and "[ …] owning and consuming certain objects and practicing certain lifestyles are the necessary conditions for happiness". This explains the reasons that lead people to consumerism, whose collateral damage, according to the author, is the materialization of love, and, in this context, people increase their working hours to acquire material goods for themselves - which, as a result of media, become "necessary" goods — as well as to buy gifts for those who endure their absence, given the long workday required to maintain this level of consumption. On this issue, Bauman, citing Hochschild, highlights:

> Consumerism works to maintain the emotional reversal of work and family. Exposed to a continuous barrage of advertisements thanks to a daily average of three hours of television (half of all their leisure time), **workers are persuaded to "need" more things. To buy what they need now, they need money. To earn money, increase your workday. Being away from home for so many hours,**

4 Global warming, the main point of the environmental issue, is a phenomenon caused by gases coming, above all, from the burning of fossil fuels and deforestation, preventing the dissipation of heat into the atmosphere, that is, it is the greenhouse gases, such as dioxide of carbon, nitrous oxide and methane. According to the 2019 Climate Change and Earth Report, issued by the Intergovernmental Panel on Climate Change (IPCC), climate change caused by this global warming can aggravate land degradation processes, through increased rainfall intensity, flooding, frequency and drought severity, sea level rise, among other situations (PADILHA, 2010, p. 10/11). According to the 2019 Climate Change and Earth Report, issued by the Intergovernmental Panel on Climate Change (IPCC), climate change caused by this global warming can aggravate land degradation processes, through increased rainfall intensity, flooding, frequency and drought severity, sea level rise, among other situations (IPCC, 2019, p. 6-7).

5 Next: Switzerland, France, Denmark, Malta, Sweden, United Kingdom, Luxembourg, Austria, Ireland and Finland.

> **they make up for their absence from home with gifts that cost money**. They materialize love. And so the cycle continues (HOCHSCHILD, p. 208, apud BAUMAN, 2008, p. 153). (our italics)

In this sense, as discussed by Maloney (2011, p. 125), consumers in this modern society end up becoming victims, as they are manipulated by advertising so that they find happiness through the acquisition of a certain good or service, once the advertising is capable of making any product considered indispensable by consumers to meet their needs.

"Consumer culture not only negatively impacts the environment, but often leads us to seek the fulfillment of the wrong desires or to seek the fulfillment of the correct desires in the wrong way" (HARSCH, 1999, p. 547). And it is this cultural tradition that ends up following a person since birth, makes this search for excessive consumption become a natural part of life, when in fact, many of the services and products enjoyed are not innate manifestations of human nature, on the contrary, the desire for them has developed over the years, which have been reinforced by the market as needs that must be immediately satisfied.

For this reason, when there are attempts by the government or other actors to reign in consumer behavior, they are seen as excessive interference and it is considered an affront to individual freedoms and rights, this is what Maloney (2011, p. 127) calls a political barrier and ideological for reducing consumption.

In Western societies, the ideology of liberalism prevails, in which there is an emphasis on individual rights and freedoms, as a way to limit abuses of government power, so that in exceptional circumstances it is possible that there is interference by the government, however, provided that whether to protect or support individual rights. It so happens that when it comes to sustainable consumption, this liberal ideology becomes a problem, as it is based on anthropocentrism. Thus, when there is regulatory intervention, such as prohibitions, to prevent direct harm to human beings, such interventions are acceptable to individual freedoms, but if some type of prohibition is imposed on environmental grounds, it is seen as intrusive and unnecessary (MALONEY, 2011, p. 127/128).

As Burdon (2011, p. 38/39) points out, liberalism promotes individual freedom without imposing any duty to human society or the environment, and in a concept of liberal private property with fully anthropocentric roots, owners only aim to expand their interests, which causes environmental damage.

Faced with such barriers, it is unmistakable that the legal systems in Brazil and worldwide face complex obstacles to address consumption levels. Although the countries in ECO/92 entered into a consensus on unsustainable consumption, there was no consensus on how to specifically resolve which concrete measures will be taken, not pointing out, for example, the level of consumption considered sustainable.

In Brazil, the laws that end up linking the environment with consumption and production do not promote sustainable consumption. For example, in the National Environmental Policy, Law n. 6.938/81, one of its instruments is about sustainable production,[6] but there is nothing related to sustainable consumption. Despite having been instituted the National Consumer Policy, through Law n. 13,186 of 2015, the objectives of this law are vague, as they do not present

6 Art 9 - The instruments of the National Environmental Policy are: (...) V - incentives for the production and installation of equipment and the creation or absorption of technology, aimed at improving environmental quality;

the ideal reduction for consumption to be considered sustainable, nor does it show how these objectives can be achieved. Likewise, the National Solid Waste Policy (Law No. 12.305/2010) has as one of its objectives, the reduction of solid waste, but it does not outline any goal. In turn, the law that deals with the consumption relationship, that is, the Consumer Defense Code, also does not have any provision that deals with the sustainability of consumption or that points out the need to observe the principle of sustainable development. Therefore, the conclusion is that the laws that deal with the subject in the Brazilian legal system end up being silent in the fight against consumerism.

In mid-2015, world leaders gathered at the United Nations headquarters in New York to outline an action plan to eradicate poverty, protect the planet and ensure people achieve peace and prosperity, thus seeking to achieve sustainable development. At the time, they prepared the 2030 Agenda, which contains a set of 17 Sustainable Development Goals, which must be achieved by 2030. One of the goals listed in this Agenda, specifically number 12, is "Ensure production and consumption standards sustainable", and, for this, one of the stipulated goals is: "By 2030, substantially reduce the generation of waste through prevention, reduction, recycling and reuse", which is also a vague goal, as it does not quantify what this reduction would be substantial.

In the following chapter, specific policy proposals will be presented on how the government can promote the ethics of sustainable consumption, through legislative changes that address the reduction of consumption levels, and it is essential that more and more laws are promoted in this regard, given that "we need to guarantee the overall sustainability of the planet, ecosystems and life itself. It is an inalienable issue if we still want to live" (BOFF, 2015, p. 26).

## 4. SUSTAINABILITY AND DEVELOPMENT: PATHS TO ACHIEVE SUSTAINABLE CONSUMPTION

As argued above, the prevailing economic system is one of the main obstacles to achieving sustainable consumption, and to overcome this adversity, productive activity cannot be privileged to the detriment of a minimum standard of living that must be ensured to human beings, but that, on the contrary, the preservation and sustainable and rational use of environmental resources must seek an improvement in the quality of life and, therefore, the economic factor must be conceived as development, not growth (ANTUNES, 2005, p. 23 ).

This does not mean that development should not be targeted, but it points to the possibility that it will no longer be seen as just economic growth, since true development is one that provides qualitative changes, both in people's lives and in the search for reduction negative impacts on the environment. In this sense, that is why sustainability best represents this purpose and that is why, before presenting the paths for the realization of sustainable consumption, it is necessary to understand it better.

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## 4.1 FROM SUSTAINABLE DEVELOPMENT TO THE CRAVING FOR SUSTAINABILITY

Sustainable development emerged as a response to deal with the environmental crisis, however, for many authors, such as Azevedo (2008, p. 125), the term sustainable development should be removed from environmental legislation as it is incompatible with the idea of environmental preservation, adding that the adjective sustainable was used in order to minimize this evident contradiction.

According to Boff (2015, p. 45), "sustainability and development constitute a contradiction in their own terms", because, in practice, development is synonymous with material growth, that is, it is industrialist/capitalist/consumerist, so the term is regarded as anthropocentric, contradictory and misleading.

Anthropocentric, as it is centered on the human being, disregarding the other beings that are part of the planet. On being contradictory, Boff claims:

> It is contradictory, as development and sustainability follow different and opposing logics. Development, as we have seen, is linear, must be growing, assuming the exploitation of nature, generating deep inequalities – wealth on the one hand and poverty on the other – and favors individual accumulation. Therefore, it is a term that comes from the field of industrialist/capitalist political economy.
>
> The sustainability category, on the contrary, comes from the sphere of biology and ecology, whose logic is circular and inclusive. It represents the trend of ecosystems towards dynamic balance, cooperation and co-evolution, and is responsible for the interdependence of everyone with everyone, ensuring the inclusion of each one, even the weakest (BOFF, 2015, p. 45).

With this view, it can be said that sustainability better represents the ability to protect the environment, as it considers all beings as worthy of protection, being able, therefore, to ward off the anthropocentric character that still prevails throughout the world.

Sachs (2002, p. 55) also highlights the contradiction of the sustainable development discourse in this capitalist world, as it states that "sustainable development is, of course, incompatible with the unrestricted game of market forces", since it has as its main objective making a profit at any cost. In this sense, Bosselmann (2015, p. 42) asserts that no state or corporate organization denies the importance of "sustainable development", moreover, the multiple literatures on the subject would not exist if "sustainable development did not keep the promise of saving us of the collapse". Thus, for the author, it would be irresponsible to ignore the concept of sustainable development for the simple fact that there is no consensus on its meaning, stating that it is necessary to perceive the ecological essence of the concept. in your words:

> Either there is ecological sustainable development or there is no sustainable development at all. The perception of environmental, economic and social factors as being equally important for sustainable development is arguably the biggest mistake in sustainable development and the biggest obstacle to achieving socioeconomic justice (BOSSELMANN, 2015, p. 42/43).

With this, the author (BOSSELMANN, 2015) criticizes the concept of sustainable development brought up in the Brundland Report:

> Sustainable development does not require a balancing act between the needs of people living today and the needs of people who will live in the future, nor does it require a balancing act between economic, social and environmental needs. The notion of sustainable development, if the words and its history have any meaning, is quite clear. It calls for development based on ecological sustainability in order to meet the needs of people living today and in the future. Understood in this way, the concept provides content and direction (BOSSELMANN, 2015, p. 28).

Thus, for Bosselmann (2015, p. 78), "the fact that social and economic aspects are included in the concept of "sustainable development" means, therefore, that they do not require any deviation from the ecological core". Thus, from this nucleus, which is considered a central point of reference, it is possible to relate the social and economic components of sustainable development.

For the author (Bosselmann, 2015, p. 50/52), as well as for Boff, the focus given to the concept of sustainable development is excessively anthropocentric, as it takes into account only human needs, when, in fact, they can only be within ecological limits, a message that was forgotten in the Brundtland Report.

As the idea of sustainable development arose from the awareness that the development model adopted is related to the environmental crisis, it is essential that the central core of this concept is linked to the preservation of nature. Thus, it can be concluded that the form of development only becomes legitimate in the face of global reality when the limits of nature are respected. It is true that all means of production, in some way, cause negative impacts to nature, but among these means, there are those that considerably reduce the harmful effects on the environment, as is the case, for example, with the use of solar and wind energy.

It is in this sense that Freitas (2016, p. 57) prefers to talk about sustainability rather than sustainable development, claiming "that sustainability should adjective, condition and infuse its characteristics to development, never the other way around", and it cannot be seen as blind economic growth, at any cost. It can be said, therefore, that development should be pursued by all societies, as long as it is based on environmental protection, as an ecologically balanced environment is essential to a healthy quality of life, with respect for the dignity of all beings and to nature, so that current and future generations have the right to live decently.

In view of this goal of sustainability, there is recognition of its multidimensional nature, as it permeates all human relationships, with some authors defending eight dimensions of sustainability, such as Sachs (2002), while others, such as Freitas ( 2015), maintains that it involves ethical, social, legal-political, economic and environmental facets. However, as stated by Klinsky and Golub (2016, p. 166) "at the very least, sustainability forces us to consider the economic, social and environmental impacts of any action or practice".

Sustainability thus suggests, given the socio-environmental problems - serious environmental crisis and alarming social inequality - a cultural change, in the sense of reconnecting man to nature and his fellow man, so that such transformations, as said, permeate all relationships human beings. Development, in this paradigm, must express this ideal of sustainability, in which not only man, but also nature and the beings that are part of it are valued as such.

It is a fact that not all activities are free to cause some impact on the environment, in addition, the need for development based on economic terms cannot be ignored, but for this form of benchmarking to become legitimate, the activities must cause the as little impact as pos-

sible, always respecting ecological limits. For this, a real transformation in the way of thinking, consuming and producing is necessary, in the sense that everyone performs their functions without harming the quality of life of present and future generations, as well as making nature worthy of respect and consideration, which , therefore, leads to a re-reading of art. 225 of the CRFB, aiming at the reintegration of the values of nature, even because the Magna Carta offers normative conditions so that the achievement of sustainability in the country becomes possible.

With this, it is recalled what Canotilho (2010, p. 8) taught about the categorical imperative of the principle of sustainability, which assumes that "humans should organize their behavior and actions so as not to live: (i) to nature's expense; (ii) at the expense of other human beings; (iii) at the expense of other nations; (iii) at the expense of other generations".

In this perspective, as defended by Boff (2015, p. 78), sustainability brings with it a new cosmology (or a new paradigm),[7] that is, that of transformation, different, in turn, from modern cosmology, in which man is seen as the dominator of nature. The new cosmology inserts the human being in nature in harmony with the other beings that are part of it, recognizing the intrinsic value of each subject and not its mere use, valuing respect for all life.

Indeed, for sustainability to exist, "a macroeconomy is needed that, in addition to recognizing the serious natural limits to the expansion of economic activities, breaks with the social logic of consumerism" (VEIGA, 2015, p. 26).

And this is possible, because as happened once, as recalled by Boff (2015, p. 97), when, in the 16th century, due to the new science, the transition from terracentrism (the Earth would be the center) to heliocentrism (the Sun is the center), minds, churches and institutions had to change at great cost. Still, according to the author, the point is that this change ended up happening, so that, by deduction, it is believed that another revolution based on this new cosmology will be possible. In this sense, Kótze (2012, p. 17) speaks of a second Copernican Revolution, which, in the face of the Anthropocene Era, requires humanity to take responsibility for unleashing the environmental crisis that it itself caused and, therefore, take attitudes in this direction. .

For this, "the Earth Charter brought back the original meaning of the concept of sustainable development" (Bolssemann, 2015, p. 19), therefore placing sustainability as the only alternative to save the planet, as long as the environmental issue be ahead of social and economic concerns (BOLSSEMANN, 2015, p. 222).

As much as it may seem a utopian idea, as stated by Boff (2015, p. 145), it is "a necessary utopia, without which chaos would supersede order and the absurd would win the game over meaning". In the same direction, Bosselmann (2015, p. 27) states that "the vision of a fair and sustainable society is not a distant dream, but a condition of any civilized society".

From this perspective, the objective of humanity must be the transformation of society at risk into a sustainable society, because, due to all the environmental problems faced, with the existence of humanity itself being compromised, sustainability must be pursued by all social actors and in all its aspects, it should be pursued as a new way of life, which necessarily involves a substantial reduction in the levels of production and consumption.

7 Paradigm and cosmology have the same meanings, that is, they bring an overview of the universe, the Earth, life and the human being, which serves as a guide for people and societies and meets a human need for a globalizing sense of everything (BOFF, 2015, p. 77).

### 4.1.1 ENVIRONMENTAL EDUCATION AS A DRIVER OF SUSTAINABILITY

For the development of a society towards sustainability, the essential step is to invest in environmental education,[8] because conscientious people tend to demand changes aimed at the collective well-being and, consequently, to fight for an ecologically balanced environment that is essential to a healthy quality of life.

At the first international conference that discussed the environment, the Stockholm Conference, environmental education was adopted as one of the principles[9] present in its Declaration. Thus, in this first conference that focused on the environment, the importance of education for environmental protection was highlighted, with the purpose of allowing man to develop in all aspects.

Brazilian legislation does not lack rules on environmental education, as can be seen in the examination of the CFRB (art. 225, paragraph 1, VI), the PNMA (art. 2, X) and the National Policy on Environmental Education. In fact, another document resulting from Eco-92 is the Treaty on Environmental Education for Sustainable Societies and Global Responsibility, which indicates some principles, as well as an action plan for environmental educators, establishing a relationship between public policies on environmental education and the sustainability.

The Earth Charter, in turn, in its principle IV, in item 14, emphasizes the need to "integrate, in formal education and lifelong learning, the knowledge, values and skills necessary for a sustainable way of life" and that everyone should be offered "educational opportunities that enable them to actively contribute to sustainable development" (item 14.a).

Leff (2010, p. 247) states that the environmental crisis that puts life at risk brings with it a moral crisis that, in turn, questions the meaning of life. With this, it is not enough just a reflection, but a re-education, so that it is possible to "know the causes of the ecological crisis and the values that were being forged in parallel with the epistemology that constituted the conception of our world and our worlds of life ".

For the author, environmental education is the field of these new battles that are about to happen, in which one must go beyond informing about the environmental crisis and global warming, as it is the time to discover their root causes, prepare thinking and life for the unknown, thinking about the unthinkable and rehearsing other ways of thinking, feeling and acting, so that everyone can unite in a dialogue of knowledge (LEFF, 2010, p. 247).

Therefore, environmental education assumes a transforming function, in which the co-responsibility of individuals becomes an essential objective to promote this new type of development that is being pursued. To Jacobi:

8 According to the National Environmental Education Policy, in its art. 1st, "Environmental education is understood as the processes through which the individual and the community build social values, knowledge, skills, attitudes and competences aimed at the conservation of the environment, a good for common use by the people, essential to health quality of life and its sustainability".

9 Principle 19: An effort towards education on environmental issues is essential, aimed at both the young and adult generations and that pay due attention to the less privileged sector of the population, to lay the foundations for a well-informed public opinion, and for good conduct. of individuals, companies and communities inspired by the sense of their responsibility for the protection and improvement of the environment in all its human dimension. It is equally essential that the mass media avoid contributing to the deterioration of the human environment and, on the contrary, disseminate information of an educational nature on the need to protect and improve it, so that man can develop. if in all respects.

> Its focus must seek a holistic perspective of action, which relates man, nature and the universe, bearing in mind that natural resources are depleted and that the main responsible for their degradation is man. [...] Environmental education must be seen as a process of permanent learning that values the various forms of knowledge and educates citizens with local and global awareness. [...] (JACOBI, 2003, p. 189-206).

Given the importance of this theme, the National Environmental Education Policy, in its art. 2, it is foreseen that "environmental education is an essential and permanent component of national education, and must be present, in an articulated manner, at all levels and modalities of the educational process [...]", therefore, it is clear that schooling it is important for environmental education to be carried out, as the Earth Charter also highlighted.

In this context, it is of fundamental importance that this topic is integrated into general education so that everyone has more awareness and knowledge in order to preserve nature, since environmental education is necessary to achieve a healthy environment, as well as to make it effective. sustainability, because through it, there can be a better quality of life and greater awareness of personal conduct, as well as increasing awareness of the relevance of harmony between beings of all species, which will undoubtedly lead people to behave more sustainable in relation to consumption.

## 4.2 PROPOSALS FOR EFFECTIVENESS OF SUSTAINABLE CONSUMPTION

As mentioned above, there are few environmental laws that promote sustainable consumption aimed at reducing the level of consumption, despite the existence of laws, including a National Consumption Policy in the country, which mention the need to reduce solid waste, for example, the devices are vague, as they do not present the paths for consumption to be reduced.

However, it should be emphasized that the change to be made is not just legislative or economic, as some that will be proposed below, it is initially necessary for people to realize that well-being and happiness can be found beyond material goods and the act of consumerism. In this way, the change needed to change consumption patterns and levels is fundamentally ethical, in which it must "overcome the idea of the human being as today's consumer/commodity and assume the (real) idea of the human being as a being who seeks the Justice" (WALDMAN, 2014, np).

After this fundamental change, the barrier of the economic system, discussed above, that encourages consumerism needs to be overcome. As has been argued by many authors, development must be measured with new indicators, for example, through the expansion of freedoms, access to health and education, environmental protection and democracy.

On this issue, Sen (2000, p. 20), one of those responsible for creating the HDI concept, argues that "development should go far beyond the accumulation of wealth and the growth of GDP and other variables related to income". In order to measure the development of a nation, in the author's view, the quality of life and the freedom enjoyed must be taken into account. Sen (2000, p. 18), for example, sees development as a process of expanding the real freedoms that people enjoy:

> Development requires removing the main sources of deprivation of liberty: poverty and tyranny, lack of economic opportunity and systematic social destitution, neglect of public services and intolerance or excessive interference by repressive states.

In this same perspective, Veiga (2010, p. 50) argues that the GDP, the criterion used to assess the development of a country, is outdated and, similarly to Sen, believes that:

> the development of a society depends on how it takes advantage of its economic performance to expand and distribute opportunities for access to goods such as civil liberties, health, education, decent employment, etc. Even more for those who have already understood, too, that development will have short legs if nature is too badly attacked by the expansion of the economy, which is a subsystem highly dependent on the conservation of the biosphere.

Along the same lines, Harsch (1999, p. 607) argues that the Gross National Product (GNP) should be abandoned as an indicator of well-being, as he believes that this criterion legitimizes, in a way, consumerism, so he advocates considering as a gauge of the GNP riches that are not measured in economic value.

The development of a nation must be understood, therefore, not as a synonym for economic growth, but as an element that is intrinsically related to the quality of life that people live in that society, and it is also essential to protect nature for development be possible. In this sense, it is worth noting that the last paragraph of Sustainable Development Goal n. 17 of Agenda 2030 raises the need for GDP to be overcome. Likewise, Agenda 21 already indicated the need for other sustainable development indicators.[10] The HDI, although it was created with the intention of evaluating quality of life, also needs to be reformulated, since it is limited to only three variables.

Thus, sustainability, the new ideal of the development of a society, must be measured by criteria that aim to assess the quality of life of people, which include access to education and health services with excellence, decent work and especially the possibility of living in a society with full freedom. At the same time, issues related to the protection of the environment must also be evaluated, such as air quality, water and sanitation, air pollution, among others.

Going forward to remedy the legislative deficiencies on the subject, proposals are being discussed around the world that are capable of contributing to sustainable consumption. Some propositions are presented by Harsch (1999, p. 604-605), among them, that countries start transmitting educational advertisements as a means of counterbalancing the harmful messages promulgated by advertisements.[11] As advertising is one of the main encouragers of consumerism, this proposal will certainly help to face the cultural obstacle of consumption, since advertisements in an educational way will address the negative impact of advertisements, enabling consumption levels to be reduced, such as as happened in places where this practice was adopted.

10 4.11. It is also convenient to consider the current concepts of economic growth and the need to create new concepts of wealth and prosperity, capable of improving living standards through changes in lifestyles that are less dependent on the Earth's finite resources and more harmonic with its productive capacity. This should be reflected in the design of new national accounting systems and other indicators of sustainable development.

11 In his article, the author mentions the existence of California's Proposition 99. This Proposal imposes a tax of 25 cents per pack of cigarettes to provide funding for a health education campaign. An ad funded by this Proposition 99 is a parody of the Marlboro billboards, featuring two cowboys walking at dusk in the open lane. The caption says, "Hey Bob, I'm sure I miss my lungs." Such counter-announcements seem to have been effective, as smoking in California has dropped 27%, or three times faster than the national average, since the passage of Proposition 99.

Another mechanism proposed by Harsch (1999, p. 604-605) is also related to advertising, as the author defends the need to reestablish commercial limits for open television broadcasters, as they are responsible for encouraging consumption. This proposal, like the one presented above, helps in facing the cultural obstacle of consumerism.[12]

Still as a way to effect the sustainability of consumption, many defend the reduction of the working hours, being even suggested by Harsch (1999, p. 606). As one of the collateral damages of consumerism is the materialization of love, which ends up taking people through a cycle of exhausting journeys to buy goods (gifts) in order to compensate for their absence, with the reduced journey, workers will be able to spend more time with their families, reducing the consumption of non-essential goods.

Furthermore, there are other positive effects of the workload reduction, such as the generation of employment and the improvement in the quality of life and maintenance of the work-life balance. In the studies by Carneiro and Ferreira (2008, p. 44) on the quality of life of workers in an experience of reduced working hours in a Brazilian public organization, it was found that the reduction of working hours improved the quality of life of individuals outside the work, which now has more time to dedicate to family, health and other activities; there was an improvement in the quality of life at work, such as better use of time and concentration, which, consequently, generated an improvement in workers' productivity.

But for this proposal to be successful, people need to be aware that well-being is mainly related to immaterial things, so that consumption, for this reason, must be sustainable, as its excess involves individuals in a cycle of hard work, reducing leisure time and family and social interaction, not to mention that it is one of the main reasons for environmental degradation. In this sense, calls attention to Farber:

> If consumption is not central to the quality of life (at least above a minimum level of need), neither is production. In general, the most pleasurable experiences do not derive from work – people obtain greater satisfaction from social activities, although work can be important for their self-esteem. Interestingly, the happiest people tend not to be super entrepreneurs; apparently, what drives people to the highest levels of performance doesn't fit with personal satisfaction. In general, materialism does not lead to well-being. Thus, most of the factors that determine happiness are non-economic (FARBER, 2011, p. 23).

In fact, sustainability will require people to change "with respect to well-being and happiness, in order to detach it as much as possible from the act of consumption", starting with letting go of an arduous work routine (OLIVEIRA, 2012, p. 106).

Another specific proposal, also brought up by Harsch (1999, p. 607-608), is to abolish harmful practices and substances placed on the market. As stated by the author, currently, environmental policy regulates production processes in a way that does not attribute any particular value to the final use for which the manufactured product is intended. Thus, he argues that an alternative approach would be to prohibit the use of harmful substances or processes when the end product does not compensate for the ecological imbalance it creates (for example, the plastics manufacturer may be allowed to use a dangerous chemical when making syringes, but

12 It is worth remembering that in the Municipality of São Paulo, the standardization, limitation and prohibition of outdoor advertising was implemented, depending on the advertisement, through the Clean City Law (Law n. 14,223/2006). Although the objective of the law was not directly to reduce the level of consumption, it ends up contributing to this objective, given that advertising ends up influencing unrestrained consumption.

not to make toys. This would not mean a ban on toys, but a ban on certain methods of making toys). Thus, this approach would differentiate between end products based on the importance of that product. With this, the legislation would no longer agree with the notion of the liberal market, in which just because a consumer is willing to spend money on a product, he has the right to create the ecological imbalance that results from fulfilling his desire as a consumer.

Harsch (1999, p. 608-610) further argues that the government should promote an environmental ethic through public education campaigns that encourage people to make decisions about whether or not to consume and weigh the ecological damage that inevitably results from most of the consumption. To that end, it cites eco-labelling products as an example to provide useful information to help consumers make decisions, as well as serve as a constant reminder that almost all products carry hidden costs.

More accurate pricing mechanisms must also be implemented to reflect the environmental costs of the entire product life cycle, that is, internalizing externalities. As a result, there would be different prices for merchandise on the shelves and, in some cases, very different products as well. What's more, durable goods would likely be less expensive than disposable goods, and all goods would be supplemented by more comprehensive information about their environmental impacts. These market failures - which do not consider all the environmental costs of a product - justify State intervention, as supported by Salzman, such as through antitrust law (SALZMAN, 1999, p. 1.257-1,259), this because for more that this issue of putting the right price has been recognized since ECO/92, in Agenda 21,[13] hardly the market at the time of setting the price of the product does not capture the following costs:

> 1) the resources and emissions from transporting these raw materials around the world, 2) the natural damage of tailings from mining or oil exploration resources, 3) manufacturing waste, 4) the contribution of volatile organic compounds to pollution; and 5) product disposition. The retail price also fails to capture depletion costs as finite resources are spent (SALZMAN, 1999, p. 1.257).

Thus, when environmental costs are reflected in the product and the consumer receives this information, this induces the consumer to have a more sustainable behavior when shopping.

Still one of the paths to more sustainable consumption, although not exactly establishing legislative norms, is when the State can encourage and influence citizens to adopt more sustainable behaviors, which is possible with the application of the nudge behavioral economic theory, that in the words of Coelho and Ayala:

> [...] is concerned with the analysis of individual behavior in order to improve the accuracy of the prediction of how human beings will act in certain contexts and, based on this finding, promote a contextual arrangement that is favorable to direct individuals to adopt a desirable conduct. The logic of this theory can be better understood when the key concepts that identify it are clarified: libertarian paternalism, architect of choices and freedom. [...] the architect of choices is responsible for organizing the context in which individuals must exercise a decision, in order to structure an architecture that influences them to adopt a pre-determined conduct desired by the architect. [...] it is paternalism because

13 (e) Development of an environmentally sound pricing policy: 4.24. Without the stimulus of prices and market indications that make clear to producers and consumers the environmental costs of energy consumption, raw materials and natural resources, as well as the generation of waste, it seems unlikely that, in the near future, they will occur significant changes in consumption and production patterns. 4.25. With the use of adequate economic instruments, it began to influence consumer behavior. These instruments include environmental charges and taxes, deposit/refund systems, etc. This process should be encouraged, in light of the specific conditions of each country.

> it is concerned with improving the quality of life and well-being of individuals, but libertarian because it does not do it through commandments such as order, prohibition or permission, but only through guidance towards adopting a better course of action for your own well-being. [...] Nudge is, therefore, a behavioral model for stimulating choices in the interest of favoring individual freedoms (COELHO e AYALA, 2018, p. 418-419).

Unlike the traditional concern to enable individuals to achieve well-being and improvements in their own lives, the concern that resides in approaching a libertarian paternalism, when it comes to protecting the environment through nudge, as argued by Carvalho and Ayala , "is rooted in values beyond individuals and human life: here is the consideration of the collective well-being of future generations and all forms of life" (COELHO; AYALA, 2018, p. . 425).

A nudge proposal presented by Coelho and Ayala (2018, p. 422) for this purpose is that all establishments of State bodies could adopt as standard rules[14] for printing "on both sides" of the sheet, which would lead to a reduction in paper consumption, such as the experience at Rugters University, which in three years reduced paper consumption by 50%. At first, it may even seem like an insignificant attitude towards other environmental problems faced, but if it is taken to all State agencies, at a national level, the consumption of paper will be substantially reduced, thus contributing to the protection of nature.

With these proposals presented, it is important to emphasize that to achieve sustainability, even in the long term, it is necessary to change the way in which companies operate and also how people live. And this change occurs on two levels, at the level of individual decision-making, for that, it is necessary that people be given conditions to make sustainable consumption decisions, such as information; and at the social level it is necessary to provide communities and infrastructure that enable people to live healthier, more satisfying and sustainable lives, such as providing quality public transport. If people have access to a good public transport service, there will be a reduction in the consumption of cars and fuel, for example (FARBER, 2011, p. 58).

Although it is not an easy task, the shift to sustainable consumption will be possible with the help of the application of the Jurisprudence of the Earth, proposed by Thomas Berry, in 2001, which seeks to redefine the relationship between human beings and the environment. that the theory of anthropocentrism be disregarded in favor of the theory of ecocentrism, in which nature will no longer be seen as a resource to be exploited for the good of man, since until then, the way in which nature is treated has not maintained the integrity of ecosystems, on which the entire community (humans and non-humans) depends (ALEXANDER, 2014, np).

The Jurisprudence of the Land thus aims at a deep ecology of law, so that the set of legal norms must respect the laws of nature, and nature is seen as a value in itself and not as a resource to satisfy the needs of men. And it is in this sense that Michel Serres (1990, p. 76/77), defends the existence of a natural contract, so that nature also holds a right, so that there is a balance between man and nature/world.

14 Nesse sentido, esclarecem Coelho e Ayala: Uma arquitetura de escolha baseada em regras-padrão, portanto, se identifica por um padrão pré-estabelecido pelo arquiteto de escolha dentre algumas outras opções, e que acaba permanecendo caso os indivíduos não tomem medidas para alterar e sair desse padrão, ou seja, as regras-padrão se estabelecem quando as pessoas optarem por não fazer nada. Salienta-se que, ainda que essa nudge se baseie no estabelecimento de uma regra-padrão, o exercício das liberdades ainda é respeitado, porque a todo momento os indivíduos possuem a opção de não o adotar, isto é, possuem a liberdade de *opt-out*: não se trata de restringir ou limitar liberdades, pois todas as demais opções de escolha são mantidas ao alcance do indivíduo (COELHO; AYALA, 2018, p. 422).

In this context, Robinson (2013. p. 502) also argues that "reforms are needed at local, regional and state levels and at international and intergovernmental levels (...) and it is human laws that need to better identify and conform to laws of nature".[15]

Given the circumstances, the restriction of individual freedom, through the imposition of consumption restriction, is necessary, so that nature is protected. The well-being must not only suit human beings, but also the unnamed beings that are part of the universe. In this way, so that human beings do not see their individual freedom as an intrusion when seeking to protect nature, it is necessary that this philosophy of the Jurisprudence of the Earth is effectively achieved, as this way, the human being will be reconnected to nature, understanding that it is just another member of this world and not simply that nature must serve all your needs.

## 5. FINAL CONSIDERATIONS

The development towards a sustainable society, worldwide, remains a continuous challenge, and environmental policy is still deficient in protecting nature, because one of the causes that most harm the environment is consumerism and there are few laws that address consumption patterns, as well as reductions in consumption levels, or in other words, that seek to implement sustainable consumption.

This deficiency happens because one of the barriers faced when trying to change the mode of consumption, especially with regard to trying to reduce consumption levels, is seen by society as a violation of individual freedoms.

However, it is possible that changes occur in society's behavior so that they review the mode of consumption, in order to protect the environment, without being considered as a violation of the exercise of individual freedoms. There is no denying that it will be a sensitive transformation, because it is related to a change in individual and social behavior, and not all people are prepared for this. Furthermore, such changes will be more controversial in industrialized/developed countries because it goes against economic interests.

Everyone – government, individuals, market – must seek changes in attitudes and in the construction of a new ethics, so that changes in consumption patterns and levels can effectively protect nature, since everyone is responsible for ensuring an ecologically balanced environment.

The State, despite not being the only author, is the one with the best conditions to empower environmental policies, in fact, it is also the State that has assumed countless international commitments and must therefore comply with them. It turns out that in many States, especially in Brazil, the State is structured under an anthropocentric perspective, not being able to effectively protect nature.

However, we are facing a new geological era, the Anthropocene era, in which human beings compromised the earth's ecological processes, making them irreversible, requiring new directions to be taken, because until then, despite the numerous legislations added all over the world, they are not being able to protect nature. Therefore, an ethical, economic and legislative change

15 ROBINSON, Nicholas. Keynote: Sustaining society in the Antrophocene Epoch. Denver Journal of International Law and Policy, vol. 41: 4, p. 467-506, 2013. p. 502.

is necessary, so that the protection of nature is prioritized, and no longer economic growth and consumption, as is currently the case.

Thus, a change in the law is necessary, therefore, one of the paths to be followed is to adopt the philosophy of Jurisprudence of the Earth to guide this change that is so urgent and necessary. The main challenge is to set aside this anthropocentric vision and adopt an ecocentric vision, which consists of recognizing the dependence of humanity, the connection of man with nature, and more recognizing the intrinsic rights of nature, so that human societies must become fit within the limits of the natural world, that is, human laws must respect the laws of nature. From this angle, it is possible that there will be a transformation from the consumer society to a sustainable society that lives within the limits of the planet.

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# THE INDIVIDUAL AND SOCIAL RIGHTS OF TRANSEXUALS: AN ANALYSIS FROM THE FOLLOWING OF FUNDAMENTAL RIGHTS AND THEIR CONCRETION

## OS DIREITOS INDIVIDUAIS E SOCIAIS DOS TRANSEXUAIS: UMA ANÁLISE SOB A ÓTICA DOS DIREITOS FUNDAMENTAIS E SUA CONCREÇÃO

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## ABSTRACT

This article aims to verify the legal and juridical regulation of the rights granted to transsexuals, with an emphasis on personality rights. The research is justified in view of the changes that have occurred with regard to gender relations, surgeries of sexual reassignment or transgenitalization, as well as changes in psychological and legal concepts regarding transsexuality, at the same time that transsexuals are still they suffer prejudices and even difficulties when it comes to personality rights such as name, use of public spaces, among others. The deductive method is used, and the research was guided by books, scientific articles, legal doctrine, legislation and jurisprudence. It emerged from the research that the rights of the transsexual are related to several personality rights and fundamental rights from every moment and decision that he makes, manifesting himself in the face of society in a multifaceted way, depending on the concrete situation that requires protection.

**Keywords:** Transsexuality. Genre. Personality. Fundamental rights. Public policy.

## RESUMO

*O presente artigo tem como objetivo verificar a regulamentação legal e jurídica dos direitos conferidos aos transexuais, com ênfase nos direitos da personalidade. A pesquisa se justifica tendo em vista as mudanças que ocorreram no que se refere às relações de gênero, cirurgias de redesignação sexual ou transgenitalização, bem como mudanças nas concepções psicológicas e jurídicas no que se refere à transexualidade, ao mesmo tempo em que os transexuais ainda sofrem preconceitos e mesmo dificuldades quando se trata dos direitos de personalidade como nome, uso de espaços públicos, dentre outros. O método utilizado é o dedutivo, sendo que a pesquisa se orientou por livros, artigos científicos, doutrina jurídica, legislação e jurisprudência. Da pesquisa resultou que os direitos do transexual relaciona-se com diversos direitos da personalidade e direitos fundamentais a partir de cada momento e decisão que ele tome, manifestando-se em face da sociedade de forma multifacetada, dependendo da situação concreta que exija proteção.*

**Palavras-chave:** *Direitos da Personalidade. Direitos Fundamentais. Gênero. Políticas públicas. Transexualidade.....*

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# 1. INTRODUCTION

The fundamental rights represent individual guarantees that, in general, safeguard the citizen from state interference in particular life. Therefore, those rights constitute important mechanisms for the defense of justice, freedom and equality.

Because of this, this article aims to verify the fundamental legislation corresponding to the transsexual public, as well as its effectiveness in society through public policies of implementation.

Therefore, the research occurred through bibliographic, legislative, jurisprudential and online collection information. In this sense, we chose to divide the work into three topics.

The first will deal with fundamental rights. To this end, it sought to make conceptualizations, definitions of dimensions of rights, specification of fundamental rights and, finally, characteristics of fundamental rights. The relationship in this topic about the right to sexuality will be in the context of individual freedoms, in particular, sexual freedom.

The second topic concerns the right of personality in order to address the conceptualization of the legal term, the origin of those rights, the category or specification thereof. The connection between personality rights and the right to sexuality, in general, concerns the honor, image and privacy of the individual.

Finally, the last section will deal specifically with the transgender community. Thus, it will try to conceptualize the theme, in order to make necessary distinctions on the subject, addressing the characteristics of the rights of this community, the delimitation about the legal nature of the same, and, finally, the way this right is protected, referencing jurisprudence and public policies.

# 2. FUNDAMENTAL RIGHTS AND THEIR CONSTITUENT ELEMENTS

The fundamental rights contained in the Federal Constitution of 1988 (CF/1988), Title II- Of fundamental rights and guarantees, Chapter I- Of individual and collective rights and duties, have the competence, according to Canotilho (1993, p. 541), in a legal-objective plan to prohibit the "interference of these in the individual legal sphere"; in the legal-subjective bias, it has the function of "positively exercising fundamental guarantees" and, in addition, has the competence to "demand omissions from the public authorities, in order to avoid harmful aggression stems from them".

There are several fundamental rights provided for in Article 5 of the 'Magna Letter', among which will be, according to the object of study, the right to life, equality, intimacy, private life, honor and image.

The Federal Constitution was the precursor in using the principle of human dignity, which is inserted in the list of foundations of the Federative Republic. According to Martins (2005, p. 71-72) "the principle of the dignity of the human person constitutes the basis, the foundation, the foundation of the Republic and the Democratic State of Law established by it".

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Once this is established, after CF/88, the dignity of the human person becomes one of the founding values of the Republic and of the Democratic State of Law, being the duty of the State to prioritize the human being in all its dimensions. That is, the state should offer conditions for people to have the means to guarantee their dignity.

Because of this, fundamental rights and guarantees were recognized and positive in CF/88. These rights and guarantees are norms intended to offer protection to citizens in their relations with the state entity, in order to guarantee decent coexistence, with freedom and equality, according to the provision of *the caput*of Article 5, which provides that "all areequal before the law, without distinction of any nature, ensuring to Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, security and property".

The concept of fundamental rights is open in doctrine once it is not possible to establish a universal definition on the subject.

In this sense, Comparato (2010, p. 74), states that they are "human rights expressly recognized by political authorship" and protect "something that is inherent to the human condition itself, without connection with certain particularities of individuals or groups". Thus, for the renowned indoctrinator, fundamental rights are human rights that protect the essential values of the human condition itself.

Silva (1992, p. 182), argues that:

> Fundamental rights of man is the most appropriate expression for this study, because, in addition to referring to principles that summarize the conception of the world and inform the political ideology of each legal order, it is reserved to designate, at the level of positive law, those prerogatives and institutions that it embodies in guarantees of a dignified, free and equal coexistence of all people.

It is possible to infer that fundamental rights reflect a set of principles that refer to the organization and political ideology adopted in the legal system. Moreover, fundamental rights have the function of guaranteeing the human being in dignified coexistence, free and equal to his fellow men.

Shortly thereafter, Trindade (2003, p. 38) indicates that fundamental rights are multifaceted in relation to the scope of their protection. In this sense, they as "a right of protection, marked by their own logic" are aimed at "safeguarding the rights of human beings and not states".

On the conceptualization of fundamental rights, we have to cover a union of rules and laws with care to protect the individual before the State, restricting the actions of the individual in order to allow citizens to exercise their freedom, in addition to establishing the necessary borders for the right of others is not reached, thus providing conviviality in society (DUQUE , 2014).

In this compass, Tavares (2008, p. 122)

> [...] it is also necessary to rule out the possibility that "fundamental precept" is any and all norms contained in the Fundamental Law. If, theoretically, this construction is permissible, the same does not occur with the current constitutional system. [...] It is necessary to guarantee "the relevance of every word constitutionally used", and one cannot simply pretend to ignore the letter of the Constitution in order to be able to construct a meaning arbitrarily. Therefore, when the Constitution speaks of "fundamental precept" it is not referring to the Constitution as a whole.

In other words, it is possible to say that the fundamental precept does not need to be in the greater legal order of a State in order to be considered as such. It is necessary that there is importance regarding the relationship of the individual with the collectivity.

Araújo and Nunes Júnior (2009, p. 110) teach that fundamental rights symbolize:

> A legal category, constitutionally erected and dedicated to the protection of human dignity in all dimensions. Thus, they have a polyhedical nature, providing themselves to the protection of the human being in their freedom (individual rights and guarantees), in their needs (economic, social and cultural rights) and in their preservation (rights to fraternity and solidarity).

In this sense, the polyhedric nature concerns the achievements of the human being throughout history, in the face of various disrespects to the dignity of the human being, such as slavery, torture, religious impositions, etc., which have come to be overlooked by various legal systems. Thematic issues will be addressed on the generations or dimensions of fundamental rights, in order to establish doctrinal concepts, examples and notes.

About the fundamental rights, it is common among indoctrinators to divide them into dimensions or generations and, according to Mendes (2008, p. 233) the fundamental rights of the first generation encompass the rights referred to in the American and French Revolutions. These rights were created with the aim of abstaining the power of the State, so as not to interfere in the intimate life of individuals. Such rights deal with individual freedoms, for example, that of conscience, worship, inviolability of domicile, among others.

Mendes (2008, p. 234) says that in view of the social problems arising from the pressures of industrialization, demographic growth, and the conflicts of society, it required the intervention of the State and, in this context, the second dimension rights emerged. These concern social, economic and cultural rights, such as social assistance, health, education, work and leisure.

The above-mentioned author also writes that third-dimensional rights protect the collectivity, and they are created with the aim of protecting peace, development, the quality of the environment, the conservation of historical and cultural heritage.

On the dimensions of fundamental rights, Moraes (2006, p. 26) transcribes the vote of Minister Celso de Melo:

> [...] While first-generation rights (civil and political rights) – which comprise classical, negative or formal freedoms – highlight the principle of freedom and second-generation rights (economic, social and cultural rights) – which identify with positive, real or concrete freedoms – they emphasize the principle of equality, third-generation rights, which materialize collective ownership powers assigned generically to all social formations , enshrine the principle of solidarity and constitute an important moment in the process of development, expansion and recognition of human rights, characterized as unavailable fundamental values, by the note of an essential inexhaustibility.

In this sense, it is capable of affirming that first-generation rights express the principle of freedom, while the principle of equality and, finally, the principle of solidarity, are second-to-ones.

Fundamental rights have some characteristics of their own, they are: universality, all individuals are subject to these rights; imprescritibility, these rights are eternal and do not change over time; individuality, it is about personal rights, so that it can only be exercised by the person himself; complementariedade, such rights must be interpreted jointly, in this sense, there is no

hierarchy between them; inviolability, they cannot be broken; unavailability, cannot be arranged by any means; inalienability, it is not possible to commercialize them (OLIVEIRA, 2008, p. 125).

Other characteristics are laid down by the doctrine with regard to the legal regime for the protection of fundamental rights. This regime has constitutional force. Thus, for its modification to happen a rigid process is necessary, so they are considered high standards of the constitution (Article 60, §4, IV CF/88).

Dias (2006, p. 72-73) explains the importance of fundamental rights in Brazilian society, according to its historical evolution:

> The evolution of human rights has reached its apex, its subjective and objective fullness. They are full human rights, of all subjects against all subjects, to protect everything that conditions human life, fixed on human values or goods, a patrimony of humanity, according to standards of evaluation that guarantee existence with its own dignity.

Thus, fundamental rights arrive at their apogeated with the positive, guaranteeing their existence in the objective scope, and the regulation of their functioning and protection of human dignity, existence at the subjective level.

Article 5 of the CF/88 states that all citizens, without distinction, have the right to life, liberty, equality, security and property. It is observed that, among the list of fundamental rights, the right to life is the most important the first of them since the State has a duty of protection in all its aspects. In addition to ensuring the right to live, it also protects the right to live with dignity in the care of the basic needs of every human being (LENZA, 2010, p. 748-749).

Moraes (2015, p. 34), on the right to life, understands that the State must "assure you in its double meaning, the first being related to the right to stay alive and the second to have a dignified life regarding subsistence".

Thus, the right to life does not only cover respect for one's own existence, but rather covers the protection of conditions necessary to ensure the minimum necessary of a dignified life.

## 2.1 RIGHT TO EQUALITY AND FREEDOM

The Declaration of Human and Citizen Rights of 1789 establishes:

> Art.1 Men are born and are free and equal in rights. Social distinctions can only be based on common utility. (...); Art. 4 Freedom consists in being able to do everything that does not harm others: thus, the exercise of the natural rights of every man is limited only to those who assure other members of society of the enjoyment of the same rights. These limits may only be determined by law; Art. 5 The law prohibits only actions harmful to society. Everything that is not sealed by the law cannot be hindered and no one can be constrained to do what she does not order

This Declaration was made in the midst of the French Revolution. In this period, as mentioned, the concept of equality is not dissociated from freedom. In this sense, men are endowed with natural rights, being restricted by the rights of other citizens, these limits are set by law.

Let us have a look at what the Universal Declaration of Human Rights establishes on the subject:

> Art. 1° All human beings are born free and equal in dignity and rights. Endowed with reason and conscience, they must act with one another in a spirit of brotherhood; Article 2 All human beings may invoke the rights and freedoms proclaimed in this Declaration, without distinction, in particular race, colour, sex, language, religion, political or other opinion, national or social origin, fortune, birth or any other situation. Furthermore, no distinction will be made based on the political, legal or international status of the country or territory of the person's naturality, whether that country or independent territory, under guardianship, autonomous or subject to some limitation of sovereignty. Art. 3 Every individual has the right to life, freedom and personal security

As well as the Declaration of Human and Citizen Rights, the Universal Declaration of Human Rights also reiterates the sovereign and inseparable stance of freedom and equality.

The right to equality also provided for in that constitutional provision, which defines that "all are equal before the law, without distinction of any kind ...". In turn, it should be interpreted with caution, since all individuals should be treated equally, as far as their inequalities are. And in order to do not discriminate between social classes, religion, biological sex, the law must be applied equally (Article 3, IV, CF/88).

Thus, Moraes (2006, p. 31) teaches:

> Thus, what is deterring are arbitrary differentiations, absurd discrimination, because the unequal treatment of unequal cases, to the extent that they are unequal, is the traditional requirement of the concept of Justice, because what is really protected are certain purposes, only if the constitutional principle is harmed when thediscriminating element is not at the service of a purpose accepted by law [...]

In this follow-up, the principle of equality is applied in CF/88 in the sense of being a means to reach justice. In this point of view, the State must provide mechanisms for individuals to find no equal situation for a given specific case.

Regarding the right to equality, Silva (2006, p. 216), flanked by other scholars, teaches that the "concepts of equality and inequality are relative, imposes confrontation and contrast between two or several situations so that where one exists is not possible to ask whether there has been equal or discriminatory treatment".

The right to freedom was earned over time. In this context, Oliveira (2007, p. 104) collects:

> According to the Declaration of human and citizen rights of 1789, 'Freedom consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man is limited only to those who assure other members of society of the enjoyment of the same rights. These limits can only be determined by law'

Article 5, IV, of the Federal Constitution guarantees the right to free expression of thought. By guaranteeing free expression, this constitutional rule records the existence of the right of opinion, which considers two values: value-demand, which would be the right to have and be able to express an opinion freely and value-indifference, when one has the freedom not to take into account the opinion of a third party (ARAÚJO and NUNES JÚNIOR, 2009, p. 141).

Related to the theme, Dias (2009, p. 63) writes in his work that:

> Freedom and equality – correlated with each other – were the first principles recognized as fundamental human rights, integrating the first generation of rights to ensure respect for the dignity of the human person. The role of law – which aims to ensure freedom – is to coordinate, organize and limit freedoms, precisely to guarantee individual freedom. Sounds like a paradox. However, there is only freedom if there is, in equal proportion and concomitance, equality. If there is no assumption of equality, there will be domination and subjection, not freedom.

Thus, when the author studies on the principle of freedom, she highlights the bond between her and equality, without one, the other would lose her meaning.

## 2.2 RIGHT TO EXPRESSION, OPINION, INTIMACY AND PRIVATE LIFE

The CF/88, in article 37, emphasizes the information of neutrality of the Public Power "in the face of opinion, prohibiting, therefore, persecutions or privilege that take into account individual convictions" (ARAÚJO and NUNES JÚNIOR, 2009, p. 141).

The right of expression can be exhibited in different ways, such as through music, theater, cinema, image, thus, "the expression of intellectual, artistic, scientific and communication activity is free, regardless of censorship or license" provided for in Article 5, IX, of the CF/88.

Thus, the right of opinion concerns a declaration of thought, a conceptual judgment, while the right of expression deals with the manifestation of feelings and creativity of the human being regardless of the formulation of values or definitions (ARAÚJO and NUNES JÚNIOR, 2009, p. 143-144).

Nevertheless, Lenza (2010, p. 761) indicates that there are cases in which federal law must regulate amusements and public spectacles, so that the recommended places, times and age groups must be respected.

Regarding the right to intimacy and private life, expressly provided for in Article 5, item X, of the Federal Constitution of 1988, there are those that "relate to the subjective relationships and intimate treatment of the person, their family relationships and friendship", while the right to private life "involves all other human relationships, including objects, such as commercial relationships, work (MORAES, 2015, p. 54).

When the right to honor and image, provided for in the same constitutional legislation, Silva (2006, p. 209) says that they integrate the concept of right to private life. This is because, "the Constitution rightly reputes them with distinct human values. Honor, image, name and personal identity are therefore the object of a right, regardless of personality."

## 2.3 RIGHT TO SEXUAL FREEDOM

In accordance with what was previously stated, the objectives of the Federative Republic of Brazil are formed by the construction of a free and egalitarian society, and these precepts are already based on the Declaration of Human and Citizen Rights of 1789.

In the meantime, the Federal Constitution is clear by prohibiting any and all forms of discrimination, further in sofaring that all individuals have the right to legal equality and freedom to do everything that the law does not prohibit. And, as stated, the violation of such rights implies the suppression or limitation of the dignity of the human person, in addition to violence to democracy, offense to the Federal Constitution.

Constitutionally, the right to freedom of thought, personality, intimacy, private life, free initiative and movement of citizens are protected. In this sense, it can be said that individual freedoms must be considered a fundamental right, which is protected in constitutional norms.

Thus, considering the various expressions of freedom, within freedom of personality and human individuality is sexual freedom. I say, "the right, in your private life, to express your sexuality in the best way that suits you" (CUNHA, without page, 2009).

For Maria Berenice Dias (p. 188, 2009): "no one can be carried out as a human being if they have not ensured respect for the exercise of sexuality, a concept that comprises both sexual freedom and freedom from free sexual orientation". In other words, respect for sexual freedom and free sexual orientation, understands the protection of human dignity.

Complementing this idea, the same author states that it is necessary to recognize that "sexuality integrates one's own human condition", because no one can realize itself as a human being if it has not ensured respect to freely exercise their sexuality. For the author, sexual freedom comprises within individual freedom, in this sense it must be interpreted as a natural right that integrates the rights of the first generation, which has already been seen here.

Although many indoctrinators consider the right to sexual freedom and free sexual orientation as a first-dimensional right. There are scholars who deepen their studies by making more detailed arguments on the subject, such as Castro (2016, p. 82), let us see:

> Equality and the sealing of discrimination and prejudice against homosexuals guarantee the classification of the right to free sexual orientation as a second-dimension right (protection against groups of social oppression, such as that resulting from homophobia, which places homosexuals as socially hyposufficient). The right to sexuality, as an integral realization of humanity for the preservation of human dignity for the purpose of free exercise of its sexuality, is classified as a third dimension right, including as a right of solidarity, without which the human condition does not take place.

Thus, it is able to say that the right to the free exercise of sexuality composes the three dimensions of rights, since it is associated with individual freedom, social equality and human solidarity, because sexuality belongs to personality and its development depends on the satisfaction of basic needs, such as the desire for contact, intimacy, emotional expression, pleasure, affection and love.

That is, to withdraw the individual's right to experience his sexuality, whatever it may be, is to offer this person an unworthy life, dias (2006, p. 76) is quoted:

> The identification of the gender of the object of desire, whether male or female, is the revealing data of sexual orientation, an option that cannot merit differentiated treatment. The fact that the attention is directed to someone of the same or different sex can not be the target of discriminatory treatment, because it is

> based on the sex of the person who makes the choice. The court decision that you take by criterion, not the effective conjunction of people, of their own lives, but the mere coincidence of sexes is part of a social prejudice.

That is, adopting precepts that segregate, which hurt the freedom of orientation, hurts fundamental precepts and reveals social prejudices on the part of those who qualify such attitudes as unworthy.

In this way, it should be in mind that it does not differentiate, as a human being, a cisgender or transgender individual. The two are individuals endowed with rights, with clear constitutional protection, being denied any discrimination due to their affective orientation, since this is a characteristic of human nature itself and includes dignity, not offending the rights or freedoms of other individuals.

In carrying out an analysis under civil-constitutional law on personality rights, Tartuce (2012, p. 142-143) notes that they are related to three major constitutional principles, they are: principle of protection of the dignity of the human person laid down in Article 1(III) of the CF/1988; principle of social solidarity that is one of the objectives of the Federative Republic of Brazil, Article 3, I and III, of the CF/1988; principle of lato sensu equality or isonomy that states "all are equal before the law, without distinction of any nature", present in Article 5, *caput,*cf/1988.

After his studies, the author concludes: "in the civil-constitutional view, just as personality rights are for the Civil Code, fundamental rights are for the Federal Constitution" (TARTUCE, 2012, p. 143). To this end, the scholar uses Utterance No. 274 of the IV Civil Law Day to maintain that both the list of personality rights and the list of fundamental rights are merely explanatory:

> The rights of personality, regulated in a non-exhaustive manner by the Civil Code, are expressions of the general clause of protection of the human person, contained in Art. 1, inc. III, of the Constitution (principle of the dignity of the human person). In case of collision between them, as none can overtake the others, the weighting technique should be applied.

In this sense, the next chapter will deal more deeply with the rights of personality, making the necessary relations with the proposed theme.

## 3. PERSONALITY RIGHTS

The protection of personality is not innovative, although the theory of personality rights only began "to enter into laws and codes" after the twentieth century (BITTAR, 1990, p.49). However, even today, the understanding of matter is not unison.

The former Civil Code of 1916 had an individualistic and patrimonialist view. Already with the making of the current Civil Code, the 2002, this vision was modified and the dignity of the human person became more valuable through the rights of personality, consistent with the constitutional precepts.

With the new rules of the Civil Code of 2002, a new scenario arose in the Brazilian legal order, because this order considered the constitutional principles and placed in its articles the rights of personality.

Due to the inclusion of these rights, the current Civil Code began to value the person and his/her achievements, showing the existential rights of the human person, which should also be protected in relations between individuals (BELTRÃO, 2014, p. 10).

Personality rights are defined by Beltrão (2014, p. 12), as a "special category of subjective rights that, based on the dignity of the human person, guarantee enjoyment and respect for their own being in all its spiritual or physical manifestations". In other words, these are subjective rights, because the good of personality is its object of study.

In this area, Diniz (2007, p. 142) discourse:

> They are the subjective right of the person to defend what is his own, that is, his physical integrity (life food, own body alive or dead, body of others alive or dead, separate parts of the body alive or dead); their intellectual integrity (freedom of thought, scientific, artistic and literary authorship) and their moral integrity (honor, recato, personal, professional and domestic secrecy, image, personal, family and social identity).

Otherwise, personality rights are essential for the person. This is due to the content conferred on the personality.

In this same sense, Azevedo (2012, p. 33) teaches how personality rights "relate to the physical, psychic and moral aspects of the person, to himself or to his dismemberments and social projections". The author concludes that "these rights ensure the existence of the human being, constituting its essence".

France (1996, p. 1033) says that these are "legal faculties whose object are the various aspects of the subject's own person, as well as their fumes and extensions".

For Diniz (2002, p. 135) personality rights "are subjective rights of the person to defend his own", some examples are the protection " his physical integrity, (...) intellectual integrity, (...) and moral integrity."

For Venosa (2002, p 148) reports that personality is "like the set of powers conferred on man to figure in legal relations".

Still on the conceptualization, France (1988, p. 200) defines how: "Personality rights are said to be the legal faculties whose objects are the various aspects of the subject's own person, as well as their essential projection in the outside world" and Gagliano and Pamplona Filho (2009, p. 150) assert that the holders of personality rights are "those who object to the physical attributes , psychicand moral of the person himself and in his social projections".

These rights are provided for in the Civil Code of 2002 in Articles 11 to 21. Gonçalves (2009, p.153). It understands that in addition to the economically appreciable rights, there are others with reference to the person, and it binds to it in a perpetual and permanent way - the rights of personality.

Categorizing such rights, as provided in the Civil Code, they refer to: the acts and provisions of the body itself (Article 13 and 14), the right not to submit to risky medical treatment (Article 15), the right to name and pseudonym (articles 16 to 19), protection of word and image (Article 20), and protection of intimacy (Article 21).

In general notes, it is verified that the Civil Code in Article 2 determines that "the civil personality of the person begins from birth with life; but the law makes safe, from conception, the rights of the unborn child."

In this sense, most scholars agree with the idea of the Brazilian legislator in codifying the Natal theory.

Nevertheless, this position is not unique, as for example Oertmann who defends the theory of conditional personality that says that "the unborn child has rights under suspensive condition" (GAGLIANO; PAMPLONA Filho, 2009, p. 131).

Beviláqua, Limongi França and Francisco Amaral Santos, support the idea of conceptist theory, which, in general, says: "the unborn child would acquire legal personality from conception, thus being considered a person" (GAGLIANO; PAMPLONA Filho, 2009, p. 131).

Thus, Rodrigues (2003, p. 61) states that the right of personality brings within it the subjective rights of which the human being is the holder, being easily distinguished by two different species, because some are detachable from the people of its holder and others that are not inherent rights to the human person and, therefore, to it linked eternally and permanently cannot be granted to the individual who does not have the right to life , to physical or intellectual freedom. These are called personality rights.

## 4. TRANSEXUALITY AND CONCRETION OF RIGHTS

Just as different groups of individuals who form society, such as children and adolescents, Indians, the elderly and women, are protected, we also find legal protection, right and indirect, granted to the portion of the population formed by transsexual people. In doctrinal conceptualizations, Maranhão (1995, p. 134) teaches, are the people who "phenotypically belong to sex defining, but psychologically to the other and behave according to the other, rejecting that". In addition, the same author says that they "do not obtain efficient psychotherapeutic results and obsessively seek the 'correction' of morphological sex, through radical surgery".

In this same sense, Ramsey (1998, p. 32) elaborates three characteristics that permeate this group, the first of which is the search for permanent hormonal treatment and/or the performance of sexual reassignment surgery; the second characteristic that these individuals have is to "complete some phases of hormonal treatment and/or sexual reassignment surgery, and be satisfied with the result"; and, finally, the latter would be that characteristic belonging to transsexuals who cannot perform hormonal treatment and/or sexual reassignment surgery for religious, political, financial reasons, among others.

At the international level, regarding the discussions of his rights, Sampaio (1998, p. 128) shows that the European Court of Human Rights has had the understanding that the change of sex and its legal consequences are due to the protection of the right to life and intimacy. Thus, for the scholar and for European jurisprudence, matters concerning transsexuals fall within the scope of the right to private life and intimacy.

In this same conjecture, Araújo (2000, p. 70) states that "the right of transsexuals occupies several topics of personality rights". This is because the transsexual when he conquers surgery,

he has the right to identity and forget about his past situation. In addition, the author states that the rights of the transsexual relate to various personality rights and fundamental rights from each moment and decision he makes. Thus, the scholar concludes: "we can therefore affirm that the right of transsexuals will prove to be multifaceted, depending on the concrete situation that requires protection."

Below we will discuss some public policies created with the aim of guaranteeing the aforementioned rights for the transgender population.

## 4.1 TRANSSEXUALIZING PROCEDURE AND SEXUAL REASSIGNMENT SURGERY

As stated, personality rights have categories within the legal instrument itself. Among the first categories are those mentioned above.

Such rights have an influence on the right to sexuality. Among the most varied examples about the acts and dispositions of the body itself and the non-right to submit to risky medical treatment, the following stand out: the sexual reassignment surgery and the transsexualizing procedure.

It should be clarified that sexual reassignment surgery is not synonymous with a transsexualizing procedure, that is, "the first is the surgical intervention itself that alters the genital organ, the second is broader and deals with the entire procedure before and after surgery" (BOZZ E LIMA, 2017, p. 7).

The Transsexualizing Process in the SUS is regulated through Ordinance No. 2,803/2013 published in the Official Gazette. This ordinance establishes guidelines for the regulation of outpatient and surgical procedures for genital readjustment in transsexuals.

That said, let us see:

> Art. 4º The integrality of care to users and users with demand for the performance of actions in the Transsexualizing Process in the Primary Care Component will be guaranteed by:I - welcoming with humanization and respect for the use of the social name; eII - regulated referral to the Specialized Care Service in the Transsexualizing Process.
>
> Art. 5º To ensure the integrality of care to users and users with demand for the performance of actions in the Transsexualizing Process in the Specialized Care Component, the following modalities will be defined: I - Outpatient Modality: consists of outpatient actions, namely clinical follow-up, pre- and postoperative follow-up and hormone therapy, aimed at promoting specialized care in the Transsexualizing Process defined in this Ordinance and performed in a health establishment registered in the National Registry System of Health Establishments (SCNES) that has conditions appropriate techniques, physical facilities and human resources as described in Annex I to this Ordinance; eII - Hospital Modality: consists of hospital actions, which are performing surgeries and pre- and postoperative follow-up, aimed at promoting specialized care in the Transsexualizing Process defined in this Ordinance and performed in a health establishment registered in the SCNES that has technical conditions, physical facilities and adequate human resources as described in Annex I to this Ordinance.

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As can be noted, in the first articles the Transsexualizing Process composes the so-called "Primary Care" and "Specialized Care", the first refers to the treatment given to the individual in his initial approach, before surgery. The second one scores the basic care of the treatment, subdividing into two categories: outpatient and hospital.

Sexual reassignment surgery, or sex change surgery, or transgenitalsurgery, must comply with some requirements for it to be performed. According to the retro ordinance mentioned, the individual must be at least 18 years old, and the public health system should be sought, presenting the complaint of incompatibility between anatomical sex and the feeling of belonging to the opposite sex.

Surgery consists of sexual reassignment, mastectomy, reconstructive breast surgery and thyroid surgery (voice change), as well as hormone therapy and pre- and postoperative follow-up with medical specialists and psychologists.

After analyzing the legal procedure, let us see how the national jurisprudence has been deciding on the subject:

> Civil APPEAL. VOLUNTARY JURISDICTION PROCEDURE. CHANGE OF CIVIL REGISTRY. CHANGE OF FIRST NAME AND SEX. Transsexual. TRANSGENITALIZATION SURGERY. DISNECESSITY. DIGNITY OF THE HUMAN PERSON. 1. This is an appeal brought against the judgment which, in the file of the procedure of voluntary jurisdiction - request for change of civil registration (reassignment of first name and gender) -, partially upheld the requests, to defer the change of the author's name in his civil registry, pursuant to Article 58 of Law No. 6.015/73, leaving rejected the request for gender change, because he understands that sexual reassignment surgery is essential to the request for sex change. **2. Identity, an element that integrates the minimum content of personality rights, can be understood as the set of characteristics proper to an individual, which characterize him as a subject. It is the manifest sign of his individuality, what makes him unique.** 3. Transsexuality can be understood as a profound conflict with genetic and morphological identity. It expresses the feeling of inadequacy in relation to gender, and of psychic incongruity in relation to biological/morphological sex. The individual does not see himself as what he is convinced of being, developing revulsion and rejection that often lead to self-mutilation or suicide. **Four, four, four. The recording of the physical person, as a mirror of civil identity, must overcome the reductionist view linked to the biological/morphological aspect and start to consider the psychosocial aspect - expression of personality, as a way to allow the guarantee of a dignified existence.** 5. Requiring transgenitalization surgery as an indispensable element to change sex in the civil registry denotes a severely disproportionate imposition, especially when it comes to a person who presents himself socially as of the opposite sex, especially when this remains proven by expert report. 6. It cannot be observed that, even if the exclusion of the costs of surgery is considered- if it is consolidated through the Unified Health System-, the transgenitalization procedure, as inherent to any other intervention, involves risks of complications and sequelae, especially if considering the delicacy and relevance of the systems and structures involved situation that touches the right to health. Nor should one neglect the hypothesis in which the transsexual has an interest in procreating before performing transgenitalization – a hypothesis pertinent to the right of freedom. Having been recognized as a transsexual, to the point of deferring the nominal change based on the need to make the embarrassing situations non-existent when the civil registry is exhibited, it is imperative, for the tables reasons, the sexual reassignment in these settlements, under pen-

> alty of judicial provision is innocuous. 7. The Superior Court of Justice, in the judgment of REsp no. 1,626,739, the Supreme Court, analyzing the thesis of general repercussion no. 761, defined that it is possible to change sex in the civil registry, even for citizens not submitted to the transgenitalization procedure. 8. Appeal known and provided. (TJ-DF 201500110260473- Secrecy of Justice 0003988-87.2015.8.07.0016, Rapporteur: SANDOVAL OLIVEIRA, Trial Date: 21/03/2018, 2nd CIVEL CLASS, Publication Date: Published in SJE: 27/03/2018, p. 269/277) (our griffin).

Initially, it is preferred to clarify that, after a quick search in an online bank, the courts of the other Courts present consonances with presented here.

The jurisprudence set out here was handed down in recursive state by the Court of Justice of the Federal District and Territories. In it, in addition to other elements, it is noted that the understanding that sexual identity is a minimum element of the rights of personality and, consequently, of the dignity of the human person, as stated in the previous chapter. Such identity must overcome the reductionist view generated by biological appearance and must respect the psychosocial aspects that represent personality traits. The other topics about changing the social name and gender in the registry will be covered in later item.

Therefore, for all that is contained here the right to sexuality has grounds in the right of personality with regard to the acts and dispositions of the body and the right not to submit to medical treatment at risk, when it comes to reassignment surgery and transsexualizing process.

## 4.2 RIGHT TO NAME TO PSEUDONYM

The name, as already said, has the objective of individualizing the person, being his identification at first.

As an example of the constitution of the right to sexuality in the rights of personality, we have the creation and permission of the social name as a mechanism of access to transsexuals to build their identity.

The social name was systematized in Decree No. 8727 of April 28, 2016. This Decree sought to regulate the use of the social name as well as the recognition of gender identity.

In accordance with this Decree, the social name refers to the "designation by which the transvestite or transsexual person identifies and is socially recognized". The social name should not be confused with the expression "gender identity" since this would be the "dimension of a person's identity that relates to the way it relates to representations of masculinity and femininity and thus translates into their social practice".

The application for the social name can be made by the transsexual or transvestite person, no longer needing the TranssexualProcess, is what says judgment of RE 670.422 and ADI 4.275.

After the legal analysis of the subject, it is necessary to analyze how the national jurisprudence has been dealing with the theme:

> Civil APPEAL. ACTION OF RECTIFICATION OF BIRTH REGISTRATION FOR THE EXCHANGE OF FIRST NAME AND INDICATION OF FEMALE SEX (GENDER) FOR MALE. TRANSSEXUAL PERSON. **DISNECESSITY OF TRANSGENITALIZATION SURGERY**. MITIGATION OF THE PRINCIPLE OF THE VERACITY OF PUBLIC RECORDS. WEIGHTING WITH THE PRINCIPLE OF THE DIGNITY OF

> THE HUMAN PERSON. PRECEDENT OF THE Supreme Court. ASSENT OF THE ATTORNEY GENERAL'S OFFICE. Host. REFORMED SENTENCE. KNOWN AND PROVIDO FEATURE. 1. In the light of the provisions of the arts. 55, 57 and 58 of Law No. 6,015/73 (Public Records Law), it is inferable that the principle of immutability of the name, however public policy, can be mitigated when the individual interest or social benefit of the amendment emerges, which claims, in any case, judicial authorization, duly motivated, after hearing of the Public Prosecutor's Office. 2. The social humiliation resulting from the exposure of the registration name and gender with which the Alant does not identify itself is a cause of psychosocial suffering, not only for this case in question, but for all subjects who do not identify with the socially attributed gender. **3.This is because, if the change of the forename configures gender change (male to female or vice versa), the maintenance of the sex constant in the civil registry will preserve the incongruity between the seated data and the gender identity of the person, who will remain susceptible to all sorts of constraints in civil life, constituting a blatant attack on the existential right inherent to personality.** KNOWN AND PROVIDO FEATURE. (Class: Appeal, Case Number: 0568650-05.2015.8.05.0001, Rapporteur: Joanice Maria Guimarães de Jesus, Third Civil Chamber of Bahia, Published: 04/04/2018) (our griffin)

First, it should be clarified that, after a brief research in online data, the jurisprudence of the other States has been following in accordance with here, in relation to the theme pointed out.

