

# THE AUTOPOIESE OF LAW AND THE TRANSPARENCY OF THE SOURCES OF FINANCING OF THE BNDES

A AUTOPOIESE DO DIREITO E A TRANSPARÊNCIA  
DAS FONTES DE FINANCIAMENTO DO BNDES

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## ABSTRACT

The article was aimed at highlighting the importance of transparency in the operations of the National Bank of Economic and Social Development, uniquely on the criterion of their sources of funding, noting that the institute is creating a legal environment favorable to the consolidation of the trust with the people of Brazil. This is on the grounds of transparency, to conform to a kind of regulation for the financial system to the public. As a theoretical framework, the work made use of the systems theory of Niklas Luhmann, with focus on the autopoiesis of law and the reach of the binary code of lawful/unlawful, suggesting that the non-implementation of the provisions of the normative instrument of transparency for the Bank, derived on the crisis in the sub-system of the law of illegality, with negative implications for the country's citizens and the decline of the legal system and the inefficiency of the law. As the previous results, the article pointed out that transparency translates to the BNDES, the greater the credibility on the financial market, the national and international level, is able to reverse the negative image that is marked by corruption. To this end, the discussion was built from a survey and interviews, based on the deductive method, which is the assessment of transparency within a logical relationship with the application of the sources of financing of the BNDES, consisting of the aspects of constitutional and infra-constitutional from your system.

**KEY-WORDS:** Autopoiesis. National Bank of Economic and Social Development. Binary Code. Systems Theory. Transparency.

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## RESUMO

O artigo objetivou evidenciar a importância da transparência na atuação do Banco Nacional de Desenvolvimento Econômico e Social (BNDES), peculiarmente, no critério das suas fontes de financiamento, ponderando que este instituto, tende a criar um ambiente jurídico favorável a consolidação da confiabilidade para com a sociedade brasileira. Isto em razão da transparência conformar uma espécie de regulação para o sistema financeiro público. Como referencial teórico, o trabalho se valeu da teoria dos sistemas de Niklas Luhmann, com ênfase na autopoiese do direito e no alcance do código binário "lícito/ilícito", propondo que a não execução dos preceitos normativos do instrumento da transparência pelo Banco, derivaria numa crise sobre o subsistema do direito da ilicitude, com implicações negativas para os cidadãos nacionais e empobrecimento do sistema jurídico com a ineficácia da norma. Como resultados prévios, o artigo destacou que a transparência traduz ao BNDES maior credibilidade no mercado financeiro nacional e internacional, capaz de reverter a imagem negativa marcada pela corrupção. Para tanto, o debate se construiu a partir da pesquisa documental e bibliográfica, com base no método dedutivo, procedendo com a apreciação da transparência dentro de uma relação lógica com a sua aplicação às fontes de financiamento do BNDES, compreendendo os aspectos constitucionais e infraconstitucionais da sua regulação.

**PALAVRAS-CHAVE:** Autopoiese. Banco Nacional de Desenvolvimento Econômico e Social. Código binário. Teoria dos Sistemas. Transparência.

## INTRODUCTION

The research that will be presented in this article, will reflect the effectiveness of the transparency instrument for the financing sources of the National Bank for Economic and Social Development (BNDES), making a socio-legal analysis about the theoretical and normative elements for its regulation.

To this end, the debate is justified by the need to transpose transparency as an important instrument available in the national legal system, capable of ennobling the Bank's relationship with Brazilian society, marked by distrust, due to the political, economic and social chaos persisting in the current situation in the country.

In this line, regarding the transparency instrument, it is not imprudent to state that it can be connected with several other social and legal conflicts, but at the root of the activities performed by the BNDES, it has a basic characteristic in its performance, the public nature. This statement reveals the indispensability of complying with constitutional and infraconstitutional precepts, since its non-observance or mere excuse for compliance will result in a range of perennial problems, marked by legal uncertainty, which imposes ambiguities on citizens about the operations that are carried out with the funds raised by the National Bank for Economic and Social Development, and which, in theory, should be returned to their original sources.

Referenced to the problem, the objective of the article will be to analyze it in the light of Niklas Luhmann's systems theory, materializing the autopoiesis of law as one of the indispensable subsystems for society, following the logic established in the core of the theory, which it has by code binary the licit/illicit. The scope, therefore, will be to highlight that the materialization of transparency by the BNDES in its financing activities - capture and return -, stands out from the role that the State has over the national economic order, being its own

responsibility to interfere, legitimately, in the conducts economic agents, with emphasis on public financing.

In order to contextualize these elements, the research will start by embracing the importance of the Bank for Brazil, which, starting from a normative appraisal, will be able from its creation to the metamorphoses that occurred over time, considering the integration of social concerns with policies and the development of its activities; subsequently, it will enter into the discussion of the sources of financing, seeking to clarify the list of sources of funds that subsidize the implementation of the Bank's activities, as well as the specific values on funding and repayments over time; finally, the research will deal in a dedicated way with the legal strength of BNDES 'transparency, seeking to scientifically consolidate the dichotomies and/or conflicts between the principles involved in the theme.

