

LINGUISTIC TURNING AND CONSTITUTIONAL STANDARDIZATION IN THE CONCRETE CASE: CONFORMATION IN THE DECISION THAT DETERMINED THE RESTAURANT TELE-DELIVERY SERVICE IN SHOPPING IN THE CORONAVIRUS PANDEMIC PERIOD

O GIRO LINGUÍSTICO E A NORMATIZAÇÃO
CONSTITUCIONAL NO CASO CONCRETO:
CONFORMAÇÃO NA DECISÃO QUE DETERMINOU O SERVIÇO
DE TELE-ENTREGA DE RESTAURANTE EM SHOPPING
NO PERÍODO DE PANDEMIA DO CORONAVÍRUS

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ABSTRACT

The article aims to analyze the court decision that, in times of the coronavirus pandemic, allowed a restaurant, established inside a shopping mall, to perform tele-delivery services. There was a ban on the operation of shopping malls and the permission of some restaurant services. There was no specific regulation for the operation of the same restaurant services inside the malls. Faced with textual provisions, appearing in municipal decrees, apparently conflicting, omitting the specific situation, the decision allowed one of the services. The theoretical basis of the decision is in the condition of philosophical hermeneutic possibility, in the *dasein*, the relevance of the text and the context for the adjudication of meanings, allowing the constitutional standardization in the specific case, identifying it in the decision. The methodological procedure starts

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from the literature review to study the paradigm case. The study reveals the possibility of legal construction that, always starting from a rational and progressive premise of human and fundamental rights, makes possible the constitutional and democratically adequate sense. In this way, both the imprisonment of strict legalism and the bet on judicial arbitrariness are ruled out.

KEYWORDS: Constitutional regulation. Apparent rules conflict. Judicial decision analysis.

RESUMO

O artigo objetiva analisar a decisão judicial que, em tempos de pandemia do coronavírus, permitiu a um restaurante, estabelecido dentro de um shopping, realizar serviços de tele-entrega. Havia proibição de funcionamento de shoppings e permissão de alguns serviços de restaurante. Inexistia regramento específico para prestação dos mesmos serviços de restaurante dentro dos shoppings. Diante de dispositivos textuais, constantes de decretos municipais, aparentemente conflitantes, com omissão da situação específica, a decisão permitiu um dos serviços. O estofo teórico da decisão tem na condição de possibilidade hermenêutica filosófica, no dasein, a relevância do texto e do contexto para a adjudicação de sentidos, permitindo a normatização constitucional no caso concreto, identificando-a na decisão. O procedimento metodológico parte da revisão bibliográfica para estudo do caso paradigma. O estudo revela a possibilidade da construção jurídica que, partindo sempre de uma premissa racional e progressiva dos direitos humanos e fundamentais, possibilita o sentido constitucional e democraticamente adequado. Desse modo, é descartado tanto o aprisionamento do legalismo estrito quanto a aposta no decisionismo.

PALAVRAS-CHAVE: Normatização constitucional. Conflito aparente de regras. Análise de decisão judicial.

1. INTRODUCTION

There are several legislative texts produced to deal with the situations resulting from the coronavirus pandemic. It is not rare to identify the legal texts limitation for solving concrete problems, as it happens in the cases treated by analyzed decisions. The fundamentation of the decision is not supported either by subsumption or by interpretative methods to extract meanings from the legal text or pseudo guiding principles covers by the judicial arbitration.

The judicial decision cannot be limited by the legal text, under the penalty of, as in the situation, not allowing answers to the social concerns. The case reveals the incompleteness of the text and, therefore, the impossibility of the subsuntive law application, as in the liberal-bourgeois dream of the mouth judge. In the same way, decisions anchored in subjectively reachable directions are not admissible, even if they are pseudo-legal because they're linked to instruments of interpretation and/or pseudo-principles that hide the judicial arbitration, pointing to paths that are not necessarily legally and democratically progressive. The two paths are constitutionally inadequate due to the insufficiency of the first and the absence of limits on the second.