The case-law on screen is the origin of the Court of Justice of Bahia, which the decision was handed down in recursal state. It is observed, initially, the conformity of the judge in relation to the position of the Supreme Court on the disnecessity of the transsexual or transvestite person to perform surgery or start the hormonization procedure to be possible to rectify the social name. Moreover, the judge makes explicit the combination of the importance of the name as a right inherent to personality and, finally, of the dignity of the human being.

In this sense, by all that has been explained, the protection of the name is one of the rights of personality. Transsexual or transvestite individuals need the procedure of rectifying their name as a mechanism for preserving their sexual identities and, so to speak, their personality. Thus, the institution of the social name is an advance towards the guarantee of sexual rights and to base this guarantee on the precepts of personality is to say that both are based on the same pillar that is human dignity.

## 5. FINAL CONSIDERATIONS

In view of all that is, it is possible to infer that fundamental rights are individual guarantees that, among other functions, safeguard the human being from the interference of the State in private life. In addition, they represent rights that serve as protection of freedom, equality and justice.

By defending individual freedom, we must compose it among several others among them: religious freedom, thought, personality, locomotion, among others. In relation to the types of freedom, in this work, it is worth mentioning the sexual freedom that would be the way the person can freely express his sexuality. In this way, I have that the right to sexuality is founded on fundamental rights, precisely by commencing one of the examples of freedom.

Short of this aspect, it is important to elucidate that sexuality itself already integrates an element of the human condition, so it must be respected under penalty of attack human dignity.

Still regarding fundamental rights, it is necessary to consider that the right to sexuality integrates the three dimensions of law, since it is associated with individual freedom, as said; social equality in the sense of protecting political minorities; and human solidarity, because it is a human condition.

Once this is done, the work is based on the right of personality, initially conceptualizing that these rights represent an extension of fundamental rights because they are founded on human dignity.

Because it understands the right of personality as legal instruments that protect the human essence itself, the right to sexuality emerges, in this context, as an integral element of the human personality. For this, he took care to bring the list of personality rights and associate with the right to sexuality.

Regarding the acts and dispositions of the body itself and the right to non-submission to risky medical work, it addressed the sexual reassignment surgery and the transsexualizing procedure.

On the right to name and pseudonym discussed the creation of the social name, a legal instrument that sought to regulate the recognition of gender identity by the name of transsexual and transvestite people.

Therefore, the work, in general, took care to deal with the definition of basic rights and their application in the face of the manifestation of sexuality, in particular that of transsexuals.

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# NEOLIBERALISM, AUSTERITY AND THE DISMANTLING OF SOCIAL RIGHTS: AN ANALYSIS FROM THE PERSPECTIVE OF THE EFFECTS ON THE SOCIAL SECURITY REFORM

## NEOLIBERALISMO, AUSTERIDADE E O DESMANTELAMENTO DOS DIREITOS SOCIAIS: UMA ANÁLISE NA PERSPECTIVA DOS EFEITOS SOBRE A REFORMA DA PREVIDÊNCIA

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## ABSTRACT

In the scenario of state crisis, the advance of neoliberalism, and austerity measures, the article seeks to relate social security reform with the dismantling of social rights in countries. Thus, the work aims to respond to the following research problem: how does the influence of neoliberalism occur in the discourses in favor of social security reform? From this, the research aims to analyze how neoliberalism was able to inflate theses and arguments in favor of this reform policy. In the end, the research hypothesis had been corroborated, because neoliberalism, in addition to converting all the domains of life into economics, is also responsible for the drastic disinvestments in social rights carried out by states, by interfering in the political activities of public entities, through the imposition of austerity policies, based on the reduction of public spending and inducers of economic growth, as well as the payment of state public debt. The research was developed through the deductive approach method.

**Keywords:** State crisis; Neoliberalism; Austerity; Social Rights; Social security reform.

## RESUMO

*No cenário de crises do Estado, do avanço do neoliberalismo e das medidas de austeridade, o artigo procura relacionar a reforma da previdência com o desmantelamento dos direitos sociais nos países. Assim, o intuito do trabalho é responder ao seguinte problema de pesquisa: como se verifica a influência do neoliberalismo nos discursos em favor da reforma da previdência? A partir disso, a pesquisa objetiva analisar de que forma o*

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*neoliberalismo foi capaz de insuflar teses e argumentos em favor dessa política de reforma. Ao final, a hipótese de pesquisa fora corroborada, pois o neoliberalismo, além de converter todos os domínios da vida em economia, também é responsável pelos desinvestimentos drásticos em direitos sociais realizados pelos Estados, ao interferir na ação política dos entes públicos, por meio da imposição de políticas de austeridade, fundadas na redução dos gastos públicos e indutoras do crescimento econômico, bem como do pagamento da dívida pública dos Estados. A pesquisa foi desenvolvida por meio do método de abordagem dedutivo.*

**Palavras-chave:** *Crises do Estado; Neoliberalismo; Austeridade; Direitos Sociais; Reforma da previdência.*

## 1. INTRODUCTION

At the same time, through a scenario of articulation of neoliberal society, there are a series of distortions and transformations that affect the State, characterized as a central institution of modernity, and constituted to safeguard the rights and democratic relations of society. In this new context, markedly, one can perceive the various crises that cross state institutions and promote some weaknesses in their performance.

Having understood some crises, starting from the instrumentalization of globalization and the expansion of neoliberalism, the initial perception is that, increasingly, states are far from fulfilling the promises of their welfare project forged during modernity, to the extent that their action is constantly limited in the face of the promotion of private articulations and interests, by those who today find themselves at the top of the pyramid. In this sense, the work intends to observe some indications of the paths between the rise of economic austerity policies in some countries and their intersections with neoliberal rationality.

Starting from the analysis of political practices around this idea of austerity or cost reduction, by the discourse towards the idealization of a new project of economic growth, the research is concerned with analyzing how neoliberalism was able to inflate theses and arguments in the direction of a political conjuncture that resulted in the approval of constitutional amendment 103/2019, known as social security reform. To this end, the study intends to answer the following research problem: how does the influence of neoliberalism be verified in discourses in favor of social security reform?

The research hypothesis suggests that neoliberalism, in addition to converting all the domains of life into economics, is also responsible for the drastic disinvestments in social rights carried out by states, by interfering in the political activities of public entities, through the imposition of austerity policies, based on the reduction of public spending and inducers of economic growth, as well as the payment of state public debt. That is, the economic elites, the financial market, and the world banks are interesting to cut public spending, privatization, and state deregulations so that there is an economic capacity to pay off the debt. Thus, the neoliberal influence on policies such as social security reform can be verified when it is of interest in eliminating social security and promoting the saving of the State by sequestration of political power.

On the first point, the paper will analyze neoliberal discourses and austerity, as well as the relationship between them. In the second moment, it will specifically address the neoliberal contours present in the social security reform, considered one of the most recent austerity measures

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in Brazil. The research will be developed through the method of a deductive approach because it will start from the analysis of neoliberalism and austerity as general categories to, during research and deepen the study of these categories, specify and insert them into the context of social security reform. As a method of procedure, the monographic method will be adopted. Finally, the research technique will be indirect documentation, through bibliographic research.

## 2. NEOLIBERALISM AND AUSTERITY: TRACES AND CHARACTERIZATION OF DISCOURSE

The intensification of the processes of globalization, as well as the difficulties faced by countries due to the tax crisis (characterized by the increase in public debt) accentuated at the end of the 20th century, corroborated a framework of the expansion of neoliberal policies (of which austerity is one of them) as a way to achieve the balance of state accounts. Although the perceptions about the relationship between neoliberalism and austerity are delimited throughout this first chapter, it is important to situate the reader, from the outset, about how the neoliberal experience is associated with the deepening of austerity policies, which is precisely the central proposal of the following chapter of openness.

### 2.1 NEOLIBERALISM AS AN ANTITHESIS OF THE SOCIAL STATE

In the current globalized order, the State, the central institution of modernity, has been going through a process of fragmentation due to a set of crises that unfold in conceptual, structural, institutional, functional, and political dimensions. In this scenario of complexities, there are several new actors in the transnational arena, such as large companies and financial organizations that, due to the protagonism conquered in recent decades, end up weakening and conditioning state institutions (BOLZAN DE MORAIS, 2015, p. 25).

The directions assumed by modernity demonstrate that the conformation of the social character of the State, aimed at the promotion and protection of social well-being, as well as the implementation of public benefits, also faces crisis. To the extent that countries are confronted by the twists produced by neoliberal globalization and its reform projects, there is a weakening of the social welfare project and, consequently, the unprotection of the social rights of that portion of the population disadvantaged by contemporary economic processes (BOLZAN DE MORAIS, 2011, p. 40).[34]

3 Despite the complexity involved in the theme, the approach to the reasons for the crisis can be done in numerous ways. The first concerns the notes of Bolzan de Morais, for whom the welfare state is at the center of a structural crisis of the State, which is divided by the author into three aspects: the fiscal-financial crisis, characterized by the weakening of social political structures, which presuppose a sustainable rearrangement; the ideological crisis, by which the forms of organization and management adopted by the welfare state are questioned and a contradiction is put into contradiction to democracy (as a political formula) and bureaucracy (as a functional arrangement); and the philosophical crisis, which reaches the foundations on which the social welfare model is based and translates into the inability to consolidate the social state project, by the disaggregation of its base, essentially in the insufficient construction of public policy strategies aimed at the implementation social rights (BOLZAN DE MORAIS, 2011, p. 42-48).

4 As globalization gained strength especially from the 1980s onto new international production networks, as well as the dispersion of production units in different countries, market interpenetration, instantaneity of financial flows and changes in the types of wealth and work.

It is noticeable a situation in which there is a certain loss of economic coordination capacity of the State, as well as its autonomy in the formulation of regulatory strategies, which evidences not an only crisis but also the loss of its centrality of action. Thus, there is a scenario in which the State has smaller investments to meet the demands of the most dependent sectors and fewer possibilities to formulate strategies of resistance to economic agents that indebt the public sector (SPENGLER; WRASSE, 2019, p. 133). In other words, this withdrawal from the State as an exclusive axis of action reflects its inability as a provider of social rights and its flexibility concerning the determinations of private powers.

In this sense, parallel to the existence of a weak or fragmented Social State, it is clear that the crisis that crosses this model is also the result of the rise of neoliberal policies that, in recent decades, have been responsible for its dismantling. This is because neoliberalism, although it is an expression of polysemic meaning, according to wendy brown's perspective (2019, p. 29), [5]"is commonly associated with a set of policies that privatize property and public services, reducing the Social State", through processes of labor, deregulation of capital and climate production of taxes and tariffs friendly to foreign investors. It can be affirmed that neoliberalism is largely responsible for the well-known crisis of the State since this current denies the very idea and importance of the component of social justice tied to the state figure.[6]

It is possible to understand, based on Brown (2018, p. 7-8), a double-sided view of how processes introduced by neoliberalism affect individuals because, while on the one hand, they seek to emanate from the networks of state regulation, on the classic ideals of individual freedom and autonomy, on the other, they empty and eliminate various public goods (through the privatization of companies, for example), end up with social security benefits and also untie the powers of corporate and financial capital and dismantle that classic solidarity, typical of modernity.

Neoliberalism is neither considered singular nor constant, on the contrary, it takes different forms and contents in the most diverse areas, so one cannot ignore Klein's finding (2007, p. 54) by stating that this ideology is chameleonic and does not obey a simple identity or nomenclature.

Nevertheless, as a way of situating the reader, the perception of Dardot and Laval (2016, p. 15-17) is adopted, associating neoliberalism with a "set of discourses, practices, and devices that determine a new model of government of men according to the universal principle of competition". The idea advocated by the authors is in the sense that neoliberalism is fundamentally a "rationality" and, as such, "tends to structure and organize not only the action of the rulers, but even the conduct of the governed". It is, therefore, governmental rationality that, in addition to shaping the subjectivity of individuals, by the universe of widespread competition, has been able to govern public policies, command world economic relations and transform society.

In addition, it is interesting to analyze how it affects the functioning of states in the psychic sphere of individuals. As Berardi (2003, p. 10) notes, in today's society there is a new productive and cultural discourse, driven by neoliberalism, carried by a promise of individual happiness and broadening the horizons of knowledge through professional success. This false promise, in the author's opinion, drives the hope of achieving happiness and success to workers who

5 To paraphrase Foucault, Gago (2015, p. 224) explains that the so-called neoliberalism of the ordoliberal school arose in Germany after World War II, in order to legitimize a "non-existent" state, unlike neoliberal thought of the eighteenth century, which was based on the introduction of market freedom in the face of the existence of a "reason of state".

6 In this sense, Brown (2019, p. 29) cites as an example the policies imposed on Chile by Augusto Pinochet, often determined by the International Monetary Fund in the form of mandates of "structural adjustment" linked to the restructuring of loans and debt.

are often highly trained and skilled but have agreed to work under conditions of astonishing stress, including severely low wages, fascinated by an ambiguous representation that they are self-employed, taking competition as the universal rule of human existence.

Sharing similar concerns, Han (2015, p. 29-30) explains that the individual in this neoliberal order is the "lord and sovereign of himself." The performance subject is free from any external instance that forces him to work and is simply submissive himself. In this sense, the author defends the idea that unlike the subject of obedience worked by Foucault, this new subject of performance surrenders to the "free coercion of maximizing performance". In this case, as well observed by the author, overwork becomes self-exploration, which ends up becoming more efficient than an exploration of the other because it goes hand in hand with the feeling of freedom.

By introducing a kind of saving of society through the conversion of all areas of life into an economy, the freedom originally promised by neoliberalism and, at the same time, the ends and appreciation of citizens, treated as companies, are reversed. From that moment on, for Brown (2015, p. 29-30), there is the characterization of a paradoxical reversal, by which the individual, while being freed from the shackling of state regulation, now commits himself to the general well-being of the nation, sacrificing himself in the name of economic growth. From the author's perspective, "a logic that combines a simplifying thought about the human capital of successful companies with a national-theological discourse of moralized sacrifice". An example of this neoliberal paradox is the promotion of private retirement funds, which collapse or disappear with each financial crisis.[7]

In this context, it is as if all institutions are unimproved operating mechanisms. Not only the company, but the state and all individuals in its relationships "calculate their possibilities of living in terms of cost-benefit". Concerning the State, in all its dimensions, "it begins to be colonized by the discourse of business management, guided by a formal, abstract and hedonistic view of efficiency, which despises any element that transcends the economic and monetary sphere" (MOURA; BOLZAN DE MORAIS, 2017, p. 187).

As can be seen, neoliberal thought takes over all areas of life and, in fact, soon reached the State and its policies. In this sense, Ferrajoli's perception (2015, p. 158) is the perception of globalization and the power of liberal ideology and analyzes how both culminated in the development of a market without rules that directly influence the social policies of countries, further aggravating the state crisis. Along these lines, in addition to neoliberal policies conditioning state actions and determining cuts in public investment in health and education, privatizations, deregulation, and liberalization, they follow a recessive spiral in countries, accompanied by the growth of inequalities, lower investments, and austerity policies.[8]

Investigating or portraying how these external forces act within states is interesting even to understand how the current crisis has developed over the years. In this sense, the neoliberal policies of capitalist elites operate concrete changes in the social fabric of states, without them having control of their actions (GAGO, 2015, p. 255). Neoliberalism has captured public power at the level of governments themselves. Through the indebtedness of the State and other

7 Adds Brown (2018, p. 35): "While neoliberal political rationality, administered by governance, eliminates the last traces of the classic republican formulation of citizenship as public engagement, she however, it retains, transformed, the idea of citizen sacrifice."

8 Not to take the expressions "liberalism" and "neoliberalism" as equivalents, it is worth stressing that "the neoliberal assault on the social, along with its identification of power exclusively with coertion, enacted as a consequence a reformation of liberalism" (BROWN, 2019, p. 53).

mechanisms, a process is generated in which, increasingly, "the government has to account to the 'market', and turn its back on citizenship". With this, the government that does not respond to the interests of the population that elected it prevails, but to the interests of the market, that is, essentially financial interests (DOWBOR, 2017, p. 134).

Nevertheless, it should be noted that, in neoliberalism, the state's action is interesting, so it is not a question of removing the State from the scene, but of this bowing to the new conditions imposed by the private powers. The very political construction of global finance can elucidate this panorama because with the resources of the State and with the rhetoric of the national interest governments conduct policies advantageous to companies and disadvantageous to the employees of their countries. In this case, it is interesting to note that states are a fundamental part of the realization of private interests, so much so that the social setbacks imposed on the large part of the population by the neoliberal discipline organize a transfer of income to more fortunate classes through covert discourses that allow the blame for the dismantling of the Social State (DARDOT; LAVAL, 2016, p. 282).

As Brown (2019, p. 53) points out, it is still necessary to consider the existence of a whole neoliberal discourse historically built also in common sense, around the idea that the Social State is to blame for the economic catastrophe that countries have been facing. This misstep, along with the discourse of personal responsibility and competition in the market around individual freedom, propagates the idea that taxes are theft, in addition to blaming the poor for their poverty status, as well as attributing to their social minorities and discriminated groups the responsibility for their tiny presence in elite positions. In other words, this attack on the social by neoliberalism franks the exercise of freedom, regardless of society and without worrying about the good." It means affirming the destruction of the "lexicon by which freedom becomes democratic, combined with a social conscience and nested in political equality". It means affirming, in some sense, the attempt to end democracy, since it does not exist without social justice.

In a way, the State has not abandoned its role in the management of the population, but its intervention seems to meet other reasons: in place of the welfare economy, through which emphasis was placed on the harmony of economic progress and the equitable distribution of the fruits of growth, "the new logic sees populations and individuals from the narrowest angle of their contribution and their cost in world competition". This context is similar to the affirmation of a new type of social policy, in which the bargaining power of trade unions is weakened, labor law is degraded, the cost of labor is lowered, the value of pensions and the quality of social protection is reduced in search of adequacy to globalization (DARDOT; LAVAL, 2016, p. 284).

There is no doubt about the existence of dramatic disinvestment in social rights, since the saving of the political dimension results in the untying of popular power and democracy, with states that increasingly give up the idea of the social. Through an inversion of values, social rights and even welfare and social assistance services become the antithesis of market democracy, that is, unacceptable blockades of the mythical free market. In this perspective, while the ties between state, finance, and corporate capital are strengthened, the popular action of workers and citizens is practically removed from the scene, both from political discourse, as well as from the popular political imagination and elites (BROWN, 2018, p. 29-30).

The circumstances that lead to the understanding of how the protagonism of financial bodies has made national governments powerless to draw attention to the influence that credit rating (or risk rating) agencies exert in this scenario. The grades attributed to countries by these

*private rating agencies can determine investments* by large companies in certain countries, and more than that, these ratings may be directly related to the imposition of austerity policies on countries, cutting the state budget, to promote growth. For example, it was enough that in August 2011 *Standard & Poor's lowered the U.S.* triple credit rating, stating a protracted controversy over raising the statutory debt ceiling and its budget policy debate so that the decade-long budget cuts (austerity) would be discussed again in the Senate (BLYTH, 2017, p. 23).

Brazil, in the second half of 2015, also served as an example of how national states are unable to conduct some external forces and articulations, when the same agency (*Standard & Poor's*) lowered its credit rating due to the serious political crisis that was surrounding the country, especially by allegations of corruption schemes involving public and private companies. The day after the drawdown, the dollar opened the session on a high, surpassing, at the time, R $ 3.90, which represented a risk of dramatic shock to the country's currency. Not to mention that, with the drawdown, chances of investments are lost in the country, since some large investors are linked to statutes that prohibit the application of capital in countries that receive unsatisfactory notes (GERVASONI, 2017, p. 228-229).[9]

Numerous situations could be called upon to illustrate the influence that financial markets have on states. Indeed, the capture of political power by the debt mechanism is only one way of portraying this influence and, perhaps, the most important also to make up for how these austerity measures become increasingly common among the policies of states. According to Dowbor's approach (2017, p. 126), large financial groups have enough power to enforce the appointment of those responsible in key positions, such as central banks, transforming external pressure into internalized structural power. Financial institutions control public debt, giving them greater leverage over government policies and priorities. In this sense, they typically demand austerity measures and structural reforms aimed at favoring a neoliberal market economy that ultimately benefits the same banks and corporations. It is recognizing a cyclical path or a debt trap because financial bodies have an interest that states are evening debt and, therefore, reducing social spending becomes paramount.

## 2.2 AUSTERITY AND ITS IMBRICATIONS WITH NEOLIBERAL RATIONALITY

As neoliberal rationality intensifies and gains form as a global project, in place of a welfare state and social policies, austerity is presented as the only measure capable of balancing the books. As Blyth (2017, p. 30) explains, for whom austerity is a dangerous idea, it is defined as a form of voluntary deflation in which the economy adjusts by reducing wages, prices, and public spending, to restore competitiveness that is supposedly better achieved by cutting the state budget, debts, and deficits. The author states that austerity is "appealing" and usually summed up in the phrase "you can't settle the debt with more debt", with which you even agree. However, their concern is that those who pay the debt are the ones that are at the base of income distribution and end up losing much more than those at the top and practically do not depend on

9 In 2015, the dollar in Brazil was quoted at R$ 2.68 in January and reached R$ 3.42 at the end of July. At the end of the year, in December, the price was R$ 3.94. This information was extracted from: G1. **Dollar rises 48% in 2015, highest annual high in nearly 13 years,** 2015. Available at: http://g1.globo .com/economy/markets /noticia/2015/12/dolar-termina-ultima-sessao--do-ano-em-alta.html . Access: 08 Jul. 2020.

services produced by the government. In other words, it means that the impoverished population dependent on the social protection of the State ends up paying the largest share of the debt, by restricting social rights, to those who hold wealth.

Dowbor's perception (2017, p. 137) that the public sphere and the population are indebted in the hands of the giants of the financial system is right. From the current Brazilian portrait, in addition to the famous state debt, the population is increasingly indebted. Perplexed, people perceive their "dirty" name on Serasa-Experian (which, by the way, is a multinational) if they do not respect the truncated rules of the system. In this case, what seems to be left is a feeling of powerlessness, because, in the confusion of financial rules, citizens contribute to the concentration of wealth and power with the high interest paid to banks and public debt, and austerity policies that deprive them of their rights.

Furthermore, western governments, central banks, the International Monetary Fund (IMF), and related international institutions are being considered to be in favor of a speech in favor of reducing excessive government debt, reducing excessive welfare programs, reducing excessive regulation. This is the language of the main institutions that place an order in the globalized neoliberal world, propagating the implicit promise that reducing these excesses of social policies, would be like reducing the excessive debt of countries. Thus, economic and financial actors want "a world in which governments spend much less on social services or the needs of neighborhood economies or small businesses and much more on the deregulations and infrastructure that corporate economic sectors crave" (SASSEN, 2016, p. 253).

This perspective is also recognized by Brown (2018, p. 41-42), for whom austerity discourses have come to dominate the political scenario of states, as a principle of undeniable reality. It means that the citizen has learned to accept drastic cuts in social services and services and, instead of being protected by the state, this new citizen held responsible tolerates deprivation, insecurity, and extreme exposure to maintain productivity, growth, fiscal stability, or the market influence of the nation. In the movements of neoliberal society, while the whole sphere of life is commercialized and the State is reconfigured according to a business model, making economic growth its only end, all possible citizenship consists in aligning expectations and ways of life to these ends.

With multiple facets, the neoliberal practices of integrating both countries and citizens into a common project of economic growth undermine the premise of solidarity of modernity, through hate speech towards workers, pensioners, immigrants, beneficiaries of social assistance, women, among other portions of the population excluded from the economic elite and which, by the way, are described as "leeches operating in an old world of privilege rather than on their own." If that were not enough, "they are also blamed for sinking states into debt, jamming growth, and bringing the world economy to the brink of collapse" (BROWN, 2018, p. 40).

Finally, of these imbrications between austerity and neoliberalism, the fact is that, gradually, states have disinvested in social rights. Moreover, it is interesting to note how the neoliberal paradox has several particularities: while, on the one hand, it exploits people who can work and makes them entrepreneurs of themselves, on the other, purges the social rights of the population that is somehow dependent on public policies. This reality can be seen in austerity policies, also known as reforms, which are increasingly common in the interiors of states in terms of social rights and benefits. So far, what is intended to be pointed out is that austerity/cost reduction is the policy that allows cutting investments in health and education, labor reforms,

social security reforms, or these political and neoliberal discourses that countries are moving towards (illusory) economic growth.

## 3. THE INFLUENCE OF NEOLIBERALISM IN THE DEBATE ON SOCIAL SECURITY REFORM

Once this point has been reached, the impacts of the neoliberal rise in all areas of life, as well as in states, seem clear. In this new scenario, disinvestments in social rights are recurrent, since the so-called spending reductions represent both the saving of the political sphere of the State, as discussed in the previous point, and the evidence of a union between neoliberalism and austerity, the currently dominant in the discourses of government leaders in most countries, although disguised or distorted by the idea of economic growth.

Neoliberal political rationality gradually eliminates the last traces of the classic formulation of citizenship as public engagement, by transforming it into the idea of citizen sacrifice in defense of the country's economic growth. An example worked by Brown (2018, p. 31-32) of this conversion of democratic citizenship and justice into economic purposes can be seen in Obama's speech in 2013, shortly after his re-election. In calling for social justice and environmental recovery, each speech of the former President of the United States referred to the contribution of the progressive agenda to economic growth. So, when Obama argued for *Medicare, immigration reforms*, raising the minimum wage, fighting sex discrimination, and investing in research, housing, clean energy, and education, all of these causes were in defense of "their contribution to American economic growth and competitiveness."[10]

It is perceived that the economic and scientific character of state policies convert the image of the State into a company, which greatly diverges from its modern construction. Moreover, this conversion is easily verified at the time of speeches and speeches in defense of austerity policies in which it is promised to reduce costs/expenses in the name of economic growth/development of countries. This trend is not only observed in several countries, but also in Brazil, where the increase in this neoliberal impulse can be visualized in the constitutional reforms of fiscal adjustments that began with Constitutional Amendment No. 95 in 2016, extending through labor and social security reforms.

For example, the labor reform (Law 13.467/2017), approved in Brazil in 2017, modified the Consolidation of Labor Laws (CLT) and brought numerous losses to workers. In this case, as in most austerity policies, his proposition came disguised as a public interest, based on the promise of job creation and economic growth for the benefit of the population. However, as expected by experts and critics of the proposal, the promise was not made. Contrary to the federal government's expectation that labor reform would generate formal jobs, the unemployment rate in Brazil reached 12.2% in the first quarter of 2020, an increase of 1.3% compared to the last quarter of 2019. According to data from the Brazilian Institute of Geography and Statistics

10 Brown (2018, p. 32) transcribes some excerpts from Obama's speech: "Every day we should make ourselves three questions as a nation: How to attract more jobs to our back? How do we equip our people with the skills they need to do these jobs? And how ensure that hard work leads to a decent life?". From this speech, one easily perceives how this liberal rationality is hidden in certain discourses, without the listeners realizing that they are "bewitched" by the factory of illusion and neoliberal efficiency.

(IBGE, 2020), there are 1.2 million more people in line for a job. In total, the country totaled 12.9 million unemployed in April 2020[11].

Despite these circumstances that are already discouraging to social rights in Brazil, the analysis to which the article intends to devote attention is, in a special way, the social security reform (Constitutional Amendment 103/2019) and the neoliberal surroundings present in this austerity measure. In advance, it can be affirmed that, as with other proposals for cost reduction measures, the change in the social security system of countries is usually justified by the premise of exhaustion of public coffers or insufficient revenue to cover social expenses. For these reasons, before moving to this particular point, it is interesting to be clear about the scope of the logic of fiscal austerity that underpins the measure of fiscal adjustment by the government, preferably in public spending, because of factors such as the economic slowdown and/or increases in public debt.

The reference to the neoliberal interest in austerity reflects the fact that states are completely involved in the finance market (point previously elucidated), so this adjustment known as austerity would have positive effects on agents' confidence in the economy. It means that by showing responsibility for public debt (in a way that meets the expectations of investors), the government gains credit from economic agents and, due to this improvement in expectations, the economy would undergo a recovery resulting from increased investment by entrepreneurs, consumption of households and attracting foreign capital. Austerity, therefore, would have "the ability to rebalance the economy, reduce public debt and resume economic growth" (ROSSI; DWECK; ARANTES, 2018, p. 16-17).

For these reasons, the influence of private actors concerning the approval of austerity measures in countries can be seen. Returning to the object of this study, there are strong indications that social security reform in Brazil (now consolidated in EC 103/2019) was approved to serve even the interests of certain private entities. Although it is difficult to establish to what extent there is effective responsibility of these agents in the decisions of the National Congress and it is not clear about the strength of corporate corporations in the Brazilian economic scenario, it is possible to verify this reality when comparing votes of the National Congress in social security reform and donations during election campaigns of people linked to large corporations active in Brazil.

Thus, it is possible to notice the direct and sometimes manifest interest of these companies in the approval of certain reforms, such as social security. In general, donations are made to multiple candidates, as a way to guarantee effective influence in the national congress votes. However, specifically, a survey conducted based on the accountability of the 2018 election campaign and the votes of the reform project in the House of Representatives is a good example to elucidate this interference. Precisely starting from [12]*the ranking of* donors presented by the Superior Electoral Court, in which José Salim Mattar Junior, owner of Localiza Hertz (the largest car rental company in Latin America), appears as the fourth largest donor (the total declared was R$ 2,920,000.00 in donations), it was found that of the eight elected federal deputies who

11 Not to mention the impacts of the Covid-19 pandemic, which, as already evaluated by experts, will bring even higher numbers in relation to unemployment in Brazil.

12 For the construction of the analysis, the data provided by G1 were mapped in: http://especiais.g1.globo.com/politica/2019/o-voto-dos-deputados/#/deputados/undefined, referring to the votes of each federal deputy in the two rounds of the proposal for social security reform, as well as the accountability of the 2018 election campaign made available by the Superior Electoral Court in: http://divulgacandcontas.tse.jus.br/divulga/#/consulta/campanha/2018/2022802018/ranks .

received donations from the businessman during the campaign, all voted in favor of the adoption of the welfare reform bill.[13]

The social security reform, considered one of the most recent austerity measures in Brazil, carried with it functional discourses to justify its implementation, proper to neoliberalism, such as the famous statement that "there is no alternative" or the false view that "the social demands of democracy do not fit in the budget". Such ideological constructions are moving towards privatization and the imposition of serious social setbacks, as was the case with the approval of the reform. Likewise, the discourses that make it seem that all citizens are equally affected and implicated by such measures today cross nations, companies, industries, cities, and public institutions, calling on individuals to "sacrifice for the survival or recovery of the economic whole, especially at the lowest levels of business and income scales" (BROWN, 2018, p. 46).

To some extent, these discourses carry the false feeling that people should contribute to the economic growth of the nation and, therefore, ended up collaborating with the acceptance of the population concerning the various kidnappings occurring in terms of rights benefits, since austerity, as a principle of undeniable reality, causes individuals to tolerate drastic cuts in educational assistance, health, and social security, for example, in the name of a larger goal: to recover the country's economy.[14]

However, reality has a divergent perspective on these false promises of neoliberalism. As economist Eduardo Fagnani, professor at **Unicamp**, rightly said, the changes introduced by the reform shall be responsible for creating "a **mass of miserable people in** the coming decades, because only a few will be able to prove the **minimum** age and **contribution time**. And they will be thrown for assistance." For Fagnani, the labor market in Brazil already has a large number of people in informality who do not contribute to social security. With even stricter rules regarding retirement, about 20% of these people will not be able to achieve the benefit and shall end up thrown into care, earning about 400 or 500 reais. Thus, by adding the impacts of labor reform and social security reform, the country's scenario leads to a reality in which there will be a kind of consumerless capitalism. The economist is emphatic in stating that these measures shall generate "a soybean exporting colony, in which the population does not need to have income" (IHU UNISINOS, 2019). Based on this understanding, it is possible to conclude that even this expectation of economic growth is illusory with these reforms because capital also depends, to some extent, on people having income to be potential consumers.

Several discourses in favor of recent reforms in Brazil can be analyzed critically. For example, the argument that the social security system would supposedly need to be reformed due to people's longer life expectancy was widely addressed by the Ministry of Economy, so much so that it increased the minimum retirement age (65 years for men and 62 years for women). However, this perspective creates a cruel paradox because the fact that the population can live longer should not be considered a problem for the State, which already indicates a possible

13 According to the detail of the accountability of the businessman, the federal deputies who received donations from the businessman and voted "yes" were: Rodrigo Maia (DEM-RJ), Marcel Van Hattem (Novo-RS), Tiago Mitraud (Novo-MG), Lucas Gonzales (Novo-MG), Paulo Eduardo Lima Martins (PSC-PR), Kim Kataguiri (DEM-SP), Pedro Cunha Lima (PSBD-PB), Vinicius Poit (Novo-SP).

14 Denise Gentil, phD in economics and professor at UFRJ, says that, based on constitutional precepts, there is no need to talk about social security deficit: "In 2013 there was a surplus of R$ 67 billion, in 2014 a surplus of R$ 35 billion and in 2015 of R$ 16 billion. The years 2014 and 2015 are years of recession, even so the social security system generated a surplus of R$ 16 billion in 2015." In the economist's perception, to insist on the argument of the social security deficit as a central idea to make the **social security reform** is mistaken, since there is no lack of resources to cover expenses (IHU UNISINOS, 2016).

contradiction in the strategies of approval of the reform. If this were not enough, there is still a need to verify the statements about the deficit, stating that social security would be the most important item in the Union budget. On the contrary, according to the Budget Law of 2019, the largest expected expenditure of the federal government was debt refinancing and interest payments, and debt amortization (UOL LUPA, 2019).

In fact, in terms of social rights in Brazil, the setbacks are increasingly visible, precisely because of this neoliberal characteristic so present in the political sphere. The problem is that there is a ripple effect pairing these constant structural reforms, which generates a mismatch between the arguments for the approval of the reforms and the reality that they reproduce. As an elucidative proposal, we have the figures regarding informality in the country, including driven by labor reform and other deregulations, aggravating the situation of social security. Considering that one of the sources of the collection comes from including wages and payrolls, higher unemployment and informality shall represent lower collection for social security, and vice versa. This points to a contradiction, because the State promotes a social security reform, on the one hand. After all, it is in deficit, but on the other, a labor reform that causes unemployment and informality.[15]

In turn, the research coordinator of the Interunion **Department of Statistics and Socioeconomic Studies** (**Dieese**), **Patricia Pelatieri, says that treating the country's largest social protection policy as a fiscal or spending problem was one of the major mistakes in social security reform. Unlike the propaganda for the approval of the reform that would end the privileges, its concrete result was that the poor and rich ended up impacted very distinctly by the measure. In this sense,** the richest 1% of the population did not have their privileges affected, "because there is no proposal to tax these billionaires to contribute and balance public revenue. So the privileged remain privileged." The rules have become even more severe for people who depend on this protection since, to retire with 100% of the average salary, it shall be necessary to contribute for 40 years (IHU UNISINOS, 2019).

In addition, it is possible to notice that women are significantly more affected by social security reform than the male population, because of the increase in the lack of pensions and, considering that, according to Dieese data, in 2017, 62.8% of women retired by age, against 37.2% of men, which demonstrates the difficulty of insured women in achieving more contribution time. The Institute also assessed, based on 2014 data, that women who retire by age have, on average, 16 years of contribution to the INSS, which already means a warning regarding the difficulty that shall be faced to achieve the necessary contribution time (FOLHA DE SÃO PAULO, 2019).

Such is the tendency and neoliberal interference in the Brazilian political scenario that there are still efforts to approve a parallel proposal, defended by the Minister of Economy, for the creation of the privatized capitalization system, similar to the one adopted by Chile when it reformed its social security system in the mid-1980s, driven by Pinochet's neoliberal dictatorship. Just to illustrate how this model works, each worker makes his savings, which are deposited into an individual account, rather than going to a collective fund. While it is kept, the money is managed by private companies, which invest in the financial market. The warning is that the major stakes for the private capitalization system are **the banks**, which will have for decades

15 Although the informality rate fell by 41% in the last quarter of 2019 to 39.9% in the first quarter of 2020, the IBGE estimated that until February 2020 Had a contingent of 36.8 million formal workers in Brazil (IBGE, 2020).

this **billion-dollar fund**. In Chile, the six institutions that made the capitalization model made billions, while workers' retirement was much lower than expected (IHU UNISINOS, 2019).

Following global neoliberalism, it is also interesting to highlight the measures imposed *by the troika (European Commission*, European Central Bank, and International Monetary Fund) concerning the Greek State, with a series of demands and reforms due to the country's gigantic debt. As a condition of resolving the country's economic crisis, *loans granted by the troika imposed conditions* on Greece ranging from changes in retirement, tax increases, and privatizations, to the return of creditors to the country to oversee the implementation of reforms (GERVASONI, 2017, p. 227-228). From this perspective, there are compelling reasons to believe that states are increasingly involved with private banks and the financial system and are always less committed to the social rights of the population.

Finally, the angle of observation proposed with these critical perspectives concerns how neoliberalism guides some global discourses and actions. The fundamental fact is that neoliberalism has today become the "dominant rationality, leaving liberal democracy nothing but an empty envelope". As dominant, this rationality takes over the political space and takes shape in a set of discursive, institutional, political, legal, and economic devices that form a complex and ubiquitous network, according to Dardot and Laval (2016, p. 384-385), "a global device that, like any device, is essentially strategic in nature".

Just as another point of observation about the different ways of analyzing how neoliberalism has permeated political action in Brazil, timely highlighting the management of the current government, in an interview granted to Folha de São Paulo (FOLHA DE SÃO PAULO, 2020) in July 2020, the secretary of privatization of the Ministry of Economy talks about his plans for the privatization of twelve state-owned companies in 2021. So far, unsurprisingly, from 2015-to 2017 the country has followed this neoliberal line concerning privatizing companies and cutting costs with social benefits toward the much-idealized economic growth. [16]

The problem lies in the fact that, since the largest pandemic ever experienced (Covid-19) became a reality in countries, much has been discussed about a possible redefinition of the state's action in the sense of protecting social rights, including having returned to the agendas the discussion on nationalization of companies (contrary to the neoliberal policy prevailing in recent decades, responsible for influencing the privatization of essential companies and services - such as health). As an example, there is the project of nationalization of a soybean exporting company in Argentina, just as France has already expressed interest in nationalizing *the companies Renault* and PSA. In this case, it is understood, through the secretary's speech, a certain insistence on neoliberal policies, against the other countries and, certainly, without worrying about the recovery of the social ills that the pandemic has found in Brazil. Privatizing companies also means eliminating public goods and thereby cutting off investments in health, education, and essential goods. As state revenue swells, the resources available for investments are minimized and, in this recessionary spiral, the population excluded from economic elites remains too much.[17]

16 The secretary's speech presents the government's strategy of privatization, with the initial project of privatizing the following state-owned companies: ABGF (Brazilian Fund Management Association); Electrobras; Nuclep (Nucleons Private Equipment); Ceagesp (Companhia de Entrepostos e Armazéns Gerais de São Paulo); Ceasamines (Supply Centers of Minas Gerais); Codesa (Santos Spirit Dock Company) (FOLHA DE SÃO PAULO, 2020).

17 These data were extracted from articles of valor econômico magazine, whose sources are in the list of references of the work.

The neoliberal interference with structural reforms interested in reducing social rights benefits is marked by austerity, which, alongside market liberalization and privatization, are the three central pillars of neoliberalism. In this sequence, it is possible to observe the Brazilian reality, while austerity policies have been happening during a period of extreme political instability and increased social ills in the country. Moreover, considering that the defense of private interests erodes democracy and strengthens corporate power in the political system, the diagnosis that can be made of Brazil, especially in recent years, is of a country in which austerity – recently observed in social security reform – juxtaposes the victims of the cuts (here considering mainly the poorest portion of the population) with the perpetrators of these policies, financial system, economic elites and subservient governments (ROSSI; DWECK; ARANTES, 2018, p. 28).

By assuming the power of privatization, constituted by state deregulation and the expansion of the reach of the personal and protected sphere, neoliberalism conceptually operates the dismantling of public institutions with private norms, extending to delegitimize the provisions of social welfare and the project of democratization of social power. On the one hand is the subject, a self-entrepreneur who is constantly self-exploited by neoliberal rationality, and, on the other, the same subject sees his daily life mercantilism and his social rights removed from the agendas of political interests of the countries. But why is it interesting to neoliberalism that countries cut or reduce social security rights? The intention is that individuals work more and more and that states spend fewer resources on welfare benefits. All this is in the name of the interests of elites, the financial market, and corporate banks that undoubtedly operate this neoliberal rationality that acts privatizing, squealing rights, and seeking payment of debt.

## 4. FINAL CONSIDERATIONS

It is undeniable that neoliberalism, driven by globalization, was able to instrumentalize and dismantle the premises of the State and its modern formation, besides transforming the subject into a free and completely unprotected individual of capital. Among neoliberal rise, state crisis, and erosion of its social function, the result is a context in which private powers increasingly dominate the public sphere of countries.

In this sense, with states completely involved with neoliberal scientist discourse and with a certain illusion of economic growth, austerity measures have been recurrent in countries, mainly through reforms, such as social security. It occurs that, as analyzed during the text, there are several losses to the population of the countries that, excluded from the economic elites, remain destitute of state protection.

It is not only a question of identifying rationality that operates constantly and in a ubiquitous way, but of verifying how much societies are increasingly immersed in this perspective. There is a significantly broad set of deregulations, reform, and underwriting of rights, affecting the lives of individuals vulnerable to the power of large corporations, banks, and the financial system, acting on behalf of their purely economic interests. Thus, the research hypothesis is corroborated, to the extent that the neoliberal influence on policies such as social security reform can be verified by the interest of these powers in eliminating social security and promoting the saving of the State, by sequestration of political power, through the illusory construction of economic growth.

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# FISCAL JUSTICE, FEDERATION AND INTERPRETATION: ICMS ON FREIGHT IN PRODUCTS INTENDED FOR THE MANAUS FREE ZONE

## JUSTIÇA FISCAL, FEDERAÇÃO E INTERPRETAÇÃO: ICMS SOBRE FRETE EM PRODUTOS DESTINADOS A ZONA FRANCA DE MANAUS

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## ABSTRACT

The study in relief deals with the problems of the Manaus Free Zone, especially the question of the interpretation of the legal system in force, to determine the type of tax incentives granted to companies that settle in the region. From the interpretation techniques, verifying the most correct understanding on the subject, one can classify such incentives as immunities or tax exemptions. Also regarding the type of interpretation, restrictive or extensive, depending on the classification of tax benefits of the aforementioned free trade area. Once these controversies have been delimited, the ICMS tax on freight will be examined, when the final destination of the goods is the Free Zone of Manaus.

**Keywords:** Free Trade Zone of Manaus, Interpretation Techniques, Tax Incentives, ICMS, Freight

## RESUMO

*O estudo em relevo trata da problemática da Zona Franca de Manaus, especialmente a questão da interpretação do ordenamento jurídico em vigor, para determinar qual o tipo de incentivos fiscais concedidos às empresas que se instalam na região. A partir das técnicas de interpretação, verificando qual o entendimento mais acertado sobre o tema, pode-se classificar tais incentivos como imunidades ou isenções tributárias. Ainda quanto ao tipo de interpretação, restritiva ou extensiva, a depender da classificação dos benefícios fiscais da citada área de livre comércio. Depois de delimitadas tais controvérsias, passa-se ao exame do ICMS incidente sobre o frete, quando o destino final das mercadorias for a Zona Franca de Manaus.*

**Palavras-chave:** *Zona Franca de Manaus, Técnicas de Interpretação, Incentivos Fiscais, ICMS, Frete*

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# 1. INTRODUCTION

Manaus Free Trade Zone implies a regime of tax benefits based on relevant principles and objectives of the Brazilian Federation, among which are socio-economic development, reduction of social inequalities and national sovereignty. Due to the peculiarities of the northern region, an adequate tax regime was structured in order to achieve these objectives.

Consequently, the problem arises regarding the delimitation of the tax benefits. This article specifically seeks to address the problem of the scope of the ICMS exclusion on the activity of freight sent to the ZFM. This is because, in cases where the final destination is abroad, the higher courts have understood the state tax under comment does not apply. As, therefore, operations for the Manaus Free Trade Zone are equivalent to an operation abroad, it is necessary to ascertain whether they would be subject to the same treatment.

Proposed to address the issue in two aspects: the nature of the ZFM, whether it is immunity or exemption; methods of interpretation that are proper to immunity and exemption. Such approaches, in turn, demand a bibliographic analysis and documents on the peculiarities of the North Region, the process of creation and extension of the Manaus Free Trade Zone, in order to delimit its nature and verify which interpretative method is most appropriate to it.

In this process, without giving up bibliographic research, the characteristics of a fair and equitable federative system are identified, characterized by cooperation. From this axiological basis, interpretation techniques and concepts of Tax Law are approached, in order to understand the difference between exemption and immunity through the hermeneutic bias: while one has a restrictive interpretation as appropriate, the other is possible to apply a systemic interpretation.

At the end, having gathered the conclusions about the nature of the ZFM and the method of interpretation that is appropriate to it, the question raised in this article is answered, about the exclusion of the ICMS on freight in the operations of sending goods to the Manaus Free Trade Zone.

# 2. THE RULES ON THE MANAUS FREE TRADE ZONE

The continental character of Brazil implies different cultures and realities, resulting from history, climate, geographical position, communicability, occupation. There is a large part of the South with marked European characteristics, due to the immigration of Germans, Italians, Poles, Lithuanians and many others. The amenity of the climate, the wide and green lands, the communicability with the other countries and peoples of the south, mark a culture and an economy completely different from the northeastern hinterland, punished by the heat and drought. Without communication with the coast, the northeastern hinterland, until the beginning of the century. XX, it showed little institutionalized, still wearing a culture with strongly colonialist traits, whose honor was fueled by a virility that was built in the intimate coexistence with blood and violence. Nothing similar, in turn, to the wealthier regions of the Southeast, which, with mineral extraction, coffee farming and occupation by the Court, had, since the time of colonization, economic

resources and urban equipment that provided the basis for the strong industrialization that followed during the century. XX.

In this diversity scenario, the North is quite rich. First, the vegetation and geography, which make it difficult to connect, via transport routes, with the rest of the country. Vast isolated areas, subject to strong humidity, taken over by a closed forest and by wild animals, hinder the construction of modern and interconnected urban centers. Because of the natural wealth, northern cities are devoted to isolation, despite the formation of urban niches that, cyclically fed by crops and plant extractions, developed in a social dynamic of strong socioeconomic inequality.

In addition, the geographic singularity of the North weakens its borders with countries in Latin America, notably Venezuela, Colombia, Bolivia and Peru. Communication with Amazon Latin America and Central America promises to be easier and more intense than with the rest of the country. This characteristic has been problematic since the middle of the 20th century until today, due to the planting and trafficking of drugs and the development of criminal extractive activities.

The need to ensure adequate infrastructure for an efficient institutionalization of the public machinery, to occupy spaces, to interconnect cities and towns, to improve communications, to mitigate isolation and to hinder the escalation of criminal activities, motivated the development of public policies strategic areas, especially aimed at the North Region, among which the Manaus Free Zone stands out. Despite the large territory and the wealth raised by rubber at specific periods in its history, Manaus was unable to evolve in the most varied aspects, namely, the economic.

Professor André Elali (MARTINS; ELALI; PEIXOTO, 2008, p. 470-471) shares the same understanding, according to which the ZFM was created to develop an industrial pole in the region, trying to reduce regional inequalities between it and the rest. Its implementation led to a significant increase in the number of inhabitants, going from 1970 to 1985, from three hundred thousand to eight hundred thousand inhabitants. For the author, the economic activities of the region were changed, with a promotion in those that previously did not have importance, such as, for example, fishing and extractivism. The legislation related to the ZFM brought several tax benefits, such as exemption from II and IPI in relation to the import of inputs destined for export and production for local consumption, reduction of the Import Tax on inputs needed in certain industrialization processes, equivalence, for all tax purposes, to an export regarding the sale of goods from the rest of Brazil with exemption from IPI and ICMS. There is still exemption from IPI and ICMS on sales abroad, reduction from 25% to 100% of the IOF on foreign exchange operations with regard to imports, refund of ICMS, at the state level, from 45% to 100%, depending of the activity involved exemption, for some services, of ISS, exemption for ten years, extendable, from the IRPJ of companies installed in the region and special IRPJ regime for companies that meet certain requirements.

Because of this, according to the aforementioned jurist, there was considerable growth in the local industrial sector, increasing the supply of jobs, with the consequent reduction of social and regional inequalities, given the better economic development of the Manaus Free Trade Zone, compared to previous periods.

Decree-Law Nº. 288, of February 28, 1967, sought to strengthen the economic bases of the region established by it, starting to treat the Manaus Free Trade Zone as a free trade area,

and giving it tax incentives, for promotion of its economy, making it attractive for companies to go out and explore their activities, with the exemption from the tax burden on their products.

Geraldo Ataliba and Cléber Giardino (1987, p. 206), when examining the matter, noted that, back in 1967, there was great expectation about the creation of the ZFM, with the scope of fixing population in the region, as well as attracting capital, increasing the consumption of the raw material produced there and create a regional industrial center, since, in addition to all the advantages mentioned, national security was consequently taken care of as a result of the occupation of a vast border area with other countries. the authors concluded, in the aforementioned studies, that the tax benefits granted to that region were agreed upon, above all by the "national interest" of the listed designs.

Art. 1, of Decree-Law nº 288/67, states that "the Manaus Free Trade Zone is an area of free import and export trade and special tax incentives, established with the purpose of creating an industrial, commercial center in the Amazon and agribusiness endowed with economic conditions that allow its development, in view of the local factors and the great distance that the consuming centers of its products are ".

Art. 4, of Decree-Law 288/67, provides that "*the export of goods of national origin for consumption or industrialization in the Manaus Free Trade Zone, or re-export abroad, will be for all tax purposes, contained in the current legislation, equivalent to a Brazilian export abroad ".*

To reinforce, the National Constituent Assembly, when drafting the 1988 Federal Constitution, inserted the matter in its text. In the Transitional Constitutional Provisions Act, in its art. 40, disciplined that the Manaus Free Zone *is maintained, with its characteristics of a free trade, export and import area, and of tax incentives, for a period of twenty-five years, from the promulgation of the Constitution.*

Subsequently, the Derivative Constituent Power, through Constitutional Amendment Nº. 42, of December 19, 2003, extended the Manaus Free Trade Zone for another ten years, contact art. 92, in the Transitional Constitutional Provisions Act. In 2014, through Constitutional Amendment 83, 50 (fifty) years were added to the term corrected by art. 92 of this Transitional Constitutional Provisions Act.

On the subject, the Federal Supreme Court (STF), when analyzing the constitutionality of the IPI credit on products purchased in the Manaus Free Trade Zone, in the absence of a legal provision, manifested itself in the sense that "the non-cumulative rule gives space for the realization of equality, of the federative pact, of the fundamental objectives of the Federative Republic of Brazil ". (Newsletter 938, RE 596614-SP). Since the Manaus Free Trade Zone is justified "for reasons of national sovereignty, insertion in global consumption and production chains, regional economic integration and reduction of regional and social inequalities at the federative level" (Informativo 938, RE 596614-SP) , the Federal Supreme Court considered that, in this case, a systematic analysis of the constitutional principles and interests should be used, which would justify the exception to non-cumulativity. Due to the peculiarities of the region, it was considered difficult to attract the exploitation of economic activity, which is why the interpretation of the devices that grant tax benefits should take place in the broadest way, in order to enable the effective development of the region.

On the occasion, it was also considered that the successive extensions of the normative framework that creates the Manaus Free Zone imply the maintenance of a strategic development

policy, fundamental, also in this case, to national sovereignty. Necessary is to occupy the North. There is still a relevant argument in the newsletter for the treatment of the matter: the necessary legality of the exemption - alleged IPI´s credit- is necessary when the rule is the tax incidence. But once the rule is that of non-incidence, the need for legality would occur for the creation and collection of the tax, since, then, the current state would be exempted: non-incidence.

The Manaus Free Trade Zone is, therefore, a constitutional and infra-constitutional strategic program for socioeconomic development, with the purpose of occupying the northern region and reducing regional inequalities. This principle framework justifies a broad interpretation of the tax benefits, so that the Manaus Free Zone will effectively achieve its purpose.

## 3. DISTINCTION BETWEEN IMMUNITY AND EXEMPTION

One cannot lose sight of the data discussed above: the Manaus Free Trade Zone is a constitutional regime of "taxability". Consequently, the ZFM has the character of immunity, whose first basic distinction in relation to the exemption is the normative provision. While the former is embedded in the constitutional text, it falls within the laws. Professor Paulo de Barros Carvalho (1999, p. 178) teaches about immunities as being a finite and determinable class of constitutional norms, which remove from the powers of the entities the power to tax on certain facts, issuing rules instituting taxes that shelter situations specific and sufficiently configured.

In the same pitch, Gilberto Ulhoa Canto (1958, p. 34), defends the impossibility of treatment that results from an immanent prohibition, for being in the constitution, of an entity with imposing power, of exercising it, in relation to facts and people. Thus, according to him, it is a limitation to the tax competence that the federal entities receive from the constitutional text, since the sectors reserved to them in the sharing of the tax competence, are already entrusted to them to the exclusion of certain people or facts. It follows the same line of ideas, among others, Walter Barbosa Correa (2011, p. 811)[3].

Without losing sight of the constitutional origin of immunity, it also exists in the implicit modality: the example is that of the vital minimum. The constitutional origin of immunity does not imply the necessary linguistic provision in the form of a tax exclusion rule. It is sufficient to identify an area of non-taxation, which can occur either because of an explicit constitutional rule, or because of a constitutional regime or institute, such as the vital minimum: income, wealth and consumption that are in a reasonable way geared to satisfying basic needs do not reveal a contributory capacity to defray public spending. Consequently, the cause of the taxes is not fulfilled, according to art. 145, Paragraph One, of the Federal Constitution, which excludes the possibility of incidence of this tax type. It is the systemic analysis of the Constitution that leads to the delimitation of an area that, ontologically, excludes the possibility of exaction, regardless of an explicit manifestation of the constitutional text.

Immunity can occur not only in the implicit modality, but also when the constitutional legislator explicitly stipulates an area of non-incidence, through the use of mistaken nomenclature,

3 For him, immunity can be characterized by three relevant issues. First, because it comes from the Constitution. Second, because it has a permanent character, while the constitutional statute remains in force. Third, for having an abstract essence, existing in function of the constitutional norm.

as an exemption. In such cases, a lack of technique of the Constituent Power is characterized: the "exemption", as it is provided for in the Constitution, is an immunity, since it implies impediment to taxation by the federated entity. See, for example, art. 195, §7º, of the CF / 88, which says that *social assistance charities that meet the requirements established by law are* ***exempt*** *from social security contributions*.

Aliomar Baleeiro (1960, p. 308) conceptualizes immunity as the "case in which the ordinary legislator cannot tax a person, thing or activity, because he defends him to do so expressly or implicitly in the Constitution". Even the text treating it as if it were an exemption, because it is in the Constitutional Text, it is said that it is an immunity, including several times already said by the Supreme Federal Court, guardian of the Constitution. See, as an example, the following excerpt:

> SECURITY COMMAND. SOCIAL SECURITY CONTRIBUTION. PATRONAL SHARE. ENTITY FOR ASSISTANCE, PHILANTROPIC AND EDUCATIONAL PURPOSES. IMMUNITY (CF, ART. 195, § 7). KNOWN AND PROVIDED RESOURCE.
>
> (...)
>
> The clause included in art. 195, §7, of the Political Charter - despite referring improperly to the Social Security contribution exemption - contemplated the social assistance beneficiary entities with the constitutional favor of tax immunity, provided that they meet the requirements established by law.
>
> The constitutional jurisprudence of the Federal Supreme Court has already identified, in the clause included in art. 195, §7, of the Constitution of the Republic, the existence of a typical guarantee of immunity (and not of simple exemption) established in favor of the social assistance beneficiaries. Previous: RTJ 137/965 (...) (BRASIL, 1996).

Immunity, therefore, is a constitutional regime that prevents federated entities from being competent to tax people, situations and objects. Even if there is a doctrinal discussion about whether immunity negatively participates in the delimitation of jurisdiction or reduces it, the important thing is the understanding that, in view of immunity, there is no tax jurisdiction. On the other hand, one cannot lose sight of the fact that immunity is an exception to the fundamental duty to pay tax, so that it must be justified in principles, policies and constitutional interests: this is how the Supreme Court on the Manaus Free Zone manifested itself. Overcoming regional inequalities, socio-economic development and national sovereignty are constitutional principles and objectives that serve as the foundation for the Manaus Free Trade Zone. Consequently, the benefits of the Free Trade Zone must be interpreted in a way that makes its foundations feasible. The analysis is systemic, as the STF has well defined.

The exemption, as outlined elsewhere, is provided for in the infraconstitutional rules. Professor Rui Barbosa Nogueira (1999), took care of the matter, very lucidly, stating that the "exemption is the exemption from paying due tax, made by express provision of the law and therefore even exempt from taxation".

Following the same path, Bernardo Ribeiro de Moraes (1982, p. 180-181), states that the exemption is configured as a tax favor, conferred by law, to exempt the taxpayer from paying the tax. There is consolidation of the taxable event, which is due, but the law waives its payment. It has to be said that the exemption is a tax favor resulting from the law, although it may have as a starting point constitutional recommendation, as was the case of art. 15, paragraph 1, of the previous Constitution, which declared exempt from consumption tax the articles classified by law, as minimum indispensable for housing, clothing, food, and medical treatment for people of

restricted economic capacity. As can be seen, the Constitution did not exempt any article from consumption tax, but recommended that the law classify articles it considered to constitute the minimum for the cases indicated, and, therefore, exempt them from the aforementioned exception. The ordinary law that excluded from the incidence, by way of exemption, the articles that it considered to constitute the minimum indispensable for the purposes determined by the Constitution. There is only an exemption after the incidence has arisen, having an exceptional and provisional aspect, depending on the will of the ordinary legislator and it comes up with the law establishing the tax or later, in separate law.

Non-incidence, on the other hand, is taken care of when the fact practiced by the taxpayer ***does not conform*** to the typical tax fact, or ***taxable fact***. Professor Rui Barbosa Nogueira (1999) defines it as the situation that is outside the limits of the tax field, or rather, the non-occurrence of the taxable event, because the standard does not describe the incidence hypothesis.

What is of interest, however, are the rules for exclusion from taxation: immunity, which operates within the scope of the Federal Constitution, excludes or negatively delimits tax jurisdiction, due to constitutional interests and principles. The exemption, which implies the exercise of tax jurisdiction by the federated entity, is a law that reduces the scope of tax incidence or the liability for its payment. According to some indoctrinators, such as Sacha Calmon in his book "General theory of norm, interpretation and tax exemption", the exemption law is part of the norm that creates the tax: it joins the law that creates it, because it derives from it person, situation or object of the incident radius, delimiting it. CTN, on the other hand, qualifies the exemption as a mere exclusion from the tax: the law removes the duty to pay the tax.

In any case, the exemption is part of the law that defines the incidence of the tax, so that it is subject to its interpretation regime. Exemption, then, is a rule of exception: its creation implies the discretion that is characteristic of the tax jurisdiction of federated entities. For such reasons, the National Tax Code provides that it must be interpreted restrictively:

> Art. 111. Tax legislation that provides for:
>
> I - suspension or exclusion of the tax credit;
>
> II - grant of exemption; (emphasis added)
>
> III - exemption from complying with accessory tax obligations.

On the other hand, when dealing with tax immunity, the form of interpretation is different. The negative delimitation of tax jurisdiction stems from principles, interests, objectives, policies and constitutional rights that demand an integrated and coherent interpretation. The exemption rule is exceptional, and should be interpreted literally, and does not include interpretation by analogy, since its scope cannot extend the assumptions in which the law granted the tax favor. Unlike immunity, which may have extended the concept, to satisfy the constitutional purpose listed. The supremacy of the Constitution must be sought in this. (MACHADO, 2011, P. 552).

Speaking, precisely, of fundamental rights, Ingo Wolfgang Sarlet (2017, p. 35) points out that, in principle, there are not only the fundamental rights provided for in Title II of the Constitution, but other rights dispersed in the Constitutional Text. Following the same path, Helenilson Cunha Pontes (2004, p. 82) points out that due to the "dramatic" character of the relationship between the individual and the State, as a taxing entity, the application of fundamental rights is extremely important, maximum due to the invasion of the State on the sphere of individual

freedoms, in search of cash. For this reason, it is essential to recognize fundamental rights as a necessary protection against attacks on individual freedoms.

The close relationship between fundamental rights and the possibilities and limits of taxation grant the taxpayer the status of freedom or elementary guarantee of the person in the Democratic Rule of Law. The Federal Supreme Court has already pacified its understanding, according to which the *Taxpayer's Statute* (limitations on the power to tax, which include some explicit and other implicit immunities) are fundamental rights, and, therefore, must be interpreted as such. A classic example occurred in the judgment of Direct Action of Unconstitutionality nº 712 / DF. At that time, Minister Celso de Mello affirmed that tax principles are a political-legal achievement for taxpayers, and are configured as an expression of the individual rights granted to private individuals by law. Since they exist to impose limitations on the State's power to tax, these postulates are exclusively addressed to the government, which submits to the imperativeness of its restrictions.

The question that cannot be overlooked is that immunity, as an area of "taxability", often arises from the joint analysis of the rules that make up the tax regime: principles and / or rules, some of which are fundamental in character, which together define the area enforcement of immunity and exclusion from jurisdiction. The activity is complex: a) to identify the norms involved; b) verify that the instrument (non-taxation) is adequate, sufficient and not more than sufficient to achieve its constitutional foundation; c) identify possible principles, interests, objectives and rules that can be negatively affected by the instrument of non-taxation; d) delimit the optimum point at which immunity, whether explicit or implicit, achieves its objectives without impairing, in an elementary way, other constitutional rules and principles.

Therefore, it is imperative to check the interpretation techniques or methods, and then to analyze how to read the tax incentives that characterize the Manaus Free Trade Zone legal system: it must be compatible with the anatomy and functionality not only the tax regime, as well as the constitution, in its entirety.

## 4. INTERPRETATIVE TECHNIQUES AND FRAMEWORK OF ZFM INCENTIVES: IMMUNITIES OR EXEMPTIONS?

According to Tércio Sampaio Ferraz Júnior, the main objective of the Science of Law is to interpret the normative texts and their intentions. For him, *this practical purpose dominates the interpretive task. For this reason it is distinguished from similar activities of the other human sciences.* (FERRAZ JR, 2012, p. 73).

There are, in Law, several interpretation techniques, namely: grammatical, logical, systematic, teleological, evolutionary history.

Thus, the first aspect to address the interpreter, is the grammatical, to investigate the concepts listed in the normative text. With this interpretation technique, the jurist analyzes an interpretation of the words contained in that standard, aiming to extract his command to the jurisdictional. According to Tércio Sampaio Ferraz Júnior (2012, p. 75), it is up to the interpreter, first, to establish a definition. Legal varies between the current use of the word for the designa-

tion of the fact, and its normative designation. The two aspects may or may not coincide. The appearance of the text, with this semantic narrowness, is the interpreter's first contact with the message made by the legislator and marks the beginning of the exegetical adventure. (CARVALHO, 2008, p. 182).

Not only, in law, there are several words with more than one possible definition, but other considerations, in addition to semantics, are necessary, such as systematicity, coherence, historicity and efficiency. This time, in addition to literality, other interpretive techniques should be used, especially logic and systematics.

The point is that because it is a whole that is intended to be coherent and integrated, the literal interpretation is not always enough: a) first because, by using it, a topical right is built; b) for this reason, literal interpretation does not avoid conflicts between different laws. Tércio Sampaio Ferraz Júnior (2012, p. 76), facing this problem, deals with the logical method, or logical technique of interpretation. Incompatibility is distinguished from contradictory (two texts are contradictory cannot be affirmed, in any situation, at the same time). Contradictory is an analytical problem in the sense of formal logic, requiring the constitution of a formal system, rigorously constructed. Incompatibility is an analytical and empirical problem. The opposition between two incompatible texts is not just a result of their formal opposition, but requires a reference to a situation.

For this reason, the reading of the law cannot neglect its systemic character. It is the technique that allows the interpreter, in a definitive way, to extract the correct sense of the normative text, since it observes the ethical and epistemological character of coherence.

There will always be an obligation for the interpreter to seek the meaning of the text, comparing it with the Constitution, since, without it, the norm has no meaning. (GRAU, 2003, p. 40).

When this technique is applied, the ends for which the standard is built must be captured, as explained by Tércio Sampaio Ferraz Júnior (2012, p. 79). For him, the perception of the ends is not immanent to each norm taken in isolation, but requires an expanded view of the norm within the order. The aforementioned author states that the systematic interpretation culminates in a procedure of participation of the interpreter, in the creation of the law, whereas in the historical-evolutionary one seeks the objectives of the legislator, examining the historical situations of the time, demanding a new valuation of values, comparing them with those of the current reality. (FERRAZ JR, 2012, p. 79).

Juarez Freitas (1995, p. 15) argues that this method of interpretation aims to analyze a set of norms, so that the broader sense of what is positively stated in the norms can be extracted, literally. For him, systematic interpretation seeks the legal system in its axiological totality, also remembering that even in the Roman-German tradition, Law is greater than the set of norms. Systematic interpretation will always be contemporary with law, neither preceding nor succeeding. It gives it life and dynamism, making the legal content transcend the mere and sparingly positive.

In the same way, Carlos Maximiliano (2011, p. 100) defends that one should compare the positive prescription with the one that came from it, looking for the connection between rule and exception, general and particular. With this submission, the precept acquires greater, perhaps unexpected, emphasis. This work of synthesis is better understood.

Systemic interpretation, which integrates rules and principles from the elementary axiology of the Federal Constitution, has become the hermeneutics that has been carried out preferentially

in Brazilian legal practice. The 1988 Constitution, made up of rules and principles, and received from the perspective of post-constitutionalism, came to be understood as a set that lends equal normativity to rules and principles, which demands a systemic reading. nevertheless, tax and criminal matters, since they are parental rights par excellence - the first of freedom and other fundamental rights and the second of property - take place under the canopy of legal certainty. Therefore, his legal practice tends to be carried out by concepts, that is what Misabel Abreu Machado Derzi teaches in his book "Tax Law, penal district and type", with regard to the imposition of tax lien: taxation, equality is necessary between the normative fact and the real fact, so that the consequent normative applies, in the exact literality in which it was legally established.

In spite of this, the practice of legal syllogism has been limited to the norm that regulates the exaction, in order to enable the taxpayer to predictability. In other situations, in which it is not within the scope of delimiting the tax incidence and paying the tax, the systemic reading of the constitutional tax regime has not been impeded, especially when the power to tax is intertwined with fundamental rights, such as expression , religion, profession, locomotion, vital minimum, and with the constitutional objectives, namely: overcoming regional inequalities, socio-economic development and sovereignty. In such cases, the systemic reading, based on these basic normative elements of the constitution, is fundamental for the compatibility of the power of taxation with the constitutional principle.

In view of these premises, it is necessary to return to the theme itself and investigate the question of the position of the Manaus Free Trade Zone and its incentives. Above, it referred to the understanding, by the STF, that the ZFM is a strategic constitutional policy of economic development supported by constitutional objectives of the greatest relevance. Better search and explore the issue, since the ZFM implies a normative set that goes from the constitution to infraconstitutional norms. This time, it is necessary to remove any doubts: it is about immunity, due to its provision in the Transitional Constitutional Provisions Act (constitutional limitations on the power to tax) or an exemption, as there is provision in Decree-Law No. 288 / 67?

Starting with the terms, in a grammatical interpretation, it is clear that *free trade areas* (or free trade zones) are a genus, of which free zones are species. According to Adilson Rodrigues Pires (2008, p. 487), "Free Trade Zones comprise export processing zones, duty-free stores and duty-free zones, in addition to others". And the aforementioned author continues, stating that the free zone must be understood as an extension of the territory of a State and has no incidence of taxes inherent to imports. They cannot be imposed restrictions, economic or otherwise, with regard to the entry of goods, if the condition of such products being consumed in the defined area is fulfilled, and for the purposes it was created, having as an example of this, art . 132, of the Mercosur Customs Code Protocol.

Thus, it is seen, by the grammatical interpretation of the term provided for in art. 40, of the Transitional Constitutional Provisions Act, namely, a free trade area, which the constituent, in addition to raising the region to constitutional status, left closely linked to the granting of tax incentives to companies that set up there, so that the region could prosper and be inhabited. Especially because, as previously seen, it was a matter of national interest.

Based on the lessons of Celso Ribeiro Bastos (1998, p. 183), free zones result from a "normative bundle" that confers benefits, above all fiscal, noting that it would be a contradiction to maintain, in the ADCT, the Manaus Free Zone, and , on the other hand, to interpret that the tax incentives previously granted, under the aegis of the previous constitution, were not covered

by the new constitutional order. What the original constituent of 1988 sought was to maintain a differentiated regime in the aforementioned area, for a period of twenty-five years. Even for a literal interpretation of the ADCT provision, when it alludes to "its characteristics as an export and import free trade area, and tax incentives".

It shares the same understanding Guilherme A. dos Santos Mendes (1995, p. 90), for whom a free zone or free trade area is a specific location, geographically and legally delimited, in which products circulate freely, without tax incidence or control, only the inspection of incoming and outgoing goods destined for import and export is in charge.

Ives Gandra da Silva Martins (BASTOS, DA SILVA MARTINS, 1988, p. 366-367) states that art. 40, of the Transitional Constitutional Provisions Act, was mandated by Deputy Bernardo Cabral, rapporteur of the National Constituent Assembly, becoming immutable until maturity, initially scheduled for 2013, even if there are changes in federal legislation. For him, if there was a change in the rules of conduct, it would affect only new ventures, including saying that Decree 205/91 was unconstitutional, when the regime was changed. Especially because, even if admitted, it could only be conveyed by law in a formal sense. Said author, in comments to art. 40, of the ADCT, dealt with the issue in a specific article on the topic, claiming that the tax benefits established by Decree-Law Nº. 288/67, supported by art. 40 of the ADCT. (MARTINS, 2011, p. 230).

Celso Ribeiro Bastos (1988) has also positioned himself, stating that the aim was to foster the region, through the granting of tax incentives and that free zones are found in less developed areas of a given country, mainly due to the inherent geographical difficulties. For this reason, when benefits are granted, they cannot be withdrawn before the end of their term. Especially because, it must be granted legal certainty to the ventures that settle in those areas and make investments for that, and, only with the counterpart of the tax benefits ensured for a certain period, they are able to make their businesses viable. Therefore, these tax incentives are not graceful, given that in order to invest in an unfavorable region, there must be a consideration, by the government, and it must be previously disciplined by law, especially regarding the maintenance of the concession term, amortization of the investments made there.