For that, the method used in this work will be the deductive one, which proceeding from the general analysis of the discussion, emphasizing the transparency theme within a logical relationship with its application to the BNDES financing sources, will seek to understand the constitutional aspects of regulation. The consolidation of the article will occur through exploratory research, noting that despite the normative cluster that involves the instrument of transparency, its effectiveness on BNDES financing sources, from the perspective of Niklas Luhmann's systems theory, indicates that the failure to implement the precepts related to the instrument's current rules tends to raise a crisis over the legal / illegal binary code of the law subsystem, reflecting negative results to the Brazilian society, for being impoverished with the ineffectiveness of the legal system under debate..

## 1 THE BNDES STARTING POINT

Created by Federal Law nº 1.628, of June 20, 1952, the National Bank for Economic Development (BNDE) was jurisdicted under the Ministry of Finance with the fundamental objective of operating as an institute that formulates and executes national policies aimed at development economic (BRASIL, 1952), who in a first stage was dedicated to infrastructure investments, but that with the creation of state-owned companies, little by little he started to invest also in the private initiative and in the industry and, later, in the agricultural sector, and in small and medium-sized companies, arriving in the 80s and 90s with other lines of investments, the focus of this article. (BNDES, [ca. 2010])

In 1971, through Federal Law nº 5,662, of June 21, the National Bank for Economic Development, originally created as a federal autarchy, underwent an important transformation, being classified in the category of public company, with legal personality of private law, with its own assets, linked to the Ministry of Planning and General Coordination, which allowed it greater flexibility in hiring personnel, freedom in fundraising and investment operations, and less political interference (BRASIL, 1971).

Regarding the intrinsically economic focus, Federal Decree Law nº 1.940, of May 25, 1982, revealed a major milestone for the nuances of the Bank's operations, with the integration of concerns that ranged from the social to the political of their development, highlights that even reflected in the legal name, changing from National Bank of Economic Development

(BNDE) to denominate National Bank of Economic and Social Development (BNDES), as it's known and revered today (BRASIL, 1982)

All these transformations, distinguish the BNDES as a singular institution, that is, it de-characterizes it from being an anomalous institution. This diagnosis is obtained from the performance of private institutions that, due to their *modus operandi*, are unable to operate in the face of risks and the long-term horizon needed for some decisive development activities. Likewise, they do not provide efficient and satisfactory resources for the financial intermediation of vehement activities in externalities. (PEREIRA; MITEFHOF, 2018, *n.p.*)

In addition to the different changes produced by the Bank's the Globalization Era, toned in the 21st century, presented BNDES with an even more punctual challenge to materialize the social slope in the Bank's mission, justifying the concern about the need to promote the competitiveness of the Brazilian economy in line with the aspects of sustainability, job and income generation, and the reduction of social and regional inequalities; supporting, therefore, projects that presented as a peculiar point, local and regional development, linked to the socio-environmental commitment and the capacity for innovation, issues that are increasingly urgent, in the context of dynamism and constant transformations arising in contemporary times. (BNDES, [ca. 2010])

The fact is that it is, historically, that is, during most of the BNDES' existence, there is a criticism that points it as the bank that works for, or at least, with a greater inclination, for the development of the national industry, that is considering that it was and still is, the sector that most benefited from the granting of credit by the institution. (BARBOZA; FURTADO; GABRIELLI, 2019, *n.p.*)

Thus, it can be said that the BNDES is established in the 21st century, as a federal public company, starting from the sources of financing – as will be highlighted below with the details –, acts as a public economic agent, destined to support investments in the most varied segments of the Brazilian economy, with emphasis on the granting of long-term financing in the country, aiming at promoting increased competitiveness and strengthening national development - within the economic and social aspects -, supporting social and cultural progress, in order to cooperate for the effectiveness of constitutional purposes, with the expansion of access to Brazilians and foreigners residing in the country, conditions for a better life, with more education, health, employment and citizenship.

And having as a basic characteristic in its performance, the public nature, it is intrinsic to BNDES the existence of some duties that private banks do not have and these obligations in a very simple way, but at the same time, very impactful are guided by the legal guidelines in force in Brazil: starting with the Constitution of the Republic of 1988, which in its article 37, clearly defined the principles of public administration - and they all apply to BNDES as a public bank. Thus, this is the form of operationalization that the Bank must highlight in its internal activities and expect that the external has on the exercise of its activities, which comes to collaborate for the discussion of regulation based on transparency, as will be discussed in a dedicated in the third chapter.

Well, the understanding that the principles of public administration are applied to the BNDES and observed in the light of the essential activities of the BNDES, at least apparently, a conflict is thought to exist, this taking into account the right of privacy of the Bank's bor-

rower of resources - also guaranteed by Federal Complementary Law nº 105, of January 10, 2001 - (BRASIL, 2001); and because the National Bank for Economic and Social Development is a public financial institution, attached to compliance with the principles of public administration, there is the prominence of the advertising principle, which remained better targeted when the advent of Federal Law nº 12.527/2011, making it possible for society and the press, the real possibility of having access to information from public institutions and direct entities or indirectly controlled by the Union, States, Federal District and Municipalities.

