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EDITORIAL

The FUMEC University Law Graduate Program (master's degree) presents the Meritum Magazine to the academic community, with the mission of being an effective instrument for the dissemination of scientific works developed in Brazil and abroad, in line with the research lines "Private Autonomy, Regulation and Strategy", "Public Sphere, Legitimacy, Control".

The upward profile and quality of the Master's Program in Law at the FUMEC University were attested by the last evaluation carried out by the Coordination for the Improvement of Higher Education Personnel - CAPES (quadrennium 2013/2016), in which it obtained grade 4 (four).

Revista Meritum, in this context of academic production quality, is a traditional journal and a reference in Law, being classified with extract B1 by the Coordination for the Improvement of Higher Education Personnel - CAPES, through the set of procedures called Qualis Periódicos.

Therefore, it is characterized by disseminating the knowledge generated from investigations that contribute to the formation of professionals with critical legal conscience, qualified not only for the exercise of legal technique, but also for thinking about the Law in its scientific, philosophical, historical, sociological and political.

As of Volume 15, Number 1, of 2020, Revista Meritum started to adopt the four-monthly periodicity (3 issues per year), with the receipt of articles for evaluation in a continuous flow. In addition, it is internationalized, through DOI, that is, it has a digital object identifier, which allows the publication to be identified in a unique and persistent way in the Web environment.

Meritum Magazine is also pleased to announce that it has introduced the English version of articles written in Portuguese and the MP3 audio version. A new permanent section of Dissertations of PPGD FUMEC was created with the objective of giving visibility to the dissertations defended by the master's students.

Articles submitted to Revista Meritum vol. 15, n. 1, were evaluated by the Editorial Coordination, which examined the suitability for the journal's editorial line, elementary formal and methodological aspects, among others. Subsequently, each text was sent to at least two reviewers, by the double blind peer review system, for analysis of form and content, as well as the issuance of the opinion.

Critically, autonomously and plurally, in this vol. 15, n. 1, several issues and problems in the legal universe related to the Democratic Rule of Law and the enforcement of rights are addressed. It seeks to analyze and debate perspectives that help to critically interpret our contemporaneity and the challenges that arise from it.

Happy reading to all!

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

SUMMARY

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THE UNAVAILABILITY OF PUBLIC INTEREST: CONTENT, LEGAL NATURE, NORMATIVE FOUNDATION AND IMPACTS ON BRAZILIAN ADMINISTRATIVE LAW

A INDISPONIBILIDADE DO INTERESSE PÚBLICO: CONTEÚDO, NATUREZA JURÍDICA, FUNDAMENTOS NORMATIVOS E IMPACTOS NO DIREITO ADMINISTRATIVO BRASILEIRO

LUZARDO FARIA[1]

ABSTRACT

The purpose of this article is to conduct a vertical analysis of the principle of unavailability of the public interest. Therefore, it starts analyzing the legal content of this principle, in order to identify what it really means. In the sequence, the legal nature of the unavailability will be examined (that is, if it is in fact constituted as a principle or if it should be seen as a rule). Once there is a relevant criticism regarding the alleged lack of support for this principle in Brazilian law, the article demonstrates its normative foundations at the constitutional and infraconstitutional level. In the end, considering that this is one of the key norms of the legal-administrative regime, the main impacts of the unavailability of the public interest for Brazilian Administrative Law are analyzed. The article uses national and foreign bibliographic research, supported by the hypothetical-deductive method.

KEY-WORDS: Public interest. Unavaliability. Legal content. Legal nature. Normative Foundation.

RESUMO

O objetivo do presente artigo é realizar uma análise verticalizada do princípio da indisponibilidade do interesse público. Para tanto, inicialmente será explorado o conteúdo jurídico desse princípio, a fim de identificar do que trata a indisponibilidade do interesse público. Na sequência, será examinada a natureza jurídica da indisponibilidade (isto é, se ela de fato se constitui como um princípio ou se deve ser encarada como uma regra). Diante das críticas quanto à suposta ausência de amparo a este princípio no Direito brasileiro, demonstra-se os seus fundamentos normativos em nível constitucional e infraconstitucional. Ao final, por se tratar de uma das normas-chave do regime jurídico-administrativo, analisa-se os principais impactos

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da indisponibilidade do interesse público para o Direito Administrativo brasileiro. O artigo utiliza-se de pesquisa bibliográfica nacional e estrangeira, amparado no método hipotético-dedutivo.

PALAVRAS-CHAVE: *Interesse público. Indisponibilidade. Conteúdo jurídico. Natureza jurídica. Fundamentos normativos.*

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1 INTRODUCTION

The principle of unavailability of the public interest is seen, alongside the notion of supremacy of the public interest, as one of the fundamental and structuring norms of the entire legal-administrative regime. According to Celso Antônio Bandeira de Mello, this is not because they have virtues in themselves that impose them as such, but because it is possible to verify that Administrative Law, as a whole, took these principles as it's legal north and, from there, was validated as a "source-matrix of the system" (MELLO, 2015, p. 57). After all, it is easily noticeable that the two norms - which reflect, in Brazil, the classic binomial of prerogatives and subjections that bypasses Administrative Law throughout the world - is what gives a uniform logical consistency to the legal-administrative regime.

However, despite the fact that, at least in theory, the importance of the principle of unavailability has been relegated, in practice very little has been written about it, still remaining as a topic practically untouched by the science of Administrative Law in Brazil.

In this sense, Mariana de Siqueira notes that in the study of the category of public interest in Brazilian Administrative Law "the works destined to rethink the supremacy of the public interest over the private one prevailed, being too few those destined to reflect specifically on the unavailability of the public interest". The unavailability, reinforces the author, "usually appears in the works about the supremacy as a 'ride' in the theoretical arguments built there, not as the main object to appear in the title, but as a theoretical element analyzed internally throughout the writings, punctual and as an accessory" (SIQUEIRA, 2016, p. 202). There are even those who maintain that the unavailability is a mere consequence of the principle of supremacy.[2]

This circumstance often ends up generating misapplications of the referred principle. In any case, knowing what is the real legal content of a particular principle that is intended to be used, knowing the rules of the system that support its existence and the elements that compose it are essential and inexcusable steps for its proper interpretation and application in concrete cases. The lack of knowledge of these factors by the legal doctrine and operators, then, is the problem that justifies the present research.

These findings - it is important to be clear - do not apply only to the principle of unavailability of the public interest. However, in spite of the honorable recognition with which it mentions the principle of unavailability, it is at least curious that the doctrine has not so far devoted itself in depth to identifying each of these peculiarities in its legal regime.

2 In this sense it is the positioning of MEIRELLES, Hely Lopes. Brazilian Administrative Law (Direito Administrativo Brasileiro). 38. ed. São Paulo: Malheiros, 2012. p. 108; and MARTINS JÚNIOR, Wallace Paiva. Principle of public interest (Princípio do interesse público). In: DI PIETRO, Maria Sylvia Zanella; and MARTINS JÚNIOR, Wallace Paiva. Administrative Law Treaty: general theory and principles of administrative law (Tratado de direito administrativo: teoria geral e princípios do direito administrativo). vol. 1. São Paulo: Review of the Courts (Revista dos Tribunais), 2014. p. 511.

By relegating the principle of unavailability to an almost "obvious" tone, the academic community made room for little or almost nothing to be known about this principle. And, ultimately, the academy authorized the Public Administration and the Judiciary to use the notion of unavailability of the public interest as a 'buzzword concept' that serves as a tie to the Administration *'when they want'*.

Seeking to combat this scenario, the objective of this article is to carry out a vertical analysis of the principle of unavailability of the public interest. To this end, initially the legal content of this principle will be explored, in order to identify what the public interest unavailability is about. In the sequence, the legal nature of the unavailability will be examined (that is, if it really constitutes a principle or should be seen as a rule). In view of the criticisms regarding the alleged lack of support for this principle in Brazilian law, its normative foundations at the constitutional and infraconstitutional level are demonstrated. In the end, as it's one of the key norms of the legal-administrative regime, the main impacts of the unavailability of the public interest for Brazilian Administrative Law are analyzed. The article uses national and foreign bibliographic research, supported by the hypothetical-deductive method.

2 THE LEGAL CONTENT OF THE INDISPONIBILITY OF THE PUBLIC INTEREST

As with the principle of the supremacy and the notion of public interest, the almost honorific recognition of the principle of unavailability in Brazilian Administrative Law is achieved mainly through the dissemination of the teachings of Celso Antônio Bandeira de Mello. Since the author chooses these concepts as the structural basis of the entire legal-administrative regime in Brazil and his work was, without a doubt, the one that most impacted academia and jurisprudence on Administrative Law in recent decades, there would be no way the principle of unavailability would not receive such importance.

As a starting point for the analysis of the legal content of the unavailability of the public interest, therefore, the lesson of Bandeira de Mello is borrowed. According to this author, the meaning of the unavailability lies in the fact that "being interests qualified as belonging to the collectivity - internal to the public sector -, they are not freely available to anyone, as they are inappropriate". According to him, "the administrative body that represents them has no availability over them, in the sense that it is only incumbent on them to cure them - which is also a duty - in strict compliance with what predisposes to *intentio legis*" (MELLO, 2015, p. 76).

Despite the profusion of the definition made by Celso Antônio and the influence that he had on the work of several other authors who took up the theme, the fact is that there is no consensus in the Brazilian doctrine regarding the content of the principle of unavailability of the public interest - and this maybe exactly because the writings on the subject, as a rule, never faced it with the specificity necessary to understand it properly.

In precious research, Natalia Pasquini Moretti (2012, p. 460) identifies that unavailability is treated from at least four facets by national doctrine: **(i)** unavailability of legal purpose; **(ii)**

unavailability of the duty to act; **(iii)** unavailability of public goods and services; **(iv)** unavailability of administrative skills.

(i) The *unavailability of the legal purpose* is the facet to which the principle in question is most commonly related. As seen, from the classic lessons of the more traditional authors listed above, it is understood that in public administrative activity "the good is not understood to be linked to the administrator's will or personality, but to the impersonal purpose that this will should serve" (LIMA, 2007, p. 37), which is found exactly in the legislation.

From this perspective, the Public Administration is prohibited from taking any decision that is not intended to meet the objectives imposed on the State by legislation. That is, the Administration cannot detach itself from the commands and directions imposed by the Constitution and the infraconstitutional rules. After all, the public interest, in legal terms, is that defined by the legislator as such.

It is interesting to note that, even in cases of conflicts of public interest, the Administration may not have the legal purpose. At first, this might seem impossible in cases where two norms with opposite purposes collide in a specific case. However, it should be remembered that the maximum purpose protected by the unavailability of the public interest is that of constitutional norms, interpreted and applied systematically, as a homogeneous body of guidelines to be followed by the Public Administration. Thus, when, faced with a specific situation, the Administration is obliged to fail to achieve the purpose intended by a certain legal rule, it is essential that this be done only to the extent that it is appropriate, necessary and proportional. This will ensure that the public interest is realized in a broader view.

(ii) *The unavailability of the act of duty* is what makes the public administration must be incessantly making all its efforts towards the achievement of the public interest. The State cannot deliberately fail to act when it sees, in this specific case, the presence of a public interest,[3] even though there is no specific normative provision requiring that specific conduct by the Administration. If this occurs, judicial measures of a mandatory nature are applicable, imposing on the Administration an obligation to do to satisfy the public interest. It is from this notion that the principle of the continuity of public services is developed, for example.

It is important to emphasize that the unavailability of the duty to act must also be seen in an inverse prism, in relation to the omission duties of the Public Administration. In these situations, this commandment has the purpose of preventing the State from taking a certain action when it is envisaged that this act will result in the violation of a public interest.[4] Thus, the State is required to adopt an omissive position. This is what happens when the Administration is required to respect the function of defending fundamental rights, which guarantees individuals a space of freedom preserved from arbitrary state interference.

(iii) *The unavailability of public goods and services* is related to the idea that the administrator, because he is not the owner of the public property, cannot have it, except in the

3 In this sense, Edmir Netto de Araújo points out that "administrative activity is compulsory for the Administration and required by the administrator, if the exercise of competence is mandatory, because in the public interest the agent cannot dispose of his or her duty, but fulfill his duty, using of the power that the law has assigned him/her" ARAÚJO, Edmir Netto de. Administrative Law Course (*Curso de Direito Administrativo)*. 5. ed. São Paulo: Saraiva, 2010. p. 74-76.

4 As remembers Luis de la Morena y de la Morena, "en ausencia de ese interés público, la Administración no podría actuar por cese o desaparición de su único (pero suficiente) soporte justificativo". MORENA, Luis de la Morena y de la. Derecho Administrativo e interés público: correlaciones básicas. *Revista de Administración Pública*, Madrid, n. 100-102, p. 847-880, ene./dic. 1983. p. 847.

strict circumstances provided for in the legislation and provided that following the procedures established there.[5] It is the logic that prevents the Public Administration, for example, from freely selling its properties or from relegating to the private sector the provision of a certain public service without prior bidding process.

(iv) *The unavailability of administrative competences*, in turn, is what prevents the Public Administration from failing to comply with the duties imposed on it by the ordinance and from using the prerogatives that the legal-administrative regime endorses in order to instrumentalize the pursuit of the public interest. According to Maria Sylvia Zanella Di Pietro, "precisely because it'is unable to have public interests whose custody is assigned to them by law, the powers attributed to the Administration have the character of power-duty; are powers that it cannot fail to exercise, under penalty of responding by default".[6]

It is expressly stated in art. 2, sole paragraph, item II of Law 9.784/99, which provides that the Public Administration must observe the criteria for "service for purposes of general interest, total or partial waiver of powers or competences is prohibited, unless authorized by law". This is the basis, for example, of the classic positions that the Administration cannot dispose of the application of administrative sanctions or the enjoyment of procedural prerogatives conferred on the Public Finance (*Fazenda Pública*).

Its content is very similar to the meaning attributed to the *unavailability of the duty to act*, with the only difference that when referring to the *unavailability of administrative powers* there is some normative provision (constitutional, legal or even administrative) imbuing the Administration with a prerogative to be used in hypotheses objectively described by the legislation for the pursuit of the public interest. In the first case, the unavailability acts in a more general way - that is, although there is no specific competence forecast -, as a way of directing the *praeter legem* activity of the Administration towards the realization of the public interest.

Altogether, it is a purely didactic division, which fulfills its function by systematizing the different areas of incidence of the principle of unavailability of the public interest in Brazilian Administrative Law. The problem, however, lies in the fact that often, faced with concrete situations, public administrators make their decisions driven by only one of the facets mentioned above, forgetting, intentionally or not, the other angles of this principle.

And, in doing so, they distort the real concept of the unavailability of the public interest, giving rise to conservative and uncompromising positions, which in practice are not able to protect the public interest in a truly adequate way. After all, since the public interest is a changing content category (according not only to the legislation, but even to the factual context of each specific case), stagnant views of the principle of unavailability will never be able to correspond to the complexity of this notion.

This is the case, for example, when public authorities, allegedly in the name of the unavailability of the public interest, are obliged to contest actions or to appeal against judicial

5 It is the definition of the principle of unavailability that is extracted from the doctrine of Diógenes Gasparini, since the initial editions of his Course. For him, "according to this principle, public goods, interests and services are not freely available to the bodies of the Public Administration, who are responsible for curing them, or the administrator, who represents them". GASPARINI, Diógenes. Administrative law. (*Direito Administrativo)*. São Paulo: Saraiva, 1989. p. 10.

6 It is the historical position displayed by the author, from the early editions of her work: DI PIETRO, Maria Sylvia Zanella. Administrative law. (*Direito Administrativo)*. 2. ed. São Paulo: Atlas, 1991. p. 67.

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decisions that are unfavorable to them, even if it is identified that the applicant, in accordance with current rules and with the prevailing jurisprudential understanding, be right. In this case, the unavailability of administrative powers is used, without duly worrying about the unavailability of legal purposes, since, clearly, it's not for this purpose that the legal system provides the Public Finance with procedural defense instruments.

Thus, an adequate understanding of the legal content of the principle of unavailability of the public interest must take into account all the multiple consequences that involve the scope of protection of this rule.

In addition, it is essential to emphasize the "counterweight" function exercised by the unavailability in relation to the supremacy of the public interest, as a way of conditioning administrative action in the pursuit of a determined public purpose, not allowing administrative prerogatives to be used for any purpose other than that of public interest. At this point, it appears that the principles of supremacy and unavailability of the public interest are, in Brazilian Administrative Law, condensations of what the administrative doctrine traditionally puts as being the opposition between, respectively, the prerogatives and the subjects of the Public Administration (MELLO, 2015, p. 57), the most striking feature of this branch of law.

Thus, the complementary relationship between the principles of supremacy and the unavailability of the public interest is latent. While the first gives the Administration the prerogatives considered necessary for the Public Power to carry out the complex activities that are its responsibility, the second acts as a limitation to these same prerogatives, conditioning administrative activity to the achievement of legal purposes, which is done through the imposition of a series of subjections that, as with the prerogatives, are also not seen in private relations (HACHEM, 2011, p. 106).

And it is exactly the principle of unavailability that makes this second angle of looking at the role of public interest in Administrative Law possible, making "the common good, at the same time, a foundation and a limit for state action" (HAEBERLIN, 2017, p. 65).

The unavailability, therefore, much more than simply saying the obvious (as some authors criticize), has an important function of directing the legal-administrative activity. It must be understood that the unavailability of the public interest is the answer, existing in the legal-administrative regime itself, to curb the undesirable excesses that the Administration could come to commit if it were granted only prerogatives (ESCOLA, 1989, p. 13). After all, this principle, "by accentuating the state's duty to serve the desires of the community, aimed to print a democratic guise to the country's Administrative Law" (HACHEM, 2011, p. 29) serving as a legal guideline for the path that Public Administration, under the aegis of the of the Federal Constitution of 1988, must pursue in order to achieve the objectives outlined by this.

3 THE LEGAL NATURE OF THE INDISPONIBILITY OF PUBLIC INTEREST: PRINCIPLE OR RULE?

Having explained the factors that make up the legal concept of the principle of unavailability of the public interest, it is now necessary to analyze the nature of the referred rule for

the Law. That is, what form it appears in the Brazilian legal system. After all, this also has a strong impact on the way in which it will be applied in practice by legal operators.

The term "principle" is one of the most polysemic in all legal science.[7] Two of these meanings, however, are used more frequently to designate a certain legal norm as a principle and, for this reason, deserve greater attention. It is the extractable meanings of the theories that classify a rule as a principle due to the *function it performed in the legal system* and the *form of its application*.

The first understanding, considered the most traditional[8], considers the principles the fundamental norms of the system, those that give rationality to the entire legal system, the one on which the entire legal system is structured and based.[9]

Celso Antônio Bandeira de Mello, main developer, as seen, of the thesis that the supremacy and unavailability of the public interest bear the character of *true legal principles*, follows this line. In this author's definition, the principles represent the *core commandments of the legal system*. In a passage that has become quite well-known, the author refers to legal principles as a "fundamental disposition that radiates over different norms, composing their spirit and serving as a criterion for their exact understanding and intelligence, exactly because it defines the logic and rationality of the normative system, giving it the tonic that gives it harmonic meaning". And, for these reasons, concludes that "violating a principle is much more serious than breaking a rule" (MELLO, 2015, p. 54).

The other very common model of differentiating principles from legal rules is based from its *application form*. This trend, which has gained great attention from Brazilian doctrine in recent decades, is led by the lessons of Ronald Dworkin and Robert Alexy. It is important to note that, although they are almost always cited together, as if they were the same line of thought, the theories constructed by Dworkin and Alexy have some points of divergence between them[10]. However, as stated, both adopt the logical-normative structure of the legal command in question as a criterion for defining it as a rule or as a legal principle.

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7 Just to get a sense of the diversity of meanings attributed to the expression "legal principles", it is worth noting that Ana Paula de Barcellos, in a specific work on the legal effectiveness of constitutional principles, identified the existence of at least seven different understandings for this term. Such disagreement stems from the ifference in the criteria used by the authors to classify a certain legal norm as a principle. And just in Barcellos research the following criteria were identified: **(i)** the content of the standard; **(ii)** the origin and validity of the standard; **(iii)** the historical commitment involved around the standard; **(iv)** the function performed by the standard in the planning; **(v)** the linguistic structure of the standard; **(vi)** the interpretative effort required to understand the scope and application of the standard; **(vii)** how to apply the standard. BARCELLOS, Ana Paula de. The legal effectiveness of constitutional principles: the principle of human dignity. (*A eficácia jurídica dos princípios constitucionais*: o princípio da dignidade da pessoa humana). 3. ed. rev. e atual. Rio de Janeiro: Renovar, 2011. p. 53-56.

8 The finding is made by Virgílio Afonso da Silva in: SILVA, Virgílio Afonso da. Principles and rules: myths and misconceptions about a distinction. (Princípios e regras: mitos e equívocos acerca de uma distinção). *Revista Latino-Americana de Estudos Constitucionais*, Belo Horizonte, n. 1, p. 607-630, Jan./Jun. 2003. p. 612. It is important to note that, in addition to the authors cited here, several other scholars are affiliated with this trend, such as, for example, José Joaquim Gomes Canotilho and Vital Moreira (CANOTILHO, J. J. Gomes; MOREIRA, Vital. Fundamentals of the constitution. (*Fundamentos da constituição)*. Coimbra: Coimbra Editora, 1991. p. 49), Cármen Lúcia Antunes Rocha (ROCHA, Cármen Lúcia Antunes. Constitutional principles of Public Administration. (*Princípios constitucionais da Administração Pública)*. Belo Horizonte: Del Rey, 1994. p. 23-25), José Afonso da Silva (SILVA, José Afonso da. Course of Positive Constitutional Law. (*Curso de Direito Constitucional Positivo)*. 32. ed. São Paulo: Malheiros, 2009. p. 91), among others. Hence the reason why this is considered the "traditional" model in Brazilian law.

9 Geraldo Ataliba, for example, one of the most acclaimed names in Brazilian Tax Law in the second half of the 20th century, manifests himself in the following sense: "principles are the key and essence of all law. There is no right without principles. Simple legal rules are worthless if they are not supported by sound principles". ATALIBA, Geraldo. Constitution change. (Mudança da Constituição). *Revista de Direito Público*, São Paulo, n. 86, p. 181- 186, Apr./Jun. 1988. p. 181.

10 In this regard, we refer again to the article by Virgílio Afonso da Silva, which brings an in-depth and detailed analysis of these differences: SILVA, Virgílio Afonso da. Principles and rules: myths and misconceptions about a distinction. (Princípios e regras: mitos e equívocos acerca de uma distinção). *Revista Latino-Americana de Estudos Constitucionais*, Belo Horizonte, n. 1, p. 607-630, Jan./Jun. 2003.

For Dworkin, rules that apply to the "all-or-nothing" logic will be considered rules. That is, once provided for in the order, if the standard is valid and the requirements for its application are met, it will inevitably affect the specific case. On the other hand, if it is, for some reason, invalid (unconstitutional, for example) or if, in the specific case, the necessary requirements for its incidence have not been met, it will not be applied. N There is no gradation or *half-term*. The rule *applies or does not apply*. The principles, in turn, would be characterized by having a weighted dimension in their structure, which does not allow its application in the logic of "all-or-nothing". The application of a certain principle, therefore, must take into account its importance in that specific case. The more important that principle is in the specific case (in relation to others that are colliding with it), the more intense its incidence (also in relation to these other colliding principles). There is, therefore, an inevitable gradation, which can only be identified according to the peculiarities of each specific case (DWORKIN, 2010, p. 39-44).

Alexy's view, as said, is very similar to Dworkin's, but they are distant on some specific issues. Regarding the rules, Alexy's definition practically coincides with Dworkin's, stating that "rules are rules that can only be fulfilled or not. If a rule is valid, then exactly what it requires must be done, neither more nor less". One of the punctual differences referred to earlier is felt in the definition of principles, which are seen as "optimization mandates", "rules that order something to be carried out to the greatest extent possible, within the factual and legal possibilities existing in the concrete case". Unlike what happens in the case of a conflict of rules - when an exception clause is sought or one of them is invalid and only the other is applied - in the event of a collision of principles the solution will be the restriction of one of the fundamental rights in favor of the other, and this restriction must be adequate, necessary and proportional to be considered valid (ALEXY, 2012, p. 64-71).

That said, one must try to understand, now, from which of these two main forms the principle of unavailability presents itself. That is, is the unavailability of the public interest a legal principle because of its *degree of fundamentality* or because of its *form of application*? Or would it meet both criteria?

Regarding its degree of fundamentality, no further discussion is warranted. Not only because this is the criterion used to support the notion of legal principle by the author who pioneered the idea of unavailability of the public interest, but also - and mainly - because: **(i)** it is one of the norms that brings the axiological foundation of the entire legal-administrative regime, pointing, as a general directive, the republican and solidary path that must be followed by the Public Administration according to the Federal Constitution of 1988; **(ii)** provides the constitutional support required to legally legitimize the subjections to which the Public Administration is subjected in Brazil; **(iii)** it serves as a hermeneutic-interpretative canon of the other rules of Administrative Law, giving a tone of homogeneity to this entire legal system.[11]

The doubt, however, can arise when trying to ascertain whether the unavailability of the public interest could also be embedded as a legal principle in terms of Robert Alexy and Ronald Dworkin. Doctrine has not yet carried out any analysis in this sense, covering unavailability.

11 Daniel Wunder Hachem also uses these criteria to identify the supremacy of the public interest as a legal principle in the sense of a fundamental norm of the system. Cf. HACHEM, Daniel Wunder. Constitutional principle of the supremacy of the public interest. (*Princípio constitucional da supremacia do interesse público*.) Belo Horizonte: Fórum, 2011. p. 147.

From the point of view of the legal nature of the rule, it is not possible to state that the unavailability of the public interest can be seen as a principle, which can be applied to a greater or lesser degree, depending on the specific case. After all, this could lead to the conclusion that, depending on the factual and legal situations of the specific case, the Public Administration could be more or less linked to the realization of the public interest. In this sense, it would be admitted that in some cases the Administration deliberately failed to serve the public interest.

However, this is obviously not the extractable legal content of the principle of unavailability, which by logical deduction would make it impossible for its legal form to be presented in this way. Thus, *the unavailability of the public interest has the logical-normative structure of rule in Brazilian Administrative Law*.

This, however, does not prevent individual or collective interests in the strict sense are pursued by Administration, as long as they are supported by the legal system and provided that its implementation corresponds, albeit indirectly, to the satisfaction of the public interest of the community itself considered. The state development activity, very consolidated in administrative practice, presents itself as a good example of this, since, in general, its validity in relation to the unavailability of the public interest is accepted without impugnment.

This finding is relevant when, for example, it examines agreements signed by the Public Administration with private individuals based on the principle of unavailability of the public interest. This is very clear in cases where the validity of agreements is discussed, recognizing the right of individuals who are litigating against the Public Treasury (*Fazenda Pública*) in the judicial sphere. *A priori*, the interest of the collectivity would be in the sense that public advocacy would make all necessary efforts so that the public entity participating in the conflict would win. However, in specific situations the agreement with the individual litigator is authorized. Once again: not only to serve your individual interest, but mainly because, in certain cases (and it is only in these cases that agreements will be allowed) there will no longer be the collective interest in adversity from the Public Finance (*Fazenda Pública*).

4 THE NORMATIVE FOUNDATIONS THAT JUSTIFY THE EXISTENCE OF THE PRINCIPLE OF INDISPONIBILITY OF PUBLIC INTEREST IN BRAZILIAN ADMINISTRATIVE LAW

Once exposed what is understood by the content and the legal nature of the principle of unavailability of the public interest, it must now be demonstrated that the referred rule does in fact exist in the legal system, not being a mere doctrinal creation. After all, it is evident that for a given concept or value to be accepted as a legal norm it must have, explicitly or implicitly, an identifiable basis in the legal system.[12] Thus, one must seek in which legal-normative provisions of Brazilian Law the principle of unavailability can support its existence as a legal norm.

12 Humberto Ávila, in this sense, says that there must be a "basis of validity in positive law, expressly or implicitly", for a given provision to be considered as a "norm-principle". Cf. ÁVILA, Humberto. Rethinking the "principle of the supremacy of the public interest over the particular". In: SARMENTO, Daniel (Org.). Public versus private interests: deconstructing the principle

In this sense, it is very common to find texts that, in an attempt to demonstrate the constitutional protection of the principle of unavailability of the public interest, point out the devices that impose restrictions on administrators regarding the sale of public goods, the holding of public tenders, bidding requirements, reforms in public assets, among others, as proof of the legal existence of this principle. However, the methodology undertaken seems to be mistaken for inverting the poles of the equation: these institutes are not the demonstration of the existence of the principle of unavailability, but at most its consequences (this, if it is in fact extractable from the Constitution). In other words, even if the final conclusion reached is the same, disagrees is the path taken by this line of argument.

Furthermore, it is also recognized that many of the "subprinciples" arising from the unavailability of the public interest were constitutionalized in the 1988 Charter, which offers a large complex of guarantees to citizens against the State (HACHEM, 2011, p. 166). This is the case, for example, with the principles of impersonality and publicity. The identification of these reflections of the principle of unavailability is quite easy.

What little is said, however, it is which are the foundations of this principle. That is, in addition to what are considered to be the fruits of unavailability, what in fact can be taken as the basis that supports the existence of this principle in Brazilian Law?

In an attempt to identify an answer to this question, the first and easiest way to be pursued is to seek in the constitutional text itself some explicit mention of the principle of unavailability of the public interest. The effort, however, would be harmless. There is no constitutional provision that expressly links the Public Administration to a "principle of unavailability of the public interest" or any other with similar wording.

The fact, however, that there is no constitutional provision expressed in this sense can in any way be seen as a definitive obstacle to the defense of the legal existence of the principle of unavailability of the public interest in Brazilian Law. In this line, the Spanish administrativist Alejandro Nieto (1991, p. 2225) points out that if - unlike what happens in his country - there is no express provision that the Administration must follow the public interest in all Constitutions, this is simply due to fact that such a link is an obvious conclusion.

It is prudent to remember that in the same situation as the principle of unavailability of the public interest are other constitutional principles of extreme relevance such as the legal certainty, proportionality and reasonableness - none of them found explicitly in a constitutional provision. Despite this situation, there is no major question about the existence of such principles, widely recognized by the doctrine and applied by national jurisprudence. The reason for this is that such rules can easily be deduced from the constitutional text. Identical, again, is the situation of the principle of unavailability, which, being extractable from a wide set of constitutional norms, presents itself as an *implicit* constitutional principle of Brazilian Administrative Law.

In this sense, Mariana de Siqueira (2016, p. 195) agrees that, although it is not a "text expressed in the provisions of the 1988 Constitution, it does not, however, lack legal protection" the principle of unavailability of the public interest. Daniel Wunder Hachem (2011, p. 118), along the same lines, goes so far as to affirm that "there is no doubt that the *unavailabi-*

of the supremacy of the public interest. (*Interesses públicos versus interesses privados*: desconstruindo o princípio da supremacia do interesse público). 3. tir. Rio de Janeiro: Lumen Juris, 2010. p. 181.

lity of public interests, as a synthesis idea of the special subjects of Public Administration in favor of the citizen, can be identified as an implicit principle in the constitutional fabric", being that the "duty of the Administration to obey all its developments (...) results directly from its submission to the Constitution".

The way, then, is to seek to identify in the constitutional text which are the devices that serve as a basis to justify the existence of the principle of unavailability of the public interest in Brazilian Administrative Law.

The preamble already contains the determination (albeit not in a binding way, but as an important hermeneutic orientation) that the Brazilian State is instituted with the aim of ensuring the well-being of the population (among other supreme values such as freedom, equality and justice).[13] In a similar sense - and there with binding force in the face of administrative activity - advocates art. 3º, item IV, that the fundamental objectives of the Republic are to promote the "good of all, without prejudice of origin, race, sex, color, age and any other forms of discrimination".[14]

Now, as taught by Héctor Jorge Escola (1989, p. 31), in Argentina the pursuit of public interest is considered a constitutional principle precisely because of the expression "general well-being" in the preamble to the Constitution, in a very similar way as like it happens in Brazil. At the national level, Juarez Freitas (2009, p. 54) is one of the authors who takes a similar position when stating, based on the constitutional provision mentioned above, that "the principle of public interest prescribes that, in the event of a collision, the will must prevail legitimate general will (the 'good of all' as stated in article 3º of the Constitution) about the selfishly articulated or factional will".

In addition to the provisions mentioned above, a systematic interpretation of constitutional rules is also capable of demonstrating the implicit reasoning of the principle of unavailability in the constitutional text in other rules of similar content to the preamble and art. 3º, item IV. When the Constitution, in several of its articles, paragraphs and items, provides as a duty for the State to promote social justice, solidarity and harmony among citizens, it is perceived that it is linking administrative activity to the fight against inequalities, the inclusion of marginalized individuals and the fight against oppression of every kinds. In short, there is an "impossibility of allowing the primacy of exclusively private interests over constitutionally protected legal assets" (HACHEM, 2011, p. 125).

Thus, the fact that the preamble and art. 3º, item IV, of the Constitution (among so many others that, in a less direct way, point to the same sense) determining the achievement of general well-being as a basic objective of Public Administration would already be sufficient normative justification to recognize the existence of the principle of unavailability of the public interest in the Brazilian legal system.

13 Constitution of the Federative Republic of Brazil. Preamble (**Constituição da República Federativa do Brasil. Preâmbulo)**. We, representatives of the Brazilian people, gathered in a National Constituent Assembly to establish a Democratic State, designed to ensure the exercise of social and individual rights, freedom, security, well-being, development, equality and justice as values supreme of a fraternal, pluralistic and unprejudiced society, founded on social harmony and committed, internally and internationally, to the peaceful settlement of disputes, we promulgate, under the protection of God, the following CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL.

14 Constitution of the Federative Republic of Brazil (**Constituição da República Federativa do Brasil)**. Art. 3º. The main objectives of the Federative Republic of Brazil are: [...] IV - to promote the good of all, without prejudice of origin, race, sex, color, age and any other forms of discrimination.

There is, however, a device that links administrative activity in an even more consistent way with the full and incessant realization of the public interest. This is art. 1º of the Federal Constitution, which defines the Brazilian State as a *Republic*.[15] Much more than a mere "abstract declaration of intent to appear in the constitutional text", this expression is constituted as "an objective command applicable and demandable to all application of the Brazilian normative system, constitutional and infra-constitutional", being that "the republican principle, allied to the condition of Democratic State of Law, is therefore, *imposing to all the relations between the state and its people*" (LIMA, 2013, p. 108-109).

Traditionally, the Republic is seen as a form of government that opposes the Monarchy, for constitutes a State in which public power is exercised by representatives of the *people*, specifically elected for this function and with several limitations in their performance - and not by representatives absolutists brought to power for theological and hereditary reasons (DALLARI, 2012, p. 225-227). Such differentiation, however, despite its importance for educational purposes and its historical value, cannot be fully accepted in contemporary society, considering that the majority of Monarchies in the world today are inserted in democratic regimes (BARCELLOS, 2018, p. 118).

In search of a definition for the term, Ana Paula de Barcellos (2018, p. 118-119) points out that, despite there are numerous divergent positions on the real meaning of the republican principle, making it impossible the task of finding "a univocal and simple historical sense", analyzing all these conceptions it is possible to "identify a common essential idea: it is the notion, somehow associated with the idea of republic, of absolute power restriction, of just government and *the exercise of power oriented towards the good of the community*". In another section, the constitutionalist reinforces that the expression "republic" is "associated with notions of fair government, the rule of law*, primacy of the public interest* and, mainly, control of power". From there, it's already possible to begin to understand the relationship between republicanism and the principle of unavailability of public interest.

In a Republic, the activity of public agents, as representatives of society and holders of public powers, must be guided by a criterion of neutrality (GABARDO, 2009, p. 363), without using the prerogatives provided by the administrative machine to privilege or harm people or social groups in specifics for personal reasons.[16] In the Brazilian constitutional order, this value was confirmed in art. 37 through the principle of impersonality. But its intrinsic relationship with the conception that the Administration should act for *public* interests - and not private - is also evident, something that reinforces the thesis that the unavailability of public interest by the Administration is an implicit legal principle extractable from the republican model of State expressly adopted by the Federal Constitution of 1988.

Thus, it is possible to affirm that the unavailability of the public interest is an indisputable reflection of the ideal of republicanism that permeates the Brazilian Constitution. From this, what can be discussed are at most the practical consequences of the principle of unavailability, but the fact that the Public Administration of a Republic must pursue public interests,

15 Constitution of the Federative Republic of Brazil (**Constituição da República Federativa do Brasil)**. Art. 1º. The Federative Republic of Brazil, formed by the indissoluble union of States and Municipalities and the Federal District, constitutes a Democratic State of Law and has as foundations.

16 In this sense, Ana Paula de Barcellos records that "the republican ideal imposes the separation between private interests of public agents and the public interest that they must defend or promote". BARCELLOS, Ana Paula de. Constitutional Law Course (**Curso de direito constitucional)**. Rio de Janeiro: Forense, 2018. p. 119.

which concern the whole community and not just certain groups of people, who hold power want to privilege, is indisputable. After all, as taught by Emerson Gabardo (2009, p. 363), "a republic in which the common interest should not be taken as a starting point, that the common interest should be prioritized over the interests of a particular character, it certainly will not be a true republic".

Another constitutional provision that also justifies the existence of the principle of unavailability, although in a more discreet way than the previous ones, is the art. 66, § 1º, which prescribes that "if the President of the Republic considers the project, in whole or in part, unconstitutional or *contrary to the public interest*, he will veto it totally or partially [...]".

As a matter of fact, at this moment the Constitution seems to be referring to a more political concept of public interest, mainly because it places this veto hypothesis next to the one in which the President identifies some unconstitutionality in the legislative project. Even so, this provision is still an indication of the direction that the Constitution intends to impose on Public Administration. It is derived from it that the link of state activity to the realization of the public interest is such that the President of the Republic is authorized to veto a law approved regularly by the democratic representatives of the people, if he considers that the rule will matter in the face of the interest of the collectivity.

The same occurs with art. 57, §6 º,[17] with art. 93, VIII,[18] with art. 95, II[19] and with the art. 231, §6º.[20] They are all constitutional provisions that serve as an example to prove the thesis that: when the presence of a public interest is verified, the Public Administration is urged to act in a certain way, through acts that it could not practice if such a practice was not strictly necessary for the protection of the public interest.

Although not directly at the constitutional level, it is also interesting to bring up art. 2º, "*e*", and single paragraph, "*e*" of Law nº 4.171/65.[21] It is said that it is not directly constitutional, since it is good to remember that although prior to the Constitution currently in force, said legislation has, in the present scenario, the function of regulating art. 5º, item LXXIII of the Constitution.[22] Well. This device provides for the possibility of annulment, through the

17 Constitution of the Federative Republic of Brazil (**Constituição da República Federativa do Brasil). Art. 57. §6º.** The extraordinary convening of the National Congress will be made: II - by the President of the Republic, by the Presidents of the Chamber of Deputies and the Federal Senate or at the request of the majority of the members of both Houses, in case of urgency or relevant public interest, in all cases of this item with the approval of the absolute majority of each of the Houses of Congress.

18 Constitution of the Federative Republic of Brazil (**Constituição da República Federativa do Brasil). Art. 93. VIII** - the act of removal, availability and retirement of the magistrate, in the public interest, will be based on a decision by a vote of the absolute majority of the respective court or of the National Council of Justice, ensuring ample defense.

19 Constitution of the Federative Republic of Brazil (**Constituição da República Federativa do Brasil) Art. 95.** The judges enjoy the following guarantees: II - immovability, except for reasons of public interest, in the form of art. 93, VII.

20 **Constitution of the Federative Republic of Brazil (Constituição da República Federativa do Brasil) Art. 231. §6º.** Acts which have as their object the occupation, dominion and possession of the lands referred to in this article, or the exploitation of the natural resources of the soil, rivers and lakes in them, are null and void, without producing legal effects; subject to the relevant public interest of the Union, according to the provisions of a complementary law, not generating nullity and extinction of the right to indemnity or actions against the Union, except, in the form of the law, for improvements resulting from the occupation in good faith.

21 Law nº 4.171/65 (**Lei nº 4.171/65). Art. 2º** Acts harmful to the assets of the entities mentioned in the previous article are null and void, in the cases of: e) deviation of purpose. **Single paragraph.** For the conceptualization of nullity cases, the following rules will be observed: e) the deviation of purpose occurs when the agent practices the act aiming at a purpose other than that provided, explicitly or implicitly, in the jurisdiction rule.

22 Constitution of the Federative Republic of Brazil (**Constituição da República Federativa do Brasil). Art. 5º. LXXIII** - any citizen is a legitimate party to bring a popular action that seeks to annul an act that is harmful to the public patrimony or of an entity in which the State participates, to administrative morality, to the environment and to the historical and cultural patrimony, the author remaining, unless proven bad faith, exempt from court costs and the burden of succumbence.

instrument of Popular Action (*Ação Popular*), of administrative acts edited for purposes other than those prescribed by law for such competence.

Especially before Celso Antônio Bandeira de Mello's theories about the matter, the Administration's duty to seek the realization of the public interest was conveyed by the doctrine not by the principle of "unavailability of the public interest", but normally as something linked to the attribute of purpose administrative acts. Paradigmatic in this sense is the lesson of José Cretella Júnior (1966, p. 240) when he pointed out that "if the agent, taken for reasons other than the public interest, edits the administrative act, this leads to a serious defect of origin, informed that it was for a purpose incompatible with that which drives State personnel".

Thus, if, at the time, the attribute of the purpose of administrative acts was seen as the main link that linked Public Administration to the satisfaction of the public interest, it is correct to understand that when prescribing in art. 2º, "e" of the Law of Popular Action that the acts in which there is any deviation in purpose will be null, the legislator at that moment reinforced the anti-legality of any Public Administration action that distanced itself from serving the public interest.

Therefore, it is visible the provision of several normative provisions in Brazilian positive law that justify the existence of the principle of unavailability of the public interest in Brazilian Administrative Law.

5 THE IMPACTS OF INDISPONIBILITY OF PUBLIC INTEREST FOR BRAZILIAN ADMINISTRATIVE LAW

Above, the main normative provisions that support the principle of unavailability of the public interest in the national legal system were seen. From the explanations given about them, it is clear that the legal existence of such a rule in Brazilian Administrative Law is unquestionable. We must now understand what impacts the unavailability of the public interest, once properly recognized as a legal principle, brings to the legal-administrative regime.

According to Celso Antônio Bandeira de Mello (2015, p. 77), the main legal consequences of the principle of unavailability of the public interest are: **(i)** the principle of legality and its consequences such as the purpose, reasonableness and proportionality, the motivation and responsibility of the State; **(ii)** mandatory performance of public activity / continuity of public services; **(iii)** control (internal and external) of administrative acts; **(iv)** the equal treatment of citizens in the face of the Administration; **(v)** publicity; **(vi)** inalienability of rights concerning public interests. Each of these characteristics is now analyzed.

(i) In the words of Bandeira de Mello (2015, p. 78), the principle of administrative legality is "a natural consequence of the unavailability of the public interest". Since the public interest is enshrined in positive legislation, it is logical that the duty of the Administration to promote this public interest arises from the duty to respect the legislation, subordinating all its activity to the legal rules enshrined in the order. The most interesting point, then, seems to be in what Celso Antônio considers as the consequences of the principle of unavailability: **(i.1)** the goal;

(i.2) the reasonableness and proportionality; **(i.3)** the motivation, and **(i.4)** the state responsibility.

(i.1) The attribute of the *purpose/goal* of administrative acts, as already mentioned, is closely related to the notion of unavailability of the public interest. It is certain that "a law is not applied correctly if the act of application is out of step with the scope of the law" (MELLO, 2015, p. 80). Thus, the duty that all legal acts that correspond to manifestations of will of the Public Administration are edited aiming at the fulfillment of a determined purpose foreseen by law (and not any purpose that, personally and subjectively, the public authority) is a result of the principle of unavailability. It is this link that binds administrative activity, under penalty of legal invalidity, to the permanent pursuit of the public interest.

(i.2) Especially in cases where the Administration enjoys a certain margin of discretion to identify a given public interest and, thus, take the decision that is incumbent on it, the unavailability of the public interest requires that this decision be *reasonable* and *proportional* to the rights and interests that are at stake. An administrative act could not be considered to be in the public interest, which deviates from the legal standard of reasonableness or which is not adequate, necessary and proportional to the purpose for which it is supposedly intended.

(i.3) The duty to *motivate* administrative acts is not only an essential requirement for the legal category of public interest to be properly applied in any case, but it also appears as a consequence of the principle of unavailability. Once the assets and rights are public and not owned by the administrator, the authority must demonstrate reasonably all the reasons that led him to take a decision. Only then will citizens and control divisions be able to verify whether the administrative act was actually edited with a view to achieving a public purpose or, on the other hand, whether the Administration disagrees with its duty to carry out the public interest.

(i.4) Only in relation to the State's civil liability regime, one dares to disagree with Bandeira de Mello, as this characteristic is not seen as a result of the principle of unavailability. Unlike what happens with the other factors analyzed above, civil liability is not a typical or extraordinary subjection of the administrative regime. All persons, physical or legal, public or private, are subject to some system of civil liability. Although the State's civil liability regime differs from that which, as a rule, is applied to private individuals,[23] this is not capable of justifying a relationship between this characteristic and the principle of unavailability.

Currently, the objective form of civil liability is already being adopted also for individuals who are inserted in certain contexts. A clear example of this is private companies whose performance in some way impacts on issues related to Environmental Law. In such cases, companies are objectively responsible for the damage they cause to the environment. Thus, it is understood that subjection to the civil liability regime in the objective modality is a legislative option, resulting from the actual situation of the activity that a certain entity is carrying out, not being something unique and exclusive to the legal-administrative regime.

(ii) The duty of *continuing* to carry out administrative activities is a clear result of the principle of unavailability of the public interest, since, being not the owner of the public pro-

23 On the state's civil liability regime in Brazil, see: FARIA, Luzardo. The inefficiency of the current model of state civil liability in Brazil and the need for damage prevention (A ineficiência do atual modelo de responsabilização civil do Estado no Brasil e a necessidade de prevenção de danos). *Revista Digital de Direito Administrativo*, São Paulo, v. 4, n. 2, p. 117-136, Jul. 2017. p. 118-119.

perty, the administrator cannot give himself the possibility to deliberately fail to fulfill a certain administrative competence.[24] As already defended on another occasion, "at the moment when the State takes over the ownership of the provision of a given service, it seems logical to deduce that it is expected to provide a continuous service, under penalty of, not satisfying the needs present in that situation, violating the dignity of the affected citizens" (FARIA, 2015, p. 121). The comment, developed based on the scope of public services, in which the principle of continuity is most commonly studied, applies without major differences to any other administrative activity.

(iii) *The submission of administrative activity to external and internal control* is another typical legal consequence of the principle of unavailability of the public interest.

Its relation to the principle of unavailability of the public interest is indissoluble, because it is only through this control that it will be possible to verify if the acts edited by the Public Administration were in fact issued with a view to realizing the public interest. Control has unparalleled importance to enable full compliance with the principle of unavailability, because without it, other consequences of this postulate (such as legality, purpose and motivation, for example) would be innocuous. It is the possibility of control that allows, through various techniques, the correction of administrative acts that are contrary to the fulfillment of the public interest, imposing coercively on the Administration the obligation to execute only the decisions that give effect to this commandment and discard those that distance themselves from it.

(iv) *The equal treatment of citizens vis-à-vis the Administration and the principle of administrative impersonality*, of which it is a direct expression, are also supported by the unavailability of the public interest. This relationship was already emphasized when it was demonstrated that the main legal provision that underlies the normative plan for the existence of the principle of unavailability in the country's Administrative Law is art. 1º of the Federal Constitution, when classifying the Brazilian State as a Republic. It is that "being in charge of managing the interests of the entire community, the Administration does not have the availability over these assets that gives it the right to treat those whose interests it represents unequally" (MELLO, 2015, p. 86). Indeed, if the administrator is, according to the principle of unavailability, a mere manager of the *res publica* (FARIA, 2013, p. 69), he obviously cannot manage it in a way that privileges or harms someone for personal reasons.

(v) Finally, *the inalienability of rights concerning public interests* is the last result of the principle of unavailability of public interest identified by Celso Antônio Bandeira de Mello. The reason for this, according to this author, is that "because the administration is a servient activity, developed at the infralegal level, it cannot alienate or be stripped of the rights that the law enshrined as internal to the public sector" (MELLO, 2015, p. 88). Similarly, Hely Lopes Meirelles (2012, p. 105) argues that the Administration "cannot renounce the powers that the law has given it for such protection, even because it does not hold public interest, whose the holder is the State".

24 In the words of Celso Antônio Bandeira de Mello, "since the administration is curator of certain interests that the law defines as public and considering that the defense, and their pursuit, is, for its, mandatory, a true duty, the continuity of the activity administrative is a principle that is imposes and prevails in any circumstances". MELLO, Celso Antônio Bandeira de. Administrative Law Course (*Curso de Direito Administrativo)*. 32. ed. São Paulo: Malheiros, 2015. p. 84.

The position, however, must be viewed with great caution. In fact, the assets and rights of the Public Administration are not "*free*" available to the administrator. It happens, however, that in certain situations the legal system may require - if this is the best answer that is offered to resolve the conflict verified in the specific case - that the Administration has a specific asset or right. Again: this does not involve a free and subjective appreciation of the administrator's personal desires, but rather the indications that can be extracted from the body of legal rules to which he is bound.

Thus, it appears that often the pre-formatted and stagnant position of the unavailability of assets and rights securitized by the Public Administration, may ultimately correspond to a violation of the principle of unavailability. As previously mentioned, it's common that *supposed* general public interests (duly guaranteed by the legal system) to lose their real quality of public interest in certain concrete situations, including making it possible to meet, in this sense, individual or collective interests *stricto sensu*. In other words, it is perfectly possible that, given a specific factual and legal context, the Administration is authorized to dispose of a portion of its assets or rights, if this is the option that best meets the public interest identified in that specific case.

This is just one of the examples able to justify that the time has come to re-read the principle of unavailability, in order to "allow, according to the legal order and in light of the factual circumstances, the use of consensual instruments for the densification of the concept of public interest, as well as for the resolution of administrative conflicts" (MORETTI, 2012, p. 465-466).

In general, all of these consequences arising from the incidence of the principle of unavailability of the public interest on the legal-administrative regime are "mechanisms capable of compelling the public administrator to satisfy the interests of the collectivity, removing personalist behaviors or linked to manifestations of his own will, and directing him towards achieving the public interest " (HACHEM, 2011, p. 49). Thus, its main function is to remove any margin of free performance in administrative activity. It is obvious that the spaces of discretion are preserved, however these must be explored by the Administration in a way conditioned to the realization of the public interest. That is, "the Administration cannot *give up* acting to satisfy the interests entrusted to it, although this does not stop it from *choosing*, within the limits of its own norm and law, how, when and how to do it" (MOREIRA NETO, 2006, p. 90).

6 CONCLUSIONS

There is no consensus in Brazilian doctrine regarding the content of the principle of unavailability of the public interest - and perhaps this is precisely because the writings on the subject as a rule have never faced it with the specificity necessary to understand it properly.

In this article, it was argued that the legal content of the principle of unavailability represents the inescapable duty of the Public Administration to undertake absolutely all its activity in order to satisfy the legally defined public interest. By virtue of the principle of unavailability, there can be no administrative act aimed at achieving any objective that does not coincide with the public interest. If not, it must be declared invalid.

The principle of unavailability of the public interest acts as a tie to administrative activity. This is the other side of the coin, made up of the principle of supremacy. It is this principle that justifies (theoretically) the exorbitant prerogatives that the legislation confers on the Public Administration when conditioning its handling to the satisfaction of the public interest.

The unavailability, therefore, much more than simply saying the obvious (as some authors criticize), has an important function of directing the legal-administrative activity. It is the unavailability of the public interest the answer, existing in the legal-administrative regime itself, to curb the undesirable excesses that the Administration could come to commit if it were granted only prerogatives.

As for its legal nature, it was seen that according to the criterion of *degree of fundamentality* there is no doubt that the unavailability of the public interest is presented as a principle. This is the central rule of Administrative Law, which, alongside supremacy, sets the tone for the entire legal-administrative regime.

Based on the criterion of the *logical-normative structure*, it was argued that the unavailability of the public interest is presented, in this point of view, as a rule. After all, supposing that the unavailability of the public interest could be seen as an optimization warrant could lead to the conclusion that, depending on the factual and legal situations of the specific case, the Public Administration could be more or less linked to the realization of the public interest. In this sense, it would be admitted that in some cases the Administration deliberately failed to serve the public interest, which goes exactly against what is considered to be the legal content of the unavailability.

Afterwards, it was demonstrated that the unavailability of the public interest is a norm that finds its foundation in positive Brazilian Law. Not expressly, but, rather, implicitly in the constitutional text, based on several normative provisions that link administrative activity to the pursuit of the public interest. It was also seen that, in an infraconstitutional basis, there are several devices that link the Public Administration to the realization of the public interest, with Law nº 4.171/65 standing out on this point.

In the end, the main implications brought by the principle of unavailability to the legal--administrative regime were identified, analyzing them one by one, specifically. It is: **(i)** the principle of legality and its consequences as the purpose, reasonableness and proportionality, motivation and responsibility of the State; **(ii)** mandatory performance of public activity / continuity of public services; **(iii)** control (internal and external) of administrative acts; **(iv)** the isonomic treatment of citizens vis-à-vis the Administration; **(v)** the publicity; and **(vi)** the inalienability of rights concerning public interests.

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DISCHARGING: ACQUISITION OF PROPERTY IMPOSED BY THE EXTRAJUDICIAL USUCAPTION PROCEDURE

DESJUDICIALIZAÇÃO: AQUISIÇÃO DA PROPRIEDADE IMÓVEL PELO PROCEDIMENTO DE USUCAPIÃO EXTRAJUDICIAL

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ABSTRACT

With the entry into force of the Code of Civil Procedure (Federal Law n. 13.105/2015), originated the possibility of adverse possession, that is, of the interested party seeking the declaration of the possession of real estate property directly in the extrajudicial services, without the necessity of if you turn to the Judiciary. It is, in fact, the search for the new civil procedure to adapt the means of conflict resolution, in order to promote social pacification with access to effective, just, efficient and adequate justice. In this idea, the adverse possession aims at exactly this misjudicializ ation of the conflicts, facilitating the acquisition of the immovable property. However, after a few years of its validity, it is necessary to analyze, through a bibliographic and specific legislation review, the institute under a vision of practical applicability and to point out possible issues that may hinder its effective action in society.

KEYWORDS: Social pacification. Adequacy in means of conflict resolution. Disqualification. Adverse possession.

RESUMO

Com a entrada em vigor do Código de Processo Civil (Lei Federal nº 13.105/2015), originou-se a possibilidade da usucapião extrajudicial, ou seja, do interessado buscar a declaração da usucapião da propriedade imobiliária diretamente nas serventias extrajudiciais, sem a necessidade de se recorrer ao Judiciário. Trata-se, em verdade, da busca pelo novo processo civil da adequação dos meios de solução de conflito, a fim de se promover a pacificação social com acesso à justiça efetiva, justa, eficiente e adequada. Nessa ideia, a usucapião extrajudicial visa exatamente essa desjudicialização dos conflitos, facilitando a aquisição da propriedade imóvel. Contudo, passado alguns anos da sua vigência, cabe analisar, por uma revisão bibliográfica e de legislação específica, o instituto sob uma visão de aplicabilidade prática e apontar possíveis questões que possam prejudicar sua atuação efetiva na sociedade.

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PALAVRAS-CHAVE: Pacificação social. Adequação nos meios de solução de conflito. Desjudicialização. Usucapião extrajudicial.

1 INTRODUCTION

The current legal scenario has brought the great importance of the study and creation of new forms of conflict resolution in order to promote a proper solution in reasonable time and in a fair and effective manner.

In this sense, the entry into force of the Civil Procedure Code of 2015 brought, among other factors, the discharging of the procedure for declaration of adverse possession of real estate property.

Meanwhile, some years after its validity, the question of the practical applicability of the institute is highlighted, that is, whether it is effectively serving its purpose and, if not, what factors can influence this (in) applicability.

Thus, this article aims to analyze the procedure of extrajudicial adverse possession, the cause of its emergence and its practical (or not) application within the proposal given to it.

Based on this problematization and outlined this objective, observing methodical, deductive, systemic and axiological, considerations on property and adverse possession will be scored, within its constitutional foundation, as well as the idea of social pacification of conflicts in a vision of adequacy of the means of solution, presenting, in this, the dejudicialization of conflicts.

Afterwards, it will deal with extrajudicial usucaption, its procedure and its applicability, as well will be made, through a bibliographic review and specific legislation, some notes of possible causes for the ineffectiveness of the institute.

2 THE PROPERTY AND ITS SOCIAL FUNCTION

The Brazilian legislator did not offer the concept of property, limiting itself only to listing, in article 1.228 of the Civil Code, the powers inherent in the condition of owner such as the ability to use, enjoy and dispose of the thing, and his right to reclaim it from the power of whoever unfairly owns or holds it (BRASIL, 2002).

This is a real right par excellence, the axis around which the right of things gravitates. It is, thus, the "most complete of subjective rights, the matrix of real rights and the nucleus of the rights of things" (GONÇALVES, 2018, p. 223).

Thus, the concept of property, although not open, must be indispensably dynamic. It must be recognized "that the constitutional guarantee of the property is subjected to an intense process of relativization, being interpreted, fundamentally, according to parameters established by the ordinary legislation" (GONÇALVES, 2018, p. 223).

Within this field, the principle of the social function of property is, undoubtedly, one of the biggest factors limiting property rights. This is because in the historical evolution of its concept, property that was full, exclusive and unlimited is now subject to public and social interest, within a phenomenon called by the doctrine and jurisprudence as publicizing private law[3].

That said, the Federal Constitution guarantees everyone the property right in its article 5, item XXII. However, shortly thereafter, in item XXIII, it relativizes this by determining that the property will serve its social function (BRASIL, 1988).

This notion is also inserted in the Civil Code, provided in article 1.228, § 1º, that "the property right must be exercised in line with its economic and social purposes" (BRASIL, 2002).

However, analyzing social function is not a simple task. "It is an expression that the doctrine itself recognizes to be of vague content. However, even if generically, it can be interpreted as the subordination of a certain institute to its social or collective interests, within a given society" (MARCHETTI FILHO, 2018b, p. 99).

In general, function, keeps the "notion of a power to give a determined destiny to an object or a legal relationship, to link them to certain objectives; which, added by the adjective 'social', means to say that this objective goes beyond the interest of the holder of the right – that, so, comes to have a power-duty - to reveal itself as of collective interest" (GODOY, 2004, p. 111).

Therefore, in simple lines, "to speak about the social function of a right, means to say its performance or reflection of its effects within the society in which it is inserted, leaving aside its exclusively individualistic aspect, and observing a collective notion of its incidence" (MARCHETTI FILHO, 2018a, p. 78).

Therefore, bringing this idea to the field of property, the social function relativizes property, transforming the concept of *jus abutendi* of Roman Law, in the sense that today the owner can no longer, within the right to dispose, do what he wants. "The disposition of the thing must take place in the light of the Federal Constitution, within the social function of property" (MARCHETTI FILHO, 2018a, p.76).

Thus, the right to property remains a fundamental right, representing the maximum characteristic of "individuality and human patrimony, but which, in its exercise, must observe a function within the society in which it is inserted, in flagrant contradiction to the extreme individualism of the 19th century, with an absolute concept of property" (MARCHETTI FILHO, 2018a, p. 78).

Anyway and synthetically, the social function of the property can be understood as the set of minimum requirements established by the legislator to consider that the exercise of the domain meets the collective interest, under penalty of adopting the sanctioning measures provided for in the ordinance.

3 "In fact, there is a' modern trend for the intersection of legal regimes specific to Public and Private Law. The publicization of Private Law is growing all the time [...] and, on the other hand, the privatization of Public Law '. Consequently, within the idea of social solidarism, already mentioned, necessary to the Constitutional State of Law, 'the principle of the dignity of the human person culminates in unveiling the new vocation of Private Law, that is, that of redirecting the scope of its norms to protection of the person, without prejudice to the regulatory mechanisms for the protection of property'" (MARCHETTI FILHO, 2018b, p. 94-95).

3 BRIEF NOTIONS ON ADVERSE POSSESSION

Described between articles 1.238 to 1.274 of the Civil Code (BRASIL, 2002), the modes of acquisition of movable and immovable property can be originated or derived. In the first, the acquisition takes place in a way that is not linked to the previous property. That is to say, there is no act of transmitting property from one subject to another. In the second, there is a bond, resulting from an act of transfer of ownership. This act results from a relationship between two subjects, such as a legal business, for example.

In these terms, the majority doctrine has understood the usucaption as a way of original acquisition of the property[4], strictly linked to time. "In fact, time can cause the extinction of a right, or its acquisition. It is the prescription, as a genre, having as type the extinctive prescription, treated in article 189 of the Civil Code, and the acquisitive prescription, treated here as adverse possession" (MAusRCHETTI FILHO, 2018a, p. 88).

Modernly, it has been understood that, in the constitutional scope, adverse possession is based on the social function of property. This is because it seeks to give the property to the one who is effectively bringing it a social and economic utility to the property (MARCHETTI FILHO, 2018a, p. 88).

Indeed, the social function of property "contemplates, at the same time, a set of faculties and a set of positive and negative obligations, no longer purely and simply expressing a situation of power, by itself and abstractly considered" (CHALHUB, 2000, p. 12).

In this line of thought, through adverse possession, within the social function, "the one who effectively gives usefulness to the thing is rewarded, to the detriment of the owner who, in the face of his disdain, allows enough considerable time to pass without giving it any social or economic" (MARCHETTI FILHO, 2018a, p. 88).

Understanding this, we have that the adverse possession must meet assumptions of a personal, real and formal nature. Those of a personal nature are requirements about active and passive legitimacy.

In this regard, from the perspective of Article 1,241 of the Civil Code, "the active legitimacy is of the possessor with possession *ad usucapionem*, that is, with the intention of 'to usucapt'. And the passive legitimacy belongs to the person who appears as the owner in the registration of the property" (MARCHETTI FILHO, 2018a, p. 89).

Furthermore, it should be noted that limitations imposed by the force of article 1.244 of the Code[5], that prevent certain people from 'usucapt' for not counting the respective term, such as "between ascendants and descendants, during the family power" and "between tutelage or curatelados and their tutors or curators, during the tutelage or curatela" (BRASIL, 2002), in the form of article 197, items II and III.

In turn, the real requirements refer to assets and rights susceptible to adverse possession, since not all things can be subject to adverse possession. This is because some goods

4 Caio Mario da Silva Pereira (2008, p. 138) believes that adverse possession is a mode of acquisition derived from property.

5 Art. 1.244. Extends to the possessor the disposition as to the debtor about the causes that prevent, suspend or interrupt the prescription, which also apply to adverse possession. (BRASIL, 2002)

are insusceptible to adverse possession due to their nature (such as air and light), or because they are out of commerce, or because they are public goods[6].

Formal assumptions, on the other hand, are related to the general indispensable and customary requirements of adverse possession, such as possession, time lapse and *animus domini*, as well as those specific to each modality, such as fair title and good faith, or the size of the area of the property, or even the form of its use.

It is also to be considered that possession *ad usucapionem*, that is, "the one that extends over time, to the point that it is capable of generating the acquisition of the property by the acquisitive prescription" (MARCHETTI FILHO, 2018a, p. 54), it must comply with the *animus domini*, be meek and peaceful, continuously and publicly, over the period defined by law. The absence of this prevents the adverse possession.

As a parenthesis, it is worth remembering that the meek and peaceful possession is that practiced without the opposition of the owner against whom he intends 'to usucapt'. Therefore, if the owner of the thing was in any way opposed to the possession of the possessor, it will no longer have the status of undisputed and will not fulfill the basic requirements 'to usucapt' (MARCHETTI FILHO, 2018a, p. 51). And it continuously comprises that possession performed without interruptions.

Likewise, the possession cannot harm the possessor who is defending his domain. Therefore, to characterize this, it is necessary that the owner does not violate the rights of the owner of the thing and the owner remains inert, passive in relation to this factual situation, without trying to recover the thing for himself.

Still referring to the theme, the possibility of succession in possession for purposes of counting the term of adverse possession is recognized, pursuant to article 1.243 of the Civil Code. In this line of count, "the possessor can, in order to count the time required by the preceding articles, add to your possession that of your predecessors (article 1.207), provided that all this possessions are continuous, peaceful and, in the cases of article 1.242, with a fair title and in good faith" (BRASIL, 2002).

It should be noted that the possession must be fair, without the vices of violence, clandestine or precariousness, insofar as if the situation is in fact the result of these forms, it will not induce possession until the effects cease. And, if it is acquired on a precarious deed, it will not change in fair ownership in any way.

In view of this, it is understood as a meek or peaceful possession, for the purposes of adverse possession, that reached without opposition to the owner of the property. That is to say, the owner is aware that his possession has been violated. However, it remains inert, doing nothing to allow its recovery, either judicially or extrajudicially.

That is, it does not alienate the invader, it does not propose the corresponding possessory remedy. Simply "conforms to the loss. Now, owner who acts like this, omitting himself reveals disinterest for the good and, with that, opens space for another to occupy and use it. Who, in the face of an aggression on possession, remains inert, reveals his disregard for it" (MARQUESI, 2018, p. 30).

6 Despite some divergence on the possibility of adverse possession in relation to public domain goods, the still dominant understanding in doctrine and jurisprudence is in the sense that "public goods are not subject to the possibility of acquisitive prescription or, in a word, the public goods are not subject to adverse possession" (MAZZA, 2015, p. 711).

On the other hand, in the case of acquisitive prescription, time lapse is one of the requirements for the consummation of adverse possession. Indeed, in its fundamentals, it is observed that "time has an purchasing power, although it is also a cause of loss of property or real right of the former holder" (MARQUESI, 2018, p. 26). This lapse may vary depending on the modality of the institute.

Anyway. It is certain that, in a superficial glance, there is a feeling that the adverse possession offends the right of property, from the moment the possessor starts to occupy the thing, losing the right to *dominus*.

However, as we have seen, within the aspect of the social function of property, there is a reason behind this legal situation that underlies this fact. On this theme, there are two explanatory currents: the subjective and the objective.

The first, called subjective, is represented by the passivity of the owner. For her, the mind of renouncing the right to property is presumed, that is, it is considered that he stopped being interested in the thing/property, giving it up.

On the other hand, the objective chain is based on the social function of the property, constitutionally recognized as the duty of the owner when exercising his property. It is the current accepted, modernly, in the constitutional view, as previously noted.

Thus, from the moment the possessor gives the property a useful, "giving it a socioeconomic function, a feature that, as is known, is the foundation of the institute in question" (MARQUESI, 2018, p. 31), the adverse possession does not offend the property. On the contrary, it strengthens it in the constitutional vision.

4 THE NEED FOR PACIFICATION OF SOCIAL CONFLICTS AND THE CIVIL PROCESS CODE

The State has the power-duty to, through jurisdictional protection, provide the pacification of social conflicts and, at least, exercise the function of justice. Indeed, access to justice is not just the fundamental right to protocol a lawsuit. Goes far beyond. It represents, within the Constitutional State of Law, access to effective, fair, efficient and adequate justice, in promoting conflict pacification, not only in the legal aspect, but also in the social and psychic aspects. (MARCHETTI FILHO, 2018c).

However, what can be verified during this process is that the Judiciary has not contributed effectively, with justice and efficiency with regard to the resolution of disputes, and this idea of pacification of the conflict is impaired.

Even because "pacifying, before being a simple task, implies a unique complexity. 'As it involves reaching a human state of mind, it covers aspects that are not only legal, but above all psychological and sociological'" (MARCHETTI FILHO, 2018c, p. 203).

In this sense, it's necessary to emphasize "at the same time that the legislator ensures unrestricted access to justice, it also advocates the virtues of consensual conflict resolution,

assigning to the State the burden of promoting this pacifying practice whenever possible" (THEODORO JÚNIOR, 2015, v. 1, p. 76).

> It is not a question of discrediting the state of Justice, but of combating the excess of litigiousness that dominates contemporary society, which believes in jurisdiction as the only way of pacifying conflicts, raising to such a gigantic number of adjourned processes, that it exceeds the flow capacity of entities and structures of the available judicial service. In several countries, culture has shifted most conflicts to extrajudicial mechanisms, such as mediation and conciliation, which, in addition to relieving pressure on public justice, are in a position to produce substantially more satisfactory results than those imposed by provisions authoritarian from the courts. (THEODORO JÚNIOR, 2015, v. 1, p. 76)

Furthermore, it must be considered that, today, there is a certain "prioritization of certain aspects of the process, for which the traditional system did not provide a solution. The most evident cases are related to access to justice and the slowness of the proceedings, as well as the distribution of the burdens resulting from the delay in resolving conflicts" (GONÇALVES, 2017, p. 44).

But it's not just. "There is also the issue of socialization of justice, related to the fact that many conflicts of interest are not brought to justice, either because of the cost that this demands, or because the interest has not harmed the right, because the damage is spread among the whole society" (GONÇALVES, 2017, p. 44).

Importantly, this line of reasoning, the Civil Procedure Code 2015 has the north "'an appreciation of consensus and a concern to create within the Judiciary a space not only for judgment, but for conflict resolution', with a view to pacification" (MARCHETTI FILHO, 2018c, p. 213).

Indeed, it seeks, within this conflict resolution vision, to provide "'a resizing and democratization of the Judiciary's own role and of the intended jurisdictional provision model'" (MARCHETTI FILHO, 2018c, p. 213).

Therefore, it is possible to highlight "basically four factors to put the 2015 Codification as an instrument of social pacification: a) objective good faith; b) cooperation; c) modernization of the contradictory; and d) the adequacy of the means of conflict resolution" (MARCHETTI FILHO, 2018c, p. 213).

In this sense, with the current Civil Procedure Code in force, the trend of adequate means for conflict solutions. Its pacification must be encouraged by the operators of the law, so that each day it is more applied case by case, within the idea of adequate conflict resolution.

5 THE PROPER CONFLICT RESOLUTION MECHANISMS

As stated, the fourth factor that promotes social pacification is the adequacy of the means of resolving conflicts offered by procedural legislation. At this point, the Civil Procedure Code gained prominence.

That's because, for him, the means available for resolving a conflict, either by self-composition (conciliation or mediation) or by heterocomposition (arbitration or specific process), "should be considered by the following premise: the middle must be suitable for solution of the conflict presented for the promotion of social pacification" (MARCHETTI FILHO, 2018c, p. 224).

Logically, in this approach, mediation, conciliation and arbitration are highlighted, precisely because, within their specificities, they remove from the State the power to decide the conflict.

> Ante a ineficiência na prestação estatal da tutela jurisdicional, especialmente pelo perfil contencioso e pela pequena efetividade em termos da pacificação real das partes, os meios diferenciados vêm deixando de ser considerados "alternativos" para passar a integrar a categoria de formas "essenciais" de composição de conflitos (jurídicos e psicológicos), funcionando como efetivos equivalentes jurisdicionais ante a substituição da decisão do juiz pela decisão conjunta das partes. (TARTUCE, 2018, p 149)

In view of this reality, there is a greater interest by the State itself in the search for less formal measures, which make the guarantee of repairing the injured legal matter viable, promoting the solution of the conflict in an appropriate way and, thus, social pacification[7].

For each type of conflict, the appropriate route for its approach must be adopted, considering several factors, such as, for example, the intention of the parties, the profile of the dispute and the possibilities inherent to each mechanism that can be applied case by case.

It is in this context that the phenomenon of de-judicialization of the conflict arises and will be treated then.

6 WAVES FOR IMPROVING JUSTICE: THE DEJUDICIALIZATION TECHNIQUE

The procedural technique provided for in the Civil Procedure Code of 1973 was essentially the judicialization of conflicts. This is because its essence was based on the individualism and patrimonialism that prevailed in the 19th Century in Europe and that came to Brazil by Enrico Tulio Liebman.

For this reason, the procedural protection of the 1973 Code was extremely strict, seeking satisfaction by final court decision of merits. And, due to this scientific rigorismo, is that there was no original provision for provisional tutelage or openness to other forms of conflict resolution.

Of course that, in modern times, this view of process and judicialization of conflicts no longer met society's wishes, notably because the Judiciary itself is no longer able to respond

7 "The judicial policy proposal which encourages the development of diverse pathways is to create, alongside the administration of traditional justice, new ways of resolving disputes, preferably through light institutions, relative or totally unprofessionalized (sometimes, even preventing the participation of lawyers); the use must be cheap - if not free - and located in order to facilitate (and maximize) access to services, operating in a simplified and poorly regulated manner to obtain solutions mediated between the parties" (TARTUCE, 2018, p 176).

satisfactorily and in a reasonable time in all the procedural demands it receives daily. The need for change was pressing.

Following that line, the reason for the 2015 Civil Procedure Code is understood, in addition to abolishing certain institutes fixed in the 1973 Code and modernizing others, it allowed the option of extrajudicialization in adverse possession of the real estate.

In this sense, the expression "dejudicialization" refers to the legislative phenomenon that brings the parties the possibility of resolving their conflicts of judicial nature, provided they have legal capacity and can be used by authorized users. It is the search for conflict solutions without the intervention of the courts.

In the field more specific to the theme proposed here, dejudicialization points to the optional transfer of some activities that, until then, were specific attributions of the Judiciary, to the scope of extrajudicial services, assuming that these institutions can resolve the conflict through administrative procedures.

In fact, the 2015 Code of Civil Procedure does not change "the scenario in the event that the adverse possession process takes place in court, despite having omitted some necessary steps. But it opens up the possibility of handling it extrajudicial, certainly to avoid the complexity and delay of the judicial system" (MARQUESI, 2018, p. 51).

This legislative process of transferring the solution of some conflicts and certain issues to extrajudicial registry offices - that before only the Judiciary would have the competence to do so - has the purpose of prioritizing agility in its resolution, especially when there is no dispute.

Within a view of adequate means of conflict resolution, proposed by the current Civil Procedure Code, the aim is precisely to reduce the growing pressure on the courts, which are full of lawsuits.

In fact, in the current format of society, with abundant information and knowledge of its rights, combined with access to justice as a fundamental guarantee, it has become essential to seek forms that promote applied solutions to conflicts in the exhibition of social pacification, leaving aside the idea of the process as an exclusive means and deconcentrating the performance of the Judiciary machine, notably of less complex issues.

Consequently, dejudicialization seeks to avoid judicial intervention in situations where it is not necessary.

> The trend that is being outlined, and that in a not too distant horizon, it is to leave to the Judiciary only cases of resisted pretension, in which the judge will act as a mediator and substitute for the will of the parties. The dejudicialization will be increasingly frequent in those cases where the parties are in agreement, the interests are available and the law authorizes the extrajudicial solution. (MARQUESI, 2018, p. 62)

Therefore, it is essential to use instruments that ensure the citizen the provision of effective judicial protection, so that it can meet the fundamental right of access to Justice. In this case, the satisfactory term for the delivery of guardianship plays an essential role, being a prerequisite for the satisfaction of disputes arising from changes in the modern world.

Faced with the obstacles faced by the Judiciary in responding with agility to the judicial demands that society produces every day, as well as the need to find effective solutions, the dejudicialization, little by little, began to become a reality in the country.

In fact, whether through laws or resolutions of the National Council of Justice, the quest to dejudicialization of conflicts is a reality. And one of the ways that favor and encourage the composition of social situations is exactly through extrajudicial services, seeking, in this way, the possibility of relieving the Judiciary.

An example of this is in extrajudicial separation and divorce, extrajudicial inventory, rectification of property registration directly at the registry office, possibility of rectifying the name in the civil registry adapting to gender identity directly at the registry office, and extrajudicial adverse possession, subject of this study.

Such examples symbolize the precious cooperation of the legislator to mitigate the burden of lawsuits and provide faster solutions for the intended proceedings, in addition to attesting progress in national legal system.

7 THE EXTRAJUDICIAL USUCAPTION OF PROPERTIES IN GENERAL LINES

Usually, adverse possession is, as a rule, declared through a judicial process that currently follows the common procedure of the Civil Procedure Code of 2015, taking into account that the new legislation ended the special procedure of the adverse possession procedure.

In fact, this procedural structure is easily noticed in articles dealing with adverse possession, for example, article 1.238 which refers to extraordinary adverse possession. For him, whoever owns, as if it were his, for fifteen years without interruption or opposition, a specific property, regardless of title and good faith, acquires the property, "being able to request the judge to declare it by sentence, which will serve title for the registry at the Real Estate Registry Office" (BRASIL, 2002).

It is observed, therefore, that the rule procedure is judicial. However, as of 2009, the possibility of adverse possession was obtained extrajudicially or in an administrative manner.

In fact, Federal Law nº 11.977/2009, known as Law of the My house My life Program, already brought, in his art. 60[8], the possibility of the recognition of the original acquisition of the property by property possessors in places susceptible to land regularization programs, without any judicial intervention (BRASIL, 2009).

More current, the Code of Civil Procedure of 2015, within its innovative spirit of better resolving conflicts, which will be seen later, brought about a major change and update in the possibility of extrajudicial or administrative recognition of the adverse possession.

8 The original wording of the article stated that "without prejudice to the rights arising from the possession previously exercised, the holder of the title of legitimation of possession, after 5 (five) years of its registration, may request the real estate registry officer to convert this title into property registration, considering to its acquisition by adverse possession, under the terms of article 183 of the Federal Constitution" (BRASIL, 2009).

Indeed, the article 1.071 of the Code of Civil Procedure introduced article 216-A into the Public Registry Law (FL nº 6.015/1973), admitting extrajudicial adverse possession, which will be processed directly at the Property Registry Office of the district where the property is located.

> Art. 216-A. Without prejudice to the judicial process, the request for extrajudicial recognition of usucaption is admitted, which will be processed directly at the registry office of the real estate in the region where the property object of adverse possession is located, at the request of the interested party, represented by a lawyer, instructed with:
>
> I - notary minutes drawn up by the notary, attesting the investiture time of the applicant and his predecessors, according to the case and his circumstances;
>
> II - plan and descriptive memorial signed by a legally qualified professional, with proof of notation of technical responsibility in the respective professional supervisory board, and by the holders of real rights and other rights registered or endorsed in the registration of the property object of adverse possession and in the registration of the adjacent properties;
>
> III - negative certificates from distributors in the district of the situation of the property and the applicant's domicile;
>
> IV - just title or any other documents that demonstrate the origin, continuity, nature and time of possession, such as the payment of taxes and fees charged on the property. (BRASIL, 1973)

It can be seen that the legislator's idea was, in fact, to create a new way of recognizing adverse possession, extrajudicially or administratively. And it did so in a "completely different and without doubt more effective way than that provided for in Law 11.977 of 07/07/2009" (HABERMANN JUNIOR; HABERMANN, 2018, p. 100).

Now, meeting the requirements of the material law and article 216-A of the Public Records Law, the interested party, gathering the documents that prove their possession, as well as their circumstances and the time lapse and, still, the "absence of action claiming the property, presents the documentation to the notary of the locality, of which, after examining it, draw up a notary minute, document by which publicly attests the existence of the possession and its characteristics" (HABERMANN JUNIOR; HABERMANN, 2018, p. 100).

This extrajudicial procedure "can occur in any kind of adverse possession, provided that has as its object a real estate and that there is no dispute" (BOCZAR; ASSUNÇÃO, 2018, p. 78). However, as can be seen from the wording of the article 216-A, "although it is a voluntary jurisdiction, the law requires that the interested party must be represented by a lawyer. This requirement is justified to make the procedure more effective" (BOCZAR; ASSUNÇÃO, 2018, p. 79).

Note that extrajudicial adverse possession will be recognized upon requirement faced with the Real Estate Registry, with the presentation of all the documents required by the items of the mentioned article and also, instituted by a notary minute drawn up by the notary.

These minutes are nothing more than a narrative objectively from a fact that was verified or witnessed by the notary, without issuing a judgment of value. It can "be made in any notary's office in the country, and subsequently forwarded to the competent Real Estate

Registry Office - together with the documents required in items I to IV of that article - for processing." (ASSIS NETO; JESUS; MELO, 2017, p. 1.420).

Another important point for the administrative procedure in the registry office is the need to instruct it with the "plan and descriptive memorial signed by a legally qualified professional, with proof of technical responsibility notation in the respective professional supervisory board, and by the holders of real rights and other rights registered or endorsed on the registration of the property subject to adverse possession and registration of adjoining properties". This, of course, to ensure security of the procedure and certainty in what is being object of adverse possession.

However, in the form of art. 216-A, § 2, if the plan and descriptive memorial are missing the signature of any of the holders of real rights or other rights registered or endorsed in the registration of the property subject to adverse possession and the adjacent properties, "this will be notified by the competent registrar, personally or by post with acknowledgment of receipt, to express consent in an express manner within 15 (fifteen) days, interpreted the silence as agreement" (BRASIL, 1973).

It is clear, from the text of the law, that the silence of such people when not signing the plan and descriptive memorial, remaining inert, means agreement in relation to its terms. So, here who is silent agrees[9].

It is important to highlight that the original wording of the article was in the opposite direction, that is, silence mattered in disagreement, which caused a series of obstacles. This text was amended by Federal Law nº 13.465 of 2017.

The presence of this requirement "reveals the consensual nature of adverse possession" (MARQUESI, 2018, p. 79), because it requires the consent of the owner of the property subject to adverse possession, as well as that of the owners of adjoining properties, which, in their case, may be tacit.

That Federal Law of 2017 also included some exceptional situations. First, in the form of § 11, in the case of real estate in an autonomous building of condominium unit, like an apartment, for example, the "consent from holders of rights in rem and other rights registered or endorsed in the registration of adjacent properties is waived and the liquidator's notification will suffice to manifest itself in the form of § 2º of this article" (BRASIL, 1973).

In addition, as required by § 12, "if the adjoining property contains a building condominium, the liquidator's notification will suffice for the effect of § 2º of this article, waiving notification of all tenants" (BRASIL, 1973).

Another important point added is in § 13, by which, if the person to be notified was not found or if they are in an uncertain place, without knowing their current address, "this fact will be certified by the registrar, who must promote the person's notification by notice through publication, twice, in a local newspaper of great circulation, for a period of fifteen days each, interpreting the silence of the notifying as agreement" (BRASIL, 1973). This notice may be made by electronic means, if so regulated by the public service's correction agency, "in which

9 On this theme, "the aphorism that 'silence gives consent'. But in fact, whoever is silent says nothing. We take care of the application of article 111 of the Civil Code, which, regarding the manifestation of will, states that 'silence matters consent, when circumstances or uses authorize it, and it is not necessary to express the declaration of will'" (MARQUESI, 2018, p. 105).

case it will dispense with publication in newspapers of great circulation" (BRASIL, 1973), in the form of § 14.

Besides, the Law also brings as a requirement in item III the "negative certificates of distributors in the district of the situation of the property and the applicant's domicile" (BRASIL, 1973). Consequently, "if the law orders the distributors' certificates to be issued, it is clear that we want to ascertain the existence of legal proceedings that may influence the acquisition of the property by adverse possession. It is understood that the certificates refer to both the person of the owner and the applicant" (MARQUESI, 2018, p. 89).

Another requirement, present in item IV, is proof of the "fair title or any other documents that demonstrate the origin, continuity, nature and time of possession, such as the payment of taxes and fees levied on the property" (BRASIL, 1973).

This requirement must "be understood as necessary only in the ordinary adverse possession, a fact that, given the lack of legal provision, other types of adverse possession do not require" (MARQUESI, 2018, p. 90).

In this regard, Federal Law nº 13.465, of 2017 added § 15 in art. 216-A, facilitating the production of the proof required in item IV. Now, if such documents are absent or insufficient, "possession and other necessary data may be proven in an administrative justification procedure in an extrajudicial service." (BRASIL, 1973).

This is another innovation of Law, now extrajudicializing the procedure of justification that "will comply, where applicable, the provisions of § 5 of art. 381 and the rite provided for in arts. 382 and 383 of Law nº 13.105, of March 16, 2015" (BRASIL, 1973).

Understanding your requirements, it is important to highlight that this form of extrajudicial procedure is optional, as the legislator himself highlighted at the beginning of article 216-A. Therefore, the interested party "may choose to bring a lawsuit even if there is no litigation, and is part of the phenomenon of dejudicialization of the law, which includes, for example, among others, the extrajudicial inventory and divorce" (GONÇALVES, 2018, p. 223). Even because, given the fundamental guarantee of access to justice and the unfeasibility of the Judiciary's assessment, present in article 5, item XXXV, of the Federal Constitution, "the law will not exclude injury or threat to the right from the Judiciary's assessment" (BRASIL, 1988).

As the interested party opted for it and formulated the request, through the representation of a lawyer and instructed with the mentioned documents, in the form of article 216-A, § 1º, "the request will be assessed by the registrar, extending the period of filing until the reception or rejection of the request" (BRASIL, 1973).

In sequence, complying with § 3º of that article, "the real estate registration officer will inform the Union, the State, the Federal District and the Municipality, personally, through the title and document registration officer, or by mail with acknowledgment of receipt, so that they can manifest themselves in 15 (fifteen) days, about the request" (BRASIL, 1973).

After this, "the real estate registration officer will promote the publication of a public notice in a widely circulated newspaper, where applicable, to the knowledge of third parties who may be interested, who may manifest themselves in 15 (fifteen) days" (BRASIL, 1973).

After this period has elapsed and the documentation is in order and there is no objection, "the real estate registry officer will register the acquisition of the property with the descrip-

tions presented, and registration may be opened, if applicable" (BRASIL, 1973), as provided in § 6º of that article.

Meanwhile, § 8 establishes that "if the documentation is not in order, the real estate registry officer will reject the application" (BRASIL, 1973), being possible, in any case, for the "interested party to raise the doubt procedure, under the terms of this Law" (BRASIL, 1973).

Always good to remember that, in the form of § 9º, "the rejection of the extrajudicial request does not prevent the filing of a adverse possession lawsuit" (BRASIL, 1973). As stated, "a contrary understanding of this would imply a violation of the guarantee of formal access to justice, provided for in art. XXXV, of the Federal Constitution" (MARCHETTI FILHO, 2018a, p. 99).

8 THE PRACTICAL APPLICABILITY OF EXTRAJUDICIAL USUCAPTION

Having exhausted the discussion on the appropriate means of resolving conflicts, understanding a little about the phenomenon of dejudicialization and the legal discipline of extrajudicial adverse possession with its procedure, the practical applicability of this institute must be analyzed.

In this regard, the doctrine has emphasized that in the face of some situations presented within the administrative procedure and also in the culture of society, the applicability of extrajudicial adverse possession has been mitigated.

That is to say, cases that could be easily resolved in the procedure of extrajudicial adverse possession, are not solved by several aspects and end up becoming a litigation process in the Judiciary.

> The obstacles to the widespread adoption of the consensual model for addressing conflicts are many, and the following obstacles can be added as central: 1. the academic training of law operators, which does not include such a system; 2. the lack of information on the availability of consensual forms; 3. the fear of the loss of power of authority of traditional institutions for the distribution of justice. (TARTUCE, 2018, p. 110)

In this line of account, some factors that make the practical application of extrajudicial adverse possession ineffective will be pointed out below.

8.1 THE LITIGIOUS CULTURE

The change of mentality and the effort of the legal community, regarding the promotion of means of resolving disputes for the settlement of conflicts, are essential in modern society, notably in the Constitutional State of Law, in the view of effective, fair, efficient and adequate access.

In this regard, relevant legislative innovations have materialized in recent years, notably in 2015, with the new Civil Procedure Code (Federal Law nº 13.105/2015), the punctual reform of the Arbitration Law (Federal Law nº 13.129/2015) and the Mediation Law (Federal Law nº 13.140/2015).

It's interesting to note that, replicating the Federal Constitution, the Civil Procedure Code of 2015 provides, in art. 3º, that "threat or injury to law shall not be excluded from judicial review" (BRASIL, 2015). But, within this aspect, it is taken into the civil process, the idea of the appropriate means of conflict resolution by stating that the process is not the only way forward.

For this reason, it emphasizes, in §§ 1º to 3º, that "arbitration is permitted, in accordance with the law" (BRASIL, 2015) and "the State will promote, whenever possible, the consensual solution of conflicts" (BRASIL, 2015). But this promotion is not just the duty of the State. "Conciliation, mediation and other methods of consensual resolution of conflicts should be encouraged by judges, lawyers, public defenders and members of the Public Ministry, including in the course of the judicial process" (BRASIL, 2015).

Therefore, the new procedural diploma determines the Courts to create judicials centers for consensual resolution of conflicts, with conciliators and mediators trained to attend the demands of conflicts present in the judiciary.

But that is not all. It also brought important aspects related to the extrajudicial solution of the conflict through administrative procedures directly at the registry office, as in the extrajudicial inventory (CPC, art. 610, §§ 1º and 2º), in divorce, separation and extinction of the stable union by consensual way through the extrajudicial way (CPC, art. 733) and the extrajudicial adverse possession, inserted through the creation of article 216-A in the Public Registry Law (CPC, art. 1.071).

However, the practical applicability of these institutes, notably extrajudicial adverse possession, is minimal. And one of the factors is exactly in the culture of litigation ingrained in brazilian society, a factor that is reflected in legal education and professional practice.

In fact, despite the fact that the law requires the participation of a lawyer in the extrajudicial adverse possession procedure, the fact is that the operators of the law, not only in graduations, but also in their professional lives, are not encouraging to adoption the measures of adequate solutions and conflict resolution in an extrajudicial way, due to self-disinterest, or due to the disbelief of the part that attends.

> In the formation of the Bachelor of Laws, the emphasis of the study ends up being primarily focused on the exercise of the contentious state jurisdiction, generating a certain neglect in dealing with consensual means. Reinforced the fundamentals of the process as an instrument of public law, the understanding was consolidated that, based on the performance of the State and its element capable of submitting one of the parties to the pretension of the other, fair is what the State determines and enforces. (TARTUCE, 2018, p 112)

This is, therefore, a reflection of the culture of litigation and the expectation of results only from judicial sentences that is impregnated in Brazilian society. "In this line of account, the lack of training for law enforcement personnel focused on the appropriate means of resolving conflicts, 'above all on a consensus basis, constitutes a major obstacle to be overcome in the development of a culture of peace'" (MARCHETTI FILHO, 2018c, p. 247)

Thus, in spite of all the legislative advances that encourage the applicability of the appropriate measures for conflict solutions and the search for the process of de-judicialization, the operators of the law are out of step with this practice.

> In this relational trajectory, the simple legislative change will not imply any transformation in the current situation if it is not accompanied by the breaking of the social paradigm that is experienced in Brazil. The change in the way of thinking of society in general, from the ordinary citizen to the operators of the law and those responsible for public administration in general and justice, mainly, is essential. (MARCHETTI FILHO, 2018c, p. 242).

Therefore, there is no need to talk only about changing the law in order to have the incentive to adopt adequate means of conflict, especially the solution of conflicts through the extrajudicial procedure. Cultural change is also essential, the social transformation to lead to the adoption of these means.

8.2 THE DUE EMOLUMENTS

In addition to the problems involving the culture of litigation and the lack of preparation or lack of interest in promoting the appropriate solution to the conflict of the legal professional, there are also obstacles in the procedural line itself. And one of them refers to the value of the fees charged in the notary service, that is, the cost of an extrajudicial procedure.

The Federal Law nº 10.169 of 2000, establishes the general rules for setting emoluments related to acts performed by notary and registry services. Thus, under the terms of article 1º, "the States and the Federal District will fix the amount of the fees related to the acts practiced by the respective notary and registry services, observing the rules of this Law" (BRASIL, 2000), and, by paragraph unique, this value "must correspond to the effective cost and the adequate and sufficient remuneration for the services provided" (BRASIL, 2000).

In addition, art. 2º of the Law establishes the parameters that must be used for setting the emoluments, highlighting:

> Art. 2º In order to set the value of the emoluments, the Law of States and the Federal District will take into account the public nature and the social character of the notary and registration services, in addition to the following rules:
>
> I – the values of the emoluments will appear in tables and will be expressed in the country's currency;
>
> II – the acts common to the various types of notary and registration services will be remunerated by specific fees, fixed for each type of act;
>
> III – the specific acts of each service will be classified into:
>
> a) acts related to legal situations, without financial content, whose fees will attend the socioeconomic peculiarities of each region;
>
> b) acts related to legal situations, with financial content,
>
> whose fees will be fixed by observing bands that establish minimum and maximum values, in which the value contained in the document presented to the notary and registry services will be included. (BRASIL, 2000)

Furthermore, the Law expressly prohibits, in art. 3º, item II, the setting of "emoluments in percentages levied on the value of the legal business object of notary and registration services" (BRASIL, 2000).

Thus, basically and in the practical field, each State Court of Justice is responsible for the price list for notary and registration services in their respective State. The values of each activity are calculated and, if there is a need for any adjustment, a Bill with the new price list is sent to the state legislature for approval, observing the principle of anteriority.

In practice, however, these values are much higher than the cost of a lawsuit. Be it because in the extrajudicial procedure there are no benefits of free justice; either because, even with regard to "justice paid", there are many times when the costs of the process are much lower than the fees charged by the notary service.

Just as an example, in the State of Mato Grosso do Sul, Law nº 3.003 of 2005, does not provide any cost estimate for the extrajudicial adverse possession procedure. However, in order to register a declaratory judgment of adverse possession, the emolument is R$ 92,00 (ninety-two reais) (table III.C, annexed to Law[10]).

Furthermore, the simple analysis of Table I of the Annex to this State Law shows the charging of emoluments staggered according to the amount declared in the deal for the drawing up of public deeds, which can reach R$ 7.847,00, which, of course, is very expensive and discourages the practice of the extrajudicial procedure, considering that the costs of the adverse possession process do not reach half that amount. That's when doesn't have the benefits of free justice.

8.3 THE RECORDER REFUSAL

The last point that stands out in this study and that generates discouragement for the use of the extrajudicial procedure of adverse possession is exactly in the procedure itself. This is because, under the terms of § 8º, article 216-A, of the Public Records Law, "at the end of the due diligence, if the documentation is not in order, the real estate registry officer will reject the request" (BRASIL, 1973).

Translating this and within the idea of the procedure of art. 216-A, the lack of express agreement of any of the persons indicated in item II - whether due to conflicting interest, or due to lack of interest in the matter, or due to malice or revenge - inevitably generates the rejection of the administrative request.

Moreover, as stated in § 9º, "the rejection of the extrajudicial request does not prevent the filing of the adverse possession lawsuit" (BRASIL, 1973). Not that this is wrong. On the contrary. It is correct, even because the law cannot exclude any subject from the Judiciary, in the form of art. 5º, item XXXV, of the Federal Constitution (BRASIL, 1988).

However, the practical and logical effect of this is that if, after all the work and cost, there is a risk of rejection for the simple fact of having an unfounded challenge, so it's better to enter directly with the adverse possession action.

10 A Lei Estadual n. 3.003/2005 e as tabelas anexas à ela estão disponíveis em: https://www.tjms.jus.br/legislacao/visualizar.php?lei=21119.

In addition, § 10º states that if there is a challenge to extrajudicial recognition, the officer must refer the case to the District Court where the property is located. And, converted into an adverse possession action, the party must amend the initial to adapt it to the common procedure of the Civil Procedure Code.

In other words, at the end of all the work, due to a simple objection, sometimes completely unfounded, which was supposed to be a simple extrajudicial procedure, ends up becoming a civil litigation, a process of adverse possession.

This makes the applicant return to square one, being obliged to face, in addition to the time lost in the extrajudicial procedure, the delay in the process. This, of course, ends up making extrajudicial adverse possession unfeasible.

9 FINAL CONSIDERATIONS

As seen, property is a fundamental right of the person, constitutionally guaranteed. But, unlike in the past, today its exercise is not absolute. This is because, while the Federal Constitution guarantees it as a fundamental right, it also brings the burden that the exercise of this property must serve the social function.

In view of this, we have that the adverse possession institute has evolved greatly, gaining a new foundation, now constitutional, focused on the social function. That is to say, adverse possession seeks to hand over ownership of the thing to the one who is effectively exercising the social function of the property, at least in the basic exercise of its powers.

From the other north, it is known that, as a rule, the declaration of the usucaption must be made by judicial sentence, which will be taken to the registry, after the processing of the process that will follow, according to the current system of the Civil Procedure Code of 2015, the procedure common.

In the meantime, it is known that the Judiciary Power, in modern society, is unable to meet the large load of demands that daily enter through virtual system, which creates a slowness for the jurisdictional provision.

This, of course, creates a detriment to effective, fair and efficient access to justice, aspects that must permeate the process under the constitutional view of the State of Law, notably for those causes that are simple to solve and there is no manifest dispute.

It was with this in mind that the 2015 Civil Procedure Code sought, within a modern vision of pacifying social conflicts, dismiss the idea of process as the only means of resolving conflict.

In fact, the Code started from the premise that the process is just another means, among many available for the solution of social conflicts. Thus, it brought the idea of the adequacy of the means of conflict resolution to promote social pacification.

Therefore, in addition to bringing conciliation, mediation and arbitration into the civil process, it also confirmed the phenomenon of dejudicialization of conflicts, giving notary services the possibility of resolving conflicts, notably those involving separation, divorce, dis-

solution of union stable, inventory and now the extrajudicial advserse possession, through the creation of article 216-A in the Public Registry Law.

This article contains all the administrative procedure that must be followed in the notary service, from the requirements of the application, the necessary documents and signatures and their outcome, with the registration of the adverse possession or its rejection, in addition to the possibility of conversion to legal process, if there is a objection.

In the meantime, some issues may impair the effectiveness of this procedure. Here, three main points were pointed out. First, the culture of litigation and the lack of trust of legal professionals and the lack of trust of society itself in other means of conflict resolution than the process. And this affects the applicability of the dejudicialization of conflicts.

Second, there is a high cost of notary services in Brazil, which sometimes exceeds the cost of the process, notably when there is the possibility of free justice, while in extrajudicial administrative proceedings, fees are always charged. Therefore, even if it's fast, the value to obtain the solution becomes more attractive through the process, even though jurisdictional protection takes time to obtain.

Finally, thirdly, there is a problem with the procedure itself. This is because, despite all the improvements made in the administrative procedure with Federal Law nº 13.465 of 2017, there is still the difficulty pointed out in the sense that the existence of impugnation, although manifestly unfounded, makes the registry officer forward the procedure to the Judiciary.

In other words, in any case, if there is rejection or objection, the process to resolve the conflict will be necessary. And the reasoning for the part is simple: only time and money was lost.

In this order of ideals, although interesting and with the objective of promoting the solution of the conflict in a simpler and faster way, the fact is that, in relation to adverse possession, the procedure ends up not having the applicability that it could have due to the factors presented.

It is therefore essential, for a better application, to promote the dissemination, in society and in professionals, of the importance of the adequacy of the conflict resolution means aiming at social pacification, removing the idea that the process is the only mean of solution.

In addition, it is necessary to promote an exemption from the procedure in order, from an economic point of view, to become more interesting, in addition to making no legislative field an adaptation of the procedure to make even more possible its materialization.

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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

GABRIELA EULALIO DE LIMA[1]

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 autopoiese 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: Autopoiese. 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.*

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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*[2]); 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[3] 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*[4] 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[5]. 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 integrality 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 contexto 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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EL CUIDADO COMO ESTRATEGIA DE SUPERVIVENCIA HUMANA:
Discapacidad, género y salud

CUIDADOS COMO ESTRATÉGIA DE SOBREVIVÊNCIA HUMANA:
Deficiência, gênero e saúde

Daniela Verónica Maza[1]

RESUMEN

En el presente trabajo se analizará la trascendencia del cuidado para la sostenibilidad de la vida de las personas, en particular de las personas con discapacidad en situación de dependencia. Se indagará en las características que presenta el cuidado, las respuestas jurisdiccionales, y las normas y criterios establecidos para brindar a las familias los apoyos para garantizar la sostenibilidad del dispositivo de cuidado.

PALABRAS CLAVE: Cuidado. Personas con discapacidad. Apoyos. Familismo.

RESUMO

Neste trabalho, será analisada a importância do cuidado com a sustentabilidade da vida das pessoas, em particular para as pessoas com deficiência em situações de dependência. Serão investigadas as características do atendimento, respostas jurisdicionais e as normas e critérios estabelecidos para fornecer às famílias os apoios para garantir a sustentabilidade do dispositivo de atendimento.