The article brings the investigation about the theoretical foundations of the provisional decision of early urgency that allowed a restaurant, established inside a shopping mall, to reopen for one of it's' services, during the coronavirus pandemic. The shopping mall administration, from reading the municipal legislation related to the issue, understood that it should block the restaurant's activity. And, on the other hand, the restaurant' representatives, understood that the same municipal legislation authorized the delivery service, and the take away.

However, the constitutionally constructed decision in the specific case seems to only allow delivery to function in the face of the confrontation of legislative texts and the support of human and fundamental rights. The possible theoretical, hermeneutic-philosophical and constitutional support for the pragmatic result reflected in the analyzed decision is being examined. The philosophical hermeneutics is previous to law, doesn't take place in the same field, has its own and distinct object, but it is a condition of possibility, and, as such, produces standards of rationality usable by law. The *dasein* is a limiter of the senses, it prevents the subjection of objects, of the meaning of the text, at the time that it also recognizes that the senses do not come metaphysically from objects, with the indispensability of the subject-interpreter, in linguistic inevitability. So, in the legal apophantic plane, the Constitution is not only written text, but it is also. The condition of hermeneutic-philosophical possibility, requires the overcoming of objectifying paralysis, which has the Constitution as a mere written text, whose meanings are pre-given and, therefore, unable to reach the new contours of a complex society in constant mutation. In the same way, it prevents the Constitution from being subjected by the interpreter. When the adjudication of meaning in the Constitution cannot be solipsistic, it is up to the interpreter to arbitrarily give the meaning. In the proposal of the article there is no space for both the interpreter hostage of the text and for those who have their self unduly gigantic. It is necessary that the senses come from the subject but in accordance with limitations arising from the social-temporal context, guided by tradition and effective history, in the concretization of the constitutional norm in the specific case.

Contemporary science is not given a pure scientificity, a rescue of the world of law completely dissociated from society. The lawyer does not just combine laws and analyzes them in theory. The lawyer should be awakened from his dream of pure, sterile rights, immune to facts. This rescue values the practical world of law, the world of life, where legal productions, the action of legal operators cannot ignore pragmatic effectiveness. The work brings vectors of philosophical rationality able to contribute for the law to pay attention to the factual consequences, focusing on a constitutional and democratic design. Legal knowledge starts from human rights and is fundamental to the solution built in accordance with the specificities of each case. In the situation analyzed in the decision, the complete obstacle to all restaurant activities would leave it in an unequal treatment in relation to its competitors, greatly harming the same and consequently all those who depend on its operation. In the other hand, the release of the same services that were performed by other competitors in the industry, established outside the mall, would be able to generate a movement of undesirable people and employees for the moment, increasing the risk of worsening pandemic problems, with greater contamination and increased number of patients and deaths. Because of that, the constitutional standardization in the specific case recognized the possibility of the company giving vent to its commercial objectives only by means of tele-delivery, allowing competition, without putting at risk other relevant interests of society facing the problem of the coronavirus pandemic. The constitutional interests of the company's commercial freedom were combined with the need to respect the health and life of citizens. The two municipal normative texts reached their factual dimension in accordance with the Constitution. When the judge allowed the texts, in the Gadamerian expression, to bring their truth, there was respect for the tripartition of powers, put as a constitutional stone clause. If it is possible to identify a highlight of the judicial function, it is not so in an activist stance, overlapping the executive or legislative function. Certainly, the supremacy of the Judiciary, the focus on its protagonism,

is not supported by a democratic regime. The isonomic assumption of citizenship does not allow delegitimization in the exercise of power, nor does it allow anyone, any person or institution to undertake the task of implementing the common good (according to its notion, not necessarily shared, therefore, proper, of good) common), submitting to all the others. Verifiable from the decision in comment that the judge in the exercise of his function, within the constitutional limits, standardizes in the specific case, bringing effectiveness in the search for the democratic outline desired socially.

2. THE ANALYZED DECISION

The decision in question was given as a preliminary, in a provisional urgent request contained in an ordinary lawsuit filed at the fifth Court of the Public Finance of the District of Porto Alegre of the Court of Justice of the State of Rio Grande do Sul, whose content was:

“Visas.