Fábio Pereira Garcia dos Santos (2008, p. 133) dealt with the matter, in a specific study on incentives in the Manaus Free Trade Zone, arguing that art. 4, of Decree-Law No. 288/67 is now constitutionally enforceable, as it was part of the package of incentives granted to the Manaus Free Trade Zone. Add to this the fact that, because it is inserted in the ADCT, and not in the main part of the Constitution, it could be argued that it would not be about immunity, but an exemption. Such an argument does not deserve to prosper, given that the transitional rules of the constitution have the same status as the others, provided for in its body itself. Celso Ribeiro Bastos (1998, p. 183), even categorically affirms that it is "a stone clause, beyond the scope of the constitutional amendment itself, maximum when it comes to law or a mere provisional measure.

In the same vein, Nelson Monteiro Neto (2002, p. 91-96), affirming the immutability of the incentives granted to the Manaus Free Trade Zone, even the rules provided for in Decree-Law nº 288/67, since the mentioned regulation was raised to the constitutional status, with CF / 88.

Thus, the rules that reduce the effectiveness, restrict or exclude benefits previously granted, are tainted by material unconstitutionality, by direct violation of art. 40, of the Transitional Constitutional Provisions Act.

Thus, in the present study, the same understanding of the aforementioned authors is shared, stating that the tax incentives granted to companies based in the Manaus Free Trade Zone have art. 40, of the Transitional Constitutional Provisions Act - ADCT, and not just Decree-Law nº 288/67.

Now, to have immunity, it does not mean that there can be no infraconstitutional norm dealing with the topic. What matters is whether there is a prediction of that benefit in the constitutional text. It is even salutary that there are rules lower than the Constitution dealing with the matter. Especially because the benefit also requires the fulfillment of some criteria or conditions.

therefore, the existence of a provision, whether in a Decree-Law or in another normative diploma, does not detract from immunity. In reverse, it causes certain conditions, which would not need to be dealt with in the constitution, to be detailed. Note, for example, art. 14, of the National Tax Code, which deals with the conditions for an entity to be considered non-profit. While CF/88 grants, for example, immunity to non-profit educational institutions (art. 150, VI, "c", of CF / 88), complying with the requirements of the law, the infraconstitutional norm disciplines more minutely the enjoyment of immunity.

The aforementioned infraconstitutional diploma was only accepted by the constitution, and, as such, the standard incentives for its enjoyment are independent, given that the aforementioned diploma was received by the new constitutional order.

Roque Antônio Carrazza (2004) teaches the issue of tax incentives and clarifies possible confusions between them and exemptions:

> We should not confuse tax incentives (also called tax benefits or tax incentives) with tax exemptions. These are just one way of granting them. Tax incentives are in the field of extrafiscality, which, as Geraldo Ataliba teaches, is the use of tax instruments for non-fiscal but ordinary purposes (that is, to condition behaviors of virtual taxpayers, and not exactly to supply money public coffers). Through tax incentives, the taxing political person encourages taxpayers to do something that the legal system considers convenient, interesting or opportune (eg, installing industries in a poor region of the country). This objective is achieved by reducing or even eliminating the tax burden. Tax incentives are manifested either in the form of immunity (eg, immunity from ICMS on exports of industrialized products) or tax exemptions (eg, exemption from IPI on sales of eyeglasses). (CARRAZZA, 2004, p. 783).

In fact, for most authors, especially Professor Ives Gandra da Silva Martins, who was responsible for informal assistance to the Constitution's rapporteur, the entire system of rules that benefited the Manaus Free Trade Zone was raised to a constitutional status, not even being able to undergo constitutional amendments, given that, since they are immunities, they are considered fundamental rights of the taxpayer, and, pursuant to art. 60, §4, IV, of CF / 88, cannot be abolished.

## 5. INTERPRETATION ABOUT ICMS ON FREIGHT IN EXPORTS.

Above, the following premises were established: a) the Manaus Free Trade Zone is constitutional in nature; b) it reveals itself as an area of "intributability", which is characteristic of immunity; c) therefore, it is subject to a systemic interpretation, which takes into account integrated the constitutional principles, rules and objectives, which are its foundation to define the scope of application; d) the scope of application must be limited to sufficient for the constitutional foundation to be realized. With these bases, sufficient elements are gathered to adequately address the problem of this article: if the freight price is excluded from taxation when shipping goods to the Manaus Free Trade Zone.

The Superior Court of Justice consolidated the understanding that there is no ICMS, when the final destination of the goods is abroad. Art. 3, II, of Complementary Law No. 87/96, prescribes the following:

> Art. 3º The tax does not apply to:
>
> (...)
>
> II – operations and services that send goods abroad, including primary products and semi-finished industrialized products, or services;
>
> (...)

Analyzing the device in question, it appears that, in addition to the goods, the item refers to services (which, in the case in relief, is freight). Because freight is part of the price of the product, being its accessory, and if the product is immune in the sale, it would not be reasonable to tax the accessories, under penalty of including part of the sale.

The Superior Court of Justice ruled that if *the transport paid by the exporter is included in the price of the exported good, taxing transport in the national territory is equivalent to taxing the export operation itself, which goes against the spirit of LC 87/96 and the Federal Constitution itself* (EREsp 710.260/RO, Primeira Seção, Rel. Min. Eliana Calmon, DJe de 14.4.2008).

Following the same path:

> TAX. CIVIL PROCEDURE. REGIONAL APPEAL ON SPECIAL APPEAL. ICMS. EXPORTS THAT DESTROY GOODS ABROAD. NO TAX INCIDENCE IN THE PROVISION OF INTERESTADUAL SERVICE. PLEASE NOT PROVIDED. 1. "The precedents of jurisprudence of this Superior Court affirm that the ICMS is not levied on interstate transportation services for goods destined abroad, since article 3, II, of LC No. 87/96 has the purpose of exempting foreign trade as presupposition for national development with the reduction of regional inequalities due to the primacy of work "(AgRg in REsp 1,301,482/MS, Min. HUMBERTO MARTINS, Second Class, DJe 16/5/13). 2. Regulatory appeal not provided. (**AgRg no REsp 1292197/SC**, Rel. Ministro ARNALDO ESTEVES LIMA, PRIMEIRA TURMA, julgado em 03/09/2013, DJe 10/09/2013)

In the same way:

> CIVIL AND TAX PROCEDURE. ICMS. TRANSPORT OF GOODS INTENDED ABROAD. EXEMPTION. 1. The orientation of the First Section of the STJ was pacified in the sense that "Article 3, II of LC 87/96 provided that ICMS is not

> levied on operations and services that send goods abroad, so that it is covered by the exemption interstate transportation of these goods "," under the teleological aspect, the purpose of the tax exemption is to make the Brazilian product more competitive in the international market ". Thus, "if the transport paid by the exporter is included in the price of the exported good, taxing transport in the national territory is equivalent to taxing the export operation itself, which goes against the spirit of LC 87/96 and the Federal Constitution" (EREsp 710.260 /RO, First Section, Min. Report Eliana Calmon, DJe of 4.14.2008). 2. Regulatory Appeal not provided. (**AgRg no REsp 1379148/SC**, Rel. Ministro HERMAN BENJAMIN, SEGUNDA TURMA, julgado em 15/08/2013, DJe 16/09/2013)

In this scenario, according to the Superior Court of Justice, when the operations are destined abroad, there is no need to talk about the incidence of ICMS on freight.

Returning to the specific theme, if, when goods are exported "abroad", ICMS does not apply to freight, as the Manaus Free Trade Zone is equated, for all tax purposes, to an export, there would also be no reason for its charge. In this case, the basis of the tax benefit of the Manaus Free Trade Zone coincides, in part, with the tax exemption of exports: making the national product attractive abroad, in order to develop domestic production.

At ZFM, the benefits are aimed at fostering productive activity in the region, in order to ensure socioeconomic development. In the specific situation, socioeconomic development is linked to two essential objectives for the Brazilian federation: reduction of regional inequalities and national sovereignty. The occupation of the region, by the State and by society, the creation of jobs, the insertion of the region in the international and national consumption route, the improvement of the quality of life and the expansion of urban equipment resulting from territorial occupation and economic development fundamental to cooperative federalism, which is intended to be egalitarian. Cooperation between federated entities implies the distribution of wealth so that fundamental rights can be guaranteed to Brazilians from any location and region.

As a result, even if the infraconstitutional norm did not expressly exempt services, in which freight is included, because it is dealing with immunity, with broader interpretation, it would be up to the interpreter, analyzing the normative framework of the constitution, to extract the interpretation in the sense that the incidence was undue. The constituent's objective, when raising the Manaus Free Trade Zone to constitutional status, was to foster it, through tax incentives, so that there was greater development, occupation and guarantee of national sovereignty, through the protection of borders.

It should be noted that the rule in question, which removes the incidence of freight, arises from the constitutional command itself, which exempts exports, with respect to the ICMS. If the operations involving the Manaus Free Trade Zone are equivalent, for all tax purposes, to an export, it should also not suffer such incidence.

This time, in the manner in which the STF has already decided, the tax benefits that constitute the Manaus Free Trade Zone must be interpreted as widely as possible, in order to attract the factors of production and consumption to the region and enable the its human, social and economic development. Therefore, it must be considered that freight is also free of taxation, as it occurs in export operations: the reasons for the non-imposition of ICMS in the ZFM are stronger and more complex than in real export operations, as they involve crucial objectives to the equanimity justice characteristic of the federative dynamic.

## 6. CONCLUSION

The Manaus Free Trade Zone has constitutional rules, more specifically in art. 40, of the Transitional Constitutional Provisions Act. Even though expressly provided for in Decree-Law Nº. 288/67, where operations for ZFM are equated with export, for all tax purposes, the basis today arises from the Constitution, and not the other way around.

This stems from a systematic interpretation of the legal system in force, that is to say, joining the normative contents spread throughout the legal system dealing with the Manaus Free Trade Zone, namely its tax incentives, to investigate the basis for including the tax favors granted to the companies that settled there.

As it is extracted from the own teachings of Ives Gandra da Silva Martins, quite mentioned in the present work, for having been a collaborator of the rapporteur of the National Constituent Assembly, the incentives given to companies in the Manaus Free Trade Zone have constitutional status, and, therefore, must be treated as immunities, not exemptions.

The distinguishing feature between immunities and exemptions, mainly, is the normative vehicle in which the tax benefit is provided. When it comes to the Constitution, we talk about immunity, when taking care of the infraconstitutional rule, we conclude that there is an exemption institute.

In addition, the second striking feature, and perhaps as important as the previous one, is the way in which each of the two fiscal favors is interpreted. As seen, immunity, as it deals with the fundamental right of the taxpayer, must be interpreted as such, that is to say, in an expansive way, to give maximum effectiveness to such rights, whereas the exemption, by express determination of the National Tax Code, must be interpreted restrictively.

In this scenario, as the interpretation methodology was used here, it was concluded that, through a systematic interpretation, the Manaus Free Zone deals with tax immunities, with regard to its incentives, and, for all tax purposes, equating such operations with exports.

When it comes to the ICMS levied on freight, the national courts have understood that there can be no collection, when the final destination of the goods is abroad (export). If the operation for the Manaus Free Trade Zone is to be equated with an export, there is no mention of the ICMS levy on freight, when goods are shipped to the Manaus Free Trade Zone.

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# DEVELOPMENT THROUGH FREEDOM: A VISION OF INDIVIDUAL AND ECONOMIC FREEDOM AS PROMOTERS OF DEVELOPMENT

## DESENVOLVIMENTO PELA LIBERDADE: UMA VISÃO DA LIBERDADE INDIVIDUAL E ECONÔMICA COMO PROMOTORAS DO DESENVOLVIMENTO

GHILHERME PRADO BOHAC DE HARO[1]
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## ABSTRACT

This paper discusses freedom as a direct instrument for achieving economic development. It presents an analysis of the concept of development, as well as its related concepts. It focuses specifically on the correlation of the emancipation of the individual in the face of the generation of wealth with personal economic freedom. Given the current Brazilian and world scenario, it aims to discuss characteristics that contribute to the elucidation of the economic context, given the comparison between countries with different degrees of individual freedom. That is, it analyzes the individual's freedom and economic development, and accumulation of wealth. The main method used is the inductive one to reach a general conclusion based on the specific analysis of each country analyzed. In addition, it uses bibliographic review and data analysis. As a result, there is a high and high degree between the level of economic development of a nation and the level of citizen freedom.

**Keywords:** Development. Individualism. Economic Freedom. Fundamental Law.

## RESUMO

*O presente trabalho discorre sobre a liberdade como instrumento direto de alcance do desenvolvimento econômico. Apresenta análise sobre o conceito de desenvolvimento, bem como, seus conceitos correlatos. Se detém especificamente acerca da correlação da emancipação do indivíduo frente a geração de riquezas tida com a liberdade econômica individual. Ante o cenário brasileiro e mundial atual, objetiva discutir características que contribuam para a elucidação do contexto econômico como um todo, tendo em vista a comparação entre países com graus diversos de liberdade individual. Ou seja, faz uma análise entre liberdade do indivíduo e o desenvolvimento econômico e acúmulo de riquezas. O principal método empregado é o indutivo, em especial, para se alcançar uma conclusão geral com base na análise específica de cada país analisado. Além disso, utiliza-se da revisão bibliográfica e análise de dados. Como resultado verifica-se que existe uma correlação e alto grau entre o nível de desenvolvimento econômico de uma nação e o nível de liberdade do cidadão.*

**Palavras-chave:** *Desenvolvimento. Individualismo. Liberdade Econômica. Direito Fundamental.*

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# 1. INTRODUCTION

This study aims to contribute to the theoretical debate on the elements that foster national and regional development, especially the fundamental right of freedom, through a dialectical interpretation that links the expansion of freedom to a perspective of greater development.

In particular, the correlation between the increase in individual economic freedom and the consequent turnover of the market generated by the private initiative in which the free exercise of competition was provided will be taken into account.

To offer elements that can support the object of this study, this article used bibliographic research, legal texts, and analysis of data pertinent to the subject, in addition to the case study related to the ranking of the countries of the globe elaborated considering freedom as a development factor, the conclusions obtained from the research were presented through inductive reasoning.

Thus, the concept of development and related issues is discussed. Next, the present study discusses freedom as a fundamental right of the individual and, more specifically, economic freedom, starting from the hypothesis of their need for private initiative to act in the market and assist in the development of that region.

Subsequently, the statistics that corroborate the present hypothesis, that freedom promotes development, use data and indexes that are consistent with the proposition of this study.

Next, it discusses how human freedoms and, in particular, individual economic freedom, support the development and influence the reduction of public measures, providing a denationalization, as well as the promotion of private institutions, private initiative.

# 2. DEVELOPMENT AND ITS RELATED CONCEPTS

The concept of development is closely linked to a gradual process from a lower, simpler state or condition to a higher, more complex, improved level. Usually, the idea of development has a significant space in the field of economic and social sciences, especially the senses of human development and economic development.

Human development, according to the lesson of Welzel et al. (2003) finds its very ancient roots in Philosophy and Economic Theory, being the subject of studies by thinkers such as Aristotle, Adam Smith, and Karl Marx. The relevance of this theory reached its peak in the 1980s, with the new perspective of human capabilities, elaborated by Amartya Sen, yielding him years later, in 1998, the Nobel Prize in Economics (ANAND; SEN, 2000).

According to reports made available by the United Nations Development Program (UNDP, 2009), the concepts of equity, sustainability, productivity, empowerment, cooperation, and security are the basic pillars of the ideal of human development, concepts understood by the United Nations body as (pp. IV-X – "Overview"):

> - Equity: the idea of equality and justice for each individual, between men and women, in all aspects of the human context;

- Sustainability: the notion that everyone has the right to obtain means of subsistence by which they can guarantee decent living conditions and access to a better distribution of the wealth produced;

- Productivity: full participation in the process of generating wealth, implying the development of public policies and social programs more efficient towards this objective;

- Empowerment: the freedom of each individual to direct their lives in the way that suits them best, with full autonomy;

- Cooperation: participation and belonging to communities and groups as a means of mutual development and cultural enrichment;

- Safety: offering development opportunities freely and safely, ensuring that individuals will not be suppressed later.

Among the several forms of human development measurement, the Human Development Index (HDI), elaborated by the United Nations Development Program, the United Nations body for the promotion of human development and the eradication of poverty, emerges as the most well-known.

This is a statistical index composed of three indicators: life expectancy, average education, and per capita income, used to classify countries into four levels of development, for which values between 0 and 1 are assigned, and the closer to 1 the value assigned, the higher the level of development of that country (UNDP, 2009), it was developed by economists Mahbub ul Haq, Gustav Ranis and Meghnad Desai in the 1990s and has since been adopted and perfected by the United Nations (STANTON, 2007).

It is related to the concept of human development, the notion of economic development, here understood as the process by which a nation progresses and develops in its economic, political, and well-being aspects of its population, although several other understandings about this theory of development have been elaborated, especially after World War II (MANSEL; WEHN, 1998),

In the field of economic sciences, the theory of economic development emerges as an unfolding of the study of economics itself but is directed to observe and analyze the wealth produced by a nation, that is, its Gross Domestic Product (GDP), and how economic growth and expansion affect aspects such as life expectancy, nutrition, education, among other socioeconomic indicators, generating theoretical interpretations about how countries thrive (SEN, 1983).

It is understood, through this theory, that the development of a nation is generally the result of economic growth through higher productivity (KUZNETS, 1966), functional political systems that are aligned with the expectations of its citizens (SHEPSLE; BONCHEK, 2010), the extension and guarantee of rights to all social groups (BAYLY, 2008), and the functioning of institutions and organizations that can provide public services with greater efficiency and quality (BRÄUTIGAM, 2002).

In a sense, such processes describe the administrative capacity and efficiency of a State, through economic development policies aimed at an attempt to solve problems related to such issues (PRITCHET et al, 2013).

Among the theories of economic and social development, in Brazilian political and economic history, the developmental theory has reached a level of relevance.

Developmentalism means the notion that the best path for the development of underdeveloped countries is through strong state intervention to foster a varied internal market and the imposition of a high tax burden on imports, to protect the internal economy (SMITH, 1985).

Also according to Smith (1985), developmentalism reached its peak between the post-War and the 1960s, having been adopted as an economic policy by many countries in Latin America, Africa, and Asia, falling into decline in the following decade, in the face of the failures and economic crises generated by such policies, although it has been revived by some countries, like Brazil, under Dilma Rousseff (2011-2016), after the global financial crisis in 2008.

If for developmental authors the State is fundamental, for others the failure of developmentalism is mainly due to the denial of autonomy and freedom to the market, for creating an internal economy highly directed by the State, sometimes associated with ideological discourse and nationalist ideas, sometimes resulting in major economic crises (EASTERLY, 2007).

As initially stated, the idea of development is somehow related to the concepts of progress and evolution.

When applied to the human context, the notion of progress means a historical and continuous movement of a society to an ever higher and ideal level, through advances in technology, science, and society, which result in an improvement in human conditions, strongly linked to the concept of modernization (APPLEBY et al., 1995).

For sociologist Nisbet (1980, p. 4), "*in the last three thousand years, no idea has had greater importance for Western Civilization than the idea of Progress*", also pointing out that the valorization of the past, the nobility of Western Civilization, the value of economic and technological growth, the faith in reason and the academic and scientific knowledge obtained by it, and what he calls the intrinsic importance of life consists of five "crucial" premises for this idea, at least for the Western world.

The concept of evolution has also been applied to theories of human development, generating what is sometimes referred to as social evolutionism and evolutionary economy.

Social evolutionism is understood as the set of ideas and theories that encompass aspects of biology, anthropology, and economics to assert that societies gradually move, from their origin, from a primitive condition to civilization (CERQUEIRA, 2000, p. 13).

Evolutionary economics, in turn, is a branch of economic science inspired by the evolutionary theories of Biology, applying concepts of this science, such as interdependence, competition, growth, structural changes, and restriction of resources for the construction of its thought (HODGSON, 1993).

The evolutionary economy directs its efforts to study the economy as a flow of interdependent processes, whose internal interactions generate changes and improvements, such as a living organism, observing the implications and consequences of these changes (WITT, 2008).

It is denoted, as soon as the concept of development, and the related meanings, play a central role in the study and observation of human societies, especially in politics and the economy, being an indispensable element for the understanding of this study. Discussing the importance and concept of Development is departed for the analysis of Freedom.

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## 3. FREEDOM

Preliminarily, to elucidate the theme of this article, it is necessary to briefly discuss the concept of freedom, also called subjective public right, present in the performance of both the State and the citizen.

The idea of freedom comes from the beginning, in Ancient Rome, freedom was almost synonymous with humanity, once, one who was not free was considered a slave, making up a mere object in society, as was the importance of this institute. That is, the ability to be free granted the individual the "libertatis status". In this sense, Jellinek has:

> Al membro dello Stato appartiene perciò uno status, nel qual egli è signore assoluto, a sfera libera dallo Stato, una sfera che esclude l' ímperium. Questa è la sfera della libertà individuale, dello negative status, dello status libertatis, nella quale gli scopi strettamente individuali sono adempiuti mediante la libera attività dell'individuo. [3] (JELLINEK,1912, p. 97)

It can be inserted, therefore, that the concept of free man had in Ancient Rome has changed over the years, however, the essence remains the same. Freedom represents the individual's ability to act according to his or her will and right, whereas the State cannot (and should not) interfere in this individual sphere.

The power to be free prevents the State from acting deliberately according to its designs, that is, in that, despite being able to establish parameters of behavior, its activity cannot be obscured by individual freedom.

The Brazilian Federal Constitution, right in the preamble, has:

> We, representatives of the Brazilian people, gathered in a National Constituent Assembly to establish a Democratic State, aimed at ensuring the exercise of social and individual rights, freedom, security, well-being, development, equality, and justice as supreme values of a fraternal, pluralistic and unprejudiced society, founded on social and committed harmony, in the internal and international order, with the peaceful settlement of the controversies, we promulgated, under the protection of God, the following Constitution of the Federative Republic of Brazil (BRASIL, 1988).

Also, in title II, "Of Fundamental Rights and Guarantees", chapter I "Of Individual and Collective Rights and Duties", Article 5 of the aforementioned Constitution, we have that "*all are equal before the law, without distinction of any nature, guaranteeing to Brazilians and foreigners residing in the country the inviolability of the right to life, freedom, equality, security, and property*".

The Brazilian Magna Carta established, early in its prepositions, freedom as a fundamental right. In the same text of the law, there are numerous mentions of the expression "freedom", demonstrating the application of such an institute in the most varied facets of human life.

Thus, considering the wife, it is now about Economic Freedom, a strand directly related to the development of a nation/region.

3 The member of the State is therefore responsible for status, in which he is absolute lord, a free sphere of the State, a sphere that excludes the *Imperium*. This is the sphere of individual freedom, negative status, status *libertatis*, in which individual scopes are fulfilled through the free activity of this individual.

## 3.1 ECONOMIC FREEDOM

The idea of economic freedom has been greatly developed with the new wave of the international economic order that has once again brought to light liberal ideals, updated to the political context, called "neoliberal politics". This can be understood as a socioeconomic doctrinal current that values the defense of individual freedoms to the detriment of any (or little) state intervention.

Regarding the neoliberal ideology, Ferrer states that[4]:

> The neoliberal ideology is the political expression of the process of globalization. Since the 1970s, an ideological movement has been gaining space worldwide, neoliberalism. This model of political and economic orientation, which constitutes the political expression of globalization, is characterized by an opposition to the interventionist State and social welfare. Initially implemented by Margaret thatcher's government (1979) and later by Ronald Reagan (1981), the neoliberal project of government acquired a worldwide scope, becoming an integral part of the process of globalization of capital. (FERRER,2001, p. 19)

Still, in the words of Octavian Ianni (1997, p. 139):

> Neoliberalism is quite an expression of the political economy of a global society. It was forged in the fight against statesmanship, planning, protectionism, socialism, in defense of the market economy, of economic freedom conceived as the foundation of political freedom, a condition of collective and individual prosperity. (IANNI, 1997, p. 139)

Thus, with neoliberalism, Economic Freedom is treated as a subjective right of the individual who, by acting according to their principles, would contribute to their productivity, generating, consequently, greater collective economic development.

Thus, in Sousa's words about Economic Liberalism, it is said that:

> Economic Liberalism can be understood as a system of expansion of freedoms to the extent that it determines free enterprise as an essential principle for the survival of the market; it is from the free initiative, free exchange, division of labor, and individual efforts that economic growth and collective well-being are promoted. It is the individual interest and the freedom to exercise this interest that generates social well-being since there is a maximization of the efficiency of each individual. (SOUSA, 2007, p. 36)

Economic freedom determines the discretion that each individual has to work, invest in himself or an enterprise, accumulate capital, and develop his business, resulting in the turnover of the economic market that benefits the collective.

In a way, economic freedom allows the person to carry out his activity without external intervention (of the State, of too much bureaucracy and cast regulations, the high tax burden, or a hindered legal system that drags decision-making in a certain technical contour), based on the dictates exclusively of the market, causing, in the end, all users of the economy of that place to benefit from having access to a quality product or service, purchased at a reasonable price.

It is important to note that, in times of crisis and economic recession, liberal ideas gain greater expression and favorable positions in academia and society in general.

4 Expressare widely criticised, in particular, for not having a neoliberal school.

Suppliers and consumers make use of the economic freedom that fosters the market for both. Regarding consumption, there will be more companies providing such a product (free competition) which, consequently, increases the attractiveness, since the supplier needs to captivate its customer. On the other hand, for the supplier, the freedom economy provides greater access to the singularities that make it grow, allowing it to compete freely with other businesses, ensuring profit.

## 4. THE CORRELATION OF FREEDOM WITH FULL DEVELOPMENT

*The Heritage Foundation* is an American organization that has as its mission: "*formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense*". [5]That is, this foundation has the scope, basically, of elaboration and explanation of market policies capable of fostering the economy considering the limitation of state power and the increase of individual freedom.

To this end, the *Heritage Foundation* has established research with the creation of an index that correlates freedom to develop.

The Economic Freedom Index, proposed by *the Heritage Foundation*, is based on the observation of four indexes that, when analyzed together, can define the degree of freedom of the economy of a local (country, state) and its development index. The indexes mentioned comprise a) how the law is structured in that locality; b) the balance between the accumulation of wealth and the tax burden; c) the degree of state intervention; and, finally, (d) the external opening limit for trade.

According to Uliano (2019), the criteria established by the *Heritage Foundation* can be defined as:

> a) Rule of Law (Rule of Law): in which it examines respect for property rights; (a) judicial efficiency by ensuring compliance with rights and contracts; and the Integrity of Government (compliance with the Constitution and laws and absence of corruption);
>
> b) Government weight: tax burden; the proportion of the national wealth consumed by the State; and fiscal balance;
>
> c) Degree of State Interventionism: freedom to undertake, investigating the difficulty to open, operate and close a company (from the number of bureaucratic procedures required, average amount of waiting days, and cost, whether to open, license the operation or close an enterprise); level of state intervention in employment contracts, reducing their freedom; and monetary freedom, i.e., absence of inflation and coercive control over prices;

5 *The Heritage Foundation's mission is to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense*. Available in: https://www.heritage.org/about-heritage/mission. Accessed June 25, 201.

> d) Trade opening: Freedom of Foreign Trade (absence of tariff and non-tariff barriers to import and export); Freedom of Investment (no legal ties to move the capital from one sector to another and across borders); and Financial Freedom (independence of the banking sector from the State).

Thus, the result obtained by this methodology is analyzed. The city of Hong Kong (special administrative region of the People's Republic of China) occupies the first place (in Asia and general) among the freest and consequently economically developed countries. Such is its supremacy of the city that it has maintained the same position for two years, which the *Heritage Foundation* highlights:

> Hong Kong became a Special Administrative Region of the People's Republic of China in 1997. Carrie Lam began a five-year term as chief executive in 2017. Under the "one country, two systems" agreement, China granted Hong Kong a high degree of autonomy in all matters except foreign and defense policy for 50 years. This policy has been strained by PRC political interference in recent years, and the Hong Kong government's decision in 2018 to ban a pro-independence party led to protests and raised concerns about prospects for freedom of speech and association in the SAR. Despite the political unrest, Hong Kong's open and market-driven economy continues to flourish, increasingly integrated with the mainland through trade, tourism, and financial links.[6]

That is, considering the above exposure, it turns out that at the time that Hong Kong acquired greater freedom (characterized by the autonomy of the government) the city flourished economically, guaranteeing its first place in the ranking.

Among the countries that hold the best rankings, concerning the degree of greater freedom and economic prosperity, in which the ranking grades range from 80 to 100 (100 being a free and developed state), six countries occupied the top in 2018, falling into the category "free", which are:

Table 1: Economic Freedom Index 2018 - " *Heritage Foundation*"

| Rank | Country | Punctuation | Change |
|---|---|---|---|
| 1 | Hong Kong | 90,2 | 0,0 |
| 2 | Singapore | 89,4 | +0,6 |
| 3 | New Zealand | 84,2 | +0,2 |
| 4 | Switzerland | 81,9 | +0,2 |
| 5 | Australia | 80,9 | 0,0 |
| 6 | Ireland | 80,5 | +0,1 |

Source: Own elaboration from <https://www.heritage.org/index/ranking>

6 Hong Kong became a Special Administrative Region of the People's Republic of China in 1997. Carrie Lam began a five-year term as executive director in 2017. Under agreement "One Country Two systems", China has granted Hong Kong a high degree of autonomy in all matters except foreign and defense policy for 50 years. This policy has been undermined by political interference from the PRC in recent years, and the Hong Kong government's decision in 2018 to ban a pro-independence party has led to protests and raised concerns about the future prospects of freedom of expression and association in the SAR. Despite the political upheave, the open and market-facing economy of Hong Kong continues to flourish, increasingly integrated with the mainland through trade, tourism and financial connections. Available in: https://www.heritage.org/index/country/hongkong. Accessed June 26, 2019 at 8:13 am.

In 2019, the ranking changed, and the economic freedom operated in four other countries made possible it is framing in the list of regions with greater economic freedom and, consequently, greater development, being:

Table 2: Economic Freedom Index 2019 - " *Heritage Foundation*"

| Rank | Country | Punctuation | Change |
|---|---|---|---|
| 1 | Hong Kong | 90,2 | 0,0 |
| 2 | Singapore | 89,4 | +0,0 |
| 3 | New Zealand | 84,4 | +0,2 |
| 4 | Switzerland | 81,9 | +0,0 |
| 5 | Australia | 80,9 | 0,0 |
| 6 | Ireland | 80,5 | +0,1 |
| 7 | United Kingdom | 89,4 | -- |
| 8 | Canada | 84,4 | -- |
| 9 | Emirates Arabic | 81,9 | -- |
| 10 | Taiwan | 80.9 | -- |

Source: Own elaboration from <https://aleconomico.org.br/ranking-de-liberdade-economica-2019>

On the other hand, some countries continuously occupy the last place, with variable scores from 49.9 to 40, characterized as "repressed", they are:

Table 3: Economic Freedom Index 2019 - worst countries - " *Heritage Foundation*"

| Rank | Country | Punctuation | Change |
|---|---|---|---|
| 170 | Ecuador | 46,9 | -1,6 |
| 171 | Algeria | 44,2 | -3,9 |
| 172 | East Timor | 44,2 | -3,9 |
| 173 | Bolivia | 42,3 | -1,8 |
| 174 | Equatorial Guinea | 41,0 | -1,0 |
| 175 | Zimbabwe | 40,4 | -3,6 |
| 176 | Republic of the Congo | 39,7 | -0,8 |
| 177 | Eritrea | 38,9 | -2,8 |
| 178 | Cuba | 27,8 | -4,1 |
| 179 | Venezuela | 25,9 | 0,7 |
| 180 | North Korea | 5,9 | +0,1 |

Source: Own elaboration from <https://www.heritage.org/index/ranking>

It is verified that the countries listed above, which occupy the last positions in the economic freedom ranking are still economically poorly developed countries, with low quality of life and per capita income. From this angle, it is also highlighted that countries listed as Venezuela,

North Korea, Cuba, and Bolivia are still internationally known for their totalitarian and centralized governments.

That is, economic freedom is connected by governments that have high control of society making it impossible for these regions to develop fully (many of them with wealthy natural resources that would contribute to internal growth and external negotiations).

The other countries of the globe are classified as Mostly Free (79.9 to 70), Moderately Free (69.9 to 60), Mostly Unfree (59.9 to 50), and, finally, Not Ranked. Brazil is currently categorized as "Mostly Unfree", with a score of 51.9. The foundation of Brazil has:

> Brazil's economic freedom score is 51.9, making its economy the 150th freest in the 2019 Index. Its overall score has increased by 0.5 points, with improvements in labor freedom and government spending outpacing declines in judicial effectiveness and government integrity. Brazil is ranked 27th among 32 countries in the Americas region, and its overall score is below the regional and world averages.[7]

It can be inserted, therefore, that Brazil does not occupy a good position in the world ranking, being surpassed by 149 countries. The centralized Brazilian government, with excessive tax and bureaucratic burden, undermines the economic freedom of the private sector, resulting in the almost shutdown (i.e., derisory growth) of the economy.

According to this analysis, Brazil should make room for private initiatives (Brazilian companies and entrepreneurs) to act in a way that will chance opportunities, leading to full economic development, based on freedom of choice. Although this work discusses it, neither concerning the text nor in the possible results to be achieved, the Law of Economic Freedom, recently approved, has as defense declared by the Executive Branch precisely the above.

Foreign investments should be encouraged (and not hindered) since they represent the obvious injection of capital in the country, especially direct investments, those that are applied directly in the productive activity. In the same vein, spending on government needs to be decreased. Finally, debureaucratization and lower interest rates will allow the country to grow at full capacity.

Interest rates have already been reduced to the lowest levels the country has had, but fiscal policy, legal uncertainty, and bureaucracy are still elements that hinder foreign investment.

As stated above, Brazil has a score of 51.9, an index lower than the global average, and the average of the Americas was 59.6 and the average overall score was 60.8 (Economic Freedom Ranking, 2019).

To corroborate the one already presented, the correlation between economic freedom and GDP per capita is presented. [8]

7 Brazil's economic freedom score is 51.9, making its economy the 150th most free in the 2019 Index. His overall score increased by 0.5 points, with improvements in freedom of labor and government spending outscoring the falls in judicial effectiveness and government integrity. Brazil ranks 27th out of 32 countries in the Americas region, and its overall score is below regional and global averages. Available in: https://www.heritage.org/index/country/brazil. Accessed June 26, 2019, at 7:59 am.

8 The data presented uses the concept of GDP - *Gross Domestic Product per capita*, corresponding to GDP per capita.

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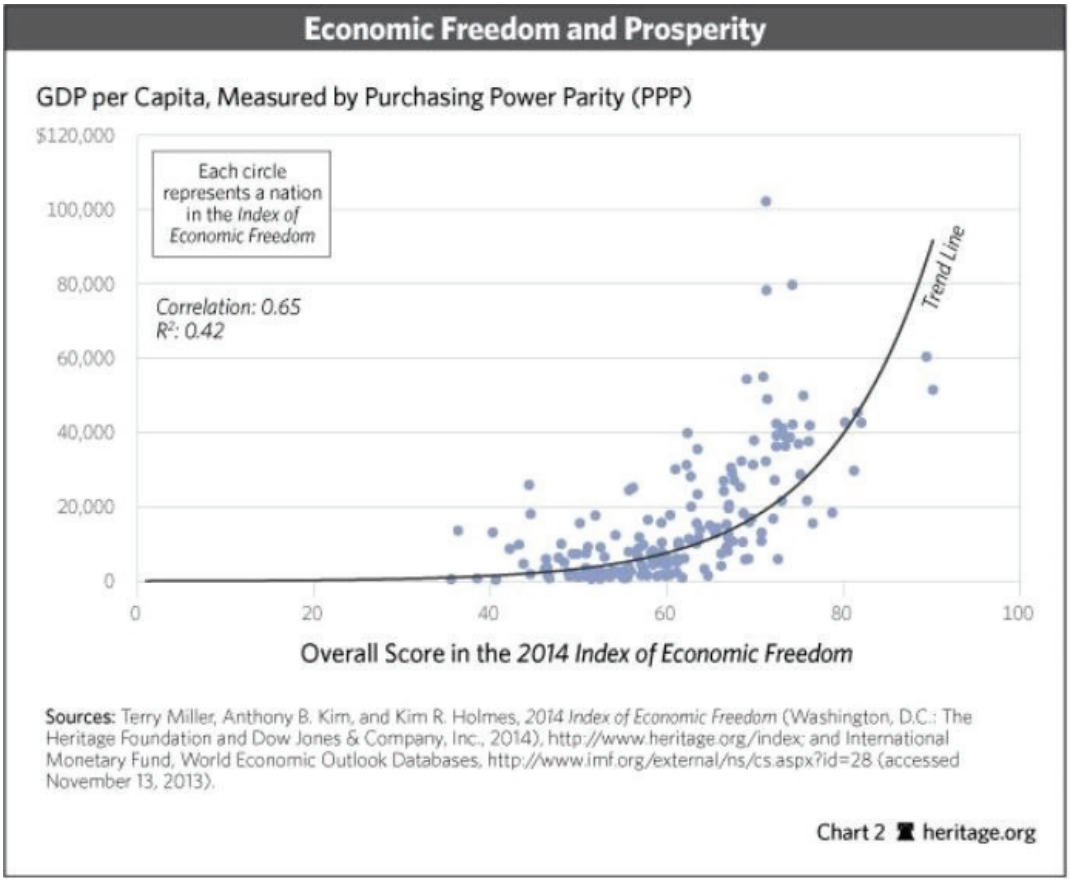
**Figure 1:** Economic Freedom and GDP per capita




Source: National Investor, 2019.

Considering the graph presented, it appears that there is a clear coalition between the high rate of economic freedom and the growth of GDP (Gross Domestic Product), which is about economic growth. Indeed, the increase in the GDP index shows that the economy of that region is expanding, promoting the accumulation of wealth.

Thus, it is subdued that regions with greater economic freedom will automatically have more income to invest in the country and the quality of life of its inhabitants, ensuring greater economic flow capable of corroborating the expansion of local development. Gdp growth is still needed to improve living conditions for the entire population.

Presented the indexes, graphs, and statements that correlate economic freedom with development, it is now talked about this relationship.

## 5. DEVELOPMENT FOR FREEDOM

Freedom, as outlined above, is one of the fundamental rights of the human being (since the beginning) because freedom unleashes the existence of other rights.

The postulates of physiocracy, in complying with liberal determinations, became the first economic school to disseminate economic freedom, in this step, taken as freedom of enterprise, competition, and free enterprise.

Sousa (2007, p. 33) talks about Physiocracy and its pioneering work in addressing freedom and individualism as drivers of development, in its words:

> The physiocrats, French citizens led by François Quesnay, instilled studies on the economic life of the time (between 1756 and 1778). The criticism embodied in his thinking (and the Fisiocracia) was sustained mainly due to the heavy tax burden that was launched against the peasant class and the regulations that prevented the flow and circulation of agricultural products, both for export and internally (therefore restricting the freedom of enterprise and the market). (...) While suggesting a liberal state position, the physiocrats centralized the idea of economic opulence in agricultural production, because they believed that only agriculture produced enough goods to expand wealth. (...) For the physiocrats, the "excess over subsistence" should be commercialized because as long as everyone produced only what was necessary to survive, there would be homogeneous poverty; therefore, those who had superfluous products should be exchanged, and it is this excess agricultural production that drives trade and government stability.

The physiocrat ideal demonstrated that as long as individuals continued to act according to the standards previously established by the State and society, there would be no development. Thus, he began to discuss the correlation between development and freedom, or rather, to observe that the progressive increase in individual freedom (which gives rise to choices) generates development. Years later, this correlation was also noted by the Brazilian legislature, which, according to Santiago:

> In the hope of achieving and guaranteeing economic development, the 1988 Constituent Group inserted, in item IV, art. 1, and the caput, of art. 170, the free initiative, at the same time the foundation of the Republic and the basic principle of the economic and financial order, both in its economic aspect, as well as in the freedom of development of companies. (SANTIAGO, 2017, p. 102)

It is understood that the expansion of freedom shall favor the achievement of individual goals and society because it shall allow the human being to choose according to his deliberation, without conceiving paths previously outlined by an institute, such as the State.

The absence of freedom causes individuals to have their actions predetermined, that is, entrepreneurs cannot innovate and end up presenting the same quality of service, thus, with the low supply (or wide offer of similar services), competition is not generated, the market is not encouraged and, consequently, there is little (or no) economic development.

Depriving freedom is limiting the individual, preventing the cause of development. Sen (2000, p. 21/23) developed the thesis that the promotion of individual freedom is a major factor in the development, *so, in his words, "to be generically against the markets would be almost as stowed as being generically against the conversation between people*".

Still, in Sen's words, it is noteworthy that:

> Under a dictatorial regime, people don't have to think – they don't have to choose – they don't have to make decisions or give their consent. All you have to do is obey. [...] In contrast, democracy cannot survive without civic virtue.

> The political challenge for people around the world today is not just to replace authoritarian regimes with democratic ones. It is also to make democracy work for ordinary people. (SEM, 2000, p. 183)

It is understood here that economic freedom will bring economic growth. Ferrer (2001, p. 24) presents the liberal view that denationalization, with consequent greater freedom to the individual, positively influences the economic and right scenario, ensuring a more accelerated development:

> Thus, one of the main components of the neoliberal ideology is the denationalization of the economy, because, without the regulation of state power, the market maintains the natural order of the system. This determination of deregulation is not only manifested at the economic level but also in the world of work with the flexibilization of labor relations, which means opposition to state protectionism in labor issues. According to the neoliberal ideal, the free negotiation between employers and employers would bring benefits not only to workers, because they would have greater freedom of choice, but mainly to the process of reproduction and accumulation of capital, which would have greater freedom in contractual relations. According to the postulates of the neoliberal program, the solution would be the minimization of the State, that is, to reduce its intervention in the market, so that it can self-regulate, as well as the reduction of public spending on the social sector, transferring this responsibility to the private sector. Such measures, together with fiscal reforms and monetary stabilization, would bring the necessary conditions for effective economic growth.

Thus, in liberal thinking, the state's action should not be focused on the regulation of private activity, restricting it and, consequently, carving out the economic growth of the place. But yes, state activity should give rise to the development of public policies that directly influence the construction and increase of personal freedoms.

In other words, the public policies developed by the State, in addition to generating an impact on the personal income of the individual, should also promote personal freedom, through social services that empower the human being to enter and contribute to the market.

Having said that, it is perceived that the state's action should not be braked, on the other hand, it must be focused, concomitantly, on the policies of growth and expansion of individual capacities (PINHEIRO, 2012, p. 35).

Furthermore, about freedom, it is worthwhile how much this right influences the resourcefulness of entrepreneurship and the search for innovation. A more open society, based on the absence of strong state intervention, as well as promoting individual freedoms, promotes technological (and, consequently) economic progress. The search for innovations has always been the object of human will (we mention, for example, the invention of the wheel, the electric motor, the lamp, the computer), since, from the beginning, man develops new techniques and instruments to facilitate his own life.

In a way, the burden of technological innovation should not be directed to the State, but, according to the company, delivered to individuals practicing private initiatives to develop themselves and their companies. Two years ago, it was estimated that 700 (seven hundred) scientific and technological research laboratories would be owned and responsible for the State, which insists on providing services that the private sector would be fully able to offer (CEDRO Technologies, 2017).

The privatization of the aforementioned services (scientific and technological research) would abolish the subsidies offered by the State to large industries (such as oil and aerospace). Thus, without state restrictions (such as limited budget, time-consuming and bureaucratic purchasing process, civil service rules) companies could give their creativity, reaching the technology market and operating according to the rules of competitiveness of the market.

Hong Kong and New Zealand are examples of economic freedom. Mctigue (2018) presents data from New Zealand to show how the absence of economic freedom was harmful to the country in the 1980s.

The countries of the globe must seek not only the best market conditions for their society but also the insertion within the world competitiveness.

## 6. FINAL CONSIDERATIONS

Given the above, it is inferable that, regardless of theories and classifications about freedom, this, when allowed and encouraged to individuals of a society, promotes collective development. In general terms, freedom connects and encourages individual action that reaches the collective level.

In this way, the mitigation of freedom is harmful to an individual (who will have his right dismantled) and to society, which will not reap the benefits of economic development and quality of life provided by free competition and initiatives that are given thanks to freedom of operation.

The individual must be free to operate according to his benefit and that of his company, the exercise of state activity, in these cases, should be minimal, with almost no interference of the State in individual activities (such as, for example, low regulation, debureaucratization, reduction of the tax burden, adoption of public training measures).

In any case, it is highlighted that denationalization does not impose (or culminates) in the elimination of the State, but rather in the minimum regulation of private activities, allowing free competition and the performance of private initiative as a driver of economic development.

It was found that there is a high rate of correlation between freedom and development, since according to graphs, studies, and rankings, the promotion of individual and economic freedom provides greater development for the free region, on the other hand, those who have their freedom stagnated stagnate in economic growth and have a decline in economic and social indices.

It is also emphasized that different from what is usually believed, the overlap of private interests, today, favors collective well-being because entrepreneurs when poring on their growth end up, consequently, improving market conditions by promoting greater quality of service and products, which contribute to the well-being of society.

It can be seen, therefore, from all the above that freedom is driving the promotion of new technologies, entrepreneurship, insertion in the world market, updating business and means, accumulating wealth, reducing poverty, generating jobs, culminating in the full development of a nation.

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# THE USE OF THE PRINCIPLES BY THE SUPREME FEDERAL COURT: AN ANALYSIS OF THE EXTRAORDINARY APPEAL N. 635.648/CE

## A UTILIZAÇÃO DOS PRINCÍPIOS PELO SUPREMO TRIBUNAL FEDERAL: UMA ANÁLISE DO RECURSO EXTRAORDINÁRIO N. 635.648/CE

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## ABSTRACT

This article has the problem of analyzing the use of the principles by the Federal Supreme Court in the judgment of extraordinary appeal n.635.684/CE. The first chapter sets out to analyze the concepts of principles and rules. The following chapter outlines the object of analysis of the aforementioned extraordinary appeal. Finally, analyze the bases and parameters for using the principles by the STF. The methodology is documentary/bibliographic.

**Keywords:** Principles; Rules; Federal Court of Justice.

## RESUMO

*O presente artigo tem como problema analisar a utilização dos princípios pelo Supremo Tribunal Federal no julgamento do recurso extraordinário n.635.684/CE. O primeiro capítulo se propõe a analisar os conceitos de princípios e regras. O capítulo seguinte, a delinear o objeto de análise do referido recurso extraordinário. Por fim, analisar as bases e parâmetros de utilização dos princípios pelo STF. A metodologia é documental/bibliográfica.*

**Palavras-chave:** Princípios; Regras; Supremo Tribunal Federal.

**Keywords:** Principles; Rules; Supreme Federal Court.

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# 1. INTRODUCTION

The present article proposes to analyze the use of the principles by the Brazilian Supreme Federal Court at the judgment of the extraordinary appeal number 635.648/EC. The choice of this appeal is unrelated to the analysis of the concrete case or with the reasons that generated the judicialization of the case, but intents to observe the constant invocation of the principles during the judgment. However, some elements of the case will be raised for better elucidation of the presented problem.

In the first chapter an analysis of the definitions and distinctions between principles and rules is done. Thereunto, notes are made about the normative force of the principles. The bibliographic methodology uses the literature of authors that dialogue with the subject, such as Marcelo Neves, Humberto Ávila, Lênio Streck and José Joaquim Gomes Canotilho.

In the second chapter there's an outline of Extraordinary Appeal number 635.684/EC. The case chosen for analysis arrived at the Federal Supreme Court under discussion of the (un) constitutionality of the predictions of item III, article 9, of law 8.745/93, which deals with the hiring of personnel by the Public Administration for a specified period due to temporary need. The methodology, in addition to bibliographical, uses the document, the judgment in question to guide the analysis of the current and the following chapter.

In the third and last chapter, a survey is made of the excerpts or passages of the ministers votes in which the principles are invoked. The aim is to note how the Supreme Court, in this specific case, uses the principles, as well as contextualizes them in the specific case.

# 2. AN ANALYSIS ABOUT THE PRINCIPLES: DEFINITIONS AND DISTINCTIONS

The definitions about the principles are many. Therefore, a survey is essential in order to find and adopt a delimitation between the main definitions of the principles. Furthermore, the distinction between principles, norms and rules is necessary.

At first, it is necessary to define the norm. Kelsen (2008), defines a norm as an interpretive act that gives legal meaning to a given act or text. Humberto Ávila (2016, p. 50) states that norms are not texts or a set of them, but meanings constructed from the systematic interpretation of normative texts.

This implies that the interpreter's activity does not mean a mere descriptive work of the meaning of a text, as "their activity consists in constituting these meanings. For this reason, it is also not plausible to accept the idea that the application of Law involves an activity of subsuming between ready concepts even before the application process" (ÁVILA, 2018, p. 52).

Interpreting is extracting the meaning of words (OLIVEIRA, 2015, p. 18), which is not limited to a construction process, but a reconstruction process, "since language is never something pre-given, but something that is materialized in use" (ÁVILA, 2018, p. 52). It can be concluded, at first, that the qualification of norm or principle will depend on a previous interpretation process,

being impossible, in the words of Kelsen (2008, p. 396), to think that "a legal norm only allows, and in all the cases, only one interpretation: the correct interpretation".

As for the principles, Canotilho and Moreira (1991, p. 49) understand that principles are condensation cores in which constitutional goods and values converge that radiate such values to the systems of norms and serve as a foundation for the application of the other norms.

José Afonso da Silva (2014, p. 93) states that the word "principle" is a mistake, however, he adds that, in the constitutional sense, as well as what is written in Title I of the Federal Constitution of 1988, principle expresses the notion of "commandment nuclear system". He follows Canotilho, inserting the principles in this position of expression of the constitutional order, and which, from its positivization, are transformed into principle-norms (CANOTILHO; MOREIRA, 1991, p. 49).

Humberto Ávila defines principles as "immediately finalistic norms, primarily prospective and with the intention of complementarity and partiality" (ÁVILA, 2016, p. 2016), which do not determinate initially a behavior, but indicate a state of things that would align certain behaviors to the achieve of this purpose.

## 2.1 BETWEEN PRINCIPLES AND RULES

According to Virgílio Afonso da Silva (2011, p. 45), the main distinguishing feature between rules and principles, according to the theory of principles, is the structure of the rights that these rules guarantee. In the case of rules, definitive rights are guaranteed (or duties are imposed), while in the case of principles, *prima facie* rights are guaranteed (or duties are imposed).

For the author, taking into account all the exceptions foreseen for in the law and verifying their impertinence, when a standard has the rule structure, the right is definitive and must be carried out in its entirety, while the principles, as they are commandments optimization (ALEXY, 2008), do not require maximum achievement, and can be fulfilled in different degrees, depending on the factual and legal conditions.

Making a distinction in terms of structure, especially when the concepts are split under a formal-enunciative differentiation (STRECK, 2017), where the textual utterance and what it expresses (*a priori*) are analyzed, is to go against what has been previously understood, that principles and rules are norms and, as such, only arise from a process of interpreting a normative text, and not before.

Otherwise, to understand the distinction in these terms would be to attribute to the rules, in semantic terms, an adjective of "closed" statement, and to the principles an open texture, giving greater scope to the interpreter, which, for Lênio Streck (2017, p. 599) makes "the semantic problem of the rule – ambiguity and vagueness – is also transferred to the principles", which would be wrong, as it would make the principles "responsible for a problem, of which they are the solution". In these terms, Streck then argues that

> [...] the principle recovers the practical world, the lived world, the forms of life (Wittgenstein). The principle 'everydays' the rule. 'Returns', therefore, the thickness to the ontic of the rule. It is 'pure' signification and de-abstratalization. [...] it is the rule that opens the interpretation, precisely because of its universalizing

> perspective (it intends to cover all cases and, in fact, it does not cover any, without the densificatory coverage provided by the practical world of principled singularity) (STRECK, 2017, p. 600).

Streck adds that while there may be a "spelling of principle," the quality of principle goes beyond simple bookkeeping. For example, the Equality Principle is not called that just because it is described in the *caput* of article 5 this way, "but it itself transcends the constitutional text to take shape in the practical world" (STRECK, 2017, p. 618).

Humberto Ávila, in that regard, denies a purely structural distinction of principles and rules, and admits the synchronic existence of these normative species in the same device.

> Analyze the constitutional provision according to which everyone should be treated equally. It is plausible to apply it as a rule, as a principle and as a postulate. As a *rule*, because it prohibits the creation or increase of taxes that are not equal for all taxpayers. As a *principle*, because it establishes as due the realization of the equality value. And as a postulate, because it establishes a legal duty of comparison to be followed in the interpretation and application (ÁVILA, 2016, p. 92)

Among other criteria, Ávila points out that rules and principles differ in terms of how they contribute to the decision. While the rules "are preliminarily decisive and comprehensive", and that generate a specific solution to the conflict, the principles "consist in primarily complementary and preliminary partial norms" (ÁVILA, 2018, p.100), since they do not have the intention of providing a specific solution, but just cooperate, with other reasons, for the decision-making.

> The rules are immediately descriptive norms, primarily retrospective and with a pretension of decidability [...] the principles are immediately finalistic norms, primarily prospective and with a pretension of complementarity and partiality, for whose application an evaluation of the correlation between the state of things to be promoted and the effects resulting from the conduct deemed necessary for its promotion (ÁVILA, 2016, p. 102).

Presenting similar reasoning, Marcelo Neves adduces a concept that guides the application of the law. It states that "principles are mediate reasons for decisions on legal issues" (NEVES, 2014, p. 84), so that between the principle and the concrete issue there will always be a rule, whether through legislative activity or jurisprudential construction. Apparently, Neves introduces a middle ground between the two concepts presented, claiming a difference with "functional-structural meaning".

Therefore, from the relevant doctrinal opinions collated and recognizing the indeterminate normative nature of the principles, it is possible to understand that in these, unlike the rules, subsumption does not apply, not being norms of immediate application to concrete cases. These norms are immediately final, prospective and intended to be complementary. And it is not understood that a distinction between principles and rules can be delimited under purely structural or purely functional criteria:

> In short, the practical effect of the qualitative distinction is to regularize the principles and principalize the rules, demonstrating that the structural and functional characteristics supposedly observed only in the principles can also be found in the rules and vice versa (VALE, 2006, p. 122).

It is understood that, the norm created based on interpretation, and generated a principle, this, although the supreme importance for the systematization of the legal system, has to go

through a careful examination of the correlation between the state of affairs to be promoted and the behaviors that have as an effect the fulfilling or not of the required purpose (ÁVILA, 2018). The principles need solid normative predictions, under the penalty of becoming an object of manipulation and rhetorical use (LOPES, 2015).

## 2.2 THE NORMATIVE FORCE AND THE METHOD OF ANALYSIS OF THE PRINCIPLES

In the specific cases, interpreted in light of the principles, these, when passing a certain degree of indefiniteness need to be placated, as a way to achieve the objectives of the rule of law and legal certainty (FROTA, 2017, p. 83).

In this sense, Streck states that the "era of constitutional principles" comes not only from the arise of new texts or constitutional orders, but also from the value opening of the system, from a political decision that "facilitates the creation of all kinds of principles [from where] as many principles could be withdrawn as much as necessary to solve difficult cases" (STRECK, 2017, p. 555), what he called *pampprincipiologism*: the indiscriminate use of legal principles. Streck exemplifies this with the indiscriminate naming of the Principle of Morality.

> Dogmatics of the most diverse nuances have used this principle as a channel to introduce corrective morality into Law. It is the door to a colonizing discourse of the autonomy of Law, ending up becoming an alibi for adjudicating discourses to enter Law (STRECK, 2017, p. 619).

Hermeneutics has as its main task to preserve the normative force of the Constitution (STRECK, 2017, p. 600), and the lack of limits in the interpretive process would culminate into *judicial activism* (STRECK, 2017, p. 67).

As a result of this evaluative and interpretative opening, and, above all, of its teleological characteristic, it is understood, therefore, that the constitutional principles are "capable of democratically opening the system for the future" (GUIMARÃES, 2007, p. 84), and, in view of the final function of the principles, the application of this normative specie consists in an expansion of the "argumentative field, making the system open to a bigger amount of arguments" (GUIMARÃES, 2007, p. 112), which directly influence the decision-making process, given that, according to Humberto Ávila (2018, p. 155), the principles give foundation to certain ends, "without, however, foreseeing the *means* for its realization".

Whatever the nature of the goal or state of affairs prescribed in principle, consistency is always a requirement. Meaning that, it is necessary to give equal treatments to similar situations. "This is a requirement that can be associated with the idea of justice. Not an external, natural, transcendent justice, but an internal justice to the system itself" (GUIMARÃES, 2007, p. 103).

A proposal for analyzing the principles is observed in Humberto Ávila (2018), which will be used as a guide for the objectives of this research. In view of the principle consideration as norms "which require the delimitation of an ideal state of affairs to be sought through the necessary behaviors for this achievement" (ÁVILA, 2018, p. 116-117), it is possible to synthesize and accommodate a path that goes through a specification or detailing of the ends to the maximum, as well as the clarification of the conditions that compound the ideal state of affairs from the similar cases mentioned in the process as elements that support the decision.

The specification goes through a systematic analysis of the constitutional norms themselves in order to turn a "vague end into a specific end" (ÁVILA, 2018, p. 117). Therefore, a reading of the Constitution with the intention of delimitating ends is required.

> For example, instead of joining the Administration to the promotion of public health, without delimiting what this means in each context, it is necessary to demonstrate that public health means, in the context under analysis and according to certain provisions of the Federal Constitution, the duty to make the 'x' vaccine available to curb the advance of the 'y' epidemic. (ÁVILA, 2018, p. 117)

In concrete terms, this first moment goes through a systematic reading of the Constitution, identifying precepts related to the observed principle, *polishing* the vagueness of terms from this analysis, and "relate the provisions according to the fundamental principles" (ÁVILA, 2018, p. 117)

In a second moment, making the study a little more pragmatic, it seeks, based on concrete cases, to clarify the ideal state of affairs to be achieved, and, consequently, a better definition of the necessary behaviors to achieve its realization. Ávila (2018) emphasizes those cases considered exemplary, due to the ability to generalize to other cases, for example,

> rather than merely stating that the Administration must guide its activity according to the standards of morality, it is necessary to indicate that, in certain cases, the duty of morality was specified as the duty to fulfill expectations created through the fulfillment of promises made before or as duty to achieve legal goals through the adoption of serious and fundamental behaviors (ÁVILA, 2018, p. 117).

The reading of specific cases, already decided by the court, and the verification of which behaviors were considered necessary (or unnecessary) to the realization of the principle's purpose, helps making the proper interpretation of this normative species. According to Ávila (2018, p. 118), it is "needed to replace the vague purpose with necessary conducts for its realization". Therefore, this verification will be used in the analysis of the object of this article, judgment of Extraordinary Appeal n. 635,648, without, however, going into the merits of the decision (which in some moments may be unavoidable).

## 3. OUTLINES ABOUT EXTRAORDINARY RESOURCE N. 635.648/CE

The case chosen for this analysis was Extraordinary Appeal No. 635.648/CE. Such appeal reached the Federal Supreme Court under discussion of the (un)constitutionality of a certain legal provision. The text under analysis is the provisions of item III, of article 9, of Law 8.745/93 (which deals with the hiring of personnel by the Public Administration for a specified period of temporary need), as written

> Article 9. Personnel hired under the terms of this Law may not: [...] III – be hired again, based on this Law, **before 24 (twenty-four) months have elapsed from the termination of their previous contract**, except in the cases of items I and IX of art. 2 of this Law, upon prior authorization, as determined by art. 5 of this Law. (Wording given by Law No. 11.784, of 2008). (BRAZIL, 1993)

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The appeal was filed against a decision handed down by the Federal Regional Court of the 5th region, the decision declared unconstitutionality of this provision to maintain a rehiring of a temporary teacher, and which has the following content:

> ADMINISTRATIVE. PUBLIC SELECTION FOR SUBSTITUTE TEACHER. CANDIDATE WHO HAD PREVIOUSLY SIGNED A CONTRACT. PROVISION OF ART. 9 OF LAW No. 8.745/93. UNCONSTITUTIONALITY. PRECEDENTS. **The constitutional principle of isonomy is affronted by** the prohibition established by law for hiring a substitute teacher who has already been hired within a period of twenty-four months, prior to the holding of the selective competition. Precedent of the egregious Plenary of the Court, in the Allegation of Unconstitutionality in AMS nº 72575/CE. Sentence upheld. Appeal and Official Remittance rejected (BRASIL, 2017, p. 3).

The appellant alleged a constitutional violation in the judgment, more precisely of the article 37, items I, II, IX, of the Federal Constitution, which elects the public examination as a means of access to public positions and jobs and which defers to the law cases of temporary hiring, which, supposedly, would substantiate such a device. He added that "the exercise of the position of professor, even temporarily, is undoubtedly capable of integrating the petitioner to the community of the institution in question, generating an advantage in his favor at the expense of other competitors" (BRASIL, 2017, p. 4).

Therefore, it is understood that both positions claim, for different purposes, a breach of the principle of equality. For the appellant, the rehiring would hurt isonomy by mischaracterizing the temporary nature of the hiring (and a supposed advantage because of the integration of the candidate to the institution), and the judgment, following the settled understanding of the TRF-5, see AMS 72575/CE, understands that preventing the hiring of a candidate, approved in a selective, objective and isonomic process, would be, rather, a violation of "the principle of equality, accessibility to public positions, efficiency and impersonality" (APELREEX 24169-AL, TRF-5, 4th Class).

> ADMINISTRATIVE. SELECTION FOR TEMPORARY CONTRACTING OF SUBSTITUTE TEACHER. PARTICIPATION OF A TEACHER ALREADY CONTRACTED. PROIBITION. LAW 8.745/93. […] 2. If a violation of art. 37, IX of the Federal Constitution exists, this violation is in the perpetuation of the temporary hiring by the Public Administration, of anyone, instead of holding a public examination to fill an effective position, **not in the participation of the petitioner in the selection process, which, in principle, is objective and isonomic;** (Full, rel. Federal Judge Paulo Roberto de Oliveira Lima, Claim of Unconstitutionality in AMS 72575-CE, judged on 10/23/02, DJ of 06/03/03).

The Union, manifesting itself as *amicus curiae*, defended the constitutionality of the provision as a constitutional instrument that prevents the perpetuation of public servers contracts, since it "would mischaracterize the temporary nature inherent to this kind of recruitment in the public service". He also stated that the exclusion of the "beneficiaries" corroborates the fairness of the selection process.

The Federal Public Prosecutor's Office also expressed its approval:

> […] 2. Art. 9, III, of Law No. 8.745/93, with the wording given by Law No. 9.849/99, aims precisely to prevent public administrators, in obvious misuse of purpose and circumventing the **principle of public tender**, indefinitely extend temporary contracts, making them permanent ones by oblique way (BRASIL, 2017, p. 5).

The argumentative construction of the antagonistic positions makes it clear that the discussion is being taken to the principiological field. The source of principles and their argumentative handling to substantiate different positions denotes the delicacy of the topic and casts serious doubts on the uniformity of an argumentation based on principles, at least in the way these arguments are presented.

The drawn scenario correlates with what Streck (2017, p. 600) called the "myth of closing the rule". Thus, by the arguments of the parties here presented, it is induced that in these statements, the parameter that the rule "is closed" was adopted and, according to Alexy (2008) and Dworkin (2002), it determines behaviors in the "all-or-nothing" manner, and that the principles can be open to argumentation even in a contradictory way. But, in fact, according to the concepts raised so far, the principles densify what is in the rule in a vague and ambiguous way (STRECK, 2017), pointing out a purpose in a prospective way (ÁVILA, 2018).

Therefore, it will be sought to analyze the outlines of this judgment of the Federal Supreme Court in the principled field. Is there, in fact, an ideal state of affairs behind each principle (ÁVILA, 2018), or is the normative application of the principles compromised by their argumentative use having two distinct purposes? Was there a rhetorical and creative use of the principles, as did the Public Ministry when citing, for example, the "Principle of Public Tender" in its arguments? This is what will be verified in the next chapter.

## 4. THE ISSUE OF THE PRINCIPLES APPLIED TO THE EXTRAORDINARY APPEAL N. 645.648/CE

The extraordinary appeal, whose judgment was the main piece for the analysis of the major ideas and arguments of the case, was granted under the following menu:

> ADMINISTRATIVE. EXTRAORDINARY APPEAL WITH GENERAL REPERCUSSION. REQUIREMENTS FOR HIRING A SUBSTITUTE TEACHER IN THE CONTEXT OF FEDERAL HIGHER EDUCATION INSTITUTIONS. LEGAL PROVISION THAT DOES NOT AUTHORIZE A NEW CONTRACT WITHOUT COMPLIANCE WITH THE INTERSTICE OF 24 (TWENTY-FOUR) MONTHS. CONSTITUTIONALITY. APPEAL PROVIDED. 1. Although the rules of public tender do not fully apply to hiring for temporary reasons, the simplified selection must observe the principles of impersonality and morality, inscribed in art. 37, caput, of the CRFB. Precedents. 2. The legal provision that does not authorize the new hiring of substitute professors without observing the minimum interstice materializes the administrative morality. 3. It is up to the Judicial power to assume a position deferring to the option expressed by the legislator when the right invoked is proportional to the common public interest. 4. The legal provision prohibiting, for a fixed period, the new hiring of a candidate previously admitted in a simplified selection process to meet the temporary need of exceptional public interest, under penalty of becoming "ordinary whatever it is, by its nature, extraordinary and transitory" (ROCHA, Cármen Lúcia Antunes. Constitutional principles of public servants. São Paulo: Saraiva, 1999, p. 244) 5. Extraordinary appeal granted. (BRAZIL, 2017).

Initially, the rapporteur, Minister Edson Facchin, condensed his vote under the argumentative construction of weighting. He claimed that the principles of impersonality and morality are imperative even in selections that do not require a public contest, and that both principles "have a normative weight equivalent to the principle of equality".

It is noticed that the first mention of principles in the judgment is focused on the structural conception of principles that materialize the axiological hermeneutic theory of Alexy (2008), who sees the principles as a *prima facie* norm, applied "as optimization commands" and require the weighting that, in its turn, is instrumentalized by the proportionality method (LOPES, 2015).

It was possible to conclude, at a previous moment, that this way of treating the principles is the same as considering them semantically open norms. Added to this is the fact that, according to the theory designed by Alexy, which underlies the weighting, that "constitutional principles are equivalent to values in the application task, since they admit the possibility of collision" (LOPES, 2015, p. 43). The problem of considering principles when considered as equivalent to values (sometimes contradictory values) lies in a possible value fixation that might not be shared by everyone in a society.

> The Axiological hermeneutic theory is criticized for its inability to accept the pluralism of contemporary society and to deal with such an inescapable fact, since it presupposes a previous hierarchical scale of principles. The proportional weighting would only be possible through the determination of a fixed hierarchical order of values (LOPES, 2015, p. 47).

It is possible to verify that by taking this path of directing the argumentation towards a structural conception of principles, considered with a *prima facie* open texture, already criticized by Streck (2017), the discourse seems to lean towards a ponderation of legal assets that, according to Lopes (2015, p. 59), "generates the weakening of the Law, which becomes malleable according to what the judges consider most interesting for the community".

After this introductory conflict, the reporting minister understood that the case referred, therefore, to "the application of the constitutional rules of public tender to the hypotheses of simplified contracts". From this, he made notes about the institute of public selection as an "administrative procedure that aims to choose, on merit, the best prepared candidate, under equal conditions", concluding based on the convergence in the doctrine on the understanding that equality, morality and impersonality are "postulates of the public tender". And he concludes his reasoning by stating that, although the constitutional permissive of hiring for a fixed period is foreseen to meet temporary needs without public examination, these same principles should still be applied to this type of selection and hiring.

Once the appeal dealt with the restriction of article 9, III, of law 8.745/93, the case has as main subject which is knowing whether such restriction is compatible with the constitutional commands of article 37 and the adjacent principles. Following the path proposed above, for the correct resolution of the conflict, the text begins to observe the specification of the state of affairs and the analysis of similar cases made by the ministers.

The reporting minister, in order to verify the pertinence of Article 37 of the Constitution, proceeded to make considerations about the normative elements "determined deadline" and "temporary need". Citing court precedents such as ADI 890 and 3.721, and RE 658,026, he concluded that it is not the activity itself, but the need that can be temporary and adequate to

serve as an object of selection without competition. of functions is continuous, but the one that determines the special form of designating someone to perform them without a public examination and upon hiring is temporary" (BRASIL, 2017).

From the reading of the precedents mentioned by the rapporteur, it is possible to extract a common understanding, which helps in specifying the state of affairs required by the invoked principle-norms. In these cases, in a context of repeated unruly and merely indicative rehirings, the understanding is unequivocal that "allowing the indeterminate perpetuation" violates the equality and morality.

On the other hand, the reporting minister points out several times that "the public tender implements the principles of article 37, *caput*, of the Federal Constitution", and citing Bandeira de Melo (2015) and Lucas Rocha Furtado (2013), he compiled that the public tender "gives everyone equal opportunities to compete for positions or jobs in the direct and indirect Administration" and that

> By preventing the use of public office for appointment based on **criteria of political or relatives recommendations,** the constitutional rule of public examination also gives effectiveness to administrative morality. (BRASIL, 2017, emphasis added)

It is concluded, a *contrario sensu*, according to the reasons mentioned by the minister the principle of morality is breached by the factual element (behavior) of the designation by mere political or parental recommendation to temporary positions (art. 37, IX, CF), and that competition, occasioned by the public tender, is a necessary behavior to achieve the state of affairs required by the principle of equality. And, as stated above, in these terms, these same principles must be adopted in a simplified selection process based on article 37, IX, CF/88.

The criticism naturally raised is that, if the principles of morality and equality, in this specific case, require aligned behaviors (ÁVILA, 2018) and instrumentalized by the public tender, which, in turn, in abstract terms, is consistent with a selection process held under these same principles, the quarantine of twenty-four (24) months provided for in the contested statement should not be interpreted in light of these principles, prohibiting mere "political indications".