In view of this dichotomy, BNDES endeavored to operate, to find a balance between the principles of public administration and its banking performance, having reached the result that it is necessary to have a clear perception about what effectively constitutes bank secrecy, considering the context of information and documents delivered by borrowers, in order to convince BNDES to release the funds, as *v.g.*, business plans, industrial secrets, strategies to face market competition, in short, all the information that corresponds to the commercial and industrial secrets that the Bank receives from its borrowers. Therefore, these are the information that must be kept confidential, in compliance with the precepts transcribed in the text of the Federal Complementary Law nº 105/2011, which, tangentially, prohibits advertising.

Secondly, after receiving this information, the Bank makes an analysis of the payment capacity of borrowers on a desired credit and this analysis, as occurs in other financial institutions for financing – with the only difference that BNDES does not take care of a private company, which sells its services with the singular objective of obtaining profits –, is played as an instrumental way to replace the assets used by the Bank, for it to continue collaborating with the development of other borrowers and that information should also not be disclosed, as they represent only a subjective assessment that the BNDES makes on the borrowers' payment capacity (BNDES, 2018).

And finally, the prohibition of advertising also surrounds the core of banking secrecy, which, following the appropriate legislation on the subject – mentioned Federal Complementary Law nº 105/2011 –, exactly figures the perception of the payment and default *status* of the resource borrowers, and what would be the borrowing balance of its borrowers with the institution, which are possible through BNDES financing sources, as will be seen below.

## 2 BNDES FINANCING SOURCES AND THE SOCIAL ROLE

Before joining the discussion itself, it is necessary to emphasize that in Brazilian territory, the BNDES is consecrated as the responsible provider of long-term capital to companies, in order to collaborate for the movement of the country's economy (TARANTIN JUNIOR; VALLE, 2015, p. 333). The role of funding sources, therefore, in this process of structural capital composition, has significant expressiveness for the capital market.

In this context, for the financing of investment projects, the National Bank for Economic and Social Development needs sources of funds, in order to subsidize the implementation of its activities and it's on this highlight that the following discussion will open.

Firstly, the National Treasury stands out, which since its creation in 1952, has been indicated as an important source of Bank financing (BRASIL, 1952, article 11, item I), that together with other government sources, such as the Workers' Support Fund (*Fundo de Amparo ao Trabalhador - FAT*), the Social Integration Program (*Programa de Integração Social - PIS*) and the Civil Servants Asset Development Program (*Programa de Formação do Patrimônio do Servidor Público - PASEP*), that together they conceive a significant portion of the BNDES' capital structure, corresponding to 71,9% (seventy-one point nine percent) of the total of its resources on March 31, 2019 - it is estimated to add the percentage of 74,7% (seventy-four point seven percent) by December 31, 2019 (BNDES, 2019).

Other government funds, such as v.g., Merchant Marine Fund (*Fundo da Marinha Mercante - FMM*), Guarantee Fund for Employees (*Fundo de Garantia do Tempo de Serviço - FGTS*) and Investment Fund (*Fundo de Investimento - FI-FGTS*); fundraising abroad, through multilateral organizations or bond issue (*bonds*<sup>2</sup>); public issuance of debentures; and private issues of Agribusiness Letters of Credit (*Letras de Crédito do Agronegócio - LCA*) and Financial Letters, complete the structure of the funding sources of the National Bank for Economic and Social Development. (BNDES, 2019).

## 2.1 NATIONAL TREASURY

Created in 2002, the Treasury Direct (*Tesouro Direto*) emerged in the national economic context with the aim of democratizing popular access to public securities, allowing investments in amounts from R\$ 30,00 (thirty reais). Take care, therefore, a Brazilian program developed in partnership with the Mercantile & Futures Exchange (*Bolsa de Mercadorias & Futuros - BM&F*) Bovespa, for the sale of government bonds to individuals – natural persons – through the internet. (BRASIL, s.d.)

According to information highlighted by the Bank, in 2015 this source occupied 56,3% (fifty-six point three percent) of the total of BNDES' sources of funds, in 2019 it represented a smaller percentage, 36,6% (thirty-six point six percent). (BRASIL, 2019)

Well, in terms of values, the percentages of the financial resources of Direct Treasury – *Tesouro Direto* – integrate, respectively, the following numbers: a) Funding: 2014 (R\$ 60 billion), 2013 (R\$ 41 billion), 2012 (R\$ 55 billion), 2011 (R\$ 50.2 billion), 2010 (R\$ 82.4 billion), 2009 ( R\$ 105 billion) and 2008 (R\$ 22.5 billion), totaling R\$ 416.1 billion – highlighting the raising of R\$ 24.7 billion to BNDES to allow participation in BNDESPAR<sup>3</sup> in the contribution to the capitalization of PETROBRÁS –; and, b) Returns: year 2019 (R\$ 30 billion), year 2018 (R\$ 130 billion), year 2017 (R\$ 50 billion), year 2016 (R\$ 113.221 billion) and year 2015 (R\$ 15.766 billion), totaling R\$ 338.987 billion. (BNDES, 2019)

Such data point to a difference of R \$ 77.12 billion, to be returned by the National Bank for Economic and Social Development to the Direct Treasury.