This is an ordinary action, in which the autor part, qualified as a restaurant located inside the premises of Barra Shopping in Porto Alegre, narrates that she was notified by the mall management about the closure of her commercial activity, due to the measures adopted by the Decrees Municipal numbers 20.534/ 2020 and 20.540/2020 to the prevention of COVID-19. It maintains that the fact that the author restaurant is located inside the mall is not an impediment to the delivery and take away. Reasons for the request based on art. 11, items XIV and XV, and §2º, of Municipal Decree nº 20.534 / 2020. Requires provisional urgent protection to authorize the reopening of the authoring company for operations under the delivery and take-away system, except for changes in the service system in the event of the edition of a more beneficial rule, under penalty of applying a daily fine. Attached documents.

It's the report.

I Decide.

First of all, I register that the initial petition contains elements that make up the request for provisional relief in anticipated urgency, being thus received by application of the principle of fungibility of the emergency relief. Furthermore, it will follow the incident procedure, due to the noncompliance of the pair. 5th of art. 303 of the CPC.

The Municipality sought to discipline procedures for the pandemic period. The confrontation of the crisis generated a situation of public calamity recognized in the municipal decrees 20,534 / 2020 and 20540/2020. I do not doubt that the risk that the coronavirus pandemic created for the life and health of the population requires urgent and drastic measures, including limiting commercial activity. These measures are provided for in the aforementioned decrees.

None of the aforementioned decrees expressly authorizes the operation of restaurants inside shopping centers. Long before the contrary, the reading of article 13 of Municipal Decree nº 20.534 / 2020 determined the non-functioning of shopping centers, except for some services considered essential by the municipal authority, among which is not the author, of the restaurant branch. The operation of the restaurants would be limited to the

tele-delivery system (delivery) and take away, according to the pair. 2nd, art. 11 of the same decree, with which, in the combination of the two devices, it would be possible to conclude (as did the notifier of the impediment of the activity's performance), that the operation of restaurants can only occur outside shopping malls and in the format of tele-delivery (delivery) and take and take away.

It turns out that the meaning of municipal regulations must be achieved in the light of the constitution. If the municipal authority has allowed other restaurants to operate in take-away and take-away (delivery) services, the possibility of extending the same services to restaurants located inside shopping centers must be verified. If any of these services is not going to increase the risk of an increase in the pandemic, when carried out inside the mall, it should be extended to restaurants in shopping malls, with due respect for the isonomic principle and free competition. Therefore, the tele-delivery service (delivery), as it does not have any differential element in relation to what is provided externally to shopping centers, due to contextual constitutional regulation, must be allowed for the author.

I repeat that the constitutional priority, in this period of crisis, is to protect the life and health of Brazilians. Therefore, the performance of commercial activities, in an exceptional character, in the face of public calamity, must comply with the non-affectation of the fundamental constitutional rights of life and health. The municipal regulation is aimed at avoiding any possibility of non-essential trips and of circulation and increase of people in the shopping centers, as well as the need for more employees of the shopping center to regulate the reception of consumers. Therefore, limiting the performance of the take-away service makes health and life safety prevail to the detriment of the author's commercial interest, in compliance with the rule in art. 13 of Municipal Decree No. 20,534 / 2020.

The requirements for granting provisional emergency relief are provided for in art. 300, from the CPC. They are the probability of the right and the danger of harm. From what has been said above is the demonstration of the first of these requirements.

The second requirement, the danger of damage, is also present. The constitutionally inadequate interpretation that prevented the delivery service generates present and future financial losses, potentially irreparable damages for the authoring company.

In view of the above, I PARTIALLY DEFY THE URGENT PROVISIONAL GUARD to authorize the reopening of the authoring company (SHOP 2093-A "CHAMPANHARIA NATALICIO") only for operations under the tele-delivery system (delivery), without prejudice to changing to a more beneficial regime or more rigorous, even with service prohibition, with the issuing of new decrees.

In the event of non-compliance by the defendants, inquire for purposes of fixing astreintes.

I grant the judicial gratuity.

Urge yourself to quote and intimidate yourself."