Thus, is it possible to state that indefinite hirings that at the same time allows the free participation of candidates (regardless of a previous contract with the Public Administration) in selective processes marked by objectivity and that, analogous to the public tender are able to provide competitiveness and equality? Since the rule does not define all-or-nothing behaviors (ÁVILA, 2018) and the principles should densify the ambiguity and vagueness of the rule (STRECK, 2017), the application of the principles of equality, impersonality and morality, in this case, should not modulate and dailyize (STRECK, 2017) the effects of the rule extracted from article 9, III, of law 8.745/93?

In this sense, André Rufino do Vale says that the solution to situations like these requires that

> in the sense of harmonizing its deontic contents [of the rule], which can be accomplished through the accommodation of its scopes of validity, that is, giving them a partially distinct personal, material, spatial and temporal scope, which allows apply one on certain occasions and the other on the others. Thus, both in the case of conflict of rules and collision of principles, preference should be given to solutions of a conciliatory nature that allow the permanence of all rules in the legal system (VALE, 2006, p. 117-118).

The issue was partially faced by the rapporteur when he stated:

> It could be added, in this sense, that the impossibility of extension would not prevent a new selection from competing those who have already been hired. This situation brings, however, an undeniable risk: the civil servant admitted under a temporary regime may, even through a new selection, be kept in a temporary position, becoming, as stated by Minister Carmén Lúcia, "ordinary what is by its nature, extraordinary and transitory" (BRASIL, 2017).

The argument of the reporting minister isn't deep enough and fails to make it clear whether what hurts the state of affairs required by the principle of administrative morality is the fact of hiring the same person more than once, even through an objective selection process; or whether it is the existence of successive selections for temporary functions; and ends up not facing this criticism. This imprecision about the purpose and state of affairs required by the principles cited in the judgment compromises an adequate normative application of the principles.

At the end of his vote, the reporting justice returns to using weighting, concluding that the quarantine provided for in the contested provision "is necessary and adequate to preserve the impersonality of the public tender". And concluded by granting the appeal. With this reaffirmation of "proportionality" and weighting as the method used by the Minister Rapporteur, it is possible to affirm that

> instead of what the proportionality formula suggests, constitutional principles are not necessarily or naturally values that should be considered based on means/ends or cost/benefits. Identifying them with values literally and logically means admitting that they can be used for both 'good' and 'evil', depending on what the observer distinguishes as 'good' and 'bad'. (GUIMARÃES, 2007, p. 190).

Therefore, this indirect identification, deduced by the method of weighing, between principles and values is "prejudicial to the very consistency of legal decisions, as the requirement of equality in the treatment of cases becomes dependent on particular moral evaluations" (GUIMARÃES, 2007, p. 190). And in an argument based on principles, as André Rufino do Vale well reminds us,

> Both rules and principles can provide *prima facie* reasons, collide in a dimension of validity or weight, be applied by subsumption or weighting. Finally, the structure of the rules will only stimulate, but will not determine, the way of interpretation and application (VALE, 2006, p. 137).

All other votes followed, without further additions and debates, the conclusions presented by the reporting minister. However, the positions of minister Ricardo Lewandowsky, minister Carmén Lúcia and minister Alexandre de Moraes deserve some consideration.

Minister Ricardo Lewandowsky limited himself to pointing out that "there are numerous cases of temporary contracts that are renewed *ad aeternum*, in open mockery of the constitutional principle of public tender." According to the concepts we have analyzed so far, in no interpretation would we've been able to attribute to the norm that requires the Public Tender (Art. 37, II, CF) a qualification of principle (as an ideal state of affairs), but only consider it a rule that materializes another constitutional principles. The constitutional requirement of public examination entails a behavior that is in line with the constitutional principles contained in Article 37, *caput*, but does not, constitutes a principle itself. As pointed out in the opening chapter, the principiological nature of an interpreted standard serves as a foundation for certain purposes without necessarily describing means or forms of materialization, something incompatible,

therefore, with the clairvoyant provisions that pragmatically require exams, or exams and titles, to the admission to public service (ÁVILA, 2016).

This attempt illustrates the discursive intention of labeling any legal institute as a principle, which is contained in the argumentative phenomenon nicknamed by Lênio Streck, (2017, p. 526) of *pamprincipiologism*.

> Without any taxonomic possibility regarding the matter, these (assertorical) statements fulfill the function of para-rules. With them, any answer can be correct. In fact, there will always be a statement of this nature applicable to the 'concrete case', which ends up being 'constructed' from a zero degree of meaning. Its multiplication is due to the erroneous understanding of the thesis that the principles provide an interpretive opening, that is, it can be said that the Dworkian thesis about the difference between principles and rules was misunderstood (STRECK, 2017, p. 575).

Minister Lewandowsky's succinct and short vote does not require lengthy considerations, although only as an atechnic, the use of the word "principle" was misplaced in his vote, in addition to, once again, bring imprecision to the judgment. The rhetorical use of the word "principle" can function as a utilitarian way out of apparent safety, but this has extremely opposite consequences (OLIVEIRA NETO, p. 486).

In its turn, Minister Carmém Lúcia, in addition to citing several precedents (ADI 3.721, ADI 3.430, ADI 890, RE 658.026, ADI 3.662) that focused on the temporariness and emergency of such contracts (but which do not specify what the court could come to understand as a violation of the aforementioned principles), concluded that

> In essence, the prohibition of rehiring a substitute teacher, previously selected to respond an emergency situation, before 24 months have elapsed from the termination of the previous contract (art. 9, item III, of Law 8.745/1993), **proves to be reasonable and proportional**. Initiative that, at the same time, **aims to give concrete effect to the principle of public tender,** ensuring the transitory nature of precarious contracts that came before. In this pursuit, there is no affront to the principle of isonomy, but in its **instrumentalization in the way of the public tender**.

In addition to once again having an aesthetic refuge from the "principle of public examination", the construction of the conclusion brings the inconsistency about knowing what mischaracterizes, for the ministers, the temporary nature of the function, if it is due to the same person who occupies it, or the repeated occurrence of temporary hiring. The argument is built in the sense that the prohibition placed in article 9, III, "ensures the transience". The same conclusion is seen in the vote of Minister Alexandre de Moraes.

The aforementioned minister begins his vote with considerations on the temporary and exceptional nature required for admissions under article 37, IX, of the Constitution, and also cites several precedents (ADI 3.721, RE 527.109, RE 658;026. ADI 3.116) that support his position.

> These precedents show the concern of the Court with the selection of criteria that ensure the transitory and exceptional nature of temporary contracts based on the permissive provisions of art. 37, IX, of the Federal Constitution, admitted that any leniency of the legislator in indicating these criteria favors the circumvention of the rule of access to public positions through competition, in disrepute to the principles of impersonality and morality of the Public Administration (BRASIL, 2017).

The minister, therefore, concludes that the limitation provided for in Article 9, III, of Law 8.745/93 is constitutionally based, since it promotes the "temporary and exceptional profile that the Constitution attributes to temporary employment", proving legitimate "the exclusion of those already contracted for the purpose of providing new temporary contracts", considering that such exclusion evidences the temporary nature of the contract (art. 37, IX, CF), with no violation of isonomy "if the differentiation criterion maintains a logical correlation with a purpose intended by the Constitution".

It is possible to identify two issues in the statements made by Minister Alexandre de Moraes. One, he does not elaborate on the "logical correlation" between the criteria of article 9, III, of Law 8.745/93 and the purpose of the principle of equality, which, on the other hand, was more or less specified by the reporting minister. Two, returns to what was questioned about the notes made on the rapporteur's vote: what is out of line with the principle of morality and impersonality is (1) the rehiring of the same person, hired in the first moment, before the elapses the stipulated period (24 months), or is it (2) the reiteration of multiple selections for hiring due to temporary need?

José dos Santos Carvalho Filho teaches that, if we are dealing with topic 1 (rehiring the same person), in order not to violate any principle, we must understand that "such prohibition must be interpreted restrictively, so that it does not apply to the hypothesis of hiring by another institution, within that period, when the interested party undergoes a new selective procedure" (CARVALHO FILHO, 2017, p. 405). This position supports the fact that, when submitted to objective and isonomic selection, there is no direct violation of any constitutional principle.

The questioning is valid because, in the votes of the ministers, there is an argumentative expense in the reasons for deciding, delimiting issues such as temporariness, exceptionality and necessity, and the restrictive use that should be given to contracts of this nature. And in this context, the application of the principle of equality is considered and withdrawn when Administrative morality and impersonality are marred by the abuse caused by selections of this nature. In this terms, considering principles as norms that can be set aside, it is worth mentioning Humberto Ávila.

> The redefinition of principles as norms that prescribe ends, serve as a normative foundation for the normative materialization process, as argued here, is important because it excludes, from the definition of principles, the possibility of restriction and consequent removal. The inclusion of the possibility of restriction and removal in the definition of principles, on the one hand, brings the principles of councils and values closer together and, on the other hand, removes the element of bonding from them (ÁVILA, 2018, p. 155).

Once again, the use of weighting can be seen. And, understanding what Ávila (2018) adduces about the removal of the "binding element", this interpretive technique has become delicate for two reasons: 1) Article 9, III of Law 8.745/93, does not prevent repeated temporary contracts with other people not falling under its terms; and 2) If there are objective elements of comparison in the simplified selection process prior to hiring, equality is imponderable, as Humberto Ávila teaches, citing the so-called structuring principles, which must always be observed, such as, for example, the principle of due legal process.

> And also the principle of equality, which requires the relationship between two subjects, **based on a measure of comparison**, to achieve a certain purpose. It presupposes the relationship between these elements, but its observance is also not gradual, nor can its relational requirements be removed for contrary reasons (ÁVILA, 2018, p. 153, without emphasis in the original)

Minister Alexandre de Moraes seeks to face this question.

> **It is true that the impossibility of rehiring the same professionals does not ensure compliance with art. 37, IX, of the Federal Constitution**, because the filling of these jobs through temporary contracts, even with people not previously hired by the Administration, also frustrates the ideal of temporality and transience of this type of hiring (BRASIL, 2017).

It is noticeable that the minister confirms that the impossibility of rehiring the same persons already hired does not guarantee compliance with article 37, IX, of the CF, which, in a way, makes the supposed weighting between administrative morality and equality, in this case, does not indicate the preponderance of one principle over the other. However, it concludes that,

> Even so, the discontinuity of the temporary bond caused by the prohibition of art. 9, III, of Law 8.745/93 prevents the installation of opposite interests to effective provision of public positions in Administration through the public tender process and removes the public administrator from the comfortable situation of reusing the same workforce already recruited through a simplified selection process.

The minister concludes his vote, then, elucidating that the contested prohibition constitutes a reasonable restriction to isonomy, favoring administrative morality, but without offering further depth analysis on the technique he used, nor specifying the state of affairs required by the principles he refereed to.

## 5. FINAL CONSIDERATIONS

Corroborating the raised teachings, the principles must be guided as finalistic norms, prospective and with the intention of complementarity, and that prescribe a state of affairs, requiring the alignment of certain behaviors to achieve this purpose, even without describing precisely which actions.

It was possible to verify that the Federal Supreme Court, judging the Extraordinary Appeal 635.648/CE, frequently used the principles of morality, equality and impersonality with a certain lack of correlation to the specific case, as it was possible to observe in the position of the Minister Rapporteur, citing such principles, but without facing the main question: Would the selection process itself materialize such principles? From another perspective, wouldn't demanding the candidate a quarantine violate such principles, especially equality?

As for the precedents mentioned, as a basis for the arguments used (ADI 890, ADI 3.116, ADI 3.237, ADI 3.721, RE 658.026, RE 527.109, among others), in the pretense of serving as a guide along the delimitation of the normativity of the analyzed principles, if they didn't served as a rationale for each minister's final decision, they outlined an ideal state of affairs, required

by the principles of morality and impersonality, different from what was used as a parameter to verify adequate behavior.

If questioned the relevance of the prohibition of article 9, III, of Law n. 8.745, to the objective selection processes, and if the principle of morality would be fulfilled by verifying the reasons, for example, of ADI n. 890, of prohibiting successive contracts through "civil adjustment of service leases" and "exceptional" admissions, the analysis of the specific case concluded that the morality, in this case cited, had no relation with the object of the process.

Based on the considerations made, it is possible to conclude that although the ministers have specified the normativity of the principles of morality and equality, from the imperative of the public tender, as a process of meritorious analysis and equal conditions, they didn't clarify whether the individual prohibition of participating in simplified competitions or the existence of successive temporary contracts was under discussion. It was not taken into account that the selection in question was not a mere political indication, but an isonomic and objective selection, as explained in the decision of the Regional Federal Court, in charge of the appeal.

The decision, therefore, lead to an arbitrary act, a freedom of action by the judge, as a tool that can origin judicial creativity and it is used as a technique that hides the paradox of the undecidability of difficult cases. To avoid this criticism, they have sought the principles, which legitimize the creation of law through jurisprudence, avoiding criticism of the use of discritionarity.

The principles, despite being used in many ways yet constitute a new element that hides the paradox of difficult cases, and works as the limits and standards that deny this discritionarity (at least in a strong sense) and legitimize the decision not because they are from nature or religion, but principles extracted from the juridic order itself, that is, legal principles.

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# THE FUNDAMENTAL DUTIES AND THE CONSTITUTION OF 88: PRECIPLE FORMATION OF THE DEMOCRATIC STATE OF LAW

## OS DEVERES FUNDAMENTAIS E A CONSTITUIÇÃO DE 88: FORMAÇÃO PRECÍPUA DO ESTADO DEMOCRÁTICO DE DIREITO

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## ABSTRACT

The purpose of this paper is to clarify the Fundamental Duties and their importance within state action, with an emphasis on the Democratic Rule of Law. Initially, a historical construction of state formation was sought up to the current model, after that, based on doctrines and articles, an analysis of the 1988 Constitution was made with an emphasis on the legal provisions referring to the Fundamental Duties contained therein. Finally, a discussion was established about what Fundamental Duties would be and his influence on state action. The bibliographic review of articles and books was used as a basis.

**Keywords:** Fundamentals Duties, 1988 Constitution, Democratic State of Law.

## RESUMO

*O presente trabalho tem por objetivo elucidar sobre os Deveres Fundamentais e a sua importância dentro da atuação estatal, com ênfase no Estado Democrático de Direito. Buscou-se, de início, uma construção histórica da formação estatal até o atual modelo, após isso, com base em doutrinas e artigos, fez-se uma análise da Constituição de 1988 com ênfase nos dispositivos legais referentes aos Deveres Fundamentais que nela constam. Por fim, foi estabelecida uma discussão acerca do que seriam os Deveres Fundamentais e a influência dele na atuação estatal. Utilizou-se como metodologia a revisão bibliográfica de artigos e livros como embasamento.*

**Palavras-chave:** *deveres fundamentais; Constituição de 1988; Estado Democrático de Direito.*

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# 1. INTRODUCTION

When talking about the formation of the state entity, we go through epochs that are mixed up with the history of mankind itself. Furthermore, every time there has been a rupture in this entity - justified by historical precedents that will be addressed in this work - there has been, in the light of most scholars on the subject, the genesis of new Fundamental Rights. These rights accumulated within a political process until they became the basis for the formation of the Democratic State of Law that we live in Brazil today.

However, little is debated doctrinally about the Fundamental Duties, which, in a generic way, can be translated as the duty that the State assumes before the population to enforce the Fundamental Rights.

Thus, this paper aims to elucidate about the Fundamental Duties in Brazil and demonstrate its importance for the effectiveness and creation of the Democratic State of Law. However, the work is limited to doing this analysis in a constitutional way until the 1988 Federal Constitution, currently in force in the country.

In view of this, the paper sought to make a historical analysis of the old constitutions that headed the country. The focus of discussion in this part was to show the political ruptures that preceded each constitution cited. Moreover, a deeper analysis of the 1988 Constitution was made in a specific topic, since it is the one that inaugurated the issue of Fundamental Duties in the Brazilian legal system.

Therefore, the work was done based on a bibliographic and documental review of books, articles and legal texts, always seeking to use the doctrines that best deal with the subject addressed. Furthermore, it is a theoretical and exploratory research that uses the dialectic method as the basis of the work, based on the technical means of investigation by the historical and observational method. All this was done on the basis of an analysis of how the Fundamental Duties behaved within the Brazilian constitutional texts.

# 2. STATE EVOLUTION AND THE FOUNDATIONS OF THE DEMOCRATIC RULE OF LAW

For a better understanding, when studying the history of the State, scholars classify the state entity according to the characteristics it has in a given context. In this way, the socalled state models are created, which are modified over time.

It is worth noting that the changes between State models occur, primarily, due to popular pressure. As a result of people's indignation, these civil claims have caused the State to undergo metamorphoses until it arrived as we know it today, as the Democratic State of Law. Thus, the State went through successive remodeling processes that were directly associated with Fundamental Rights, but not always with Fundamental Duties.

The studies of professors Gina Pompeu and Rosa Pontes are emphasized, who, when studying the change of the State over time, associate this change with economic interests and

human needs that vary in each period and start to not correspond to the State model in force in the period, based on economic, social, and political changes acting on the increase or decrease of State power (POMPEU; PONTES, 2018).

At first, the concept of the State is not pacific, however, one can refer to it from the 16th century on, in modernity, where this entity is able to fit around all the constitutive elements elected by Dallari. (BASTOS, 1995).Thus, these elements are found in Dallari's definition as (1972, p.104) "[ ...] the State as the sovereign legal order, which aims at the common good of a people located in a certain territory". Thus, the elements are: people, territory and sovereignty.

Thus, before there was a State with all the aforementioned elements, what existed was the feudal system, Feudalism. As a model of organization of civil relations, Feudalism was characterized by not having a general centralization of power for the entire population, the power relationship here was limited to small territories and was based on vassalage, a regime known in the Middle Ages. Moreover, as an economic characteristic there was a minimalist mode of production based on the subsistence of the population that paid taxes in the form of food for the feudal lord, all far from accumulation of capital, Dobb (1977, p. 01):

> If we ask ourselves what was the basic conflict generated by the feudal mode of production, it seems to me that we will have only one answer. Fundamentally, the mode of production in feudalism was the small mode of production - carried out by small producers attached to the land and its instruments of production. The basic social relation rested on the extraction of the surplus product of this small mode of production by the feudal ruling class - a relationship of exploitation underpinned by various methods of 'extra-economic coercion' (DOBB, 1977, p. 1).

In the same line of reasoning, the author approaches the issue of the decline of the feudal system, associating the fact to the revolt of the small producers who had the excess product retained within the system, not making a profit, just subsisting, causing a discontent and a long process of changes in collective organization, in the words of the author herself:

> In my view, this is the connection. To the extent that small producers achieved partial emancipation from feudal exploitation - perhaps at first a mere softening (with the transition from labor-rent to money-rent) - they could keep for themselves a part of the surplus product. Thus they obtained the means and motivation to improve cultivation and extend it to new areas, which incidentally served to further sharpen antagonism against feudal restrictions. Thus the foundations were also laid for some capital *accumulation within the small mode of production itself,* and thus for the beginning of a process of *class differentiation within the small producers' economy* - the well-known process, witnessed at various times in widely scattered parts of the world, towards the formation, on the one hand, of an upper layer of relatively well-to-do progressive farmers (the kulaks in the Russian tradition) and, on the other, of a layer of ruined peasants. This social polarization in the village (and. similarly, in the urban crafts) paved the way for wage production and, as a result, for bourgeois relations of production. (DOBB, 1977, p.3).

The fact is that after the rupture of the aforementioned system, the Absolutist State began. Characterized by the advent of National Monarchies together with the mercantilist development, the time of the great navigations (QUIJANO, 2005), this state matrix was characterized by keeping the territorial unity. Thus, the State in this context was based on the Catholic religion that, besides validating the king's power by saying that he was chosen by God, also dictated rules

of behavior. Thus, a king-church binomial was maintained that left the king free to govern in an arbitrary way and without thinking about the people since everything that came from him was seen as God's will.

Thus, in the early seventeenth century and late nineteenth century, the bourgeois movements - French Revolution[3], Glorious Revolution - accelerated the decline of monarchies, since the State model was not based on the welfare of the people, a fact that gave rise to the Liberal State. It is in this context that the first dimension of Fundamental Rights emerged - rights that are essential to men in their coexistence with others and before the State itself, determining a relationship of harmony and reciprocal respect.

Briefly, the rights of the first dimension are the rights of man in the face of an absentee state, it is based on subjectivity, valuing the human person individually considered, reproduced as: right to life, property, religious freedom and freedom of thought, among others.This generation became known as the Rights of Freedom (BONAVIDES, 2008).

According to Renata Lima (2018, p. 8), about the freedom fostered in the first generation of Fundamental Rights, she states:

> Economic liberalism had the need to prevent the intervention of Absolutist states, and the concentration of power in the mothers of one person. For the greatest enjoyment of commerce, the obligation of the State not to do was essential, as well as the existence of equal laws for all. In this vein, it can be said that the liberal bourgeois state, which contributed to the rule of law, was the one that fought the absolutist states. Therefore, the determination of economic policy was in the sense of not intervening in private business, letting it flow, and be guided by the market. (LIMA, 2018, p. 8)

Thus, it can be seen that liberalism[4], in its first experience, is not linked to the idea of Fundamental Duties. The state organization did not intend to be an active entity within public policies, it was based on the minimum intervention of rulers so that the fundamental rights mentioned above were consolidated.

Moreover, there is the birth of the Social State[5] with the Russian Revolution of 1917. This State sought to regulate the economy on the basis of disciplinary norms, as well as the creation of companies to ensure services (BASTOS, 1995), trying to reverse the ills that the Industrial Revolution brought to workers, such as mass unemployment and the precarious conditions of underemployment.

On the other hand, the Social Rights are revealed, which claimed an economic isonomy among citizens, expressing themselves as rights to education, health, work, social assistance,

3 In the period before the French Revolution, Law was divided or fragmented into particular systems, both from the class point of view and from the material and territorial point of view. There was a Law for the clergy, as another for the nobility, and yet another for the people, while each region had its own particular system of rules, uses and customs, often conflicting, with certain relations being governed by Canon Law and another by State Law". (MIGUEL REALE, 1987, p. 412).

4 "The term liberalism has become associated with the idea of freedom, with political, economic, philosophical, social, and psychological nuances. In the political sense, liberalism was associated with democracy. In the economic sense, liberalism was associated with freedom of profession, of work, and of economic activity. Philosophically, liberalism was associated with freedom of belief, thought, feeling, and action. In the social sense, liberalism was associated with society's desire to enjoy autonomy to conduct and determine its own destiny. In this sense, liberalism has raised, notably, the cause of independence of the former English colonies, Spanish, Portuguese. (FARIAS NETO, 2011, p. 275.)

5 According to Gilberto Bercovici (1999, p. 37): "The basis of the Welfare State is equality in freedom and the guarantee of the exercise of this freedom. The State is no longer limited to promoting formal equality, legal equality. The equality sought is material equality, no longer before the law, but through the law. Equality does not limit freedom. What the state guarantees is equality of opportunity, which implies freedom, justifying state intervention."

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thus, social and economic cultural rights. Professor Paulo Gustavo Gonet Branco (2000, p.107) illustrates: "Fundamental rights assume a position of definite prominence in society when the traditional relationship between the State and the individual is inverted and it is recognized that the individual first has rights and then duties before the State, and that the State has, in relation to the individual, first duties and then rights. These rights are called the second dimension of Fundamental Rights.

In this way, we have the beginning of the discussion within the history of the State about the Fundamental Duties. At this point, the people add to their rights the ability to demand from the State an active posture towards their existence, bringing the beginning of the discussion of the State having the duty to guarantee the basic minimum for life, interfering in the people's private existence.

However, the State continues to remodel itself. There is World War II and, with its end, the establishment of the Democratic State of Law, as well as the Declaration of Human Rights in 1948, entering a new social order in which international ties are strengthened for the creation of global mechanisms that guarantee Fundamental Rights. In this perspective, there is the institution of the third dimension of these rights entitled the Rights of Fraternity or Solidarity, which refer to diffuse and collective rights, not purely to the man-citizen and the man-State, but to the focus on man and his fellow man. This dimension emerges in themes related to the right to peace, to the environment, to the self-determination of peoples, to development, to communication and to the common inheritance of humanity.

Thus, it is in this form of State that we have a legal system based on norms and principles. The set of laws of post-war countries began to adapt to the light of world pacts, highlighting as an example the Universal Declaration of Human Rights.

Thus, this period is marked by the attempt to consolidate the aforementioned dimension of fundamental rights. In Brazil, the 1988 Constitution - the source of discussion in the next topic of this article - was created at this historical moment, trying to guarantee both fundamental Rights and Duties.

There is, moreover, the fourth dimension of Fundamental Rights, defended by Professor Paulo Bonavides (2000, p. 525-526), as the right to democracy, information and pluralism, in his words:

> Fourth generation rights not only culminate in the *objectivity* of the rights of the two preceding generations, but also absorb - without, however, removing it - the *subjectivity of* individual rights, namely, first generation rights. These rights survive, and not only survive, but are enhanced in their *main objective* and *axiological* dimension, being able, from now on, to radiate with the highest normative efficacy to all rights in society and in the legal system. From here we can, therefore, proceed to the assertion that the rights of the second, third and fourth generations are not interpreted, but *concretized*. It is in the wake of this concretization that the future of political globalization resides, its principle of legitimacy, the incorporating force of its liberating values.
>
> (...)
>
> Finally, fourth generation rights comprise the future of citizenship and the future of freedom for all peoples. Only with them will political globalization be legitimate and possible. (BONAVIDES, 2000, p. 525-526)

Moreover, Bonavides goes further in his scientific research, as he deals with what he classifies as the fifth dimension of fundamental rights, the right to peace. The author illustrates in the text that classifying peace as a third generation right does not really qualify the importance it has in the era of what he calls the new constitutionalism, in his words:

> Today, the West, on the contrary, is witnessing the irresistible advent of another constitutionalism - that of normativity - dynamic and evolutionary, and at the same time, principled and fertile in the gestation of new fundamental rights. The realization and observance of these rights humanizes communion with the social, tempers and softens reactions to power, and makes the burden of authority weigh less heavily on the forums of citizenship. The new Rule of Law of the five generations of fundamental rights comes to crown, therefore, that spirit of humanism that, in the perimeter of legality, inhabits the social regions and permeates the Law in all its dimensions. The legal dignity of peace derives from the universal recognition that is due to it as a qualitative assumption of human coexistence, an element of conservation of the species, and the realm of security of rights. (BONAVIDES, 2008, p.86).

In this way, Paulo Bonavides demonstrates the importance of peace as a fundamental right, and goes further by raising the importance of the discussion of new fundamental rights that validate the new process of constitutionalism that he cites.

It is worth noting that scholars on the subject criticize the classifications of Fundamental Rights, not denying them, but rather seeking to go beyond them, making it a valid discussion, since, as much as the division of the dimensions of these rights is a didactic tool, one must go beyond, perceive the intersection of these dimensions beyond subjective and objective classifications, in the words of Hachem:

> [...] all fundamental rights, due to the complexity of their legal nature and normative structure, possess concomitantly the totality of traits that supposedly would be peculiar to each one of the generations: (i) they direct duties of abstention to the Public Power; (ii) they impose on the State obligations to provide factual and normative benefits; (iii) they possess at the same time both the supposedly exclusive transindividual ownership of "third generation rights", and the individual ownership allegedly typical of "first and second generation rights" (HACHEM, 2020, p. 409).

From the above, it can be inferred that the history of the state entity and all its reformulation is linked to the Fundamental Rights and their dimensions. However, Fundamental Duties require a more structural analysis within a legal system, since, besides being a subject, little discussed by research in the legal area, it varies within each nation-state.

## 3. BRAZIL'S CONSTITUTIONAL HISTORY AND THE CHANGE IN PARADIGM WITH THE 1988 FEDERAL CONSTITUTION

A constitution carries with it the foundations of the legal system of which it is a part. When studying Constitutional Law, the idea of hierarchy of norms is denoted right from the start. Thus, this structure was thought by Kelsen (1998), of pyramidal configuration, in which the constitu-

tion would be part of the apex of this form, thus legitimating its role of regulation within the order and ensuring that all rules below must follow the dictates outlined by it. In this sense, the importance of understanding the Charter of each state is demonstrated, and from this, linking each document with the historical moment that governed.

In Brazil, right after the end of the so-called Colonial Brazil, the first constitution was created, the Constitution of 1824. This Magna Carta brought in its legal text contradictions since its creation, since within its legislative process it sought to ally the ideas of liberal regimes that had been conquered in France, such as the vote, however, it was not determined the universal character of this right, in the words of Mattos:

> The First Constituent and Legislative General Assembly for the Kingdom of Brazil was convened by Decree No. 57 of June 19, 1822, signed by José Bonifácio de Andrada e Silva. The deputies were to be nominated by the voters of the parishes, and these were to be chosen directly by the mayor of the parishes. To be entitled to vote in the parish elections it was necessary to be married or single over 20 years old, as long as one was not a child of the family. Everyone, however, needed to have at least one year of residence in the parish where they were going to exercise their right to vote, it was mandatory, with the exception of those who lived on salary. The only people not included in this rule were the bookkeepers and first clerks of commercial houses, the servants of the Royal House (who did not wear white coats), and the administrators of rural farms and factories. Excluded from voting were also regular religious, naturalized foreigners and criminals. (MATTOS, 2011, p.8).

However, even with a selective process for a legislative assembly that was totally excluding and aimed at an elite that was forming in the new context of the country, Dom Pedro I, afraid of losing his sovereignty, dissolved this assembly and established the Constitution of 1824 in a dictatorial manner, establishing a distorted legislative power, since it disregarded the tripartite division of powers and established the Moderator Power:

> From the analysis of the way in which the Brazilian State was structured in the Constitution of 1824, it is clear that it blends the liberal ideas reinstated at the time with a monarchical structure marked by conservatism. This is in fact the result of the inevitable clash of interests between the members of the Constituent Assembly, appointed by Pedro I, who were moving toward the structuring of a Charter that would reflect the republican ideas then conquered by the people of France, and the natural resistance of the prince who found himself facing a threat to his monarchial authority. [...] With the coup that resulted in the bestowal of our first Constitutional Charter, it can be seen, therefore, that the Emperor sought to ally the ideas of the liberal French Charter, without, however, giving up his power. In this way, he repudiated the tripartite model of power implemented in France by the ideals of Montesquieu, which had among others the power to limit the others. (MERGULHÃO, JUNIOR, MACHADO, 2011, p. 104-105).

Thus, the Political Letter brought with it characteristics such as the centralization of power in the regent's hand through the Moderator Power. Moreover, this same power would bind all state attributions, since everything that happened in other spheres would have to be approved by Dom Pedro I. Furthermore, an excluding electoral process is denoted - precisely in articles 92, 94 and 95 (CONSTITUIÇÃO FEDERAL, 1824, BRAZIL) - as it took into consideration criteria of income.

Furthermore, the old monarchical regime entered a process of decline as the collective ideals changed. Two main reasons are given for the long process of decline, namely the abolition of slavery - the basic structure of the economy in the empire - and the Proclamation of the Republic in 1889.

Thus, the Magna Carta in force (Constitution of 1824) no longer harmonized with the reality of the country that was undergoing the process of transition to the Republic. Soon, in this context, in the same year of the proclamation of the Republic, the first organizational changes in the country were also instituted. About these changes, Mattos explains that:

> Each State would later enact its definitive Constitution, electing its deliberative bodies and local Governments. Meanwhile, the new States would be administered by the "governments they had proclaimed or, in their absence, by governors delegated by the Provisional Government", without recognizing any local government contrary to the republican form. (MATTOS, 2011, p. 12 ).

Thus, the Constitution of 1891 was created and its main landmark was the establishment of federalism in Brazil, a model that is still adopted today in the political organization of the country. Trindade explains that the federalism adopted:

> It leaves the newly created states a significant margin of autonomy. According to the Constitution, they own the mines and vacant lands located in their respective territories and can make agreements and conventions among themselves, without political character (art. 62). They can also legislate on any matter that is not denied to them, expressly or implicitly, by the constitutional principles of the Union (art. 63)
>
> [...]
>
> This device allows the states, for example, to levy interstate taxes, to decree export taxes, to borrow abroad, to elaborate their own electoral and judiciary system, to organize military force, etc. (TRINDANDE, 2011, p. 188)

Besides federalism, presidentialism was also instituted as a system of government, thus having the first military president in power, Deodoro da Fonseca, who would soon be replaced by his vice-president, Floriano Peixoto, when the Estado de Sítio was instituted in the country. The new law also introduced provisions such as habeas-corpus, and, of course, the extinction of the Moderator Power.

However, the basis of support for the economic and political system of the First Republic, or Old Republic, was the "coronelismo". Trindade elucidates that:

> Having occupied the leadership in his municipality, the colonel, on whom everyone depends, has his local power base structured from alliances with some other colonels, generally leaders in the municipal districts, with important people in the localities - doctors, lawyers, civil servants, merchants and priests, among others -, besides a personal guard, formed by henchmen and hired guns. (TRINDADE,200, p. 180)

In this way, the country entered an unstable political process, passing through numerous presidents who did not remain in power for the duration of their mandate. At the same time, the Liberal Alliance is gaining strength, a movement that introduces the discussion about the representation of professional associations within the national politics. Barreto explains that the movement:

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> (...) presented a much greater quantity and intensity than historiographical research usually indicates. It had some important general characteristics: it was up to date with international issues; it was not merely theoretical or rhetorical, since it had the formulation of the new Constitution as a natural outflow; it ended up drawing the attention of the main national sectors and of outstanding intellectuals, as well as taking place with great intensity and a strong sense of urgency, given the climate of uncertainty about the directions that the "revolution", started in 1930, would lead the country to. In short, it was an intellectual debate in both meanings of the term: the production and dissemination of ideas and political engagement on the issues in vogue. (BARRETO, 2004, p.120).

Thus, the "coronelismo" was framed as a political system, a complex network of relations that went from the President of the Republic to the regional colonels, characterized as a relation of reciprocal compromises that maintained the executive power between São Paulo and Minas Gerais. In this system, the colonels, who were regional leaders, held the power to command the votes of their subordinates and did this based on political interests and promises coming from the governors, and these governors were linked to the president, and so everything was formed. (CARVALHO, 1997).

In this way, the political movement of 1930 shakes the structure of the Brazilian Republic and will have as its main agendas:

> The purpose of modifying the regime established by the 1891 Constitution. The program of the Liberal Alliance, which would become victorious with the Revolution of 1930, included the idea of "representation and justice" with an undefined element of propositions, corresponding in the political plan to the free manifestation of the will and popular sovereignty with freedom of vote, the guarantee of the autonomy of the states and the organization in new bases of the Executive Power of the Union and the States. (MATTOS, 2011, p.17).

A Provisional Government was established, headed by Getúlio Vargas. This government had the economic paw to overcome a deficit left by years of mismanagement along with a drop in the value of the coffee bag, the country's main export product. Later, more precisely in 1932, this government issued a decree for elections to the National Constituent Assembly. (LIMA, 1970).

Thus, in 1934, the new Constitution was born, which would follow the current models that were emerging in the world, giving a first idea of what the Fundamental Duties would be when talking about issues such as economic and social order, even though not talking about them expressly, in Mattos' words:

> The 1934 Constitution is part of the movement of post-war constitutions in the Western world, containing what was called the "social meaning of law" and inspired by the German Weimar Constitution of 1919 and the Spanish Constitution of 1931. The most important points of the Constitution fall within the framework of the economic and social order, for the first time included in a Brazilian constitutional text.
>
> [...]
>
> It was up to the union to draw up the National Education Plan, whose basic laws were immediately fixed. Education was proclaimed as a social right, as well as work (...) (MATTOS, 2011, p.18).

It is also worth noting that the social rights cited by the Constitution confirm what is classified as the second dimension of Fundamental Rights.

However, the Magna Carta of 1934 did not have a prolonged validity, since after the known "Estado Novo" of Vargas, who did not want to leave power, the Constitution of 1937 was established. Target of much criticism, the aforementioned Constitution is seen by intellectuals as a non-legitimate document, besides being considered a document of little use for understanding the problems the country was going through at the time, states Abreu::

> Even today, some 80 years after its granting, specific studies by jurists and historians on the 1937 Constitution are rare and limited. Perhaps this lack of studies is due to a common contempt for this document, for its granting character and supposed lack of legal and political legitimacy. For some and others, whether contemporary or not to the Constitution, its lack of legal and political legitimacy would not only justify the contempt for this document but also demonstrate its limited character as a source for understanding Vargas' Estado Novo and its authoritarian and corporative political model. (ABREU, 2016, p. 463).

Thus, with the precepts of the Aliança Nacional Libertadora (National Liberation Alliance), and also the Cohen Plan, established so that Getúlio would remain in power, the 1937 Charter ended up falling at the time the Estado Novo was extinguished. In 1945, a new National Constituent Assembly was established that would open the way for a new Magna Carta. (MEZZAROBA, 1992).

Thus, in 1946, yet another Major Law was born in Brazil, undoubtedly seen as a response to Vargas' Estado Novo. Demonstrating itself as a mature constitution within the republican regime, the Lei Maior sought to divide its attributions in its genesis, designating subcommittees for its elaboration. This constituent process was based on returning the attributions of the old Magna Carta of 1934, however, updating certain concepts for the time when it was made. (MATTOS, 2011)

Soon, it dealt with issues such as the Federal Organization, in addition to the Organization of Powers, especially the Executive, in which it was taxed its powers and responsibilities, denoting then that it sought the containment of this power that ended up being inflated in the last state experience as seen before. It instituted a republican regime, being a democratic and liberal legislation. Other federalist attributions were also treated as the basis of the country's new constitutional phase, in Cavalcanti's words:

> The distribution of incomes, the legal, political and economic regime of the Municipalities, the organization of the legislative chambers, the economic structure and so many other subjects were studied in view of the experience and the harsh provocations suffered by the country in the last decades. (CAVALCANTI, 1947, p.1).

In this way, the 1946 constitution did not bring any direct attribution to the Fundamental Duties, there was no direct application of the term nor of the determination of what these duties would be.

Consequently, in 1964 the military ascended to political power. Preceded by moments such as the March of the Family with God for Freedom, and based on the support of some sectors of the time, such as the church and the religious civil authorities that defended private property, the then future president, João Goulart, did not take office and a new political history began in the country that would last for years. (GUISOLPHI, 2010).

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With this change in the administrative bases, when an authoritarian and repressive government was installed, the old constitution (1946) no longer matched reality. Thus, after successive Institutional Acts promulgated by the presidents of the Military Era, in 1967 the then president Castello Branco began the process of drafting a new Magna Carta, in which the dictator:

> He appointed a committee of notables supervised by himself, and charged the Congress elected in 1962, mutilated by dozens of annulments, with no representation whatsoever, to approve, with a clarion call, a new Constitution for discussion and vote on which it had not been mandated. Thus was born, in the context of a farce, without any legitimacy, the sixth Brazilian Constitution. The endeavor had a double objective: to contribute to the institutionalization of the dictatorship (whatever that might mean) and to bind the dictator himself - already 'elected' by an obedient and shrunken Congress - in a legal framework alien to his will. Among not a few, the illusion was created that the dictatorship had been overcome, giving way to an authoritarian rule of law. (REIS, 2018, p. 279).

Thus, the 1967 Constitution is far from talking about what the Fundamental Duties would be. Furthermore, in 1969 there is the most important Institutional Act, number 5, which is treated as a new constitution, since the Act alters basic fundamental rights, such as freedom of the press and due process of law.

However, after 21 years of military regime, democracy was again established in Brazil, a fact that occurred on the basis of civil movements throughout the country. This phenomenon became known as redemocratization. Therefore, with the rupture of the social reality previously experienced, the foundations of the legal system could not remain the same. Consequently, in 1986 elections were held to choose Governors, Representatives and Senators, who would also be the constituents:

> The constituents would be deputies and senators, who would be in charge of drafting the Constitution and routine legislation. The social groups and classes interested in getting their ideas approved and defending their interests in the new Constitution chose their candidates, whose campaign they began to finance. (MATTOS, 2011, p.34)

Thus, it was in a historical context based on repudiation of the atrocities and the regressions that the Military Dictatorship represented for Human Rights that the 1988 assembly approved the text of the well-known Carta Cidadã (Citizen's Charter), the 1988 Federal Constitution, still in effect today.

Known for its immense list of guarantees and delimitations of state attributions, the 1988 Constitution shows itself as a response to the dictatorial regime after it. In addition, the Major Law expressly brought an entire chapter dedicated to the Fundamental Duties, a subject that will be discussed in the next topic, in which this concern of the original legislator will also be explained.

## 4. THE 1988 CONSTITUTION AND THE FUNDAMENTAL DUTIES.

When starting the discussion about the Fundamental Duties, some precepts elucidated by authors who talk about the subject become interesting in order to understand the core of the subject. Thus, one of the most valuable teachings for the debate is made by Georg Jellinek when dealing with the four statuses that the individual may find himself facing the State.

The author classifies these statuses in: passive, positive negative and active (JELLINEK, 2002). Namely, in the passive status, the individual before the state is subordinated to the public powers and is seen as a subject of duty - occurring predominantly with a cooperation with the state. In the negative status, on the other hand, the individual is consecrated as a being that has the power of self-determination, guaranteeing a state noninterference in his life. When found in the positive status, the citizen would have the right to demand the State to provide services and goods. Finally - and most importantly for the theme of the work - in the active status, the subject starts to enjoy influence before the state formation, here it is highlighted as an example the suffrage, therefore, he starts to exercise his political rights, being demanded and being able to demand from the state. (JELLINEK, 2002).

Thus, it is noteworthy that the Fundamental Duties, in one of its main assignments happens when the political being is in the "active status" before the State, term used in Jellinek's classification. Thus, in this status created by the author, the individual has the power to influence the State directly or indirectly, no longer just being influenced, one of the greatest examples of this citizen role would be the power to choose their representatives through the vote. However, as it will be explained in the present topic, the legal garantism also approaches the State-Citizen bond in other aspects, deepening even more the discussion.

Furthermore, based on the discussion above it is necessary to define what the Fundamental Duties are and the importance that the theme has in our legal system. Dimoulis and Martins define these duties as:

> Duties of action or omission, proclaimed by the Constitution (formal fundamentality), whose active and passive subjects are indicated in each rule or can be deduced through interpretation. Very often the ownership and passive subjects are diffuse and the content of the duty (required conduct) can only result from infra-constitutional concretization. (DIMOULIS; MARTINS, 2000, p. 67).

In complement, the meaning of Vieira and Pedra (2013, p. 5) exposes the relationship of duties with the legal system: "Fundamental duties are not mere impositions based on human virtues. They constitute, in truth, a reciprocal model proper of the social contract, where, finally, citizens will have a duty of obedience to the legal system. "Finally, and no less important, another definition that seems correct to us would be that of Duque and Pedra:

> [...] fundamental duties can be conceived as legal duties of the person, both physical and legal, which, by determining the fundamental position of the individual, present a meaning for a certain group or society and, thus, can be demanded in a public, private, political, economic and social perspective (DUQUE; PEDRA, 2013, p.151).

From what was exposed, it is evident that the Fundamental Duties are primarily related to the legality of each legal system, that is, they carry the need for recognition in the texts of the Constitution and regulation by ordinary laws.

Furthermore, when studying these duties, one notices a scarcity of legal texts on the subject, especially when comparatively analyzing the studies on Fundamental Rights, a related matter. Some authors justify the lack of approach for the following reasons:

> [...] we are of the opinion that such a neglect of fundamental duties has more proximate causes. These certainly include both the political, social and cultural situation of the second post-war period and the return to a strict liberal view of fundamental rights. As for the first cause, we need only recall that the dominant concern at that time was the establishment or foundation of constitutional regimes that were strong enough to protect fundamental rights and liberties. That is, regimes that would oppose in a fully effective way any and all attempts to return to the totalitarian or authoritarian past. It was therefore necessary to exorcise the past dominated by duties, or rather, by duties without rights (NABAIS, 2007, p.13).

In a complementary way, still on the subject:

> There is not in the Brazilian jurisprudence and doctrine the due development of fundamental duties. This legacy of omission takes place basically on foundation of the Liberal State heritage and the first generation rights, with the position of the particular in face of the State [...] (Vieira; Pedra, 2013, p. 2).

This limited approach by authors who speak on the subject is also related to the low number of provisions found in the current Federal Constitution that governs Brazil. Our Magna Carta, even though in its Title II, Chapter I, it bears the statement "Of the Individual and Collective Rights and Duties" brought exhaustively rights and only a few duties without even making use of the term Fundamental Duties.

In this sense, the texts by Dimoulis and Martins, deduce, in a didactic way, classifications about the duties that can be found within the Constitution taking into account the characteristics of the devices. The attributes used, in general, would be: The autonomy or not of the Fundamental Duty - i.e. whether it exists in its own form or by linkage to a Fundamental Right -; the duty to be explicit or implicit - whether it is written or not in the constitutional text - and finally, to whom the duty relates - common person or State (DIMOULIS; MARTINS, 2000).

Thus, when compared to the Indian Constitution, for example, the 1988 Federal Constitution is still lagging behind on the subject of Fundamental Duties. India, after its independence in 1947, promulgated its first constitution and became a republic in 1950. The text of the Charter incorporated both Fundamental Rights and Fundamental Duties. (SRIPATI, Vijayashiri; THIRUVENGADAM, Arun K., 2004).

Thus, the Fundamental Duties in the Indian Constitution are found as guidelines and principles of national policy. The text in Part IV of the Constitution is focused on the actions that the Indian state should take in relation to social, economic, and cultural rights. In this way, Article 37 of the Charter further deduces the importance of recognizing these duties in order to govern the country. (SRIPATI, Vijayashiri; THIRUVENGADAM, Arun K., 2004)

As the list treated by the doctrine is extensive, it would not fit to talk about all of them in this article, however, there are three important classifications to elucidate the research on the

duties portrayed, they are: Implicit and non-autonomous State Duties; Autonomous State Duties and Autonomous Private Duties.

The Implicit and non-autonomous State Duties, according to the authors, are those that arise in the light of the Fundamental Right to which it relates, besides having emerged with the first legal-objective dimension of fundamental rights, therefore, in the perspective of a negative State regarding the interference in private life. Examples of these duties are the state duties of protection, which are configured as the duty of the State to protect the Fundamental Right in relation to threats and aggression to this guarantee (DIMOULIS; MARTINS, 2000).

On the other hand, there are the Autonomous State Duties, which in a different way, are sanctioned by the constitutional text for the States to do them, an obligation before the population that may demand them. The example in this case would be the duty that the State has to criminalize conduct that the legislature, influenced by what society considers negative. (DIMOULIS; MARTINS, 2000).

In addition, one must overcome the understanding that only the State is the subject of duties, and it is in the classification of the autonomous duties of individuals that we can visualize the statement. These duties are those that are outlined and must be obeyed by private individuals in their legal actions, therefore, they are duties directed to a certain sector of the population. The best example within the Federal Constitution is education as a duty of the family over children and adolescents. (DIMOULIS; MARTINS, 2000).

Still on the duties between private individuals, another point that is raised in the texts of scholars would be the issue of solidarity in private relations, considered as the other side of the relationship rights and duties between individuals, ensuring the dignity of the human person, namely:

> Solidarity is, in fact, the other side of the same coin in the game of rights and duties, since it ratifies the incidence of fundamental rights covered by the constitutional norm, and can be understood from a relationship of reciprocity: if there are rights, in return, there is the duty to provide solidarity (DUQUE; PEDRA, 2013, p. 148).

Finally, the last point to be remembered when talking about the Fundamental Duties would be to overcome the idea that duties are suppressors of rights. The authors who have dedicated themselves to studying the duties are unanimous in considering that there is a synallagmatic relationship between rights and duties, since there is a mutual protection by them to the legal system itself, therefore, to the Democratic State of Law (NABAIS, 2007).

In conclusion, also adduces Vieira and Pedra (2013, p. 3): "It is necessary to understand fundamental duties not as a counterpoint or a mitigator of rights, but rather as a provider or promoter of them."

## 5. FINAL REMARKS

It is concluded in this paper that the Brazilian legal system lacks a specificity on the Fundamental Duties, influencing, thus, to a limited number of authors who are dedicated to dealing with the subject. However, this is a characteristic of Western legal systems, the low visibility

of the Fundamental Duties, since the constitutional history of these countries were founded, primarily, based on individual freedom as a maximum premise. (BONAVIDES, 2008).

When analyzing the history of the Magna Carta of Brazil, it was confirmed the absence of rules destined, and even the use of nomenclature, as to the Fundamental Duties. The original Brazilian legislator, in none of the conjunctures highlighted the importance of the guarantee of duties for the consolidation of the democratic bias that a republic brings with it. Furthermore, when the legislator employed conducts considered to be Fundamental Duties, he did not clarify the forms required for their consolidation, leaving it to the infra-constitutional legislations to elucidate on the subject. An example of this is the solidarity in private relations. Considered as one of the main aspects of the Fundamental Duties, this solidarity guaranteed by the constitutional text - in singularity and not entitled in itself as a Fundamental Duty - is studied in the light of private law, therefore, of civil law, demonstrating that it was left to infra-constitutional legislation to delimit this duty.

In this way, the analysis of the 1988 Federal Constitution, made in the article, also proves the absence of a specific nomenclature that speaks about the Fundamental Duties. This fact shows that the original legislator did not in fact focus on these duties, even though in Chapter I of Title II of the Constitution he tries to portray the so-called Individual and Collective Duties together with the Rights.

Furthermore, the body of national works shows a disparity in the number of authors who speak of Fundamental Duties in their bibliography when compared to the number of writers who speak of Fundamental Rights.

The Fundamental Duties convalidate as a significant theme to understand the power to demand and indirectly direct that every citizen has in a Democratic State of Law.

In view of all this, it is noted that, even with the importance proven by authors who speak on the subject, the Fundamental Duties do not enjoy the due value as a forming base of the Democratic State of Law. Scholars converge in considering that Fundamental Rights go hand in hand with Duties, duties that shape the State as much as and in the same proportion as the principle norms. It is defended, then, the need for greater research in the Brazilian scenario on the Fundamental Duties that govern our legal system, both constitutional and infra-constitutional.

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# THE ROLE OF TECHNOLOGY IN THE DEMOCRATIC RULE OF LAW CONSTRUCTION

## O PAPEL DA TECNOLOGIA NA CONSTRUÇÃO DO ESTADO DEMOCRÁTICO DE DIREITO

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## ABSTRACT

The study is an analysis of the use of technology as a factor for the improvement or construction of the Democratic State of Law. Its objective is to weigh the use of technology for the improvement of the Democratic State of Law, considering all the challenges presented by the globalized world and especially the changes that have occurred in the production, communication, and education modes, among other innumerous changes, which have become internationalized, especially through the use of modern technology. For many scholars, this has also contributed to the softening of the national State. The question is to be able to use technology in favor of the State, that is, in search of its improvement. Communication-oriented technologies, if well employed, are capable of improving public administration, with better practices in terms of administrative planning, as well as in terms of the transparency of the State's actions, in such a way as to create a positive response to the globalization process. The deductive method was employed, following the legal-sociological approach, of the descriptive and propositional type, based on theoretical research, that is, based on secondary data.

**Keywords:** improvement of public administration; democratic rule of law; globalization; use of technology.

## RESUMO

*O estudo trata de uma análise sobre o emprego da tecnologia como fator de aperfeiçoament0oou construção do Estado Democrático de Direito. Tem como objetivo sopesar a utilização tecnológica para o aperfeiçoamento do Estado Democrático de Direito, considerando todos os desafios apresentados pelo mundo globalizado e principalmente as mudanças ocorridas no modo de produção, comunicação, educação entre outras inúmeras mudanças, que acabaram se internacionalizando em especial pelo uso da moderna tecnologia, sendo que para muitos estudiosos, contribuiu, também, para o abrandamento do Estado nacional. A questão é poder afligir a tecnologia a favor do Estado, ou seja, em busca do seu aprimoramento. As tecnologias voltadas às comunicações, caso bem empregadas, são capazes de aperfeiçoar a administração pública, com práticas melhores no que se alude ao planejamento administrativo, de tal modo como em relação à transparência das atuações de Estado, de maneira a suscitar uma defrontação positiva ao processo de globalização. Foi empregado o método dedutivo, seguindo a vertente jurídico sociológica, do tipo descritivo e propositivo, baseando-se em pesquisas teóricas, ou seja, a partir de dados sedundários.*

**Palavras-chave:** *aperfeiçoamento da administração pública; Estado Democrático de Direito; globalização; utilização da tecnologia.*

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# 1. INTRODUCTION

The purpose of this article is to provide the reader with a reflection on the use of available technologies to improve the Democratic State of Law, considering the new needs that have arisen from a globalized world.

In order for this analysis to be made in a pedagogical way, the studies began with conceptualizations, which were followed by a presentation of the historical part of the Democratic State of Law. After this, the theme of globalization took its course, with a brief study of it, in order to bring it into the main theme, which is the use of the same technology that may be contributing to the weakening of the National State in an inverted form, that is, to the strengthening of the Democratic State of Law.

Globalization is seen by some scholars of the subject as a stage of transformation of the capitalist mode of production, considering that the main studies on this phenomenon in general have only the economic bias. It is known that the economic analysis is only one of the ways to understand globalization, considering that the cultural, political, environmental, and other aspects should also be analyzed.

Faced with these countless ways of apprehending the phenomenon of globalization, one of them ends up standing out, that is, the possibility of a weakening of the National State because it is considered to be increasingly inoperative in the face of the social and economic transformations that are taking place. The creation of other points of gravitation of power is considered, especially in private international entities, which end up being endowed with another structuring of action that goes beyond the reach of the national State itself.

From another point of view, we have the national public administration, which has as its main purpose to take care of the common good of the citizen, aiming to meet the public purposes. The use of technology can contribute to the optimization of work, greater effectiveness, reducing bureaucracy in the provision of services.

The present study aims to discuss the use of technology in favor of the effectiveness of the Democratic State of Law, mainly in order to allow a better access of citizens to State decisions, as well as its improvement regarding the creation and management of public policies, which may contribute, at the same time, to its legitimization.

The deductive method was used, with bibliographic research that is not limited only to the legal area, promoting reflections on the application of technology in a way that promotes the modernization of the State.

# 2. COMPOSIÇÃO DO ESTADO DEMOCRÁTICO DE DIREITO

For a better understanding of the Democratic Rule of Law, a historical and conceptual approach is necessary, otherwise the study that we intend to develop here will not be delimited.

The concept of Democratic Rule of Law, as we know it today, follows events through historical evolution ('divided' into Liberal Rule of Law; Social Rule of Law and Democratic Rule of

Law). In the Modern Age, in the 18th century, under the influence of the Enlightenment, several transformations occurred, with philosophical lines characterizing a Liberal State, which was based on the hypersufficiency and equality of individuals, believing that individuals and their relations did not need a greater state intervention. Liberalism has as philosophy and policy ater state intervention, based on the claim that individual initiatives are better for the economic, social and cultural life of the citizen, opposing nepotism. (AMORIM, 2010, pp. 34-35)

Dissatisfied with the situation and through a popular uprising, there is a transformation of the Liberal State into the Social State, at the end of the 19th century, considering the global changes that came to meet the thought of a State that emphasized the social aspects, where the State and society take responsibility for the individual's hyposufficiency, through market regulation, public policies and the formation of large economies. The welfare state brought with it an immense commitment to the people, through the promotion of positive actions, which would be demanded, constituting the very meaning of the welfare state, which came to have as a scope the organization of society in order to meet social demands. (SOARES, 2012, pp. 112-117)

In a simplified and objective way, the concept of the Democratic State of Law refers to a State where respect for civil liberties is necessary at all times and also for fundamental guarantees, including guarantees of individual and collective rights, social rights, and political rights.

This means that for a state to achieve the scope of being respected a Democratic State of Law, all citizens' rights need to have legal coverage and to be protected by the state, through its governments. In a Democratic Rule of Law, the rulers need to respect what is provided for in the laws.

As cited in Article 1 of the Brazilian Federal Constitution "all power emanates from the people", that is, the State needs to be guided by democratic precepts, certifying social justice and established in the principle of the dignity of the human person, with free elections, respecting public authorities, fundamental rights and guarantees, and the environment (BRASIL, 1998). For the author Alexandre de Moraes:

> Characterizing the Constitutional State, it means that the State is governed by democratic norms, with free, periodic elections by the people, as well as respect by the public authorities for fundamental rights and guarantees [...] fundamentally expresses the requirement for full participation of each and every person in the political life of the country, in order to ensure respect for popular sovereignty (MORAES, 2010, p. 6)

Brazil is framed in the group of Democratic Rule of Law. Its main characteristics are popular sovereignty, representative and participatory democracy, a constitutional state, and a system of human rights guarantees, as previously stated, under the premise that democracy is a principle of government where the decisive power related to politics is in the hands of the people.

The State does not exist simply to be a State, as it is based on certain obligations essential to the proper society and human kind. Thus, the Democratic State of Law is not only concerned with acting legally, but mainly with making its decisions legitimate, a legitimacy that will only come about when accepted by the people, through their participation, either collective or individual.

For José Afonso da Silva the Democratic State of Law is the junction of Rule of Law and Democratic State, not only in a formal sense, but forming a new concept that ensures the principles of both and even adds a revolutionary element of the status quo. (SILVA, 1988, p. 1- 2)

The rule of law is seen as a necessary instrument to prevent the use of arbitrary force, as it is considered an ideal for many who preach against authoritarianism and totalitarianism, being seen as one of the foundations of democracy. The idea of the Rule of Law goes against arbitrary power, which is why it is defended by many (democrats, egalitarians, liberals, etc)

The Rule of Law aims as a state structure for the Public Power to be supervised by a Major Law, that is, a Constitution, thus having a greater juridical character of the Political Power.

In Miguel Reale's understanding:

> By rule of law we mean that which, freely constituted on the basis of law, regulates all its decisions by it. The 1988 constituents, who deliberated sometimes as illuminists, sometimes as enlightened, were not content with formal juridicality, preferring to speak of a Democratic State of Law, which is characterized by also taking into account the concrete values of equality. (REALE, 2000, p.37)

The democratic state assumes the design of equality, having the law as an instrument of social restructuring, going beyond the utopia of social transformation. The democratic principle explains in its essence the requirement for the active participation of all people in the political life of the country. There is a need for popular sovereignty within the democratic state. In the conception of José Afonso da Silva:

> The democratic state is founded on the principle of popular sovereignty, which imposes the effective and active participation of the people in public affairs, a participation that is not exhausted, as we shall see, in the simple formation of representative institutions, which constitute a stage in the evolution of the democratic state, but not its complete development. (SILVA, 2007, p. 66)

The Democratic State has as its real intention to concretize a dignified life for mankind. It must go beyond the utopia of dignity to an effective reality, and it is up to the State, through its public participation, to create this reality. The people must have a direct participation in this State.

The State must keep in mind that democracy is the need and capacity to solve problems always for the sake of a greater good, seeking the materiality of an existence with dignity for its population, making a social transformation happen, through its regulations, where all the fundamental rights and guarantees are ensured and put into practice.

The Democratic State of Law provides for some important characteristics that are effective in its composition: equal participation in decisions; sovereignty and popular sovereignty; public administrative acts; free access to justice; guarantee of social justice; among others, and will be analyzed and discussed in this work when faced with globalization.

In the next topic the study will be conducted in the sense that these characteristics or factors can be better met, taking into account the challenges presented by a globalized world.

## 3. THE CHALLENGES OF GLOBALIZATION FOR THE DEMOCRATIC RULE OF LAW

For many, when talking about globalization, only the phase after the entrance of the Internet into the world comes to mind, but globalization has been happening since the time of the great

navigations, 15th and 16th centuries, in the mercantilist period, having its effectiveness in the 20th century, after the fall of socialism in Europe, and its greatest impulse was with neoliberalism from 1970 on. In Brazil, globalization had its greatest impact at the end of the 20th century, with the privatization of some economic sectors. (IANNI, 2001, p.86- 88)

The globalization arising from technology through the internet, digital systems, telephony, and satellite network communications, has stemmed from the need for cheaper product prices, greater competition, and the search for cheap labor, because the domestic markets were worn out; and, with the end of socialism, this search has extended to this new market.

Globalization is a capitalist phenomenon and a process of tightening economic, social, political and cultural relations among the various and different countries in the world, having the ability to destroy barriers to a free movement of capital. An interconnection between people, commerce, and states, linking to the concept of globalization those of universal and international.

It focuses on the growing relationship between countries through a reduction of their geographical distances (cross-border relationship), thus bringing about several changes: in the production of wealth, in the work sector, in the state function, in the information obtained from all over the world, in the cultural-social-political-economic vision. In this way, it can be said, it would be a unification, without conflicts, of the world territory.

For Marcos Gonçalvez, *apud* by Janaína and Claudine:

> This is globalization, this conception of the so-called "global village" that massifies the means of communication, making the whole orb as if it were a country town, where everyone already knows everything, states Gonçalves (1997). The Earth has become globalized, such that the globe has ceased to be an astronomical figure to more fully acquire its historical significance. (2014, p. 05)

With globalization and the unbridled use of technology, there is a prevailing view that states are increasingly influenced and limited by international political actions, and state sovereignty is at risk. It is up to the State to adapt to the globalized ways. Just as the world has adapted and adapts to globalization, Law must also adapt. The Democratic State of Law must be connected to all the changes, whether positive or negative, brought about by this new paradigm.

The figure of new actors in this modern world context has caused the National State to cease to be the dominant protagonist, with a decentralization of regulations and a deconstruction in the known hierarchy of Law, where the consequences go beyond the state territory. In this new globalized context, there is a relationship between world norms. (SOUZA, 2017, p. 1187). I

n this same sense, Eloísa Argerigh:

> In this way we can see that, in the context of globalization, we are facing an extremely complex process, in which a new governance requires new knowledge, more integration, and more information from States, so that they can maintain themselves in the international scenario. A new posture with regard to changing the role of the state, as the dominant actor in the international system, is not only a necessity, but a growing demand. This is why it is not difficult to understand why the effects of globalization, especially with regard to the weakening of the sovereign authority exercised by the state and the loss of its autonomy, are so profound and controversial. (ARGERIGH, 2003, p. 145-146)

Today's society is more interconnected every day through technology, and there is a need for the Democratic State of Law to restructure and reinvent itself in order to respond to social demands.

One cannot impose innovations in the field of Law exclusively to globalization, but it is assertive that globalization brings reflexes in this environment, and a complex analysis of the world social, economic, political, and cultural situation is necessary for a conception of legal knowledge.

For the Democratic State of Law, globalization is a "double-edged sword", because at the same time that it provides countless benefits to the society that is under its aegis, it also brings, especially in the social aspect, extreme inequalities to the same population - a subject that will be dealt with in detail in the next item of work.

To Fernando de Sousa:

> For globalization to be effectively a mechanism for promoting democratization, the traditional concept of "people's democracy" needs to be extended beyond territorial boundaries, in the sense that, in the face of global forces, this relationship cannot be restricted to the population-state duality included in the traditional understanding of the term. From this perspective, globalization has already had the effect of elaborating supra-state policies, which go far beyond national jurisdictions, demonstrating this need for openness to a broader understanding. through the expression of the popular will, the definition of a democratic supranational community has been complex. In this context of denationalization, international organizations allow narrow political decisions to be reflected in the context of global decision-making, seeking to strengthen political communities in the global context. They can therefore be vehicles for promoting democratization, through their regulatory and governance role at the supranational level, while respecting and reflecting democratic principles and social and economic promotion. (SOUSA, 2006, p.12)

With globalization, although Western and capitalist, comes the need to reinvigorate sustainability due to the exacerbated growth of many nations around the world. Rich countries or not, must walk together in the sense of taking care not only of the environment, but also of the social environment in which one lives, adopting precautionary decisions, to avoid further environmental destruction for the preservation of future generations. (EDDINE, 2008, p.436).

In current international trade relations, the environment has been highlighted, where each country in the trade relationship is obliged to take care of it within its internal domain, because many countries to achieve wealth have ended up generating social inequalities and degradation of its environment.

There is no longer any way to ignore the climate changes that have occurred. There is no such thing as a self-sufficient nation when it comes to the environment. A global agreement is needed to generate a short, medium, and long-term solution, because the common environment (oxygen, for example) is everyone's responsibility, and it can only be preserved if there is effective worldwide action.

In this same sense the words of Siomara Cador Eddine, in her article entitled "Globalization and the role of the State: challenges for a democratic and sustainable State":

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> To achieve sustainable development, it is fundamental to establish a clear commitment to sovereignty. This commitment will make it possible to build a more prosperous country, with a strengthened democracy and autonomous decision-making, providing more direct forms of popular participation and interference in the discussion of major national issues. For this, we need long-term strategic policies, with intense discussion about the purposes and paths of growth and the desired and possible sustainability for society and the State. (EDDINE, 2008, p. 442)

In order for democracy to succeed in the face of globalization, a commitment from the authorities, be they national or international, is necessary. The way of governing has to interweave democratic principles and legislative activity in the face of necessary reformulations.

There is the softening of state regulation by commerce, making it clear that the state must redefine itself in relation to democracy, seeking to recover the institutional guarantees that enable citizens to participate in it. Moreover, it is clear that the state must change its way of thinking in relation to the fulfillment of its public policies and services. (ARGERICH, 2003, p.4)

There is a new world configuration, where the traditional state sovereignty no longer replicates the current political conditions, having to rebuild the democratic component to overcome the shortcomings of democracy.

## 4. TECHNOLOGY WORKING IN FAVOR OF THE DEMOCRATIC RULE OF LAW

After a brief analysis of the concepts of Democratic Rule of Law and globalization, there is an urgent need to verify the effects of technology on them.

With the rapid development of technology, there has been a greater flow of information obtained in the globalized world, because the Internet is currently responsible for the dissemination of an exacerbated number of ideas, concepts, opinions, judgments concentrated in a single access. And this access is in the palm of most people's hands, because through a smartphone you can connect and know what is happening anywhere in the world.

The responsible use of technology is, without a doubt, a strong ally of democracy. Through it, it is possible to instantly broadcast any kind of news needed for knowledge or clarification on a certain subject. Through the Internet, it is possible to organize tactics so that decisions can be adopted in favor of democracy involving the population in general.

"Technology is doing for our brains what machines did for our arms in the Industrial Revolution. "This phrase is said by Mauricio Benvenutti, in his book Audacious (2018, p, 17), and he is absolutely right in his sayings. Technology has become something disruptive, because it has changed the usual continuation of a process. With it that normal segment of conveying information has been disrupted. To have an idea of the temporal change of receiving information, in 1965 the news of the death of the American president Abraham Lincoln took 13 days to cross the Atlantic Ocean and reach Europe. In contrast, in 1997 (22 years ago), the crash of the Hong Kong stock market took 13 seconds to spread worldwide and devastate the other stock markets.

Still in Benvenutti 's words:

> *Today, a person in Kenya with a smartphone in his hands accesses more information than President Bill Clinton did when he ruled the United States in the 1990s. This Kenyan's Google is as good as that of Larry Page, the founder of Google itself. The knowledge he gets is the same as yours. Human empowerment, which started in communications and access to information, is expanding to all areas. And it brings advanced technologies ever closer to ordinary citizens. (BENVENUTTI, 2018, p. 23)*

*Popular participation is something primordial to guarantee democracy, thus, the facilitated access, through the internet, to political information, plays an effective role in decision making, improving it. There is, in this way, an action that facilitates information, making it possible, through social networks, for people to debate issues that were previously only plastered on the physical media. Before the arrival of technology, the Internet, it was not possible to debate what had happened. Simply, the information reached the population in the format that interested who was informing, and the population had to read it, or listen to it, but never debate it.*

*One of the many demonstrations of popular sovereignty in Brazil is the vote, and the internet has been extremely important here, because countless pieces of information and explanations related to the possible governors reach the entire population.*

*Another important way of improving democracy through the Internet are the government transparency portals. These portals require reliable sources of information about the public machine because they are not mere publications of data to the population, but clear, true, intelligible, organized and easily accessible data. Broad access to public acts is another way to ensure democracy, and was reinforced by the Access to Information Act, 2011.*

*To Marciele Bernardes and Aires Rover:*

> In this line, the electronic government programs (e-gov) take prominence because, from the incorporation of the Internet in the routine of administrations, they constitute a powerful tool for reform of the State and, thereby, facilitate transparency (accountability), efficiency in the provision of public services, the fight against bureaucracy and, above all, the individualization of service to the citizen (BERNARDES; ROVER, 2012, p. 2)

The need for a wide dissemination of this data was also due to the population's own demand to know how their representatives are applying the resources destined to the present administration. With this data available on the Internet, society has the possibility of being more active, being able to supervise and opine in the formulation of proposals, with an approximation between the government and the population. In order for there to be real benefits in the use of the Internet for public data dissemination, it is essential that those who use it do so in a neutral and impartial manner, without manipulation of information. Another great advantage of obtaining and disclosing data, especially public data, through the Internet is its low cost compared to traditional means of communication.

With the publication of public spending on the Internet, it is much easier for the population to control this spending and its applicability, as mentioned above, thus strengthening the guarantee of social justice, which is an outstanding characteristic of the Democratic State of Law.

Social justice aims to ensure equality and solidarity, anchored in political and moral principles, seeking a social balance, for without it there is no democracy. The right to education, work,

health, leisure, access to justice, and others, must be preserved so that less social inequality occurs. And technology becomes primordial for this achievement, because with it, through the use of the internet, it is possible to highlight the social problems encountered, and thus, the Public Power can act in the search for an egalitarian society.

Globalization has a great responsibility towards the guarantee of social justice, because it is the one that guarantees the economic growth of a country making its people have minimum guarantees of dignity and equal opportunities. According to José Afonso da Silva:

> To have social welfare and justice as an objective means that the country's economic and social relations, to generate welfare, must provide work and adequate living conditions, material, spiritual and intellectual, for the worker and his family, and that the wealth produced in the country, to generate social justice, must be equitably distributed. (SILVA, 2007, p. 758)

For an effective Democratic State of Law, free access to justice or the right to access to justice is necessary, which due to its importance is elevated to a Human Rights prerogative, surpassing a constitutional guarantee. It is up to every man to be heard and judged by a legitimate and impartial Court, the principle of equality always prevailing, since the race, sex, financial condition, or religion of the citizen is not taken into consideration when he seeks justice through the State.

The cost of this justice is high, as it requires several legal apparatuses and procedures for it to occur. Law 1.060/50 and the current Code of Civil Procedure bring the necessary requirements for the citizen to qualify for free legal assistance, transferring all expenses with justice to the State.

Technology meets these costs, when with its computers and internet, it has reduced the procedural time of the facts brought to the State for resolution. With the reduction in procedural time, there was a greater dynamism in the trials and judicial delays began to be seen as a problem for the State. An excellent example of procedural economy is the possibility of remote interrogations by videoconference, in some specific cases.

Besides the economy brought by technology to the State, it brought greater satisfaction to those who sought it, because the procedural resolution became faster and clearer, because the party can follow, via the Internet, the steps and course that its process is taking.