2 Kind of guarantee of a promise, represent debt securities.

3 Corresponds to *BNDES Participações S / A.*, Which is a public limited company with registration as a publicly-held company before the Brazilian Securities and Exchange Commission, manager of shareholdings and one of the three wholly owned subsidiaries of the National Bank for Economic and Social Development.



According to Ernani Teixeira Torres Filho and Fernando Nogueira da Costa: "The National Treasury offers investors a sovereign risk, to raise in the long term, both in the domestic and international financial markets." (TORRES FILHO; COSTA, 2012, *n.p.*). This makes this funding source able to enable the reallocation of resources in more appropriate terms, in order to direct the priority sectors towards national development.

## **2.2 WORKERS' SUPPORT FUND (*Fundo de Amparo ao Trabalhador - FAT*), SOCIAL INTEGRATION PROGRAM (*Programa de Integração Social - PIS*) AND THE CIVIL SERVANTS ASSET DEVELOPMENT PROGRAM (*Programa de Formação do Patrimônio do Servidor Público – PASEP*)**

About the PIS-PASEP Fund, It is important to highlight that, with the promulgation of the Constitution of 1988, its article 239, §1º, showed that at least 40% (forty percent) of the collection of PIS-PASEP, should be used to finance economic development programs through the BNDES, covering that not only the unemployed worker, but the conditions of new job opportunities would also be constitutionally protected. (BRASIL, 1988, article 239, §1º)

In 1990, however, with the advent of Federal Law nº 7.998, of January 11, the PIS-PASEP Fund was extinguished - no funding has been made since then - and the Workers' Assistance Fund (*Fundo de Amparo ao Trabalhador – FAT*) was created, with the collection of that being allocated to the FAT, thus configuring its main source of resource. (BRASIL, 1990)

However, such changes did not change the constitutional essence, as the funds continue to be transferred to the BNDES, ensuring a stable source for the execution of investments in the economic and social development of Brazil.

Nevertheless, the contribution of the Constitutional FAT is consecrated as of utmost importance for the Bank, which in the conception of Ernani Teixeira Torres Filho and Fernando Nogueira da Costa is due to the facts of: "[...] to be a stable and guaranteed source of resources, which historically has been maintained at levels higher than the respective income payments. Furthermore, the Constitutional FAT was the Bank's main permanent source [...]" (TORRES FILHO; COSTA, 2012, *n.p.*).

This source of funds is used to help lines of credit that aim to support businesses in diverse sectors and customers of all sizes - including microentrepreneur and family farmer -, returning to the FAT in the form of interest payments. (BNDES, [ca. 2019])

Still on the Workers' Support Fund (*Fundo de Amparo ao Trabalhador - FAT*) and the PIS-PASEP Fund, it should be noted that until 2009, these two government funds represented a significant part of the Bank's financing structure. (BNDES, [ca. 2019])

Under the normative logic, the funds raised from the Worker's Support Fund, are identified as "Constitutional FAT" and are remunerated in accordance with the provisions of Federal Law nº 13.483, of September 21, 2017, that is, when applied by the official federal financial institutions in contracted financing operations, as from the 1st January 2018, will be remunerated *pro rata die*, using the Long-Term Rate (*Taxa de Longo Prazo – TLP*), calculated monthly, composed of the variation of the Extended National Consumer Price Index (*Índice Nacional de Preços ao Consumidor Amplo – IPCA*), calculated and disclosed by the Brazilian

Institute of Geography and Statistics (*Instituto Brasileiro de Geografia e Estatística – IBGE*), and by the fixed interest rate, established in each operation; and when not applied in financing operations, that is, when they are available for application, they will be calculated in the Special Settlement and Custody System (*Sistema Especial de Liquidação e de Custódia – Selic*), discounted by the percentage of 0.09% p.y. (nine hundredth percent per year). (BRASIL, 2017, article 2º, *caput* e §3º)

Given the lack of a normative provision that provides for the return of the principal of these resources – safeguarding cases of insufficient cash from the Fund to fund unemployment insurance and wage bonus programs –, only caution remains regarding the half-yearly payment of interest on these funds, so that the balance of the Constitutional FAT is considered a permanent and secure source, with costs compatible with the long-term financing of investments in productive activities subordinated debt, being part of it computed in the calculation of the Bank's Regulatory Capital. (BNDES, 2019)

Through the Resolution of the National Monetary Council nº 4.679, of July 31, 2018, the amount related to the FAT recognized in Level II of the Reference Equity (*Patrimônio de Referência – PR Nível II*), limited the percentages applied to the value of this resource computed at the aforementioned level on June 30, 2018, establishing a reduction schedule of 10% (ten percent) per year from January 1, 2020 until its complete exclusion in the year 2029. (BRASIL, 2018, article 1º)