PALAVRAS-CHAVE: *Assistência. Pessoas com deficiência. Apoio. Familismo.*

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EL CUIDADO Y SUPERVIVENCIA

El éxito reproductivo de las especies depende de los mecanismos que adopten para garantizar la supervivencia y la reproducción de su descendencia y así, asegurar la continuidad a lo largo del tiempo, manifestaba en una interesante entrevista la Dra. Sartor, investigadora Doctorada en biología con orientación en ecología de la Universidad Nacional de Córdoba. Explicaba que las especies animales utilizan diferentes estrategias comportamentales para garantizar su permanencia en el tiempo, siendo el cuidado parental una de ellas, el cual plantea decisiones como por ejemplo el número de crías, la inversión de energía en una determinada cría a costa de las reservas del presupuesto parental para otras crías. Pero es el ambiente (el filtro ambiental, según Darwin) el que determina qué estrategia comportamental será la adecuada. Si el ambiente se modifica, estrategias que eran exitosas ahora pueden no serlo, por ejemplo: la elección de la estrategia de los anfibios, aves, mamíferos, etc. estará determinada por el riesgo que enfrentan sus crías cuando nacen o en función de la autosuficiencia, el entorno y el lugar. En cuanto a los seres humanos, la biología entiende que el factor social es determinante de su comportamiento y mecanismos de supervivencia.

Estas nociones provenientes de la biología permiten considerar que la incorporación masiva en el mercado laboral y la presencia de otros factores determinantes como la disminución de la tasa de mortalidad infantil y prolongación de la esperanza de vida, deberían haber modificado las estrategias de cuidado para favorecer el recambio y supervivencia de la población a lo largo del tiempo como especie específicamente en relación con el cuidado parental, asumido históricamente por las mujeres (por ej. En la distribución, incorporación de otros actores en el cuidado, el fortalecimiento de las redes de apoyo para encararlo, en la cuantificación y valoración del trabajo de cuidado, etc.), ya que de no hacerlo, la especie humana estaría poniéndose en riesgo y comprometiendo su sostenibilidad.

EL CUIDADO DESDE UN ENFOQUE DE DERECHOS

Abordar el cuidado desde el punto de vista jurídico representa un gran desafío, ya que ha tenido una importante recepción en el ámbito de las ciencias sociales, adquiriendo mayor complejidad en la última década. La gran evolución literaria en el ámbito de la antropología, sociología, historia, economía, filosofía, e inclusive por disciplinas como la medicina, demostró que es un campo que debe ser explorado desde otros saberes, brindando la ciencia jurídica significativos aportes relativos al enfoque de derechos que hoy parece imponerse frente a las dificultades que se presentan para satisfacer las demandas de quienes por su discapacidad se encuentran en situación de dependencia, siendo una línea de abordaje central para avanzar en su determinación.

La noción de cuidado en las políticas de protección social y bienestar social se ha vuelto clave para el análisis y la investigación con perspectiva de género, y por su riqueza y densidad teórica, el cuidado es, tanto en la academia como en la política, un concepto potente

y estratégico, capaz de articular debates y agendas antes dispersas, de generar consensos básicos y de avanzar en una agenda de equidad de género en la región[2].

Las regulaciones destinadas a garantizar el bienestar físico y emocional cotidiano de las personas con algún nivel de dependencia se denominan políticas de cuidado y son muy recientes en la agenda del Estado. Ellas intervienen en la forma en la que la sociedad organiza el cuidado y establecen los derechos al cuidado[3]. Estas políticas consideran tanto a los destinatarios del cuidado, como a las personas proveedoras e incluyen medidas destinadas tanto a garantizar el acceso a servicios, tiempo y recursos para cuidar y ser cuidado, como a velar por su calidad mediante regulaciones y supervisiones[4].

En América Latina el Consenso de Quito (2007) aprobado por los gobiernos de la región marco un hito en el empoderamiento del cuidado como problema a ser abordado por los Estados, no sólo en términos de compromisos asumidos sino también de difusión de diagnósticos. Posteriormente, el Consenso de Brasilia (2010) refrena y amplía estos compromisos, haciendo referencia explícita al derecho al cuidado y a la obligación de establecer servicios de cuidado, así como licencias parentales y otras regulaciones afines. En esta dirección una alerta importante es que, si bien la agenda del cuidado en nuestra región ha sido impulsada por la agenda de género, a medida que avanza se puede ir vislumbrando en muchos de los países que el vínculo se desprende, haciéndose cada vez más énfasis en la satisfacción de las necesidades de los receptores dependientes, como lo es en Uruguay. Pese a ello, aún la traducción del cuidado en políticas y su implementación ha sido relativamente escasa y lenta en la región. Sus riesgos asociados permanecen anclados en las familias, y se ha tendido a desconocer la relevancia del cuidado como parte sustancial de los sistemas de protección social. De allí que la División de Desarrollo Social, mediante el desarrollo de investigación y de asesoría técnica, busca posicionar al cuidado como un pilar de la protección social y las políticas públicas. Se postula que la perspectiva de derechos debe abarcar tanto la condición de los sujetos de cuidado como de las personas cuidadoras; por otra parte, el derecho a cuidar, a ser cuidado y autocuidarse es indispensable para ejercer otros derechos humanos. En el caso de la infancia temprana, debe buscarse dar un salto en el desarrollo de las destrezas y capacidades infantiles mediante intervenciones tempranas que son críticas para el desarrollo cognitivo, y que pueden disminuir las desigualdades sociales. En el caso de las personas adultas mayores vulnerables y dependientes y de las personas con discapacidad, el cuidado debe promover su actividad y autonomía y actuar contra su aislamiento social. En el caso de las personas cuidadoras, la organización social del cuidado vela por ampliar sus opciones vitales.[5]

2 Salvador, S.. Políticas de Cuidado en el Salvador. *Asuntos de género* ,CEPAL. 2015. 10-13.

3 Observatorio de Igualdad de Género de América Latina y el Caribe. División de Asuntos de Género. ONU. CEPAL. Consultado el 14/9/2019. Disponible en: https://oig.cepal.org/es/leyes/leyes-de-cuidado?page=3

4 Artículo - copia fiel del publicado en la revista Nueva Sociedad No 256, marzo-abril de 2015, ISSN: 0251-3552.

5 Página Oficial CEPAL. Consultado el 12/01/2019. Organización de Naciones Unidas. Disponible en: https://www.cepal.org/es/sobre-el-cuidado-y-las-politicas-de-cuidado

EL ORIGEN DE LA TRANSFORMACIÓN

Acostumbramos a considerar el cuidado como una relación binaria en la cual estaban involucradas la persona receptora y la dadora de los cuidados, quedando emplazada dicha relación en el ámbito de la familiar; no obstante, la literatura del cuidado señala que es un vínculo que responde a relaciones de género, familiares, comunitarias, políticas públicas, intervenciones de expertos y profesionales, redes migratorias y relaciones económicas. A pesar de que la modernidad enlazó en su discurso hegemónico la importancia de la autonomía, el voluntarismo y el egoísmo como eje central para el desarrollo y el crecimiento de las naciones, son las relaciones humanas de interdependencia las que nos constituyen como sujetos y las que dan identidad a nuestras sociedades. Del mismo modo, que cuando las personas llegan a edad adulta se invisibiliza la interdependencia, y el paradigma del individualismo autosuficiente suele borrar las relaciones sociales que sostienen la vida de quienes salen al mercado, convirtiendo a las personas que llevan a cabo el trabajo doméstico y de cuidados en hilos invisibles, pues nunca se muestran los hilos con los que se teje esa capacidad social.[6]

Para la administración de justicia es clave comprender que las actividades de cuidado se encuentran atravesadas por un proceso de menosprecio y desvalorización social, y dato sustancial para otorgar respuestas jurisdiccionales que contemplen el complejo entramado que históricamente ha dejado de lado el trabajo de cuidado realizado por las mujeres o, según lo señala Brovelli, por personas que se encuentran en una situación de vulnerabilidad psico/social dentro de la familia[7] puesto que, de no hacerlo, se corre el riesgo de afectar los derechos de personas que hoy gozan de una especial protección jurídica[8].

Las transformaciones sociales ocurridas en los últimos tiempos, han modificado significativamente la demanda de cuidado, especialmente con relación a las personas con discapacidad (en adelante PCD). Conforme las exigencias derivadas del actual ordenamiento jurídico, ello impone la urgente revisión de las políticas públicas estructurales existentes y el diseño de otras nuevas dirigidas a fortalecer la transversalización de la perspectiva de género y de cuidados en los órganos vitales del Estado. Nos encontramos frente a una gran oportunidad para vigorizar su institucionalidad y proporcionar respuestas adecuadas a los problemas sociales y económicos, mediante la creación de áreas especializadas, la búsqueda de diseños más eficaces y eficientes, con la visión interseccional, que permitan elaborar diagnósticos precisos, monitorear, evaluar y mejorar continuadamente las políticas públicas de cuidado.

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6 Ramaciotti, Karina; Zangaro, Marcela. "Los derroteros del cuidado". Universidad de Quilmes. ISBN 978-987-558-550-8. 1ra. Edición. Provincia de Buenos Aires. 2019:9.

7 Brovelli, Karina. Cuando el cuidado no es un asunto de mujeres. Organización de los cuidados por parte de personas en situación de vulnerabilidad psico/social. Revista Argentina de Terapia Ocupacional. Año 1. Nro. 1. Diciembre de 2015. ISSN. 2469-1143. Esta investigadora que exploró en los perfiles de las personas que se ocupan del cuidado en el ámbito familiar. La investigadora examinó las prácticas de cuidado al interior de los grupos familiares en los que el papel de cuidador/a es desempeñado por aquel miembro de la familia que se encuentra en situación de vulnerabilidad psicosocial, observó una feminización de estas personas, pero concluye que es su posición vulnerable/subordinada al interior del grupo familiar que las hace depositarias de las responsabilidades de cuidado ya sean varones o mujeres. Además señala que observó una doble invisibilización de estas personas ya que se suma a este rol la situación de vulnerabilidad psicosocial, que históricamente implicó desconocimiento de derechos.

8 Convención para la Eliminación de Todas Formas de Discriminación Contra la Mujer, Convención Interamericana para Prevenir, Sancionar y Erradicar la Violencia contra la Mujer "Belem do Pará", el cual establece un mecanismo de seguimiento de la convención (MESECVI) para evaluar y apoyar continua e independientemente a los Estados firmantes, Art. 75 inc. 22 y 23 de la Constitución Nacional. Ley 26.485.

El cuidado de la salud de las PCD en situación de dependencia y sus familias, ha sido garantizado y protegido mediante la jerarquización Constitucional de Tratados Internacionales[9], luego operativizados por leyes y reglamentaciones. Asimismo, se observa que el cambio de paradigma sobre la discapacidad adoptado en la Convención Sobre los Derechos de las Personas con Discapacidad, propició el nacimiento de nuevas obligaciones, visibilizó otros actores responsables, cuestionó nuevas formas de pensar el cuidado terapéutico y asistencial, y obligó a quien interviene en su organización, especialmente al Poder Ejecutivo, pero también a los Poderes Legislativo y Judicial, a reflexionar sobre las transformaciones urgentes y necesarias e iniciar una etapa, aún vigente, de adecuación jurídico/normativa y de promoción y remoción de patrones estereotipados respecto de las PCD y de quienes deben proveer cuidados.

Entre las transformaciones aludidas, encontramos la modificación de la Ley Nro. 24.901 (2009), introducida por Ley 26. 480, que incorpora la ***asistencia domiciliaria como un novedoso dispositivo dentro del sistema de prestaciones básicas para brindar los apoyos necesarios para que las PCD recuperen o conserven las funciones de autovalidamiento para la vida diaria, facilitando la articulación y sostenibilidad del cuidado, quedando instituido un nuevo apoyo para su familia, evitando de esta forma la institucionalización de las personas con déficit de autonomía y/o deficiencias crónicas.***

Este mecanismo permite que las familias articulen su dinámica organizacional, liberando tiempo para la realización de otras actividades (laborales, terapéuticas, educativas, sociales y de esparcimiento), aliviando la intensidad de los cuidados, optimizando los tiempos de relación, facilitando el mantenimiento de vínculos afectivos sanos, la sostenibilidad del cuidado y el autocuidado de las PCD y sus cuidadoras. Otro efecto importante de destacar es de carácter patrimonial, puesto que la distribución del costo del cuidado colabora con la preservación del nivel de gastos en la familia, evita el agobio financiero y valora este trabajo como elemento esencial para el desarrollo de la vida. A su vez, la desfamiliarización de la gestión administrativa para obtener la cobertura contribuye a proveer mayor cantidad de tiempo para que demás integrantes de las familias puedan realizar otras actividades para su desarrollo personal y/o profesional. En definitiva, se obtiene un impacto generizado disuasivo que impide la perpetuación de estereotipos de género en relación con el cuidado personal.

Si se indaga en los estándares jurídicos para la protección y cuidados de las PCD en situación de dependencia y sus cuidadoras, encontramos que la Convención sobre los Derechos de las Personas con Discapacidad reconoce expresamente que las familias tienen el derecho a recibir apoyos en su Preámbulo al señalar que: "*…x) la familia es la unidad colectiva natural y fundamental de la sociedad y tiene derecho a recibir protección de ésta y del Estado, y de que las personas con discapacidad y sus familiares deben recibir la protección y la asisten-*

9 [Cfr. Art. 42 y 75 inc. 22 de la CN; Declaración Americana de los Derechos y Deberes del Hombre (1, 5, 6, 7, 11, 12, 15, 16, 17, 18, 23, 24 y 35); Declaración Universal de los Derechos Humanos (art. 10, 25 y 26); Convención Americana Sobre los Derechos Humanos o Pacto San José de Costa Rica (art. 1, 2, 5, 7, 8, 17, 19, 24, 25, 26 y 29); Pacto Internacional de Derechos Económicos, Sociales y Culturales (art. 3, 5, 6, 7, 9, 10, 12, 13 y 15); Pacto Internacional de Derechos Civiles y Políticos y su Protocolo Facultativo (art. 1, 3, 6, 7, 8, 9, 17, 23, 24 y 26); Convención para la Eliminación de Todas Formas de Discriminación Contra la Mujer (art. 2, 3, 4, 5, 6, 10, 11, 12, 13, 14 y 16); Convención de los derechos del Niño (art. 2, 3, 4, 5, 6, 9,12, 16, 18, 19, 23, 24, 25, 26, 27 y 39); Convención Sobre los Derechos de las Personas con Discapacidad (art. 4, 5, 6, 7, 25, 26, 28 2. Inc. c., con jerarquía constitucional Ley 27.044); Convención Interamericana para la Eliminación de todas las formas de Discriminación Contra las Personas con Discapacidad (art. 2, 3, 4 y 7, receptada en nuestro derecho interno por ley 25.280); Convención Interamericana Para Prevenir, Sancionar y Erradicar la Violencia Contra la Mujer "Convención Belem Do Pará" (art. 3, 4, 5, 6, 7)]

cia necesarias para que las familias puedan contribuir a que las personas con discapacidad gocen de sus derechos plenamente y en igualdad de condiciones…". A su vez, posiciona al Estado como un actor fundamental para garantizar el derecho a recibir protección y cuidados, también reconocido por el Comité de los Derechos del Niño en la Observación General Nº 9, en la que se sostuvo que "*las causas, la prevención y el cuidado de las discapacidades no recibe la tan necesaria atención en los programas de investigación nacionales e internacionales, y se alienta a los Estados Partes a que asignen prioridad a esta cuestión y garanticen la financiación y la supervisión de la investigación centrada en la discapacidad, prestando especial atención a su aspectico ético."*[10]

NORMAS QUE REGULAN EL CUIDADO

Al consultar fuentes estadísticas para evaluar la eficacia de los planteos sobre cuidados, se observa un incremento exponencial de los procesos de amparo en los que se reclaman prestaciones de salud, que alcanzan cerca del 45,60 % del total de los expedientes iniciados en los Tribunales Federales Civiles y Comerciales de la CABA[11]. Esto implica la, aceleración de los tiempos para producir respuestas jurisdiccionales dado los breves plazos previstos para tramitarlos (48 hs.), lo que indica que se traduce en una mayor presión para la toma de decisiones urgentes, que impactará en la intensidad y volumen de trabajo de cada uno de los organismos de la justicia intervinientes, encontrando estas demandas nuevas barreras generadas en el propio ámbito jurisdiccional.

El escenario descripto demuestra que la administración de justicia no ha es indiferente a los cambios sociales vinculados con el empobrecimiento de la población, la incorporación masiva de las mujeres al empleo, el envejecimiento del envejecimiento de la población y su feminización, a la mayor prevalencia a adquirir enfermedades crónicas, al incremento de los requerimientos de cuidado de las personas -tengan o no una discapacidad que les genere dependencia-, inclusive las situaciones de alta dependencia -no olvidemos que el 15% de nuestra población presenta algún tipo de discapacidad y el 13% de ellas tiene tres o más dificultades-. Muy por el contrario, el Poder Judicial, se ha constituido en un actor estratégico para evitar que se produzca la violación de derechos humanos fundamentales.

PERO, ¿QUÉ SUCEDE CUANDO SE PLANTEAN RECLAMOS POR CUIDADO ANTE LA JUSTICIA?

Frente a la obligación de garantizar el acceso a la justicia y los derechos fundamentales afectados, la Magistratura argentina ehibe larga experiencia en pronunciamientos sobre el cuidado médico-asistencial[12], el cuidado personal, al fijar el monto de una compensación económica, al cuantificar el valor de la vida o la incapacidad producida en el ámbito laboral,

10 Observación General Nº 9. Comité CDN. Punto 61.Pagina

11 Estadísticas de amparos/ sumarísimos de salud año 2015 al 2019. Cifra obtenida del total de los ingresos en el fuero civil y comercial federal. (*) Fecha de corte 10.9.2019.

12 Caso Lifschitz (2004) es uno de los casos más importantes que en toda sentencia en materia de requerimientos del cuidado de la salud de PCD. Otros reclamos están vinculados con la Asistencia Domiciliaria prevista en el art. 39 inc. d) de la Ley 24.901 o el Acompañamiento Terapéutico del art. 12 de la ley 26.657.

incluso al conceder una excarcelación o prisión domiciliaria[13], etc., que han obtenido reconocimiento jurídico favorable sustentado en normas de jerarquía constitucional que resguardaban la protección del derecho a la vida, la salud, y la integridad física, entre otros.

Este posicionamiento jurisprudencial frente a las demandas de cuidados basados en el Pacto Internacional de Derechos Económicos, Sociales y Culturales, la Convención de los Derechos del Niño, la Convención Sobre los Derechos de las Personas con Discapacidad[14], la Convención Interamericana Sobre la Protección de los Derechos Humanos de las Personas Mayores[15], el art. 75 inc. 22 y 23 de la Constitución Nacional, el Código Civil y Comercial de la Nación, la ley 24.901[16] y la Ley de Salud Mental N° 26.657 (art. 12), entre otras tantas leyes específicas, importa visibilizar la trascendencia que tiene el cuidado en la vida de las personas, garantizándose judicialmente un entorno que le proporcione sostenibilidad, resignificándose situaciones que el derecho siempre abordó, e incluyendo los aspectos más básicos de la vida cotidiana donde la judicatura no puede quedar ausente.

La justicia ha ido construyendo desde hace mucho tiempo la noción de protección especial como estrategia para cubrir las particulares circunstancias que atraviesan las personas en situación de dependencia, las institucionalizas, o riesgo (niñas, niños y adolescentes, personas mayores o con discapacidad, mujeres, personas LGTTTBYQ, etc.). En la jurisprudencia de la Corte Suprema de Justicia de la Nación hay pronunciamientos históricos que marcan un posicionamiento político institucional frente a determinadas problemáticas. A los efectos de este trabajo me detendré en el análisis del caso Lifschitz del año 2004, que brinda lineamientos precisos sobre el posicionamiento del poder judicial en estos casos, expone la función y limitaciones de la judicatura, y es uno de los más presentes en la jurisprudencia de la Justicia Civil y Comercial Federal sobre salud.

En él, la Corte toma los argumentos del Procurador General de la Nación, sostuvo que las personas con discapacidad "*además de la especial atención que merecen de quienes están directamente obligados a su cuidado, requiere también la de los jueces y de la sociedad toda, siendo su interés la consideración primordial, lo viene a tanto a orientar como a condicionar la decisión de los jueces llamados a juzgamiento en todos los casos*" (doctrina de fallos: 322:2701; 324:122)[17].

Como nota destacada se observa que en esta respuesta jurisdiccional se identificó a todos los actores y responsables de garantizar el cuidado, no solo las familias, sino también los agentes de salud, la sociedad, y la judicatura, deben cumplir con la obligación señalada expresamente por el Máximo Tribunal y están condicionados frente a la necesidad de las PCD que necesitan cuidados. Un nuevo comportamiento se impuso, aquél que advertía la necesidad de modificar los patrones tradicionales que desconocían las desigualdades de este colectivo, para transformarse en protagonistas de la especial protección.

13 Art. 10 CPPN y el art. 32 de la Ley de ejecución pena privativa de libertad Nro. 23.660 (mod. Por Ley Nro. 26.472).

14 La Convención se concibió como un instrumento para garantizar los derechos humanos de las personas con discapacidad con una dimensión explicita de desarrollo social.

15 Art. 3 inc. f) y art. 12 y19.

16 Ley 24.901. Art. 39 inc. d. (mod. por ley 26.480).

17 CSJN. Caso Lifscitz, Graciela Beatriz y otros c/ Estado Nacional. 15 de junio de 2004.

DEMANDAS JUDICIALES DE CUIDADO

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PERO, ¿QUÉ SUCEDE CUANDO SE PLANTEAN RECLAMOS POR CUIDADO ANTE LA JUSTICIA?

Frente a la obligación de garantizar el acceso a la justicia y los derechos fundamentales afectados, la Magistratura argentina exhibe larga experiencia en pronunciamientos sobre el cuidado médico-asistencial[19], el cuidado personal, al fijar el monto de una compensación económica, al cuantificar el valor de la vida o la incapacidad producida en el ámbito laboral, incluso al conceder una excarcelación o prisión domiciliaria[20], etc., que han obtenido reconocimiento jurídico favorable sustentado en normas de jerarquía constitucional que resguardaban la protección del derecho a la vida, la salud, y la integridad física, entre otros.

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18 Estadísticas de amparos/ sumarísimos de salud año 2015 al 2019. Cifra obtenida del total de los ingresos en el fuero civil y comercial federal. (*) Fecha de corte 10.9.2019.

19 Caso Lifschitz (2004) es uno de los casos más importantes que en toda sentencia en materia de requerimientos del cuidado de la salud de PCD. Otros reclamos están vinculados con la Asistencia Domiciliaria prevista en el art. 39 inc. d) de la Ley 24.901 o el Acompañamiento Terapéutico del art. 12 de la ley 26.657.

20 Art. 10 CPPN y el art. 32 de la Ley de ejecución pena privativa de libertad Nro. 23.660 (mod. Por Ley Nro. 26.472).

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22 Art. 3 inc. f) y art. 12 y19.

23 Ley 24.901. Art. 39 inc. d. (mod. por ley 26.480).

específicas, importa visibilizar la trascendencia que tiene el cuidado en la vida de las personas, garantizándose judicialmente un entorno que le proporcione sostenibilidad, resignificándose situaciones que el derecho siempre abordó, e incluyendo los aspectos más básicos de la vida cotidiana donde la judicatura no puede quedar ausente.

La justicia ha ido construyendo desde hace mucho tiempo la noción de protección especial como estrategia para cubrir las particulares circunstancias que atraviesan las personas en situación de dependencia, las institucionalizas, o riesgo (niñas, niños y adolescentes, personas mayores o con discapacidad, mujeres, personas LGTTTBYQ, etc.). En la jurisprudencia de la Corte Suprema de Justicia de la Nación hay pronunciamientos históricos que marcan un posicionamiento político institucional frente a determinadas problemáticas. A los efectos de este trabajo me detendré en el análisis del caso Lifschitz del año 2004, que brinda lineamientos precisos sobre el posicionamiento del poder judicial en estos casos, expone la función y limitaciones de la judicatura, y es uno de los más presentes en la jurisprudencia de la Justicia Civil y Comercial Federal sobre salud.

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DESAFÍOS PARA GARANTIZAR EL CUIDADO

Una nota significativa e insoslayable en relación con el trabajo de cuidado, es que se instituye como una práctica atravesada por sentimientos de amor, solidaridad, lealtad; por normas sociales, éticas, morales y por mandatos culturales y de género, que llevan a naturalizar, legitimizar y reproducir el protagonismo de las mujeres en esas tareas, incluso cuando ello tenga efectos adversos para la propia salud[25]. Debido a que en nuestra cultura aún persiste en la familia una inequitativa distribución de las responsabilidades de cuidado, es obligación del Estado aplicar en estos casos la Convención Sobre la Eliminación de Todas las Formas

24 CSJN. Caso Lifscitz, Graciela Beatriz y otros c/ Estado Nacional. 15 de junio de 2004.

25 Ponce, Marisa, "*El cuidado de la salud de los que cuidan*", en de cuidados y cuidado de las acciones públicas y privadas. Ed. Biblos, Ciudad de Buenos Aires. 2015. Pág. 156.

de Discriminación contra la Mujer y la Convención Belem do Pará[26], para examinar leyes[27] y políticas neutrales en cuanto al género y asegurarse de que no crean o perpetúan las desigualdades existentes[28].

Es decir, si bien el cuidado -como mecanismo comportamental implementado históricamente para la sostenibilidad de la vida de las personas- ha sido reconocido desde hace décadas por nuestros Tribunales, aún requiere en el proceso de decisión, se valore e incorpore, el mayor impacto que provoca en las vidas de quienes proveen cuidados en la familia, principalmente de las mujeres, y aplicar las normas y estándares internacionales establecidos en su protección.

En definitiva, esta valoración jurisdiccional deberá profundizar en la observancia del emplazamiento en el que se produce la relación de cuidado (institucionalizado o doméstico), en las personas que intervienen (familia, mujeres, agentes de salud obligados a brindar apoyos), y cuando ellos sean solicitados en instancias administrativas o jurisdiccionales, atender a la responsabilidad de los actores que intervienen, el tiempo que requiere su provisión, la distribución en función de la intensidad en relación del tipo de discapacidad y/o nivel de dependencia, y las prestaciones contempladas en nuestro ordenamiento jurídico para apoyar a las familias en el proceso de integración y cuidado de las PCD.

A nivel infraconstitucional y local, se desarrolló un *corpus* jurídico a través de un extenso aunque asistemático conjunto normativo con eje en distintos aspectos: el reconocimiento de apoyos[29], la incorporación de la perspectiva de género[30], su transversalidad y la eliminación de estereotipos de género[31]; el procesamiento de datos con perspectiva de género[32]; el impulso y medición de la igualdad de responsabilidades en el hogar entre el hombre y la mujer[33]; la prohibición de discriminación, entre otras.

Estas observaciones, permiten plantear desde una perspectiva de derechos la importancia de producir respuestas jurisdiccionales en materia de cuidado[34] (terapéutico/asistencial)

26 Convención Interamericana para Prevenir, Sancionar y Erradicar la Violencia Contra la Mujer (art. 3, 4, 6 inc. a y 7 inc. e).

27 Ley de protección integral a las mujeres Nro. 26.485 (mod. por Ley 27.501 y 27.533).

28 Recomendación general núm. 28, párr. 16.

29 Art. 39 inc. d) de la Ley 24.901 que prevé la figura de asistencia domiciliaria, y art. 12 de la Ley 26.657 que reconoce la necesidad de acompañamiento terapéutico como dispositivo ante situaciones donde el tratamiento de salud mental aconseja su externación y permanencia en domicilio.

30 Ley de capacitación obligatoria en la temática de género y violencia contra las mujeres Nro. 27.499.; Ley 26.485 de protección integral a las mujeres Art. 7 inc. d).

31 En relación con los estereotipos de género, en el Caso Artavia Murillo y otros (Fecundación in vitro) Vs. Costa Rica. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2012, la Corte Interamericana resalta que estos estereotipos de género son incompatibles con el derecho internacional de los derechos humanos y se deben tomar medidas para erradicarlos. El Tribunal no está validando dichos estereotipos y tan sólo los reconoce y visibiliza para precisar el impacto desproporcionado de la interferencia generada por la sentencia de la Sala Constitucional (Parágrafo 302) y en el Caso Espinoza González vs. Perú. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia 20 de noviembre de 2014. Al respecto, consideró que el estereotipo de género se refiere a una pre-concepción de atributos o características poseídas o papeles que son o deberían ser ejecutados por hombre y mujeres respectivamente. La Corte ha identificado estereotipos de género que son incompatibles con el derecho internacional de los derechos humanos y respecto de los cuales los Estados deben tomar medidas para erradicarlos. Parágrafo 268.

32 La Ley CABA n° 5588 de inclusión del área temática de Derechos Humanos para la producción de indicadores y publicación de estadísticas y la Ley CABA n° 5924, BOCBA N° 5290 del 09/01/2018, garantiza la incorporación del enfoque de género en todas las producciones del Sistema Estadístico de la Ciudad Autónoma de Buenos Aires. La Ley CABA n° 4.181 establece el servicio de atención telefónica gratuita LINEA MUJER.

33 Ley CABA n° 4892, BOCBA N° 4333 del 05/02/2014, para impulsar acciones sobre la contribución de la economía del cuidado.

34 Ley CABA n° 5261, Ley contra la discriminación.

que disminuyan el familismo[35], las asimetrías sociales y de género, distribuyendo equitativamente las responsabilidades entre los diferentes actores involucrados en el cuidado de las PCD, garantizando a las familias y a su interior a la principal proveedora, tiempo de descanso, acceso a la educación, el cuidado de otros miembros dependientes, tiempo para establecer y mantener redes conversacionales que le brinden contención emocional, y el acceso a la información para poder solicitar los apoyos necesarios para garantizar la sostenibilidad del dispositivo de cuidado que la familia y los profesionales tratantes de la PCD requieran.

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Constitución Nacional

Código Civil y Comercial de la Nación

Declaración Americana de los Derechos y Deberes del Hombre

Declaración Universal de Derechos Humanos

Convención sobre los Derechos del Niño (CDN)

Convención Sobre La Eliminación de Todas Las Formas De Discriminación contra la Mujer (CEDAW)

35 El concepto de familismo remite al modelo de los países mediterráneos en el cual se observa una confianza permanente en la familia para la provisión de trabajo y servicios asistenciales, tanto en su solidaridad intergeneracional como en su estructura de género (Cfr. Findling, Liliana, Mario Silvia y Champalbert Laura. "Como cuidan y se cuidan las mujeres del Gran Buenos Aires. Población de Buenos Aires. Vol. 11. Num. 20 de octubre. 2014, pp. 40). Según otras investigaciones el familismo, en un sentido genérico, se refiere a la creencia cada vez más extendida en la importancia de la familia y, por tanto, la necesidad de desarrollar programas de apoyo y defensa de la institución familiar (Pope-noe, 1988;1994 citado por Adela Garzón "Familismo y creencias políticas" en Revista de Psicología Política, Nro. 17, 1998, 101-128). Consultado el 18/3/2020. Disponible en: https://www.us.es/garzon/psicología%20politica/N17-5.pdf. Otros autores señalan que "el familismo de las sociedades está frecuentemente ligado a las limitaciones que presentan los Estados de Bienestar al hacer recaer sobre ellas un protagonismo excesivo.". Sánchez Vera, Pedro y Marcos Bote Díaz. "Familismo y cambio social. El caso de España Sociologías". Revista Dossiê. Porto Alegre, Nro. 21. 2009:122. Consultado el 18/3/2020. Disponible en: http://www.scielo.br/pdf/soc/n21/07.pdf.

Convención Interamericana para Prevenir, Sancionar y Erradicar la Violencia contra La Mujer "*Convención de Belem do Pará*"

Mecanismo de Seguimiento de la Convención Belém do Pará (MESECVI)

Convención sobre los Derechos de las Personas con Discapacidad

Convención Americana Sobre Derechos Humanos (CADH)

Declaración Universal de Derechos Humanos (DUDH)

Pacto Internacional de Derechos Económicos, Sociales y Culturales (PIDESC)

personas con Discapacidad.

Convención Interamericana Sobre la Protección de los Derechos Humanos de las Personas Mayores

Ley 24.901 y sus modificaciones (Ley N° 26.480)

Ley de Salud Mental Nº 26.657. Decreto 603/13

Ley 26.485. Protección Integral de las Mujeres

Ley Nro. 27.499 de capacitación obligatoria en la temática de género y violencia contra las mujeres.

Observación General Nro. 28 de la CEDAW

Observación General Nº 9. Comité CDN.

La Ley CABA n° 5588 de inclusión del área temática de Derechos Humanos para la producción de indicadores y publicación de estadísticas

Ley CABA n° 5924, BOCBA N° 5290 del 09/01/2018, garantiza la incorporación del enfoque de género en todas las producciones del Sistema Estadístico de la Ciudad Autónoma de Buenos Aires.

Ley CABA n° 4.181 establece el servicio de atención telefónica gratuita LINEA MUJER.

INFORME REGIONAL SOBRE LA MEDICIÓN DE LA DISCAPACIDAD Una mirada a los procedimientos de medición de la discapacidad en América Latina y el Caribe.

Ley CABA n° 5261, Ley contra la discriminación.

Ley CABA n° 4892, BOCBA N° 4333 del 05/02/2014, para impulsar acciones sobre la contribución de la economía del cuidado.

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PERSONAL TRAINER'S CIVIL LIABILITY

RESPONSABILIDADE CIVIL DO PERSONAL TRAINER

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ABSTRACT

This work deals with the civil liability of the personal trainer in the exercise of the physical educator profession. This study covers the incidence of the Civil Code, the Law 9.696/1998, the CONFEF Resolutions and other normative provisions that regulate the professional performance in physical education and its relationship with the institute of civil liability. The study of the theme is pertinent considering the increase in the demand for personalized services in the area of physical education in search of a better life quality and health in general. The objective of this work is to understand the regulation of the professional practice of physical education teachers in Brazil, specifically the profession of personal trainer, building a dialogue between this and the civil liability general theory, passing through the evaluation of how these issues are handled and applied by the Judiciary. The methodology consists of hypothetical-deductive research, with qualitative approach, descriptive purpose, with the objective of proposing a formative evaluation on the theme. Based on the Consumer Protection Code, it is concluded that the personal trainer responds subjectively, when acting as a liberal professional, and when linked to an academy, it responds objectively.

KEYWORDS: Civil liability. Physical Education. Personal Trainer. Damage.

RESUMO

Este trabalho trata da responsabilidade civil do personal trainer no exercício da profissão de educador físico. Este estudo abrange a incidência do Código Civil, da Lei nº 9.696/1998, das Resoluções do CONFEF e demais disposições normativas que regulam a atuação profissional na educação física e sua relação com o instituto da responsabilidade civil. O estudo do tema é pertinente considerando o aumento na demanda da prestação de serviços personalizados na área da educação física em busca por uma melhor qualidade de vida e de saúde em geral. O objetivo deste trabalho consiste na compreensão da regulamentação do exercício profissional dos educadores físicos no Brasil, especificamente da profissão de personal trainer, construindo um diálogo entre esta e a teoria geral da responsabilidade civil, passando pela avaliação de como esses temas são trabalhados e aplicados pelo Poder Judiciário. A metodologia consiste em pesquisa hipotético-dedutiva, com abordagem qualitativa, propósito descritivo, com o objetivo de propor uma avaliação formativa sobre o tema. Com fundamento no Código de Defesa do Consumidor, conclui-se que o per-

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sonal trainer responde subjetivamente, quando atuar como profissional liberal, e quando estiver vinculado a uma academia, esta responde objetivamente.

PALAVRAS-CHAVE: *Responsabilidade Civil. Educação Física. Personal Trainer. Dano.*

1 INTRODUCTION

Liability is one of the main themes of study in the scope of Civil Law, based on the restoration of equity and off-balance sheet arising from the damage and this arising from the most varied species of social facts. Among the many activities carried out in the social field, the activity of physical educators in general is one of the fields from which the existence of damages and losses can originate, leading to the need for reparation. This is essential in the social field, as a way to protect legal interests safeguarded by law, whether they are of a patrimonial nature or rights related to personality. In this context, this work will have as main theme the civil liability of physical educators, more specifically, the personal trainer in their typical activities.

In recent years, the demand for a physical education career has grown considerably. According to data from the National Institute of Educational Studies and Research Anísio Teixeira (*Instituto Nacional de Estudos e Pesquisas Educacionais Anísio Teixeira - INEP*), in 2015, the number of trainees in the higher education courses in physical education was around 35 thousand people[3]. In addition, the search for a better quality of life and health in general, through the most varied types of supervised physical activity is increasingly growing. As this activity is supported by doctors and the media, the importance of studying civil liability is perceived in the case of: physical, patrimonial and moral damages that can be caused to users of the services provided by physical educators, especially those who act as personal trainers.

Methodological procedures include hypothetical-deductive research, with a qualitative approach, descriptive purpose, and the objective of proposing a formative assessment. The rules related to the proposed theme will be directly examined, including Law Nº 9.696/1998 and specific resolutions published by the Federal Council for Physical Education (*Conselho Federal de Educação Física - CREF*), such as, for example, Resolution Nº 307/2015, which provides on the Code of Ethics for Physical Education Professionals (*Código de Ética dos Profissionais de Educação Física*), building a dialogue between its determinations and the civil liability institute. In addition, a current practical case will be analyzed in order to examine the treatment given by the Judiciary to the concepts and facts involved in the repair of damages caused during the professional exercise of the personal trainer.

Initially, the concepts that support the general theory of civil liability will be outlined, including the concepts of strict/objective civil liability and subjective civil liability, contractual and non-contractual, illegal act, abuse of rights, as well as the foundations that give meaning the observance of civil liability within the social reality.

3 National Institute of Educational Studies and Research Anísio Teixeira (Instituto Nacional de Estudos e Pesquisas Educacionais Anísio Teixeira - INEP). Higher Education Statistical Synopses - Graduation (Sinopses Estatísticas da Educação Superior – Graduação). Available in: http://portal.inep.gov.br/web/guest/sinopses-estatisticas-da-educacao-superior. Accessed on: September 21, 2018.

Then, the assumptions, or essential elements of civil liability, will be defined, that is, positive or negative human conduct, the general fault/blame of the agent, the causal link or nexus of causality and the damage, or injury caused.

Subsequently, the regulation of professional practice in physical education in Brazil will be presented and analyzed, based on Law Nº 9.696/1998, Resolution Nº 307/2015 of Federal Council of Physical Education (*Conselho Federal de Educação Física - CONFEF*) and the other resolutions issued by the same institution. Understanding this matter is especially relevant, as these determinations organize and regulate the work of physical educators in the country, making it possible to perceive the relationships that can be established between this regulation and the subject of civil liability in case of damages arising from the professional exercise of the personal trainer.

Finally, a judicial decision related to the topic will be examined, making it possible to analyze the protection afforded by the Judiciary to individuals who suffer losses from the follow-up and supervision of physical education professionals, especially in the case of those who work as a personal trainer.

2 GENERAL THEORY AND ASSUMPTIONS OF CIVIL LIABILITY

Responsibility or liability is one of the main aspects of social reality, representing the duty to restore the equity balance (*patrimonial and extrapatrimonial balance*) (property and off-balance sheet damages) and resulting from any activity that causes damage or loss, originated in the legal consequences of the activity and the duty not to harm others (STOLZE, 2012, p. 46). The origin of the theme is linked to Roman Law, in the regulation organized by the State to compensate the damages caused in the criminal and civil spheres, through the fault/blame of the author, generating a penalty and the duty of reparation (TARTUCE, 2017, p. 499).

In the case of civil liability, its observance may originate from mandatory non-compliance, disobedience to contractual rules or the lack of observance of a certain rule that regulates life and social relations. Civil liability is well founded and linked to the need to demand a response that expresses efficiency, justice and security, contributing to social order and pacification. For this reason, the issue of responsibility is increasingly concentrated on the judgment of the damage itself and its consequences, not only in the conduct of the agent who caused it (GONÇALVES, 2018, p. 30-31).

The doctrine deals with civil liability from a dual or binary model. Despite their distinct origin, the modalities of civil liability are based on the same source, which is the social contract, and on the same fact, that is, the violation of a pre-existing legal duty, and obey the same basic principles and rules (MARTINS-COSTA, 2003, p. 97).

In the Brazilian legal system, civil liability assumed the *status* of fundamental right by the Federal Constitution of 1988, being expressly recognized in article 5º, item V (the right of reply is guaranteed, proportional to the appeal, in addition to compensation for material,

moral or image damage (our translation into english)) and in article 5º, item X (intimacy, private life, honor and image of people are inviolable, and the right to compensation for material or moral damage resulting from their violation being assured (our translation into english)), these articles deal specifically with the right to compensation for property/equity and off--balance sheet damages (*patrimonial* and *extrapatrimonial* balance).

In general, civil liability can be classified into contractual or business (*negocial* or by negotiation) and 'extracontractual' or non-contractual or Aquilian.

The first stems from the breach of a contractual obligation or unilateral business and is regulated in articles 389 to 391 of the Civil Code[4]. It can originate, for example, in the non--compliance with the obligation of a transport company to drive a goods safely, in the event that the goods were partially or totally destroyed due to a transport incident.

In Aquilian civil liability, there is no link between the victim and the one who caused the damage, based on the illegal act and the abuse of the right, treated in articles 186 and 187 of the Civil Code, respectively (GONÇALVES, 2018, p. 45).

One of the main institutes that characterize non-contractual civil liability is the unlawful act or ilegal act, treated in article 186 of the Civil Code[5]. This can be understood as any human act or conduct that violates subjective and private rights, injuring the legal order and causing harm to others. It's a legal fact in a broad sense, generating the duty of reparation and indemnity, whether in the civil, criminal or administrative scope, as demonstrated in Article 927 of the Civil Code (BRASIL, 2002).

The abuse of rights, which is also the basis for non-contractual civil liability, is provided for in article 187 of the Civil Code[6], being a legal act that has a lawful object, but which when practiced is exaggerated, entails consequences that are considered illegal, violating principles such as that of ethics, sociality, good faith and good customs (FRANÇA, 1977, p. 45).

Civil liability can also be classified as objective or subjective. The subjective liability is based on proof of the blame of the perpetrator of the damage, thus being indemnifiable.

And the strict liability, on the other hand, exists in the legal possibilities in which the damage needs to be repaired, regardless of the existence of blame, requiring only the existence of the damage and the causal link or nexus of causality. Strict liability is present in several articles of the Civil Code, such as articles 936 and 937[7], that deal with the responsibility of the owner of the animal and the owner of the ruined building, as well as in articles 12 and 14 of the Consumer Protection Code (*Código de Defesa do Consumidor*) (Federal Law Nº

4 Art. 389. If the obligation isn't fulfilled, the debtor is liable for losses and damages, plus interest and monetary restatement according to regularly established official indexes, and attorney fees.
Art. 390. In the case of negative obligations, the debtor has been defaulted since the day on which he performed the act that he should abstain from.
Art. 391. For the default of obligations all debtor's assets are responsible. (Our translation into english)

5 Art. 186. Anyone who, through voluntary action or omission, negligence or imprudence, violates the right and causes harm to others, even if exclusively moral, commits an unlawful act. (Our translation into english)

6 Art. 187. The holder of a right who, when exercising it, manifestly exceeds the limits imposed by his economic or social purpose, good faith or good customs also commits an unlawful act. (Our translation into english)

7 Art. 936. The owner, or keeper, of the animal will reimburse the damage caused if it does not prove the victim's blame or force majeure.
Art. 937. The owner of a building or construction is liable for damages resulting from its ruin, if it comes from a lack of repairs, whose the necessity was manifest. (Our translation into english)

8.078/90). It's based on the theory of risk, whose idea is that every person who carries out an activity assumes the risks of damage to third parties arising from this activity, being obliged to repair them, even if there is no fault/blame (GAGLIANO; PAMPLONA FILHO, 2012, p. 201).

There is no consensus on the essential elements of civil liability or the duty to repair and indemnify. However, in general, four elements are considered: human conduct or action, the general blame of the agent, the causal link or nexus of causality, and the damage or harm caused.

The assumption of human conduct, concerns an action or omission, from any person, that causes harm to others. That is, the damage may be caused by positive or negative conduct, voluntary or arising from negligence (*negligência*), recklessness/imprudence (imprudência) or malpractice (imperícia), characterizing intent or blame in *stricto sensu*. For the negative conduct to be characterized, it is necessary to demonstrate that a certain conduct, configured as a legal duty that would avoid the damage, was not practiced. For example, article 938 of the Civil Code determines that the inhabitant of the building, from whom things fall, is responsible for the damage caused, since there is a presumption that this damage could be avoided through positive conduct that was no longer practiced by the agent (GONÇALVES, 2017, p. 65).

Generic blame/fault or lato sensu, covers intent and fault stricto sensu. The intent involves the agent's willingness to harm the right of others, in order to harm. In civil liability, the intent receives the same treatment of serious or very serious blame, generating the duty of indemnity. The guilt/blame in *stricto sensu*, on the other hand, results from the non-observance of an existing legal duty, there being no need for intentional violation, and may stem from the lack of diligence of the agent causing the damage, or from negligence, recklessness or malpractice. (TARTUCE, 2017, p. 522).

The causal link is the immaterial element of civil liability, directly linking human conduct to the damage caused in a cause and effect relationship. It constitutes the link between the offense to the right and the damage suffered. Thus, the harmful fact originates in the action or is a predictable consequence of it. The existence of a causal link is a mandatory element for the obligation to indemnify (PEREIRA, 1994, p. 75).

Finally, damage is the essential element, the legal fact that triggers the civil liability. This results from proof of damage, from injury to a legal object, whether of an equity or off-balance sheet nature. Without it, there is no object for redress in the civil sphere. The damage can be moral, falling on honor, personal or family name, causing suffering to the victim, or property (patrimony), when it has repercussions on the financial reality of the victim (FARIAS; ROSENVALD; BRAGA NETTO, 2017, p. 235).

3 REGULATION OF PROFESSIONAL ACTIVITY IN PHYSICAL EDUCATION AND ITS CODE OF ETHICS

In Brazil, the work of the physical education professional started to be regulated as of Law Nº 9.696, of September 1, 1998, enacted after intense debate by scholars, researchers

and professionals, with the objective: the organization of the professional exercise of the physical educator and the creation of the Federal Council of Physical Education (*Conselho Federal de Educação Física - CONFEF*). Before the enactment of this law, since the 1940s, the need to regulate the physical education profession in Brazil was discussed through meetings and debates between students, scholars and directors of educational institutions, aiming at its organization, protection and appreciation of professionals working in the area (SOUSA NETO et. al, 2004, p. 123).

The article 1º of Law Nº 9.696/1998 defined limits as to the subjects who could act in the area of physical education, restricting such action exclusively to those who are regularly registered with the Regional Physical Education Councils (*Conselhos Regionais de Educação Física - CREFs*)[8]. This limitation aimed to protect the labor market of physical educators, since many people without training (higher education) in the area acted as such, reducing the quality of services and classes provided by these individuals without higher and specific training (BRASIL, 1998).

To be enrolled in the Regional Physical Education Councils, it's necessary, according to article 2º of the referred Law, to have a diploma obtained in a higher education course in physical education, officially authorized or recognized, or to have a physical education diploma issued by a foreign higher education institution valid in the National territory. In addition, item III of article 2º determined that those who already exercised their own activities of physical education professionals until the law was in force could also be enrolled in the Regional Physical Education Councils (BRASIL, 1998)[9]. That is, the latter could receive authorization from *CONFEF* to continue working, as a transitional measure between two legal states, respecting the right already acquired by these workers in this adaptation phase. (ALMEIDA; GUTIERREZ, 2008).

The duties of physical education professionals are listed in article 3º of Law Nº 9.696/1998, which is a taxing role, involving functions such as: planning, supervising, organizing, executing and evaluating works, programs and projects, as well as providing services consulting, advisory, planning personalized and specific training, as well as participation in the dissemination of technical, scientific and pedagogical information in the area of physical activities and sports (BRASIL, 1998)[10]. In this way, the physical education professional can act as a specialist in the most varied types of physical exercises, from gymnastics, through struggles in its various categories, dances, weight training, rehabilitation, ergonomics, yoga, activities organized in groups or supervised individually.

In this sense, it's important to note that the limitation of subjects who are authorized to exercise the duties of physical educators not only had effects on the protection of these professionals, but also contributed to the increase in the quality of service provision and in

8 Art. 1o. The exercise of Physical Education activities and the designation of a Physical Education Professional is the prerogative of professionals regularly registered with the Regional Physical Education Councils. (Our translation into english)

9 Art. 2º. Only the following professionals will be enrolled in the boards of the Regional Physical Education Councils: I - holders of a diploma obtained in a Physical Education course, officially authorized or recognized; II - holders of a diploma in Physical Education issued by a foreign higher education institution, revalidated in accordance with the legislation in force; III - those who, up to the date of entry into force of this Law, have provenly performed their own activities for Physical Education Professionals, under the terms to be established by the Federal Physical Education Council. (Our translation into english)

10 Art. 3º. The Physical Education Professional is responsible for coordinating, planning, programming, supervising, promoting, directing, organizing, evaluating and executing works, programs, plans and projects, as well as providing audit, consultancy and advisory services, carrying out specialized training, participating in multidisciplinary teams and interdisciplinary and prepare technical, scientific and pedagogical reports, all in the areas of physical activities and sport. (Our translation into english)

the exercise of related activities, due to more in-depth knowledge and the most effective preparation expected from those who have training courses, generating more satisfactory results and avoiding risks and possible damage to the health of those whose activities are being mediated by a physical educator (FREIRE; VERENGUER; COSTA REIS, 2002, p.42-44).

Among the activities developed by physical education professionals, there is the work of the personal trainer, an original term in English already incorporated into Brazilian daily life, which is used to identify a physical educator who offers: supervision, guidance and individual and adapted monitoring, in the search for goals based on the user's need or desires in relation to their health or fitness. This work is built through specific training that takes into account the abilities and limitations of each student, giving him security and the possibility of faster and more efficient results. For the exercise of this activity, the following are mandatory: registration with CREFs and adequate training, guaranteeing quality in the provision of services and reducing risks from inadequate guidance and monitoring.

One of the main determinations of Law Nº 9.696/1998 was the creation of the Federal Physical Education Council (Conselho Federal de Educação Física), which was established as an administrative, non-profit entity, responsible for the professional regulation of physical educators; empowering this autarchy to determine the ways in which physical education professionals should be trained, guarantee their exclusive rights to act in the area, guiding, disciplining and supervising the exercise of professional activity (BRASIL, 1998)[11].

Since its creation, *CONFEF* has issued several resolutions on the topic, such as Resolution Nº 45/2002, which provides for the organization of courses for untrained professionals, and Resolution Nº 46/2002, which deals with the intervention of educators in the organization and supervision of educational activities in basic education (CONFEF, 2002; ALMEIDA; GUTIERREZ, 2008).

One of the main normative provisions of *CONFEF* in recent years is the Resolution Nº 307, of November 9, 2015, which provides for the Code of Ethics for Physical Education Professionals registered in the CONFEF/CREFs System (*Código de Ética dos Profissionais de Educação Física registrados no Sistema CONFEF/CREFs*). From the analysis of the preamble of this Code of Ethics, it is clear that it was elaborated based on the awareness of the social and educational role that physical educators have, and the need to improve and adapt professionals to the complexities involved in individual, social and collective fulfillment of those who benefit from their work. Its creation took into account the Universal Declaration of Human Rights and Culture; the Agenda 21, which emphasizes protecting the environment in human relations; and the Brazilian Charter of Physical Education of 2000 (*Carta Brasileira de Educação Física de 2000*), in its care for the risks that may exist on the nature, society and health of the individual (CONFEF, 2015).

The elaboration of the Code of Ethics for Physical Education Professionals (*Código de Ética dos Profissionais de Educação Física*) aimed to guarantee the exercise of the profession in a competent and qualified manner, aiming at a better quality of life for all involved in its manifestation, whether the beneficiaries, who use the professional services, or its recipient

11 Art. 4º. Federal Council and Regional Councils for Physical Education are created. (*Conselho Federal e os Conselhos Regionais de Educação Física*) (Our translation into english)

(the physical educator himself), pursuant to article 2º of Resolution Nº 307/2015[12]. Thus, the referred Code establishes, in articles 4 and 5, the principles and guidelines of professional practice in the área, in articles 6 to 9, the responsibilities and duties involved; in articles 10 and 11, the rights and benefits of physical educators; and finally, in article 12, infractions and penalties in case of violation of the determinations of the Code of Ethics (CONFEF, 2015).

The principles that guide the exercise of the physical education professional, set out in article 4º, items I, II, VII and VIII of the Code of Ethics, are: respect for life, dignity and integrity of the individual; social responsibility; the provision of services in a responsible and honest manner; as well as, the performance within their identity and specific attributions of their professional field, taking into account the social role of the physical educator and the effects of their activity on the quality of life of the beneficiaries (CONFEF, 2015).

Among the responsibilities of the physical education professional, foreseen in the Code of Ethics, the highlights are items III, IV and V of article 6º, which determine that educators must provide safe service and guidance to the beneficiary, based on the educational knowledge acquired in his training courses, which bring health benefits and avoid risks, acting responsibly, including warning the user about any dangers involved in the activity carried out, according to item VI of the same article and item I of article 5º. In item XIV of article 6º, it's clear the determination that the physical activity professional must be responsible for absences committed during the exercise of his activity, either collectively or individually. In article 7º, item I, it was determined that the physical educator cannot hire services that may cause moral damage to his beneficiary or even to himself, or to incur an error that reveals a lack of professional capacity (CONFEF, 2015).

In the event of violations of the Code of Ethics, according to articles 12 and 14, the physical education professional may suffer penalties from the Ethics Commissions (*Comissões de Ética*), the Boards of Instruction and Judgment (*Juntas de Instrução e Julgamento*), the Regional Ethics Courts (*Tribunais Regionais de Ética*) and the Superior Court of Ethics of the *CONFEF* or *CREFs* system (*Tribunal Superior de Ética do sistema CONFEF ou CREFs*). The penalties involve: warning, public censorship, suspension of the exercise of the profession and even the cancellation of the professional registration together with the publicity of the fact that originated the penalty (CONFEF, 2015)[13]. The work of physical educators, especially the personal trainer, involves the risk of accidents with their students, especially injuries, which can cause property and off-balance damage to the student, due to imprudence, malpractice or negligence on the part of the physical educator. In this case, the personal trainer must be held responsible, repairing the damage caused. (OLIVEIRA, SILVA, 2005, p. 4; CONFEF, 2000).

12 Art. 2º. For the purposes of this Code, it is considered: I - beneficiary, the individual or institution that uses the services of the Physical Education Professional; II - recipient, the Physical Education Professional. (Our translation into english)

13 Art. 12. Failure to comply with the provisions of this Code constitutes an ethical infraction, the infringer being subject to one of the following penalties, to be applied according to the gravity of the infractionI - written warning, with or without a fine; II - public censorship; III - suspension of the exercise of the profession; IV - cancellation of professional registration and disclosure of the fact. (Our translation into english)

Art. 14 - The Ethics Commissions, the Instruction and Judgment Boards, the Regional Ethics Courts and the Superior Court of Ethics are organs of the CONFEF / CREFs System with their areas of coverage and competences listed in the Procedural Code of Ethics of the System CONFEF / CREFs. (Our translation into english) (Art. 14 – As Comissões de Ética, as Juntas de Instrução e Julgamento, os Tribunais Regionais de Ética e o Tribunal Superior de Ética são órgãos do Sistema CONFEF/CREFs com suas áreas de abrangência e competências elencadas no Código Processual de Ética do Sistema CONFEF/CREFs)

The activity of the personal trainer is generally linked to contractual responsibility, when the latter is in charge of fulfilling what has been agreed with his students, in the elaboration, supervision and monitoring of the varied modalities of physical activities, aiming at the desired and necessary objectives for each student. In the case of a civil relation, if he does not fulfill his duty, he can answer for the damages caused, according to article 475 of the Civil Code[14].

In most cases, the existing legal relation (between the personal trainer and the student who benefits from his services) is of a consumer nature, as the service is an activity offered in the consumer market in order to meet your needs (FILOMENO, 2018, p. 44); with remuneration (service)[15], for the work done by a physical education professional (provider/supplier)[16], to an individual as the final recipient (consumer)[17].Thus, in terms of consumer legislation, the following hypotheses are possible, which will imply in different results with regard to the responsibility of this professional: a) the personal trainer acts as a 'liberal professional', that is, without being linked to any gym or any other type of business activity; b) the personal trainer is employed or simply provides service on behalf of a gym or similar entity.

In the first hypothesis, the liability will be subjective, that is, the personal responsibility of the personal trainer will only be determined through the verification of blame *lato sensu* (article 14, § 4°, Consumer Protection Code (*Código de Defesa do Consumidor - CDC*))[18]. In the second hypothesis, however, the gym or similar institution will be objectively held responsible, that is, regardless of the existence of blame *lato sensu* (article 14, *caput*, *CDC*)[19].

The personal trainer's civil liability also stems from the provision in article 186 of the Civil Code[20], because the harmful acts are also understood as illicit acts, which violate the rights of others, and can cause physical or psychological damages, including with patrimonial repercussions. As an illegal act, when it is committed in the context of a consumer relation it will be treated as an abusive practice, under the terms of article 39 of the *CDC* (exemplary list)[21].

In any case, regardless of whether or not the activity is provided in the context of a consumer relationship, it's necessary to take great care on the part of the personal trainer with the physical and psychological integrity of the beneficiary, avoiding accidents (v.g., on weight machines with washers and weights), as well as cherish the student's health, not indicating the use of substances that can harm their health (v.g., anabolic steroids) (ALMEIDA *et. al.*, 2007).

14 Art. 475. The party injured by the default may request the termination of the contract, if it does not prefer to demand compliance, being possible, in any case, indemnification for losses and damages. (Our translation into english)

15 Art. 3º, §2°. Service is any activity provided in the consumer market, for remuneration, including those of a banking, financial, credit and insurance nature, except those arising from labor relations. (Our translation into english)

16 Art. 3°, *caput*. Supplier is any natural or legal person, public or private, national or foreign, as well as depersonalized entities, which develop activities of production, assembly, creation, construction, transformation, import, export, distribution or commercialization of products or provision of services. (Our translation into english)

17 Art. 2°, *caput*. Consumer is any natural or legal person who purchases or uses a product or service as the final recipiente. (Our translation into english)

18 Art. 14, §4°. The personal liability of the liberal professionals will be determined through the verification of blame. (Our translation into english)

19 Art. 14. The service provider is liable, regardless of fault, for repairing the damage caused to consumers by defects in the provision of services, as well as for insufficient or inadequate information about their enjoyment and risks. (Our translate into english)

20 Art. 186. Anyone who, through voluntary action or omission, negligence or imprudence, violates the right and causes harm to others, even if exclusively moral, commits an illicit act. (Our translate into english)

21 Art. 39. The supplier of products or services is prohibited, among other abusive practices: [...]. (Our translate into english)

It's thus possible to perceive the liability involved in the exercise of the professional physical education activity, which have direct effects on the health and well-being of the beneficiaries, that in case of error, poor execution of a certain exercise or improper use of equipment, lack of monitoring or adequate guidance, among others, can result in temporary or permanent physical damage to health or even in an attempt against life itself.

4 PERSONAL TRAINER'S CIVIL LIABILITY IN NATIONAL JURISPRUDENCE

Examining current jurisprudence contributes in a fundamental way to understanding the way in which the topic of civil liability arising from services provided by physical educators is being worked on in practice, as well as the protection that can be afforded to those who suffer damage from these activities. This is a topic that has rarely reached Brazilian courts. In this context of scarcity, the decisions that will be analyzed below stand out, which can contribute to the debate due to the relation with the subject.

In this sense, a case judged by the Santa Catarina Court of Justice (TJSC, 2014) will be analyzed, in which, in the initial petition, the author stated that, because he had not been assisted by the trainer in the practice of the exercise called "bench press", nor having received immediate help from the professor and owner of the gym, he could not bear the weight and the iron rod fell on his chest, causing damage to his healthIn addition, he stated that, after the accident, the academy instructor offended him, causing him even more embarrassment. Maintaining that the damages suffered have been demonstrated, the plaintiff requested his compensation through indemnity for moral damages, as well as the application of the inversion of the burden of proof, based on article 6º, item VIII of the Consumer Protection Code (*CDC*)[22].

In the sentence, the judge acknowledged that the indemnity claim for moral damages, made against the academy, filed by the plaintiff, was not considered, understanding that the probation charge was the responsibility of the plaintiff (the judge also did not accept the request for reversal of the burden of proof). Although, having not proven the occurrence of an illegal act, based on article 186 of the Civil Code, there was no basis for the reparation of the moral damages alleged by the author, which was also applied to the allegation regarding the verbal offenses that the author claimed to have addressed to him by the instructor and owner of the academy. In the judgment at first instance, no consumption relation was recognized. It's concluded that the instructor of the academy would not have the obligation to be present at the exact moment of the accident because he is not an exclusive or personal trainer, and that the author of the action was responsible for waiting for his availability, and could not assign him the responsibility for the damage suffered.

In the appeal, the decision handed down in the sentence was maintained, understanding that it was the exclusive fault of the consumer when he used the weight training equipment

22 Art. 6º. The basic consumer rights are: [...] VIII - facilitating the defense of their rights, including reversing the burden of proof, in their favor, in civil proceedings, when, at the judge's discretion, if the allegation is credible or when he is under-sufficient, according to the ordinary rules of experience. (Our translation into english)

with a weight above what he could bear, without waiting for the professional help of the trainer, breaking the causal link and removing the duty of indemnity from the service provider, based on article 14 of the Consumer Protection Code (*CDC*). Only in the second instance was the consumer nature of the relation recognized. Even so, the inversion of the burden of proof was considered unfeasible, the claim was rejected and the sentence was confirmed.

The case cited does not directly refer to the work of the personal trainer, but it is important to analyze some aspects that are related to the theme of this work. When the judge of first instance concludes that the instructor of the gym did not have the duty to closely monitor the author of the action individually, he refers to the work of the personal trainer, which shows that in case of this – personal trainer, he would be held responsible for equivalent damage, since it's a specific, direct and individualized monitoring activity.

The personal trainer has the assignment and the duty to supervise, monitor and support in a manner adapted to the beneficiary's capacities and limitations, and for this reason in the case of accidents, he has the duty to repair the damages suffered by those under his responsibility, orders and supervision, as a professional and service provider in a consumer relationship (ALMEIDA *et.al.*, 2007). This liability must be determined subjectively, that is, it's essential to prove blame *lato sensu* (negligence, imprudence or malpractice).

Another case to be observed was judged by the 1st Class of Appeals of the Paraná Court of Justice (*1ª Turma Recursal do Tribunal de Justiça do Paraná*) (TJPR, 2015). In the initial petition, filed with the Special Court of the District of Foz do Iguaçu, the author stated that she entered into a service contract with the defendant, who would work as her personal physical trainer three times a week, lasting one hour per class, paying the contracted monthly fees, but the latter refused to provide the services, asking the author to leave his establishment. The plaintiff then filed a lawsuit requesting indemnity for moral damages, which was rejected by the first instance.

In appeal, the plaintiff reaffirmed the occurrence of moral damages and breach of contract, requiring the applicability of the Consumer Protection Code (*Código de Defesa do Consumidor - CDC*). The defendant, in his defense, stated that the breach of contract was due to delays on the part of the plaintiff, which, according to the judgment of the appeal judges, was not properly proven. The Court recognized the configuration of the legal consumption relation, and also considered that there was a refusal and failure to provide the services agreed with the physical trainer, configuring the abusive practice defined in article 39, item II of the *CDC*, that is, the refusal to attend consumer demand, despite his availability and the adjusted agreement, justifying the reparation for moral damages. In Class Appeals (*Turma Recursal*), by majority vote, the judges met, gave and upheld the appeal, reforming the initial sentence.

In both decisions analyzed, 'the consumerist nature of the service provider's relation with the personal trainer' to the beneficiary student was recognized (in one of them this recognition did not occur in the first instance), which attracts its regulation, especially in the area of civil liability, in addition to the general principles and provisions set out in the Civil Code (*Código Civil*), and the specific provisions established by the Consumer Protection Code (*Código de Defesa do Consumidor - CDC*).

5 CONCLUSION

The civil liability institute is one of the most relevant aspects in Civil Law, due to its social role in the protection of patrimonial and off-balance sheet legal assets, contributing to social order and pacification, having a specific foundation in Brazilian legislation, either in the Federal Constitution (article 5º, items V and X) (*Contituição Brasileira de 1988*) as well as in the infra-constitutional legislation, in articles 186, 187, 389 390 and 391 of the Civil Code (*Código Civil Brasileiro*), and in articles 6º, item VI and 14 of the Consumer Protection Code (*Código de Defesa do Consumidor - CDC*).

It is a secondary legal duty that arises with the failure to comply with a primary obligation that generates damage. Always resulting from an illegal act or abuse of rights, civil liability may arise from a contract or legal transaction between the parties (contractual) or instituted by the legislation itself (non-contractual or Aquilian). As a rule, civil liability presupposes the existence of human conduct (commissive or omissive), blame *lato sensu* (intentional or blame *stricto sensu*), damage and the causal link between conduct and damage.

Depending on the need or not to prove the blame in lato sensu of the author of the act, civil liability can be classified as objective and subjective. The first is determined independently of the proof of blame *lato sensu*, while in the second the aforementioned blame needs to be demonstrated for there the application of liability is made.

The regulation of the professional performance of physical education in the last decades, with Law Nº 9.696/1998 and the determinations of the Federal Council of Physical Education (*Conselho Federal de Educação Física - CONFEF*) and of the Regional Councils of Physical Education (*Conselhos Regionais de Educação Física - CREFs*), like the Resolution nº 307/2015 by CONFEF (Code of Ethics for Physical Education Professionals (*Código de Ética dos Profissionais de Educação Física*)), demonstrate the concern for the responsible exercise of the profession by physical educators, in the sense of being adequately prepared, generating more efficient results and reducing risks resulting from poor supervision or execution of the physical exercises.

In order to configure the need for redress resulting from civil liability, it is necessary to observe whether the conduct involved fits into the main assumptions of civil liability, which are: positive or negative human conduct, blame in the broad sense, causation (causal link) and the damage or injury caused.

In most cases, the activity developed by the personal trainer constitutes a legal relation of consumption, since the presence of all the elements that constitute this relation it's verified, with the physical educator (or the gym) being considered a supplier, when he provides his service with the remuneration, to an individual who receives it as a consumer.

The physical education professional who exercises the role of personal trainer can act as a liberal professional, without being linked to any gym, or as an employee or simply a service provider on behalf of a gym. In the first case - personal trainer as a liberal professional - he will be held subjectively responsible (through the verification of blame *lato sensu*) under the terms of article 14, § 4º of the Consumer Protection Code (*Código de Defesa do Consumidor - CDC*). In the second case, the gym will be held objectively responsible (regardless of the existence of intent or blame *stricto sensu*), under the terms of article 14, *caput* of the same Code.

Examination of the jurisprudence showed that there is still divergence between judges regarding the configuration of the legal relation of consumption in the activity of providing personal trainer services, especially as a liberal professional. However, overcoming this discussion, it's peaceful to understand the system of liability of that professional, depending on the way in which he develops his activities, independently if as a liberal professional or linked to a gym or similar institution.

The understanding of the ways in which personal trainer civil liability is characterized and configured contributes to the protection and defense of consumers, immediately, through the application of civil-consumerist legislation with constitutional basis, and mediately, in the search for maintaining order and social pacification.

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PRECEDENTS: BETWEEN CLOUDS AND CLOCKS

PRECEDENTES: ENTRE NUVENS E RELÓGIOS

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ABSTRACT

The present article aims to test the hypothesis that the precedents, from the perspective of the theory of democratic procedurality and critical rationalism, must being understood as a procedural legal-institute. In this sense, it was found that the precedents cannot match the jurisprudential asylum and the obligatory precedents, which were compared to the cloud and clock scheme studied by Karl Popper, since both systems have weaknesses and aporias. The methodological procedure used was the legal-theoretical, since the notions of critical rationalism, precedents and democratic procedurality were critically analyzed. It was possible to demonstrate that, in the Democratic Rule of Law, the construction and application of the precedents must take place in a dialogic-argumentative procedural space based on the constitutional principles of the process, in order to conclude that the precedents should be subject to revision, interpretation, discussion. and supervision by any of the people.

KEYWORDS: Precedents. Democratic procedurality. Clouds. Clocks. Critical rationalism.

RESUMO

O presente artigo objetiva testar a hipótese de que os precedentes, na perspectiva da teoria da processualidade democrática e do racionalismo crítico, devem ser compreendidos como instituto-jurídico processual. Nesse sentido, verificou-se que os precedentes não podem se equiparar ao manicômio jurisprudencial e aos precedentes obrigatórios, os quais foram comparados ao esquema de nuvens e relógios estudado por Karl Popper, já que ambos sistemas possuem fragilidades e aporias. O procedimento metodológico utilizado foi o jurídico-teórico, já que se analisou criticamente as noções do racionalismo crítico, dos precedentes e da processualidade democrática. Foi possível demonstrar que, no Estado Democrático de Direito, a construção e aplicação dos precedentes deve se dar em espaço processual dialógico-argumentativo a partir dos princípios constitucionais do processo, a fim de concluir que os precedentes devem ser passíveis de revisão, interpretação, discussão e fiscalização por qualquer do povo.

PALAVRAS-CHAVE: *Precedentes. Processualidade democrática. Nuvens. Relógios. Racionalismo crítico.*

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INTRODUCTION

The present work has as its theme the analysis of the scheme studied by Karl Popper about clouds and clocks in comparison to the theory of precedents, which must be marked out and built from the perspective of the theory of democratic procedurality.

In this perspective, Karl Popper's cloud scheme, which represents an unpredictable and chaotic system, was examined in the first part of the work. Then, a comparison was made with the so-called jurisprudential asylum, which represents the same instability of clouds, since it has conflicting, antagonistic, unpredictable decisions and violating of due process.

In the second part, it was analyzed: a comparison between the clock scheme outlined by Popper, which represents a totally predictable, stable and safe system, with the mandatory precedent model - adopted by the 2015 Brazilian Civil Procedure Code (*Código de Processo Civil Brasileiro de 2015*) and mainly by Daniel Mitidiero and Luiz Guilherme Marinoni -, who seek in the interpretation of the higher courts the predictability through the application of precedents (prospective) able to predict the conduct to be taken by the judiciary and by society.

In the third part: criticisms were made of the perspective of the jurisprudential asylum (clouds) and mandatory precedents (clocks) since both systems violate fundamental rights and guarantees, because they prevent the construction of decisions from being carried out in compliance with the constitutional principles of the process and generate an argumentative closure to all procedural subjects. In this sense, it has been shown that mandatory precedents, in addition to being extremely paradoxical, prevent the people from overseeing the construction and the application of such pronouncements, which are elevated to the status of dogmas.

At the end, in the fourth part, Karl Popper's critical rationalism and Rosemiro Pereira Leal's theory of democratic procedurality (neoinstitutionalist) were presented as theoretical frameworks for the conjecture of a *procedural* and *democratic* theory of precedents. Thus, it's concluded that the precedents cannot be clouds or clocks, but, rather, a procedural legal--institute, so that all procedural subjects can participate and supervise its formation and application.

The methodology adopted in this research was the legal-theoretical, since it's intended to demonstrate and criticize the dogmatic aspect given by the traditional doctrine to the precedents in the 2015 Brazilian Civil Procedure Code (*Código de Processo Civil Brasileiro de 2015*). The investigation will be legal-interpretive, through the analytical procedure for decomposition of the research object in its various aspects.

1 OF THE CLOUDS: THE JURISPRUDENTIAL ASYLUM

Karl Raimund Popper, in his work "Objective Knowledge" ("*Conhecimento Objetivo*"), when presenting his conjectures about critical rationalism, performs an analysis about

clouds and clocks, in order to illustrate the problems of the currents of indeterminism[2] and of determinism[3].

In relation to clouds, Popper argues that "my clouds are intended to represent physical systems that, like gases, are highly irregular, disordered and more or less unpredictable" (POPPER, 1999, p. 194). In other words, clouds would be "difficult to accurately" ("*difícil precisão*") (POPPER, 1999, p. 194) as they would represent enormous instability and unpredictability.

Karl Popper will then relate the clouds to the physical indeterminism that consists of "the doctrine that not all events in the physical world are predetermined with absolute precision, in all their infinitesimal details" (POPPER, 1999, p. 203). (Our translation into english)

In this sense, Tereza Calvet teaches:

> This metaphor of clouds and clocks allows Popper to characterize deterministic and indeterministic systems: a cloud is commonly considered to be highly unpredictable and certainly indeterminate - the clouds would then represent highly irregular, disordered and more or less unpredictable physical systems. (CALVET, 1997, p. 02) (Our translation into english)

If we go through Popper's analysis of clouds for the science of procedural law, specifically the question of precedents[4], it can be seen that clouds can be equated with the so-called *jurisprudential asylum*.

Ronaldo Brêtas de Carvalho Dias teaches that the jurisprudential asylum derives from the violation of due constitutional process, at the time when the judges start to decide based on subjective criteria, through the choice of those "points that their intellectually superior gifts or their prodigious mind understand it to be appreciable as if the judging state bodies have a sort of selective privilege of cognition" (BRÊTAS, 2018, p. 192). (Our translation into english)

Likewise, the author also points out the lack of knowledge of the courts about the understandings of the higher courts, as well as the lack of debate among the judges about their votes, as a collegiate body. In addition, he exposes the existence of decisions with presentation of reasons beyond the principle of legality, which has disastrous consequences for stability and the Democratic State of Law. (BRÊTAS, 2018)

Thus, Brêtas mentions that the jurisprudential asylum ends up revealing "more stupid court pronouncements, because its decision-making contents completely hostile the principled configuration of the Democratic State of Law and the fundamental guarantee of the due constitutional process" (BRÊTAS, 2018, p. 194). (Our translation into english)

Alexandre Bahia and Dierle Nunes teach that this jurisprudential asylum is the result of an 'interpretive anarchy' and the so-called 'interpretative ground zero':

2 According to Nicola Abbagnano, indeterminism "denies the determinism of the motives, that is, the determination of human will by motives". (ABBAGNANO, 2012, p. 636) (Our translation into english)

3 Nicola Abbagnano clarifies that determinism is a "doctrine that recognizes the universality of the casual principle and therefore also admits the necessary determination of human actions based on their motives", thus, determinism designates "the recognition and universal scope of causal need, which constitutes a rational order, but not a final one, and therefore doesn't lend itself to being designated by the old name of destiny". (ABBAGNANO, 2012, p. 287) (Our translation into english)

4 In the present work, a study about a possible correlation between the currents of determinism and indeterminism with the study of precedents will not be carried out, which would require further research on this theme. However, mention of such currents is important in order to understand the allusion between clouds and clocks made by Karl Popper.

> However, in the face of the Brazilian assumption that Ministers (and judges) must have freedom of decision, a framework of 'interpretive anarchy' is created in which it's not even possible to respect the institutional history of solving a case within the same court. Each judge and each court body judges from an interpretive 'ground zero', without regard to the integrity and background of analysis of that case; allowing the generation of as many understandings as there are judges. (BAHIA; NUNES, 2010, p. 91) (Our translation into english)

The jurisprudential asylum consists in the fact that the judges and courts decide a particular case in a totally different way from what they had already decided in similar cases, as if they had never made decisions on the subject, according to their free conviction.

This time, it's possible to affirm that the jurisprudential asylum is similar to the scheme traced by Popper in relation to clouds, since it presents unpredictability, instability and inconsistency in decision-making.

The existence of the jurisprudential asylum - which is still present in the current conjuncture of the Brazilian judiciary –, has led to a tendency towards *decision standardization* (*padronização decisória*) since numerous reforms carried out in the 1973 Brazilian Civil Procedure Code (*Código de Processo Civil Brasileiro de 1973 – CPC/1973*), which influenced directly in the drafting of the 2015 Brazilian Civil Procedure Code (*Código de Processo Civil Brasileiro de 2015 – CPC/2015*) based on combating such jurisprudential lottery[5], from the incorporation of *precedents* arising from the *common law*.

In this context, when analyzing the elaboration of *CPC/2015*, Alexandre Rocha (2018) points out that the jurists who were part of the Draft Committee detected a violation of the reasonable duration of the procedure and of the speed, legal security and isonomy, due to the unpredictability generated by conflicting decisions that are outside to the legal system.

Thus, with the assumption of CPC / 2015, with the objective of combating the *jurisprudential cloud*, several techniques and positions were incorporated, so that to the precedents were given *binding force* and, as a consequence, changed from clouds to clocks, as we can see below.

2 OF THE CLOCKS: THE MANDATORY PRECEDENTS

In addition to cloud analysis, Popper also advocates in his scheme the clocks. According to Karl Popper, while clouds represent unpredictability and instability, the clock, which the author represents by a grandfather clock, is "very reliable, a precision clock, with the intention of representing physical systems that are regular, orderly and highly predictable behavior" (POPPER, 1999, p. 194). (Our translation into english)

5 "In the name of legal certainty and effectiveness, in the Explanatory Memorandum of CPC/2015, a deep concern with the unwanted fragmentation of the system is revealed, something that could occur as a result of the jurisprudential fluctuation. In this context, the higher courts assume the function of shaping the legal system through their decisions. However, in addition to the aforementioned objectives, it's expected that the standardization and stabilization of jurisprudence, given not only by the higher courts, but also by the courts of second instance, will be able to reduce the burden of judicial proceedings" (VIANA; NUNES, 2018, p. 201) (Our translation into english).

In this context, "we speak of 'clock accuracy' when we want to describe a highly regular and predictable phenomenon" (POPPER, 1999, p. 194). Thus, Tereza Calvet teaches that, unlike the clouds, "a clock is highly predictable and a good clock, for example, a grandfather clock, can be considered as a paradigm of a mechanical physical system and deterministic" (CALVET, 1997, p. 02). (Our translations into english)

The figure of watches would be linked to physical determinism, as taught by Karl Popper:

> A physical deterministic clock mechanism is, above all, completely self-sufficient: in the perfect deterministic physical world there is simply no place for any outside intervention. Everything that happens in such a world is physically predetermined, including all of our movements and, therefore, all of our actions. Thus, all our thoughts, feelings and efforts may have no practical influence on what happens in the physical world: they are, if not mere illusions, at most by-products ('epiphenomena') of physical events. (POPPER, 1999, p. 201) (Our translation into english)

The comparison that can be made with the procedural law regarding Popper's analysis of clocks, is directly linked to the mandatory precedents and the notion of predictability implied by the authors who defend the decision standardization through the understandings of the national courts, which is done present in *CPC/2015*.

Within this perspective, Daniel Mitidiero and Luiz Guilherme Marinoni are protagonists in the defense that the Superior Courts should act as Supreme Courts for the formation of mandatory precedents, which will shape, order and bring predictability to the legal system and to the conduct of the citizens-jurisdicted.

In order to present such a model, Daniel Mitidiero defends the perspective of the Supreme Courts, whose objective would be to guide the application of the Law based on the "*just interpretation of the legal order*, the specific case being just a pretext for it to set *precedents*" (MITIDIERO, 2014, p. 55). The specific case, then, would be just a mechanism for the Supreme Court to create a precedent for linking society and the judiciary, and to become a source of law. (MITIDIERO, 2014)

In his doctrinal work "Precedents: from persuasion to attachment" ("*Precedentes: da persuasão à vinculação*"), Daniel Mitidiero argues that interpretation isn't pure declaration, nor pure creation, but, rather, "a *reconstruction of the normative meaning*, with what isn't even a declaration of a preexisting norm and nor an *ex nihilo* creation". The norms would have dubious, ambiguous, lacunaous characteristics, which is why it's necessary to recognize "the mythological character of interpretive cognitivism and in the recognition of the double indetermination of the law" (MITIDIERO, 2016, p. 77). (Our translations into english)

In order to face the mere declaration of a preexisting legal norm, the Supreme Courts become a viability factor in the granting of prospective interpretation and of unity to the law, which is why the figure of the binding precedent appears as a solution to this problem of the indeterminacy of the law. Mitidiero will argue, then, that such function of Supreme Courts, the only ones capable of creating mandatory precedents, would be exercised by the Supreme Federal Court (*Supremo Tribunal Federal – STF*) and the Superior Court of Justice (*Superior Tribunal de Justiça – STJ*), with the responsibility of preventing the dispersion of the legal system and guiding the interpretation of judges. (MITIDIERO, 2016)

For Mitidiero, the authority of the precedent would come to be in the sense given to the right by the *STF* and *STJ*, that is, "the authority of the precedent is the own authority of the interpreted right and the authority of the interpreter" (MITIDIERO, 2016, p. 77). (Our translation into english)

In the words of this author:

> The understanding of the theory of interpretation in a logical-argumentative perspective removes the focus exclusively from the law and also places it in the precedent, so that *freedom* and *equality* from that point on must also be considered before the *product of interpretation* and *legal security* before a framework that encompasses both the *interpretative activity* and its *result*. Thus, *the precedent, being the result of the reconstruction of the meaning of the legislation, becomes the ultimate guarantor of freedom, equality and legal security in the Constitutional State*. In this line, the judicial precedent constitutes the primary source of law, whose binding efficacy doesn't arise from *judicial custom* and *doctrine*, nor from the *goodness* and *social congruence* of the reasons invoked and nor from a *constitutional or legal norm* that determines it, but from the *strength institutionalizing* of the jurisdictional interpretation, that is, from the *institutional strength of jurisdiction* as a basic function of the State. (MITIDIERO, 2016, p. 99) (Our translation into english)

In harmony with Mitidiero's proposals, Luiz Guilherme Marinoni defends the mandatory precedents:

> The Supreme Court's decision, when expressing the sense of the law, begins to guide social life and guide the decisions of judges and appellate courts. If the Supreme Courts have the function of developing law alongside the legislature, their decisions must gain the authority that allows them to correspond to the meaning they have in the legal order. It's precisely here that the decisions of the Supreme Courts assume the precedent quality. (MARINONI, 2016, p. 65) (Our translation into english)

In this context, for the author, when the Supreme Court starts to give meaning to the law and to the right, since it has the belief in the dissociation between text and norm, the granting of unity to law through the precedent is allowed. Thus, the interpretation and the meaning given to the law by the precedent would be the function of the Supreme Court, so that it's possible to confer unity to the law/right. Therefore, for Marinoni, the precedent becomes an instrument for the elaboration of the meaning of the norm. (MARINONI, 2016)

Thus, Marinoni defends that the Supreme Courts should complete legislative activity:

> As there is no longer any doubt that the interpreter can, from legitimate and reasonable interpretation activities, remove more than one norm from a single legal text, the need arises, by mere logical consequence, to give the apex Courts the function to define the meaning attributable to the law, without which, moreover, the activity of the legislator would never gain completeness. This function, as is easy to see, is related to the need to have a coherent legal order and with respect for spaces of freedom, the equal distribution of law and legal security. Is that, the law has changed place; it abandoned the legal text - in which, in fact, it never fully accommodated itself - and started to take the place of the decisions of the Supreme Courts. Thus, these, by mere logical consequence, came to represent the criteria for guiding society and for solving conflicting cases, giving rise to what is called precedent. (MARINONI, 2016, p. 94) (Our translation into english)

The perspective of Mitidiero and Marinoni is very similar to the figure of the clocks, since these authors defend that the understandings of the *STJ* and *STF*, through the mandatory precedents, are so predictable that they will shape and predict all possible behaviors, which would bring completeness and stability *ad aeternum* to the juridical/legal system.[6]

In this sense, Gabriela Oliveira Freitas synthesizes well the dogmatic perspective of the mandatory precedents:

> It can be noted the intention to extend the scope of applicability of judicial decisions, making the Judiciary, in the least number of times possible, have to deepen in the analysis of similar issues, becoming more quantitatively efficient through the establishment of standards to be followed in subsequent identical cases, under the argument of preserving isonomy, procedural speed, stability and predictability of jurisdictional provisions. (FREITAS, G., 2019b, p. 156-157) (Our translation into english)

Based on this tendency to standardize decision making through the precedents, *CPC/2015* brings in its text several mechanisms for forming binding judgments, such as the summaries, repetitive appeals, incident of resolution of repetitive demands and incident of assumption of competence.[7]

In addition, article 926 of *CPC/2015* was introduced under the influence of Lenio Streck, who, adhering to Dworkin's theory of integrity, outlined such a proposition. The article 926 provides that the courts must standardize their jurisprudence, in addition to keeping it stable, coherent and complete.[8]

Another important provision for precedents in *CPC/2015* is the article 927, which provides for the obligation of judges and courts to observe: I - the decisions of the Supreme Federal Court (*STF*) in concentrated control of constitutionality; II - the statements of the binding summary (*súmula vinculante*); III - judgments in cases of the assumption of competence or of the resolution of repetitive demands (*acórdãos em incidente de assunção de competência ou de resolução de demandas repetitivas*) and in the judgment of extraordinary and special repetitive appeals (*acórdãos em julgamento de recursos extraordinário e especial repetitivos*); IV - the statements of the summaries of the Supreme Federal Court (*STF*) in constitutional matters and of the Superior Court of Justice (*STJ*) in infraconstitutional matters; V - the orientation of the plenary or the special body to which they are linked.[9]

The *CPC/2015* also brings several (ideological) techniques for applying precedents and decision-making standards in an attempt to bring greater speed, efficiency and predictability, namely: the protection of evidence (art. 311), the preliminary dismissal of requests (art. 332),

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6 This reading can be extracted, for example, when Mitidiero argues that *STF* and *STJ* "should give unity to law from the solution of cases that serve as precedents to guide the future interpretation of the law by the other judges that make up the system in charge of distributing justice in order to avoid the dispersion of the legal system" (MITIDIERO, 2016, p. 93) (our translation into english). In the same way, although Mitidiero isn't expressed as to ad aeternum stability, this conclusion can be inferred at the moment that he defends the expansion of the list of articles 311, 332, 927, 932 and 1.030 of the *CPC/2015* to include any kind of precedent arising from the Courts Superiors, which causes the plastering of the Law due to inadmissibility of resources. (MITIDIERO, 2016, p. 104-115).

7 The analysis of the formation of precedents by these techniques is beyond the scope of this article, which is why we suggest checking the works of the authors: Alexandre Rocha (2018), Ana Paula Pereira da Silva Dinz (2016), Victor Barbosa Dutra (2018) and Gabriela Oliveira Freitas (2019a, p. 39-59), who make a more detailed analysis on this topic.

8 Luís Gustavo Reis Mundim performs an analysis of the elements present in that article, which would be outside of the scope of the present work. For this, see: MUNDIM, 2018, p. 156-166.

9 The article 927 has raised several discussions about its constitutionality and about how it will be the linked, which is why several positions have been adopted by the doctrine. (MUNDIM, 2018, p. 156-166).

the monocratic judgment of appeals (art. 932, items IV and VI), the possibility of provisional compliance with a judgment based on precedents (art. 521, item IV), as well as the provision for the dismissal of special and extraordinary appeals based on repetitive judgments (art. 1030, item I) and the impossibility of appeals to higher courts for "unlocking" of the special and extraordinary appeals (art. 1042).[10]

So, it's clear that, like clocks, mandatory precedents would allow self-sufficiency due to predetermining the decisions and predicting what will be applied in the future, on the grounds of legal certainty and equality. In this sense, it's seen that the defense of mandatory precedents ends up advocating prospective precedents, always focused on the future application of jurisprudential understandings.

In this sense, Gustavo de Castro Faria explains:

> All the fascination unmeasured by the application of a system of precedents in our law, it seems, finds great support in the theories that attribute to the standardized methods of judgment a greater respect for the guarantee of isonomy and legal security, since the guarantee of respect the word of the courts (*stare decisis*) would allow the citizen to foresee the burden of (il) legality that his behavior will be endowed with, making the solution of future disputes predictable and avoiding 'surprises' at the time of judgments. (FARIA, 2012, p. 88) (Our translation into english)

However, as will be seen in the next topic, both the perspective of the jurisprudential asylum (clouds) and that of mandatory precedents (clocks) are harmful to the Democratic State of Law, since they still allow the protagonists of the judges to dictate the normative sense and are incompatible with democratic procedurality.

3 THE CRITICISM TO THE CLOUDS AND TO THE CLOCKS: THE DANGERS OF THE JURISPRUDENTIAL ASYLUM AND OF THE MANDATORY PRECEDENTS

The jurisprudential asylum (jurisprudential clouds) brings several constraints to the construction of the Democratic State of Law, in a non-dogmatic perspective[11]. This is because the *jurisprudential clouds* foster the motivated free conviction of the judges who will decide the law according to their conscience, interests and sense of justice.

In addition, this positioning reinforces the judges' solipsism and generates different interpretations about the same norms. Effectively, the chaos of jurisprudence with conflicting decisions, without reasoning and without observance of the contradictory, of the broad

10 For a detailed analysis of the aforementioned techniques and rituals for applying precedents, check out the works of: Aurélio Viana and Dierle Nunes (2018, p. 261-277), Carlos Henrique Soares (2017), Francisco Rabelo Dourado de Andrade (2017), Luís Gustavo Reis Mundim (2018, p. 202-214) and Vinicius Lott Thibau (2019).

11 Rosemiro Pereira Leal (2017b) coined the term Dogmatic State to designate an autocratic state perspective that, based on dogmatic science of law, completely ignores the implementation of democracy through procedurality. Thus, the Dogmatic State would be antagonistic to the Democratic State of Law. On this perspective, also check the works of André Del Negri (2018) and Luís Gustavo Reis Mundim (2018, p. 29-40).

defense and of the isonomy generate an unpredictability that perpetuates an enormous divergence of understandings.

This warning, made by Maurício Ramires, that "the heart of the problem of judicial arbitrariness in invoking precedents, therefore, rests in the combination of these two factors: the elevation of the judgment to the status of general law and the existence of antagonistic precedents, adaptable to all 'needs'" (RAMIRES, 2010, p. 45) (our translation into english).

It must be pointed out here that: there is no advocacy for an unthinking decision standardization based on mandatory precedents, as will be seen below, as the jurisprudential dissent is important for the formation of decisions that encompass various arguments and theories for an adequate rivalry for the formation of the final decision.[12] What we criticize is that this divergence cannot be aligned with an interpretative anarchy that fosters arbitrariness of the judges and the violation of fundamental rights and guarantees ensured from the plan that instituted the normativity.

In turn, with regard to mandatory precedents (clocks-precedents), there are several criticisms to be made.

The first of them concerns the fact that the defense that the Superior Courts should act as Supreme Courts and create precedents from any decision only increases judicial discretion and the violation of the principle of legality, since precedents would become more important even than the law itself.

In this sense, Lenio Luiz Streck criticizes:

> The attempt to grant binding efficacy to the decisions of the Superior Courts, who would be *responsible for interpreting* and establishing the meaning of the normative texts, with the other judges and courts being obliged to follow (regardless of its content) the supposed 'precedents', to the extent in which its function would be reduced to that of 'applying its', even if its doesn't conform to the law itself and to the Constitution, *it suffers from an indisputable unconstitutionality*. Would the new Civil Procedure Code and, perhaps, the procedural doctrine itself modify the jurisdictional powers of the Courts, which can only be done by amending the Constitution?
>
> In addition, there is more relevance to the 'violation' of the precedent – which could possibly be wrong, without, with this, losing its binding force – than to the law. In other words, a 'mandatory' precedent is better than the law itself! (STRECK, 2018, p. 44-45) (Our translation into english)

What is perceived is the generation of "an argumentative closure so great that it provides *normative violence* that dismantles procedural guarantees and that ends up generating a *jurisprudentialization of the law*" (MUNDIM; VARELA, 2019, p. 310) (our translation into english), since to the other subjects procedural is prohibited to carry out the interpretation of the law because the final word belongs to the higher courts, as well as making it impossible to distinguish or overcome[13] the decision-making standard.

12 In a similar sense, Gustavo de Castro Faria teaches that "concepts such as legal certainty and isonomy – the basis of the *standardization* process of the interpretation of law – are explained in the context of a judicial provision based on the ideal of predictability and stability, labeling itself as undesirable and counterproductive the disagreement between the courts on how to decide the same issue" (FARIA, 2012, p. 50). (Our translation into english)

13 The system of precedents provided for in *CPC/2015*, mainly after the reform carried out by Law nº 13.256/2016, which returned with the double admissibility judgment of special and extraordinary appeals, ended up practically preventing the distinction and overcoming of the precedents. (MUNDIM, 2018, p. 147-156). In this sense, Lenio Luiz Streck's questioning is

This argumentative closure is also criticized by Luís Gustavo Reis Mundim:

> This is because, the defense of the Superior Courts, *STF* and *STJ*, as Supreme Courts, is to bet the cards in a solipsist salvific jurisdiction, focused on the syncretism of the founding and conservative violence of the law (State--Security-Exception), which impose their decisions authoritatively in an *upside-down building*.
>
> The search for a sovereign and unique foundation by the Supreme Courts generates an argumentative closure that completely ignores the premises of interpretive equality (isomeric hermeneutics) that must exist between Citizen and State in democracy, because it puts the latter in a position of advantage that reduces any possibility of exercising scientific criticism by the *medium* of due process.
>
> Thus, this authoritarian discourse due to an irreducible *belief* in the mystical (and mythical) foundations of the authority of the Supreme Courts and the authority of the precedent itself, ends up camouflaging and generating an enormous normative vacuum (naked space – unprocessualized) reigned by *jurisprudential reason* that prevents any discourse of the parties in the construction of binding provisions. (MUNDIM, 2018, p. 187) (Our translation into english)

The perspective of mandatory precedents, taken over by the defense of the Supreme Courts, in addition to being extremely paradoxical[14], is also in line with the Bülowian perspective of process, here is: "there is confidence in the sentiment and in the conscience of the higher courts, as if their judges were recipients and captors of social values and desires, qualified to know what is better or worse for the people". (MUNDIM; VARELA, 2019, p. 309) (our translation into english).

In this sense, Guilherme César Pinheiro draws an important criticism to the perspective that mandatory precedents would be infallible and the interpretation given by the courts (lower and higher) would be the most perfect and correct possible:

> Added to all this, the fact that a decision (from the Supreme Court or any other court) isn't capable of resolving the 'inherent problems' to the legal interpretation, even if it's constitutionally correct.
>
> [...]
>
> In other words, there will always be a need for interpretation, be it decisions or legislative texts. In fact, many times, it's essential to spend an arduous argumentative effort on the part of the procedural subjects, in order to arrive at a constitutionally adequate answer to the problem posed by the judicial demand. (PINHEIRO, 2016, p. 176) (Our translation into english)

What is perceived is that the perfection desired by the *precedentalist* authors prevents the interpretation of the precedent itself from occurring, which allows the courts to act "in a naked space (unprocessualized) typical of the State of Exception", since the "establishment

important: "A simple question: Is it possible that after the 'authority' of the precedent is settled, will be possible to reach to the Court of Precedents? We cannot forget that, along with the doctrine of theses and precedents, comes together a rigid system of recursive filters, preventing the Court of Precedents from being subjected to the epistemological constraint of correcting their own mistakes" (STRECK, 2018, p. 75) (our translation into english).

14 Here, it can be mentioned that the model of the Supreme Courts of Daniel Mitidiero and Luiz Guilherme Marinoni is permeated by aporias that aren't answered by the authors and reflect the Bülow's paradox raised to the plane of precedents (MUNDIM, 2018, p. 177-192; MUNDIM; VARELA, 2019), the paradox of mandatory precedents (VIANA; NUNES, 2018, p. 251-261) and a paradoxical relation with efficiency in the provision of jurisdiction, with the reasonable duration of procedures, with the legal certainty and with the due process (SOARES, 2017).

of a meaning for a law or norm in a solipsist way makes that the Supreme Courts are both inside and outside the normativity, with continuous interdiction and suspension of the legality" (MUNDIM, 2019, p. 328) (our translation into english).

It's worth saying, as Francisco José Borges Motta and Maurício Ramires explain, "the sense of a precedent doesn't end with the meaning that was impressed by the judge who decided it", since it's still possible to make distinctions and overcomes that judgment. (MOTTA; RAMIRES, 2016, p. 106). (Our translation into english)

Another relevant criticism is that: the own constitutional function of the higher courts is distorted by the formation of mandatory precedents. This is because, in Brazil, there are no Supreme Courts, but, yes, appellate courts, as Rosemiro Pereira Leal explains:

> From the above and in emphasizing that Brazil doesn't have 'Supreme Courts', but *appeals courts*, once our *STF* and *STJ* cannot, under the paradigm of Democratic State (Non-Dogmatic State), act for the judicialization of politics as guardians mythical (tutors, mentors) of a very sacred Brazilian *constitutional book*, as their own ministers proclaim in their exquisite and strange nomenclature, the procedural institute of the precedent adopted by § 2º of art. 926 of *CPC/2015* must be dimensioned (semantically demarcated) based on the intrasignificant normative posed by the *caput* of art. 926 and its § 1º to establish the following and new configurative roadmap for the formation and standardization of *jurisprudence* in Brazil in order, by reducing its historical errors and failures, to make it 'stable, integral and coherent' [...]. (LEAL, 2017a, p. 306-307) (Our translation into english)

In addition, it's clear that there is a continuation of a *dogmatic logic* in the formation and application of mandatory precedents, since its argumentative basis "is offered to the legal community as dogma, that is, unquestionably, being possible for the judge and for the interested parties just welcome its application" (FREITAS, G., 2019b, p. 155) (our translation into english).

In other words, it's a "methodology of building dogmas, in which a single statement (dogmatic and universal) is established to be applied in future situations" (FREITAS, G., 2019b, p. 158) (our translation into english).

In turn, the provisions of *CPC/2015*, which deal with the precedents, also present several dangers. This is because, it can be said that the aforementioned legislation is imbued with an efficient core of quantitative bias by the search for speed, maximum productivity, procedural simplification, search for results and achievement of goals.[15]

In this context, the unrestrained search for speed allows the decision standardization to tarnish the quality of the formation of decisions, which empties the dialogical-discursive space, with prejudice to the principle of contradiction and to the democratic process itself (FREITAS, H., 2019, p. 170).

This perspective opens space so that courts can use an unconstitutional *preventive decision standardization*[16] through prospective precedents that prevent divergences of unders-

15 Helena Patrícia Freitas teaches that "giving vent to the judgments of the demands has become imperative for the achievement of the efficiency indexes set by the CNJ", since, based on a neoliberal perspective, "the decision standardization has lent itself to a propaganda effect, as if it could, in fact, leverage the best results in productive terms, through the making wholesale decisions". (FREITAS, H., 2019, p. 170) (Our translation into english)

16 Regarding the preventive decision standardization in the Incident of Resolution of Repetitive Demands (*Incidente de Resolução de Demandas Repetitivas*), Alexandre Varela de Oliveira and Luís Gustavo Reis Mundim teach that "it would be privileging

tanding between courts or within the same court, but that neglect due process in the shared construction of decisions.

As Lorena Ribeiro de Carvalho Sousa teaches, the neoliberal assumption of the search for quantitative and rapid efficiency of jurisdiction makes the courts – and here such reasoning is fully applicable to the model of Mitidiero and Marinoni –, decide theses and don't deals, "abstracting the its specificities", in addition to applying the thesis "mechanically to countless future cases, also disregarding its particularities", which disagrees "with all the constitutional perspective attributed to the process and to the duty to state reasons" (SOUSA, 2019, p. 67-68) (our translation into english).

Thus, what is perceived is that the devices that aim at the rapid application of decision--making standards, precedents and summaries, present in *CPC/2015*, in addition to remaining in a *fundamental dogmatic structure*[17], disregard the real causes of jurisdictional delays, such as dead steps of the procedure and the lack of structure of the judiciary.[18]

Then, Alexandre Rocha's questioning becomes relevant:

> [...] it's quite questionable (to say the least) the idea that the mere creation of techniques for the uniformity of jurisprudence (especially through the attribution of binding effects to certain jurisdictional pronouncements, as will be seen later), without concern for the causes of growth in the number of cases in the country or with the quality of the jurisdictional provision, would be able to generate reduction in the number and in the duration of processes. (ROCHA, 2018, p. 55) (Our translation into english)

In the same way, the fallacious discourse of attribution of legal security, like a clock--precedent that provides for all situations to be applicable, "operates outside the democratic discourse, because if the fundamental rights of the process only conform the instrument of to say the law by the judge, the 'legal certainty' is reduced to the numerical efficiency achieved by the decrease of appeals judged by the *STJ*" (DINIZ, 2016, p. 73) (our translation into english).