3. THE RELATIONSHIP OF PHILOSOPHY WITH THE LAW

Philosophy, philosophical hermeneutics, is at an earlier level different from law, with different fields of study and practice. There is a double level of phenomenology, a previous one, structural, which is philosophical and a second apophantic, ornamental, with procedural and / or argumentative logical structures (STRECK, 2008, p. 132). While the first thematizes the field of being, the presupposition of all knowledge and all science, the second deals with the being, assuming language, but using the method to deepen specific issues, in a determined praxis (OLIVEIRA, 1996, p. 216). While philosophy focuses its efforts on the problems of the solution, the sciences seek to solve the problems (STEIN, 2004, p. 135-136).

The autonomy of objects does not make the law indifferent to philosophical hermeneutics when the common empirical assumption is added (STEIN, 2002, p. 100). Hermeneutics, in its fusion of horizons and condition of a comprehensive possibility of being (being-there), is the presupposition of scientific knowledge, including legal knowledge, with which it is able to exercise the role of "guardian" of the knowledge of science and law . Therefore, a more philosophical Law is proposed, where all legal production must respect the hermeneutic epistemological precedence (STEIN, 2004, p. 126), to the detriment of previous archetypes (STEIN ,, 2002, p. 104), especially the false model illustration, based on fixed and immutable principles, immune to time and history (HOMMERDING, 2007, p. 42-43). Guardian philosophy plays a cooperative role in improving, insofar as it is able to bring the world experienced into law (HABERMAS, 1989, p.18), providing the necessary clearance for the meeting of legal production with sensitive data, with sense data (STEIN, Ernildo, 2002, p. 112). The law, therefore, cannot be immune to philosophy.

The philosophical paradigms prior to the linguistic-ontological turn, conceived of the language as an expression of the realization of an ideal essence, when it is access to understanding, sense of the world (GADAMER, 1999, p. 642) and externalization of reason (OLIVEIRA, 1996, p 202-203). The theory of knowledge guided by the metaphysical subject-object² relationship, supports the entification of being, leading to an interpretive process guided predominantly by the objectivity of the text or subjectivity of the interpreter (STRECK, 2008, p. 128-129), ignoring the ontological difference, for based on a difference between subjectivity and transcendental objectivity, which was an impediment to the cooperation of philosophy, to the philosophical filtering of law (STEIN, 2002, p. 100). The law, in the criticized view, was constituted in an operational knowledge that ignored the philosophical preposition (STRECK, 2009b, p. 67), with which it built a proper philosophy for the law (STEIN, 2004, p. 137) incapable of bring the same rational vectors of philosophical hermeneutics.

Philosophical hermeneutics, when moving in a different plane from the law, with its phenomenology of knowledge (STRECK, 2008, p. 156-167), has transcendental ordering capacity of the scientific basis for the correction of scientific discourse (STEIN, 2004, p. 127). This transcendence of philosophy (STEIN, 2004, p.149) is capable of "bleeding plenipotentiary concepts from the Law" (STRECK, 2009b, p. 67). This does not matter, however, in the philosophical imposition of answers to legal problems, there is no co-option of the object of the law, inasmuch as the philosophical hermeneutic transcendence is not comprehensive of all

2 Where linguisticity is always prior to any understanding, preventing the senses from being reached independently of being, as in the premise of objectification of the world, configuring the subject-object relationship ". (GADAMER, 1999, p. 653).

forms of knowledge (STEIN, 2004, p. 130- 139). However, the task is not simple, requiring the ability to read both speeches, in order to prevent the mistaken transposition of speech (STEIN, 2004, p. 127-128).

The autonomy of law is recognized in the face of philosophical hermeneutics. Law does not belong to philosophical hermeneutics, just as hermeneutics does not belong to law. Neither can evoke the goal of unraveling all human knowledge. Interpretation is immanent to being in your experience of the world and, from that, the possibility of scientific experience arises. The ontological and scientific experience is unavoidable, the first being a condition for the possibility of the second, denouncing the different plans in which they pass (STEIN, 2002, p. 102). It is therefore permissible for each of the knowledges to develop their own, intrinsic criteria for proving and refuting their statements (STEIN, 2004, p. 139), but with the capacity for dialogue exposed. Before being harmful, philosophical hermeneutics is able to reinforce the legal discourse, in the face of the liberation from previous philosophical paradigms (STRECK, 2008, p. 133).