When it comes to a Democratic State of Law, there is a need for a higher law, and the entire population must follow it and live under its effects and orders. No citizen can allege ignorance of the laws that govern his government, especially in a democracy, where the people's participation must be effective.

Technology, once again, becomes essential, as it easily, quickly, and almost costlessly discloses information that is indispensable for living in harmony with other citizens. And for this to happen, it is necessary that access to the internet is easy and inexpensive, so that the entire population can make use of it.

Freedom of speech and of actions in a democracy are part of its essence. In Brazil, social movements emerged in the 19th century, with the Balaiada Movement in Maranhão. In the 1960s, social movements were already turning against the Military Regime, with the support of students and workers' groups. With the 1988 Federal Constitution, these movements became more effective. Social movements are groups of people with the same objective to be defended,

whether it be transformative or for the struggle for a common good in favor of society, and may be against or in favor of the State. They are organized movements with a purpose to be achieved. They can act in different areas: religious, racial, environmental, gender, and others. And they can also occur all over the world and at the same time, and that is where technology interferes. (GOHN, 2011, pp. 03 and 04)

The technology for the success of a social movement is primordial, because it is through the Internet that most of the members of social movements debate the issue of the agenda, organize themselves, articulate themselves, and propagate the time and place that the movement will take place. With the arrival of the Internet, these movements have gained strength, because the ease of information exchange has become easy and immediate. An idea can be transported, through the internet, all over the world, in a matter of seconds. And to this idea, supporters of thoughts can emerge where a social movement is formed. So that from an idea practical effects arise to the advantage of many. All change starts from an idea, and from this idea attitudes around it bring improvements.

There are several social movements worldwide, which only gained the strength and impact they have today due to the use of the internet, an example of this is the Feminist Movement. It emerged at the end of the 19th century, with the fight for women's legal rights, seeking the right to vote. Already in the 1960s and 1970s, this movement sought equal rights, between men and women, and greater feminist freedom. With the arrival and applicability of technology and this and other movements - such as the Black, Student, Labor, LGTBQIA+, Environmentalist movements - greater organization became possible. (BEZERRA, 2019, p. 04)

The largest Social Movement that took place in Brazil took place in 2013, where through the Internet it was possible to coordinate and disseminate to the whole world the places, days and time that this social and nonpartisan Movement would occur. (QUEIROZ, 2017, p. 03)

Still along this same line of population participation, it is necessary to mention the right to education as a characteristic and guarantee of the Democratic State of Law, because for the individual to become an effective citizen he has to be well trained and educated so that he doesn't become just a "puppet" in the hands of his rulers, because the low condition of education dampens the democratic system. The Federal Constitution of 1988, instituted in article 205:

> Education, a right of all and duty of the state and of the family, will be promoted and encouraged with the collaboration of society, aiming at the full development of the person, his preparation for the exercise of citizenship and his qualification for work. (BRAZIL, 1988)

It is necessary that education be taken completely seriously in any country that wants to be a true Democratic State of Law, and for this to happen, it is necessary to have a capable educational system to designate citizens, so that political illiteracy is avoided. However, the educational system in any country requires spending within the government's plan, and technology, in this sense, is effective for the economy.

With technology, education can be offered to the entire population at affordable prices to the population, and also to the government. Online courses, Distance Education, digital libraries are realities offered and affordable in Brazil. Not only a financial economy is obtained with these courses, but also a time economy, because in a poor country where the population has to work, often three periods, being able to study in the comfort of your home, with your family,

is an achievement. With the use of technology, education can reach places that were not possible before, guaranteeing democracy.

Technology is present in the Democratic State of Law and, in a certain way, inherent to it, making it increasingly necessary to use it in order to make it effective, with consideration and responsibility

## 5. PROCESSES OF DEMOCRATIC DECONSTRUCTION IN THE FACE OF THE MISUSE OF TECHNOLOGY

At the same time that technology is something incredible and is rooted in the Democratic Rule of Law, it is necessary to ponder its use. The Democratic Rule of Law also needs other foundations and characteristics necessary for its existence.

The world used to be seen in a linear and local way and today it is seen in an exponential and global way due to the constant use of technology. Sensors, drones, 3D printers, internet of things, artificial intelligence, robots, etc., evolve absurdly fast, being protagonists of the changes noticed in society (DESIDERI, 2017). The linear thinking of man and the exponential growth of technology can generate excellent opportunities (as mentioned in the previous item) or an announced tragedy - as will be seen in this item.

According to a study done by the World Economic Forum in Davos in January 2018, it was clear that 65% of children in the current first grade will work in entirely new activities that do not yet exist, due to the constant use of new technologies, the impact of automation, and artificial intelligence. (BENVENUTTI, 2018, p. 55). This subject and these data scare most of the population, not only in Brazil, but also worldwide, because the doubt that hovers is whether jobs will cease to exist or will only need a new adaptation to the technological reality.

One of the foundations of the Democratic State of Law is to maintain the dignity of its population. And this dignity has decent work as its principle. Jobs have been changing for a long time. Since the First Industrial Revolution there have been discussions about the benefits or harms of the use of technology, all depending on the economic moment the world is going through.

It is clear that innovation scares and often hinders the economic market, because it brings difficulties in adapting and learning about the new. The relationship between employment and innovation often generates conflicts and is totally complex, according to Jorge Mattoso, professor of Economics at Unicamp:

> The introduction of technological innovation in the productive process is not a recent phenomenon and is the result of competition between capitals. Its major objective is to raise productivity and reduce the live labor directly involved in this process. If “the machine is innocent of the miseries it causes” (Marx, 1975), unemployment is, contradictorily, a consequence of the development of technical progress, in the conditions proper to the uncontrolled functioning of the capitalist mode of production. In other words, although technological

> innovation is the dynamic of accumulation in the incessant search for the highest possible valorization of capital, it moves against workers and society as a result of its private appropriation, of its unilateral use and without social regulation. (MATTOSO, 2000, p. 2)

The reduction of human intermediation in several activities, such as banking transactions, shopping, and online services, is already part of the day-to-day life of many populations, including the Brazilian population.

The need for new technologies to achieve modernization is indisputable, but at the same time, the loss of jobs is inevitable, with a giant loss for society, affecting in some way the democratic rule of law, considering that the decision-making power has been transferred to the international level, and most of the time is linked to large banking conglomerates.

According to data from CONTRAF/CUT's website of January 22, 2016, banks, aiming only to maintain their exorbitant profits, are laying off more and more employees, hiring fewer and lower salaries, because transactions made over the internet, through smartphones or computers, are much cheaper and faster.

> In 2015, banks operating in Brazil closed 9,886 jobs, according to the Bank Employment Survey (PEB), released this Friday (22) by Contraf-CUT. The number almost doubled compared to 2014, when 5,004 jobs were closed in the banking sector, representing an advance of 97.6%. The study is done monthly, in partnership with Dieese, uses data from the General Cadastre for Employed and Unemployed (Caged) of the Ministry of Labor and Employment (MTE) and also reveals that in the last three years the sector has continued to shed jobs. In comparison with 2013, when 4,329 jobs were cut, the numbers for 2015 represent an even greater increase, of 128.4%. (CONTRAF/CUT website, 2016, p. 01)

Numerous other sectors already frequently suffer from unemployment in order to survive in such a competitive market due to technological innovation, and some others are about to.

The Democratic State of Law, with technological innovations, does not suffer negative impact only with the growth of unemployment, which hinders the achievement of one of its greatest results, which in this case is the dignity of the human person. It also ends up being eroded by the media, which are also called social media, such as through the propagation of false news.

The social movements organized through social networks already mentioned in the previous item can also generate damages to the Democratic Rule of Law, because by concentrating many people around a purpose, one can have the destruction of public and private property, physical/moral/sexual violence between participants and non-participants of the movement. The Democratic State of Law can suffer harm with the indiscriminate use of technologies, where those who hold power over them can exploit the uninformed, leaving them on the margins and leading them to exclusion from true ethical, moral, social, financial, employment, and other values.

The main question that arises is how to work on little known issues, with planetary scope, employing technological ingenuity with the same frameworks used when these new elements did not yet exist. Surely, these are the major difficulties that lead to doubts as to the type of action to be implemented so that the Democratic State of Law continues to exist?

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## 6. THE USE OF TECHNOLOGY IN THE PROCESS OF IMPROVING PUBLIC ADMINISTRATION

The State is responsible for guaranteeing social guarantees, and even for accounting for the resources deposited by the community. To fulfill its role in the best way, it is necessary to implement the constitutional principles of legality, impersonality, morality, publicity, and efficiency.

These principles are set forth in Article 37 of the Federal Constitution. Besides the Constitution, there are other principles listed in other laws, to which all persons belonging to the public administration must conform, so that the activities of the public sector have an appropriate performance. The purpose of the national public administration is to work for the common good of the community, in the public interest, in the interest of its citizens and their rights. It is responsible for managing the various services, organs, and state agents in the quest to meet the needs of society.

In the words of Hely Lopes Meirelles:

> Hence the undeniable duty of the public administrator to act according to the precepts of Law and administrative Moral, because such precepts express the will of the holder of administrative interests - the people - and condition the acts to be performed in the performance of the public duty entrusted to him. (MEIRELLES, 2010, p. 87)

In order for the public administration to achieve in a concrete way what is assigned to it, it is necessary to improve itself through the use of technology. The public sector needs technological innovation in order for there to be an evolution in the services it offers. The bureaucracy and the lack of efficiency in the services provided are less and less acceptable to the population. For this reason, the public administration needs to improve the services provided through technology, making it an ally of cost reduction, debureaucratization, and effectiveness in the services provided.

Technology, through the Internet, has the power to integrate the population and the public administration, and it is through the Internet that the disclosure of information reaches everyone. Transparency in public management is something primordial in the relationship between administration and population.

The development of information and communication technologies (ICTs), regardless of the possible risks arising from the technological revolution, enables a population participation together with the public administration, never seen before the Internet. In the words of Bernardes and Rovers:

> As can be seen, despite the doctrinal differences about the ambivalences and risks arising from the technological revolution, the fact is that this scenario of greater openness to interaction and participation between people and institutions gives the user-citizen the opportunity to have more interaction with the government, to have access to relevant information about the management of public interests, to participate in administrative and political processes, in short, a new possibility of exercising democracy in a digital environment. Perhaps this represents one of the greatest contributions of the Internet. (BERNARDES; ROVER, 2012, p. 4)

These technologies create opportunities for the population to participate through plebiscite on the functioning mechanism of the administration and allow it to orient itself as to the needs of the population. It is necessary to see technological progress as an instrument to meet social demands. The transparency shown by the public administration through its portals can contribute to credibility and trust. However, it is not enough just to provide information, it is necessary for there to be a digital democracy that the citizen participates effectively in government programs, deliberating and demonstrating through his will the construction of a collective will.

An efficient administration is one that achieves positive results with minimum costs and reduced efforts. In other words, it is necessary to offer quality services to the population, in a reasonable amount of time and at a reasonable cost. Technology in public administration serves to reconcile what is needed to achieve efficiency in its management, allowing it to monitor public actions, assisting administrators in preparing the strategic program in order to obtain the best way to use financial resources.

Cláudia Mara de Almeida Rabelo Viegas and Cesar Leandro de Almeida Rabelo emphasize:

> We have to take advantage of technology, information technology, and the Internet, as mechanisms to improve our lives, through effective participation in the life of the country, suggesting, controlling, and executing public policies. Thus, we must exercise participatory democracy, according to the model through debates on public issues in the virtual environment making use of the mechanisms of Electronic Government. (VIEGAS; RABELO, 2011, p. 3)

The insertion of technology in public services can largely change the form of the work produced, because computers accelerate the pace of the numerous activities performed, and can even promote greater efficiency and optimization of public services. Thus, the administration has celerity and economy in its services provided, improving its service to the population.

The use of ICT serves as a security instrument of credibility and reliability, speed, and quality of services, and may come to establish adjustments between public administrators and the citizen. With the use of the Internet, it becomes possible to share information and resources. The public administration, before this evolution, used technology in an isolated and plastered way, and often repeated the same thing. By sharing information, this same administration can provide a better and faster service. (CUNHA; MIRANDA, 2013, p. 03)

It is no longer acceptable for public management not to use technology. Communication and information technologies have come to restructure the understanding of public administration, making it more democratic, efficient, fast, and economical.

On the other hand, there are still challenges for the democratic rule of law, since even with the use of this technology in its favor, its ability to promote the defense of national interests depends on its subordination to the international financial market.

The attribution to the national state of the condition of protagonist, that is, capable of acting in a way to reorganize the strategic productive sectors by means of public policies, seems almost unattainable when one thinks about the gradual erosion of its power to establish a general equilibrium.

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## 7. CONCLUSION

With globalization and the applicability of technology countless consequences have come to the Democratic State of Law. Examples include the unbridled and inconsequential use of technology, the internalization of international policies, and the very existence of internationally shared sovereignty.

The sovereignty of a state has always been seen as the generation of political and economic limits with the construction of territorial borders, which in most cases were insurmountable. With globalization, the world began to be understood in a homogeneous way, with the reduction of commercial and social barriers, and at the same time with the decentralization of political power.

Technology was one of the instruments used to promote this integration, consequently creating other spheres of power in order to redesign the very structure of the national state, which at each moment was losing its prominence. In this sense, we have technology employed in such a way as to produce a true corrosion of the national state and consequently of its power to act.

The processes of deterritorialization and new public management procedures have become a decisive milestone for the promotion of changes in the Democratic State of Law that are capable of establishing a process of reconstruction/adaptation to this new reality. The complexity of understanding this new internationalized world is growing, going beyond the rules of the past, whose main purpose was to regulate only what occurred within the national territory.

Within this context, a question arose, which is the main objective of this study. How to take advantage of this technology to improve the State, in order to enable the promotion of its main objectives? Firstly, the so-called information-oriented technology was explored, considering that through it the State will be able to strengthen democracy, by enabling the democratic participation of the population in decision making. Other purposes such as the improvement of education through new procedures, greater access to justice and the improvement of the administrative machinery may also be achieved through this process of resizing the Democratic State of Law.

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# THE AMBIVALENT POWER OF TECHNOLOGY, HANS JONAS' CATEGORIC IMPERATIVE AND ITS ADEQUACY FOR THE SOCIETY IN THE DIGITAL AGE

## O PODER AMBIVALENTE DA TECNOLOGIA, O IMPERATIVO CATEGÓRICO DE HANS JONAS E SUA ADEQUAÇÃO PARA A SOCIEDADE NA ERA DIGITAL

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## ABSTRACT

The use of modern technique requires an ethical responsibility in the face of the ambivalence of the impacts of human action, in which the heuristic of fear presents itself as the best direction in favor of current and future society. The new must be called for a new way of thinking, privileging the diagnosis of negative results to consider the possible threats that may arise from the techno-scientific achievements. Thus, this paper aims

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to investigate the application of Hans Jonas' theory of ethical responsibility in the context of the techno-digital era. As a research problem, it asks if the principle of responsibility proposed by Hans Jonas meets the conduct requirements of contemporary digital society. As a hypothesis, it states that the contemporary digital society requires self-determined conduct for the domain of individual action, as the essence of the human being, giving rise to an adaptation of Hans Jonas' categorical imperative, which contemplates a natural obstacle to the inexorable breach of privacy in the era digital. Bibliographic research was primarily carried out in books, articles, and theses related to the theme. The research is inserted in the juridical-social aspect, adopting, as predominant reasoning, the hypothetical-deductive.

**Keywords:** Hans Jonas. Principle of responsibility. Technology. Categorical imperative.

## RESUMO

*O uso da técnica moderna exige uma responsabilidade ética diante da ambivalência dos impactos do agir humano, em que a heurística do temor se apresenta como a melhor direção em favor da sociedade atual e futura. O novo dever ser reclama uma nova forma de pensar, privilegiando o diagnóstico de resultados negativos, de modo a considerar as possíveis ameaças que poderão advir das conquistas tecno-científicas. Assim, o presente artigo tem como objetivo investigar a aplicação da teoria da responsabilidade ética de Hans Jonas no contexto da era tecno-digital. Indaga-se, como problema de pesquisa, se o princípio da responsabilidade proposto por Hans Jonas atende às exigências de conduta da sociedade digital contemporânea. Como hipótese, afirma-se que a sociedade digital contemporânea exige uma conduta autodeterminada para o domínio do agir individual, como essência do ser humano, ensejando uma adequação do imperativo categórico de Hans Jonas, que contemple um obstáculo natural à inexorável quebra da privacidade na era digital. Fora realizada, precipuamente, pesquisa bibliográfica, em livros, artigos e teses referentes ao tema. A pesquisa se insere na vertente jurídico-social, adotando, como raciocínio predominante, o hipotético-dedutivo.*

**Palavras-chave:** *Hans Jonas. Princípio da responsabilidade. Tecnologia. Imperativo categórico.*

# 1. INTRODUCTION

A novelty of almost half a century the digital technology promised - and fulfilled - the dream of a connected world where data and personal information constitute important financial assets, capable of defining strategies and decisions, in the most varied segments of society.

Technological advances, which expose the human person to new situations, and therefore to new dangers, demand ethics of responsibility, through the resignification of human power, resulting from uncontrollable self-teaching and the speed of changes promoted by human action. At the same time, man experiences a break between theory and practice. He combines science with technique, to give practical application to theoretical knowledge, through technology, which becomes the hallmark of society.

If technical-scientific (r) evolution has promoted changes in the way of living, thinking, and relating, this means that human activity has also been transformed, and from this new action, new reflective thinking about human performance. This new thinking is intrinsically related to ethical responsibility, that is, responsibility for the moral valuation of human action in the face of ignorance of the consequences and the impact of new technologies. In this context, ethics presents itself as a moderating factor of acting for acting, of doing for doing, and the fear of consequences is revealed as a methodological resource for ethical reflection.

The technological revolution, experienced since the end of the 20th century, gave man the notion - or assumption - of controlling power over humanity, which would lead to the infinite expansion of the conditions of human life. However, if on the one hand technology has brought advancement and development, on the other hand, it has brought the need for power control and predictability of forecasts.

The novelties and technological interference in everyday life caused the illusion that all problems will be solved by the power of the technology itself. More and more man finds himself compelled to the compulsory updating of equipment, driven by knowledge and its instrumentalization, despite the unpredictability of the practical consequences of his discovery. Technology no longer obeys human reason, on the contrary, it imposes itself as the driver of humanity, in programmed obsolescence of human life.

Human's action is not limited to the behavior of singular individuals but also encompasses collective subjects that previously did not experience ethics for themselves, such as organizations, industries, research bodies, technology companies, as well as considered as complex agents that produce action throughout the planet in a significant way, and that, for this reason, they must also assume an ethical responsibility, previously reserved to human beings.

From the moment that technological development put man in theoretical and practical conditions to destroy his autonomy, freedom, and privacy, threatening individual guarantees universally recognized, man's action started to demand limits, if not by ethical conscience, certainly by normative power.

Indeed, technological development does not only affect the economic field, but also the personal sphere, in which citizens see themselves amid new social and political relations, assuming the position of objects thought of as a means for instrumentalizing the technique.

It was this evidence that aroused the reflection of thinkers for contemporary ethics, applied to technological action, that is, applied to the transformations of human action in the new technological-digital scenario, for which traditional ethics were no longer sufficient.

Thus, this article aims to investigate the application of the Hans Jonas (2006) theory of ethical responsibility in the context of the techno-digital era. It is asked, as a research problem, if the principle of responsibility proposed by Hans Jonas meets the conduct requirements of contemporary digital society. As a hypothesis, it is stated that the contemporary digital society requires self-determined conduct for the domain of individual action, as the essence of the human being, giving rise to an adaptation of Hans Jonas's categorical imperative, and which contemplates a natural obstacle to the inexorable breach of privacy in a digital age.

In topic two, the reasons for reflection and the proposition of the ethics of Hans Jonas' responsibility as a new human duty, being, and acting will be addressed. In the third topic, the study will deal with the heuristic of fear - or heuristic of fear, in a translation more in line with the philosophical context -, in which the German philosopher wants ethics to be interconnected rather with fear than with the desire for the new, so that the technological development does not become a threat, or, in fact, an annihilation of human authenticity. Then, topic four will deal with the categorical imperative proposed by Hans Jonas, although at the time the author was unaware that, in the 21st century, relations would be stratified in digital media. In the end, this study dares to propose a categorical imperative for the digital age, taking Hans Jonas's categorical imperative as its theoretical framework.

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Bibliographic research had been used primarily through books, articles, and theses. The research is inserted in the juridical-social aspect (GUSTIN; DIAS; NICÁCIO, 2020), adopting, as the predominant reasoning, the hypothetical-deductive.

## 2. THE HANS JONAS'S RESPONSIBILITY ETHICS

Hans Jonas, a German philosopher of Jewish origin, with strong intellectual performance throughout the 20th century, began his studies as a disciple of Martin Heidegger, accompanying his mentor to the University of Freiburg, where he met Rudolf Bultmann and, under his guidance, presented his thesis about gnosis in Christianity, which contains striking originality "[...] by demonstrating the direct connection of ancient Gnosticism to the existential pessimism of modern times" (OLIVEIRA, 2014, p. 20).

From then on, Jonas's concern with the placement of man in the universe and the need for self-affirmation to establish his place in the world demonstrated the ambivalence of human power over nature, in which both man and nature become an object of the technique, "[...] which starts to grow detached from the ethical reflective capacity regarding its positive and negative potentialities" (OLIVEIRA, 2014, p. 12).

It is in the search for the foundations of new ethics for the orientation of technological activity, that in 1979, Hans Jonas (2006) presents the work "The principle of responsibility: testing an ethics for technological civilization", in which he proposes a new concept moral, replacing the old ethical imperatives, for the protection of man and nature against the risks and dangers of technique.

Without being characterized as a technophobic, the author warns about the need to reaffirm the indispensable alliance between techno-scientific progress and ethical-moral elevation, to understand and guide the modified nature of human action, proposing ethical responsibility in civilization technological, under a new categorical imperative.

In the presentation of Hans Jonas's ethical precept, Maria Clara Lucchetti Bingemer, also quoting the author, asserts that:

> For there to be responsible, there must be a conscious subject. However, the technological imperative eliminates conscience, eliminates the subject, eliminates freedom in favor of determinism. The hyperspecialization of sciences cripples and displaces the very notion of being human. This divorce between scientific advances and ethical reflection led Jonas to propose new dimensions of responsibility, since "modern technology has introduced actions of such different magnitudes, with such unpredictable objectives and consequences, that the landmarks of previous ethics can no longer contain them". (BINGEMER, 2006, p. 18)

With the Nazi ascension, Jonas was forced to leave the Germanic territory, going to reside in England, where he enlisted in the British army, in the fight against Nazism (OLIVEIRA, 2014). And it was during Second World War that Hans Jonas experienced and witnessed the greatest horrors of the use of technology. In that context of war, the intellectual began to maintain a critical eye concerning the domain of technology and its blind acceptance by man, expressing

his concern for the future of humanity and the authenticity of human life in publications such as "Phenomenology of life: foundations for a philosophical biography "; "Philosophical Essays: from the ancient creed to the technological man"; "Knowing, faith, reason, and responsibility: your essays" (OLIVEIRA, 2014); until in 1979, due to the specificity of the theme, Hans Jonas (2006) published, in German, his native language, the work "The principle of Responsibility: an essay on ethics for technological civilization", whose conclusions served as the basis for two more future works, complementary to the study of ethical responsibility (OLIVEIRA, 2014).

Hans Jonas refers to the atomic bombs dropped on the Japanese cities of Hiroshima and Nagasaki as an example of the destructive and apocalyptic potential of technology, although it is certain that not even the predictable destructive potential was able to control the extreme powers of technological knowledge and its use, that being human insists on continuing to conquer and exercise (JONAS, 2006).

Even though technological knowledge has already demonstrated the ability to build bombs, cause radioactive and environmental disasters, monopolize the attention of men, limit the freedom and privacy of humanity, the consequences of this unlimited knowledge were and have been received as an inevitable destination of the evolution of human knowledge, with which the planet, globally, will have to submit and adopt - not to say to be enslaved - to its command.

Indeed, the utopia of the technological solution has become an incentive for the construction of a philosophical ethical system, based on being, in the sense of existing, and no longer in the "should be", in the sense of acting, because the current human action it has repercussions on the future of humanity and, therefore, on the condition of being "human" (JONAS, 2006).

Faced with the question of whether there should be something instead of nothing, Hans Jonas (2006, p. 87) reformulates the question and places it in a fundamental way for his theory, because in his ethical view there is an unconditional obligation of human existence, and "this imposition is based on a primary duty to Being, as opposed to nothing".

In this light, Hans Jonas (2006, p. 95) developed the concepts of good, duty, and being, bringing the conception that the center of the ethics of the future is not in the doctrine of behavioral doing, "[...] but metaphysics, as a doctrine of Being, of which the idea of man is a part ". It is not simply a matter of changing the action, but, fundamentally, who promotes the action, to legitimize the action.

To the human "duty to be", Jonas connects the responsibility of being, that is, to the duties of being, which must be recognized as a priority for the discernment of the values to be considered, for the conjecture of the future human existence. On the theory of values, Hans Jonas explains that:

> [...] only from objectivity could an objective must-be deduced, and with it a commitment to the preservation of Being, a responsibility related to Being. Our ethical-metaphysical question about man's must-be, in a world that must be, becomes a logical question about the status of values as such. In the currently precarious and confusing situation of the theory of value, with its ultimately nihilistic skepticism, this is not a promising undertaking. But it has to be undertaken, at least due to the clarity of a responsibility related to Being. (JONAS, 2006, p. 103)

Hans Jonas does not deal with the responsibility of being or should be based on past acts as if it were punishment or guilt for wrongdoing, linked to the cause or motive to act. The

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Jonasian ethical proposition starts from a consequentialist view, based on the commitment to do or fail to do something in the face of the ambivalent effects of the present act, that is, the consequences of the act. It is the responsibility for something that should be avoided in the future since it is ethics directed towards the future.

From the notion of responsibility for the result, and the dimensions of technological actions "[...] in a cumulative and probably very little reversible way (OLIVEIRA, 2014, p. 119), Hans Jonas realized the need to build ethics focused on the application of the technique, due to the ambivalence of its effects (beneficial and harmful), as well as the automaticity of its application, insofar as the execution of the technique is no longer due to the need for use, but by the mere autonomous power to use.

The new global dimensions of space and time expand the effects of technology, referring to new ethical thinking, which also occurs due to the rupture of anthropocentrism, because the impact of the technique is no longer restricted to man, but, rather, to all beings' humans and non-humans, born and unborn, that sustain human survival (JONAS, 2006).

In this regard, the philosopher rests the principle of ethical responsibility for technological civilization on the apocalyptic potential of technology, which values ontological ethics in metaphysical terms in the face of crucial questions that "indicate to what extent we can take chances with technical bets and what risks must be considered inadmissible" (SUSIN, 2017, p. 30).

The responsibility ethics proposed by Hans Jonas (2006) thus starts from the threat of modern technology, characterized by a self-propulsion, almost pathological, in search of infinite overcoming, in which the production ends up prevailing over the action, and the *homo faber*, in an appropriation of the concept of Hannah Arend[4], superior to *homo sapiens*.

This is because the technique ended up exceeding the objectives outlined in times past when its creation and use was measured by human necessity "[...] and not as a path to an end chosen by humanity" (JONAS, 2006, p. 43).

Nowadays technology has become the central enterprise of man, based on the need for continuous progress, in the function of the development in the search for total domination over things and man himself. It is a question of overcoming *homo sapiens* by *homo fabe*r, eager for incessant inventive employment, even if a man had not needed or claimed for this technological overcoming.

Thus, "Technology assumes an ethical significance because of the central place that it now subjectively occupies at the ends of human life" (JONAS, 2006, p. 43). Producing takes the place of acting. Therefore, the moral of acting lose space for the moral of producing, demanding new imperatives and social intervention in the form of public policy, such as the scope of the effects of technology in time and space.

Because technology causes modification of human behavior, Hans Jonas justified the need for ethical reflection in the face of new action, without which man would continue in a Promethean delusion, as a partner of God, creating and submitting all nature to his conveniences, regardless of the consequences that this creation can bring, leading humanity "[...] to the greatest challenge ever posed to human beings by their action" (JONAS, 2006, p. 21).

4 Man as a manufacturer of durable artifacts building a world by mastering a technique, for "[...] who every instrument is a means of achieving a prescribed end" (ARENDT, 2010, p. 185).

In other words, once the power of technology has been demonstrated in its form of performance, and considering that every action requires a moral examination, the significant and unprecedented changes brought about in this form of performance also demand the same moral examination.

While the technique was conceived to satisfy vital needs, submit to nature, the modern technique presents itself for the mastery and exploration of nature. In this step, it is necessary to analyze the extent to which the technique, as idealized and employed today, modifies the human action once experienced because man has never been detached from the technique. That is to say, the ethical analysis of human action "aims at the human difference between modern technique and that of previous times" (JONAS, 2006, p. 29).

The interference of technology in human action results in the displacement of the anthropocentric ethical vision, previously focused on the human relationship or of each man with himself, for the relationship of man with the world, through *techné,* based on the duty to be, whether in virtue the expansion of the consequences of human activities in space and time, whether by the fact that many places himself as an object of technique for an end.

Due to the technological determinism that eliminates conscience, the subject, and freedom in favor of the imperative of technique, Jonas's ethical responsibility inserts the latter into the horizon of ethical reflection, presenting itself as a barrier to the science that imposes itself and is legitimized for the mere need to overcome. It is the qualitative novelty of human actions that leads to the need to reframe the concept of ethics, as it has never been considered in the perspective of traditional ethics (JONAS, 2006, p. 29).

The ambivalence of technological power, enhanced for evil or good, is that it imposes an ethical conscience in the use of technology. If all technologies had exclusive beneficial use, there would be no need to evaluate them ethically. It is precisely in the risk of technology, presented as a solution to all problems, without measuring the risks and threats arising from its use, that a new ethical responsibility is claimed.

By relegating man to the secondary level, technology takes the leading role in the evolution of humanity, as a science that leads to unpredictable knowledge, which is no longer designed to respond exclusively to the need of man, but presents itself as a direction in the search for the progress for the sake of progress, obedient to the blind idea of previous technical overcoming.

In the absence of neutrality, technology places itself in the central position of acting, in which ethics needs to evaluate not only the intention to do but also the consequences in technological doing, from which the risk may be born, being, curiously, the greatest risk of technology in the success (for the evil perpetrated) than in the failure (OLIVEIRA, 2014).

In the analysis of the duality between the good use and the bad use of the technique, Jonas works ethics according to the scope of acting in time and space. That is, while in the past techniques the technological action had an immediate reach, limited to the borders and detached from long-term planning, the current technique, in the digital age, shows itself to be immediate, global, and reflected in future generations.

So are the algorithms that, designed for the recognition of human needs, enable the processing of huge amounts of information in a centralized way, just like computational algorithms, which through autonomous learning *(machine learning)* assume the authority to decide, define, profile and plan, while man abdicates his power to make the right choices.

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Faced with this digital dictatorship, Yuval Noah Harari (2018) presents 21 lessons for the 21st century, in a work that draws attention to the fact that when authority moves from humans to algorithms, the world is no longer a field of action for autonomous individuals in the search for the best. Instead, the universe becomes a stream of data, in which living organisms are taken as a combinatorial analysis of algorithmizable DNA to meet the needs of others.

It is in the fusion of biotechnology and information technology that humanity is faced with the maximum risks that humankind has ever faced, in order to impose an ethical responsibility in acting (should be) as never imagined by traditional anthropocentric ethics and, perhaps, nor by Hans Jonas, were it not for the German philosopher's concern to foresee the effects of a negative prognosis on humanity.

For Hans Jonas (2006), ethics in technological civilization cannot do without the exercise of futurology based on the present damages and hypothetical risks arising from current actions, to generate an ethical diagnosis of what should be expected, of what should be encouraged, what should be avoided compared to what should be expected, since the risk would generate the potential to change attitudes and behaviors for the future.

When presenting the essay on ethics for technological civilization, Hans Jonas (2006, p. 21) argues that man only has a notion of what is at stake when he knows what is at stake, only with the preview of the disfigurement of man is that you will arrive at the concept of the man you want to preserve. The ethical compass for technological development is the prediction of danger, referred to by the author as the "heuristic of fear" (JONAS, 2006, p. 21).

The heuristic of fear, or heuristic of fear, in a translation more in line with the philosophical perception presented by Hans Jonas (OLIVEIRA, 2014), constitutes one of the central points in the constitution of the principle of ethical responsibility, since the ability to predict prognosis negatives imposes a responsible action, changing the present action in order to prevent the undesirable from occurring, "[...] with the premise of preserving future generations and all forms of life" (SUSIN, 2017, p. 36).

In Hans Jonas's ethical conception, the fear of acting would work as a prevention to the harmful actions of what could happen when using a certain technology, which would end up directly influencing immediate human behavior. According to the creator of the principle of ethical responsibility in the technological age:

> We need the threat to the human image - and well-defined types of threats - in order, with the dread generated, to affirm an authentic human image. As long as the danger is unknown, it will not be known what is there to protect and why we should do it: for this reason, contrary to all logic and method, knowledge originates from what we must protect ourselves against. This appears first and, through the upheaval of feelings, which knowledge is anticipated, teaches us to see the value whose opposite affects us so much. [...] What we don't want, we know much earlier than what we want. Therefore, to investigate what we value, the philosophy of morals has to consult our fear before our desire. (JONAS, 2006, p. 70-71).

In addition to traditional ethics, which are based on principles already known, the ethics of responsibility is based, therefore, on the discovery of unknown principles, but whose assumption becomes necessary and urgent to remove risks on future interests, based on a bet on the present tense.

For Jonasian thought, this is the new role of moral knowledge, in which "knowledge becomes a priority duty, beyond everything that was previously required" (JONAS, 2006, p. 41). Knowledge of a future dimension of human action will be required in front of technical/theoretical knowledge, although it is difficult for theoretical knowledge to anticipate the magnitude of the effects of its application, which confers greater risk when acting, and, therefore, the greater ethical meaning of acting in the present.

For Hans Jonas (2006, p. 41):

> Recognizing ignorance, then, becomes the other side of the obligation to know, and with that, it becomes a part of ethics that must instruct self-control, more and more necessary, over our excessive power. No previous ethics has been forced to consider the global condition of human life and the distant future, including the existence of the species. The fact that today they are at stake requires, in a word, a new conception of rights and duties, for which no ancient ethics and metaphysics can even offer the principles, much less a finished doctrine. (JONAS, 2006, p. 41)

Bringing to the current context, if the human being had projected the risks of technology that led to the digital dictatorship, experienced in the 21st century, it would have been perceived, and perhaps prevented, that the entire universe became a flow of data, in which man would find himself merged with technology and hacked by it in its essence, being exposed to a flood of manipulations guided by the agreed decoding of the human operating system.

## 3. THE HEURISTICS OF FEARS IN THE DIGITAL AGE

The central point of Hans Jonas' ethical responsibility is represented by the heuristic of fear, in which the human being will only have the scope of his actions if his unwanted result is projected. It is through the exercise of futurology, faced with a negative prognosis of actions, that the future would open up in new possibilities, while humanity would keep the reins on its desires, evils could be minimized (JONAS, 2006).

The current technological power does not include more optimistic actions based on the utopia that the immediate solution, due to knowledge at hand, is disconnected from the future, and that the consequences of today's acts will be the responsibility of only those who will experience it. It is important to give preference to the fear of the bad, in which the future cannot be expected by the accumulated successes of the technology, or by the fact that a new technique comes from the mere adaptation of the previous technique, refusing, therefore, any voluntary restraint or immediate ethical questioning.

In this sense, rather than fear, fear is characteristic of ethics, which is why Hans Jonas's heuristic proposition does not bring a feeling of weakness or helplessness, but, rather, "a reflective premise on the dangers that become real, insofar as the possibilities for its realization becomes evident" (OLIVEIRA, 2014, p. 134).

Under this perception, Jelson Oliveira (2014) identifies that the best translation of the concept of *heuristik der furcht* is heuristic of fear, differently from what Marjiane Lisboa and Luiz Barros Montes proposed in the translation into Portuguese of the work "The Principle of

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Responsibility: the essay of an ethics for technological civilization "(JONAS, 2006). This is because fear would translate into an altered state of consciousness, in which the individual would be paralyzed by the fact and ethics would have no space. Fear, on the other hand, is not something pathological that leads to flight in face of the same fact. On the contrary, it leads the individual to face "the situation, in an attempt to guide the action well, which means, in this case, to prevent the imaginatively projected from being concretely effective (OLIVEIRA, 2014, p. 134).

It is not a question of condemning technology to a necessary and relentless bad prognosis, especially if one considers the ambivalence of human actions. The utopia of technology is founded on past success, thus identified in the actions that corresponded to the expectations of humanity. Despite the popular intention to reconfigure and improve human living conditions, technology still has selfish or partisan biases, which end up camouflaged by the enthusiasm and ingenuity with which the successes of the technique have been welcomed by man.

At the time, Hans Jonas focused on the evil effects brought about by human action on nature, in which man believed he was above nature and not as another element of the natural environment, fixed on the belief of total control while ignoring the adversities that your action could present you.

However, in the case of ethics that has to do with acting, the logical consequence is that any direct or indirect human action, modifying nature, does not dispense with ethical analysis, since even the indirect action will end up impacting the human natural environment, especially if considered Lavoisier's maxim (2012, p. 77) that "in nature, nothing is created or nothing is lost, everything is transformed".

In this context, what to expect from digital technology and its immediate and future impacts? What are the consequences that the virtualization of communication has brought to humanity?

Died in 1993, at the age of 93, Hans Jonas experienced a little of what today would be technological disruption[5], thus understood as an innovation that brings about the rupture of known standards. In the analysis of the consequences of human acts, Jonas already indicated that the excessive use of technology, often without the pressing need, gave the man the feeling of power, which would be identified by the Israeli professor Yuval Noah Harari (2018) as a digital dictatorship.

When recognizing in technology the motto chosen by the human being for the evolution of civilization, the contemporary Israeli philosopher analyzes the same lines proposed by Hans Jonas, to verify that the changes already experienced and those that may result from the virtualization of social, commercial, loving and even parental, have not yet received the necessary ethical treatment. According to Harari:

> Considering the immense destructive power of our civilization, we cannot afford to have more failed models, world wars, and bloody revolutions. This time, failed models can result in nuclear wars, monstrosities generated by genetic engineering, and a complete collapse of the biosphere. So we have to do better than we did when facing the Industrial Revolution. (HARARI, 2018, p. 58)

The fear of the Israeli scholar is not based exclusively on the collapse of the biosphere, but also, and above all, on the seductive intervention of artificial intelligence in the contemporary

5 Cf. Disruption, [2021]: "Act or effect of breaking (up); rupture, fracture, rupture ". Term contemporaneously associated with sudden changes, driven by technological means.

society presented, at first, on an optional basis, to then assume authority for the free will of human individuals (HARARI, 2018).

Since the 1960s, the application of artificial intelligence has populated the plot of science fiction films.[6] It was imagined how the human being would gain outer space. How the individual would be able to contact anyone anywhere, that a document could be in two places at the same time, without losing its value or how a spelling mistake could be reissued without the need to rewrite the entire text. It was thought about the ease of access to information and dreamed of the possibility of gathering in one place all the data that are relevant to a subject.

Since the 1960s, mankind already had the technique of algorithmic communication and had the possibility that algorithms would solve primary and complex issues, without, however, projects that the future technological revolution could establish a dictatorship of *big data*[7] algorithms while undermining the idea of freedom and privacy.

If today personal data has become a wealth accessible to companies, organizations, public agents, and even other citizens, contributing to the manipulation, surveillance, and articulated targeting of the individual, it is because 20 years ago algorithms were developed for the processing of unprecedented data, making what was previously accessible only to the holder access to all.

Less than a decade ago, this apocalyptic scenario inspired television series.[8] Today, human beings ignore the possibility that, with the evolution of digital technology and biotechnology, data collection will no longer depend on the individual's consent. That from the granting of data to virtual social interaction networks to digital commerce organizations, to public and private companies, anyone will be able to collect, record, and transfer all personal and biometric data of the citizen, whoever is interested, because concentrated on mobile devices or data cloud (*cloud computing*).

This situation imposed the regulation of the circulation of personal data in Brazil through Law No. 13,709, of August 14, 2018 (BRAZIL, [2020]), guided by the considerations that supported the edition of the European Data Protection Law, among them :

> (6) Rapid technological developments and globalization have created new challenges for the protection of personal data. The collection and sharing of personal data have increased significantly. New technologies allow private companies and public entities to use personal data on an unprecedented scale in the exercise of their activities. Natural persons increasingly make their personal information available in a public and global way. New technologies have transformed the economy and social life and should contribute to facilitating the free movement of personal data in the Union and its transfer to third countries and international organizations while ensuring a high level of protection of personal data. (EUROPEAN UNION, [2016]).

6 Cf. Jornada..., 1970; Blade..., 1982; Matrix,1999; A Rede, 1996.

7 Cf. Big ..., 2021: "Big data are high-volume, high-speed and/or high-variety information assets that require innovative and cost-effective ways of processing information that allows for improved vision, decision making, and process automation. . " (BIG ..., 2021, our translation). Original text: "Big data is high-volume, high-velocity and/or high-variety information assets that demand cost-effective, innovative forms of information processing that enable enhanced insight, decision making, and process automation."

8 Cf. Black Mirror, television series in which it presents fiction with themes that examine contemporary society, the unforeseen consequences of new technologies (BLACK..., 2011).

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If information is power, why does man willingly have that power in favor of strangers? Why do people, as holders of their personal data, make their lives widely available, subjecting themselves to informational surveillance?

The answer lies in the present, in which information is grouped in large volumes, by public or private organizations, focused on their interests, while the population remains blindly enslaved by the utopia that exposure will make the individual a complete, connected, and human being. matched, or that digital technology will only represent a time saver. Despite the utopian prediction, reality did not live up to projected expectations. Either the man did not promote the prognostic analysis of his actions, or, if he exercised it, he ignored the negative prognosis of the consequences of his acts for a future, now lived, imposing governmental normative measures, aimed at regulating what much of the humanity doesn't even understand.

This gap between utopian expectation and reality can be attributed to the ambivalence of acts, which imposes on technological civilization the ethical responsibility to know the facts and weigh the consequences of human intention or action for the present and the future, drawing on the formula *in dubio pro malo*, which, in addition to giving expression to the ethical duty, presents itself as a shield to the imagined danger, allowing the scientific-technological retreat, when a bad prognosis is perceived (JONAS, 2006).

Only ethical action through fear can cool the power of technology, in the face of enthusiasm and innocence "with which the successes of technique have been accepted and practiced in all areas of human society, under the banner of the utopia of progress" (OLIVEIRA, 2014, p. 136).

Because it is heuristic, the fear of consequences takes into account theoretical and factual knowledge. The first, related to ethical, subjective issues, fundamental to human life; the second, related to objective empiricism, from which it is possible to make predictions. Both objective and subjective analysis, that is to say, factual or theoretical, are mutually supportive in the search for prognosis, "since the knowledge of ethical principles, in a way, depends on empirical knowledge, which ends up being based on reality, the resulting possibilities and forecasts "(SUSIN, 2017, p. 41).

The ethics of the future, designed by the German philosopher, is in fear for what has not yet been experienced and has no affinities in past experiences. For Jonas (2006, p. 72), one should prefer the imagined *malum* to the experienced *malum,* produced intentionally, in the duty to project a future *malum* in an appropriate way to evoke the corresponding fear of rational action in favor of humanity and not as a shield from the individual threat.

Although Hans Jonas had not known artificial intelligence in an irrevocable and unavoidable reality, it is known that his ideas were not contrary to technological discoveries. The philosophical hypothesis is that to know this technical-scientific reality, the human being needs to leave the cave and discover the proposition of the world for himself (the facts), to empirically, under the fear of evil, falsify what is claimed to be good for him. Only by knowing the reality, subjectively and objectively, with its immediate and future pros and cons, can the human being take risks ethically and consciously for an authentic life.

All historical facts are better understood when analyzed for their consequences. However, the consequences of the *technologization* of society may remove from man the power to see things as they actually happened, and perpetuate the error for the next generations, which

imposes immediate and reflective management, under a new categorical imperative, in the face of the fear of that human intelligence is artificialized or irremediably annihilated.

## 4. THE CATEGORICAL IMPERATIVE OF HANS JONAS

Man, with a product of nature, has always been an entity that is indisputably connected to the world. From man comes any idea of duty regarding human conduct, until acting has become the object of duty - "that is, the duty to protect the basic premise of all duty, that is, precisely the presence of mere candidates for a moral universe in the future physical world"(JONAS, 2006, p. 45).

For Hans Jonas (2006, p. 47-48), moral duty means conserving the physical world and the human essence on Earth, which is important in protecting your vulnerability in the face of the threat of technological evolution, based on the following categorical imperative: '"Act in such a way that the effects of your action are compatible with the permanence of an authentic human life on Earth'; or expressed negatively: 'Act so that the effects of your action are not destructive to the future possibility of such a life' "(JONAS, 2006, p. 47-48).

The ethical imperative proposed by Hans Jonas seeks to adapt to the challenges presented by the role of technique in contemporary times, in which the new human action should be the central object of concern, in the search for responsible progress.

Before the moral command proposed by Hans Jonas, Immanuel Kant (2009) had proposed the following imperative: Act in such a way that you can also want your maxim to become law. For Jonas, Kant's imperative presupposed a coincidence in the general human conception, in which the expression "you can also" stems from the rationality in the acceptance of the idea by all actors in society, as a logic of "power" or "not power" which expresses "[...] self-compatibility or incompatibility, and not moral approval or disapproval." (JONAS, 2006, p. 47).

Indeed, while Kant's categorical imperative was focused on the individual, and his criterion was subjective and momentary, the categorical imperative proposed by the 20th-century philosopher "[...] calls for another coherence: not that of the act with oneself, but those of its final effects for the continuity of human activity in the future. " (JONAS, 2006, p. 49).

In this light, Hans Jonas criticizes the idea of the 18th-century Prussian philosopher, generalizing human ethics, as if the maxim of an individual was realized in the general exercise of the community, making it unquestionable to the vision of others. In other words, Kant bet on man's goodwill in making the right choice, assuming that the individual choice will always be correct and considered. Jonah's imperative seeks the moral law, to reach the individual's feelings, in considering the consequences of the acts for the future and his responsibility concerning humanity.

In other words: Immanuel Kant's categorical imperative did not take into account the individual's choice, according to his perception of what is right for him, that is, the individual's free will in what affects him. On the contrary, it hypothetically takes action, as a generalized individual thought, in which objective responsibility is transformed into subjective responsibility, due to individual self-determination.

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For Hans Jonas, Kant "[...] exhorted each of us to ponder what would happen if the maxim of his current action were transformed into a principle of general legislation" (JONAS, 2006, p. 48). In his critical analysis, the German philosopher refuted the Kantian imperative when he did not identify in his proposal the probability that the private individual choice, which was not "[...] general, or which could in any way contribute to such generalization "(JONAS, 2006, p. 48).

Despite the difference in categorical propositions of Jonas and Kant, the one presented for the collective praxis, and the one for the individual, immediate, and interpersonal plan, Gabriel Insaurralde recognizes common points among the philosophers, since both need to count on "a correspondence and agreement with a law external to the action "(JUNGES, 2010). Asked about the identity between the two thinkers, Insaurralde asserts that:

> For Jonas, the most important thing is to make a law that reaches the feelings, and that has to do with the consequences of what is done. For Kant, if we have a good intention, it is enough. Not for Jonas. He argues that you can have good intentions, such as when you throw an herbicide on the ground. On the other hand, the consequences of its action are not known. Therein lies the problem. If you do not realize the consequences of your action, it can become immoral. Jonas updates the Kantian imperative for a technological society. On the other hand, Jonas is sometimes too Kantian. This is because he seeks a universal law, albeit focused on the consequences of the action. This introduces the question of the future and responsibility for modernity, being an important contribution of Jonas. (JUNGUES, 2010).

The new order protests for the coherence of the acts with their final effects for the continuity of human activity in the future. Jonasian ethical responsibility does not consider real consequences as a value, but rather the assessment of the subjectivity of acting given the possible consequences, which affect, male finally, the human and non-human essence. In the words of Hans Jonas:

> The actions subordinated to the new imperative, that is, the actions of the collective whole, assume the character of universality in the real measure of its effectiveness. They "totalize" themselves in the progression of their impulse, forcibly ending in the universal configuration of the state of affairs. This adds to the moral calculation the time horizon that is missing from the logical and instantaneous operation of the Kantian imperative: if the latter extends over an ever-present order of abstract compatibility, our imperative extends towards a foreseeable concrete future, which constitutes the finished dimension of our responsibility. (JONAS, 2006, p. 48-49)

Knowledge is in human hands, as the only being endowed with intelligence and the ability to predict its actions, whether by a subjective or objective prognosis, but, in any case, intrusive in the human way of life, and therefore, subject to valuation.

After the Antigone choir sang the human deeds of breaking the seas, taming the horses, and capturing the fish (SÓFOCLES, 2005), man tamed the rivers, reduced the distances, and broke the force between the atomic nuclei, adapting them to the most powerful means of destruction until today architected. At Jonas's command, the knowledge or ignorance of the devastating power of the Hiroshima and Nagasaki bombs would not need to be conditioned by empiricism, so that the idealization of this action (using the energy of the atomic nucleus in the bomb) would be classified as unethical. The possibility of destruction was enough.

In the model of Hans Jonas, the ethics relevant to the technological society does not dispense with the commitment of man to trace the prognosis of his actions, to rationalize the importance, the need, and the convenience of the development and use of the technique, under penalty of humanity to be condemned to the end, by the depletion of natural resources that sustain human life and the technique itself.

## 4.1 POR UM IMPERATIVO CATEGÓRICO ADEQUADO À ERA DIGITAL

Only 25 years after the death of Hans Jonas, the consequences of human action were evident in climate change and, therefore, for the physical survival of mankind. In addition to this evidence, Yuval Noah Harari denounced the changes that disruptive technologies will bring to human nature since people have different opinions regarding the use of bioengineering and artificial intelligence, and the ignorance with which they welcome the proposition technology. For the author of "21 Lessons for the 21st Century", "if mankind fails to conceive and manage globally accepted ethical guidelines, the season will be open for Dr. Frankenstein" (HARARI, 2018, p. 157).

From the much that has already been said about the dangers of artificial intelligence, the accumulated successes certainly surpass the setbacks, but there can be the unconditional, unquestionable and unreasonable acceptance of technology in confrontation with human rationality, especially when what at stake are fundamental rights proper to the dignity of the human person, which, in one way or another, must be consistent with an authentic human life on Earth.

The thriving reality, to some extent imagined, or at least feared by Hans Jonas, encourages the formulation of a categorical imperative suited to the digital age: *It acts in such a way as if its individuality represents the maxim of its human essence*.

The categorical proposition of this study is not based on human egoism, in the sense of disassociation of the individual with the world, but, in the sense of preserving his place in the world (as a human being), because the human essence is in individuality. As long as man remains faithful to his free, autonomous, and rational essence, his capacity for reaction and protection will be preserved for the exercise of his uniqueness, both for present and future lives. According to Hannah Arendt:

[...] destroying individuality is destroying spontaneity, man's ability to start something new with his resources, something that cannot be explained based on reaction to the environment and facts. Once the individuality is dead, nothing remains but horrible puppets with the faces of men, all with the same behavior as Pavlov's dog, all reacting with perfect predictability even when they march towards death. This is the real triumph of the system: The triumph of the SS requires that the tortured victim allow himself to be taken to the gallows without protests, that he resign and surrender to the point of failing to assert his identity. (ARENDT, 1989, p. 506)

If Arendt's reflection was based on the strength of Nazism, the reflection of this study is based on the deceptive appearance of artificial intelligence, which, under the banner of evolutionary conquest, puts the individual's freedom and privacy at risk, which constitutes the essence of human life.

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Attentive to Hans Jonas' criticism of Kant's categorical imperative, the proposition of a categorical imperative suited to the digital age has its possessive pronoun, because the individuality of one may not be the individuality of the other. Therefore, it is up to each human being to act according to their individuality, so that everyone reaches their individuality, as being the human essence, capable of rationalizing and defending themselves from actions that threaten their essence.

In other words: if the imperative for the digital age sought individuality in the human essence, it would be assumed that individuality would be linked to a general human essence, and not to the individual, as a singular, autonomous, and free being, able to manage their self-determination.

## 5. CONCLUSION

Hans Jonas's philosophical itinerary focuses on the attempt to create an individual conscience to review the mistakes and successes of humanity, to promote a prognosis of the evils of actions, which can impact human survival on the planet.

Based on the hypothesis of the consequences of human actions on nature, founded on the advancement of technology, it is necessary to reflect on the consequences of the misuse of technology, which is also considered, now, the digital technology and the artificial intelligence that sustains it, for the protection of a dignified human life.

The new world order transformed what was once limited, into unlimited. State's intervention was necessary to protect interference with human life, while the State still reserves the right to restrict this protection, in defense of compliance with the law, the exercise of its own activities, and public security. Express predictions of the limits of private life are presented, regulated by devices that guarantee their protection, and others, that guarantee the disclosure of intimacy, for the common good.

In this new context, the fundamental right to data protection is an essential component for the exercise of the right to privacy, as a condition for a dignified human life. The electronic space requires the observance of responsible ethics, based on individual conscience, for the benefit of the collective.

The fear of the results of a digitalized social and political relations must be seen as a methodological resource for reflecting the ethical responsibility on human action, and thus represent an obstacle to the domain of technique over the world, as a manifestation of authoritarian power, to which the human being must bow, under pain of being punished or removed from the political-social system.

Acting in such a way that the effects of human action are not destructive to future lives is essential not only for reshaping future human and extra-human living conditions but also for the current way of life and thinking, so that man you must ask yourself about the risks and threats of technical action before doing, considering the ambivalence of its effects, the automaticity of its application, the new global dimensions in time and space, surpassing traditional (anthropocentric) ethics, which no longer respond by modified human action.

The virtualization of social relations, the uncontrolled manipulation of the data of individuals, collected and collected as input for a capitalist surveillance society, and the substitution of the privacy spectrum for security, for the control in the treatment of data, justify the ethical reflection and its responsibility for the Hans Jonas' view, due to the high impact of its consequences on human life.

Since the dignity of the human person is the guiding value of the Brazilian constitutional order, it is a deontological value (in addition to axiological), that is, morally necessary, which serves to guide the current practice, in the balance between public and private, certain and wrong, just and unfair, in order to avoid the unwanted consequences of the future.

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# REFLECTIONS ON THE AUTONOMY OF THE EMPLOYEE'S WILL FROM THE NEW REGULATION OF EMPLOYMENT RELATIONS IN BRAZIL

## REFLEXÕES SOBRE A AUTONOMIA DA VONTADE DO EMPREGADO A PARTIR DA NOVA REGULAÇÃO DAS RELAÇÕES DE EMPREGO NO BRASIL

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## ABSTRACT

This article analyzed the exaltation of the autonomy of the employee's will in the employment relationship, based on a new regulation of labor law in Brazil, experienced in recent years and introduced by the changes promoted by the Labor Reform in the country in 2017, as well as by the decision given by the Supreme Court, in the direct action of unconstitutionality n. 6363. In addition to listing several examples, there was an analysis of two very significant situations: the contractual freedom of the hypersufficient employee and the possibility of salary reduction by individual adjustment between employee and employer. The research was justified because of the evident paradox in exalting the autonomy of the employee's will in an asymmetric legal relationship, in which it is assumed that the worker is hyposufficient. Based on the dialectics and the technique of indirect documentary research in the documentary and bibliographical research modalities, this study concluded, in the condition of the results found, that the valorization of the autonomy of the employee's will, in a markedly asymmetric legal relationship, directs labor law in the country to a new paradigm, with risks equivalent to those verified when constructing this legal branch.

**Keywords:** Hypersufficient; Labor Reform; Direct action of unconstitutionality n. 6363; Autonomy of the will.

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**RESUMO**

*Este artigo analisou a exaltação da autonomia da vontade do empregado na relação empregatícia, a partir de uma nova regulação do direito do trabalho no Brasil, vivenciada nos últimos anos e constada pelas alterações promovidas pela Reforma Trabalhista, no país, em 2017, bem como pela decisão proferida, pelo Supremo Tribunal Federal, na ação direta de inconstitucionalidade n. 6363. Além da listagem de diversos exemplos, houve análise de duas situações bastante significativas: a liberdade contratual do empregado hipersuficiente e a possibilidade de redução salarial por ajuste individual entre empregado e empregador. A pesquisa se justificou por conta do evidente paradoxo em se exaltar a autonomia da vontade do empregado em uma relação jurídica assimétrica, cuja presunção é a de que o trabalhador seja hipossuficiente. A partir da dialética e da técnica de pesquisa documental indireta nas modalidades pesquisas documental e bibliográfica, este estudo concluiu, na condição de resultados encontrados, que a valorização da autonomia da vontade do empregado, em uma relação jurídica marcadamente assimétrica, direciona o direito do trabalho no país para um novo paradigma, com riscos equivalentes aos verificados quando da construção deste ramo jurídico.*

**Palavras-chave:** *hipersuficiente ; reforma trabalhista; ação direita de inconstitucionalidade n. 6363; autonomia da vontade.*



# 1. INTRODUCTION

The regulation of labor law in Brazil, in recent years, has undergone, apparently, structural transformations, mainly due to the promulgation of the Labor Reform by Law no. 13,467 / 2017 (BRASIL, 2017),[3] responsible for numerous changes in the Consolidation of Labor Laws - CLT (BRASIL, 2020a), and for judicial decisions, especially the direct action of unconstitutionality (ADI) n. 6363 pending before the Federal Supreme Court (STF). (BRASIL, ADI 6363, 2020).

One of the sensitive points of these changes puts in shock, in an employment relationship, the autonomy of the will and the employee's under-sufficiency. This supposed contradiction, in theory, is capable of demanding reflection on the very purpose of building labor law, based on very particular characteristics of this legal branch.

The legal creation, by the Labor Reform, of the hypersufficient employee (CLT, art. 444, single paragraph), as well as the possibility of individual adjustment, between employee and employer, with the scope of reducing salary, are representative points of this scenario, although deal with examples in a considerable universe of evident exaltation of an alleged autonomy of the will the employee, to regulate the working conditions, in the employment relations.

This research analyzes the exaltation of the autonomy of the worker's will, inserted in an employment relationship, based on a new regulation of labor law in Brazil built in recent years. The problem allows to extract reflections about this supposed paradox in a legal branch marked by particularities when compared with civil law.

This study is justified due to this new regulation, based on legislative changes and judicial decisions with binding effects, the contents of which, supposedly, signal a structural change in labor law, based on the celebration of an alleged autonomy of the employee's will, the which, perhaps, generates paradoxical consequences in the formation of employment relationships in the country.

3 From this point on, citations to this Law will not be referenced. This rule will be adopted for all normative acts and judicial decisions (only for them), with reference only in the first citation, without prejudice to its listing at the end. The objective is to make the text more fluid.

The research development method is dialectical, whose content, genuinely, in general lines, was seen as an art of dialogue, of discussion. In modernity, however, dialectic has incorporated the meaning of understanding reality, in motion, with contradictions and antagonisms and in permanent transformation. (MARTINS; THEÓPHILO, 2009, p. 49).

Dialectics, as a reciprocal action, in an unfinished and jointly analyzed process (MARCONI, LAKATOS, 2007, p. 83-84), allows us to analyze this valorization of the employee's will autonomy in an asymmetric legal relationship marked by the employee's under-sufficiency ( employment relationship).

This research adopts the technique of indirect documentary research in the modalities of documentary and bibliographic research, that is, for the preparation of this study, it analyzes public documents, statistics, normative sources and bibliography made public.[4]

This study aims to: a) list some recent changes in the regulation of labor law in Brazil, capable of situating the problem of this study; b) examine, by way of example, two significant changes that represent this new scenario in which there is an appreciation of the autonomy of the worker's will: the greater contractual freedom granted to the hypersufficient employee and the possibility of salary reduction by individual adjustment, authorized by ADI n. 6363, pending before the STF; c) from these examples, respond to the problem of this research by analyzing this supposed paradox embodied in the exaltation of workers' autonomy in employment relationships. This will even be the order of the sections.

## 2. LABOR REFORM, HYPERSUFFICIENT EMPLOYEE AND WAGE REDUCTION BY INDIVIDUAL AGREEMENT: THE EXALTATION OF THE PRETENDED AUTONOMY OF THE EMPLOYEE'S WILL[5]

The Labor Reform, which took place in 2017, brought about a profound change in the regulation of labor law in Brazil. It seems possible to extract several meanings from these modifications. One is the exaltation of the autonomy of the will[6] of the employee.

Perhaps, one of the effects of increasing the autonomy of the employee's will is the weakening of the presumption of worker under-sufficiency and the partial removal of the so-called contractual management.

CLT presents several examples of valuing the autonomy of the employee's will, based on changes resulting from the Labor Reform. In a merely illustrative list, it is possible to list the following precepts that seem to signal this direction:

4 From classification exposed by Marconi and Lakatos. (2010, p. 48-57).

5 Some excerpts from this chapter, with adaptations, were extracted from Eça and Fonseca. (2020).

6 This study, due to its limits, will not deal with the supposed difference between autonomy of the will and private autonomy. There are theoretical currents that differentiate them. Others approach them as synonyms. One of the effects of this autonomy is freedom of contract and the possibility for the employer to create self-regulations. It is in this sense that it will be used in this research.

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a) authorization of monthly and semiannual compensation of working hours by individual agreement between employee and employer (CLT, art. 59, §5 and 6).

As for the hour bank forecast, the collective bargaining requirement continues (CLT, art. 59, §2º). In it the compensation can be annual. In fact, the Superior Labor Court (TST) has a Summary (85, V), published before the Labor Reform, whose content is that this type of compensation (bank of hours), because it is burdensome to the employee, must be built collective work instrument. (BRAZIL, Súmula 85, 2017). In the hour bank, the compensated hour (usually intended for compensatory time off) is paid simply, without the additional. Therefore, the employee fulfills overtime and receives it for time off, without the respective additional constitutionally guaranteed as a fundamental right of workers,[7] under the terms of art. 7, XVI, of the Federal Constitution of 1988 (CF / 1988). (BRAZIL, 2019);

b) establishment of a working hour of twelve hours followed by thirty-six uninterrupted hours of rest by individual agreement between employee and employer (CLT, art. 59-A). Again, the autonomy of the will prevails.

The TST (Precedent No. 444), before the Labor Reform, required collective bargaining to adopt the twelve-hour day, in addition to considering it as an exceptional measure. (BRAZIL, Súmula 444, 2017). The new CLT provision, as seen, requires only individual agreement.

Art. 59-A of the CLT, in addition to this context, was the object of ADI before the STF (BRASIL, ADI 5994, 2020), by allowing an agreement between employee and employer to establish a twelve-hour day, with the reminder that standard, constitutionally provided for, is eight hours (CF / 1988, art. 7, XIII);

c) adoption, by virtue of the provision in the individual labor contract, of the teleworking regime (CLT, art. 75-C), that is, again, the parts of the employment relationship have autonomy to define the way in which the work is carried out: in person or telecommuting.

Generally, the teleworking regime is desired by the employee, however, one cannot forget his difficulties and risks. (FONSECA, 2017). Therefore, it is possible to question whether it would be up to the autonomy of the parties' will to define it or if there would be any normative parameter to be observed in order to preserve the health and safety of the employee;

On the other hand, the adoption of the teleworking regime may materialize gains in the employee's quality of life. At this point, the autonomy of the will may be an ally of a more emancipatory work.

d) adoption, by individual agreement between employee and employer, of the intermittent employment contract (CLT, art. 452-A).

Under the intermittent employment contract, in short, there is only the payment of the hour actually worked. This type of contract decreases the employee's remuneration scale and institutionalizes a precarious contract, by modifying, exceptionally, the standard of paying for the time available, adopted by art. 4th of the CLT. With this, it tends to decrease the value of the wage bill and, depending on the situation, leave the employee without the perception of wages for long periods.



7 The STF expressly considered social rights to be types of fundamental rights: (BRASIL, ADI 5938, 2019).

Art. 552-A of CLT, whose text introduced the intermittent employment contract, was also the object of ADI before the STF. (BRASIL, ADI 6154, 2020);

e) unnecessary collective bargaining for the employer to promote unmotivated collective layoffs (CLT, art. 477-A).

This legal preceptive also contradicted the position of the TST, whose jurisprudence, at least before the Labor Reform, was in the sense that collective layoffs, to be carried out, depended on prior collective bargaining, as it is a group, massive, community layoff. , inherent to the collective bargaining powers, and for causing greater socioeconomic impacts when compared with the individual contract termination. (BRAZIL, ordinary appeal 173-02.2011.5.15.0000, 2012).

The legal authorization for mass dismissal, without prior collective bargaining, was also the object of an ADI before the STF. (BRASIL, ADI 6142, 2020);

f) possibility of termination of the employment contract in the cancellation modality (individual adjustment between employee and employer), with a decrease in the amount paid as severance payments (CLT, Art. 484-A).

In this case, the autonomy of the will will legitimize the decrease in the amount due as severance payments;

g) pact, by individual agreement between employee and employer, of arbitration clause in employment contracts whose remuneration is more than twice the maximum limit established for the benefits of the General Social Security Regime (CLT, art. 507-A.

The list seems sufficient to show that, especially after the Labor Reform, there was an exaltation of the autonomy of the employee's will in the employment relationship, with authorization to, individually and jointly with the employer, regulate working conditions.

Basically, the questioning, including those contained in the mentioned ADIs, concerns the limits of the employee's will autonomy in the employment relationship, or, in other words, what would be the limits of the contractual freedom of the employee and the employer, as well as the beautiful ones the power of self-regulation in an employment relationship.

It is possible, therefore, to extract a category of analysis from these changes promoted by the reformist legislator, based on valuing the autonomy of the employee's will to define, in consensus with his employer, rights (even of a fundamental nature) arising from the employment relationship.

The following two examples, analyzed with greater verticality, perhaps, show even more this direction of valuing the autonomy of the will of the parties inserted in an employment relationship. First, the creation, by the Labor Reform, of the figure called hypersufficient employee will be analyzed. Then, what was decided by the STF, in ADI n. 6363, on maintaining the effectiveness of the provisions of Provisional Measure no. 936/2020.

The regulation of the hypersufficient employee was inserted in the sole paragraph in art. 444 of the CLT::

> Art. 444. [...]
> Single paragraph. The free stipulation referred to in the caput of this article applies to the cases provided for in art. 611-A of this Consolidation, with the same legal effectiveness and preponderance over collective instruments, in the

> case of an employee holding a higher education diploma and who perceives a monthly salary equal to or greater than twice the maximum limit of the benefits of the General Social Security System .

The hypersufficient employee is characterized as such based on two criteria: salary level and training. The situation described in art. 444, single paragraph, of the CLT is an attempt to differentiate a type of employee based on their particular conditions from the notion of presumed hyposufficiency, whose recognition is something innate to the construction of labor law.

In the case of perceiving a salary equal to or higher than twice the maximum limit of benefits paid by the General Social Security System and having a higher education degree, the employee is considered to be over-sufficient (a counterpoint to the idea of under-sufficient). Consequently, art. 444, single paragraph, of the CLT, gives greater contractual freedom to dispose of their labor rights. For the device, the presence of this scenario allows the conclusion that hyposufficiency would cease. Consequently, there would be greater contractual freedom based on their autonomy of the will.

Once hypersufficiency was recognized, there would be greater contractual freedom (a greater degree of autonomy of the will). It would partially cease the governing over the contract. In this case, the parties (employee and employer) may freely stipulate based on the hypotheses provided for in art. 611-A of the CLT, with predominant effects on the law and collective labor instruments.

Art. 611-A of the CLT, also inserted by the Labor Reform, sets out an extensive list of possibilities. All the hypotheses listed in the provision are subject to individual negotiation between the employee (provided that he / she is hypersufficient) and the employer, whose effectiveness, as warned, will be supralegal and equally superior to the norms arising from collective bargaining.

The proposal to insert the figure of the hypersufficient employee may be to overcome the under-sufficiency through income and educational background. For an optimistic view, it may even mean an incentive for the qualification of Brazilian workers. In practice, however, perhaps, it signals the legitimation of the civilizing demotion of the employee who fulfills these conditions and presents himself as hypersufficient, since the condition of subordination remains and there will continue to be no plan of symmetry between him and his employer to effectively negotiate conditions of work.

There is, for a certain theoretical sector, an evident incompatibility between the wording of the caput and the sole paragraph of art. 444 of the CLT. (SEVERO; BIGGER 2017, p. 99). The caput limits the autonomy of the parties' will by imposing a certain contractual direction. The free stipulation of the parties may not contradict the labor protection provisions, norms resulting from a collective labor agreement (ACT) or collective labor agreement (CCT). The sole paragraph bets on the employee's autonomy of will in order to have, in his individual employment contract, forecasts with effectiveness of a prevailing rule to those arising from ACT, ACT and the laws.

The situation described in art. 444, sole paragraph, of the CLT (hypersufficient employee), therefore, signals the preponderance of the autonomy of the will in the formation of the employment contract to the detriment of the contractual directionism on the employment relations, marked by the presumed hyposufficiency of the employee.

Another situation experienced in legal practice, which is very illustrative for the purposes of this research, was that verified in a judgment rendered by the STF. This Court issued an injunc-

tion in ADI no. 6363, with binding effects, to confer interpretation according to the Constitution to the provisions of art. 11, §4, of the then Provisional Measure no. 936/2020.

Before analyzing the decision issued by the STF in ADI n. 6363, the wording of art. 11, §4, of Provisional Measure no. 936/2020, currently converted into Law No. 14,020 / 2020. (BRAZIL, 2020c).

> Art. 11. [...] §4º. Individual agreements to reduce working hours and wages or temporarily suspend the employment contract, agreed under the terms of this Provisional Measure, must be communicated by employers to the respective labor union, within up to ten calendar days, counted from the date of employment. your celebration. (BRASIL, 2020b).

Art. 11, §4, of Provisional Measure no. 936/2020 (repeated in art. 12, §4 of Law no. 14.020 / 2020), under the justifications of the state of public calamity and the public health emergency of international importance resulting from covid-19, authorized that individual agreements, entered into between employer and employee, reduce wages, working hours and implement contractual suspension (hypothesis in which there would be no remuneration consideration).

The provision of the aforementioned Provisional Measure is unconstitutional. Above all, it defies the precept of art. 7, VI of the CF / 1988: "[...] Workers' rights are ... irreducible from wages, except as provided for in a collective agreement or agreement;" (BRASIL, 1988).