In addition to Constitutional transfers, the Workers' Assistance Fund also includes fundraising by BNDES in the format "FAT Special Deposits" (*"FAT Depósitos Especiais"*) – allocated by Resolution nº 439, of June 2, 2005 -, which shows that they are currently remunerated by the Long Term Rate (*Taxa de Longo Prazo – TLP*), from the release of loans to final beneficiaries and by the same criteria applied to the National Treasury's cash availability, currently the Selic rate, in the case of resources not yet released to the final beneficiaries. In addition to remuneration, monthly amortization is due. (BRASIL, 2005, article 4º, §1º)

According to information released by the BNDES, on March 31, 2019, the balance of FAT funds totaled R\$ 273,7 billion, of which R\$ 264,4 billion was inherent to the Constitutional FAT balance - of this total, in the first quarter of 2019, R\$ 4,7 billion was raised - and R\$ 9,3 billion from the balance of FAT Special Deposits. And from the fundraising of the PIS/PASEP Fund, which ceased since its extinction in 1990, the balance of the Fund earned in that same period, amounted to R\$ 20,7 billion. (BNDES, 2019)

### 2.3 OTHER FUNDRAISING

Regarding external funding, these tend to diversify and complemente the sources of BNDES funds, consenting to the dissipation of risks, the stimulation of other Brazilian issuers and the strengthening of relationships with the international financial community, which since 1953, the Bank has been raising funds in the international market through bond issuance operations (*bonds*) and, since 1972, it has been raising funds through loans from multilateral organizations, government agencies and other institutions. (BNDES, [ca. 2010])



The *bonds*, established as the external securities issued by the Bank, have fixed interest rates in the process of *bookbuilding*<sup>4</sup> and amortization of the principal amount in a single installment. Also according to data collected by the BNDES, in the first quarter of 2019, they indicate the total balance with bond issuance obligations of R\$ 14,0 billion, which in the year, R\$ 2,9 billion related to bonds issued in 2014 were settled. (BNDES, 2019)

For operations with multilateral institutions and government agencies, the balance recorded on March 31, 2019, totaled R\$ 21,5 billion, as a result of operations carried out with partner institutions, to cite as examples: Inter-American Development Bank (*Banco Interamericano de Desenvolvimento – BID*), Japan Bank for International Cooperation (JBIC), Kreditanstalt für Wiederaufbau (KfW), Nordic Investment Bank (NIB), China Development Bank (CDB), Agence Française de Développement (AFD), Swedish Export Credit Corporation (SEK) and the Official Credit Institute (*Instituto de Crédito Oficial – ICO*). The funds raised from these institutions are generally earmarked for specific sectors or business segments and must meet the conditions of the creditor institution, the main advantages of these sources being the stable cost and the longer term of financing in relation to other market funding, in addition to its countercyclical character<sup>5</sup>. In times of scarcity of resources, marked by international crises or exchange rate crises, the agencies maintained the level of granting their loans. (BNDES, 2019)

## 2.4 OTHER GOVERNMENTAL SOURCES

The history of the National Bank for Economic and Social Development records fundraising through government funds, aiming to materialize alternative sources of funds to support long-term investment projects. Being recorded in the first quarter of 2019, the total balance of R\$ 32,6 billion divided between the Merchant Marine Fund (*Fundo de Marinha Mercante – FMM*) - R\$ 23,1 billion -, the FI-FGTS (Investment Fund of the Time Guarantee Fund Service - *Fundo de investimento do Fundo de Garantia do Tempo de Serviço*) - R\$ 2,5 billion - and FGTS (Guarantee Fund for Time of Service - *Fundo de Garantia do Tempo de Serviço*) - R\$ 2,8 billion. (BNDES, 2019)

The Merchant Marine Fund is administered by the Ministry of Infrastructure and is highlighted as the accounting nature fund, proposed to provide resources for the development of the Merchant Marine and the Brazilian construction industry, and for naval repair. (BRASIL, s.d.)

The Investment Fund for the Seniority Guarantee Fund, on the other hand, was instituted nationally by Federal Law nº 11.491, of June 20, 2007, being characterized by the application of FGTS resources, destined to investments in projects in the airport sectors, energy, road, rail, waterway, port and sanitation, in accordance with the guidelines, criteria and conditions provided by the FGTS Curator Council. (BRASIL, 2007)

Finally, the Seniority Guarantee Fund was established by the revoked Federal Law nº 5.107, of September 13, 1966 and, currently, it is governed by Federal Law nº 8.036, of May 11,

4 It is a process that aims to find a fair price for a public offering of securities, through the analysis of the demand for the papers made by a coordinator together with institutional investors.

5 Consists of the set of governmental actions aimed at preventing, overcoming, or minimizing, the effects of the economic cycle.