The absence of contact points between philosophy and law, the lack of transcendence, produced a right that is sometimes metaphysically objectivist, sometimes subjectivist (STRECK, 2009b, p. 67). In the article and in the analyzed decision it is proposed to overcome this problem with the adoption of a perspective of a living and felt Constitution (VERDÚ, 2004, p. 7-8) hermeneutically in the *dasein* (VÉLEZ, 2006, p. 40), in a being not encapsulated (HEIDEGGER, 2009, p. 128), where the production and limitation of meanings stems from tradition and historical reality (GADAMER, 1999, p. 415-416). Therefore, unambiguous, objective meanings that are independent of the subject or arbitrary, exclusively subjective truths are unacceptable. The senses derive from the linguistic advent, considering the man in his historical and temporal contextuality, in the *dasein*. Time, historicity, limit the meanings of being, justifying the well-known Gadamerian expression that man is "the son of his time" (GADAMER, 1999, p. 577), making the recognition of the finitude of being-man inevitable, of historical consciousness (GADAMER, 1999, p. 444).

The decision assumes different levels of the legal and philosophical hermeneutics. There is no pre-given answer, but a constitutional construction shaped to the specific case. So, in the judicial solution there is neither the objectivity of the application of legal rules nor a solipsist application, but limited in time and contextually, based on the Constitution, capable of inserting through the interpreter, without slipping into the arbitration, the necessary outline of the social and democratic interest in law.

4. LINGUISTIC OPENING AND INTERPRETATIVE METHODS

Interpretation as an instrument to achieve meanings immanent to the legal text is closely linked to the Platonic or Neoplatonic postulate of name and essence correspondence (CASSIER, 1992, p. 17). However, this link and the resulting universality of meanings are metaphysical, presupposing an ideal world accessible to man and / or a transposition of experiences and pre-understandings. There is no universality of meanings, one interpretation is never the same as another, even if the object of the interpretation is the same (HEI-

DEGGER, 2009, p. 94). The giro-linguistic mattered in the "palavering" of the world (VÉLEZ, 2006, p. 40), transforming the human condition itself (ZEA, 2010, p. 9). Not that the world and things cannot survive without man (HEIDEGGER, 2009, p. 77 and GADAMER, 1999, p. 649), but that the meanings are in the existence of man, in the dasein, consisting of apprehensions of the thing that never they will be the thing in itself, but that consist of the limit of man's world (HEIDEGGER, 2009, p. 75). The senses of the world, any one of them, comes from being through language, with which the senses are not in the being, but in the being, however, not as the property of the individual, in his uniqueness, because dasein is a shared unveiling (HEIDEGGER, 2009, p. 127). The permissible sharing of communicative capacity requires an agreement about the thing (GADAMER, 1999, p. 559-560), but without supporting the objectivist dream of equivalence of words and things, but accepting an internal link between word and thing (GADAMER, 1999, p. 587).

In understanding the text, specifically, it cannot be different. The second Wittgenstein abandons the rigor of conventionality of meanings to equate the wording of things with the act of labeling a thing (WITTGENSTEIN, 1994, p. 32), since linguistic conventions are unable to bring reality (OLIVEIRA, 1996, p. 128). Placing oneself in accordance with the text that allows its understanding, assuming this communicative conventionality, supports inevitable ambiguities, since there are only similarities and approximations, where the use of words finds no borders, which, on the other hand, does not imply absence of meaning (OLIVEIRA, 1996, p. 130), since the similarities and kinships in the dasein are impediments to the arbitration of meanings (OLIVEIRA, 1996, p. 131). The hermeneutic filtering of arbitrary meanings is an impediment to the absence of meanings, which makes communication unfeasible, and to agree. Philosophical hermeneutics reveals both the inappropriation of the world by language, authorizing the arbitration of meanings by the interpreter, and the objectification of the world, with meanings derived exclusively from the text, independent of the contextual and historical being (GADAMER, 1999, p. 653).