Therefore, the jurisprudential asylum and the mandatory precedents are detrimental to the Democratic State of Law, because they preclude the *proceduralized* construction of decisions in a shared way by the procedural subjects, in compliance with constitutional-procedural principles and the equal right of interpretation (isomenic hermeneutics), already which maintains a truculent dogmatic logic.

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the protagonism of the courts, insofar as their decisions would be based on their sensibilities, wills, interests and convenience, which would make it impossible to implement fundamental rights due to a merely quantitative preventive decision standardization. Then, there would be a clear shield to access to jurisdiction and to procedural effectiveness, with the consequent absence of the democratic and systemic legitimacy". (OLIVEIRA; MUNDIM, 2019, p. 41) (Our translation into english)

17 André Cordeiro Leal and Vinicius Lott Thibau teach that the fundamental structure of dogmatic procedural law has "the jurisdiction at the center of the system and process and action to orbit this core determining its direction", which wasn't broken by *CPC/2015*. (LEAL; THIBAU, 2018, p. 33) (Our translation into english)

18 On these causes, check the work of Ronaldo Brêtas de Carvalho Dias (2018). Also important, the criticism of João Carlos Salles de Carvalho: "These discourses of effectiveness, once unmasked, show themselves full of opaque promises, since they say little or nothing about the 'dead stages' of the process, about the paradoxical deadlines improper, on excessive vacations and the obsolete forensic routine, on the decisions being made by interns inside the offices, on symbolic or unattainable goals, on the remarkable discouragement of some civil servants, on the protectionist corporatism of the judiciary, without mentioning here so many other administrative embarrassments that are known to permeate legal practice, but which - for fear or taboo - have become a practically untouchable subject in academic and forensic circles". (CARVALHO, 2018, p. 165) (Our translation into english)

In this sense, clouds and clocks are insufficient for the construction of a procedural theory of precedents, outside of the dogmatism and of the subjectivity, which will only be possible from the theory of democratic procedurality (neoinstitutionalist), which is epistemologically demarcated by the critical rationalism of Karl Popper, as we will see in the next topic.

4 BETWEEN CLOUDS AND CLOCKS: THE PRECEDENT AS A PROCEDURAL LEGAL-INSTITUTE

In the work "Objective Knowledge" ("*Conhecimento Objetivo*"), after Karl Popper made an analysis about clouds and clocks, when he criticizes both determinism and indeterminism, conjectures about critical rationalism are made.

João Carlos Salles de Carvalho teaches that, in Popper, "the break with modern determinism, that is, the denial that all clouds are clocks, doesn't necessarily imply the acceptance of a radical indeterminism, in which all clocks are clouds" (CARVALHO, 2018, p. 46) (our translation into english).

In this sense, Popper will propose his theory as "something of an *intermediate* character between perfect chance and perfect determinism - something intermediate between perfect clouds and perfect clocks" (POPPER, 1999, p. 210) (our translation into english). The Austrian philosopher, from the analysis of clouds and clocks, starts to talk about the four functions of language, namely, expressive, signaling, descriptive and argumentative, the first two being common to the languages of animals and men[19], and the last two exclusive of men[20]. (POPPER, 1999, p. 215-216)

Among these four functions, Karl Popper teaches that the highest is the *argumentative function*, because, in operation, it's disciplined by a critical discussion. The argumentative function is linked "to an argumentative, critical and rational attitude" that has "led to the evolution of science" (POPPER, 1999, p. 217) (our translations into english).

Thus, Popper will relate the argumentative function to the use of *critical arguments*:

> [...] critical arguments are a means of control: they are a mean of eliminating errors, a mean of selection. We solve our problems by proposing experimentally several competing theories and hypotheses, like test balloons, so to speak; it's leading them to critical discussions and empirical theses, in order to eliminate errors.
>
> Thus, the evolution of the higher functions of language, which I have been trying to describe, can be characterized as the evolution of new means of solving problems, by new kinds of experiences and by new methods of error elimination; that is, new methods *to control* the experience. (POPPER, 1999, p. 219-220) (Our translation into english)

In this sense, the superior functions of language, especially argumentative, enable the growth of man, as he can "develop autonomous and refutable *scientific theories* (committed

19 Popper (1999) calls them inferior functions of language.

20 Popper (1999) calls them superior functions of language.

to democracy), able to better control his conduct and better regulate the social life" (CARVALHO, 2018, p. 47) (our translation into english).

Karl Popper, then, wedges the critical-eliminationist method that "is content with the fact that the rationality of a theory rests in choosing it because it's better than its predecessors", since it was subjected to more severe tests, "therefore being able to, get closer to the truth" (ALMEIDA, 2005, p. 25) (our translation into english).

Popper's critical-eliminationist method "starts with problems, namely, both practical and theoretical problems" (POPPER, 2006, p. 14), which is why "the science starts with problems and ends with problems" (POPPER, 1977, p. 141) (our translation into english).

Thus, Popper's critical method can be summarized in the following formula: P1 -> TT -> EE -> P2, where: P1 is the problem to be solved, TT is the theorized testification of the problem, EE the elimination of errors, and P2 the problem generated by the elimination of the error, which is always less than the first problem.

Thus, the method of scientific knowledge "*is the critical method*: the method of searching for errors and eliminating errors in the service of the search for truth, in the service of truth" (POPPER, 2006, p. 15). Therefore, in Popper, the knowledge or the scientific knowledge is conjectural, hypothetical knowledge, since a more resistant theory can always appear and replace the previous theory, with the objective of "avoiding the dogmatic; it's always a critical posture, even before itself" (POPPER, 1994, p. 53) (our translations into english).

It's with this Popperian epistemological axis that Rosemiro Pereira Leal (2013) conjectures the neoinstitutionalist theory of the process – theory of democratic procedurality – for the construction of a non-dogmatic law and, therefore, effectively democratic.

In this sense, João Carlos Salles de Carvalho points out that democratic law must "abandon the myth of knowledge by the subject-authority", in order to inaugurate "a rationality that is known to be fallible, based on the evolution of knowledge by critical rationalism" (CARVALHO, 2018, p. 49-50) (our translation into english).

Rosemiro Pereira Leal teaches that, in democratic procedurality, the process is a constitutionalized legal-linguistic institution that will govern the procedures, so that the state decisions (legislative, judicial or administrative) are the result of sharing the procedural dialogue in the Constitutionalized Legal Community, which, through contradictory, broad defense and equality, will serve as a prerequisite for the creation, transformation, postulation, recognition and extinction of rights:

> The *due process*, as a constitutionalized institution, is, therefore, defined as a conjunction of principles-institutes (contradictory, isonomy, broad defense, right to lawyer and procedural gratuity), which is the legal-discursive referent of procedurality even though this, in its specific legal models, doesn't take place expressly and necessarily in contradictory terms. The *process*, by constitutional concretization, is conceived here as a governing institution and as an presumption of the legitimacy of all creation, transformation, postulation and recognition of rights by legislative, judicial and administrative provisions. (LEAL, 2016, p. 157) (Our translation into english)

Once, then, that one of the axes of democratic procedurality is found in popular sovereignty and in the enjoyment of fundamental rights (VARELA, 2019), the process in the neoinstitutionalist theory generates a "legal-discursive space of broad inspection" (*"espaço*

jurídico-discursivo de fiscalidade ampla") (DEL NEGRI, 2019, p. 14) by citizens (constitutional subjects), who will participate and recognize themselves as authors and co-authors of the decision-making pronouncements.[21]

That is why André Del Negri teaches that, in the State of Democratic Law, the process is seen as a logical-legal referent that "through the broad contradiction and equal right of interpretation for all, has the objective of offering a set of theories for clarify the contentes" obscure, which "distance us from the enjoyment of the fundamental rights", in addition to enabling the testification of "decisions and criteria that aren't attributed as to being democratic and objective in the exercise of State functions" (DEL NEGRI, 2019, p. 15) (our translation into english).

In other words, according to Leal, to everyone in the people must be guaranteed the possibility of supervising the construction of decisions that, through theorized testification of the legal system, will be given *democratic legitimacy* by eliminating errors that may prevent the enjoyment of fundamental rights (LEAL, 2016, p. 126). That is why the neoinstitutionalist theory moves away from the "jurisdictional action in concepts and personalist judgments of common sense, of convenience or of discretion of the judge" (LEAL, 2016, p. 63) (our translation into english).

This is what André Del Negri teaches:

> [...] in the speech that is intended to be democratic, in order not to depend on the clairvoyance of decision-making authorities, that the *problems* be faced through *theories* and *critical* notes in *due process*, such as *metalanguage*, so that *objective knowledge* is the spinal cord for the making *decisions*. When talking about *theory*, certainly, we aren't talking here about interpretive methods that seek the meaning of the law. (DEL NEGRI, 2019, p. 109-110) (Our translation into english)

That is why a *procedural* theory of precedents must be demarcated by Popper's critical rationalism and by the theory of democratic procedurality (neoinstitutionalist) by Rosemiro Pereira Leal.

The precedents cannot be clouds or clocks, but something in between/intermediate, since cannot conceive a jurisprudential anarchy, which assumes free convincing motivated as a theoretical foundation, nor a mandatory precedent, due to the argumentative closure, the petrification of law and impossibility of testifying and monitoring decisions by any of the people.

The precedent, in the theory of democratic procedurality, must be a legal procedural institute[22] without the primacy of jurisdiction prevailing over due process, as Rosemiro Pereira Leal teaches:

> What is relevant to the understanding of the precedent institute is the departure from the primacy of the jurisdiction that characterizes the Dogmatic State (Liberal and Social of Law) to, in its place, institute due process as the

21 Rosemary Cipriano da Silva teaches, based on the teachings of Rosemiro Leal, that "In the paradigm of democratic law, the axis of decisions isn't found in the immediate and prescriptive reason of the judge, but is built in the procedural space of discursive reason. In this sense, the arguments for the justification of the law that legitimize the claims of validity are found in the theory of the process that is conceived by the equality between producers and recipients of legal rules, thus allowing the recipients of the rules to recognize themselves as authors of its". (SILVA, 2012, p. 92-93) (Our translation into english)

22 Institute, in neoinstitutionalist theory, is the "grouping of principles that keep unity or affinities of logical-legal contents in the legal discourse". (LEAL, 2016, p. 393) (Our translation into english)

> center of the legal system of the Democratic State, always demanding, to the jurisprudential formation by chain of precedents, to be standardized, in the construction of the decisions, the constructive sieve of the due legal process, that is the set of procedures proceduralized to the consolidation of the 'legal security, freedom and equality' (so requested by the jurisdictionalists!) as a fundamental right constitutionalized in Brazil (art. 5º, LIV and LV, of *CF/88*). In Democratic States, it is not the jurisdictional activity per se that will promote the longed-for unity of law on the basis of *secundum conscientiam* (interpretive cognitivism of the logical positivism), but a solid foundation of the *objective cognitiveness* of the logical-discursive structures of proceduralized procedurality that legitimizes the constructivity of precedents within the scope of a legal decision-(of division), no more than an instrumental judicial decision based on a performative reason of the jurisdictional knowledge. (LEAL, 2017a, p. 305) (Our translation into english)

A procedural theory of precedents (democratic), doesn't allow that the establishment of the normative meaning to be given by a Supreme Court, in order to provide legal certainty to the law, but advocates the democratic legitimacy of binding provisions, based on its construction shared by the subjects through due process, as a logical referent of the legal system. (MUNDIM, 2018)

That is, it's also necessary to allow the participation of those interested in the construction of the decision, as taught by Gabriela Oliveira Freitas:

> In view of the current procedural conjuncture, it isn't only possible, it's also necessary, that precedents be used in order to seek the uniformity of jurisprudence since the search for the referred uniformity on the interpretation of the law is built by the widely participation of the interested parties and not by a solitary and solipsist act of the judges, as currently occurs in Brazilian law.
>
> It's perceived, therefore, that the interested parties must be guaranteed participation in the construction of the uniform jurisdictional provision of the norm to be applied in the case in which they are parties. (FREITAS, G., 2014, p. 110) (Our translation into english)

It's important, at this moment, to realize a differentiate between democratic procedurality and Ronald Dworkin's theory of integrity. This is because, the precedent as a procedural institute and a middle ground between clouds and clocks, doesn't mean demarcating coherence, integrity, stability and uniformity of decisions from the Dworkin.

The integrity theory still allows the judge's solipsism, despite his attempt to break it, as the elements of coherence and integrity are the maintainers of autocratic past decisions, which hurt the due process:

> Still, it's relevant to mention that the observance of past decisions to dictate the present and the future also ends up reifying and reiterating authoritarian practices already present in history.
>
> [...]
>
> This institutional history of society and of judicial decisions, as Dworkin presupposes, is derived from common sense, customs and practices that exclude and hinder due process as an interpretative activity through the exercise of contradictory, broad defense and isonomy behold they are riddled with ends merely dominating and imposing fo power. (MUNDIM, 2018, p. 88-89) (Our translation into english)

Furthermore, Dworkin didn't advocate how the *procedural parties* would participate in the construction of the decision[23] (DEL NEGRI, 2019, p. 397). Thus, as Vinicius Lott Thibau teaches, what democratic procedurality seeks is the *integrality* of those legitimized to the process (people) in decision-making and not the *integrity* in the Dworkinian molds:

> What is relevant for the operationalization of non-dogmatic law is that the interpretation ceases to be understood as a discretionary activity of fixing the valid meaning of the laws by the judge and starts to be conjectured as an activity accessible to the integrality of the members of the legal community of the legitimized to the process. In order to the interpretation of the law not to be considered an activity exclusive to the jurisdiction, however, it's essential to assimilate that the 'hermeneutics, in democracies, is given on the popular constructive basis of the law. (THIBAU, 2018, p. 228) (Our translation into english)

In this sense, in order to make a democratic theory of precedents viable, it's necessary to enable *incessant inspection and control* in the scope of formation and application of the precedents (MUNDIM, 2018) to allow the broad p proceduralized participation of procedural subjects and the revisiting of decision standards through possible overruns and distinctions.[24]

For this reason, the formation of precedents must take place from the connection of the cause of asking (cause of the action) and request, "since they are *logical antecedents* that are part of the *constructive nucleus* of precedents" (MUNDIM, 2018, p. 237) (our translation into english). In this sense, Rosemiro Pereira Leal teaches that the precedent as a legal institute must be attached to the cause of askink (cause of the action) and request, as it will allow the debate to be processed by the parties and other procedural subjects:

> By reading the art. 926 of the *NCPC*, the precedent institute built by the logical-legal conjunction of the *causa petendi* and the *petitum* is connected to the formation of the *dominant jurisprudence* not equivalent to a mere consectarian of an interdital decision of an authority, without investigating which theory of procedural *procedurality* gave support for the construction of the *precedent* that isn't, in itself, a procedure, but a short description of the characteristics of the *procedural elements* (art. 330, § 1º, I) that composed the structure of the procedure established according to previous compliance with the presuppositions of admissibility (art. 485, IV and VI), collimating into a proceduralized *merital decision* made by the Democratic State (not Dogmatic). (LEAL, 2017a, p. 309) (Our translation into english)

In other words, from linking the cause of asking and request, it's not allowed that the normative sense set by the precedent be given only and just by a wise authority, as Mitidiero and Marinoni intend, but, rather, by the construction, in a broad contradictory and equal right of interpretation, by the parties and procedural subjects.

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23 Rosemiro Pereira Leal teaches that: "The parties, as subjects of the judicial process, in these circumstances, are, for the decision maker, prima facie members of a political society ex-ante of their entry into court, and the case brought to court can be judged by principles not legalized, being, in many cases, irrelevant to the legality strict to the solution of the controversy. Due legal process dispenses with previous structural models of full or summary ordinaryity (fundamentals of cognitio) to ensure contradictory or broad defense, since such rights are, in law as integrity, guaranteed by the judge as tutelage that the authority confers to the parties dosing them the convenience whose amplitude is placed by their fairness judgments (just decision)". (LEAL, 2017b, p. 127-128) (Our translation into english)

24 Here are interesting the proposals for the diffuse control of jurisprudentiality by Gabriela Oliveira Freitas (2019a), the creation of reviewing chambers of jurisprudence by Gustavo Castro Faria (2012, p.113-136) and the constitutional procedure for revising binding precedents by Luís Gustavo Reis Mundim (2018, p. 252-256). This three proposals are based on the theoretical framework of democratic procedurality.

Specifically to the application of precedents, this must be carried out by means of a knowledge procedure demarcated by logical phases, in order to avoid the suppression of phases by the rapid application of precedents without the contradictory, broad defense and isonomy (MUNDIM, 2018, p. 243-352).

Here, the technique to remedy and organize the procedure[25] can serve as a procedural framework so that the debate about the application or not of the precedent to the dispute is set as an issue to be resolved in the final decision, which would allow the procedural debate by the parties in a procedural space, without the use of procedural acceleration techniques in favor of an efficient bias.

In this sense, it can be inferred that the construction of a theory of precedents must go through the process in its centrality, as it deviates from the mistake made by the *precedentalists* that the jurisdiction is the center of the legal system. What is perceived, then, is that only democratic procedurality prevents that the construction and application of precedents taking place in a dogmatic way, since it allows the parties and other procedural subjects to construct and review binding decisions in contradictory, broad defense and isonomy, for the equal right to argue critically and interpret the legal sense.

It concludes that precedents must be between clouds and clocks, since, as a legal procedural institute, they allow the effective legitimate and democratic construction of decisions by all of the people.

5 CONCLUSION

The cloud scheme, which is characterized by intense unpredictability and instability, can be compared with the so-called *jurisprudential asylum*, in which the free conviction of the judges as a decision-making basis prevails. Said asylum generates unpredictable and conflicting decisions that completely ignore the due process in its construction.

In turn, the clock scheme represents a highly accurate, predictable and stable system, which can be compared to the defense of mandatory precedents. The mandatory precedents and the model of the Supreme Courts advocate that the precedents can be predictable, stable and can arise from any decision issued by the STF and STJ, which are the only ones able to establish the normative meaning so that the citizen can predict his conduct.

However, both perspectives are incompatible with the Democratic State of Law and with democratic procedurality, as they relegate the construction of precedents to the solipsism of judges and national courts. The jurisprudential asylum for not bringing any systemic stability, while the mandatory precedents seek an *ad aeternum* stability that closes the possibility of construction, interpretation and inspection of the binding pronouncements to be formed in the courts.

25 Alexandre Varela de Oliveira teaches that the delimitation of the object of the cognition procedure "will be linked to the issues defined in the decision on sanitation and organization, which must be mandatorily observed by the magistrate, so that the jurisdictional pronouncement doesn't fail to appreciate issues of fact or of law previously pointed out by the parties". (VARELA, 2019, p. 113) (Our translation into english)

Thus, based on Karl Popper's critical rationalism and Rosemiro Pereira Leal's theory of democratic (neoinstitutionalist) procedurality, one can conjecture and conclude that precedents in democracy must be *between clouds and clocks*, as they must be understood as procedural legal-institute, so that all of the people and all procedural subjects participate and supervise the construction of binding provisions, as well as can debate and interpret the application of such pronouncements, because only then will there be decision-making legitimacy.

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PHISHING AND SOCIAL ENGINEERING: BETWEEN CRIMINALIZATION AND THE USE OF SOCIAL MEANS OF PROTECTION

PHISHING E ENGENHARIA SOCIAL: ENTRE A CRIMINALIZAÇÃO E A UTILIZAÇÃO DE MEIOS SOCIAIS DE PROTEÇÃO

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ABSTRACT

This article aimed to study the need for criminal typification of phishing. In this sense, it investigated how the Brazilian legal system deals (and must deal) with the criminal aspects of digital crimes against property. Its hypothesis was that the crimes against the person committed by hacking were included in the Brazilian penal system, in line with the principles of defense of honor and vulnerability, but crimes against digital property have not been typified yet — however, the need for such a criminalization was considered doubtful, in view of the greater social importance that would have creative and alternative solutions, based on phishing prevention policies and vulnerabilities to social engineering. Methodologically, the research used the hypothetical-deductive procedure method, with a qualitative and technical approach to bibliographic-documentary research. In this sense, the work began with locating the practice of phishing within social engineering strategies. Soon afterwards, a legal-dogmatic study was carried out in order to identify whether such a practice is penalized in Brazil. Finally, it was considered if the best way to avoid the practice of phishing: whether it would be the specific typification of the conduct or if other non-criminal forms of phishing prevention would be more efficient than the criminal typification. As a result, it appeared that there are more creative, innovative and socially better alternatives for data protection and the prevention of cybercrime, than mere specific criminalization. These strategies go mainly through the development of (I) an informational education and empowerment of digital citizenship; (II) an organizational culture of data protection

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through corporate policies or compliance; and (III) self-regulation or regulation by design of the technology companies themselves, basing their algorithms on principles of privacy and human rights.

Keywords: Social Engineering. Phishing. Digital Scam. Criminalization.

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RESUMO

Este artigo objetivou estudar a necessidade de tipificação criminal do phishing. Nesse sentido, investigou-se de que forma o ordenamento jurídico brasileiro trata (e deve tratar) dos aspectos penais dos crimes digitais contra o patrimônio. Sua hipótese é de que os crimes contra a pessoa praticados por hacking foram incluídos no sistema penal brasileiro, alinhados aos princípios de defesa da honra e da vulnerabilidade, mas os crimes patrimoniais digitais ainda não foram tipificados — contudo, duvidou-se da necessidade dessa criminalização frente à importância social maior que teriam soluções criativas e alternativas, baseadas em políticas de prevenção ao phishing e as vulnerabilidades à engenharia social. Metodologicamente, a pesquisa se valeu do método de procedimento hipotético-dedutivo, com abordagem qualitativo e técnica de pesquisa bibliográfico-documental. Nesse sentido, o trabalho iniciou com a localização da prática do phishing dentro de estratégias de engenharia social. Passou-se, logo após, à realização de um estudo jurídico-dogmático a fim de identificar se tal prática é tipificada penalmente no Brasil. Por fim, foi ponderado se o melhor caminho para evitar a prática do phishing: se seria a tipificação específica da conduta ou se outras formas não penais de prevenção ao phishing seriam mais eficientes do que a tipificação penal. Como resultados, apresentou-se que há alternativas mais criativas, inovadoras e socialmente mais adequadas para a proteção dos dados e a prevenção aos cibercrimes, do que a mera criminalização especifica. Essas estratégias perpassam, principalmente, pelo desenvolvimento de (I) uma educação informacional e empoderamento da cidadania digital; (II) de uma cultura organizacional de proteção de dados por meio das políticas corporativas ou compliance; e (III) da autorregulação ou regulação by design das próprias empresas de tecnologia, pautando seus algoritmos em princípios de privacidade e direitos humanos.

Palavras-Chave: *Engenharia Social. Phishing. Estelionato Digital. Criminalização.*

INTRODUCTION

The rise of digital relations and the ubiquity of virtual systems to promote commerce, banking and social networks have put the so-called "cybercrimes" in question, resulting in a multiplicity of proposed solutions. Social engineering has an impact on people's lives and company activities, affecting privacy and data security - and the vulnerability of information management systems isn't in technical aspects, but in human relations.

The growing theoretical sophistication about these digital crimes allows to expand the discussions even outside the scope of criminal dogmatics, linking political and social contexts to the need to resist and protect citizens from frauds that use social engineering to obtain patrimonial advantage. In this sense, phishing unites technological and non-technological practices of social engineering to deceive users on the internet, implying that it occurs through a logical and coherent decision by the user - however, it reveals itself as the delivery of important data to achieve the economic objective of the swindler. This legal asset (property) is already protected against fraud by the crime of fraud/scam; however, there is no specific typification for when using digital media - hence the nomenclature "digital fraud" or "digital scam" ("*estelionato digital*").

The problem that caused this research can thus be described: how does the Brazilian legal system deal (and must deal) with the criminal aspects of digital crimes against property? It is hypothesized, for this questioning, that crimes against the person committed by hacking were included in the Brazilian penal system, in line with the principles of defense of honor and vulnerability of children and adolescents, for example; but, digital crimes against property (digital property crimes) have not yet been typified - however, there is doubt about the need for this specific criminalization, given the greater social importance that would have the creative and alternative solutions, based on phishing prevention policies and the vulnerabilities exposed to social engineering strategies.

The general objective of this article is to carry out a study on the need for criminal classification to reach social engineers who apply scams in the digital sphere with social protection means, ranging from individual practices to those of large corporations, including the obligation of the Public Power in promote digital citizenship. To achieve this general objective, its development was divided into three sections. The first is intended to study the practices of social engineering and its consequences for citizens and companies. The second is dedicated to understanding the criminalization process of certain digital practices, focusing mainly on the need to criminalize digital fraud/scam. Finally, the third part looks at non-criminal ways of preventing phishing.

Methodologically, it is listed that this research, of an academic nature, used the hypothetical-deductive procedure method, with a qualitative approach method and bibliographic--documentary research technique.

In this sense, the work begins with locating the practice of phishing within social engineering strategies. Soon afterwards, a legal-dogmatic study was carried out in order to identify if such a practice is criminally typified in Brazil. Finally, it is considered whether the best way to avoid the practice of phishing would be: the specific type of conduct, or if other non-criminal forms of phishing prevention would be more efficient than the criminal type.

1 SOCIAL ENGINEERING AS AN EXPLORATION OF THE HUMAN LINK OF DIGITAL FRAUD

The main methods used by so-called "social engineers" in search of digital information, as pointed out by Hadnagy (2011), can be listed as follows: (I) *information capture:* the ability to find suitable means and places to search for information; (II) *elicitation*: ability to confuse users, that is, make them take conclusions that seem logical, but that have the real meaning hidden by the social engineer; (III) *pretense*: ability to act as if it were someone else, to interfere in the personal identity of users, that is, make yourself who you aren't; and (IV) *mental tactics (psychological)*: corresponding to the ability to develop techniques using fundamentals of psychology to condition behaviors or change users' decisions.

These methods therefore correspond, as stated by Mann (2008, p. 87-141), correspond to the act of understanding and instrumentalizing human vulnerabilities in favor of the interest in violating the security of a system - through the creation of trust in the social engi-

neer, in subconscious intuition by commands (such as neurolinguistic programming) and the abuse of 'digital vulnerable', people such as children and elderly. Social engineering is, therefore, according to Mitnick and Simon (2002, p. 3-12), the exploitation of the weakest point of security - the human element, as individuals tend to find information useful to hackers innocuous, in addition to being limited in their ability to process data (needing to make notes or unsafe records, for example)

In the context of users of digital systems, according to Abladi and Weir (2018, p. 4-6), it's possible to identify a framework of user vulnerabilities based on: (I) *behavior*: where virtual engagement can indicate adherence to scams; (II) *perception*: users who (do not) perceive the risks of their behavior; (III) *socio-psychological elements*: personality traits that social engineers identify as most susceptible; and (IV) *socio-emotional elements*: conditions that make people more vulnerable at specific moments.

The authors Long et al. (2008) describe three practical applications of information *capture* methods: (I) *dumpster diving*: which consists, literally, in the practice of looking for disposal or garbage, documents that contain sensitive data and can facilitate access to systems; (II) *tailgating*: ability to physically infiltrate protected locations simply by joining a group of authorized persons; e (III) *shoulder surfing*: practice of observing "over the shoulder" the use of an authorized person. Therefore, social engineering consists of '*hacker no tech*' practices, that is, the most simple or complex that help to access digital systems, in addition to or before the technical aspects.

This tendency to identify the human link as a weak point in the security of systems is what Heartfield and Loukas (2015, p. 1-4) point out as a "semantic attack", technological or not, promoting elicitation, that is, making people think they are accessing something they aren't — thus getting user data in a way that people don't even feel harmed. It's like the practice of promoting websites that look like a reliable service to the user, but aren't. For example, they can be sites that direct access to a fake e-mail account that looks like the real account, causing confusion justified by the user, that is, pretending to be something real, and confusing the user to reach conclusions that only appear to be logical.

The apparent logic of these scams also contemplates the "internal danger", that is, the one that is revealed when the vulnerability in relation to the data is close and within the same environment, as in corporate structures, where security focuses on external dangers and does not recognize the risks of internal communications (and, apparently, harmless) between internal users that can reveal weaknesses regarding passwords or accesses that challenge the integrity of digitally secured data (XIANGYU; QIUYANG; CHANDEL, 2017, p. 32-33).

The *intention* is the practice of being another person, that is, using another identity in the digital context or not, adopting the history, profile and personality of another, with a view to a specific interest, that is, to be the person who give greater conditions for access to some data. It's the staging, acting in a role to achieve a goal (HADNAGY, 2011, p. 111). The claim can be made digitally (e-mail, social networks, etc.), by phone and even by presenting a false identity document - passing the agent through a trusted person to achieve a specific objective. In this scenario, the social engineer creates a context to influence victims to reveal sensitive information by understanding that they are talking to someone reliable (WORKMAN, 2007, p. 664).

The intention allows the person to request information to which only another person has access, or without the consequences of the social engineer himself in accessing it. Pretending to be someone else is an essential tool for social engineering, either in technological and digital practices, as well as in non-technological methods used as aids in accessing systems. The intrusion using the identity of another may not be perceived as an intrusion, precisely because the identity used has the access requirements and the goals of the social engineer aren't expected. Also, it can serve for a social engineering attack that makes people in an organization or a private individual take actions that are foreign to their will, being influenced by someone they think is real (TETRI; VUORINEN, 2013, p. 1015).

For Hadnagy (2011, p. 139-186) the *mental tactics* concern the search, by social engineers, for their interests, analyzing micro personal expressions and suggesting behaviors through neurolinguistic programming. An example is the notion of rapport as a technique for gaining trust from others and showing confidence, suggesting to other people's minds that the social engineer is trustworthy, thereby reducing people's defenses ("lowering their guard") in relation to the security of your privacy. It's the use of a deep understanding of the ways of thinking (patterns) and the senses - there are those who, for the most part, think through what they see or hear or through their emotions -, and the social engineer being attentive to these behaviors and managing to foresee possible decision-making when knowing what people close to, the user have aversion or appreciation for.

Neurolinguistic programming (NLP) is a field of study of personalities and behavioral patterns, being the basis for social engineers to apply data acquisition techniques through effective communication procedures applied to subjective human experience (BERGER, 1999, p. 139-141). It's the ability to learn the 'physical representations of brain activities' and of the unconscious, seeking to predict decisions and impose commands for future acts - in other words, making subconscious suggestions to behavior (MANN, 2008, p. 115-126). While it's a behavioral analysis, it also becomes a behavioral suggestion.

The mental tactics of social engineering subject users to a specific type of victimization to fraud, in which susceptibility ends up simplifying vulnerable psychological categories, when, in fact, victimization in these processes occurs in a complex and often casual process (NORRIS; BROOKES; DOWELL, 2019, p. 242). Therefore, the use of mental tactics derived from the knowledge of psychology doesn't have the ability to point out groups of people who are especially vulnerable, but to recognize emotional or psychosocial vulnerabilities in specific cases.

2 PHISHING AND CRIMINALIZATION OF THE DIGITAL SCAM

An application of these social engineering methods is the practice of phishing, which is an attack on the user, causing the user to deliver personal and financial data to the social engineers, confusing him when making him access a link/website that he believes to be reliable, or respond to a message that at first appears legitimate (CHAUDHRY; CHAUDHRY; RITTENHOUSE, 2016, p. 247). The most applied form of this coup is made "attentive to the

context", that is, according to Jagatic et al. (2005, p. 1), the social engineer gains the victim's confidence by knowing his environment and habits, becoming apparently legitimate - the social engineer knows part of the user's data, which he obtained through social engineering techniques, and the scam is effectively accomplished at the moment when the fraudster obtains the missing data, possibly linked to equity gain.

A practical example of what phishing is for the internet user is, as the computer security company Avast (2020) defines, simplifying the theme to its consequences for users: "it's a dishonest way that cybercriminals use to trick you into revealing personal information, such as passwords or credit cards, CPF and bank account numbers. They do this by sending fake emails or directing the user to fake websites" (our translation into english). The detail for the criminalization of this conduct is the objective of these practices, which can be differentiated in: crimes against the person (related to honor), and crimes against the patrimony (in which the data obtained illegally are used to obtain economic gain). The first ones, in the Brazilian penal system, were typified in Law nº 12.737/2012, but the assets are considered, mainly, as inserted in the criminal type of the fraud.

The emergence of digital crimes, which wouldn't exist without the relevance that digital systems have taken on the lives of people and companies/organizations, made a re-reading of Criminal Law necessary. And the use of the internet as a means to practice these acts gives rise to the so-called "cybercrimes" or "cyber crimes", defined, to Acha (2018, p. 8), as being "any typical, anti-legal and culpable actions committed against or through the use of automatic data processing or its transmission in which the internet is the main object or instrument of the crime" (our translation into english). However, there is an adequate distinction in these crimes, according to Fiorillo and Conte (2016, p. 139-145): there are those crimes that are 'computer crimes themselves' (or pure), practiced completely within a digital system, such as hacking and malware; and 'improper computer crimes', linked to the relation between digital and non-digital, such as digital fraud.

The social engineering used by phishing is included in the second category, of improper crime, as it encompasses the digital sphere, but goes beyond this sphere in terms of the act and the object of the crime. The definition of digital fraud is the most appropriate because it contemplates the notion of social engineering related to methods of capturing, eliciting, pretending and mental tactics, seeking objectives or having their means linked to digital data, that is, the local or non-local of the internet and digitized systems.[4] Therefore, this is the 'interpretation scenario' of an existing crime in criminal law, the crime of fraud (*estelionato*) in art. 171 of the Brazilian Penal Code.

The "digital" adjective to the crime of fraud is, therefore, an act of interpretation of the criminal law, understanding that: the advantage and prejudice of this offense are obtained through digital tools, and have as a legal asset/good the digital data related to privacy. The criminalization of this conduct, therefore, is characterized in the doctrinal environment and has effects on the jurisprudence (FREITAS, 2009, p. 64), despite the will of many that the penal

4 The thesis of Fernando José da Costa (2011, p. 149-158) presents the *place of the crime*: for the purposes of criminal prosecution, it must follow the place of the criminal conduct, but respecting the case of the crime only being considered in the *place of the crime result*. Thus maintaining a criterion of competence, even recognizing the virtual space without borders.

legislation is adapted and provides specific conducts for the digital environment, in view of a need for criminal classification.[5]

The Law nº 12.737/2012 introduced into the legal system the classification of so-called 'pure computer crimes', in the crime of "computer device invasion" (art. 154-A of the Brazilian Penal Code): Invade someone else›s computer device, connected or not to the computer network, by undue violation of the security mechanism and in order to obtain, tamper with or destroy data [...]" (our translation into english), that is, it contemplates the legal good of individual freedom, privacy and intimacy in the digital environment. This 'breached computer device' can be any device capable of storing personal data, such as computers, tablets or cell phones, that are protected by passwords or another protection mechanism, and the intruder being a willful active person who circumvents the security system in the name of the breach of data privacy (KUNRATH, 2017, p. 68).

There is, however, a difference between the practices typified under Law nº 12.737 and that of the digital fraud (untyped); precisely because the behaviors typified in this law are related to crimes against persons, and untyped behavior is a property crime, not concerning honor. The digital fraud through phishing is intended to capture personal and financial data of users (victims of the scam) for economic purposes (COSTA, 2011, p. 99-100). Thus, in analogy to what Wendt's research presents (2016, p. 154-159), due to the expansion of risks and uncertainties promoted by internet communication, the intention to criminalize the act in Criminal Law will not reach the complexity of the practice. It's necessary to contemplate objective criteria for the application of the Law, fleeing the trend brought about by the expansion of the risk of expanding criminal law - forcing society to seek non-penal alternatives.[6] This is the case of fraud, which under the digital context maintains the need to protect the same legal asset, regardless of new means, from the point of view of criminalization, but exposing the need for educational and social forms of defense and resistance to new frauds/scams.

3 DATA PROTECTION AND DIGITAL CITIZENSHIP BY SOCIAL MEDIA OF DEFENSE

Among the challenges, 'to prevent cybercrime', it is necessary to face the distinction between criminal policies and innovative preventive policies, that is, between the formal criminalization of the typification of acts and the rise of policies such as: (I) digital security policies, (II) 'informational education policies' and ethics on the internet, (III) conflict resolution policies in virtual relations, according to Kunrath (2017, p. 72-146). This non-penal paradigm respects the tendency to search for alternatives to combat cybercrime at the international

5 Art. 5º, XXXIX of the Brazilian Constitution/1988: there is no crime without a previous law that defines it, nor a penalty without prior legal agreement (Our translation into english) ("não há crime sem lei anterior que o defina, nem pena sem prévia cominação legal").

6 As Wendt states (2016, p. 165): "If Criminal Law has the same function as thorns in relation to flowers, supposedly to protect society, both thorn and Criminal Law are doomed to failure, because the ax of contemporary times is overwhelming and the cuts and wounds generated will not heal with more axes. It's necessary to rethink the normative-penal criterion as a way to solve social issues that are possible to be solved through behavioral, administrative or technical practices, or, perhaps, by other branches of Law other than Criminal". (Our translation into english)

level, more linked to information security than to criminal prosecution (SILVA, 2012, p. 103-104).

The simulation promoted by the study by Konradt, Schilling and Werners (2016, p. 10) indicates that in the context of the current digitalization of society, the professionalization of the analysis of the so-called "cybercrimes" has been promoted, making necessary to address the economic sources and the fruits arising from these techniques that use social engineering, considering that social engineers work under a multiplicity of risks and under the "trial and error", being more important to combat them protect privacy from the data that the punishment of these conducts with a new criminal type and a 'new arm' of the penal system.

The rise of a digital security policy contemplates that proposed in the '*Marco Civil da Internet*' (Law nº 12.965/2014) as principles and guarantees of internet use in Brazil, as respect for freedom of expression and human rights (art. 2) and the principle of protection of privacy and personal data. The guarantees (art. 7) are of the inviolability of intimacy and personal communication via the internet, the only alternative for providing personal data to third parties is free, express and informed consent. Also, it's the duty of the Public Power (Union, States and Municipalities) to develop the internet and a participatory and collaborative internet management structure, promoting digital inclusion and a digital culture (art. 27).

Digital inclusion and internet culture are directly linked to data protection, which is why it's instrumentalized in the 'General Law for the Protection of Personal Data' (*Lei Geral de Proteção de Dados Pessoais - LGPD*) (Law nº 13.709/2018), in force established for 2020, which provides for this aspect of the treatment of personal data and is disciplined by respect for privacy and informational self-determination (art. 2º, I and II), thus being a tool also with the aim of fostering a culture of data protection, for individuals and companies. In these aspects, the 'innovative policies of informational education' and 'ethics on the internet' can be understood as: a public defense tool against cybercrimes.

Digital inclusion, therefore, is the promotion of citizenship that recognizes the dimension of virtual space and recognizes digital security as something fundamental for insertion in the information society (MARTINI, 2005). Informational education, which empowers citizens in the digital sphere, is also associated with their under-sufficient position in consumer relations, recognizing the technical inequality that consumers have in relation to the extensive databases of retail companies, for example (MIRAGEM, 2019, p. 27-28). Therefore, digital citizenship presupposes the technical empowerment of the citizen, while recognizing the technological asymmetries of the social structure.

Also, from the companies point of view, the idea of information security policies and compliance is considered, paying attention to the principle of privacy and preservation of digital data, that is, corporate policies that establish administrative guidelines and standards for information security. The possible legacy for these regulatory frameworks, especially the *LGPD (Lei Geral de Proteção de Dados Pessoais)*, according to Bioni (2019, p. 32-33), is the strengthening of a data protection culture for organizations, taking into account important factors such as reputation and trust in the corporate environment. Also, that there is a regulatory culture in favor of the interpretation and systematic application of this protection in all technological development (DONEDA; MENDES, 2019, p. 322).

The mitigation of the risks brought by the techniques associated with social engineering, must go through the identification of the aggressors with these so-called 'user weaknesses', that is, the human part in digital systems. As Towsend notes (2019), Avast, when reporting the factors to be observed for social engineers to take advantage of users: time pressure (forcing the user to make immediate decisions), fear of loss, wrong direction, false assessments, false identity and partial information.

Phishing has broadened its context beyond digital fraud, and the act of 'phishing for phools', or "fishing for fools", as stated by Akerlof and Shiller (2015, p. 10) covers the areas of commercial advertising and politics, in which consumer and electoral markets use data from internet users to interfere in their perceptions, acquiring them legally - even though these markets are adept at practices that hide the real reason for capturing information.

Education and collective awareness can contribute to collaborative ways of combating techniques such as phishing, and it's necessary to develop educational ways to create resistant and resilient defensive behavior against these attacks: they can be through games[7], they can be through games, booklets or newsletters that expose how users' data may or may not be used and how this use is legal, preventing or at least reducing user confusion when delivering personal data on digital platforms.

Thus, working with technological education - strengthening the human link (TAYOURI, 2015, p. 1096) -, as the study by Nicholson, Coventry and Briggs points out (2017, p. 292) understanding the importance of using social media, not just technological ones, to defend against attacks by social engineers - as well as paying attention to the data of the attacker, in cases of phishing.

For the corporate environment, an alternative is the individual empowerment of employees, forming resistant and resilient users to social engineering attacks, such as identity theft and ransomware. The recommendations made by the study by Thomas (2018, p. 17) are aimed at recognizing the different groups of users within a corporate network in view of the impact of their work, familiarity with phishing and levels of trust (in believing they are not susceptible to scams), improving specific vulnerabilities, empowering employees to behave in an active way that knows the risks and the forms of defense for each act performed in relation to digital data.

This is only possible through organizational policies appropriate to effective data security with participatory forms, which educate employees, and privacy protection practices in company activities — the *LGPD* legally represents this evolution in the organizational sector, whether in public governance or in private corporations, based on the foundation of accountability or corporate responsibility. Thus, it emerges: the need for organizations to comply with the law (compliance), maintaining in their practices the principle of informative self-determination, informed consent and the protection of personal data - empowering the institutions responsible for investigations and internal liability/responsibility in companies with a view to those principles. One of these practices is the so-called 'private certification of compliance with data protection principles'.

7 The text of the authors Arachchilage, Love and Beznosov (2016) shows interesting results on the education of users in a digital game that indicates anti-phishing tools.

The establishment of internal controls aims to reinforce state regulation, law enforcement, in the case of data protection, as described by Frazão, Oliva and Abilia (2019, p. 693-711), need to be adapted to the risk of activity, to the creation of a training program for employees about data security, to the regulation by design and effective monitoring of the compliance program itself. One of the direct consequences of this scenario is the creation of the data protection officer (RECIO, 2017), professional or sector responsible for data protection within a company, which aims to align business activity with the legal precepts about privacy and information security , making companies and people less vulnerable to scams classifiable as digital fraud/scams.

There remains, the social role given to technology companies, which manage the algorithms and digital systems used in all these operations (personal or business). It's what is called regulation by design, in which the creators of the algorithms are responsible for verifying the protection of fundamental rights, especially privacy, in the order of their systems, being systematically incorporated. That is, according to Magrani (2019), Law being used as metatechnology, that is, software engineering starts to consider fundamental rights and human rights, in this case the right to data security, in the sphere of technological production. It's the algorithmic accountability, in which the social responsibility of the developer is required (KITCHIN, 2017, p. 26-27).

It's a process that combines the self-regulation of these transnational (FORNASIER; FERREIRA, 2015, p. 409) technology companies with the need for social auditability, and the programming must be subjected to critical analysis by society, as well as caring for the legal principles that guide human rights, including the principle of informative self-determination. At the same time as there is a privatization of regulation, there must also be the privatization of responsibilities, such is the importance of algorithms guided by large technology companies (MARTIN, 2019). Programming needs to take into account the need to create spaces with democratic and social values, bringing the best of the objectives of the laws into the algorithms (WEBER, 2018, p. 705-706).

The disruptive characteristic of new technologies and their algorithms can allow for safer systems and empower users, making them more capable of resisting digital scams, and the Law should behave properly, not regressing to the positivism of the criminal typification of the conduct of the digital fraud or digital scam, but incorporating principles appropriate to the core of programming - creating a flexible law capable of dealing with technologies, making the relations between software engineering and law as something hybrid (SANTOS; MARCO; MOLLER, 2019, p. 3079-3081).

CONCLUSION

The defense against attacks and the protection of personal data in the face of social engineering and its most evident practice (phishing) doesn't go beyond the simple development of an invulnerable system, as this practice doesn't use digital tools or complex technologies. These practices depend on the exploration of human openings and weaknesses in social relations in relation to privacy. Phishing depends on a complexity of factors and feeds

on them - its combat must be proportional, and it needs an adequate digital education, which contemplates a digital citizenship aware of everything that is shared in the networks and its consequences, restricting the holes in which a social engineer can take over the personal data of internet users.

This conclusion was possible after describing the phenomenon called: social engineering, understood as a set of methods that condition a series of practices, legal and illegal, technological and non-technological. In this case, phishing is a scam that uses social engineering practices to capture information, elicitation, pretentiousness and mental tactics to apply fraud in order to realize an economic advantage. It's a complex concept precisely because of its association between technological factors and practices that aren't related to technical complexity. In other words, the social engineer, even applying the fraud on digital systems, doesn't need to be a computer expert, a hacker - even for this reason they are considered 'improper digital crimes'.

The criminalization of digital fraud involves clarifying this practice, avoiding being dazzled by computer and digital issues, realizing that, often, the digital environment is simple and is associated with non-technological techniques for obtaining data. Thus, this practice differs from the crimes against the person typified by Law 12.735 / 2012, as there is no complex adulteration of a digital system for the protection of personal data, but the use of social techniques to trick victims into delivering data that subject their assets to misappropriation. Phishing uses new information and communication technologies as a means of applying these frauds, but its techniques are purely social.

The prevention of these practices is, therefore, much more accomplished through informational education and a culture of data protection, and the empowerment of the digital citizen, than through the criminalization of computer behavior.

Trying not to fall into the temptation of criminalization (criminal typification), responding to the problem proposed by this research: creative, innovative and socially more suitable alternatives for data protection and cybercrime prevention emerge, and in this article we list or divide these responses into three groups: (I) in informational education and the empowerment of digital citizenship; (II) in the organizational culture of data protection through corporate policies or compliance; and (III) self-regulation or regulation by design of the technology companies themselves, basing their algorithms on privacy and human rights principles.

And it should be noted that the development of preventive policies, in addition to mere criminal repression through new types, doesn't come here to mean the 'responsibility of the victim for the criminal's conduct', but, rather, 'to make the Public Power and the technology ', calling, in relation to such entities, for preventive and proactive attitudes against such practices. In other words: such entities and institutions must abandon the repression posture through legislation as being useful and necessary in itself.

These social means of prevention are the alternative solutions to the penal system, which seek more a culture of promoting digital citizenship and empowering users based on the notion of privacy and resilience to scams, than the criminalization/typification of conduct, with a view to that the specific and careful classification of the criminal type of digital fraud has more to do with the good functioning of criminal dogmatics, than with the effective protection of personal data. Anyway and thus, the proposed triad of alternatives – one for

individuals, another for legal entities and, also, for those institutions/organizations that have instructed the functioning of digital systems – has in view the implementation of the principles of informational self-determination and digital inclusion.

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THE JUDICIAL ACTIVISM AND THE WEAKNESS OF POLITICAL POWER: EFFECTIVE CRISIS OR PARADIGMATIC CHANGE?

O ATIVISMO JUDICIAL E O ENFRAQUECIMENTO DO PODER POLÍTICO: CRISE EFETIVA OU MUDANÇA PARADIGMÁTICA?

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ABSTRACT

The purpose of this article was to promote a theoretical reflection on the Brazilian legal doctrine on the phenomenon of judicial activism. Using bibliographic research and the deductive method with conceptual analysis and reflection, we sought to identify the causes for judicial activism and reflect on whether this process of intentional intervention by the judiciary in policy-makers is a crisis of political powers or concerns itself strengthening of the judiciary for the enforcement of constitutionally guaranteed rights. The reflection on the theme from the critical theory allowed us to conclude that political activism characterizes a paradigmatic change in the judge's behavior and was triggered from the Constitutional text of 1988. Social issues started to be object of effective demand by society, especially before the inertia of the executive and legislative branches. The activist interventions of the judiciary sought to do justice by being punctual and acted, above all, in matters that involved effective risks to health and life, or even in other social issues neglected by the political powers.

KEYWORDS: Judicial activism. Criticism of judicial activism. Criticism of the law. Hermeneutics.

RESUMO

O objetivo neste deste artigo foi impulsionar uma reflexão teórica em torno da doutrina jurídica brasileira sobre o fenômeno do ativismo judicial. Recorrendo a pesquisa bibliográfica e ao método dedutivo com a análise conceitual e de reflexão procurou-se identificar as causas para o ativismo judicial e refletir se este processo intervenção intencional do judiciário no policy-makers se trata de uma crise dos poderes políticos ou se diz respeito ao fortalecimento do judiciário para a efetivação dos direitos constitucionalmente assegurados. A reflexão sobre o tema a partir da teoria crítica permitiu concluir que o ativismo político caracteriza

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uma mudança paradigmática no comportamento do juiz e foi desencadeada a partir do texto Constitucional de 1988. As questões sociais passaram a ser objeto de efetiva cobrança pela sociedade, sobretudo ante a inércia dos poderes executivo e legislativo. As intervenções ativistas do judiciário procuravam fazer justiça ao mostrarem-se pontuais e atuaram, sobretudo, em matérias que envolveram riscos efetivos a saúde e a vida, ou ainda em outras questões sociais negligenciadas pelos poderes políticos.

PALAVRAS-CHAVE: *Ativismo judicial. Crítica ao ativismo judicial. Crítica ao direito. Hermenêutica.*

1 INTRODUCTION

In Brazil, the sum of rights and guarantees whose effectiveness is demanded of the State, especially in the figure of the Legislative and Executive powers, but which according to Ferreira Filho (2007, p. 245) act slowly, making the Judiciary exercise more vitality its competences, notably in relation to the effectiveness of the rights and guarantees provided for in the constitutional text.

It is around this situation among the three powers that criticisms of the so-called judicial activism are born, which stands out due to the conduct of the magistrate who promotes an interpretation of the laws and the Constitution, in order to safeguard the right that is constitutionally provided for and pleaded. The directed criticisms promote questions about the democratic legitimacy of the magistrates (since they weren't conducted by scrutiny), the politicization of the justice and the institutional capacity of the Judiciary. Both critics argue that judicial activism is weakening the Brazilian politics and the democratic process as a whole. On the other hand, the arguments in favor of defending judicial activism are basically based on the fact that the inertia of the other powers, especially the Legislative, causes a visible non-compliance with the main social duties entrusted to the State. (MARTINI e LESSA, 2017, p.5-24)

The purpose of this article is to sharpen a theoretical reflection in the face of this debate on the phenomenon of judicial activism present in Brazilian legal doctrine. The question that guides the reflection is: if the intentional intervention of the Judiciary in the policy-makers is a crisis of the political powers, or if it concerns the strengthening of the judiciary in order to enforce the constitutionally guaranteed rights? We start from the hypothesis that in Brazil, starting from the 1988 Constitutional text, social rights became the object of effective charging by society and the activist interventions of the judiciary are on social issues neglected by political powers. There is significant progress in the development of studies on judicial activism in Brazil, however the theoretical reflection proposed here is justified by intending to address the issue of political activism based on critical theory and a paradigmatic change in the judge's behavior, which in addition to applying the law, updating it according to the social needs of the moment, he seeks to do justice (COELHO, 2004, p. 388).

To achieve the proposed objective, we opted for the use of bibliographic research and the deductive method, with conceptual and reflection analysis to identify how the legal doctrines, selected and treated in the next sections, understand the phenomenon of judicial activism and its intervention on the policy-makers. The article ends with a reflection on the critical theory of law and the paradigmatic change that the referred system establishes in the natio-

nal law, and which will allow to understand with greater clarity the phenomenon called judicial activism.

2 RECOGNITION OF SOCIAL RIGHTS AND THE JUDICIAL ACTIVISM

According to Schonardie, Foguesatto and Leves (2018) built over several generations, social rights show the recognition by the State regarding the minimum rights of citizens, going back to individual and collective contents, such as respect for the State regarding to individual rights - first generation - even to the rights recognized in the fourth generation, which deal with issues involving genetics or the environment, notably collective.

In any case, a joint approach is necessary between the social rights recognized in their various generations and the phenomenon of judicial activism, which is justified because one is the result of the other, that is, judicial activism is born due to the failure by the State to rights recognized throughout history.

Thus, it remains necessary to address the generation-building process so that after we list the reasons that fostered the judicial activism.

For Miguel Reale "[...] the different parts of the Law aren't situated side by side, as finished and static things, because Law is an order that is renewed day by day" (REALE, 2002, p. 6) (our translation into english). It isn't by chance that Sarlet asserts that in the constitutionalist doctrine the set of human rights historically goes back to the development and recognition of social rights, that is, to the generations of rights, each of them consistent with the historical moment in which they were developed, adding and expanding their protective scope (SARLET, 2015, p. 459-488).

Protective expansion that concerns the history built over five generations. In this sense, it's important to remember that the first dimension recognizes man as a subject of individual rights, demarcating his individual autonomy vis-à-vis the Public Power, while the second generation recognizes man's work in society and he as a social being, living up to social, economic and cultural rights, further expanding the sense of the *wellfare state* (COELHO, 2011, p.182).

For Cavalcante Filho, the first generation of rights is characterized by the imposition on the State of the duty to respect individual rights, demanding from the State an obligation not to do so, which is embodied in the impossibility of promoting any offense to those rights. On the contrary, second generation rights impose on the State an obligation corresponding to the duty to do, that is, to hand over to deprived social groups: rights such as education, health and public security, thus reducing inequalities (CAVALCANTE FILHO, 2010, p.12)

The third dimension recognizes the constitutionalization of citizenship rights (man as a human being and as a citizen), where the ethical basis is formed by solidarity, fraternity and charity, recognized as collective or diffuse ownership, and imposes the need to observe an environment that provides effective dignified life. Hence the concern with environmental

rights, and with values such as peace and self-determination of peoples, quality of life, communication and preservation of historical and cultural heritage (COELHO, 2011, p.183).

Bobbio clearly emphasizes this historical construction that goes back to the social rights of man, built gradually. The author adds:

> From a theoretical point of view, I have always defended - and continue to defend, strengthened by new arguments that human rights, however fundamental they may be, are historical rights, that is, born in certain circumstances, characterized by struggles in defense of new freedoms against old powers, and born gradually, not all at once and nor once and for all. The problem - on which, it seems, philosophers are called upon to give their opinion - the foundation, even the absolute, irresistible, unquestionable foundation, of human rights and a poorly formulated problem: religious freedom is an effect of wars of religion; civil liberties, the struggle of parliaments against absolute sovereigns; political freedom and social freedoms, the birth, growth and maturation of the wage workers movement, peasants with little or no land, the poor who demand from public authorities not only the recognition of personal freedom and negative freedoms, but also the protection of work against unemployment, the first rudiments of instruction against illiteracy, then assistance for disability and old age, all of which are needs that the wealthy owners could satisfy for themselves. (BOBBIO, 2004, p. 9) (Our translation into english)

The doctrine recognizes the rights of the third generation as transindividuals, that is, they belong to all citizens, but they cannot be recognized as belonging to any one of them in isolation. Relevant examples of this generation would be the right to an ecologically balanced environment, the right to peace and the right to development (CAVALCANTE FILHO, 2010, p. 12).

Bobbio for his part also highlights issues involving the environment:

> Together with social rights, which were called second generation rights, today emerged the so-called third generation rights, which constitute a category, to tell the truth, which is still excessively heterogeneous and vague, which prevents us from understanding what is actually being it comes. The most important of them is the one claimed by ecological movements: the right to live in an unpolluted environment. But new requirements are already being presented that could only be called fourth generation rights, referring to the increasingly traumatic effects of biological research, which will allow manipulations of each individual's genetic heritage. (BOBBIO, 2004, p.9) (Our translation into english)

Once again, Constitutional Law was imbued with incorporating new extensions, given that man is currently the holder of virtual and bioethical rights that have exponentially expanded legal discussions to a global sphere, effectively corresponding to the fourth and fifth generations of human rights (COELHO, 2011, p.183).

However, there is no consensus on the rights recognized as fourth generation, so that some doctrines recognize the genetic engineering, while others refer to the struggle for participation in the democratic process (CAVALCANTE FILHO, 2010, p.12).

The advent of the Social Welfare State reversed important parts of the basic postulates existing in the State of Law and, consequently, the Judiciary also has its attributions changed,

going on to analyze the measures taken and the achievement of the results pursued by the Legislative (FERRAZ JR, 1994).

Change of posture imposed on the Judiciary, which, mainly due to the classic division of powers imposed, was limited to respecting the socio-political conditions of the 19th century. This scenario would be altered due to the technological society and the Social State, which demanded: from the Judiciary the unneutrality and from the judge the exercise of a socio-political function, that is, a prospective responsibility and concerned with the political purpose. In this new scenario, the judge is now equally responsible for the political success of the other powers of the government, including working to correct any mistakes that may conflict with the social nature pursued by the State (FERRAZ JR, 1994, p.12-21).

In fact, a simple reading from the Constitutional text highlights this generous character of rights and guarantees. For Sarlet:

> In Brazil, the Federal Constitution of 1988 included a generous cast (at the time, possibly, without precedents and parallels in contemporary constitutionalism) of social rights and workers' rights in the Title of Fundamental Rights and Guarantees, in addition to a set of principles and rules dealing with on economic, social, environmental and cultural matters in the titles of the economic and social constitutional order. (SARLET, 2015, p. 461) (Our translation into english)

This model, however, demands an effective commitment from the powers of the Union, under penalty of non-compliance with the forecasts enshrined in that constitutional text.

In this sense, Moura points out that "[...] in Brazil, judicial activism is directly related to the crisis of legitimacy and democratic representativeness, which generates a detachment between the representative bodies and the society, and the inability or lack of interest in meeting the demands producing a shift in the exercise of citizenship to the sphere of the Judiciary" (MOURA, 2016, p.638) (our translation into english).

According to Oliveira,

> The conception of activism, in turn, is linked to an extensive and vigorous effective participation of the Judiciary in the consolidation of the values and purposes established by the Constitution. It's a proactive interpretation of *Lex Fundamentallis* that provides a reinterpretation of its real meaning, scope and axiological values, with the aim of allowing the making of modern, reforming/revolutionary, progressive and constructive decisions. (OLIVEIRA, 2017, p. 3) (Our translation into english)

Following Silva's thinking, it's very clear the reasons that would justify the decisions made by the Judiciary, since it's evident in contemporary society a deficit of dignity that sees in the Judiciary as the recipient of social frustrations, especially when realizing the rights that founded the essential core. Thus, with the State inert in its obligations, the Judiciary is called upon to intervene in guaranteeing the existential minimum (SILVA, 2017, p. 14-28).

Oliveira also draws attention to the fact that in Brazil the phenomenon of judicialization is also due, in large part, to the very text of the Constitution, since it has a embracing analytical text, and that by constitutionalizing the matters through interpretation, it removes automatically, these issues of the scope of the policy, converting them into constitutional norm. According to Oliveira, another supporting factor for this phenomenon would be the 'hybrid system of constitutionality control' that allows any magistrate to acclaim the declaration

of unconstitutionality of a norm, which causes that: new insurgencies are submitted to the scrutiny of the judiciary and further encouraging the protagonism. (OLIVEIRA, 2017, p. 2)

For Martini and Lessa, the ineffectiveness of the State in managing public health is what promoted the phenomenon of judicial activism, since in the face of the inertia of the other powers, at least one of the powers remained sensitized to such an important theme, that is to say, essential for achieve welfare and social justice (MARTINI e LESSA, 2017, p. 5-24).

Expectations and pressures on the celerity of implementation, as well as the expansion of rights already recognized in certain categories, or even the effectiveness of rights, all relapse on the Judiciary. It's in this sense that comes the so-called "State-Providence" ("*Estado-providência*"), the driving force of judicial activism that leads judges and courts to reveal, in some situations, the limits that are imposed by the legal system itself (RAMOS, 2015, p. 286). Thus, guided by the Constitutions that began to provide for and deal with fundamental rights, judges allow themselves to give due treatment and attention to the respective rights (BARBOZA, 2014, p. 85).

Understanding not far from the conclusion led by Coelho when stating the need to consider not only the compliance with the rules of conduct existing in society at any price, but also the consequences of its application, which he calls effective justice. This is because,

> [...] if there is an objective of justice, it's summed up in the binomial dignity/solidarity, which is true both for the common man, the citizen who feels injustice in his own flesh, and for those to whom society has delegated the task of distributing justice, what matters in making it effective in all sectors of individual and collective human life. (COELHO, 2001, p. 147) (Our translation into english)

Synthesis also possible is extracted from the understanding presented by Herknhoff when stating that

> There cannot be an authentic prevalence of the Law, if the Law doesn't aim to realize Social Justice. It's not possible to intend true Development if it isn't centered on the Human Person, if its address isn't the construction of a society in which the human persons that integrate it can realize their existential potentialities. (HERKNHOFF, 2004, p.116) (Our translation into english)

In the words of Barroso,

> [...] the judicial activism is an attitude, the choice of a specific and proactive way of interpreting the Constitution, expanding its meaning and scope. Usually it settles in situations of retraction of the Legislative Power, of a certain detachment between the political class and the civil society, preventing the social demands from being effectively fulfilled. (BARROSO, 2009, p.6) (Our translation into english)

Barroso justifies the role of the Judiciary, on the grounds that judicial activism is linked to a protagonist participation of the Judiciary in the realization of constitutional rights (BARROSO, 2009, p. 6).

This understanding is not far from the one pointed out by Oliveira when asserting that:

> [...] as being an attitude, a proactive way of interpreting, especially the Political Charter, to discipline a situation that wasn't disposed of by any norm, or that was disposed of, but that no longer meets the factual reality demanded

> by those interested who need a jurisdictional provision. (OLIVEIRA, 2017, p. 3) (Our translation into english)

Oliveira, continually, stresses the need to keep in mind that there isn't an endless set of ready solutions for any and all factual conflicts presented to the judiciary that needs to deliver the judicial provision. At the same time, it's necessary to consider the fact that the Judiciary cannot be limited to the exact terms and expressions contained in the normative text, many of them subjective and ambiguous, or even the situations of normative gaps. Both situations, demanding from the magistrate a political action by the judge, creating solutions not yet conceived by the legislator, always obeying the limits of reasonability, extreme observance of the text of the Constitution, without losing sight of the fact that it must avoid situations of legal insecurity or hurt the separation of powers (OLIVEIRA, 2017, p. 5)

As Baquero and other authors point out, the inertia of these democratic institutions, that is, this malfunction puts at risk the credibility of this system, not only because of the citizens' distrust as to the need for the system itself, but also regarding the existence of political parties. According to Baquero:

> Paradoxically, the strengthening of representative democracy in Brazil, undermined by the ineptitude of the political elite in its political and institutional performance, involves the strengthening of institutions, which will exist in the exact measure of the change in political practices and habits that are socially and culturally ingrained throughout the society. (BAQUERO, 2018, p. 102) (Our translation into english)

This is what happens in relation to the judicial institution, called to intervene in various social issues. Finally, it's extremely important to present the conclusions of Mazarotto and Quadros (2018), which emphasizes that the so-called construction of a just society occurs by the various institutions that compose it, which are directly responsible for the dissemination and prevalence of a equality scenario, especially from the moment when the State assumes the tasks of assistentialist nature, aiming at everyone without any distinction. However, the management failures that arise motivate the political intervention of the Judiciary as a way of effective implementation of the positivized rights, since its first function is precisely to fully promote the provisions set out in the Constitutional text. It's, therefore, an instrument for effecting guarantees and an inclusive instrument (MAZAROTTO e QUADROS, 2018, p. 156-178).

Thus, having presented the facts and arguments that would justify the intervention of the Judiciary, we should present the arguments against the intervention, the subject of the next topic.

3 CRITICISM TO JUDICIAL ACTIVISM

One of the biggest questions made to the interventionist model led by the Judiciary would be the democratic legitimacy, since, theoretically, the characters would lack the necessary requirement to validate their decisions, even if this decisions directly serve the interests of citizens. In fact, even though judges, judges of the Superior Courts (appellate judge)

and ministers aren't elected public agents, they still exercise political powers, insofar as they accumulate forces even to invalidate acts of other powers, even if these two bodies are represented by the President of the Republic or by members of the National Congress in its entirety (BARROSO, 2009, p. 1-29).

Despite being considered as the third and least important of the three powers presented by the classic model of division, the importance of the Judiciary Power is unquestionable when analyzed from the perspective of individual freedoms and rights, of which it's undoubtedly its main guarantor (FERREIRA FILHO, 2007, p. 245). Herknhoff is very clear in asserting that:

> [...] there can be no real prevalence of the Law, if the Law doesn't aim to achieve Social Justice. It's not possible to intend true Development if it isn't centered on the Human Person, if its address isn't the construction of a society in which the human persons that integrate it can realize their existential potentialities. (HERKNHOFF, 2016, p. 116) (Our translation into english)

In this sense, by the way, Cambi asserts that the law isn't effectively limited to the norms, since it isn't possible to extract pre-established decision content from it, and the Brazilian Constitution directs the process as a whole towards a discussion and argumentation bias, from in order to extract the best possible response from the legal system to social problems. As Cambi rightly points out, "[...] in countries of late modernity, such as Brazil, it's not satisfactory that the Judiciary fails to enforce fundamental rights, waiting for the indefinite action of the legislator" (CAMBI, 2012, p.88) (our translation into english).

When dealing specifically with the Judiciary and its guarantees, Ferreira Filho recalls that it's up to the judiciary to do justice, but that in the current modern State this task is confused with the application of laws. Thus, accepting the Judiciary as a mere enforcer of rules, in spite of this being its essence, would mean making it limited, especially when analyzing specific cases that require special attention, limiting it to the administrative function (FERREIRA FILHO, 2007, p. 248-249). Like this:

> [...] respect for democracy, in a substantial sense, justifies the responsible judicial leadership. It's important to note that its use doesn't imply incentive to decisionisms or voluntarisms, nor to the return to the Jurisprudence of Values. On the contrary, it's intended to safeguard the position of the jurisdiction in the implementation of the Constitution, having, for this purpose, to obstruct the obstacles against the realization of fundamental rights. (CAMBI, 2012, p. 93) (Our translation into english)

As Alberto asserts:

> [...] if, at first, the law was a safe parameter for defining social issues, with the increase of the social complexity it became insufficient, which demanded active action by the Judiciary, carrying out, even in a counter-majoritarian way, the inserted values in the Charter of the Republic. (ALBERTO, 2012, p. 42) (Our translation into english)

It's not by chance, the author Hespanha, announced that the new world configuration and the scientific revolution, as well as the valorization of diversity, pluralism of societies, equality, groups with differences (cultural, experiential, physical and intellectual capacities), professionals, policies etc., would impose on the current model to accept new ways of building democracy and new paradigms for the law, making it effective (HESPANHA, 2013, p. 63)

In this tone, Alberto stresses in a very clear and forceful way that it's not up to the Supreme Federal Court (*Supremo Tribunal Federal – STF*), an alternative that doesn't express itself on controversial issues, so by not doing so, it would be fostering a model that imposes limited performance, in the exact terms of the original model that was designed for it (ALBERTO, 2012, p. 43).

In any case, if the arguments set out above were not enough, the doctrine also justifies the decision-making power of magistrates from two angles, one being the normative and the other philosophical.

The first one - normative - is evident in the fact that the Brazilian Constitution, like the other nations that adopted the democratic regime, recognizes a portion of political power to the Judiciary and, above all, to the Supreme Federal Court (*Supremo Tribunal Federal – STF*). Even the other public agents not elected through the electoral system, also, hold part of this political power. In any case, it's certain that when applying the laws, the magistrates are effectively implementing decisions taken by the legislators, that is, the representatives of the people, despite the need to consider that the magistrates and Courts don't perform purely mechanical activities (GRAU, 2002, p. 64).

With regard to philosophical justification, this is the result of two aspects, namely, constitutionalism and democracy, as taught by Barroso:

> The philosophical justification for constitutional jurisdiction and the role of the Judiciary in institutional life is a little more sophisticated, but still easy to understand. The democratic constitutional state, as the name suggests, is the product of two ideas that have joined, but aren't confused. *Constitutionalism* means limited power and respect for fundamental rights. The State of law as an expression of reason. *Democracy* means popular sovereignty, government of the people. The power based on the will of the majority. Between democracy and constitutionalism, between will and reason, between fundamental rights and government of the majority, can arise situations of tension and apparent conflicts. (BARROSO, 2009, p. 11) (Our translation into english)

This measure portrays the position of the magistrate who decides the question posed in a broad and proactive way, but always interpreting the Constitutional text, going beyond the ordinary legislator. And this initiative translates into an effective mechanism that makes possible to "get around" a situation created by the inertia or ineffectiveness of those who are inserted in the political process (BARROSO, 2009, p. 1-29). In fact, Barroso in another of his works stated:

> The role of the Judiciary and, especially, of the constitutional courts and supreme courts should be to safeguard the democratic process and promote constitutional values, overcoming the deficit of legitimacy of the other Powers, when applicable. However, without disqualifying their own performance, what will happen if they act abusively, exercising political preferences instead of realizing constitutional principles. (BARROSO, 2005, p. 51) (Our translation into english)

So far, in fact, the role of the judge in the materialization of fundamental rights seems evident.

We should now emphasize the existence of two other criticisms directed at judicial activism. The first would be the risks of politicization of justice.

For Ferraz Júnior, it's in the State of law that the judge is diverted from his administrative function, like that of any public official, to incorporate the expression of force originating in the State. Here the freedom and independence of the judge are born, while the State, its officials and other public agents come to answer civilly and administratively for damages caused to the citizen, whose responsibility is of the magistrate. Hence also comes: the birth of the necessary immunity of the judge for his acts, which fosters the necessary partiality and which reinforces, without any doubt, the legal security (FERRAZ JR, 1994, p. 12-16).

Once again, we invoke Ferraz Júnior's magisterium to remind us that the so-called 'political de-neutralization of the judiciary' launched and exposed it as a whole in the media, showing a conflict that considers the responsibilities and independence of the judiciary, reaching the conclusion that the legal system is at the service of implementing social values. In effect, this marketing directly affects the judiciary, so that even its neutrality in certain events is exploited politically, in order to form popular consensus, reducing the right to a simple condition of a consumer object and making it lose its prudence (FERRAZ JR, 1994, p. 16-21). In this sense Ferraz states that:

> Well, with the politicization of Justice, everything starts to be governed by relations between means and ends. Law doesn't lose its status as a public good, but it loses its sense of prudence, because of its legitimacy it ceases to rest on the *potential* concord of men, to be based on a kind of coercion: the coercion of functional effectiveness. That is, politicized, the jurisdictional experience becomes prey to a game of stimuli and responses that requires more calculation than wisdom. It follows from this that the judge's relation with the world has become merely pragmatic. Because, seeing it as a political problem, he feels and transforms his decision-making action into a pure technical option, which must be modified according to the results and whose validity rests on the proper functioning. (FERRAZ JR, 1994, p.19) (Our translation into english)

Another relevant fact that must be considered is that: from the Social State comes the figure of the so-called principle of positive freedom, where everyone is guaranteed equal access to full citizenship, whose implementation is quickly demanded from the Legislative and Executive powers, but the consequences would also affect the Judiciary, as well as alter the role of this latter (FERRAZ JR, 1994).

It means to say that, from then on, the Judiciary is also responsible for the concretization of social rights, assuming responsibilities that would initially belong only to the other powers. Regarding politicization, Cappelletti stresses:

> Effectively, the role of the judge is much more difficult and complex, and the judge, morally and politically, is far more responsible for his decisions than traditional doctrines had suggested. [...] He can no longer hide himself, so easily, behind the fragile defense of the conception of law as a pre-established, clear and objective norm, on which he can base his decision in a 'neutral' form. His personal, moral and political responsibility is involved, as well as legal, whenever there is an openness to different choice in the law. And the experience teaches that such openness is always or almost always presente. (CAPPELLETTI, 1993, p. 33) (Our translation into english)

According to Cappelletti's magisterium, initially only the United States wouldn't have offered resistance to assume the responsibilities imposed by the politicization that was initially considered an excessively heavy burden, but, that the duty to comply with the provisions

of the respective texts, requires more forceful conduct, so to ensure that the State – in the person of the Executive and Legislative powers – complies with its obligations (CAPPELLETTI, 1993, p. 46-47)[3].

For Barroso, the movements of the Courts in the direction of promoting decisions built on arguments are perfectly valid, since there are no ready solutions to all the problems that arise, as well as the lack of absolute independence of the law in relation to politics.

Regarding this theme, Ferreira Filho states that politicization has relevant support in national politics, coming from those who pursue a model of "external control" of the Judiciary, as a way of punishing the excesses committed. Effectively, the indoctrinator understands that this would be an attempt to impose on the Judiciary a politically correct standard of their decisions, mainly because they aren't the judges elected by the people, but should be controlled by the representatives of the people (FERREIRA FILHO, 1994, p. 1-17).

This risk cannot be effectively removed, as highlighted by Barroso, incumbent upon the magistrate the duty of observing the existing limits, without failing to fulfill the duties of protecting fundamental rights, incurring unfair results (BARROSO, 2009, p. 1-29).

Another risk pointed out by the critics would be the institutional capacity of the Judiciary. In this sense, Barroso clarifies that both powers exercise it, thus preventing a kind of hegemonic instance that brings risks to democracy. However, he emphasizes that in the constitutional model in force, the final word, with regard to the interpretation of constitutional rules carried out in the Judiciary, doesn't mean that all matters must be effectively decided by this. It's what happens during the analysis of demands involving technical or scientific rigor, where the Judiciary will privilege the understandings presented by the Legislative and Executive, or as an intervention act as a limiter due to extravagant decisions that compromise more relevant issues, such as the case, for example, of the public health system. In short, it reserves limited performance and only in cases where its performance is necessary (BARROSO, 2005).

A practical example of this application can be seen in relation to the judgment of the Cesari Battisti case, in which the institutional capacity remained directly addressed by the *STF*, which declared itself incompetent, recognizing the Executive's competence and technical capacity to decide on the extradition process[4].

With this, we have sufficient foundation to understand the system's functionality, capable of recognizing and guiding judgment powers and limits of decision-making powers. Even because, the circumstances that give rise to judicial activism must be recognized as a solution with a provisional character, and that its use must be applied in an eventual and controlled way, and that the expansion of the judiciary must not lose sight of the bad that affects the Brazilian democracy, which is the crisis of representation of the legislative power (BARROSO, 2005, p. 1-42)

The fact is that political parties must consider citizens as true political and potentially participatory actors with regard to the most important choices in the community. Moreover,

3 In addition to the duty of compliance foreseen by Cappelletti, it's also a fact that the magistrate is prevented from evading his legal duty to deliver the judicial provision, especially when dealing with constitutionally guaranteed rights.

4 Judgment issued by the Federal Supreme Court in the Separate Petition for Extradition nº 1085 / Complaint nº 11243 (*Acórdão proferido pelo Supremo Tribunal Federal na Petição Avulsa de Extradição nº 1085. Petição Avulsa na Extradição nº 1085 / Reclamação nº 11243*). Vote by Minister Luis Fux, p. 33. Available in: http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ext1085LF.pdf. Accessed on: July 28, 2019.

the parties must rethink their role and what they have effectively fulfilled, the latter, moreover, more focused on ideological and organizational interests than the real object, which is to make the ideals that permeate representative democracy viable (FACHIN e SILVA, 2017, p. 239).

4 CRITICAL THEORY OF LAW AND THE PARADIGMATIC CHANGE

According to Ferrajoli, two models of the State of Law are accounted for in the modern State. The first stands out for the existence of a single source of law, which is the formal one, that is, the State of Law that draws on the principle of legality and that enshrines the juspositivist understanding, praising and further strengthening the State's monopoly on production of normative rules. In turn, the second model shows obedience by the State regarding the fundamental principles and rights provided for in the Constitutional text, while preaching the division of powers and also the obedience to the maximum rule by them (FERRAJOLI, 2001, p. 31).

Regarding the phenomenon of the Constitutional Revolution, Cappelletti argues that in Europe this only occurred because of the understanding that fundamental rights require a judicial machine to become effective, so that constitutional Courts were created and constitutional processes were created to make them work (CAPPELLETTI, 2001, p. 261).

Note that important points deserve attention at this point. The first, more obvious, portrays the importance given to constitutional issues and their promotion, while the second, in turn, points to the need to create a specialized judicial structure to enforce the rights ensured from the Constitutional Revolution.

The Constitutions started to provide for fundamental rights and an important detail concerns the fact that, even though they existed before World War II, the former were recognized only for their purely declaratory character, whereas in the current model the protection of human rights is evident, in addition to acting simultaneously as a limiter of Legislative and Executive powers, that is, as an effective instrument of constitutionality control (BARBOZA, 2014, p. 85).

However, this change doesn't immediately deliver the rights provided for in the constitutional texts, providing the opportunity for the creation of a critical movement.

As Wolkmer points out, this critical model highlights a relatively new system that was inaugurated in the 1960s in the extinct Soviet Union, and that starts to question the juspositivist model that reigned sovereignly in academic and institutional circles, demystifying the legality of traditional dogmatics, while which introduced a socio-political analysis. Indeed, this model was consolidated in France in the 1970s, expanding to countries such as Italy, Spain, Belgium, Germany, England and Portugal (WOLKMER, 2015, p. 44).

This criticism sought the necessary alignment of the rules with the evolution perceived by society. In this sense, in fact, Stein points out that from this idea of changing society, an anthropological paradigm of transformation of man is extracted, which leads him to freedom

in the face of natural determinisms and historical social. (STEIN, 1986, p. 102 apud WOLKMER, 2015, p. 34). Regarding the Frankfurt criticism Stein points out that:

> It's characterized by the assumption that we are all on a plan in which there is only the human. And it's from this plan that the questions arise. The knowledge issues can no longer be resolved by appealing to nature or to theological explanations. From the destruction of the idea of consciousness, from the criticism of the epistemological models of the subject-object relation, from the rejection of theories of representation, these questions can no longer be resolved through a kind of journey into the interior, towards consciousness. It's not by describing a fictional mental-cognitive machine that we are going to solve the problem of knowledge. We will have to solve it based on the analysis of what man produces: his speech, his culture, his History. (STEIN, 1986, p. 113 apud WOLKMER, 2015, p. 34) (Our translation into english)

That said, Wolkmer points out the need for observation as to the form of knowledge that critical theory imposes, asking whether it conforms to scientific-observable knowledge or to a reflexively acceptable philosophy (STEIN, 1986, p. 113 apud WOLKMER, 2015, p. 35). Answer that is given by Geuss when asserting that the critical theory has as purpose the enlightenment and the emancipation, but not the need for empirical confirmation. Thus, they are admitted even because of the heavy evaluation screen that they suffer, but which give them the characteristic of being reflexively acceptable (GEUSS, 1988, p. 92 apud WOLKMER, 2015, p. 34)

Lack of scientific specificity that doesn't remove the critical model and the characteristic of social researcher that makes its recognized and that legitimizes its due to multiple interests of repressed groups, causing them in their self-awareness. Thus, critical theory has the positive role of ideologically bringing them to participate in an adequate process of clarification and emancipation, which meets the needs and interests of the really oppressed (GEUSS, 1988, p. 141-143 apud WOLKMER, 2015, p. 35-36).

For Coelho, this engagement doesn't include: discussions in the field of social sciences, especially in the field of law, where justice, the State and values are objects of ideological discourses. Precisely because they are objects created by knowledge, and knowing that knowledge is gradually transformed, the legal knowledge is also transformed, receiving a new assignment that promotes criticism in the sense of prospective, that is, focused on future needs based on reality social that is experienced at that time. Hence the importance of jurisprudence which, when considering other sciences in its core, allows a broader and more accurate reading of the real social conditions. It's concluded with this, that the criticism of the law brings in its belly the accumulated past not with the intention of incorporating it into the ordering as a rule, but as a tool that allows the structuring, making possible the reconstruction of the man and of the society (COELHO, 2004, p. 383).

For Wolkmer, critical legal theory can be conceptualized as:

> [...] the theoretical-practical formulation that reveals itself capable of questioning and breaking itself with the normative that is disciplinarily ordered and officially enshrined (in knowledge, in speech, in behavior and in the institutional) in a given social formation and the possibility of conceiving and operationalizing other differentiated, non-repressive and emancipatory forms of legal practice. (WOLKMER, 2015, p. 46) (Our translation into english)

In fact, the day-to-day work of critical theory is to promote the evolution of debates, in order to contemplate a wider range of interests that permeate society. In this sense, Coelho emphasizes that in the view of dogmatics, the criticism seeks to rewrite the general theory of law, mixing concepts, experience and dynamics of law, but for the author it's necessary to add the role of the jurist in the replacement of normative content, of so that him considers the context and the social reality. After all, "[...] the judge, especially, isn't responsible for applying the law, but for doing justice" (COELHO, 2004, p. 388).

It can be seen from the above that Coelho announces a new role entrusted to jurists, which is to update the norms according to the social needs of that time. Thus, this theory imposes an extremely important role on the judges, making them begin to observe with greater caution not only the cold letter of the law, but consider in their decisions the social relations that permeate society and the specific case. In fact, this paradigmatic change regarding the performance of the magistrates, as well as the valorization of the figure of the judge, had already been presented by Carnelutti; and he said:

> It's evident that the judgment suggests the figure of the judge, in which the science of law, increasingly, recognizes the elementary body of law. It wasn't thought of in the past. For a long time, the judgment was devalued, compared to the law, and the judgment appeared as a background element, compared to the legislator. Nevertheless, the truth is that, without judgment, the law could neither arise nor serve the purposes of law. Historically, judgment precedes laws: before creating laws, the chief asserts himself as a judge; the primitive formation of laws is the custom, and this supposes a sequel of judgments. On the other hand, without judgment, the law would be an unfulfilled and often inactive mandate. [...] Not only the law, but also the sentence aren't a finished legal product, that is - without metaphors -, it's not enough to achieve the ends of the law. To this end, the executive process is so necessary as the cognitive process. (CARNELLUTI, 2015, p. 83) (Our translation into english)

A similar statement can be seen in the doctrine of Ferraz Júnior when he emphasized that the state of Social Welfare unified the State and society, so that this latter seeks the effectiveness of its rights by demanding from the Legislative and Executive the materialization of the promised rights. New scenario that requires of the Judiciary to change its attributions, which starts to work together with the other powers in the implementation of the annotated social rights (FERRAZ JR, 1994, p. 12-21)

Thus, guided by the Constitutions that started to provide and deal with fundamental rights, the judges end up giving due treatment and attention to the respective rights (BARBOZA, 2014, p. 85). In effect, this constitutional model ends up transferring to the judge the task of extracting rights and guarantees provided for amid the abstract rules of the text of the constitution. In this sense:

> The open and abstract character of the constitutional norms changes the positivist paradigm of a supposed prediction of the norm to be adopted to the specific case, and countries begin, which adopted constitutionalism as a way of protecting fundamental rights against state arbitrariness, to approximate to common law, especially with regard to constitutional jurisdiction. To that extent, as there is no possibility of pointing out in advance which right is applied to the case, it will be up to the Judiciary to densify and give meaning to these rights, according to the historical, social, political, moral and legal

> context of the society at that moment. The norm, therefore, doesn't exist in the text, but only in the specific case. (BARBOSA, 2014, p. 92) (Our translation into english)

Barroso also emphasizes the role of the magistrate, remembering that an important event of constitutionalism is the institutional rise of the Judiciary in its constitutional jurisdiction, notably in the judicialization of social issues, or even those of a moral or political nature, including endowed with a certain degree of activism judicial. However, he argues that there must be a zeal with regard to legitimacy that cannot go beyond institutional limits, and whenever there are no fundamental rights or guarantees at stake, the choices must prevail by rules created by legislators. Finally, that constitutional jurisdiction shouldn't suppress the voice of society, especially because power emanates from the people and not from magistrates (BARROSO, 2013, p. 923-924).

In effect, the jurist doesn't have the role of maintaining a static normative plan, but rather updating it in order to incorporate the demands and requirements of the social reality of that moment, especially to the magistrate, who is no longer just responsible for applying the law, but, do effective justice (COELHO, 2004, p. 388).

Effectiveness that considers the wishes of society, and recognizes that: "Justice isn't something that can be reduced to a sectorial manifestation of the human: it cannot be reduced to a concept, a virtue, a norm, a value, a criterion. It's a feeling, an emotion, a passion, something that people experience and that permeates all of this" (COELHO, 2011, p. 147) (our translation into english).

Note, moreover, that the Law of Introduction to the Norms of Brazilian Law (*Lei de Introdução as Normas do Direito Brasileiro - LINDB*) in its art. 5º makes an express prediction about this possibility of teleological interpretation[5], that is, the idea of the purpose of the law that can be considered by the court, whether in filling in gaps or even to consider the consequences arising from the sentence handed down.

Siqueira Neto, in turn, emphasizes not only the need for the magistrate to observe the constitutional rules, but goes further to affirm that a new function is recognized for the magistrate, which is embodied in the "expansion of the function of the so-called Constitutional Judge who becomes an enforcer from constitutional right to the true builders of constitutional citizenship. Everything, repeat, without disrespecting the division of powers, since its performance is within the limits of the Constitution and the Legal Order" (SIQUEIRA NETO, 2015, p. 297) (our translation into english).

Furthermore, "[...] there is a paradigm shift here, moving from constitutional decision to constitutional construction, a process in which the judge becomes an agent that promotes the construction of constitutional law" (SIQUEIRA NETO, 2015, p. 297). This author cites in this same work, as an example of this statement, the content of the inaugural speech by Minister Enrique Ricardo Lewandowski, whose importance deserves reproduction:

> In this context, the Judiciary confined, since the 18th century, to the function of simple *bouche de la loi*, that is, to the role of mere mechanical interpreter of the laws, was little by little compelled to maximize its hermeneutic activity

5 Law of Introduction to the Norms of Brazilian Law (*Lei de Introdução as Normas do Direito Brasileiro – LINDB*), with the wording of Law nº 12.376, of 2010, art. 5th: "In the application of the law, the judge will attend to the social ends to which it's directed and to the requirements of the common good".

> in order to give concreteness to the fundamental rights, understood in their several generations. It so happens that, ensuring the enjoyment of these rights, today, effectively, means offering a speedy judicial provision, because, as has long been known, justice that is late is justice that fails. Among us, in fact, a new citizen's right has recently been included in the current Constitution: the right to 'reasonable process'. (LEWANDOWSKI, 2013, p. 2) (Our translation into english)

In fact, "[...] this position reinforces the mission of the Constitutional Judge integrated to the valorization of Human Rights in a perspective of concomitant realization and harmonization" (SIQUEIRA NETO, 2015, p. 297) (our translation into english).

Still referring to the same inaugural speech, Lewandowski in turn highlights the Judiciary's posture, stating that "the Judiciary, overcoming a more orthodox hermeneutic stance, which unveiled the Law only from legal rules established in the Constitution and in the laws, passed to do so also based on principles, overcoming the traditional view that had of them, considered precepts of a merely indicative or programmatic character". And he continues to affirm that "[...] the judges began to draw practical consequences from the republican, democratic and federative principles, as well as from the postulates of isonomy, reasonableness, proportionality, morality, impersonality, efficiency and dignity of human person, thus broadening the spectrum of their decisions" (LEWANDOWSKI, 2013, p. 3) (our translations into english).

Fact is, that from then on:

> "[...] the Judiciary began to intervene in issues that were previously reserved exclusively to other Powers, participating more actively in the formulation of public policies, especially in the areas of health, the environment, consumption, and the protection of the elderly, children, adolescents and people with disabilities [...] the Federal Supreme Court, in a particular way, started to interfere in borderline situations, in which neither the Legislative nor the Executive, managed to reach the necessary consensus to resolve them". (LEWANDOWSKI, 2013, p. 3) (Our translation into english)

There is, therefore, a notable paradigmatic change that demands from the State a greater attention and respect for the foreseen rights, demanding, above all from the Judiciary, a more forceful intervention, which can be seen with some ease from the phenomenon recognized as judicial activism, as remained duly dealt with on the specific topic.

5 FINAL CONSIDERATIONS

It became evident from this brief work that the construction of what we understand today as social rights faced an arduous path. In this sense, the constitutional revolution was extremely important, which, in the midst of the remnants left by the Second World War, promoted the incorporation of social rights. Thus, adding these to the rights ensured by the various generations of rights that, later, would be recognized, gives the order the constitutional guarantees that we have today consolidated.

In the Brazilian case, from the Constitutional text of 1988, social issues were duly settled within it and became the object of effective collection by society, especially in view of

the inertia of the Executive and Legislative powers. Indeed, the doctrine demonstrates that the recognized intervention in judicial activism proves to be punctual and acts, above all, in matters that involve effective risks to health and life, or even in other social issues where the neglect of other powers is also seen.

Thus, the judge, a figure called by indoctrinators as an essential tool, always guided by the Constitutional text, starts to decide in a broader, inclusive and assistential way, in order to enforce the postulates laid down in the major law. Even because it's necessary to consider that once provoked, this cannot evade the duty to decide. It's not by chance that, the research points out that it was precisely the ignored social demands and the paradigmatic changes that gave to the Judiciary the competence to deal with the questions taken to the referred body, effectively enforcing the Constitutional text of which it's the greatest guardian.

On the other hand, this brief survey demonstrates that there is political legitimacy in the Judiciary, just as there is a political portion in any sentence handed down by any magistrate, even if he uses, purely and simply, the normative text of a law, since the rule then used is effectively a legislative product widely discussed by the representatives of the people.

Furthermore, let us see that the institutional limits, too, remain obeyed, since in questionings made, in the many opportunities in which it was consulted by the other powers, the Judiciary, when it was effectively, recognized in the other the legitimacy of power. It means to say that, if there were, in fact, a exacerbated opportunism, the judiciary could take advantage of the fact that it was provoked to make the decisions that it literally wanted or understood.

Thus, if there is obedience to the constitutional limits and for everything else that has been substantiated previously, it's possible to conclude that there is no the alleged weakening of the policy at the time of the interventions of the Judiciary, since this guard shares part of the political power that was entrusted to it and that doesn't make it an imminent risk to the democratic process. On the contrary, it safeguards rights enshrined in the Constitution.

It can also be seen that not only the fundamentals that structure the decisions, but also the repercussions before and after the decision, as well as the inexistence of the Law or even the limits of its interpretation are also objects of public and notorious discussion, which this is exactly what the critical model has always pursued, all in the sense of discussing and implementing the predicted social rights, instilling in modern legal thinking the need to think about the law considering the effective fulfillment of the social predictions provided for in the Constitutional text, individually and collectively.

There is, therefore, a clear and notorious paradigmatic change, without the pseudo--weakening of any of the powers of the State. On the contrary, as Cappelletti rightly said, with the implementation of constitutional provisions by the Judiciary, both are strengthened, especially the State, which is the sum of all of them.

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THE PROCESS OF DEMARCATION OF TRADITIONAL INDIGENOUS LANDS IN THE SOUTHERN REGION OF BRAZIL: AN ANALYSIS OF LEGAL AND POLITICAL OBSTACLES

O PROCESSO DE DEMARCAÇÃO DAS TERRAS TRADICIONAIS INDÍGENAS NA REGIÃO SUL DO BRASIL: UMA ANÁLISE DOS OBSTÁCULOS JURÍDICOS E POLÍTICOS

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ABSTRACT

The proposed study aims to analyze the problem of demarcation of indigenous lands in the southern region of Brazil. Initially, the historical aspects, relevant concepts, constitutional rights and guarantees of indigenous peoples and interventionist policies in defense of these peoples were addressed. In this sense, the role of FUNAI as an organ directly responsible for the demarcations was highlighted, but, especially the current situation of the processes of regularization of indigenous areas. The deductive method in theoretical and qualitative exploration was used as a scientific methodology with the use of bibliographic and legal documentary material. It was found that one of the main obstacles to the effective demarcation of indigenous lands is linked to the absence of public policies, in which the interests of certain groups overlap with diffuse and collective interests. In addition, the lack of trained civil servants at FUNAI, the low budget and the lack of staff in the judiciary, coupled with the great demand for lawsuits of all kinds, in all spheres of this power, end up generating the impasses the definitive demarcations, a since administrative procedures cannot be finalized and, in the end, a large part of these processes will end up in the Judiciary.

KEYWORDS: Indigenous peoples. Demarcation. Indigenous rights. South region of Brazil.

RESUMO

O estudo proposto tem como objetivo analisar a problemática da demarcação das terras indígenas na Região Sul do Brasil. Inicialmente abordou-se os aspectos históricos, conceitos relevantes, direitos e garantias

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constitucionais dos povos indígenas e as políticas intervencionistas na defesa destes povos. Neste sentido, destacou-se o papel da FUNAI como órgão responsável direto pelas demarcações, mas, especialmente a situação atual dos processos de regularização das áreas indígenas. Foi utilizado como metodologia científica o método dedutivo em exploração teórica e qualitativa com a utilização de material bibliográfico e documental legal. Constatou-se que um dos principais obstáculos para as efetivas demarcações das terras indígenas está ligado à ausência de políticas públicas, em que os interesses de determinados grupos se sobrepõem aos interesses difusos e coletivos. Além disso, a falta de servidores públicos capacitados na FUNAI, o baixo orçamento e a falta de pessoal do judiciário, aliada à grande demanda de processos de todas as espécies, em todas as esferas deste poder, acabam gerando os impasses as demarcações definitivas, uma vez que os procedimentos administrativos não conseguem ser finalizados e, no final, grande parte destes processos vai parar no Poder Judiciário.

PALAVRAS-CHAVE: *Povos indígenas. Demarcação. Direitos indígenas. Região Sul do Brasil.*

1 INTRODUCTION

The occupation and conquest of the title, "New World", by European conquerors in relation to the future American continent, aimed at the exploitation of wealth, mainly precious metals, gold and silver. These metals, mainly, gold constituted the basis of measure of wealth of the new Absolutist States of the 15th century.

However, the Europeans found in this "new" territory "discovered" when crossing the Atlantic Ocean, diverse native peoples with different languages, cultures, traditions and forms of social organizations. In certain regions were found: complex civilizations (with complex forms of social organization) and others with more tribal organizations. However, all with models of social organization, totally different from European models.

At first, European conquerors, needing the knowledge of these peoples on how to survive in this "new" land, sought to understand and tolerate these peoples. However, after the emergence of the first conflicts and with the European need to exploit and enslave indigenous peoples in order to forge the economic model for exploiting the wealth of the land, a great massacres began.

At no time in the entire history of occupation and conquest of American territory, the protection of the rights of indigenous peoples and the maintenance of their lands was in the scope of this processOn the contrary, what was established was: a genuine genocide of these peoples, with a view to exterminating this culture and all their rights over their land and their millenary form of life.

Throughout the colonial, imperial, republican, military and finally democratic periods, indigenous peoples were: sometimes ignored, sometimes treated as if they were not human, sometimes treated as incapable (which somehow still remains), and their rights weren't respected, especially with regard to land rights.

The 1988 Brazilian Constitution strengthened some ideas and policies that had emerged from 1910 onwards. However, it was only with the advent of the 1988 Constitution that real attention was paid, even if on a small scale, to the rights of indigenous peoples. The 'Statute of the Indian' (*Estatuto do Índio*) was approved by the 1988 Constitution and, although outda-

ted, strengthens the need to guarantee the living conditions of indigenous peoples, both in terms of integration, which the statute provides, and in terms of maintaining their identity.

Thus, a legal and factual analysis of the current situation of indigenous peoples in Brazil will be made, more especially with regard to territorial issues and the demarcation of indigenous lands, as well as political and legal obstacles that may harm the effecting the aforementioned demarcations in the southern region of Brazil.

2 TRADITIONAL INDIGENOUS LANDS AND THE EFFECTS OF COLONIZATION

Initially, it should be noted that European occupations[3] caused significant changes in the culture and demography of the diverse indigenous populations that resided in the country. The demographic changes were due to the colonization itself, with struggles due to the demarcation and territorial conquests, diseases transmitted by white people, in addition to "[...] intensive exploitation of indigenous labor, such as slavery [...]" (our translation into english) (COLAÇO, 2005, p.11-12).

Cultural changes were due to the lack of respect for the culture of indigenous peoples, which was gradually being destroyed, since the colonizers began to impose their own culture on the colonized indians. Important changes have occurred for indigenous peoples, especially with regard to evangelization, with significant consequences for their culture, since the arrival of the Jesuits culminated in a significant change in the religious beliefs imposed from this and there. The Jesuits, coming from Europe, served primarily to the interests of the Spanish Monarchy, "occupying the territory, defending its borders, and, through tutelary power, acting as an efficient vehicle for the dissemination of European Christian-Western culture" (our translation into english) (COLAÇO, 1998, p.05).

Europeans viewed the Indians as a completely inferior species and without any capacity to govern themselves, even with the belief that there was no legal system between these peoples, which proved not to be real, over the years and after many research and analysis. Thus, through the tutelage imposed on the Indians by the Europeans, through the Jesuits, they justified by what they called, at the time, humanization (COLAÇO, 1998, p.22).

It is possible to observe that since the beginning of the European conquests and colonizations, in the "new" American continent, there was no observance of the rights of these original peoples, or of the legal systems proper to the indigenous populations, imposing as essential the implementation of situations and conditions that aimed at guaranteeing the continuity of the colonizers' projects. In this sense, the search for wealth and the imposition of culture, religion and civility of the dominants, without paying attention to the fact that the real owners of the land found at the time, were the people who were already there, with the rights of use and pre-existing occupation, with 'rules' already established (WOLKMER, 2001).

3 Europeans, according to history, when they arrived in America didn't know that they were here, believing that in reality that they landed in India, even having called the peoples who lived here as 'Indians' for such reasons. In fact, Christopher Columbus himself ended up dying, after two trips, believing that he had actually arrived in Asia. (GALEANO, 1980).

In the case of the history of the conquest and colonization of Brazil, on the part of the Portuguese who arrived here, they met native peoples (original), who in a generalized way they called 'Indians'[4] and who had a history and culture different from the European peoples[5] (COLAÇO, 2005).

When the Portuguese arrived in Brazil, several indigenous populations occupied the territory, and the Tupi-Guarani were predominantly on the coast, where European conquerors[6] from Portugal first arrived. In this way, these populations were the first to suffer cultural and social interference, as a whole, from European peoples. In addition, they were captured and forced to work for the colonizers, thus causing the annihilation of their traditions, customs, beliefs, cultures and their history, which started to mix with the history of the then invaders. (SANTOS, 1973)

Meira (2013, p. 103), points out that, in Brazil, "what was in effect from Colony to the Empire was a strong reduction in the indigenous population due to epidemics, wars and exploitation of indigenous labor", not having existed, in the first centuries, any political, humanitarian or cultural concern or interest with these peoples.

These original peoples, in addition to their own traditions and cultures, had a legal order, or legal rules, even if these weren't written or if there is no real knowledge about them. On the contrary, the indigenous peoples found in Brazil at the time of its colonization, had until then, norms of conviviality elaborated by the own group to which they belonged, which they called 'tradition'. These norms, or traditions, should be respected and followed, under penalty of the individual who disobeyed, being excluded and abandoned by the group of which he was part, after all, "[...] circumventing customs would be disrespecting taboos, it would be irate the gods and nature [...]" and this would jeopardize both, the individual and the group as a whole (our translation into english) (COLAÇO, 2005, p. 23).

The sociopolitical and legal institutions of these original indigenous peoples attended to their needs for conflict resolution, organization and social interaction for millennia. These institutions, if we can call them that, had another form of organization and constitution totally different from the European model of the same period (MONTE, 1999, p. 17).

It's necessary to highlight that although the evangelization and integration of indigenous peoples have suppressed the traditions, customs and legal system of these peoples, they still maintain traces of their own cultures, which ends up turning them into an example of resistance to the system of legal monism imposed by the colonizers (MONTE, 1999).

The first rules that governed the situations of the indigenous peoples found in Brazil were the letters exchanged between the colonies and their territories, and in the case of Brazil, it should be emphasized that it was the Portuguese Empire, through the 'Royal Charter', dated 9 April 1655 (*Carta Régia, 09/04/1655*) and, subsequently, the Pombaline Law of 1755 (*Lei Pombalina de 1755*). The aforementioned 'Royal Charter' established certain rights

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5 In the eyes of Europeans, the Indians were inferior specimens and unable to self-govern; thus, through the tutelary regime they would bring civilization and the consequent [sic] "humanization", legitimizing transmission and cultural interference, inserting them in a new socio-cultural order. (COLAÇO, 2005, p. 13).