1990, with the maximum objective, to protect the worker whose contract is terminated without just cause, an account linked to the employment contract is opened at the time of hiring, in which at the beginning of each month, employers deposit in the name of their employees, the amount corresponding to 8% (eight percent) of the salary of each one of them. Therefore, it is the constitution of account balances linked to the current law and other incorporated resources, should be applied with monetary restatement and interest, in order to ensure the coverage of its obligations. (BRASIL, 1990)

## 2.5 OTHER OBLIGATIONS

Within the "other obligations" group, the most important funding comes from the domestic market, with emphasis on the debentures issued by BNDESPAR, the Agribusiness Letters of Credit (LCA) and the Financial Letters, which, on March 31, 2019, represented a balance in liabilities of R\$ 4,8 billion, of which R\$ 2,0 billion corresponded to the issuance of debentures by BNDESPAR; R\$ 0,4 billion translated the balance of Letters of Credit for Agribusiness (LCA), which for BNDES serve to boost the holding of auctions with institutions qualified in electronic trading platforms and as of August 2017, he started to act as a dealer for the Central Bank (BACEN), by intermediating transactions, raising funds from financial institutions and passing them on to BACEN; and R\$ 2,4 billion for Financial Letters, result of two issues - in May and December 2018 -, with a maturity of 02 (two) years, whose objective was to compose developmental strategies for new instruments to capture the market, diversifying the investor base, with ways to prepare the Bank to act as the most frequent issuer in the local market. (BNDES, 2019)

## 2.6 AMAZON FUND (AF) AND SHAREHOLDERS' EQUITY

Finishing the list of BNDES sources of funds, according to information available on the Bank's website, for long-term financing, the Amazon Fund (FA) and Equity (Net Worth) stand out, the one destined to finance projects for the prevention, monitoring and combating deforestation and promoting conservation and sustainable use of forests in the Amazon Biome, closed the first quarter with a total of R\$ 3,6 billion, net of the 3% (three percent) portion intended to cover costs; and the Equity (Net Worth) with a total of R\$ 95,1 billion, reflecting the positive impact of the equity valuation adjustment, net of taxes (R\$ 4,5 billion) and net income for the period (R\$ 11,1 billion). (BNDES, 2019)

With these sources of funds from the BNDES, it is noticeable that private financial institutions are no longer the only sources of financing for the business sector. The Bank's tax list proposes alternative resources available to large, medium, small and micro entrepreneurs, providing credit lines for the development of corporate activity, as well as subsidizing working capital.

Barbara Coscrato Gonçalves, Camila da Silva Macedo and Juliana Leonardo de Oliveira Bergamini propose that the BNDES: "[...]emerges as an important financing option for both short and long-term needs, especially due to reduced interest rates, which are usually more

interesting than those provided by traditional financial institutions." (GONÇALVES; MACEDO; BERGAMINI, 2018, p. 109).

Thus, with business activities consecrated as an important fraction for the Brazilian economy, the broader and more organized the access to capital through BNDES financing sources, the greater the prospects that the corporations will continue and contribute to national development.

### 3 TRANSPARENCY AND BNDES

After the achievements dedicated to financing sources from the National Bank for Economic and Social Development, it is possible to declare how important the public note is on values captured and returned to sources of funds, consolidation, guarantee, accountability or an "honest act" for society, so discredited in the political, economic and social context, in the current Brazilian situation.

Behold, this integrity of the BNDES, is nothing more than the maturation of the constitutional and infraconstitutional norm, which revealed transparency as the facilitating instrument for the Brazilian citizen of social control of state actions, which in the conception of Maria Inês Souza Bravo and Maria Valéria Costa Correia: "In the process of redemocratization of the country, the expression 'social control' comes to be understood as the control of society over the State" (BRAVO; CORREIA, 2012, *n.p.*).

Otherwise, Lucas Gonçalves da Silva and Patrícia Verônica Nunes Carvalho Sobral de Souza are accurate in considering that: "The participation of the individual in political life is an efficient model of popular development. The most developed countries have latent social control, since citizens are concerned with the application of public funds". (SILVA; SOUZA, 2017, p. 214)

Well, in Brazil, the enactment of Federal Law Nº 12.527, of November 18, 2011 (popularly known as the Access to Information Law), in force since May 16, 2012, revitalizes this participation of the national citizen, ratifying the constitutional right of access to public information - provided for in item XXXIII of article 5, in item II of § 3º of article 37 and in § 2º of article 216 of the Constitution (BRASIL, 1988) -, remained regulated. Being created through this special norm, mechanisms that would make it possible for everyone, without distinction, whether individuals or legal entities, without any justification, access to information from public entities and entities controlled, directly or indirectly, by the Union, States, Federal District and Municipalities. (BRASIL, 2011)

The fundamental intention of the legislator with the mentioned rule, was to bring a more effective context of probity to Brazil, that through the transparency of information of general or collective interest, from public entities and entities controlled, directly or indirectly, by the Federation Entities, would follow the example of countries that, through the transparency mechanism, succeeded in becoming developed Nation-States, within a more egalitarian perspective, with the most correct application of resources and the most distant from corruption.