Interpretation as a method is inserted in the critique of the referred objectification and subjectification, opposed by the language that introduces the being into the world (OLIVEIRA, 1996, p. 127), by the hermeneutics as an existential of the historical being, as a world experience (VATTIMO, 1987, p. 155), where interpreting is understanding (GADAMER, 1999, p. 566) and applying is the sensitive expression of thought (OLIVEIRA, 1996, p. 107), causing the positivist separation of understanding, interpretation and application to collapse to unveil its unity (GADAMER, 1999, p. 460). There is a denial of the instrumental character of interpretation, with the linguistic turn, when language is a condition for the possibility of understanding (OLIVEIRA, 1996, p. 128). Language, interpretation and understanding are vectors that most closely clarify the metaphysics of objectification and plastering of meanings, while the rationality of the application acquires special relevance in the control of solipsist subjectivity, sealing its relativism (STRECK, 2015, p. 99).

Legal positivism conceives meanings pre-given in the legal text, assuming meanings independent of being (STRECK, 2008, p. 128). The jurist uses the technical instrument of interpretation and, if the method is adequate, with the correct understanding and application, it achieves objective and universal results (STRECK, 2009b, p. 67-68). Language was metaphysically separated from knowledge, from interpretation, structuring the language-object relationship, with the possibility of even suppressing language for understanding, as in the

Platonic premise mentioned (BARTHES, 1987, p. 20). Metaphysics is revealed by Gadamer (1999, p. 566) when he recognizes the universality of language, constituting a condition of being, without which there is no interpretation, there is no understanding, there is no access to the world. The positivist objectification in the adjudication of meanings is overcome by the linguistic process of understanding and interpretation, since "language is the universal medium in which understanding itself takes place. The way of understanding is interpretation (GADAMER, 1999, p. 566). So, the object (its sense) is only or can become through language, interpretation and understanding (GADAMER, 1999, p. 588-589), in the "being-sense-language" (VÉLEZ, 2006, P. 40).

In another moment, the law submitted itself to the philosophy of consciousness where the subject is oversized, reaching a centralized position of intellectual domain, which allows him to assume a relativism in relation to things and subject the senses (STRECK, 2014, p. 54). It was said that in the unitary interpretive process, the application imposes the factual context of being, resulting in the philosophical hermeneutic tradition, in historicity, impeding the choice of meanings of being, support in which the being develops its truth and its freedom (OLIVEIRA, 1996, p. 220). Therefore, the meanings derive from the linguistic window, from the hermeneutic circle, amalgamated with tradition. The production of meanings stems from historical-effectual awareness. In reading the text, including the legal one, the mentioned assumptions are responsible for the new sense of writing, distant from objectification (STRECK, 2009a, p. 222) and subjectivation, guiding the senses in their historical constructivist character (STRECK, 2009a, p. 215). There is a demandable effort by the interpreter to unveil any phenomenon (HEIDEGGER, 2009, p. 73), not to reach the objectified meaning, but not to be driven by subjectification, to not allow answers apart from history and temporality, disincarnated from a specific historical, cultural and determined case (VÉLEZ, 2006, p. 49). There is a correspondence between subjectivity and objectivity in language, in their reciprocal belonging, not allowing the experience to happen in any different way (OLIVEIRA, 1996, p. 247).

The philosophy of conscience in law ignores the philosophical hermeneutical postulates referred to. Unviable is the recognition of a dominant knowledge of the interpreting jurist, of a capacity for appropriation and seizure of the written writing, including the legal one. Very different from this, there is a submission by the interpreting jurist to the dominant claim of the text (GADAMER, 1999, p. 464). Anti-democratic decisionism, where legal solutions obey exclusively subjective criteria of the judging body (ENGELMANN, 2001, p. 71), often, especially in contemporary times, find their escape valve, their cover-up in the application of principles. This type of principled "application" results in an uncontrollable and unacceptable (ENGELMANN, 2001, p. 167-168), when, in the perspective of the article, the law and the constitution must dictate the democratic limit of judicial action (STRECK, 2015, pp. 107-108).