6 "The term "discovered", which for a long time has been used in official Latin American history, disregards in a prejudiced and arbitrary manner the indigenous peoples that inhabited the American continent. For the approach in the present study, we opted for the use of the word "conquest", which represents in a more reliable way the reality that happened at that time". (Our translation into english) (PREVE, 2019, p. 148).

for indigenous people, but paradoxically, allowed certain situations for them to be enslaved (ALENCAR, 2015, p.01)

The first legal norm that brought some security to the indigenous peoples, was the Imperial Law 601 of 1850, which reserved the lands of the villages to these peoples[7], which were summarized in groups of various ethnicities, including the indigenous peoples, in a determined area of land, with the purpose, in particular, of maintaining control and catechizing the peoples gathered there (ALENCAR, 2015, p. 01).

The so-called 'villages' gave rise to what was called the "Directory of the Indians" ("*Diretório dos Índios"*), at the time created by the Marquis of Pombal, in the middle of 1757, which would last until 1798, having, during this period, instituted policies that were limited to confining indigenous populations in small land conglomerates, which, as a rule, were limited to the surroundings of their small villages. "This policy, associated with the practice of transforming all other spaces into vacant lands on which third parties were allowed to hold titles, will create land chaos, in fact and in law, in which the Indians were involved" (our translation into english) (ARAUJO, 2006, p. 25).

The 1891 Constitution didn't change the legal, human, political and national situation of indigenous peoples. Only in 1910, the Indian Protection Service (*Serviço de Proteção ao Índio - SPI*) was created - commanded by Marechal Rondon, which started to bring some peace and security to the native peoples of Brazil, until then, not considered members of the Brazilian people (ALENCAR, 2015, p.01).

Only in 1934, the Indians began to have effective legal protection, and the text of the Constitution of that year, established the private competence of the Union to legislate on the incorporation of forestry into the national communion, in its art. 5º, and in its article 129, it established "(...) respect for the possession of lands of forestry that are permanently located in them, being, however, forbidden to alienate these lands". (BRASIL, 1934)

New changes in relation to the indigenous question were only observed in the following Constitution, of 1967, and in the Constitutional Amendment of 1969 (*Emenda Constitucional de 1969*), which maintained such provisions, adding, in article 186 of the aforementioned Constitution, that the indigenous lands belonged to the goods of the Union. Meanwhile, this 1969 Amendment included in article 198 the nullity of the legal effects of dominance, possession or occupation by third parties of indigenous lands without the right to action or indemnity against the Union and the FUNAI. (ALENCAR, 2015, p. 1)

In 1988, with the entry into force of the current Brazilian Constitution, indigenous peoples began to have an entire chapter protecting them, as well as their legacies, in addition to articles scattered throughout the constitutional text, such as article 231, which protects and guarantees to the indigenous peoples, their languages, customs, traditions, land rights originally and traditionally occupied by them, recognizing them as a social organization. (ALENCAR, 2015)

7 Village: destination of areas where indigenous communities were gathered under the administration of religious orders (especially Jesuits) and which followed the so-called 1686 Missions Regiment, aiming in particular to facilitate the work of religious assistance, or catechesis. (ARAUJO, 2006, p. 25)

In terms of the relevant concepts for understanding the proposed work, it's possible to find them in Law nº 6.001/1973, which provides for the status of the 'Statute of the Indian' (*Estatuto do Índio*). Thus, it's necessary that these concepts are explained here, as follows.

The legislation in question, in its article 3º, item I, describes as being Indian, or silvicultural, any and all individuals that have pre-Columbian origin and ancestry and that can be identified as belonging to an ethnic group and that their cultural characteristics may distinguish him from national society. Still, in item II, of the same article there is a description that the Indigenous Community, or Tribal Group, is characterized when a set of Indian families or communities, who live both in complete isolation and in permanent contact, or not, with others sectors and social groups, aren't integrated to the this latter.

The article 4º of Law Nº 6.001/1973 also explains that indigenous populations will be considered isolated when they live in unknown groups or, even when about these groups we have little and vague information, usually through occasional contacts with elements of the national communion.

On the other hand, the Indians are considered integrated when they are united to the national communion and profiled in the full exercise of all civil rights, even if they maintain their own uses, customs and traditions. And, if they are in permanent or intermittent contact with foreign groups, and retaining part of the conditions of their Aboriginal life, but being open to accept certain practices and lifestyles common to other sectors of the national communion, from which they become increasingly more dependent for self-support, we can say that they are in the process of integration (FUNAI, 2018).

With regard to the concept of indigenous lands, Law Nº 6.001/73 brings in its article 17, the following legal requirements:

> Art. 17. Indigenous lands are reputed:
>
> I - lands occupied or inhabited by foresters, referred to in articles 4º, IV, and 198, of the Constitution;
>
> II - the reserved areas referred to in Chapter III of this Title;
>
> III - lands belonging to indigenous or forestry communities.
>
> (Our translation into english) (BRASIL, 1973).

Occupied lands are those that are traditionally inhabited and used by indigenous populations, although there are no demarcation actions or even recognition by the State. (CAVALCANTE, 2016)

According to Cavalcante's (2016) understanding, when talking about 'reserved lands', described in Chapter III of Law Nº 6.001/1973, reference is made to the lands expressly called 'indigenous reserves', which are demarcated by State power, so that the Indians can occupy them and take possession of them, regardless of whether there was already a previous occupation on the part of these peoples.

The 'lands belonging to indigenous communities or to forestry', on the other hand, refer specifically to the dominant territories, that is, they actually belong, with record ownership, to the Indians, which in reality, occurs in rare cases. In contrast, the two species described above, that is, the 'traditionally occupied lands' and the 'indigenous reserves', effectively belong to the Union, without title to the indigenous populations. (CAVALCANTE, 2016)

At the end of the 19th century, when European immigrants came to work in Brazil, after the abolition of slavery, it was observed in the southeast and south of the country, more specifically in the states of São Paulo, Paraná and Santa Catarina, the appearance of countless conflicts with the indigenous peoples who were expelled from their territories by the immigrants who arrived here. (MEIRA, 2013, p. 104)

And at the end of the previous century and the beginning of the 20th century, the Brazilian government decided to expand its telegraph lines in relation to the west / northwest, towards the State of Mato Grosso, culminating in the entry of employees into unexplored territory, which caused to become aware of innumerable tribes and indigenous populations hitherto unknown. In this context, the figure of Cândido Rondon emerged, a military who would defend the indigenous peoples and fight against the acts of extermination of these populations that occurred intensely in the south and southeast regions. "His motto 'to die if necessary, to kill never' has become legendary". (MEIRA, 2013, p. 104)

Due to the great influence of Caândido Rondon, in 1910 his arguments were able to influence the government to the point of creating the 'Service for the Protection of Indians and Location of National Workers' (*Serviço de Proteção aos Índios e Localização dos Trabalhadores Nacionais - SPILTN*), which became known as *SPI*, from 1918, which would last until 1967, as previously highlighted. (MEIRA, 2013, p. 105)

It's also necessary to highlight the interventionist policies to protect indigenous peoples in Brazil. One of the main milestones in this regard was the creation of the Indian Protection Service in 1910 (*Serviço de Proteção aos Índios - SPI*), which had no chance of recognizing indigenous peoples their deserved rights, especially to land, as determined by the new legislation in force at the time. In 1910 there was a movement to recognize indigenous lands, which should be done by the Member States of the Union and their respective municipalities. However, as the lands had been transformed into vacant land, and, consequently, the Portuguese Crown had transferred its to whoever interested it ((transfer of land according to the interests of the Portuguese Crown), became difficult to demarcate the territories for the occupation of indigenous peoples. (ARAUJO, 2006, p. 27)

The real changes began between the years 1967 and 1969, with the 1967 Constitution and the 1969 Constitutional Amendment, which declared indigenous lands to be the patrimony of the Union, removing, at least, the continuity of the drudgery practiced by the entities federated and private sectors allied to their governments. In addition, the legal provisions began to guarantee the exclusive enjoyment of natural resources that may exist on the lands they occupy, in addition to expressly annulling acts that had an impact on the lands occupied by the indigenous people, without any indemnity or understanding of 'acquired rights'. (ARAUJO, 2006, p. 30)

Although the protectionist speeches were fierce, in practice the military government didn't fulfill with the promises of inspection and punishment of those responsible for the squandering of the indigenous people's heritage and non-compliance with legal provisions, culminating in 1967 with the extinction of the *SPI*, and, concomitantly, with the creation of "National Indian Foundation" (*Fundação Nacional do Índio - FUNAI*). (ARAUJO, 2006, p. 31)

The *FUNAI*, however, would be built on the basis of the *SPI*, following, in fact, the same guidelines and operation, which, in practice, didn't bring, at that time, any different result. The

situation and the pressure on the government ended up forcing the military government to draft specific legislation to defend the interests of indigenous peoples, when then, in 1973, the Law Nº 6.001, called 'Statute of the Indian' (*Estatuto do Índio*), came into force. (ARAUJO, 2006, p. 31-32)

The 'Statute of the Indian' is based on the premise of the progressive and harmonious integration of indigenous peoples into Brazilian society and in the legal system. "In other words, the objective of the Statute was to make the Indians gradually stop being Indians". (ARAUJO, 2006, p. 32)

However, from 1988 onwards, *FUNAI* became a kind of tutor of the indigenous peoples, as if they were totally or relatively incapable, including, with some difficulty for the judiciary of that time to understand the possibility of the Indians to choose their own representatives, especially lawyers, since they suffered with the need to always clarify their interests regarding the representation of those - lawyers, before the police and judicial authorities. (ARAUJO, 2006, p. 41-42)

Centuries after colonization, now it's possible to glimpse the existence of the 'National Policy for the Promotion and Protection of Indigenous Peoples' (*Política Nacional de Promoção e Proteção dos Povos Indígenas - PNPPPI*), it appears that although the protectionist discourse has been widespread for a long time, it's possible to observe, in recent years, the growing concern with the real rights and guarantees provided for in the Constitution, at least, in theory. (FUNAI, 2018)

As extracted from the topic 'indigenous policy', on the Portal of the Ministry of Justice (*Portal Brasileiro do Ministério da Justiça*), it's necessary to highlight that innumerable norms have been elaborated with the intention of guaranteeing real protection to the Indians, including, with deconcentration and decentralization of the relevant policies in relation, for example, to the education for indigenous peoples and questions about indigenous health. (FUNAI, 2018)

It happens, however, that no matter how valiant and intense the drafting of legislation capable of guaranteeing rights and public policies to the Indians, it's only the constant enforcement and inspection of these norms that will be able to eliminate the homeless abandonment to which the indigenous peoples are subject. As in all national sectors, indigenous peoples need more attention and effective administrative acts capable of causing real impacts in terms of constitutional rights and guarantees, as shown in the following approach.

In this sense, due to the magnitude and impacts generated since the Brazilian Constitution of 1988 came into force with respect to the fundamental rights and guarantees of indigenous peoples, it is necessary to list some highlights. This is because, the Constitution of 1988 established the recognition to indigenous peoples of 'collective and permanent rights', "(...) creating the bases for the establishment of the right of a multi-ethnic and multicultural society, in which peoples continue to exist as peoples that they are, regardless of the degree of contact or interaction they have with other sectors of society". (ARAUJO, 2006, p. 45)

The 1988 Constitutional text, mainly in the provisions of article 231, recognizes the rights of the Indians in relation to social organization, customs, languages, beliefs and traditions, and the original rights over the lands that they traditionally occupy, determining that the Union is responsible for the protection and demarcation of indigenous lands.

It's clear, therefore, from the text expressed in the Brazilian Constitution, that indigenous peoples came to have greater protection, at least in theory, in relation to their individual and collective rights, as well as in relation to lands considered as 'traditionally occupied', and the Union is responsible for ensuring these rights.

The rights provided for in the transcribed article can be translated into: extra-patrimonial rights (such as the right to social organization, customs, languages, beliefs and traditions, that is, in a more summarized way, the right to difference), and, patrimonial right (which is summarized in the right to land/soil), the latter being considered original rights, that is, rights that precede the creation of the State itself. (OLIVEIRA, 2017)

It's possible to see, therefore, that the Constitution of 1988 brought important determinations regarding the rights and guarantees of indigenous peoples, especially with regard to the lands traditionally occupied by these peoples, guaranteeing them, in a way, that their cultural and traditional assets/goods are maintained and preserved.

In this way, the Constitution of 1988, more specifically in its article 231, assures the rights of indigenous peoples to their traditionally occupied lands, in face of the absence of express rules, which ended up causing several legal insecurities to those interested. In this sense, it's possible to note that even with the guarantees and protections of rights related to indigenous peoples by the 1988 Constitution, the social history of the formation of the Brazilian State, since the colonial period, still marks our society with profound social inequalities experienced between its people. (CUSTÓDIO; LIMA, 2009, p. 286)

Furthermore, it must be emphasized that the law has always been at the service (and still is), and was elaborated, in its most part, by a 'power-hungry bourgeois social elite'. "The normative production had as one of its functions the exercise of social control over the less favored classes, concealed by political and economic interests". (CUSTÓDIO; LIMA, 2009, p. 286)

However, it's undeniable to note the advances provided by the Constitutional Charter of 1988. From this legal statute, several complementary and ordinary laws unfolded. Thus, in order to reinforce the legal provisions that deal with the issues of demarcation of indigenous lands, now constitutionally guaranteed, the existence of the following legal instruments on the subject is emphasized: Decree Nº 1.775/1996, which provides for administrative procedures for demarcations; Decree Nº 5.051/2004, which promulgated Convention nº 169 of the International Labor Organization – ILO (*Convenção 169 da Organização Internacional do Trabalho - OIT*), on indigenous peoples; Ordinance MJ No. 14/96 (*Portaria MJ Nº 14/1996*), which came to establish rules on the preparation of the detailed report on the identification and delimitation of indigenous lands; Ordinance MJ Nº 2498/11 (*Portaria MJ Nº 2498/2011*), which regulates the participation of federated entities within the scope of the administrative process of demarcating indigenous lands; the Normative Instruction of *FUNAI* Nº 02/2012, which establishes the Permanent Commission for the Analysis of Improvements (*Comissão Permanente de Análise de Benfeitorias - CPAB*) and establishes the procedure for indemnification of the improvements implanted in the interior of indigenous lands; and, finally, the Ordinance Nº 682/PRES – *FUNAI*, of June 24, 2008 (*Portaria Nº 682/PRES – FUNAI – 24/06/2008*), which establishes the 'Manual of Physical Demarcation of indigenous lands' (*Manual de Demarcação Física de Terras Indígenas*).

Furthermore, it urges to register that FUNAI's main function, since its creation, but especially after Law Nº 6.001/1973 came into force, has always been to protect the interests of indigenous peoples, as well as their heritage, considering those relatively unable to practice self-representation. (ARAUJO, 2006)

In view of the approaches made so far, and based on the position of Araujo (2006), it appears that several measures have been taken, in recent years, so that the indigenous populations have their right to land respected, and from this derives the respect for other aspects intrinsic to indigenous peoples, such as customs, traditions, culture, religion, etc. If the laws, although still precarious in the sense of protection, have been encouraging the territorial desires of the indigenous people, it's necessary that the conducts and procedures are more viable and agile.

Thus, on the other hand, "one or the other" wouldn't be allowed to have absolute power over decisions that defer, or not, the administrative processes of demarcation of indigenous lands, thus, avoiding that errors remain surrounding the indigenous peoples to effectively exercise their power in their lands.

3 LEGAL AND POLITICAL OBSTACLES FOR DEMARCATION OF INDIGENOUS LANDS IN SOUTHERN BRAZIL

It's not possible to specify the time when the first inhabitants started to occupy the territories in South America, and, consequently, in the south of Brazil, although it's estimated, through anthropological studies, that the human presence dates, in the southern region of Brazil 13 (thirteen) thousand years ago, migrating from North America to regions of South America, and, later, settling in the southern region of Brazil. (LISBOA, 2010)

The first written records of indigenous peoples in the southern region of Brazil date from 1626 and 1630, when the Jesuits, colonizers and politicians began to migrate to this region on missions that, as history indicates, had as main objective to put an end to disputes of the region between the Portuguese and Spanish crowns. (LISBOA, 2010)

In relation to the indigenous peoples encountered when the Europeans occupied southern Brazil, the following stand out: the Kaingang, Xokleng and Guarani. (LISBOA, 2010, p. 31). The conflicts with these peoples and the European colonizer had as main element of dispute the occupation of the indigenous lands.

In this process of established conflicts, the social figure of the so-called 'bugreiros' is pointed out, who were nothing more than 'Indian hunters', since these, cornered and with their areas and territories being occupied, destroyed and with their smaller lands, started to attack the cattle and the colonists' farms in search of plundering for survival. The way the aforementioned 'bugreiros' acted, exterminating and massacring indigenous populations, was highlighted in the southern region of Brazil, since the State was unable to provide the security that the colonizers demanded. (LISBOA, 2010)

Only with the creation of official indigenous entities, such as the *SPI*, for example, was it possible to observe the beginning of the demarcation of indigenous lands in the territories of

southern Brazil, and that, despite not having fulfilled their function, in many circumstances, as already highlighted, they prevented major massacres from being committed against the indigenous people and that, in some way, the demarcation of their lands began, as the legislation in force at the time prescribed. (LISBOA, 2010)

Thus, based on the provisions of the Constitution of 1988 and Decree Nº 1.775/1996, the process of demarcating indigenous lands constitutes an administrative procedure aimed at identifying and signaling the limits of areas traditionally occupied by indigenous populations.

In relation to the aforementioned Decree, according to Araujo (2006), the procedure for demarcating indigenous lands, established in this Decree Nº 1.775/96, is divided into some stages.

The first stage is the identification, in which FUNAI appoints an anthropologist who will prepare a study on the area to be demarcated. This study will support the work of a chosen technical group, preferably formed by members of the indigenous body, as a rule, of the FUNAI, "which will carry out complementary studies of an ethno-historical, sociological, legal, cartographic and environmental nature, in addition to the land survey for the delimitation of the limits of the Indigenous Land" (our translation into english). The work carried out must be presented to the president of the '*Fundação Nacional do Índio*', who will approve it, and the official document will be published soon after, in addition to being fixed on a public mural in the Municipality where the demarcation takes place. (ARAUJO, 2006, p.50)

The second stage is called contradictory. It's the next moment, when, the publication is made and the notice is posted on a municipal mural: the opportunity opens for States, Municipalities, or any other interested party to challenge the demarcation procedure, within the period of 90 (ninety) days from the publication, requesting and presenting evidence that may establish indemnity or point out defects in the technical report. "From then on, *FUNAI* has 60 days to give an opinion on the reasons of the interested parties and forward the procedure to the Minister of Justice" (our translation into english). (ARAUJO, 2006, p. 50)

Then, in the third stage, there is the 'declaration of limits', which is the moment when the Minister of Justice, within 30 (thirty) days, must make the declaration of the limits defined in the technical study, and, finally, determine the physical demarcation of the territory in question. "Instead, however, he may choose to prescribe due diligence to be carried out in another 90 days, or even disapprove of the identification through a reasoned decision, to also be published in the official press" (our translation into english). (ARAUJO, 2006, p. 50)

Once the previous steps have been completed and the Minister of Justice has declared the limits, without any request for diligence or disapproved of the identification, in the manner previously explained, it proceeds to the fourth stage of physical demarcation.

This stage will be carried out by *FUNAI*, which will place physical landmarks, place plaques, bites in the vegetation, among other ways of marking the limits of the area defined in the technical study. "Still at this stage, the National Institute of Colonization and Agrarian Reform, as a priority, will resettle any non-Indian occupants" (our translation into english) (*Instituto Nacional de Colonização e Reforma Agrária - INCRA*). (ARAUJO, 2006, p. 50-51)

The fifth stage is the Homologation, being that "the entire demarcation procedure will, finally, be submitted to the President of the Republic for ratification by means of a decree" (our translation into english). (ARAUJO, 2006, p. 51)

Finally, the sixth and final step consists of Registration. "The demarcated and homologated Indigenous Land will be registered, within 30 days, at the Real Estate Registry Office of the corresponding district and at the Union Patrimony Secretariat" (*SPU - Secretaria de Patrimonio da União*) (our translation into english). (ARAUJO, 2006, p. 51)

In this way, the administrative procedure for the demarcation of indigenous lands can be considered an 'act of a purely declaratory nature'. In other words, the administrative act of demarcating indigenous lands doesn't constitute any right, but only, recognizes an existing right, which, as described above, is an original right, arising from the Constitution of 1988.

In addition, as indigenous lands came to be considered as Union assets, they are, as already stated, inalienable and unavailable, as well as, the rights over them have become imprescriptible, and these lands currently house around 300 peoples throughout the national territory. Currently, it's possible to observe 462 indigenous lands regularized in Brazil, occupying around 12,2% of the national territory, with the largest concentration is in the area called the Legal Amazon (*Amazônia Legal*). Of these areas, the South and Southeast Regions have the lowest percentage of distribution. (FUNAI, 2018)

In the areas of greatest impact resulting from colonization, which developed economically more intensively, the possession of the Indians remained low and sparse, without taking into account the real needs of these peoples to maintain their way of life and their survival. It's precisely in regions such as Mato Grosso do Sul, and more especially the States of Paraná, Santa Catarina and Rio Grande do Sul that there are the greatest incidences of conflicts regarding the 'land tenure regularization of indigenous lands' and territorial disputes.

Regarding policies to encourage the regularization of indigenous lands, the following is extracted from the *FUNAI* online portal:

> This occurs based on specific policies, tax incentives and transfer of federal resources exclusively destined to indigenous lands and to indigenous policies developed inside and outside indigenous lands (such as: ecological ICMS, transfers related to the territorial and environmental management of indigenous lands, transfers related to indigenous school education, resources related to housing policies aimed at indigenous lands, resources destined to actions of ethno-development, promotion of indigenous production and agricultural technical assistance in indigenous lands etc.). Especially in the states and municipalities located on the border, the demarcation of indigenous lands guarantees a greater presence and state control in these especially vulnerable areas and, in many cases, of remote access. (Our translation into english) (FUNAI, 2018)

It's observed in the text above that the Union, responsible for ensuring the application of constitutional and infraconstitutional rules, has policies to encourage Municipalities and States to implement and ensure the demarcation and regularization of indigenous areas, including with the transfer of resources and tax incentives.

In addition to the tax incentives and transfers of resources that benefit the federated entities, the regularization of indigenous lands brings, albeit indirectly, a benefit to society as a whole, starting with the reduction of conflicts over lands, understanding that these regularizations contribute to the construction of a multi-ethnic and multicultural society, and, finally, keeping alive the traditions and way of life of the indigenous populations, which end up enriching the country's cultural heritage. (FUNAI, 2018)

In addition to all the benefits and recognition of the right of human dignity of the Indians, it must be emphasized that the demarcation of indigenous lands brings benefits to the environment, and thus, has a direct impact on the international community, since the lands of the Indians are the ones that most maintains environmental protection.

However, according to Barros and Barcelos (2016), *FUNAI* faces multiple difficulties in equipping it, especially with regard to the lack of servers and qualified personnel to carry out the procedures required for the demarcation, which ends up being left to the Foundation, as rule.

Its possible to identify as main obstacles to the demarcation and regularization of indigenous areas, according to Barros and Barcelos (2016), budgetary and personnel restrictions at *FUNAI*, in addition to political pressures that stifle the constitutional right to land, the main claim of these peoples.

As stated by the employees, in a letter sent to the Government and the press, in 2016, *FUNAI* had 7 Regional Coordinations (*Coordenações Regionais - CR's*) and 297 Local Technical Coordinations (*Coordenações Técnicas Locais - CTL's*), decentralized units close to the indigenous people, and in many of this *CTLs* there are no employees, and when there are, there are only three. (BARROS E BARCELOS, 2016)

There are reports, including of cases in Paraná in which the Mayors of several Municipalities met to coerce and threaten the lives of *CTL's* employees, who even had to leave the regions, moving to Brasília. (BARROS E BARCELOS, 2016).

More than the obstacles caused by FUNAI's lack of structure, it's necessary to pay attention to the fact that the greatest obstacles to the effective demarcation and regularization of indigenous lands are to be found in the political and economic dispute.

Ruralist and agribusiness benches are the biggest obstacles to the realization of the demarcation of indigenous lands, since, driven by their own interests, landowners focused on agriculture and livestock, in addition to the large timber and mining companies, among other related companies to the extraction of natural resources, and all pressure the government politically so that the regularizations do not affect the progress of their businesses.

In the South Region of Brazil, the demarcation processes encounter numerous obstacles, especially due to the large number of registered property titles. This supposed regularity of lands duly registered in the name of owners who occupied them or obtained their titles many decades ago, makes political pressures more intense, including, with greater ease of articulation in the Judiciary. (BARROS E BARCELOS, 2016)

"In a context of reprimanding the country's exports, which has become even more dependent on agricultural and mining commodities, the contradiction with the indigenous agenda is evident again". (Our translation into english) (BARROS E BARCELOS, 2016, p. 1)

In addition, the judicial machinery is also outdated in relation to the number of civil servants, from technicians to magistrates and members of the Public Prosecutor's Office (*Magistrados e Membros do Ministério Público*), which has long been in existence. This lag of civil servants, as is known, makes Brazilian justice overly long, and, in one way or another, almost all administrative demarcation processes end up generating some kind of discussion in the judiciary.

Barros and Barcelos wrote (2016, p. 01):

> In 2014, demarcations of three indigenous lands were canceled after a decision by the Second Panel of the Supreme Federal Court (STF). Two of these lands are at the epicenter of violence against indigenous peoples, Mato Grosso do Sul: TI Guyraroka, of the Guarani and Kaiowá peoples, and TI Limão Verde, of the Terena people. TI Porquinhos, belonging to the Canela-pãnjekra people of Maranhão, also had its demarcation canceled. The Supreme Court, however, has already adopted contrary positions. The court recently denied following a writ of mandamus requesting the revocation of the demarcation of the TI Morro dos Cavalos, in Santa Catarina, based on the timeline thesis. (Our translation into english)

In a general context it's possible to declare that the State, as a whole, has a lag of employees and trained personnel in all areas, ranging from *FUNAI*, which is responsible for the technical studies and stages of the administrative demarcation process, ending in the Judiciary, where most of the demarcation processes end.

In addition to the lack of state structure, it appears that private interests still tend to overlap with diffuse and collective interests, since one of the biggest, if not the biggest obstacles to the demarcation and regularization of indigenous lands are the political and economic sectors, in which agribusiness entrepreneurs, and other branches linked to the extraction of goods and products from the land, influence, through their benches, the decisions of the Executive, Legislative and Judiciary.

The right of indigenous peoples to lands, especially those they traditionally occupy, aims to: respect the cultures and traditions of native peoples, guarantee the reduction of territorial conflicts, promote sustainability and preserve the environment, in addition to ensuring that Municipalities and States fulfill their obligations to provide dignified care to their citizens. (FUNAI, 2018)

5 FINAL CONSIDERATIONS

During the first centuries of European occupation in Brazilian territory, indigenous peoples were massacred, killed, enslaved and, the most part, expelled or removed from the lands that they originally occupied. In the name of progress, civilization and private and governmental economic interests, indigenous peoples began to lose their traditions, customs, religions and forms of primary organizations, although, to a large extent, these peoples struggle to keep the ethnic memories of their people alive.

Regarding the procedures for the demarcation of indigenous lands, it appears that very few are the effective conducts, as the processes have been paralyzed due to the interests of certain economic groups or political groups. The dismantling that FUNAI, as a public space of the State that promotes public policies, has suffered includes reductions and cuts in budgets and personnel structure. This fact, combined with the procedural slowness of the Judiciary and the countless resources available to third parties interested in preventing demarcations, end up causing the delay in completing the demarcation processes of indigenous lands.

Throughout the Brazilian territory, especially in the South Region, the greatest obstacles to the demarcation and regularization of indigenous lands are to be found in the political and economic conflicts linked to the interests of agribusiness, in view of the fact that it's a region with high speculative capital of the land for the production of commodities. Therefore, disadvantaging those who are the original occupants of these territories and who end up being marginalized and excluded from any process of recognition of their original rights, especially the right over the land they live on.

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ACCESS TO THE JURISDICTION OF JUSTICE IN COMPLEX CONFLICTS: CONTRIBUTION OF THE ROMAN EXPERIENCE TO SOLUTIONS BY JUDICIAL PUBLIC HEARING OR EXTRAJUDICIAL PUBLIC HEARING

ACESSO À JURISDIÇÃO DA JUSTIÇA NOS CONFLITOS COMPLEXOS: CONTRIBUIÇÃO DA EXPERIÊNCIA ROMANA NA SOLUÇÕES POR AUDIÊNCIA PÚBLICA JUDICIAL OU EXTRAJUDICIAL DELIBERATIVA

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SUMMARY

With the teaching method of the professional master in law of UFSC, whose area of concentration is access to justice, the article is based on the Roman sources and Iurisdictio, with a theory for popular participation in complex conflicts, through audience Deliberative judicial public. Exemplifies with a proposal of institutional structure and own procedural rite, elaborated with legal operators in Brazil. The result points to a theory of its own, and a model text for practical guidance.

KEYWORDS: Public hearing. Jurisdiction. Access to justice. Complex conflict. Collective assets.

RESUMO

Com o método de ensino do Mestrado Profissional em Direito da UFSC, cuja área de concentração é Acesso à Justiça, o artigo aventa, com base nas fontes e na iurisdictio romanas, uma teoria para a participação popular nos conflitos complexos, através de audiência pública judicial deliberativa. Exemplifica com uma proposta de estrutura institucional e de rito processual próprio, elaborados junto a operadores jurídicos no Brasil. O resultado aponta para uma teoria própria, e um texto modelo para orientação prática.

PALAVRAS-CHAVE: *Audiência pública. Jurisdição. Acesso à justiça. Conflito complexo. Bens coletivos.*

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INTRODUCTION

The Professional Master's in Law at the Federal University of Santa Catarina (*Mestrado Profissional em Direito da Universidade Federal de Santa Catarina*) (2019)[3], Course created in 2015 and installed in November 2016, has had a major impact on the methodology of legal education and the introduction of new technologies for access to justice (Federal University of Santa Catarina (Universidade Federal de Santa Catarina), 2019)[4] in Brazil: the student is challenged from a concrete case of his professional experience, to describe the problem in its casuistry and to build solutions with the help of theoretical contributions from the Course, the institution in which he works and the research to which he is dedicated.

This type of methodological posture contrasts with the traditional model of Brazilian legal education, which prefers to privilege the opposite way, from the abstract to the concrete. This work is devoted to the problem and tries to compare the experiences: Roman (casuistic), and modern (metaphysical and fragmented). Two stagnant matrices, theoretically separate, but historically inseparable, and both face each other in front of the complex conflicts of today; which point to the need to review the entire pattern of legal thinking that has prevailed in recent centuries and build a new model.

With the object of this question and this proposal, under the bias of the university teaching of Law, the article sees the legal reasoning itself, as the mental and technical process that takes place in normative and jurisdictional contexts, aimed at decidability of conflicts. It presupposes legal reasoning, the existence of its own method under a set of valid formulas, which can be validly used. The Romans taught that the *ius* sometimes applies to the pertinent and sometimes it's built to measure for the specific case.

Said May (1907, p. 59 *et seq*) that the Law, being a historical phenomenon, people and things receive from it an artificial and technical version, in which it does not prevail: point of view or aspect of its natural qualities. The person becomes *persona*, with roles to play, and the things (*res*) become the object of rights, in the situation of goods/assets (*bona*); what gives rise, in conflicts and in the historical perspective, to the rites: *legis actiones*.

Through the form system (*per formulas*), adds Maynz (1891, p. 498), the Roman *iudicium* was simplified by a series of measures that culminated in the Ebucia Law, in ends of the Republic, but before Cicero. This is the period to which this article refers, when dealing with sources, also considering the two *Iuliae* laws that reformed the Ebucia Law under Augusto and gave the full feature to the *formatted* process, according to Gaio (CORREIA, 1955, p. 1-289).

Said Aristotle in Poetics (2011, p. 44) that poetry is born from the propensity to imitation from the person's first knowledge, and the natural reality that imitation provides pleasure. And that it is not the function of the poet to faithfully report the facts, in the way that this is imposed on the historian; because his commitment, as a poet, is to the universal, not to the particular: he expresses, in beauty, the aesthetic dimension of his worldview. However, the

3 In this course, the Area of Concentration is: Law and Access to Justice. With the following Lines of Research: 'Access to Justice and alternative forms of conflict resolution: the administration of justice from the perspective of dialogue'; and, 'Access to Justice and judicial and administrative proceedings: the administration of justice from a combat perspective'.

4 Aiming to have an impact on the public institutions to which its students belong, the Course promotes the: Access to Justice and New Technologies Seminar. Professional Graduate Program in Law at the Federal University of Santa Catarina (Seminário Acesso à justiça e novas tecnologias. Programa de Pós-Graduação profissional em Direito da Universidade Federal de Santa Catarina). Florianópolis, 10-11 Jun. 2019. Available in: http://mpd.posgrad.ufsc.br/. Accessed on: June 10, 2019.

Law, it should be added, seeks to imitate itself; with its own and shared method of dealing technically with facts as evidence, in the face of the objective existence of a conflict, to be decided in a given legal order.

Legal reasoning, in other words, pursues the justice in a constant and perpetual way, in the desire to give each one what belongs to each one. But justice is not revenge. What is fair isn't born of just indignation, but of equity, Digesto has already said (PILATI, 2013, p. 40)[5]. The facts are of interest to the lawyer, thus and in this context, in the dimension of evidence, which submits the version and the argument, in search of the necessary decision.

However, going back to the general objective of the article, things aren't so simple, when comparing modern justice with the Roman *iuris dictio*, regarding the complex conflicts that threaten the planet, even in spite of the outdated model in force. Here's the problem. And what the article aims, finally, is to point out a direction for the solution of complex conflicts through the self-composition, through the participative and deliberative public judicial hearing.

Complex conflicts, for this article, are those that involve interests of the community in any aspect, including those of great social repercussion, repetitive demands and demands provoked by great litigants. Likewise those that concern collective fundamental rights, such as the environment and the 'Participatory Master Plan of the Municipalities' (*Plano Diretor Participativo dos Municípios*). Because the density and multiplicity of interests and of people, don't open another perspective than that of self-composition, involving authorities from different spheres, in addition to conducting a competent magistrate.

The text is developed in five sections. The first pertinent to the dimension of the Roman sources, contextualized in the plans: political, philosophical, legal and jurisdictional. The second concerns the modern dimension of law, with emphasis on the metaphysical treatment of the conflict, which it operates. The third and fourth, focused on: decidability of complex conflicts, which challenge the approximation of the two models, ancient and modern; moving towards a fusion in a new paradigm, which arises from the questioning of the prevailing legal structure and culture; the latter, too focused on the individualistic and autocratic dimension, inadequate to face complex conflicts.

And the fifth section is a report of research carried out by the author of this article with the Labor Court of the 12th Region (*Justiça do Trabalho da 12ª Região*), in Santa Catarina, which culminated in a proposal for an appropriate structure and procedure for a public hearing in the Labor Court. A conclusão, assim, é com uma proposta concreta de institucionalização da audiência pública, teoria e prática, no Brasil.

1 THE DIMENSION OF SOURCES: THE ROMAN MODEL OF JURISDICTION UNDER THE EBUCIA LAW

One of the major errors in the study of sources is to restrict the interpreter to the legal aspect, without worrying about the framework: historical, political, philosophical and jurisdic-

5 Literally: *Hoc Edictum summam habet aequitatem e sine cuiusquam indignatione iusta*.

tional of the revisited experience; it's undoubtedly up to him to know and take into account: the real distance between the two eras, his and the other to which he reports; finally, and most importantly, for a transformative reading of the sources it's necessary to start with a theory that transforms the present. Without that it does't advance.

In the case of this article, the visit to the sources is largely based on the postmodern theory of Law (PILATI, 2011). In summary, the theory proposes: overcoming the modern public--private dichotomy; bringing to the fore, in return and inspired by Roman law, the trilogy of goods/assets in a new configuration: public, private and collective. Collective are those fundamental social rights, like the environment, that belong to all citizens, in off-balance-sheet condominium (*condomínio extrapatrimonial*).

At the root of the proposal is an idea of recovering the direct sovereignty of citizens, so that they can exist and act collectively at the political and legal level, in the representative system; and so they can deliberate in a participatory judicial public hearing at the level of exercising collective rights. With this, the 'social function', in turn, distances itself as a synonym for 'solidarity', merely, since economic interests may come up against in the autonomous rights, of other holders, as observed, *mutatis mutandis*, in the neighborhood rights.

This idea is of Roman inspiration, because on the political level, the end of the republic is of direct democracy in Rome: sovereignty resides in the *populus*. The laws are of the initiative of the Judiciary, are approved by the *populus* and confirmed by the *auctoritas patrum* of the Senate and, well, by the T of agreement signed by the Tribune of the Plebe. It isn't a representative law, therefore. It should also be noted that the word *derectum* (of Judeo-Christian inspiration) wasn't used yet, but, yes, the term *ius*, that was used to represent the entire justice system (PARICIO; BARREIRO, 2010, p. 22)[6]. And the property was still of a family character and not individual, as it would be in the modern constitution.

At the level of values, Rome, at that time, was focused on 'strengthening families' with a view to military power and the subjugation of peoples, and not to the development of an economic-financial system, as in the modern molds of hegemony. And the *iuris dictio*, under the *ordo iudiciorum privatorum*, constituted a great private arbitration system, far from the state shape that, later on, would be implanted under the representative aegis in which we live today.

The *iudicium* was carried out in two phases, by the form system, then in force, and under the baton of the Praetor; a temporary civil magistrate, elected by the *populus*, who assumes by lowering his edict, by which he introduces new interdictions, new actions and exceptions, to face new conflicts (today it may be said: new rights); and presides over a process, which orders the most (in the *in iure* phase), without worrying about condemning. Only condemnation is considered in the second phase (*apud iudicem*), which took place with the judge or arbitrators of the parties' choice; and the judgment was based: on *ius* or on fact, on good faith, on equity, in short, depending on the specificity of the conflict, enabled in the formula.

The process belongs to the parties, because in truth it is established between tenants of the public thing, who in addition, have the prerogative to choose any citizen to exercise the role of *iudex* (in the simplest causes) or of *arbitri* (when the judgment should be by equity and by more than one judge). And so the Romans faced transformations and new conflicts

6 Between the 4th and 9th centuries the term *derectum* completely replaced the Roman word *ius*. The Roman jus' was replaced by the idea of Judeo-Christian moralizing rectitude.

through the *iuris dictio*, and not through representative state laws, along the lines of modernity.

In short, and to close this part: the complex and participatory self-composition judicial process can only be constructed legally in Brazil, if the theory and the legal culture learn, with Roman law, as is done in the jurisdiction of direct democracy. Because modernity, as you can see in the next section, has no form or model figure to behave it.

2 THE MODERN DIMENSION: THE STATE MODEL

In order to approach the current system, it's necessary, first of all, to bear in mind that modernity is turned, in terms of values, to economic rationality. Everything that exists outside of us, the *res* as the Romans defined it, is primarily intended, politically and legally, to the game of economic interests. In this sense, all science moves and is governed by technologies of profit and accumulation; so that population and technological growth accelerates and intensifies, for example, environmental destruction. Because the environment is not property in the strong sense of this term, privately owned. In calling the environment "right", the real meaning, in practice, is that the environment is a police case, at the mercy of state voluntarism.

The political guise of such a philosophical design (or economic more properly) is an 'order suit': the representative system, of indirect democracy. An ingenious model, which aligns public policies to hegemonic economic activity, of free enterprise under loose, and sometimes conniving, state control. The *populus* of the Roman era gave way to the dichotomy: State (with the supremacy of state public law) and Civil Society (amorphous and legally, non-existent, limited to electoral majorities). The electoral debate, already denounced by Nabuco (2015, p. 35), makes little progress, beyond the accusations and personal moralisms.

At the legal level, it's a system that operates through the stagnation of collective, that is, the automatic disqualification of 'collective off-balance sheet interests', thus relegated to second-class tutelage, under the responsibility of a lenient State, as with the forest reserves in the face of uncontrollable deforestation. Because the whole system is geared towards economic exploitation, and protecting the environment, investing in health, in education is expensive and uneconomical for reigning thinking.

In this context, jurisdictional activity makes - under the responsibility of the State and its autocratic power - the judge 'the mouth of the law' (representative), or little more than that; since it operates a system aimed at individual conflicts, previously cut and packaged for consumption of an order that does not sympathize with conflicts in their real complexity. It tends to work on the level of formalities and technical issues, since the truth of the conflict is previously excluded from consideration, because the model itself is untouchable.

Under modernity the conflict gains a metaphysical dimension, of abstract operation by subsumption, and the words themselves, as Wilde said (2017, p. 74)[7], deviate, under the

7 In this context, says Wilde, that all forms of government are doomed to failure (p. 38); because the property model *hinders* (*estorva*) (p. 33) the development of (true) Individualism.

tyranny of political authority, from the proper and true meaning, *to express the obverse of its exact meaning* (*para expressar o anverso de sua exata significação*). The vital human space of intuition is closed, as Nietzsche says (2017, p. 52), and in the sameness, *ordinary geniuses have a grotesque ability to, in the face of the deepest and richest saying, see nothing but their own current opinion* (*os gênios ordinários têm uma grotesca habilidade para, diante do dito mais profundo e rico, nada ver a não ser sua própria opinião corrente*).

3 THE DIMENSION OF COMPLEX CONFLICTS: NEED FOR SYSTEM REVIEW

The limitations of today's legal-political model are revealed to the greatest extent in the face of the more complex conflicts, which it's unable to resolve, and which today affect the entire planet and the economy itself; it is the case of global warming and major environmental tragedies, such as the rupture of ore tailings dams in Minas Gerais, Brazil (CASTRO, 2019). These are problems that cannot be solved within the scope of public policies and ordinary state police instruments (these that are much more geared towards being condescending to the cause than committed to the solution and prevention).

Complex conflicts, therefore, are those that stem from the global networked economy; of activities that tend to shift the environmental cost to the periphery and transfer the benefits to the central countries. As with: pesticides, deforestation, pollution from mining activities; as is the risk of tailings dams in Brazil. These are conflicts that indiscriminately affect people, goods, assets and the rights of innocent populations, as a direct result of the legal model that favors a certain economic activity, and relegates true legal security to second-class protection.

This is because the other rights, which the State relegates, are downgraded *ab ovo* by the legal system in force in the world, given that they are at the risk of state voluntarism at the internal level and summit meetings at the external level; collegiate in which the hegemonic will of those who benefit from distortion prevails. And so, for so long that things are like this, it seems normal for Law to be inane and apparently uncommitted to conflicts with greater social impact. In the face of tragedies such as Brumadinho's in Minas Gerais, it seems that it all comes down to identifying culprits and pursuing indemnities, without touching the causes for the prevention and substitution of opportunistic and anti-economic technologies.

It is a model that refuses to return citizens to the condition of populus, as the holder of collective goods; that for a long time excluded from the legal systems the in iure phase of the Roman process, in which the magistrate more ordered and dealt with sovereign citizens, leaving the act of condemning for the second moment, already in the plane of effects, after being exhausted the space for creating law for the specific case.

The question under these conditions is only one: how to reestablish the role of Law so that it acts in real time, at today's speed, as a mediator of any and all complex conflicts? How to become an instrument for absorbing the new, facing the challenge of new technologies, without denying the essence of *suum cuique tribuere*? There is no doubt that it's necessary

to recover the three elements of the Gaius' triptych: to restore the person's sovereignty as a *populus*; overcome the traditional public and private of Modernity, and return to the citizens the condominium on collective goods, such as that of a balanced and healthy environment; finally, to rescue, at the level of *actiones*, the complex collective process, of deliberative popular participation, of self-composition.

4 OUTLINE OF A MODEL TO DEAL WITH COMPLEX CONFLICTS: NEW ROLES FOR PROCESSUAL SUBJECTS FROM THE BRAZILIAN CONSTITUTION OF 1988

It isn't a question of excluding the State, or disallowing its autocratic jurisdiction; but to optimize the system in the constitutional plenitude of art. 1º of the Constitution of the Federative Republic of Brazil of 1988 (*Constituição da República Federativa do Brasil-CRFB/88*), which establishes in the sole paragraph that sovereignty is exercised: through elected representatives or directly, under the terms of this Constitution (*por meio de representantes eleitos* ou diretamente*, nos termos desta Constituição*).

The system of 'complex jurisdiction' necessarily encompasses the two dimensions of sovereignty: the representative and autocratic, as it normally/ordinary belongs; and the participatory, directly exercised by the *populus* - regarding collective goods; that is, in relation to those goods/assets that cannot be disposed of individually but collectivelyThis reveals a new and expanded jurisdictional framework, with the inclusion of new roles to be played by procedural subjects, in the face of this new category of involvement, which are the 'fundamental collective rights'.

Therefore, one of the dimensions of complex jurisdiction is the due legal process of exercising collective rights in the face of other private or public state claims and interests; its object are goods/assets that belong to the whole community, just like the environment, to which we are all condominiums. It always involves a plurality of subjects and interests, and works in pursuit of consensus. The appropriate procedural route is that of the deliberative public judicial hearing[8]. Not that we cannot operate out of court; but the involvement, the social dimension, is of such intensity in such cases, that the presence of a magistrate becomes essential to the conduct, to the satisfaction, of the procedural acts.

The other dimension, parallel to the complex jurisdiction, is the traditional, with an autocratic, punitive, condemnatory aspect. In each case, it's up to the parties and the magistrate to give due consideration to the specific demand, through the participatory or autocratic way, in what is incumbent on them, depending on their nature and the provisions of the order. However, these two alternatives are completely different and are based on their own procedural forms.

In Mexico, for example, a lawsuit was recently filed in defense of clean air; but by the traditional autocratic way (FOLHA DE SÃO PAULO, 2019); the Judiciary condemned the State

8 On the judicial public hearing, previous works, more detailed, in Pilati (2017) and (2015, p. 359-389).

to limit pollution, which is certainly very difficult to quantify and to execute without bringing together all the protagonists: polluters, authorities, the general population, technicians, scientists and all the information to be previously collected.

Proceedings of this nature cannot follow any procedural route other than that of the deliberative public hearing; which obliges the magistrate to set up a collective forum for studies and for forwarding dialogued decisions, in all competent spheres, identifying the causes and compromising all sectors and subjects involved. This magistrate, necessarily, has to be inspired by the Roman jurisdiction, because his role would be to order and coordinate a great task force aiming at sustainable development, to accommodate/balance the burdens and bonuses of the economic process.

In fact, the role of the Jurisdiction in this case is: to preside and mediate a great collective effort, to gather knowledge and information, to make diagnoses, to make possible discussions of alternatives and new technologies, with the State participating, receiving orders, making resources and supplies available, finally, enabling a process of effective and sovereign participation of the *populus* in the pursuit of the just and the best quality of life.

Certainly, the world wouldn't be the same, as the applicable Law would be being built from the solution by consensus of conflicts in its own reality.

5 REPORT OF A THEORETICAL-PRACTICAL STUDY OF JUDICIAL PUBLIC HEARING IN SANTA CATARINA

At the beginning of 2014, the Magistrates and the Judicial School of the Regional Labor Court of the 12th Region (*Magistrados e a Escola Judicial do Tribunal Regional do Trabalho da 12ª Região*), encouraged by the policy of the National Council of Justice in Brazil (*Conselho Nacional de Justiça no Brasil*), decided to focus on the problem of the *Public Hearing* (*Audiência Pública*). Overcoming the practice of 'simple public consultation' and facing the issue in terms of material and procedural law, relieving the Labor Judiciary (*Justiça Trabalhista*) of the repetitive demands, of the great litigants and of the great legal voids that scoff at the Justice. The 'Participatory Judicial Public Hearing' (*Audiência Pública Judicial Participativa*) should be this instrument.

It was necessary to discuss and define the institutional structure and the respective process, guided by a new legal theory; capable of reaching and mediating collective conflicts, case by case and at the macro level, through self-composition under the aegis of fundamental social rights. To seek a broader notion of the traditional concepts of part/suitor, conflict, access to justice, process. Outline a theory aimed at participation in the Labor process; redefine the role of jurisdiction; and call, for that, the universe of magistrates involved in the practice of the forum, within the scope of the Regional Labor Court of the 12th Region (*Tribunal Regional do Trabalho da 12ª Região*).

The starting point was to adopt the 'paradigm' concept as a method (KUHN, 2013, p. 115; MORIN, 2011; MORIN, 2000, p. 40)[9] as an instrument of comparison / transformation between: Antiquity, Modernity and Post-Modernity. Modernity centered on the individual and on the State, on political representation with indirect democracy, parliamentary laws and their complementary ties, and which prioritizes the economic activity, the individualism. Postmodernity centered on the sovereign political participation of Society, on the notion of collective subject, of collective goods/assets, within the scope of fundamental social rights, in short, under the terms of the Constitution of the Federative Republic of Brazil. And Roman antiquity as an inspiration for direct democracy and jurisdiction, rooted in the *populus*, as a great private arbitration system.

After one year of discussion with approximately one hundred magistrates, the Group's proposal was that the public hearing could be institutionalized through two Resolutions to be promulgated by the higher authority: the first by creating a Permanent Nucleus of Public Hearing (*Núcleo Permanente de Audiência Pública – NAP*); and the other regulating the procedure. With this solution, the difficulties and obstacles raised by the Judges were contemplated, in order to reconcile the new structure with the normal activities in the Labor Justice at First and Second Instance (*Justiça do Trabalho em Primeiro e Segundo Grau*).

The Permanent Nucleus of Public Hearing' (*Núcleo Permanente de Audiência Pública – NAP*) creation Act would be introduced with a series of *Consideranda*: ground in art. 1st of the Brazilian Constitution; access to justice as access to just order (art. 5, XXXV); judicial policy refined by consensual mechanisms for dispute settlement; aimed at social pacification and the prevention of litigation, in the face of excessive judicialization; in line already practiced by the courts, according to the Resolutions in force, to opt for the creation of 'Cores of repetitive appeals controllers' (*Núcleos controladores de recursos repetitivos*), in addition to mechanisms for the composition of mass conflicts; the need to plan, implement and improve actions aimed at complying with the judicial policy of pacifying conflicts with collective reflexes; in short, the creation of the Permanent Nucleus of Public Hearing (*Núcleo Permanente de Audiência Pública*) would aim to standardize existing structures, professionalize and concretize impersonality in the functioning of organs aimed at self-composing media at the collective level.

In eight articles, it was implemented, through a Resolution to be provided by the President in Regional Labor Court of the 12th Region (*Tribunal Regional do Trabalho da 12ª Região – TRT 12º Região*) the Permanent Nucleus of Public Hearings (*Núcleo Permanente de Audiências Públicas – NAP*), *linked to the presidency of the TRT, as a member of 'Permanent Center for Conciliation and Support for Judicial Units of First Instance' (Núcleo Permanente de Conciliação e Apoio às Unidades Judiciárias de Primeira Instância – CONAP), responsible for coordinating the system of self-composition of issues involving significant social repercussions, repetitive demands and great litigants.*

This would happen with integrated performance of Judges and Superior Court Judges, *through the participation and cooperation of people, bodies, entities and actors from the social, economic and political spheres, within the scope of labor relation*s. The *NAP*, speci-

9 *Paradigms are the principles of the principles, some master notions that control the spirits, that command the theories, without being aware of ourselves* (Our translation into english) (*Os paradigmas são os princípios dos princípios, algumas noções mestras que controlam os espíritos, que comandam as teorias, sem que estejamos conscientes de nós mesmos*) (MORIN, 2000, p. 40).

fically, would be composed of Superior Court Judges (President, *Corregedor*, Director of the Judicial School) and three elected magistrates (a substitute judge, a full judge and a superior court judge). The Coordination would be exercised by the School Director, who would conduct himself according to the rules foreseen in the paragraphs of art. 2º.

Who would appoint the magistrates to hold the public hearing would be the *NAP*, suspending the deadlines for decision-making acts of whoever was summoned. The School would be in charge of promoting training courses for conducting a public hearing and the missing cases would be resolved by the *NAP* itself. It's observed that the structure of coordination of public hearings is a body/department apart from routine jurisdictional activities, and is centered on the Judicial School.

The second Resolution would regulate the holding of public hearings within the scope of the *TRT*, in view of the creation of the *NAP*, with constitutional basis in art. 1º and 58, § 2º and *considering the existence of issues of superior social relevance and whose interest goes beyond that of the parties and demands interdisciplinary technical knowledge and participation by the Society*. There are seventeen articles.

The art. 2º defining Public Hearing: for the purposes of this Resolution, it's an instrument of participatory and face-to-face deliberation conducted by Labor Magistrate(s), with the objective of obtaining the self-composition of conflict of significant social repercussion - including cases of repetitive demands and great litigants - under the coordination of the 'Permanent Nucleus of Public Hearing' - *NAP* instituted by the *TRT* of the 12th Region (our translation into english) (*para os fins desta Resolução, é instrumento de deliberação participativa e presencial conduzida por Magistrado(s) do Trabalho, com o objetivo de obter a autocomposição de conflito de expressiva repercussão social – aí incluídos os casos de demandas repetitivas e de grandes litigantes – sob a coordenação do Núcleo Permanente de Audiência Pública – NAP instituído pelo TRT da 12ª Região*).

The general guideline (art. 3º) is the search for self-composition through consensus, recognizing the conditions of autonomy and independence of citizens as a Society and as individuals; public authorities and agents as representatives of State power; and labor magistrates in their jurisdictional prerogatives (our translation into english) (*a busca da autocomposição pelo consenso, reconhecendo para tanto as condições de autonomia e independência dos cidadãos como Sociedade e como indivíduos; das autoridades e agentes públicos como representantes do poder do Estado; e dos magistrados do trabalho em suas prerrogativas da jurisdição*).

Can be considered subjects and participants, at the discretion of the Public Hearing Commission (*Comissão de Audiência Pública*) (art. 4º):

> I. individuals, legal entities and interested groups in general, without exception;
>
> II. the authorities, departments / agencies and agents of the State, with respect to the respective spheres of public power, in accordance with the law;
>
> III. labor magistrates, although not members of the Public Hearing Commission; and
>
> IV. other social, economic, political, academic and scientific bodies, entities and actors. (Our translation into english)

Public hearings are called and held within the institutional and logistical scope of the 'Permanent Nucleus of Public Hearings' - *NAP*, under the terms of the Call Notice (*Edital de Convocação*) (art. 6). But any magistrate or interested part may propose the setting up of public hearing on issue related to labor jurisdiction; and the *NAP* will consider the request, designate the members of the Commission, and the coordinating magistrate.

Upon request or on its own initiative, *NAP* may carry out other acts of participation, such as public consultation, collective production of evidence for processes of the same nature, in the form and under the terms defined in the respective summons (*como consulta pública, produção coletiva de prova para processos da mesma natureza, na forma e nos termos definidos no ato de convocação respectivo*). And the magistrate or interested part that proposes the opening of a public hearing will indicate the content and scope of the conflict, with the elements at his disposal, as well as may express an interest in participating in the responsible Commission (*manifestar interesse em participar da Comissão responsável*), suggesting members and participants of the public hearing.

The *NAP*, together with the designated Commission, takes care of the preparatory measures, provides information, resources and necessary infrastructure, and outlines the conduct of the work, the forms of participation and the list of participants and guests (art. 7º). Some protagonists are communicated directly regarding the holding of the Public hearing (art. 8º): Chief Prosecutor of the Public Labor Ministry of the 12th Region; President of the Brazilian Bar Association - Santa Catarina Section; Representative of each interested entity; Director of the Office of the International Labor Organization in Brazil; and the Regional Superintendent of Labor and Employment in Santa Catarina (*Procurador-Chefe do Ministério Público do Trabalho da 12ª Região; Presidente da Ordem dos Advogados do Brasil – Seccional de Santa Catarina; Representante de cada entidade interessada; Diretor do Escritório da Organização Internacional do Trabalho no Brasil; e o Superintendente Regional do Trabalho e Emprego em Santa Catarina*). And art. 9 allows the Labor Magistrates of Santa Catarina to speak/manifest at the public hearing, at any stage of the process, by any means (*manifestar-se na audiência pública, em qualquer fase do processo, por qualquer meio*).

One of the most important documents in the process is provided for in art. 10: after the preliminary steps are taken, *NAP* will publish the 'Public Hearing Call Notice' (*Edital de Convocação da Audiência Pública*). This Notice will indicate (art. 11):

> I - the members of the Public Hearing Commission;
>
> II - the object;
>
> III - the objective;
>
> IV - the date, time and place of the opening of the Public Hearing;
>
> V - the rite and forms of participation;
>
> VI - the proposed schedule of procedural acts;
>
> VII - the respective legal effects of the process;
>
> VIII - the list of participants and guests. (Our translation into english)

The Commission decides on the inclusion of new participants and guests, after the publication of the notice, which will be widely disseminated and forwarded to all judges and superior court judges of the *TRT* of the 12th Region. It's up to the magistrate or competent body/entity (*ao magistrado ou órgão competente*), from the publication of the Notice, to decide on

the suspension of the processes that are related (*decidir acerca da suspensão dos processos que tenham relação*) to the object of the public hearing.

The guests must confirm their presence, being able to: appear in person at the public hearing or through a representative with the power to deliberate; but the support service, between the publication of the Notice and the installation of the public hearing, will make contact with the participants referred to in art. 8, reinforcing the invitation, and communicating any relevant information to the conducting judicial authority.

The art. 12 provides for the public hearing installation session, in which the conducting judicial authority:

> I - warn those present about the nature of the process;
>
> II - define the adjustments to be made to the proposal and the rite;
>
> III - identify the complementary measures to be taken, such as technical clarifications, requisitions and communications;
>
> IV - establish the schedule of activities. (Our translation into english)

Before any deliberation, the judicial authority enlightens the participants about the nature of the process that is beginning; its open, inclusive and constructive character, and will encourage them to clearly and sincerely expose their interests and proposals, aiming to build in consensus the most appropriate decision for individuals, State and Society. And when he finds the absence of a participant in the category referred to in article 8º, he will take the necessary measures for attendance, in accordance with the law.

Access to the public hearing is open to all those who wish, whether in the physical space of its realization, or through other available means, such as: internet, videoconference, television or radio, as the case may be and the decision of the conducting judicial authority (art. 13). Access to the physical space can be done by prior registration within the term of the Notice, if the conducting judicial authority so understands (*se assim o entender a autoridade judicial condutora*).

Participation in the deliberations will be oral or in writing, with priority to the subjects directly summoned (art. 14). And the Commission will establish, in each case, the conditions, deadline, time, order and priority of the manifestations, guaranteeing the participation to the different currents of opinion. All manifestations will be registered and will integrate the public hearing process.

The art. 15 provides that, after the public hearing is concluded, the Public Hearing Commission will prepare the Final Report (*concluída a audiência pública, a Comissão de Audiência Pública elaborará o Relatório Final*) containing the summary of the acts performed, debates, proposals, proofs and the results achieved, without prejudice to other elements considered relevant. Os participantes diretamente convocados poderão firmar documento próprio, a ser homologado pela autoridade judicial condutora.

Finally, art. 16, *NAP* will forward a copy of the Final Report to all *TRT* Magistrates in the 12th Region, as well as to all participants and guests, and make it available on the *12th Region's TRT* website. In the event of an impasse (art. 17) on the question of the progress of the public hearing, the decision will be rendered immediately by the conducting judicial authority, in an unappealable manner.

As can be seen, it's a discussed and detailed document, which gives a good idea of the complexity that is this work of holding a public hearing, in the theoretical and practical line defended in this article. It presupposes public spirit and loyalty among the participants.

CONCLUSION

There is no doubt that the concern of the Professional Master in Law at Federal University of Santa Catarina (*Mestrado Profissional em Direito da Universidade Federal de Santa Catarina - UFSC*) in adopting the method of starting from the fact, from the problem to be solved, is in line with the Roman casuistic system. And that the classical sources are a reference and an opportune lesson to help solve the complex problems that modernity cannot adequately address with its method of moving from the abstract to the concrete.

In addition, Roman antiquity worked in a system of direct democracy, with jurisdiction based on the *populus* and not in a State separate and different from this *populus* And so it offers support for them to overcome the problems of the modernity of codes, structurally unprepared in relation to the participation that is needed in the case of a deliberative judicial public hearing.

The limitations of the Brazilian jurisdictional system are evident in the face of tragedies such as that of Mariana, Rio Doce and Brumadinho in Minas Gerais, as well as the pollution of rivers and other types of problems that the legal model does not cover and does not solve, since they are complex conflicts also the case of repetitive demands, great litigants and great social repercussions, which overload justice/judiciary with a burden impossible to absorb. Precisely when the times are fast, and the need for fair access to Justice is intensified.

It's in this context of crisis, that this article brings and holds a theoretical and practical discussion, with a view to solving the crisis through participation; proposing to face these problems through complex jurisdiction, similar to the Roman process, which conformed to the same nature of the conflict; that is, bringing the participatory and deliberative public hearing to the system of access to justice, without prejudice to traditional jurisdiction.

And so, supported by a theory that redefines the Brazilian model, with a new classification of the elements: people, goods and actions, this article makes use of a research concretely carried out in Santa Catarina with legal operators, Magistrates of Labor Justice (*Magistrados da Justiça do Trabalho*), which offers a model for holding a participatory and deliberative judicial public hearing. With two Resolutions that establish, respectively, the institutional framework and the procedural path to follow, in the case.

And so, with the notion of sovereign populus as to collective goods/assets, the affirmation of complex jurisdiction can be reestablished: alongside the traditional and autocratic, punitive and condemnatory process, the participative process emerges, building consensus around the exercise of fundamental collective and off-balance sheet rights recognized and guaranteed by the Constitution of the Federative Republic of Brazil.

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SOCIAL EUTHANASIA, RIGHT TO HEALTH AND PERSONALITY RIGHTS: A LOOK ON EXTREME POVERTY

EUTANÁSIA SOCIAL, DIREITO À SAÚDE E OS DIREITOS DA PERSONALIDADE: UM OLHAR SOBRE A POBREZA EXTREMA

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ABSTRACT

Right to health is one of the most important rights, once it is necessary to preserve human life itself. It also has a close connection with the dignity of the human person. However, the current scenario shows a great state neglect about this right effectuation. It generates, among others consequences, mysthanasia, or in other words, death anticipation in a miserable and suffered way. Thus, this paper will show problems using questions about: What is the effectuation of this right importance to everyone? How is mysthanasia still invisible in legal debates without charge the violator agent? How this phenomenon can hold as a social exclusion form institutionalized from poor people's layers and extremely poor? Therefore, there is, as a main goal, a critical analysis about social euthanasia as a state inefficiency fruit and as an institutional phenomenon of populational layer exclusion connected to extreme poverty. And also, as specific objective, this paper aims to analyze the right to health, its relation with the dignity of the human person and with personality rights, and the necessity of its state effectuation, enabling, then, the analysis of mysthanasia in a critical way and of how this phenomenon can be shown as a social exclusion, mainly of the poorest population layers. Therefore, it used the hypothetical-deductive method and the literature review methodology.

KEYWORDS: Mysthanasia. Public abandonment. Reserve of the possible. Deaths. Poor people.

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RESUMO

O direito à saúde se configura entre os direitos mais importantes, na medida em que ele se faz necessário para a preservação da própria vida humana, além de encontrar íntima ligação com o princípio da dignidade da pessoa humana. Todavia, o cenário atual demonstra um grande descaso estatal com relação a efetivação desse direito, que acaba gerando, entre outras consequências, a ocorrência da mistanásia, ou seja, a antecipação da morte de uma forma miserável e sofrida. Deste modo, o artigo terá como problemáticas os questionamentos sobre: qual a importância da efetivação desse direito à todos? Como a mistanásia ainda permanece invisível nos debates jurídicos e sem uma responsabilização ao agente violador? Como esse fenômeno pode vigorar como forma de exclusão social institucionalizada das camadas pobres e extremamente pobres? Assim, tem-se como objetivo geral fazer uma análise crítica da eutanásia social como fruto da ineficiência estatal e como fenômeno institucional de exclusão da camada populacional abarcada pela pobreza extrema, e de modo específico, objetivará fazer uma análise acerca do direito à saúde e da sua relação com a dignidade da pessoa humana e com os direitos da personalidade e da necessidade de sua efetivação por parte do Estado, para posteriormente ser possível analisar a mistanásia de forma crítica, e como tal fenômeno pode se mostrar como fator de exclusão social principalmente das camadas mais pobres da população. Para tanto, se utilizará o método hipotético-dedutivo e a metodologia de revisão bibliográfica.

PALAVRAS CHAVE: *Mistanásia. Abandono público. Reserva do possível. Mortes. Pobres.*

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INTRODUCTION

In the postmodern world, the principle of the dignity of the human person has unparalleled importance within the national and international legal scene, radiating its effects for the recognition of numerous fundamental rights, including the right to health. Such a right appears not only as a fundamental (social) right but also as a human right, that is, a right that must be guaranteed to each and every person throughout the world.

Such importance is due to the close connection that the right to health has with the right to life, mainly to a dignified life, which may infer its importance even among the rights that protect the full development of the human personality, given its correlation with the guiding nucleus of the dignity of the human person.

However, due to this right falling within the fundamental social rights, that is, among the rights that depend on the State's interference to become effective, there are many times when the public power alleges the lack of resources to guarantee material access to health to all, causing a cruel problem to arise: social euthanasia or mysthanasia, a phenomenon that anticipates the death of countless people, in a miserable, cruel and painful way, mainly due to public abandonment in relation to the effectiveness of a right to health that is, in fact, accessible to all.

Thus, the present article has as problematic the questions about: what is the importance of realizing the right to health for all? How does mysthanasia, which is commonplace in Brazil, remain almost invisible among the legal debates on the contemporary scene? And, how can such a phenomenon prevail as a form of institutionalized social exclusion of the poor and extremely poor?

In view of the issues surrounding this article, the first hypothesis is: the fact that the legal debate on social euthanasia is infrequent, since the responsible for such an act is pre-

cisely the State, which is no longer held responsible for reasons to have protection, under the cover of the absence of financial resources and the reserve of the possible, protection that is accepted and approved by a significant part of the jurists. Furthermore, with regard to how mysthanasia can prevail as a form of institutionalized social exclusion of the poor, the hypothesis indicates that people who depend exclusively on the public health system to treat diseases are essentially the poorest population that, in addition to being financially vulnerable, when ill, they also have an external physical vulnerability, so that the State's omission or recklessness in relation to these lives, to the point of promoting a suffered death, also end up promoting social exclusion of these people, either before death, when making access to health or qualitative treatment unfeasible, or after, with death that occurred before or outside of the time.

To this end, this research will have as a general objective to make a critical analysis of social euthanasia as a result of state inefficiency with regard to the realization of the right to health for all, and as an institutional phenomenon of exclusion of the poorest from the social scenario, through state promotion. (or at least a permit) of unworthy, unfortunate and anticipated deaths. And it will aim, in a specific way, to make an analysis about the right to health and its relation with the right to life and the dignity of the human person, as well as the issues related to it as a human, fundamental and personality right, And it will aim, in a specific way, to make an analysis about the right to health and its relation with the right to life and the dignity of the human person, as well as the issues related to it as a human, fundamental and personality right, and the need for it to be implemented by the State, so that it's possible to analyze social euthanasia (or mysthanasia), critically, addressing the main characteristic aspects of it and its occurrence as a result of not realizing the right to health for all, as well as the way in which this phenomenon can show itself as a factor of social exclusion, mainly of the poorest groups of the population.

In order to carry out the analysis of the theme, the hypothetical-deductive method will be used, which starts from general premises, such as fundamental rights (right to life, health, ...) and the principle of human dignity, to later enter a specific analysis, which is that of social euthanasia and the aspects that permeate it.

Regarding the methodology adopted, the article will be based on the literature review method, making use of articles, books and book chapters, whether physical, coming from national electronic magazines or contained in Brazilian platforms, in order to assess which ones understandings about the rights that involve social euthanasia (life, health, the principle of human dignity, etc.), how and why this occurs, the state's performance in its occurrence, how it prevails as a factor of social exclusion, among others, as well of articles available on international platforms, such as Ebsco and SSRN, aiming to analyze international debates about aspects that will be outlined in this article, such as the right to health, human rights and human dignity.

1 THE RIGHT TO HEALTH: FUNDAMENTAL, HUMAN AND PERSONALITY

1.1 RIGHT TO HEALTH: FROM FUNDAMENTALITY TO THE EFFECTIVENESS OF THIS RIGHT

Initially, before entering specifically the right to health, it's necessary to highlight the importance that the principle of the dignity of the human person has for the entire legal system, insofar as it consists of "At the core point where all the fundamental rights of the human person unfold" (SZANIAWSKI, 2005, p. 142), including the right to health.

The dignity of the human person, in its most current conception, is still very well founded and even conceptualized based on Kantian thought (SARLET, 2009-a, p. 37), which maintains that in the kingdom of the end everything has a price or a dignity (KANT, 1980, p. 140) and that "the Man, and, in general, every rational being, exists as an end in itself, not simply as a means for arbitrary use of this or that will" (our translation into english) (KANT, 1980, p. 134-135). Thus, Kant weaves that the peculiar and irreplaceable quality of the human, as rational, is to be endowed with a dignity, which unfolds in this capacity to exercise the autonomy of the will.

The dignity of the human person is thus revealed to be the greatest among the principles and in that which should be used as an interpretive parameter for all the others (MORAES, 2019, p. 19), and whose conceptualization is difficult or impossible, because dealing with a "fluid, multifaceted and multidisciplinary" concept (SZANIAWSKI, 2005, p. 140), but it's essentially based on "the assumption that each human has an intrinsic value and enjoys a special position in the universe" (BARROSO , 2014, p. 14) and whose primary function is "to attribute normative force to the Constitution and to give maximum effectiveness to negative and installmental fundamental rights" (WEDY, 2018, p. 206). (Our translations into english)

In this perspective, the dignity of the human person[3] is used as a fundamental principle 'matrix, generator of other fundamental rights (SZANIAWSKI, 2005, p. 143), as it always shows a connotation of respect for human (MORAES, 2019, p. 21). In this sense, Ingo Wolfgang Sarlet (2009-b, p. 37) teaches that:

> It has for dignity of the human person the intrinsic and distinctive quality recognized in each human being that deserves the same respect and consideration by the State and the community, implying, in this sense, a complex of fundamental rights and duties that ensure the person both against any degrading and inhumane act, as well as guaranteeing the minimum existential conditions for a healthy life [...]. (Our translation into english)

3 Regarding the protection of the dignity of the human person at the international level, Mary Neal defends: "The idea of dignity is, of course, very intimately associated with rights, but no specific 'right to dignity' is enumerated either in international or in UK domestic law. Instead, dignity seems usually to be regarded as an underpinning justification for substantive rights, or a 'source of rights', implying (i) that dignity is not a substantive right in itself, and (ii) that dignity is more overarching, and more fundamental, than any of the individual rights it grounds". (NEAL, 2014, p. 31)

Furthermore, and evidencing its importance within the Brazilian legal system, the Federal Constitution of 1988 brought the dignity of the human person in its art. 1º, III[4], as one of the foundations of the Federative Republic of Brazil, treating it as the "axiological epicenter of the constitutional order, radiating effects over the entire legal system" (SARMENTO, 2004, p. 109).

Thus, the principle of the dignity of the human person can be seen in two aspects, because on the one hand it represents a substantial quality of the human person and expression of the essence of human dignity, and on the other, as the foundation of the political order and national peace, that makes it be a source of rights (SZANIAWSKI, 2005, p. 143).

In this perspective, we have that: the right to health and all other fundamental rights, whether individual, social or diffuse, must always be analyzed from the perspective of the dignity of the human person, especially with regard to their generating matrix of rights that guarantee minimum existential conditions for the exercise of a dignified life, since "social, economic and cultural rights, whether in the condition of defense rights (negative), or in their service dimension (acting as positive rights), constitute demand and realization of the dignity of the human person" (SARLET, 2009-a, p. 100).

Thus, it's clear that the right to health, given its importance for the realization of the dignity of the person, has its tutelage both in the international legal system, being provided for in documents such as the Universal Declaration of Human Rights (*Declaração Universal dos Direitos Humanos* - 1948)[5] and the International Covenant on Economic, Social and Cultural Rights (*Pacto Internacional Sobre Direitos Econômicos, Sociais e Culturais* - 1966)[6], as well the national, provided for in article 6º of the Federal Constitution of 1988[7] and in art. 196[8] to 200 of the same legal diploma, thus constituting itself as a legitimate human and fundamental (social) right.

However, the mere international and constitutional forecasts of this right aren't enough for it to materialize, it's necessary to go further, creating public policies that make them effective, a task that is primarily the responsibility of the State, especially in the presence of a Social Democratic State of Law, which "presents itself as a guarantor of minimum resources for a dignified life" (OTERO; MASSARUTTI, 2016, p. 856). In this sense, there are the teachings of Cleber Sanfelici Otero and Marcelo Luiz Hille (2013, p. 490):

4 Art. 1º The Federative Republic of Brazil, formed by the indissoluble union of States and Municipalities and the Federal District, constitutes a Democratic State of Law and is based on: [...] III - the dignity of the human person; [...]. (Our translation into english)

5 Universal Declaration of Human Rights, Article XXV: 1- Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. [...].

6 International Covenant on Economic, Social and Cultural Rights, Article 12 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

7 Art. 6º, CF/1988: These are social rights to education, health, food, work, housing, transportation, leisure, security, social security, maternity and child protection, assistance to the destitute, in the form of this Constitution. (Our translation into english)

8 Art. 196. Health is the right of all and the duty of the State, guaranteed through social and economic policies aimed at reducing the risk of illness and other diseases and universal and equal access to actions and services for their promotion, protection and recovery. (Our translation into english)

> When defending the principle of dignity, we seek: respect for life, physical integrity and moral integrity of human beings.
>
> It's therefore up to the Democratic Rule of Law to provide the means to ensure the minimum guarantees for the dignified existence of every human, through the recognition and protection of fundamental rights, such as freedom, equality, access to health and education, among others. (Our translation into english)

Thus, for the concreteness of the principle of the dignity of the human person, there must be minimum guarantees, which is the own essence of fundamental rights, which bind "public power as a whole, as well as private, natural or legal persons" (SZANIAWSKI, 2005, p. 142). Thus, Cleide Aparecida Gomes Rodrigues Fermentão (2007, p. 73) teaches that: they are configured "attacks on human dignity, the absence of dwelling house, habitation, education, health [...]" (our translations), imposing mainly on power public to make them effective.

In this same sense, Luis Roberto Barroso teaches (2003, p. 38):

> The legal content of the principle is associated with fundamental rights, involving aspects of individual, political and social rights. Its elementary material nucleus is composed of the existential minimum, a phrase that identifies the set of basic goods and utilities for physical and indispensable subsistence to enjoy one's own freedom. Below that level, even when there is survival, there is no dignity. The list of benefits that make up the existential minimum includes variation according to the subjective view of those who prepare it, but there seems to be a reasonable consensus that it includes: minimum income, basic health and basic education. (Our translation into english)

As noted, the right to health is always specified among the main rights that constitute the minimum existential that must be guaranteed to all, which is precisely because of the close connection it has with the right to life and especially with the right to a dignified life[9].

However, the question of the realization of fundamental social rights, such as the right to health, necessarily involves the indispensability of positive actions by the State (VIDAL DE SOUZA; SANOMIYA, 2017, p. 394), since it's configured as "a subjective public right, enforceable against the State, since its exercise and effectiveness depend on the contribution of material and human resources to be implemented through public health policies" (BAHIA; ABUJAMRA, 2009, p. 303), which consequently implies a debate about the limitations of the Government budget. (Our translation into english)

However, such a debate "is aggravated in the Brazilian scenario due to the economic, political and social crisis that is currently evident in Brazil" (SELAYARAN; MACHADO; MORAIS, 2018, p. 10), thus having the acceptance by the doctrine and jurisprudence on the application of the so-called "reserve of the possible", which consists of an "original concept – and ontologically unpretentious –, in the argumentative-factual limitation to the implementation of social rights due to insufficient budget for such" (BERNARDI; LAZARI In SIQUEIRA; LEÃO JUNIOR, 2011, p. 254), used by the public authorities as a way of "exempting themselves from health care responsibilities, as well as in others, within the context of social rights" (TASCA, 2013, p. 100). (Our translation into english)

9 In this sense: "The existential minimum works with the effectuation of fundamental rights considered as minimum for the reach of a dignified life, links state activity in the execution of public policies for the materialization of the right to health, safety, housing, education, among others". (MACIEL-LIMA; OLIVEIRA; DOMINGOS, 2018, p. 239)

It happens that, without denying the existence of state financial limitations for the realization of all social rights, such an argument cannot be used by the State to not offer benefits and services, even when it's in question: the minimum necessary for people to live and survive with respect and dignity (OTERO; HILLE, 2013, p. 501); which is the case with the right to health, because "even if the budgetary resource is small, it's essential to ensure budgetary provision for this minimum considered essential" (BERTOLAIA; PALAZZOLO, 2016, p. 296) . In this sense, Sarlet and Figueiredo (2007, p. 201) outline that:

> [...] in terms of protection of the existential minimum (which in the field of health, due to its connection with the most significant assets for the person), it's necessary to recognize a definitive subjective right to benefits and a coherent defensive protection, in such a way that, as a rule , reasons linked to the reserve of the possible shouldn't prevail as an argument to, by itself, remove the satisfaction of the right and the requirement of the fulfillment of duties, both related and autonomous, since neither the principle of parliamentary reserve in budgetary matters nor that of separation of powers take on absolute features. (Our translation into english)

Furthermore, the reserve of the possible can only appear as a valid argument when it's effectively demonstrated by the public authorities that any restriction to social rights was the result of a weighting exercise between conflicting principles, in which the proportionality requirements were met, and with the preservation of the minimum content necessary to guarantee a dignified life (KELBERT, 2011, p. 106) or "for those situations that go beyond the existential minimum and that refer to individuals who have the means to obtain the intended benefit by themselves" (RIBEIRO, 2011, p. 89) (our translation into english). The teachings of Otero and Massarutti (2016, p. 856-857) are also added, that:

> [...] dignified life has a nucleus within the principle of human dignity, which is the minimum of conditions or assurance instruments for a dignified existence, which cannot be affected under any circumstances. If the public administrator or the legislator has to make a choice between fundamental rights to be realized, he may even make this option with suppedaneous in the reserve of the possible clause, but will never be allowed to reach the minimum capable of providing a dignified existence.
>
> In this sense, at least from a theoretical point of view, health, as an integral part of the minimum resources necessary for a dignified existence, couldn't be restricted in any way [...] (Our translation into english)

Thus, the need for state action to invest in public health policies that satisfy everyone's needs is imperative, not only with regard to the scope of reparations, but also with regard to prevention and promotion thereof, under the terms of art. 196 of the Brazilian Federal Constitution of 1988, as well as in line with the WHO (World Health Organization) definition of health, which defines it as "a state of complete physical, mental and social well-being, and not just the absence of disease or infirmity"[10], that is, "the concept of health encompasses the biopsychosocial balance of the human person" (SIQUEIRA; LAZARETTI, 2019, p. 310) and cannot be seen only as the absence or cure of diseases, but in a broader perspective of prevention disease and promoting quality of life (MASSAFRA, 2004, p. 66), and the State cannot argue – due to its inertia, inefficiency or inefficiency in the realization of the right to health (in its broad

10 Definition contained in the preamble to the Constitution of the World Health Organization. Available in: http://www.direitoshumanos.usp.br/index.php/OMS-Organiza%C3%A7%C3%A3o-Mundial-da-Sa%C3%BAde/constituicao-da-organizacao-mundial-da-saude-omswho.html. Accessed on: November 20, 2019.

concept) and in the correct application of public money – the justification of the reserve of the possible as a legitimizing mechanism of non- material guarantee of this essential right for the preservation of human (dignified) life.

1.2 RIGHT TO HEALTH: A LEGITIMATE RIGHT TO PERSONALITY

As previously highlighted, the right to health has a close relation with the right to life and with the dignity of the human person, configuring itself as necessary to guarantee the minimum existential humans and, with provision in the legal system as much as a human rights as a fundamental right. However, it's also possible to classify it as a personality right, that is, belonging to the list of rights so "essential to the development and fulfillment of the person, which, based on the dignity of the human person, guarantee the enjoyment and respect for their own being, in all dimensions, spiritual and physical" (FOLLONE; RODRIGUES *In* SIQUEIRA; AMARAL, 2017, p. 317).

With regard to the rights of the personality, our Constitution didn't insert a specific provision that protects them, but ends up recognizing and protecting the general right of personality through the principle of human dignity, which is in force as a general clause of concretization of protection and development of the personality of the individual, since this principle, figuring as a fundamental guiding principle that should serve as an interpretation for the entire legal system, and ends up constituting the general clause of protection of the personality, insofar as the natural person is the first and last addressee of the legal order (SZANIAWSKI, 2005, p. 137).

Personality rights are so important that Adriano de Cupis argues that without them "the personality would remain a completely unrealized susceptibility, deprived of all full value: rights without which all the other subjective rights would lose all interest to the individual - which is to say that if they didn't exist, the person wouldn't exist as such" (CUPIS, 2004, p. 24) (our translation into english).

Thus, we have that: the rights of the personality are based on the principle of the dignity of the human person, which is what allows to defend the protection of a general right of the personality, and they are rights that have a primary connection with the very possibility of full development of the person and his personality, thus guaranteeing the exercise of "be" in all its various dimensions.

Thus, the protection of the full development of each person's personality shouldn't take into account only individual rights, such as life and freedom, and leave aside the protection of essential rights for the very assurance of those, rights without which ones cannot even talk about life and especially about a dignified life, like the right to health or food. These are rights that, once absent, make it impossible or, at least, hinder the full development of the person and his personality. In this sense, the teachings of Rabindranath Capelo de Souza (1995, p. 516) are important, that:

> [...] the personality <physical> or <moral> referred to in art. 70 of the Civil Code covers both goods linked to the physical reality of each man (*homo phoenomenon*), and the goods inherent to his autonomy and freedom (*homo noumenon*), which with this legal provision protects not only the essentials of the personality of all men (*humanitas*) but also the particular individua-

> lity and unrepeatability of each one (*individualitas*) and that **the protection of human personality requires not only the protection of their inner goods but also the protection and preservation of each man's outer living space**. (Emphasis added) (Our translation into english)

This time, the right to health, especially when reserving an intimate connection with the right to life, turns out to be "a fundamental right that is related to the full development of the human personality and integrates the right to the minimum for a dignified life [...]" (OTERO; MASSARUTTI, 2016, p. 849), which can also be included not only as a human and fundamental right, but also as a personality right, emphasizing the importance of its tutelage and effectiveness.

Furthermore, this statement can even be based on the teachings of Fernanda Cantali (2009, p. 217), who argues that: the search for the effectiveness of the principle of human dignity - which is the general clause for the protection of human personality - imposes a bifrontal action, acting in a protective and promotional perspective, that is, guaranteeing a sphere of personal self-determination, expression of private autonomy and of personal freedom, but also guaranteeing the imperative of assistance through state action or collective. Perez Luno (p. 318) also teaches in this sense, stating that "the dignity of the human person isn't only a negative guarantee that the person will not be the object of offenses or humiliation, but also implies, in a positive sense, in the full development of personality of each individual" (our translation into english).

In this perspective, defends Fermentão (2007, p. 75-76):

> The Modern State has the task of protecting fundamental rights and promoting the full development of the person. Assumes the obligation to respect the individual rights of the person, such as the right to life, freedom, information, work, study, and others, both essential and characteristic of every human person, who has rights as a citizen, and, therefore, the State also has a duty to promote such rights, eliminating any difficulties, whether economic or social, that may prevent the effective exercise of personal rights and citizenship. The State has an obligation to intervene and to enable that the existential and individual interests of the human person to be exercised. (Our translation into english)

In this tone, the principle of human dignity doesn't matter only in a limit for the Public Powers, in the sense of refraining from attempting against it, but, rather, it translates a north for the state conduct, imposing a commissive attitude of the public authorities for the protection of the free development of the human personality, with the guarantee of the minimum conditions for life with dignity (SARMENTO, 2004, p. 113), conditions that include an effective access to the right to health, at a repressive, protective and promotional level.

In Brazil, the Federal Constitution of 1988 brought in its art. 198, that "public health actions and services are part of a hierarchical network and constitute a single system", a norm that gave rise to the 'Unified Health System' (*Sistema Único de Saúde - SUS*), bringing in art. 200[11] of the same diploma what are the attributions of this system, which address

11 Art. 200. The unified health system is responsible, in addition to other duties, under the terms of the law: I – to control and inspect procedures, products and substances of interest to health and to participate in the production of medicines, equipment, immunobiologicals, blood products and other inputs; II – to carry out the health and epidemiological surveillance actions, as well as the workers' health; III – to order the training of human resources in the health area; IV – to participate in the formulation of the policy and the execution of basic sanitation actions; V – to increase, in its area of activity, scientific and technological development and innovation; VI – to survey and inspect food, including the control of its nutritional content, as

issues related not only to actions aimed at access to health, but also basic sanitation, food, protection of the environment, among others. Subsequently, this system was regulated by Law nº 8.080/1990, which provides, among other things, that the public health services and the private services integrated into the '*Sistema Único de Saúde – SUS*', must follow some principles, among them the the universality of access to health services at all levels of assistance (art. 7º, I, Law nº 8.080/1990), which guarantees, for all people, access to available health actions and services (BARROSO, 2009, p. 41).

However, despite the fact that the Constitution provides for a fundamental right of access to health, the State ends up failing and doesn't offer a universal system (MACIEL--LIMA; OLIVEIRA; DOMINGOS, 2018, p. 238)[12], because the contemporary homeland reality has shown that "the public health system has been selective in the face of the lack of infrastructure, which is precarious, and of health resources, which are scarce" (SIQUEIRA; LAZARETTI, 2019, p. 312), since the right to health is a right that, necessarily, "depends on the political will, that is, on the will of the Powers to carry out policies, actions and services aimed at ending the problem of its ineffectiveness" (PICCIRILLO; ZAIA, 2016, p. 323), and that, in the absence of such a will, its effectiveness is hindered, and can sometimes show the existence of social euthanasia or 'mysthanasia', which refers to a "slow, cruel and miserable death resulting from the abandonment in which a large part of the Brazilian population is found" (ZAGANELLI; SOUZA; CABRAL; SANCHES, 2016, p. 7) (our translations), which will be addressed specifically in the next topic.

2 SOCIAL EUTHANASIA: THE STATE AS A VIOLATING AGENT FOR THE DIGNITY OF THE HUMAN PERSON?

The term "euthanasia", thus considered, is a word that comes from the Greek, derived from "*eu*" (well) and "*thanatos*" (death), which in its origin is understood as good death, appropriate death, godly death, death beneficial (SA; NAVES, 2011, p. 95). Thus, it ends up being understood as a dignified, painless death.

To configure euthanasia, it's necessary to understand whether 3 (three) essential requirements are present, namely: a) a situation of incurable terminal illness or irreversible disability; b) the humanitarian and pious motive of the agent; c) the existence of consent validly provided by the patient, if conscious, but if unconscious, the principle of beneficence prevails, which determines the performance of third parties in the patient's best interest (SIQUEIRA; LAZARETTI, 2019, p. 313-315). In other words, it shows that death is anticipated to avoid suffering the patient who, due to something incurable or irreversible, wouldn't have a dignified life if such a situation is postponed, so that death is anticipated, and painlessly, so that if the pacient has a "good death".

well as drinks and water for human consumption; VII – to participate in the control and inspection of the production, transport, storage and use of psychoactive, toxic and radioactive substances and products; VIII – to collaborate in the protection of the environment, including that of the labor. (Our translation into english)

12 In the original: "The Constitution provides for a fundamental right of access to health, however, the State fails and not offer a universal system [...]".

However, what is known as social euthanasia or 'mysthanasia', in no way resembles euthanasia itself. The expression 'mysthanasia' (*mistanásia*) also has a Greek etymology, derived from "*mis*" (unhappy) and "*thanatos*" (death), that is, it translates the idea of a death suffered, before and out of time, caused slowly, being a death that have as scope the social inequalities and caused, in most cases, by the neglect of the public power in relation to the poor class of society (ZAGANELLI; SOUZA; CABRAL; SANCHES, 2016, p. 7). Thus, the teachings are important:

> Euthanasia, at least in its intention, wants to be a good, smooth, painless death, while the situation called social euthanasia isn't good, smooth or painless. Within the great category of mysthanasia I want to focus on three situations: first, the large mass of sick and disabled people who, for political, social and economic reasons, aren't even patients, as they are unable to enter the medical care system effectively; second, the patients who manage to be patients and then become victims of medical error and, third, the patients who end up being victims of malpractice for economic, scientific or socio-political reasons. Mysthanasia is a category that allows us to take the phenomenon of human evil seriously. (MARTIN *In* FERREIRA; OSELKA; GARRAFA, 1998, p. 172) (Our translation into english)

Thus, there is that social euthanasia or mysthanasia refers to the deaths that occur due to lack of assistance from the State, due to medical error and bad practice (SIQUEIRA; LAZARETTI, 2019, p. 317). So, there will be the occurrence of mysthanasia in three hypotheses: when citizens aren't even 'be a patient', because they are unable to enter the health system due to geographic, political and social factors, characterizing an omission of aid by the State; when citizens get access to a public health unit, but in view of the large number of patients added to the lack of adequate structure, they end up not being attended, and the diseases persist or worse, with their death in the Unified System lines or, when attended to, there are insufficient beds or devices, forcing health professionals to choose which patients to attend; or, still, being attended to, they end up being victims of medical error (recklessness and negligence) and dying (CABETTE, 2009).

Thus, one of the great counterpoints between mysthanasia and euthanasia is the result, because while that (mysthanasia) causes death before the hour, in a miserable and painful way, this (euthanasia) causes a death also before the hour, but in a gentle way and without pain, and it's precisely this result that makes euthanasia attractive to many and the mysthanasia invisible to others, that is, we live in a society that at the same time offers the highest technology for "well dying", denies the indispensable for "good living" (PAOLO; RIBAS; PEREIRA, 2006, p. 274-275).

In the words of Dworkin (2003, p. 280),

> [...] The death dominates because it's not just the beginning of nothing, but the end of everything, and the way we think and talk about death - the emphasis we put on "dying with dignity" - shows how important that the life to end properly, that death is a reflection of the way we wish we had lived. (Our translation into english)

Thus, death, which puts an end to the breath of life, cannot simply be anticipated by the mere justification that the State lacks resources to invest in infrastructure, materials, health workers, beds and medicines, instruments necessary to give full effectiveness to the right to health. Accepting this justification as valid, is the same as accepting the occurrence

of mass homicides, perpetrated on those who only have the 'Unified Health System' (*Sistema Único de Saúde – SUS*) as a hope to have access to health and a decent life.

It is worth noting that the right to health must also be understood as a "right to social justice essentially as a way of guaranteeing a dignified life" (SILVA; VITA, 2014, p. 261), so that it can be consider that there is a cruel and dangerous hypocrisy in the concern with the offer of a "dignified death", when little is done to provide those who live the respect for their human dignity (CABETTE, 2009, p. 31).

In addition, regarding mysthanasia, it's added that:

> In Latin America, in general, the most common form of mysthanasia is the failure to provide structural assistance that affects millions of patients during their entire life and not just in the advanced and terminal stages of their illnesses. The absence or precariousness of medical care services, in many places, ensures that people with physical or mental disabilities or with diseases that could be treated die before the time, suffering while experiencing pain and suffering in principle preventable. (MARTIN *In* FERREIRA; OSELKA; GARRAFA, 1998, p. 175) (Our translation into english)

Thus, the reality that is revealed is that, while talking about the possibility of a legislative change in Brazil to accept the occurrence of euthanasia - which is still prohibited in the Brazilian State[13] – and the spotlight is turned to the debate about providing a dignified death to those who no longer have the viability of a dignified future life, the discussion about mysthanasia, that is, the countless miserable deaths perpetrated in the country due solely to the absence of a effective and universal state provision of the right to health, remain invisible, non-existent or stifled.

And this scenario is justified because social euthanasia is directly related to public health policies and the quality of life that must be part of state planning in search of the social justice (ZAGANELLI; SOUZA; CABRAL; SANCHES, 2016, p. 8) and of the realization of the dignity of the human person to all. Thus, it's substantiated precisely because of the ineffectiveness and inertia of the State in relation to the promotion of public policies in this sense[14], which ends up acting just in opposition to its state role: instead of protecting and promoting quality access to health for all, it acts as a violator of life, human dignity and even death at the right time, and isn't even punished or held responsible for such violations, even though, in theory, there is possibility of State liability (only in the civil field - not in the criminal field) when the unsatisfactory provision of health service occurs[15].

13 In this sense: "[...] Brazilian criminal law has never been interested in making euthanasia a crime in itself. In the majority doctrine there is a tendency with regard to equating the conduct with homicide, typified in article 121 of the 1940 Brazilian Penal Code, in force today". (FERREIRA; PORTO, 2017, p. 156) (Our translation into english).

14 Regarding the role of the state in promoting the right to health, the teachings of Silva and Vita stand out (2014, p. 249): "The guarantee of the social right to health requires from the State an administration capable of implementing public policies capable of meeting the most urgent needs. Among them, we highlight the needs related to the provision of free medicines, hiring and decent remuneration to health professionals, construction and structuring of hospitals and public health posts, among other needs". (Our translation into english)

15 In this sense: "In spite of the fact that there is a satisfactory year provision of the public health service, from which harm is derived, state responsibility is exaggerated. From such responsibility comes the duty to compensate the injured citizen due to the absence or failure in the health service, by repairing the damage or its reimbursement, through a quantum of indemnity, according to the understanding of the doctrine and of the most current jurisprudence in our country". (GOMES, 2010, p. 183) (Our translation into english)

3 SOCIAL EUTHANASIA AND EXTREME POVERTY: A RELATION OF SOCIAL EXCLUSION

Poverty and extreme poverty are a latent reality, especially in underdeveloped countries such as Brazil, and the view on them has changed since the 20th century, because what was previously limited only to the economic power of the person, becomes still be linked to the economic situation, but expanded, adding the fact that the first condition of poverty is due to the impediment of having access to other factors that would inhibit its perpetuation (FERNANDES, 2017, p. 308) and it doesn't refer only to the lack of material goods (TEIXEIRA, 2014, p. 216).

In this sense, it's important to explain about the conception of Amartya Sen, which identifies poverty as a deprivation of capabilities:

> [...] poverty can be sensibly identified in terms of capacity deprivation, with the approach focusing on intrinsically important deprivations, in contrast to low income, whose value is only instrumentally; b) there are other influences on the deprivation of capacities, therefore on real poverty, in addition to the low level of income, since this isn't the only instrument of capacity generation; c) the instrumental relation between low income and low capacity varies between communities and even between families and individuals, adding that the impact of income on capacities is contingent and conditional. (SEN, 2010, p. 121) (Our translation into english)

Thus, poverty can be understood as a form of social exclusion, as a result of the unequal distribution of essential goods for a dignified life, goods that correspond to the capacity of individuals, families and communities to supply their basic needs (FERNANDES, 2017, p. 309) and is configured as a social factor that goes far beyond the reductionist criterion of income; mentioning Paugam about "social disqualification", that is, the relation that exists between a population designated as poor due to their dependence on social services and the rest of society (PAUGAN *In* VERAS, 1999, p. 63-64), thus placing it as a multidimensional phenomenon (CABRAL JUNIOR; COSTA, 2017, p. 796).

In line with this thought, José Loureiro argues that "poverty can be translated into deprivation or insufficient access to fundamental goods (v.g., food, health) that jeopardize the own survival" (LOUREIRO *In* CORREA; MACHADO; LOUREIRO, 2012, p. 409) (Our translation into english).

Thus, it's possible to extract from the most modern conceptions about poverty a common denominator, that is, common denominator: that poverty isn't only linked to the low income factor, but also is linked to issues such as the dependence on public services to obtain access to fundamental goods, such as the right to health, food, education, among others, access that, if obtained in a qualitative way, wouldn't only allow the dignified experience of this large portion of the population, but also the own possibility of social ascension and overcoming poverty.

In this way, what can be seen, in terms of the discussions hitherto woven, is that the 'mysthanasia', as a miserable and painful anticipation of death, - caused mainly by the omission and public abandonment of the State regarding the universal realization of the right to health - has affected the poorest sections of the population more precisely, since there

is a direct and exclusive dependence on the 'Unified Health System', without any possibility of resorting to other means to obtain medical treatment, in addition to the fact that health is an element that has a total relation not only with the individual, but with the entire social environment that surrounds him (RAMOS; DINIZ, 2017, p. 174), which doesn't favor the populations living in conditions of extreme poverty and that, for the most part, don't even have a healthy habitat for life.

In this sense, Martin's teachings are important (*In* FERREIRA; OSELKA; GARRAFA, 1998, p. 175):

> It's precisely the complexity of the causes of this situation that generates a certain feeling of helplessness in society, conducive to the spread of mentality: "save yourself who can". Private health plans for those who are able to pay and the appeal to traditional alternative medicines and new ones by the rich and the poor, alike, are symptomatic data of a malaise in society in face the absence of health services in many places and the scrapping of public services and the elitization of private services in others. In a society where considerable financial resources are unable to guarantee quality of care, the greatest and most urgent ethical issue that arises in the face of the poor patient in the advanced stage of their illness isn't the euthanasia or dysthanasia, destinations reserved for patients who manage to break their barriers of exclusion and becoming patient, but, yes, mysthanasia, destination reserved for those thrown into the dark and cramped rooms of the shanty town or in the more airy spaces, although not necessarily less polluted, under the bridges of our big cities. (Our translation into english)

Furthermore, there is still a 'state neglect' in relation to the "diseases of poverty", which are so named because, even extinct in the past, they end up returning to the current reality because the poor and extremely poor population ends up having no means to avoid contamination[16] or don't know how to do it and, especially, when they get sick, they are poorly assisted (SOUZA, 2011, p. 313-314). In this sense, Silva and Gonçalves clarify (2013, p. 565):

> Just look, for example, at the institutional neglect of so-called diseases of poverty. It's admirable, in the derogatory sense of the word, the government's resignation in relation to the existence of diseases considered outdated, but which affect and lead to the death of a considerable portion of the poor, miserable population and residents of remote regions of Brazil. This fact is proven by the high number of new cases of tuberculosis and leishmaniasis in the Brazilian territory, diseases whose drugs developed for their respective treatments occurred, mainly, between the 40s and 50s, with no development of relevant drug innovations after this period. Leishmaniasis is quantified in 30 thousand new cases per year. Tuberculosis reaches the number of 70 thousand new cases per year in Brazil (BRASIL. Ministério da Saúde. Portal do SUS). The Rocinha slum, located in the city of Rio de Janeiro, for example, came to account for 50 cases of tuberculosis per month in 2008 (SOUZA, 2011, p. 313). Still in 2011, between January and October, malaria reached the record of 217.298 new cases in the Amazon region, where 99% of the cases of this disease are concentrated in Brazil (BRASIL. Ministério da Saúde. O SUS enfrenta malária). (Our translation into english)

16 In this sense: "Urban disadvantage and vulnerability lead to various forms of health inequalities. The absence of basic amenities in low-income settlements in urban areas, together with unsanitary environments and overcrowding, creates a vicious cycle of infections, malnutrition, and poor health". (SHAFIQUE; BHATTACHARYYA; ANWAR; ADAMS, 2018, p. 63-64).

In this way, the dependence of the poorest classes of the population is added to the 'Unified Health Service'[17] exclusively, with the aforementioned "diseases of poverty" and the fact that such population normally lives with hunger, with living in homes precarious, with the absence of clean water, unemployment or working in overwhelming conditions, etc., which ends up contributing to the spread of ill health and a deadly and excluding culture (MARTIN *In* FERREIRA; OSELKA; GARRAFA, 1998, p. 175).