CF / 1988 is crystal clear in the sense that, strictly speaking, the principle of wage intangibility applies. The reduction in wages should be seen as an exceptional measure and would only be authorized through a collective labor agreement or collective labor agreement.

The need for collective bargaining to reduce wages, in addition to the crystal-clear prediction on the dogmatic-constitutional plane, is endorsed on the theoretical plane. In this sense, in an exemplary listing, the lessons of Arnaldo Süssekind (SÜSSEKIND; MARANHÃO; VIANNA; TEIXEIRA, 1999, p. 155), Evaristo de Moraes Filho (MORAES FILHO; MORAES, 2014, p. 276), Orlando can be invoked Gomes and Elson Gottschalk (GOMES; GOTTSCHALK, 1998, p. 201), Maurício Godinho Delgado (DELGADO, 2015, p. 209-210), Vólia Bomfim Cassar (CASSAR, 2018, p. 861-862), Carlos Henrique Bezerra Leite (LEITE, 2019, p. 100 and 479), Alice Monteiro de Barros (BARROS, 2005, p. 706-707) and Pedro Paulo Teixeira Manus. (MANUS, 2003, p. 271).

The states of public calamity and public health emergency, for their part, are unable to suspend the normative force of the Constitution. (HESSE, 1991). Even in this extraordinary situation, art. 7, VI, of the CF / 1988 remains in force.

From this scenario, the STF had two paths: to apply the Constitution or to deny it, in this case, under the guise of a weighted hermeneutics.

The STF, by a majority of votes, dismissed the injunction. According to the decision, the individual adjustment would represent a convergence of interests and a speedy conflict resolution mechanism. Finally, he noted the need for exceptional and temporary flexibility in the requirement for collective bargaining, due to the covid-19 pandemic. In summary, in particular, the provision of Provisional Measure no. 936/2020.

The STF's decision to maintain the contested provision of Provisional Measure no. 936/2020, from another point of view, carries as a background the exaltation of the idea of autonomy of the will of the employee inserted in an employment relationship. In theory, the employee would be able to define, together with his employer, the salary reduction.

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On the other hand, the Supreme Court decision relativizes the notion of hyposufficiency, so present in labor law, by admitting that an employee authorizes, without assistance from the professional union, the reduction of his salary.

From the presentation of these two cases, there seems to be evidence of a recent inclination to value the autonomy of the will of the parties involved in the employment relationship. The task of the next section will be to promote a more vertical analysis with the aim of responding to the problem and analyzing this supposed paradox of labor law in Brazil to value the autonomy of the employee's will.

## 3. PARADOXAL EXALTING AUTONOMY IN EMPLOYMENT RELATIONS IN BRAZIL[8]

The real discovery of the 18th century was not the need for work, but the freedom of work, with the destruction of forced labor, whose violence was direct, or at least potential, something dominant in the Middle Ages. In addition to this, new meanings for work are beginning. (CASTEL, 2015, p. 232 and 234).

The freedom to work against work in corporations (and other types of forced labor), as a right to work, was a proposal in tune with the ideas of economic liberalism present in the 18th century. (CARACUEL, 1979, p. 16-17). In the period of the Industrial Revolution, there is concomitantly, the rise of economic liberalism, based mainly on the ideas of Adam Smith (SMITH, 2013) and David Ricardo. (RICARDO, 1975).

Liberal ideas, thriving at the time of the Industrial Revolution and in shaping the capitalist mode of production, were insufficient to safeguard work and the social condition of work. Although Adam Smith (SMITH, 2013, p. 1, 7-9, 19-23, 36-42, 60 and 413-415) recognized the work value, there was no protective web, as, for example, in general, in the proposal of labor law, whose protections to the worker and to the social condition of work work as one of the purposes of its construction.

In this scenario, there was a kind of overexploitation[9] of the workforce, unprotected by the lack of a labor law. Because of the lower resistance to discipline and because they accepted lower wages, children and women were preferred to men. They were more docile and represented cheaper labor force. The machine tools made the muscular strength generally present in men superfluous, which also made it possible for women and children to work, with increased exploitation. Intensity and productivity reach levels never imagined.[10]

Friedrich Engels, when answering about the difference between slave workers, serfs and proletarians then emerging, provides the necessary analysis to demonstrate the situation of workers before the institutionalization of labor law.

8 Some excerpts from this section were built from previously developed research: (FONSECA, 2017).

9 This category (overexploitation of the workforce) is studied, in another context, by: (MARIN, 2000, p. 123 and 125-126).

10 Some analyzes of this paragraph were inspired by reading: (MARX, 2012, p. 451, 467-470 e 484).

According to his lesson, the slave was sold in a single act, while the worker (in fact, his labor force), sells himself every hour, every day. The slave was his master's thing and property. For this reason, he had, in a way, a guaranteed existence, no matter how miserable it was. The proletarian, although free, has no guarantee, from an individual perspective, about his existence because he is at the mercy of competition and of all market fluctuations. (ENGELS, 1987. p. 17-19).

Émile Zola, in Germinal, in the year 1885, the name of the first month of spring in the calendar of the French Revolution, also recounts the degrading situation of coal mine workers in northern France. (ZOLA, 2011).

The situation of workers in England is also narrated by Engels, in another book, published in 1845 (ENGELS, 2010, p. 37-39 and 41), which also highlights the precariousness of the work environment since the beginning of the called free work.

The right to work, guaranteed in the French Constitution of 1791 (art. 3), established that society was compelled to provide for the livelihood of unfortunate citizens both by the creation of jobs and by the maintenance of means of subsistence for those unable to work. (BRASIL, 1791). The French Constitution brought a new element to the right to work: a social trait, with the constitutional obligation of the State to promote that right. (IBARRECHE, 1996, p. 88). This new data joins the purely liberal conception of considering it only as a synonym for freedom to work. (FONSECA, 2017, p. 116).

The workers, therefore, lived in conditions, either at work or outside it, deplorable. There was, as there still is, a brutal incompatibility between human emancipation and the capitalist mode of production. Consequently, a movement of social unrest began. The guarantee of the right to work, as provided for in the French Constitution (on condition of freedom to work and a fragile welfare system), was insufficient to prevent the impoverishment of workers. (HUBERMAN, 2014, p. 151; FONSECA, 2019, p. 125).

Since the emergence of the manufacturing system, especially with the Industrial Revolution, on the other hand, the working class is being formed and begins to organize itself with the scope of fighting for its interests. Thus, a movement for the formation of workers' organizations is initiated and, in return, the State (bourgeois) acts to prevent these associations. The presence of proletarians in factories and around cities caused a greater concentration of workers. The improvement in transport and communication facilitated the strengthening of the unit. Capitalism, therefore, produced the working class and provided opportunities for union strengthening. (HUBERMAN, 2014, p. 151; FONSECA, 2019, p. 125).

There were certainly many revolts and social struggles, including violent ones. It can be recalled, by way of illustration, of ludismo (initiated, in England, in 1811), of cartismo (between the years 1830 to 1850, also in England), the Lyon Revolt (in France, in 1831) and Revolution of 1848. There were also the formation of social movements refractory to liberalism, such as those of socialists (including utopians), anarchists and social democrats.

The capitalist mode of production holds out a promise that the worker will be free. "[...] In view of the evident deficit of workers' freedom, this conception is seductive. With the dismantling of the feudal system and the emergence of capitalism, a new way of working begins: wage labor. " (FONSECA, 2019, p. 115).

Evaristo de Moraes warns that economists, against the evidence of the facts, maintained their belief in the virtues of freedom of work. In labor relations, the supposed freedom has been

generating oppression, misery, exploitation of the workforce and progressive demotion of the worker (MORAES, 1998, p. 9).

In Brazil, there are particularities, despite the existence of contact points. With regard to the idea of social formation, it seems inappropriate to import, without a filter, what happened in Western Europe.

Slave labor in Brazil ceased in 1888. At that time, the country did not adopt a mode of slave production, but a pre-capitalist productive form. Capitalism did not install itself completely, nor did labor law appear in the face of a lack of free work or freedom of work.

As if that were not enough, there was an effective attempt to steal the speech of the working class (PARANHOS, 2007. p. 23-44 and 83-90). Labor law in Brazil, for many, presents itself as a kindness of the State towards workers, with the forgetfulness that before the so-called Revolution of 1930 there was an incipient labor law filled with labor norms and a considerable social movement in favor of the workers.

> Thus, the CLT and labor rights, at the official and ideological levels, are seen as gifts and concessions from the State; of capitalism in Brazil, without forgetting the role of the State, which also contributes to the regulation of labor relations in the country, guided, above all, by the interest in the growth of industrial capitalism. (FONSECA, 2019, p. 250).

This Brazilian context for the formation of labor law has effects. One of them, perhaps, is a relative apathy of the working class to fight for their rights. This deficit, perhaps, is carried over to the exercise of a pretense of autonomy of the employee's will.

From the capitalist mode of production and the promise of freedom of work (something resulting from the expansion of the idea of freedom that came from the French Revolution, with late effects in Brazil), labor relations began to be regulated by the so-called common law (civil law) . The result was problematic. The exploitation of the workforce has reached barbaric levels.

This whole scenario, obviously, implied reflexes in the creation of law, since law is a cultural product. (FLORES, 2009). It made possible the construction of labor law, with labor laws and codes, the constitutionalization of social law, from the framework of the Constitution of Mexico, in 1917, and of Weimar, in 1919, and the internationalization of labor law, with normativity radiated by the International Labor Organization (ILO) in 1919.

This new direction of the law towards the recognition of social rights translates into new historical commitments (although not realizable) such as the adoption of material equality. Labor law, certainly, was the one that developed the most from this conception. (DELGADO; DELGADO, 2017, p. 42).

In this scenario, consequently, there was a need for the appearance of the so-called special law (labor law) unrelated to civil law (common law), built from its own rules, principles and methodologies. This path, didactically, is reported by Héctor-Hugo Bargagelata (BARBAGELATA, 2012. p. 112-119), based on the thesis of the particularism of labor law.

From a procedural perspective, (here it is necessary to add that CLT, in the same body, deals with the material and procedural rights of work, which seems to signal an easing of a partial separation between material and process law), Américo Plá Rodrigues wife the particularity of the labor procedure based on three principles: compensatory inequality, real truth and unavailability of rights. When analyzing it, he found it difficult to verify these principles in other

procedural branches, especially in civil proceedings. Other, typically labor-based principles, such as speed, gratuity and conciliation, shifted to civil proceedings, which, meanwhile, did not apply to those. (RODRIGUES, 1992, p. 243-244).

Labor law, since then, has been presenting itself as an autonomous branch in relation to other legal branches, including civil law. At the theoretical level, strictly speaking, their autonomy is defended because they find, in their core, their own rules, principles and methodology. (CESARINO JR., 1963, p. 112-115; NASCIMENTO, 1995, p. 122-124; PINTO, 2007, p. 64-67).

This conclusion, however, refrains from preventing a dialogue with other legal branches. Labor law, in advance, is assumed to be insufficient and incomplete to address all the problems arising from labor relations. By corollary, in Brazil (CLT, art. 8º and §1º) and also in other countries, normative predictions with the admission of importation of common law precepts are quite common, that is, any other branch of law other than the special work (it is called the subsidiarity technique). In addition, Messias Donato rightly maintains that labor law is, in essence, multidisciplinary. (DONATO, 2008, p. 86).

Furthermore, it seems inappropriate to consider that the approximation of labor law as a civil law will always bring harm to workers. There are civilian devices with potential quite in tune with the purposes of labor law, such as the social ends of the contract and the respect, including contractual, of personality rights.

The proposal of the Labor Reform to repeat the past and promote a certain path of return from labor law to civil law with the exaltation of the autonomy of the employee's will in the employment relationship is, therefore, quite paradoxical. The detachment of labor law from civil law, with the above mentioned reservations, meant the inefficiency of the theoretical premises of this legal branch to face the singularities of the employment link.

The Labor Reform attracted the logic of civil law to labor law, to the point of concluding that it is not a typical labor law (SEVERO; BIGGER 2017, p. 17 and 27), which generates a series of problems in this area. legal branch.

The warning from Márcio Tulio Viana is opportune: "[...] the contract [in labor law] is valued so much that its form is enough to make it presumed - practically absolutely [...] opening unprecedented spaces for the escape from law. " (VIANA, 2018, p. 416).

It should be remembered that the employment contract is a typical adhesion contract (DELGADO; DELGADO, 2017, p. 158), with virtually no margin for discussions by the employee. Therefore, after the Labor Reform and ADI n. 6363, the individual adjustment between employee and employer has a different connotation, along with greater contractual freedom.

In the capitalist mode of production, labor behaves like a commodity and, as such, is sold on the market (exchanged for money). It is a way of material survival for the worker and should be embodied in a means of emancipation. Labor law, by presenting special principles and rules, in relation to civil law, in addition to legitimizing this practice, almost contradictorily, seeks to alleviate the exploitation of the labor force. The approximation of the two branches based on the idea of autonomy of the employee's will to define, alongside the employer, the rules of the employment contract, removes from the labor law its character of partially protective shield.

Capitalism, however, is not limited to the sphere of production. There is a violent cultural industry whose objective is to impose the consumption of the goods produced. Even in the

hours of rest, the worker is obliged to consume it and his break from work seems more like a new job. (ADORNO; HORKHEIMER, 2006, p. 105). In an apparently similar sense, there is the notion that contractual freedom will lead to gains in the rights of employees, as if there was a relationship of full equivalence between them and their employers.

Again, the classic lesson from Evaristo de Morais is precise: "When dealing with this supposed freedom that presides over the employment contract, observe that it is little in practice [...]". (MORAES, 1998, p. 11). In an employment relationship there is an evident asymmetry between employee and employer. The subordination element,[11] including structural (DELGADO, 2006. p. 667), objective (VILHENA, 2005, p. 514 and 521-526) and algorithmic (MIZIARA, 2019, p. 175), or economic dependence (OLIVEIRA, 2014) , as one of the elements necessary for the characterization of the employment relationship (CLT, art. 3), in addition to the dissociation between means of production and workforce, are safe directions for that conclusion.

The definition of subordination has been adapting over time. It does not fall on the person of the employee, but on working conditions. Still, it remains an element of asymmetry between the parties. If it is understood by the notion of dependence (in fact, this is the word foreseen in article 2 of the CLT), subordination is understood only as one of the consequences of wages, however insufficient to understand the whole phenomenon. In effect, economic dependency, as the most appropriate category, would characterize the employee as the dispossessed, coerced and expropriated subject of the employment relationship. (OLIVEIRA, 2014. p. 256-258).

Subordination refrains from being overcome by raising the salary and / or by training the employee in higher education. Its founding element remains in the employment relationship: the asymmetry of the link based on the separation between the means of production and the labor force. Consequently, the space for the autonomy of the will, in a legal relationship of this type, ends up being shortened, especially when one observes, as in Brazil, an army of unemployed workers, structural unemployment and very weak union associations.

Regardless of the position adopted (subordination or dependence), there is an impropriety in imagining that an employee will have equal conditions in negotiating, individually, working conditions with his employer. The refusal to accept the conditions imposed, possibly, will prevent admission or will result in the termination of the employment contract.

The policyholder, moreover, "[...] is the holder of a scarce factor (the capital) [...]", that is, of the means of production. Thus, it has a predominance in the way in which the employment contract must be structured. It should also be emphasized that the labor force, a commodity of which the worker is a carrier, is inseparable from the worker. Consequently, the agreement will involve the worker's body. Therefore, it is inept, from a pragmatic point of view, any autonomy of will of the employee to establish, with his employer, working conditions. (GOLDIN, 2017, p. 14).

The labor law would be, concomitantly, materialized by a contract-freedom and a contract-submission. Strictly speaking, there is a space around the recognition of the voluntary nature of the bond. However, in stark contradiction, with the contractual fulfillment, the initial freedom is added by submission (sometimiento). (GOLDIN, 2017, p. 14).

The current phase of regulation of labor law in Brazil, therefore, is moving towards a new paradigm. (KUHN, 2007, p. 220). In law, paradigms constitute legal theory and practice. (OLIVEIRA,



11 On the subject of subordination in the employment contract: (PORTO, 2015).

2016, p. 96). This new archetype would be anchored in a regulation, the content of which sees the autonomy of the employee's will, in individually adjusting working conditions with his employer, including with effects on the main obligation incumbent on the employer: salary reduction.

To be more exact, this new form of regulation of labor law in Brazil, would be oxygenated by a neoliberal paradigm. Neoliberalism is a political-economic theory whose human well-being is enhanced when individual entrepreneurial freedoms and capacities are managed within the framework of an institutional structure characterized by solid rights to private property and free markets and trade. It is up to the State to create and maintain an institutional structure conducive to these practices. In effect, it is necessary to ensure the integrity of the currency, to provide a structure for the defense of property, with military, police and the law, and to encourage the free market. (HARVEY, 2014. p. 12). With the exception of the essential functions for the reproduction of capital, it must behave as a minimal State, whose epilogue, in general, is the compromise of public policies, social well-being and human dignity. The labor law, therefore, in the way in which it was constituted, contradicts the principles of neoliberalism.

Pierre Dardot and Christian Laval, for their part, point to neoliberalism as the new reason for the world. Neoliberalism, the authors conclude, affects the individuality of people and compels them to act in a certain way, as a kind of individual company. (DARDOT; LAVAL, 2016. p. 377-378).

The impact of the Labor Reform and the decision, with binding effects, of the Supreme Court in ADI n. 6363, whose partial syntheses can be signaled to exalt the autonomy of the employee's will in the employment relationship, seem capable of directing labor law, in the country, towards a new (neoliberal) paradigm; almost a return to the origins, with more sophistication, however and perhaps, with risks equivalent (or greater) to those verified in the origin of the construction of this legal branch

## 4. CONCLUSION

This article analyzed the exaltation of autonomy by the new regulation of labor law in Brazil, especially with the enactment of the Labor Reform (Law No. 13,467 / 2017), responsible for changes in the CLT, and judicial decisions, especially the one handed down, in precautionary assessment, in ADI no. 6363, pending before the STF, whose effects are binding.

The first section listed recent changes in the regulation of labor law in Brazil, promoted by the Labor Reform, capable of showing the appreciation of the autonomy of the employee's will in the employment contract, as well as analyzing, by way of example, two representative situations: the largest contractual freedom of the hypersufficient employee and the possibility of salary reduction by individual adjustment, authorized by ADI no. 6363, pending before the STF.

The second section analyzed the problem of this article, based on contradictions, paradoxes and inconsistencies generated by the exaltation of the autonomy of the employee's will in employment relationships.

The research concluded that the valorization of the autonomy of the employee's will, in a legal relationship, markedly asymmetrical and in which the idea of economic dependence and / or subordination prevails, directs the labor law, in Brazil, towards a new (neoliberal)

paradigm , perhaps, with risks equivalent (or greater) to those verified when the construction of this legal branch.



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# THE NEW PETROLEUM REGULATORY FRAMEWORK AND THE PRODUCTION SHARING REGIME: EVOLUTION OF REGULATORY SYSTEM

## O NOVO MARCO REGULATÓRIO DO PETRÓLEO E O REGIME DE PARTILHA DA PRODUÇÃO: A EVOLUÇÃO DO MODELO REGULATÓRIO

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## ABSTRACT

A few years ago, large hydrocarbon reserves were discovered in a region called pre-salt, which extends over 800 km of the Brazilian coast, at a depth of about seven thousand meters above sea level. The Federal Government owns the mineral resources found in the marine subsoil within the continental shelf, but the exploitation of this material, although considered a monopoly, may be permitted according to regulatory regimes provided for in the legislation. The general objective of this research is to examine the concession and sharing regimes for the pre-salt blocks, in order to promote a discussion on the hypothetically most viable model in terms of government revenues. It is not about to point out a system as ideal, but the hypothesis seeks to demonstrate that the production sharing regime has brought significant advances in prospecting, allowing a new way of costing exploration. The research has a deductive methodology, with eminently bibliographic support.

**Keywords:** Petroleum; pre-salt; Production sharing; regulatory systems; royalties.

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OLIVEIRA, Emerson Ademir Borges de; RAMOS JÚNIOR, Galdino Luiz; REZENDE, Heverton Lopes. The new oil regulatory framework and the production sharing regime: the evolution of the regulatory model. **Revista Meritum**, Belo Horizonte, vol. 16, n. 1, p. 280, 2021. DOI: https://doi.org/ 10.46560/meritum.v16i1.8259 within the continental shelf, but the exploitation of this material, although considered a monopoly, may be permitted according to regulatory regimes provided for in the legislation. The general objective of this research is to examine the concession and sharing regimes for the pre-salt blocks, in order to promote a discussion on the hypothetically most viable model in terms of government revenues. It is not about to point out a system as ideal, but the hypothesis seeks to demonstrate that the production sharing regime has brought significant advances in prospecting, allowing a new way of costing exploration. The research has a deductive methodology, with eminently bibliographic support.

## RESUMO

*Há poucos anos foram descobertas grandes reservas de hidrocarbonetos numa região denominada pré-sal, que se estende por 800 km do litoral brasileiro, em profundidade de cerca de sete mil metros do nível do oceano. A União é proprietária dos recursos minerais que se encontram no subsolo marinho dentro da plataforma continental, mas a exploração desse material, embora considerada monopólio, pode ser permitida conforme regimes regulatórios previstos na legislação. O objetivo geral desta pesquisa é examinar os regimes de concessão e partilha dos blocos do pré-sal, a fim de promover uma discussão sobre o modelo hipoteticamente mais viável em termos de receitas governamentais. Não se trata, pura e simplesmente, de apontar um sistema como ideal, mas a hipótese busca demonstrar que o regime de partilha de produção trouxe significativos avanços na prospecção, permitindo uma nova forma de custeio da exploração. A pesquisa possui metodologia dedutiva, com apoio eminentemente bibliográfico.*


**Palavras-chave:** *petróleo; pré -sal; partilha de produção; sistemas regulatórios; royalties.*

# 1. INTRODUCTION

Oil is an important source of energy today. Like natural gas, it is a hydrocarbon formed from chemical reactions that occurred thousands of years ago, originating in organic materials.

In 2007, the discovery of large hydrocarbon reserves was announced in a region that extends for 800 kilometers, between the coasts of the states of Espírito Santo and Santa Catarina, at a depth of about seven thousand meters from ocean level. This region is called “pre-salt”, since the source rock is under an extensive salt layer of approximately two kilometers.

Considering that the mineral resources found in the Brazilian Continental Shelf belong to the Union, the extraction of these resources can be authorized by the Union to public or private companies, by the regulatory regimes provided in the legislation, which will be presented in this article, with emphasis on the production sharing regime, implemented in 2010 by Law No. 12,351, and which changed the regulatory framework then in force.

Through the deductive method, bibliographical and descriptive research, the following problem is intended to be answered: considering the legislative innovation in the last decade, which constituted the new regulatory framework for petroleum, is it currently possible to establish which regime has the potential to offer greater government revenues?

The general objective is to examine the concession and sharing regimes for the pre-salt blocks, in order to promote a discussion about which model is hypothetically more viable in terms of government revenues.

As specific objectives, we propose: a) to present general concepts about petroleum and the pre-salt region; b) to explain the new petroleum regulatory framework and the regimes in effect; c) to foster a comparison between the regulatory regimes.

It must be emphasized that, hypothetically, the article does not have the power to affirm that one sharing system is better than another, but, in practical terms, to demonstrate that the new regime, with the modification that broke with the need for Petrobras’ participation, allowed an acceleration in the exploration process, as well as a reduction in costs for the mixed economy company, especially when it was going through serious financial difficulties.

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This research is justified because the topic has gained much relevance in recent years, especially after the latest auction rounds of the pre-salt fields held in 2019 under the sharing regime. Many questions have been raised regarding the regimes that can bring more wealth to Brazil. This is what we intend to promote here.

## 2. THE ORIGIN OF OIL AND PRE-SALT

A liquid or gaseous hydrocarbon is the result of chemical reactions that took place thousands of years ago. These reactions occurred in compacted organic materials that were deposited in a liquid environment with little oxygen, which were overlaid by layers of earth over the years. Liquid hydrocarbons in their natural state, such as crude oil and condensate, are called petroleum, as stated in Law 9478/1997. Oil is an important source of energy and its derivatives - such as gasoline, diesel oil, and kerosene - are used as fuel for automobiles and thermoelectric plants, besides the industrial application in several segments of the economy. The role of oil is intimately connected to the stages of the so-called Industrial Revolutions which, as dynamic and cyclical movements, developed the legal-social relations, broadening perspectives and establishing new economic and cultural paradigms. We speak of revolutions in a plural perspective, because, in a historical analysis, there were several moments that were characteristic of the social particularities that mark a period of time in the evolution of humanity:

> Sparked by the mechanization of spinning and weaving, the First Industrial Revolution began with Britain's textile industry in the mid-18th century. Over the next 100 years, it transformed all existing industries and gave birth to many others, from machine tools (the mechanical lathe, for example) to steel manufacturing, the steam engine, and railroads (SCHWAB, 2019, p. 42).

In the same way, the Second Industrial Revolution brought the rise of fuels and with them a new system of interpersonal closeness, changing the rhythm of "human coexistence" and exacerbating the needs arising from these relationships.

> In the period between 1870 and 1930, a new wave of interrelated technologies began to compound the growth and opportunities that came with the First Industrial Revolution... The internal combustion engine made possible the automobile, the airplane, and eventually their ecosystems - including manufacturing jobs and highway infrastructure. Breakthroughs occurred in chemistry: the world gained new materials, such as thermoset plastics, and new processes - Haber-Bosch's ammonia synthesis paved the way for cheap hydrogen fertilizers, the "green revolution" of the 1950s, and the subsequent dizzying increase in human population (SCHWAB, 2019, p. 43)

Without exclusionary bias, the Third and Fourth Industrial Revolutions have placed society in the world of technology, transforming it into an "information collective", denoting a new social format. Despite this "new moment", oil is still the basis for sustaining several economies, and is treated as an indispensable element for the development of countries inserted in this technological context. In other words, the Industrial Revolutions complement each other, and are not about overcoming phases, but about the emergence of new perspectives without losing the old discoveries.

Brazil is an important oil producer and became self-sufficient in 2006, but this does not mean that it is not still an importer of this hydrocarbon.

This is because this self- sufficiency is only numerical, i.e., the country produces a larger quantity than it consumes; on the other hand, the demand for derivatives is still high, which implies imports, in addition to other problems such as the demand for refining in the national territory.

This self-sufficiency was announced in 2006 by the Union, shortly before the announcement of one of the largest oil discoveries in recent years; in the Santos Basin region [4], in the field called "Tupi", evidence was identified of large oil reserves located beneath the salt layer, in a region approximately seven thousand meters below the surface of the Atlantic Ocean. After this discovery, it was announced, in 2007, the existence of the pre- salt province, mapped in a region that extends from southern Espírito Santo to northern Santa Catarina, with approximately 800 kilometers long (SCHUTTE, 2012, p. 14).

Regarding the origins of this layer, the state company explains:

> The pre-salt is a sequence of sedimentary rocks formed more than 100 million years ago in the geographical space created by the separation of the ancient continent Gondwana. More specifically, by the separation of the current American and African continents, which started about 150 million years ago. Between the two continents, large depressions were initially formed, which gave rise to large lakes. There, over millions of years, the oil-bearing rocks of the pre-salt layer were deposited. As all the rivers from the separating continents flowed into the lower regions, large volumes of organic matter were deposited there. As the continents drifted apart, the organic material accumulated in this new space was covered by the waters of the forming Atlantic Ocean. Here began the formation of a salt layer that today is up to 2,000 meters thick. This layer of salt was deposited on the accumulated organic matter, retaining it for millions of years, until thermochemical processes transformed the organic layer into hydrocarbons (oil and natural gas) (PETROBRAS, 2020))

In this same vein, Ferro and Teixeira (2009, p.1) point out that the pre-salt reservoirs were formed 122 million years ago when there was a lake environment in a small strip of sea that opened between Africa and America. Thus, with the separation of the plates of these continents that were formed, there was the entry of sea water, which would have vaporized in this hot environment, so that salt started to be deposited on the organic sediments.

The term pre-salt, on the other hand, refers to the geological time scale, i.e. the time of oil formation, and not to its position (FOGAÇA, 2020). In this sense, Abreu (2013, p. 8) points out: "Conceptually, the term 'Pre-salt' that is present in the media in general and in technical texts is close to a definition of geological time character, which means the interval of rocks that was deposited before salt layers.

Therefore, the area accumulates light oil of excellent quality, which projects Brazil to face the great demand for energy in the world. This is because oil extraction has been increasing gradually every year. In 2014, it was possible to extract 500,000 barrels per day, and in 2018, a few years after the start of exploration, this number already exceeded 1.5 million (PETROBRAS, 2020).

4 The Santos Basin is one of the three Sedimentary Basins where the pre-salt layer oil is found. The other two are the Campos and Espírito Santo Basins.

To have an idea of the impact of oil production in the region mentioned above, for comparison purposes, note that it took 45 years for Petrobras[5] - since its creation - to reach, in 1998, the production of the first million barrels of oil. The mark of 1.5 million barrels was reached only four years later, in 2002 (PETROBRAS, 2020). Furthermore, in the month of September 2019, with 110 wells producing, average production was 1.82 million barrels of oil per day and 73.3 million cubic meters of gas per day, adding up to a hydrocarbon production of 2.2 million barrels of oil equivalent per day.

Furthermore, in the last 60 months leading up to September 2019, average pre-salt oil production grew 243% (PRE-SAL OIL, 2019, p. 9).

Indeed, for Lima (2008), the discovery of oil in the pre-salt layer of the Santos basin was only possible thanks to the accumulation of Petrobras' experience in 68 years of prospecting. For the author, this experience begins with the first successful well, located in Lobato, Bahia, in 1939. Although oil extraction is a high-risk activity, with about 25% success rate in wells drilled, the pre-salt represents low risk (LIMA, 2008), because the exploratory success rate is 86%, much higher than the world average (IBP, 2016).

Furthermore, for Petrobras (2020), the volume of oil produced "per well" in the Santos Basin pre-salt is above what is expected in the oil and gas industry. On average, 25 thousand barrels of oil are extracted per day; and of the ten Brazilian wells with the highest production, nine of them are located in this area, the most productive being the Tupi field, with 36 thousand barrels of average flow per day.

The pre-salt is located 300 kilometers off the Brazilian continental and insular coast, partially within the Exclusive Economic Zone (EEZ, from here on). This region is described in article 6 of Law 8.617/1993, which states that the EEZ is a strip extending up to two hundred nautical miles, which is about 370 kilometers, overlapping the territorial sea. In other words, 184 nautical miles beyond the territorial sea, which has 12 miles, but encompassing it (BORGES, 2020, p. 202).

In the EEZ, Brazil has sovereign rights for the purposes of exploration and exploitation, in addition to the conservation and management of natural resources of the waters overlying the seabed, the seabed and its subsoil, and even to all that refers to other activities with a view to exploration and exploitation of that zone for economic purposes. Furthermore, according to article 20, item V of the Constitution of the Republic of 1988, those natural resources of the continental shelf and the exclusive economic zone are considered Union property (BORGES, 2020, p. 201-203).

From an international perspective, one can establish a concern of the global community with issues related to oil, its exploration and extraction, mainly due to the fact that its reserves are external, going beyond the territorial limits of one state, reaching the others.

Thus, there is talk of "international unitization:

5 According to art. 61 of Law No. 9.478/1997, Petróleo Brasileiro S.A. - PETROBRAS is a mixed economy company linked to the Ministry of Mines and Energy, whose purpose is the research, mining, refining, processing, trade and transportation of oil from wells, shale or other rocks, its derivatives, natural gas and other fluid hydrocarbons, as well as any other related or similar activities, as defined by law. Art. 62 of the same law, on the other hand, establishes that the Union will keep the shareholding control of PETROBRAS with the ownership and possession of, at least, fifty percent of the shares, plus one share, of the voting capital.

> International unitization is understood as a contract that aims to consolidate legal business between international subjects from multiple areas or blocks, in order to allow the field to be efficiently explored within the unitary perspective, using the division of costs and revenues, through the establishment of joint ventures that will perform the activities. (OLIVEIRA; XAVIER, 2007, p. 681-682).

International law, especially public law, presents relevant sources for the coordination and cooperation of the various international subjects, also in matters involving oil. In this scenario, not only international treaties can be acclaimed, but also the election of international customs as a source of public international law constitutes a historical and paradigmatic milestone for structuring the subject.

In this sense, it is worth noting that Brazil ratified the Montego Bay Convention, held in 1982 in Geneva. This Convention on the Law of the Sea establishes in its article 76 and following provisions on the continental shelf, which comprises the bed and the subsoil of submarine areas, establishing that the coastal state exercises sovereignty over the shelf for the purposes of exploration and exploitation of its natural resources (including mineral resources).

Under the Convention, the coastal country must apply to the Secretary-General of the United Nations for the establishment of the platform, submitting maps and information, including geodetic data, permanently describing the outer limits of its continental shelf, however, the area claimed must not exceed 350 nautical miles from the coast. This is the extended continental shelf (BORGES, 2020, p. 202).

In this sense, Schutte points out about the continental shelf:

> Brazil began in 1989 its Continental Shelf Lifting Plan (LEPLAC), to establish its continental shelf beyond 200 nautical miles from the EEZ, in accordance with the criteria established by the convention. In April 2007, the United Nations Commission on the Limits of the Continental Shelf approved most of the Brazilian plea (about 85%), extending Brazilian maritime jurisdiction to an area of 4,451,766 km2, known as the Blue Amazon, half the continental area of 8,511,996 km2. With this there was legal protection for the pre-salt, although the largest power with great external dependence on oil has not yet ratified the convention. (SCHUTTE, 2012, p. 15)

This concern with legitimizing the pre-salt reserves and those that will be discovered makes the claim of establishing the platform under the Convention more legitimate. This wealth will certainly position Brazil as an important player on the world stage and in the oil trade in the coming years, not least because the estimated production for the year 2031 is an impressive 3.89 million barrels of oil per day, considering the exploration contracts in progress until 2019 (PRE-SAL PETROLEUM, 2019, p.26). Obviously, to reach this mark a lot of investment in the sector will be necessary, such as acquisition of platforms, installation of more effective systems, drilling of wells, etc.

Despite the stimuli to reduce the dependence on oil in the world, there is still a growing demand in countries like China, a market to be explored by Brazil, without moving away from trade with the United States.

Leão and Trabali Neto note:

> Therefore, the Arab crisis shows that the regulatory changes and the acceleration of pre-salt auctions are, above all, a central element of the geopolitical strategy of the United States and China. If, in the Middle East, the two powers

> oppose each other, in the Southern Cone they converge. And with this convergence there is a migration, still slow, of the geopolitical axis of oil and its tensions to the Southern Cone. (LION; TRABALI NETO, 2019)

As pointed out, the said country can use strategies to diversify oil purchases, seeking other markets, such as the Brazilian one, distancing itself from conflicts in the Middle East (LEÃO; TRABALI NETO, 2019).

There are, on the other hand, those who have reservations in relation to the expectation of financial return from the pre-salt. In this sense, Sauer and Rodrigues:

> The pre-salt acquired the dimension of a myth: it came to mean the promise of fabulous resources that will allow Brazil to finally reach a standard of public services that is compatible with the basic needs of the population. The pre-salt oil exists, and in great quantity, but its real dimension is still unknown. It is a real, concrete promise. But the path to transform it into wealth for the population is still uncertain. Countless countries have seen their expectations surrounding the promises of oil wealth dashed. The real debate is in the political arena: there are conflicts of interest among the various players involved: the population, the shareholders or controlling shareholders of Petrobras and other interested companies, and the consumers of oil derivatives in the country itself. This debate is transferred to the petroleum industry organization sphere, the regulatory model, the production regimes that present variations linked to each perspective of defended interests. (SAUER AND RODRIGUES, 2016, p. 186)

This road to financial return to the country through investments in health, education, etc., may actually take a considerable amount of time, not least because there are imbroglios in the political field that will be highlighted later in this paper. Truly there is a great opportunity for Brazil, but many economic and technological challenges lie ahead in order to guarantee these opportunities. We will mention a few.

According to Fogaça (2020), the challenges to be faced in pre-salt exploration begin with its depth, which extends for about seven kilometers, crossing an extensive salt layer measuring about two kilometers.

Besides this, salt forces Brazil to use new technologies for drilling, since at this depth it becomes a viscous and unstable material, and it is also necessary to keep the extracted crude oil warm in order to avoid clots that can clog the pipelines; this, added to the difficulties related to depth and transport logistics, obviously raise the costs of the operation (FOGAÇA, 2020).

Therefore, regulatory and institutional issues are very important because, when dealing with high-cost and high-risk investments, a scenario of uncertainties and threats of political interventions can hinder investments. The institutional environment surrounding an exploration project is a fundamental parameter for the decision to invest (EPE, 2018).

One should not forget, also, the scenario of uncertainty generated by cyclical fluctuations in the price of oil, with abrupt price drops (PEDROSA; CORRÊA, 2016, p. 13). Still:

> When the Brazilian pre-salt was discovered, the world was in the midst of an economic boom, accompanied by a significant increase in global demand for oil and rising prices. After the 2008 financial crisis, which was short-lived in terms of its impact on the oil industry, oil prices reached levels well above $100 per barrel, making the pre-salt projects increasingly attractive. The reversal of expectations came to happen with the collapse of prices from the end of 2014. (PEDROSA; CORRÊA, 2016, p. 13).

The international crisis also impacted the oil industry, in addition to the corruption scandals involving Petrobras, an opportunity in which a picture of indebtedness took hold, affecting ventures such as the pre-salt (PEDROSA; CORRÊA, 2016, p. 13).

Moreover, the environmental impact is also another problem, since Brazil can become a villain in global warming by increasing the supply of fossil fuels in the market, to the detriment of other energy sources (FOGAÇA, 2020).

For Schutte (2012, p. 9) the energy issue is intrinsically linked to the environmental issue, because in the coming decades the world will have the challenge of reducing greenhouse gas emissions, seeking a transition to a low carbon intensity economy. To this end, it would be a trend to decrease, albeit gradually, the use of oil, but this will hardly occur in a scenario in which the pre-salt production becomes unviable because of the growing demand in some countries.

Naturally, challenges such as these exist in risky activities and must be faced, always seeking the best for Brazilian society.

## 3. THE NEW REGULATORY FRAMEWORK

As is well known, Article 20 of the Constitution of the Republic of 1988 establishes what the Union's assets are; and, among these assets, items V and IX list the natural resources 3 THE NEW REGULATORY FRAMEWORK of the continental shelf and the EEZ and the mineral resources, including those in the subsoil, which obviously includes hydrocarbons [6].

But it was in 1997 that Law No. 9.478 was enacted, specifically regulating the national energy policy, the activities related to the oil monopoly, establishing the National Energy Policy Council (CNPE) and the National Petroleum Agency (ANP)[7], also providing, in its Article 5, that the economic activities described in Article 4 of the same law would be regulated and supervised by the Union and could be exercised through concession or authorization, by companies incorporated under Brazilian law, with headquarters and administration in the country.

These activities, originally described as a federal monopoly, were: the research and extraction of oil and natural gas reserves and other fluid hydrocarbons; the refining of national or foreign oil; the import and export of products and basic derivatives resulting from the activities described above, as well as the maritime transportation of national crude oil or basic oil derivatives produced in the country.

Since 1995, after the enactment of Constitutional Amendment no. 9, the Federal Government's monopoly over the activities described in art. 177 of the Constitution, which includes the activities listed in the previous paragraph, has been somewhat mitigated, allowing the contracting of state or private companies to perform these activities.

6 Article 3 of Law 9478/1997 provides in a similar way, namely: "The deposits of oil, natural gas and other fluid hydrocarbons existing in the national territory belong to the Union, including the terrestrial part, the territorial sea, the continental shelf and the exclusive economic zone.

7 According to art. 21 of Law 9478/1997, all the rights of exploration and production of oil, natural gas and other fluid hydrocarbons in the national territory, including the terrestrial part, the territorial sea, the continental shelf and the exclusive economic zone, belong to the Union, and its administration is the responsibility of the ANP.

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Furthermore, what reinforces this mitigation is the content of art. 23 of Law 9478/1997, which states that exploration, development and production of oil and natural gas will be carried out through concession contracts or under the production sharing regime in the pre-salt and strategic areas.

Thus, in 2010, Law No. 12,351 was enacted, which provides for the exploration and production of oil, natural gas and other fluid hydrocarbons, under the production sharing system, in pre-salt areas and strategic areas. In addition to its peculiarities, which will be presented later, it altered article 5 of Law 9478/1997 to allow the contracting of companies to explore the activities described in article 4 under a new regime, called production sharing.

For Pedrosa and Corrêa (2016, p. 12) in that scenario where the pre-salt was becoming a reality there was an intense debate about the most appropriate regulatory regime to share the wealth in the country. And in 2010 there was a change in the Regulatory Framework then in force, including the sharing system to be applicable to areas not granted in the pre-salt region on the southeast coast of the country. On that occasion, the onerous assignment regime was implemented by Law No. 12,276/2010, which provided for the capitalization of Petrobras with the granting of up to five billion barrels of oil in areas of the polygon.

In this way, the Federal Government could onerously assign to Petrobras, even without a bidding process, the exercise of exploration and exploitation activities for oil, natural gas, and other fluid hydrocarbons, in areas not granted in the pre-salt, starting production in the region.

Another interesting fact is that until 2016, when Law No. 13,365 was enacted, Petrobras was considered the operator responsible for conducting and executing, directly or indirectly, all exploration, evaluation, development, production and decommissioning activities of exploration and production facilities, as provided in the original wording of art. 2, item VI of Law No. 12,351/2010; while art. 4 of the same law established that Petrobras would be the operator of all blocks contracted under the production sharing regime.

With the entry into force of Law 13.365/2016, both devices cited were modified, even so the company has preference to be the operator of the blocks to be contracted under the production sharing regime, as will be explained better in a specific topic.

On the other hand, to represent the Union in the sharing contracts, production individualization agreements involving areas, until then not contracted in the pre-salt, as well as to manage the Union's oil and natural gas commercialization contracts (PEDROSA; CORRÊA, 2016, p. 12); among other functions described in Article 4 of Law No. 12,304/2010, the Public Company Pre-Salt Petroleum (PPSA) was created in 2013, regulated by Decree No. 8,063/2013, which approved its Bylaws, determining provisions.

It is, therefore, a company connected to matters related to the management of production sharing contracts signed by the Ministry of Mines and Energy, as well as contracts for the commercialization of oil, natural gas and other fluid hydrocarbons of the Federal Government, but it is not responsible for the execution of exploration, development and production activities.

It is interesting to note that Provisional Measure No. 811/2017 allowed PPSA to act directly in the commercialization of oil, natural gas and other hydrocarbons, preferably in the auction mode; this activity was later disciplined in Law No. 13,679/2018.

After this presentation of the regulatory framework, we will now analyze the Concession and Sharing regulatory models, as well as general aspects about the Transfer of Rights to Petrobras in the pre-salt area.

In this sense, it should be noted that two criteria are used to choose the regime: the revenue capacity and the state's ability to exercise control over the exploration and management of reserves (SCHUTTE, 2012, p. 25). In other words, the expectations of the Union in relation to the exploration of a particular area and the conditions should guide the choice of the regime that is the most interesting.

## 3.1 PREVIOUS REGULATORY MODELS: FROM ONEROUS TRANSFER TO THE CONCESSION REGIME

Law no. 12,276/2010 authorized the Federal Government to assign, in a burdensome manner, to Petrobras (even without a bidding process), the exercise of exploration and exploitation activities for oil, natural gas, and other fluid hydrocarbons, in areas located in the pre-salt layer, not yet granted.

To this end, in this type of contract called "onerous transfer", Petrobras could extract the number of barrels of oil determined in the contract, except for the maximum limit of five billion oil equivalents, for a pre-established remuneration. The surplus to this amount must be the object of an auction.

In 2010, six blocks were assigned to Petrobras in the Santos Basin pre-salt area, which currently correspond to the Búzios, Sépia, Atapu, North Berbigão, South Berbigão, North Sururu, South Sururu, Itapu, South Tupi and South Sapinhoá fields. Throughout Exploration, volumes greater than the five billion barrels initially forecast were discovered.

These surpluses were to be auctioned under the regime called "sharing", with the consent of the operator of the assignment fields, at which time Petrobras exercised its preemptive right and acquired the areas of Itaipu, as the sole operator (100%); and Búzios, in consortium with the Chinese CNODC Brasil Petróleo e Gás Ltda (5%) and CNOOC Petroleum Brasil (5%) (PETROBRAS, 2019).

Law 13,885/2019 establishes criteria for distributing part of the amounts collected from the auctions of surplus volumes to the states and municipalities, less the expenses resulting from the revision of the onerous assignment contract.

Furthermore, an interesting question concerns the possible unconstitutionality of the Law regarding the assignment made exclusively to Petrobras. Would there be a possible violation of the Principle of Economic Freedom, since a company with private capital is favored to the detriment of the others? With all due respect, we believe not.

This is because, as said, hydrocarbons belong to the Federal Government (art. 20 c/c 177 of the CF); and considering that Petrobras is a Mixed Economy Company, in which a good part of the capital is concentrated in the controlling group composed of the Federal Government, FPS and BNDES and its subsidiary BNDESPAR, the assignment made directly to this company ended up constituting a public interest operation, with a legitimate claim to explore the pre-salt discoveries at a previously defined level of barrels of oil.

Subsequently, with the advent of the concession regime, provided in Law 9.478/1997, the oil produced is owned by the company that acquires the right to explore the block offered at auction. After payment of taxes and contributions due, the concessionaire company, winner of the bidding, can freely dispose of the oil it will produce (SAUER; RODRIGUES, 2016, p. 199).

The contract has a fixed term and the risk of the venture is entirely of the concessionaire, even if it fails to find the oil or gas, but, as said before, it has the benefit of being considered the owner of the hydrocarbons (bid) that are produced. In this model, the concessionaire pays government participation, such as signature bonus, royalties and, in case of high-production fields, special participation (ANP, 2018)

By the way:

In these bids, interested companies offer, individually or in consortia, an amount in signature bonus and propose a Minimum Exploratory Program (MEP), i.e., they commit to perform certain activities, such as seismic surveys, exploratory well drilling, among others, in that area. The company or consortium that submits the most advantageous proposal, according to the criteria set forth in the tender, receives the right to explore that area to verify the existence of commercial deposits of oil and/or natural gas (ANP, 2018).

In other words, the winner of the bid is the one who offers the highest signature bonus, and also meets the Minimum Exploratory Program. And the contract must provide for the governmental participations described above, which are also foreseen in the bid notice.

Royalties are paid monthly from the start of production in the amount of ten (10) percent of production, but taking into account any geological risks, production expectations and other relevant factors, the ANP may stipulate in the public notice a reduction to five (5) percent of the production value.

The distribution of these Royalties is regulated in articles 47 to 49 of Law No. 12,351/2010, which provides percentages for the states and municipalities facing the explored area, as well as municipalities affected by fluid hydrocarbon operations, and percentages for special social funds described in the law.

## 3.2 THE NEW PRODUCTION SHARING REGIME

This regime was implemented in 2010 by Law No. 12,351, and now coexists with the concession regime. See its definition, according to art. 2, I, of that law:

> Production sharing: regime of exploration and production of oil, natural gas and other fluid hydrocarbons in which the contractor performs, at its own expense and risk, the activities of exploration, evaluation, development and production and, in the event of a commercial discovery, acquires the right to appropriate the cost in oil, the volume of production corresponding to the royalties due, as well as part of the surplus in oil, in the proportion, conditions and deadlines established in contract.

Note that in the production sharing contract, the State, being formally the owner of the material, authorizes part of the production to be used as payment to the contractor for the costs of exploration and production. The portion of the oil used for this purpose is called “cost oil”. After deducting the costs, the remaining oil is the surplus, or the “profit” generated in the operation,

called “profit oil”. The latter will be shared between the contractor and the Union, as provided in a contract, whose percentage is previously defined (SAUER; RODRIGUES, 2016, p. 199)

Prior to the contracting, the Ministry of Mines and Energy (directly, or through the ANP), may carry out a potential evaluation of the pre-salt areas and other strategic areas, through a contract with Petrobras for exploratory studies necessary for the evaluation.

The sharing contracts in the pre-salt polygon can be signed through a prior auction bidding procedure, or directly with Petrobras, to preserve the national interest and meet the other goals of the energy policy, in this case the bidding is waived, pursuant to art. 8, I and 12 of Law No. 12.351/2010, and the management of the contracts, as stated above, will be the responsibility of the public company Pré-Sal.

By the way, the ANP notes on the bidding procedure:

> The blocks and the technical and economic parameters of the production sharing contracts are defined in a resolution of the CNPE and the bidding is promoted by the ANP. The Ministry of Mines and Energy (MME) is responsible for establishing the guidelines to be observed by the ANP to promote the bidding and for preparing the drafts of the notices and contracts, subsequently approved by that body. In the sharing bids promoted by the ANP, the winning company will be the one that offers the Brazilian State the largest portion of oil and natural gas (i.e. the largest portion of the surplus in oil) (ANP, 2018)

The bidding in the sharing system will follow the provisions of Law No. 12.351/2010, but also the rules of the ANP and the Bidding Notice, so that Petrobras may participate in the auction, including to increase its minimum participation, pursuant to art. 14 of that law. And, as mentioned above, to judge the bid, the proposal that presents the most advantage to the Union will be chosen, according to the criterion of offering the highest surplus in oil, respecting the minimum percentage described in art. 10, III, “b”, of the Law.

It is true that in this regime some risks are more accentuated, such as the volatility of the price of a barrel of oil in the market, in addition to the risks inherent to the development of the project; in this case, if the cost of production is higher than expected, the portion of oil to be shared with the Federal Government will be lower. However, as is known, investments in the oil sector are projected for several years, and are marked by considerable oscillations in value, which makes a projection that considers only this factor complex.

Furthermore, according to art. 4 of Law 12.351/2010, considering the national interest, the CNPE may offer Petrobras the right of preference as operator of the blocks under the production sharing regime.

In this case, from the communication of the CNPE, the company must manifest itself about this right in each block offered within thirty days, justifying the interest, at which time the CNPE should propose to the Presidency of the Republic which blocks will be operated by Petrobras, except for the 30% participation, to be explained in a specific topic (CARDOSO; OLIVEIRA, 2018, p. 342)

Designated as the operator, the consortium contract must establish that it will be responsible for the contract’s execution, without prejudice to the joint liability of the other consortium members before the contracting party or third parties, except for Petro-Sal, under the terms of § 2nd paragraph of art. 8 of the Law.

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It is interesting to note that the Bill No. 3,178/2019 is currently in Congress, authored by Senator José Serra (PSDB-SP), which intends to change the legislation "to allow bidding with concession in the blocks where this regime is more advantageous for Brazil and to institute the dispute under equal conditions in production sharing bids" (BRASIL, 2019).

In summary, the project, which is not yet included in the Plenary's voting agenda, provides for the revocation of the right of preference for Petrobras in bidding under the production sharing regime, in addition to ensuring that the CNPE, advised by the ANP, chooses the best legal regime to be adopted in the pre-salt auctions.

The issue is complex and foresees significant changes in the regulatory framework, but so far there is no way to measure the directions that will be adopted by the Legislative Branch.

## 3.3 OF THE CONSORTIUM IN THE SHARING REGIME8 , OF THE GOVERNMENTAL PARTICIPATIONS AND DISTRIBUTION OF ROYALTIES

Whenever Petrobras is contracted directly or when it wins the bid alone, it will form a consortium with Petro-Sal. On the other hand, the winning bidder will also form a consortium with Petro-Sal, as well as with Petrobras, in accordance with art. 4 of Law 12,351/2010, if it has exercised its right of first refusal to be the operator, except for a participation of no less than thirty (30) percent. This participation will imply its adherence to the rules of the Tender Protocol and the winning proposal.

In this sense, see also what Sauer and Rodrigues say about the role of Petrobras in the sharing:

> It is in the interest of the State, or Society, the owner of the oil, to appropriate the largest possible portion of the surplus. But there are details that deserve attention. According to the legislation, currently being amended in Congress, Petrobras must hold a minimum 30% stake in the consortium that wins the bidding, and thus the contract, assuming the role of operator. However, as suspected and confirmed in the Libra Auction - the only one held under the sharing system until 2016 (October) - the consortia without Petrobras were not viable. Partly because, if they win the bid, in dispute with Petrobras, the latter should be incorporated into the consortium; on the other hand, because Petrobras, holder of knowledge and technological capacity in pre-salt operations, is in an asymmetric position in relation to the other competitors that do not reach an agreement with it to join the consortium. (SAUER; RODRIGUES, 2016, p. 199)

This thirty (30) percent stake may, in a way, hinder the capture of interest from investors, especially foreign ones.

However, this right of preference is constitutional, since, as said in the topic that refers to the onerous transfer, since hydrocarbons are Union assets, the intentions to preserve the public interest with a certain control and participation in production, giving Petrobras the option to participate in the consortia in the informed percentage, are legitimate.

8 The Consortium described in Law 12.351/2010 is formed in accordance with art. 279 of the Corporations Law.

Moreover, in the sharing regime, the government revenues are the Signature Bonus and the Royalties, according to art. 42 of Law No. 12.351/2010, in addition to the surplus oil that will be sold and other taxes levied on the product.

Here are some important definitions:

The signing bonus does not integrate the cost in oil; it corresponds to a fixed amount owed by the contractor to the Union, which is paid upon signing the contract, and is not refundable.

See what Sauer and Rodrigues say about the signing bonus:

> [...] is an advance payment made by the winner. In the case of Libra it was 15 billion reais. The bidder's calculation will duly discount this bonus from its offer in the Union's share of the oil profit. The demand for a high immediate payment reveals an option of the government: to have a lot of money at hand right away, to the detriment of what it could receive in the future. (SAUER; RODRIGUES, 2016, p. 201)

In other words, as the author explains, the government chooses to receive this amount and, right from the start, use the resources to subsidize its actions.

By the way, we have already said Borges de Oliveira:

> In the concession process, the signature bonus, first, corresponds to "the amount offered by the winning bidder in the proposal to obtain the oil or natural gas concession, and cannot be less than the minimum amount set by the ANP in the bid notice" (art. 9 of Decree 2705/98). It is "a benefit due by the winner of the bidding that would have the main purpose of 'recovering the government costs arising from the process'" (OLIVEIRA, 2005, p.497).Also, according to article 10 of the Decree, the resources from the signature bonus will be allocated to the ANP. (OLIVEIRA, 2017, p. 34)

Royalties, on the other hand, are a monthly financial compensation, due by the contractor from the beginning of commercial production, at a rate of fifteen (15) percent for the exploration of oil, natural gas and other liquid hydrocarbons, and are also not computed in the calculation of cost in oil, being prohibited its reimbursement. The royalties are substantial values, closer to the idea of compensation for the extraction and use of deposits (BORGES DE OLIVEIRA, 2017, p. 34).

The distribution of these Royalties is made in the percentages established in Article 42-B of Law No. 12.351/2010. For a better understanding of the distribution system, as well as considering the priority approach to the sharing regime in this article, we will mention below only the percentages pertinent to the operations developed in the continental shelf, territorial sea or exclusive economic zone, namely:

> a) 22% (twenty-two percent) for the confronting States;
>
> b) 5% (five percent) for the confronting Municipalities;
>
> c) 2% (two percent) for the Municipalities affected by the loading and unloading operations of oil, natural gas, and other fluid hydrocarbons, in the form and criteria established by the ANP;
>
> d) twenty-four point five percent (24.5%) to constitute a special fund, to be distributed among the States and the Federal District, if applicable, according to the following criteria:

> e) 24.5% (twenty-four point five percent) for the constitution of a special fund, to be distributed among the Municipalities according to the following criteria(...)
>
> f) twenty-two percent (22%) to the Federal Government, to be allocated to the Social Fund, established by this Law, less the portions allocated to specific agencies of the Direct Administration of the Federal Government, pursuant to the Executive Branch's regulation.

These percentages show that the legislator's intention was to prioritize a fair distribution of the wealth from hydrocarbon exploration among the various federal entities, as well as special and social funds.

Furthermore, with respect to oil, natural gas and other fluid hydrocarbons that were allocated to the Federal Government as a result of the portion of the partition agreement, they must be marketed in accordance with the rules of private law, including by exempting the bidding process. PPSA may contract directly with Petrobras, representing the Federal Government, as the marketing agent for this portion of production, prioritizing the domestic market.

The revenue from the commercialization mentioned in the previous paragraph must be destined to the Social Fund linked to the Presidency of the Republic, with the purpose of constituting a source of resources for social and regional development, through programs and projects in the areas of poverty alleviation and development of education, culture, sports, public health, science and technology, environment, and mitigation and adaptation to climate change, all according to art. 47 and following of Law 12.351/2010.

Furthermore, in the year 2031, the seventeen production sharing contracts that are currently in progress will reach peak production, with 3.89 million barrels of oil extracted per day, which represents an impressive number, if we consider that all oil production in the country in 2019 reached 2.9 million barrels/day (PRE-SAL PETROLEUM, 2019, p. 26).

See also the following projection:

> Taking into account an exchange rate of US$ 4 and the barrel price at US$ 60, the estimated revenue for the Union with the sale of oil is R$ 110 billion in 2032, when the Union's production will reach its peak. Between 2020 and 2032, the total projected revenue is R$ 424 billion [...] Considering the estimated revenue from the commercialization of the Union's oil, the royalties to be paid for all contracts (R$349 billion) and the taxes paid to the federal government (R$227 billion), government participations will reach R$1 trillion in the period 2020-2032 (PRE-SAL OIL, 2019, p. 28).

In this sense, despite the virtual profitability that lies ahead in the sharing model, this does not mean that it is the most advantageous regime. In this respect, Sauer and Rodrigues address this issue:

> After the service regimes, the concessions and production sharing regimes alternate in the position of the one that generates more government revenue. The concession regime, in most cases, generates more revenue, since it brings in a larger government share, except in the case of fields contracted under a mixed onerous assignment and production sharing regime and the Libra and Lula and Cernambi fields, for which in some scenarios of oil barrel prices the production sharing regime brings in more revenue to the government, since they are those with the largest reserves among those analyzed. (SAUER; RODRIGUES, 2016, p. 205)

For the authors, the sharing regime is not necessarily the one that guarantees greater government revenue. According to the economic and financial simulations performed in their research, in most of the fields analyzed, the concessions regime is the one that offers higher revenue, because in this regime the sum of royalties and special participation is higher than the sum of royalties and the Union's share in surplus oil in the case of the production sharing regime (SAUER; RODRIGUES, 2016, p. 205).

However, Sauer and Rodrigues point out that the difference in the revenues of the two regimes diminishes when the price of oil rises:

> When oil prices rise, the difference in government revenues between the two regimes decreases, since the portion of the oil surplus in the production sharing regime becomes larger and larger, considering the rules applied in the case of the Libra field, adopted as reference. According to these rules, a base rate of the federal government's participation in the surplus oil was adopted, which increases as the price of a barrel of oil rises, and is linked to the average daily production of the wells. (SAUER; RODRIGUES, 2016, p. 219)

It is a logical conclusion, because if prices rise, government revenues will be higher, but we understand that it is not prudent to expect a more favorable exchange rate or even a greater appreciation of oil and its derivatives, for the reasons already explained at the beginning of this article.

From this data, it is not difficult to see that the option for a regime must be very well planned, based on the legislation, besides serving the public interest and always seeking the best financial returns to the Government.

## 4. FINAL CONSIDERATIONS

Throughout this paper, a brief history of the formation of oil in the pre-salt layer was presented, as well as the importance of the hydrocarbon reserves contained therein. Among many logistical and economic challenges, prospecting and extraction in the fields of this region have been very successful, not only because the product extracted is of good quality, but also because the success in drilling is higher than the world average.

It is true that oil is a non-renewable energy source, but it will still be used for a long time due to the great demand and the current technological scenario; this is why the discovery of the pre-salt fields came at an appropriate time, even because, until some time ago, there was not enough technology for drilling in this layer that is about seven kilometers from the surface of the Atlantic Ocean.

Thus, it was shown that hydrocarbons are property of the Union, and their extraction was foreseen in the constitutional text as a monopoly. However, after 1995, this monopoly was mitigated when the contracting of private or state companies to carry out the production was foreseen, and these companies only have the right to explore the activity in the contracted terms.

In this sense, although the pre-salt region is located 300 kilometers off the continental coast, it is positioned on the continental shelf, which is part of the territorial sea and the exclusive economic zone, where Brazil has sovereign rights for the purposes of exploration and exploitation of the sea and its subsoil, under the terms of the Montego Bay Convention, of which we are

signatories. The wealth under our seas, with encouraging extraction projections, can project the country on the international scene as one of the world's largest oil producers.

It was also shown the oil regulatory framework, consisting of several laws governing the exploration regimes, with special emphasis on Law No. 12,351 of 2010, which changed part of the regulatory framework then in force, providing the onerous assignment regime, which enabled the capitalization of Petrobras with the granting of production of up to five billion barrels of oil, starting the exploration in areas of the polygon, even without bidding. In addition, this law also implemented the Sharing regime in the pre-salt fields, which then coexisted with the Concession regime foreseen in Law 9.478/1997.

To this end, it was found that one of the main changes concerning the change in the regulatory framework implemented by Law No. 12.351/2010 was that the sharing system allowed for greater control of the state through the preemptive right of Petrobras, and the participation in 30% of any consortia, in addition to receiving part of the oil produced, royalties and other shares. This control, in a way, may even foster the country's technological growth in oil matters, as well as maintain greater interference in production control.

Finally, in a comparison between the regimes of Concession and Sharing, one can see the existence of theoretical simulations in the sense that the Concession contract can bring more return in financial resources to the Government than the Sharing regime; this occurs provided that the oil price fluctuations do not go out of normality, significantly raising the price of a barrel of oil. That is, under normal conditions, there will be higher government revenues. However, as can be seen, this is not a valid logic for all occasions, which leads us to conclude that the choice for one or another regime will always depend on a broad contextual analysis, from the geopolitical, economic and technical point of view.

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# RIGHT TO EDUCATION, PUBLIC POLICIES AND HIGHER EDUCATION IN THE COREDE NORTE/RIO GRANDE DO SUL

## DIREITO À EDUCAÇÃO, POLÍTICAS PÚBLICAS E O ENSINO SUPERIOR NA REGIÃO DO COREDE NORTE/RIO GRANDE DO SUL

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## ABSTRACT

The article aims to reflect about the historical trajectory and contributions of public policies and educational institutions in the Northern region of Rio Grande do Sul, focusing on the analysis based on data related to the quantitative evolution of the number of higher education institutions and students in the region, in the period between 2000 and 2018, concerning the right to education. The issue is to show how higher education institutions are assisting and enhancing productive competences and social demands that induce decentralisation/concentration of development in the region. The study comprises the 32 municipalities included in the Regional Council of Development of the North of Rio Grande do Sul (COREDE Norte). The methodological procedure used is bibliographic-investigative, combined with data and statistics from MEC, IPEA, FEE, INEP and COREDE Norte.

**Keywords:** Right to education. University education. Public policy. Northern Region of Rio Grande do Sul.

## RESUMO

*O artigo busca refletir sobre a trajetória histórica e contribuições das políticas públicas e as instituições de ensino da região Norte do Rio Grande do Sul, focando a análise a partir de levantamento de dados sobre a evolução quantitativa do número de instituições de ensino superior e de estudantes na região, no período compreendido entres 2000 e 2018, concernente ao direito a educação. A problemática posta busca evidenciar de que forma as instituições de ensino superior, estão auxiliando e potencializando as vocações produtivas e às demandas sociais que induzam a descentralização/concentração do desenvolvimento na região. O estudo compreende os 32 municípios incluídos no Conselho Regional de Desenvolvimento Norte do Rio grande do Sul (COREDE Norte). Utiliza-se o procedimento metodológico bibliográfico-investigativo, acrescido de dados e estatísticas do MEC, IPEA, FEE, INEP e COREDE Norte.*

**Palavras-chave:** *Direito à Educação. Ensino Superior. Políticas Públicas. Região Norte do Rio Grande do Sul.*

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# 1. INTRODUCTION

The historical trajectory of the constitution of higher education in Brazil, was guided by the process of formation of Brazilian society and its economic, political and social developments. Since their creation, the Institutions of Higher Education (University) have sought to respond to specific demands, from the training of labor, to the intellectual training for the constitution of intellectual high society and the development of regions. Modernly, the right to education has become a fundamental human right, one of the most important dimensions in the realization of human dignity. The principle of the dignity of the human being, implies in treating the human being as an end in himself, and never as a means to an end. Thus, a dignified life cannot be conceived without the institutional and normative guarantee of the right to education. And it is in this spirit that the 1988 Federative Constitution of Brazil, determines that education must promote the qualification of individuals for citizenship and for work. In this sense, the right to education, when exercised, emerges for the process of emancipation and human autonomy and consolidates itself as a procedure for the consolidation of other human rights.

In this context, allowing access, permanence, and possibilities of entry into college is to give completeness to the right to education. Since the first actions of implementation of higher education courses until the beginning of the 21st century, the HEIs demonstrate in their genesis the presence of conflicting opinions and projects that express the divisions and contradictions of society. The contrasting and expressive relationship between university and society is what explains, in part, the fact that, since it's emergence, it has become a social practice based on the public recognition of its legitimacy and its attributions. This assumption is based on a principle of differentiation, which gives it autonomy before other social institutions, and structured by ordinances, rules, norms and values of recognition and legitimacy internal to it. In other words, going through all the dimensions of the reforms implemented in the trajectory of Higher Education, one can see antagonisms such as: the acceleration of the privatization of education (20th century), (CHAVES, 2010) and the expansion of education with the opening of new structures in the 21st century.

The present study seeks to reflect on the historical trajectory and contributions of public policies and educational institutions in the Northern region of Rio Grande do Sul, focusing on the analysis from data collection on the quantitative evolution of the number of higher education institutions and students in the region, in the period between 2000 and 2018, concerning the right to education. The study comprises the 32 municipalities included in the Northern Regional Development Council of Rio Grande do Sul (COREDE Norte) and uses the bibliographic-investigative methodological procedure, plus data and statistics from the MEC, IPEA, FEE, INEP and COREDE Norte.

# 2. HIGHER EDUCATION IN CONTEMPORARY PERSPECTIVES IN THE BRAZILIAN CONTEXT

In Brazil, the first attempts to create higher education courses were elaborated by the Jesuits, in the colonial period, in 1572, in Bahia, but they were extinguished with the expulsion

of the Jesuits from the country in 1759, through the implementation of the reformist policies of the Marquis of Pombal, causing a significant disarticulation of the educational system.[3]

At the beginning of the 19th century, the benchmark for higher education was established, with the transfer of the seat of metropolitan power from Portugal to Brazil. But it was with the transmigration of the Royal Family to Brazil that, in 1808, the Medical Course of Surgery was created in Bahia and, in November of the same year, the Anatomical, Surgical and Medical School was established at the Military Hospital of Rio de Janeiro (FÁVERO, 2006). The main objective of the Portuguese Crown was to create schools and courses related to the need to form and qualify an elite of bureaucrats (white, Portuguese and sons of the elite), considered essential to the management and administration of the political and economic interests of the Crown in the Colony. In addition, they sought to train specialists capable of elaborating and producing symbolic goods needed by the emerging society. In the same way, the aim was to train a range of liberal professionals to support the "new elites". The higher education establishments were structured separately, and later, after successive attempts, were assembled into universities. Until 1889, all institutions of higher education were state-run, but with the necessity of the State in expanding schooling opportunities, the creation of private colleges began (CUNHA, 1980).

In this way, it is not an exaggeration to state that the Brazilian education system, since the beginning of the Incarnations, promoted and assisted the social segregation since the early school years between the gentiles, the orphans and the white, Portuguese and elite children. This historical observation, in a way, except for the due repairs, is still reproduced under other characteristics. The most evident example is expressed in the search for private schooling, as an idea of quality education, circumscribed to a part of the population that has the economic resources to sustain the expenses with education, and the public school for the rest. This perspective is reproduced in higher education; 75% of students study in private universities (INEP, 2017).

Access to public higher education for the popular classes occurred in recent decades, through public competitive examinations (SAT), in which the majority was eliminated due to insufficient performance in the apprehension of content in the elective tests. With the introduction of other selection mechanisms, exclusion still occurs through the difficulties in accessing the most desired elite courses, which offer the greatest possibilities of absorption by the labor market and the greatest chances of economic returns.

Even with these caveats, data regarding the number of students enrolled in higher education shows growth over the last two decades in Brazil. Between 1991 and 2017, total enrollment more than quadrupled from 1.56 million to 6.63 million, that is, it showed an average expansion rate of 5.5% per year. Another relevant element was the accentuated expansion of the interiorization of universities/faculties outside the capital cities and consolidated metropolitan centers. In this segment, the average growth of enrollments was 5.7% per year during the same period. Decentralization, when adopted, becomes an effective strategy, as it allows the expansion of

3 During the colonial period Brazil was dominated, externally, by the Portuguese Crown; internally, by a mercantile and patriarchal bourgeoisie that had its moment of glory in the middle of the 17th century, with the sugar cycle in Pernambuco and Bahia. During the Colonial Period, given the failures of the Portuguese elites, it was up to the local elites to develop in their own way local administration actions to continue with the administration of the country. The country went through a second cycle of expansion, which peaked a century later, with the gold and diamonds of Minas Gerais, but this was by nature a transitory cycle. After 1750, for about 100 years, the Brazilian economy went into decay, showing how the Portuguese mercantile colonization was incapable of establishing modern capitalism and a sustained development process in the country. At the time of Independence, income per inhabitant in Brazil was visibly lower than in European and some Latin American countries. The economic decadence, which was also the long decadence of the sugar mill owners, only ended with the coffee expansion, which gained momentum in the mid-19th century. See Caio Prado Jr. (1979a), Celso Furtado (1982) and Ignácio Rangel (1980).

the possibilities of access to higher education, including in regions that have a low Human Development Index (HDI). Based on this context, higher education institutions located in the interior of the country became notable on a national level, raising their participation in the total number of enrollments from 49% to 53%, thus becoming an important axis of Brazilian higher education (INEP, 2017).

Based on this new geographic/spatial configuration of Brazilian higher education, the South/Southeast regions, although they have registered equally accentuated growth (average annual increase of 4.7% between 1991 and 2017), have lost relative position, in 1991 this prime area accounted for 75% of the contingent of students enrolled in in-class undergraduate courses, in 2017, this participation had reduced to 60% (INEP, 2017). When analyzing the 2018 Census of Higher Education, regarding the percentage of HEIs, by administrative category in Brazil, the data indicated that there are 299 public HEIs and 2,238 private HEIs.