5. CONSTITUTIONAL STANDARDIZATION IN THE CASE STUDYED

The concrete case starts from the premise of the constitutional hierarchy (LEAL, 2006, p.1565) and the strengthening of the Constitution (HOMMERDING, 2007, p. 27). The constitutional perspective under study does not overvalue the legal text, equating law and law, with the legislator as the only legitimate producer of the law (GROSSI, 2003, p. 64) and the judge as a mere mouth of the law. There is an escape from a Kantian bet on a legislator who can do anything, since it is supposed to represent the will of the people (BODENHEIMER, 1966, p. 80-81). It is the Judiciary that stands out in the constitutional concretization of the specific case (HÖFFE, 2003, p. 69-70). Not in an exacerbated and uncontrollable subjectivism (STRECK, 2014, p. 53), but in contextual and temporal limits, hermeneutically hostile both paralyzing objectivity and arbitrary subjectivity.

The objectivity of the law gave rise to the belief in subsumption, where the great objective of the law should be centered on the clarity of the law, for "literal application", bringing as a consequence stagnation, the inability to adapt to the variables of the world of life, creating injustices (GARCÍA-HUIDOBRO, 2002, p. 106-107). In fact, subsumption and the interpretative method are two sides of the same coin, the coin of objectification of meanings (STRECK, 2009a, p. 310). The objectification of meanings generates unbreakable dogmas, where the interpreter, consciously or unconsciously, when looking for the voice (the meaning) of the law, ends up listening only to his own voice (TODOROV, 1991, p. 149), making the echo reverberate authorized speech (AROCA, 1999, p. 16). In this juridical habitus, there is a belief in the reach of meanings in an acontextual way (DWORKIN, 2009, p. 23), for which the criticism of language entification must be remembered, which results in the lack of perception of ontological difference (STEIN, 2002, p. 100). The plastering of the law, in the face of criticized predicatives, becomes inevitable, hindering the constitutional and democratic end of the law.

The study brings the perception that the mere mechanical reproduction of the law is not admissible, as it would happen in the subsuntive activity, since all interpretation is productive. Therefore, the positivist classification of application by subsumption for express rules is inappropriate and, in the absence of these, the exceptional situation of integration and / or production of the law (GUASTINI, 2005, p. 43). The bet on objectivity and the subscriptive application of the law to produce the applicable meanings in the specific case, with tolerance for practical reason in cases without a legal provision, resulted in an epistemological production conscious of its inability to encompass all the facts of life, causing a crack in the law with the admission of the court order (STRECK ,, 2015, p. 107-108).

Subjectivity is essential in the adjudication of meanings, but not in an uncontrollable way, as in judicial arbitration. The linguistic-hermeneutic turn claims to be for the attainment of meanings, therefore, it must happen in the law, in the jurisdictional activity, the construction of the norm, with attention to the ontological difference, to the phenomenological unveiling, in a constitutional and democratic harmony (VERDÚ, 2004, p. 6-7), in the apophantic plane of law. The law is not held hostage either by positivist-legalistic immobility or by practical reason, with limited mobility, able to meet the changing nature of society, its changing social contours (VILLEY, 2007, p. 51-52), (excludes) on a floor of rational progressivity, including, when necessary, of a countermajoritarian nature to meet the democratic end

(BODENHEIMER, 1966, p. 71), without betting on a subjective moral and intellectual superiority (HÖFFE, 2005, p. 127).

The local specificities became very evident with the pandemic, demanding the constitutional standardization not plastered, attentive to them, following the path of constitutional concretization, of the real constitution (HESSE, 1991, p. 9-21). The observance of peculiarities, as occurred in the decision under study, demonstrates the desired constitutional mobility of the law, able to avoid injustices, consistent in the detachment of the factual and the social. The desired ability to follow the factual, on the other hand, (modified) cannot go beyond legal and constitutional limits. So, it is undoubtedly that the jurisdictional activity is the subjective construction of the norm, within the constitutional standards, considering the essential differences of each factual situation analyzed in the process (STRECK, 2009b, p. 76).