Thus, "poverty is an obstacle to access to health, which shows that there is still a correlation between social class and health" (RAMOS; RAMOS, 2016, p. 300), and, consequently, the occurrence of social euthanasia ends up having as victims mainly the layer of the population where poverty and extreme poverty are present, where dependence on public service is the only hope, thus being effective as an instrument that, in addition to killing, excludes these populations socially, in a cruel and painful way. So, the term mysthanasia ends up giving meaning "to the death of thousands of people without any assistance, left to their own devices, in dumps, under overpasses, bridges, streets and, mainly, in hospitals with crowded corridors, with dying and abandoned patients for the State and for all" (MENDONÇA; DA SILVA, 2014, p. 175), and whose violating agent, unfortunately, remains unaccountable for such deaths and for the institutionalized exclusion it promotes. Thus, there is, finally, the importance of viewing the right to health as an ethical demand for equity and the need to internalize public moral norms to progressively realize this right (RUGER, 2006, p. 326)[18], as well as the adoption of a perspective that understands that the realization of the right to health must be seen as a priority, since the absence of equal access sometimes leads to an institutionalized exclusion of those who depend on exclusive access to public health, which is often precarious and insufficient.

FINAL CONSIDERATIONS

In view of all the considerations made in this article, the importance that the right to health has for the actual concreteness of the right to life and the dignity of the human person remains evident, figuring as a right that besides being human and fundamental, it can also be considered as a personality right, insofar as it maintains an intimate relation with the core of those rights, that is, the dignity of the human person, in addition to the fact that there is no way to talk about the full development of the personality of the person if it's not given to each individual, effectively, the preservation and care with their health and life.

In addition, because it's a unique right that is included among the rights characterized as "minimum existential", and that must be guaranteed to each person, the claim of the 'reserve of the possible' by the State, in order to justify its omission and inefficiency, with regard to the promotion of public health policies for all, and the incorrect application of public resources, shouldn't be understood as a valid justification by the legal system, as it involves

17 In comparative law, we have that: "Over 42.5 million Americans (15.5%) have no health insurance coverage—a major increase since 1990s despite the strong performance of the American economy since the recession of the early 1990s. Of these, 32.4% of the poor or 10.4 million people are without coverage". (KINNEY, 2000, p. 1475)

18 "[...] It emphasizes the importance of viewing the right to health as an ethical demand for equity in health and the need for the internalization of public moral norms to progressively realize this right. [...]". (RUGER, 2006, p. 326)

such a relevant right, or at least it should only be considered as a valid argument if it remains effectively demonstrated that the limitation to its effectiveness was made by weighing conflicting rights of the same relevance and in which the proportionality requirements were met and with the preservation of the minimum content necessary to guarantee the exercise of life with dignity, under penalty of, indiscriminately accepting such state claim, make the own materiality of the right to health unfeasible and continue to legitimize that consequences such as mysthanasia are perpetuated.

In this tone, it was also found that social euthanasia or mysthanasia (*eutanásia social ou mistanásia*) in no way resembles euthanasia itself, whereas in those cases death is also anticipated, and such anticipation occurs in a miserable, painful and cruel way, a result, in large part of the times, the state's omission regarding the implementation of a health system that is, in fact, accessible to all and of quality, and not a system that is inaccessible to many, or that when accessed, is selective and precarious, leaving to perish countless people without, at least, adequate care.

Thus, social euthanasia is revealed, not only a disregard for the right to health, but also as a violating act perpetrated constantly by the State and whose accountability and even the legal debate, for involving precisely the great "leviathan", still it's makes it invisible and, consequently, stimulates the continuation of this institutionalized social exclusion, especially of the social layer covered by poverty and extreme poverty, which depend only on a public service so that their health is treated and preserved, as well as their dignity respected.

In this way, the answers to the problems initially proposed in this article are in the sense that: the realization of the right to health is of paramount importance, especially as this right reveals itself as a human, fundamental and personality right, necessary for the realization of the dignity of the human person and for a full and free development of the personality.

In addition, phenomena as cruel as mysthanasia remain practically invisible in the contemporary scenario, because it has as its causative agent precisely the one that should protect and enforce the rights of the population, that is, the State, which not only promotes (or at least allows) several deaths to be perpetrated due to failures and insufficiencies in the provision of a qualitative and universal health service, but also promotes the institutionalized social exclusion of the poor and extremely poor classes, this because this portion of the population has only the public health service to resort to and, in addition, they usually have precarious living conditions, without adequate housing or food, with the absence of clean water, etc., which facilitate the spread of ill health and the perpetuation of a deadly and exclusionary culture.

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HERMENEUTICS OF THE FAMILY USUCAPTION: ANALYSIS OF THE PRESUPPOSITIONS OF FAMILY USUCAPTION ACCORDING TO SYSTEMIC INTERPRETATION

HERMENÊUTICA DA USUCAPIÃO FAMILIAR: ANÁLISE DOS PRESSUPOSTOS DA USUCAPIÃO FAMILIAR A PARTIR DE UMA INTERPRETAÇÃO SISTÊMICA

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ABSTRACT

The usucaption institute is truly nuclear for Real Rights. This subject is achieved through action seeking property, and the purpose is to achieve the right of ownership, by proving the requirements, ie the intention to own, term and others. Specifically, in 2011, family cancellation occurred, which requires that the family leave, the exclusive possession for two years, possession with all qualification requirements, and the author cannot be the owner of another urban or rural property, also must have respect for the location of the property in urban area and the property cannot exceed the measure of 250 meters. This is a subject that is full of doubt, in theory and in the tribals. Therefore, the difficult point of this work is the investigation into the possibility of reducing this species to family abandonment or if we can defend other hypotheses, because the Laws of Civil Law of Brazil place the abandonment of home alongside other equally complicated hypotheses in the Family right. The studies done let us understand that abandoning the home requires the sum of abandoning the home and family. In another matter, the word "ex-husband" has to do with the reality of the separation. Finally, the abandonment requirement is as serious as the other requirements of article 1573 of the Civil Code, for example, such as physical or moral aggression, therefore, the adverse possession of the family is only in the case of abandonment

KEYWORDS: Usucaption. Abandonment. Family. Spouses.

RESUMO

O instituto da usucapião verdadeiramente é nuclear para os Direitos Reais. O referido instituto é logrado tipicamente por meio de ação petitória, cujo propósito consiste na obtenção do direito real de propriedade, mediante a comprovação da qualificação possessória, isto é, da intenção de dono, prescrição aquisitiva e

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outros. De modo específico, em 2011, insurgiu a usucapião familiar, que exige para a sua configuração o abandono familiar, a posse exclusiva de dois anos e qualificada, além de o usucapiente não poder ser proprietário de outro imóvel urbano ou rural, respeitando ainda a localização do imóvel em zona urbana e que o imóvel não poderá sobejar a metragem de 250 metros quadrados. Ocorre que essa modalidade é alvo de múltiplas discussões doutrinárias e jurisprudenciais. Diante disso, o ponto melindroso deste trabalho não é outro senão a investigação a possibilidade de restringir esta modalidade ao abandono familiar ou se é defensável inserir outras hipóteses, em virtude de o ordenamento civil pátrio posicionar o abandono de lar ao lado de outras hipóteses similarmente nefastas, na. Assim, os estudos realizados nos permitem compreender que o abandono de lar exige o cúmulo do abandono do imóvel e da família. Noutro giro, a expressão "ex-cônjuge" ou "ex-companheiro" está ligada à situação fática de separação. Por derradeiro, o pressuposto de abandono é tão gravoso quanto outras hipóteses descritas no artigo 1573 do Código Civil, tais como a ofensa física ou moral, razão pela qual a usucapião familiar não deve se restringir ao abandono.

PALAVRAS-CHAVE: *Usucapião. Abandono. Família. Cônjuges.*

1 INTRODUCTION

The most distinct sources of Brazilian law commonly convey the extinction of guilt for divorce. In fact, the fact is that this discussion lost its furor in Family Law (*Direito de Família*), especially after the supervenience of Constitutional Amendment 66 of 2010 (*Emenda Constitucional 66 de 2010*), which aimed to abolish minimum time lapses for the purpose of dissolving the bond or the conjugal society. However, after one year of this Amendment, there was a certain instigation to resume this discussion in the Law of Things (*Direito das Coisas*), due to Law nº 12.424 of 2011, due to the insertion of the new form of adverse possession (or usucaption), namely the family adverse possession (or family usucaption), whose basic assumption it consists of the proof, by the *usucapiente* (who is in the process of acquiring or acquired by adverse possession), of the abandonment of home (historical hypothesis of guilt[2] for the divorce, in the terms of article 1573, IV of the Civil Code of 2002) (*Código Civil Brasileiro de 2002*).

At this point, the anguish of this research emerges, from the identification of the "mens legis" that illuminated the mind of the legislator. The spouse "agent of the material marital relationship" will suffer a nefarious patrimonial consequence, which will consist of the loss of the parcel of property that was peculiar to him (in a condominium with the abandoned spouse), due to the reprehensible conduct of abandonment. In this discourse, we systematically believe that abandoning a home in the conjugal area finds hypotheses similarly reprehensible.

2 In an authentic exemplary role, in addition to leaving home, the following are hypotheses of guilt for divorce: Art. 1.573. Some of the following reasons may characterize the impossibility of the communion of life:
I - adultery;
II - death attempt;
III - ill-treatment or severe injury;
IV - voluntary abandonment of the conjugal home for one continuous year;
V - conviction for infamous crime;
VI - dishonorable conduct.
Sole paragraph. The judge may consider other facts that make the impossibility of life in common evident. (BRASIL, 2002) (Our translation into english)

In this perspective, the expression "systemic interpretation", contained in the title, was used with the aim of looking at family adverse possession in all its angles and presuppositions, in view of the institutes involved in Family Law and in the Law of Things.

This article will unfold in five chapters, which will bring principled and institutional views that will gravitate towards family adverse possession. All this work will have the purpose of verifying the possibility of extending reprehensible hypotheses, in the field of family adverse possession, beyond the abandonment of home.

2 PRINCIPIOLOGY

Principles are nuclei of thought, through which hermeneutics itself is structured. In this capacity, the Philosophy of Law[3] is dedicated to studying the space occupied by the principles in the Science of Law. Although there are doctrinal dissonances, the most prudent thing is to bring objective airs to the principles, in comparison with the subjectivity of morality, in addition to the mark of enforceability (chargeable).

Tércio Sampaio Júnior explains the strength of the principles in the following terms:

> The principles, as we see, are directors enunciated of human activity legally considered. The ones we mentioned are regional. However, there are principles that apply in all areas. These are general principles of law, such as that of equality, that of liability for damages, that the agreement must be observed (pacta sunt servanda) etc. In its name, dogmatics seeks to understand law as a whole, postulating its unity. For its, despite the distinctions, the law is, ultimately, only one. Hence the systematizing sense of its task. The resulting system, as we have seen, may not be a strictly logical set, but it must manifest a certain coherence and sense of cohesion. (FERRAZ JÚNIOR, 2017, p.108) (Our translation into english)

Principles are parameters, waves of maturation of legal thinking. They are pillars capable of clarifying and enlightening the minds of the actors of law. In this way, the principled application conveys congruence and interpretative sustainability.

To elucidate the impact of the principles let us see the thought of the jusphilosophist Miguel Reale:

> Principles are, therefore, truths or fundamental judgments, which serve as a foundation or guarantee of certainty to a set of judgments, ordered in a system of concepts related to a given portion of reality. Sometimes propositions are also called principles, which, although not evident or resulting from evidence, are assumed to be the foundations of the validity of a particular knowledge system, as its necessary assumptions. (REALE, 2002, p.60) (Our translation into english)

3 So it was with Philosophy: it was reborn. And the Philosophy of Law arrived with all its usual energy. Revolutionary, since it's not tied to any parameters; she returned to free the legal thought. There is no State Science, much less Philosophy. There is also no Market Science or Philosophy (this mark of the present times). Philosophy has to help loosen the bonds, unveil the concealment brought by language, show the limits of technique, teach how to work with principles, make clear fundamental values and ethics, generate courage to do justice, in short, to produce an awareness of the relevant social role that every student and operator of the Law should have. (NUNES, 2015, p. 18) (Our translation into english)

Therefore, the principles bring clarity to the speech or legal decision. In this speech of exaltation, the normative precepts are nothing more than principled radiations.

2.1 DIGNITY OF THE HUMAN PERSON

The dignity of the human person presents as irradiations: the protection of physical and moral integrity. These irradiations incline us once again to the axiological proximity between the dignity of the human person and the personality, it's an umbilical harmony.

According to Bretas and Machado: "The dignity of the human person is the justifying source of the entire Brazilian Legal System, the pillar on which all normative structures must rest". (BRETAS E MACHADO, 2018, p.60)

They are also basic species of dignity, ontics and assistance. The first of which refers to the perception that dignity is: a legal, latent good, inherent to man. That is, 'I am a man so I have dignity'. On the other hand, assistance is understood as the need for the State to protect the dignity of man, in a preventive, repressive, extrajudicial and jurisdictional way. In this line:

> The value of dignity reaches all sectors of the legal order (...) the material substrate of dignity thus understood can be deployed in four postulates: i) moral subject (ethical) recognizes the existence of others as subjects equal to him; ii) deserving of the same respect for the psychophysical integrity to which it is held; iii) is endowed with free will, with self-determination; iv) it's part of the social group, in relation to which it's guaranteed not to be marginalized. (MORAES, 2006, p.17) (Our translation into english)

Dignity, according to the invoked precepts, is considered a "stone clause" (*cláusula pétrea*), therefore, protected materially by the original constituent power, under the terms of article 60, paragraph four, of the current Brazilian Federal Constitution.

Dignity is a personal and individual right, therefore, it belongs to the list of individual rights, therefore, a fundamental right of the first generation. In this sense, the discourse is interconnected with revolutionary defenses (French, American Revolutions and so many others), according to Puccinelli Júnior (2015, p.26)

The dignity, understood as a fundamental right, carries with it: horizontal effectiveness (between people, not hierarchical, there must be reciprocity of respect and the promotion of respect for dignity); vertical efficacy (the State must excel in the zeal for dignity, similarly to the discourse of dignity of assistance); and, radiating efficacy (the defense of dignity concerns the most different horizons and spheres), as it's possible to extract from André Puccinelli Júnior's reflection (2015, p.263-264).

2.2 PRIVATE AUTONOMY

The first hermeneutic care to be taken is to identify the most appropriate morphology. That is, we cannot confuse private autonomy and autonomy of the will, after all, the autonomy of the will is very much related to the perspective of unlimited freedom, without major state interference. On the other hand, private autonomy allows, more clearly, State interference, considering the discourse of the social function of contracts, for example. Let's see:

> In a flagrant way, private autonomy must be confronted with the autonomy of the will. Although we know that the first one presents marked legal limitations, differently from the autonomy of the will, taking into account the freedom concerning to the individuals, sensibly studied in the contractual orbit, however, without the perceptions of marked legal limitations. (BRETAS, 2015, p.127) (Our translation into english)

Private autonomy is translated, in objective terms, as limited freedom in the patrimonial context. This principle has a series of consequences, including mandatory, initial intangibility, contractual freedom and freedom to contract, among others.

The limitation of autonomy can be made due to conventional and normative limits. Categorically, autonomy is limited by the social function of contracts, as well as by the dignity of human person.

According to Perlingieri, private autonomy must be interpreted as:

> (...) the freedom to regulate one's own actions or, more precisely, to allow all individuals involved in a common behavior to determine the rules of that behavior through a common understanding. (PERLINGIERI, 2002, p.17) (Our translation into english)

That said, private autonomy must lead the interpreter to the levels of contractual and contracting freedoms. In this tone, we must conceive freedom in a manner consistent with rational normative limits.

2. 3 SOCIAL FUNCTION OF THE PROPERTY

The property, since the most remote times, has undergone significant transformations. From communal to private. From absolute and intangible property, according to the Romans to social-function property, as theorized by Szaniawski, quoting Léon Duguit (2000, p.32). In other words, it's a question of migration from the 'property-right' perspective to 'property--duty'.

Fachin (1988, p.15) clarifies that, in more remote periods of history, private property represented the exacerbation of individualism, moreover, it was marked by inviolability and absolutism. In this sense, it's understood that in that period there was no possibility for State intervention. Since the perpetual and absolute character of the property prospered.

The legislator did not exhaust the concept of 'social function of possession' and 'social function of property', in fact, his stance was none other than to posit a general clause, through which parameters and pillars of the social function were established, especially regarding to the environment, under the terms of article 186 of the Constitution of the Federative Republic of Brazil.

What is decisive when evaluating the social function of possession and the social function of property is to perceive its profound interconnection with the legal good: dignity of the human person. In this sense, from a serious reading of the "Legal Statute of Minimum Equity" ("*Estatuto Jurídico do Patrimônio Mínimo*"), by Luiz Edson Fachin (2008), we can reach the proposition that dignity is the main element that makes up the patrimony. For, when we talk about State heritage, the premise is that all tangible and intangible (corporeal and incorpo-

real) assets are components of this heritage, and the existential structures concerning to their people.

Thus, the dignity of the human person and the social function are inseparable, as well as, according to article 186 of the current Brazilian Federal Constitution, the rational use of the soil, respect for the environment and workers.

In this same dogmatic tone, let us see Gonçalves's conception:

> The current Federal Constitution provides that the property will serve its social function (art. 5º, XXIII). It also determines that the economic order will observe the function of property, imposing a brake on business activity (art. 170, III) (...) This whole set, however, ends up tracing the current profile of property law in Brazilian law, which has ceased to present the characteristics of absolute and unlimited law, to become a right of social purpose (GONÇALVES, p.241-242, 2018) (Our translation into english)

We must also see that, as taught by Pietro Perlingieri (2002, p.229), the social function is a decisive element of property, that is, if there is no compliance with the parameters of the social function, essentially, there is no way to recognize ownership.

3 ELEMENTARY CONCEPTS

Ineluctably, the interpretative exercise requires the construction of variables and institutes. In this work, the institutes to be confronted are: detention, possession and property.

It's important to mention, preliminarily, that the expression "possessor" is not to be confused with the owner, since he – owner – carries with him the attributes of disposing and claiming the thing in the face of the one who unjustly holds it, under the terms of article 1.228 of the current Civil Code.

Possessor is also not to be confused with holder; it's also important to consider that the qualified possession (*posse qualificada*) is not to be confused with the detention, being certain that this does not induce usucaption and that – qualified possession – yes.

3.1POSSESSION

The legal nature of 'possession' will always be stormy. At first, according to the lessons of Carlos Roberto Gonçalves (p.382, 2019) we must understand it as factual, inasmuch as the materialization of its attributes can occur independently of any adjustment of designs. It can also be taken as a right, since its vilipendum establishes in favor of its legitimate addressee a series of extrajudicial, typical and atypical possessory mechanisms, for guardianship purposes.

What is certain is that: no reflection we make will be sufficiently robust to settle historical doctrinal spirits. However, although we are far from exhausting this issue, beforehand we must remove the positioning of possession as a real right, despite its interface and a certain

"umbilicalism" with property, since possession is not regulated in the apparent taxing role of Rights Reais (*Direitos Reais*), pursuant to article 1.225 of the current Civil Code of 2002.

3.1.1 Concepts and Theories

In the Law of Things, there is an indispensable study about two critical legal assets, both concerning the fundamental rights of the first generation (property and possession). On the other hand, we also present the relevant discourse on second generation fundamental rights, with a view to social rights.

Beforehand, it's necessary to propose that in the light of the Civil Code of 2002, under the terms of article 1.196, the possessor is one who exercises one of the attributes of owner, which are prescribed in article 1.228, caput, of the Civil Code, that is, it's of those - possessor - who exercise the attribute (s) of using, possess and enjoying the thing.

3.1.2 Detention

Among the modalities of detention, the following ones emerge: mere permission or tolerance, under the terms of article 1.208 of the Civil Code, as well as the unjust modalities (violence and clandestinity, while they last, and precariousness).

In addition to these initials, let us invoke the infamous "servant possessor" (*fâmulo possuidor*) (the one that retains possession in favor of third parties. In the case of this modality, adverse possession is possible, provided that we are faced with the depletion of subordination), under the terms of the article 1.198 of the Civil Code.

Finally, the factual exercises, apparently possessory on public goods, under the terms of article 191, sole paragraph, 183 of the Federal Constitution of Brazil (*Constituição Federal do Brasil de 1988*), according to the Summary 619 of the Superior Court of Justice (*Súmula do Superior Tribunal de Justiça*) and 340 of the Supreme Federal Court (*Súmula do Supremo Tribunal de Justiça*), and article 99 of the Civil Code (*Código Civil Brasileiro*), will not induce the adverse possession. Thus, in the terms of Summary 340 of the Supreme Federal Court: no matter what kind of public good, be it dominical, special or common use, none of these modalities will induce adverse possession, "a priori".

We can see the jurisprudential sense, when reflecting on this Summary, since the usucaption is a hypothesis of original acquisition, due to the possessory exercise, bringing a tendency to individual character (certainly of *inter parts* reach in favor of the *usucapiente*).

4 ADVERSE POSSESSION / USUCAPTION

4.1 ESSENCE

The institute of adverse possession is complex and assumes a central position in the Law of Things. Usucaption or adverse possession is a classic institute of the Law of Things, it consists of the means through which, according to Rizzardo (2016, p. 54), the original acquisition in favor of the *usucapiente* will be perfected, being transmitted, by virtue of the recognition of qualified possession, a suitable title for the purpose of transferring the property.

Understanding this work involves understanding possession. After all, possession in its cosmopolitan standard is fact and right, as well as having a series of classifications, such as: simple versus qualified, direct versus indirect, 'with-possession' (*composse*) versus exclusive, objectively addicted versus not addicted, good faith versus bad faith etc.

This work requires dogmatic and axiological valuations. With regard to possession, the Civil Code of 2002 adopts the simplified theory of possession, by Rudolf Von Ihering, according to article 1.196.

According to this theory, the possessor is the one who brings with him the attributes: *affectio tenedi* and *corpus*. These assumptions, which lead us to believe that the possessor is the one that has the appearance of an owner, that is, we are facing that a subject who behaves with considerable zeal in relation to the thing to the point of resembling the owner, we are facing the discourse of visibility, of exteriorization. So let's note:

> Today the name 'corpus' is given to the person's external relationship with the thing established by the apprehension. Roman jurists, on the contrary, used this expression only to designate the manifestation of the will in the act of apprehension. The 'corpus', according to the dominant theory, is the physical power or the indeed supremacy over the thing, such is the fundamental notion by the current theory. It's absolutely erroneous, as can be seen in my work already cited: The foundation of possessory protection. (IHERING, 2002, p.43) (Our translation into english)

On the other hand, the valuation is unequivocal, to a lesser extent (when compared to the prestige of Ihering's Theory), p on the part of the Civil Code, of the Subjective Theory of Von Savigny, according to which, according to Gonçalves' interpretation (2019, p. 371), possessor is the one who gathers the subjective (*animus domini*) and objective (corpus: inclining ourselves to the power of the subject in relation to something) assumptions.

Add to that the sociological theory, supported by authors such as Silvio Perozzi, according to Gonçalves (2019, p. 374), bringing up the thesis that the possessor imposes an abstention in relation to the collectivity, promoting an authentic social recognition.

Paulo Nader invokes the sociological conception in the following terms:

> Sociological currents, sensitized by the profound social inequality, which affects a large part of the peoples and marks the beginning of the third millennium, seek to value possession as an instrument of property acquisition, emphasizing social justice as a preeminent value. The doctrine finds a valuable foundation in the studies of Frenchman Raymond Saleilles. Sensitive to

> the trend, the Civil Code, giving projection to the constitutional principle of the social function of property (art. 5º, XXIII), confers the domain of extensive area, after five years of uninterrupted possession and in good faith, to a considerable group of people who, together or separately, has carried out works and services of social and economic interest (art. 1.228, § 4º) (NADER, 2016, p.39) (Our translation into english)

Therefore, in comparative law on possession the Italian, French and German influences are worthy of appreciation, for the purpose of building the Law of Laws in Brazil[4]. As we have explained, the theories of Savigny and Ihering were and are developed in Germany. In another round, Silvio Perozzi's theory was developed in Italy. Finally, comparatively, we cannot ignore the "Napoleonic" impact in France.

Based on the Civil Code of 2002, under the terms of article 1.196, the possessor is one who exercises one of the attributes of the owner, which is prescribed in article 1.228, caput, of the Civil Code, that is, it's the one who exercises the attribute (s) of using, possess and enjoying the thing (*usar, fruir e gozar da coisa*).

4.2 MODALITIES AND ASSUMPTION

Multiple are the forms of adverse possession, being certain that they all have multiple points in common. In the first moment, we must confront the usucaption over movable versus immovable property, the first is prescribed in article 1.260 of the Civil Code and which is divided into: ordinary (requires good faith and fair title, in addition to the three-year period) and extraordinary (time lapse of five years, regardless of fair title and good faith). On the other hand, the adverse possession of real estate (usucaption over immovable property) has a series of developments, which will foresee time lapses varying between 2, 5, 10 and 15 years.

Independently of the form of adverse possession, qualified possession will be essential, that is, *ad usucapionem*, capable of fulfilling the whole of assumptions for purposes of usucapion. These assumptions reveal the need, essential, for possession to be tame, peaceful, uninterrupted and with *animus domini*.

The *extraordinary* modality: it's provided for in article 1.238 of the Civil Code, which provides for the 15 or 10 year acquisition time lapse (provided that the *usucapiente* exercises possession for housing purposes or has built relevant works under the social or economic

4 Previous to the controversy between Savigny and Ihering, the Code Napoléon, by art. 2.228, thus defines the object of our present study: "Possession is the detention or enjoyment of a thing or a right that we have or that we exercise by ourselves, or by someone else who has it or who exercises it in our name". Apparently the legislator would not have distinguished possession from detention, which is not real, since the term detention was not used in a technical sense, but equivalent to apprehension. The 'possession' is designed as a simple fact and not as a subjective right. The system admits, in addition to the possession of things, that of rights. With a distinction between natural and civil possession, the Spanish Civil Code, of 1888, by art. 430, conceptualizes civil possession in the light of Savigny's subjective theory, placing natural possession as "the possession of a thing or the enjoyment of a right by a person". The specific difference in civil possession is that a person has a thing or enjoys a right with the intention of owning it. Natural possession, or detention, is characterized, according to Aubry and Rau, when "a person does have in fact something under his power, without the intention of subjecting him to the exercise of a real right". (Direct quotes with our english translation)

The Civil Code of Germany - the homeland of Savigny and Ihering - did not elaborate on the definition of possession (Besitz), limited to providing for its acquisition: "Possession of a thing is acquired by obtaining in fact power over the thing..." (art. 854). From Savigny's conception he assimilated only the corpus element. The theme of 'possession' is developed in the other devices - art. 855 to 872. According to the BGB, you will have possession when someone actually exercises power over a thing. By virtue of art. 1,140, 1st part, the Italian Civil Code, 1942, endorsed the theory of Rudolf von Ihering. (NADER, 2016, p.39). (Direct quotes with our english translation)

aegis). It's important to mention that this modality does not require good faith, a fair title, nor are there any length limits.

Ordinary: article 1.242 of the Civil Code, in which the acquisitive prescription is 10 or 5 years (single paragraph of the article in focus). This modality will require good faith and fair title of the *usucapiente.*

Specials: all of these modalities provide for a five-year delay for the original acquisition via usucaption, value the housing element, as well as if the property must be located in the urban or rural area, finally, the *usucapients* cannot own other urban properties or rural. Specifically see the developments of the special modalities:

Urban individual (*Urbana especial*) (article 9º of Law nº 10.257/01, whose length cannot be over 250 square meters).

Urban collective special (*Especial coletiva urbana*) (article 10 of Law nº 10.257/01), whose normative content is*:*

> Art. 10. Informal urban centers that have existed without opposition for more than five years and whose total area divided by the number of possessors is less than two hundred and fifty square meters per possessor are likely to be usucaped collectively, provided that the possessors are not owners of another urban property or rural. (BRASIL, 2001) (Our translation into english)

Rural Constitutional or Pro-Labore (*Constitucional rural ou pró-labore*) (article 191 of the Federal Constitution), whose length cannot exceed 50 hectares, provided that the property is located in a rural area and serves for housing and labor, under the terms of the aforementioned constitutional article.

Family urban individual (*Individual urbana familiar*) (article 1.240-A of the Civil Code), whose legitimacy concerns the abandoned spouse (according to the Federal Justice Council (*Conselho de Justiça Federal*), abandonment will simultaneously require the abandonment of possession and of family), provided that the latter exercises exclusive possession for two years, in an urban area, in a property that does not exceed 250 m².

Finally, we have the ones of complex materialization, which are: Administrative (Law nº 13.105/2015), as well as Silviculture (Law nº 6.001/1973).

Amid all these modalities, multiple borderline assumptions can be glimpsed, among which: 'to usucapt' it's essential that possession is more than simple, more than *ad interdicta*; possession needs to be qualified, *ad usucapionem*, that is, it must be a quiet, peaceful, uninterrupted possession, and with the subjective remnant of Savigny's theory of possession, the *animus domini*. It's worth stating that it's essential that the possessors exercise their possession with the intention of ownership, as if they really were owners.

5 PRESUPPOSED / ASSUMPTIONS OF FAMILY USUCAPTION

This final chapter will present the assumptions of the 'individual family urban special adverse possession', as a result of Federal Ordinary Law nº 12.424 of 2011, capable of inserting article 1240-A, of the Civil Code of 2002, according to which:

> Anyone who exercises, for 2 (two) years uninterruptedly and without opposition, direct possession, exclusively, on an urban property of up to 250 m2 (two hundred and fifty square meters) whose property he/she shares with a former spouse or ex-partner who abandoned home, using it for his/her home or family, he/she will acquire full ownership, provided he/she does not own another urban or rural property.
>
> § 1º The right provided for in the caput will not be recognized by the same possessor more than once. (BRASIL, 2002) (Our translation into english)

This modality has a striking similarity with the 'individual urban special usucaption', since both are attached to properties located in the urban area, as well as both will only be achieved if the property subject to adverse possession does not have an excess of 250 square meters in its footage. Still in a similar tone, it's clear that both have the restriction that the *usucapiente* cannot have another urban or rural property. However, what differentiates 'family adverse possession' from the 'individual urban special' is certainly the two-year period, as well as exclusive possession, and the fact that it requires abandoning the home. In another way, the 'individual urban special' does not require abandonment of the home, nor does it require exclusive possession. Finally, its acquisition time span is five years.

The *usucapiente* in the modality in focus must prove that the property is the one in which there is habitual housing, being certain that this modality cannot be achieved more than once by the same subject.

Therefore, it's important to place the interlocutor that this modality is not subject to retroactivity. For this reason, the understanding was established, according to the statement 498 of the Federal Justice Council (*Enunciado 498 – Conselho de Justiça Federal*), that family adverse possession can only be vindicated from June 16, 2013.

The assumption of abandonment deserves special mention, for purposes of adverse possession in the current modality. Preliminarily, this modality should never be considered absurd, because even before the supervenience of family adverse possession, article 1.275 of the Civil Code of 2002 already provided that abandonment is a hypothesis of loss of property.

According to Farias and Rosenvald (2017):

> As and what the caput of art. 1,240 of the Civil Code, the maximum length of the property will be 250 m². With the abandonment of the home for the biennium, the ex-spouse or ex-partner who remained in the property will claim the usucaption of the immovable part that did not belong to him/her, and being that the provenance of the claim will determine a new form of extinction of co-ownership, different from those that are recommended in family law (FARIAS E ROSENVALD, p. 461, 2017) (Our translation into english)

The interpretation of the Federal Justice Council in relation to the institute still deserves extreme appreciation, according to which family adverse possession does not imply discussion about guilt for divorce. In the meantime, there is no need to discuss guilt in this form of adverse possession, which is why statement 595 of this Council emerges, which revoked statement 499:

> The 'abandonment of the home' requirement should be interpreted in the perspective of the family adverse possession institute as voluntary abandonment of ownership of the property in addition to the absence of family

> guardianship, regardless of the finding of guilt for the end of the marriage or stable union (...) (TARTUCE, 2018)[5] (Our translation into english)

It is noticeable that, for the configuration of abandonment, for purposes of family adverse possession, the abandonment of the property, as well as of the family[6], will be required, observing the circumstances of the specific case. In this sense:

> The spouse or partner of the usucapient must have left the home. Abandonment is characterized by helplessness. The spouse or partner leaves home, leaving their consort and / or children helpless, without their contribution, without their physical presence. The fact that the spouse or partner leaves home, but continues to contribute, does not constitute abandonment. (FIUZA, p.982, 2014) (Our translation into english)

As explained in the previous chapters, in addition to specific assumptions, it will be necessary, the "animus domini" and that possession is tame, peaceful and uninterrupted. In addition, we need to pay attention to the morphology of the words "ex-spouses" and "ex-partners", contained in article 1.240-A. In this semantic tone, an ex-spouse or ex-partner is only configured if there has already been the dissolution of the marital bond or stable relationship, which is why the mere separation would in fact not dissolve the marital bond, therefore, it could not configure family adverse possession, in a literal view.

De indeed separation, although, by itself, is not capable of dissolving the marital bond, it can fulfill one of the requirements of family adverse possession. How can we see: Let us imagine that Fernanda is married to Josué, and that both are married under the legal regime (partial communion of goods), according to Law nº 6.515/1977, and that the couple acquired a property in the constancy of the marriage. Based on this information, pursuant to article 1.658 of the Civil Code, the property is owned by Fernanda and Josué. Thus, if Fernanda leaves the home and Josué remains in this home for more than two years with exclusive possession of the property, combined with the other assumptions previously analyzed, there is no denying that there was de indeed separation, however, both are still in the condition of spouses (that is, they are not yet ex-spouses, as morphologically article 1.240-A is demanding), and despite that, we do not propose, in the narrated terms, any obstacles for Josué to succeed family adverse possession. For this reason, we believe that the extensive interpretation in relation to the device is applicable, due to the fact that family adverse possession is both applicable between spouses or partners, who are actually separated, according to the statement 501 of the Federal Justice Council[7] being certain that the core point will be the configuration of abandonment, which is due to the abandonment of the property, as well as the abandonment of the family itself, checking if there was family helplessness.

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5 TARTUCE, Flávio. Official disclosure of the statements approved at the VII Civil Law Conference in September 2015 (Divulgação oficial dos enunciados aprovados na VII Jornada de Direito Civil em Setembro de 2015). Available in: https://flaviotartuce.jusbrasil.com.br/noticias/247806230/divulgacao-oficial-dos-enunciados-aprovados-na-vii-jornada-de-direito-civil-em-setembro-de-2015. Accessed on: December 18, 2018.

6 Family in the definition of Rodrigo da Cunha Pereira has a very broad connotation, under the conjugal aegis or not, fruit of natural fertilization or not, etc.: A genus that comprises two species, in its constitution: the conjugal family and the parental family. The conjugal is one that is established based on a loving relationship, involving sexuality and may result from children, or not. It can be hetero-affective or homo-affective, by marriage or stable union, simultaneous to the other, breaking the principle of monogamy, or not; the parental family is the one that results from the formation of consanguineous or socio-affective bonds. It can be by natural or artificial insemination, generated in a proper or replacement uterus (surrogacy). In any case, parental or conjugal, it's in the Family Law's interest to include all these new configurations so that rights can be attributed and receive protection from the State. (PEREIRA, 2018, p.288)

7 The expressions "ex-spouse" and "ex-partner", contained in art. 1.240-A of the Civil Code, correspond to the factual situation of separation, regardless of divorce.

According to the most distinct sources of law, the hypothesis that generates family adverse possession is restricted to abandonment. However, abandonment in the family civilist sphere generates which effect historically? The guilt[8] for divorce, whose discussion is predominantly softened in terms of understanding (since it shines the thought that the blame for divorce, therefore Constitutional Amendment 66 of 2010 (*Emenda Constitucional 66/2010*), no longer makes any sense), it has become harmless for Family Law, although there is no explicitly abolitionist normative provision. In this same bias:

> In fact, if abandonment of the home is no longer a legal basis for divorce inasmuch as this right is essentially potestative and dispenses specific cause declared, on the other hand, it may result in the recognition of adverse possession in favor of the spouse or partner who remained in the couple's property, exercising quiet, peaceful possession and with *animus domini* (GAGLIANO, PAMPLONA FILHO, p. 1012, 2017) (Our translation into english)

In this context, abandonment is accompanied, according to article 1.573, of so many other hypotheses:

> Art. 1.573. Some of the following reasons may characterize the impossibility of the communion of life:
>
> I - adultery;
>
> II - death attempt;
>
> III - ill-treatment or severe injury;
>
> IV - voluntary abandonment of the conjugal home for one continuous year;
>
> V - conviction for infamous crime;
>
> VI - dishonorable conduct.
>
> Sole paragraph. The judge may consider other facts that make the impossibility of life in common evident. (BRASIL, 2002) (Our translation into english)

For this reason, the legislator in article 1.240-A of the Civil Code of 2002 established a single hypothesis that generates family adverse possession. Thus, based on an inescapable systematic between the invoked article and article 1.573 of this diploma, we do not see any obstacles to the extension of the hypotheses that generate family adverse possession.

6 FINAL CONSIDERATIONS

After all the interpretive path taken, we believe that the family adverse possession experience in fact experienced complex doctrinal and jurisprudential dissonances. In fact, the

8 When discussing the reflection of guilt/fault in the context of family adverse possession: Consequently, by inserting among the requirements of adverse possession the voluntary and unjustified abandonment of the home by one of the spouses or partners, Law nº 12.424/11, apparently, it rescues the discussion of the violation of the duties of marriage and stable union. That is to say, to the detriment of freedom and the confirmation of the end of affectivity, guilt and the cause of separation would be evaluated, themes that had been abolished by the referred Constitutional Amendment whose effectiveness is immediate and direct, not demanding the edition of any infraconstitutional normIf the rules prior to EC nº 66/2010 are no longer welcomed by the legal order, certainly, the later ones - such as the one now being discussed - can be considered ineffective in the constitutional order. More consistent with a constitutional vision, it will be to interpret the requirement of abandonment, as an omission of the fundamental duty of family coexistence (art. 227, CF) by that parent who was absent from home. (FARIAS, ROSENVALD, p. 461, 2017) (Our translation into english)

legislator, in his harsh ratio legis, was happy to bring this new form of usucaption, inasmuch as the conduct of abandonment of home between partners or spouses deserves to be protected in a different way, since it reveals the breach of a conjugal duty, in addition to generating for the one who was abandoned, congruently, *animus domini* and the possibility of exercising exclusive possession. Incidentally, guardianship in relation to family adverse possession took place in the most typical way of Civil Law, that is, through a patrimonial reflex. Accordingly, the abandoned spouse or partner will become, in its entirety, owner of the property that he/she had in a condominium with his/her consort, the "abandoner".

Supported by this legislative reason, the Federal Court of Justice establishes that abandonment, for purposes of family adverse possession, will occur through the accumulation of abandonment of possession of the property *to be usucapted* and the abandonment of the family, in view of the observance of helplessness. In this sense, family adverse possession values the spell of the spouse or partner's possessory detachment, as well as repudiating the conduct of abandonment of the family.

So, if abandonment of the family is also relevant to the configuration of family adverse possession, we systematically see that, by diving into the aforementioned "harsh legislative reason", there would be other hypotheses (also considered in the scope of Family Law (*Direito de Família*)), provided for in article 1.573 of the Civil Code in force, which could generate family adverse possession. Thus, adultery, infamous crime, bodily injury, attempted murder, are foreseen in the same abstract factual support that prescribes abandonment (article 1.573 of the Civil Code of 2002), being certain that all of them are hypotheses historically and similarly serious in the conjugal scope.

Therefore, we try to promote a hermeneutic encounter between Family Law and the Law of Things, based on two critical institutions: marriage and adverse possession. From this meeting, accompanied by the interpretative zeal we had, when trying to reach the *mens legis* peculiar to article 1.240-A, we are in favor of the insertion of other hypotheses of article 1,573 of the current Civil Code, for the configuration of the individual family urban special adverse possession (*usucapião especial urbana individual familiar*).

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AN INTRODUCTION TO ECONOMIC ANALYSIS OF LAW

UMA INTRODUÇÃO À ANÁLISE ECONÔMICA DO DIREITO

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ABSTRACT

The purpose of this article is to deal with the introductory aspects of Economic Analysis of Law (AED). To reach the objective, the research started by the interaction between the sciences of Law and Economics, their differences and convergences. Then it was about the origin of the movement, passing to the methodological premises of the economic theory based on the scarcity of resources, the maximizing rationality, the incentive structure and the question of efficiency. The research converges to demonstrate the need for dialogue and cooperation between the disciplines of Law and Economics. It is concluded that the AED, in its pragmatic and consequentialist bias, helps the jurist to understand the application of the legal norm (descriptive sense) providing the keys for understanding the choices made by the legislator on the different themes aiming at the improvement of legislation (predictive sense). The article is inserted in the branch of Legal, Social and Environmental Sciences, in the areas of Environmental Law, Water Law and Civil Procedural Law, being analyzed in a holistic perspective. The methodology adopted was bibliographic and documentary, in a qualitative analises.

KEYSWORDS: Law. Economy. Economic Analysis of Law.

RESUMO

O presente artigo tem por objeto tratar dos aspectos introdutórios da Análise Econômica do Direito (AED). Para o alcance do objetivo a pesquisa iniciou pela interação entre as ciências do Direito e da Economia, suas diferenças e convergências. Em seguida se tratou da origem do movimento, passando às premissas metodológicas da teoria econômica calcada na escassez de recursos, na racionalidade maximizadora, na estrutura de incentivos e na questão da eficiência. A pesquisa converge para a demonstração de necessidade de diálogo e cooperação entre as disciplinas do Direito e Economia. Conclui-se que a AED, em seu viés pragmático e consequencialista, auxilia o jurista a compreender a aplicação da norma jurídica (sentido descritivo) fornecendo as chaves de compreensão das escolhas feitas pelo legislador sobre os diferentes temas visando o aprimoramento da legislação (sentido preditivo). O artigo se insere no ramo das Ciências Jurídicas e Econômicas, na área do Direito Econômico, sendo analisada em uma perspectiva holística. A metodologia adotada foi a revisão bibliográfica e documental a partir de uma análise qualitativa.

PALAVRAS-CHAVE: *Direito. Economia. Análise Econômica do Direito.*

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1 INTRODUCTION

Law, as a mode of social ordering, in the systems of Roman-German tradition, is traditionally conceived based on the concept of sanction.

In coercibility, in the subsumption of fact to the norm and in pure methodology (COELHO, 2001, p. 02)[3], without the contamination of other knowledge, that Law, as a science, was revealed.

However, as the complexity of the social phenomenon grew, notably from the first half of the 20th century, legal positivism was in crisis. It was no longer possible to close the legal norm to the legal text, nor to confuse the law (rule) with the Law itself. The legal formalism with a hermetic, legalistic and sterile profile did not meet the demands of society.

Social pluralism demanded new knowledge that the science of law, by itself, was unable to offer. New answers to old problems were therefore called for. Thus, new archetypes emerge as a reaction movement to the so-called juspositivism.

Unlike the European system, which walked with an emphasis on constitutional principles, the North American model turned to an approximation of 'social reality' or 'pragmatics of law', working, instead of abstract values, with concrete answers, endowing the Law with syncretic or interdisciplinary knowledge based on new interpretive tools from the Economy (GICO JÚNIOR, 2012, p. 07)[4].

It's in this context, then, that the economic theory of law is developed, marked by interdisciplinarity and shaped in a new methodology. The economic, theoretical and empirical instruments are used, aiming to improve the legislative elaboration, the doctrinal interpretation and the jurisprudential application of the legal norms based on the analysis of the results and consequences. Therefore, a new model was inaugurated, shaped by the so-called 'economy *jus*'.

However, the dialogue between 'Law' and 'Economics' has not always been facilitated. On the other hand, due to scientific isolation, academic specialization and the diversity of objects, this bridge for a long time it stopped being crossed. There was, in this position, a certain prejudice on both sides, which caused great noise between the exchange of knowledge

3 Such was the influence of Hans Kelsen, who under the column of legal positivism, defended a pure conception of Law, having as its object, exclusively, the sanctioning legal rule on the one hand, and the neutrality value on the other, supported by the single criterion of validity, thus moving away (given the scientific nature of the law) from issues related to ethics, morals, politics, sociology and, also, economics. The law scientist must deal exclusively with the norm. The interfering factors in the production of the norm, as well as the values contained therein, are strictly foreign to the object of legal science. It would be up to sociology, psychology, ethics or political theory to examine the connection between law and facts specific to the object of each discipline. Pure theory does not deny the connection, but its importance or even pertinence in the study of the content of the legal norm. On the other hand, legal knowledge to be scientific must be neutral, in the sense that it cannot issue any value judgment about the option adopted by the competent body for the edition of the legal rule. (COELHO, 2001, p. 02) (Our translation into english)

4 "In North American legal realism, the reaction to juspositivism resulted in a clamor for interdisciplinarity with other sciences to bring law closer to social reality, moving away from its sterile formalism. This movement ended up generating several interdisciplinary schools of legal thought, not necessarily converging, that tried to see the world in a more realistic and pragmatic way through science, such as Economic Analysis of Law and Critical Legal Studies, among other movements. In countries with a European-continental tradition, including Brazil, one of the late reactions to juspositivism was neoconstitutionalism, which proposes to denounce the inability of logical-formal reasoning to deal with highly controversial issues, to which there is no single answer and takes up the position according to which a reference to law would not be possible without an evaluative connotation. (GICO JÚNIOR, 2012, p. 07) (Our translation into english)

(PINHEIRO; SADDI, 2005, p. 04). There are several factors that contributed to ward off these sciences.

It's possible to say that: while Law is discourse (rhetorical language), Economics is mathematics (econometric language); Law has as its value the ideal of Justice (abstraction), while Economics aims for effective results (concreteness); Law is dogmatic and hermetic (closed system), unlike economics which is empirical (open system); Law is legalistic (formal), but Economics is utilitarian (pragmatic); Law operates in the world of duty to be (prescriptive sense), however Economics operates in the world of being (descriptive sense) (SALAMA, 2017, p. 12).

However, this methodological antagonism is in the past, since both sciences deal with problems of organization, stability and efficiency of the system. Furthermore, there is no right that doesn't reflect an economic cost, and doesn't work: an economic system unlinked of legal institutions that promotes a guise and that guarantees the fulfillment of transactions (NUSDEO, 2008, p 39)[5]. Therefore, both knowledges correspond as the verse and reverse of the medal.

Therefore, currently, there is no reason to be the imprisonment of these two scientific knowledge. Law and Economics go together, hand in hand, they are fields that cross and interpenetrate each other. There is, therefore, a dialectical interaction, with reciprocal influence, between the economic and the legal, and it is not possible to conceive this - legal - as an ideological superstructure of that - economy, nor to reduce it to that - economy - as an exclusive source of legal norms.

This is so true that the Constitution of the Federative Republic of Brazil (*Constituição da República Federativa do Brasil*) enshrined an entire chapter regarding the Economic Order, demonstrating the perfect harmony that exists between such sciences, transforming the economic phenomenon into a legally appreciable object, just like the Midas touch (REALE JUNIOR, 2002, p. 29)[6].

Indeed, the importance of both disciplines for social ordering is beyond doubt, since the relationship between Law and Economics has always been a novel that has shaken the foundations of the civilized world, since the dawn of human history (LEWIS, 2005, p. 23).

It's necessary, therefore, to understand both aspects within an approximate perspective of scientific knowledge without sterile constraints, in view of the reciprocity of effects that derive from this relation.

Therefore, it shows intimate connection, so that, more than confrontation, cooperation is needed, above all.

This article is part of the branch of 'Legal and Economic Sciences', in the area of Economic Law, being analyzed in a holistic perspective.

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5 "Economy and Law are inextricably linked, since the basic relationships established by society for the use of scarce resources are instrumental, that is, legal. On the other hand, economic needs influence institutional organization and law-making. Anyway, there is no economic phenomenon not inserted in an institutional niche". (NUSDEO, 2008, p 39) (Our translation into english)

6 "We would say that the law is like King Midas. If, in Greek legend, this monarch converted everything he touched into gold, annihilating himself in his own riches, the Law, not by punishment, but by ethical destination, converts everything its touches into legal, to give its conditions of guaranteed realization, in harmony with other social values". (REALE JUNIOR, 2002, p. 29) (Our translation into english)

Then, the following question arises: Is there a scientific relation between Law and Economics? The worked hypothesis not only recognizes the relationship, but also foresees its articulation as a new scientific branch.

With this, the objective is to evaluate the relationship between these two types of knowledge, developing a new scientific line. The methodology adopted was bibliographic and documentary, in a qualitative analysis. The academic relevance of this research is demonstrated in the sense of contributing to the recognition / consolidation of Economic Law as an autonomous branch of science.

2 HISTORICAL ORIGIN

This movement takes historical roots in Human empiricism (BITTAR, 2019, p. 85)[7], in philosophical pragmatism (CHAUI, 2000, p. 132)[8] and is clearly reflected in the legal realism (FONTES, 2014, p. 86-87)[9] (GODOY, 2012)[10], rejecting the metaphysical concepts of 'Justice' to seek the criteria of experimentation, utility, consequentialism, social well-being and efficiency for the pillars of this novel school.

For Richard Posner, considered one of the founding fathers of this current of thought, at the American School of Chicago, from the 1970s onwards, the economic analysis of law corresponds to the most important development of legal thinking in the last quarter of a century, with Economics spread to a growing range of legal issues not traditionally linked to it (POSNER, 1986, p. 17).

It's true that when it comes to economic analysis, it's intuitive to think about issues of great national repercussion, such as interest rates, inflation, exchange rate policies, savings and markets. In short, we think of money. This, however, is half true. Economic science does not deal exclusively with monetary issues, it goes much further.

The modern economy has gone beyond the limits of production and distribution of goods and services, to focus on non-market human behavior, in the decision-making process, in a

7 "David Hume's philosophy has its foundations based on practical experience, which figures as the great matrix of knowledge, fitting into the English and Scottish empiricist philosophies, moving away from the prevailing jusnaturalist rationalism". (BITTAR, 2019, p. 85) (Our translation into english)

8 For empiricist philosophers, the truth, besides being always in fact, must be obtained by experimentation, having as its effectiveness or practical utility. Knowledge is considered to be true not only when it explains a fact, but especially when it allows observing practical and applicable consequences.

9 "Legal realism or pragmatism is the chain of jusphilosophy according to which the law, at least the valid law, is that effectively observed and applied in a given society. This current departs both from jusnaturalism and from normative positivism. (...) Legal realism is influenced by philosophical pragmatism and also utilitarianism, recommending that the judge be concerned above all with the practical consequences of his decisions". (FONTES, 2014, p. 86-87) (Our translation into english)

10 There is substantial criticism about the lack of knowledge of jurists, regarding legal realism, in countries with a positivist matrix. The author states that: "Realists abandoned metaphysics and romantic constructs of natural law, in favor of pragmatism, practical utility, and factual performance. North American legal realism is related to pragmatism, as well as some expressive nuclei of contemporary legal thought, such as the law and economics movement (Law and Economics) and critical legal studies (critical theory of Law). Little known in Brazil, because it's confused with legal tradition supposedly refractory to ours, the North American legal realism isn't a subject that has worried the Brazilian jusphilosophical inquiry, which has already been the victim of chronic and pathological monoglossia, centered on translations of European texts. We are still hostages to analytical philosophy, German metaphysics, French foundationalism and an incipient Portuguese constitutionalism. It is a common place for the association of the cultural environment of the United States with the imperialism that nuances the capitalism of that country and with consumer media products. Therefore, the neglect towards a substantially very dense thought, which we need to somehow study". (GODOY, 2012) (Our translation into english)

rational world in which resources are limited in view of personal needs and where people aim to promote their own interest.

According to the concept of Lionel Robbins (2014), economics must be understood, then, as "the science that studies human behavior as a relation between ends and scarce means that have alternative uses".

Hence the correct sentence by Edmund Burke (2019), according to which "the economy is a distributive virtue and consists not in saving, but in choosing".

Therefore, if human conduct is subject to choices for the use of scarce resources in an alternative way, regardless of the nature of the decision, they involve the economic method (GICO JÚNIOR, 2012, p. 13)[11].

With this focus, economic analysis offers useful tools to the legal world, since it's based on a theory about human behavior that does not exist in Law. Thus, it assists in the understanding of social facts, either through a diagnosis of objective reality (positive analysis), or through a prognosis (normative analysis) of how agents will respond to certain legal incentives (GICO JÚNIOR, 2012, p. 18).

The Economic methodology applied to Law must answer, in summary, four basic questions in relation to the legal system:

1) What is the objective to be achieved with a certain legal norm?

2) Does the legal standard achieve the expected results?

3) What are the consequences of applying the legal standard?

4) How should the legal standard be applied?

3 METHODOLOGICAL PREMISES OF ECONOMIC ANALYSIS OF LAW

In order to provide answers to such questions, the economic method is supported by some premises or postulates that provide a theoretical framework for the model. They are: a) the scarcity of resources, b) the rationality of the agents, c) the incentives offered, and d) the economic efficiency.

The first one portrays a dilemma marked by the dichotomy between the scarcity of resources in the face of unlimited human needs. In fact, the drawn desires of the human heart have no limits unlike resources, which are finite in nature. The law of scarcity is a constancy, from which man, although he tries to overcome it, cannot escape (NUSDEO, 2008, p 27)[12].

11 "In this sense, economic science, previously associated only with that part of human activity that we normally call economics, today investigates a wide range of human activities, many of which are also studied by other social sciences such as political science, sociology, anthropology, psychology and, of course, the law. It is this interaction between law and economics that was conventionally called Economic Analysis of Law". (GICO JÚNIOR, 2012, p. 13) (Our translation into english)

12 "In contrast to what happens with human needs, the resources that humanity has to satisfy them are finite and seriously limited. Such a limitation is insurmountable, despite the successes of technology in always pushing forward the breaking point, when the exhaustion of the goods available to the human species would lead, if not to collapse, at least to the progressive stagnation of the entire economic process, which, in the end instance, consists of the management of scarce resources

Therefore, if there were abundant resources, there would be no social friction. There would be no dispute, as a qualified conflict of interest, thus making both, Law and Economics, meaningless.

By way of conclusion, it's due to the insufficiency of goods that everyone is forced to choose between possible alternatives, but excluding each other.

The decision-making process thus starts from a second assumption, namely, that economic agents are rational.

Maximizing rationality represents, within the scarcity of resources, the attempt to promote self-interest (SMITH, 2019)[13], that is, it presupposes that individuals act to satisfy their personal goals, whatever they may be.

This decision-making model that maximizes interest, so to speak, encompasses the most imaginative human actions, from carrying out economic activities to the simplest choice processes, such as the decision to consume or leisure, and even the most elaborate decisions, such as entering into contracts and settling disputes (SALAMA, 2017, p. 27)[14].

It's clear that this economic approach is not to be confused with selfishness or greed. *Juseconomy* (*juseconomia*) is not intended for material gain, but focuses on how people behave in order to satisfy their own interests or maximize their personal preferences.

In other words, people act in ways that achieve personal benefits, regardless of what object it is, whether pecuniary, political, altruistic or even familiar (GICO JÚNIOR, 2012, p. 23)[15].

Adopts the image of *homo economicus* anchored in the philosophy of utilitarianism (BENTHAM, 1984, p. 09-13)[16].

Under the amalgam of this principle, human decisions are seen as the result of a calculated mental process, in which the person ponders, like an accountant, the gains to be obtained from his conduct, less any losses to be avoided, maximizing the enjoyment of utilities to the point of being translated into well-being and happiness (HUNT; LAUTZENHEISER, 2013, p. 193-194).

This rational ideal, based on the choice of alternatives that mutually exclude each other, due to the restriction of resources, entails a comparative analysis between the cost and the

available to the inhabitants of this planet. (...)The law of scarcity is an iron and unavoidable law, having subjected men to its yoke forever, leading them to organize and establish specific relationships among themselves, in order to face it, or better, live with it, mitigating it your serevity as much as possible". (NUSDEO, 2008, p 27) (Our translation into english)

13 As Adam Smith already predicted: "It's not from the benevolence of the butcher, the brewer and the baker that we expect our dinner, but from the consideration that they have for their own interests. We appeal not to humanity, but to self-love, and we never speak of our needs, but of the advantages they can obtain". (SMITH, 2019) (Our translation into english)

14 "This maximizing behavior is therefore taken to encompass a huge range of actions, ranging from the decision to consume or produce a good, to the decision to contract with someone, to pay taxes, to accept or propose a settlement in a litigation, to talk on the cell phone while driving and even to vote against or in favor of a bill". (SALAMA, 2017, p. 27) (Our translation into english)

15 "(...) the juseconomic approach does not require supposing that individuals are selfish, greedy or motivated only by material gains, it's only assumed that agents are rational maximizers of their usefulness, whatever that means for them. In this line, for example, they are fully subject to economic analysis situations in which human behavior has as its central motivation immaterial or psychological elements, such as prestige (e.g., gym), power (e.g., politics) or even altruism (e.g., family). Still, it's the individual who acts and from it we begin our search for understanding the collective". (GICO JÚNIOR, 2012, p. 23) (Our translation into english)

16 Jeramy Bentham is considered the great precursor to the principle of utility, in the sense that people seek to maximize their own well-being by recognizing that mankind is under the control of two masters: pleasure and pain. Therefore, it's in the desire to obtain happiness and get away from pain that the key to human motivation can be found. (BENTHAM, 1984, p. 09-13)

benefit to be obtained with the committed behavior, which in economic language is translated by the expression *trade-off*.

That is to say, in order to obtain something it's necessary to give up another, in a relationship of loss and gain. In other words, the delight of any benefit entails the renunciation / waiver of the equivalent not chosen or deprecated. Life, therefore, is seen as a permanent process of exchange, whether with explicit prices or not (GICO JÚNIOR, 2012, p. 20)[17].

Herein rest the fundamental aspect of the behavioral model of Economics applied to Law. Methodological individualism is used as a starting point, by deducing that the individual behavior that maximizes its usefulness is projected collectively in companies, organizations, institutions and in the State itself.

As a related development, the question arises that: all human conduct responds to incentives. Here is the third postulate of the Economic Analysis of Law – EAL (*Análise Econômica do Direito – AED*).

The idea of incentive is common in both, Law and Economics. The entire legal building is built on the premise that people will observe legal norms, that is, they will respond to legal incentives, positive (premium) or negative (sanction), depending on the marginal weighting of the costs and benefits that derive from the behavior.

Transporting this thought to the legal world, the conduct of: to fulfill or not a contract, to violate the law, to commit civil or criminal infractions will depend, precisely, on the rational balance of the individual, on the incentives offered, about the costs or benefits that each action will result (PINHEIRO; SADDI, 2005, p. 90)[18].

It's no different in the economy, however, the focus of incentives is on price figures. Therefore, it's assumed that people will react to legal sanctions, such as consumers and agents would behave in relation to market prices. If low, the behavior will be encouraged with the expansion of the offer. If high, the tendency is for it to retract with the increase in cost, which will inhibit the behavior, given the rationality of the agents.

COOTER and ULEN (2010, pag. 25) summarize the issue as follows:

> Lawmakers often ask: How will a sanction affect behavior? For example, if punitive damages are imposed on the manufacturer of a defective product, what will happen to the product's safety and price in the future? Or, will crime decrease if offenders who break the law for the third time are automatically arrested? Jurists answered these questions in 1960 in much the same way they had 2.000 years ago - by consulting intuition and whatever facts were

17 "Every choice presupposes a cost, a *trade off*, which is exactly the second most interesting feasible allocation for the resource, but which has been neglected. This cost is called the opportunity cost. So, for example, if we decide to buy fighter planes to strengthen our Aeronautics, we abdicate another allocation that these resources could have (e.g., build schools). If you choose to read this chapter, you will stop doing other activities such as being with your children, walking with your girlfriend or watching television. The usefulness that each one would enjoy with one of these activities is its opportunity cost, i.e., the implicit or explicit price paid for the good. Note that saying that something has a cost does not imply that it has a monetary value. Now you know that there is a lot of wisdom in the popular saying "everything in life has a price", just look to the side". (GICO JÚNIOR, 2012, p. 20) (Our translation into english)

18 "Applied to the universe of law, it implies that the decision to terminate a contract, to engage in activities originally not provided for in the contract, or to behave illegally, will depend on a rational balance of the benefits and marginal costs of each action. For example, the cost of accidents. The driver of the vehicle only respects the norm of stopping at a red light because this is more economical than receiving a traffic ticket. Those who violate the law or contracts, according to this conceptual premise, do so with the objective of maximizing their liquid satisfaction, as they perceive benefits that are greater than the costs, widely understood to include the negative utility resulting from the loss of freedom, ostracism social etc.". (PINHEIRO; SADDI, 2005, p. 90) (Our translation into english)

> available. Economics provided a scientific theory to predict the effects of legal sanctions on behavior. For economists, sanctions are similar to prices, and presumably people react to sanctions, in large part, in the same way they react to prices. People respond to higher prices by consuming less of the most expensive product; thus, they are supposed to react to tougher legal sanctions by practicing less of the sanctioned activity. Economics has mathematically accurate theories (price theory and game theory) and empirically sound methods (statistics and econometrics) of analyzing the effects of prices on behavior. (COOTER; ULEN, 2010, p. 25) (Our translation into english)

The incentive structure, therefore, is the essential piece in understanding the Economic Analysis of Law. The change in social behavior, by means of legal rules, depends precisely on the incentives adopted in the norm / law, its objectives and results that can be evaluated concretely by economic reading[19].

With this north, a legal system must be more concerned with the structure of incentives than with values abstractly considered, in order to achieve the desired objectives.

In view of this panorama of scarcity, rationality, maximization of utilities and comparative cost-benefit relations, to induce choices and behaviors, economic analysis strives for an efficient allocation of available resources. Efficiency, it can be said, is the core or touchstone of Economic Analysis of Law.

In economics, this postulate leads to broad results. Efficiency aims at maximizing utility or social well-being and minimizing the social costs involved, which can be understood within an individual and collective conception.

The first concept of economic efficiency fell to Vilfredo Pareto; for this author there would only be efficiency in the allocation of resources in the market when there was a balanced situation in the transactions. That is, efficiency would correspond to an improvement in the situation obtained among economic agents, as long as it did not cause any loss, decrease or worsening for others. (SALAMA, 2017, p. 86)[20]. In this context, there would be an optimum allocation of resources, a "Great' Pareto" or a "Pareto-efficient" (*"Ótimo de Pareto"* or *"Pareto-eficiente"*).

The great criticism of this criterion rests on the individualistic, consensual aspect, and on the demand for unanimity in its conforming balance, which leads to an unreal application of its requirements, given that, in a capitalist economy, exchanges can be unequal, being possible that losses occur between the parties and undesirable effects are projected to third parties.

19 An emblematic example, as a structure of normative incentives for the reduction of traffic accidents, is the so-called "Operation Dry Law" ("Operação Lei Seca"), resulting from Law nº 9.503/97, which has worsened over timeThe legislation brings serious administrative (art. 165) and criminal (art. 306) penalties, prohibiting the driving of a motor vehicle, under the influence of alcohol or other psychoactive substance, with the imposition of financial losses resulting from the application of fines, cost of opportunity in view of the suspension of the right to license, in addition to emotional distress and expenses with criminal defense and eventual serving of sentences in case of conviction.

20 "The conception of the Italian economist Vilfredo Pareto aimed to resolve an issue arising from the utilitarian philosophy concerning the problem of measuring happiness or general well-being. For this to be observed, it would be necessary for all participants involved in the transaction to experience an improvement in their situation, when compared to the original conditions prior to the relationship. Paretian happiness or well-being requires everyone to win, but no one to bear losses". (SALAMA, 2017, p. 86) (Our translation into english)

Pareto's criterion is criticized, as it's not exempt from subjective valuation, which prevents an objective analysis. Pareto guides efficiency under an individual subjective bias, that is, in relation to personal well-being (in which social well-being is confused with individual well-being), so that the efficiency criterion would be subjectified, since it's based on the concept of well-being of each one. However, an optimal solution depends on each party's point of view.

Meeting this equalizing need, the compensation method was developed by Nicholas Kaldor and John Hicks. In the Kaldor-Hicks criterion, the allocation efficiency is not supported by the consensus, nor are unanimous gains required.

What matters is that the socially earned benefit (general well-being) is able to make up for the losses with the possibility, in theory, of compensating the losses borne by the losers (compensation for losses incurred by losers). Hence it is called "Pareto-Superior".

In fact, in a real world of exchange economics, Pareto's criterion isn't the most appropriate. The ideal of well-being cannot be linked to an equality process. Since people are maximizing their own interest and there is a scarcity of resources at the other end, the entire gain can correspond to a hypothetical or real loss, current or future, individual or diffuse for the system.

With this guise, the criterion of economic efficiency cannot remain based on the absence of losses, as they naturally exist. But rather in the possibility of compensation, where the general gains outweigh the losses, with the maximization of the collective wealth/riches and the fulfillment of the dictates of the Constitutional Economic Order (*Ordem Constitucional Econômica*) (MARTINS, 2017, p. 31).

For Law, efficiency, traditionally, has always been linked to the reach of Justice. The Roman brocade *fiat justitia et pereat mundus* well mirrors this facet, so Justice couldn't be measured or quantified, but felt. However, doing justice, even if the world perishes, reveals a total lack of commitment to the social reality that surrounds us. The old adage forgets that rights have costs, they don't grow on trees.

In fact, Justice entails value. In this spectrum, the economic tool cannot reliably x-ray this valuation he cannot say what is fair.

However, in a scenario of scarcity of resources, with the constitutional need for the realization of fundamental rights of all kinds, a legal rule that generates waste, unjustified losses and disregard for legitimate claims, can be reprimand, because its unjust and, therefore, inefficient.

In that sense, the lesson of GICO JUNIOR (2012, p. 27):

> In a world where resources are scarce and human needs potentially limitless, there is nothing more unfair than waste. In this sense, EAL can contribute to (a) the identification of what is unfair - any rule that generates waste (is inefficient) is unfair, and (b) any weighting exercise is impossible if those who are doing it doens't know what is effectively on each side of the scale, that is, without understanding the real consequences of this or that rule. Juriseconomics helps us to discover what we will really achieve with a given public policy (prognosis) and what we are giving up to achieve that result (opportunity cost). Only holders of this knowledge will we be able to carry out a cost--benefit analysis and make the socially desirable decision. (...) As stated, if

> resources are scarce and needs are potentially limitless, all waste implies unmet human needs, so any definition of justice should have as a necessary condition, even if not sufficient, the elimination of waste (i.e., efficiency). We don't know what is fair, but we know that inefficiency is always unfair, so I can't see any conflict between efficiency and justice, quite the opposite, one is a condition for the other's existence. (GICO JUNIOR, 2012, p. 27) (Our translation into english)

It is thanks to Economic Analysis that the concept of efficiency, within the scope of Law, is realigned to the consequentialist bias[21]. In legal language, care is about functionalizing efficiency with the scope that the normative system can meet individual and collective claims without losing the north of economics.

CONCLUSION

As seen, Law and Economics don't live in separate worlds. They are complementary social sciences. Both focus on the system's organization, stability and efficiency.

In fact, if in the past your knowledge remained separate, due to academic specialization and the diversity of objects, today, this isolation is no longer justified.

The traditional conception of Law, influenced by legal positivism, strong in the idea of pure methodology and scientific neutrality, is not going to prosper modernly in face of the demand to meet the new social issues, within a scenario of scarcity of resources.

In reaction to this panorama, *jus* economics (*jus* economia) arises, as a result of philosophical pragmatism and legal realism, giving rise to the Economic Analysis of Law movement.

Based on its methodological premises, it seeks to evaluate the descriptive meaning of the legal standard/rule in its real application, with regard to the content and concrete effects, as well as to establish a prognosis of how the standard/rule should be elaborated/applied, in order to achieve the desired objectives, based on economics and the incentive structure.

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21 This seems to be the new horizon of the legal system brought by Decree-Law nº 4.657/62 - Law of Introduction to the rules of Brazilian Law (*Lei de Introdução às normas do Direito Brasileiro*). The wording of art. 21 states that: The decision that, in the administrative, controlling or judicial spheres, decrees the invalidation of an act, contract, adjustment, process or administrative rule must expressly indicate its legal and administrative consequences. Art. 23 states that: the administrative, controlling or judicial decision that establishes a new interpretation or orientation on a norm of undetermined content, imposing a new duty or new condition of law, should provide for a transition regime when indispensable for the new duty or condition of law to be fulfilled proportionately, equally and efficiently and without prejudice to general interests. (Our translation into english)

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FOSTERING INNOVATION FOR MICRO AND SMALL COMPANIES THROUGH ANGEL INVESTMENT CONTRACTS[1]

FOMENTO ÀS MICRO E PEQUENAS EMPRESAS INOVAÇÃO POR MEIO DOS CONTRATOS DE INVESTIMENTO-ANJO

ELISA MARA COIMBRA[2]

ABSTRACT

The article analyzes the innovation promotion policy to micro and small enterprises from the legal regime perspective of the angel investors contract established by Supplementary Law nº 155/2016. The objective is extracting what elements the legal regime of angel investors contracts aims to stimulate for analyzing their adequacy and sufficiency, through an Entrepreneur State intervention perspective. First of all, it is done a review of how micro and small enterprise legislation has evolved. Next, the description of innovation promotion policy to micro and small enterprises are elaborated. And, finally, the relationship between innovation promotion policy and angel investing contracts is established, by a bibliographical research and the deductive method.

KEYWORDS: Innovation. Angel investing contracts. Supplementary Law nº 155/2016.

RESUMO

O artigo analisa a política de fomento à inovação das micro e pequenas empresas sob a perspectiva dos contratos de investimento-anjo instituídos pela Lei Complementar nº 155/2016. O objetivo é tentar extrair que elementos o regime jurídico dos contratos de investimento-anjo visa estimular, na tentativa de analisar a sua adequação e suficiência, sob o ponto de vista da intervenção de um Estado Empreendedor. Para isso,

1 In this work, the same nomenclature as Complementary Law Nº 123/2006 - "micro and small companies" - is used, despite technical imprecision. This is because the term 'company' actually refers to economic activity, while, in turn, the term 'business society' refers to the legal entity that carries out economic activity with elements of the company. Another inaccuracy of the expression chosen by the law concerns the inclusion of 'simple companies' - which aren't 'business companies' - within the scope of the definition of article 3 of Complementary Law Nº 123/2006, mentioned below. It should also be noted that, before this Complementary Law, there was no provision to include 'simple companies' in the specific legal regime that favors micro and small companies.

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primeiramente, elabora-se uma revisão de como a legislação de apoio à micro e pequena empresa evoluiu. Em seguida, descrevem-se as características das políticas de fomento à inovação nas micro e pequenas empresas. E, por fim, coteja-se a relação entre fomento à inovação e contrato investimento-anjo, por meio de uma pesquisa bibliográfica e do método dedutivo.

PALAVRAS-CHAVE: *Inovação. Contrato de investimento-anjo. Lei Complementar nº 155/2016.*

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INTRODUCTION

In this paper, considering the reality of micro and small companies and the peculiarities of possible measures to encourage innovation, the legal regime of angel investment contracts is discussed as a possible mechanism to foster innovation. In this context, the following problem-question is elaborated: how did the legislator, through the figure of the angel investment contract of Complementary Law Nº 155/2016, foster innovation in micro and small companies?

Then, the following hypothesis is elaborated: the instrument to foster innovation brought by Complementary Law 155/2016 aims to overcome the insufficiency of financial capital and human capital, characteristic of micro and small companies and the main difficulties thtat they face '?' (SEBRAE, 2018).

The theoretical framework used is the idea of 'Entrepreneurial State' developed by Mariana Mazucato (2014), according to which the State acts not only to correct market failures but also to intervene in social and environmental dimensions, among others, which aren't attractive to the private sector, using innovation to do so.

It's intended to collaborate with the theme not only from a theoretical point of view, but also pragmatically, using the deductive method. Thus, economic data on the micro and small business segment are sought to support the analysis of the elements that the legal regime of angel investment contracts aims to stimulate, in order to deduce shortcomings and gaps in the current legislation.

The objective is to investigate the economic function, extracted through the interpretation of the legal text, in order to identify any detachment between the data collected and the description of the legal regime discriminated from Article 61-A of Complementary Nº Law 123/2006.

1. REGULATORY EVOLUTION OF MICRO AND SMALL COMPANIES IN BRAZIL

In Brazil, the first Law to establish a special regulation for micro companies was Law Nº 7.256/1984, even before the Constitution of the Federative Republic of Brazil of 1988, and established for this category of companies a differentiated, simplified and favored regime covering administrative, social security and credit areas, among others. Despite the impor-

tance of this initiative, the special treatment established at the time had a much more restricted spectrum than the current. In this line, it's possible to observe, for example, the veto to the differentiated tax regime, related to articles 11 to 16, of Law Nº 7.256/1984, in contrast to the current 'Special Unified System of Collection of Taxes and Contributions' due by Micro Businesses - Simple National (*Regime Especial Unificado de Arrecadação de Tributos e Contribuições devidos pelas Microempresas e Empresas de Pequeno Porte - Simples Nacional), instituted by Complementary Law No. 123/2006. In addition, there was no mention of 'small companies', only micro, considering as such those with revenues of up to 10.000 OTN*[3] (NOGUEIRA, 2016, p. 11)[4].

Another provision of Law Nº 7.256/1984 that stands out is the articles related to credit support, which established, since that time, favorable conditions for micro companies in operations with public and private financial institutions, including for promotion and development banks. Among these conditions was the prohibition on requiring guarantees other than bail and endorsement (*fiança e aval), for financing of up to 5.000 OTN. This rule points to a problem faced today by micro and small companies when requesting financing from financial institutions, which, on the other hand, require them to provide guarantees to support the risks of the operation.*

Then, the Brazilian Constitution of 1988 also established favored treatment for micro and small companies, under the terms of article 179:

> Art. 179. The Union, the States, the Federal District and the Municipalities will dispense for micro and small businesses, as defined by law, differentiated legal treatment, aiming to encourage them by simplifying their administrative, tax, social security and credit obligations, or by eliminating or reducing these by law. (Our translation into english) (*A União, os Estados, o Distrito Federal e os Municípios dispensarão às microempresas e às empresas de pequeno porte, assim definidas em lei, tratamento jurídico diferenciado, visando a incentivá-las pela simplificação de suas obrigações administrativas, tributárias, previdenciárias e creditícias, ou pela eliminação ou redução destas por meio de lei*) (BRASIL, 1988)

Later, by means of Constitutional Amendment nº 49 of 2006 (*Emenda Constitucional nº 49/2006), the favored treatment of micro and small companies was erected at principle, included in the list of article 170 of the 1988 Constitution.*

Since the presidential veto to articles 11 to 16 of Law Nº 7.256/1984, regarding the tax regime favored by micro companies, the need for simplified treatment in the tax area had deepened. However, only in 1996, through the enactment of Law Nº 9.317/1996, did the 'Special Unified System of Collection of Taxes and Contributions' due by Micro Businesses - Simple National (Regime Especial Unificado de Arrecadação de Tributos e Contribuições devidos

3 National Treasury Bonds (*Obrigações do Tesouro Nacional).*

4 According to Fran Martins and Carlos Henrique Abrão (2017, p. 123), the choice of the criterion to define micro and small companies is related to article 966 of the Brazilian Civil Code of 2002, which recommends that an entrepreneur is one who exercises professionally an organized economic activity for the production and circulation of goods and services. Thus, when defining a company as an economic activity, the micro enterprise is defined as the economic activity organized on a smaller scale, choosing billing as the measure of that scale. Therefore, the Complementary Law, when inspired by the Brazilian Civil Code of 2002, therefore, is also inspired reflexively by the Italian Civil Code of 1942, which removes the theory of acts of commerce. It's also noted that there are other criteria, other than just billing, to measure the size of micro and small companies, including the number of employees. In the European Union, for example, the definition is based on more than one criterion: the number of employees, annual sales and net profit (ZUCOLOTO et al., 2016, p.20). In the United States, on the other hand, it also verifies a complex criterion, based on the Naics Code (North American Industry System) that can have as reference the gross revenue, the value of the assets or the number of employees, depending on the activity (ZUCOLOTO et al., 2016, p.19).

pelas Microempresas e Empresas de Pequeno Porte - Simples Nacional) be approved, which unified six federal taxes, in despite the prediction of exceptions for some service provision activities[5].

Subsequently, Law Nº 9.841/1999 was enacted, which instituted the 'Statute of Micro and Small Enterprises' (*Estatuto da Microempresa e da Empresa de Pequeno Porte), providing for the different, simplified and favored legal treatment provided for in articles 170 and 179 of the Brazilian Constitution of 1988. In this, the definitions of 'micro and small companies according to billing' were included, as well as the creation of 'joint guarantee societies' (sociedades de garantia solidária) as an alternative to the need for the submission of guarantees by micro and small companies, in the event of possible requests financing before financial institutions.*

Currently, Complementary Law Nº 123/2006 regulates the matter, revoking the previous regulations. With regard to tax treatment, there was a considerable expansion of the unified regime, which now includes eight federal, state and municipal taxes.

In addition, the Complementary Law Nº 123/2006 also established competitive advantages in the bidding process in the event of a tie, in addition to the possibility of exclusive bids for micro and small companies up to the amount of R$ 80 thousand and the possibility of subcontracting them in non-exclusive bids. This favored the growth of the participation of micro and small companies in public bids.

> The impacts of this measure are significant and growing. As a result, in 2013, purchases made by federal government entities with micro and small companies totaled R$ 17,0 billion: an increase of 20,3% in relation to 2008 and an increase in participation in total order purchases 27,9% in the same period. (Our translation into english) (NOGUEIRA, 2016, p. 13)

It's also added that Complementary Law Nº 123/2006, recognizing the importance of innovative processes for the segment, and included a chapter called "Stimulating Innovation" (*"Estímulo à Inovação") that establishes, among other measures: a) the obligation for the Union, States, Federal District, Municipalities and their respective development agencies, Scientific and Technological Institutions (Instituições Científicas e Tecnológicas - ICT), technological innovation centers and support institutions to maintain specific programs for micro and small companies; b) the possibility of reducing tax rates and contributions levied on the acquisition or import of equipment acquired by micro and small companies for incorporation in their fixed assets; c) support for quality certification of products and processes for micro and small companies.*

Subsequently, through Complementary Law 128/2008, the figure of the 'individual microentrepreneur' (microempreendedor individual - MEI) was created, whose objective was to remove various economic activities from informality. More recently, Complementary Law Nº 147/2014 and Complementary Law Nº 155/2016 improved the process of simplifying the regime, as well as extending the possibility of including some service provider activities in 'Simples Nacional'.

The Complementary Law Nº 123/2006 continued to establish billing as a measure to define the size of the company for the purposes of its application, including whether or not

5 Then, Complementary Law Nº 147/2014 increased the list of activities providing services that could be included in the favored regime.

they were included in 'Simples Nacional'. It's important to remember that such criteria for defining size are restricted to the application of Complementary Law Nº 123/2006, with other rules, which regulate other effects, which set different criteria for defining the size of the company. In this direction, the limits are reproduced below:

> Art. 3º For the purposes of this Complementary Law, micro or small companies are considered, the entrepreneurial company, the simple company, the limited liability individual company and the entrepreneur referred to in art. 966 of Law nº10.406, of January 10, 2002 (Civil Code), duly registered with the Commercial Companies Registry or the Civil Registry of Legal Entities, as the case may be, provided that:
>
> I - in the case of the micro enterprise, earn, in each calendar year, gross revenue equal to or less than R$ 360.000,00 (three hundred and sixty thousand reais); and

II - in the case of a small business, earn, in each calendar year, gross revenue greater than R$ 360.000,00 (three hundred and sixty thousand reais) and equal to or less than R$ 4.800.000,00 (four million and eight hundred thousand reais). (Our translation into english) (BRASIL, 2006)

The Complementary Law Nº 155/2016 also brought changes to Complementary Law Nº 123/2006, related to the chapter called "Stimulus to credit and capitalization" (*"Estímulo ao crédito e à capitalização"). Preliminarily, it's registered that, even before its edition, the need for measures to improve the access of micro and small companies to the credit and capital market had already been foreseen, aiming at reducing the transaction cost, raising allocative efficiency, the incentive to the competitive environment and the quality of the information set (article 57), as well as the possibility of creating a 'National Credit Guarantee System by the Executive Branch – by the Government' (Sistema Nacional de Garantias de Crédito pelo Poder Executivo) in order to facilitate the access of micro and small companies companies, not yet completed (Article 60-A).*

However, the Law, in addition to expanding public credit policies for this segment (article 58), introduced article 61-A, which established the possibility of making direct investments in micro and small companies, in order to provide the incentive for innovation activities. It's the possibility of capital injection by an individual or legal entity, called 'angel investor'. Such measure is an alternative to increasing resources in innovation without this preventing the enjoyment of the benefits resulting from the favored treatment of micro and small companies, among its the enjoyment of the 'Simples Nacional'.

More recently, despite not being in the scope of this research, Complementary Law Nº 123/2006 was amended through Complementary Law Nº 167/2019, to add new forms of incentive to innovation, whose legal regime was called 'Innovate Simple of the Simple Innovation Company' ("Inova Simples da Empresa Simples de Inovação") with a view to stimulating its creation, formalization, development and consolidation as agents that induce technological advances and the generation of jobs and income.

The regulatory evolution of micro and small companies points to the weakening of industrial policies and traditional innovation, which treat industrial and innovation policies in a stagnant manner, as pointed out by Dahlstrand et al. (2010). Thus, an integrated approach between industrial and innovation policies is increasingly common. If, on the one hand, the

industrial policies are aimed at producing income for the country, the innovation policies, according to Dahlstrand *et al. (2010, p. 4), are traditionally related to three major objectives: a) growth in the intensification of research and development; b) stimulating a culture of innovation and; c) stimulating the development and commercialization of technology. Thus, considering knowledge as a predominant factor of production, industrial policies that disregard this tend to prove to be increasingly ineffective.*

Gilbert et al. (2004) trace a historical panorama of how knowledge, catalyzed by globalization, has become a predominant factor of production in relation to capital, land and labor, impacting the efficiency of traditional industrial policies. In this context, it's recognized how the market structure is modified according to the innovation produced, either by the creation of new markets or by the closing of previous ones, even changing the traditional form of competition - way of forming the lowest prices (GILBERT et al., 2004, p. 314) - for that related to the opening of new technological routes.

Therefore, there is a change in the articulation of private actors, whether through increasingly symbiotic partnerships between large, micro and small companies, due to the rediscovery of the potential of micro and small companies to spread innovation (ORTEGA-ARGILÉS et al., 2009), or because of the need for a more intimate relation between researchers and entrepreneurs, including a proposal for 'more radical entrepreneurship' (AUDRETSCH, 2014), to go through all stages of the idealization process until profitable commercialization, producing different networks of relations (HARRYSON, 2008), among others.

Recognizing the complexity of fostering entrepreneurship to innovation, admittedly of greater impact, the legislator has increasingly endeavored to adopt measures that encourage micro and small companies focused on innovation, such as the Complementary Law Nº 155/2016.

2. THE SPECIFICITY OF PUBLIC INNOVATION POLICIES FOR MICRO AND SMALL COMPANIES

According to SEBRAE (2018), "in Brazil there are 6,4 million of establishments. Of this total, 99% are micro and small companies" *(micro e pequenas empresas - MPE)*. "This MSCs account for 52% of formal jobs in the private sector (16,1 million)" (our translation into english). To illustrate the heterogeneity of the innovative dynamics of micro and small companies, the work carried out by ZUCOLOTO *et al.* (2016), according to which the innovative efforts of micro and small companies tend to vary according to the sector:

> In this case, the sectorial research shows two different dynamics in the Brazilian reality. In high-tech industries, as discussed earlier, MSCs' entry opportunities focus on their ability to offer innovative products, inducing them to make a greater innovative effort. In addition, these sectors are dominated by transnational corporations, which tend to favor R&D activities in their countries of origin.
>
> In the traditional industries, on the other hand, it is the larger companies that carry out the highest R&D efforts, being the smallest technological followers,

> limiting themselves to accompanying technological development through the modernization of their processes. (Our translation into english) (ZUCOLOTO *et al.*, 2016, p.39)

In other words, high-tech sectors demand more intensive innovative efforts from micro and small companies than from large companies and transnational corporations, so that those potentially launch new products on the market. On the other hand, more traditional sectors require less innovative efforts from micro and small companies than from large companies, being those that follow existing technologies, incorporating more innovation in their processes than in their products, a point of increasing their competitive advantage.

In this way, the stimulus to the 'high-tech sectors' is distinct from the traditional sectors, since, in those sectors, the uncertainty and investment costs are greater. This characteristic must necessarily impact the development of public policies for the sectorIn addition, there is a gap, within the current financing instruments, characterized by the absence of mechanisms to promote pre-operational companies (the startups).

In summary, in the midst of difficulties in promoting innovation, especially in early stage businesses, one of the main aspects that industrial and innovation public policies considered is the encouragement of private financing at this stage, since the granting of loans requires, as a rule, the offer of guarantee, in return or counterpart.

In the work written by Riding (2008), the author points out the relevance of angel investment, which is more informal than investments made through 'privaty equity' or 'venture capital'; however, angel investment is valuable not only because it covers a broader base of companies, but also extra skills, through mentoring and support (GRILLI, 2019). For example, an angel investor who is interested in an investment in the 'legal tech area'[6], will have a better chance of success if he knows technically the market and/or the technology that is being developed.

In meeting this concern, the hypothesis arises: the legal regime of the angel investment contract, provided for in Complementary Law Nº 123/2006, which aims to reduce the investor's legal uncertainty, so that they can invest their resources to innovation projects without be co-responsible for possible tax, labor and other responsibilities, gradually encouraging the closing of this gap.

The objective is to attract private capital in the direction of stimulated public policy – the innovation. In this work, the policy of the legislator is analyzed, especially for instituting the angel investment institute –, and especially when companies aren't in the bank financing profile, either due to the impossibility of presenting traditional guarantees (mortgages and endorsement), either by uncertainty of the intended innovation increased by the scarcity of resources to be applied (financial and human).

6 They are technology-intensive startups, focused on providing services in the legal area, such as artificial intelligence applications in this industry.

3. THE GENERAL LEGAL REGIME OF THE ANGEL INVESTMENT CONTRACT DEFINED IN COMPLEMENTARY LAW Nº 123/2006

At the outset, it's observed that the legal regime of the angel investment contract described from article 61-A, of Complementary Law Nº 123/2006, is concerned with legal certainty, especially with that of the angel investor, that is, those who wish to invest resources in a specific micro or small company, in order to foster innovation and/or productive investments, stimulating fundraising in its activities. This is because, if angel investment is one of the instruments that aims to close the financing gap of 'technology-based micro and small companies', the stimulus sought by the legislator is related to mitigate the risks of the angel investor (WANG et al., 2019).

To this end, the Complementary Law in question makes possible to use a contract that ends an advantageous economic relation for both: for micro and small companies, which benefit from the resources contributed, as well as for the investor, who benefits from the returns invested, as well as by possible shareholding. Otherwise, if there were no favorable conditions for micro and small companies, they wouldn't use the institute and would probably they opt for traditional mechanisms, even if insufficient, since the choice to open the business to investors depends on the decision-making instances of the society/company itself.

On the one hand, the non-payment of resources invested in the corporate capital of the business company, under the caput of article 61-A, of Complementary Law Nº 123/2006 ("Art. 61-A. In order to encourage innovation activities and productive investments, the society classified as a microenterprise or small business, under the terms of this Complementary Law, may admit the capital contribution, which will not integrate the company's social capital") (our translation into english) ("*Art. 61-A. Para incentivar as atividades de inovação e os investimentos produtivos, a sociedade enquadrada como microempresa ou empresa de pequeno porte, nos termos desta Lei Complementar, poderá admitir o aporte de capital, que não integrará o capital social da empresa*"), it favors micro and small companies, given that the company in which it was invested will continue to enjoy the tax benefits of the '*Simples Nacional*'. This is because, under the terms of the legal provision, contributions aren't considered revenue for tax purposes, pursuant to article 61-A, of Complementary Law Nº 123/2006 ("§ 5º. For purposes of framing the company as a microenterprise or small business, the amounts of capital contributed aren't considered as company revenues") (our translation into english) ("§ *5º.* Para fins de enquadramento da sociedade como microempresa ou empresa de pequeno porte, os valores de capital aportado não são considerados receitas da sociedade").

On the other hand, the Complementary Law also establishes rules to encourage investors, especially with regard to legal certainty. One of the mechanisms used is the 'asset shielding of the angel investor', by differentiating him from the partner/member and excluding him from the liability of any debt, including judicial recovery, under the terms of article 61-A, §4, of the Complementary Law Nº 123/2006 ("§ 4º. The angel investor: I - will not be considered a partner and will not have any right to management or vote in the administration of the company; II - will not be liable for any debt of the company, including in judicial recovery, and not

applying to him the art. 50 of Law Nº 10.406, of January 10, 2002 - Civil Code") (our translation into english) ("§ *4º.* O investidor-anjo: I - não será considerado sócio nem terá qualquer direito a gerência ou voto na administração da empresa; II – não responderá por qualquer dívida da empresa, inclusive em recuperação judicial, não se aplicando a ele o *art. 50 da Lei nº 10.406, de 10 de janeiro de 2002 - Código Civil*").

In this way, the Complementary Law allows the angel investor to be able to estimate more securely how much he will invest in the micro or small business society, thus avoiding future commitments, avoiding, for example, of the tax, labor and other responsibilities, even derived from the disregard of the legal personality, since the angel investor doesn't become a partner/member.

In addition, another point to highlight is the 'competitive concern' that the Complementary Law seems to have had, although this message isn't expressly reproduced. This inference stems from the rules related to the limits set for investments, with an evident concern to mitigate the participation of investors in the direction of the business, pursuant to article 61-A, § 6º, of Complementary Law Nº 123/2006 ("§ 6º. At the end of each period, the angel investor will be entitled to the remuneration corresponding to the distributed results, according to the participation agreement, not exceeding 50% (fifty percent) of the profits of the company classified as a micro or small company") (our translation into english) ("§ *6º Ao final de cada período, o investidor-anjo fará jus à remuneração correspondente aos resultados distribuídos, conforme contrato de participação, não superior a 50% (cinquenta por cento) dos lucros da sociedade enquadrada como microempresa ou empresa de pequeno porte*"), or § 7º, of the same article ("§ 7º. The angel investor can only exercise the redemption right after, at least, two years after the capital contribution, or a longer term established in the participation agreement, and his assets will be paid in accordance with art. 1.031 of Law Nº 10.406, of January 10, 2002 - Civil Code, which cannot exceed the invested amount duly corrected") (our translation into english) ("§ *7º.* O investidor-anjo somente poderá exercer o direito de resgate *depois de decorridos, no mínimo, dois anos do aporte de capital, ou prazo superior estabelecido no contrato de participação, e seus haveres serão pagos na forma do art. 1.031 da Lei nº 10.406, de 10 de janeiro de 2002 – Código Civil, não podendo ultrapassar o valor investido devidamente corrigido*").

The question that remains is whether such rules should really have been fixed a priori, given that the economic effects vary according to the market structure in which the economic agents are inserted, that is, the same behavior can bring positive or negative externalities depending on the relevant market in question and on the economic power of the agent.

Despite the importance of the regulation defined by Complementary Law Nº 123/2006, in particular embodied in the paragraphs mentioned above (which will be reflected in the contractual clauses of any investment contracts entered into), it should be noted that, in the case of transactions involving technology intended to innovate, it appears that the economic relations are more complex than Complementary Law Nº 123/2006 seemed to apprehend.

In other words, the success of the business depends not only on financial capital, but also on the human capital that will conduct the business, that is, the operation will necessarily involve a network of employees, considering that, as a rule, the small size of the companies of this type doesn't allow the hiring of specialized labor for different expertise. Therefore, the clauses contained in the angel investment contract must go far beyond financial clauses

or the clauses considered mandatory by the legal regime described above, and must include a well-defined goal metric.

4. ANGEL INVESTMENT CONTRACT IN PRACTICE: FROM DUE DILIGENCE TO DISINVESTMENT

Considering that angel investment activity is a private activity not regulated by the "Securities Market Commission" (*Comissão de Valores Mobiliários – CVM), unlike what happens with open fundraising, including crowdfunding*[7]*, ome precautions need to be reinforced, especially with regard to prospecting of the investee, the due diligence*[8] *and the divestment.*

Before the contractual instrument is signed, the angel investor needs to know the investment object. On the other hand, the investee company may need to protect the information that was organized before the transaction. At that time, it's recommended to enter into a Non-Disclosure Agreement (NDA), a confidentiality agreement to protect the sensitive information of the future business.

After the prospecting phase, the investor and investee sign a Term Sheet, that is, a memorandum of understanding, prior to the angel investment contract itself, in which the first conditions precedent to the contract are established (aspects analyzed in due diligence, in special), the structure of the transaction, the investor's rights, the confidentiality clause, especially when the Non-Disclosure Agreement (NDA) was not signed, among other possibilities. Here it's already observed that the instrument has the potential not only to meet the financial constraints of micro and small companies, but also to supply the insufficiency of specialized human resources, especially when, among the conditions, it's inserted: the commitment of the founding partners and team founder (usually holders of specialized knowledge) do not withdraw from society.

As a rule, it's possible to observe the use of these agreements in high technology sectors. This is because, when it comes to innovation, the speed of market transformations, especially in high-tech sectors, can affect the success of a given startup, in case it's necessary to restart a negotiation looking for a new investor, after the default of an eventual memorandum of understandings. In this market segment, timing is extremely important, otherwise the business will be lost. However, if it is a mere productive investment, such documents can be disregarded, not required.

Then, the due diligence phase begins, the phase in which the investor in fact will analyze the health of the company and the risk of the investment to be made, according to the criteria established in the memorandum of understanding. Therefore, it's recommended to analyze accounting, financial, legal aspects, regulatory restrictions to the business, relevant intellectual property records and operational feasibility analysis (CROCE et al., 2017). According to Robert Wiltbank and Warren Boeker (2007), investors who invested more time in due dili-

7 The *CVM Instruction Nº 588/2017 deals with the 'public offer for distribution of securities' and 'the issuance of small business companies' carried out by exempting registration through an electronic platform for participatory investment, among other measures.*

8 See Ramalho's teachings (2019).

gence obtained better results, despite the fact that due diligence procedure entails financial and time costs. In this sense, as a public policy, Complementary Law Nº 123/2006 failed to encourage due diligence procedures, especially in high technology sectors, considering the asymmetry of information between investors and those invested in an unregulated market.

It should also be noted that the parameters defined in these phases help to demonstrate possible pre-contractual liability, in case the business doesn't materialize due to violation of the principle of violation of good faith and protection of trust, pursuant to articles 421 ("Art. 421. The freedom to contract will be exercised due to and within the limits of the social function of the contract") (our translation into english) ("Art. 421. A liberdade de contratar será exercida em razão e nos limites da função social do contrato") and 422 ("Art. 422. The contractors are obliged to keep the principles of probity and good faith in the conclusion of the contract, as well as in its execution") (our translation into english) ("Art. 422. Os contratantes são obrigados a guardar, assim na conclusão do contrato, como em sua execução, os princípios de probidade e boa-fé"), both of the Brazilian Civil Code.

An example that could be hypothetically elaborated is, if after due diligence, the investor discovers that the investee has no right to exploit a patent essential to the object of the business. In this case, the investor could fail to enter into the investment contract without suffering any type of liability, even if pre-contractual.

Then, after the due diligence procedure, the investor confirms or not the amount to be contributed, considering the evaluation of the business company - before the contribution - and the prognosis about the future evaluation. It's important to point out that, from a business point of view, in the event of a clause converting the contribution into equity interest (not mandatory in the legal regime of Complementary Law Nº 123/2006), the participation in the business company securitized by the angel investor after conversion, as a rule, it has an intermediate value between the evaluation before the investment and the prognosis of the evaluation after the investment, so that there is a financial incentive for both, for the investor and for the investee. The more balanced the return between the parties, greater are the chances of new rounds of investment.

Then, if the conditions of the Memorandum of Understanding are implemented, the instrument of the angel investment contract itself is signedIt's, therefore, an angel investment contract convertible or not into equity interest, that is, an intermediary model between the 'convertible loan agreement' (used predominantly for anonymous society) and the 'purchase and sale agreement of equity interest', in order to meet the peculiarities of the innovation market, which influence the new clauses that will compose the new investment modality.

An impact of the peculiarities of the innovation market in the angel investment contract with a view to meeting its economic function is the need to establish a business plan with goal setting. In none of the contracts indicated above (loan and purchase and sale), this feature makes up the structure of the transaction. It turns out that when it comes to innovation, as discussed earlier, uncertainty is its mark (KLINE et al. 2017). Therefore, the more detailed the steps to be developed by the investee, the easier it will be to identify the events that give rise to the application of specific clauses of this type of transaction, thus allowing the reduction of information asymmetry.

It's also added that the business plan and the goals set, intrinsically related to innovation activities, are also important as parameters for the eventual demonstration of blame on the part of managers in the event of failure, especially in cases where there has been no appreciation of the business company initially foreseen, as well as for the interpretation of eventual hypotheses of defaults, absolute or relative by any of the contracting parties.

In this line, Complementary Law No. 123/2006 fails to include completely different objects in the same legal regime: innovation activities (which may or may not include productive investments) and productive investments (which do not necessarily imply innovation), since productive investments aren't characterized by the uncertainty inherent in innovation activities ("Art. 61-A. In order to encourage innovation activities and productive investments, the society classified as a microenterprise or small business, under the terms of this Complementary Law, may admit the capital contribution, which will not integrate the company's social capital") (our translation into english) ("Art. 61-A. Para incentivar as atividades de inovação e os investimentos produtivos, a sociedade enquadrada como microempresa ou empresa de pequeno porte, nos termos desta Lei Complementar, poderá admitir o aporte de capital, que não integrará o capital social da empresa").

However, this characteristic may have arisen from the need to stimulate the sector considering the heterogeneity of the micro and small companies market, since not all micro and small companies are dedicated to innovative activity (be it process - traditional sectors -, be it product - high technology sectors). Thus, micro and small companies that do not innovate 'hitchhike' in the legal regime described here, to meet their productive investment purposes. In fact, the biggest problem is the regulatory insufficiency for financing innovative activities to any degree (products or processes).

Therefore, given the broad spectrum of the contractual object (innovation activities and productive investments) included in the regulation of the angel investment contract, the Complementary Law Nº 155/2016 failed to detail the legal regime specifically related to innovation activities, for example, failing to protect parts of the information asymmetry, inherent in this type of activity. In other words, other public policies, other than the angel investment contract, could be used more effectively to promote productive investments in micro and small companies and this legal regime could have been more daring in terms of regulation and incentives.

In addition, Complementary Law Nº 155/2016 provided for the possibility for the investor to redeem their investment, after a period of 2 (two) years ("§ 7º. The angel investor can only exercise the redemption right after, at least, two years after the capital contribution, or a longer term established in the participation agreement, and his assets will be paid in accordance with art. 1.031 of Law Nº 10.406, of January 10, 2002 - Civil Code, which cannot exceed the invested amount duly corrected") (our translation into english) ("§ *7º O investidor-anjo somente poderá exercer o direito de resgate depois de decorridos, no mínimo, dois anos do aporte de capital, ou prazo superior estabelecido no contrato de participação, e seus haveres serão pagos na forma do art. 1.031 da Lei nº 10.406, de 10 de janeiro de 2002 – Código Civil, não podendo ultrapassar o valor investido devidamente corrigido*"), if the investor understands that the return risks may be increased in the event that his investments remain in the company, even if its goals are being met.

This isn't a case of default on goals, which could give rise to early redemption (theory of absolute default). In the first case, the rule of article 1.031 of Civil Code of 2002 applies, according to which the parameter for the resolution is the company's equity situation, recorded on the balance sheet on the resolution date, limited to the corrected invested amount[9].

Another beneficial clause for investors that don't have the power to intervene in the direction of business, is the remuneration of the contribution, corresponding to the distributed results ("§6º. At the end of each period, the angel investor will be entitled to the remuneration corresponding to the distributed results, according to the participation agreement, not exceeding 50% (fifty percent) of the profits of the company classified as a micro or small company") (our translation into english) ("§ 6º. Ao *final de cada período, o investidor-anjo fará jus* à remuneração *correspondente aos resultados distribuídos, conforme contrato de participação, não superior a 50% (cinquenta por cento) dos lucros da sociedade enquadrada como microempresa ou empresa de pequeno porte").*

This form of remuneration can be advantageous if the startup is leveraged in a period of time below the limit of the investment contract provided for by law, that is, seven years. Otherwise, the return will only come in the form of article 61-A, § 7º, of Complementary Law Nº 123/2006, already commented. Therefore, due diligence is essential for a more accurate prognosis.