Regarding public HEIs: 42.8% are state (128); 36.8% are federal (110); and 20.4% are municipal (61). In terms of the participation of universities, 53.8% of the offer is public. Among the private HEIs, colleges predominate (86.2%), while of the federal HEIs, 57.3% correspond to universities, 36.4% to Federal Institutes of Education, Science and Technology (IFS) and Federal Centers of Technological Education (CEFETS); 1.8% to colleges and 4.5% are university centers (INEP, 2018).

It is important to point out that the expansion is the sum of several efforts and demands from society and specific groups: regional leaders, educational segments, and public policies. The action of the federal government, despite its responsibility, was decisive in the process, by establishing public policies of a systemic nature. Thus, if adopted continuously, the strategy points in the direction that can reduce or enhance regional inequalities, in which the State becomes the main articulator and inducer, a fundamental assumption widely studied by institutional economics. For North (1990), institutions have the “power of the game”, insofar as they promote the regulated interaction of individuals, by means of protocol relations (formalized and written laws and constitutions that dictate the rules of the game), set in motion and executed by governments, agents or actors with some power of coercion. Institutions are structures that somehow condition and regulate people’s social behavior, which are regular and standardized by means of ideas and the translated values of a given society (NEALE, 1994).

As examples of this strategy, there are the actions effected by the interiorization, as already mentioned, of the federal higher education network, foreseen in the National Education Plan - 2001/2010; in the Support Program for Restructuring and Expansion Plans of Federal Universities (REUNI); in the Financing Fund for Higher Education Students (FIES); in the University for All Program (PROUNI); in the creation of Federal Institutes of Education, Science and Technology (IFET) and in the National System for Evaluation of Higher Education (SINAES). Moreover, there are the public social policies of social inclusion that allowed, through the institutionalization of quotas, greater access of students from state public networks and black, indigenous and mixed race students in higher education courses throughout the country.

Moreover, it is important to highlight, that in addition to the perspectives generated with the process of enlargement of the strategic role of education and the possibilities of inclusion of a larger contingent of adults in higher education. Moreover, the projection of impacts felt in the job market are points of view that create expectations in a large portion of the local and regional population. On the other hand, the character promoted by decentralization has triggered,

stimulated, and created opportunities for new processes of professional training, employment, and income in places where these possibilities did not exist.

In the same way, the states also collaborated with the process of expansion of higher education. According to data from official agencies, the states have 42 universities and 04 state colleges in Brazil. The State of Paraná has the largest number, 7 in total; followed by Bahia, São Paulo with 4 HEIs, Ceará and Rio de Janeiro with 3, Alagoas, Maranhão, Minas Gerais with 2 and 1 in the States of Amapá, Amazonas, Distrito Federal, Goiás, Mato Grosso, Mato Grosso do Sul, Pará, Paraíba, Pernambuco, Piauí, Rio Grande do Norte and Rio Grande do Sul. The best state universities in Brazil, taking into consideration the various evaluation elements and their alternations from year to year in teaching, research fields, extension actions, research, enrollment, evasion, insertion in the labor market, innovation and internationalization are listed the University of São Paulo (USP), State University of Campinas (UNICAMP), Paulista State University "Júlio de Mesquita Filho" (UNESP); State University of Rio de Janeiro (UERJ), State University of Londrina (UEL) and the State University of Maringá (UEM), (INEP, 2018).

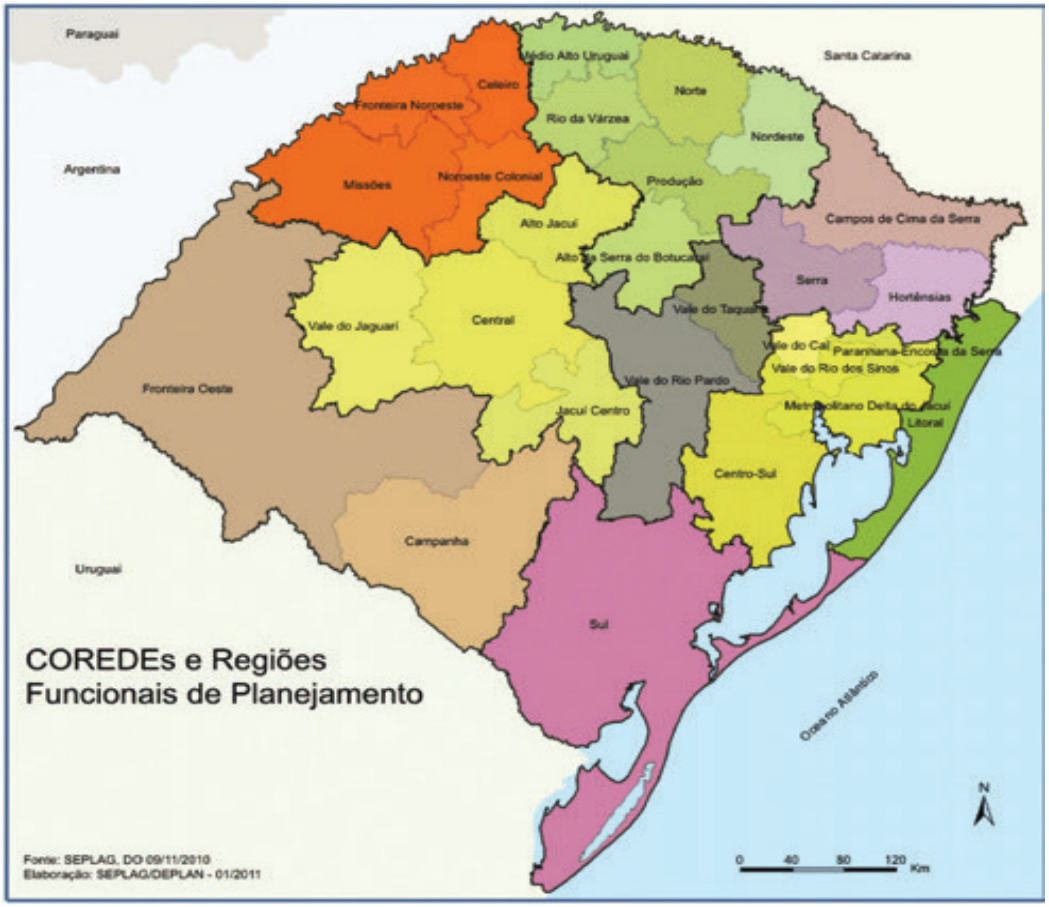
## 3. ABOUT THE NORTHERN REGIO OF RIO GRANDE DO SUL EM HIGHER EDUCATION

A The first higher education schools created in Rio Grande do Sul were the School of Pharmacy and Chemistry, in September 1895, and the School of Engineering. Initially, the emergence of higher education in Rio Grande do Sul followed a path similar to the traditional pattern in the country, that is, the creation of isolated schools and colleges that later became universities. The dynamics of regional political and economic development, with the change of dynamic centers, implied changes in the concentration, demand and supply of higher education, as well as new institutional proposals. Much of this strategy has been affected through a very interiorized higher education network, with a large number of prominent institutions in various municipalities. Data tabulated in 2019, revealed that in 2017 it had 21 universities, 7 university centers, 103 colleges, and 3 Federal Institutes of Education Science and Technology (SECRETARIA DE PLANEJAMENTO E GESTÃO, 2019).

The region of the Regional Council for the Development of the North of Rio Grande do Sul (COREDE NORTE), (Figure 1), according to 2018 estimates, had a population of 230,682 inhabitants (FEE, 2018) and was the last in the phase of the colonization process and S ettlement of the state, detaching caboclos, indigenous and black people who occupied the land before the arrival of European settlers (COREDE NORTE, 2017). In the 1970s, the region suffered a significant and intense process of rural exodus and deterritorialization, due in part to the large industrialization stimulated by federal, regional and state public policies. The deterritorialization process of the Brazilian regions is connected with the growing territorial occupation, with the continuous transformation of agricultural production and of society in general, which in the last 50 years, the country went from an eminently rural and agricultural perspective to another, predominantly urban and industrial (TOLEDO, 2017). Regarding the offer of education, it is with the arrival of European immigrants, from the beginning of the twentieth century, that the educational scenario is effective through the emergence of initiatives of community education, at

first, and later the function was being implemented and expanded by the public administration in state and municipal levels.

Figura 1 – Territorial division of the Regional Development Councils (COREDES).

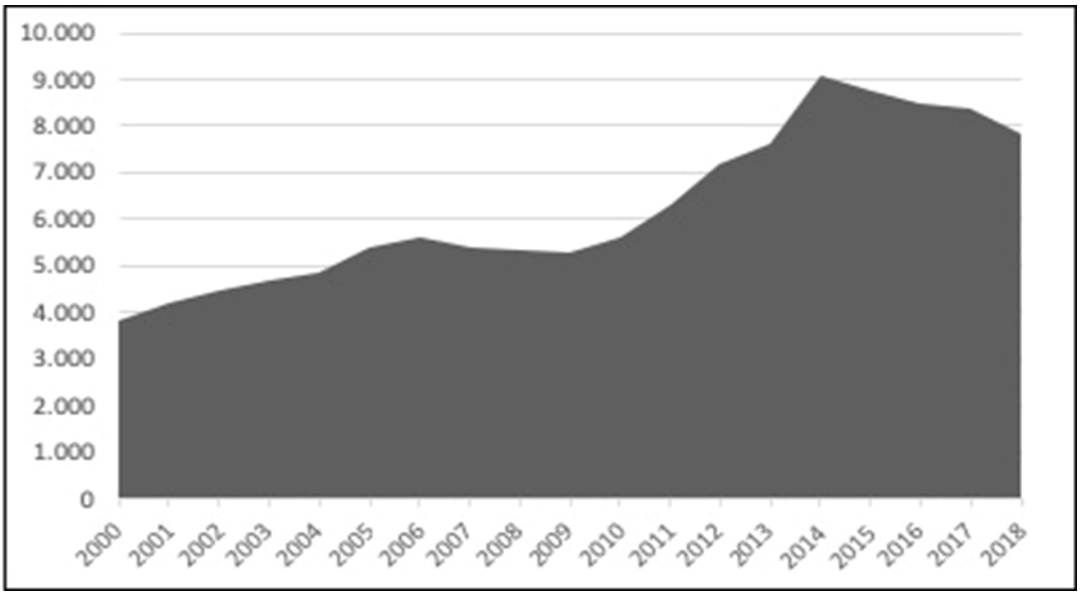



Source: Foundation of Economics and Statistics (FEE), (2014).

The Corede Norte of Rio Grande do Sul, occupies the third position in the component on education in the state ranking, with a performance equivalent to 0.750. In the educational structure of the region, there are 236 educational establishments at the levels of elementary school (161), middle school (48), high school (48), young-adult (22) and special (5), (COREDE NORTE, 2017). It is important to highlight that regarding education, although the Corede Norte region of Rio Grande do Sul shows good performance, it still has a high percentage of adults with incomplete primary education.

The recent expansion of higher education in Brazil was built from a set of actions and programs that made it possible to increase the number of enrollments (Figure 2). In 2000, 3,800 students were enrolled and in 2018, more than 7,800 (49% growth), whose peak enrollment was in 2014 with 9,071, (FEE, 2018). The policy option guaranteed the democratization of access to both public and private institutions. In the higher education modality, the region has 18 establishments. Of these three institutions are of public origin: the State University of Rio Grande do Sul (UERGS), the Federal Institute of Rio Grande do Sul (IFRS) and the Federal University of the Southern Border (UFFS) and one is declared community, the Integrated Regional University (URI) and the others (14) are of private order and character (PREFEITURA MUNICIPAL DE ERECHIM, 2020). Figure 2 - Number of enrollments in the Northern Corede (2000-2018).

Figure 2 - Number of enrollments in the Northern Corede (2000-2018).




Source: FEE Open Dates (2020).

In terms of theoretical approach, it is pertinent to use the perspective advocated by Hirschmann (1977) on the negative tendency to consolidate and promote development in areas with low human development index through the State, in which the allocation of resources in public investments occurs in a residual or compensatory manner, without the ability to promote structural transformations. Basically, according to the author, the most common option is to shift efforts to regions that are friendlier and more favorable to economic growth, whose productive and social infrastructure (roads, education, health) are already consolidated, and that benefit the pole cities with more attractive and dynamic economies. This process, can happen when the regions meet the appropriate conditions to make investments and that beckon with the possibility of profit. In the case of the region under study, public investments have occurred, notably in the last decades, a factor that has potentiated the expansion and interiorization of public higher education institutions (UERGS, UFFS, and IFRS). On the other hand, the contributions of institutional economics (NORTH, 1990) are still fundamentally relevant, by focusing analytical efforts to highlight the role of institutional, inductive and regulatory of the State, and in the case of the study proposal, on the expansion of public investments, openness and regulation for the expansion of private investments in higher education institutions.

## 4. PUBLIC POLICIES, REGIONAL DEVELOPMENT, AND HIGHER EDUCATION: PERSPECTIVES FOR COREDE NORTE DO RIO GRANDO DO SUL

The birth of the idea of public policy is a legacy of the academic studies emerging in the United States of America. The process emerged by skipping the steps followed by the European tradition of studies and research focused on the analytical area on the State and its institutions, than on the production of governments. However, in conceptual terms, there is neither a single,

nor a better, definition of what is public policy (SOUZA, 2006). For many authors, public policy can be the disciplinary field that analyzes the government under the aegis of public issues (MEAD,1995). It can be the set of government actions that will produce specific effects, through political delegation that influence the lives of citizens (LYNN, 1980, PETERS, 1986). However, the definition best known in the literature and used is the one introduced by Laswell (1936), translated into those decisions and analyses that fall on public policy that implies answering the following fundamental questions: Who gains what with public policy? Why and what difference does it make?

In this context, it seems that these are the central questions that any public policy must answer. In other words, the problem of measuring and analyzing the impacts of any public policy lies in the problematization or methodological difficulty suggested by Arretche (1998), when he emphasizes that the main weakness lies precisely in analytically demonstrating that the results found (whether success or failure) are casually related to the products and public goods offered by a given policy. That is to say, how to correctly establish the strategies used to capture and diminish complexity and subtlety in order to reduce imprecision when isolating cause and effect variables. The enigma lies in how to attribute the results solely to a public policy, being that, sometimes, the results can be potentiated, masked by the presence and interface with policies of other administrative spheres (state or municipal), and that operate in the same institutional environment, and sometimes, aiming at the same objectives.

In this arena, public policies for higher education related to the demands for the promotion of regional development are placed. Like the concept of public policy, it is diffuse to conceptualize precisely what regional development is. The formulation acts in the sphere of fad and unfolding of the modern utopia of sustainable development (BURSZTYN, BURSZTYN, 2012), prescribed in the Bruntland Report, which seeks to meet present needs without compromising the needs of the future, which ultimately means rethinking with the process of expropriation of goods and natural assets by industrial society. Andrade (1987) that regional development refers to a process triggered by programs guided by several principles: capital of each region, population aware and interested in promoting development.

For POLÈSE (1998), regional economic development occurs through the decentralization of policies and regional strategies. In this way, the economic base allows capital, labor, and economic inclinations to flow as a support for the region's development and according to its vocation (agricultural, industrial, or commercial), allied to the human factor (culture, customs, work practices, etc.). In this way, development (or growth?) is sought through increased production and, at the same time, to promote changes in technical and institutional arrangements. In this aspect, the mediation of the State exercised by regulation is vital, in the prospection and use of resources and investments, including in education. It is expected in some way to indicate the project of nation to be built by all citizens.

The 1988 Federal Constitution (FC) categorizes access to education as a fundamental social right (Article 6), foreseeing the common competence of the Union, the States, the Federal District, and the Municipalities[4] o provide the means for its access (Article 23, item V), also high-

4 The Constitution is clear when it attributes to the Union, in Article 22, XXIV, private competence to legislate on "directives and bases of education". Even though it can be delegated to another federative entity, according to the sole paragraph of the same provision7, it can be affirmed that the Union, to better serve the general interests, has the power to regulate education by providing for its method and organization. As for the competence, the Municipalities will act primarily in elementary school and early childhood education. The States and the Federal District will have priority in primary and secondary education.

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lighting that it is the duty of both the State, the family, and society to promote it, aiming at the full development of the person for the exercise of citizenship and qualification for work (Article 227). Regarding higher education, the responsibility can be assumed by municipalities, States and the Union. In Brazil, most HEIs are under the responsibility of the Union. On the other hand, with respect to the budgetary availability for the development of education, the FC indicates in Article 212, by providing for the division and redistribution of resources earned through taxes for the maintenance of education, further determining the priority of meeting the needs of compulsory education, especially for the purposes of achieving universality, quality and equity of education, as defined by the National Education Plan (BRASIL, 1998).

When considering the growing material and subjective needs of modern societies, education becomes a central element in promoting development, focused on the production of science, on the elevation of socioeconomic opportunities and on the expansion of citizenship. As anticipated, Corede Norte has a large higher education network with 18 establishments. Sen (2000) considers that education, together with the offer of health policies, influences the freedom and the individual's ability to live better and develop his potentials. In this way, the empowerment of the individuals' capacity has repercussions in enabling them to make the best choices and to participate more effectively in economic and political activities. Sen emphasizes that illiteracy can be an extraordinary barrier to participation in these activities. He also emphasizes that a country, state, or region can be very rich in economic terms and yet be very poor in terms of the quality of human life of its citizens.

In this scenario, it is possible to collect information on actions and activities developed in the analyzed region in the areas of teaching, extension and research. The State University of Rio Grande do Sul is distributed in 07 regions and has 64 courses offered annually in the IES. Of the 2,500 vacancies authorized in e-MEC in 2018, 38 courses are listed as SISU participants. Of the 1,465 vacancies offered in SISU, 884 vacancies are affirmative action. (UERGS, 2018), which thus becomes an important element of inclusion.

## 5. CONCLUSION

Understanding the right to education and the formation of Brazilian society requires recognizing the process of implementation and consolidation of higher education in the historical and socio-legal formation process of Brazil. As a fundamental right, the recognition of the right to education is not recent, although considerable progress has been made in this field since the 1988 Federal Constitution. The right to higher education with the right to fundamental education in the Charter of 1988 is identified, when analyzing the role of the State and the limits of its constitutionally foreseen actions.

Thus, the objective of this study was to reflect on the historical trajectory and contributions of public policies and educational institutions in the Northern region of Rio Grande do Sul. It was possible to verify that, in the region studied, the offer of higher education is expressive and that they seek to meet the principles expressed in art. 206 of the FC of 1988, adapted to the definition and conformation of this field. For example, there is the issue of universal and free education,

in which one must consider that higher education cannot be treated in the same parameters as primary and secondary education, since it is not considered a compulsory level of education.

When it comes to development and public policies, it is common to read and hear from specialists and researchers that the economic development of Brazil in the five centuries after the process of occupation and settlement was frustrating, but it did not fail to occur. Inequality is always an element pointed out among the fundamental problems, surpassing even that of other Latin American countries. Nevertheless, living standards have improved moderately for almost everyone, and society has diversified and increased its level of education. On the political level, the trajectory has been through the following regimes: Colonial, Imperial, Republic and the reestablishment of democracy in 1985, although it has been discouraging on the economic and justice levels, it has followed its trajectory between advances and setbacks.

This political-administrative transition process that took place as society and politics diversified and fragmented, disorganized and reorganized, imposed on the old elites and the new political and social actors some obstacles in defining their own interests and, consequently, in leveraging access to Higher Education in Brazil. These transformations are the expression of the complexification of civil society in Brazil. Like the market, civil society is not rational, does not follow a course nor obeys a specific logic. It consists of agents who rationally seek to identify their own interests with the collective ones, but whose success in this attempt is always precarious.

The economic and social dynamics of the Brazilian regions in the first two decades of the 21st century have been influenced by a set of factors that have made it complex, diversified, and excluding countless social categories. In general, as a result of the accumulation pattern centered mainly on commodities and as an effect of the low performance of the transformation industry, a more interiorized and less metropolitan character of the Brazilian production has been noted, inserting the small and intermediate cities in the range of expansion of public policies of punctual development, inclusive and reparatory public policies. In this context, there is an expansion of Higher Education in all Brazilian states.

In the South of Brazil, three institutions were established after the year 2000. The institutions bring in their commitment to the expansion of schooling, regional development and sociocultural strengthening through extension and research actions.

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# FINANCING OF HIGHER EDUCATION IN BRAZIL AND ENDOWMENT FUNDS: A STUDY ABOUT THE POLYTECHNIC SCHOOL'S FUND OF THE UNIVERSITY OF SÃO PAULO

## FINANCIAMENTO DA EDUCAÇÃO SUPERIOR NO BRASIL E OS FUNDOS PATRIMONIAIS: UM ESTUDO SOBRE O FUNDO DA ESCOLA POLITÉCNICA DA UNIVERSIDADE DE SÃO PAULO

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## ABSTRACT

The article aims to investigate whether endowment funds can be considered a source of funding for higher education. To this end, it is divided into four stages. The first is dedicated to the study of education as a fundamental right in the Federal Constitution. The second identifies financing models for higher education and how the costing of education occurs in Brazil. The third is focused on the Brazilian legal discipline of public endowment funds. The fourth part is the study of the University of São Paulo Polytechnic School Fund. The question posed is whether private endowment funds can replace public funding in higher education. To answer it, a hypothetic-deductive approach and bibliographic and documentary research were used. The conclusion of the research suggests that the use of equity funds in a hybrid financing model in the face of the predictions of Law number 13.800 of 2019 does not mean a replacement of the public financing model.

**Keywords:** Endowment funds. Education funding. Higher education. Amigos da Poli Association Endowment Fund.

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**RESUMO**

*O artigo objetiva investigar se os fundos patrimoniais podem ser considerados como fonte de custeio para a educação superior. Para tanto, está dividido em quatro etapas. A primeira se dedica ao estudo da educação como um direito fundamental na Constituição Federal. A segunda identifica modelos de financiamento voltados ao ensino superior e o modo como ocorre o custeio da educação no Brasil. A terceira está voltada à disciplina jurídica brasileira dos fundos patrimoniais. A quarta realiza um estudo sobre o Fundo da Escola Politécnica da Universidade de São Paulo. A pergunta colocada é se os fundos patrimoniais podem substituir o financiamento público no ensino superior. Para respondê-la, utilizou-se metodologia de abordagem hipótetico-dedutiva e pesquisa bibliográfica e documental. Conclui-se pela utilização dos fundos patrimoniais em um modelo de financiamento híbrido diante da Lei n.º 13.800/2019, que, embora legal, não significa uma substituição do modelo de financiamento público.*

*A conclusão da pesquisa sugere que a utilização dos fundos patrimoniais em um modelo de financiamento híbrido diante das previsões da Lei número 13.800 de 2019 não significam uma substituição do modelo de financiamento público.*

**Palavras-chave:** *Fundos patrimoniais; Custeio da educação; Ensino superior; Associação Fundo Patrimonial Amigos da Poli.*

# 1. INTRODUCTION

In 2018, after the fire at Brazil's National Museum, the severity of the fiscal crisis experienced by the country and its consequences on the financing of education and the needs linked to social and cultural rights became evident. This has encouraged the search for certain fundraising alternatives. In this context, Law Number 13.800 of January 4, 2019 regulated the institute of equity funds in the Brazilian legal system involving the public administration. It is highlighted on the relevance of the theme due to its provision as a fundamental right by Article 6 of the Federal Constitution of 1988 and the need for debate about the sources of funding for higher education.

Based on this regulation, the use of endowment funds as a means of obtaining revenue and the possibility of their being considered a source of funding for higher education is questioned. Therefore, the research hypothesis is that endowment funds cannot be considered as a source of funding, but as a way of complementing revenue that does not replace the public financing model.

For this, it was used the hypothetical-deductive approach methodology and the monographic procedure method and applied the bibliographic and documental research techniques. In order to perform the study, it was decided to conduct a survey on the national endowment funds related to higher education, being later selected a particular fund that would allow a visualization of the situation of the endowment funds in Brazil. As a result, the fund managed by the Association Endowment Fund *Amigos da Poli*, which supports the Polytechnic School of *São Paulo's* University, was chosen.

Thus, the first section will discuss the fundamental right to education and its constitutional provision. Then, the models for financing higher education and the way that education is funded in Brazil will be addressed. The third section has as its object the legal discipline of equity funds,

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especially in the form provided in Law Number 13.800 of 2019. Finally, the fourth section will investigate the structures and finances of the Endowment Fund of *Amigos da Poli*, also in view of the legal arrangement initiated with the new legislation.

## 2. THE FUNDAMENTAL RIGHT TO EDUCATION AND THE FEDERAL CONSTITUTION

In the constitutional order inaugurated by the Federal Constitution of 1988, through article 6, the right to education was recognized in the list of fundamental social rights, with greater detail as of article 205 in Title VIII denominated "Da Ordem Social". The recognition of the right to education as a fundamental right of social nature results in the legal duty of the State and of society to act positively, going beyond the consideration of merely individual interests from a claim of material character and not merely formal (CEZNE, 2006, pp. 117-118; 120-121).

According to Clarice Seixas Duarte (2007), the right to education is a collective right, which, however, does not prevent the priority of certain vulnerable groups in its realization. Moreover, it is a right of immediate applicability that must be progressively satisfied, in particular through public policies, which does not mean attributing to this right a merely programmatic nature.

The recognition of education as a fundamental right also results in its understanding as a permanent clause, as a norm that cannot be suppressed from the legal system by means of a constitutional amendment. This is because all fundamental rights, despite the text's express mention only of individual rights and guarantees, are included as a permanent clause in art. 60, paragraph 4, item IV of the 1988 Constitutional Charter (DUARTE, 2007).

This identification binds the powers - Executive, Legislative, and Judiciary - so that they act, through available resources and in a progressive manner, to ensure the full exercise of the right to education (TRAVINCAS, 2016, pp. 95-96).

In accordance with the federative principle, the Federal Constitution set broad guidelines for democratic management by assigning to each of the entities the responsibility for the education system. The Union has the exclusive competence to legislate on guidelines and bases for national education[4], with Law Number 9.394, of December 20 of 1996, outstanding in this regard.

The constitutional text follows the line of cooperative federalism, in order to trace as common competence of the Union, the States, the Federal District and the Municipalities the forms of access to culture, education, science, technology, research and innovation[5], being a case of concurrent competence between the Union, the States and the Federal District. As for the residual competence of the Municipalities, they must maintain, with the technical and financial cooperation of the Union and the States, programs for early childhood education and elementary school[6].

4 Article 22, section XXIV of Federal Constitution of 1988.

5 Article 23, section V of Federal Constitution of 1988.

6 Article 30, section VI of Federal Constitution of 1988.

Despite of the institution of a collaboration scheme among the federated entities, the municipalities have priority competence, but not exclusive one, in relation to infant and elementary education. The States and the Federal District are responsible for primary and secondary education. While the Union focuses on the federal public institutions, mainly on higher and technical education, supporting the fulfillment of the goals of basic education in conjunction with the other entities. As Fulvia Gioia (2016, p. 16 and 57) explains, the division into levels of education does not mean a division of the right to education itself but, concerns the limits of the actions of each federated entity, defined according to this division.

The right to education is defined in article 205 of the Federal Constitution, a provision that begins the chapter in which a constitutional system of education was consecrated. Education has the status of a subjective right and consists of the right of all and the duty of the State and of the family, to be promoted and fostered in collaboration with society, aiming at the full development of the person, preparing them for the exercise of citizenship and qualifying them for work, as inferred from the constitutional rule (CEZNE, 2006, p. 117-118).

Like other rights, education implies costs (SUNSTEIN, 1999), supported by different agents and in different ways (GIOIA, 2016, p. 15), particularly, in this system, rules aimed at obtaining and applying financial resources, according to rules of financial law.

Considering that the object of this article involves only higher education, it is important to mention university autonomy, enshrined in art. 207 of the Federal Constitution, which has a direct impact on financial and asset management. Nevertheless, universities and higher education institutions, in general the public ones, depend on the authorization of the respective budget allocations.

## 3. THE FINANCING MODELS FOR HIGHER EDUCATION IN BRAZIL

Given the consecration of the right to education as a fundamental right in the Federal Constitution and the necessary funding, it is presented in general the main models of Brazilian financing of education and, specifically those of higher education. To this end, the investigation begins with the study of the minimum educational budget and its constitutional provision, clarifying - in addition - the changes promoted in the costing of education from the establishment of a spending cap, with analysis of the repercussions on higher education.

Then, it focuses on the funding models as from the funds, in order to introduce the private funding through endowment funds, central object of the present work. Finally, the costing of education in the federal budget is analyzed, to elucidate the influence of the fiscal crisis scenario on higher education in Brazil, as well as in relation to the State of São Paulo, considering that the equity fund object of study supports the Polytechnic School of the University of São Paulo.

## 3.1 MINIMUM EDUCATIONAL BUDGET IN THE FEDERAL CONSTITUTION

The constitutional text, aiming to achieve the realization of the right to education at all levels of the federation, brings a series of provisions for the financing of education. Thus, in order to execute the objectives that are tangent to the material competencies of the federative entities the article 212 of the Federal Constitution establishes the technique of the constitutional binding of revenues destined to education. In other words, the Union must, annually, a percentage of eighteen percent, and the States, the Federal District and the Municipalities twenty-five percent, at least of the revenue from taxes, included those from transfers in the maintenance and development of education (TRAVINCAS, 2016, p. 89).

From the recognition of the education as a fundamental right and, therefore, of direct and immediate applicability provided in §1 of Article 5 of the Charter of 1988, the establishment of the minimum percentage should be in accordance with the function of its progressive protection and promotion, as argued by Amanda Travincas (2016, p. 94-95). Therefore, the constitutionally established percentages should be understood in the context of maximizing the realization of the right to education. For these constitutional bindings, the destination of the money involves federal, state, and municipal education, in addition to those provided for in article 213 of the Federal Constitution.

Tax collection is the main source of this funding, especially the one that arising from taxes with specific criteria for distribution and redistribution of income implemented from fiscal federalism, in exception to the non-binding rule (TRAVINCAS, 2016, p. 91). In this regard, both the values collected from the federated entity's own competence are encompassed, as well as from direct[7] and indirect transfers, such as those made from the collection with the Income Tax and the Tax on Industrialized Products and the transfer through the accounting funds of participation of the States, the FPE, and the Municipalities, the FPM[8].

The supplementary programs of food and health care assistance aimed at serving the student in all stages of basic education, such as supplementary programs of didactic material, transportation, food and health care assistance have funding projection by means of resources from social contributions and other budgetary resources[9]. The Federal Constitution, in Article 212, paragraph 5th, also provides an additional source of specific financing for public basic education, which is the social contribution of the educational wage[10] collected by companies.

In 2016, there was the enactment of Constitutional Amendment n° 95, which had the purpose of establishing a "new fiscal regime in the Fiscal and Social Security Budgets of the Union" to be in force for twenty fiscal years, starting in 2017. Considering the purpose of this research, it is important to point out that with this change, a limit[11] was set for the primary expenses of the

7 Articles 157 and 158 of Federal Constitution of 1988.

8 There are other constitutional provisions specifically related to the commitment to the goals correlated to basic education, such as, for example, the FUNDEB (Fund for Maintenance and Development of Basic Education), but these are beyond the scope of this research.

9 Article 212, paragraph 4th of Federal Constitution of 1988.

10 The state and municipal quotas of the collection of the social contribution of the educational salary will be distributed in proportion to the number of students enrolled in basic education in the respective public school systems.

11 The criterion for determining this limit was defined on sections I and II of the first paragraph of article 107 of the Transitional Constitutional Provisions Act: for the fiscal year 2017, the value taken as a basis had been that of the primary expenditure paid in the fiscal year 2016 (corrected with the addition of the percentage of 7.2%), with the inclusion of the rests payable paid and

Executive Branch in each fiscal year. In this regime, the minimum investments in maintenance and development of education, including higher education, would be calculated, according to art. 110 of the ADCT, as follows:

- For the year 2017, in reference to the minimum applications equivalent to 18%, in the case of the Union, and to 25%, in the case of the States, Federal District, and Municipalities, of the revenue resulting from taxes, including those from transfers (as per the caput of article 212 of the CF);
- For subsequent fiscal years, based on the amounts calculated for the minimum applications in the immediately previous fiscal year, corrected by the IPCA variation (Broad National Consumer Price Index), or by another index that replaces it, for the twelve-month period ending in June of the previous fiscal year to which the budget law refers (according to subsection II of paragraph 1 of article 107 of the ADCT).

There is a clear change in this new regime to the extent that the limitation of primary expenditure has repercussions on the amount allocated to education and, in particular, to higher education, which tends to be reduced only to the constitutionally guaranteed minimum. It happens because political choices must be made to ensure the balance of public spending needed for several areas of common interest, which characterizes, therefore, the delimitation of a spending limit.

It happens that, as Fulvia Gioia (2017, p. 338) points out, this reduction in the amount allocated to education affects especially higher education, because the contributions of federal financial resources are configured as essential to the states and municipalities to meet the best possible the constitutional function of maintenance and development of basic education[12]. Therefore, it can be seen that basic education has specific constitutional funding sources that are subject to criteria not affected by the rules of the Constitutional Amendment (EC) nº 95/2016. In relation to higher education, there is no constitutional provision for a specific funding source and, consequently, the reduction of resources for this level of education tends to be greater.

## 3.2 COSTING MODELS FROM THE FUNDS

Considering the overview of the constitutional financing of education, it is possible to visualize a model of public financing through funds, which can be studied from three categories, highlighting the public funds. These consist of public funding for public funds for education, especially the FUNDEB (Fund for Maintenance and Development of Basic Education and Valorization of Education Professionals)[13] and the FUNDEF (Fund for Maintenance and Development of Basic Education and Valorization of Teaching Staff)[14].

of the other operations that affected the primary result (sections I); for subsequent years, the value taken as a basis would be the primary expenditure for the immediately preceding year, corrected by the variation of the IPCA (Broad National Consumer Price Index), published by the IBGE (Brazilian Institute of Geography and Statistics), or another index that replaces it, for the twelve-month period ending in June of the previous year.

12 Based on the role of supplementing the financial resources that the Union plays in relation to the other federative entities, with a view to maintaining and developing basic education - a priority competence of the states and municipalities.

13 Created by Constitutional Amendment No. 53 of 2006 and regulated by the Law Number 11.494 and Decree Number 6.253, both of 2007.

14 Created by Constitutional Amendment No. 14 of 1996, regulated by the Law Number 9.424 of 1996 and Decree No. 2,264 of 1997.

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However, given the focus of this research, which is higher education, the models of funding through funds destined for this level of education will be delimited and presented. One of them refers to the public financing destined to the private network, such as FIES (Student Financing Fund)[15] and PROUNI (University for All Program)[16]. Another fund, which is also of interest to the present object of study, is the private funding with emphasis on equity funds regulated stem from Federal Law Number 13.800 of 2019.

## 3.3 THE COST OF EDUCATION IN THE FEDERAL BUDGET AND THE CASE OF SÃO PAULO

Before proceeding with the study on endowment funds, it is necessary to elucidate the costing of higher education in Brazil in the fiscal crisis scenario, taking into account the values foreseen in the budget, as well as those effectively collected. To this end, data corresponding to the 2019 fiscal year were used as the time frame of the study.

The Union budget for the fiscal year 2019 had as initial projected expenditure the amount of R$ 3.23 trillion, while the updated expenditure corresponded to the amount of R$ 3.30 trillion (PORTAL DA TRANSPARÊNCIA, 2020). In relation to revenue, there was an estimation of R$ 3.26 trillion, while the amount of R$ 2.95 trillion was effectively collected (Transparency Portal, 2020). Through these data, it can be verified that the effective amount collected was lower than the estimated one. Of this amount, still according to the 2019 budget, the portion allocated to the MEC (Ministry of Education) was R$ 21.89 billion, including the amounts intended for universities and institutes. In contrast, the planned expenditure for the MEC reached the amount of R$ 122.95 billion.

Through these data, it is possible to verify the effective cost of maintaining education for the Union, in order to satisfy it as a fundamental right. In this sense, it was tried to show that in addition to the high cost of education, there is a deficit of approximately R$ 101 billion in the Ministry of Education.

In the case of the State of São Paulo, according to information present in the 2019 budget, it is understood that higher education is of primary interest to the Secretariat of Economic Development, Science, Technology and Innovation (SDECTI). This understanding is a different approach from the one applied by the vast majority of other Brazilian states, regarding the issue of the right to education as a fundamental right and as a requirement for economic development. As a higher education institution, the University of São Paulo (USP) and the Polytechnic School, supported by the Fundo Patrimonial Amigos da Poli, a later object of analysis, are also considered in this scope.

For SDECTI, in the 2019 budget, the projected expenditure for the secretariat was budgeted in the amount of R$ 16.7 billion. Of this amount, the expenditure of R$ 6.19 billion was foreseen for higher education, as a program, which represents approximately 37% of the total amount of expenditure of the secretariat in question.

15 Instituted by the Federal Law Number 10.260 of 2001.

16 Instituted by the Federal Law number 11.096 of 2005.

In the fiscal year 2019, the University of São Paulo obtained total revenue collected in the amount of R$ 5.63 billion, despite the estimated initial budget of R$ 5.7 billion. Of this amount, R$ 110.48 million corresponded to its own revenue (financial investments, reimbursements and other revenues), R$ 155.57 million to revenues linked to the units (health services, provision of services, agreements and other revenues) and R$ 5.47 billion to non-linked revenues (being the estimated initial budget of R$ 5, 58 billion), among them, those coming from transfers from the State Treasury (R$ 5.36 billion) especially from the collection of the Tax on Circulation of Goods and Services (UNIVERSIDADE DE SÃO PAULO, 2020), which shows the existing dependence on resources from the State of São Paulo.

Regarding the expenses, there was an estimated initial budget of R$5.7 billion, while R$5.53 billion was spent. Of this amount, R$ 132 million were related to expenses funded by the units' tied revenues, while R$ 5.4 billion corresponded to expenses with treasury resources and own resources not tied (personnel, court-ordered debt and indemnities, other costs, and investments). Only the costs with personnel were equivalent to the expenditure of R$ 4.64 billion, representing 84.94% of the percentage of commitment of the non-binding revenues (UNIVERSIDADE DE SÃO PAULO, 2020).

Such values, especially those involved with personnel expenses, reinforce how expensive higher education costs are with a focus on USP, considering that the total expenditure of this university represents, according to the data presented above, a significant part of that allocated to SDECTI.

There was also an increase of 2.28%, in 2019, concerning the execution of personnel expenses, when compared to the financial year of 2018, in which the amount of R$4.54 billion was executed at USP. In regard to the total expenses, corresponding to the non-binding resources, there was, in 2018, an execution of R$ 5.22 billion, with an increase of 3.47% in fiscal year 2019, demonstrating the growth of the expense (UNIVERSIDADE DE SÃO PAULO).

Thus, the data presented illustrate that, even in the context of the fiscal crisis described, the costing of education in Brazil, particularly as to higher education, is still extremely dependent on transfers from tax collection. Thus, it is evident that a private source would have great difficulty in representing a true alternative to public funding, paradigmatic in the current legal-constitutional order.

## 4. THE LEGAL DISCIPLINE OF PUBLIC ENDOWMENT FUNDS

From the study on the costing of education in Brazil and considering the apparent need to search for alternative sources of funding for higher education, the legal institute of public endowment funds is analyzed. Considering that, the search begins with the conceptual examination of it and its characteristics. Next, it is verified how such institute is regulated in the Brazilian reality, focusing on Law number 13.800 of 2019, its object and the provisions regarding the agents involved, the accountability mechanisms and the revenue projection of the public endowment funds.

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## 4.1 PUBLIC ENDOWMENT FUNDS: CONCEPT AND CHARACTERISTICS

Regarding public endowments or philanthropic equity funds, Erika Spalding (2016, p. 05) conceptualizes them as:

> The concept of an public endowment is that of a permanent fund, structured through a long-term investment management model and with appropriate governance, and that, in essence, seeks to preserve the principal amount and regulate the use of the income earned on behalf of its proposed mission. It is a set of permanent assets (cash, bonds, real estate, among others), managed with the purpose of preserving the donated value in the long term, using its earnings in favor of non-profit entities and their institutional purposes. It aims, thus, to create a structure for the sustainability of the entity, enabling a long-term management of the resources destined to the fund and ensuring the maintenance (and desirably the increase) of the original assets.

A public endowment fund is a fiscal instrument whose claim involves its perpetuity through the administration of its assets in order to preserve the principal amount - arising from donations from individuals or legal entities of private law. The income from investments made in favor of the public interest cause or institution to which the fund is destined is destined.

Therefore, Jorge Augusto Hirata (2019, p. 20) highlights that, concerning the legal nature of the equity fund, the function of the institute is more important than its structure (for example, which bodies and how many members it has).In other words, to classify a fund as equity, it is necessary to identify whether it is intended for perpetuity and whether it seeks to finance an institution or cause of public and/or social interest, as well as whether the use of its resources obeys the limits stipulated from a governance structure corresponding to such perpetuity, which seeks to maintain focus in relation to the established purpose.

As the referred author emphasizes, it is also defining of the equity fund that it is managed by a non-profit entity. This is because, if the entity earns any profit, the private benefit is characterized, in distinction to the social interest objectified (HIRATA, 2019, p. 23). In the same way, the donor (whether an individual or legal entity) should not manage the assets donated to the fund, in order to avoid administration for his own benefit.

Under the given circumstances, the distinction of this kind of fund regarding investment funds consists in the activity of the shareholders responsible for the deliberation, in contrast to the role assumed by the donors in equity funds, who not only are not configured as shareholders, but also do not receive any dividends from the fund and, as a rule, do not deliberate on its future (SPALDING, 2016, p. 40-42).

This stems from a deeper distinction regarding the very purpose of the funds analyzed in this research. It happens because endowment funds aim at financing the supported institution or cause, while investment funds are directed at the private benefit of the donors (SPALDING, 2016, p. 42).

Moreover, considering the need to meet the activity, cause or institution of social interest, the fund must have an asset capable of meeting the established purpose. In other words, the assets should be sufficient to generate income to the fund through the investments made (HIRATA, 2019, p. 22).

Because of that an important dilemma between flexibility and rigidity in the administration of equity funds is caused (HIRATA, 2019, p. 32). This is because the equity should be sufficient to generate income to the fund, while meeting defined social purpose, with great need for liquidity. The balance aimed at the management of equity fund resources should come, therefore, through the compatibility of the redemption policy with the one of investment (FABIANI; DA CRUZ, 2017, p. 190).

The equity fund must have a clear strategy for what its investment policy consists of. This in view of achieving the highest return considering the sustainability of the supported entity, which must be balanced with the expenses and possible redemption established from the calculation method stipulated by the redemption policy, with the additional element of the perspective of perpetuity of the fund (FABIANI; DA CRUZ, 2017, p. 190-191).

As it can be seen, it is impossible for an endowment fund to be a source of revenue for funding expenses, such as personnel costs. Instead, the focus of this legal institute, considering its objective of perpetual maintenance, is on the financing of specific projects and programs (as a research, development scholarships, maintenance scholarships) related to the purpose of public interest.

## 4.2 EQUITY FUNDS AFTER LAW NUMBER 13.800 OF 201

The experience with equity funds in the context of higher education[17] in Brazil began before 2019, constituted especially from the international[18] example. However, only through Law number. 13.800 of 2019[19] there was the effective regulation of this institute in the Brazilian legal system.

From the text of the legislation analyzed[20], its application is directed at the Public Administration (and less concerned with the private sector) in order to regulate the possibility of signing partnership instruments and program execution terms by means of endowment funds.

This special attention can be observed, for example, in the requirements for the fund's Board of Directors when there is an exclusivity clause with a public[21] institution; in the payment limit for members of the fund's bodies in case of exclusivity with a public institution[22]; and in the requirement for an execution[23] agreement for the partnerships between the managing organization, the supported public institution and, if applicable, the executing organization.

Furthermore, the Law number 13.800 of 2019 expressly determines which parties are involved in the establishment and management of an endowment fund[24]: the supported institu-

17 Examples of that are the FEA USP's Equity Fund Foundation, created in 2017; the GV Law Endowment Association, created in 2012; and the Friends of Poli (USP's Polytechnic School) Equity Fund Association, created in 2011.

18 In the United States, the main examples are the endowments of Harvard and Yale Universities. In the United Kingdom, the endowments of Oxford and Cambridge Universities can be highlighted (SINCLAIR, 2020).

19 This legislation comes from the conversion into law (with amendments) of Provisional Measure number 851 of 2018.

20 Authorizes the Public Administration to sign partnership instruments and execution terms for programs, projects and other purposes of public interest with asset fund management organizations; amends Laws numbers 9249 and 9250 of December 26, 1995, Law number 9532 of December 10, 1997, and Law number 12114 of December 9, 2009; and makes other provisions.

21 Article 8, 1st to 4th paragraphs, of Law number 13.800 of 2019.

22 Article 12, 1st paragraph, of Law number 13.800 of 2019.

23 Article 2, section VIII, of Law number 13.800 of 2019.

24 Article 2, I, II and III, of Law number 13.800 of 2019.

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tion, the executing organization, and the managing organization. The supported institution, which can be public and must always be non-profit, must be dedicated to the realization of the public interest purpose(s) that justifies the support of the equity fund. The beneficiaries of programs, projects, or activities financed with the fund's resources are classified as supported institutions.

The executing organizations are responsible for the execution of the programs and projects linked to the established purposes of public interest. They must also be non-profit institutions and there is no exhaustive provision in the legislation under analysis about which are their internal institutions.

The organization that manages the public endowment fund will always be a non-profit private law institution and must act exclusively in attracting and managing donations from private law individuals and companies. It necessarily takes the form of a private association or foundation, and its obligations are listed in article 6 of the legal diploma under analysis. The composition of the management organization is also foreseen by the legislation in question, with a Board of Directors, an Investment Committee and a Fiscal Council, with the possibility of remuneration of its members by the management organization, according to the fund's income[25].

The Board of Directors has the power to deliberate on the matters listed in Article 9 of Law number 13,800 of 2019[26], related to the bylaws, management and transparency standards, redemption rules, the composition of other institutions, and the conclusion, amendment, and suspension of partnership instruments. This Council must be composed of up to seven remunerated members, with the possibility of admitting other members without remuneration[27]. In case a partnership instrument is signed with an exclusivity clause with the supported institution, the latter must appoint a representative of the supported institution to compose the Council, with voting rights[28]. If such exclusivity clause occurs with a public supported institution, it is also foreseen that the members' mandate will be of two years, with the possibility of reappointment[29]; and that the donor (natural person or legal entity representative) representing more than 10% of the total fund composition will be assured participation, without voting rights, in the deliberative meetings of the Board of Directors[30].

The Investment Committee, obligatory for endowment funds whose assets exceed R$5,000,000.00, has the competence to recommend the investment policy and the rules for the redemption and use of the resources to the Board of Directors; to coordinate and supervise the performance of those responsible for the management of the resources; and to prepare an annual report on the rules for the financial investments, for the redemption and use of the resources, as well as on the management of the fund's resources[31]. The members of this Com-

25 Article 12, *caput*, of Law number 13.800 of 2019.

26 Article 9 The Board of Directors shall be responsible for deciding on:
I - the bylaws, the internal norms relative to the investment policy, the administration norms and the rules for the redemption and use of the resources, as well as publish them;
II - the financial statements and the rendering of accounts of the asset fund management organization, as well as approving and publishing them;
III - the composition of the Investment Committee or the hiring referred to in 1st paragraph of article 10 of this Law;
IV - the composition of the Fiscal Council; and
V - the execution of partnership instruments, their alterations and the cases of their suspension.

27 Article 8, *caput,* of Law number 13.800 of 2019.

28 Article 8, 2nd paragraph, of Law number 13.800 of 2019.

29 Article 8, 1st paragraph, of Law number 13.800 of 2019.

30 Article 8, 3rd paragraph, of Law number 13.800 of 2019.

31 Article 10, I, II and III, and 4th paragraph, of Law number 13.800 of 2019.

mittee, chosen by the Board of Directors, must be proven suitable and have knowledge and experience in the financial or capital market, in addition to being registered with the Securities Commission (CVM). The financial investment of the endowment fund may be carried out by a fund management company registered at the CVM and authorized by the Board of Directors[32].

Finally, the Fiscal Council is responsible for issuing opinions to the Board of Directors regarding the supervision of the managers of the equity fund and the accounts of the management organization. The members of the Fiscal Council - as is the case of the Investment Committee - are chosen by the Board of Directors and must be qualified individuals with expertise in administration, economics, accounting, or actuarial science[33].

There are also some provisions in the Law analyzed in relation to the accountability mechanisms of the players involved in the management process of the endowment funds. In doing so, the assets of the institutors, the supported institution, the management organization, and the fund itself are separated. Therefore, the obligations assumed by each actor involved in this process - supported institution, managing organization and executing organization - belong to themselves, without responsibility of the others for any non-compliance with these obligations[34]. It is not clear, however, what are the possible sanctions attributable to these institutions, considering only the Law number 13.800 of 2019.

Furthermore, there are provisions that the liability of the management organization for its obligations is only up to the limit of the assets and rights belonging to the equity fund[35], and that the managers of the management organization will only be held civilly liable for the losses they cause when they practice management acts with malice or through gross error, or acts that violate the law or the statute[36]. Briefly, there is little emphasis on the accountability mechanisms of the supported institution and the executing organization.

Thus, there is special attention to the revenues and the way they are used. In this regard, it should be noted that the transfer of resources from public law institutions to private endowment funds is not permitted[37]. Moreover, there is no possibility of financial return to donors in all forms of donation[38].

One of the types of donation foreseen is the permanent unrestricted one. Such donation is included in the permanent assets of the fund and cannot be redeemed, however its income can be used in programs and projects related to the purpose of the endowment fund. Another modality is the permanent specific purpose restricted donation, which is also added to the permanent equity of the fund and cannot be redeemed, with the income being restricted to projects related to the purpose defined in the donation instrument itself. Furthermore, there is the specific purpose donation, which is destined to a purpose defined in the donation instrument and cannot be immediately used. This donation is added to the fund's permanent assets and

32 Article 10, 1st and 3rd paragraphs, of Law number 13.800 of 2019.

33 Article 11 I and II, and 1st paragraph, of Law number 13.800 of 2019.

34 Article 4, paragraphs 2nd and 3rd, of Law number 13.800 of 2019.

35 Article 17, paragraph 2nd, of Law number 13.800 of 2019.

36 Article 12, paragraph 4th, I and II, of Law number 13.800 of 2019.

37 Article 17, *caput*, of Law number 13.800 of 2019.

38 Article 14, paragraph 4th,, of Law number 13.800 of 2019.

the value equivalent to the principal donated can be redeemed by the managing organization from what was established in the donation instrument[39].

In the presidential sanction, the creation of tax incentives was vetoed, which, even in the text approved by Congress, were limited to support for public institutions (HIRATA, 2019, p. 114). Many authors consider that the incidence of the Tax on Transmission *Causa Mortis* and Donation (ITCMD) on donation comprises a disincentive, since the donor, even for an equity fund, would have to pay the tax cost, in addition to the value intended for the social purpose (MARTINS, 2013, p. 2; PAULSEN; MELO, 2006, p. 200). A fiscal policy of tax incentives for donation to equity funds should seek laws aiming to achieve the necessary and expected social return, since the social gain with the extrafiscality should be equal or greater than the gain coming from state action, because if less - by the principle of efficiency[40] - it would have no place in the national fiscal policy.

Regarding the mandatory adherence to the analyzed legislation, there is ambiguity in the legal text about its mandatory nature to all equity funds or only to those linked to public institutions and to entities that want to constitute funds, under the terms of Law number 13.800 of 2019 (HIRATA, 2019, p. 122-123). However, considering the absence of greater incentives for adherence to the legislation, in view of the transaction costs and the absence of sanctions for noncompliance, there is a tendency towards no great adherence by equity funds linked to private entities (HIRATA, 2019, p. 122-123).Thus, Law number 13.800 of 2019 has significant relevance for public institutions, which includes higher education institutions of the public University (such as the University of São Paulo), in view of the mandatory adherence by them to the terms of the legislation.

## 5. CASE STUDY: THE "FRIENDS OF POLI" ENDOWMENT FUND ASSOCIATION

Considering the possibility of private endowment funds being a source of funding for higher education, an investigation is carried out regarding the case of the "Friends of Poli" Endowment Fund Association, in order to identify - through the selected parameters - if there is plausibility of this hypothesis in the referred case. Initially, it is necessary to justify the choice of the asset fund in question as the object of study of this search, given the alternatives of existing asset funds for analysis. After presenting the method of choice, an analysis of the selected fund will be performed, observing how it stands before the innovations of Law number 13.800 of 2019 and, with its current revenue, what role it plays in the funding of the supported institution.

### 5.1 METHOD FOR CHOOSING THE ANALYZED FUND

In order to select the fund that is the object of the present research, a previous survey was carried out about the existing equity funds in Brazil that support only projects directed

39 Article 14, paragraphs 1st , 2nd and 3rd, of Law number 13.800 of 2019.

40 Article 37 of the Constitution of the Federative Republic of Brazil.

to higher education institutions. There is no official way to identify all the equity funds in the national territory, which motivated a search through the electronic address of the Ministry of Justice[41] and the higher education institutions. Moreover, as a basis, the survey conducted by Erika Spalding was used to identify the funds focused on teaching, research, and extension in higher education (2016, p. 22-27).

Hence, four funds were identified: the Association Endowment of Law GV[42], the Investment Fund XI of August (FIXI)[43], the Association of Poli's Friends Endowment Fund[44] and the Endowment Fund Foundation of FEA USP[45]. Considering that the Law 13.800 of 2019 has as its specific object the authorization for the Public Administration to establish relationships with organizations that manage equity funds, the GV Law Endowment Association was excluded, since the supported institution, the São Paulo School of Law of Getúlio Vargas Fundation, is a legal entity of private law.

The FIXI, as an investment fund, is not in the object of research for having a legal nature distinct from an equity fund. Moreover, it is managed by the supported entity itself, the Academic Center XI of August, and has only one institution, the General Assembly, in which the redemption rules are stipulated only in the management commitment (SPALDING, 2016, p. 88; p. 94).

Among the two remaining funds, it was decided not to focus the analysis on the Equity Fund Foundation of FEA USP, since it was established in 2015, it is less old than the Friends of Poli Equity Fund Association, created in 2011, which has greater assets and more projects supported. Thus, this choice allows a more precise study regarding the role that the funds can play in the funding of higher education.

## 5.2 THE ASSOCIATION OF POLI'S FRIENDS EQUITY FUND UNDER THE LAW 13.800 OF 2019

In order to analyze the "Friends of Poli" endowment fund, the following comparative criteria will be applied: a) if the chosen fund fits the object of Law number 13.800/2019; b) if it supports a higher education institution under public law; c) if the management of the equity fund is the responsibility of the supported institution itself; d) if there is a projection of areas or actions for which the resources should be destined; e) if the Association presents the structure foreseen in the law of equity funds for the managing organization; 800/2019; b) if it supports a higher education institution under public law; c) if the management of the equity fund is the responsibility of the supported institution itself; d) if there is a projection of areas or actions for which the resources should be destined; e) if the Association presents the structure of institutions foreseen in the law of equity funds for the managing organization; f) if there is an Investment Committee; g) if there is a provision for the accountability of the members of the Association's organs; h) if there is a campaign to raise private resources; i) if there is a methodology for the

41 By searching for "Civil Society Organization of Public Interest (OSCIP)", with an "educational" purpose, using the expressions endowment and endowment fund.

42 Electronic address at http://edireitogv.com.br/.

43 It does not have an electronic address, however a space on the USP Law School website, at http://www.direito.usp.br/faculdade/caxi08_01.php.

44 Electronic address at https://www.amigosdapoli.com.br/.

45 Electronic address at <https://www.fpfeausp.org.br/>.

selection of projects; j) if the Law institutes any mechanism that motivates the increase of the fund's assets.

It can be stated that the equity fund studied fits the object of Law number 13.800 of 2019, as it suits the purpose of constituting a regular and stable source of long-term resources to be invested, based on donations from private individuals and companies, for the promotion of supported institutions and causes of public interest.

In this case, the fund is formed by endowments from the managing organization and donations from individuals or companies, which can be made monthly or in a single installment. Through a perpetuity mechanism, the amount derived from donations is the main source of the fund, which is not used directly to support projects, but rather in investments. The income from these investments is applied to the projects chosen by the Association[46].

Furthermore, the Association that manages it, a Civil Society Organization of Public Interest (OSCIP), has an undetermined[47] duration and has as its objective the promotion of education and human and technical development of the community of the Polytechnic School of the University of São Paulo[48], without profit or economic purposes.

Under the given circumstances, the Association and the endowment fund support a public higher education institution, since the funded projects and actions will necessarily be carried out in the polytechnic community. Furthermore, the management of the fund is the responsibility of the "Friends of Poli" Equity Fund Association - in the terms of the legislation, the managing organization - and not of the supported entity itself. It is necessary to highlight that the equity fund is part of the Association's assets, as it does not have its own legal personality, in order to ensure the sustainability of the organization and its social objective, even though it is managed by the Investment Committee[49].

Furthermore, the by-laws provide for the actions to which the resources of the fund should be directed with a view to fulfilling the purpose of the Association and the equity fund, such as the support, promotion and implementation of projects, including research, complementary courses and technology studies and development; the promotion of improvements in the physical space of the supported institution; the granting of loans to students of the supported institution to attend undergraduate and graduate courses or complementary courses to their education; and the entering into partnerships, agreements and contracts with public or private organizations, the promotion of volunteer work[50].

Although the creation and structuring of the Association and the equity fund researched was previous to Law number 13,800/2019, there is a correspondence with most of the institutions foreseen in the legislation. In this sense, the Association has its composition arranged in: an executive board, a fiscal council, and a deliberative council. There is also an investment committee elected by the deliberative board, and an assembly which all the bodies are submitted.

46 According to paragraph 2nd of article 21 of the Association's bylaws, the annual use of a percentage of the fund's assets by the Association is allowed, as long as it is limited to 10% of the principal amount and exclusively to achieve the organization's social objective.

47 Article 1, of the Association's bylaws.

48 Article 3, of the bylaws of the Association. As stated in 2nd paragraph of the same article, the polytechnic community is composed of undergraduate and graduate *stricto-sensu* students, faculty, employees, and non-profit entities representing these categories.

49 Article 21, 1st and 5th paragraphs of the Association's bylaws.

50 The 1st of article 3 of the Association`s bylaws.

The board is responsible for the administrative management of the Association, dealing with the routine matters of the fund. It is elected by the Deliberative Council for a two-year term[51]. Nowadays, it is composed of eight members, with a president director and a vice-president director.

The Fiscal Council is responsible for supervising the acts performed by the administrative institutions[52]. It is composed of three members - who are preferably non-members with knowledge in accounting, finance, administration, or who have business experience - two of whom are elected by the General Assembly and one indicated by the Director of the Polytechnic School. There is no remuneration for the exercise of its statutory functions[53].

The Deliberative Council is responsible for deciding the strategies and priorities of the Association also approves investments in projects indicated in the public selection[54]. It is currently composed of eight members, two of whom are professors at Polytechnic School[55], and its members are not remunerated for their functions[56].

All institutions are bound by the decisions of the General Assembly, which is sovereign in its deliberations. This institution is composed of all members[57], who, in turn, are divided into founders, effective and honorary members. The founders are the individuals present at the Constitutive Assembly, the effective members are the individuals or legal entities that collaborate to the social object of the Association with financial contribution or equivalent from the amount stipulated and approved by the Deliberative Council, while the honorary member is the Polytechnic School of the University of São Paulo[58].

Thus, there is apparent equivalence between the functions of the managing organization, provided by the law, and those assumed by the Friends of Poli Equity Fund Association. As for the Association's internal institutions, the existence of a Fiscal Council can be observed. Furthermore, there is equivalence of part of the functions of the Deliberative Council with those of the Board of Directors[59] foreseen by the law. However, the fund studied does not have any legal relationship with an executing organization. Distinctively, there is only a Board of Directors with executive functions as an internal institution of the Association, the managing organization. This makes it unclear whether the Association must, necessarily, and under penalty of nullity of the equity fund, proceed to enter into a partnership instrument with an executing organization with a distinct legal personality.

In order to manage the fund, there is also an Investment Committee, elected by the Deliberative Council and responsible for proposing an investment policy to the deliberative council

51 The provisions of article 36 of the bylaws of the Association provide for the competence of the Board of Directors.

52 The provisions of article 42 of the Association's bylaws provide for the competence of the Fiscal Council.

53 Article 40, paragraphs 1, 2 and 3 of the Association's bylaws.

54 The article 31 of the bylaws of the Association provides for the competencies of the Deliberative Council.

55 As established in article 30, paragraph 1st, of the Association's statute, one of these vacancies is filled by the Director of the Polytechnic School and the other by an active professor of the institution, with high academic qualifications, elected by the General Assembly or by the members of the Deliberative Council, if the Assembly decides.

56 Article 30, paragraph 7th of the Association's bylaws.

57 Article 25 of the Association's bylaws. Each member who has fulfilled their associative obligations has the right to one vote in ordinary and extraordinary meetings, as provided in Article 9 of the Association's bylaws.

58 Article 7 of the Association's bylaws.

59 According to the report for fiscal year 2019, the Board operates in eight areas: wholesale fundraising (prospects high-volume donations); retail fundraising (prospects small donors); career center coordination (project to prepare for the job market); communications; finance (asset and investment management, and fund controller); operations (volunteer management and organization oversight); relationship with the Polytechnic School; and technology (technology infrastructure generation, information security, and digital asset control).

and for managing the Association's equity fund resources. The committee is composed of three members elected by the deliberative council for a two-year term[60].

This Committee is responsible for nominating a manager for the resources of the asset fund, as previously approved by the Deliberative Council, which must be a competent institution and with notorious capacity in asset and resource administration, and may be dismissed at any time, as long as after consultation with the Deliberative Council[61]. Specifically in relation to the Investment Committee, there is a legal provision that its members must be registered with the Securities Commission (CVM) as analysts, consultants or administrators of securities portfolios, even if they contract a legal entity that manages resources to make the financial application of the endowment fund operational, which is not required in the statute of the Friends of Poli Association[62].

The members of the listed institutions, who do not have a share in the economic results of the Association, are responsible for the exercise of their statutory functions, however, not for the obligations assumed by the organization, except in the case of excess of mandate, malice, guilt, gross error or acts that violate the Law or the Statute[63] . There is a provision that the associates are not liable, not even subsidiarity, for the obligations assumed by the Association[64].

As for private fundraising campaigns in the "Friends of Poli", as detailed in the report published by the Board on the official website of the Association (POLI FRIENDS HERITAGE FUND ASSOCIATION, 2020), there is the "Month of Donation Campaign", which had three editions and, in 2019, was held in the month of November. This initiative aims to stimulate the culture of giving and increase the donor base of the endowment fund by holding fundraising events, with the massive engagement of the polytechnic community, the participation of social media influencers and partnership with companies. There are also isolated marketing campaigns that are not detailed in the report.

Regarding the method for choosing the funded projects, an annual public selection is launched and - after the enrollment of interested parties - a virtual evaluation is carried out by a technical committee integrated by advisors, engineering professionals, and professors of the supported institution, according to the report for the biennium 2018-2019.

The selected projects are presented in person to an examining board composed of associated donors, advisors, and professors. Subsequently, the remaining projects are presented to the Deliberative Council, which defines which ones will be supported and the amounts earmarked for each one. Once the projects are chosen, an accountability contract is formalized, which subjects the receipt of the resources to the periodic supervision of the projects' evolution. All selections are made by means of a public selection process.

60 Article 21, paragraph 4 and article 44, paragraph 1, both of the Association's bylaws.

61 Article 21, paragraphs 8, 9 and 10, of the Association's bylaws.

62 If the fund has an equity of less than R$ 5,000,000.00 (five million reais), which does not apply to the fund under study, which does have an Investment Committee, the legislation foresees the option of an Investment Committee. However, the stipulation of a maximum value to allow the option of the referred committee brings an excessive rigidity to the organizational structure of the fund, which can represent a disincentive to the institution of new funds and an obstacle to the necessary fluidity for a fund that pretends to be long-lasting.

63 Article 24, of the bylaws of the Association. It is allowed, however, the advance of cash for the realization of expenses in the service of the Association, with the corresponding rendering of accounts.

64 Article 12 of the Association's bylaws.

Considering that the law does not provide any tax incentives, including in relation to ITCMD, there are no effective mechanisms to enable a substantial increase in the fund's assets. Nevertheless, according to the report at the end of 2019, the equity fund had assets of R$ 30.4 million, with a 35% growth compared to 2018, when the value was R$ 22.5 million. There was also an investment of R$666,000 in 27 projects, with a growth of 11% compared to 2018, when R$600,000 was invested in 24 projects. At the end of this two-year period, the fund had 4,373 donors, with an asset increase of R$3.2 million due to new donations in 2019.

However, when comparing the execution of expenses of R$ 5.53 billion by the University of São Paulo in fiscal year 2019 and the assets of the "Friends of Poli" endowment fund, the eventual substitution of the public funding model for one based mostly on private initiative is unfeasible, which does not exclude the use of these resources as a source of funding for education. In the case of the association reported, this seems to be clear, particularly because the statute itself prohibits the transfer of resources to cover recurring expenses of the supported institution.

## 6. CONCLUSION

From the objective previously established and in view of the reasons raised, it can be concluded that there is, in the current legal regime, a private source of resources through the equity funds, in a hybrid financing model. However, this source does not replace a mostly public financing model by means of fiscal transfers and the public budget, since it does not supply current expenses, such as those related to personnel costs. The resources obtained through the endowment funds may, therefore, constitute a parallel source of funding, and only an adjunct to public funding. The case study carried out proves this hypothesis, insofar as the Friends of Poli, one of the oldest and most solid endowment funds in the country in the scope of support to higher education institutions, has reduced assets in relation to the current expenses of the supported institution.

The approval of Law number 13.800 of 2019 does not significantly change this scenario, as it does not enable a substantial increase in the resources of the endowment funds, despite enshrining a legal regime that effectively seeks to provide legal certainty to the relationships involving them. In this legislation, one notices the absence of greater incentives, including tax incentives, for the donor and the third sector, of more robust accountability mechanisms, which are restricted to the managing organization, and of the provision for sanctions for non-compliance with what is established in the legislation. There is also a focus on the rigidity of the structure of the managing organization's internal organs that may bring excessive burdens to those who constitute an endowment fund.

Thus, the endowment funds as a source of parallel funding of public funding instead of a substitute one are aimed at ensuring sustainability to the supported institution, participating in the funding of specific programs and projects, such as research and extension scholarships. Moreover, considering the provision of constitutional source of specific funding regarding only basic education, it is possible to envision an alternative that strengthens the public funding of higher education through, for example, the creation of a specific constitutional fund for this

level of education, to the extent that it is the most affected one by the spending cap stipulated by the constitutional amendment number 95 of 2016.



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# THE PRINCIPLE OF EQUITABLE REPARATION (REFUND) IN THE INTERNATIONAL AIR TRANSPORT CONTRACT: REFLECTIONS ON THE SCOPE OF BREAKING THE PARADIGM OF INTEGRAL REPAIR IN BRAZILIAN LAW

## LE PRINCIPE DE RÉPARATION ÉQUITABLE (REMBOURSEMENT) DANS LE CONTRAT DE TRANSPORT AÉRIEN INTERNATIONAL: RÉFLEXIONS SUR LA PORTÉE DE LA VIOLATION DU PARADIGME DE LA RÉPARATION INTÉGRALE EN DROIT BRÉSILIEN

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## ABSTRACT

This article aims to study the application of the Montreal Convention from the decision rendered by the Federal Supreme Court in Extraordinary Appeal 636.331 - RJ. In this sense, it is relevant to highlight how the incidence of the 'principle of equitable reparation' (principle of restitution) represents a partial paradigm shift in the jurisprudence of the Brazilian Constitutional Court in relation to the application of the principle of full reparation.

**Keywords:** Transport. Air. International . Principles. Equitable Reparation. Full Repair. Defense. Consumer. Federal Court of Justice.

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**ABSTRACT**

*Cet article aimed at the application of the Convention of Montréal, on the basis of the decision rendered by the Cour Suprême Fédérale in extraordinaire appel 636.331 - RJ. En ce sens, il est pertinent de souligner comment l'incidence du principe de réparation équitable represents une rupture partielle de paradigm dans la jurisprudence de la Cour constitutionnelle brésilienne en ce qui concerns l'application du principe de réparation entégrale.*

**Mots-clés** *: Transport a érien . International. princes. Equitable reparation. Integral Rep aration . defense. Consommateur. Cour Suprême Fédérale.*

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# 1. INTRODUCTION

Before addressing the legal issue addressed in this study, it should be noted that air transport has registered significant growth in Brazil in recent years, with the exception, of course, of the Covid 19 Pandemic period.

According to data from the National Civil Aviation Agency, in 2017 alone, 112.5 million passengers were transported, of which 90.6 million on domestic flights and 21.8 million on international flights, with the inclusion of 49 million passengers in last 10 years. The average growth of passenger transport from 2008 to 2017 was 7.1% per year, therefore, 5.5 times greater than that seen in the Brazilian Gross Domestic Product (GDP) (ANAC, 2017).

This brief digression shows the macroeconomic relevance of the air sector, which explains the significant increase in lawsuits where flight delays and cancellations, lost luggage, among other failures in the provision of the aforementioned services are reported.

In this step, the country's jurisprudence until the year 2016, including within the scope of the Federal Supreme Court, had established the prevalence of the principle of full compensation for property and non-property damages, anchored in the principle of consumer protection, inscribed in item V. , article 170 of the Constitution of the Republic (BRASIL, 1988).

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The matter was returned for examination by the Federal Supreme Court, through Extraordinary Appeal 636.331 - RJ (BRASIL, 2018), revealing continuity of the jurisprudential discussion, with a tendency to change the understanding previously constructed regarding the application of the Warsaw and Montreal Conventions.

In this context, it is intended to present a study on the principle of equitable reparation in cases of liability of passenger air carriers, the application of the Warsaw and Montreal Conventions and their relation to the Consumer Protection Code (BRASIL, 1990). Thus, the hypothesis of preservation of the constitutional principle of consumer protection will be examined.

For the development of the work, the method will be the deductive, based on doctrinal research, jurisprudence and examination of constitutional and legal texts, for a better angulation of the subject.

Finally, this article will be structured starting, initially, from the understanding of constitutional civil law and what is meant by hermeneutic turn. Next, the context of globalization and air transport. Continuing, civil liability and the principle of full reparation will be studied, in the light of Brazilian doctrine and jurisprudence. Next, the focus will be on the principle of consumer protection in international air transport. In the conclusions, an attempt will be made to summarize the theme and our position.