In the decision under study it is possible to notice that the normatization occurred respecting the legal text, going directly into the municipal textual devices, allowing it to say something, far from previous opinions of meanings, seeking its legitimation (GADAMER, 1999, p. 403) in presence of a constitutional dialectic. In this interaction, the constitutional interests at stake in the temporal facticity were not ignored, in the face of the pandemic, in the specific situation of the controversy, about the possibility of carrying out activities (tele-delivery and take-out), at the mall, when the general determination was to prohibit the operation of shopping centers and to authorize the two types of services in other restaurants. Constitutional and democratic standardization, in the context exposed, allowed tele-delivery to function exclusively to meet constitutional equality and preserve the social interest in controlling the pandemic, involving the right to life and health. The judicial activity, therefore, very far from trying to replace the activity of the legislator or the public administrator, of relying on judicial activism, brought the appropriate legal solution in the constitutional temporality (STRECK, TASSINARI, LEPPER, 2015, p. 52-62), considering the incessant social mutability (CHAUÍ, Marilena, 1983, p. 7), accentuated in times of pandemic, where regional peculiarities, especially in view of the possible greater or lesser effectiveness of the control mechanisms, are determinants of the convenient limitations.

6. CONCLUSION

The article studied the judicial decision that determined the operation of the restaurant delivery service in a shopping center. Municipal regulations that did not specifically discipline the situation faced in the decision were considered, not for application by subsumption, but for standardization in the specific case, in constitutional dialectic involving freedom and equality of the right to trade with the risk to life and health population, in the presence of the pandemic.

The linguistic giro allowed the recognition of a previous philosophical hermeneutic condition, with transcendental ordinariness capacity, able to contribute to the improvement of the law, allowing the phenomenal reconnection, especially in the case of the article, bringing the relevance of time and history in the construction of the without resorting to practical reason. This interaction presupposes the autonomy of philosophy and law, with different objects, but

with the possibility of adjudicating knowledge, due to the sharing of the lived world. Therefore, the perspective of the incommunicability of philosophy and law, as well as the sectorization of philosophy, as in the admission of the philosophy of law, is abandoned.

There is in the constitutional standardization in the specific case suggested in the writing an increase in the constitutional role, no longer just as a written text, but above all alive in society, in citizens. The linguistic turn brings about the awakening of the positivist dream of encapsulating the senses along the lines of the legal text, in the face of the adjudication of meanings of the linguistic unfeasibility, of the *dasein*. In this is the indispensability of the being for the attainment of meanings, but in a closing to the arbitration, due to the tradition and historicity, the temporality of the man and the historical conscience, which allows the Judiciary, the role of guardian of the Constitution and of contemporary democracy.

Interpretation is not a method for achieving universal meanings. There is no equivalence between words and things. The hermeneutic circle shows that an interpretation is never the same as another, even though there is an identity of an interpreted object. The apprehensions besides being always diverse will also never be the thing in itself, in front of the linguistic intermediation, in which the world comes to be through language. Situation that does not authorize the being to appropriate the world, insofar as it is to be in the world, to be with others, requiring a sharing of meanings, which permits even the communicative capacity of man.

The linguistic conventions of textual communication, with relevance to the legal, are unable to restore the Platonic correspondence of object, of the world. The interpreter must fulfill the task of agreeing, in spite of dealing only with similarities and approximations of these linguistic conventions, with inevitable inaccuracies. The proximity of the senses and the *dasein* allow the meaningful textual completeness in the being. At the legal level, the epistemological dialectical effort of the infraconstitutional and constitutional rules for hermeneutic unearthing is required, able to connect the contextualized decision to the democratic objective, with interpretation, understanding and application as a single event.

The defended constitutional supremacy highlights judicial action in its implementation, without adhering to an abusive subjectivism. The Constitution goes from being a mere legislative text to being a norm in lived situations. It leaves behind the legal belief in subsumption, in interpretative methods and in practical reason, allowing a substantial constitutional content that transforms reality, rationally progressive, in the face of possible situations of perversity in maintaining the status quo. So the law escapes legalistic imprisonment and solipsist judicial insecurity. In the study and the decision in question, an essential mobility is assumed in the *dasein*, notably for the moment of worsening social crises resulting from the coronavirus pandemic, at the same time that consistent barriers are established in the respect of legitimate legal constructions, especially of the legal text, but without losing the ability to pursue progressive democratic rational ends.

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