However, remunerative financial clauses aren't enough to guarantee the success of the operation. To protect the investor, there are other clauses that can be incorporated into the contract. The preference and tag along clauses[10], for example, were established as mandatory in this type of business transaction, both established in art. 61-C, of Complementary Law Nº 123/2006 ("Art. 61-C. If the partners decide to sell the company, the angel investor will have preemptive rights in the acquisition, as well as the right to 'joint sale of ownership of the capital contribution', under the same terms and conditions that are offered to the regular partners") (our translation into english) ("*Art. 61-C. Caso os sócios decidam pela venda da empresa, o investidor-anjo terá direito de preferência na aquisição, bem como direito de venda conjunta da titularidade do aporte de capital, nos mesmos termos e condições que forem ofertados aos sócios regulares*"). Despite the mandatory nature of these in the legal regime of Complementary Law 123/2006, it's possible that, depending on the business, such clauses aren't interesting.

On the other hand, it's more appropriate to include other unnamed clauses in the regulation of the legal regime of the angel investment contract, such as: no shop clause[11], full ratchet clause[12], lockup clause[13], clause for converting the contribution into equity interest,

9 This prediction discourages the investor to make the redemption, because, if he simply wanted his corrected money, he could invest his resources in other, with less risky, investment modalities. Such observation becomes even more explicit when the equivalence of income tax rates on income resulting from capital contributions made is identified, pursuant to article 61-A of Complementary Law Nº 123/2006 (article 5º of the Normative Instruction of Brazil Nº 1.719/2017) and on net income and gains earned in the financial and capital markets (Normative Instruction of Brazil Nº 1.585/2015). In other words, by taxing the two economic facts in the same way, the one with the greatest risk was discouraged, in this case, the first hypothesis.

10 Clause traditionally attributed to the protection of minority shareholders, who are guaranteed the same conditions offered to majority shareholders, in the event of the sale of equity interest. In this case, the clause was adapted to protect the angel investor.

11 Clause that prohibits the potential investor from holding interests in competing companies.

12 Clause establishing some kind of counterpart against decisions that harm minority shareholders.

13 Clause that prevents the entrepreneur and / or the founding team from leaving the company, as long as there is potential for the investor to grow.

clause prohibiting the transfer to third parties of intellectual property technology relevant to the business, among others, depending on the structure of the transaction and the relevant market used.

Therefore, depending on the dynamics of the sector to be invested, it's essential to complement the angel investment contract in addition to the legal regime of Complementary Law No. 123/2006 and to establish an efficient due diligence, as by this that it will depend on the chances of return and the legal structure of the transaction.

CONCLUSION

The present work sought to analyze the legal regime established by Complementary Law Nº 155/2016 about the angel investment, in the context of public policies to foster innovation aimed at micro and small companies. Thus, the path taken initially was to analyze the regulatory evolution of the promotion mechanisms in Brazil, as well as the peculiarities of micro and small companies.

Thus, it was verified how Complementary Law nº 155/2016 collaborated with overcoming the insufficiency of financial capital and human capital characteristic of micro and small companies, considering the insufficiency of financial capital and human capital of micro and small companies, main difficulties they face (SEBRAE, 2018) and the importance of innovation for a country's economic development (DAHLSTRAND et al., 2010).

Thus, some shortcomings were identified in this development initiative, Complementary Law Nº 155/2016, dispensing, for example, with the angel investment legal regime established by Complementary Law Nº 155/2016 and opting for the 'convertible loan into shareholding regime', since the remuneration to the investor may be low (article 61-A, § 7º, of Complementary Law Nº 123/2006), if, for example, the time for incorporating the technology in the market is longer than the term of 7-year (article 61-A, § 6º, of Complementary Law Nº 123/2006).

The Complementary Law Nº 155/2016 also failed to encourage the due diligence procedure, which is essential for the profitability of the investment made, as well as for stimulating new investment rounds. In addition, this Complementary Law Nº 155/2016 could also have, at least, indicated possible business clauses typical of foreign literature adaptable to investment contracts, which would also have the power to favor the correct interpretation of the courts in cases of judicialization of the contractual relations.

In addition, the legal regime of the investment contract established by Complementary Law Nº 155/2016, focused on establishing financial clauses to solve the credit problem of micro and small companies, losing the opportunity to more assertively solve the problem of insufficiency of human capital, characteristic of micro and small companies, and failing, for example, to make mandatory the commitment of the founding partners and teams not to leave the company until the redemption has been carried out.

Therefore, the legal regime of the instituted angel investment contract could have more strongly mitigated the problem of insufficient financial capital and human capital, characteristic of micro and small companies, to privilege the credit issue, especially giving more secu-

rity to the angel investor regarding the return on his investments through a more appropriate tax treatment regarding the shielding of the labor and fiscal responsibility of investors when, for example, the legal regime of the contracts doesn't fit the specific business circumstances (deadline previously fixed, for example).

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UNITED STATES OF AMERICA AND BRAZIL: A STUDY OF THE COMPARATIVE LAW ON THE IMPLICATIONS IN THE CONSTITUTIONALITY CONTROL

ESTADOS UNIDOS DA AMÉRICA E BRASIL: UM ESTUDO DE DIREITO COMPARADO SOBRE AS IMPLICAÇÕES NO CONTROLE DE CONSTITUCIONALIDADE

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ABSTRACT

First, the study gives a brief historical account of the evolution of judicial precedents in the United States through the Marbury v. Madison and the importance of this case in American constitutional law. Following on the doctrine that defends the precedents in Brazil and its arguments and grounds for its application in the internal scope. In this way, the main objective of the study is to explain the consequences that the application of judicial precedents can bring to the Brazilian State if it is carried out in the way that is occurring, that is, without interpretation criteria and without grounds for its effective application, which can be harmful not only to the legal system, but to society as a whole. Therefore, the important use of the reasoned interpretation that must be used by Brazilian courts and not simply a composition of non-systematic presumptions of the Judiciary Power, as has been occurring in the Brazilian scenario, remains crystal clear.

KEY WORDS: Constitutionality Control. Comparative Law. United States of America and Brazil. Science of Interpretation.

RESUMO

Primeiramente o estudo realiza um breve apanhado histórico da evolução dos precedentes judiciais nos Estados Unidos através do caso Marbury v. Madison e a importância deste caso no direito constitucional americano. Na sequência a doutrina que defende os precedentes no Brasil e seus argumentos e fundamentos para sua aplicação em âmbito interno. Desta forma, o objetivo principal do estudo é explicar as

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consequências que a aplicação dos precedentes judiciais pode acarretar ao Estado brasileiro se realizada da forma que está ocorrendo, ou seja, sem critérios de interpretação e sem fundamentados para sua efetiva aplicação, que pode ser prejudicial não apenas ao sistema jurídico, mas à sociedade como um todo. Logo, resta cristalina a importante utilização da interpretação fundamentada que deve ser utilizada pelos tribunais brasileiros e não simplesmente uma composição de presunções não sistemáticas do Poder Judiciário, como vem ocorrendo no cenário brasileiro.

PALAVRAS-CHAVE: *Controle de Constitucionalidade. Direito Comparado. Estados Unidos da América e Brasil. Ciência da Interpretação.*

1 INTRODUCTION

When we enter into the vast territory of the search for the application of precedents in Brazil, there is much to be discovered and analyzed, from the roots of the Common Law system to the form of decisions handed down by Brazilian Courts.

First, let it be clear that Brazil brings its legal traditions from the system that has been passed on to us from Rome, Portugal, France and Germany: Brazil is and has always been Civil Law. However, with the novelties brought into the Brazilian system due to the 'concentrated control of constitutionality', as well as taking into account the general repercussion, these possibilities provide Brazil with a judicial lawsuit similar to that of Common Law. The problem is that: we are still a country that carries the tradition of Civil Law in its daily routine, and the possibilities of using precedents in today's Brazil are more than frustrating, if not disastrous.

What we intend to show here is how the decisions taken by the Brazilian Courts go against the Common Law system. There are no concise reasons, studied and argued as it's done in Common Law and in the doctrine of *stare decisis*. Of course, it cannot be agreed that in countries that adopt this system, decisions aren't controversial and aren't subject to change. However, it's from these decisions that the catalog of precedents is built, and that is why it's necessary to carry out an interpretive and systematic analysis of each specific case.

The first chapter of this scientific article deals with the development of Common Law in the United States and how the precedents were achieved through the case of Marbury v. Madison and of the doctrine *stare decisis*.

In the second chapter, the objective is to show the Brazilian doctrine that defends precedents in Brazil, and what benefits the application of precedents can bring to the internal legal system. However, on the other hand, an analysis is carried out through a reading by Lenio Streck on the way that court decisions are made or performed. Through hermeneutics, this author criticizes the form of interpretation applied by the judges in the Brazilian State when deciding the cases they analyze. In other words, Brazil is on the opposite path to the Common Law system, with respect to the way in which judicial decisions have been made and uttered.

On the other hand, it is also shown that with the advent of the 'New Civil Procedure Code' (*Novo Código de Processo Civil Brasileiro* or Código de Processo Civil de 2015 or *CPC/2015*), there is something to celebrate, as the judiciary's discretion is somewhat restricted, making the use of the principle free conviction is diminished, or even extinguished by the courts.

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Broadly speaking, the present study isn't intended to measure whether one system is better than the other, or whether the judicial precedents are harmful to the law. What must be considered here is the interpretation to be carried out and its limits, already concluding, beforehand, that the limit is the Constitution.

2 THE EVOLUTION OF PRECEDENTS IN THE UNITED STATES OF AMERICA

As is known, the precedent system is a theory provided for in Common Law, a system that isn't adopted in Brazil. The United States is one of the countries that adopted the Common Law system, also known as Anglo-Saxon, with roots brought by English law, since the United States was colonized by the English. Therefore, precedents have binding force in their legal system. Compared to the precedent system in England, the number of precedents in the United States is much greater, regardless of the subject.

Its interesting to analyze that, unlike England, Common Law in the United States has its own characteristics, not only in terms of the judiciary, but in various organizational spheres. The organizational pluralism is one of those peculiarities of the American state.

Constitutional law in the United States didn't start in a very peacefully way. Around the 17th century, the United States began to be colonized by Englishmen who migrated to the place for several reasons. The colonies implanted in the new continent were faithful to the English colonies and the governor was designated by London.

In the middle of the year 1760, with the occurrence of the Stamp Act, an episode in which the British Crown imposed taxes on stamps, newspapers and other documents with the aim that their colonies contributed to their own defense, only aggravated the situation that was no longer in total control, there was great disobedience, because the British colonies questioned their non-participation in the decisions of the English Parliament.

Between the years 1775-1788 the colonies were at war, deciding for their own independence and that consequently would generate the American revolution. So, it was from such an act that there was the great mark of American independence, as explained by BARROSO (2013, p. 38):

> There it was decided to set up an organized army, whose command was given to George Washington; former colonies were encouraged to adopt written constitutions; and a commission was appointed to draw up the Declaration of Independence, whose main rapporteur was Thomas Jefferson. Signed on July 4, 1776 by members of Congress, this document is considered a milestone in the history of political ideas, now symbolizing the independence of the thirteen American colonies, still as distinct States. (Our translation into english)

As the years went by, there were still difficulties in ratifying the new constitutional model by the States. However, the Constitution didn't have a bill of rights, which was only introduced in 1791, with the first ten amendments, known as the Bill of Rights. The Bill of Rights brought

a variety of rights that enshrined freedom of religion, expression, the right to meetings and rights related to due process and the conditions for a fair trial.

The American Constitution, compared to the 1988 Brazilian Constitution, has undergone few amendments and is still in force today. The American Supreme Court has a fundamental role in constitutionalism in the United States through its interpretations.

The decisions arising from the Court's interpretations weren't consolidated quickly, nor were its decisions always of a charitable nature at the national level and even at the international level. Along with the precedents, a main characteristic of the Common Law system, it cannot always be considered that they were and still are applied in the United States in a way that doesn't deserve criticism. However, as mentioned, it's a main feature of the Common Law system, that is, it's the form that constitutional law presents for its possible effectiveness in the United States.

2.1 THE STARE DECISIS DOCTRINE AND THE DEVELOPMENT OF PRECEDENTS

The *stare decisis* doctrine means to say that the decisions of the higher courts become binding on all the lower bodies of a jurisdiction. The institute *stare decisis* has an important and complex role in the construction of precedents in the American State and isn't expressly provided for in the United States Constitution, it's an institute originating from Common Law.

However, it's important to mention that this doctrine isn't synonymous with the 'precedents' and both cannot be confused, according to analysis by STRECK (2014, p. 40):

> In this perspective, cannot lose sight of the fact that stare decisis is more than the application of a similar solution rule for equal cases, as this would be a very simplified view of a highly complex procedure that has been structured in those communities for centuries. (Our translation into english)

And the author adds by, citing that (STRECK; 2014, P.40):

> (...) the *stare decisis* doctrine, in its technical sense, only emerged later, through a systematization of decisions, which distinguished the elaboration/construction (holding) and the case that would consist of the precedent and would be binding for future cases, and the *dictum*, which consisted of in the argument used by the court, dispensable to the decision and, therefore, weren't binding. (Our translation into english)

In this way, what is considered according to the author above, is that the doctrine of precedents and the doctrine *stare decisis* cannot in any way be confused, since this came long after that, and the first, that of precedents, was structured at the end of the 17th century.

With the stare decisis the decisions of the American Supreme Court start to have a binding effect, and in these cases the judges are linked to the decisions of the past, as APPIO quotes (2009, p.57): "a judge may even disagree with the correction of the previous decision, signed in the precedent and, even so, will have to adhere to what has already been decided in the past. In cases of vertical linking, the adhesion is unrestricted and mandatory". In cases of horizontal link APPIO (2009, p.57) explains that: "judges are linked to the precedents of their

predecessors and can only stop applying these precedents if they choose to revoke them expressly (overruling)" (our translations into english).

In the *stare decisis* system, cases of overruling are possible, that is, revocation of a precedent. For the overruling to be applied, it's necessary to comply with relevant criteria for the revocation of the precedent. Again in the words of APPIO (2009, p.60):

> It's important to add the information that *overruling* cannot be invoked by a lower court or judge with the purpose of revoking a decision of a Superior Court and that the precedents of the United States Supreme Court - because the highest body of the American Judiciary - can only be revoked by the Supreme Court itself (or by Congress). (Our translation into english)

So, it's possible to perceive the importance of analyzing the case and the reasoning, both for the construction and for the deconstruction of a judicial precedent.

2.2 MARBURY V. MADISON CASE AS A CONCRETE OF CONSTITUTIONAL PRECEDENTS IN THE UNITED STATES

In the American state, there was the experience with precedents, but not in the sphere of Constitutional Law. The application of constitutional precedents in the United States didn't solidify with the arrival of the American Common Law system, because for a doctrine of precedents to be consolidated, prior decisions were necessary. Stare decisis also cost to consolidate, mainly related to constitutional decisions, as analyzed by SARLET (2012, p. 884-885):

> It's true that American doctrine took a long time to individualize constitutional precedents - that is, precedents that deal with constitutional issues - in the face of the precedents of Commom Law and legal interpretation. This is probably because the constitutional jurisdiction represents something absolutely new for lawyers from the origins of the American judicial system. There was experience with the precedents of the Common Law, but not with the constitutional precedents. The doctrine took time - almost a century - to develop a theory capable of clarifying the relations between the different kinds of precedents. (Our translation into english)

Constitutional law in the United States materializes with the famous case Marbury v. Madison, and despite the fact that there is no provision for the control of constitutionality in the American State, it was with this case that the American constitutionality control emerged and, as a result, the first precedent was consolidated.

The case Marbury v. Madison is a major milestone in the constitutional law of the United States and it will always be important to describe it, especially when entering the extensive path of precedent, and especially when it comes to constitutionality control. Brazil also started to use this institute when analyzing the rules that aren't in line with the 1988 Federal Constitution.

The decision through the interpretation of the Supreme Court in the case Marbury v. Madison, is a decision that shouldn't be analyzed in isolation, given its importance for all American institutional spheres. In the year 1801, John Adam, the President of the country at the time, was nearing the end of his term and appointed some judges who were allies to

his party to occupy positions available in the federal judiciary, and among the nominees was Willian Marbury.

It turned out that there was no time for Marbury to start the new position, as Thomas Jefferson, who was in theory against John Adams politically, took office as President, appointing James Madison as Secretary of State. Madison, when analyzing the situation of the appointments made by Adam, realized that most of the judges had not received the letter of appointment and for this reason decided to cancel the act of the ex-president because the act wouldn't be complete.

Marbury, unhappy with Madison's decision, filed a request in the Supreme Court, *writ of mandamus*, foreseen in the Judiciary Act, for the ex-president's appointments to be maintained by the new President, as he believed that there was a potestative right to become a magistrate. The Executive was summoned to present a defense, but did nothing.

John Marshall, who had previously been Secretary of State under the Adam government, and at that time held the position of President of the Supreme Court, found himself in a situation that was completely difficult to resolve. If he ordered that Jefferson to take over Marbury, he would have no way of implementing the command; the Supreme Court would be demoralized. If he gave to Jefferson the reason, without his having defended himself, he would appear fearful, weak, the Supreme Court would emerge from the fray demoralized as well. (GODOY; 2004, p.65)

It was then that, in 1803, Marshall, with his great skill, recognized that Marbury was entitled to the appointment of the magistracy, since it was a matter of fulfilling the public interest. However, he still substantiated his decision that the device that Marbury used to substantiate his request was an unconstitutional provision, that is, it was null, therefore, the Supreme Court had no legitimacy to consider Marbury's request.

In this way, we can analyze in the explanation of MACIEL (2006, p.40):

> (...) even though it couldn't be extracted from the device in question, unquestionably, the Court's original competence to judge the writ saved by Marbury and others, Marshall, surreptitiously and highly ingenious, said that the section 13 of the Organic Law attributed unconstitutionally competence to the Supreme Court to judge the *writ*. (Our translation into english)

In Marbury's interpretation, the Judiciary Act wasn't in accordance with the Constitution, and as Marshall understood by the hierarchy of Constitutional rules, the infralegal rules that weren't in line with the Constitution wouldn't be valid, therefore, declared the article of the Judiciary Act that Marbury used, as unconstitutional, carrying out the 'constitutionality control' for the first time and the first precedent in the United States. Thus, in the face of this decision, he didn't conflict with then-current President Thomas Jefferson, didn't fail to give to Marbury a reason, and even spared the Supreme Court from making a decision that could harm and vex itself.

Analyzing the perspective of precedents from the aforementioned case, it's clear that, despite the United States being governed by the Common Law system, the law set isn't left aside, as the Judge Marshall interpreted and decided on the constitutional hierarchy, that is, due to the prevalence of the Major Law, even though it had no constitutionality control. Thus, it can be understood according to FARNSWORTH (1963, p.72) that: "the United States has

its own system of legislation, but judges are in the courts not to modify the statutes, that is, the legislation, but rather to decide according to the existing law through interpretation" (our translation into english).

Let's look in more detail:

> Although the interpretation of statutes raises some questions, which are peculiar to the Americam legal system, many of the fundamental are familiar to the most of the legal system. To begin with, it is axiomatic that as between the court and the legislature, the command of the legislature is supreme except, to be sure, on the point of validity of the statutes itself. Case law can be and often is altered by statute but, at least in principle, statutes cannot be altered by court decision. The court's function is dealing with the legislation is that of interpretation. As to be nature and limits of this function, however, there is no universal agreement.

Thus, with the consolidation of the constitutional precedents in the American State from the important case Marbury v. Madison understands that the courts must interpret and apply the existing legislation.

It's evident that the entire precedent system in the United States has different sides. On the one hand, there are judges who can be considered activists, who, as a rule, follow the ideologies of the Democratic Party, with the most activist being Judge Earl Warren, but this one, appointed by the President of the time who belonged to the Republican Party. At this stage, it's understood that the Supreme Court has rendered, let's say, progressive decisions in the history of the United States.

On the other hand, there are judges considered as textualists, originalists, who understand that interpretations must be carried out literally with the text of the Constitution. After the death of Willian Rehnquist, the current president of the United States Supreme Court was John Roberts, who was appointed by President George W. Bush in 2005. Roberts is a Republican and has a very conservative tendency.

In the conservative phase that the United States Supreme Court is currently experiencing, the decisions reached by the way of thinking of the Court previously established, known as the Warren Court, are gradually becoming more and more conservative.

Just as a demonstration of how the American Court is changing, in 1989 with Rehnquist in the presidency, with the Webster v. Reproductive Health Service, there was a major constraint on abortion practices.

A few years before Robert took over the presidency of the Court in 2005, he wrote a document requesting that the decision taken in 1973, in which the legality of abortion was decided, the case described briefly above, be revoked. However, to no avail. It's true that there are differences between the American States, but, in general, the United States doesn't criminalize the act.

Despite being a legal system originating from the American State and an "inheritance" of the English Common Law system, what is undoubtedly perceived is the judicial activism when interpreting the American Constitution, which has been in force since 1789. It's obvious that in all the years in which the United States Supreme Court has acted, there have been many positive changes for the State itself, and consequently for Brazil, since, to a large extent, the Brazilian judicial model is based on the American model. However, it's of greater relevance

to analyze the decisions commented so far, and to understand the extent to which 'interpretations and judicial opinions' can be reached in specific cases. In other words, there is a very fine line between decisions and opinions and one must not be confused with the other.

3 DOCTRINES ON PRECEDENTS IN BRAZIL

As it became known, Brazil adopts the Civil Law system in a legal context, also known as Romano-Germanic. Civil Law has its origins in ancient Rome. Just as the Common Law of the United States has dispersed somewhat from its English origin, Civil Law also has some distinctions from its Roman roots.

Unlike Common Law, in Civil Law the laws are the main source for conflict resolution and guarantees of fundamental rights, they are based on forms of 'Codes' coming from the Legislative Power, however, they need to be in line with the Brazilian Federal Constitution. In addition: the laws of the Roman-Germanic system, used in a specific case, aren't intended to be used, not exactly the same, for the resolution of future cases; since in a system in which the law is prevalent, there isn't only one correct law to apply to the case to be tried.

The Brazilian idea of 'constitutionality control' (*controle de constitucionalidade*) has a Bahian matrix, in Ruy Barbosa's thinking. In fact, in the comments to the 1891 Republican Constitution, one of its creators, the always remembered Ruy Barbosa (1929, p. 87), teaches, about the 'constitutionality control' that:

> Justice has to know about their existence, to know about the existence of the law. But it doesn't exercise, in this respect, the least discretionary function. The Constitution outlined in arts. 36 and 40 the rules of legislative elaboration imposed on the three factors, on whose cooperation the legitimate formation of laws depends. If any of these rules is materially confiscated, or postponed, and of that flagrant infraction, authentic evidence is preserved in the Congress or Government's own acts, intended to certify the deliberation, sanction, promulgation, there is no law; because its elaboration wasn't consumed. The courts, therefore, cannot apply it. In a word, any material contravention of constitutional forms, authentically proven, in the legislative drafting process, is addictive and nullifies the act of the legislator. Not so the simple violation of regulatory forms. (Our translation into english)

The Brazilian doctrine defending the precedents claims that: there is a great approximation of the Common Law and Romano-Germanic system, mainly after the new Civil Procedure Code. MARINONI (2013, p. 22), defends the approximation of the two systems and mentions that there is "(...) the need to surrender respect to precedents in Brazilian law". The author further explains that (2013, p. 22):

> Despite the transformations that took place in Civil Law - including the conceptions of law and jurisdiction, markedly due to the impact of constitutionalism - and the specificities of the Brazilian system - which is subject to diffuse control of the law's constitutionality, there is a notable resistance, not to mention indifference, to common law institutes of great importance for the improvement of our law, as is the case of respect for precedents. (Our translation into english)

The author WAMBIER (1997, p. 80), who is also a defender of the doctrine of precedents, explains that: "It's an achievement of civilized peoples, which generates security, predictability and constitutes a defense of the system against arbitrariness" (our translation into english).

Both authors believe that: the courts equally deciding on a specific concrete case and with mandatory force, the decisions rendered will have a more isonomic character, guaranteeing the parties' rights in a more concise manner. In other words, they believe that judicial precedents bring security to the legal system, and that when the Civil Law system is applied there is no guarantee of equality for all individuals under the State of Law (*Estado de Direito*).

3.1 BRIEF ANALYSIS OF THE THEORY OF PRECEDENTS IN THE CIVIL PROCEDURE CODE OF 2015

The new Civil Procedure Code didn't bring the regulation of precedents in the Brazilian State, but in several of its articles the subject is mentioned. For many years the Superior Courts have been, in some way, trying to introduce the practice of precedents, even before Constitutional Amendment nº 45 of 2004, which regulated the institute of 'binding summary' (*Súmulas Vinculantes*) issued only by the Supreme Federal Court (*Supremo Tribunal Federal*).

As for the new Civil Procedure Code of 2015, BARROSO and MELLO (s/a, p. 11-12) mention:

> It established a broad system of binding precedents, providing for the possibility of producing judgments with such effectiveness not only by the higher courts, but also by the second-degree courts. In this line, art. 927 of the new Code defined, as understandings to be mandatorily observed by other instances: (i) the binding summary, (ii) the decisions rendered by the STF in the context of concentrated control of constitutionality, (iii) the judgments handed down in judgment with general repercussion or in an extraordinary or special repetitive appeal, (iv) the judgments of the courts handed down in incident of resolution of repetitive demand and (v) incident of assumption of competence, (vi) the statements of the simple summary of the jurisprudence of the STF and the STJ and (vii) the guidelines signed by the plenary or by the special bodies of the second-degree courts. (Our translation into english, corresponding to the original text of the items: "(i) as súmulas vinculantes, (ii) as decisões proferidas pelo STF em sede de controle concentrado da constitucionalidade, (iii) os acórdãos proferidos em julgamento com repercussão geral ou em recurso extraordinário ou especial repetitivo, (iv) os julgados dos tribunais proferidos em incidente de resolução de demanda repetitiva e (v) em incidente de assunção de competência, (vi) os enunciados da súmula simples da jurisprudência do STF e do STJ e (vii) as orientações firmadas pelo plenário ou pelos órgãos especiais das cortes de segundo grau.")

In the institutes shown above, two of them weren't previously foreseen, these being the 'incidents of resolution of repetitive demand' (*incidentes de resolução de demanda repetitiva*) and 'assumption of competence' (*assunção de competência*).

The theory of precedents has been taking shape not only at the constitutional level, but also at the procedural level with the advent of the New Civil Procedure Code (*Novo Código de Processo Civil de 2015*). ATAÍDE JR. (2012, p. 363) mentions that the practice of precedents "(...) resolves, with greater legal certainty, coherence, speed and isonomy, the mass demands,

the repetitive causes, or better, the causes whose relevance goes beyond the subjective interests of the parties" (our translation into english).

Analyzing art. 927 of the *NCPC*, already mentioned above according to Barroso, in what concerns the 'incident of resolution of repetitive demand', was one of the biggest news brought in the *new CPC*. As explained by BARROZO and MELLO (s/a, p. 12): "The incident of resolution of repetitive demand corresponds to a special procedure for the judgment of a repetitive case that can be instituted in the second-degree of jurisdiction" (our translation into english). That is, in analysis of articles 976 to 987 of this CPC/2015, the purpose of the institute is so that: when a certain jurisprudence is established on a given issue, it's feasible that the courts of second instance decide all the following cases, as a rule, equally.

Regarding the second important point mentioned above, brought by article 927 of the CPC, the incident of 'assumption of competence', BARROZO E MELLO (s/a, p. 12) explain that: "The incident of assumption of competence allows the judgment of a relevant question of right, with great social repercussion, which isn't repeated in different cases, to be assessed by a specific body, indicated by the internal rules of the court" (our translation into english).

The institute provided for in article 947 of the CPC/2015 establishes several requirements for its admissibility, but what is most relevant in the present research is what is mentioned in § 3º - "The agreement rendered in assumption of jurisdiction will bind all judges and fractional bodies, unless there is a thesis review" (our translation into english). Therefore, in interpretation of the Civil Procedure Code, WAMBIER (WAMBIER et al. 2015, p. 2113) cite that:

> With the intention of imposing compliance with what is defined by the collegiate, § 3º of art. 947 of the current legislation expressly provides that the decision will bind all judges and fractional organs of the court. There, the great distinction between the assumption of the 1973 CPC and the current CPC. There is nothing more natural for the link to occur as the higher collegiate recognized the relevance of the issue and decided it. There would be insecurity if decisions were taken in other processes regarding the same thesis signed in a different sense, in addition to such an action going against the importance of respecting the jurisprudence of hierarchically superior bodies. (Our translation into english)

In this way, what is generally understood, not only with the implementation of the two institutes clearly in the CPC, but also with the objective of implanting the theory of precedents in the Brazilian judicial system, is that: what is sought is 'equality' and 'legal certainty' in the decisions of so-called 'similar cases' (*igualdade e segurança jurídica nos casos similares*).

But the question is: is there really equality and legal certainty in decisions, based on the premise that the practice of precedents is already implemented in our system? We understand that no: the jurisprudential praxis of our Supreme Federal Court (*Supremo Tribunal Federal*) demonstrates a stupendous fragility of this Brazilian Supreme Court in maintaining its own jurisprudence, so that this Supreme Court of Brazil judges against itself when using the new instruments that have been made available by the Constitution of 1988 and by the *NCPC*. Legal instability - which violates the constitutional principle of legal certainty - is what causes the injunctions granted by the Supreme Federal Court ministers (*Ministros do Supremo Tribunal Federal*), successively, against each other, almost all of them going in paths that aren't those of the Class (*Turma*) and/or those of the Plenary of the Court (*Plenário da Corte*). Therefore, it's to be suspected that the *STF*, in its current composition is, indeed, politicized.

3.2 A READING BY LENIO STRECK - HERMENEUTIC CRITICISM OF LAW

Brazilian doctrine that defends precedents states that: with judicial precedents, equality, isonomy and legal certainty will be guaranteed, as isn't consistent that in similar cases, judges use a different interpretation of the law, that is, it's necessary to have consolidated an interpretation, so that equality is present in the decisions and fundamentals.

In Brazil, there is no possibility for the Civil Law tradition to be extinguished in order to start using Common Law criteria. First, STRECK (2014, p. 35) mentions that: "(..) in the Civil Law tradition, it's only possible to assess the importance of jurisprudence if we take into account its relation with the law". At another point, the author also mentions that (STRECK; 2014, p. 52): "to discuss precedents, jurisprudence and binding summaries is, necessarily, to enter the delicate field of hermeneutics. There are several ways of working on the "hermeneutic question", which, in the end, will be the "hermeneutic question"". (Our translations into english)

Well, it's true that in the Civil Law system, judges aren't exempt from interpretation in order to arrive at the best possible decision in each specific case, but there is a need for these interpretations to be linked to the law, and not a tangle of decisions without the proper structure of law or right, that is, a jumble of unfounded decisions, where 'the judge decides how he wants', because, such a fact would become a kind of judicial arbitrariness, which is also not acceptable in the Common Law system. And today, what is perceived in the Brazilian judiciary is this phenomenon, which STRECK calls 'solipsism'. In this way, we can analyze the criticism made by the author (2014, p. 330-331):

> The pre-judgments are conditions for the possibility of understanding because it allows us to project meaning. However, the projected meaning can only be confirmed if it derives from a legitimate prejudice. Illegitimate pre--judgments generate projects of illegitimate meaning and, inevitably, cause the interpretation to be in error. Only those who suspend their own previous judgments are those who interpret correctly. A judge who is unable to suspend his previous judgments is incapable of his task. (Our translation into english)

Before going further into the theory of judicial precedents in Lenio Streck's view, it's essential to mention the interpretation of the norm from a text. The norm is the interpretation of the text, it arises from a hermeneutic process carried out by the interpreter who will apply the text, in the form of a norm to the specific case, but again, this application must not be carried out through any interpretation.

In the words of KELSEN (1998, p. 3):

> What transforms this fact into a legal act (lawful or unlawful) isn't its facticity, it isn't its natural being, that is, its being as determined by the law of causality and enclosed in the system of nature, but the objective meaning that is connected to this act, the meaning that it has. (Our translation into english)

Therefore, it's perceived that it's up to the interpreter of the law to make/to give sense of the text in which the norm is inserted and to analyze it in face of the problematization posed. Let's see in the words of GRAU (2006, p. 35):

> The interpreter discerns the meaning of the text from and in view of a given case; the interpretation of the law consists of implementing the law in each case, that is, in its application [Gadamer]. Thus, there is an equation between interpretation and application; here, we aren't, facing two distinct moments, but facing a single operation [Marí]. Interpretation and application embody a unitary process [Gadamer], overlapping. (Our translation into english)

Following in the words of STRECK, who states that the norm will always be the interpretation of the text, let's see (2014, p. 312-313):

> Therefore, in a simplified way, it's possible to affirm that when one speaks of "the norm that emerges from the text", isn't talking about a hermeneutic--interpretative process carried out by parts (thus repeating the classic hermeneutics - first I know, then I interpret, finally, apply). *Obviously not.* I don't see the text first and then "couple" the respective standard. The "norm" isn't a "cover of meaning", which would exist apart from the text. In contrast to this, *when I come across the text, it's already standardized*, from my condition of be-in-the-world. (Our translation into english)

Thus, in view of the explanation between text and norm and understanding that the norm is a consequence of the interpretation of the text, comes to understand the need for a cohesive interpretation of the text, and not the mere practice of solipsism practiced by judges. Therefore, it is worth thinking: if with the norm arising from a text expressed in a legislation, misinterpretations occur, how is being the interpretation by the judges in Brazilian courts in cases of application of judicial precedents with the attempt to match the Common Law model? However, it's important to remember that, even in a precedent system, the judge has discretion for interpretation, it's necessary to observe the entire catalog of existing precedents.

The rule of *stare decisis* from the precedent system is the main feature of Common Law, as already seen, and is an essential point for the application of precedents. In other words, with the need to apply *stare decisis* at the moment of analysis, for a decision to become a precedent, an element with binding force for the entire system is perceived, which isn't provided for in local law, but yes in tradition. Since, for the effective creation of a precedent, the *ratio decidendi* and the *obiter dictum* must be analyzed.

Well, at this moment we will enter the field of 'summaries' (*súmulas*), which are inherent to the Civil Law system. It's therefore essential to establish, at once, that 'summaries' (*súmulas*) and precedents (*precedentes*) aren't the same thing.

3.3 BINDING SUMMARY (Súmula Vinculante) X PRECEDENT

We clarify, first and essentially, that we will deal, specifically, in 'binding summaries' (*súmulas vinculantes*), that is, summaries edited by the Supreme Federal Court (*Supremo Tribunal Federal*), that need a serious interpretation of the law/right so that they can have binding force. And, therefore, to think that editing binding summaries through a any and relativistic interpretation of law is to generate precedents, is a big mistake.

STRECK criticizes the binding effect attributed to the *STF* in lawsuits that declare the 'unconstitutionality of norms', see (2014, p. 723):

> The first issue that emerges is the apparent novelty in the sense that a decision that declares unconstitutionality - therefore, the invalidity - of a law has a binding effect. Nothing more obvious, and it's surprising that it was necessary to establish this effect in legislation. Hermeneutically, a decision that declares unconstitutionality is a decision that "nadifies". If a law is invalidated by the Court charged with finally saying whether a law is unconstitutional or not, how admit that someone, judge or court, could say otherwise? And what would the judge be judging? About something that is no longer valid? About a vain law? None? Therefore, nothing more logical than the binding effect in a lawsuit that declares the invalidity of a normative act. (Our translation into english)

Likewise, it can be said that there is a binding effect of the declaration of constitutionality and unconstitutionality, and the author concludes by saying that (STRECK; 2014, p. 723-724): "these are different things, treated wrongly by the legislator. In other words, while the declaration of nullity implies the annulment of the law, the declaration of constitutionality doesn't have a similar effect" (our translation into english).

With all this novelty that Constitutional Amendment nº 45 brought to the Brazilian legal system, it's clear that with the STF's prerogative to interpret the law as it sees fit, there is a kind of change in the interpretation of the rule/norm and even a change in the mutation constitutional itself, (this, coming from German law) where the constitutionality of these changes isn't always observed.

It's crystal clear that there is a need to interpret the rule/norm and the specific cases so that the binding effects of these decisions can have an effect, and here isn't said that all decisions of the higher courts shouldn't be taken into account, what is said is that the law must be observed and thoroughly analyzed before decisions with effect *erga omnes* are launched into the legal system.

It's necessary that the diffuse and concentrated constitutionality control be distinct, since both are different in their object, form of analysis of the law and also in their effects. The doctrine defender of the application of precedents in the Brazilian State, has argued that diffuse control and concentrated control of constitutionality should be seen as a single institute. However, it must be realized that such thinking is contrary to the Constitution. Thus, explains José Afonso da Silva (SILVA, 2013, p. 51):

> Political control is what gives the verification of unconstitutionality to bodies of a political nature, such as: the Legislative Power itself, a predominant solution in Europe in the last century; or a special organ, such as the Presidium of the Supreme Soviet of the former Soviet Union (Constitution of the USSR, art. 121, § 4º) and the Conseil Constitutionnel of the current French Constitution of 1958 (arts. 56 to 63). The jurisdictional control, widespread today, called judicial review in the United States of North America, is the faculty that the constitutions grant to the Judiciary to declare the unconstitutionality of law and other acts of the Public Power that contradict, formally or materially, constitutional precepts or principles. (Our translation into english)

The two forms of constitutionality control must not be equated. STRECK (2014, p. 58) calls this theory of equalizing diffuse and concentrated control: "objectification of diffuse control", because "(...) it carries the idea that the *STF* and the *STJ* don't judge conflicts" and "their actions would be only objective". And he concludes that (STRECK, 2014, p. 58) "(...) in

reality, the so-called objectification allows the *STF* to do whatever it wants, including departing from the constitutional text" (our translation into english).

The fact that the higher courts are only available to act in an objective manner isn't compatible with the Constitution of 1988 and such a fact couldn't even occur with a change in the constitutional text, because the Superior Courts, *STF* and *STJ*, would be transformed into courts just to analyze constitutional remedies, that is, writ of mandamus (*Mandado de Segurança*), *habeas corpus*, injunction (*Mandado de Injunção*) and *habeas data*, therefore, it would lose the jurisdictional function of dispute settlement, not only through the judicial remedies, special and extraordinary (*Recurso Especial e Recurso Extraordinário*), but also the function of acting in the control of constitutionality and defense of the Federal Constitution.

Both the summary and the precedent, are texts that have been given meaning arising from a specific case, thus (STRECK; 2011, p. 368):

> (...) consequently, there will always be a degree of generalization to be extracted from the core of the decision, which will make the hermeneutical link (discursive commitments) with the cases that will be analyzed in their individuality, promoting the emergence of new norms as the new cases are arising. (Our translation into english)

Therefore, STRECK (2014, p. 61) concludes that: "(...) this means that the norm that emerges from "this specific case" is, in the next moment, also a text, from which a new norm will emerge" (our translation into english).

The fact that differentiates the summary from the precedents of Common Law is that the summary isn't edited to solve only one specific case, as it's done in Common Law, where the precedent aims, first, to solve the case under analysis, but the summary aims at the resolution of all future cases, and not a specific case that is under consideration, therefore, should be seen as a normative text.

Therefore, in a system that adopts Civil Law, as is the case in Brazil, it is not relevant that the Judiciary Power has the prerogative to legislate and to attribute interpretation to the norm according to its conviction. There is a great need for a serious analysis of law/right, to be done before the publication of binding summaries and even precedents, coming from the Common Law system.

Another highly relevant distinction made by Streck is that there is no reason to safely compare that Common Law is better than Civil Law, as part of the precedent-defending doctrine it understands to be. Nor can it simply be said that Common Law is better than Civil Law because a country's legal system works better than Brazil's legal system. It's necessary to analyze all the relevant and historical points of each country to understand its legal functioning. What can be said in the face of such a position, according to STRECK (2014, p. 91) is that: "(...) as a rule, in Germany or in England, the judicial decisions may be better than ours". Therefore, what matters isn't necessarily the legal system of each country, but the quality of judicial decisions.

Therefore, for the analysis of the quality of decisions in Brazil, isn't relevant to make this analysis only by comparing it to the Common Law legal system, it's also important to analyze guided in other countries that adopt the Civil Law system itself, as is the case of Germany. In this way, it will be possible to have more precise conclusions regarding the decisions made in

Brazil, considering the equality of the legal systems, even each one with its own peculiarities. Finally, the author concludes (STRECK; 2014, p. 93) that: "(...) arguing by law or by precedent doesn't, in itself, guarantee a hermeneutically authentic answer".

3.4 NEW CIVIL PROCEDURE CODE AND THE ADVANCEMENT OF LAW HERMENEUTICS

There are those who defend that: the precedent system was implemented in the New Civil Procedure Code, with the argument that this will generate more equality and legal certainty. However, STRECK (2016, s/p) mentions that "through the creation of decision-making instruments, which makes it seem that this doctrine ignores that the Constitution itself and the legislation that complies with it effectively link the performance of the Judiciary before of everything. And not the other way around" (our translation into english).

For STRECK (2016, s/p) Civil Procedure Code of 2015 (*Código de Processo Civil de 2015 ou Novo Código de Processo Civil Brasileiro – CPC/2015 ou NCPC*) doesn't have a precedent system based on the Common Law system, what it does bring are "(...) binding judicial provisions whose function is to reduce the judicial complexity to face the Brazilian phenomenon of repetitive litigation. Answers before questions. But, we cannot equate article 927 with a system of precedents, under penalty of having a distorted application of the *CPC*" (our translation into english). In other words, they must be read as judicial provisions, with binding effects without presenting greater complexity in cases presented as similar.

Through the analysis carried out so far, although it's certain to say that in the Brazilian judiciary there is a lot of judicial protagonism and the discretion exercised by the judges is immense, STRECK considers the need to recognize that there were advances with the advent of the *NCPC*, in light of the theory of the Hermeneutic Criticism of Law. The main advance brought, through a proposal by STRECK, is the extinction of free conviction in judicial decisions. The author considers that such withdrawal was a "hermeneutic achievement" (*"conquista hermenêutica"*).

There were several provisions in the *NCPC* project that dealt with the judge's free assessment, which were extinguished on the grounds that (STRECK; 2016, p.148-149):

> (...) although historically the Procedural Codes are based on free conviction and free judicial appraisal, it's no longer possible, in full democracy, to continue transferring the resolution of complex cases in favor of the subjective appraisal of judges and courts. As the Bill started to adopt polycentrism and co-participation in the process, it's evident that the Project's structure approach can now be read as a system no longer centered on the figure of the judge. The parts of the process are of particular relevance. This is the perfect marriage called "co-participation", with strong hints of polycentrism. The corollary of this is the withdrawal of "free convincing". The free conviction was justified in view of the need to overcome the tariff test. Philosophically, the abandonment of the formula of free convincing or free appreciation of evidence is a corollary of the paradigm of intersubjectivity, whose understanding is indispensable in times of democracy and autonomy of law. Thus, the invocation of free conviction on the part of judges and courts will result, in all evidence, the nullity of the decision. (Our translation into elglish)

This justification was accepted by the Chamber of Deputies (*Câmara do Deputados*), given the fact that it's no longer possible to develop codes in which the State can be seen as an enemy of the citizen. Thus, with the removal of the provision that the Code brought about the free conviction of the judge, some of the discretion of the decision or of the 'discretionary decision' is removed from the courts, limiting the judges to make decisions as they see fit, that is, the judge must decide based on reasons.

It's seen that it's impossible to deal with both summaries and precedents without the interpretative element. However, 'can't say anything about anything', it means (STRECK; 2014, p. 113): "(...) interpretation is application; is to settle senses. The senses aren't random. There is no grade zero. There is an interpretive chain that links us. Both in daily life and in law" (our translation into english). Therefore, with the consistency and seriousness considered in the interpretations, it's concluded that there is a binding interpretation, regardless if it's a summary, a law and a precedents.

Thus, returning briefly to the analysis of the hermeneutical advances in *CPC/2015*, there is no denying that there was a leap towards a non-solipsist view of judicial decisions. But this doesn't mean that the *CPC* couldn't be better developed.

In view of this brief analysis of the hermeneutic conquest, what can be concluded, so far and in general, is that: the Common Law system is no better than the Civil Law system; there is great discretion in the Judiciary in Brazil; binding summaries and precedents shouldn't be confused; text and norm are also not the same, and the cohesive hermeneutics is necessary in the decisions of Brazilian courts.

Therefore, hermeneutics is necessary in the analysis of cases, especially those in the Supreme Federal Court (*Supremo Tribunal Federal*), and it's obvious that: as decisions are presented today, Brazil is going against the Common Law system. Finally, in the words of STRECK (2014, p. 373): "Hermeneutics is experience. It's life! This is our challenge: to apply it in the world of life!" (Our translation into english).

4 FINAL CONSIDERATIONS

The Supreme Federal Court (*Supremo Tribunal Federal – STF*) is a court whose main purpose is to keep the Constitution and respect its legal dictates. Therefore, there is no reason to say that the *STF* is a court that is designed to create laws, but rather to decide according to what is expressedIt's obvious that the interpretation must be carried out, but not based on solipsism, a phenomenon in which the judges decide according to their opinion, as already addressed by STRECK.

For a concise and serious analysis, it's very important, above all, to understand the systematic of the legal systems Commom Law and Civil Law, and each of the peculiarities presented in the countries that adopt one of these systems. In Brazil, there are those who argue that the application of precedents from Common Law is the best alternative for the controversies brought to the judiciary, however, on the other hand, it's essential to carry out an analysis based on the hermeneutics of the decisions handed down by the courts.

Regarding the relation between precedent and binding summary, as mentioned, they cannot be confused and assimilated; since that in the precedente, there is a need to presente the requirements based on the *stare decisis* doctrine and to first assess the case under analysis; and the binding summary is destined for the resolution of all future cases (to resolve all future cases), and not a specific case that is under consideration, therefore, should be seen as a normative text.

Thus, there are no safe parameters to affirm that the Common Law system is better than Civil Law, since each one has its own peculiarities and are adapted according to the need of the legal system of each country, through its historical and cultural movements. Therefore, what matters isn't necessarily the legal system adopted itself, but the quality of the judicial decisions.

Therefore, Brazilian courts, specifically the Supreme Federal Court, need to use the prerogative it holds: to defend the Federal Constitution and use the mechanisms that are there to act fairly for society and in the face of society; and not to think that "doing justice" is to put one's own opinion as Ministers find it most relevant in the decisions in which they are responsible for appreciating and justifying that it's "for the good of society" to decide a case totally contrary to their past decisions, which supposedly have already been pacified, and mainly decide against the Constitution of the State.

In this way, there will be no legal system to support so many controversies based on anything, which consequently (instead of how the defenders of precedents in Brazil claim that with their application there will be more legal security), there will be no security at all, whereas the practice that has been practiced in Brazilian courts is to modify something that is already decided, confirmed and is positive.

Therefore, despite the entire study, there are still questions to be asked regarding the (non) evolution of judicial precedents in the Brazilian State, such as: how to defend a legal security that moves contrary to the Federal Constitution? How to defend a legal security that distances itself even from the real essence and application of the common precedents from Common Law?! And besides: instead of trying to bring judicial precedents into the Civil Law system, why not, first, improve the existing legal and hermeneutical bases within our own legal system? Anyway, perhaps this is another issue to be studied in depth, considering the need for a serious hermeneutic analysis to be carried out.

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PRAXIS, SOCIAL MEDIA AND POLITIZATION PROCESS: AN ANALYSIS OF THE NEW SOCIAL MANIFESTS IN THE LIBERAL DEMOCRACIES

PRÁXIS, REDES SOCIAIS E PROCESSO DE POLITIZAÇÃO: UMA ANÁLISE DAS NOVAS MANIFESTAÇÕES SOCIAIS PERANTE AS DEMOCRACIAS LIBERAIS

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ABSTRACT

The general objective of this article is to carry out a reflexive analysis against the liberal democratic model, in which globalization and social media have been thought to be the main tools for gathering concerned citizens who feel unsatisfied with government as well as for spreading information and political alternatives to the established modern liberal theory of democracy. In order to change the present system, based on bourgeois hegemony, a concept from Antonio Gramsci's theory, the new social movements which start online must go through a process of politization. However, what seems to be happening is the opposite process, depolitization, as a way to weaken the social protests. Finally, the role of popular political action, is highlighted throughout the research as way to question the status quo through the dialectical process of praxis. The research now developed has a theoretical-descriptive character and qualitative bias, which is proposed within a critical and reflective perspective. The deductive method, of historical-comparative procedure and the bibliographic research technique specialized in the researched subject are used.

KEYWORDS: Liberal Democracy. Globalization. Politization. Post-Politics. Social Media.

RESUMO

O presente artigo tem por objetivo geral realizar uma análise reflexiva frente ao modelo democrático liberal, nos quais a globalização e as redes sociais têm sido apontadas como as ferramentas principais para a mobilização política de cidadãos que se veem insatisfeitos com o regime, assim como para a divulgação de modelos políticos alternativos à fórmula liberal-democrática já estabelecida. Observa-se a necessidade primordial de politização dos novos movimentos sociais para prover mudanças no sistema baseado na hege-

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monia liberal, como teorizado por Antonio Gramsci. Contudo, nota-se, na prática, que ocorre o processo inverso, a despolitização, como forma de desmobilizar as lutas sociais. Por fim, salienta-se durante toda pesquisa o papel da ação política popular como meio de contestação do status quo e, de forma concorrente a este, o desenvolvimento da práxis como processo dialético, a partir dos escritos gramscianos. A pesquisa ora desenvolvida tem caráter teórico-descritivo e viés qualitativo, que é proposto dentro de uma perspectiva crítica e reflexiva. Utiliza-se o método dedutivo, de procedimento histórico-comparativo e a técnica de pesquisa bibliográfica especializada no assunto pesquisado.

PALAVRAS-CHAVE: *Democracia liberal. Globalização. Politização. Pós-Política. Mídias Sociais.*

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1 INTRODUCTION

It's undeniable that the development of technology promotes new paradigms in world societies, which translate into new challenges; what was previously unimaginable becomes reality. Since the introduction of the internet, physical boundaries have been overcome to promote instantaneous connection between different people and social groups, and the impacts of virtual reality become latent, as they add more and more people, that is, users, in their digital domains.

In this sense, it's possible to build a positive view about this phenomenon, due to the advances provided by greater freedom of expression in the online environment; and as a result, the mobilization of citizens dissatisfied with government regimes can be cited. In this way, the connected citizen is the social actor in the 21st century, responsible for the task of questioning, and, consequently, for the demonstration that politics in a globalized world requires an analysis beyond the political models inherited from the 19th century. Therefore, it's worth reflecting on the future of these events, whose origin refers to the online environment.

Therefore, the research developed here has a theoretical-descriptive character and qualitative bias, which is proposed within a critical and reflective perspective. The deductive method is used, with a historical-comparative procedure and the bibliographic research technique focusing on the proposed and researched subject.

An analysis based on the characteristics of liberal democracy by a Marxist bias is proposed, based on the Gramscian concepts of hegemony and philosophy of praxis. In this perspective, it seeks to understand the potential counter-hegemonic aspect of the new social manifestations, whose origin refers to the online environment, in addition to the need for the politicization process of such movements and the consequences of depoliticization, a process with the focus of maintaining hegemonic discourses.

Thus, this article starts from the analysis of the relation between the liberal State and the democratic State, highlighting the incorporation, as a general thought, of the idea of Public Freedoms as a fundamental conceptual element to the democratic State, as well as Democracy as a universal value to be pursued by societies.

Then the research addresses the analysis of the phenomenon of representation as a phenomenon that, in addition to causing the citizen to distance himself from politics, causes the crisis of performance of the democratic regime, which is why it's necessary to affirm

popular power through of concrete attitudes. It's clarified, then, that political apathy is revealed as an important harmful consequence caused by the understanding that liberal democracy wouldn't be a means to achieve significant ends, such as the existence of a regime in which all democratic values are guaranteed in practice. Its goal is procedural.

After setting these premises, the phenomenon of globalization and the close relation between social movements and New Technologies are addressed. The possibility that local social movements may gain worldwide repercussion, from the internet and social networks, is, therefore, a new reality. Recent world history is marked by the important presence of the "people of the square", who, using the "technology of liberation", would break the hegemony of the elites.

Thus, there is an urgent need to investigate whether the liberating potential contained in such technologies, in fact, has been able to be noticed, whether social media are managing to undertake the communication necessary to challenge hegemonic thinking, whether they are, in fact, undertaking an effective reflection on ethics and politics, if they are really putting into practice a new way of thinking about social issues or if they are just the essence of post--politics'?'.

With these doctrinal outlines, the result of the research is reached, culminating in the conclusion that despite its liberating and counter-hegemonic potential, there is a capture of such mechanisms that, therefore, fail to develop a level of politicization that it's necessary to overcome the *status quo*.

2 THE INTRINSIC RELATION BETWEEN LIBERALISM AND DEMOCRACY

During the 17th century, liberal theory was developed on the European continent, whose influences go beyond the economic sphere, since questions arise about the need to affirm individual freedom, the so-called freedom of the moderns, as explained and defined by Constant (1985, p. 13).

Thus, it's questioned: the role of the citizen in society and what practices would be allowed, in the sense that freedom would represent an intrinsic value to the human condition itself. Therefore, it's understood that it's a tradition of thought that "situates the freedom of the individual, disregarded or trampled by organicist philosophies of different orientations" (our translation into english) (LOSURDO, 2006, p. 13). Thus, political liberalism arises, whose doctrine underlies the 18th century bourgeois revolutions.

It's noted that the theory of democracy is faced with liberalism, which becomes essential in the construction of the contemporary notion about this regime. For Bobbio (2000, p. 32/33), a liberal State and a democratic State would be interdependent, since certain freedoms would be necessary for the effective exercise of democratic power, as well as that democratic power would be necessary to "guarantee the existence and persistence of fundamental freedoms" (our translation into english).

In this way, the importance of individual freedoms is emphasized as conquests of liberal revolutions, which, in turn, sedimented liberal democracy, a political regime that "[...] has in bourgeois revolutions, [...] for opening the political space necessary for the consolidation and reproduction of the capitalist economy, the historical conditions of its genesis" (our translation into english) (COUTINHO, 1996, p. 22).

We can observe, therefore, the creation of the concept of liberal democracy, as a result of the interconnection between democracy and political theory, which represents the interests captained by the revolutionary bourgeoisie. Thus, a codependency relation emerges between the governmental regime model and political philosophy, whose connection is translated into the guarantee of individual freedoms for citizens, based on the separation between State and civil society, "defining the own notion of freedom from the latter's autonomy, its ontological priority vis-à-vis the State, its prerogatives, limits and state control" (our translation into english) (GUIMARÃES, 2006, p. 230).

In this way, the society of a modern democratic regime is based on the inviolability of freedoms, accepting the understanding that modern democracy would be: the manifestation of the supremacy of such rights and the autonomy of the person.

Contemporary political science, therefore, incorporated this ideology into the concept of democracy, since both share the individual will as an origin. Consequently, the meaning of the word "democracy" changes; it represents the political regime in which individual rights are guaranteed as 'rights of the first order', being "a rational model of social order, capable of preserving free human existence" (our translation into english) (VITULLO, 2014, p. 91).

The understanding of democracy as a universal value is also accepted, in the sense that political liberalism is the condition for the existence of democracy, at the same time that it's enshrined as its economic base, that is, "speak of democracy 'without a surname' when in reality we are talking about 'democratic capitalisms', in which the noun is capitalism and the adjective, democracy", as Boron clarifies (our translation into english) (2001, *apud* VITULLO, 2017, p.92).

In this way, individual rights will be considered as a democratic "compass", that is, a way of measuring the quality of democratic government, or even if its existence is at serious risk; so, legal guarantees play a central role in this context. In this perspective, the legal system is structured to protect such rights, as it's essential that the Constitution of a democratic nation provides for fundamental freedoms in its provisions and articles, since, and after all, it's the 'Magna Carta' of a legal system.

2.1 THE REPRESENTATIVE DEMOCRACY

There is no doubt that political participation is essential to the realization of democracy, being another important issue in the debate about the characteristics of a democratic regime. The 'Enlightenment liberalism' doesn't see 'direct democracy' as viable and 'parliamentary democracy' is neglected, in which the duty to make laws concerns "a restricted body of representatives elected by those citizens to whom political rights are recognized" (our translation into english) (BOBBIO, 1987, p. 324). Thus, the citizen becomes empowered to decide on something that, in the previous political order, didn't concern him.

It's noteworthy that, at the present time, it's not possible to exercise direct political participation in its fullness, given the multiplicity and densification of political issues and opinions, the population and the territorial vastness of many countries. According to the liberal paradigm, political representation is an individual decision based on the exercise of 'power of choice', provided that the condition of being imbued with the legal capacity to do so is present. It's observed that representation is understood as a substitution for direct participation. In this sense, it's understood that political participation is valued in itself, as an exercise of autonomy, and the people are only the formal holder of political sovereignty while its exercise is carried out by their representatives who have a free mandate (CERRONI, 1976 *apud* MARTORANO, p. 43).

Another relevant aspect is the importance given to the procedural issues of the regime, which are fundamental for its proper functioning. In this sense, there would be two possibilities for the development of representative democracy, namely: the gradual expansion of the right to vote, by "constant, gradual and general evolution, for all citizens of both sexes who have reached a certain age limit" (our translation into english) (BOBBIO, 1998, p. 325); or the increase in representative bodies/institutions, composed of representatives chosen by the population through the electoral process.

The distance between the population and its representatives is emphasized; if there is a guarantee that the elections will take place as provided for in national legislation, democracy exists, even if "reduced to a simple technique of self-reproduction of power relations and of separation between representatives and represented" (our translation into english) (VITULLO, 2014, p. 94). There is no concern in evaluating the result produced by Democracy, such is the concern with its form. In this sense, as explained by Amorim and Rodrigues (2012, p. 80), the indexes created to measure democratic access to public offices, as well as the holding of periodic and free elections, are unable to measure important dimensions of democratic practice, such as: a) institutional quality, b) political efficiency, c) the behavior of political leaders, d) citizen satisfaction with Democracy.

In this way, it's not possible to challenge the status quo or, at least, to ensure that it's challenged, through such merely formal rules. Therefore, the democratic theory shows itself guided by the notions of governance and stability and the development of the regime would occur by the good functioning of the institutions, mainly the regularity and the existence of free elections.

However, the results of a government aligned with such proposals, don't necessarily seem beneficial to the population, consisting of an elitist democracy model, as theorized by Schumpter, who argues that democratic practice should be reduced to a method of choice, choice by the people, of that group within the elites that for the people seems the most capable to govern. In this way, democracy is understood as a "method of relaying elites in power" (our translation into english) (SCHUMPETER, 1961 *apud* DURIGUETTO, 2012, p. 328). But, the availability of representative options doesn't seem sufficient. There is a limitation in this model by distancing the citizen from politics and placing him only to decide between groups belonging to the elite, since they would be better prepared for politics.

In this sense, a consequence is the rematch of interests, that is, the subversion by the representatives of interests that would theoretically emanate from the popular mass of represented. Political participation is limited in the name of: the "rules of the game" mentioned

above, and of the procedures established by law; that is, "the set of procedures established by the normative language of law to prevent the colonization of society by the market and by the administration" (our translation into english) (CORVAL, 2015, p. 247).

The influence of Weberian thinking is emphasized by the structuring of the bureaucracy, whose procedural aspects determine the 'good functioning of the system', which is rationally developed by "fully developed bureaucratic mechanism compared to other organizations in exactly the same way in which the machine compares to non-mechanical modes of production" (our translation into english) (WEBER, 1982 *apud* FARIA, 2010, p. 249).

Although stability is fundamental, it's worth emphasizing that the *status quo* must be questioned by citizens when it isn't beneficial to them. However, this aspect is relegated to the background and the act of the election and its implications aren't sufficient to guarantee the effectiveness of political participation, since, for that, it's required that "the voices of citizens in politics are clear, remarkable and equal" (our translation into english) (VERBA *et all,* 1995 *apud* HINDMAN, 2002, p. 6).

In turn, a second model of liberal democracy rejects the elitist bias and adopts a different analysis about the opposition groups. In this way, it's accepted: the demands of a notably plural society and the right to express ideals freely, which constitutes a legal guarantee. In this context, the State acts according to the needs interposed by the groups, having the duty to maintain order to avoid the appearance of conflicts. Therefore, it can be concluded that, for pluralists, democracy is guaranteed by "the existence of different groups that defend their specific interests and private" (our translation into english) (DURIGUETTO, 2012, p. 292). Thus, the influence on decisions is combined with political-electoral participation through the articulation of interests.

It's possible to infer criticism of both models of democracy, since the gradual conquest of social rights comes from collective struggles, which implies concrete political action, which surpassed the limitation of the mere choice of representatives Being satisfied with the conditions of political participation of liberal democracy implies confusion between disparate practices (that is, restricted political deliberation within the scope of elected representatives and the construction of power by the popular mass), and the possibilities within a bureaucratic and procedural system become an obstacle to political transformation.

This implies forgetting that: democratic legitimacy must not, and cannot be, only, *a priori*, and must, also be *a posteriori*, that is, there must be instruments to evaluate the results produced by democracy after the election of representatives. This is all the more important when it's observes that the crisis that democracy is going through today is, above all, a crisis linked to a deep crisis of performance arising from several unfulfilled promises (Mounk, 2019, p. 160).

Bobbio (2000, p. 34/45) correctly points out six such promises, namely: 1) The individual's empowerment; 2) The prohibition of the imperative mandate; 3) The defeat of the oligarchies; 4) The exercise beyond the political frontier, with its performance in non-political spaces in which a power is exercised and that makes binding decisions for an entire social group; 5) The elimination of Invisible Power, such as the power exercised by the mafia, militia, organized crime etc., and finally, 6) Education for citizenship, that enabled the exercise of an eminently active citizenship.

It should also be noted that the normalization of such a form of government also limits opposition to the system to action according to the democratic "rules of the game", necessary for the gradual approval of progressive policies. The legal prerogatives of freedoms and representative democracy are not enough, if when popular manifestation occur, the state apparatus takes charge of containing and criminalizing them, since "collective actions that come into conflict with the interests of the apparatus government and capital are subject to repression" (VIANA, 2018, p. 132).

The consequences fall on the population, which is in a position that can easily lean towards political apathy, in a passive position, since political action is relegated to voting, in a context of choosing representatives whose interests may clash with popular. In this context, other ways of thinking about collective organization seem to gain strength and the democratic regime and, what is worse, their values, are threatened. Many people ask (themselves): Why insist on Democracy if it no longer meets society's wishes? Why insist on Democracy if political agents do not represent or realize the interests of those who elected them?

Therefore, it's necessary to affirm popular power through concrete attitudes; it's a way to establish democracy in fact. The creation of an inversion in democratic practice is observed, since "democracy isn't created by popular power, but this is created by that" (our translation into english) (FERNANDES, 2019, p. 72).

2.2 THE POLITICAL APATHY IN LIBERAL DEMOCRACY

Due to the complexity of the democracy model based on bureaucratization and rational organization in the liberal molds, the results of the consolidation of such regime indicate that: isn't convenient to have a democracy whose structure allows the population to exercise effective control over the process and ensure that will have a participatory voice in politics, which results in an unequal enjoyment of political freedoms guaranteed by law.

In this sense, questions arise, and one would have to think about the growing need for the expansion of democracy, through the continuous expansion of institutions as spaces for popular participation, in facto or real. This solution is avoided in a context of liberal democracy, as it's undesirable for favored social groups that the lower classes become more active and aim for greater political participation. With this objective, over time, institutional barriers were created [...] to, in the face of social inequality and facing the possibility of the emergence of more intense social conflicts, block the penetration of popular spheres in the political regime (MARTORANO, 2007, p. 40).

In this sense, it's worth emphasizing a key-concept to understand the maintenance of oppressive relations in democratic society: hegemony, theorized by the Italian philosopher Antonio Gramsci, based on the methodology of historical-dialectic Marxism. Hegemony is understood as a relation of domination between classes, guided by inequality of power. Gramsci develops this concept by turning to what he calls subaltern class, that is, inserted in a lower position in the relations of domination existing in society, and points out that "subaltern groups always suffer from the initiative of dominant groups, even when they rebel and rise: only 'permanent' victory breaks, and not immediately, subordination" (our translation into english) (GRAMSCI 2002, *apud* SIMIONATTO, 2009, p. 42).

In this way, hegemony develops in a context not only of coercion, but also of consensus. That is, the bourgeois hegemony in the state structure manifests itself through its control, when a class is able to present and make them accept the conditions of its existence and class development as a universal principle, as a world conception (our translation into english) (*"[...] consegue apresentar e fazer aceitar as condições da sua existência e do seu desenvolvimento de classe como princípio universal, como concepção de mundo"*) (GRAMSCI, 2006, p. 302).

After all, force is, in isolation, a fragile legitimizing element, devoid of any ethical justification. Yes because, the strongest is never strong enough to always be the sir/master, if he doesn't transform that strength into a right and obedience into duty (our translation into english) (*"o mais forte não é nunca assaz forte para ser sempre o senhor, se não transforma essa força em direito e a obediência em dever"*) (Rousseau, 1989, p. 24).

It's, in certain aspects, what La Boétie (2010) identified as "voluntary servitude" (*"servidão voluntária"*). The fact that an infinite number of men, facing the political sovereign, not only consented to obey, but to serve, voluntarily, putting themselves in the position of tyrannized people, worried La Boétie, who rightly warned that vassal/subjects do not need to fight tyrants or even defend themselves against him. It's enough that they refuse to serve him, so that he is naturally overcome.

It's evident that, today, delicate and efficient seduction techniques, supported by the most recent neuroscience studies, are used to ensure the maintenance of 'self-compliacent mistake' (*engano autocomplascente*). See Roitman's (2007, p. 10) insightful analysis about how we accept democratic discourse devoid of democratic practice:

> Algo similar ocurre con el discurso de la Coca-Cola, transformado en refresco, dice acabar con la sed al tiempo que se presenta como la chispa de la vida. Pero si la tomamos, fracasa: no acaba con la sed y, si estamos deprimidos, ponernos frente a la botella no nos fortalece el espíritu. Sin embargo, se consume como si tuviese ambas cualidades y lo que es peor de todo, se vive autocomplaciente en el engaño. Así, aumenta el número de bebedores de Coca-Cola, los cuales son conscientes de su cobardía al renunciar a ver la realidad. Siguen consumiendo Coca-Cola como si acabara con su sed y la depresión. Algo similar ocurre con los productores de democracia representativa, imponen una lógica de consumo. La fiesta de las elecciones. El ritual electoral donde se eligen elites gobernantes. Competencia para administrar eficazmente el Estado. Así, argumentan quienes asumen su discurso. Se vive en democracia cuando se compite por el control de las instituciones y existe alternancia en el poder. Por consiguiente, la democracia consiste en elegir gobernantes para crear, aplicar leyes y desarrollar normas por gobernantes elegidos. Una tautología, recurrente. (ROITMAN, 2007, p. 10)

Therefore, it is common for the subject to adopt the worldview of the superior, even if such conception is in contradiction with practice. Furthermore, is emphasized that this conception of the world is imposed by the external environment, therefore, "it's devoid of critical awareness and coherence, it's disaggregated and occasional" (our translation into english) (*"é desprovida de consciência crítica e coerência, é desagregada e ocasional"*) (ALVES, 2010, p. 4).

Also is observed that "[...] every relation of 'hegemony' is necessarily a pedagogical relation" (our translation into english) (GRAMSCI, 2006, p. 399), since the relation of domination

also develop from the discourse and from the ideology propagated for the society, in order to establish relations of domination by culture.

Thus, is observed that there is a harmful consequence of the understanding that liberal democracy isn't a means to achieve significant ends, such as the existence of a regime in which all democratic values are guaranteed in practice, in addition to legal guarantees, however, as an end in itself. Still regarding the liberal-democratic formula, it can be inferred that: a major problem for the regime isn't identified if the citizen is apathetic, as it's a sign that the system is without risks to his integrity.

It should be noted that political apathy is a way of maintaining bourgeois hegemony and reinforcing the notion of consensus, being understood as passive adherence to the concept of 'government of the dominant class', as it indicates the existence of an electorate ready to choose their representatives, without making political decisions in factFurthermore, in certain circumstances a democratic system can be highly stable "if a substantial part of the electorate merely accepts it" (our translation into english) (DAHL, 1961, p. 314), moreover, for a democratic system to be highly stable is fundamental, as already saw, voluntary submission to such a system.

However, new ways of contesting the hegemony present in society have been developing. In this sense, it's essential that citizens can be aware of the existence of such an unequal system, planned in such a way as to protect the interests of the political class and its maintenance in power. The politically apathetic citizen only technically chooses who will represent him and his interests, however, it's about deciding which group, among the dominant social class, will have political power and will remain privileged in the oppressive structure.

3 GLOBALIZATION AND DEMOCRACY

The liberal democratic formula resists despite notable global changes, which pose new challenges for civil society, which implies greater demands in the relation with the State and the democratic political regime. In this perspective, liberal democracy and its social institutions remain and adapt to changes, without, however, changing the structure on which it rests, "because the bourgeois class puts itself as a moving organism, capable of absorb the whole society, assimilating it culturally and economically" (our translation into english) (GRAMSCI, 2007, p. 271).

One of the phenomena that has resulted in more complex implications since the 1990s is the globalization, which imposes challenges for regimes, as it demands a repositioning of the State in a broader field of power and a reconfiguration of the work/function of States. This broader field of power is partly constituted by the formation of a 'new private institutional order', linked to the global economy (SASSEN, 2010, p. 31).

The post-globalization policy requires renewal, because the molds of classic democratic institutions aren't sufficient to represent the citizen who demands change, as a political subject. It's observed that social life was also affected by this process of the intensification of social relations on a world scale, which link distant locations in such a way that "local

events are modeled by events occurring many miles away and vice versa" (our translation into english) (GIDDENS, 1991, p. 69).

According to Anthony Giddens, globalization constitutes in a dialectical process because such local events can "move in an opposite direction to the very distant relations that mold them" (our translation into english) (GIDDENS, 1991, p. 70). That said, the changes that occurred in the local sphere become as significant for globalization as the lateral expansion of social connections across time and space, as there are greater chances that local transformation will generate effects on a global scale.

In this sense, there is the creation of technological innovations that increase the reach of the 'means of communication'; the Internet made possible to expand the public sphere, as it allows real-time communication and increases the possibility of reaching a certain message. It also constitutes an obstacle to media control by governmental regimes, that is, of matters widely publicized and consumed 'for and by the' population, since the web allows "individuals to post, for a minimal cost, messages and images that can be seen instantly by global audiences " (our translation into english) (LUPIA *apud* HINDMAN, 2009, p. 316).

This characteristic of the globalization process is relevant to the understanding of social movements that have worldwide repercussions from the internet, not limited to generating consequences only at the local level, since an event can have a global impact. In this way, an era is inaugurated in which there is a greater possibility of greater understanding about hegemony, by enabling citizens to use it as a means to express their dissatisfactions and to connect globally with other citizens who share their ideas. In this sense, the internet shows itself as a multifunctional tool, since users "are no longer empty recipients, but journalists, commentators and organizers" (our translation into english) (DIAMOND, 2012, p. 5). Therefore, since 2007, approximately, social networks were developed.

4 THE POWER OF SOCIAL MEDIA

From the advent of the internet, collective spaces are created for the transmission of ideas, in which the user is allowed to be part of a virtual community. According to the regulations made by the social network itself regarding users, everyone can create a profile and express themselves on different subjects. Soon, different social groups would contact each other through the promotion of diverse debates, which can be generated from simple events. As an example, we can mention the dissemination of a video that raises questions about structural racism, by demonstrating police brutality in relation to the black community. The importance of discourse in cultural and social domains in networks is emphasized, because, in contemporary society, production is also based on social relations, symbols, identities and individual needs (MELUCCI, 1996, p. 99).

Thus, there is a possibility of starting an online debate about oppression, and, consequently, of a political mobilization around such social problem, with the focus of promoting change. However, the crucial difference between 'manifesting online' and 'effectively making an impact' must be considered, as this consequence depends on the reach of online publications.

It's a question related to the identification of readers with what is being said and propagated there, that is: the ideas contained in the characters exposed in some social network. It's, therefore, a different way of mobilization, and it becomes possible to bring together people who belong to the same social group to fight for changes that will be beneficial to them. This union can become a social movement, "when such groups merge, that is, when they come together and carry out mobilizations" (our translation into english) (VIANA, 2018, p. 127).

It's also possible to expand the critical thought, as it's possible to share digital documents that contribute to expanding access to knowledge. It's worth mentioning that the access to information in the online environment isn't enough as a political action, as it's necessary to generate concrete effects. It's possible to identify the following example: during protests against the Iranian government in 2009, which, although they arose through online mobilization, didn't prevent human rights violations from occurring; the technology hasn't prevented the torture and execution of many protestants (DIAMOND, 2009, p. 14).

In this sense, it's observed that the mobilization is a central piece to reach a collective objective of great proportions, although instantaneous. It's observed that a series of events isn't necessary to provoke the existence of the questioning movements; there is mobilization because the group of citizens who want to change certain characteristics concerning the government has the/a motivation to do so. However, the results of these may be insufficient, if there is no essential element to promote the continuation of the mobilization until it's victorious in its struggle against the *status quo*, the politicization.

In any case, it remains undeniable that Manjoo (2016) is absolutely correct when he affirms that Social Media has become an increasingly powerful cultural and political force, to the point that its effects begin to alter the course of global events.

Larry Diamond (2012) goes so far as to include Social Media in what he calls "liberation technologies" in the face of the empowerment that they would give to citizens and civil society to facilitate independent communication, expose opinions, mobilize protests, monitor elections, oversee the government and other ways of achieving freedom. An important sample of such liberation movements can be found in the "Green Revolution" in Iran, in the "Arab Spring" in the Middle East and North Africa, and in Brazil, in the mobilization in favor of the half-way, and demonstrate that, in fact, *NTIC´*s enjoy significant potential to reduce the communication gap between insiders and outsiders. These are examples in the sense of how the 'manifestations' motivated by Social Media can have some level of politicization.

Friedman (2014), for his part, came to imagine that the democratization and diffusion of the revolution and universalization of new technologies, which went from the computers of the Elites to the Smartphones of the people, would give rise to a new global political force, bigger and more important than the "Davos Men". In this sense, it should be clarified that the expression "Davos Men" was coined by Huntington (2004) to identify a global "superclass", emerging from the Davos World Economic Forum, a cosmopolitan and transnational elite, formed by high technology, finance, multinationals, academics and NGOs and who had "little need for national loyalty" and more in common with each other than their fellow citizens.

Well, this greater and more important force than the "Men of Davos", Friedman (2014) called "Square People". Such 'people in the square' would represent a diversity of policies

and would demand a new type of social contract. They would fight to have their voice heard more and more. They would also fight for better schools, roads and a better 'Rule of Law' (*Estado de Direito*). They would demand for the possibility of a better future and for to have their voices amplified.

5 POLITICATION AS A CONTEST OF HEGEMONY

It's observed that social insurgencies are intrinsically related to complex processes, which directly influence the achievement of results of a certain social movement and whether the objectives achieved will be short, medium or long term. That is, the organization of a social movement, even if it starts online, must go through a process of politicization, which implies understanding the power relations existing in society. Furthermore, politicization doesn't happen instantly; on the contrary, it's developed in a complex way, wich the scope needs to be gradually expanded, from theory to practice, in a dialectical process of praxis. This concept was further developed by Gramsci, from the Marxist historical-dialectical materialist analysis.

In this way, it's about the unification of practical and theoretical consciousness, being "a policy that is also philosophy, and a philosophy that is also political" (our translation into english) (GRAMSCI, 2000, p. 351). It's argued that the process of the philosophy of praxis must be understood as the way in which social classes without privileges build a new hegemony, from the deposition of the domination of the classes responsible for social inequalities.

For that, it's necessary to understand the historical subject. Thus, an analysis of the social subject is proposed as an agent that has the ability to promote his emancipation from awareness, therefore being "a historical creation and not of nature" (our translation into english) (MICHELIS, 2017, p. 58). Gramsci reinvents the category of materialism, understanding it as a condition for articulating the questioning of the *status quo*. Thus, the philosophy of praxis isn't a synonym, but an "interpretation of historical materialism as an independent and original philosophy" (our translation into english) (LIGUORI, 2017, p. 593).

In the process of emancipation, praxis becomes fundamental for changing paradigms. It's based on the understanding that, in a society whose hegemony is bourgeois, the class conflict exists and is assimilated by hegemonic institutions. That is, the dominant groups create a kind of common sense whose main function is to promote the demobilization of popular struggles.

It's noted that such influence by the dominant classes isn't violent, but reductionist, because it places popular manifestations on a level of mere corporate interest. Therefore, it's a way to reinforce the bourgeois hegemony, since the reinforcement of common sense has the objective of combating possible counter-hegemonic discourses, that is, the State creates, preventively, the adequate public opinion, that is, it organizes and centralizes certain elements of civil society (GRAMSCI, 2002 *apud* SIMIONATTO, 2009, p. 43).

The notion of common sense is essential to understand how the philosophy of praxis will be emancipatory, that is, so that the subordinate classes have the possibility to "leave

the economic-corporate phase to rise to the phase of political-intellectual hegemony in civil society and become dominant in political society" (GRAMSCI, 2002 *apud* SIMIONATTO, 2009, p. 43). Thus, it's necessary to promote a new way of thinking about social issues in addition to conflicts of interest between social groups that must be resolved within the institutions. For Gramsci, the change in hegemonic discourse also develops in the scope of discourse, that is, the consensus that exists in society. In this sense, it's essential to ensure that the subordinate classes have "a hegemonic activity even before going to power" (our translation into english) (GRAMSCI, 2006, p. 63).

For that, there is the importance of praxis, which offers the necessary means "to overcome common sense and make the subordinate classes capable of producing a counter-hegemony" (SIMIONATTO, 2009, p. 43). It's worth emphasizing that Gramsci doesn't understand philosophy as coming from bourgeois intellectual practice, but as a reflection about ethics and politics that can be done by everyone; therefore, popular sovereignty is sought through autonomy and liberation from the existing oppressive paradigm. Thus, praxis emanates from subordinate social groups that encompass not only workers in the factory environment, but that "extend to the social reality of marginalized regions" (SEMERARO, 2014, p. 139) (our translations into english).

It's possible to compare the participants of social movements driven or created by the intermediary of social networks with the populist phase of praxis, according to the description of "a long process, with actions and reactions, sets and separations and the growth of groups" (our translation into english) (GRAMSCI, 2000, p. 351). However, there is a need for awareness on praxis. In this sense, theoretical knowledge is fundamental. It is noteworthy that, even though social networks have the power to bring together people under the same ideal, allied to the dissemination of information, guaranteeing what the future of such social insurgencies will be becomes an arduous task since the motivation of the people involved in such manifestations it can change.

In this perspective, it's possible to observe that, although there is action, that is, the practice of insurgency against the system, it's meticulously dismantled in the same meantime by which it was initiated. Therefore, even though these are effective as a means of summoning citizens to political action, there is also a disadvantage in this area, that is, in the post-manifestation political processes. Here, we cannot fail to recall the correct and precise observation of Krastev (2018) in the sense that the new authoritarians ended up being the biggest beneficiaries of the wave of protests of the last decade, having also contributed to the declining influence of NGOs as an agent of social and political change.

That said, it's important to highlight the possibility that the media reinforce the hegemonic discourse, as a strategy of degenerating the discourse of the questioning groups of order, in order to maintain public opinion based on the consensus existing in domination relations, because "there is a struggle for the monopoly of public opinion bodies: newspapers, parties, parliament, so that only one force shapes opinion and, therefore, national public will, disaggregating those who disagree in an individual and inorganic dust cloud" (our translation into english) (GRAMSCI, 2002 *apud* SIMIONATTO, 2009, p. 41).

As an example, it can be pointed out the discourses proliferated in the networks that are assumed to be ideologically neutral. This neutrality isn't beneficial, as it reduces the significance of the politicization process, by associating it with the mere identification with political

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parties or prominent figures in the political context. Therefore, the act of politicizing cannot be considered interesting for social groups indignant with oppression, as it implies an understanding of the need for praxis as a form of fight against oppression.

In this perspective, the demonstration would acquire "knowledge of the world as it transforms it" (our translation into english) (GRAMSCI, 2002 *apud* SIMIONATTO, 2009, p. 43). Thus, it can be said that the social groups involved in a given protest would proceed towards a new phase in the praxis process, with the aim of changing the reality in which they live from the recreation of social facts and the elaboration of a new vision of the world.

However, from the moment that politicization is placed in the guise of choice among the political spectrum, individuals can reject it, as the process becomes framed in common sense. In this way, the process of depoliticization proceeds, that is, the dismantling of the political conscience that is at the origin of the social insurgency. In turn, the proper notion of praxis can be identified as negative, in the sense of "disturbance of order", whose effects will not be relevant in the long term.

About the rapid demobilization of global movements organized by Social Media, Friedman (2014) rightly reminds us that behind several massive manifestations on the streets, especially those that occurred in the last century, a well-founded and permanent organization rarely can be found, that is able to follow the demands of the protesters and carry out the complex political work, face to face and without grace that produces real changes in the government.

Along the same lines, Zeynep's lessons (2014, apud Friedman, 2014), who rightly clarifies that before the Internet, the tedious organizational work required to circumvent censorship or organize a protest also helped to create infrastructure for decision-making and strategies to sustain the movement, given that the current technological state allows such movements to overcome this stage, often at their own expense.

And this infrastructure is relevant to give strength and long life to counter-hegemonic movementsAnd this is all the more true when we are faced with Brumberg's precise observation (apud Friedman, 2014), in the sense that the most successful 'people in the square' in the Arab world, who forged a whole new constitution, would be in Tunisia , which would be the Arab country with the strongest civil society institutions - especially a powerful union federation, as well as business associations, human rights and lawyers.

But that's not all! The movements motivated by Social Media have another important opponent to prevent or hinder its effective politicization: the spectacularization. In this sense, political articulation isn't understood as relevant at first moment, which puts the movements, as already seen, as susceptible to the dismantling of counter-hegemonic discourse. Examples of spectacularization can be seen in several world insurgencies, such as the 'Occupy movement', which has achieved great repercussions. In this way, it's a superficial understanding, which underestimates the potential for change of the manifestations; it's translated into "doing politics on the streets", which acts as a substitute for the important task of political organization; "the manifestation is seen as both, a political beginning and an end, when, in fact, it's a means" (our translation into english) (FERNANDES, 2019, p. 72).

On the other hand, for the depoliticization discourse, the insurgency constitutes as a threat to the existing peace in the system, which was structured with the fulcrum of being a

"form of government characterized by a set of rules that allow the change of governments without the need to use violence" (our translation into english) (BOBBIO, 1996, p. 233). The narrative according to which elections would promote social change in a safe manner is reinforced, unlike political action. Political apathy is understood as positive, as it doesn't represent a concrete threat to the system.

When depoliticization occurs, there is a high probability that social movements will not be able to achieve the ends for which they were created, consequently, without promoting effective changes, except for a brief period of time in which the unrest against the system prevailed and it became a driver for the practical aspect of praxis, therefore, the action. The result consists of a group of individuals who, although they may have similar ideas about a certain fact, they aren't able to organize themselves to question it, limiting themselves to social networks to express their discontent. However, it doesn't mean that the result of cyber social movements is unique or that depoliticization is their fate.

6 CONSEQUENCES OF DEPOLITIZATION: THE POST-POLITICS

One of the possible results of such long-term manifestations, when the groups involved don't go through the process of politicization, is the post-politics, a concept defined by Zizek (ZIZEK, 2008 *apud* FERNANDES, 2019, p.217), when referring to the new ways of doing politics from the 1990s. In this way, post-politics is a depoliticization that doesn't aim to question the current social structures, but to reaffirm knowledge from common sense as a post-ideology, that is, to overcome existing ideologies, since "the conflict of global ideological views embodied in different parties that compete for power is replaced by the collaboration of enlightened technocrats and liberal multiculturalists" (ZIZEK, 2008 *apud* FERNANDES, 2019, p.217).

According to the post-political discourse, reflection on issues directly related to 'doing politics' isn't necessary, as this constitutes a process of negotiating interests, through which it's possible to reach a consensus; this is an important concept to understand this type of depoliticization that is vehemently opposed to extremism. This position isn't reasonable if we consider that the concept of radicalism in a post-political discourse is based on the idea of opposition. Therefore, anyone who fights against the oppressive structure and opposes exploitative relations and seeks its end from praxis, can be considered as "extremist".

However, this narrative has the facility to delegitimize political action and the organization derived from it, in order to weaken the fight against the hegemonic system. It's noteworthy that post-political discourses can be used for both, on the ideological positions on the right and on the left, and are adapted to serve the interests of those who propose to reproduce it selectively, because "it offers conflict management artifacts along the way of consent that are useful, even to those who build themselves in ultrapolitics" (our translation into english) (FERNANDES, 2019, p. 246). In this way, they offer possibilities for the emergence of conservative figures on the political scene. Therefore, post-politics isn't so beneficial for those who wish to fight against the status quo, as for those who wish to maintain the system.

Since post-politics rejects political antagonism, it's proposed that consent and negotiation are the alternative to eliminate persistent contradictions in society. For that, it uses technocratic responses, with the fulcrum of integrating scientific basis to the reproduction of common sense and presenting solutions with a new appearance, thus being "a fantasy of a policy without politics" (our translation into english) (DEAN, 2013 *apud* FERNANDES, 2019, p. 246)

In this sense, one of the defining characteristics of post-political discourse is the presumed neutrality. An example is the "neither left nor right" discourse, widely disseminated online by prominent current political figures who present as renewal, and who consider that the solutions they propose for democratic problems appear to overcome the natural conflict between left and right. In this way, the ideological spectra are seen in a similar way to the Horseshoe Theory ("*Teoria da Ferradura*"), which sees the left and the right as equal in their extreme forms, when, in truth, they are ideologies diametrically different from each other.

In this meantime, social networks reveal their usefulness to promote the massive diffusion of post-political thoughts, built according to the interests of those who wrote them, aiming to reach a certain class, which finds itself agreeing with a common sense discourse, because it's naturalized.

The power of social networks is, in this way, used to weaken the social manifestations whose origin was also from these same means. Even the agenda related to human rights of a social character is considered post-ideological, that is, as a question of common sense. Thus, this narrative ignores the origins of the recognition of the set of human rights, constantly relegated to a level of inferiority in relation to the rights of the first order, namely, fundamental freedoms, since "any possibility that is beyond, in the essence of thought radical and basic, is excluded" (our translation into english) (FERNANDES, 2019, p. 220).

7 FINAL CONSIDERATIONS

It's undeniable that the problem of political representation in the post-globalization world is an urgent issue to be developed by political science, however, it's necessary to look beyond the immediate and instant character of social networks, if there is an objective to change structures social. It has been proven, by the awakening of manifestations around the world, that the liberal model of democracy isn't sustainable in a world whose transformations are increasingly vertiginous.

However, the occupation of the streets as a space for political manifestation isn't enough as political representation, since it isn't an end in itself, but a means to propose a redefinition of the concept of democracy beyond the liberal modelIn this sense, Gramscian reflections are essential for understanding the need for praxis as a driving force for political change. The overcoming of the liberal-bourgeois hegemony demands the construction of a new hegemony, based on the overcoming of the relations of domination and the oppression of the subaltern classes.

In this sense, although social networks can contribute to social change, and indeed they can, these can also be means to reinforce the existing structure, based on the post-political discourse, as, unfortunately, it has been occurring, which sees theory coupled with practice as a radicalism, when, in fact, it's a way of understanding liberal hegemony and its objective of maintaining political apathy and citizen participation in decisions just by choosing representatives within the own elites.

In short, it's essential to fight against the post-politics for the development of praxis, based on the negation of the supposedly neutral discourse, which, in fact, is in favor of hegemonic structures. To this end, it's necessary to re-signify the role of social networks in this area, given its potential to promote changes and encourage the organization of citizens to call for new political horizons. Thus, it's urgent to think about ways of politicizing the new social manifestations, as well as ways to develop the critical awareness of interconnected citizens, whose power of mobilization has already been felt.

Therefore, it's imperative to agree with Friedman (2014) who warns that despite the capture of the speech and praxis of the "people of the square" by the hegemonic forces, it's possible to assume that without such people, no major change will be possible, especially in certain countries, so social media has that important potential to reach, move and keep them moving.

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CRITICAL ANALYSIS OF THE POSSIBILITY OF APPLYING RESTORATIVE JUSTICE BY THE PUBLIC MINISTRY OF LABOR

ANÁLISE CRÍTICA ACERCA DA POSSIBILIDADE DE APLICAÇÃO DA JUSTIÇA RESTAURATIVA PELO MINISTÉRIO PÚBLICO DO TRABALHO

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ABSTRACT

The current work seeks to study the possibility of applying restorative justice to extrajudicial collective protection by the Labor Prosecution Office in labor irregularities reported to the institution. The hypothetical--deductive approach was adopted and the bibliographic research was herein employed. It was found that the Prosecution Office is an institution with power to develop arguments in order to deliberate and discuss on equal terms with those interested in and the ones involved in conflicts, problems and social dissatisfactions. It concludes that the Labor Prosecution Office is a political-bureaucratic actor with power to establish dialogical procedures of accomplishment of social rights, harmonization and social pacification, with restorative practices being possible performances in ministerial procedures.

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KEYWORDS: Restorative justice. Social rights. Extrajudicial Collective Guardianship. Public Ministry of Labor.

RESUMO

O presente trabalho objetiva estudar a possibilidade de aplicação da justiça restaurativa na tutela coletiva extrajudicial pelo Ministério Público do Trabalho em irregularidades trabalhistas noticiadas à instituição. Adotou-se como método de abordagem o hipotético-dedutivo e, como método de procedimento, a pesquisa bibliográfica. Verificou-se que o Ministério Público é uma instituição com poderes para formular argumentos no intuito de deliberar e de discutir, em igualdade de condições, com os interessados e os envolvidos em conflitos, problemas e insatisfações sociais. Conclui-se que o Ministério Público do Trabalho é um ator político-burocrático com poderes para instaurar procedimentos dialógicos para proceder à concretização de direitos sociais, à harmonização e à pacificação social, sendo as práticas restaurativas uma das possibilidades de atuação nos procedimentos ministeriais.

PALAVRAS-CHAVE: *Justiça restaurativa. Direitos Sociais. Tutela Coletiva Extrajudicial. Ministério Público do Trabalho.*

1 INTRODUCTION

This article aims to study the possibility of applying restorative justice in extrajudicial collective protection by the Public Ministry of Labor (*Ministério Público do Trabalho – MPT*) in labor irregularities reported to the ministerial institution. Therefore, the problem question in this article is: to what extent is the Public Ministry of Labor an institution capable of applying restorative practices in the procedures it institutes? The hypothesis is raised that: the Public Ministry of Labor is a political-bureaucratic actor with powers to establish dialogical procedures to proceed with the realization of social rights, social harmonization and pacification, with restorative practices being one of those procedures.

To verify the hypothesis raised, the following path will be taken: analysis of the structure and forms of application of restorative justice, investigation of the work of the Public Ministry of Labor, report on the development of restorative justice within the scope of the Public Ministry and proposition for the application of restorative practices by the Public Ministry of Labor.

The hypothetical-deductive approach method is used, through which a hypothesis is proposed for the problem and, throughout the research, its investigation is attempted. As a method of procedure, bibliographic research is adopted, which aims to obtain data and arguments in order to corroborate or disqualify the hypothesis raised.

First, an analysis is made of the structure of restorative justice, exposing some forms of its application. For that, its are demonstrated: the focuses, the objectives, the pillars, the elements and the three main models of restorative practices - the victim-offender, the conferences of family groups and the circular processes.

Then, the work of the Public Ministry of Labor is investigated as a political-bureaucratic actor with powers to establish dialogical procedures with a view to the realization of social rights and public policies and social harmonization and pacification.

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Subsequently, it's reported the development of restorative justice within the scope of the Public Ministry (*Ministério Público – MP*) based on the analysis of Resolution Nº 118/2014 of the National Council of the Public Ministry (*Conselho Nacional do Ministério Público – CNMP*), which provides for the National Policy of Incentive to Self-Composition (*Política Nacional de Incentivo à Autocomposição*), especially examining the articles in which the restorative practices are established.

Finally, it's proposed the application of restorative practices by the Public Ministry of Labor, elucidating some issues related to restorative techniques, as well as presenting some criticisms and suggestions, which will allow an analysis of restorative justice applied to extra-procedural labor tutelage, of collective character.

2 RESTORATIVE JUSTICE

According to historical and anthropological sources, there are traces of what we now call "restorative practices" in some communities in Africa, New Zealand, Austria and the Americas. However, some of these practices were stifled by the diverse dominations that these peoples suffered and many disappeared due to the centralization of the dominant state power (JACCOUD, 2005, p. 163-164).

The inspiration for the current restorative model goes back to the ancestral traditions of the Maoris, from New Zealand, and the indigenous cultures of Canada (PINTO, 2005, p. 23). In New Zealand, restorative justice began to take on the contours we know today, standing out in the scope of criminal law in juvenile offenses, as a way of dealing with crimes of less offensive potential or property crimes. However, it was from the experience observed in South Africa with the Truth and Reconciliation Commissions (*Comissões de Verdade e Reconciliação*) that the structures of restorative justice were expanded and started to be applied in situations of generalized violence (ZEHR, 2015, p. 12).

Restorative justice is an approach that favors every form of action, individual or collective, aimed to: (1) correct the consequences experienced as a result of an infraction, (2) encourage conflict resolution or reconciliation between parties linked to a conflict, (3) create a sense of responsibility for the acts practiced and (4) generate a commitment for each one of those involved (JACCOUD, 2005, p. 169).

The special concern of restorative justice refers to the victim's needs, among which the following stand out: (1) obtaining information, that is, obtaining real answers to questions related to the hurtful acts suffered and the offender; (2) tell the truth, that is, have the opportunity to narrate what happened from his/her perspective; (3) regain empowerment, so that control over all aspects of his/her life is returned; (4) obtain equity restitution or vindication by the one who caused the damage (ZEHR, 2015, p. 28-29).

The second major focus is on ensuring that offenders take the responsibility. True accountability encourages the offender to understand the consequences of his actions and encourages the feeling of co-responsibility for the suffering of others, prompting the offender to take corrective measures when possible (ZEHR, 2015, p. 30-31).

Thus, justice must offer to the one who caused the damage: (1) responsibility for his actions, so that he takes care of the damage caused; (2) encouraging empathy and social accountability, so that the offender transforms the shame felt by the perception of error; (3) the stimulus to the transformation experience from that act, to the point of curing the evils that corroborated so that he acted in that way, allowing the treatment of related problems and improving his personal skills; (4) the encouragement and support for his reintegration into the community; (5) detention, if applicable (ZEHR, 2015, p. 31).

The pillars of restorative justice are: damages and needs, obligations and engagement[4]. Restorative justice focuses on the harm done, as it sees crime as harm done to people and the community[5]. These damages result in obligations that create accountability for those who caused them, making the offenders understand the consequences of their behavior and make a commitment to correct the situation as far as possible. Thus, restorative justice promotes the engagement and participation of all those affected (ZEHR, 2015, p. 38-40).

One of the objectives of restorative justice is to deal with the harmful act (damage), being a stimulus to the offender to do the right thing. This necessarily implies a responsibility for the offender, who must try, as much as possible, to repair the damage in all its dimensions: patrimonial, social, intellectual, psychological etc. It should be noted that, in the first place, the offender is responsible for repairing the damage caused, but the community, in some cases, may also be responsible (ZEHR, 2015, p. 44-45).

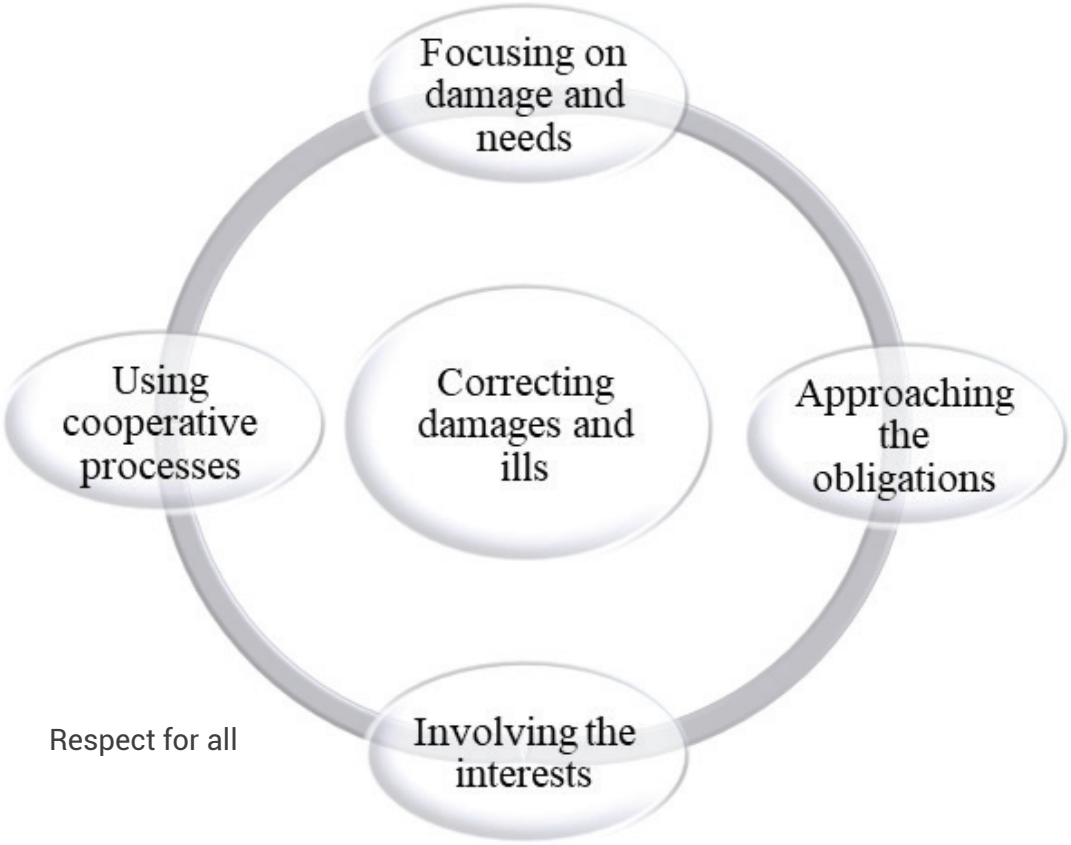
The dispersion and sharing of the power to decide on elementary issues in the agents' lives are fundamental to social transformation. The protagonism of the subjects and the openness to the diversity of narratives complete and complex the image of the State and its citizens (ARAÚJO, 2019, p. 285).

Another objective is to address the causes that led to the offense. For this, it is necessary to examine the damage that the offender himself suffered, as many illicit acts arise as a response to a sense of victimization and an effort to reverse this situation (or arise from unmet needs). The trauma can be considered a central experience in everyone's life (victim, offender and community). Efforts to repair the evil are at the heart of restorative justice in two dimensions: a) treating its causes, including the negative factors that made the illegal behavior possible; b) treat the damage done (ZEHR, 2015, p. 46-48).

4 According to Zehr (2008, p. 178), the experience of justice is a basic human need, without which healing and reconciliation are difficult to obtain or even impossible. Therefore, justice is a precondition for the solution (the management and transformation of conflicts, problems and social dissatisfactions - CPSD). It's observed that it's not the author's objective, at least in this work, to conceptualize basic human need, however the theory of needs developed by the authors Doyal and Gough is adopted (1994), according to which there are basic needs: common, universal and objective. The criterion used to distinguish human needs, the basic from intermediate or preferences, was the negative impact (serious damage) caused by not meeting these needs, especially with regard to physical and mental health. Thus, Doyal and Gough (1994) argue that there are two basic needs: physical health and rational autonomy (agency autonomy and critical autonomy). In short, agency autonomy is the ability to act and be responsible for your actions; whereas, critical autonomy is the ability to participate in the evaluation processes of the culture in which it's inserted, understanding and changing it, if necessary. In addition, basic human needs comprise eleven other intermediate needs that optimize them: a) nutritious food and drinking water; b) adequate housing; c) work environment devoid of risks; d) healthy physical environment; e) appropriate health care; f) child protection; g) significant primary relationships; h) physical security; i) economic security; j) appropriate education; k) security in family planning.