With the elaboration of this article, it is expected to contribute to the discussion about reparation in the international air transport contract, and to a critical reflection on the need for adequate application of legal-constitutional principles and modern hermeneutics, in the construction of judicial decisions. , in the case of civil liability for the air passenger transport service.

## 2. CONSTITUTIONAL CIVIL LAW

As Fernando Whitaker da Cunha recalls, “Constitutional Civil Law focuses on the rules of Civil Law contained in the Constitution, despite every right, of course, finding its primordial sources, its “ tête de chapitre ” in the “Lex Magna”” (CUNHA, 1998, p. 228).

In this step, according to Teresa Negreiros, “The process of constitutionalization of civil law implies the replacement of its value center - instead of the individual comes the person”. And she concludes: “And where before, absolute individual freedom reigned, social solidarity gains meaning and legal force” (NEGREIROS, 2006, p. 11).

In this way, civil law, previously focused on its purely privatist character, where the autonomy of the will and the individualist character reigned, starts to receive, as a contribution of its constitutionalization, the emergence of a new evaluative conformation that shelters the principles of the dignity of the person, privacy and the social function of property, among others.

Thus, when it comes to civil, contractual and non-contractual liability, there are currently a series of constitutional provisions that will lead to the application of civil law, sometimes limiting the autonomy of the will, as is the case with the principle of consumer protection inserted in item XXXII, article 5, of the Constitution of the Republic (BRASIL, 1988).

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This new evaluative approach and principles of a legal-constitutional aspect was born, as will be seen below, with the overcoming of legal positivism, making an important contribution to the science of law.

## 3. OF THE HERMENEUTIC TURN

As Paulo Nader recalls, legal positivism was characterized by the law studied evaluatively, by the coercibility of the law as a source of law, by the imperative derived from state power and by the belief that the legal system would be endowed with completeness and coherence. In this scenario, the law was marked by a mechanistic interpretation, where the jurist would be able to declare the law without getting involved in creative processes (NADER, 2018, p. 226-227).

Nevertheless, in the legal community, especially after the second world war, there was a strong perception of disagreement with legal positivism, which had been used by authoritarian regimes such as Nazism and fascism to justify the atrocities that had once been practiced in strict legality.

Therefore, in Paulo Nader's view, the criticisms of Hans Kelsen's Pure Theory were not unreasonable, mainly because of the conception that the interpretation of law could be limited to the possible solutions provided for in the normative "frame" or that from which there was no need to seek teleological, axiological, historical or sociological subsidies for the application of the legal system (NADER, 2018, p. 252-253).

There was no room for an evaluative, aseptic right, whose claim to completeness was no longer sustained in the face of an increasingly complex society in its social and economic constitution.

This environment gave rise to the so-called hermeneutic turn from positivism to post-positivism, in which legal hermeneutics resumes its central place in the application of law, starting to contemplate, alongside constitutional and infraconstitutional legislation, the application of legal principles. This work has as its precursor the German jurist Josef Esser , with the publication in 1960 of the work "Principle and Norm in the Jurisprudential Elaboration of Private Law", says Juliana Magalhães (MAGALHÃES, 2005).

According to Juliana Neuenschwander Magalhães, it is with the hermeneutic turn that the process of overcoming the limits of legal formalism imposed by positivism begins, re-entering the legal discourse as central characteristics: hermeneutics at the center of legal discussions; the right not limited to normative positivity; the clarification of the role of values in the construction of law; placing the interpreter as a catalyst in overcoming the paradox established between law and society; and, still, the law as an interpretive practice that must find meaning in the context where it is applied (MAGALHÃES, 2005).

Opening modern hermeneutics, with a strong impact on the legal community, the philosophical production of Hans-Georg Gadamer is evident, especially in the Work Truth and Method, volumes I and II, published for the first time also in the fruitful year of 1960.

Josef Esser and Hans-Georg Gadamer were followed by several other jurists who began to dedicate themselves to legal principles, including Chaïm Perelman , Ronald Dworkin and Robert Alexy (SOARES, 2010, p. 56-57).

In this context, civil law, previously limited to the dogmatics of codifications, begins to receive the broad and profound impact of values and principles brought by the Constitutions, as Pietro Perlingieri emphasizes, when commenting on the advent of the 1948 Constitution on Italian civil law:

> The set of values, assets, interests that the legal system considers and privileges, and even its hierarchy, translate the type of system with which it operates. In the abstract, there is no legal system, but there are legal systems, each of which is characterized by a philosophy of life, that is, by values and fundamental principles that constitute its qualifying structure (PERLINGIERI, 2002, p. 5).

Perlingieri's doctrine, whose work was first published in 1975, remains current, by supporting the concept that each legal system seeks its anchor in the Constitution and values of a given society.

In contrast to this view, with the advent of globalization that began in the 1990s, there is an increase in situations where supranational law begins to produce significant impacts on the application of interstate law, such as, for example, in the regulation of international air transport.

Therefore, the present study is justified to clarify aspects related to the constitutional and interpretative parameters and limits so that the so-called transnational law can be applied to international passenger air transport contracts.

It is also relevant to appreciate the implications of the jurisprudence of the Federal Supreme Court on the subject, from the analysis of Extraordinary Appeal 636.331 - RJ (BRASIL, 2017), especially in a social fabric where the constitutional principle of consumer protection continues to have central relevance in the affirmation of constitutional principles and values.

## 4. GLOBALIZATION AND AIR TRANSPORT

It is necessary to understand, initially, what can be conceived as "globalization".

This is a controversial expression, according to an authoritative study by Boaventura de Souza Santos:

> Globalization is very difficult to define. Many definitions focus on the economy, that is, on the new world economy that emerged in the last two decades as a consequence of the dizzying intensification of the transnationalization of the production of goods and services and of the financial markets — a process through which multinational companies rose to a unprecedented pre-eminence as international actors. (SANTOS, 2001).

Regarding this reflection, Boaventura de Souza Santos (2001) defends that globalization and its definition is "more sensitive to social, political and cultural dimensions", therefore:

> What we usually call globalization are, in fact, differentiated sets of social relations; different sets of social relationships give rise to different phenomena of globalization. In these terms, there is not strictly a single entity called globalization; there are instead globalizations; strictly speaking, this term should only be used in the plural. Any broader concept must be procedural and not substantive. (SANTOS, 2001).

Asseveres Boaventura de Souza Santos, on the other hand, "as bundles of social relations, globalizations involve conflicts and, therefore, winners and losers". In Boaventura's summary: "Often, the discourse on globalization is the story of the winners told by themselves. In fact, the victory is apparently so absolute that the defeated end up disappearing completely from the scene" (SANTOS, 2001).

Despite the fragmentary character of the word "globalization", it is possible to find in Sygmunt Bauman the description of this phenomenon as if mirrored in the radiography of the weakening of the Constitutional State, in a society marked by the intensive use of information technology and consumption as a social value, in times that he does not call postmodernity, but 'liquid modernity'. What is observed in Bauman is the crisis of the State in the face of the expansion of demands arising from society in the face of a weakened State (BAUMAN, 2016).

In this context, it is relevant to resume in Boaventura de Souza Santos the approach of globalization as "the process by which a given condition or local entity manages to extend its influence to the entire globe and, in doing so, develops the ability to designate as local another social condition or rival entity" (SANTOS, 2001).

It is opportune to identify in legal hermeneutics whether the constitutional and infra-constitutional principles that structure contemporary civil law are being observed in internationalization processes, especially when segments of global economic activity are regulated, as is the case of air transport of cargo and passengers.

It is reminded that the Council of the European Union, in a decision of April 5, 2001, approved, within the scope of its Member States, the Montreal Convention of May 28, 1999.

In Brazil, in turn, the Montreal Convention was internalized a few years later, through Legislative Decree no. September 2006 (BRAZIL, 2006).

In this way, given the scenario of strong growth in international passenger air transport in Brazil, as already explained in the introduction, it is relevant to study, when talking about the Montreal Convention, whether the interpretation currently developed in the jurisprudence of the Federal Supreme Court allows the preservation of the other principles foreseen in the Brazilian legal and constitutional order, including from the perspective of the globalization process and, above all, the defense of consumer rights and contractual and extra-contractual civil liability.

## 5. CIVIL LIABILITY

It is therefore necessary to make a brief incursion into civil, contractual and non-contractual liability, before returning to the topic of international air transport.

According to César Fiuza:

> Legally, the term liability is usually linked to the fact that we are responsible for the acts we practice. It reveals, then, a duty, a commitment, a sanction, an imposition resulting from some act or fact (FIUZA, 2006).

In this step, civil liability can also be considered as a duty to recover the damage resulting from the violation of an original legal duty (HUSID, 2014).

As is well known, in light of article 186 of the Civil Code, for the configuration of civil liability, the following requirements must be present: voluntary action (due to negligence or imprudence); the damage (material or moral); and the causal nexus (Brasil, 2002).

It should be noted that article 186 of the Civil Code, as a general and not typological or closed clause, serves the law as a whole, gaining a polysemic sense, governing the most diverse types of prohibited behavior (STOCO, 2014, p. 182).

Hence, although not expressly mentioned in article 186, intent and malpractice can also be admitted as generators of civil liability.

## 5.1 CONTRACTUAL AND EXTRA-CONTRACTUAL CIVIL LIABILITY

The extra-contractual or aquilian civil liability is one that arises from the general duty to repair the damage resulting from any events where there was moral or material injury to someone.

Contractual will, in turn, be the civil liability arising from the breach of the obligations agreed by the parties that subscribe to a certain agreement.

With regard to the air transport of passengers and cargo, civil liability can arise both from the transport contract (example: passenger subject to unreasonable cancellation of the contracted flight) and from the law (example: third person, hit on the ground by fragments detached from of aircraft).

There is, therefore, in the scope of civil liability, a huge range of cases and situations to be covered by the legal protection of rights, especially when practiced by economic agents or large companies.

Hence the importance that the principle of full reparation had been receiving, in national law, as will be seen below.

## 5.2 THE PRINCIPLE OF COMPREHENSIVE REPAIR

In Brazilian law, the principle of full reparation is provided for in item VI, article 6, of the Consumer Protection Code (BRASIL, 1990) and in article 944 of the Civil Code (BRASIL, 2002).

As Mariana Morato Stival reminds us , “Article 944 of the Civil Code provides that compensation is measured by the extent of the damage”. It also asserts, “although part of the doctrine understands that the theory of the extent of damage was adopted, whose compensation must be fixed based on the losses suffered by the victim”, there is “a greater expansion of this protection, that is, the victim of the illicit act must be compensated for all losses incurred. From this perspective, there is the principle of full compensation for damages” (STIVAL, 2013, p. 155).

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In this regard, there are several decisions of the Federal Supreme Court, recognizing the embodiment of the principle of full reparation in article 944 of the Civil Code:

> DECISION EXTRAORDINARY APPEAL – FACTUAL MATTERS – INTERPRETATION OF LEGAL RULES – UNFEASIBLE – INTERLOCUTORY ISSUE. 1. The Superior Labor Court, confirming the understanding formalized in the judgment of the appeal for embargoes in a review appeal, determined the maintenance of the benefits provided for in the collective rule. In the extraordinary case whose transit it seeks to achieve, the appellant alleges violations of articles 5, item II, and 7, item XXVI, of the Federal Constitution. It contradicts the principle of legality and the one relating to the observance of the collective agreement. He claims that the collective norm limited the provision of the health plan to five years after retirement due to disability, as well as the payment of housing assistance for 12 months. Discusses the lack of legal provision for the granting of said benefits. 2. First of all, observe the moment of filing, for the purpose of enforcing the procedural rule. The publication of the decision by which the appeal is inadmissible is after March 18, 2016, the date on which the Civil Procedure Code becomes effective, and the filing of the grievance is governed by this legal diploma. The extraordinary recourse is different from that revealed by a simple review of the decision, most of the times proceeded through the resource par excellence – the appeal. It operates in an exceptional case in the light of the factual framework sovereignly outlined by the Court of origin, considering the premises contained in the contested act. The settled jurisprudence is peaceful in this regard, and the entry No. 279 of the Supreme Court's Precedent should be kept in mind: For a simple re-examination of evidence, there is no extraordinary appeal. I take from the appealed judgment the following excerpt: From the appealed order and the judgments on pages 1065-1099 and 112-1115, note that e. The 7th Panel settled the controversy in question based on two basic premises, namely, (1) that the disability retirement resulted from an occupational disease and (2) that, due to this particularity, the plaintiff would be entitled to the health plan for the duration of the perception of the social security benefit, due to the principle of full compensation, enshrined in article 944, caput, of the Civil Code. […] Thus, once the application of the collective rule limiting the benefit to retirees due to disability has been ruled out, there is no mention of misapplication, but in line with the aforementioned entry. The reasons for the extraordinary are based on factual assumptions foreign to the judgment under consideration, seeking, in short, to reexamine the probative elements in order, based on a different scenario, to establish the viability of the appeal. In addition to this aspect, the contested pronouncement reveals an interpretation of strictly legal norms, not giving rise to access to the Supreme Court. At the mercy of articulation on violence to the Charter of the Republic, it is intended to submit to analysis a matter that does not fit into item III of article 102 of the Federal Constitution. 3. I am aware of the grievance and I despise it. I set the appeal fees at the level of 5% of the value of the conviction, pursuant to article 85, § 11, of the Code of Civil Procedure. 4. Publish. Brasília, March 3, 2017. Justice MARCO AURÉLIO Rapporteur" - ARE 1027058 / PA - PARÁ EXTRAORDINARY APPEAL WITH INTERLOCUTORY Rapporteur( a): Min. MARCO AURÉLIO Judgment: 03/03/2017 Publication ELECTRONIC PROCESS DJe-048 DISCLOSURE 03/13 /2017 PUBLIC 03/14/2017 (BRAZIL, 2017).

The Superior Court of Justice had even admitted the prevalence of the application of the principle of full reparation provided for in article 944 of the Brazilian Civil Code in the face of the Warsaw Convention, according to the decision in " AgRg no REsp 1421155 / SP, STJ, rel. Minister Ricardo Villas Bôas Cueva, j. 4.12.2016 (BRAZIL, 2016).

However, upon the trial of Extraordinary Appeal 636.331 – RJ, the Federal Supreme Court would break with the aforementioned range of precedents.

Thus, as prior to the aforementioned decision, the principle of full compensation, provided for in item VI, article 6 of the Consumer Protection Code (BRASIL, 1990) and in article 944 of the Civil Code (BRASIL, 2002) had prevailed in international air transport contracts, it is relevant to analyze the scope of that decision, in particular, in view of the principle of restitution or equitable reparation provided for in Decree no. 5,910/2006 (BRASIL, 2006) which enacted the Montreal Convention in Brazil.

## 6. LIMITATIONS TO THE PRINCIPLE OF CONSUMER DEFENSE IN INTERNATIONAL AIR TRANSPORT

According to the provisions of item V, article 170 of the Constitution of the Republic:

> Art. 170. The economic order, founded on the valorization of human work and free initiative, aims to ensure a dignified existence for all, in accordance with the dictates of social justice, observing the following principles:
>
> [...]
>
> V - consumer protection... (BRAZIL, 1988).

It should be noted that the principle of consumer protection had already been recognized, several times as a structuring of the economic order, including by the Federal Supreme Court (ADI 4613 / DF, STF, rel. Minister. DIAS TOFFOLI, j. 9.20.2018) (BRAZIL , 2018).

There was, in the jurisprudence established by the Brazilian Constitutional Court, a perennial range of previous precedents, as mentioned, that guaranteed the prevalence of the principle of integral reparation, as a guaranteeing principle of the constitutional principle of consumer protection.

It so happens that after returning to the Federal Supreme Court the question regarding the scope of validity of article 178 of the Constitution of the Republic (BRASIL, 1988), partially reviewing the cited jurisprudence, the Court decided to give precedence to the parameters established by the Montreal Convention on the of Consumer Defense, thus removing the incidence of the principle of full reparation in cases involving civil liability covered by international air legislation.

In this sense, it is salutary to recover the grounds set out there in general repercussion in the judgment of Extraordinary Appeal 636.331 - RJ:

> General repercussion. Topic 210. Fixation of the thesis : " Pursuant to article 178 of the Constitution of the Republic, international norms and treaties limiting the liability of passenger air carriers, especially the Warsaw and Montreal Conventions, prevail in relation to the Defense Code of the Consumer ". 6. Concrete case. Judgment that applied the Consumer Defense Code. Indemnity greater than the limit provided for in art. 22 of the Warsaw Convention, as amended by later international agreements. Appealed decision reformed, to reduce the value of the conviction for material damage, limiting it to the level established in international law. 7. Appeal granted (ADI 4613 / DF, STF, Relating Minister. DIAS TOFFOLI, j. 9.20.2018) (BRAZIL, 2018).

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It is quite relevant to study, with some accuracy, the repercussions of that judgment, which in a less attentive reading could point to an extension of its effects not consistent with the legal foundations that led to its delivery.

Thus, it should be noted that in the votes cast, the Ministers themselves made clear the delimitation of the litigious object as restricted to cases of compensation for material damages for lost luggage, according to the clarifications provided by Minister Gilmar Mendes during the judgment of ADI 4613/DF :

> MINISTER MARCO AURÉLIO - As for moral damages, Your Excellency...
>
> MINISTER GILMAR MENDES (REPORTER) - This is not stated. I'm saying that the Warsaw Convention rule only deals with property damage.
>
> MINISTER MARCO AURÉLIO - Because there is, in the Court, precedent from 1996, of the Second Panel, and it was unanimous, after a request from Minister Francisco Rezek, in the sense that, in the case, prevails, from the angle of the moral damages, the Federal Constitution.
>
> MINISTER GILMAR MENDES (REPORTER) - We can reach the same conclusion. I am saying that the Convention did not discipline..." (BRASIL, 2018).

In a following dialogue, Justice Marco Aurélio again asked the rapporteur of ADI 4613/DF to clarify the fact that compensation for moral damages is not covered there:

> MINISTER MARCO AURÉLIO – President, just to provide a clarification, since I have separated Justice Gilmar Mendes, the object of extraordinary number 636.331 is unique: compensation for material damage, including the contents of the suitcase. Liability for moral damages is not at stake here.
>
> MINISTER GILMAR MENDES (RAPPORTEUR) - I made a point of making it clear, in any case, that the Convention only limits for material damage. Therefore, we do not... as Your Excellency had already signed. (BRAZIL, 2018).

Therefore, in the light of the debate held in the discussion of the aforementioned judgment, it can be concluded that although the prevalence of article 178 of the Constitution of the Republic (BRASIL, 1988) in relation to material damage caused by the loss of luggage is established, the prevalence of Constitution of 1988 and, therefore, of item V, article 170 of the aforementioned Diploma, in cases where matters not expressly regulated by the Warsaw Convention are discussed, as is the case of moral damages, expressly mentioned by the Ministers in the judgment of ADI 46/13 (BRAZIL, 2018).

In this step, the aforementioned precedent cannot be interpreted beyond the matter covered therein, that is, in cases of fixing compensation for material damage resulting from the loss of luggage on international flights.

It is also necessary to understand in what terms and situations the principle of equitable reparation is applied, in order to avoid, in the interpretation of the Montreal Convention, understandings that, by way of affirming it, end up going beyond its own terms.

## 6.1 THE PRINCIPLE OF EQUITABLE REMEDY

As in relation to material damages resulting from the loss of luggage, the Federal Supreme Court affirmed the non-prevalence of the Consumer Protection Code, it can be concluded that in these cases, as a rule, the principle of equitable restitution or restitution principle prevails, not adopting, in these cases, the principle of integral reparation.

This is because the principle of equitable reparation (compensation) or the principle of restitution expressly of the Warsaw Convention, enacted by Decree No. 5.910, of September 27, 2006: "RECOGNIZING the importance of ensuring the protection of the interests of users of international air transport and the need for equitable compensation, based on the principle of restitution; [...]" (BRAZIL, 2006).

It should be noted that, as a general rule, the aforementioned treaty did not encompass the principle of full compensation for damages caused to passengers or cargo transported, contenting itself with it as a matter of course, with equitable compensation for any damages suffered by the consumer.

It should be noted that one of the most expressive manifestations of this principle is the admission of compensation amounts, as extracted from items 1 and 2, article 22 of the Montreal Convention:

> Article 22 – Limits of Liability Relating to Delay of Baggage and Cargo 1. In case of damage caused by delay in the carriage of persons, as specified in Article 19, the liability of the carrier is limited to 4,150 Special Drawing Rights per passenger. 2. In the carriage of Baggage, the liability of the Carrier in the event of destruction, loss, damage or delay is limited to 1,000 Special Drawing Rights per passenger, unless the Passenger has made the Carrier, when delivering the Checked Baggage, a special declaration of the value of its delivery at the place of destination, and has paid an additional amount, if applicable. In this case, the carrier will be obliged to pay a sum that will not exceed the declared value, unless it proves that this value is greater than the actual value of delivery at the place of destination. 3. In the carriage of cargo, the liability of the carrier in the event of destruction, loss, damage or delay is limited to an amount of 17 Special Drawing Rights per kilogram, unless the shipper has made the carrier, when delivering the volume, a special declaration of the value of its delivery at the place of destination, and has paid an additional amount, if applicable. In this case, the carrier will be obliged to pay an amount that will not exceed the declared value, unless it proves that this value is greater than the actual value of delivery at the place of destination. 4. In the event of destruction, loss, damage or delay of a part of the cargo or any object it contains, in order to determine the amount that constitutes the limit of liability of the carrier, only the total weight of the package or packages will be taken into account. affected. However, when the destruction, loss , damage or delay of a part of the cargo or an object it contains affects the value of other packages included in the same air waybill, or in the same receipt or, if none of these documents has been issued , in the records kept by other means, mentioned in number 2 of Article 4, to determine the limit of liability, the total weight of such volumes will also be taken into account (BRASIL, 2006).

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The aforementioned regulation proves to be extremely unfavorable and, in many cases, disproportionate to the damage caused to the consumer. It is possible to identify, in this case, a certain tendency of contemporary constitutionalism to admit the flexibilization of rights in national legal systems, through the admission of the validity of transnational regulations to which the constitutional text itself confers this regulatory force.

This is the case of article 5, § 2 of the Constitution of the Republic, according to which "the rights and guarantees expressed in this Constitution do not exclude others arising from the regime and principles adopted by it, or from the international treaties in which the Federative Republic of Brazil be a part" (BRASIL, 1988).

The repercussions in the case of lost luggage are very relevant. This is because, even if the passenger on an international flight is carrying luggage with a value greater than the value charged in the aforementioned Convention, he will not be entitled to effective compensation for lost goods, that is, he must be satisfied with equitable, partial and incomplete compensation for the damages supported.

## 6.2 EXCEPTIONS TO THE EQUITABLE REMEDY PRINCIPLE

A less reflective reading of the judgment rendered in Extraordinary Appeal 636.331 – RJ already mentioned, could even cloud the view on cases in which the Montreal Convention itself does not support the principle of equitable redress.

According to article 22 of the Montreal Convention prescribes in item 5:

> 5. The provisions of numbers 1 and 2 of this Article shall not apply if it is proven that the damage is the result of an action or omission of the carrier or its agents, with the intention of causing damage, or recklessly and knowing that it would probably cause damage. , whenever, in the event of an act or omission of an agent, it is also proved that he was acting in the exercise of his functions. (BRAZIL, 2006).

A simple reading of item 5 of article 22 of the Montreal Convention (BRAZIL, 2006), allows us to perceive that it encompasses some exceptions to the pricing of values in items 1 and 2 that may occur when: a) there is an intention to cause damage; and b) the harmful act was likely due to a reckless omissive or commissioned attitude by an agent.

Unlike the hypotheses in items 1 to 4, of the same article 22 of the Montreal Convention (BRAZIL, 2006), in the cases discussed in item 5 transcribed, the existence of intent causes the tariff to cease so that the reparation can be fixed in order to refund full damages caused to the consumer.

Pricing is also ruled out when the company, already aware of the agent's reckless attitude or omission, knows the probability of damage and does not undertake to avoid it.

It takes into account the Montreal Convention (BRAZIL, 2006), in these last two cases, the ' severity of the fault ' to increase the amount of compensation. Here, therefore, the gravity of the fault is an element of guarantee of full reparation.

Just for the purposes of comparison, it is interesting to note that in Brazilian law, in the sole paragraph of article 944 of the Civil Code, the evaluation of this criterion was expressly admitted,

not for the increase, but specifically, for the reduction of the indemnity when disproportionate to the seriousness of the fault in relation to the damage:

> Art. 944. Indemnity is measured by the extent of the damage. Single paragraph. If there is an excessive disproportion between the gravity of the fault and the damage, the judge may equitably reduce the compensation. (BRAZIL, 2002)

The fact is that the decision of the Federal Supreme Court, in the context of Extraordinary Appeal 636.331 – RJ (BRASIL, 2017), already transcribed, does not seem to have exhausted the entire issue of civil liability arising from international air transport contracts, and a decision that addresses other relevant topics such as, for example, the case of air accidents with fatal victims and the establishment of values related to the compensation of moral damages resulting therefrom.

An important aspect, little commented on, pertains to the requirement of reciprocity in the treatment of air transport within the scope of other nations.

This requirement is expressed in the wording of article 178 of the Constitution of the Republic, with the following content: "The law shall provide for the ordering of air, water and land transport, and, regarding the ordering of international transport, it must observe the agreements signed by the Union, complied with the principle of reciprocity." (BRAZIL, 1988).

Thus, in light of the aforementioned precept, it is also possible to expect, in addition to what was decided in RE 636.331 - RJ (BRASIL, 2017), that the Federal Supreme Court will assess, in other cases, the requirement to comply with the requirement of reciprocity, especially in the implementation of another principle of paramount importance, such as the constitutional principle of consumer protection.

## 7. CONCLUSIONS

The average growth of passenger transport from 2008 to 2017 was 7.1% per year, therefore, 5.5 times greater than that seen in the Brazilian Gross Domestic Product (GDP), which was accompanied by a significant increase in lawsuits where delays, flight cancellations, lost luggage, among other failures in the provision of said services have been reported.

In this sense, it can be seen how the phenomenon of economic globalization has brought the need to deal with conflicts whose regulation is sometimes transnational, as in the case of passenger air transport.

This framework requires the courts to be able to harmonize constitutional legislation with treaties and norms of international law, in order to consider, in the cases under trial, the values and principles at stake, as well as the greater or lesser prevalence of one over the other in the cases under trial, including to avoid violating the constitutional principle of consumer protection.

The post-positivist modern hermeneutics, based on the consideration of constitutional principles and norms, can allow greater decision-making and qualitative coherence of judicial decisions, with a view to improving the effectiveness of judicial provisions.

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In the field of civil, contractual and non-contractual liability, arising from the provision of air services, a legal understanding was consolidating where the prevalence of the Consumer Protection Code, including the guarantee of full reparation for consumers and victims of injuries committed by carriers.

This position remains intact in the case of national and local air transport.

However, with regard to the international transport of passengers, with the judgment of the Extraordinary Repetitive Appeal 636.331 - RJ, this understanding was substantially changed, affirming the inapplicability of the Consumer Protection Code in the face of the provisions of the limiting international norms and treaties liability for the carriage of passengers by air.

However, there is a need to pay attention to the contours and limits of this judgment, whose general repercussion is limited to cases where material damages arising from the loss of luggage are discussed, not covering claims for compensation for moral damages and other matters not regulated in the Montreal Convention (BRAZIL, 2006).

With the judgment of RE 636.331 - RJ by the Federal Supreme Court, therefore, in cases of lost luggage, the principle of equitable reparation (equitable compensation) also known as the principle of restitution, which makes up the text of the Montreal Convention to the detriment of the principle of integral reparation, with the exception of two studied exceptions.

The first exception is when there is intent on the part of the airline to cause the loss or delay in delivery, and the second, when the harmful act was likely due to reckless omissiveness or commission by the carrier's agent.

In these two exceptions, the Montreal Convention itself, enacted in Brazil through Decree No. 5.910/2006 (BRASIL, 2006) allows full reparation by qualifying the gravity of the fault as a justification for full compensation.

It is important to clarify that article 178 of the Constitution of the Republic of 1988, the basis of the decision rendered by the Federal Supreme Court, could only prevail when the constitutional presupposition contained therein of the existence of reciprocity in relation to the other signatory nations of the conventional acts of international law is fulfilled.

It is therefore expected that the prevalence of the Montreal Convention (BRAZIL, 2006) will not be admitted by national jurisprudence, when the requirement of reciprocity is not met or when other constitutional principles, such as the principle of consumer protection, are disproportionately affected.

In this sense, the proper application of legal-constitutional principles and modern hermeneutics, in the construction of judicial decisions, proves to be important in preserving the principle of consumer protection inserted in article 170, item V of the Constitution of the Republic (BRASIL, 1988), since it is possible, including, in this case, the weighting of values in relation to the rule of article 178 of the same Legal Diploma.

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# TRANSFER OF SENTENCED PEOPLE (TSP) AS AN INSTRUMENT FOR THE PROTECTION OF HUMAN RIGHTS: AN ANALYSIS OF THE PRISON OF FOREIGNERS IN AMAZONAS IN THE LIGHT OF TRANSNATIONAL LAW

## A TRANSFERÊNCIA DE PESSOAS CONDENADAS (TPC) COMO INSTRUMENTO DE PROTEÇÃO DE DIREITOS HUMANOS: UMA ANÁLISE DA PRISÃO DE ESTRANGEIROS NO AMAZONAS À LUZ DO DIREITO TRANSNACIONAL

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## ABSTRACT

The procedure for the transfer of sentenced persons is a legal mechanism provided for by the Migration Law on a humanitarian basis and its objective is to allow persons who have been definitively sentenced in another State to serve their sentence in the country of their nationality or residence. The question to be answered by this research is: how can this institute contribute to the protection of foreign prisoners? Thus, the objective of this article is to investigate this instrument of international cooperation, verifying its potentialities in the light of Transnational Law. The aim is to assess the possibility of using it to protect the human rights of foreign-

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ers imprisoned in Brazil, more specifically, in the state of Amazonas. To do so, the deductive method will be used, starting with a bibliographical review of general themes such as Transnational Law, protection of human rights and the very concept of the "Transfer of Convicted Persons" institute, in view of the problem formulated. As a source of quantitative observation, statistical data, collected by the National Penitentiary Department within the state of Amazonas in the period between July and December 2019 (last census conducted), and the provenance of foreigners arrested in the specified geographic area will also be used, given its location in a border region. All this to verify the feasibility of adopting the measure of Transfer of Convicted Persons as an aggregator mechanism for both regional prison public policies and in the aspect of protecting the human rights of foreign prisoners.

**Keywords:** Transnational Law; Penitentiary System; Foreigners; Transfer of Convicted Persons.

## RESUMO

*O procedimento de Transferência de Pessoas Condenadas (TPC) é mecanismo legal previsto na Lei de Migração, com base humanitária, e que visa permitir que pessoas condenadas definitivamente em Estado diverso possam cumprir pena no país de sua nacionalidade ou residência. A questão a ser respondida, todavia, é: como tal instituto pode contribuir para a tutela de indivíduos estrangeiros presos? O objetivo do presente artigo, assim, é investigar o referido instrumento de cooperação internacional, verificando suas potencialidades à luz do Direito Transnacional, para aferir a possibilidade de sua utilização como proteção de direitos humanos dos estrangeiros presos no Brasil e, mais especificamente, no Estado do Amazonas. Para tanto, far-se-á uso do método dedutivo, partindo-se da revisão bibliográfica de temas gerais como o Direito Transnacional, proteção de direitos humanos e do próprio conceito do instituto "Transferência de Pessoas Condenadas", para alcançar as repostas para o problema formulado. Utilizar-se-á também dados estatísticos coletados pelo Departamento Penitenciário Nacional no âmbito do estado do Amazonas, no período compreendido entre julho a dezembro de 2019 (último censo realizado), como forma de observação quantitativa e da proveniência de estrangeiros presos no recorte geográfico especificado, dada a sua localização em região de fronteira. Tudo isso para, ao fim, se alcançar como resultado a viabilidade da adoção da medida de Transferência de Pessoas Condenadas como mecanismo agregador tanto para as políticas públicas penitenciárias regionais, mas, principalmente, no aspecto de proteção aos direitos humanos dos presos estrangeiros.*

**Palavras-chave:** *Direito Transnacional; Sistema Penitenciário; Estrangeiros; Transferência de Pessoas Condenadas.*

# 1. INTRODUÇÃO

When a person is sentenced to imprisonment by the State in its judicial capacity it emerges a State obligation to provide the minimum elements for the maintenance of basic needs such as food, lodging, health, education, professional training, religiosity and any others that do not conflict with the nature of the sentence's execution and that allow social reintegration at the end of the term of the sentence.

However, in States like Brazil, where the most basic social rights have always been denied to large portions of the population, "prison has been consolidated as a form of punishment par excellence without ever fully providing for the most basic needs of the population it incarcerates" (GODOI, 2015, p. 135).

Nevertheless, it is necessary to keep in mind that the prisoner does not lose the quality of human being, who is subject of rights and, more than ever, needs the State protection and provision to subsist.

Considering the precarious conditions under which sentenced Brazilians are imprisoned[4], the situation of foreign citizens imprisoned is even worse.

Factors such as language, culture, lack of a fixed residence, lack of training for the development of labor activities after serving the sentence, distance from family members, are just some of the problems that make the re-socialization process of this person even more difficult.

In this scenario, a mechanism for international cooperation in criminal matters has arisen and seeks precisely to give greater humanity to the sentences served by foreigners. It is the Transfer of Sentenced Persons.

This is the main purpose of this article, which aims to analyze the applicability of the institute, verifying its potentialities in the light of Transnational Law, to assess the possibility of its use to protect the human rights of imprisoned foreigners.

In this way, it will be possible to verify how the humanitarian procedure for the transfer of sentenced persons can contribute to the guarantee of human rights for foreigners imprisoned in Brazil and to the improvement of prison management in the state of Amazonas and may represent a tool for reducing prison overpopulation.

This is done from the perspective of Transnational Law because, as it will be shown, international cooperation on human rights, especially in the case of prisoners, requires an analysis beyond domestic law and international law.

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## 2. UNDERSTANDING TRANSNATIONAL LAW

The approach to Transnational Law requires a brief review of the concepts of globalization and transnationality. This is necessary because, although they have different definitions, they are closely related and complement each other.

Once the relevant considerations on the concepts in question have been presented, some possible applications of Transnational Law will also be demonstrated, as an example, but which will allow us to understand, in extension and depth, how this branch of law can contribute to the protection of other rights, among which human rights are particularly relevant.

### 2.1 GLOBALIZATION, TRANSNATIONALITY AND TRANSNATIONAL LAW

Although it appeared in the 1980s (THERBORN, 2001), the expression globalization represents a much older phenomenon, dating back to the 15th and 16th centuries, when Europeans began the process of maritime colonial expansion. Thus, it is possible to realize that globalization is not a sudden and consolidated fact, but a gradual integration process that is constantly expanding (SILVA; LOPES JUNIOR, 2008).

4 Cezar Roberto Bitencourt (2004) has long been describing the crisis of prison sentencing, listing among other problems the following: prison overpopulation; lack of hygiene; poor working conditions; deficient medical and health care; malnutrition; high drug consumption; and sexual abuse.

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According to the lessons from the German sociologist Ulrich Beck (1999), the phenomenon of globalization unfolds from the dissemination of technological advances, especially after the second half of the twentieth century, spreading widely throughout the world after the end of the Cold War. Thus, the author explains that:

> Globalization means the everyday experience of borderless action in the dimensions of economy, information, ecology, technology, cross-cultural conflicts and civil society, (...) which transforms everyday life with undeniable violence and forces everyone to accommodate its presence and provide response (BECK, 1999, p. 47).

This increasingly intense and integrated global situation, however, is not compatible with principles and rules that are limited to dealing with conflict and dispute issues between the various States, typical of classical international legal relations. On the other hand there is an increasing demand for solidarity and cooperation relations, typical of transnationality.

In this regard, Ulrich Beck (1999) identifies the theme of social organization in the historical context of the late 1980s and early 1990s. He explains that society, increasingly connected and globalized by capitalist hegemony since 1989, lives in a new world, a kind of uninvestigated continent that opens up to a transnational no-man's land, that is, an intermediate space between the national and the local. Therefore, in this context, discussions about transnationality and Transnational Law begin.

Faced with the need for answers and elements of understanding that are compatible with current demands, the models based on national and international law that have existed up to now are no longer sufficient to regulate the complexity of existing and future social relations.

Explaining what the idea of transnationality would be, Gustavo Lins Ribeiro (1997) teaches that its fundamentals derive from the idea of globalization, but with emphasis on the relationship between territories and the different social, cultural and political arrangements that guide the way individuals represent belonging to social, cultural, political, and economic units.

Also, according to this author, discussing transnationality implies raising the possibility of changing conceptions about citizenship, aiming to create a clear sensibility and responsibility regarding the effects of political and economic actions in a globalized world (RIBEIRO, 1997).

As reported by Ojeda Avilés (2013), the outlines for the emergence of a new transnational order, and, therefore, of a Transnational Law, are thus being outlined: (i) the hidden conflict between the State and the Market, that is, between the public and the private (the horizontal power of large multinational companies has come to compete with the vertical power of governments and to take advantage of their international status to overcome both local governments and also workers' entities, in a phenomenon known as the privatization of international relations); (ii) the occurrence of disasters on a global scale, whose responsibility can be attributed to multinational companies (for example: Bhopal leak[5] ; Exxon Valdez ship[6]; among others); (iii) a wide variety of normative production by those involved in the transnational scenario, for

5 Leak in Bhopal (1984): A leak at a pesticide plant released more than 40 tons of toxic gases into the air in the city of Bhopal, India. After the accident, the company abandoned the site, and more than 2,000 people died from contact with the lethal substances, and others suffered burns to their eyes and lungs. (UNION CARBIDE CORPORATION, 2019).

6 Exxon Valdez ship (1989): the tanker collided with submerged rocks off the coast of Alaska and started an unprecedented spill (about 40 million liters of oil), contaminating more than two thousand kilometers of beaches and causing the death of one hundred thousand birds (GONÇALVES, 2017).

example private regulations, arbitration awards, collective agreements, etc., which dispute and many conflict with national legal norms and international treaties.

A pioneer in the matter, Phillip C. Jessup, through the work entitled Transnational Law (1965), in the context of the globalization and transnationality scenario, coined the term and gave the first outlines of what would be the Transnational Law.

According to the author, International Law no longer contained all the issues related to the problems of the world community, which is why the new relationships arising from globalization would be the content of Transnational Law. The concept of this new branch of law would encompass the set of rules regulating acts or facts that transcend national borders, and such situations may involve individuals, companies, States, organizations of States or any other groups (JESSUP, 1965).

In a further theoretical development, Detlev Vagts (1986) clarified that Transnational Law has three characterizing elements: 1) Subjects that transcend national borders; 2) Subjects that do not bear a clear distinction between public and private law; 3) Subjects that bear open and flexible sources, such as soft law[7].

Still about the definition, Harold Hongju Koh (2006), a follower of Vagts, teaches that Transnational Law is a hybrid between domestic and international law, of crucial importance in the life of contemporary societies. For the author, it is through Transnational Law that one can allow: the incorporation of rules of International Law into domestic law (as in the case of Human Rights); the inverse procedure, that is, the replication of a rule of domestic law of a given country in International Law (with the making of a trade regulation treaty, for example); the horizontal exchange of knowledge between States, copying successful experiences from one domestic system to another.

After these considerations, it is possible to synthesize what has been discussed through the concept of Antonio O. Avilés (2013) for Transnational Law adopted in this article: it is a set of rules that regulates the relations between subjects without empire and with transnational transcendence[8].

Therefore, the study of transnationality and Transnational Law are of great importance in the contemporary world, to the extent that legal science demands the realization of studies that contemplate the evolution of the globalized world society, in the face of changes brought about by the phenomenon of transnationalization and new situations previously neither experienced nor imagined (PIFFER; CRUZ, 2018).

7 Expression used in the scope of International Public Law that designates the international text, under various names, that are not legally binding on the signatories. They are, therefore, optional, unlike jus cogens, which are cogent norms. In turn, they are also known as *droit doux* (flexible law) or even soft norm. According to Valério de Oliveira Mazzuoli, "it can be said that in its modern sense, it comprises all rules whose normative value is less constraining than that of traditional legal norms, either because the instruments that house them do not hold the status of 'legal norm', or because their provisions, although included in the context of binding instruments, do not create positive law obligations for States, or only weakly constraining obligations. (MAZZUOLI, 2015, p. 184-185). Examples of normative acts that enshrine the soft law: arbitration awards, private regulations, collective agreements, uses and customs.

8 For Avilés (2013), this definition encompasses the following three elements: a) it refers to horizontal contents, including the private relations of public entities or the rights to provide benefits before such entities; b) regulated by normative sources of all kinds, not only public ones: laws, treaties, arbitration awards, collective agreements and contracts, uses and customs, and even business decisions and practices of a regulatory nature are part of this branch of Law; c) supranational transcendence in any of the elements is determinant, as otherwise it does not acquire the appropriate dimension.

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The conditions and novelties of the globalized world also reflect directly in the context of criminal prosecution and execution, and transnational law has mechanisms and instruments to add to international cooperation in favor of human rights, in general, and of prisoners.

First, however, it is worth briefly highlighting some other applications of Transnational Law.

## 2.2 APPLICATIONS OF TRANSNATIONAL LAW

Transnationality and Transnational Law manifest themselves in the daily lives of individuals, companies and States, as it has been demonstrated. The following objects will be taken as examples of its application: the European Union; Sports Law; environmental protection.

This is expected to open the horizon of application of transnational theories and to understand the scope of Transnational Law, so that it can then be used in the protection of human rights.

### 2.2.1 EUROPEAN UNION (EU)

The European Union is an arena of important transnational developments and arguably where transnational law has reached levels of development not yet seen in other parts of the world. It consists of an economic and political union of 27 independent member States situated in Europe. It was established in 1992 by the Maastricht Treaty and its legal nature is that of a *sui generis* international organization, an intergovernmental community that is similar to the organizational formulas of national States (PIFFER, 2014).

The States that comprise the European Union transfer portions of their sovereignty to the Organization to deal with issues that are considered common to all members, such as monetary policy, immigration policy, and the environment, in order to jointly achieve common objectives, namely: to ensure the free movement of people, goods, services, and capital between member countries.

The European Union, here understood as an intergovernmental community, has its own institutional apparatus, notably the European Commission, the Council of the European Union, the European Council, the Court of Justice of the European Union, and the European Central Bank. The European Parliament is elected every five years by the citizens of the European Union.

Finally, from a normative perspective, the European Union is constituted by its own autonomous legal system (constituted by several treaties) regarding to the national systems, but in close connection with them, since it is realized (made concrete), in part, through the national institutions, in a cooperative relationship.

Thus, the European Union integration process itself has characteristics of transnationality, being, in the view of Joana Stelzer (2011), a reference of an organization that goes beyond the territorial limits of the States, having a legal model that is not limited to borders.

### 2.2.2 SPORTS LAW

The Sports Law also attracts attention for its evident transnationality due to its notable public relevance. Although it had been treated as a secondary activity until the end of World War II, after this troubled period, it began to have public relevance, and even gradually provided for by the Constitutional Charter as an obligation of the State (MIRANDA, 2011).

According to Martinho Neves Miranda (2011), the various international competitions and the Olympic Games, along with globalization, have driven sports to figure in the world legal scene. However, it lacks a unified regulation with the adherence of the States to the guidelines established by the sports institutions, in a universal way.

Among the prominent institutions that belong to the complex institutional structure that involves the world sport, it is the International Olympic Committee (IOC), created on June 23, 1894, being considered the most important world sports association. Its autonomy is evidenced before the prohibition for any of its members, in accepting from the government, organizations or third parties, any kind of interference in the freedom of action and vote (PIFFER; CRUZ, 2018).

The International Federations of various sports, the National Olympic Committees, and the Arbitration and Sports Courts also belong to this huge and complex system in the sports world.

These organizations and their own regulations demand that the Sports Courts acts based on rules and regulations originated in the structures of world sports. This highlights the transnational character that goes beyond any rules of domestic law, creating a criterion of exclusion of the State judicial pathway regarding specific issues of competitions, provided, of course, that do not interferes in other branches of law.

### 2.2.3 ENVIRONMENT

Among so many other cases of Transnational Law applicability the environment is the third and last example selected before analyzing human rights.

The transnationality of environmental issues is demonstrated by the relationship of development between ecosystems and life all over the planet, making it manifestly impossible to implement an effective protection restricted to a certain country or a delimited territory based on an outdated modern concept of sovereignty.

This happens because injuries to the environment that affect the collectivity, cross borders, alter the climate balance, affect current and future generations and the entire community of life, go beyond the territorial limits of states (PIFFER; CRUZ, 2018).

The issue is so relevant that Arnaldo Miglino (2011) foresees the ecological problem as the one that will probably lead to the creation of a transnational power center, overcoming the ideology and legal structure of international relations. For the author, the need for transnational regulatory instruments is urgent to restore the ecological and climatic balance since all the law and international organizations are incapable of appropriately disciplining such problems.

The creation of institutional mechanisms to ensure the effective materialization of solidarity and cooperation is, as argued by the author, considered necessary. It is also mentioned

that this need is not only in the environmental field, but also in other diverse manifestations of transnationality, especially when human rights are involved, as it will be demonstrated below.

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## 3. INMATES' HUMAN RIGHTS

The expressions "human rights" and "fundamental rights" are used as synonyms by some authors, at least with regard to their material content. Despite the objective of the present research, it is relevant to mention the relationship between human rights and international law, since these are the legal arrangements that recognize the human being as an object, regardless of any link with the constitutional order of the States, being, therefore, valid supranationally. The Fundamental Rights, on the other hand, would be the rights of the human being recognized and positivized in the constitutional sphere of a State.

As discussed in the previous topic, this incorporation of domestic rights into the international sphere, and the opposite, is particular to Transnational Law, also encompassing Human Rights.

Therefore, the human rights will be analyzed from the perspective of transnationality, and then, the issue of those persons deprived of their freedom addressed.

### 3.1 THE TRANSNATIONALITY OF HUMAN RIGHTS

After the end of World War II and the discovery of the horrors perpetrated by Nazi fascism, notably the massacre of millions of human beings for reasons of eugenicist policy, such as the holocaust of the Jews in concentration camps, the international community realized the need to establish legal rules for the protection of human rights, so that such events would not be repeated. Thus, the branch of international human rights emerged with the establishment of several international treaties, as well as the institution of international courts for the prosecution and trial of those accused of violating these standards (PIFFER; CRUZ, 2018).

Among the numerous international treaties signed in the post-war period, the following deserve special mention: (i) Convention for the Prevention and Punishment of Genocide(1948); (ii) International Convention on the Elimination of All Forms of Racial Discrimination (1965); (iii) International Covenant on Civil and Political Rights (1966); (iv) International Covenant on Economic, Social and Cultural Rights (1966); (v) Convention on the Rights of the Child (1989); (vi) Comprehensive Nuclear-Test-Ban Treaty (1996); (vii) International Convention for the Suppression of the Financing of Terrorism (1999).

Among the competent courts for the enforcement of international rules, the International Court of Justice, the International Criminal Court, the Court of Justice of the European Union, and the Inter-American Court of Human Rights, besides others, are worthy of attention.

However, the great challenge faced in the enforcement of human rights in transnational terms is the consideration of the concept of sovereign states. However, the disregard of the transnational characteristic of the Human Rights theme restricts countless possibilities for the protection and recognition of these rights (PIFFER; CRUZ, 2018).

For Piffer and Cruz (2018), this is how Transnational Law can be seen as an important instrument for the protection of human rights, especially when issues such as non-discrimination, migrants, and other transnational social actors who need the protection and enforcement of their rights because they are human beings are at stake.

Protecting human rights, sometimes not even constitutionalized, demands a concomitantly positive (provision) and negative (defense) approach from States. The deficient performance of countries in the protection of such rights, whether by ignoring them or by not providing the existential minimum, generates damages that go beyond the territorial limits of a country.

When it comes to diffuse rights, the transnationality of the issue is even more latent, since it is not known exactly where their holders are located, what the conditions of aggression are or who should be protected (GARCIA, 2011). Thus, only through transnationality it is possible to guarantee some effectiveness to this class of rights.

Thus, once the pertinence of the analysis of human rights from a transnational perspective is demonstrated, the discussion about the guarantee of human rights for prisoners follows, given the vulnerability of this group, which can be even greater in the case of foreign prisoners.

## 3.2 RIGHTS OF INMATE

At this point of the discussion, we must address something obvious from a legal point of view but forgotten (or neglected) from a political-social point of view: the rights constitutionally guaranteed to any citizen, *uti cives*, in the words of Jason Albergaria (1987), also remain with the imprisoned, except those expressly or necessarily mitigated by law or sentence.

This is because a conviction does not remove from a prisoner his or her quality as a human being with legal rights and guarantees, except, of course, for those expressly lost or limited by the sentence (such as freedom of movement) as mentioned above.

The Federal Constitution reserves its fundamental rights to all, indistinctly, and not only to individuals at liberty.

In this regard the Criminal Enforcement Law states that all rights not affected by the sentence or the law shall be assured to the convicted and the inmate (article 3). Similarly, article 38 of the Penal Code establishes that the prisoner retains all rights not affected by the loss of freedom.

Thus, only the rights related to the free locomotion of the prisoner would be suspended during the completion of the sentence and only in the case of closed regime. Suppress from the prisoner other rights unrelated to the freedom of locomotion would be to apply an additional penalty not provided by law (MIRABETE, 2017).

For this reason Edmundo de Oliveira (1980) is emphatic when he states that the condition of the condemned man cannot be underestimated by prison life and the loss of some of his rights cannot mean a civil death.

Thus, it is evident that the list of rights provided by article 41 of the Criminal Enforcement Law is not exhaustive.

Still citing Albergaria (1987), it should be noted that the Statute of Criminal Enforcement, when listing these rights in its articles, is highlighting them, not excluding other rights guaranteed

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in other legislation, especially the fundamental human rights constitutionally provided. This is what the author calls "prison rights", which correspond to the obligations of the Penitentiary Administration, provided in the form of assistance.

Therefore, the convicted person in prison and serving his sentence not only has duties but is also the subject of rights that will have to be recognized and supported by the State and the international, or even transnational, community.

Thus, the condition of citizen of the imprisoned person must be recognized, guaranteeing them all the fundamental rights, arising from human nature itself (as long as they are not limited by the sentence).

There is, however, a significant disparity between the legal treatment given to prisoners and the social-political reality in prisons.

This occurs, in particular, because the marginalization of the imprisoned person is increasing, keeping them away not only from the social life that is typical of deprivation of liberty, but also, many times, from their condition as citizens with rights and dignity.

Ana Gabriela Mendes Braga (2014, p. 73), indicates that "the absence of identification with the person imprisoned and of recognition of them as an equal, makes their suffering invisible in the eyes of society.

In the same vein, Garland:

> [...] the public does not listen to the anguish of prisoners and their families, because the discourse of the media and popular criminology shows criminals as 'different', and less than fully human [...] the conflict between civilized sensibilities and the often brutal routine of punishment is minimized and made more tolerable. Modern punishment is then institutionally ordered and represented by a discourse that denies the inherent violence of its practices" (Free translation). (GARLAND, 1990, p. 243)

Common sense considers incarceration as the solution to criminality. It is forgotten, however, that imprisonment, by itself, does not rehabilitate, and can contribute to the prisoner's return to society unproductive, idle, and marginalized, as an egress prone to criminal recidivism.

Based on this, Ana Gabriela Mendes Braga (2014) emphasizes the need for society's concern with the reinsertion of the prison system's egresses, insofar as the segregationism represented by the prison walls further distances the conditions for readaptation after life in prison.

This social reintegration presupposes, therefore, a sentence that, when served, respects the prisoner as a human being and that can help him, providing him with favorable conditions to return to harmonious social life, keeping them away from the practice of crime.

In this regard, Vitor Gonçalves Machado argues that resocialization:

> is aimed at the idea of humanization, consisting of a model where the prisoner is provided with the essential conditions and means for his effective reintegration into society, avoiding, at the same time, recidivism. The resocializing goal is to neutralize the harmful effects acquired especially during the execution of the prison sentence, so as not to stigmatize the prisoner. It suggests, therefore, a positive intervention in this in order to enable him to integrate and participate, with dignity and actively, in society, without trauma and limitations. (MACHADO, 2014, p. 1)

Social reintegration is, therefore,among many others, a right of imprisoned citizens who, as such, use work, study, or any other available programs to support their safe social return, characterized by respect for the human dignity of offenders and the active participation of the community in this process (FELBERG, 2015).

Furthermore, if the recognition of the rights of the prisoner is doubtful, as to the foreign convict serving time in Brazil, the issue is even more complicated.

Imprisonment in a place other than your country of birth or residence tends to represent an extra obstacle to one of the main functions of the penalty: effective resocialization.

This is mainly, in addition to difficulties such as language and culture, there are constitutionally provided rights that, although they constitute fundamental rights, do not reach foreigners, but only nationals.

For example, it is worth noting that some judges do not grant foreign prisoners the progression of the penalty to a more beneficial regime or conditional release, based on the risk of escape of these prisoners, because they have no home in the country. In this sense, the following judgment of the Court of Mato Grosso in the HC 14.214/2009:

> [...] The progression of regime is forbidden to foreigners in irregular situation, convicted of drug trafficking, if there is a process of deportation from the national territory in development and if he does not demonstrate to have a fixed residence in Brazil, thus avoiding the frustration of the penal execution [...]

Thus, it does not seem there are many practical guarantees as to the possibility of the foreign prisoners in Brazil receiving a sentence governed by the progressive system, focused on re-socialization and avoiding recidivism, especially since, away from their country and their family, the basic element that is social reintegration is missing.

The concern about the issue, it should be emphasized, needs to be greater than the internal legal order of a country, since it involves a matter as seen, of human rights.

Fortunately, in Brazil, there is a mechanism that can contribute a lot to tackle the problem, as it will be seen in the following item.

## 4. THE TRANSFER OF SENTENCED PERSONS AS AN INSTRUMENT OF HUMANITARIAN PROTECTION FOR FOREIGNERS IMPRISONED IN AMAZONAS

The instrument of international legal cooperation in criminal matters known as “Transfer of Sentenced Persons (TSP)” is a useful object for the analysis of the concepts studied in this research. It happens because the protection of the human dignity of the prisoner and the preservation of their fundamental rights are necessary.

This chapter aims to analyze the procedure of Transfer of Convicted Persons, after observing data from the prison system in the state of Amazonas regarding the number and origin of foreign prisoners, in order to identify the possibility of its use for the transnational protection of prisoners’ rights.

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It was decided to reduce the sample of foreign prisoners to the prison population in custody in the State of Amazonas: first, for a matter of regionalization of the discussion in the present article; second, due to the greater accuracy in the statistical data collected by the National Penitentiary Department in that geographic area, in the period from July to December 2019 (last census conducted); and third, due to the proximity of the State of Amazonas with the Brazilian territorial limits and, consequently, with border countries, being common the processing, conviction and incarceration of foreigners for crimes committed in the state.

Therefore, some numbers about the Amazon prison system started to be analyzed.

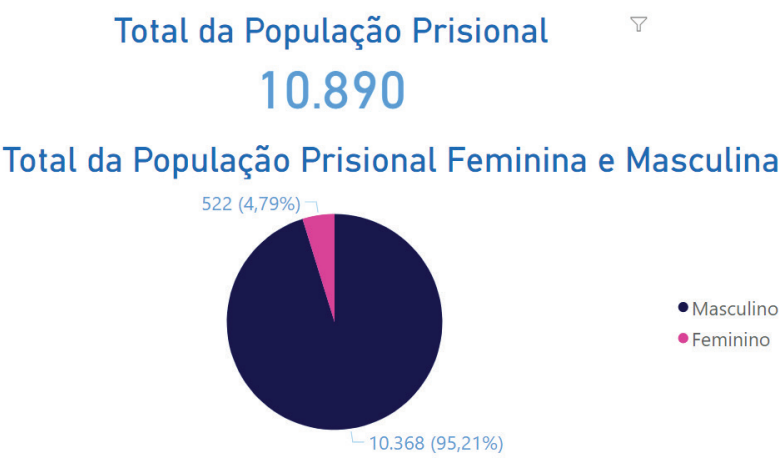
## 4.1 THE FOREIGN POPULATION IN THE AMAZONIAN PRISON SYSTEM IN NUMBERS

The prison population in Amazonas, according to the most recent Analytical Report of the Survey of Penitentiary Information (INFOPEN[9]) - which compiles data collected from July to December 2019 -, is 12,069 (twelve thousand and sixty-nine) prisoners, being 10,890 (ten thousand, eight hundred and ninety) in custody in the penitentiary system and another 1,179 (one thousand, one hundred and seventy-nine) deprived of freedom in other prisons linked to the Public Security agencies (Judicial Police Stations and Police Battalions and Military Firefighters).

For the purposes of this article, the custodial prison population analyzed will be, exclusively, that of the Amazon prison system, since this was the database used in the graphic analysis of the National Penitentiary Department itself, in the aforementioned time frame (July to December 2019) [10].

Thus, once the parameters and cuts of the collected data have been established, the analysis of these 10,890 (ten thousand, eight hundred and ninety) prisoners in the Amazon penitentiary system will be carried out, which, as to gender, can be represented in the following chart:

**Graph** 1 **– Prison population in Amazonas**




Source: Infopen/ Jul.-Dec.2019

9 Statistical information system of the Brazilian penitentiary system, under the responsibility of the National Penitentiary Department – an agency subordinated to the Ministry of Justice and Public Safety.

10 In Brazil, the number of prisoners according to the same analytical report is 755,274 (seven hundred and fifty-five thousand, two hundred and twenty-four).

Although the number of prisoners is significant, the situation is even more worrisome when the number of vacancies officially existing in the state is verified. It happens because, according to the survey of the analytical report of INFOPEN (2019), there are, in Amazonas, 3,511 (three thousand, five hundred and eleven) vacancies, which means an average of 1 vacancy for each 3.1 prisoners.

In other words, the prison system in the State of Amazonas is overcrowded, with a deficit of 7,379 (seven thousand, three hundred and seventy-nine) vacancies.

Due to the high rate of overcrowding, the number of foreign prisoners seems to be small, since, of the total number of prisoners, there are 127 (one hundred and twenty-seven) individuals from other countries, 103 (one hundred and three) men and 24 (twenty-four) women. Also, the majority among the foreigners arrested in the state of Amazonas are Colombians, Venezuelans, and Peruvians.

The data mentioned above should be considered.

The number of incarcerated foreigners in brazil is about 1% of the prison population in the country. However, these prisoners fulfill their sentences in a prison system in a chaotic state and whose sentences tend to be more sacrificial, as it will be seen below.

Furthermore, the positive impact that the transfer of more than a hundred prisoners can have on the administration of the Amazon prison system, which is constantly trying to reduce incarceration and restructure public prison policies, should not be minimized.

Thus, as it will be shown, the procedures of Transfer of Convicted Persons is not the solution to the problem of prison administration in the state of Amazonas. However, it can aggregate a lot to the regional public prison policies, but, mainly, in the aspect of protection to the human rights of the prisoners.

## 4.2 THE TRANSFER OF SENTENCED PERSONS PROCEDURE (TSP)

Extradition is the first institute to be considered when thinking about international legal cooperation in regard to prisoner migration.

This is an act of cooperation that consists in the surrender of a person, investigated, prosecuted or convicted of one or more crimes, to the country that requests it, and is not admitted for purely administrative, civil or tax cases. (DEL'OLMO; KÄMPF, 2011).

This institute aims to restrict freedom and enable the surrender of people who are outside the borders of a State that prosecutes or convicts them, based on the principle of universal justice. Nowadays, in Brazil, this institute is regulated by law number 13.445 of 2017 (establishing the Migration law).

Extradition has, therefore, a more repressive character, aiming precisely to prevent migratory initiatives from hindering the sovereign States' duty-power to punish (MUZZI, 2017).

The Transfer of Sentenced Persons (TSP), beside extradition, is an institution of international legal cooperation. However, it is little researched. The institute has an eminently humanitarian focus, insofar as it aims to bring the family and its social and cultural environment closer

together, which is an important psychological and emotional support that facilitates rehabilitation after the sentence has been served.

The instrument under review is a measure whose purpose is to allow persons definitively sentenced in another State to serve their sentence in the country of their nationality or with which they have personal ties or residence (MUZZI, 2017).

According to the Ministry of Justice and Public Security website (2020):

> the United Nations has insisted on the indispensability of such cooperation, directing efforts to spread the proposal of prisoner transfer as a modern method of re-education to strengthen the foundation of personal reconstruction of the prisoner facing the prospect of a future free life in society.

In Brazil, it is provided for in the Migration law between articles 103 and 105. The Department of Asset Recovery and International Legal Cooperation, as an agency of the Ministry of Justice and Public Safety (MJPS), is responsible for all administrative proceedings for transfer purposes of convicted persons, as well as for the analysis of the admissibility of the request.

The primary requirement for the investigation procedure to be initiated is voluntariness. It is necessary, therefore, for the prisoner (or their representative) to express their will to serve the sentence (or the rest of it) in their home State or State with which they have the aforementioned ties.

Under the given circumstances, the Migration law, in its article 104, institutes the following requirements to proceed with of the request: i) the prisoner's bond with the State to which the transfer is requested; ii) the final conviction; iii) the sentence to be served (or remaining to be served) is at least one year at the date of the request to the state of conviction; iv) double criminality; v) express consent of the prisoner to be transferred; and vi) the agreement of both States.

Furthermore, it is important to point out that the Transfer of Convicted Persons can be classified according to the position of the Brazilian State in the process in question being active or passive.

The modality of Active Transfer of sentenced persons will occur when a Brazilian prisoner in a foreign State requests or agrees to be transferred to Brazil in order to serve their sentence close to their family and/or social environment. Persons who, although not nationals, have personal ties or habitual residence in Brazil may also make such request (MUZZI, 2017).

On the other hand, the Passive Transfer of convicted persons occurs when the foreign individual convicted in Brazil requests or agrees to be transferred to a State of which they are a national or have a personal link or habitual residence (MUZZI, 2017).

The website of the Ministry of Justice and Public Safety (2020), explains the procedure that must be followed by the foreigner who wishes to be transferred to serve the remainder of their sentence in their country of origin. The formal request for transfer must be forwarded to the Ministry of Justice, which will contact the competent agencies to receive the rest of the documents under the respective treaty (bilateral or multilateral).

In the case of a Brazilian serving a sentence abroad, in addition to making the request to the country in which they are staying, it is also possible to forward the request to be transferred to the Brazilian Ministry of Justice and Public Safety, which will adopt the necessary measures

to inform the petitioner's wishes to the other State. As a rule, the transfer expenses are paid by the State that will receive the Brazilian citizen who has been sentenced abroad.

The transfer requests must be granted by the countries involved, under the terms of the Treaties signed between the signatory States and Brazil, and the refusal decision must be justified.

Finally, it is important to point out that Brazil currently has 17 bilateral Treaties for the Transfer of Sentenced Persons, and four multilateral ones[11].

## 4.3 TRANSFER OF SENTENCED PERSONS (TSP) AS A POSSIBLE TRANSNATIONAL SOLUTION TO A REGIONAL PROBLEM

The globalization and the increase in migratory flows and transnational criminality have led to an increase in the number of prisoners in countries other than their own, as it has been demonstrated in this research.

The State of Amazonas, due to its proximity to the Brazilian border with other South American countries, puts the region in a peculiar position for the practice of transnational crimes, among which drug trafficking is one of the most frequent one.

Drug trafficking, which could be the object of its own study focusing on transnationality and Transnational Law, is commonly practiced in border regions (merely geographic), as it is the case of the triple border formed by Colombia, Peru and Brazil.

Haesbaert and Gonçalves (2005) point out that in this international drug industry, operations occur on a global scale, but their profits depend on the geographical location of the places of production and consumption, the existence of national borders, and the legislation of each national State.

It can be seen that drug trafficking, considered a transnational crime, is endowed with negative implications for the politics and the economy of the countries that are part of its route, generating very significant losses, both political and economic, to the countries involved.

These negative implications are reflected even in the prison system. It is enough to obsesrve that, of the foreign prisoners in Amazonas, the number of those of Colombian and Peruvian nationality represent a significant percentage of the prison population[12].

Under the given circumstances, not only must the policies related to fighting transnational crimes be reviewed, but also a solution for the situation of these prisoners in national territory must be found, whether for humanitarian reasons or for reasons of prison administration.

11 According to the website of the Ministry of Justice and Public Safety (2020), Brazil has bilateral agreements with the following countries: Argentina; Belgium; Bolivia; Canada; Chile; Spain; India; Japan; Panama; Paraguay; Peru; Poland; the Netherlands; the United Kingdom of Great Britain and Northern Ireland; Suriname; Turkey; and Ukraine. Furthermore, there are four specific multilateral treaties on the subject: the Inter-American Convention on Serving Criminal Sentences Abroad (Decree Number 5919 of October 3, 2006); the Convention on the Transfer of Sentenced Persons between Member States of the Community of Portuguese-Speaking Countries – CPLP (Decree Number 8. 049, of July 11, 2013); Agreement on the Transfer of Sentenced Persons between Mercosul States Parties (Decree Number 8.315, of September 24, 2014); Agreement on the Transfer of Sentenced Persons from Mercosul States Parties and the Republic of Bolivia and the Republic of Chile (Decree Number 9.566, of November 16, 2018).

12 According to a report on the EMTEMPO portal, from November 04, 2018, 94 (ninety-four) of the 105 (one hundred and five) foreign prisoners in the Amazonian prison system were Colombians (55) and Peruvians (39). Available on https://d.emtempo.com.br/amazonas/126612/amazonas-possui-105-estrangeiros-presos.

It is imperative to remember that prison overpopulation is one of the factors that leads to a drastic reduction in the use of other activities that the penal center should provide to achieve the resocialization of each convict.

Furthermore, the linguistic and cultural factors can also be a hindering element in the search for social reintegration of foreign convicts in Brazil, who suffer an additional and more distressing punishment.

Likewise, it is more advantageous for the prisoners to serve their sentence in their country[13], not only for the offender, but also from the point of view of re-socializing public policies.

The previous subtopic showed that the Transfer of Convicted Persons instrument may be effective in reducing the problem raised, since, at the same time that it ensures the dignity of the human person, aiming at bringing the family and the sociocultural environment closer, in order to enable the effective resocialization of the prisoner, it also contributes to the reduction of the prison population in the region.

This measure avoids the negative discrimination that occurs inside penal establishments, as well as the unequal treatment regarding the concession of benefits, often denied to foreigners.

Thus, in addition to guaranteeing a dignified and fair enforcement of the sentence imposed, the instrument, at the same time, helps the prisoners' families, who suffer in a potential way the evils of conviction due to distance: difficulties in relationships, financial problems, social stigma.

## 5. CONCLUSION

In view of what has been presented, the present research, whether from a humanistic, administrative, or even economic point of view, allows to conclude that the procedure for the Transfer of Sentenced Persons is an important instrument for transnational cooperation that keeps the aims of the prison sentence imposed on foreign convicts in view, but at the same time allows them to serve their sentence with dignity in their country.

It was also verified that the perspective chosen to discuss the theme, that is, Transnational Law, proved to be adequate since Human Rights, themselves, have transnational aspects, and even more so when it comes to the human rights of foreign prisoners.

At the regional level, although it does not represent a final solution to the problem of prison administration in the state of Amazonas, there is no doubt that the procedures for the Transfer of Convicted Persons can add significantly to the local public prison policies in the aspect of protecting the human rights of prisoners.

It is important to remember that prison overpopulation is one of the factors that leads to a drastic reduction in the use of other activities that the penal center should provide to achieve the resocialization of each prisoner, and Amazonas, unfortunately, is an example of this.

13 The official website of the Ministry of Justice highlights a news item entitled "Transfer of foreign prisoners helps resocialization", which states that, statistically, CPS increases the possibility of recovery and resocialization after the sentence has ended. Available at: https://www.justica.gov.br/news/transferencia-de-presos-estrangeiros-auxilia-ressocializacao.

Therefore, proposals such as the present one only tend to contribute to the reduction of the problem, and the instrument of the Transfer of Convicted Persons shows itself capable of being one more positive measure in the search for a solution to the Brazilian prison problem.

Thus, it is hoped that this brief analysis will serve as motivation for the study and reflection on the matter, as well as that it will contribute to the beginning of a social and political restlessness with the purpose of reaching an effective and definitive solution in regard to the resocializing aspect of the deprivation of freedom, whose effectiveness in Brazil is limited.

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# LINE OF RESEARCH: PUBLIC SPHERE, LEGITIMACY AND CONTROL

The identity between the public sphere and the state cannot be conceived at the same time. The public sphere "is composed of movements, organizations and associations, which capture the echoes of social problems that resonate in the private spheres, condense them and transmit them, then, to the public political sphere. Its institutional nucleus is made up of free, non-state and non-economic associations and organizations, which anchor the communication structures of the public sphere in the social components of the world of life ". (HABERMAS, Jürgen. Law and democracy: between fatality and validity. Rio de Janeiro: Tempo Brasileiro, 1999. v. 2, p. 99 et seq.).

The center of the public political sphere, in turn, is also composed of other functional "subsystems", each representing its role within the political system, such as the administrative system, the parliamentary complex, the judicial system and the democratic opinion formed by elections and political parties. In the contemporary moment, spaces in the public sphere gain more breadth and dynamism in the search for collective means of building plural identities. It is no longer between state powers or because of belonging to historically situated communities, but between different sources of social integration, that a new balance must be sought.

The object of study in this line aims to reconstruct the classic academic approaches to public law, centered on the perspective of the State and Public Administration, based on two instruments of the social integration process: legitimacy and control.

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# 1. THE (IN)CONSTITUTIONALITY OF THE PUBLIC SAFETY RATE IN THE CONTEXT OF PRIVATE EVENTS

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## ABSTRACT

This paper aims to analyze the possibility of the State charging public security fees at private events. The research aims to bring general and specific provisions about the tax rate, in the public security rate modality, and the performance of public servants in these events. Bearing in mind that, in private events, whether sporting, musical or cultural, the individual usually charges a box office fee, forming a consumption relationship. In these events, it is common for the State to employ its security forces to meet the organization and security needs of its participants. In this way, police forces are deployed to act in a location, where private interests are present. The objective of the research will be to analyze a possible injury to the public interest, when there is no consideration by the individual regarding the security of the event. Through bibliographic, jurisprudential, legislative research, dissertations and scientific articles we will approach the topic using the hypothetical deductive method.

**Keywords:** Public Security Fee. Public service. Public interest. Private Event.