Janyluce Rezende Gama and Georgete Medleg Rodrigues consider: "Transparency and access to public information are some of the fundamental pillars of a government open to social participation" (GAMA; RODRIGUES, 2016, p. 48). This makes these themes, objects increasingly explored by science and academia, precisely because it represents a milestone in the effective implementation of the fundamental precepts that were already disciplined in the Constitutional Text of 1988.

Transparency, specifically, clarifies how public goods are governed and/or administered, highlighting how revenues are obtained, how they are and why they are spent (CAMPOS; PAIVA; GOMES, 2013, *n.p.*). Thus, the BNDES, despite not having the concept of dependent state and, consequently, is not governed by Federal Law nº 4.320, of March 17, 1964, Public Finance Law (BRASIL, 1964), its accounting and financial management is guided by the rules of Federal Law nº 6.404, of December 15, 1976, Corporations Law (*Lei das Sociedades Anônimas*) (BRASIL, 1976), occupying the quadrant of public banking institutions (BNDES, *s.d.*). Thus, it is part of the list of institutions that must operate under the canopy of transparency, giving publicity to all their movements, whether assets and/or liabilities.

In the current social and legal context, information is consecrated as one of the essential factors for the best performance of companies, which has gained significant space in the public sector, since this, more than any other, needs to give expressive responses to society. (CAVALCANTI; DAMASCENO; SOUZA NETO, 2013, *n.p.*)

However, despite the decree of the Access to Information Law in 2011 (*Lei de Acesso à Informação*), only in October 2016, through joint action between the Brazilian Bar Association (*Ordem dos Advogados do Brasil*), the National Association of External Control Auditors of the Brazilian Courts of Accounts (*Associação Nacional dos Auditores de Controle Externo dos Tribunais de Contas do Brasil*), the Association of External Control Audit of the Federal Court of Auditors (*Associação da Auditoria de Controle Externo do Tribunal de Contas da União*) and the National Association of the Public Ministry of Accounts (*Associação Nacional do Ministério Público de Contas*), based on the law, mentioned above, officiated the National Bank for Economic and Social Development, requesting that information on the last 10 (ten) years of external financing be made available on the Bank's website, internal operations and partnership with foreign institutions. This document was placed on the agenda of the meeting and the legal director of the BNDES at the time, Marcelo de Siqueira Freitas, considered a concern on the part of the institution to move towards transparency, leaving the prevalence of making operations hidden under the cloak of bank secrecy. (CONJUR, 2016)

Nevertheless, another important institution that played a role in the debate on the adherence of the transparency institute to the National Bank for Economic and Social Development, it was the Federal Court of Accounts (*Tribunal de Contas da União – TCU*), that on August 21, 2018, held a public hearing jointly with the Bank, whose focal utility was to deal with more advanced points of the theme, with a view to expanding access to the terms of Brazilian legislation to BNDES activities; being suggested that being an investment bank, like any other in Brazil and in the world - of the same nature -, takes resources, whether from shareholders, whether those generated internally or those in the market; applies a fee to pay for their services and makes them available to third parties; having as elementary intention, to generate the return with its activities, that is, from the application of these resources, materializing the financial intermediation. (BNDES, 2018)

Considering the aspects of strict compliance with constitutional precepts and those described in special laws, the National Bank for Economic and Social Development was able to better observe the Transparency Policy for its system, making available in its portal the integrity of the free information from the legal protection of bank secrecy, allocated in specific sections, which translate the list of information classified as "Active Transparency", taking care of this information presented proactively and of a different nature from those that are conditioned to the request by the society, categorizing the "Passive Transparency". (BNDES, *s.d.*)

Tânia Carolina Nunes Machado Gonçalves and Marcelo D. Varella ponder that: "[...] the fundamental right of access to information, guided by the active transparency of the Public Administration, that is, the search for proactivity in the dissemination of information. Both are constitutional principles and, as such, there is no hierarchy between them". (GONÇALVES; VARELLA, 2018, *n.p.*)

Therefore, the Bank's website presents options that can be used by civil society and supervisory institutions to obtain the most appropriate access to the needs of each one, with regard to transparency, and to obtain information of general and collective interest about the BNDES, it is imperative that a request for information is registered at e-SIC – <http://www.acessoainformacao.gov.br/sistema/>; for operational doubts, that is, for receiving information about BNDES financial products or on open financing requests, contact the central through the 'Contact us' "*Fale Conosco*" – by number 0800 702 6337 –; and to make a suggestion, complaint or claim, send a message to the Ombudsman (*Ouvidoria*) – through the number 0800 702 6307. (BNDES, *s.d.*)

About the transparency institute, which can be connected with so many other social and legal conflicts, about the activities performed by BNDES, important to emphasize that its materialization highlights, mainly, the role of the State in the national economic order, considering that it is incumbent on it to intervene legitimately in the conduct of economic agents, through the most distinct mechanisms of development, which in this research stand out the public funding, responsibility prioritized by the constituent of 1988. (BRASIL, 1988, *caput* of the article 174)