5 Due to the methodological cut, although there are strong conceptual differences between community and society, the first term will be used here to represent the community or collectivity, as it better means the defended idea. To deepen the theme, consult the text: El retorno a la comunidad: problemas, debates y desafíos de vivir juntos, de Alfonso Torres Carrillo (2013).

Figure 1 - Restorative justice.



Source: ZEHR, 2015, p. 50 and adapted by the authors into english.

The central issue of the restorative process is to correct the serious damage[6] from the harmful act. Therefore, restorative justice adopts some measures: a) focuses on the needs and harms of those involved to analyze claims, expectations, fears, frustrations and others; b) involves everyone's interests; c) approaches the obligations that all involved have with the CPSD; d) makes use, to reach the expected result, of cooperative processes to create or reestablish a link between the subjects involved, as well as (re) create the feeling of responsibility for individual acts towards others. It should be noted that all this work is marked by mutual respect between the participants, in a cooperative and non-adversarial atmosphere.

There are three main models of restorative practices: victim-offender encounters, family group conferences and circular processes. Each of them implies, to some extent and inseparably, a dialogue between the interests of those involved. Everyone starts from the assumption that, in order to resolve any and all harmful behavior, it's necessary, first of all, to attend to three premises: (1) the evil committed must be known by all; (2) equity[7] needs to be created

6 Doyal and Gough (1994, p. 50) use the expression "serious damage" to refer to the negative impacts that prevent or seriously jeopardize the objective possibility for human beings to live physically and socially in conditions to be able to express their active capacity critical.

7 Zehr, in the works: Changing the lenses (Trocando as lentes, 2008) and Restorative justice (Justiça restaurativa, 2015), does not present a legal-philosophical concept of equity, he only presents it as a value to be pursued by restorative justice. However, it is emphasized that the discretionary use of the term can lead to erroneous understandings, since several authors, such as Aristotle (Nicomachean Ethics), John Rawls (A theory of justice) and Ronald Dworkin (The empire of law), conceptualized it differently. Although there is a certain legal common sense in approaching equity as the justice of the specific case, which would go back to the Aristotelian concept, such a concept is mistaken in ignoring the anthropology and metaethics

or restored; (3) it's necessary to approach of everyone's future intentions. Furthermore, in all models, people's participation must be voluntary (ZEHR, 2015, p. 62-63).

The victim-offender encounters involve those directly harmed and those responsible for the damage. *A priori*, the victim and the offender must be separated, but if there is consent for the two to meet, the restorative procedure must be organized and conducted by a facilitator who will guide the process in a balanced way/mode (ZEHR, 2015, p. 66).

In one of the phases, the victim is offered the opportunity to meet with the offender in a safe and structured environment/location, accompanied by facilitators, for a confrontation (or rather, a cooperative space) in which both can build a restorative plan for address the conflict and resolve it (transform or manage it) (PAZ, S.; PAZ, M., 2005, p. 127).

At family group conferences, there is an expansion of participants, including, necessarily: family members and other members of the community directly involved in the conflict. Such a model focuses on providing support to those who have suffered the harm and to the family, as well as to those who have caused the harm and their family (ZEHR, 2015, p. 66-67). The objectives of the conferences are: to involve the victim in the construction of the response to the crime, to make the offender aware of the evil of his acts and to link the victim and the offender to the community (PAZ, S.; PAZ, M., 2005, p. 127).

Peacebuilding circles are a process of dialogue that intentionally creates a space in which people can feel safe to discuss difficult or painful problems, in order to improve relationships and resolve differences. The circle's intention is to think of solutions that are consistent with each participating member. The process is based on the assumption that each participant in the circle has equal value and dignity, guaranteeing the right of participation to all, as it's understood that each participant has gifts to offer in the search for a good solution to the problem (PRANIS, 2010, p. 11).

Circles are preconceived to discuss how the conversation will take place, before discussing difficult issues. Consequently, in order to achieve that meeting, the circle studies the values and guidelines, before addressing differences or conflicts (or rather, conflicts, problems or social dissatisfactions (CPSD)). When possible, the circle also examines relationship building before discussing difficult issues. The facilitator's responsibility, in these cases, is to assist participants in creating a safe zone for conversation and to monitor the quality of the space (and dialogue) during the realization of the circle. Therefore, if the environment becomes disrespectful, the facilitator should draw the group's attention to this problem and help them to restore the space of respect (PRANIS, 2010, p. 11).

In Brazil, Restorative Justice began to be officially applied in 2005 with three pilot projects implemented in the States of São Paulo and Rio Grande do Sul and in the Federal District. Currently, programs, projects and actions in Restorative Justice are, as a rule, coordinated and promoted by the Judiciary and the most used restorative methodologies are Kay Pranis' peace-building circles and those based on non-violent communication. Despite the expansion, the application is restricted to minor criminal offenses, infractions and domestic vio-

that support the concept. Cordioli (2015, p. 185-209) clarifies that many current theories of justice, like Rawls's, have failed to consider the role of ethics and people and have focused their analysis on politics and social institutions. However, equity, in Aristotle, is an ethical virtue that is one of the modalities of justice, as a rectification of the legal just. That is, a desirable attribute of character that leads a person to want the just, not only in the sense of the law, but that surpasses it when the latter is shown to be against the equality and the common good. Therefore, there is no way to separate the concept of equity in Aristotle from the concepts of virtue, vice, justice, equality and the common good.

lence, although there is a high interest in developing training and restorative actions in family law (CONSELHO NACIONAL DE JUSTIÇA, 2019, p. 5, 39).

After the analysis of restorative justice, showing the three main models of restorative practices, let us analyze the work of the Public Ministry of Labor, as an institution capable of promoting social harmonization through the search for the realization of social rights.

3 PRACTICE OF THE PUBLIC MINISTRY OF LABOR

The Constitution of the Federative Republic of Brazil of 1988 (*Constituição da República Federativa do Brasil de 1988*) ensured that the Public Ministry was structured with professionalism, specialization of action and a bureaucratic body with the power to fulfill the constitutional mission of realizing human rights. (ACKERMAN, 2000, p. 692).

The Public Ministry is a bureaucratic institution with powers to formulate arguments in order to deliberate and discuss, on equal terms, with interested parties and those involved in CPSD, in the search for a reasoned deliberative agreement that meets justice (SILVA, 2016, p. 241).

In order to expand the reach of the institution, this 1988 Constitution bureaucratized the Public Ministry in two federative spheres: the Union and the States. Thus, for the concretization and realization of social rights, the Federal Public Ministry comprises/covers: the Federal Public Ministry, the Public Ministry of the Federal District and Territories, the Military Public Ministry and the Public Ministry of Labor (*Ministério Público Federal; Ministério Público do Distrito Federal e Territórios; Ministério Público Militar e Ministério Público do Trabalho*) (SILVA, 2016, p. 248).

Therefore, the Public Ministry is a political-bureaucratic actor who has the power to establish dialogical procedures to proceed with the specification and implementation of social rights in order to make them enforceable in the individual and collective field (SILVA, 2016, p. 78-79). The Public Ministry of Labor adopts several administrative (or rather, ministerial)[8] procedures that make it possible for them to act (Figura 2).

8 Despite being called "administrative procedures", it is considered that such denomination is a way of reading the new with old lenses, since the Public Ministry has constitutional autonomy and acts independently of the other branches of the Public Power. Therefore, the correct classification is an act, procedure or ministerial negotiation when it comes to the exercise of the typical assignment of the Public Ministry, without this ruling out the possibility of atypical attributions, such as administrative acts and processes of appointment, dismissal of civil servants and members, among others. (SILVA, 2016, p. 276).

Figure 2 - Administrative procedures of the Public Ministry of Labor.

PROCEDURE (Correspondence in English – Original in Portuguese)	INITIALS (Referring to the originals in Portuguese)
Precatory Letter from the Public Ministry Carta Precatória do Ministério Púbico	CP
Civil Inquiry – Inquérito Civil	IC
Fact News – Notícia de Fato	NF
Judicial Follow-up Procedure – Procedimento de Acompanhamento Judicial	PAJ
Administrative Procedure of Mediation – Procedimento Administrativo de Mediação	PA-MED
Administrative Procedure of Arbitration – Procedimento Administrativo de Arbitragem	PA-ARB
Promotional Administrative Procedure – Procedimento Administrativo Promocional	PA-PROMO
Preparatory Procedure – Procedimento Preparatório	PP

Source: Prepared by the authors.

Each of these procedures has a different purpose and object, which will not be discussed in this article[9]. Therefore, it's observed that the Public Ministry of Labor has several instruments for the realization of social human rights, public policies and social harmonization and pacification, among which the following stand out: the civil investigation, the human rights implementation agreement or conduct adjustment term[10], recommendation, public policy promotion procedure, administrative mediation and arbitration procedures (SILVA, 2016, p. 78).

This form of ministerial action, aimed at defending the public interest and social demands, compared, for example, with the material parameters of legitimacy of judicial intervention in public policies (SOUZA NETO, 2008, p. 125), complies with the criteria for acting in such policies in a more flexible way, with the defense of the hyposufficient, allowing: (1) individual's

9 To learn more about ministerial procedures, see the work: The Public Ministry and the realization of human rights (O Ministério Público e a concretização dos direitos humanos), by Sandoval Alves da Silva (2016).

10 According to Silva (2016, p. 303-305), the word "term" refers to a formalization document and not to the agreement itself; the word "adjustment" means the act or effect of adjusting actions, but the planning of the fulfillment of a social right does not necessarily have to come from something out of place/something misfit; the mention of "conduct" comes from the belief that it's necessary to fix what is wrong. For this reason, the name "agreement for the realization of human rights" (acordo de concretização de direitos humanos – ACDH) is proposed, as it's more consistent with the ministerial resolutive functions, and this agreement will be formalized by the "term of agreement for the realization of human rights" (termo de acordo de concretização de direitos humanos – TCDH).

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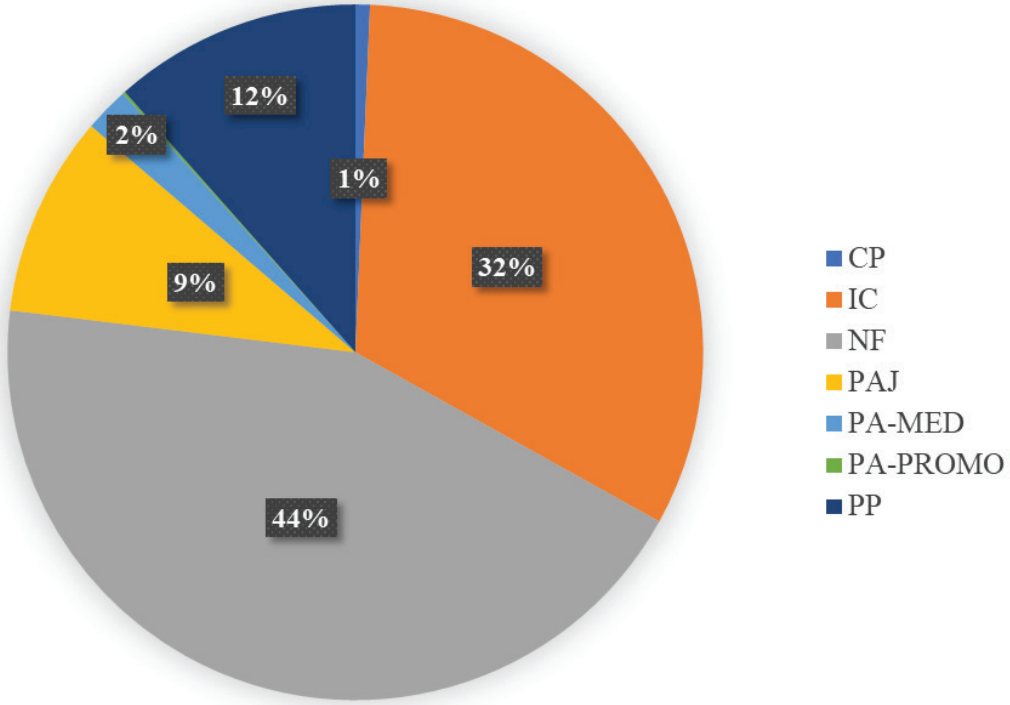
participation in private and collective autonomy, (2) universalization of social measures, guaranteeing simultaneous, equal and universal access, (3) consideration of the social rights system in its unit, (4) the primacy of the technical and administrative option (in case of divergence) and the most economical solution (cost-benefit ratio) and (5) exercising control over the budget execution of public policies (SILVA, 2016, p. 80).

In 2015, at the Public Ministry of Labor of the State of Pará, Regional Labor Office of the 8th Region Pará and Amapá (*Ministério Público do Trabalho do Pará – MPT-PA, Procuradoria Regional do Trabalho da 8ª Região Pará e Amapá*), at the headquarters in Belém, 1,777 (one thousand seven hundred and seventy-seven) procedures were instituted, which were distributed to the 19 (nineteen) offices that make up the regional ministerial body of the 8th Region[11]. Based on the total data obtained in the research, a survey of the procedures was carried out (Figure 3).

Figure 3 - Procedures opened by the Public Ministry of Labor - State of Pará in 2015.



Source: Prepared by the authors.

It's observed that 44% (forty-four percent) of the procedures instituted by Public Ministry of Labor - State of Pará in 2015 were ('*Notícias de Fato (NF)*)' of irregularities that arrived at the agency through information given by workers, by interested third parties, by Tutelary Council, by Dial 100, linked, at the time, to the Ministry of Human Rights (now called Ministry of Women, Family and Human Rights), and by several other bodies.

Some 'NF' were converted into Civil Inquiries (*Inquéritos Civil - IC*)', accounting for 32% (thirty-two percent) of the procedures initiated. Then, the third most established procedure

11 Data obtained from the PIBIC research linked to the Faculty of Law of the Federal University of Pará (UFPA) regarding the research project: The resolution of collective problems and conflicts through procedural and extra-procedural means established by the Public Ministry (A resolutividade dos problemas e conflitos coletivos por meios processuais e extraprocessuais instaurados pelo ministério público), researched the procedures instituted by the Public Ministry of Labor - State of Pará in 2015.

was the Preparatory Procedures (*Procedimentos Preparatórios - PP*) for the establishment of 'CI', totaling 12% (twelve percent). The Judicial Follow-up Procedures (*Procedimentos de Acompanhamento Judicial – PAJ*) represent 9% (nine percent) of the 2015 procedures, being the fourth most established procedure by the entity. Finally, with 2% (two percent) and 1% (one percent), respectively, are the Mediation Procedures (*Procedimentos de Mediação - PA--MED*) and the Precatory Letters of the Public Ministry (*Cartas Precatórias (CP) do Ministério Público*).

It is asserted that, among the procedures established, 2 (two) were Ministerial Promotional Procedures (*Procedimentos Ministeriais Promocionais - PA-PROMO*), a small amount compared to the other procedures, so it did not enter the chart above. Nor were there any Arbitration Procedures (*Procedimentos de Arbitragem - PA-ARB*) instituted in 2015. Therefore, it appears that there is no specific procedure in the Public Ministry for restorative procedures that use the methods employed by restorative justice.

However, this does not mean that the restorative procedures are not applied within the scope of the Public Ministry of Labor, as there are reports of use by the Regional Labor Office of the 8th Region Pará and Amapá, as will be explored in the following sections.

4 RESTAURATIVE JUSTICE WITHIN THE PUBLIC MINISTRY

In 2014, the National Council for the Public Ministry (*Conselho Nacional do Ministério Público – CNMP*) issued Resolution Nº 118, which provides for the National Policy of Incentive to Self-Composition, which considers negotiation, mediation, conciliation, procedural conventions and restorative practices, effective instruments of social pacification, resolution and prevention of disputes, controversies and problems. In addition, the appropriate use of these institutes has reduced the excessive judicialization and has satisfied those involved (CONSELHO NACIONAL DO MINISTÉRIO PÚBLICO, 2015, p. 1-2).

It's observed that the Resolution emphasizes that restorative practices have been shown to be effective instruments for social pacification, the resolution, administration or transformation of conflicts, problems and social dissatisfactions (CPSD)[12], as well as reducing the judicialization of demands, empowering and satisfying those involved. Based on this indication, two assertions can be made: (1) other means, other than the judicial process, can be effective in the resolution, administration and transformation of CPSD[13]; (2) the means of

12 It's understood that not all conflicts, problems and social dissatisfactions (CPSD) are solvable, some manage to be only manageable while they last and others can be transformed, that is, it can be stimulated that the changes are constructive from the conflict. This perspective can be deepened in the article Access to justice in the Project "Writing and Rewriting Our History" (Acesso à justiça no Projeto "Escrevendo e Reescrevendo a Nossa História") (Pernoh) (SILVA; SIQUEIRA, 2020).

13 With regard to the expression "alternative means" or the words "complementary" and "alternative", doctrinal controversy and possible technical impropriety are registered, as they only value the judicial system. Likewise, the word "appropriate" may also imply technicality, giving prestige to the self-composing route, to the detriment of the judicial route. Thus, when "alternative" is used, it's understood that the Judiciary is overvalued; on the other hand, when you choose "appropriate", you are undervaluing it. This perspective can be deepened in the article: Society and the solution of negotiated conflicts (A sociedade e a solução de conflitos negociados) (SILVA, 2019).

resolution, administration and conflict management are also capable of promoting access to justice[14], regardless of access to the Judiciary.

This perspective demonstrates that the Public Ministry, including that of Labor, seeks, in its work, to consolidate a culture of peace that prioritizes dialogue and agreement in the resolution of the CPSD. To this end, the National Council for the Public Ministry may even carry out research on administrative (or rather, ministerial) processes within the scope of its activities, as well as disseminate its to other members of the Ministry and to society (article 6º, items IV and V, of Resolution Nº 118/2014)[15] (CONSELHO NACIONAL DO MINISTÉRIO PÚBLICO, 2015, p. 2).

This change in the perspective of the Public Ministry came from considering the institution's judicial performance with a demand-based procedural performance[16] to the detriment of extra-procedural action, since the procedural activity consumes the ministerial activity, taking away time[17] to get involved in the resolution of CPSD in the field of extraprocessuality (SILVA, 2016, p. 244). The resolutive action of the Public Ministry is one of the ways to make access to justice effective[18], an attempt to exhaust the extrajudicial possibilities of resolution (administration and transformation) of the issues that are reported to this entity (MIRANDA, 2010, p. 373).

The Resolution deals specifically about restorative justice in two provisions: article 13[19] and article 14[20]. The first states that restorative practices are recommended in situations where it is feasible to repair the effects of the infraction through harmonization between the parties, aiming at restoring social life and pacifying relationships. The second informs that, in restorative practices, the offender, the victim and any other persons or sectors, public or private, of the affected community, with the help of a facilitator, will participate together in meetings, aiming at the formulation of a restorative plan for the reparation or mitigation of

14 It is understood that access to justice does not just mean access to the Judiciary, since access to justice implies access to citizenship and access to democratic participation in the direction of their own community life This perspective can be seen in the book Mediation in civil conflicts (Mediação nos conflitos civis) by Fernanda Tartuce (2015), and in the article (In) access to justice with the devastating labor reform (O (in)acesso à justiça com a demolidora reforma trabalhista), by Sandoval Alves da Silva (2017).

15 Art. 6º. In order to achieve the aforementioned objectives, the CNMP may: [...] IV - Conduct research on negotiation, mediation, conciliation, procedural conventions, restorative processes and other self-composing mechanisms; V - Promote publications on negotiation, mediation, conciliation, procedural conventions, restorative processes and other self-composing mechanisms. (Our translation into english)

16 Macêdo (2013, p. 341) characterizes the demand model as the one that makes use of civil and criminal judicial demands in resolving conflicts, either as a plaintiff or as an intervener.

17 It should be noted that, although there is concern about the delay that the Judiciary takes to resolve a conflict, a problem or a social dissatisfaction, it cannot be said that the speed is always positive, since the reasonableness of the duration of the process does not mean necessarily effectiveness, nor that self-compositional methods are an alternative to the delay of the Judiciary because they are faster. As an example, methodologies such as peace-building circles, classified as self-composing, require much more time and effort from those involved. Therefore, it cannot be categorically stated that self-composing means are necessarily faster. This perspective can be deepened in Silva and Siqueira. (2020).

18 For Tartuce (2015, p. 77-78), the core of access to justice is not to allow everyone to go to court, but to allow justice to be carried out in the context in which people are inserted. In the democratic process, access to justice plays an important role in enabling citizens to protect their interests and in enabling society to peaceful self-composition of conflicts (social problems and dissatisfactions).

19 Art. 13. Restorative practices are recommended in situations for which it is feasible to seek to remedy the effects of the infraction through harmonization between its author(s) and the victim(s), with the aim of to restore social coexistence and the effective pacification of relationships. (Our translation into english)

20 Art. 14. In restorative practices developed by the Public Ministry, the offender, the victim and any other persons or sectors, public or private, of the affected community, with the help of a facilitator, participate jointly in meetings, with a view to formulating a restorative plan for the repair or mitigation of the damage, the reinstatement of the offender and social harmonization. (Our translation into english)

damage, reinstatement of the offender and social harmonization (CONSELHO NACIONAL DO MINISTÉRIO PÚBLICO, 2015, p. 7).

It appears that both articles deal with restorative procedures in general, without detailing them. Article 13 emphasizes that such practices are only recommended for some situations; therefore, not every case that arrives at the Public Ministry is suitable for restorative justice. The article itself mentions the requirement that makes possible to use it: when the feasibility of repairing the effects of the infringement through harmonization between those involved is observed.

However, Zehr (2015, p. 19-20) emphasizes that restorative justice does not have the fundamental scope the forgiveness or the reconciliation, although they are necessary, in a certain way; it does not necessarily even require a return to of *status quo ante bellum*, since the return to the past, in many cases, is not possible, some situations need to be transformed[21] and not restored. Therefore, restorative justice does not mean a return to the pre-conflict state.

Furthermore, in our opinion, neither the *ex tunc* effect does this, because the occurrence of trauma, conflict, problems or social dissatisfaction has already altered the state of things, relationships, feelings, the human psyche etc., that even the restoration of the injured person, the complete restoration of the damage or its effects cannot remove its occurrence from the world of phenomena, as if nothing had happened, which is why the idea of returning to the pre-conflict state shows become viable only in the ideal world.

Article 14, when using the terms "offender" and "victim", seems to refer to one of the procedures of restorative justice: the victim-offender conference. However, as it's an open article, it is clear that there was only a lack of technique in the use of words, since some procedures choose to use terms such as "participants", "involved" and others, because they are more generic and less stigmatizing[22].

Furthermore, the same article, when mentioning the possible participants in the restorative procedure, omits the community as a fundamental participant in the restoration process. For Araújo (2019, p. 285), in restorative justice, the involvement of subjects (including the community) in deliberative or dialogical processes is accompanied by accountability for the causes, the results and the execution of the planned actions.

Community involvement is of paramount importance for the effectiveness of harmonization from restorative practices. On the one hand, the community is the backdrop for many conflicts (or rather, conflicts, problems and social dissatisfactions (CPSD)). On the other hand, the tools that communities use to treat them can help the State to broaden its understanding of justice and the strategies to satisfy it. Thus, although the State is a relevant supporter, the conflicts that lead to public discussions are usually confined to the private sphere.

21 The term "transformation" of conflicts expresses the search for ways to stimulate constructive changes based on the conflict. This theoretical current asserts itself as neither idealistic nor utopian, since it seeks practical results from methods of conflict transformation. The transformation of conflicts involves viewing and reacting to the "ups and downs" of conflict as a life-giving opportunity to create constructive processes of change, which reduce violence and enhance justice in direct interactions and social structures, as well as responding to the problems of human relationships (LEDERACH, 2012, p. 16 e p. 27).

22 Silva (2016, p. 293-294) points out that the use of the words "respondents", "investigated", "denounced" and the like, reveals traces of the criminal inquiry in the public civil inquiry, in a logic of prosecution, whose main focus is correction and punishment. The author suggests a shift from the main focus to the realization of social rights, public policies and social harmonization and pacification, adopting a preventive or prospective view in response to unmet needs; for that, it's advisable to use words like "participants", "involved" and others.

Therefore, the doing justice "in, for and by the community" is not centered on the figure of the State (ARAÚJO, 2019, p. 285-287).

As such, communities also suffer the impacts of social disharmony and, in many cases, can and should be considered subjects interested in the conflict, since they may have responsibilities towards those involved in the conflict. In this way, communities need justice to offer: (1) attention to its concerns as victims of the offense, (2) opportunities to delimit a sense of community and mutual and collective responsibility and (3) opportunities and encouragement for its to also make commitments to its members (ZEHR, 2015, p. 32).

Another important aspect presented in article 14 of the Resolution is that the participants will meet to formulate a restorative plan to deal with the repair or mitigation of the damage, the reintegration of the offender and social harmonization. This element is reflected in the way CPSD is seen. According to Araújo (2019, p. 221), conflicts can be seen in two ways: focal and topographic[23]. The first focuses exclusively on the urgencies that arise from conflict, while the second understands it as an opportunity to understand patterns and modify the structures of relationships.

Therefore, to map a conflict, it's important to pay attention to the following elements: a) the characteristics of the subjects involved, their interests and needs; b) the power structures and patterns of intersubjective relationships; c) the conceptual structures that support each once of these perspectives; d) the understandings of the world of the individuals and groups in question; e) the emotions aroused by the conflicting situation (ARAÚJO, 2019, p. 221).

In view of the above, it appears that, in order to arrive at the restorative plan, as envisaged in the resolution, it is necessary to observe all of the elements described, since the disregard of anyone could harm the formulation and execution of the restorative plan, since it would not consider all the nuances that make up the CPSD. In addition, the objectives of the plan, according to the CNMP, are: a) repair or mitigation of the damage, b) reinstatement of the offender and c) social harmonization.

Such objectives are in line with the five key principles or actions of restorative justice: (1) focus, first of all, on the needs of victims, offenders and the community, as well as the damage suffered by them; (2) addressing the obligations arising from the damage; (3) make use of cooperative and inclusive processes; (4) involve everyone who has an interest in the situation; (5) seek to repair the damage, as far as possible (ZEHR, 2015, p. 49).

As an example of the application of restorative justice by the Public Ministry, we can mention two projects: "Restorative MP and the Culture of Peace" ("*MP Restaurativo e a Cultura de Paz*")[24], developed by the Public Ministry of Paraná, and the Permanent Center for the Encouragement of Self-Composition ("*Núcleo Permanente de Incentivo à Autocomposição –*

23 Lederach (2012, p. 21-23) teaches us another way of looking at conflict. Imagine an eyeglass frame with three lenses: one clearly shows what is far away; the second focuses on what is in the middle distance and the third expands the view of things nearby. Thus, each lens has a specific function and does not perform the function of the other or all at the same time. Such lenses assist us in understanding the complexity of reality and conflict. The lens that magnifies the nearby object is necessary for us to visualize the immediate situation. The lens that allows objects to be sharpened at a medium distance, makes it possible to identify patterns of behavior in a relationship / conflict, as well as the context to which it is inserted. And finally, the last lens, far away, allows a macro view about the conflict allowing to create ways to deal with it.

24 To learn more about the project developed by the Public Ministry of the Paraná State of Paraná, visit the website: http://www.site.mppr.mp.br/modules/conteudo/conteudo.php?conteudo=99.

NUPA"), of the Public Ministry of Rio Grande do Norte[25]. Both aim to implement the restorative practices in the performance, including extrajudicial, of the Public Ministry, through training courses for its members, preparation of manuals and reports, creation of integrated centers.

Finally, the article 18[26] of the Resolution deals with the training of members and servants of the Public Ministry who will be qualified by the competent institutions to exercise the practices of restorative justice. Therefore, only properly trained people should apply such practices. From the above, it follows that restorative practices should be encouraged within the scope of the Public Ministry, including that of Labor, as we will analyze below.

5 RESTAURATIVE JUSTICE APPLIED BY THE PUBLIC MINISTRY OF LABOR

Restorative justice aims to give protagonism to the subjects involved, allowing a holistic view of the conflict, with the participation of the affected community and the restoration of relationships. Resolution Nº 118/2014 of CNMP provides for the National Policy of Incentive to Self-Composition (*Política Nacional de Incentivo à Autocomposição*) and stimulates the realization of restorative practices. However, much is questioned about the possibility of applying such practices in labor disputes.

It's inferred that it possible to apply restorative justice in the Labor Court in collective extrajudicial protection. The collective damages that occur in the workplace are often the result of a compromised work environment. In this context, community participation is essential. The ordinary procedure in which only the incoming worker and the entrepreneur participate does not account or does not cover for this reality. It's useless for these parties to reach an agreement regarding that specific problem without changing the working environment that allows the perpetuation of similar violations. Even less effective is judicialization, which often ignores the root of the problem and, although successful in terms of what is claimed, it does not act on the macro aspect. In this context, restorative justice offers collective decision-making methodologies in which the parties become aware of their responsibility in the face of conflict and collectively create ways to resolve or manage it.

Examples of possible applications are cases involving child labor, slave labor and accidents at work. As for the latter, it's argued that there is a monetization of health and that cases of Repetitive Strain Injury (*Lesão por Esforço Repetitivo (LER)*) and Hearing Loss Induced by Occupational Noise (*Perda Auditiva Induzida por Ruído Ocupacional (PAIR)*) are not resolvable with indemnity, since they result from the work environment[27]. Therefore, it is necessary to

25 To learn more about the project developed by the Public Ministry of the State of Rio Grande do Norte, visit the website: https://www.mprn.mp.br/portal/inicio/institucional/nupa.

26 Art. 18. The members and servants of the Public Ministry will be trained by the Schools of the Public Ministry, directly or in partnership with the National School of Mediation and Conciliation (Escola Nacional de Mediação e de Conciliação - ENAM), of the Secretariat of Judicial Reform of the Ministry of Justice, or with other accredited schools with the Judiciary or the Public Ministry, so that they can conduct negotiation, conciliation, mediation and restorative practices sessions, being able to do so through partnerships with other specialized institutions. (Our translation into english)

27 The work environment stems from the orderly interaction of natural, technical and psychological factors inherent to working conditions, work organization and interpersonal relationships that condition the safety and biopsychological health of those exposed to any legal-work context (MARANHÃO, 2016, p. 112).

restore the psychological (self-esteem), the collective (work environment and the group) and the family circle (as the disease reflected in the domestic bosom and in the relationship with friends) (BARROS, 2006, p. 5).

With the application of restorative justice in these cases it will be possible to: (1) bring the community in and check if the current employees, as well as those already fired, presents other problems arising from the work environment, (2) provide medical, psychological and social assistance to cases already detected, (3) adopt preventive measures so that the harmful act does not recur or does not have the same consequences, and (4) inspect the company, monitoring the fulfillment of the commitments assumed (BARROS, 2006, p. 5).

In this sense, some authors propose the creation of a network of restorative assistance with doctors, social workers, representatives of the Public Ministry of Labor (*Ministério Público do Trabalho*), of the Regional Police Offices of Labor (*Delegacias Regionais do Trabalho*), among others (BARROS, 2006, p. 7).

It should be clarified that labor disputes that discuss only pecuniary obligations should not be the object of restorative justice, which should be limited to cases in which it's necessary to "restore" the relationship and in which there is consensus between the parties (or rather, agreement between the parties involved), since consensus is an essential element. Therefore, restorative justice does not aim to replace the existing justice systems, but only to offer a new approach to certain types of conflicts (LARA, 2013, p. 70-71).

Another issue that could be the object of restorative justice is the reintegration of workers with temporary job stability, as is, for example, the case of workers who are members of the so-called Internal Commission of Accident Prevention (*Comissão Interna de Prevenção de Acidentes (CIPA)*) (art. 10, II, "a" of the Act of the Transitory Constitutional Provisions - Federal Constitution of Brazil - *Ato das Disposições Constitucionais Transitórias (ADCT)*), of the pregnant (art. 10, II, "b" of the *ADCT*), of the leader union (art. 543, § 3º of the Consolidation of Labor Laws (*Consolidação das Leis do Trabalho (CLT)*), of cooperative leaders (art. 55 of the Law Nº 5.764/1971) and workers who suffered an accident at work (art. 118 of the Law Nº 8.213/1991) (LARA, 2013, p. 71-72).

In such cases, the judge reinstates the worker unfairly dismissed or applies the sanction provided for in article 496 of the CLT[28], and may, at best, seek conciliation in the court hearing. In any case, there is the problem of submitting a person to return to work in a hostile environment or of applying a financial penalty that, however, does not reposition the worker in the (lawful) labor market, thus not guaranteeing him an income future (LARA, 2013, p. 71-72).

With the application of restorative justice, it's possible to clarify the factual situation presented, facilitate overcoming the emotional issue that would prevent the employee from returning and favor the continuity of the employment relationship, one of the basic principles of labor law. (LARA, 2013, p. 71-72).

Another case in which restorative practices could be applied are demands from family businesses or companies with a limited number of employees or even domestic work, situa-

28 Article 496 of the CLT - When the reinstatement of the stable employee is inadvisable, given the degree of incompatibility resulting from the agreement, especially when it is the individual employer, the labor court may convert that obligation into indemnity due under the terms of the following article. (Our translation into english)

tions in which the emotional connection of people in the workplace tends to be greater (LARA, 2013, p. 73).

Cases involving moral harassment in the work environment are also suitable for the application of restorative practices, which can be dealt with in the day-to-day activities of the Public Ministry of Labor (*Ministério Público do Trabalho*) through the factual news of irregularities that reach to the agency. This Ministry, as a bureaucratic institution capable of solving, administering and transforming CPSD, has several mechanisms for this. However, none of the names of ministerial procedures refer specifically to restorative practices. Therefore, there is no specific categorization for them, as there is for administrative mediation (PA-MED) and arbitration (PA-ARB) procedures.

However, this does not necessarily mean that restorative practices are not adopted in some ministerial procedures, as will be demonstrated by the report of the application of restorative practices in 3 (three) different procedures that were reported to MPT-PA[29].

The first ministerial procedure dealt with a case of moral harassment in which the differences between the old and the new management made it difficult to live (coexistence) in the work environment. In this case, the old management felt persecuted by several conducts of the current management, such as, for example, the exclusion of management activities, the exclusion from the list of birthdays of the month, the suppression of bonus, the reduction of the salary amount and other. In view of these facts, the public prosecutor suggested to those involved the application of restorative practices to restore interpersonal and professional relationships within the institution, being accepted by all. Upon consent, a duly accredited facilitator with experience in the area was appointed. They opted for the methodology of peace-building circles. Pre-circles were held to understand the feelings of those involved and the unmet needs that culminated in that situation.

Then, the peace-building circle was held, in which the feelings, expectations and needs of those involved were clarified. Participants undertook to practice respect for others, mutual assistance, patience and care for colleagues, as well as making everyone listen actively focused on work activities, receiving doubts, compliments and constructive criticism, seeking empathy, professional improvement and the search for mental, physical, social and spiritual health of all colleagues. The agreement was signed by everyone and it registered the responsibility of that professional community. This procedure is in the post-circle phase, in which there is an investigation as to whether the commitments assumed are being fulfilled.

The second ministerial procedure occurred in another case of moral harassment, in which a group of workers felt persecuted by management due to their professional training. According to the workers, the differential treatment was expressed in the setting of workload that prevented the performance of another job, in the exclusion of activities inherent to the function and in the disqualification of their professional performance, which caused them psychological problems related to self-esteem.

In view of the refusal by one of those involved in the invitation to participate in restorative practices, the prosecutor of the case notified, under penalty of coercive conduct, those

29 The restorative procedures mentioned here are generic narratives with the purpose of illustrating and exemplifying the application of such practices within the scope of the Public Ministry of Labor, because, due to the confidentiality of restorative procedures, the disclosure of substantial data and data that allow the identification of cases restored or in the process of restoration is not permitted.

involved to participate in a peace-building circle, carried out by a designated facilitator. The restorative procedure aimed to make the participants commit themselves to show solidarity with co-workers, to comply with institutional rules with equality, to be professional with all colleagues, to improve access to communication with some co-workers and to respect the protocols established for certain services. The agreement was signed by all participants, and the responsibility of that professional community was registered. This procedure is also in the post-circle phase.

The third ministerial procedure, in which restorative practices were applied, aimed at restoring relations between the founders and the leaders of a project, whose misunderstandings and disagreements were making communication impossible and, consequently, the smooth running/progress of the project. In this case, all those involved consented to the application of peace-building circles, which were carried out by an external facilitator, the misunderstandings were clarified and there was a frank dialogue about past disagreements, reconstructing communication to guarantee the good performance and development of the project.

It's observed that none of the three procedures narrated has a specific categorization to demonstrate that in these cases restorative justice was applied, which led the ministerial practice to use restorative justice as an incident in procedures for the pursuit of labor irregularities. Thus, the absence of a specific procedure to designate restorative justice, makes it difficult to quantify the cases in which restorative practices were applied, as well as the evaluation of the methodology used, whether it was successful or failed.

With the stated difficulty, *MPT* members and servants, and the *CNMP* itself, will not be able to carry out a qualified research about the use of restorative practices. Therefore, without this research, restorative justice will not be subject to praise or criticism, which are very important for the improvement of restoration and its practice at the ministerial level. Therefore, it would be interesting for the *MPT* to create a specific procedure to catalog this practice, which would be designated, for example, by the term "ministerial restorative procedure" (*"procedimento ministerial restaurativo" - PMR*) or "ministerial procedure of restorative practices" (*"procedimento ministerial de práticas restaurativas" - PMPR*), or by a similar designation for the same purpose.

By the way, the suggestion made extends to all public ministries. In fact, evaluating the ways in which restorative practices have been carried out is extremely important for the development of the institute, including its regulation by the *CNMP*, in order to standardize, proceduralize and concretize the restorative justice at the ministerial level.

It is also observed that the three reported cases were conducted by a facilitator external to the structure of the *MPT*, who acted on a voluntary basis, that is, at no cost to the institution. This detail is noteworthy because, to apply the restorative procedures, it's necessary to have a facilitator qualified to do so, that is, a person who has taken the course of facilitator of restorative justice.

The National Council of Public Ministry (*Conselho Nacional do Ministério Público – CNMP*), aware of this requirement, clarified, in article 18 of Resolution Nº 118/2014, that the members and servants of the Public Ministry, including of Labor, will be trained by the Schools of the Public Ministry (*Escolas do Ministério Público*), so that they can conduct negotia-

tion sessions, conciliation, mediation and restorative practices (CONSELHO NACIONAL DO MINISTÉRIO PÚBLICO, 2015, p. 8).

However, it is asserted that, given the experience of *MPT* members and servants, as persecutors, they are not indicated to apply restorative practices directly, when they are acting in ministerial procedures that do not have restorative justice as their specific object. As stated, the experience gained from working in the agency as a persecutor is incompatible with his role as a facilitator in ministerial procedures for the application of restorative justice, since the facilitator needs to be as impartial[30], reliable and symmetrical as possibleso that the conduct of the circle does not generate an unsafe environment, in which, of course, restorative justice may fail, or worse, to function as yet another subterfuge to reach only one agreement.

In the peace-building circle procedure, for example, the facilitator helps the group to create and maintain a safe space so that all participants can speak honestly and openly without disrespecting anyone. The facilitator monitors the space and encourages the group's reflections through questions or suggested topics. He cannot direct the group towards a certain result previously wanted, since his function is to start a respectful and safe space that involves everyone in sharing responsibility for the space. Somado a isso, não é papel do facilitador consertar o problema que o círculo está reportando, apenas deve zelar pelo bem-estar de cada membro do círculo (PRANIS, 2010, p. 19).

Such difficulty has already been verified in mediation procedures, with article 113, § 5º, of Resolution Nº 166/2019 of the Superior Council of the Public Ministry of Labor (*Conselho Superior do Ministério Público do Trabalho - CSMPT*)[31] determined that, when the prosecutor acts as mediator, he is prevented, for a period of one year, from carrying out an investigation or taking any legal action in which any of the subjects involved are involved (CONSELHO SUPERIOR DO MINISTÉRIO PÚBLICO DO TRABALHO, 2019). Thus, such a resolution recognizes that the same prosecutor/procurator who applies mediation methods (or restorative practices) cannot act as a persecutor, simply judicializing the demand in the event of failure.

Thus, being created a specific procedure that categorizes the application of restorative practices, the prosecutor/procurator who acts as a facilitator would also be prevented from acting as a persecutor or plaintiff, and should insist on self-composing practices; if unsuccessful, the procedure must be archived and the factual information sent for the adoption of measures by another member of the Public Ministry of Labor, in a manner similar to that provided for in article 113, § 4º, of Resolution Nº 166/2019 *CSMPT* [32]. In addition, such a resolution could also be modified to include such impediment for prosecutors/procurators who act as facilitators.

It's worth mentioning that secrecy is of paramount importance in restorative practices. The circle, for example, aims to create a safe space between participants that allows them to address their problems without fear of reprisals. Consequently, if secrecy is not adopted,

30 To deepen the debate on the impartiality of the Public Minitry, recommended the article: Essay on the study of the impartiality of the Public Ministry (Ensaio ao estudo da imparcialidade do Ministério Público) (SILVA, 2009).

31 Art. 133 [...], § 5º The member of the Public Ministry of Labor who acts as a mediator is prevented, for a period of one year, counted from the end of the last hearing in which he served, from carrying out an investigation or taking any legal action involving any parties that were part of the mediation procedure or conciliation. (Our translation into english)

32 Art. 133 [...], § 4º In the event of an infringement of the rights referred to in item II that cannot be resolved within the scope of the mediation or conciliation itself, the procedure will be filed and the factual news will be forwarded for the adoption of measures by another member of the Public Ministry of Labor. (Our translation into english)

trust will be undermined, since, although not intentionally, the attorney/procurator could use information obtained through confidential means - the circle - to judicialize the demand. In other words, the facilitator needs to be an impartial, symmetrical agent, willing to understand the problems of those involved and help them to solve them jointly. Therefore, the facilitator needs to convey confidence to the participants; which would not be possible if any of the parties involved saw the facilitator as someone who could harm any of the parties involved based on the information obtained in a confidential manner.

Another option for *MPT* is to work with accredited facilitators (ministerial friends) who are not linked to the Ministry, as occurred in the cases described above. This option would imply the creation of a database of accredited facilitators. As for the role of the facilitators, it could be *pro bono* or *pro labore*. This last modality would imply an additional expense in the Ministry's budget allocation, since many of these professionals charge to act as facilitators[33].

Another possibility is the creation of restorative centers with a multidisciplinary team and the joint performance of several labor bodies, such as the Labor Justice, the Public Ministry of Labor, the Regional Police stations of Labor (respectively: *Justiça do Trabalho, o Ministério Público do Trabalho, as Delegacias Regionais do Trabalho*) and other organs. Thus, the cases brought to the MPT would be filtered by the prosecutor himself, who, checking the possibility of applying restorative justice, would establish a "restorative ministerial procedure", forwarding it to the Nucleus and even being able to act as a facilitator, provided that the impediment to act as a persecutor or demander is respected.

In addition, these Centers/Nucleus could also count on the support of public and private universities, which, engaged in the training of law professionals focused on self-composition, would offer optional disciplines for the training of facilitators, even allowing the fulfillment of the mandatory internship in these Centers. Thus, it would be possible for duly trained and voluntary facilitators to act, eliminating budgetary expenditure.

In view of the above, it appears that the Public Ministry, including that of Labor, is a political-bureaucratic actor with powers to establish dialogical procedures to carry out social rights and social harmonization and pacification, with restorative practices being one of those procedures, since several cases that arrive at the institution deal with themes that enable the application of restorative justice.

6 FINAL CONSIDERATIONS

The history of restorative justice goes back to some ancient communities, but it appears that the current model is based on the New Zealand tradition. Restorative justice seeks an approximation of actions aiming to correct unmet human needs, the damage caused, to reconcile the parties linked to the conflict, problem or social dissatisfaction, creating a feeling of responsibility and commitment in all involved.

33 It's observed that no value judgment is being issued to consider if the charge for acting as a facilitator is correct or not, it is only found that an accredited facilitator can lead to an increase in MPT expenses.

Restorative justice focuses on the victim's needs, while ensuring that the offender(s) assume their responsibility(ies). Therefore, the pillars of restorative justice are: the needs of those involved, the damage done, the obligations and responsibilities and the engagement of all those affected by the harmful act. It was clarified that one of the objectives of restorative justice is to deal with the harmful act (damage) and the other is to address unmet needs and the causes that led to the offense.

The three main models of restorative practices were presented: the victim-offender meetings, the conferences of family groups and the circular processes or circles of peace building, each one involving, to some extent, the dialogue between the interests of those involved, always voluntary and cooperative way.

After presenting restorative justice, the work of the Public Ministry of Labor was reported as an institution with the power to deliberate and discuss, on equal terms, with those interested and those involved in conflicts, problems or social dissatisfactions, in the search for resolution, administration or transformation.

It was found that the Public Ministry of Labor has several procedures that make it possible to implement social human rights, public policies and harmonize and pacify social relations. In addition, it was reported that, in 2015, 1.777 (one thousand, seven hundred and seventy-seven) procedures were initiated at the Public Ministry of Labor of the State of Pará (*Ministério Público do Trabalho do Pará*), Regional Labor Office of the 8th Region Pará and Amapá (*Procuradoria Regional do Trabalho da 8ª Região – Pará e Amapá*), in Belém, but none of them addressed the main objective or incidental to: restorative justice.

In 2019, restorative practices were applied in three different procedures of the Regional Labor Office of the 8th Region Pará (*Procuradoria Regional do Trabalho do MPT-PA*), based in Belém (PA). However, in none of these procedures, the main object was the use of restorative practices, addressed only incidentally.

Then, the Resolution Nº 118/2014 of the National Council of the Public Ministry (*Conselho Nacional do Ministério Público – CNMP*) was analyzed, which instituted the National Policy for Incentive to Self-Composition (*Política Nacional de Incentivo à Autocomposição*). This resolution motivated the change of perspective that occurred in the Public Ministry, including that of Labor, which began to seek in its performance the sedimentation of the culture of peace which it prioritizes: dialogue and agreement in the resolution, administration and transformation of conflicts, problems and social dissatisfactions.

Considerations and criticisms were also made to articles 13, 14 and 18 of Resolution Nº 118/2014 of the *CNMP*, which deal specifically with restorative practices at the ministerial level.

Finally, the possibility of applying restorative practices to collective labor irregularities that were reported to the Public Ministry of Labor was proposed, elucidating some cases that could give rise to the use of these practices, such as: those involving child labor, slave labor, accidents at work, the reintegration of workers with temporary job stability – workers who are members of the Internal Commission of Accident Prevention (*Comissão Interna de Prevenção de Acidentes (CIPA)*) (art. 10, II, "a" of the Act of the Transitory Constitutional Provisions - Federal Constitution of Brazil - *Ato das Disposições Constitucionais Transitórias (ADCT)*), of the pregnant (art. 10, II, "b" of the *ADCT*), of the leader union (art. 543, § 3º of the Consoli-

dation of Labor Laws (*Consolidação das Leis do Trabalho (CLT)*), of cooperative leaders (art. 55 of the Law Nº 5.764/1971), workers who suffered an accident at work (art. 118 of the Law Nº 8.213/1991), in addition to cases of bullying in the workplace.

Some considerations and proposals were formulated about the use of restorative justice in the Public Ministry of Labor, among which the following stand out: the creation of a specific ministerial procedure, "restorative ministerial procedure" (*"procedimento ministerial restaurativo" - PMR*), for cases in which restorative practices were applied; the analogous application of the impediment provided for in article 113, §§ 4º and 5º, of Resolution Nº 166/2019 by National Council of the Public Ministry of Labor (*Conselho Nacional do Ministério Público do Trabalho - CNMPT*) to the restorative procedure, or its amendment to include the impediment of restorative practices; the creation of a database with registered facilitators to act in the cases.

In addition, it was also suggested to create Centers involving all institutions that deal directly with labor irregularities for the application of restorative justice, with the appointment of prosecutors/procurators to work as facilitators, in which case prosecutors are prevented from acting as persecutors or demanders for a certain period of time. It was also suggested a partnership with public and private universities that allows voluntary internship in these Centers, offering suitably qualified facilitators, at no cost to the Public Ministry of Labor. The provision of facilitator courses should also be the responsibility of the Schools of Government (*Escolas de Governo*), such as the Superior School of the Federal Public Ministry (*Escola Superior do Ministério Público da União - ESMPU*), under the terms of article 18 of Resolution Nº 118/2014 of the *CNMP*.

Finally, it is concluded that the Public Ministry of Labor (*Ministério Público do Trabalho*) is a political-bureaucratic actor with constitutional and infraconstitutional powers to establish dialogical procedures to proceed with the realization of social rights, as well as to promote social harmonization and pacification, being restorative practices one of these procedures, mainly or incidentally, since several cases that arrive at the institution deal with themes that enable the application of restorative justice, in addition to gathering the elements necessary for its application.

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ONTOLOGY OF PRIVACY

ONTOLOGIA DA PRIVACIDADE

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ABSTRACT

The research problem of this article is the following question: What is the ontology of privacy? Two proposals will be analyzed. The first proposal classifies privacy as personality right. The second proposal understands privacy as a property. Both will be analyzed comparatively from the perspective of personality rights and data protection laws. The contemporary understanding of privacy is also compatible with its historical and cultural aspects. Thus, the first section deals historically and briefly with the development and origin of privacy. The second section verifies the adequacy of the results obtained in the first section and their adequacy to the legal characteristics attributed to personality rights, especially privacy. In the end, it is verified that the identifying elements of a personality right are incompatible and unchangeable when compared with the ontology of privacy since it is constituted and shaped according to the cultural and social precepts in force at the time of its exercise. The deductive method and the technique of *bibliographical research are used.*

KEYWORDS: Privacy. Ontology. Personality. Personal data.

RESUMO

O problema de pesquisa deste artigo é o seguinte questionamento: qual é a ontologia da privacidade? Duas propostas serão analisadas. A primeira proposta classifica a privacidade como direito da personalidade. A segunda proposta entende a privacidade como bem disponível, passível de economicidade. Ambas serão analisadas de forma comparativa à luz dos direitos da personalidade e de legislações de proteção de dados. Verifica-se, também, a compatibilidade do entendimento contemporâneo de privacidade com seus aspectos históricos e culturais que a constituíram. Assim, a primeira seção aborda histórica e brevemente o desenvolvimento e origem da privacidade. A segunda seção verifica a adequação dos resultados obtidos na primeira seção e sua adequação às características jurídicas atribuídas aos direitos da personalidade, em especial a privacidade. Ao final, verifica-se que os elementos identificadores de um direito da personalidade são incompatíveis e inverificáveis quando se comparados com a ontologia da privacidade, já que constituída e moldada conforme os preceitos culturais e sociais vigentes à época de seu exercício. Para a construção desse raciocínio, utiliza-se o método dedutivo e a técnica de pesquisa bibliográfica.

PALAVRAS-CHAVE: *Privacidade. Ontologia. Personalidade. Dados pessoais.*

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1 INTRODUCTION

The diversity of contemporary society demonstrates dynamics that can be identified in Information and Communication Technologies (ICTs) and are capable of raising questions about adequate guarantees for the protection of privacy. Points of convergence between market forces and the unity of the person find a place for discussion in the abstractions of cyberspace.

The question that arises as a research problem is: what is the ontology of privacy? The objective is to demonstrate the compatibility between the various legislative and doctrinal experiments underway, advocating certain functions and precepts to privacy with the resistance found in market, political and bureaucratic apparatus.

A brief historical analysis is carried out in the first section. An analysis is made to understand privacy, covering from the tribal period (between 200.000 BC and 6.000 BC) until its modern conception coined in 1890. It's emphasized that such analysis is incomplete. There is a limitation of time and space to make the detailing of the historicity of this institute effective. One of the criteria of distinction and importance to be highlighted is the proprietary basis of privacy. It's understood that, in its origin, privacy is characterized as property, with its due justifications evidenced throughout the text.

In the second section, the correlation between protection of privacy and the subject's private life in the surveillance society is questioned under the focus of socially relevant relationships and information, whether public or private, through a new generation of laws on the protection of this right.

In the third and final section, the characteristics and functions of personality rights (without a broad sense) are compared with the characteristics of privacy. It's intended to question the own coherence of the legal formulas adopted in the data protection doctrine and legislation, regarding the personalism of privacy under the historical approach carried out to date. This, moreover, is a reflection that must be carried out to verify the ontology of privacy, which as proposed is directed to the property.

On the one hand, the defense of this institute as a personality right is known and adopted by the Brazilian legislator in arts. 11 and 21 of the Civil Code of 2002. On the other hand, the proposal evidenced in apparent compatibility with its ontological aspects directs privacy not only as a right, but as a good available within the autonomous existential sphere of his/her owner.

In the end, it is assumed that the characterization of privacy as an integral part of personality rights, as well as its reproduction in data protection laws and in the legislative frameworks corresponding to its principles and functions, hinders its effective protection due to the incompatibility between ontology, dogmatic, pragmatic and legal. This reason authorizes the insertion of a new reframing of this right. For the construction of this reasoning, the deductive method and the bibliographic research technique are used.

2 "PRIVACY MAY BE AN ANOMALY"[2]

Privacy as it appears in contemporary times is a relatively new conception, dating from 1890, with the essay The Right to Privacy, by Warren and Brandeis (1890).3 This direction was shaped by the majority of humans who lived throughout history and contributed little by little to the construction and conceptualization of privacy in their small communities.

What stands out is that in 3.000 years of history, the privacy has been delegated to the background. Humans choose money, prestige or convenience when in conflict with privacy, or the desire to be alone.

During the tribal period (between 200.000 BC and 6.000 BC), the anthropologist Jered Diamond points out that children of hunters slept with their parents in the same bed or hut. There was no privacy. The minors witnessed sexual relations with their parents. In the Trobriand Islands, Malinowski showed that parents didn't take special precautions to prevent their children from watching them having sex: they just scolded the child and asked her to cover her head with a cloth.4

In antiquity (between 600 BC and 400 BC), the Greeks showed some taste for privacy. Unlike what happened in the tribal period, the application of an evolved engineering allowed the people of that time to act on it to contemplate their desires. According to Samantha Burke, Greek geometry made possible to create houses with a mathematically minimal exposure to public exposure, while maximizing the available light input on the space in question (BURKE, 2000).

In Rome, the restrooms were public. Angela (2016, p. 236-240) points to evidence that people talked while relieving themselves in open rooms with several bathrooms.5 This argument gains strength when the Romans, despite having the economic conditions to build houses with internal walls, chose to show their private lives. In addition, most Romans chose to live in crowded apartments, with walls thin enough to hear all the noise. Overt displays of wealth, at that time, for others present in society were a status symbol (FERESTEIN, 2013).

In the middle ages (400 AC - 1200 AC), holy practitioners of Christianity inaugurated the modern concept of privacy when they opted for seclusion. The popularization of the biblical conception that morality wasn't only the result of bad action, but the intention to cause harm, led its most devoted followers to recoil from society and to obsessively focus on fighting against their inner demons, freeing themselves of the worldly distractions (FERESTEIN, 2015).

> Just as fish die if they stay too long out of water, so the monks who loiter outside their cells or pass their time with men of the world lose the intensity of inner peace. So, like a fish going towards the sea, we must hurry to reach our cell, for fear that if we delay outside, we will lose our interior watchfulness (KELLER, 2005, p. 51).[6]

2 Expression used by Cerf (2013): "privacy may be an anomaly".

3 The authors conceptualized privacy as: "the right to be alone".

4 Original: "Because hunter-gatherer children sleep with their parents, either in the same bed or in the same hut, there is no privacy. Children see their parents having sex. In the Trobriand Islands, Malinowski was told that parents took no special precautions to prevent their children from watching them having sex: they just scolded the child and told it to cover its head with a mat" (DIAMOND, 2013).

5 "Think of Ancient Rome as a giant campground" (ÂNGELA, 2016, p. 240).

6 Prescription of St. Abba Antony, father of all monks. (KELLER, 2005, p. 51).

At that time there was no word of Latin or medieval origin equivalent to *privacy*. *Privatio* meant to *take out* (DUBY, 1993). In fact, according to Duby (1993), the building plans of the buildings at that time showed that humans and animals slept under the same roof, in the same place, since there was only one room in the residence.

At the end of the medieval period and at the beginning of the Renaissance period (1.300 AC - 1.600 AC), it was possible to witness the creation of the pillars of privacy. For Smith (1975, p. 234), privacy is the main achievement of this period. At the beginning of the 13th century, the commandments of the Catholic Church postulated the obligation of mass confessions, reformulating the paradigm of morality to something essentially private, displaced from society, causing a great upheaval in much of Europe.

Subsequently, technological advances were favorable to the theological guidelines present at that historic moment. A new technology allowed the dissemination of ideals in a quiet and much cheaper way: the Guttenberg printer. The individualistic aspect, that was already consecrated in the creators and thinkers of that time, was reinforced and overburdened the European population through individual reading. Poets, artists and theologians had their ideals of abandoning worldly distractions fixed for the purpose of transforming the individualistic heart with a greater relation with God. Moreover, until the mid-18th century, although public readings were present as a tradition, the silent and recluse study was an elite luxury for many years (FERESTEIN, 2015).

Another construction that made possible to elaborate the concept of privacy was the invention of sleeping beds. The single beds created in modern times were seen as one of the most expensive items in the residence. It became a place for social gatherings, where those present were invited to rest with the whole family and employees of that residence (FERESTEIN, 2015).

This scenario remained until the outbreak and peak of the Black Death (Bubonic plague) (AC 1.343 - AC 1.353). Until then, European life without hygienic care has caused infectious diseases to destroy large cities and newly populated conglomerates. This radical situation forced the community to deeply reform its health and hygiene habits, both at home and in hospitals, where it was common for patients to sleep close to each other (FERESTEIN, 2015).

Although this scenario led to a change in the sense of privacy, it didn't mean that more intimate situations such as sex still continued in the private sense, as we understand today. It was common, justified on spiritual and logistical grounds, to witness the consummation of the marriage. Bride and groom went to bed before the eyes of family and friends, and the next day they displayed the sheets as proof that the marriage was consummated (DUBY, 1993).

In this period, there was no such plausible justification for demanding and imposing privacy. Although there were separate beds, most houses had only one bedroom. According to Sierlo, an Italian architect, the creation of internal walls was not intended to guarantee privacy, but to meet the desire to keep warm, since in this scenario there was only a fireplace in the center of the room so that people could circulate it, see each other, and have fun telling stories (FERESTEIN, 2015).

The personal and legal conception of privacy began to change in the period of the Industrial Revolution (1600 AC - 1840 AC). The population began to demand the monitoring of the law in relation to the growing social demands directed to the secret. On August 20, 1770,

Adams, the future president of the United States, expressing his support for privacy, wrote the following note: "I am under no moral or other Obligation...to publish to the World how much my Expences or my Incomes amount to yearly" (FERESTEIN, 2015).7 The desire to maintain the private in relation to the public sphere is able to become evident and to date its growth in later centuries.

In the golden years (1840 AC - 1950 AC), the privacy came to be understood as a "distinctly modern product, one of the luxuries of civilization" (GODKIN, 1980, p. 12). The concentration of wealth in the hands of the bourgeoisie served as a basis for the authorities to recognize privacy as a basic precept of *property* of human life.8 In this sense, this new need for intimacy made the process in which multiple factors intervened, from new housing construction techniques to the separation between places to live and to work (RODOTÀ, 2008, p. 26). "What is private as opposed to what is public is no longer identified by a political approach to gain strength in the opposition between the social and the intimate" (CACHAPUZ, 2006, p. 68).

For the poor, however, life still remained public. Sartre (1998, p. 4) gives a detailed account of the streets of Naples demonstrating:

> The ground floor of every building contains a host of tiny rooms that open directly onto the street and each of these tiny rooms contains a family...they drag tables and chairs out into the street or leave them on the threshold, half outside, half inside...outside is organically linked to inside...yesterday I saw a mother and a father dining outdoors, while their baby slept in a crib next to the parents' bed and an older daughter did her homework at another table by the light of a kerosene lantern...if a woman falls ill and stays in bed all day, it's open knowledge and everyone can see her.[9]

It was in 1890 that the right to privacy was born as a legal product of a historical reformulation. The Right to Privacy, a seminal essay by Warren and Brandeis (1890) is curiously based on the protection of intimate life and private life against the invasion of technology in the personal sphere.

The precepts of the industrial revolution, still rooted in Warren and Brandeis (1890, p. 1) can be observed in the first sentence of their text: "That the individual shall have full protection in person and in property is a principle as old as the common law [...]".10 Not only the person, but also the property come into focus on protecting privacy. And this is an interesting

7 FERESTEIN, Gregory. Google's Cerf Says "Privacy May Be An Anomaly". Historically, He's Right. Techcrunch. 2013. Available in: https://techcrunch.com/2013/11/20/googles-cerf-says-privacy-may-be-an-anomaly-historically-hes-right/. Accessed on: January 4, 2020.

8 Arendt (2010, p. 72 and 87) reinforces: "We owe the full development of home life and in the family as an interior and private space to the extraordinary political sense of the Roman people, who, unlike the Greeks, never sacrificed the private to the public, but, on the contrary, understood that these domains could only exist in the form of coexistence" (...) "is that the four walls of a person's private property offer the only safe haven against the ordinary public world - not only against everything that occurs in it, but also against its own publicity, against the fact of' being seen and heard . An existence lived entirely in public, in the presence of others, becomes, as they say, superficial. Retains its visibility, but loses the quality resulting from coming to light from a darker terrain, which must remain hidden in order not to lose its depth in a very real, non-subjective sense. The only effective way to guarantee the darkness of what should be hidden from the light of advertising is the private property, a privately owned place to hide". (Our translation into english)

9 SARTRE, J. P. in PROST, Antony; VINCENT, G. A History of Private Life: Riddles of Identity in Modern Times. Vol. 5. Cambridge: Harvard University Press, 1998.

10 WARREN, Samuel D.; BRANDEIS, Louis D. The Right to Privacy, Harvard Law Review, 1890.

point, since when the debate or speech of this current right, only its first spectrum (person) is taken into account11.

It so happens that, at this historic moment, privacy was not yet characterized as a positive norm. It was only in 1903, at the request of US President Grover Cleveland, that the New York legislature established a penalty of up to U$1.000 (one thousand dollars) for the use of someone's unauthorized image for commercial purposes. This didn't happen automatically and because of The Right to Privacy, but because Cleveland married a wife considered beautiful by the media. The Frances Cleveland's image was featured in numerous television commercials, causing the president to put pressure on the legislative chamber (FERESTEIN, 2015).

The complexity and intensity of everyday life required a withdrawal of the subject from the public world. At least a moment of solitude and intimacy has become essential for the individual. This fact is difficult to achieve with modern technological inventions that subject its users to situations of extreme visibility that can make pain and moral distress much greater than those inflicted by bodily damage.

Postcards were one of the first instruments to be used as a reserve for private life. Lane's reports (2009, p. 47) in The Atlantic Monthly explain:

> There is a lady who conducts her entire correspondence through this channel. She reveals secrets supposed to be the most pro- found, relates misdemeanors and indiscretions with a reckless disregard of the consequences. Her confidence is unbounded in the integrity of postmen and bell-boys, while the latter may be seen any morning, sitting on the doorsteps of apartment houses, making merry over the post-card correspondence.[12]

In this sequence, another successful creation of ICT's was the telephone. Although the initial value of the individual lines was extremely disproportionate to current standards, the existence of shared lines made it possible for neighbors and closer entities to use and enjoy this function.

> Party lines could destroy relationships…if you were dating someone on the party line and got a call from another girl, well, the jig was up. Five minutes after you hung up, everybody in the neighborhood — including your girlfriend — knew about the call. In fact, there were times when the girlfriend butted in and chewed both the caller and the callee out. Watch what you say (LANE, 2009, p. 47).[13]

From this period onwards, there was a strong disproportion between the extraordinary effects of new technologies and the paradigmatic changes marked by the emergence of privacy as an essential resource for the organization of being. Aspiring such a right and seeing it impassive to exercise with such a transformation of scientific and legal institutions puts the material and immaterial protection of the subject in check.

The highlighted intention of this section turns to the beginning of the comparison between the historical and legal aspects of privacy. This set of elements shows how a new frontier of

11 "The American understanding of privacy stems especially from the right to property, imposing limits on the state's power to invade, control or dispose of it. However, jurisprudence has developed and today has a much more complex meaning than the original" (GARCIA, 2018, p. 6). (Our translation into english)

12 LANE, Frederic S. American Privacy: The 400-Year History of Our Most Contested Right. Boston: Beacon Press, 2009.

13 LANE, Frederic S. American Privacy: The 400-Year History of Our Most Contested Right. Boston: Beacon Press, 2009.

this apparent right is being delineated. In its primary aspect, dating back to antiquity, privacy was seen as non-existent. Apparently, there are no historical reports that place privacy as a natural right. One of the most recent redefinitions of intimate life is that enshrined in the industrial revolution, which characterized it as a property, a luxury, an asset available of the bourgeois classes.

We can see from this brief history that, for more than 3.000 years, privacy wasn't understood as a right. If this is the global picture to be observed, contemporary privacy can be a historic anomaly. And how important is this? This finding tends to favor the concrete regulation of privacy, according to its ontological aspect. At first, it seems to us that its ontology is geared to the cultural and socio-political aspect of the time when its exercise is carried out. Warren and Brandeis only designated it as a right because their personal spheres were affected. Until then, it was seen as an asset, a property (and this continues to be shaped).

At the same time, we live in a society where an intense surveillance of the ICT's affects the subject, reinforcing privacy as a right. And, what about its nature? If we consider privacy a cultural fruit, is there compatibility with this proposition and its exercise? If the meaning is cultural, are the unavailability and inalienability of this institute14 capable (or at least efficient) of removing obstacles of an economic nature to guarantee a more extensive protection? The next section will give us elements to discuss these questions.

3 PRIVACY UNDER ATTACK IN THE SURVEILLANCE SOCIETY

Along this line, as much as we assume the ontology of privacy as a cultural product, a concept has not yet been presented, it can be said, representative of its capacity to be legally protected. A seminal elaboration was carried out by Alan Westin (2015, p. 12), for which "privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others".15

Some authors differentiate privacy from intimacy. For Nery (2015, p. 63),

> intimacy is considered the most private sphere of the individual. There, his personal information is protected so as not to reach the knowledge of others, becoming an inviolable field, protected infra and constitutionally, also referring to the own image before the mass media. (Our translation into english)

The privacy "is situated in the legal field, it's human acts external to intimacy, reserved by the own person or by its nature" (MACEIRA, 2015, p. 64). In this way, "it would be the externalization of a part of intimacy to the detriment of a certain group, location, or any activity, be it of interaction or not, as a title of will of the individual who decides to carry it out and demonstrate that that area constitutes his privacy" (DIVINO; SIQUEIRA, 2017, p. 227-228). (Our translations into english)

14 "Art. 11. With the exception of cases provided for by law, personality rights are non-transferable and cannot be renounced, and their exercise cannot be voluntarily limited". (BRASIL 2002) (Our translation into english)

15 WESTIN, Alan F. Privacy and Freedom. Nova York: IG Publishing, 2015.

For Silva (2008, p. 100) "the set of information about the individual that he can decide to keep under his exclusive control, or communicate, deciding to whom, when, where and under what conditions, without being legally subject to it", would be the ideal concept of privacy.

Although this differentiation exists, there is no practical use in its defense. Just the opposite. This bipartition tends only to hinder the effective protection of the private sphere of citizens, considering that they are precisely the ones with the greatest share of control power over the apparatus that violate their autonomy. Telling whether privacy or intimacy has been violated, in an essentially subjective aspect, opens a two-way street for the offender's negative claim about his role in the private sphere.16

One of the most objective concepts we find in Rodotà. For the author, privacy is understood "as the right to maintain control over one's own information" (RODOTÀ, 2008, p. 92). In this sense, there is not only control over what comes out, but also what comes in. And as much as Rodotà's formulation is linked to fundamental rights and personality rights, his position leads us to a certain property under privacy, "a new property right over personal data, which has become an indispensable asset and of great value in the age of direct marketing" (RODOTÀ, 2008, p. 153). This is quite questionable, since when approached about data commodification the author basically denies any kind of possibility because it's the result of the *person's* subjective sphere.

The proposal to consider the data17 as a "property" of the interested party reveals insufficient protection precisely under the profile of the fundamental right to privacy, because the possibility of negotiating an economic counterpart presents itself as the only instrument capable of attributing to the interested party a real power of control over the own data that could, otherwise, be collected without his consent or even without his knowledge.

Here we find perhaps the paradox of this article. How to effectively protect privacy without considering it how something available, malleable, in the sphere of its owner? Studies demonstrate the possibility of user acceptance in the sale of his data if a consideration/counterpart is granted. One of these studies was carried out at the University of Pennsylvania, which resulted in the following questioning: "please think about the supermarket you go to most often. Let's say this supermarket says it will give you discounts in exchange for its collecting information about all your grocery purchases. Would you accept the offer or not?"

16 Cancelier (2017, p. 221), in the same sense: "For us, despite the importance of differentiating between the terms privacy and intimacy, there are no impediments in the use of the expression right to privacy to deal with the right to intimacy, after all this is inserted in that". (Our translation into english)

17 A question may arise about the difference between privacy rights and data protection. In principle, the divergence between them is apparently terminological. However, an attempt is made to delimit the scope of coverage of both. While the right to privacy is constituted as an autonomous institute of its owner's personality, allowing him to control what enters and leaves his private sphere through his informative self-determination, data protection can be considered as a species of the privacy genre. It can be said that are two sides of the same coin. The exercise of data protection is based not only on informational self-determination, but also on privacy, as that is included in this. It appears that, although data protection is restricted to only one aspect of privacy, if viewed as a whole, we believed that both are complementary. From this perspective, it doesn't seem logical to stipulate a dichotomy and stratify, on the one hand, the right to privacy, and on the other, data protection. Ontologically they are unified. But, in order to delimit and meet didactic aspects, data protection is consecrated as a kind of privacy for attention and delimitation of informational acts that are removed from the private sphere of its owner, while the right to privacy addresses something broader, not restricting itself only to this information collected and processed in a virtual environment.

(TUROW, 2015, p. 12).18 Interestingly, a percentage of 43% of the people interviewed agreed with the practice19.

The assumption of multiple functionalities brought by technology is part of the development of the various moments of a journey in a person's life. Its dimension, not only diachronic, but also synchronized with the subject's identity, breaks down barriers and assumes a continuous interactive position between humans and machines. At each moment, the context in which the person constructs his path and his significant subjective and objective reference is radically modified. In a legal dimension, this is no different (SANTOS DIVINO, 2019).

Especially in the area of consumption, the discussion on consumer protection in e-commerce isn't relatively new, but neither is it old. The legislative reference in foreign law responsible for the recognition of electronic contracts as a legal business was given in the Uncitral Model Law on Electronic Commerce (*Lei Modelo da Uncitral sobre o Comércio Eletrônico de 1997*), 1997, in its arts. 5 and 1120. In Brazil, the discussion takes place in the early 2000s, mainly with Marques (2004). At that time, the author was already visualizing the possibility of the existence and expansion of a space brought by the internet, expressed in electronic and mass communication networks, to gain trust and elaborate practical mechanisms for consumers, "as well as reconstruct the deconstructed dogmatics" of the contract (SANTOS DIVINO, 2019).

The reflections on this theme are apparently broad. The innovative character of technology shows changes in the relations between the citizen and the consumer market. This description common to the characteristic of a society succumbed to the informational criterion denotes an astonishing growth in the participation of these subjects in the virtual world. The electronic contracts operate the consumer experience in the network society. In order to verify the role and position of the consumer in electronic contractual relations, called e-commerce, it would be a mistake to analyze them exclusively from the theoretical point of view. Some practical considerations must be pointed out as a general character to support the present argument.

Considering the concrete experiences and experiments of e-commerce, we identified the influence of a plurality of instruments used for effective consumer satisfaction. The organization of private structures in the formation of contractual networks enables access to information and the provision of online services through structured and differentiated tools and procedures in new perspectives.

The relevance assumed by electronic commerce and, in general, the economic dimension, induces the transformation of the internet into an aseptic place, where the very consumer, whether adult or child, can enter as if it were a huge shopping center, a commercial center without borders, without running the risk of having your attention diverted from anything

18 TUROW, Joseph; HENESSY, Michael; DRAPER, Nora. The tradeoff fallacy: how marketers are misrepresenting and opening them up to exploitation. Available in: https://www.asc.upenn.edu/sites/default/files/TradeoffFallacy_1.pdf. Accessed on: January 6, 2020.

19 Denominated exchange rate (trade-off). More about that in (IAB, 2010).

20 "Article 5. Legal recognition of data messages. Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message
Article 11. Formation and validity of contracts (1) In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose". (UNITED NATIONS, 1999, p. 5)

other than the consumer activity (RODOTÀ, 2008, p. 179). We are, however, faced with a complex situation: from the moment when commercial use transcends all other modalities of contractual use, due to its practicality and convenience, the format of the internet and its own nature are deeply transformed and emerge new demands and proposals to regulate this scenario. For the supplier of products or services in e-commerce, it is essential to 'accept the consumer' in order to collect and process data for the finalization of that consumer relationship. If the consumer denies, that one will not be able to finish it (SANTOS DIVINO, 2019).

In this same sense, there is a concept of false gratuity in the provision of services. The fundamental point certainly concerns the economic possibility over the consumer privacy. Social networks are examples that use unpaid electronic contracts directly to provide networked products and services. It happens that there is a certain onerous cost of access to social networks, as privacy and personal data have economic value for obtaining patrimonial advantages.

> By the way, a 2012 study on the topic revealed that, if social media were supported by users, rather than advertisers, Facebook would be the most expensive, costing 5.04 dollars per year or 42 cents of dollars per month. The Twitter would cost 2.29 dollars per year; the Linkedin, 1.50 dollars per year; and, the YouTube, 1.17 dollars. (CORDEIRO; KONDER, 2019, p. 197) (Our translation into english)

When using Facebook services (2020), for example, the user in question provides data on content sharing; sending messages; communication with other users, which may include information present in the content or about it/him. After collecting this information, which has already been processed using data initially captured, Facebook will be able to use it to, among other purposes: send marketing communications; improve advertising and measurement systems, being able to show ads that the company considers relevant to the person concerned, both inside and outside the services offered, in addition to measuring the effectiveness and reach of ads and services containing data on how many people viewed the ads or installed an app after seeing an ad; or provide demographic information to help your partners (Facebook partners) understand your audience or customers.

There is not, or there is no way a service that is really free, even if it's worldwide in scope and with numerous participants, to achieve this monetary correspondence. The combined techniques of information technology factors and the collection and processing of personal data enable interactive media to earn advertising income. The discipline brought up in terms of services and in the privacy policy isn't merely protective. The heart of the possibilities offered and the increased distinctions in these contractual instruments extract indications in two directions (DIVINO, 2018).

The defense of privacy, therefore, requires an expansion of the institutional ontological perspective, overcoming its purely subjectivist conception, as a seemingly unavailable and non-delegable right, as well as its purely proprietary conception. A set of disciplines must exist and switch according to the functions for which they are intended to protect privacy. There are, however, challenges to be faced against the contemporary legal concept of privacy.

4 ONTOLOGY OF PRIVACY: BETWEEN PERSONALITY LAW AND AVAILABLE GOOD

When there is an alternation of society for individuals, from the collective to the singular, the polarities are accentuated and become more perspective in the eyes of regular participants. In order to delimit the scheme of the new reality arising from past experiences and analyzes, conceptual attribution is essential to perceive the context in which relations between people, between individuals and social organizations are constituted. Based on this observation, three concepts are essential: personality, personality right and person.

Personality refers to "a susceptibility to be the holder of legal rights and obligations" (DE CUPIS, 2008, p. 19). The rights attributed to it are "legal faculties whose object is the different aspects of the subject's own person, as well as their extensions and projections" (FRANCE, 1983, p. 37). The person, in turn, apparently would be the entity endowed with freedom of the will, the will to meaning and the meaning of life, capable of exercising what is appropriate and what is attributed to him (FRANKL, 1994, p. 16).

It's observed that the differentiation between the above propositions is visible. It's decided to use only the term 'personality right' to avoid ambiguities, allowing the reader to identify what is intended in this present work. The other terms will not be worked on because there is no intrinsic relation with this section.

When analyzing the concept of personality law, realizes the importance of including certain functions in its scope. If we are in the order of personality and subjectivity, such functions and limitations can only be considered legitimate in cases of compatibility with the private autonomy of the holder, which is also based on the free exercise of life.

This particular intersection shows that the characteristics - as well as the functions - of personality rights are the result of an exemplary description. Don't get the fee due to its immeasurable scope and origin. For Schreiber (2014, p. 228),

> Its legal functions are different, such as: (I) highlighting the different threats that each of these attributes may suffer, facilitating damage prevention (preventive function); (II) allow, through the development of specific instruments, the fullest repair of injuries that may affect them (reparative function); (III) assist in the formulation of specific parameters for weighing up the hypotheses of collision between the personality rights themselves or between them and other fundamental rights (peacemaking function); and (IV) encourage the development of these attributes through public policies and appropriate social initiatives (promotional function). (Our translation into english)

The dissertation through these functions leads both the legislator21 and part of the jurists to assign characteristics consistent with the human condition of such rights. According to Bittar (2015, p. 43),

21 "Art. 11. With the exception of cases provided for by law, personality rights are non-transferable and cannot be renounced, and their exercise may not be voluntarily limited."
"Art. 20. Unless authorized, or if necessary for the administration of justice or the maintenance of public order, the disclosure of writings, the transmission of the word, or the publication, display or use of a person's image may be prohibited, at her request and without prejudice to the indemnity that may apply, if its achieve honor, good fame or respectability, or if it is intended for commercial purposes." (BRASIL, 2020) (Our translations into english)

> In effect, these rights are endowed with special characters, for an effective protection for the human person, in function of possessing, as object, the highest assets of the human person. That is why the legal system cannot allow that the holder to strip of its, lending its an essential character. Hence, they are, at first, non-transferable and indispensable rights, being restricted to the person of the holder and manifesting from birth (2002 Civil Code, art. 2°).
>
> In their general and principiological characteristics, they are innate rights (original), absolute, off-balance sheet, non-transferable, imprescriptible, unenforceable, lifelong, necessary and opposable *erga omnes*, as the best doctrine has been established, as art. 11 of the new Code.22 (Our translation into english)

The recognition of privacy as a personality right is considered to be of great importance in Brazilian doctrine. In addition to Schreiber (2014) and Bittar (2015), a brief survey demonstrates the articulation between the postulated premise and its empirical relation.23

It's understood that the sense of privacy in the surveillance society must transcend its dogmatic aspect, relating to the realization of the values of humanity in each society and culture in force at the time of its exercise (NASCIMENTO, 2017). The violation of this right in the virtual network proposed the creation of new legislative mechanisms to protect, repair and compensate the damages arising from this conduct. A common thread required the release of external factors in the formation of the individual's privacy and personality. In this scenario, data protection legislation emerged with the function of marking the fact of belonging to a privileged group of rules aimed at the extensive regulation of the subjectivity of the holder of this right.

This reality is more complex and progressively affects all subjective tutelage. We explain. Both in Regulation 2016/679 of the European Union and in Brazilian Law nº 13.709/2019, both responsible for the establishment of a General Data Protection Regime, the focus of consent is the heart of the discussion.

Firstly, the conceptual aspect of this term must be delimited, but such a task isn't an easy one. It starts from the assumption that a subject of law has autonomy to decide and choose on aspects of his life. The exercise of this discernment as a unique tool develops self--determination as the capacity to practice or not a certain act that is put to him. Specifically in the legal field, the application of consent occurs as a constitutive element of the negotiating sphere. The psychic externalization of this consent, this will, this desire, this belief to accomplish something and this intentional phenomenon is what is intended for the constitution of a contract. A subject X only sells a movable or immovable asset because him intends to do so. Based on rational criteria plus discernment, the subject develops a mental capacity for exercise to choose what he wants for his life. This aspect is even extended to rights considered very personal, such as the economic effectiveness of the image right. A renowned subject who intends, wishes or intends the economic exercise of his image, wants it to be so through the psychological externalization of his will in the practical aspect that may or may not be registered in a contractual instrument.

22 BITTAR, Carlos Alberto. Personality rights (Os direitos da personalidade). 8. Ed. São Paulo: Saraiva, 2015, p. 43.

23 See more in: (NASCIMENTO, 2017, p. 265-288); (SARTORI, 2016, p. 49-104) and (TEIXEIRA, 2018, p. 75-104).

Therefore, consent is considered the master key and an indispensable element in the constitution of a legal business. No one, in principle, can be a part to a contract that he/she don't want. The content of the contractual clauses must be compatible with the psychological guidelines envisaged by the contractor, under penalty of violation of his autonomy and objective good faith. Thus, consent acquires an important role for the exercise of the holder as a person. Its realization as a greater good rest in the satisfaction and realization of the objectified object by its consent, abstracted from its discernment and rational criteria.

Roughly speaking, therefore, consent is more than the externalization of the individual's intentionality through speech acts for the exercise and practice of an act that he aims at. Thus, consent for data processing will only be granted if the holder understands and intends with such an attitude (SANTOS DIVINO, 2019).

The art. 7º of the General Law for the Protection of Personal Data (Law nº 13.709/2018) (*Lei Geral de Proteção de Dados Pessoais - LGPD*) (BRASIL, 2018) states some alternative hypotheses in which data processing would be legitimate. It's understood that at this moment, how the legislator used the disjunctive conjunction or at the end of item IX, if configured any of the hypotheses present in the other items, data processing would be authorized, regardless of having or not *consent*. See: in a hermeneutic reading, if the legislator had decided for the full application of consent in the other hypotheses prescribed in the regulation in question, he would have created subheading in item I, instead of making other items (or better, included such requirement in the caput of article). In addition, the disjunctive conjunction is used or, at the time when he could have limited the hypotheses to the making of the first. For this reason, even if there is no consent from the holder, if any of the hypotheses present in items II to X is configured, the processing of data will be legitimate, as long as the other legislative principles are respected (SANTOS DIVINO, 2019).

As a rule, the legislation takes a protective stance and lists two situations in which it's possible to process this data. The first requires, specifically and prominently, the consent of the data subject to perform the data processing, provided that the purpose is defined (art. 11, *caput*, I, of LGPD). The second (art. 11, II, a-g, of *LGPD*), dispenses the consent, but will only occur in exceptional cases. All of these situations are exhaustive enumerations and don't allow for broad interpretation. Any other situation that isn't listed here or that the consent of the holder is absent or unverifiable will prevent the treatment agent from acting.

It's true that there are strategies that oppose such logics and legal organizational structures, such as contemporary electronic contractual molds. These, considered clickwrap24 or point-and-click, hinder a more precise analysis to verify the requirements mentioned above.

24 "As a particular modality of adhesion contracts, in the field of electronic contracting, it's important to highlight the so-called *clickwrap* licenses ("*clickwrap agreements*" or "*point-and-click agreements*"), usually submitted to the agreement of the user of the product or service, containing clauses about of its performance, being so named, since its validity is based on the act of pressing the acceptance button (often by means of the mouse), keeping great similarity with the *shrinkwrap* licenses used in the commercialization of software, in which acceptance occurs in the act opening the package containing the physical supports where the program is located" (MARTINS, 2016, p. 131). (Our translation into english)
In addition, the term "*clickwrap*" comes from the term "*shrinkwrap*", used to designate software purchases made in high demand. Its intrinsic relationship with intellectual property acquired great relevance in 1996, with the judgment ProCD, Inc. v. Zeidenberg. "In ProCD, a manufacturer of computer software (ProCD), compiled information from over 3,000 directories into a telephone book database containing approximately 95 million telephone listings (at considerable expense) and developed a search engine to be used in conjunction with the database. In order to effectively market the software, ProCD licensed the database at different prices-higher prices for commercial users and lower prices for private users. A problem arose, however, when Zeidenberg bought a private user package, but ignored the license, extracted the listings, and made the database commercially available over the Internet through his own proprietary search engine. ProCD sued Zeidenberg, claiming Copyright infringement and breach of the shrinkwrap license agreement" (COVOTTA; SERGEEFF, 1998, p. 35-54). (1998).

However, the strength of the new technologies and their synergy with the legislation must take a stance to facilitate this fact, as well as the creation of specific contractual models for the optional assignment of personal data by the holder when using a certain service. What should be borne in mind, in the first place, is that the design of consent as the locus of data processing outlines some trends, mainly principiological, which have not been forgotten by the law. On the contrary, they were listed in a specific list.

The problem is what to do in order to collect this consent. Current electronic contractual models don't favor this practice. The simple attitude of clicking on a dialog box and accepting the Terms of Service and the Privacy Policy obviously isn't something that can be affirmed by granting consent. Because, the reading of this type of contract, for it contains numerous technical traits, impairs the understanding of lay people. That's when they do the reading. Because, most of the time, according to the first authors, 74% of people ignore such terms and policies (OBAR; OELDORF-HIRSCH, 2018).

With these considerations, we return to the ontological dynamics that are typical of private life. Technological incompatibility with data protection laws and also with social development under intense surveillance, makes impossible to effectively protect this right under the terms intended by its owner. Privacy and personal data, today, have a high economic value capable of limiting or excluding other forms of legal protection under the virtual dimension.

This more complex reality progressively affects the entire social organization. It's necessary to consider it when drawing the new parameters for rights and social organization, to directly interfere in this dimension and guarantee the freedom of the subject. A reframing of privacy is necessary to favor its development as something controllable in the intimate sphere of its owner.

Initial actions already highlight reformulated dimensions for the reinterpretation of this right. The first one is called "*decisional*": "[...] it's the type of protection that is given to the individual's way of life, including his/her choices, tastes, projects, characteristics" (PEIXOTO, EHRHARDT JR, 2018, p. 48). The second, informational, derived from Solove (2008), understands that privacy must be seen in a "contextualized perspective in its particulars, and not just as something abstract". Finally, the third dimension, called spatial, "[...] turns to that which is the most traditional dimension of privacy of all, that original dimension, from which every subject related to privacy developed. It's the privacy of the home, the privacy of a room in the house, of a specific physical place" (PEIXOTO, EHRHARDT JR, 2018, p. 54). (Our translations into english)

Although the description of the last dimension is questionable, considering that the development of privacy between walls was to take place only after the industrial revolution, the central idea is a proposal to reformulate privacy to meet legitimate contemporary interests, that is, its protection.

The importance of this jurisprudence is to consider the possibility of the binding force of *clickwrap* and *shrinkwrap* licenses. The terms described therein, according to the decision of the North American court, have a contractual character and are equivalent to the principle of *pacta sunt servanda*. That is, what has been agreed, must be fulfilled. This position raises serious considerations. First, it must be understood that there is no theoretical reduction in consent to this type of contractual modality. While consent is an intentionality factor, something of an essentially subjective character that is linked to the autonomy and self-determination of its holder, both clickwrap and shrinkwrap are electronic contractual modalities in which the holder will use it as a possible form of expression of his consent. While one has a subjective meaning, the other acquires a legal and formal notion.

What is proposed, at this moment, is to place the problem of the defense of privacy in a dimension in which it's precisely the information and communication technologies that enable its defense and exercise. Its ontology is taken into account. We initially say that, because it's a cultural fruit, the privatistic aspect is shaped by social customs. In the contemporary surveillance society, privacy is nothing more than an economic resource used for the development of large companies. And how does the titular subject stand in front of this?

Although the general data regulation was recently enacted, in the European Union there was the Directive 95/46/EC of the European Parliament and of the Council, of 24 October 1995, on the protection of individuals with regard to the processing of personal data and the free movement of such data. This, however, didn't prevent the emblematic Cambridge Analytica Case (DAVIES, 2015), despite the fact that the Regulation 679/2016 has a lot of textual content in common with its revoked rule.

What we hope to deduce from this reasoning is that the market and society will not be hampered by the imposition of the necessary consent for the collection and processing of personal data, as well as by the impossibility of entrenching a kind of social profile of technologies, in the sense of the necessary creation of risks to the private sphere. This means that programs will be used on a network for the ongoing contemporary practice of breaching privacy. First of all: because the legislation usually finds territorial limits for its effective application. Whereas the internet is something transcendental of sovereign boundaries. On the other hand, it's basically unfeasible, from an economic perspective, to collect any and all types of consent in a network so that the contract that is being drafted is actually implemented.

This, however, doesn't only affect virtual relations, although it focuses on them especially. It's postulated that the characteristics of unavailability, inaccessibility and inalienability cease and enable the holder of privacy to obtain proportional gains and profits to those that the company responsible for the violation of his privacy (lato sensu - also covering data collection and treatment). It can be seen that, according to the privacy ontology, aimed at a culturally shaped element, legal development ignored historical development and started from the premises of Warren and Brandeis as if it were a supreme and immediate result of society.

The view of this right as a good seems to be more viable than just an ineligible, incessible, unavailable and inalienable personality right. The support of the existential autonomy of the being allows him to concentrate in his acts of private autonomy what is intended to enter and leave his intimate sphere. In this same sense, elementary provisions that don't contradict their human significance are subject to economic effectiveness. What is private matters only to its owner. If it's intended to be made public, it isn't for the judiciary to take action to prohibit such conduct. In addition, if it's intended to obtain economic gains from such a practice, provided that as stated above it doesn't contradict or modify its position or reduce the human condition to an extremely decadent level, impassive in the exercise of its own dignity, only the results must be authorized and regulated. The prohibition of this type of object only tends to hinder and transform into hypocrisy something that would allow a more balanced social connection between subject and individual.

Thus, the imposition on everyone of the characteristics of personality rights for privacy seems to be disconnected from its historical context. Must analyze its feature as a property and, in the first place, allow its holder to be freely available. It would no longer be fair for the

individual to participate in the economic aspect of something that is already exclusively his. In difficult times, despite the undeniable legislative delays and the planning of legal systems to promote such protection.

5 CONCLUSION

Putting into question the current system of personality law that covers privacy, it was necessary to reflect on the role that both reveal to and before institutional subjects. The marketing and political aspects use this modified social circuit to earn income and to establish particular rules between the former and the holders of the right to privacy.

In this conception, norms and legislation directed to the protection of intimate life appear. In fact, even though deontological codes and good conduct direct the interested categories, in this case the rights holders, the established rules tend to discipline an apparently utopian relation. In the contract drafting phase, as seen, the reference on the collection of consent, if elaborated along the lines established in the standard, tends to challenge and hinder electronic contracting. And, from a certain point of view, there are territorial limits that must be observed for the correct jurisdictional application of a given country.

In this perspective, the first section was responsible for demonstrating the ontology of privacy. In its historical aspect, privacy was characterized as property. Its essence, thus directed, should be used as a template for future legal and socioeconomic constructions, a fact that cannot be detected.

In the second section it became evident, under an empirical analysis, that the legislative, normative and legal precepts currently advocated by the legal community are apparently incompatible with the very personal characteristics attributed to this right. According to research raised and pointed out by Turow, Henessy and Draper, people would switch personal data at discounts at supermarkets. This means that the tendency to dispose of this asset, or at least the temporary assignment carried out under the economic approach, is already practical and accepted by the community that holds this right.

What was intended with the observation in the second section was to demonstrate the existence of a reformulation or resignification of privacy in the information context. Apparently, advocating it as a personality right would only hinder its full exercise and protection. On the one hand, it prevents its holders from being able to freely assign it or dispose of it in the consumer market, if they so wish. On the other hand, data protection laws apparently become an ineffective utopia due to: if the precepts listed there are followed, all economic marketing contracts tend to stop to collect the subject's consent.

Thus, as a solution to this problem, in contrast to a new protective trend: it's claimed that privacy is seen not only as a right of the personality, but as a well-available component of the person's existential autonomous sphere. What is private is of interest only to the person who has the secrecy. If the holder wants to make it available, the State cannot do anything to prevent such conduct. And if this can be done free of charge, why not costly, in order to allow

proportional or fractional gains to the holders who exercise it? It's necessary to take this into account.

Considering the current experiences in a framework of democratic balance, we know the central role of the internet. Its growth is significant for all areas of science, including law. It would be a mistake to extract from this scenario the survival of a movement that cannot be based only on its legal roots. The electronic relations have given rise to a paradigm that, until now, even in the presence of revolutionary innovations, there is a complex legal and social reorganization. In this sense, we are walking a few steps, but in the wrong direction.

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THE MASTER PLAN AND DEMOCRATIC PARTICIPATION IN THE DEVELOPMENT OF PUBLIC POLICIES FOR THE CITY

O PLANO DIRETOR E A PARTICIPAÇÃO DEMOCRÁTICA NO DESENVOLVIMENTO DE POLÍTICAS PÚBLICAS PARA A CIDADE

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ABSTRACT

This article aims to analyze the democratic participation in the control of public policies of city development through the Master Plan which is considered the basic instrument of urban development instituting guidelines in search of improvements for the community, providing a dialogue between society and public administration. Planning the urban environment is strictly important for the development of a city, so that it fulfills its social function in order to avoid problems such as social exclusion. Urban public policies concern the plan of the city's collective issues and aim to realize the rights of citizens who must actively participate in order for them to function and be properly implemented. The Master Plan is mandatory for cities with more than 20,000 inhabitants, and aims to organize and improve public spaces, giving the broad possibility of citizen participation in decision-making by the public power. In this sense, the importance of this instrument as a mechanism for the promotion of democracy. The study stands out by analyzing the importance of citizen participation in the design and implementation of policies promoted by the Master Plan for the development of the city and how their foundations can, provided that properly implemented improve the quality of life of citizens. The research is characterized as being theoretical, qualitative and bibliographic and the method of procedure is deductive, drawing on historical, sociological and legal material from books and scientific articles.

KEYWORDS: Urban Planning. Master plan. Participation. Public policy. Development.

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RESUMO

O presente artigo tem o objetivo de analisar a participação democrática no controle das políticas públicas de desenvolvimento da cidade por meio do Plano Diretor que é considerado o instrumento básico de desenvolvimento urbano instituindo diretrizes em busca de melhorias para a coletividade, proporcionando um diálogo entre sociedade e administração pública. Planejar o ambiente urbano é estritamente importante para o desenvolvimento de uma cidade, para que esta cumpra a sua função social a fim de se evitar problemas como a exclusão social. As políticas públicas urbanas dizem respeito ao plano das questões coletivas da cidade e visam concretizar os direitos dos cidadãos que devem participar ativamente para que elas funcionem e sejam devidamente implementadas. O Plano Diretor é obrigatório para as cidades com mais de 20.000 habitantes, e visa organizar e melhorar os espaços públicos, dando a ampla possibilidade de participação do cidadão na tomada de decisões do poder público. Neste sentido a importância deste instrumento como mecanismo de promoção da democracia. O estudo se destaca ao analisar a importância da participação cidadã na elaboração e implementação das políticas promovidas pelo Plano Diretor para o desenvolvimento da cidade e como seus fundamentos podem, desde que devidamente implementados melhorar a qualidade de vida dos cidadãos. A pesquisa se caracteriza como sendo teórica, qualitativa e bibliográfica e o método de procedimento é o dedutivo, valendo-se de material histórico, sociológico e jurídico, a partir de livros e artigos científicos.

PALAVRAS-CHAVE: *Planejamento Urbano. Plano Diretor. Participação. Políticas Públicas. Desenvolvimento.*

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1 INTRODUCTION

Seeking to circumvent urban problems such as inadequate land/soil use, slums, impoverishment of part of the population, misery and delinquency, due to the poor distribution of income and among other motivations, urban planning standards were established, with emphasis on the Master Plan , as an instrument capable of organizing the city, promoting urban public policies that favor the common good over the particular.

It's important to remember that in order to exist harmony within a society, guaranteeing the social integrity of citizens, it's extremely important that this urban environment is organized with norms designed for its development.

Still, citizen participation is also important in making decisions and formulating public policies for the interests of your city, which is guaranteed by the Brazilian Constitution of 1988.

The participatory republican principle is an important milestone for the Democratic Rule of Law, favoring democratic management and concretization of fundamental and social rights.

The City Statute ("*Estatuto da Cidade*") imposed citizen participation for the preparation of the Master Plans ("*Plano Diretor*"), mandatory for cities with more than 20.000 (twenty thousand) inhabitants, as a way of guaranteeing the full guarantee of rights and urban balance.

This provision is extremely relevant, balancing the relations between State and citizens, in which the development of urban standards in the Municipality has the evaluation and the endorsement of society.

Chapter IV of the City Statute indicates four instruments to guarantee the democratic management required for the Master Plans to have effective popular participation, namely:

the collegiate bodies of urban policy at the national, state and municipal levels; debates, hearings and public consultations; conferences on issues of urban interest at the national, state and municipal levels; and the popular initiative for a bill and plans, programs and projects on urban development.

In this way, we can see how much the population is legally protected against irregularities and administrative illegalities.

However, there is an increasing lack of interest or disbelief, or even what scholars call 'urban illiteracy', characterizing that the population doesn't worry or isn't aware of it or even says that 'they are too busy' to know and to treat matters of their own interest in the city where they lives, favoring the discretion of the Administration.

The Public Administration taking advantage of this situation, of non-interaction and non-monitoring by the population, ends up not complying with the urban planning instituted by its Master Plan, causing numerous social problems to the population.

The participatory inclusion imposed for the elaboration of the Master Plan is the main object of this study, guaranteeing democratic management and promoting public policies so that the city fulfills its social function, ordering public spaces and reducing social segregation.

The joint action of society with the Municipal Administration favors a balanced environment and consequently sustainability, insofar the state actions are legitimized by citizen participation.

This article was developed from bibliographical, theoretical and qualitative research, in the areas of Constitutional, Environmental-Urbanistic and Administrative Law, and the data from the researched sources were analyzed by a deductive methodological process.

In this sense, the research started with an analysis of the republican principle of participation and its inclusion and importance for urban planning, highlighting the Master Plan as an important instrument to guarantee this participation and still demonstrating that, despite the advances in urban planning practices, the popular participation has not yet received due attention.

2 PARTICIPATIVE INCLUSION IN URBAN PLANNING

The concept of 'Urban Planning' has its roots in the Enlightenment, gaining, during the years of the Welfare State[4] some particularities linked to economic growth and investment in social policies.[5]

4 Welfare State it's the State in which the citizen, regardless of his social situation, has the right to be protected against short or long term dependencies. It would be the State that guarantees minimum types of income, food, health, housing, education, guaranteed to every citizen not as a charity, but as a political right. STRECK, Lênio Luiz. Constitutional Jurisdiction and Legal Decision (Jurisdição Constitucional e Decisão Jurídica). São Paulo: Editora Revista dos Tribunais, 2013. p. 84.

5 MARICATO, Ermínia. Brazil 2000: what urban planning? (Brasil 2000: qual planejamento urbano?). In: Cadernos IPP UR, Rio de Janeiro, Year XI, 1 e 2, 1997. Available in: https://erminiamaricato.files.wordpress.com/2016/12/cadernos-ippur.pdf. Accessed on: July 10, 2019.

Planning has a direct connection with drawing up plans and controlling, creating the idea of prevention and organization of the future, seeking to visualize and solve all possible situations that may arise within a society.

In this tone, urban planning was born as a solution and as a response to the needs of the dynamic and systemic growth of cities, concerned with the accelerated growth of the population and inadequate land/soil occupation, factors that have been causing irreparable problems to the environment in which men live.

Therefore, planning the urban environment, the city, means instituting guidelines for organizing living areas, seeking to promote to the population an ecologically balanced and organized environment, in which everyone has decent conditions for survival, such as environmental sanitation, education, housing, leisure, job.

To plan is to formulate and to define social and environmental change strategies for the benefit of the community.

According to Abranches[6]:

> The action of planning must always also include, equally, the spatiality and the social relations in cities, considering that these are permeated by a set of relations in which the existence of conflicts of interest and dominant and dominated is an always present factor (...) must, also, consider the participation of social actors who are outside the State institution so that decisions about the future of cities can approach what is idealized by the beneficiaries and interested parties themselves. (Our translation into english)

In Brazil, the arrival of urban planning models with more participatory and democratic features emerged especially in the 90s, motivated by the strength of the National Movement for Urban Reform (*Movimento Nacional de Reforma Urbana – MNRU*)[7].

Abranches[8] explains that through movements like this, greater articulations of public policies emerged and a greater commitment to the democratization of urban planning and city management, with popular participation becoming a priority element in city planning.

The period of greatest urban development began with the creation of the National Urban Development Policy (*Política Nacional de Desenvolvimento Urbano – PNDU*), which was part of the II National Urban Development Plan (*II Plano Nacional de Desenvolvimento Urbano – PNDU*), in 1973, during the military regime.[9]

6 ABRANCHES, Mônica. Urban planning in Belo Horizonte: a new mapping of the city's problems in the view of the Municipal Councilors (Planejamento urbano em Belo Horizonte: um novo mapeamento dos problemas da cidade na visão dos Conselheiros Municipais). Belo Horizonte: Pontifícia Universidade Católica de Minas Gerais, 2007. p. 36.

7 The MNRU it was the result of the union of several entities (neighborhood activist organizations, neighborhood associations, academics, professionals and popular movements) that wanted to take the opportunity to participate in the construction of popular amendments to be sent to the Constituent Assembly, these amendments were partially used in the 1988 Constitution, reduced to articles 182 and 183 which deal with the Municipal Master Plans and the adverse possession law. ABRANCHES, Mônica. Urban planning in Belo Horizonte: a new mapping of the city's problems in the view of the Municipal Councilors (Planejamento urbano em Belo Horizonte: um novo mapeamento dos problemas da cidade na visão dos Conselheiros Municipais). Belo Horizonte: Pontifícia Universidade Católica de Minas Gerais, 2007. p. 43.

8 ABRANCHES, Mônica. Urban planning in Belo Horizonte: a new mapping of the city's problems in the view of the Municipal Councilors (Planejamento urbano em Belo Horizonte: um novo mapeamento dos problemas da cidade na visão dos Conselheiros Municipais). Belo Horizonte: Pontifícia Universidade Católica de Minas Gerais, 2007. p. 44.

9 MARICATO, Ermínia. Ideas out of place and the place out of ideas. Urban planning in Brazil (As ideias fora do lugar e o lugar fora das ideias. Planejamento urbano no Brasil). In: A cidade do pensamento único. 8ª. ed. Petrópolis: Vozes, 2013. p. 126-127.

With the establishment of the 1988 Constituent and the arrival of the Democratic and Social State of Law, the guarantee of citizen participation in decision-making processes was established, favoring the application of urban legislation.

Siqueira Júnior[10] well teaches that the participation of the individual in the affairs of the State is the exercise of citizenship which, today, has a much broader meaning than the simple exercise of voting.

The current conception of citizenship also presupposes that the citizen participates in decision-making on issues of public interest that take place through the so-called public policies.[11]

The participation is a principle of Public Administration enshrined in Constitutional and Administrative Law.[12]

Perez[13] stresses that "it's through decision-making processes that allow dialogue between society and the Public Administration that the degree of efficiency of its performance is increased" ("é por meio de processos de decisão que permitam o diálogo entre a sociedade e a Administração Pública que esta aumenta o grau de eficiência de sua atuação") (our translation into english).

The Federal Constitution of 1988 assures the direct participation of the people in the construction of the Democratic State of Law, establishing a series of norms with the scope of supporting the participatory institutes in the Public Administration, turning in this study our eyes to the Master Plan, instituted in its article 182, § 1º.

This legal provision describes that "the urban development policy, carried out by the Municipal Government, according to general guidelines established by law, aims to order the full development of the city's social functions and guarantee the well-being of its inhabitants" ("*a política de desenvolvimento urbano, executada pelo Poder Público Municipal, conforme diretrizes gerais fixadas lei, tem por objetivo ordenar o pleno desenvolvimento das funções sociais da cidade e garantir o bem – estar de seus habitantes*") (our translation into english)[14].

Reaffirming, this provision establishes that the urban development policy aims to: order the full development of the city's social functions and guarantee the well-being of its inhabitants.

In addition, we find a Constitutional provision for urban public policies in articles 23, item IX and 30, item VIII, with this latter standing out, which delegates competence to the Municipality to legislate promoting the appropriate territorial ordering, through: planning and control of land/soil use, parceling and land/soil occupation.

10 SIQUEIRA JÚNIOR, Paulo Hamilton. Citizenship and Public Policies (Cidadania e Políticas Públicas). Revista do Instituto dos Advogados de São Paulo, vol. 18/2006, Jul. – Dec. 2006, p. 1.

11 SIQUEIRA JÚNIOR, Paulo Hamilton. Citizenship and Public Policies (Cidadania e Políticas Públicas). Revista do Instituto dos Advogados de São Paulo, vol. 18/2006, Jul. – Dec. 2006, p. 1.

12 PEREZ, Marcos Augusto. Society's participation in the formulation, decision and execution of public policies (A participação da sociedade na formulação, decisão e execução das políticas públicas). In: Políticas Públicas: reflexões sobre o conceito jurídico. São Paulo: Saraiva, 2006, p. 163.

13 PEREZ, Marcos Augusto. Society's participation in the formulation, decision and execution of public policies (A participação da sociedade na formulação, decisão e execução das políticas públicas). In: Políticas Públicas: reflexões sobre o conceito jurídico. São Paulo: Saraiva, 2006, p. 163.

14 BRASIL. Constitution of the Federative Republic of Brazil of 1988 (Constituição da República Federativa do Brasil de 1988). Available in: http://www.trtsp.jus.br/legislacao/constituicao-federal-emendas. Accessed on January 2, 2020.

At this point, we can highlight the insertion of instruments to guarantee democratic management and the demand for popular participation in all phases of the process of preparing the Master Plan.

The Participative Master Plan (*Plano Diretor Participativo*) was also regulated by the City Statute (Estatuto da Cidade), which imposes the participation of society in the elaboration of norms of an urban nature. Considered the basic instrument for the policy of urban development and expansion, the Master Plan is considered an important tool for cities that face unlimited horizontal expansion, advancing on fragile or environmental preservation areas, as it points out basic urban planning guidelines for organization of the city, with the appropriate use and occupation of the soil, preventive measures against private irregularities, measures for sustainable development with better distribution of income, decent housing, education, transportation, reduction of crime.

The Chapter IV of the City Statute indicates four instruments to guarantee the democratic management required for the Master Plans to have effective popular participation, namely: the collegiate bodies of urban policy at the national, state and municipal levels; debates, hearings and public consultations; conferences on issues of urban interest at the national, state and municipal levels; and a popular initiative for the bill and urban development plans, programs and projects.

Thus, as José Afonso da Silva well observes:[15] "the planning is no longer a process that depends on the will of governments, it's a constitutional and legal imposition" ("*o planejamento não é mais um processo que dependa da vontade dos governantes é uma imposição constitucional e legal*") (our translation into english).

Nelson Saule Junior[16] points out that the City Statute City Statute launched a great challenge in regulating the Participative Master Plan, as it incorporated the most vibrant and lively aspects of democracy development by inserting the direct and universal participation of citizens in decision-making processes.

We can highlight among the participation instruments: councils, commissions and participatory committees; public hearings; public consultations; referendum; plebiscite; important mechanisms capable of guaranteeing a dialogue between society and the Public Administration and, through the Master Plan, provide for the concretization and implementation of public policies for the benefit of the entire collectivity.

This concern with the insertion of instruments that guarantee democratic management and the demand for popular participation in all phases of the process of preparing the Master Plan within the scope of the Municipal Public Power express the principle of popular sovereignty and offer a way to strengthen the participatory democracy.

Fadigas[17] points out that "the absence of direct or indirect participation by society in the definition of policies and in the monitoring and scrutiny of their application and in the evaluation of results represents a clear violation of rights and a flagrant imbalance in the system of

15 SILVA, José Afonso da. Brazilian Urban Law (Direito Urbanístico Brasileiro). São Paulo: Melhoramentos. 2008, 5ª edição. p. 90.

16 JUNIOR. Nelson Saule. Right to the city: legal trails for the right to sustainable cities (Direito à cidade: trilhas legais para o direito às cidades sustentáveis). São Paulo: Max Limonad, 2001.

17 FADIGAS, Leonel. Urbanism and Territory: Public policies (Urbanismo e Território: As políticas públicas). Edições Sílabo. 1ª Edição – Lisboa, April, 2015. p. 13.

relations between the State and citizens" ("*a ausência de participação, direta ou indireta, da sociedade na definição das políticas e no acompanhamento e escrutínio da sua aplicação e na avaliação dos resultados representa uma clara violação de direitos e um flagrante desequilíbrio no sistema de relações entre o Estado e os cidadãos*") (our translation into english).

For Bucci[18] the full realization of democratic management is the only guarantee that the instruments of urban policy brought by the City Statute are capable of promoting the right to the city for all.

However, although the concern with social well-being and the transmission of mechanisms to achieve this premise, there is still a failure in the implementation and applicability of the so utopian urban planning.

Although the legislation is abundant, the implementation of policies aimed at the urban environment generally doesn't occur as planned, either due to the discretion of the Administration, or due to the lack of interest of the citizen himself, which makes the plans most of the time inefficient.

Abranches[19] states that despite the advances in urban planning practices, especially the politicized character of this proposal, popular participation hasn't yet received due attention.

In this sense, Maricato points out that[20] "the legal power of the federal executive over urban development, especially over its central aspect, which is the control over soil use and occupation, is very small" ("*o poder legal do executivo federal sobre o desenvolvimento urbano, em especial sobre seu aspecto central, que é o controle sobre uso e ocupação do solo, é muito pequeno*") (our translation into english).

Brazilian cities are as they are, not for lack of plans and laws, but for political interests and cultural problems[21], pointing to the 'urban illiteracy'[22].

It's noted, therefore, the need for awareness by the population itself, regarding the development of a greater interest in the desires of their city so that the premises instituted by urban planning, the welfare state in the city are properly realized through public policies designed for dialogue between society and the Public Administration.

Concurrent highlight Reis and Leal[23]:

> For the citizen, it's very relevant that he knows and understands what is foreseen in the policies that affect him, who established its, how its were established, how its is being implemented, what are the interests at stake, what are the main forces involved, what are the existing spaces for participation,

18 BUCCI, Maria Paula Dallari. Democratic City Management (Gestão Democrática da Cidade). In. DALLARI, Adilson Abreu & FERRAZ, Sérgio. (Coords). Estatuto da Cidade (comentários à Lei Federal 10.257/2001). São Paulo: Malheiros, 2002, p. 322-341.

19 ABRANCHES, Mônica. Urban planning in Belo Horizonte: a new mapping of the city's problems in the view of the Municipal Councilors (Planejamento urbano em Belo Horizonte: um novo mapeamento dos problemas da cidade na visão dos Conselheiros Municipais). Belo Horizonte: Pontifícia Universidade Católica de Minas Gerais, 2007. p. 44.

20 MARICATO, Ermínia. The impasse of urban politics in Brazil (O impasse da política urbana no Brasil). 3ª. ed. Petrópolis: Vozes, 2014. p. 53.

21 MARICATO, Ermínia. The impasse of urban politics in Brazil (O impasse da política urbana no Brasil). 3ª. ed. Petrópolis: Vozes, 2014. p. 53-54.

22 Ermínia Maricato deals with "urban illiteracy", such as society's misinformation about the city's history and the municipal budget, alienation over the geographic and urban space in Brazil, factors that harm the city's sustainability. Idem. p. 54.

23 REIS, Jorge Renato; LEAL, Rogério Gesta. Social Rights and Public Policies. Contemporary challenges (Direitos Sociais e Políticas Públicas. Desafios contemporâneos). Tomo 8. Santa Cruz do Sul. EDUNISC. 2008. p. 2.308.

> the possible allies and opponents, among other elements. (Our translation into english)

The active performance of society is fundamental for the efficiency of administrative performance, it's, shall we say, that a joint action, encompassing the trinomial: participation, efficiency and legitimacy.[24]

This thinking means that: through 'citizen participation' acting in decision-making processes with the Public Administration, its become more efficient for the common good and legitimate, to the extent that its have had the intervention of society for its approval.

Thus, it's important to understand how this participation can stimulate in citizens not only the responsibility for the favorable results obtained, but also the collaboration with its conservation in the city plan, assisting in the proposition of public policies to improve men's life, enabling that the city fulfills its social function. So now we can proceed to the analysis of the Master Plan as a public policy for urban development.

3 THE MASTER PLAN AS A PUBLIC POLICY FOR CITY DEVELOPMENT

Initially, it's important to understand that public policies "are actions that the government takes in order to achieve the goals set and that will be carried out by the public authorities" (our translation into english) ("*são ações que o governo realiza com a finalidade de atingir as metas estabelecidas e que serão realizadas pelo poder público*").[25]

For Reis and Leal[26] public policies are the result of politics, understandable in the light of institutions and political processes, which are closely linked to the more general issues of society, with emphasis on development and social inclusion.

Bucci complements[27] that policies are forged to achieve specific objectives, which make this – policies – differ from laws, that is, policies are propositions that describe objectives.

Public policies aren't, therefore, a category defined and instituted by law, but complex arrangements, typical of political-administrative activity, that the science of law must be able to describe, understand and analyze, in order to integrate in the political activities the values and methods specific to the legal universe.[28]

24 PEREZ, Marcos Augusto. Society's participation in the formulation, decision and execution of public policies (A participação da sociedade na formulação, decisão e execução das políticas públicas). In: Políticas Públicas: reflexões sobre o conceito jurídico. São Paulo: Saraiva, 2006, p. 167-168.

25 SIQUEIRA JÚNIOR, Paulo Hamilton. Citizenship and Public Policies (Cidadania e Políticas Públicas). Revista do Instituto dos Advogados de São Paulo, vol. 18/2006, Jul. – Dec. 2006, p. 4.

26 REIS, Jorge Renato; LEAL, Rogério Gesta. Social Rights and Public Policies. Contemporary challenges (Direitos Sociais e Políticas Públicas. Desafios contemporâneos). Tomo 8. Santa Cruz do Sul. EDUNISC. 2008. p. 2.309.

27 BUCCI, Maria Paula Dallari. Public Policies: reflections on the legal concept (Políticas Públicas: reflexões sobre o conceito jurídico). UNISANTOS. São Paulo. Editora Saraiva, 2006. p. 25.

28 BUCCI, Maria Paula Dallari. Public Policies: reflections on the legal concept (Políticas Públicas: reflexões sobre o conceito jurídico). UNISANTOS. São Paulo. Editora Saraiva, 2006. p. 25.

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Still for the same author [29] "the ideal of a public policy is to result in the achievement of the social objectives (measurable) it has set itself; to obtain determined results within a certain period of time" (*"o ideal de uma política pública é resultar no atingimento dos objetivos sociais (mensuráveis) a que se propôs; obter resultados determinados, em certo espaço de tempo*") (our translation into english).

However, it's also necessary to evaluate the programmatic character of the plan, of the policy, so that its objectives adapt to reality and, in this sense, Maria Paula Dallari Bucci[30] highlighted in her work the problem of the effectiveness of the so-called programmatic norms, in which one of its effects it's the prohibition on the omission of Public Powers in the realization of social rights.

Based on the study of the work "Applicability of Constitutional Norms" (*"Aplicabilidade das Normas Constitucionais"*) by José Afonso da Silva, Bucci[31] highlighted that "the procedural law that sanctions omissions, enunciated in the Federal Constitution (articles 102, I, q, and 103, § 2º) would be one of the paths for the effectiveness of the programmatic norms, in view of the inertia of the Public Power in the initiative of the legislative or administrative measures necessary for the implementation of the law" ("*o direito processual que sanciona as omissões, enunciado na Constituição Federal (artigos 102, I, q, e 103, §2º) seria um dos caminhos para a efetivação das normas programáticas, em face da inércia do Poder Público na iniciativa das medidas legislativas ou administrativas necessárias à implementação do direito*") (our translation into english).

Reis and Leal also point out[32] that policies guide state action, reducing the effects of one of the constitutive problems of the democratic regime, which is the administrative discontinuity resulting from the periodic renewal of the governors, as each new government means some discontinuity, that is, the policies that were initiated and not ended in the previous government generally aren't effective, because for the new government this policies are no longer necessary, other objectives have emerged, leaving the needs that had been raised aside, forgotten.

On the other hand, it's understood that although it's widely recognized that administrative discontinuity leads to the abandonment of the current guidelines and also to the creation of others, generating a waste of political energy and financial resources, this situation isn't at all negative, because it allows innovations and advances.[33]

The new times call for boldness to review positions and to innovate. The safest anchor for political innovation is to encourage cooperation between public and private agentes and civil society.

29 BUCCI, Maria Paula Dallari. Public Policies: reflections on the legal concept (Políticas Públicas: reflexões sobre o conceito jurídico). UNISANTOS. São Paulo. Editora Saraiva, 2006. p. 43.

30 BUCCI, Maria Paula Dallari. Public Policies: reflections on the legal concept (Políticas Públicas: reflexões sobre o conceito jurídico). UNISANTOS. São Paulo. Editora Saraiva, 2006. p. 28.

31 BUCCI, Maria Paula Dallari. Public Policies: reflections on the legal concept (Políticas Públicas: reflexões sobre o conceito jurídico). UNISANTOS. São Paulo. Editora Saraiva, 2006. p. 29.

32 REIS, Jorge Renato; LEAL, Rogério Gesta. Op. cit., p. 2.312.

33 REIS, Jorge Renato; LEAL, Rogério Gesta. Social Rights and Public Policies. Contemporary challenges (Direitos Sociais e Políticas Públicas. Desafios contemporâneos). Tomo 8. Santa Cruz do Sul. EDUNISC. 2008. p. 2.312.

In democratic terms, the authority of the State results from the collective will that is freely expressed and assumed by social participation and, therefore, public policies, represent the result of the exercise of power by an authority vested with public power and legitimacy.[34]

In this sense, we can say that the Master Plan is an important instrument capable of preventing administrative discontinuity and favoring citizen participation in the search for better living conditions for the collectivity.

Hely Lopes Meirelles[35] conceptualized that:

> The Master Plan or Integrated Development Master Plan, as it's modernly called, is the complex of legal norms and technical guidelines for the global development, constant of the Municipality, under the physical, social, economic and administrative aspects, desired by the local community. It must be the expression of the aspirations of the citizens regarding the progress of the municipal territory in its the whole city/countryside. It's the technical-legal instrument defined for the objectives of each Municipality and therefore with supremacy over the others, to guide all activity of Administration and Managers in public and private achievements that interest or affect the collectivity. The Master Plan must be one and only, although successively adapted to the new demands of the community and local progress, in a perennial process of planning that realizes its adaptation to the needs of the population, within the modern management techniques and resources of each City Hall. The Master Plan isn't static; it's dynamic and evolutionary. In setting objectives and guiding the development of the Municipality, it's the supreme and general law that establishes priorities in the achievements of the local government, conducts and orders the growth of the city, disciplines and controls urban activities for the benefit of social welfare. (Our translation into english)

In Brazil, urban planning, in general, doesn't always achieve these objectives, either due to the lack of coordination of actions, the lack of effective controls over the agents, the inability to overcome the political and economic conflicts inherent in urban development or due to excessive rigidity on the setting acceptable standards. Changing this situation is, therefore, a challenge for the municipal administrators.[36]

Through the Master Plan, the Public Administration must be subject to the approval of society on the actions to be taken. This instrument is characterized as the most latent manifestation of the democratic management of a city.

At this point, urban planning by the Municipality is fundamental, in order to guide public policies to mitigate these negative consequences, which must be built with popular participation, in search of the common social good.[37]

34 FADIGAS, Leonel. Urbanism and Territory: Public policies (Urbanismo e Território: As políticas públicas). Edições Sílabo. 1ª Edição – Lisboa, April, 2015. p. 13.

35 MEIRELLES, Hely Lopes. Brazilian Municipal Law (Direito Municipal Brasileiro). Malheiros. 13. ed. São Paulo: 2006. p. 538-539.

36 D'ANDREA, Catherine. The City Statute and the Planning of Transportation and of Circulation (O Estatuto da Cidade e os Planejamentos de Transporte e de Circulação), 2004. Available in: http://redpgv.coppe.ufrj.br/arquivos/'Andrea_UFSCar2004.pdf. Accessed on: January 1, 2020.

37 PERES, Renata Bovo. Regional and urban planning and the environmental issue: analysis of the relation between the Tietê-Jacaré watershed plan and the municipal master plans of Araraquara and São Carlos, SP (O planejamento regional e urbano e a questão ambiental: análise da relação entre o plano de bacia hidrográfica Tietê-Jacaré e os planos diretores municipais de Araraquara e São Carlos, SP). 2012. Available in: http://www.sustenta.ufscar.br/arquivos/teses/teserenatabovoperes.pdf. Accessed on: January 1, 2020.

In the analysis of the creation of public policies, it's very important that analysts are neutral and aware of the risks of anchoring their work in neoliberal and anti-state assumptions, which advocate the adequacy of public administration to market values and to the dictates of private administration and because this we see the importance of participatory inclusion in the elaboration of these policies.

In the urban plan, we highlight the Master Plan for constituting the complex of legal norms and technical guidelines that aim at the global and constant development of the Municipality, under the physical, social, economic and administrative aspects, desired by the local community, which is expressed by the mandatory popular participation in its formulation, it's important to highlight this democratic prevalence, in the sense that: where there is the participation of the people, there is citizenship, freedom, justice.

Silva and Júnior[38] they understand that in order to congregate in the political and decision-making life of the State it's important to find mechanisms for popular participation, that there is space for representation, technique and management and, above all, space for the citizen who must also be concerned with 'public things'.

Thus, the Master Plan stands out as an important instrument capable of promoting this space to the citizen, of dialogue on decision-making with the Public Administration.

However, what is verified by the urban planners is that the norms elaborated in the Master Plan do not leave the paper and that in reality the citizen's participation covers only specific groups formed by the government, in its interest, masking the real democratic management that should exist.

The legislation is strict in the sense of mandatory participation, but as Maricato[39] puts it, the Master Plan "offers a discourse of good intentions, but far from practice" ("*oferece discurso de boas intenções, mas distante da prática*") (our translation into english).

Maricato[40] also notes that it doesn't matter just a normative plan, which is exhausted in the approval of a law, but that is committed to a process, a domain of democratic management, to rectify its course, an operational domain, with established investments, with actions determined and inspection.

In order to register the real situation that happens with citizen participation in the Master Plans, Maricato exposes:[41]

> (...) it isn't for lack of urban plans that Brazilian cities have serious problems. It's also not, necessarily, due to the poor quality of these plans, but because its growth takes place outside the plans approved by the City Councils, which follow traditional interests of local politics and specific groups linked to the government on duty. (Our translation into english)

38 SILVA, Juvêncio Borges; JÚNIOR, Natal dos Reis Carvalho. DEMOCRATIZING DEMOCRACY: popular participation as a means of overcoming obstacles to democratic consolidation in Brazil (DEMOCRATIZAR A DEMOCRACIA: participação popular como meio de superação dos obstáculos a consolidação democrática no Brasil). Revista Humus, vol. 7, nº 20, 2017. Available in: http://www.periodicoseletronicos.ufma.br/index.php/revistahumus/article/dowload/6786/4844. p. 69. Accessed on: January 5, 2019.

39 MARICATO, Ermínia. Ideas out of place and the place out of ideas. Urban planning in Brazil (As ideias fora do lugar e o lugar fora das ideias. Planejamento urbano no Brasil). In: A cidade do pensamento único. 8ª. ed. Petrópolis: Vozes, 2013. p. 124.

40 MARICATO, Ermínia. Brazil, cities: alternatives to urban crisis (Brasil, cidades: alternativas para crise urbana). 7 ed. – Petrópolis, RJ: Vozes, 2013.

41 MARICATO, Ermínia. Op. cit. p. 124.

However, citizen awareness is an extremely important factor for the effectiveness of the application of urban planning and the consequent improvement of living conditions, preventing the manipulation and arbitrariness of the Public Administration, forging a false participation of the citizens in the elaboration of the Master Plans of their cities, and consequent rules for improving the lives of their residents.

Encouraging participation must come from society, but it must also have the support of the State.[42]

The State must encourage popular participation and not simulate this situation as we observe it to be happening, taking advantage of the lack of interest or, better said, citizen disbelief.

From the analysis, we can see that we have a vast normative apparatus capable of realizing the fundamental and social rights of citizens, promoting the ideal division of the soil/land, reduction of social inequalities, balanced environment, in short, cities with better living conditions for residents.

The Master Plan is a public policy of extreme relevance, an urban framework and, if properly prepared and implemented, it's able to help a lot in the development of the city.

It's necessary to raise the interest in the population about the desires of their city, combating the disinterest, the disbelief, the "urban illiteracy". The citizen needs to understand that he has instruments that provide him with possibilities to combat administrative discretion and to promote the proper urban development in his city.

4 CONCLUSION

Brazilian cities, in general, increasingly experience degrading situations with regard to urban problems, caused in large part by the rapid occupation and by the lack of urban planning or even by the failure to implement plans.

The disorderly development in cities, without the proper urban planning or, as already mentioned, their failure, justified by the discretion of the Public Administration coupled with the population's lack of interest or disbelief in the demands and desires of their city, has been favoring numerous problems of a nature social.

The purpose of urban planning is to formulate, to define and to promote strategies for social and environmental changes, decent living conditions for humans, guiding the development of the city.

In order to better ensure these premises and after facing many barriers, with the arrival of the Federal Constitution of 1988, a great milestone was established for Brazilian democracy,

42 SILVA, Juvêncio Borges; JÚNIOR, Natal dos Reis Carvalho. DEMOCRATIZING DEMOCRACY: popular participation as a means of overcoming obstacles to democratic consolidation in Brazil (DEMOCRATIZAR A DEMOCRACIA: participação popular como meio de superação dos obstáculos a consolidação democrática no Brasil). Revista Humus, vol. 7, nº 20, 2017. Available in: http://www.periodicoseletronicos.ufma.br/index.php/revistahumus/article/dowload/6786/4844. p. 69. Accessed on: January 5, 2019.

ensuring citizen participation in the concretization of the Democratic State of Law, listing in several of its provisions the obligation of this principle.

Within the framework of the 1988 Constitution and the profound redemocratization of the State and Society that it proposed, norms and policies flourished from a complete review of the city's legal and political understanding. Urbanists and jurists were taken with great enthusiasm from the recognition of the right to the city as a fundamental right, in light of which the City Statute was edited and interpreted with its promises of citizen participation in offering, to everyone, of the conditions for 'live well' in the city.

The City Statute listed numerous mechanisms for urban improvement and enshrined the participatory principle, that gained strength when it was treated as a mandatory element in the elaboration of the Master Plans.

However, even with advances in democratic institutions, unfortunately, we see the deepening of inequalities and the degradation of urban life. Failures in the implementation of the Master Plans driven by political interests and lack of democratic participation by the local population, to the detriment of the strong influence of economic groups, among other issues that are diagnosed today as the major challenges to the realization of the fundamental right to good urban order in Brazil.

It's important to understand that the direct participation of the people in urban decision--making is extremely important for the city to fulfill its social function, but this reality hasn't yet reached the necessary levels of interest. We can see that there is a certain lack of interest, disbelief and even a lack of knowledge about the importance and need for the citizen to participate actively in the acts of public life.

It was demonstrated that the legislation is abundant and guarantees this participation in public management, but still ineffective, making necessary to raise the population's awareness of the importance of their knowledge of the and about the plans and policies developed and to be developed in their favor.

Urban planning is an essential factor to reduce discrimination and social inequalities, making human rights effective and making common interest prevail over the particular; and this reasoning is legitimized by the obligation of the citizen to participate in the elaboration of the plans, passing on to the Administration their needs and desires, starting from the premise that 'who knows more about the problems and needs of the population is the citizen himself'.

A The Federal Constitution of 1988 and the City Statute listed important urban planning instruments in order to guarantee an adequate urban development. The participatory inclusion in the elaboration of the Master Plan stands out for the development of democracy in Brazil, guaranteeing the concretization of the social function that the city must fulfill.

At this point, it's worth noting that the Master Plan promotes participation and institutes citizenship and democracy, having in its guidelines norms capable of providing better living conditions and dignity to the population, regularizing housing, reducing social inequalities, avoiding problems such as slums, impoverishment of part of the population, misery and delinquency, due to the poor distribution of income, real estate speculation and the absence of agrarian reform, concerned with the environment and the development of the city.

It demonstrated the important role of the participation of the population imposed for the elaboration of the Master Plans and the need for the people to become aware about the public actions and to actively participate in decision-making.

However, it was also highlighted that popular participation hasn't yet received due attention and that factors such as disinterest or disbelief, or even what scholars call "urban illiteracy", prevent this principle from fulfilling its role, favoring the discretion of the Public Administration which takes advantage of this situation, of non-interaction and non-monitoring by the population, and ends up failing to comply with the urban planning instituted by its Master Plan, causing numerous social problems to the population.

However, the importance of the principle of participation being realized in urban planning is notorious, so that state activities are inspected, monitored and the population benefits from approved public policies.

Urban public policies need to get off the ground and, for that, the population necessarily needs to be aware. The Democratic State of Law is made in a joint action between society and the State.

Finally, having demonstrated some problems faced in participatory inclusion, we can conclude that its foundation is the future for a better life. The city needs of the popular participation. Citizens need to exercise citizenship and the democratic power granted under the Federal Constitution. As a result, it is possible to make public policies for urban development leave the paper and exercise their function, be properly implemented and improve the living conditions of the citizen.

With the democratic perspective imposed on planning, the State should not / can act alone, it's necessary for popular participation to be radicalized and the civil society to be qualified by promoting the organization and elaboration of proposals and strategies to intervene and to improve the city.

It's necessary to recognize the instruments created and guarantee their effectiveness, and the Master Plan presents itself as a strong instrument of promotion for the sustainable development of cities, fully capable of promoting the overcoming of social inequalities, supported by the imposed popular participation in decision-making, aiming at the promotion of effective public policies to the fulfillment of an adequate urban planning, which orders the territory and reduces social inequalities, ensures the fair distribution of urban infrastructure and services and the principles of human dignity and the citizenship, fulfilling the social function of the city , really configuring the Democratic State of Law proposed in our Constituent.

The guarantee of its proposals and perspectives, as already described, depends on a joint action of society with the Public Administration. The formulation of a political project anchored by participation, legitimized by the demand and the commitment of civil society in the proposition of public policies, advances towards the constitution of a collective subject and an effectively political project for society.

Considering the aforementioned analyzes, it's possible to believe more and more in the potential of participatory structures in search of collective improvements and as outlined, the importance of this principle in the urban sphere to guarantee the realization of fundamental rights and the fulfillment of the social function of the city for the collectivity.

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EXECUTIVE TECHNIQUE IN THE CIVIL PROCESS CODE AND ITS LIMITS

A TÉCNICA EXECUTIVA NO CÓDIGO DE PROCESSO CIVIL E SEUS LIMITES

MATEUS SCHWETTER SILVA TEIXEIRA1

ABSTRACT

This article deals with the execution of Brazilian civil procedural law and its evolution. With the Civil Procedure Code of 2015, there have been changes and innovations in numerous articles, such as article 139, item IV, which generated understanding of part of the doctrine of the atypicality of executive means in execution for certain amount, with the application of measures atypical to those debtors, such as the retention of the passport or the national driver's license. It is around this theme that the present work will be developed. The methodology used was a qualitative research, with a review of the literature on the topic, within classic and modern doctrines, as well as legal articles and current jurisprudence. In the first stage, we observe the general aspects of the execution process. The second stage deals with the application of executive means, from the original Civil Procedure Code of 1973, the reforms of 1994 and 2002 and the new code of 2015, with an analysis of Article 139, item IV, and their possible effects. In the third step, we intend a constitutional analysis of the effects of the application of article 139, section IV of said Code. In the end, the possibility of applying the measures will be demonstrated, according to requirements that must be observed by the judge.

KEYWORDS: Civil proceedings. Execution of paying a certain amount. Atypical executive means. Constitutional Law.

RESUMO

O presente artigo trata sobre a execução do direito processual civil brasileiro e a sua evolução, sendo que, com o Código de Processo Civil de 2015, houve modificação e inovação em inúmeros dispositivos, como o artigo 139, inciso IV, que gerou entendimento de parte da doutrina da atipicidade dos meios executivos em execução por quantia certa, com aplicação de medidas atípicas aos executados, como a retenção do passaporte ou da carteira nacional de habilitação. É entorno desta temática que o presente trabalho será desenvolvido. A metodologia utilizada foi de pesquisa qualitativa, com revisão da literatura acerca do tema, dentro doutrinadores clássicos e modernos, bem como de artigos jurídicos e jurisprudência atual. Na primeira etapa, realiza-se observação acerca dos aspectos gerais do processo de execução. A segunda etapa aborda a aplicação dos meios executivos, desde a versão original do Código de processo Civil de 1973, as reformas de 1994 e 2002 e o novo código de 2015, com análise do artigo 139, inciso IV, e seus possíveis efeitos. Na terceira etapa, pretende-se uma análise constitucional dos efeitos da aplicação do artigo 139,

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inciso IV do referido Código. Ao fim, será demontrada a possibilidade de aplicação das medidas, de acordo com requisitos que devem ser observados pelo juiz.

PALAVRAS-CHAVE: *Processo civil. Execução de pagar quantia certa. Meios executivos atípicos. Direito Constitucional.*

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1 INTRODUCTION

This article will deal with atypical executive means in the execution for a certain amount, provided for in article 139, item IV of Law nº 13.105/2015 (BRASIL, 2015), also called the Civil Procedure Code (CPC).

Execution for a certain amount occurs in the face of a pecuniary obligation or an obligation 'to do', 'not to do' or 'to give something', converted into a pecuniary obligation. It happens that, over the years, under the Civil Procedure Code of 1973 and its reforms, the procedural practice demonstrated that the typicality of the executive means was insufficient for the debtors to be solvent, with a mutation regarding this regime in the different species of execution.

The procedural practice, also, revealed that innumerable enforcement proceedings for a certain amount are suspended due to the absence of debtors' assets to be submitted to the pledge and expropriation institutes, however, the creditor notes that, in certain scenarios, that debtor, in fact, has financial conditions to bear the debt. However, as a precaution, he tried to untie any assets from his real estate, so that they would not be expropriated, thus concealing the patrimonial reality.

In this way, the Code of Civil Procedure, promulgated in 2015, brought an innovative institute, which, as it's a general clause, has been widely discussed by the doctrine and already by the jurisprudence. It was established in the chapter dealing with the Powers of the Judge, article 139, item IV, of the Civil Procedure Code, which the judge will be responsible for: "determining all inductive, coercive, mandatory or subrogatory measures necessary to ensure compliance with a judicial order, including in actions whose object is a pecuniary installment".

In the meantime, for much of the doctrine, it was established the principle of atypicality of executive means to executions for a certain amount. Thus, lawyers initiated requests for the application of that article in enforcement proceedings (execution processes), with the retention of the debtor's passport and the suspension of his National Driver's License. The work will be limited to these two hypotheses, although it recognizes other measures such as: impediment to participation in bidding and public tenders.[2]

As will be shown throughout this work, the measure brought uproar to the doctrine, given that most scholars defend the atypicality as a way of guaranteeing execution, which, today, in a high number of cases remains frustrated. In contrast, other scholars argue that the article under discussion was poorly written and that its great breadth could generate unconstitutional decisions.

2 Doctrine and jurisprudence are scarce when it comes to the topic, it's recommended: NOBREGA, Guilherme Pupe da. Reflections on the atypical nature of executive techniques and article 139, IV, of the CPC 2015. Available at: https://www.migalhas.com.br/coluna/processo-e-procedimento/243746/reflexoes-sobre-a-atipicidade-das-tecnicas-executivas-e-o--artigo-139-iv-do-cpc-de-2015. Accessed on: Feb. 20, 2020.

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The magnitude of the topic under discussion is evident, as the measures required by lawyers and granted in some decisions have gained considerable notoriety, in view of the paradigmatic change performed. In this sense, the present research is necessary in order to examine the possible application of the institute under analysis and its consequences, object of a close study by the doctrine.

It is a qualitative research, carried out by reviewing the literature with analysis of scientific articles, books and jurisprudence on the subject, with the aim of making an objective and adequate analysis of the research.

Far from the intention of exhausting the topic, the present research will be carried out around the institute foreseen in article 139, item IV of the Civil Procedure Code, its scope, applicability and limits in view of the Constitution of the Federative Republic of Brazil – (*Constituição da República Federativa do Brasil*) (BRASIL, 1988).

2 GENERAL ASPECTS OF EXECUTION IN THE CIVIL PROCEDURE CODE

In this study, which is based on execution for a certain amount, it is important to define and understand what the 'execution process' means, it is a genus, of which there are species in the Civil Procedure Code and extravagant legislation.

Classical doctrine divides the modalities of process into: cognitive tutelage, that in which the right is recognized or it's correct about the right, and executive tutelage, that in which a right already settled is satisfied. As explained by Elpídio Donizetti Nunes (2017, p. 1209), the process will proceed through the knowledge process (cognition) procedure when one of the parties seeks to know the law, otherwise, the procedure will be for execution, when one of the parties already has the right established and seeks to satisfy it, with the fulfillment of the agreed obligation. The renowned author further determines that the acts of the execution process differ from the acts of the knowledge process, given that, as already mentioned, the creditor's objective is only the satisfaction of his credit. In this regard, the objective is to compel the debtor to pay off his debt or fulfill the obligation previously agreed, which may be an obligation to do, not do or deliver something.

It is worth mentioning what the doctrine understands about execution: Fredie Didier clarifies this concept, explaining that in the execution there is satisfaction of an obligation already due, and there is a division between voluntary execution - called compliance by a large part of the doctrine - and execution itself, in which the debtor is not solvent with the debt presented (DIDIER et. al, 2017, v. 3, p. 45).

Therefore, it must be evidenced that the execution, process of satisfaction of a right, is a genus that includes other species. So that the Civil Procedure Code establishes in its article 771 that the provisions referring to execution based on an extrajudicial title apply to other execution procedures, as appropriate.

With the perspective presented, it was observed that the execution is a genus, with species that have their particularities of application, as will be observed in the execution for a certain amount.

2.1 EXECUTION FOR THE RIGHT AMOUNT

Execution for a certain amount is due to the obligation to give money, a fungible thing, that is, one that can be replaced by another of the same kind, quantity and quality, according to article 85 of Law nº 10.406/2002 (BRASIL, 2002), also known as Civil Code (*Código Civil Brasileiro*).

According to the study already mentioned, the creditor's objective in this procedure is the satisfaction of his credit, because, when he becomes part of an obligation, the duty is attracted by the debtor and it can be said, the risk, of responding with his assets (THEODORO JR., 2017, v. 3, p. 424).

Execution for a certain amount, a type of execution, as dealt with in the Civil Procedure Code, is one in which expropriation of the executed goods occurs, according to article 824: "Execution for a certain amount is carried out by expropriating the property of the executed, except for special executions". It is worth mentioning that the execution for a certain amount, as a rule, results in the execution of extrajudicial executive titles, those described in article 784 of the Civil Procedure Code. However, it can also be based on a judicial title, however, due to the didactic that accompanies the Civil Procedure Code since its version of the year 1973, it is called 'Compliance with Judgment' (*cumprimento de sentença*), with regulation in articles 520 to 527 of that Code. However, as mentioned, article 771 establishes that the provisions of the Execution Book (*Livro de Execução*) apply in the subsidiarily to the 'Compliance with Judgment' (*cumprimento de sentença*).

The execution process will be carried out through the expropriatory means provided for in the Code of Civil Procedure and, when these are not sufficient or there are no apparent assets, following the doctrine defends, it may be possible to use atypical means of execution, the theme of this study. Article 825 of the civil procedural law establishes that expropriation consists of: "adjudication, alienation or appropriation of 'fruits' (goods or utilities from other pre-existing) and income from a company or other property".[3]

Thus, it is observed that, in the execution procedure for a certain amount, the primary objective of the creditor is the expropriation of the debtor's assets to satisfy his credit.

It should be noted that the execution procedure for a certain amount is not the central object of this study, however, for a better understanding of the institutes treated, it is essential to understand in general terms the steps of the execution process for a certain amount:

> The execution for right amount against the so-called debtor is to expropriate as many assets as necessary for the satisfaction of the creditor (NCPC, art. 789). The sanction to be performed in casu is the coercive payment of the debt documented in the extrajudicial executive title. It is a direct execution, in which the judicial entity acts by subrogation, making the payment that

3 A expropriação pode ocorrer por adjudicação, o bem incorpora-se ao patrimônio do credor (artigos 876 e seguintes do CPC) ou por alienação em que o bem é alienado por leilão ou hasta pública (artigos 879 e seguintes do CPC).

> should have been made by the debtor, using assets compulsorily extracted from his assets. After the creditor's provocation (initial petition) and the debtor's summons (summons to pay), the acts that integrate the procedure in question "consist, especially, in the seizure of the debtor's assets (attachment), its transformation into money through expropriation (sale) and delivery of the product to the creditor (payment)" (THEODORO JR., 2017, v. 3, p. 428).

In this way, the main acts that aim at the execution for a certain amount are the attachment of the debtor's assets, with the possible adjudication or sale by public auction or auction/sale and, finally, the payment of the debt that is due.

3 THE EVOLUTION OF THE CIVIL PROCEDURE CODE OF 1973 TO THE CIVIL PROCEDURE CODE OF 2015

The Civil Procedure Code regarding the execution institute, has undergone an evolution, which can be noted from the first version of the Civil Procedure Code of 1973 (BRAZIL, 1973), as well as its major reforms: the Law nº 8.952/1994 (BRASIL, 1994) and Law nº 10.444/2002 (BRASIL, 2002).

In this sense, Alcântara and Rodrigues, supported by the thoughts of Marinoni and Arenhart, explain that the original technique of the Civil Procedure Code of 1973 did not have the function of allowing specific protection of rights, there was only the possibility of seeking redress protection for In this sense, Alcântara and Rodrigues, supported by the thoughts of Marinoni and Arenhart, explain that the original technique of the Civil Procedure Code of 1973 did not have the function of allowing specific protection of rights, there was only the possibility of seeking redress protection for noncompliance with a contractual obligation (MARINONI; ARENHART apud ALCÂNTARA; RODRIGUES, 2017, p. 224).

In fact, legal practice has led the legislator to know that reforms were necessary, as the envisaged executive remedies were insufficient for the demands of a certain amount, inhibitory and removal of illicit. The Civil Procedure Code of 1973, in it original wording, dealt with the execution in article 461: "The sentence must be certain, even when deciding on a conditional legal relationship".

In this vein, Rafael Lima observed that the Principle of the typicality of the executive means was valid in all execution procedures, be it for a certain amount, or for the obligation to do, not to do and deliver thing. This system implied a stagnant role for the judge, who could apply only the mechanisms dictated by law (LIMA, 2016, p. 266).

In 1994, aware of the general breach of obligations, Bill nº 3.803/1993 (BRASIL, 1993) was prepared, regarding article 461, the dossier emphasizes in the explanatory memorandum that a more effective system is important. In 1994, aware of the general breach of obligations, Bill nº 3.803/1993 (BRASIL, 1993) was prepared, regarding article 461, the dossier emphasizes in the explanatory memorandum that a more effective system is importante for the fulfillment of obligations to do or not to do and in which the judge can determine specific tutelages

that ensure a relationship between the practical result and the payment, and may impose a fine on the defendant (BRASIL, Projeto de Lei n.º 3.803/1993, p.19).

In effect, after the approval of the referred bill, which resulted in the conversion to Law nº 8.952/1994, a new wording for article 461 was described:

> Art. 461. In an action that has as its object the fulfillment of the obligation to do or not do, the judge **will grant specific protection of the obligation or, if the request is successful, he will determine measures to ensure the practical result equivalent to that of the payment.** (Wording given by Law nº 8.952, dated of 12.13.1994)
>
> [...]
>
> § 5**o For the execution of specific tutelage or for obtaining the equivalent practical result, the judge may, by letter or on request, determine the necessary measures, such as search and seizure, removal of people and things, undoing works, impediment of activity harmful, in addition to requesting police force** (Included by Law nº 8.952, dated of 12.13.1994) (BRASIL, 1994, our emphasis).

In summary, what is observed is that when Law 8.952/1994 was enacted, the Principle of atypical executive means for the obligations of doing and not doing was established, which at that time meant a great advance for the execution procedures and for the role of the Judge, who could *ex officio* or at the provocation of the parties, grant the necessary measures to fulfill the obligations 'of do' and 'not do' (ARAUJO, 2017, p.2).

Subsequently, in the year 2000, Bill nº 3.476 of 2000 was presented. It's noted that in its processing dossier, article 461-A was suggested with the same system as article 461, at the suggestion of Teori Zavascki, for the application of the atypicality of executive means in obligations to deliver (BRASIL, Projeto de Lei nº 3.476/2000, p. 55).

In this context, in which the insufficiency of the legislation in force at that time was observed again, the astraint system for compliance and the Principle of atypicality of the executive means were fixed for the obligations to deliver something (it should be noted that there is talk of 'thing' and not money)[4]. Note the new wording:

> Art. 461: [...]
>
> § 5o For the effectiveness of the specific protection or the obtaining of the equivalent practical result, the judge may, on ex officio or on request, determine the necessary measures, such as the imposition of a fine for delay, search and seizure, removal of people and things, undoing works and preventing harmful activity, if necessary with a request for police force (Wording given by Law nº 10.444, of 7.5.2002, our emphasis). [...]
>
> Art. 461-A. In the action that has as object the delivery of a thing, the judge, when granting specific tutelage, will fix the term for the fulfillment of the obligation (Included by Law nº 10.444, of 7.5.2002). [...]
>
> § 3o Applies to the action provided for in this article the provisions of §§ 1º to 6º of art. 461 (Included by Law nº 10.444, of 7.5.2002) (BRASIL, 2002a).

4 Money is good fungible, applying the right amount execution procedure. Theodoro Júnior clarifies that the 'obligation to give' can be divided into: the debtor delivering what is not his; the debtor delivers the installment of things done by himself; or to refund, when the debtor has received for temporary possession and must return (THEODORO JR., 2017, v. 3, p. 430). The Civil Procedure Code establishes different procedures, depending on the type of obligation.

The new wording of article 461, paragraph 5º, mentioned above, establishes the atypicality of the executive means, with an exemplary role. In turn, Article 461-A, § 3º determines that executions for delivery of a thing will be governed by the referred § 5º. What, also, is established for executions of delivery of things, the atypicality of executive means.

Although, what is verified is that the obligations to give / deliver things, which if in the case of money, the Principle of typicality of the executive means, and only the fine of article 475-J of the 1973 Code can occur: "will be increased by a fine in the percentage of ten percent and, at the request of the creditor and subject to the provisions of art. 614, item II, of this Law, a pledge and assessment warrant will be issued" (BRASIL, 1973).

Before entering into the reform of the Civil Procedure Code with the promulgation of the Civil Procedure Code of 2015, it is opportune to examine the reflection brought by Alcântara and Rodrigues, in the sense that the execution in the old Civil Procedure Code had as a characteristic the division into two axioms, first in the type of obligation (to do, not to do, to pay an amount or to deliver something other than money), the second is the way in which the obligation was generated, whether in a court decision or extrajudicial executive title (ALCÂNTARA; RODRIGUES, 2017, p. 225).

In this area, it is understood that this structure generated a system in which the execution procedures for a certain amount were governed by the Principle of the typicality of the executive means, which today is discussed by the doctrine with the new legislation in force.

3.1 THE CIVIL PROCEDURE CODE 2015

As the next point of this research, we will now study the new regime of the Civil Procedure Code with regard to the atypical executive measures provided for in article 139, item IV, in which the doctrinal and jurisprudential doubt, to be demonstrated, hangs over the possible applicability of inductive, coercive, mandatory or subrogatory measures in execution for a certain amount.

In this sense, the object of the study is restricted to the analysis of article 139, item IV of the Civil Procedure Code and its eventual application to execution for a certain amount. This with the purpose of elaborating a more didactic work and defined precisely to the intended problem.

The Civil Procedure Code of 1973 had good procedural technique, however, it underwent several reforms that brought an often complex wording, with procedures that could be improved. In this way, the project for a new code was prepared based on constitutional principles with a new perspective of bringing a dynamic contradictory in which the process belongs to all the procedural subjects involved, with the objective of bringing effective judicial activity to citizens (THEODORO JR., 2017, v. 1, p. 36).

In this segment, it is noted that, as had already happened previously, the execution legislation, even with the reforms carried out, was no longer sufficient to the new impositions of a complex modernity, in which the problems interact with each other.

Execution for a certain amount, in this context, was governed only by the Principle of the typicality of executive means. Thus, in an execution process that did not find assets to be

pledged, that is, the execution was frustrated, the process was suspended under the terms of article 791, item III of the Civil Procedure Code of 1973 (current article 921, item III of the Civil Procedure Code of 2015).

In other words, it is not possible to state firmly that the atypical regime is the current regime, because, today, the doctrinal discussion occurs in face of the applicability or inapplicability of the Principle of atypical executive means in executions for a certain amount.

The uproar occurs in the face of article 139, item IV, contained in Book III - Of the subjects of the process, Title IV - Of the auxiliary of Justice, Chapter I - Of the powers, duties and responsibility of the judge (*Livro III – Dos sujeitos do processo, Título IV – Dos auxiliares da Justiça, Capítulo I – Dos poderes, dos deveres e da responsabilidade do juiz*): [...] IV - determine all inductive, coercive, mandatory or subrogatory measures necessary to ensure compliance with a court order, including in actions that have as their object a cash benefit (BRASIL, 2015).

Initially, what stands out in the final part of the item is highlighted: "including in actions that have as object the pecuniary benefit", it is noted then that a large part of the doctrine understands that all the necessary measures to ensure compliance with a court order apply to executions for a certain amount, as these are actions whose object is the pecuniary benefit.

The understanding is naturally justified, to one, because it is a spontaneous evolution of what had already occurred in 1994 and 2002; to two, as it turns out that in executions of paying a certain amount, the procedural rule was stagnant, not allowing any other technique other than those provided for in the Civil Procedure Code (MARINONI; ARENHART; MITIDIERO, 2017, vol. 2, p. 584).

LIMA (2016, p. 274) clarifies that the procedural practice usually deals with the breach of obligations, and it was evident the use of third parties to hide assets, as well as enforcement/execution mechanisms in favor of insolvency.

It is important to mention that in the execution processes for a certain amount, it is possible to verify the existence of two types of debtor: (i) the debtor in good faith, who does not pay his debt for lack of assets, often because it succumbed to economic circumstances and is in a state of insolvency, and (ii) the debtor in bad faith, the so-called chicanist, evasive, artifice, that is, the debtor who has enough assets to pay off his debt, however manipulates the procedural institutes under his protection and refrains from paying off his debt, taking often a life of luxury that is portrayed in all sectors of society, except in the process (DONIZZETI, 2017, p. 1211).

It is at this juncture that the application of atypical execution measures is discussed, considering the common proverb "won, but did not take", that is, the characteristics of the failed execution are disseminated in society, leading to a generalized understanding of the inefficiency of the activation of the Judiciary.

Furthermore, it should be noted that part of the doctrine provides a relevant explanation, mentioning that it's a violation of isonomy to treat the execution creditor for a certain amount in a different way from the execution creditor to do, not do or deliver. So that the conjunctural legal regime harmed only one type of creditor and benefits the rest, which could also violate the Principle of Isonomy, under the terms of art. 5th, caput of the Brazilian Constitution (GUERRA, 2003, p. 128).

In view of this, Daniel Amorim Assumpção Neves, great mentor of new atypical means of execution, teaches that article 139, IV of the Civil Procedure Code is the ratification of the Principle of atypical executive means in execution for a certain amount, so that any any attempt to limit executions of doing, not doing and delivering things, will be against the law (NEVES, 2017, p. 2).

Following the reasoning mentioned, Elpídio Donizetti brings weight, stating that since the Civil Procedure Code of 1973, the magistrate could already apply the necessary measures to comply with specific tutelage. This is because with the new code, the aforementioned principle started to have a more comprehensive application, which allows the legislator to apply appropriate measures to the specific case, so that the legal guardianships until then breached are effective (NUNES, 2017, p. 422).

In a similar understanding, Fredie Didier explains that article 139, IV of the Code of Civil Procedure defines in a clear option that the execution for a certain amount may have application of the Principle of atypicality of the executive means, going further, affirms that the denial of such understanding can only lead to the understanding that the choice made by the legislator is ignored (DIDIER et al., 2017, v. 3, p. 107).

Not least, note the statement of the National School and Training and Improvement of Magistrates (*Escola Nacional e Formação e Aperfeiçoamento dos Magistrados – ENFAM*):

> Statement nº 48: "The art. 139, IV, of CPC/2015 translates a general power of enforcement, allowing the application of atypical measures to guarantee the fulfillment of any judicial order, including in the scope of compliance with the sentence and in the execution process based on extrajudicial documents" (ENFAM, 2018).

In the opposite sense, it is possible to mention the concept of Araken de Assis, which supports the enshrining of the Principle of the typicality of enforcement means, based on the guarantee of due legal process, provided for in Article 5 of the Constitution of the Federative Republic of Brazil. To this end, he asserted that the idea of atypicality of enforcement means based on Article 536 of the Code of Civil Procedure does not provide consistent support, and the magistrate in enforcement/execution must comply with what the rule determines. Finally, he warned that the 2015 Code of Civil Procedure brought innovations, among which the atypicality of atypical means is not included, and the procedural rule regarding enforcement/executive means should be considered, under penalty of inflicting the principle of due legal process. (ASSIS, 2016, p. 187).

In line with this understanding, Teresa Wambier brings the perspective that caution should be exercised when applying Article 139, item IV of the CPC, given that the application of atypical measures to execution for a certain amount could generate a mismatch in the system. However, atypical measures should only be applied to executions that deal with obligations to do, not do and deliver thing (WAMBIER et al., 2016, p. 483).

As a result, there is a striking doctrinal divergence as to the application of atypical measures in executions for a certain amount. As this study progresses, it will be explained how the application can be made and, especially, its possible limits.

3.2 GENERAL CLAUSE AND ITS MEANING

Article 139, item IV of the current procedural rule has its meaning considered controversial by a large part of the doctrine.

At the outset, it should be noted that the referred item describes a general clause, as explained by Didier, the general clause is characterized by bringing a normative text, in which the factual hypothesis is constituted by expressions without a specific meaning, generating undetermined legal effects. (DIDIER et. al, 2017, vol. 3, p. 101).

In the presented prism, what is verified is that the legal effect of a general clause, like article 139, item IV, is undetermined, in the Brazilian procedural reality, will depend on the direction that the judge will apply.

Likewise, it can be said that in the general clauses, the legislator purposefully establishes that the effect of the rules will be determined by its applicator, allowing the adequacy of the effects of the rule to the specific case. (BERNARDES; THOMÉ, 2013, p. 57).

At the moment it proves to be essential to clarify the meaning of the expressions contained in the article, the inductive, coercive, mandatory and subrogatory measures, so that its effects are understood, as general clauses.

Daniel Neves defends when the debtor's desire is replaced by the law's desire, generating satisfaction, there is a subrogatory measure, such as search and seizure. On the other hand, it deals with coercive measures, which would be the psychological coercion of the debtor to fulfill the obligation (NEVES, 2016, p. 231).

In contrast, Donizetti Nunes brings a more in-depth conception, defining coercive measures as those that enforce a judicial order (compliance with a court order), such as the imposition of a daily fine. In another sense, it mentions mandatory measures, which would come from the effects of part of the decision of a constitutive nature. Finally, it deals with subrogatory measures, which attribute to a third party the producing the intended effect (NUNES, 2017, p. 423).

It is worth mentioning Meireles' clarification that coercive measures are intended to coerce the debtor to satisfy an obligation, as an example, mention the astreintes (art. 537 of Civil Procedure Code - CPC). As for inductive measures, the author also demonstrates that they have the objective of embarrassing the debtor to make the payment of his debt, however they are distinguished as to the nature of the sanction, which is no longer negative and becomes positive, as a kind of premium sanction in which the debtor is encouraged to comply with the judicial decision. As an example, he mentions the reduction of fees (article 827, § 1º of CPC). An important reflection of the author on this point is that the inductive measures are provided for by law and Article 139, item IV of the CPC, and cannot be interpreted as a possibility for the judge to impose a business disadvantage on the creditor not provided for by law or contract. In the author's understanding, these measures could be used only in cases provided for by law (MEIRELES, 2015, p. 5 – 10).

In a divergent current, Didier understands that the article suffers from a legislative technique (‘*atecnia legislativa*’), because mandatory, inductive and coercive measures are

synonymous, they are means of indirect execution of a judicial decision. The subrogatory measures are forms of the direct execution of the decision (DIDIER et al., 2017, v. 3, p. 101).

That said, in the case of synonyms or different concepts, it's evident that item IV, of article 139, can be conceived as a general clause, with undetermined effects, of which it's clearly observed that the limits will be imposed by the jurisprudence.

3.3. APPLICATION OF ARTICLE 139, ITEM IV OF THE CIVIL PROCEDURE CODE

Already at this stage of the present study, in which the scope of the supposed application of atypical executive measures has been clarified, for a closer analysis, it will be considered that the Civil Procedure Code adopted the principle of atypicality in execution for a certain amount, for so that the proposals for its application are known.

A big point of the debate is fixed at the moment when the measures would be applied, because even if the perspective was adopted that the atypical means apply to the execution for a certain amount, there is still doubt if the application would be later than the application of the typical means.

At the beginning of the debate, it should be noted that the Forum of Civil Proceduralists drew up a statement, in which it concludes by the subsidiary application of atypical means, as long as the adversary is allowed:

> STATEMENT 12 - (arts. 139, IV, 523, 536 e 771) The application of atypical subrogatory and coercive measures is applicable to any obligation to comply with a sentence or the execution of an extrajudicial enforcement order. These measures, however, will be applied in a subsidiary way to the typified measures, observing the contradictory, even if deferred, and by means of a decision in the light of art. 489, § 1º, I and II. (Group: Execution - Grupo: Execução) (FPPC, 2016).

Thus, assuming that atypical executive measures were applied, the aforementioned statement, as well as other scholars, believes that there would be subsidiary application.

Fredie Didier teaches that the rule is the primary observance of typical executive means, where the 2015 Code of Civil Procedure deals with more than 100 (one hundred) articles detailing the procedure of attachment and expropriation in the execution for a certain amount, with numerous hypotheses of non-attachment and detailed description of the procedure of public auction, auction and adjudication of assets. In his opinion, atypical executive means can only be applied when all the possibilities of attachment and expropriation provided for in the procedural statute have already been exhausted. (DIDIER et. al, 2017, p. 106).

A similar understanding is that defended by Daniel Neves, who states that typical measures, such as seizure and expropriation, should be the magistrate's initial choice, if they are described in law. And only after the demonstration of ineffectiveness, atypical measures are applied (NEVES, 2017, p. 12).

Rafael Lima defends the application in the same way, in which the typical means provided for in the Code of Civil Procedure must first be applied, so that, after the exhaustion of

these measures and the observance of due legal process, the atypical measures are applied (LIMA, 2016, p. 276).

Luciano Araújo, in a singular understanding, defends the summons of the executed to reveal what assets can be seized, in the name of good faith and cooperation and only after the said act and all the possibilities of attachment are exhausted, could it apply to atypical measures of execution (ARAUJO, 2017, p. 8).

One cannot fail to mention part of the minority doctrine, which understands that the application of atypical executive means is a rule, so that the creditor can request them regardless of prior application of typical means. (SILVA apud ARAUJO, 2017, p. 7). In addition to Ricardo Alexandre da Silva, this position is supported by Luiz Guilherme Marinoni, Sérgio Cruz Arenhart and Daniel Mitidiero (2017, volume 2, p. 711).

The majority doctrine is adopted in this work - atypical measures are subsidiary to typical measures. This is due to a procedural issue, as the CPC establishes in several articles a system for execution with typical measures, one must initially perform with these measures, which are already pre-defined, typified and widely applied by the jurisprudence. Subsequently, in case of demonstration of ineffectiveness of the typical measures, of concealment of assets, with guarantee of the adversary, the atypical measures would apply.

Typical measures are intended to find the debtor's assets capable of paying off his debt to the creditor, atypical measures are a form of psychological coercion. Thus, it is consistent that the debtor's assets are sought first so that the expropriation is made and the debt is settled. If this search for the debtor's assets is unsuccessful and there is evidence that the debtor hides assets, atypical measures may be required.

At this point, the judge should exercise extreme caution, as atypical measures are on a fine line in which they can be revoked by the *ad quem* court for violating fundamental rights. So, it is a procedural issue connected directly to fundamental rights.

The suspension of the national driver's license and passport retention have repercussions on freedom of movement, a fundamental right guaranteed by the Brazilian Constitution, therefore, as it's a more serious measure, it must be applied with caution and in a secondary way, as a means of psychological coercion, so that the debtor who hides assets feels compelled to comply with his obligation.

In the case of application of measures, such as the suspension of the national license and passport retention card, the necessary requirements are demonstrated, exhaustion of the typical means of execution, reasoned, contradictory decision, demonstration of concealment of assets, appropriate, proportional and reasonable measure, there is no violation of procedural rules or fundamental rights.

However, assuming that the aforementioned measures were applied without complying with any of the requirements mentioned, excesses could occur on the part of the judges, which should be corrected using the Courts, as an example: Habeas Corpus nº 97.876/SP, decided by the Superior Court of Justice (*Superior Tribunal de Justiça*), which will be mentioned in this study later. In this judgment, there was an understanding that atypical measures can be applied, provided that the typical means of execution are exhausted, with a reasoned decision, respecting the adversary, and there must be evidence that this is an exceptional, necessary, adequate and proportional measure. In the case under discussion, the STJ understood

that the measure was illegal and arbitrary, as it was disproportionate and unreasonable, and the typical means of enforcement/execution had not been exhausted previously. The Court finally understood that the suspension of the national driver's license could not be discussed in habeas corpus, and the decision should be challenged by another means. Regarding the passport, the appeal was partially recognized, and given the order to return the debtor's passport (BRASIL, 2018).[5]

It is relevant the precaution that the doctrine has in the analysis of the application of this article, since it is a general clause, its effects are numerous, because the applied measures will be built by the judges' decisions, therefore, a certain judge may decide not to apply the atypical measures, on the other hand, a different judge may understand that the application would fall only on the retention of the passport, or on the suspension of the national driving license.

In this regard, item IV of article 139 of the procedural statute cannot be interpreted as a "carte blanche" at the discretion of the magistrate (STRECK; NUNES, 2016). However, as atypical measures, the constitutional and legal principles are applied, which can bring applied results.

Daniel Neves believes that such measures can be achieved through passport retention, suspension of the National Driver's License, interdiction of credit cards. Likewise, it states that these are psychological coercion measures, which do not act on the debtor's body, but rather on his willingness to pay the obligation. Furthermore, it highlights that these measures are not new in the legal system, considering that there is legal authorization to carry out the protest of final decision (art. 528, § 1º of the CPC), as well as its inclusion in the database of defaulters (art. 782, § 3º). Finally, he stressed that one should not confuse a measure of psychological coercion with a sanction: the first stems from default and the objective is to satisfy the creditor's credit, and the second stems from material law. Therefore, the legal nature of both is distinct (NEVES, 2017, p. 22).

Accompanying the aforementioned understanding Lima (2016, p. 279), he assimilates that the passport seizure measures and suspension of the National Driver's License can be applied, however, with the proviso that the possible effects of such application are demonstrated, so that the technique is not used as a means of sanction.

With the opposite understanding, Didier teaches that it is not possible to retain a National Driver's License, Passport or Credit Card. His justification is that he does not believe there is a consequential relationship between the measures and the objective pursued in the execution, after all, the mere retention of a document would not oblige the debtor to pay off

5 In the same sense, several decisions can be verified: SUPERIOR COURT OF JUSTICE, 4th Class, Appeal in Special Appeal Nº 1495012 / SP, Rapporteur Minister Marco Buzzi, Judgment date: October 29, 2019, DJE: 11/12/2019; SUPERIOR COURT OF JUSTICE, 4th Class, Special Appeal Nº 1782418 / RJ, Rapporteur Minister Nancy Andrighi, Judgment date: April 23, 2019, DJE 26/04/2019; COURT OF JUSTICE OF THE FEDERAL DISTRICT AND TERRITORIES, 2nd Civil Class, Interlocutory instrument nº 0703360-32.2019.8.07.9000, Rapporteur Judge Cesar Loyola, Judgment date: October 30, 2019, DJE 11/13/2019; COURT OF JUSTICE OF SANTA CATARINA, Third Vice-Presidency, Interlocutory Instrument nº 4032876-67.2018.8.24.0000, Judge Judge Luiz Zanelato, Judgment date: August 29, 2019. With related correspondence of the original sources: SUPERIOR TRIBUNAL DE JUSTIÇA, 4ª Turma, Agravo em Recurso Especial nº 1495012/SP, Relator Ministro Marco Buzzi, Data do julgamento: 29 de outubro de 2019, DJE: 12/11/2019; SUPERIOR TRIBUNAL DE JUSTIÇA, 4ª Turma, Recurso Especial nº 1782418/RJ, Relatora Ministra Nancy Andrighi, Data do julgamento 23 de abril de 2019, DJE 26/04/2019. TRIBUNAL DE JUSTIÇA DO DISTRITO FEDERAL E TERRITÓRIOS, 2ª Turma Cível, Agravo de instrumento nº 0703360-32.2019.8.07.9000, Relator Desembargador Cesar Loyola, Data do julgamento 30 de outubro de 2019, DJE 13/11/2019. TRIBUNAL DE JUSTIÇA DE SANTA CATARINA, Terceira Vice-Presidência, Agravo de Instrumento nº 4032876-67.2018.8.24.0000, Relator Desembargador Luiz Zanelato, Data do julgamento 29 de agosto de 2019).

his debt. Furthermore, he adds that the measures resemble a kind of sanction against the debtor, which may restrict his freedom to come and go. (DIDIER et. al, 2017, p. 115).

In different arguments, without mentioning which atypical executive measures would be applicable, Alcântara and Rodrigues state that Article 139, item IV, of the Civil Procedure Code, cannot be interpreted as a "solipsist judicial activism" that does not respect fundamental rights (ALCÂNTARA; RODRIGUES, 2017, p. 230).

In the evidenced prism, it is certain that it is a controversial matter in the doctrine and in the jurisprudence. Thus, as it's a recent institute, it is natural that understandings that are too opposed emerge, however, with the formation of jurisprudence on the subject, the more pacified will be its interpretation.

Therefore, it is worth noting that the application of atypical executive measures should not be used as a punishment in cases where the debtor violates the dignity of justice, given that article 77, § 2º of the Code of Civil Procedure brings adequate punishment for these cases (LIMA, 2016, p. 275).

The atypical measures to be applied do not mean punishment or even the satisfaction of the obligation, repeat the lesson from Daniel Neves, they are only psychological coercion measures, its function is that the debtor feels coercion to make the payment (NEVES, 2017, p. 8).

For Neves (2017, p. 24), the decision granting the atypical enforcement/execution measures must be justified, pursuant to article 489, paragraph 1 of the Civil Procedure Code, demonstrating that the decision is proportional and appropriate to the case. Likewise, the author mentions that there must be a time limit for the effects of the measures, having a transitory characteristic, and cannot serve only as a way to penalize the debtor without a time limit, according to the Principle of the utility of execution.

According to the said Principle, enforcement should be useful to the creditor, not only serving as an instrument for penalizing the debtor, who could lose an asset that would not be sufficient to pay the debt, that is, even if expropriated, the debtor would still be in debt with respect to the full amount of the debt, the creditor would not take advantage of this expropriating act (THEODORO JR., 2017, v. 3, p. 224).

In addition, the civil process must be guided by the principles of proportionality and suitability, that is, it is necessary to weigh the productive effects in the specific case to generate the least possible losses to the creditor and the debtor.

Furthermore, it appears that several characteristics that can be adopted in the execution of article 139, item IV of the Civil Procedure Code is graduality, with the possibility of using measures in a staggered way, in which each measure will have effects for a certain period, being able to be replaced or established in conjunction with others, so that in the decision itself the debtor is aware that by delaying the satisfaction of the execution, he will have a higher level of restriction (DIDIER et. al, 2017, p. 120).

It is of utmost importance to stress that the debtor, the target of the provisions dealt with in this point, is the one called 'chicanist', the debtor who does not pay, even if he has assets. In this sense, they understand NUNES (2017, p. 1211) and NEVES (2017, p. 13).

Neves (2017, p. 13) discipline that is recurrent in the legal routine the occurrence of debtors with hidden assets, who previously took actions to avoid attachment and expropriation. There is an asset shield, as the author calls it, generating a situation in which the debtor continues his life as if he did not have a debt, leading to the frustration of the executionIn this reasoning, he advances that in the process there must be indications that the debtor does not pay only for the desire to not fulfill the obligation, even having sufficient equity.

Likewise, throughout the procedure, including the application of atypical measures, the principles of contradictory and broad defense must be guaranteed (article 5, item LV of the Constitution of the Republic of 1988). The adversary can also be guaranteed in a deferred mode, however, it must be applied (NEVES, 2017, p. 24) (DIDIER et. al, 2017, p. 117).

Thus, it must be unequivocal the understanding that the possible application of atypical executive means in the execution process for a certain amount must be subsidiary to the typical means (attachment and expropriation), in cases where there are clear signs of concealment of assets and that the debtor demonstrates act in bad faith, showing that the measure will be useful and effective to the procedure. The measures can be applied alone or together, always on a temporary basis, guaranteeing the adversary, broad defense and the guarantee of all fundamental rights, and must be proportionate and appropriate to each specific case.

4 THE EXECUTIVE TECHNIQUES AND THEIR LIMITS ON FUNDAMENTAL RIGHTS

The purpose of this chapter is to compare the atypical executive measures (namely, the retention of the passport and the suspension of the national driving license) to fundamental rights, so that an analysis of the possible effects of its application is made.

The article 1º of the CPC establishes that civil proceedings will be carried out in accordance with the fundamental values and rules of the Constitution (BRASIL, 2015). On this occasion, the phenomenon of the constitutionalization of civil proceedings must be addressed, which gave rise to a new perspective after the Constitution of the Federative Republic of Brazil of 1988, with a new relationship between material and procedural law, which cannot be isolated, however must work together, in view of article 5º, item XXXV of the Constitution, which provides for the protection by law of any injury or threat of injury to law (THEODORO JR., 2017, v. 1, p. 28).

THEODORO JR. (2017, v. 1, p. 28) continues on the theme, emphasizing that there was a transformation of the due legal process, with democratization of the process that takes place with a dynamic adversary, involving the litigating parties, as well as the magistrate, through cooperation and co-participation of all involved.

In the meantime, two modes of application of the atypical executive means of execution will be analyzed, interpreted from article 139, item IV of the civil procedural statute, namely the retention of passports and the suspension of the national driver's license, with its effects in view of the constitutionalization of the civil process.

4.1 ANALYSIS OF MEASURES IN FACE OF FUNDAMENTAL RIGHTS

At first, two atypical executive measures indicated by lawyers for application in article 139, item IV of the Civil Procedure Code can be cited: the first is the retention of the Passport; and the second, the suspension of the National Driver's License.

The two measures will be analyzed together, because, despite their differences, they fall under the same criteria of analysis of fundamental rights: the right to move (movement), article 5º, item XV of the Constitution of the Republic.

Regarding the measures, Daniel Neves (2017, p. 15) states that the retention of the passport would be a legitimate measure that would prevent the debtor, who travels only for leisure, from increasing his expenses, also states that the suspension of the National Driver's License it would be a measure that pressures the debtor to fulfill his obligation, being indirect means of psychological coercion to the payment.

Rafael Lima (2016, p. 273) justifies that the techniques for retaining a passport and suspending the CNH may be appropriate when used in a case in which they are shown to be effective and necessary, and it is not possible to apply them in a disorderly manner.

For this analysis, it is initially clarified that the possible question to be asked to these two measures would be regarding the restriction of the right to move, provided for in article 5º, item XV of the Constitution: "locomotion in national territory is free in times of peace, and anyone, under the terms of the law, may enter, remain in or leave it with their goods" (BRASIL, 1988).

The Constitutional provision is a rule of contained efficacy, this type of rule allows the possibility of a law regulating its application, and there may be restrictions with justified reasons (TAVARES, 2012, p. 119).

Freedom of movement has four basic points, the first is the right to enter the national territory, the second is the right to stay in the national territory, the third is the right to move within the national territory, between cities or Federated States, and the fourth point is the right to move beyond the national territory (TAVARES, 2012, p. 652).

Within the national territory, freedom of movement encompasses the right to come and go between Federated States, Municipalities and regions within the Municipalities. It is observed that this freedom of movement is always conditioned to the Brazilian rules and the rules of other countries, demonstrating its regulation by other rules.

In this sense, freedom of movement is a significantly complex fundamental right, as it's a contained efficacy norm, it does not have a practical and direct application, depending on other norms for its effectiveness.

Regarding the right to travel, in an important lesson, Minister Ellen Gracie disciplined that there is no absolute right to freedom to come and go, and there may be a need to weigh up conflicting interests, depending on the case under analysis (BRASIL, 2008).

Considering that the fundamental right to free movement is not absolute and it is a constitutional norm of contained efficacy, it's verified what the infra-constitutional laws establish about the Passport and the National Driver's License.

Regarding the National Driver's License, the Brazilian Traffic Code (*Código de Trânsito Brasileiro*) establishes in its article 159, § 1º that: "It's mandatory to carry the Driving Permit or the National Driver's License when the driver is driving the vehicle [...]" (BRASIL, 1997).

In this sense, it's observed that freedom of movement, using motor vehicles is regulated by the Brazilian Traffic Code, and to be able to drive a vehicle, it is necessary to have the National Driver's License. However, as already mentioned, this right is not absolute and the Brazilian Traffic Code itself describes cases in which the National Driver's License may be suspended, under the terms of its article 261, for violations of the Code, referring to traffic regulations.

It appears that the right to travel exercised by driving a vehicle is highly regulated and can only be implemented after the course with theoretical classes, practices and exams. Still, even with the document, it will not be perpetual, and must be renewed, respecting the traffic rules, under penalty of its suspension or confiscation, in administrative area.

With regard to the retention of the debtor's passport, Decree nº 5.978/1996, article 2º, provides that: "Passport is the identification document, owned by the Union, required of all those who intend to make an international travel, except in cases provided for in treaties, agreements and other international acts [...]" (BRASIL, 2006).

In this context, it is noteworthy that, in Brazil, the passport is a document owned by the Union. The document referred to is known to be used by people from all over the world for international travel, in a way that is essential for the entry in many countries.

Among the countless conditions for the passport to be granted, there is the aforementioned Decree, article 20, item VII: "not to be sought by the Justice or prevented by Court from obtaining a passport" (BRASIL, 2006).

The retention of the passport in this study, would be done in cases of debtor who has financial conditions to make the payment of his debt and hides his assets so that they are not seized, thus making several international trips for leisure, to visit museums, parks, beaches, for the sole purpose of entertainment. Diverse is the case of the debtor who travels for work and depends on trips to exercise his professional activity, such as airline pilots, ship workers and flight attendants. In these situations the retention of your passport would prevent the exercise of work, which cannot be authorized, and there must be careful analysis by the magistrate who analyzes the specific case (NEVES, 2017, p. 17).

Again in this context, the limitation of the right to move the executed is questioned, which could not pass between countries.

In strong analysis, the right to travel, applying passport seizure, will not be totally restricted, however partially, because within the scope of the Mercosul countries, there is free transit with an identity card. It appears that the San Miguel de Tucumán Agreement, Mercosul / CMC / DEC nº 18/08, in its article 1º, recognizes the validity of the personal identification documents of each State Party and Associate, as a suitable travel document for the transit of nationals and / or regular residents (MERCOSUL, 2008).

That is, a citizen with a passport retained for debt in execution for a certain amount, will still be able to transit through 09 (nine) Mercosul countries, carrying only their Brazilian identity card.

It should be noted that the Constitution often presents concepts and words that can lead to numerous interpretations, which makes the doctrine elaborate numerous articles about the subject and the jurisprudence has decisions with different interpretations.

André Ramos Tavares (2012, p. 659) understands that when the Constitution has indeterminate terms, it is the task of the Judiciary to complement these terms, as long as the limits of constitutional interpretation are observed. In this sense, it is observed that today in Brazil constitutional mutation occurs in several cases. It is noted that the hermeneutics of decisions varies according to the historical moment and its requirements.

It must be evidenced that the retention of the passport should not be ordered by the magistrate when it is proved that the executioner depends on international travel for his work, which would directly affect his livelihood and further aggravate the debtor's financial condition (NEVES, 2017, p. 16).

Likewise, if the executed person depends on the national driver's license to perform his/her job, as a taxi driver, transportation application driver, bus driver, truck driver, among many, the document cannot be suspended, after all, the debtor would not be able to guarantee their livelihood, thus violating the principles of reasonableness and suitability (NEVES, 2017, p. 17).

Gajardoni (2015) understands that the interpretation of article 139, item IV of the Civil Procedure Code must be enhanced, so that the measures employed will have limits on the exhaustion of the typical means provided for in the Code (attachment, expropriation and adjudication), in principle proportionality and in the Constitution of the Federative Republic of Brazil.

Therefore, it appears that the atypical executive measures are too complex to interpret, which generates divergent understandings about the constitutionality or not of the measures.

Thiago Rodovalho (2016) brought an important reflection, presenting the concept that the driving of motor vehicles is a citizen's right, however, it differs from what would be the fundamental right to move/locomotion. His contribution stands out for this work when he mentions that the national driver's license can be suspended administratively, without judicial authority acting in the case. It also adds that millions of citizens do not drive and that there are other restrictions on the right to drive, such as the rotation of vehicles carried out in the city of São Paulo. In summary, he stated that there is no unconstitutionality, as long as the application is made in a subsidiary manner, respecting the provisions of the CPC, after all they are only psychological coercive means for complying with the obligation.

In this understanding, Daniel Neves (2017, p. 14) teaches that the principle of effectiveness of executive protection, too, would be a fundamental right, since the dignity of the human person of the demandant must be respected. In addition, he mentioned that the removal of people and things already restricts the right to come and go, as provided in the Civil Procedure Code of 1973, article 461, § 5º and which are still considered in article 536, § 1º CPC, in this reasoning, concludes that the differentiation of executions of doing, not doing and delivering things, from obligations to deliver a certain amount would be an evident unconstitutionality,

after all, certain creditors would benefit from more effective measures depending on the type of obligation under discussion.

Marcelo Lima Guerra (2003, p. 128), even before the CPC, mentions that the procedure of executions of doing or not doing could not be different from the others, since the principle of isonomy would be violated (article 5º, item I, CRFB), as a more efficient procedure is being provided for certain types of obligations.

In a different understanding, note that Araken de Assis, quoted by Didier (2017, p. 101) understands that the atypicality of executive measures would be unconstitutional, since article 5, including LIV, of the Brazilian Constitution, guarantees the observance of due process legal for a citizen to be deprived of any good.

Nobrega (2016) interprets that article 139, item IV of the CPC must be declared unconstitutional without reducing the text, so that it does not occur: the seizure of the passport, the suspension of the national driving license and other measures.

Streck and Nunes (2016) understand that the increase in the scope of application of article 139, item IV of the Civil Procedure Code cannot be done in an authoritarian manner, and constitutional limits, such as due constitutional process, must be respected.

Recently, a decision of great importance on the subject was published by the Superior Court of Justice (*Superior Tribunal de Justiça - STJ*):

> SPECIAL RESOURCE. EVICTION AND RENTAL COLLECTION ACTION. FULFILLMENT OF SENTENCE. ATYPICAL EXECUTIVE MEASURES. ART. 139, IV, OF CPC / 15. 'APPLICATION' IN THESIS. OUTLINE OF GUIDELINES TO BE OBSERVED FOR ITS APPLICATION. […] 4. The systematic interpretation of the legal system reveals, however, that such a legal provision does not authorize the indiscriminate adoption of any executive measure, regardless of beacons or effective means of control. 5. According to the STJ's understanding, the modern rules of procedure, still supported by the search for jurisdictional effectiveness, may under no circumstances be distanced from constitutional dictates, only being possible to implement non-discretionary commands or commands that restrict individual rights of reasonable way. Specific precedent. 6. **The adoption of atypical executive means is appropriate provided that, if there is evidence that the debtor has expropriable assets, such measures are adopted in a subsidiary manner, by means of a decision that contains adequate grounds for the specifics of the concrete hypothesis, with observance of the substantial contradictory and the postulate of proportionality** […]. (RECURSO ESPECIAL. AÇÃO DE DESPEJO E COBRANÇA DE ALUGUEIS. CUMPRIMENTO DE SENTENÇA. MEDIDAS EXECUTIVAS ATÍPICAS. ART. 139, IV, DO CPC/15. CABIMENTO, EM TESE. DELINEAMENTO DE DIRETRIZES A SEREM OBSERVADAS PARA SUA APLICAÇÃO. […] 4. A interpretação sistemática do ordenamento jurídico revela, todavia, que tal previsão legal não autoriza a adoção indiscriminada de qualquer medida executiva, independentemente de balizas ou meios de controle efetivos. 5. De acordo com o entendimento do STJ, as modernas regras de processo, ainda respaldadas pela busca da efetividade jurisdicional, em nenhuma circunstância poderão se distanciar dos ditames constitucionais, apenas sendo possível a implementação de comandos não discricionários ou que restrinjam direitos individuais de forma razoável. Precedente específico. 6. **A adoção de meios executivos atípicos é cabível desde que, verificando-se a existência de indícios de que o devedor possua patrimônio expropriável, tais medidas sejam**

> **adotadas de modo subsidiário, por meio de decisão que contenha fundamentação adequada às especificidades da hipótese concreta, com observância do contraditório substancial e do postulado da proporcionalidade** [...]) (BRASIL, 2020, our emphasis).

The Third Panel, in a special appeal (*Recuso Especial*), decided that the CPC allows the use of atypical executive means, as long as the requirements are met: there are indications that the debtor has expropriable assets, the measures are adopted subsidiarily and that the decision is justified in the specific case, with an emphasis on contradictory and proportionality. In addition, the decision clarifies that these are exceptional measures, and must have as requirements the summons of the debtor to pay the debt or the presentation of assets to settle it, after using the typical measures and, if there is no result, the application of the measures atypical. The judgment was unanimous, the Reviewing Ministers accompanied the Reporting Minister. The judgment reiterates the STJ's jurisprudence, which is not yet consolidated (BRASIL, 2020).

Still, it's important to highlight one of the first analyzes of the STJ on the theme:

> ORDINARY RESOURCE IN HABEAS CORPUS. EXECUTION OF EXTRAJUDICIAL TITLE. ATYPICAL COERCITIVE MEASURES. CPC / 2015. CONSENTANEOUS INTERPRETATION WITH CONSTITUTIONAL ORDERING. SUBSIDIARITY, NEED, ADEQUACY AND PROPORTIONALITY. PASSPORT RETENTION. ILLEGAL COACTION. GRANTING THE ORDER. SUSPENSION OF CNH. NO KNOWLEDGE. [...]
>
> 9. It is illegal and arbitrary to impose a coercive measure to suspend the passport issued in the middle of execution by extrajudicial title (duplicate of service provision), as it restricts the fundamental right to come and go in a disproportionate and unreasonable way. Since the exhaustion of traditional means of satisfaction has not been demonstrated, the measure does not prove necessary. **10. The recognition of the illegality of the measure consisting in the seizure of the patient's passport, in the case under consideration, has no claim to affirm the impossibility of this coercive measure in other cases and in a generic way. The measure may eventually be used, provided the contradictory is obeyed and the decision is justified and adequate, also checking the proportionality of the measure.** 11. The jurisprudence of this Superior Court is in the sense that the suspension of the National Driver's License does not constitute a threat to the right of the holder to come and go, thus, the use of habeas corpus is inappropriate, preventing its knowledge. It is a fact that the retention of this document has the potential to cause considerable embarrassment to anyone and, to some certain groups, even more drastically, as is the case with professionals, who drive vehicles, the source of livelihood. It is also a fact that, if this particular condition is detected, however, the possibility of challenging the decision is certain, however through a different route from habeas corpus, because its reason will not be the illegal or arbitrary coercion to the right of locomotion, but the inadequacy of another nature. 12. Ordinary resource partially known (BRASIL, 2018, emphasis added. (BRASIL, 2018, emphasis added) (RECURSO ORDINÁRIO EM HABEAS CORPUS. EXECUÇÃO DE TÍTULO EXTRAJUDICIAL. MEDIDAS COERCITIVAS ATÍPICAS. CPC/2015. INTERPRETAÇÃO CONSENTÂNEA COM O ORDENAMENTO CONSTITUCIONAL. SUBSIDIARIEDADE, NECESSIDADE, ADEQUAÇÃO E PROPORCIONALIDADE. RETENÇÃO DE PASSAPORTE. COAÇÃO ILEGAL. CONCESSÃO DA ORDEM. SUSPENSÃO DA CNH. NÃO CONHECIMENTO. [...] 9. Revela-se ilegal e arbitrária a medida coercitiva de suspensão do passaporte proferida no bojo de execução por título extrajudicial (duplicata de prestação

> de serviço), por restringir direito fundamental de ir e vir de forma desproporcional e não razoável**. Não tendo sido demonstrado o esgotamento dos meios tradicionais de satisfação, a medida não se comprova necessária. 10. O reconhecimento da ilegalidade da medida consistente na apreensão do passaporte do paciente, na hipótese em apreço, não tem qualquer pretensão em afirmar a impossibilidade dessa providência coercitiva em outros casos e de maneira genérica. A medida poderá eventualmente ser utilizada, desde que obedecido o contraditório e fundamentada e adequada a decisão, verificada também a proporcionalidade da providência.** 11. A jurisprudência desta Corte Superior é no sentido de que a suspensão da Carteira Nacional de Habilitação não configura ameaça ao direito de ir e vir do titular, sendo, assim, inadequada a utilização do habeas corpus, impedindo seu conhecimento. É fato que a retenção desse documento tem potencial para causar embaraços consideráveis a qualquer pessoa e, a alguns determinados grupos, ainda de forma mais drástica, caso de profissionais, que tem na condução de veículos, a fonte de sustento. É fato também que, se detectada esta condição particular, no entanto, a possibilidade de impugnação da decisão é certa, todavia por via diversa do habeas corpus, porque sua razão não será a coação ilegal ou arbitrária ao direito de locomoção, mas inadequação de outra natureza. 12. Recurso ordinário parcialmente conhecido)

In the aforementioned judgment, the collegiate decision makes it clear that the atypical executive measures do not apply to that specific case, as the typical means of execution have not been exhausted, however, it makes it clear that the measures can be applied, provided that the adversary is obeyed, with reasoned and proportional decision.[6]

The controversy on the subject recently led to the filing of a Direct Action of Unconstitutionality (*Ação Direta de Inconstitucionalidade*), so that it can be declared null, without reducing the text of item IV of article 139 of the CPC, with the argument that it violates the principle of freedom of movement and the principle of dignity of the human person, still under analysis (FALCÃO; TEIXEIRA, 2018).

The Attorney General's Office (*Procuradoria Geral da República*) was favorable in relation to the action, in his understanding the seizure of documents (national driver's license and passport) would be unconstitutional, even with the provision of article 139, item IV of the CPC, since the judge did not can restrict more rights than the legislator. Still, he contended that in case of application of restrictive measures, the decision must be justified, showing that the typical measures were insufficient and that the applied measures are proportional (BRASIL, 2018a).

Therefore, it appears that the matter brings disagreement with doctrine and jurisprudence, since the article 139, item IV of the CPC brings a general clause that has a broad and divergent interpretation of the jurisprudence, as in other matters discussed, it will be up to

6 In the same sense, it is important to mention the following judgments: SUPERIOR COURT OF JUSTICE. 3rd Class. Special Appeal Nº 1788950/MT, by Rapporteur of Minister Nancy Andrighi. Judgment date: April 23, 2019. DJE 26/04/2019; SUPERIOR JUSTICE TRIBUNAL. 4th Class. Special Appeal Nº 1.866.715/SP, by the Reporting by Minister Marco Buzzi. Judgment date: March 23, 2020. DJE 03/25/2020; COURT OF JUSTICE OF PARANÁ. 6th Civil Chamber. Interlocutory Appeal Nº 0049006-91.2019.8.16.0000, by Rapporteur of Judge Hilgenberg Prestes Mattar. Judgment date: February 14, 2020. (Respectively referenced in the original: SUPERIOR TRIBUNAL DE JUSTIÇA. 3ª Turma. Recurso Especial nº 1788950/MT, de Relatoria da Ministra Nancy Andrighi. Data do julgamento: 23 de abril de 2019. DJE 26/04/2019; SUPERIOR TRIBUNAL DE JUSTIÇA. 4ª Turma. Recurso Especial nº 1.866.715/SP, de Relatoria do Ministro Marco Buzzi. Data do julgamento: 23 de março de 2020. DJE 25/03/2020; TRIBUNAL DE JUSTIÇA DO PARANÁ. 6ª Câmara Cível. Agravo de Instrumento n. 0049006-91.2019.8.16.0000, de Relatoria do Desembargador Hilgenberg Prestes Mattar. Data do julgamento: 14 de fevereiro de 2020).

the Supreme Court Federal (*Supremo Tribunal Federal*) decide the scope of application of this institute.

5 CONCLUSIONS

In view of the study carried out, it was found, primarily, that the execution process underwent changes with the of Civil Procedure Code of 2015, in its scope, after the initial phase of the procedure, the debtor's assets are seized and possible adjudication or sale of these assets.

However, as already mentioned, there are countless cases in Brazil that remained in frustrated execution, that is, it was not possible to find the debtor's assets, real estate, movable properties, shares, bank accounts, vehicles, among others.

Already with the Civil Procedure Code promulgated in 2015, article 139 which addresses the judge powers, in item IV established the possibility for the magistrate to determine all inductive, coercive, mandatory and subrogatory measures for the effectiveness of his decisions, including pecuniary obligations.

In this way, the atypicality of the executive means for executions for a certain amount was established; and some scholars argue that these measures would be diverse, and may incur, among them, in: passport retention and suspension of the national driver's license, hypotheses discussed in this work.

The application of these measures must be made in a subsidiary manner, so that, after all the possibilities of attachment have been exhausted and with evidence that the executed party is a permanent debtor, the one who shields his assets, the atypical executive measures must be applied. The CPC deals with typical execution measures in more than one hundred articles, so, in line with the procedural text, initially, should seek, by these means, the assets of the executed debtor and in case of frustrated execution, atypical means are used, which, being more expensive, should be used only when other measures are not possible.

However, it is necessary to pay attention to some crucial points, the application of the measures must respect the principles of execution, and should bring less burden to the debtor, with utility and suitability to the case, so that the measures used are not a form of punishment to the debtor. In addition, it is worth mentioning that the application of the measures must be transient, given that their definitive application would have the character of a sanction, which is not sought in this case.

Equally, it should be noted that the objective of the measures is the debtor's psychological coercion, given that if the debtor has financial conditions to pay the debt and hides his assets, it is fair to understand that he is also unable to afford international travel or with a vehicle.

In cases in which there are excesses in the application of the measures, the defendant must seek to guarantee his rights with the use of the appropriate procedural resources, such as those mentioned in this work.

As already mentioned, the application of atypical measures to suspend the national driver's license and retention of passports must respect the principles of civil execution, as well as the Constitution of the Federative Republic of Brazil.

Regarding the retention of the passport, it was found that it is an official document owned by the Union. Even without having it, it is possible to travel through nine countries in Latin America. That is, the retention of the passport is verified as legitimate, since it does not suppress the constitutional right of locomotion of the executed, there is only one limitation, as a way to psychologically coerce that debtor who postpones the payment of his debt.

On the other hand, the suspension of the national driver's license does not impede the right to citizen mobility, taking into account that most Brazilians get around by public transport or even without a vehicle. What can not be confused is the right to drive and the right to move, being different, the right to drive can be suspended or canceled administratively, in cases of violations of the Brazilian Traffic Code, not limited to the right to move.

In this sense, the right to move is composed of four dimensions: the first is the right to enter the national territory, the second is the right to remain in the national territory, the third is the movement within the national territory and the fourth is the right displacement beyond the national territory.

It appears that the right to mobility is not limited to the possibility of driving or entering countries that require a passport, in fact, it is a complex right, which brings numerous possibilities for regulation, as it's a rule of contained effectiveness.

The retention of the passport or suspension of the driver's license clearly does not suppress this right, since there is still the possibility of entering countries that does not require a passport or the options of getting around without driving motor vehicles.

Therefore, what is observed is that the right to travel is being respected in the suspension of the national driver's license and also in the retention of the passport, since in both situations the citizen is still free to move within Brazilian territory and even into the territory of other nations.

Therefore, it is understood that article 139, item IV of the CPC, establishes the subsidiarity of atypical executive measures in execution for a certain amount. These must be adopted as a form of psychological coercion applied to the debtor of execution, and there must be prior exhaustion of the typical means provided for in the procedural statute and with overwhelming evidence that there is patrimonial shielding. This is not the definitive solution to the adversities of the execution processes, however, it can prove to be effective in increasing the compliance, the fulfillment and the credit satisfaction in executions for a certain amount.

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CONTROLE DE CONSTITUCIONALIDADE E A ILEGITIMIDADE DEMOCRÁTICA DAS DECISÕES DO SUPREMO TRIBUNAL FEDERAL À LUZ DA TEORIA DE JEREMY WALDRON

MARCELO MATOS DE OLIVEIRA

OLIVEIRA, Marcelo Matos de. **Controle de constitucionalidade e a ilegitimidade democrática das decisões do Supremo Tribunal Federal à luz da teoria de Jeremy Waldron**. 2020. Dissertação (Mestrado em Direito). Fundação Mineira de Educação e Cultura – FUMEC. Faculdade de Ciências Humanas, Sociais e da Saúde, Programa de Pós-Graduação em Direito. Belo Horizonte, 2020.

Defesa em 14 de feveriro de 2020.
Orientador: Prof. Dr. Luís Carlos Balbino Gambogi
Coorientador: Prof. Dr. Sérgio Henriques Zandona Freitas

RESUMO

A presente dissertação tem como temática a relação entre constitucionalismo e democracia e o debate das teorias jurídicas e da política no âmbito da jurisdição constitucional brasileira, em meio a dissensos morais relevantes. Como problema de pesquisa e à luz da teoria da dignidade da legislação de Jeremy Waldron, marco teórico da pesquisa, o trabalho indaga se caberia ao Supremo Tribunal Federal exercer o *judicial review* sobre a questão da antecipação do cumprimento da pena sem a comprovação definitiva da culpa. Ainda, questiona-se qual seria o *locus* adequado para a promoção de debate o mais amplo possível, considerando-se que todos os destinatários devem ser também autores dos projetos de vida e das normas que regulam os modos de agir. Como hipótese, e diante da abordagem das mudanças e inovações colacionadas pelo Código de Processo Penal, afirma-se que a decisão da Repercussão Geral no Agravo em Recurso Extraordinário nº 964246/SP do Supremo Tribunal Federal foi de encontro às alterações legislativas mais recentes, que tiveram conotação garantista, com o objetivo de restringir cada vez mais as possibilidades de constrição da liberdade antes da formação definitiva da culpa, revelando, no caso, patente déficit democrático. Como objetivo geral, o trabalho pretende identificar qual o ambiente legítimo para promover debates acerca dos desacordos morais razoáveis que surgem numa sociedade plural, complexa, entre pessoas dotadas de boa-fé. São objetivos específicos do trabalho: (a) analisar os sistemas de controle de constitucionalidade, notadamente o norte-americano, o austríaco e o brasileiro; (b) analisar o perfil da jurisdição constitucional brasileira, à luz da autocontenção e da juristocracia, compreendendo-se o ativismo judicial; (c) perquirir a vontade do legislador constituinte e ordinário acerca do tratamento dado ao princípio do estado de inocência e da possibilidade de antecipação da execução da pena, com estudo de caso do Supremo Tribunal Federal; (d) investigar a teoria de Jeremy Waldron acerca dos pressupostos do caso essencial e do resgate da dignidade da legislação; e (e) identificar qual seria o ambiente democrático mais favorável aos debates acerca de dissensos morais razoáveis. A pesquisa se desenvolve em vertente metodológica jurídico-sociológica e em perspectiva interdisciplinar, a partir da conjugação de conceitos das teorias política e filosófica do Direito, Direito Constitucional e Direito Processual Penal. Adotou-se, com predominância, o raciocínio dedutivo, o método descritivo e o tipo bibliográfico e jurisprudencial.

Palavras-chave: Controle judicial de constitucionalidade. Legitimidade democrática. Supremo Tribunal Federal. Dignidade da legislação. Jeremy Waldron.

O CONTRATO DE NAMORO NA FAMÍLIA EMPRESÁRIA COMO INSTRUMENTO DE GOVERNANÇA

UYARA VAZ DA ROCHA TRAVIZANI

TRAVIZANI, Uyara Vaz da Rocha. **O contrato de namoro na família empresária como instrumento de governança**. 2020, (126)f. Dissertação (Mestrado em Direito). Fundação Mineira de Educação e Cultura – FUMEC. Faculdade de Ciências Humanas, Sociais e da Saúde, Programa de Pós-Graduação em Direito. Belo Horizonte, 2020.

Defesa em 06 de março de 2020.
Orientador: Prof. Dr. Frederico de Andrade Gabrich

RESUMO

A evolução do Direito alterou a estrutura familiar no ordenamento jurídico brasileiro, sendo certo que, atualmente, não há mais a existência de modelos pré-definidos de famílias, sendo todos protegidos e reconhecidos pelo Direito brasileiro. Hoje, todas as modalidades de família devem ser resguardadas, tendo em vista promover o crescimento do indivíduo e contribuir para a manutenção da sua dignidade. Além disso, é sabido que as relações amorosas também têm se modificado, não sendo necessária a existência de casamento ou união estável para que as pessoas coabitem, dividam as despesas e todos os aspectos da vida. No entanto, caso essa situação seja vivenciada no âmbito de uma família empresária, a existência de um relacionamento amoroso nesses termos pode, em algum momento, trazer consequências inesperadas e indesejadas à sociedade empresária, com o reconhecimento de uma união estável em desfavor do membro da família empresária e consequente impacto na vida da sociedade. Assim, a partir do método dedutivo e tendo como marcos teóricos a Constituição Brasileira, o Código Civil, bem como a jurisprudência brasileira do STF e do STJ acerca do conceito de família, a presente pesquisa tem como tema-problema a análise da licitude do contrato de namoro, bem como da possibilidade de a celebração do mencionado contrato se tornar obrigatória, como instrumento de governança familiar, para pessoas que integram uma família empresária, sendo ou não sócias de uma sociedade empresária familiar.

Palavras-chave: Governança. Família Empresária. Contrato de Namoro.

A POSSIBILIDADE DE CUMULAÇÃO DOS ADICIONAIS DE INSALUBRIDADE E PERICULOSIDADE

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RESUMO

Os adicionais de insalubridade e periculosidade, são os únicos adicionais que não se cumulam quando o trabalhador está exposto simultaneamente aos dois, por força do art. 193; §2º; CLT. Todavia a melhor interpretação do ornamento jurídico trabalhista, impõe uma visão da possibilidade da cumulação destes adicionais. Pontua-se que, os adicionais são distintos, o texto consolidado é anterior a carta magna de 88, sendo que o Brasil ratificou posteriormente a 1943, Tratados Internacionais sobre o tema, além da observância de questões relativas ao trabalho digno e ao valor do trabalho. Esta incerteza, face tratar de entendimento atual do Colendo Tribunal Superior, gera insegurança a empresários e trabalhadores, seja na ordem econômica (passivo trabalhista), seja social (trabalho digno e exposição a ricos de doença e/ou acidente). Assim, o intuito deste trabalho é analisar a possibilidade de cumulação destes dois adicionais, frente o atual ordenamento jurídico e viabilidade de sua aplicação. O tema problema deste trabalho percorre, de forma pragmática, a possibilidade de cumulação dos adicionais de insalubridade e periculosidade, tendo como marco teórico o entendimento contemporâneo do Colendo Tribunal Superior do Trabalho, exposto no voto do Ministro Relator Renato de Lacerda Paiva, no julgamento da SDI-1 processo nº E RR 1072.211.5.02.0384. A metodologia adotada consiste em descrever, interpretar e avaliar os métodos hipotético-dedutivo decorrente de pesquisas bibliográficas (livros, artigos de periódicos, revistas, teses, dissertações), de fontes normativas. Chegando-se à conclusão de que a melhor interpretação do tema é pela possibilidade da cumulação dos adicionais de insalubridade e periculosidade.

Palavras-chave: Salário Condição. Adicionais. Insalubridade. Periculosidade. OIT. Trabalho Digno. Princípios Constitucionais Trabalhistas.