In this regard, Celso Antonio Bandeira de Mello reverence that: "[...] with the advent of the 1988 Constitution, it became emphatically explicit that not even economic planning - carried out by the Government for some sector of activity or for all of them - can impose itself as mandatory for the private sector". (MELLO, 1999, p. 178)

This understanding and the normative cluster that surrounds the adherence of the transparency theme to the BNDES, translates into the reading that it is not possible to admit any excuse for the realization of the co-existing state responsibility for the realization of constitutional principles, and this, because it is from the fulfillment of the prescription in the legal norm, that there is a revival of the constitutional principles of public administration and, equally, of the realization of the ordering and / or regulation of the economic activity performed through public financing, whose objective is primarily the search for the public good, which can be defined politically and economically. (SALOMÃO FILHO, 2008, p. 21/23)

And this discussion on BNDES 'transparency and financing sources can be analyzed in the light of Niklas Luhmann's systems theory, materializing the autopoiesis of law as one of the subsystems, which has the licit / illicit by binary code. (LUHMANN, 2016, p. 65)

Considering that within the Brazilian State, the reproduction of the legal system - constantly evolving - takes place through the Constitution and infraconstitutional rules. In this bias, what was highlighted in this research on the intrinsic characteristics of the BNDES, as a public bank, is plausible to consider that the non-compliance with the precepts related to transparency, would reveal a crisis on the licit / illicit binary code, which is reflected frontally in society.

Niklas Luhmann reveals that law and society are structurally coupled, that is, related by mutual interdependence, as the law makes up the skeleton of the social system, its essential role is intended to amortize part of the disorganized complexity that society is submerged and, it also aims to make the social environment obtain a higher and more structured complexity. (LUHMANN, 2016, p. 69)

Synthetically, the law moves in the macro system to meet the needs of ordering in society, so that without this subsystem, there would be no conduct guidance in the social environment.

Nevertheless, regarding the evolution of the subsystem of law in the context of Luhmann's theory and its convergence with transparency for BNDES financing sources, it is also possible to ascertain its meaning in the line of affinity with other social subsystems - applicable to this discussion, the political and the economic - which, by virtue of their relations with an environment marked by the development of complexities and social contingencies, goes back to the structures of society to the suffering of pressures that point to the sense of change. (LUHMANN, 1983, p. 172)

This statement emerges of great importance to transpose that transparency is an extraordinary instrument to ennoble the BNDES relationship with society, after all, for the theme sources of financing, effectively, it means giving legal and social security to Brazilians about the operations that are carried out with the funds raised from public funds and returned to their original sources.

Furthermore, transparency in the conduct of monetary policy can also be understood as an effective and justified tool to establish a context of information asymmetries between the public monetary authority and civil society, showing that, by promoting the development of a culture of transparency, there is a reduction of uncertainties and an increase in efficiency over public monetary policy.

## FINAL CONSIDERATIONS

In summary, the results obtained in this work point to the following empirical evidence:

1) By highlighting the importance of transparency in BNDES financing sources, creates a socio-legal environment more conducive to stability, reinforced with the argument that transparency spreads a regulation of the public financial system, which cannot and should not be



neutral, following constitutional terms, adjusted by Federal Law Nº 12.527/2011, which establishes the duty to guarantee the right of access to information, franchised through pragmatic and agile procedures, in a transparent, clear and easy-to-understand language;

2) Furthermore, the performance in matters of transparency in the BNDES, materializes the constitutional regulatory action, which covers that public financing will be safe, permeated by the process of monitoring the implementation of a model and managing the development of economic activity - from the perspective of the provision of public services -, articulated through an infraconstitutional legal mechanism, which submerges the appreciation of the regulatory impact of transparent information management regarding the capture and return of the sources of funds used by the BNDES. All of this, provides a broader and clearer access to the dissemination of its results, which, as a consequence, results in a cyclical movement if the Bank's developmental activity;

3) In this perspective, the strength of transparency on BNDES financing sources, analyzed from the perspective of Niklas Luhmann's systems theory, alludes that the Bank's failure to implement the precepts regarding the rules in force to the transparency instrument, tends to raise a crisis over the licit / illicit binary code of the law subsystem, reflecting negative results for Brazilian society, as it impoverishes itself with the ineffectiveness of the legal system over the debate;

4) Finally, it should be noted that transparency translates into BNDES greater credibility in the national and international financial market, presenting itself in the economic scenario of the Brazilian State, as an institution that operates in search of harmony between the country's social and economic development goals, respecting the treatment of personal information of borrowers of resources, which must be done in a transparent manner and with respect to their life and intimacy, honor and image, as well as individual freedoms and guarantees, without, however, dismember the fundamental role of transparency in the current social context and in the economic increase in productivity of the sectors of the national economy, detaching itself, as gradually as possible, from the negative image of the deterioration of Brazilian credibility marked by corruption.

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